(FOR LIMITED CIRCULATION ONLY)
Volume 2, No. 1, Pages 102, October 2020

THE RESOLUTION PROFESSIONAL

RESEARCH JOURNAL OF THE INDIAN INSTITUTE OF INSOLVENCY PROFESSIONALS OF ICAI (IIIPI)
(A Section 8 Company & Wholly Owned Subsidiary of ICAI and Registered as an IPA with IBBI)

RESCUING THE CORPORATE LIVES

ABOUT IIIPI

The Insolvency and Bankruptcy Code, 2016 (Code) provides that no entity shall carry on its business as an Insolvency Professional Agency (IPA) under this Code and enrol insolvency professionals (IPs) as its members except under and in accordance with a certificate of registration issued in this behalf by the Insolvency and Bankruptcy Board of India (IBBI).

Against this backdrop of the Code and the IBBI (Insolvency Professional Agencies) Regulation, 2016 (IPA Regulation) the Institute of Chartered Accountants of India (ICAI) formed the Indian Institute of Insolvency Professionals of ICAI (IIIPI), a section 8 company to enrol and regulate insolvency professionals as its members in accordance with the Code read with its regulations.

IIIPI is the first insolvency professional agency (IPA) of India registered with IBBI. The certificate of registration was handed over to the agency by the then Hon'ble Minister of Finance Shri Arun Jaitley on 28th November 2016.

CONTENTS

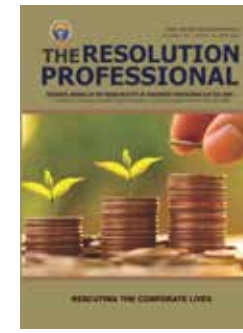
Printed and published by CA. Rahul Madan on behalf of the Indian Institute of Insolvency Professionals of ICAI (IIIPI) for the purpose of limited circulation for non-commercial information purpose only.

Editor: CA. Rahul Madan

Published at ICAI Bhawan, P.O. Box No. 7100, Indraprastha Marg, New Delhi - 110002 and printed at Perfact Impression Pvt Ltd., 2 Prem Nagar Market, Thyagraj Nagar, Near INA, New Delhi-110003. Web: www.perfactimpression.com

TOTAL CIRCULATION: 500
Total No. of Pages: 102 including Covers
Frequency: Quarterly (Aug.- Sept.)
Images sourced from free sites.

E Journal Circulation (Soft Copy): ~ 3,000



OCTOBER 2020
IN THIS ISSUE...

CONTENTS

From Editor's Desk

Dear Member,

At the outset, I would like to express my gratitude to the Governing Board of IIIP-ICAI and Insolvency and Bankruptcy Board of India, for allowing me to become part of this esteemed institution and make a difference to the insolvency profession. Being a chartered accountant and a registered insolvency professional myself, this relationship becomes even more special and enriching. With advent of IBC in 2016, seen as a show-piece legislation and one of the major economic reforms, the law has been consolidated and codified for effective resolution of insolvency and bankruptcy in India. The code has been implemented keeping in mind the best global practices and experience in this regard, suitably adapted to the Indian conditions, to achieve value maximisation in a time-bound manner while promoting entrepreneurship, availability of credit and balancing the interests of all stakeholders. In a short period since its implementation, the efficacy of IBC over other debt-resolution mechanisms, has been proven beyond doubt. In the scheme of the IBC, inter-alia, IPAs and IPs are considered two key pillars towards effective implementation of the insolvency regime. While IPAs acting as intermediaries between the regulator and the IPs, play a key role in enrolling, educating, training and regulating the professional members, IPs are obligated to provide professional services to debtors, creditors and other stakeholders, adhering to ethical and professional code of conduct.

Given the global medical emergency we are facing, last couple of months have been quite unnerving for each one of us, personally and professionally. The recent relaxations and suspension of a few provisions in IBC, should be viewed as temporary measures, being in the larger interest of the corporate ecosystem of our country, especially the MSME sector. In this context, I am reminded of a very apt reference made by Dr. M. S. Sahoo, Chairman, IBBI, drawing similarities between an insolvency professional and a health worker. The latter saves human lives, whereas the former works tirelessly to save lives of corporates on which depend the livelihoods of employees and future of other stakeholders. In these uncertain times, it's equally important to stay safe, stay positive and stay active. Looking for opportunity in adversity, during the period of inactivity, let's keep educating and updating ourselves to be able to face the challenges in future, especially as cross-border and group insolvency regimes are around the corner. In times to come I would look forward to receiving the fresh ideas and suggestions from our members and other stakeholders, while working towards making our institution truly a world class insolvency agency.

Editor

Message from the Chairman, Editorial Board

CA. Atul Kumar Gupta
Chairman
Editorial Board

Dear Member,

It is indeed a pleasure to reconnect with you, after a break, through the medium of "The Resolution Professional", the in-house journal of the Indian Institute of Insolvency Professionals of ICAI (IIIPI).

In reaching out to you once again, it will be our endeavor to work for the strengthening of our professional bonds and towards the betterment of the profession in the present dynamic global business environment. This journal is being positioned to meet the long-felt demand of our members for contemporary and usable information about latest developments in the field of resolving stressed assets.

Much has transpired since the last issue was in your hands. A significant contribution by the Insolvency Professionals (IPs) has been seen in the improvement witnessed in India's position in World Bank's Ease of Doing Business rankings which has been upgraded to 63 in the year 2020. In fact, the successful implementation of the Insolvency and Bankruptcy Code (IBC) has played a crucial role in moving India up the chain from 130th rank it was placed at in 2016. The World Bank ranking came as a whiff of fresh air for the Indian economy that had been starved of good news.

The Year Gone By

The year gone by has also seen a tumultuous churn in the form of changes introduced in the Code, procedures, new regulations and landmark judgements. These included requirements for performance security by the Resolution Applicant, introduction of Authorization for Assignment, cooling period of 1 year for acceptance of employment with related parties, engaging relatives for CIRP(s) handled by an IP, sale of a CD under liquidation as a going concern, etc. The government also approved amendments for increasing the threshold time for resolution from 270 days to 330 days. A special framework under Section 227 of the Code also provides an interim mechanism for resolution of systemically important financial service providers, apart from Banks.

The Supreme Court pronouncements on *K. Sashidhar vs Indian Overseas Bank & Ors* clarified the commercial wisdom of the CoC giving it paramount status, without any judicial intervention - which included both NCLT/ NCLAT. The upholding of the constitutional validity of the IBC in its entirety, by the Apex Court in case of Swiss Ribbons was another landmark judgement in 2019.

The Essar Steel default case, which was dragging on for over 2.5 years, also saw a closure with Arcelor Mittal finally buying the ailing steel manufacturer. With the closure of the CIRP of Essar Steel, IBC saw one of the biggest resolutions involving a payment of Rs. 42,000 crore, which many see as a testimony to the success of the IBC. It is a matter of pride for us that the concerned Resolution Professional is enrolled with IIIPI.

COVID-19: The New Threat

The unprecedented impact of the pandemic COVID-19 that followed in March 2020, threatened to derail the Global economy. The outbreak has been declared as an international emergency by the World Health Organization. The economic impact of the 2020 coronavirus pandemic in India has been largely disruptive. India's growth in the fourth quarter of the fiscal year 2020 went down to 3.1% according to the Ministry of Statistics which was mainly attributed to the coronavirus pandemic effect on the Indian economy.

While presenting the Finance Bill for the year 2020-21, the Union Government on 01.02.2020 had reasonably estimated India's nominal GDP growth rate (i.e., real growth + inflation) of 10 percent. However, the same now seems far from reality and certainty. In India the three major contributors to GDP namely private consumption, investment and external trade have all been affected.

Emerging Economic Challenges

The slowdown in demand, closure of production activities, fall in the global price of crude oil, disruption of foreign trade, price decrease in the commodities like energy, metals and fertilizers, restrictions on the aviation industry as also on tourism, amongst others, are bound to exert pressure on the inflation, thus adversely affecting the nation's economy chart.

As estimated by Centre for Monitoring Indian Economy (CMIE) in April 2020, the overall unemployment rate may have surged to 23 per cent, with urban unemployment standing at nearly 31 per cent. International Labour Organisation (ILO) has estimated about 40 crore workers of unorganised sector to be unemployed.

The RBI Monetary Policy report of 09/04/2020 has highlighted that:

"…Lockdowns were/have been imposed in most countries. Travel bans have created distress for airlines, tourism and hospitality industries. In the commodity and financial markets, crude oil prices have been on a downward spiral; with West Texas Intermediate (WTI) crude prices crashing below USD 20 per barrel on March 30, 2020. Equity markets have suffered major losses, while gold, fixed income assets - mainly government debt, and the US dollar gained ground due to safe haven demand, but later corrected significantly on profit-booking and flight to cash. With the pandemic still looming, the estimates of the downward drag on global growth are being continuously revised….."

Mitigation Measures

To mitigate the impact of the pandemic, the Government of India announced a variety of measures to tackle the situation, from food security and extra funds for healthcare and for the states, to sector related incentives and tax deadline extensions. On 26 March a number of economic relief measures for the poor were announced totaling over Rs.170,000 crore (US$24 billion). The next day the Reserve Bank of India also announced a number of measures which would make available Rs. 374,000 crore (US$52 billion) to the country's financial system. The World Bank and Asian Development Bank approved support to India to tackle the coronavirus pandemic.

Some other important measures have been:

- On 17 April, the RBI Governor announced more measures to counter the economic impact of the pandemic including Rs. 50,000 crore (US$7.0 billion) special finance to NABARD, SIDBI, and NHB.
- On 18 April, to protect Indian companies during the pandemic, the government changed India's foreign direct investment policy.
- On 12 May the Prime Minister announced an overall economic package worth Rs. 20 lakh crore (US$280 billion), 10% of India's GDP, with emphasis on India as a self-reliant nation.
- During the next five days the Finance Minister announced the details of the economic package.
- Two days later the Cabinet cleared a number of proposals in the economic package including a free food grains package.

- Mobile manufacturing incentives were offered by the government to mobile manufacturers in the beginning of June 2020. This includes a Rs. 50,000 crore (US$7.0 billion) production-linked incentive on goods made locally in India.

IBC Amendment – A Relief Package For Stressed Enterprizes

By an ordinance dated 05/06/2020, India has suspended initiation of fresh insolvency proceedings for a period of six months (extendable to 1 year) to shield companies impacted by the outbreak of Covid-19. It applies to defaults arising on or after March 25, 2020 and states that notwithstanding anything contained in the code, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March, 2020. The ordinance, by introducing s. 10A, suspends Sections 7, 9 and 10 on grounds that:

i. the pandemic has created uncertainty and stress for business for reasons beyond their control
ii. the nationwide lockdown has added to disruption of normal business operations in such circumstances
iii. it would be difficult to find adequate number of resolution applicants for a distressed/ defaulting business

The ordinance also perpetually prohibits initiation of insolvency proceedings on account of default committed by the company during these six months (or a year if the suspension is extended).

Further, insertion of sub-section (3) in s. 66 provides relaxation from wrongful trading provisions, which is understandable. It may, however, be noted that the sub-section should be read in the context of sub-section (2) and not sub-section (1), as the latter covers 'fraudulent trading'.

A cause of anxiety for our members has been the turn that the Insolvency Profession would take pursuant to the above restrictions. While admission of fresh cases where the default has occurred after 25th of March, 2020, will be barred, an earlier amendment raising the default limit from Rs.1 lakh to Rs. 1 cr. may also impact Operating Creditors who are MSMEs and substantially curtail the resolution opportunities available to them.

These restrictions may also encourage lenders and corporate debtors to look at a scheme of restructuring under Section 230-32 of the Companies Act and more vigorously pursue the expeditious introduction of "Pre-packs" as a resolution option.

Conclusion

While the debate rages on the nature of India's recovery in the future – V, W or U shaped- it is a fact that the contraction that India is expected to see in the Financial Year 2021 will not be uniform; rather it will differ according to various parameters such as state and sector. Agriculture and government sectors are likely not to see any contraction.

In the light of the above and the new horizons of Insolvency involving Partnership Firms, Guarantors, Individuals, Groups, Cross-Border Insolvency, etc., the grey areas will need to be resolved expeditiously. However, in these times of redrawing of the contours of conventional wisdom, both challenges and opportunities abound. It will be our endeavor to work with our IPs closely to help them realize their full potential.

I take this opportunity to request our members to support the journal through submission of articles and case studies for evaluation by the editorial board and publication, if suitable.

Best wishes,

CA. Atul Kumar Gupta
President, ICAI
& Chairman
Editorial Board, The Resolution Professional
IIIPI
September 25, 2020

Message from the Chairman, IIIPI

Dr. Ashok Haldia
Chairman, Governing Board,
IIIPI

Dear Member,

At the outset let me welcome you to the forum presented by the Journal of IIIPI – "The Resolution Professional" in its new format, redesigned and re-structured to cover entire spectrum of the IBC related knowledge base and recent developments covering the entire value chain comprehensively.

IBC, An Efficacious Framework

IBC regime in India has evolved and matured since its inception in October 2016. It has set the ground for a much-needed creditor-driven insolvency resolution mechanism. The IBCstands on the four pillars of Insolvency Professionals, Information Utility, Regulator and Adjudicator. It has not only simplified the legal framework by consolidating multiple laws on the subject but has also led to a faster and smoother resolution process for stressed assets in India.

The IBC framework has over its existence for four years, proven its efficacy. So far under IBC, realization by financial creditors under resolution plans in comparison to liquidation value, was 183% while the realization by them in comparison to their claims' value is 45%. Such realization is much better than that in the earlier regime. As per RBI's data, during 2018-19, banks recovered 5.3%, 3.5%, 14.5% and 42.5% of the amount involved through Lok Adalats, DRTs, SARFAESI and the IBC respectively.

The adjudicatory process is also simplified by assigning the task to a dedicated structure of National Company Law Tribunal (NCLT) and National Company Law Appellate Tribunal (NCLAT) for corporate insolvencies. The IBC has been remarkable in the speed of its implementation with perceptible impact during the short time it has been in force. The period taken in insolvency resolution/disposal has significantly reduced from over 4 years in the previous regime(s) to around 1 year under IBC regime. The average time taken for completion of 250 CIRPs yielding resolution is 423 days. The average time taken for completion of 955 CIRPs which have yielded orders for liquidations, is 312 days.

Interestingly, one of the most significant impact of IBC has been in regard to much needed disciplining the borrowers' behaviour and improving the quality of due-diligence or monitoring of loan accounts by the banks/ financial institutions. The credible threat of the IBC process, that a company may change hands, has sensitized the borrowers into following financial discipline.

Besides, in the case of existing defaults, the debtors feel compelled to come forward and settle the defaults at an early stage. Thousands of debtors are settling defaults at early stages of the life cycle of a distressed asset. They are settling when default is imminent, either on

receipt of a notice for repayment but before filing an application or in the course of CIRP. The impact of IBC is thus more visible outside IBC's framework which augurs well for the financial sector.

Headwinds and Responses

However in the dynamic world that we are in, the insolvency resolution framework constantly remains in the evolutionary phase. There are areas that require recalibration and refocus in the light of valuable experience gained so far. The proactive approach in this regard shall further strengthen and streamline the administrative or legal processes, and by spawning a commensurate institutional infrastructure. Some of such initiatives include balancing the rights of the operational creditors vis-à-vis the rights of financial creditors, regulating the time required for judicial processes, safeguarding the rights and interests of the Insolvency Professionals, etc. Though the Code relies to a great extent on the decisions of the committee of creditors (COC), nevertheless it leaves considerable discretion in the hands of the insolvency professional. It is therefore imperative to introduce capacity-building measures equipping them with relevant skills and mindsets to be able to discharge their responsibilities with professional excellence, independence and integrity. The need of the hour for the insolvency professionals is to rise to the occasion, hone and exhibit their acumen keeping in view the demanding nature of insolvency process.

Another worrying aspect is that the failure of or delay by the financial creditors to arrive at a consensus leads to the liquidation of the Corporate Debtor. All the parties to the CIRP should aim at and assidusouly work towards maximization of the value of corporate debtor through resolution and failing which only liquidation should be resorted.

As per a recent study conducted by IIIPI on timeliness and effectiveness of litigation under CIRP, litigation(s) per CIRP takes about 113 days which is significant given the fact that IBC prescribes the maximum period of 180 days for a CIRP to conclude. Moreover, average litigation cost per CIRP works out to Rs.18 lacs which is high. While the number of benches and judges have been enhanced, the duration of acquisition and the opportunity cost involved is sometimes demoralizing for potential acquirers. As a matter of fact, of the 2108 ongoing CIRPs as at end of June 2020, the resolution of as many as 1094 cases has been dragging on beyond the mandatory (maximum) 270 days, primarily due to legal hassles.

The 'prepack' insolvency framework expected to be announced soon will give legal backing to pre-IBC resolution. If properly designed and implemented, it will effectively bypass various requirements or interventions by the Courts at different stages under the usual IBC process, thus significantly reducing litigation-related costs and delays. It would also help decongest the over-burdened NCLTs.

Emerging Landscape amidst COVID-19

In the direction of making IBC a wholistic framework, the steps are afoot to extend its scope to areas of individual bankruptcies (beyond personal guarantors of corporate borrowers), group insolvencies, cross-border insolvencies, special resolution framework for MSMEs, pre-packaged (out of court settlements) insolvency resolution, and the like. This in turn, would throw up a vast set of challenges as well as opportunities for insolvency professionals.

Even as the insolvency professionals seek to tap into such opportunities, the recent disruption caused by the spread of COVID-19, threatens to strike hard at the four-year-old IBC regime. The CIRPs in their final stages of resolution are probably be the most affected. The concern is ever more grave for larger cases like IL&FS, Dewan Housing Finance, Jaypee Infra, Bhushan Power & Steel, Alok Industries

and Reliance Communications which may now take longer to execute resolution plans. Even those plans which were either approved or were under consideration by the Committee of Creditors or NCLT may go back to the drawing board for a review of valuations and viability of businesses. Many of the Corporate Debtors undergoing CIRP have seen their cash flows drying up overnight amid the lockdown and continuing stressful condition of the economy. The situation becomes grimmer when we consider the MSMEs and the unorganized sector.

The number of fresh insolvencies are expected to rise significantly once the suspension on certain provisions of IBC, is lifted in near future. Globally the response to emerging scenario, in the wake of pandemic and post lifting of temporary suspension, has been graded over three phases to ensure smooth transition of economy. In the first phase, effective measures are needed to halt fresh insolvencies, like temporary suspension, etc. In the second phase and upon facing the surge in insolvencies, the scenario can probably be best managed through special 'out of court' arrangements to flatten the curve. In the third phase the steps can be taken to normalize the regular insolvency framework to address the default overhang.

While it is early days yet, the ability of the Indian entrepreneur to weather the fiercest of storms is acknowledged. The next few months will be crucial from the point of view of the Indian and Global economy and the challenges arising in the social sector (including health). The pre-existing stress from the slow-down in 2019 and the induced stress from the COVID onslaught in 2020 will test the resilience of our systems and the robustness of IBC as a means of commercial stress resolution.

We can draw some comfort from our comparison with other markets when we look at the pace at which we have achieved our present level of strengths. In the US, for example, it took 10 years (from 1978) for the bankruptcy law to attain some stability. At one point, they were even considering repealing it. The progress in India has been remarkable by global standards.

As the premier Insolvency Professionals Agency, we at IIIPI are committed to be a leading institution for development of an independent, ethical and world-class insolvency profession responding to needs and expectations of the stakeholders. I look forward to our close engagement with members and various stakeholders. Enriched by their value-added contribution, IIIPI resolves to serve humbly aiming at promotion and development of a well-grounded insolvency profession for subserving the cause of IBC.

A five-day programme recently held for equipping IPs with skills in managing corporate debtor under CIRP, has been a remarkable success. Many more such programs and research studies are lined up in our work-plan over next six months.

The Board of IIIPI together with the management has charted out a multi-pronged strategy for making IIIPI a world-class institution. Let us join and work together towards this endeavour.

I look forward to being with you during one-of-its-kind international conference on 'Insolvency Resolution Regime - Global Responses and Headwinds', studded with distinguished speakers across government, regulators, industry, IPs, and other stakeholders from India and other countries, on 24th-25th October 2020.

Best Wishes. Stay Safe. Stay Healthy

Dr. Ashok Haldia
Chairman, Governing Board
IIIPI, New Delhi

Address by Chairman, IBBI

Dr. M. S. Sahoo
Chairman
IBBI

Dr. M. S. Sahoo, Chairperson, Insolvency and Bankruptcy Board of India (IBBI), was invited to address the 14th meeting of the Governing Board of the Indian Institute of Insolvency Professionals of ICAI (IIIPI) on May 26, 2020. In his address, Dr. Sahoo shared his views on evolving ecosystem of insolvency and bankruptcy profession in the country and expectations of the regulator from Insolvency Professional Agencies (IPAs) and Insolvency Professionals (IPs) to ensure a world class robust resolution regime in India.

In continuation of his address, we also have views of CA. Atul Kumar Gupta, President, the Institute of Chartered Accountants of India (ICAI) and Dr. Ashok Haldia, Chairman, IIIPI. Read on to know more...

IPAs in the Governance Hierarchy[1]

I thank Mr. Ashok Haldia, Chairman, IIIPI for giving me this opportunity to talk to you, a distinguished set of individuals. You are the who's who of the corporate and financial world and the IIIPI is privileged to have you on its Board.

It was on 1st October, 2016 that IBBI was set up with a mandate to commence the corporate insolvency proceedings by 1st December, in just sixty days, by which it had to create the entire ecosystem comprising Insolvency Professionals Agencies (IPAs), Insolvency Professionals (IPs), rules and regulations for processes, and so on. This mandate could not have materialised if the Institute of Chartered Accountants of India had not promoted IIIPI to join the insolvency ecosystem in November, 2016. I must congratulate you for the IIIPI achieving a leadership position in terms of membership of about two third of IPs, with commensurate number of Authorisation for Assignments (AFAs) and number of assignments by its members.

Good Governance

The concept of IPA is, in fact, a very novel one. I have not seen a similar organisation in the Indian context except that it is comparable with the stock exchanges, which act as frontline regulators for the stockbrokers and regulate markets under regulatory oversight of the Securities and Exchange Board of India (SEBI). The COVID-19 pandemic impacted everyone, including regulators. It, however, did not interrupt the trading operations of the stock exchanges which underscores the resilience of the systems in place with them. The stock exchanges are now the envy of the regulator. There is similar scope for IPAs like IIIPI to take a centre stage and become an envy of the IBBI

1. Address by Dr. M. S. Sahoo, Chairperson, IBBI at 14th Meeting of the Governing Board of IIIPI held on 26th May, 2020.

and I sincerely wish it happens during my tenure with the regulator.

An IPA has broadly two sets of interests. One is public interest, as enumerated in section 202 of the Insolvency and Bankruptcy Code, 2016 (Code), encompassing the interests of the debtors, creditors, other stakeholders, the market, and the society. An IPA also pursues private interest, as enumerated in section 204 of the Code, encompassing the top and bottom lines of the business, the interests of professional members, shareholders, and employees. A measure - commercial or regulatory - undertaken by an IPA may not always further both the interests simultaneously. Or, an IPA may adopt measures that give precedence to one interest over the other. A big dilemma before you is: how does IIIPI balance public interests and private interests. There is no magic formula to do so. We faced similar problems in the space of stock exchanges for decades. We addressed this by demutualisation of stock exchanges in 2005. However, we have started the IPAs on a much sounder footing. Section 203 of the Code provides for governance norms for IPAs. There is limited presence of IPs in the Governing Board which has 50% independent directors. The IPAs have in-built features of demutualisation which were brought in the stock exchanges after 150 years of existence. An IPA is better structured to balance private and public interests, provided this remains in top of your mind, while taking decisions for or on behalf of IIIPI.

An Instrumentality of State

Given the interests of an IPA, it is simultaneously 'State' and a market participant. It regulates and develops the insolvency profession and has several responsibilities under section 200 read with section 204 of the Code. Let's visualise the IPA in the governance hierarchy. Citizens are ultimate principals in parliamentary democracies. They delegate their authority to their representatives who form the Parliament. The Parliament further delegates some of its authority to the Government which further delegates the same to the Ministers. The Government and Ministers delegate the implementation to the Bureaucracy. Thus, in a normal chain of delegation, there are four delegates, namely, the Parliament, the Government, the Ministers, and the Bureaucracy. The delegation to independent regulatory agencies is relatively a new concept in the Indian context, beginning in 1992, with the establishment of SEBI. We consider bodies like SEBI, IRDAI, ICAI, ICSI, etc. as regulatory state, being the fifth layer in the governance hierarchy[2]. Further delegation to IPAs constitutes the sixth layer. As IBBI is bound by a principal-agent contractual framework to deliver on its mandate to the Government, so also is an IPA.

In the hierarchy of principals and agents, IPAs are closest to the market. Because of this proximity, they have a better understanding of the market than the Government or IBBI has. As agents of IBBI, and indirectly of the Government, IPAs regulate the conduct of their constituents. It is possible that there is some transmission loss in terms of objectives or focus from one layer to the other in the hierarchy. Appropriate design of contracts minimises the loss by holding an IPA accountable while incentivising it to promote the interests of the principal. It is also important to minimise the perceived conflict of interests between the commercial aspirations and regulatory tasks of an IPA.

There are a series of judgements[3] where it has been held that the stock exchange is an instrumentality of State under Article 12 of the constitution and is amenable to writ jurisdiction under Article 226. Similarly, an IPA is an instrumentality of State and performs statutory public duty cast on it under a statute. As envisaged in the report of the Bankruptcy Law Reforms Committee (BLRC), an IPA is a

2. Fabrizio Gilardi and Dietmar Braun (2006), "Delegation in Contemporary Democracies", Volume 43, Routledge/ECPR Studies in European Political Science, Routledge.

3. Delhi Stock Exchange and Anr. Vs. K.C. Sharma and Ors., 2002, Delhi High Court.

mini State. It discharges three sets of functions, namely, quasi-legislative, executive, and quasi-judicial. The quasi-legislative functions cover making byelaws to lay down standards and code of conduct, which are binding on all its members. The executive functions include monitoring, inspection, and investigation of professional members on a regular basis, addressing grievances of aggrieved parties, gathering information about their performance, etc. with the overarching objective of preventing malicious behaviour and malfeasance conduct by IPs. The quasi-judicial functions include dealing with complaints against members and taking suitable disciplinary actions.

Generally, there is a broad separation of powers among the agencies associated with law - the legislature makes the law; the executive and the judiciary respectively administer and enforce it. This provides a system of checks and balances for one another to prevent misuse of power. The Hon'ble Supreme Court[4] made an interesting observation in the context of SEBI's powers: *"Integration of power by vesting legislative, executive and judicial powers in the same body (SEBI), in future, may raise a several public law concerns as the principle of control of one body over the other was the central theme underlying the doctrine of separation of powers".* Though the Constitution of India does not envisage strict separation of powers, it does indeed make horizontal division of powers among the legislature, the executive, and the judiciary. In keeping with the spirit of the constitutional provisions, every regulator must ensure that its three wings exercise quasi-legislative, executive and quasi-judicial powers with independence and without intra-institutional bargaining and, thereby, avoid potential public law concerns prognosticated by the Hon'ble Supreme Court. This requires the three wings to operate at arm's length distance from one another, a system of mutual checks and balances to prevent any excess. The IBBI has created three separate wings, in charge of three separate whole-time members to ensure that the wings exercise quasi-legislative, executive, and quasi-judicial powers with independence. The IIIPI should also strive towards having such checks and balances, if not done already.

A primary function of a state agency like IPA is to protect the interest of consumers or users. This is evident from the long titles of the modern legislations such the SEBI Act, IRDAI Act, the Competition Act. Section 204 of the Code enjoins upon the IPA to redress the grievances of the consumers against its members. There is a considerable scope and an urgent need for IIIPI to improve its performance in this regard.

Inter-se Competition

Though an IPA is an agency of State, it is not a monopolist like IBBI, SEBI, Competition Commission of India, etc. Like stock exchanges, IPAs compete among themselves focussing their unique selling propositions. As a market player, an IPA is selling two products. One is its membership. It is important that such membership enjoys a brand equity and brand loyalty and commands a premium in the market. I am told, in the context of RVOs in the US, members of a Valuation Professional Organisation (VPO) command 40% higher remuneration than those of other VPOs. The second is professional development services provided by IPAs to their members.

The BLRC envisaged that IPAs would be competing among themselves. You need to fight fiercely with your competitors at marketplace. You need to have a competitive strategy such as Philip Kotler's five forces model[5] or any other model that can drive your business. You need to understand rivalry within your industry. Rivalries naturally develop between players competing in the same market. I do not see this yet happening among IPAs. You also need to consider forces like pressure from substitute products, bargaining power of suppliers, bargaining power of buyers, threat of new

4. Clariant International & Anr. Vs. SEBI, 2004, Supreme Court.

5. Competitive Strategy: Techniques for Analyzing Industries and Competitors, Philip Kotler, 1980.

entrants, etc. There is no entry barrier today either by law or by market power. Traditional entry barriers like economies of scale, the amount of investment, switching cost, etc. do not exist in the IPA space except that an IPA has to be a section 8 (not for profit) company and this has limited the entry to some extent. In UK, the Recognised Professional Bodies (RPBs) regulate the insolvency practitioners. However, the Insolvency Service (Government Department dealing with Insolvency) is empowered by law to act as an RPB itself and compete with other RPBs. There is currently a proposal for the Insolvency Service to takeover this responsibility from RPBs. So, you need to remain relevant and add value for your continued existence. You need to ensure that you are indispensable, and no one can replace you. You need to perform and demonstrate performance quarter after quarter as a listed company does.

While competing among yourselves, as a front-line regulator, you should ensure that your members set high standards which in turn would earn the confidence and trust of stakeholders. The ultimate objective is that the market value that the IPs, who are members of IPA "X", are the best and the first choice of stakeholders for provision of services under the Code. Further, every profession - CA, CS, or Advocate - has a reputation. It takes considerable effort and time to build reputation. The society and stakeholders form a view about a profession in its initial years. That view does not change for long, even if the profession behaves differently. You must build and safeguard the reputation of the insolvency profession now to ensure it becomes the most enviable profession in the country. By building reputation of your members and creating a brand loyalty, you would be discharging an important statutory duty that you have under section 204 of the Code to safeguard the rights, privileges, and interest of your members.

Best Practices

I have spent a long time in the financial markets. The SEBI Act, 1992, Regulations made by SEBI and case laws taken together constitute about one third of the total law governing securities markets, while two third of the law comes from the custom or the best practices. For instance, debit and credit rule (in accountancy) does not flow from any law; it flows from the custom. Likewise, IPs face complicated situations, for which there is no solution in rule book. The solution emerges from practice. The law at times adopts the best practices. Most often such practices acquire the force of law and guide the practitioners. I urge you to take the lead in developing best practices for situations for which rule book has no solution.

COVID-19 Pandemic

Let me briefly touch upon COVID-19 pandemic. The authorities have been extremely proactive to make the Code accommodative to deal with insolvencies. The Government, vide notification dated 24th March, 2020, one day before the lockdown, increased the threshold amount of default required to initiate an insolvency proceeding under the Code from Rs.1 lakh to Rs.1 crore, with the intent to prevent MSMEs from being pushed into insolvency for their inability to meet their repayment obligations due to business disruptions. Based on the announcement of the Finance Minister on 17th May, 2020, the work is on to amend the Code to suspend initiation of insolvency proceedings against corporate debtors in respect of any default arising during the COVID-19 period. This will prevent corporate persons which are experiencing distress largely on account of unprecedented situation being pushed into insolvency proceedings when it is difficult to find adequate number of resolution applicants to rescue them.

The market protagonists believe that suspension of the Code would deprive ailing entities to

find a resolution or allow unviable companies to continue. Currently, every company is struggling for its own survival. Who can rescue another ailing company? If all these are pushed into insolvency, many of them may face liquidation for want of resolution applicants to rescue them. Rescuing lives of companies being the prime objective of the Code, it cannot be used to take away their lives prematurely.

Further, the insolvency framework typically aims to: (i) rescue a viable firm, and (ii) liquidate an unviable firm. In the present circumstances, there are two policy choices: If insolvency framework is suspended, unviable firms would not be liquidated; and if it is not suspended, viable firms would be liquidated. The first choice fails to liquidate an unviable firm, which can be rectified in the following quarter or year. The second choice liquidates a viable one forever, which cannot be undone. Rescuing a viable firm is, therefore, far more important than failing to liquidate an unviable one during the current crisis. Additionally, the second choice provides a breathing space, when many companies, which are failing solely on account of COVID-19, would bounce back on their own as soon as normalcy restores. Or, they would recalibrate their operations and businesses to an 'all-new normal'. They may even explore innovative workouts for resolutions outside the Code.

Also underway is a tailor-made package for resolution of MSMEs. This would enable MSMEs to resolve their own distress, if they wish, even in COVID-19 times. Government has decided to enlarge the scope of MSMEs. The enterprises having investment in Plant and Machinery or Equipment up to Rs.50 crore and turnover up to Rs.250 crore would be considered MSMEs. With this definition, about 60% of companies would fall in the ambit of MSME. As the story unfolds further, I am sure, Government would step in with further appropriate measures. I believe, the IPAs can play a significant role in these circumstances. While contributing to policy formulation, they must prepare their members as care givers for the persons in distress.

I thank Chairman, IIIPI and distinguished directors of Governing Board for this opportunity and wish IIIPI all the best in its future endeavours.

Thank you

Excerpts from Speech by Dr. Ashok Haldia Chairman, IIIPI

I extend a warm welcome to Dr. M. S. Sahoo, Chairperson IBBI

It's a privilege to have you with us in the Board meeting of IIIPI. Although IBBI has been closely interacting with IIIPI and monitoring & supervising their operations, we thought to gain from your wisdom in the areas of (i) IIIPI's functioning, (ii) the direction in which the insolvency regime is moving particularly in the wake of Covid-pandemic, (iii) the impact of some provisions of IBC getting suspended, and (iv) the manner in which IIIPI could better respond to the members requirements and regulatory expectations.

I also take this opportunity to introduce you to our Board members. Though you need no introduction, may I mention your illustrious background in the banking and finance sector, particularly your distinguished stints at the Ministry of Finance followed by SEBI, Competition Commission of India and at the helm of ICSI. Your contribution to shaping up the insolvency regime in such a short time frame is unparalleled. Under your guidance IBC has evolved into one of the most important legislations for the world to see and appreciate.

IIIPI, apart from being a wholly owned subsidiary of ICAI, is the largest IPA with over 61% share of membership across IPAs. Moreover 60 to 70% of cases under CIRP and liquidation have been dealt with by the members of IIIPI. Given the volume IIIPI is looking after, we have tried our best to stand up to our reputation and meet the

expectations of our stakeholders. We seek your guidance to further improve ourselves. We are committed to building capacity of our members by conducting the contemporary programs and webinars besides having in place international tie-ups with ICAEW in the past or proposed tie-up with INSOL, UK. We are also working with World Bank, IFC and other institutions in this direction.

Though we have contributed to some of the contemporary research projects in the past, we look forward to undertaking more meaningful research in emerging areas to strengthen the insolvency regime. To achieve the said objective, we've identified a few areas like group insolvency, cross-border insolvency, pre-packaged insolvency and the grey areas of the IBC which are not often covered by the law, rules and regulation. Such grey areas could be across functioning of IPs, COCs, Banks and CDs, where best practices need to be developed and promoted with the support of IBBI.

I also refer to the deliberations with you during a webinar in the month of April this year, when you had highlighted the need to carry out research on the extent of infructuous litigation during CIRPs and the burden it casts on the system. It might be important to understand infructuous litigation as that where the remedy is not commensurate with the time and cost involved. We have carried out such research cum study and to our surprise, it emerged that 143 days is the average time taken in various litigations during a CIRP which constitutes about 40-50% of overall time at the different stages post the admission. Moreover, a CIRP normally faces an average of about 3 litigations in its lifecycle. The average cost on litigation that we have estimated is around Rs.18 lakhs per CIRP. If we multiply that by approx. 3000 cases (concluded so far) the total cost works out to a whopping Rs.540 crores. We would be sharing the detailed report/findings separately.

We look forward to your guidance and thank you once again for joining us today.

Excerpts from Speech by CA. Atul Kumar Gupta, President, ICAI

I welcome Dr. M.S Sahoo, Chairperson IBBI on behalf of the IIIPI's Board and ICAI.

As rightly mentioned by Dr. Haldia, IIIPI is the offshoot of ICAI and we are together putting in our sincere efforts to ensure that it is becoming enabling partner in the nation building by its contribution. I truly believe that IIIPI can contribute not only by equipping insolvency professionals but also simultaneously by carrying out research initiatives. In the direction of re-skilling of Insolvency Professionals effective delivery is important and I believe that the 3 years' rigorous practical training while pursuing the CA qualification, enables professionals to be more useful asset for IBC as compared to the other IPs. As a professional rendering services in insolvency or assurance areas, such practical exposure provides the professional with necessary acumen and attitude to be able to face the challenges. I believe that the insolvency profession calls for an environment of trust that professionals need to earn from both regulators and entrepreneurs. In the times of distress, such trust should translate into stress resolution related challenges being met by the dedicated team of professionals more efficiently and effectively.

I am pleased to share that IIIPI supported by ICAI is fully geared up, with all its initiatives to support this unique initiative of our country and in undertaking futuristic research to strengthen the policy framework. At this juncture, we look forward to guidance and words of wisdom about how we can partner IBBI in shaping the vision and kind of research initiatives we should be undertaking as an institution. I remember your earlier initiative of putting up the pre-packaged insolvency framework, before the Insolvency committee, which seems to be the need of the hour today.

We thank you again and are eagerly looking forward to your valuable guidance in this direction.

Research cum Study on Timeliness & Effectiveness of Litigation under IBC

IBC provides a highly comprehensive step by step timeline to complete the Corporate Insolvency Resolution Process (CIRP) under a defined schedule. However, the litigations often come in the way and cause delays. The Indian Institute of Insolvency Professionals of ICAI (IIIPI) conducted a study into the issue titled 'Research cum Study on Timeliness & Effectiveness of Litigation under IBC". The present article is ***summary*** *of the study conducted by IIIPI. Read on to know more...*

Indian Institute of Insolvency Professionals of ICAI (IIIPI)

The timely completion of the Corporate Insolvency Resolution Process (CIRP) under the Insolvency and Bankruptcy Code (IBC), 2016 has always been one of the biggest challenges in India. This is primarily because of judicial interventions at various stages of the CIRP, due to which the interim resolution professionals (IRPs)/resolution professionals (IPs) fail to complete those stages in the allocated time period.

In this context, it is worth noting that litigation, by nature, could be classified into three categories – (i) Unavoidable, (ii) Avoidable-Relief and, (iii) Avoidable-Infructuous. The "Unavoidable" litigations represent legal interventions as prescribed in the IBC which can be viewed as part and parcel of the effective resolution mechanism while the litigations resulting into relief are referred as "Avoidable-Relief". The "Avoidable-Infructuous" are those litigations which are either quashed by the courts or are met with strictures/cost-orders against the erring party. In the present study, the researcher has made an attempt to find out time consumed in above three types of litigations across four pre-defined stages of the CIRP and make suggestions to improve timeliness and effectiveness of the process.

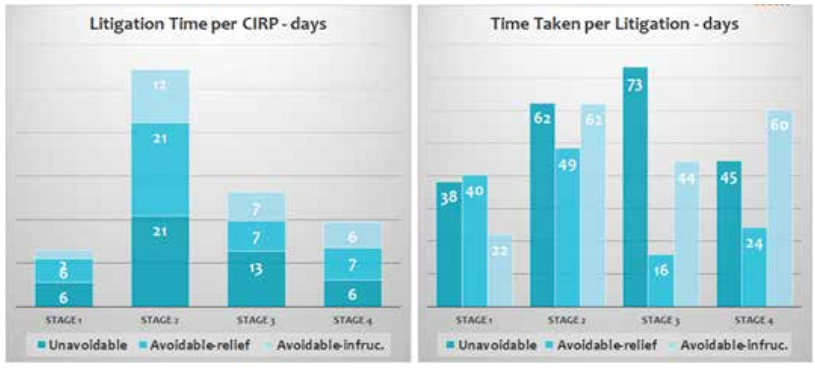
Methodology of the Study

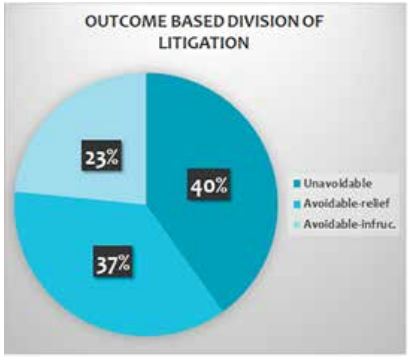
Questionnaire was used to collect the litigation data from four stages (i) Stage 1- 'from commencement till COC (Committee of Creditors) formation' (ii) Stage 2- 'after COC formation till issuance of Request for Resolution Plan (RFRP)', (iii) Stage 3- 'after issuance of RFRP till approval of Resolution Plan', & (iv) Stage 4-during liquidation Furthermore, each stage was divided into three categories i.e., Unavoidable Litigation, Avoidable-Relief and Avoidable-Infructuous. Besides, the participants were also asked to provide inputs of costs involved on litigation as percentage of CIRP cost and subjective comments/ suggestions to improve the CIRP time-lines with respect to the litigation.

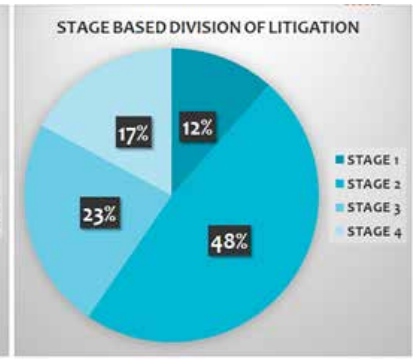
The "Avoidable-Infructuous" are those litigations which are either quashed by the courts or are met with strictures/cost-orders against the erring party.

Observations

The data collected from 60 participating IPs across 208 CIRPs was processed for tabulation and analysis. The key findings of the study could be presented as under:







Highlights

- Litigation time per CIRP: 113 days
- Average number of litigation per CIRP: ~3
- Average time per litigation: 43 days
- Average litigation cost per CIRP: 18 lakhs
- Sample size across 60 RPs, 208 CIRPs

Recommendations

From the perspective of World Bank's 'Ease of Doing Business' ranking and particularly in the context of ease of insolvency, the timeliness and cost of insolvency process, inter-alia, form the key components of any insolvency regime. Moreover, the value maximisation objective of IBC can be served much better if the time taken in CIRP is minimised. Therefore, following recommendations should be positively considered for improvement in timeliness and effectiveness of the CIRP:

1. **Unavoidable**
   - Automation/Technology to improve legal infrastructure
   - Checklists based orders instead of lengthy pronouncements
   - More delegation to RPs/COC to reduce burden on judiciary
   - Introduction of pre-pack resolutions to save time/cost
2. **Avoidable - Relief**
   - Better awareness of IBC regime among stakeholders
   - Technology/Diversification to improve RP infrastructure
   - Best practices/regulatory intervention for grey areas
3. **Avoidable- Infructuous**
   - Sensitization of stakeholders on behavioural aspects
   - Making existing promoter a party, especially for MSMEs
   - Frivolous litigation to be made onerous/penalising.

Insolvency Process under IBC: Planning, Monitoring and Control

With the banking sector swamped with bad loans (Non Performing Assets), it was time for an insolvency law to be promulgated to ensure credit availability as well as to tackle the moral hazard that there would always be a way out of defaults through restructurings and one-time settlements. The Insolvency and Bankruptcy Code (IBC), 2016 aims to change this adverse economic atmosphere to restore the confidence of the financial institutions and banks by putting the reigns of business of a defaulting person firmly in the hands of lenders through insolvency professionals. Read on to know more...

Ajay Milhotra
(The author is a professional member of IIIPI)

Introduction

The preamble of the IBC, 2016 states, "IBC, 2016 is a Code to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India (IBBI), and for matters connected therewith or incidental thereto". Thus in the very preamble the IBC makes it loud and clear that the creditors have the first right on the assets of a debtor.

IBC, 2016 (the Code) has moved the needle from a situation where 'debtors were in possession' to a position where 'creditors are in control'. The Code consolidates all existing insolvency related laws as well as amends multiple legislations including the Companies Act. The Code has an overriding effect on all other laws relating to insolvency and bankruptcy, and has clearly defined 'order of priority' or the waterfall mechanism for distribution of assets procured

through resolution plan or liquidation of the debtor.

Application of IBC: Entities Covered and Default Amount

As per the Code, following entities are covered:

(a) any company incorporated under the Companies Act, 2013 or under any previous company law;

(b) any other company governed by any special Act for the time being in force, except in so far as the said provisions are inconsistent with the provisions of such special Act;

(c) any Limited Liability Partnership (LLP) incorporated under the Limited Liability Partnership Act, 2008;

(d) such other body incorporated under any law for the time being in force, as the Central Government (Government of India) may, by notification, specify in this behalf;

(e) personal guarantors to corporate debtors;

(f) partnership firms and proprietorship firms; and

(g) individuals, other than persons referred to in clause (e) in relation to their insolvency, liquidation, voluntary liquidation or bankruptcy, as the case may be.

For matters relating to corporate debtors under insolvency or liquidation minimum amount of default should be for one crore rupees or more. For matters relating to fresh start, insolvency, bankruptcy of individuals and partnership firms the amount of default should not be less than one thousand rupees.

Parts, Sections, Schedules and Regulations

The IBC, 2016 is divided into five parts, with 255 Sections, 12 Schedules and 25 IBBI Regulations and a set of Adjudicating Authority (AA) Rules – forming the repertoire for the insolvency professionals (IPs).
Insolvency and Liquidation for Corporate Persons, which has so far been the thrust of the Code, is contained in Part 2 of the Code and runs from section 4 to section 77 in VII chapters. Recently, insolvency resolution processes for Personal Guarantors to Corporate Debtors and Bankruptcy Process for Personal Guarantors to Corporate Debtors have been notified and brought into ambit of corporate insolvency resolution process (CIRP).

Ground Breaking Judgements: Evolving Process

- **Swiss Ribbons (January 25, 2019)** – the Supreme Court upheld the constitutional validity of the IBC in its entirety, also upheld the constitutionality of the commercial primacy provided to financial creditors under the Code and remarked that laws concerning economic and commercial matters should not be influenced too much by the principles of equity, reasonableness and fairness of the traditional laws.
- **Essar Steel (November 15, 2019)** – the Supreme Court upheld that resolution plan could distinguish between different financial creditors on the basis of the priority and value of their security, and such a distribution was also upheld by the Supreme Court in its judgment in Essar Steel. In the judgement dissenting creditors too were given protection for the amounts due to them to the extent of the liquidation value.
- **Jaypee Infratech (February 26, 2020)** - NCLT has approved the state-run NBCC's proposal to acquire debt-ridden realtor Jaypee Infratech Ltd (JIL), bringing relief to around 20,000 homebuyers in Noida and Greater Noida. This includes the Rs 750 crore plus interest collected by the Supreme Court from Jaypee Associates Ltd (JAL) and the 858 acres of prime land that the SC has held was a preference and therefore belongs to JIL.

Progress of IBC till December 2019 (As per IBBI Newsletter)

A. Number of CIRP Cases

Admitted	Closed				Ongoing
	Approval of Resolution Plan	Commencement of Liquidation	Others-settled, withdrawn etc.	Total	
3,312	190	780	381	1351	1961

B. CIRP Yielding Resolutions

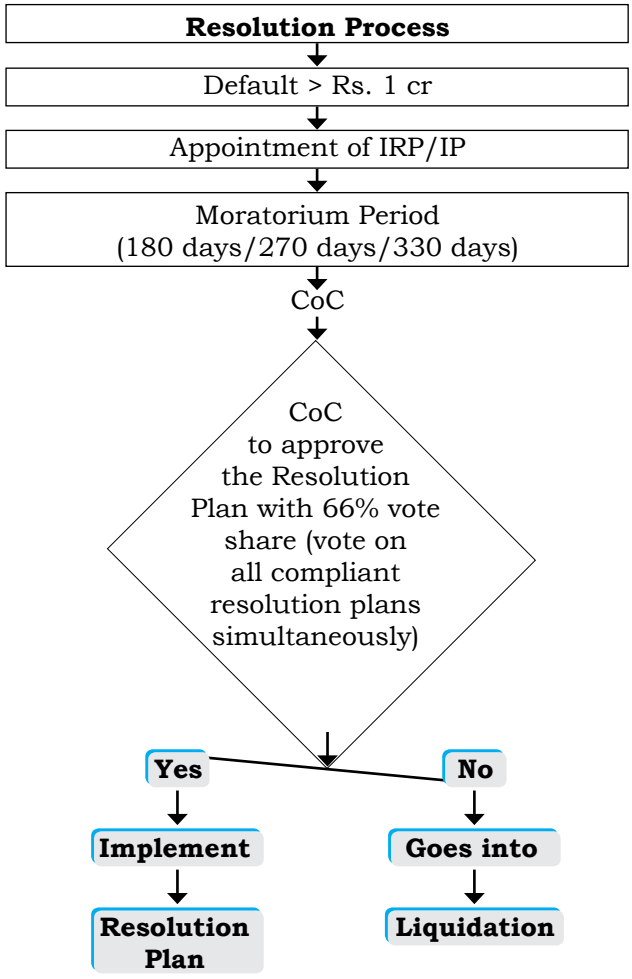
Total Admitted claims of FCs	Liquidation Value	Realisable by FCs
Rs 3,51,527.98 crores	Rs 76,685.79 crores	Rs 1,51,664.12 crores

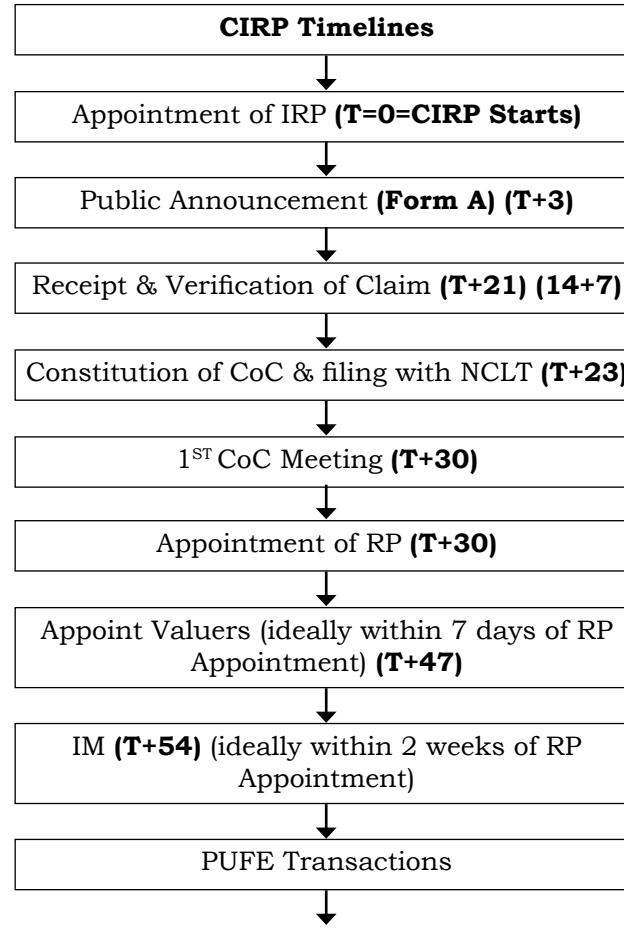
Conclusion: DNA of the Insolvency Process Conclusion

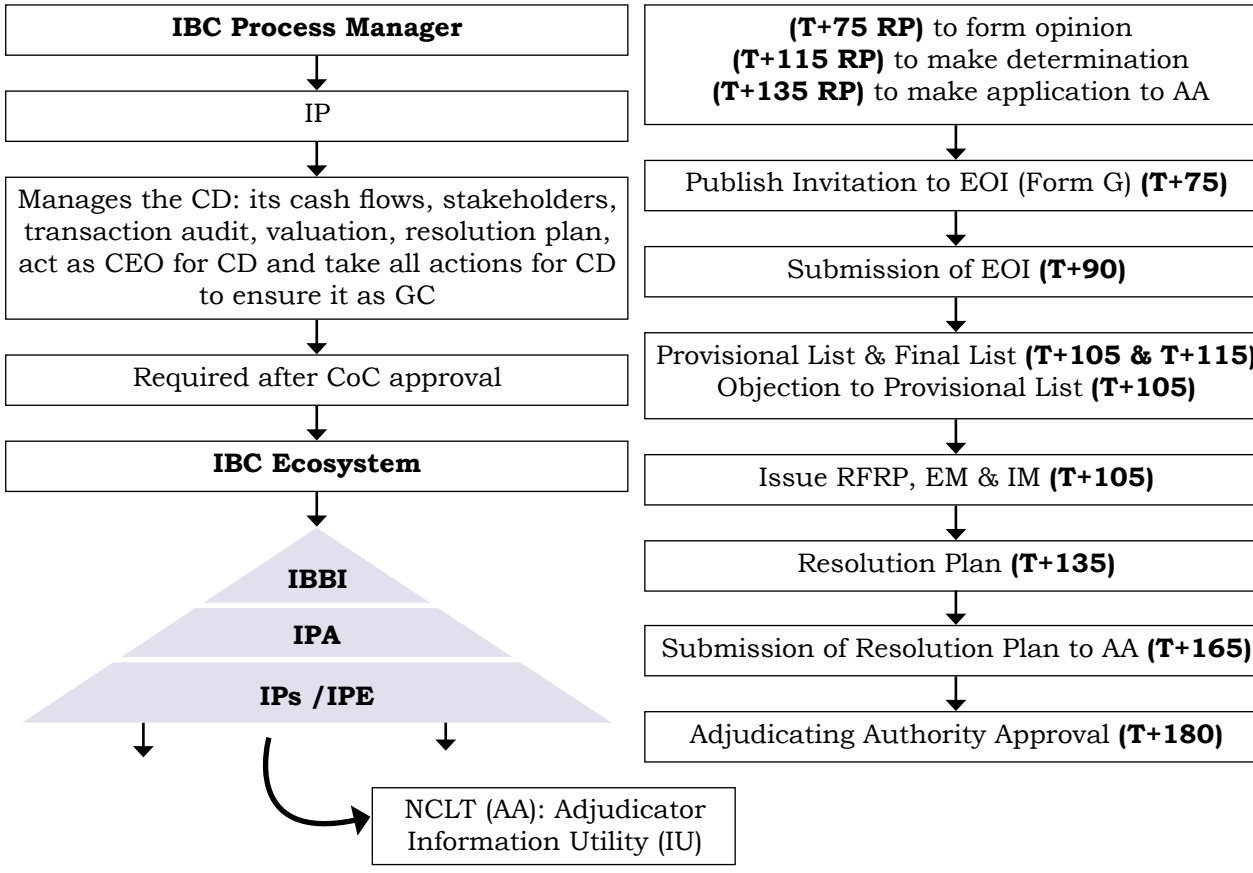
To conclude, the DNA of CIRP is such that the IP has to act efficiently and effectively, from the time the public announcement is made for the CIRP till the time the CIRP period of 180 days (or 270 or 330 days) comes to an end. The CIRP culminates in either revival of the corporate debtor (CD)/ defaulting company through a resolution plan or if the continuance of business is not found feasible and viable by the CoC putting it in liquidation. The IPs have a critical role in the CIRP to ensure timely valuation of assets, timely transaction audit report, if required, resolution plan vetting and good corporate governance of the CD while staying updated on the evolution and changes that's taking place in the Code. This could be better presented in a flow chart as follows:

- The timelines enumerated in the flow chart below needs to be constantly monitored and controlled through spreadsheets and charts, and have a team comprising of different professionals
- Timely resolution would help in maximization of value of assets for the creditors, leading to highest net present value (NPV) possible
- Delays may lead to further deterioration in the condition and in the value of assets (both tangible and intangible) as well as in the costs of insolvency, hence the criticality of expeditious and cost-effective insolvency process.

Flow Chart: Planning, Monitoring and Control of the CIRP under IBC







Glossary

CIRP = Corporate Insolvency Resolution Process
CoC = Committee of Creditors
CD = Corporate Debtor
EoI = Expression of Interest
EM = Evaluation Matrix
FC = Financial Creditor
GC = Going Concern
IBC = Insolvency and Bankruptcy Code, 2016
IBBI = Insolvency and Bankruptcy Board of India
IM = Information Memorandum
IP = Insolvency Professional
IRP = Interim Resolution Professional
IPA = Insolvency Professional Agency
IU = Information Utilities
NCLT = National Company Law Tribunal
OC = Operational Creditor
PUFE = Preferential, Undervalued, Fraudulent, Extortionate
RA = Resolution Applicant

> **"The first order objective of the Code is resolution. The second order objective is maximization of value of assets of the firm and the third order objectives are promoting entrepreneurships, availability of credit, and balancing the interests of stakeholders. This order of objectives is sacrosanct."**
>
> **Dr. M. S. Sahoo, Chairperson, Insolvency and Bankruptcy Board of India (IBBI)**

Regulations on Personal Guarantor: Suggestions to Improve its Efficacy

The roll out of Corporate Insolvency Resolution Process (CIRP) under the Insolvency and Bankruptcy Code (IBC/ the Code) is regarded as one of the most revolutionary reforms unleashed in independent India. However its success was impeded by the absence of regulations to cover the liabilities of the personal guarantors (PGs) within its ambit. The delay is attributed to the provision of different designated courts for corporate and non- corporate under the Code. Read on to know more...

S. Shivaswamy
(The author is a professional member of IIIPI)

Although, through various court judgments and interventions by the Insolvency and Bankruptcy Board of India (IBBI), the creditor (s) has been given liberty to initiate proceedings against the corporate guarantor independently (Appellant.-*Bijay Kumar Aggarwal,(Ex-Director Genegrow Commercial Pvt Ltd Vs.SBI and Anr-NCLAT-New Delhi, Appeal No.CA(AT)(I)-993/2019 Dated 23/01/2020)* but the position of personal guarantor remained uncertain. The IBBI on November 20, 2019 issued two separate regulations on "Insolvency Process & Bankruptcy for personal guarantors to Corporate Debtor" which were aimed at providing the missing link in insolvency process but, perhaps, ended up making the task more complicated.

Need of Separate Regulations Covering Personal Guarantor

Before discussing the merits of these regulations, let's examine whether there was really any need to issue separate regulations covering only

personal guarantor? All it required was a simple notification placing personal guarantor at par with the Corporate Debtor (CD) and seeking his/ her active cooperation in resolution/ liquidation process. Similarly, in respect to corporate guarantors, instead of pursuing with two separate CIRPs one each against Corporate Debtor and Corporate Guarantor; both could have been made stakeholders in the Committee of Creditors (CoC) to add punch to the resolution process. Section 35(1) (b) of the IBC, on powers and duties of liquidator inter-alia includes *"taking into his custody or controlling all the assets, property, effects and actionable claims of the corporate debtor"*. The property of guarantor could have been made part of liquidation estate by just issuing a notice to the guarantor, thus obviating the necessity of a repeat process. Besides, the proceedings against the personal guarantor are supposed to be initiated on behalf of the CD which is under liquidation or a proven insolvent entity. It is doubtful whether any further legal action can be legally sustained in such a case.

The latest regulations contain several other omissions indicating that the same was done in a great hurry. For example, under "Regulation 3", definition of personal guarantor is not included along with other important stakeholders. No rationale has been given as to why same Interim Resolution Professional (IRP), an unrelated party, who handled the case of CD can't be IRP in this case. In respect of the CIRP, notice to Corporate Debtor is mandatory, whether under Section 7, 9 or 10 of IBC. No mention of such notice is found in the regulations issued. In that case who will trigger insolvency proceedings? Nor there is a mention of Adjudicating Authority (AA) for appointment of IRP. There is no mention of Public Announcement either and date on which Public Announcement is issued. Regulation 6 is about debt counselling which is a welcome addition but personal guarantor is not a debtor! What debt counselling can be given to him alone when there was no provision for debt counselling to CD? Action against personal guarantor arises on account of his surety to FC on behalf of CD. It is also not clear whether the mandate to IRP is limited to invoking guarantee or launch fresh proceedings to include all the liabilities of the guarantor unrelated to CD. From Regulation 7 onward, the provisions are related to submission and verification of claims, CoC meeting, repayment plan etc., little realising that the guarantee is a single act of surety to the FC and there can be only single claim. There are many such omissions galore making the work of Bankruptcy Trustee very difficult.

Efficacy of Regulations on Personal Guarantor

Let's have a closer look at the efficacy of regulations on personal guarantor. The personal guarantor can be a director of suspended board or some related/unrelated third party, with or without any collateral security. In case the guarantee is not backed by any collateral security, it becomes a clean unsecured guarantee. In such a scenario it doesn't make much sense to initiate another proceeding through the same mechanism of public announcement/inviting claims/ CoC etc., when all other creditors' viz. unsecured financial, operational and employees are outside its purview. If the guarantor doesn't bring any additional value to the resolution by way of security then the scope of recovery remains negligible.

The IP/Liquidator will have to scan the Income Tax /Wealth Tax returns filed to determine net worth of guarantor and realisable value of unencumbered assets. In respect of movable assets like personal belongings, jewellery, deposits etc., recovery prospects are remote. It is impossible to attach and auction such assets even for an established auction house. RP/Liquidator is neither trained nor meant to conduct such operation. No purpose will be served to take it to the next level liquidation.

Now let's consider another scenario wherein the guarantor had mortgaged his personal immovable property viz. house property, plot of land or commercial property of appreciable value. Such a security is again available only to the Financing Banks but not the other creditors. If it was also part of the main CIRP, it would have increased the level of comfort for resolution applicant and improved the resolution chances. It is pertinent to note that such additional collateral would have helped the banks to take extra exposure in the business of CD. Encouraged by such confidence on part of financing bank, other unsecured creditors and operational creditors would have extended

credit and helped CD expand its business. So such loans are already part of the CIRP. In such a scenario why should RP exclude guarantor from original CIRP? If CIRP fails to attract any RA (Resolution Applicant), based on the liquidation value of the assets of CD alone, it automatically slips into liquidation. Again secured financial creditor by opting not to relinquish security interest will appropriate entire sale proceeds with other creditors drawing a blank. Secured creditor has additional comfort of guarantor's property. After going through the motion of CIRP/Liquidation against the guarantors assets, financial creditor may possibly have recovered his full dues with still some surplus left. Can it be returned to the guarantor? It should not be because a bankrupt is not expected to profit from bankruptcy trust. It will have to be returned to IBBI.

Whether the objective of IBC in maximising the value of assets has been achieved? Not really. All the operational creditors, unsecured financial creditors, other creditors having given advance in good faith lost their entire investment. Workers lost their jobs and possibly superannuation benefits too. The secured financial creditors may have got back their money but suffered business losses. Whether all these losses could have been averted by a different integrated approach? Before we find answer to these questions. Let's have a look at one hypothetical case of ABC Pvt Ltd given below:

ABC Pvt Ltd

	Capital & Liabilities (Rs in Crores)		Assets (Rs in Crores)	
1	Equity	10	Fixed Assets	15
2	Reserve & Surplus	30	Current Assets	25
3	Bank Loan	30	Other current Assets	5
4	Trade Creditors	15		
5	Other Liabilities	20		
6	Total	45		45

Additional Information: *Fair Market Value: 20, Liquidation Value 12, Value of Collateral Security 10.*

The ABC Pvt Ltd due to various managerial issues slipped into the state of insolvency. The MD of the Company had tried to salvage the position by offering his personal property as collateral security two years back but unfortunately suffered stroke thereafter and died. There is no second line of management. During the CIRP, the Resolution Applicant hesitated to put sizeable money on the table and the Company slipped into liquidation. The secured creditor was however able to recover much of his dues from the sale of Company's assets and thereafter from the sale of collateral security. All others got nothing except token amount of Rs. 50 lacs paid to workers.

All the operational creditors, unsecured financial creditors, other creditors having given advance in good faith lost their entire investment.

Now let's consider a different scenario wherein the collateral security was also a part of the main CIRP and made available to the Resolution Applicant. Then there were greater chances for some RA to successfully bid for it and even at 15 to 20% haircut the proposal could have been accepted. The workers could have retained their job. Trade creditors could have resumed business dealings with the company. After a year of operation the new promoters could have raised loan/resources to slowly settle other dues and asset value of the company would have improved vastly. Such an approach would have resulted in maximisation of asset value, reduction in job losses, converted the investment of trade creditors and others into productive use and contributed to overall growth of the economy. By separating personal guarantee from the CD and subjecting it to a separate CIRP/Liquidation exercise has reduced it to a loan recovery exercise.

Impact of COVID-19 Pandemic

The ensuing COVID-19 pandemic couldn't have come at worse time when economy was just struggling to come out of the downturn. The estimated loss of the GDP even by modest 10% amounts to Rs. 20 lac crores. The impact of such losses will be felt most severely in the MSME sector characterised by shrinking demand resulting in lower production and

consequently lower income to the workers thereby pushing the economy into the prolonged spell of recession. The main concern of the IBC and the Government of India should be to ensure resolution in maximum number of cases instead of liquidation. Combining personal guarantee with the main application under section 7 and 9 of the Code will address some of the concerns.

Judicial Interventions

Furthermore, recent judicial interventions seem to have made the issue of personal guarantee more complicated. The orders of NCLT/NCLAT/HCs and the Supreme Court have been confusing and often contradictory on the question of invoking personal guarantee. The provision of moratorium under Section 14(3) after amendment doesn't extend to surety *(SBI Vs Ramakrishna& Anr. Appeal No: CA-3595/2018-SC dated 14/08/2018).* Whereas under the Code FC is free to initiate insolvency proceedings against either CD or Guarantor *(Ferro Alloys Corporation Ltd. Vs. Rural Electrification Corporation Ltd.- NCLATCA(AT) (I)-148/2017, 92/2017 & 93/2017 dated 08/01/2019),* only one proceeding can be sustained at a time *(Shabad Khan Vs. M/s Nissus Finance and Investment Manager & Ors. NCLAT- CA No.82 of 2020 dated 08/01/2020).*

The ensuing COVID-19 pandemic couldn't have come at worse time when economy was just struggling to come out of the downturn. The estimated loss of the GDP even by modest 10% amounts to Rs. 20 lac crores. The impact of such losses will be felt most severely in the MSME sector characterised by shrinking demand resulting in lower production and consequently lower income to the workers thereby pushing the economy into the prolonged spell of recession.

In respect of *SBI Vs Anil Amba Dhiraj Lal Ambani,* NCLT permitted RP to file bankruptcy petition against the surety *(IA No. 1009 of 2020 in CP (IB) No. 916/ (MB) of 2020 dated 20/08/2020)* but the same has been stayed by Delhi High Court *(WP(C) 5712/2020 dated 27/08/2020).*

Recommendations

It is suggested that the guarantor should also be made part of CoC as a related party of CD, and the additional security offered by the guarantor be made part of CIRP. This would greatly enhance the chances of resolution and improve turnaround time. In a civil suit also both borrower & guarantor are covered in the same petition, without any legal impediments.

Good News for Secureds in India

Supreme Court Confirms Priority of Secured Claims (and More)

The opinion of the Supreme Court in Essar Steel did not address an issue lurking in one of the official explanations to the 2019 Amendments. (Unlike statutes in the U.S., in India such explanations are part of the law.) Explanation 1 provides that regardless of the value of the assets that are subject to security interests, a distribution under a resolution plan that accords with the liquidation priorities shall be deemed "fair and equitable. Read on to know more...

In the September 2019 issue of the *ABI Journal*, we observed that the position of secured lenders under the new Indian Insolvency and Bankruptcy Code (IBC) was insecure.[1] Two months earlier, the National Company Law Appellate Panel (NCLAT) had held in *Essar Steel* that "there is no distinction made between one or other 'Financial Creditor.'... [A]ll of such persons form one class, i.e., 'Financial Creditor' and they cannot be sub-classified as 'Secured' or 'Unsecured Financial Creditor.'").[2] The decision of the appellate panel eliminated any distinction between unsecured and secured creditors in an Indian reorganization case (a CIRP). On the other hand, the rights of secured creditors in their collateral would be unaffected in liquidation.

Prof. C. Scott Pryor
(The author teaches at Campbell University School of Law in Raleigh, N.C.)

[1]Prof. Scott Pryor, "Re-Secure in India: Government Acts Quickly to Restore Priority of Secured Claims," XXXVIII *ABI Journal* 9, 24-25, 65-66, September 2019, *available at* abi.org/abi-journal (unless otherwise specified, all links in this article were last visited on Jan. 22, 2020). The article also provides a primer on the history and structure of the IBC as a whole with special attention to the Corporate Insolvency Resolution Process (CIRP).

[2] (*Standard Chartered Bank v. Satish Kumar Gupta, Resolution Prof'l (In re Essar Steel Ltd.)* (NCLAT July 2019) ¶ 164.

** "Good News for Secureds in India" by Prof. C. Scott Pryor was first published in the American Bankruptcy Institute (ABI) Journal Vol. XXXIX, No. 3, March 2020. Used by Permission.*

The *Essar Steel* case had been pending for more than a year when its committee of creditors (CoC) finally approved the resolution plan of ArcelorMittal India. The resolution plan proposed to pay secured financial creditors 92 percent of their claims and unsecured creditors either 100 percent (if their admitted claim was no more than 1 crore rupees[3]) or nothing at all (if the claim was for more than 1 crore). The wide disparity between the secured creditors and the bulk of the unsecured creditors was justified because the liquidation analysis showed that unsecured creditors would receive nothing in a liquidation. The appellate panel was unpersuaded and held that it was share and share alike in a CIRP.

The Government of India responded quickly with a set of amendments to the IBC designed to reestablish the priority of secured claims in a CIRP (the "2019 Amendments"). The 2019 Amendments firmly tethered the criteria for confirmation of section 30 of the IBC (similar to § 1129) to the priorities in a liquidation under section 53 of the IBC (similar to § 726).

Good News for Secured Creditors

Even before the enactment of the 2019 Amendments, the CoC in *Essar Steel* appealed to the Supreme Court to reverse the appellate panel's decision and reinstate the resolution plan that it had approved. Notwithstanding the 2019 Amendments, it was not a foregone conclusion that the Supreme Court would sustain the appeal. The members of the Indian judiciary are neither textualists nor originalists, and regularly show less deference to the text of legislation than is customary in the U.S.

On Nov. 15, the Supreme Court issued a 164- page opinion.[4] It summarily reversed the appellate panel and firmly ensconced the priority of secured creditors in their collateral. Working from the text of the 2019 Amendments and synthesizing a range of international materials, the Court concluded:

> [I]t can be seen that the Code and the Regulations, read as a whole, together with the observations of expert bodies and this Court's judgment, all lead to the conclusion that the equality principle cannot be stretched to treating unequals equally, as that will destroy the very objective of the Code. Equitable treatment is to be accorded to each creditor depending upon the class to which it belongs: secured or unsecured, financial or operational.[5]

Better News

The Court did even more than restore the rights of secured creditors. It went out of its way to enhance the discretion of the CoC. As discussed in the previous A*BI Journal article*,[6] the IBC allocates to the CoC control of the resolution process and the power to choose among competing resolution plans. Moreover, the CoC is comprised only of financial creditors, almost all of which will be secured. In other words, secured creditors openly control a CIRP. With respect to their discretion, the Court wrote:

Notwithstanding the 2019 Amendments, it was not a foregone conclusion that the Supreme Court would sustain the appeal. The members of the Indian judiciary are neither textualists nor originalists, and regularly show less deference to the text of legislation than is customary in the U.S.

> The other argument based upon serious conflict of interest between secured and unsecured financial creditors ... is an argument which flies in the face of the majority of financial creditors being given complete discretion over feasibility and viability of resolution plans, which includes the manner of distribution of debts [sic] that is contained in them. *The Committee of Creditors does not act in any fiduciary capacity to any group of creditors.*[7]

Potentially Even Better News

The opinion of the Supreme Court in Essar Steel did not address an issue lurking in one of the official explanations to the 2019 Amendments. (Unlike statutes in the U.S., in India such explanations are part of the law.) Explanation 1 provides that regardless of the

[3] Rs 1,00,00,000 (1 crore) ≈ $141,000.

[4] Comm. of Creditors of Essar Steel India Ltd. v. Satish Kuman Gupta (Supreme Court 2019), available at main.sci.gov.in/supremecourt/2019/24417/24417_2019_4_1501_18158_Judgement_15-Nov-2019.pdf.

[5] *Id.* at ¶ 57.

[6] *Pryor,* supra n.1.

[7] *Comm. of Creditors of Essar Steel India Ltd. v. Satish Kuman Gupta*, supra n.4 at ¶ 93 (emphasis added)

value of the assets that are subject to security interests, a distribution under a resolution plan that accords with the liquidation priorities shall be deemed "fair and equitable."[8]

This provision brings to mind cramdown under § 1129(b). However, when it comes to cramming down a secured creditor under chapter 11, "fair and equitable" requires that a secured creditor receive only the *value* of its collateral.[9] Following the 2019 Amendments, the cross-reference in section 30 of the IBC to the liquidation waterfall of section 53 mandates far more.

The liquidation priorities under section 53(1) of the IBC are not as neatly hierarchical as § 726 (or § 510). As one would expect, the IBC begins with the costs of administration,[10] then it proceeds to a joint priority of "*debts* owed to a secured creditor," which relinquishes its collateral in the liquidation proceeding, and unpaid workmen's dues (wages) accruing in the past 24 months.[11] Amounts due for the past 12 months to employees other than workmen[12] enjoy a third level priority,[13] and in turn, they are followed by financial debts[14] owed to unsecured creditors.[15] The fifth priority is also joint: It includes taxes plus "debts owed to a secured creditor for any amount unpaid following the enforcement of [a] security interest."[16] Finally, and only at the sixth level of priority, are claims of unsecured creditors.[17]

There is no parallel to § 506(a) under the IBC; there is no bifurcation of claims of secured creditors. In other words, in a liquidation all financial debts — secured and unsecured (including deficiencies) — are to be paid before unsecured creditors. With the 2019 Amendments, the same should be true in reorganizations under the CIRP. Cramdown indeed!

Concluding Observations

In the U.S. over the past several decades, the power of secured creditors has changed the way in which chapter 11 is applied.[18] In India, just as much of the nation passed over landlines and moved directly to mobile telephony, the IBC has skipped chapter 11's highly structured and finely balanced "dance" among the debtor, its secured creditors and its unsecured creditors. Instead, the bulk of authority for a CIRP is placed squarely in the hands of a CoC made up of secured creditors, who owe no duty to unsecured creditors, and who have priority for payment of their full claims.

Most resolution plans will nonetheless allocate a portion of the value of the enterprise to unsecured creditors, even if that leaves secured creditors with a shortfall. Stiffing all operational creditors could make long-term rehabilitation of a firm very difficult. Still, where secured creditors are not paid in full, it is certainly possible that the CoC will approve a plan under which unsecured creditors receive nothing.

Whether the Indian Supreme Court will follow the text of the 2019 Amendments if faced with such a result remains to be seen. What is clear is that in the span of five months, the place of secured credit in India has seen an enormous reversal of fortune.

[8] *See* Insolvency and Bankruptcy Code, No. 31 of 2016, § 30, India Code (2016), as amended, *available* at indiacode.nic.in: "Explanation 1. - For the removal of doubts, it is hereby clarified that a distribution in accordance with the provisions of this clause shall be fair and equitable to such creditors."

[9] Section 1129(b)(2)(A).

[10] I.B.C. s. 53(1)(a).

[11] I.B.C. s. 53(1)(b) (emphasis added).

[12] The distinction between "workmen" and "employees" is found in the India Disputes Act, 1947. In brief, employees are managers or supervisors of workmen.

[13] I.B.C. s. 53(1)(c).

[14] Recall that "financial debts" are typically owed to banks and other commercial lenders, as well as equipment lessors.

[15] I.B.C. s. 53(1)(d).

[16] I.B.C. s. 53(1)(e). The fifth-level priority for deficiency claims is for secured creditors who chose to "real ize" their security interests outside the liquidation proceeding. Deficiencies of secured creditors who "relinquish" their security to the liquidation process enjoy the second-level priority of I.B.C. s. 53 (1) (b). For a secured creditor in a liquidation, nothing like relief from the automatic stay is necessary. It can pull out its collateral upon request, subject to "proving" its security interest. I.B.C. s. 52 (3). On the other hand, a secured creditor cannot "realize" its collateral in a CIRP; it is in for the long haul.

[17] .B.C. s. 53(1)(f).

[18] *See* David A. Skeel & George Triantis, "Bankruptcy's Uneasy Shift to a Contract Paradigm," 166 *U. Penn. L. Rev.* 1777, 1779 (2018) ("The most dramatic development in [recent] decades ... has been the increasing use of actual contracts to shape the bankruptcy process.").

MSME units under IBC

In many of the instances the promoter/s of the MSMEs do not take the help of professionals, especially in financial and commercial matters and end up in distress. Coming to technicalities of the IBC, the legal position allows an MSME company to bid for its own resolution in the capacity of a company i.e., Resolution Applicant (RA). Read on to know more...

The purpose of the Insolvency and Bankruptcy Code, 2016 (IBC/the Code) is basically to resolve a defaulted unit by displacing the existing promoters in default and transferring the same to better hands. However, for units in the Micro, Small and Medium Enterprises (MSMEs) sector there are exceptions in the sense that the law has been modified to give a chance to the existing promoters to revive their businesses. This is mainly to encourage entrepreneurship at the small and medium level and strengthen the economic base of the country. The March 2018 Report of the Insolvency Law Committee states, "MSMEs form the foundation of the Indian economy, and are key drivers of employment, production, economic growth, entrepreneurship and financial inclusion. As per the report, there are 512 lakh MSMEs and their contribution amounts to 37.33 percent of the country's GDP. Thus, the importance of MSMEs in the Indian economy cannot be underestimated, as they are the one of the best vehicles for job creation and economic growth".

The MSMEs are given advantage across most of the global economies as reflected in the World Bank Report, May 2017. However, the MSMEs are getting adversely affected in two ways: firstly, the temporary credit disruption

Pratim Bayal
(The author is a professional member of IIIPI)

created by the large businesses being in the Corporate Insolvency Resolution Process (CIRP) is leading the affected MSMEs to be dragged into insolvency, which may potentially lead to liquidation and secondly, in a CIRP where MSMEs are operational creditors, the liquidation value guaranteed to them is negligible.

It was also mentioned in the Insolvency Law Committee Report (ILCR), 2018 that a business in the MSMEs sector attracts interest primarily from a promoter of an MSME and may not be of interest to other resolution applicants.

In recognition to the importance of MSMEs in the Indian economy and the unique challenges faced by them the applicability of section 29A of the Code was proposed to be restricted only to disqualify willful defaulters from bidding for MSMEs. Besides, the MSMEs units which are in distress might right size their exposure, consolidate, wait for better opportunities and then again come up with better value. But all these can take time and in between one of their operational creditors or lender might initiate insolvency process against the distressed unit. Once in insolvency, the National Company Law Tribunal (NCLT) under legal structure of the IBC will remove the existing promoter/s and seek to bring in new promoter/s or investor/s who will be allowed to provide resolution of the defaulted credit of the company and take up the ownership and place the company back on track. However for the units which belong to MSMEs sector, the promoter/s is given a chance to resolve the default and continue the company with a positive intent.

Special Provisions for MSMEs in IBC

Let's go into detail. As per IBC, the Interim Resolution Professional (IRP)/ Resolution Professional (RP) invites expression of interest to take up the defaulted company. However, for sec 29 A of the code, the existing promoters get excluded in the process indirectly. It may be noted that Sec 29 A does not specifically exclude the promoters but has clauses that will implicitly restrict existing promoters from bidding. Section 29 A does not allow an applicant who:

a) Has a Non-Performing Asset (NPA) account with any bank or Institutional Lender or

b) Has given guarantee for a company which is in insolvency

To submit expression of interest, in most of the cases the concerned defaulted company will be an NPA account or the promoter may have given personal guarantee for the defaulted company and thereby gets excluded.

However to encourage the promoters of MSME units as explained above, Sec 240 A of the Code provides exclusion of the above specific clause in case the defaulted corporate debtor belongs to the MSMEs sector. This comes as a life-saver for MSMEs promoters as they can even place their bid for their own company which otherwise would not have been possible had the company been a non- MSMEs. It may be noted that the resolution applicant is not required to belong to the MSME. Thus in case the same promoter group having a group company which is not an MSME, might bid for the distressed unit as well. However this is not possible for a promoter who has been declared a willful defaulter or himself is a disqualified director. Thus promoters or management of these companies should keep this in mind and put their best effort to bring back their company on right track even after the company has been taken into NCLT for insolvency.

MSMEs form the foundation of the Indian economy, and are key drivers of employment, production, economic growth, entrepreneurship and financial inclusion.

However this does not in any way mean that the company should not practice prudent financial management. In fact in many instances the promoter of these small and medium size companies do not take the help of professionals, especially in financial and commercial matters and end up in distress which otherwise could have been avoided. These days various hired services are available which can help the companies to deploy better resources in financial and commercial matters without much financial commitment. Availing these services is always a better option so that a distress situation is better handled or avoided. At the cost of repetition some of the routine matters may apparently appear to be simple which the promoters might be ignoring today and in process pave the way for future debacle.

Apart from that the promoters / directors of the MSME corporate debtor can even avoid the bidding process in IBC 2016, provided the resolution plan suggested by the company is well accepted by the Committee of Creditors (CoC), a committee comprising the creditors, and approved by the NCLT. The IBC allows the CoC, to set up minimum eligibility criteria for the prospective applicant who will be eligible to offer resolution for the defaulted company. IBC also sets some procedures to be followed while dealing with the prospective resolution applicant. But for MSME, the promoter/ director can bypass these eligibility criteria also. This position has been given judicial support by NCLAT in the matter of *Saravana Global Holdings and Others vs. Bafna Pharmaceuticals and others* dated July 4, 2019.

Challenges before MSMEs

However, all these preferences/privileges to MSME are subject to the approval of the lenders and the lenders will only approve a resolution plan. The promoters therefore must provide a robust plan that can satisfy the lenders. On the other hand, if the plan is approved by the concerned NCLT, the promoters get a new lease of life to carry on business. Long list of pending liabilities can be right sized through a plan that is approved by the court/NCLT and would help the company to tide over the distressed situation.

If the resolution plan of the promoter is accepted by CoC and subsequently approved by the concerned NCLT, the promoter/s gets a new lease of life to carry on business.

However on the contrary this advantage should not be viewed by the promoters of the MSMEs as a tool to get rid of the defaulted liability specifically the statutory ones. The position of the statutory liabilities would only be decided by the NCLT/ Adjudicating Authority (AA), on a case to case basis where in the proposed resolution plan by the promoters seek relief to all the statutory liabilities.

Given the basic intent of the legislature as explained above, the AA would always take a pro-MSMEs view whenever there is conflict while deciding issues under IBC wherein the corporate debtor belongs to the MSMEs sector.

COVID-19 Pandemic and the Way Ahead

However, due to the ensuing crisis of COVID-19 pandemic one more effective option, apart from several credit incentives, has been given to the promoters of the MSMEs to revive their businesses if they feel stress in cash flow due to nationwide lock down and economic crisis caused by it.

For a distressed MSME corporate debtor, the promoters / directors of the corporate debtor can be a resolution applicant.

The Reserve Bank of India (RBI) vide its circular dated August 6, 2020 have given option for one time settlement of accounts with not more than Rs 25 crore exposure with banks and Non-Banking Finance Companies (NBFCs) including non-fund based exposure as on March 01, 2020. However these are primarily for good accounts which got stressed due to COVID-19 pandemic. The basic criteria for an MSME unit to avail the option and revive the business are as below:

a. The borrower's account was a 'standard asset' as on March 1, 2020.

b. The restructuring of the borrower account is implemented by March 31, 2021.

c. The borrowing entity is GST-registered on the date of implementation of the restructuring.

d. Where the accounts which may have slipped into NPA category between March 2, 2020 and the date of implementation may be upgraded as 'standard asset', as on the date of implementation of the restructuring plan.

e. Banks shall maintain additional provision of 5% on these accounts over and above the provision already held by them.

Let's hope the entrepreneurs in the MSMEs in our country, which is a driving fuel to any economy, must be aware of the legal position and try to revive their businesses while even going through insolvency. Of course prevention is better than cure and the entrepreneurs with the help of concerned professionals should take adequate precautions so that unwanted distress situation could be avoided beforehand.

Management of Stressed Enterprises during CIRP: Tips for IPs

The roll out of Corporate Insolvency Resolution Process (CIRP) under the Insolvency and Bankruptcy Code (IBC/ the Code) is regarded as one of the most revolutionary reforms unleashed in independent India. However its success was impeded by the absence of regulations to cover the liabilities of the personal guarantors (PGs) within its ambit. The delay is attributed to the provision of different designated courts for corporate and non- corporate under the Code. Read on to know more...

S.L. Narasimha Rao
(The author is a professional member of IIIPI)

Introduction

When the case of a Corporate Debtor (CD) is presented for resolution before the National Company Law Tribunal (NCLT) under section 7 of the Insolvency and Bankruptcy Code (IBC/ the Code), 2016, by the FC, OC or CD as the case may be, it is a sine-qua-non that applicant proposes a name from the list of Insolvency Professionals (IPs) registered with Insolvency and Bankruptcy Board of India (IBBI) as the Interim Resolution Professional (IRP). After admission of the case by AA for resolution, the Committee of Creditors (COC) needs to confirm the IRP as RP (Resolution Professional) in its very first meeting or appoint a new IP as RP.

The practical steps in the article have been enumerated for any IP who is engaged as an IRP/ RP for managing a CD in the field of operational manufacturing unit, to act as a guide in not forgetting essential things and complete the assignment successfully. The duties of IP as stipulated in section 17 of the Code are more tilted towards safeguarding the assets of the corporate debtor and following the applicable laws. However, the section 20 (i) does not

speak about the practical duties/obligations of IP, except saying that IP should take all such actions as are necessary to keep the CD as a Going Concern (GC). When operations are kept alive, the value of the assets and the enterprise value of the CD are enhanced. The investors (resolution applicants) will be more interested to bid for a running enterprise and also offer a higher price, which will increase the monetary pie available to all the stakeholders/ creditors.

Managing the Unit during CIRP: Work & Responsibilities of IP

After appointment as an IRP/ RP, the IP is responsible to manage the affairs of the CD as stipulated in section 17 of the IBC and as per the regulations prescribed by IBBI for CIRP and take all such actions as are necessary to keep the Corporate Debtor (CD) as a Going Concern as in section 20 (1).

IP has also an onerous task of keeping on the right side of the law by operating within the parameters set by IBC and regulations stipulated by IBBI. All deviations from IBC (including mistakes) are punishable.

IRP/RP in Actual Practice

The duties of IP in his capacity as IRP/RP as stipulated in section 17 of IBC are more tilted towards safeguarding the assets of CD and following the applicable laws. The section 20 (i) does not speak about the practical duties/ obligations of IP, except saying that IP in his capacity as IRP/RP should take all such actions as are necessary to keep the CD as a Going Concern (GC).

This, in a way, is both a boon and bane for the IP in as much as everything needed to keep the CD as a GC is left to the imagination and practical experience of the IP, as there are definitely more problems in keeping a manufacturing CD unit as a GC than that of a service oriented CD.

'Going Concern' is an Audit Concept

Standard on Auditing (SA) 570 - Going Concern - is effective for audits of financial statements for periods beginning on or after April 01, 2017.

Under the going concern basis of accounting, CD is required to prepare the financial statements on the assumption that:

i) the entity is a going concern; and

ii) the entity will continue its operations for the foreseeable future.

The auditor would examine the above financial statements and give his opinion with respect to management's use of the going concern assumptions.

IP in his capacity as IRP/RP is required to take all such actions as are necessary to keep the Corporate Debtor (CD) as a Going Concern GC. However, there is hardly any judgement/guideline about the process to be followed.

Thus, it can be seen from the above that SA – 570 is basically an accounting/auditing concept designed to verify the management's assumptions regarding CD's continued operations as a Going Concern.

Going Concern and Judiciary

Several judgements by the NCLT, National Company Law Appellate Tribunal (NCLAT) and Supreme Court have emphasized the need to keep the CD as a GC during CIRP and liquidation period. But, hardly any of them provides the course of action to be followed by the IPs to keep the CD as a GC.

Practical Meaning of a Going Concern (GC) for a CD

For an Operations Manager, a GC essentially means that all the machines are in operating condition for a manufacturing CD, capable of producing the rated output within the optimum consumption norms/parameters and Working Capital Management (WCM), subject to the availability of orders and Working Capital (WC) and the ability to generate a positive cash flow. In other words, the departments of Operations (Production) and Maintenance, Purchase, Marketing and Dispatch are functioning normally, generating positive cash flows.

For a service sector CD, the same thing as above applies, except that in place of manufactured goods, the personnel of CD will execute all projects/assignments generating positive cash flows. The ideal situation for an IP would be operation of a CD at the break-even point (with

no cash loss) and, if possible, generate more cash which can be paid towards the arrears of dues of the creditors.

Steps to be followed by IP

As a management expert with experience as an operations manager in a chemical industry and as a financial expert in a financial institution (Project Finance), I would like to share a few tips with my fellow IPs to keep a manufacturing CD unit as a GC in their capacity as IRPs/RPs. They could be classified into two parts – (1) External Areas of Management and, (2) Internal Areas of Management.

(1) **External Areas of Management:** The External Areas of Management and the required interventions could be summerised as follows:

A. **Industrial Relations and Human Resource (HR):** It is essential that IP calls a meeting of all the officers (managerial staff), workman employees and assure them of continued employment with salaries, keeping the discharge of staff to a minimum based purely on efficiency, cost considerations as well as availability of funds.

Further, there will always be interference by local politicians including MLAs/MPs/ Ministers etc., through the leaders of employees' union/s to protect the jobs and interests of the workers. The IPs need to prepare to handle these issues which involves an exercise in diplomacy, negotiation and power of convincing arguments.

B. **Supply Chain Management (SCM):** In today's context SCM is an important cost center and if managed properly would contribute to the bottom line. Arrival of input raw materials on time (just-in-time method originated in Japan) and in required quantities would reduce costs of storage, inventory and handling losses and would also simultaneously result in efficient working capital management.

C. **Warehousing, Distribution and Logistics Management:** Products need to be stored in intermediate warehouses for timely distribution to the demand/consumption centers. Here again, just-in-time method would help in on time receipt of material and enhance the appeal and shelf life of the product apart from increased customer satisfaction.

(2) **Internal Areas of Management:** There are many internal areas of management, which require constant attention of the IP. They contribute towards the enhanced efficiency of CD and increase its attractiveness to the investors (Resolution Applicants). Some of these are enumerated below:

A. **Cost Optimization/ Efficiency/ Management and Allocation of Monetary Resources:** Two of the most difficult tasks for an IP are managing the all-round costs and efficient allocation of available monetary resources during the CIRP. A cost audit/survey of CD's operations, at the beginning of CIRP will be helpful in deciding the following:

a. Unnecessary costs/cost centres.

b. Rationalisation/Optimisation of human resources. IP can discharge persons deemed unnecessary.

c. Increased efficiency of available resources.

d. Allocation of resources.

B. **Maintenance of Plant & Machinery (P&M):** A timely maintenance schedule for P&M would ensure easy availability of machines for the required production without any problem. Also, potential Resolution Applicants would be attracted by operating units /machines.

Industrial Relations and HR is an exercise in diplomacy, negotiation and power of convincing arguments.

There are many internal areas of management, which require constant attention of IP which contribute towards the enhanced efficiency of CD and increase its attractiveness to the investors (Resolution Applicants).

C. **Management of Receivables (Debtors):** An early/timely collection of receivables would reduce the pressure on working

capital and would facilitate/encourage getting more orders for the goods produced. Here, diplomacy and negotiating skills of IP would be crucial and play a major role for collection of receivables with minimum disputes.

D. **Trade Payables (Creditors):** Creditors are the most important part of operations of CD and timely payment to them would ensure a proper Supply Chain Management (SCM). Creditors are to be kept happy and in good spirits for timely supply of inputs. Here again, the diplomacy and negotiating skills of IP would yield highly satisfactory results.

E. **Working Capital (WC) Management:** Working Capital (WC) is the life line (Blood supply) of the operations of CD. A short and tight WC time cycle is needed to ensure all round cost efficiency. The creditors, debtors and supply chain management with warehousing, distribution and logistics management would ensure an adequate recycle (rotation) of working capital funds and result in smooth operations of CD with least interest cost.

F. **Relationship with Financial Creditors (FCs) or FC Management:** Though theoretically, all the stakeholders of CD are supposed to take instruction from the IP (IRP/RP) in the management of CD as a GC, it does not work that way in practice.

The FC/s, holding the purse strings, are the most important and it is essential that an IP keeps them in good humour and has the best working relationship. In WC management and release of additional funds to operations, FCs are the first preferred source of funds. Also, for raising interim finance from the market the approval of CoC and cooperation of FCs is essential.

Benefits for the CD & FCs

a. When operations are kept alive with positive cash flows, the value of the assets and the enterprise value of the CD are enhanced, which bring a better price for the FCs from the prospective resolution applicants .

b. The investors (resolution applicants) will be more interested to bid for a running enterprise and would be willing to offer a higher price as well, which will increase the monetary pie available to all the stakeholders.

Benefits for the IP

a. Satisfaction of a job well done

b. Possibility of more assignments from FCs

Management of Stressed Enterprises during COVID-19

The COVID-19 pandemic has thrown into further chaos the already stressed operating parameters of a CD. Therefore, the job of IPs have become more complex and stressful.

The IP has to surmount multiple challenges if the CD is to be run as a GC during the COVID-19 pandemic. Followings are a few suggestions to combat the challenges posed by the COVID-19 crisis in managing a CD as a GC:

Regulatory Approvals

Essentially, the first duty of an IP would be to obtain all the regulatory approvals from the local authorities with respect to the number of shifts and/or working hours to be operated, containment measures to be adopted/ implemented etc.

Logistics and Transportation of Goods

1. The second essential step would be to estimate and find out the demand for the products/services offered by the CD as also the Time & Quantity schedule for the supply.

2. On similar lines, an estimate of the requirement of inputs/raw materials needs to be made along with the "Time & Quantity Schedule".

3. As of now (September 2020), though many restrictions have been eased /removed, transportation of goods (inputs & products) remains a major logistical nightmare for the IPs. Differing and different rules are operating in the interstate transportation of goods. The problems would multiply manifold, if the regulatory authorities enroute cannot be satisfied in a proper manner.

Preventive Measures for the employees & Visitors

Protection & Safety of the employees is paramount duty of IP. It becomes the paramount duty of the IP to protect all the employees in the factory/office and also the visitors (suppliers, customers, officials of FCs, statutory & local authorities etc.) duly and adequately from contracting and/or spreading the pandemic.

The COVID-19 pandemic has thrown into further chaos the already stressed operating parameters of a CD. Therefore, the job of IPs has become more complex and stressful.

The measures to be adopted to protect employees and visitors from COVID-19 infection could be summerised as follows:

Screening and Testing

- Regular temperature screenings of all the employees and visitors have been made mandatory.
- Testing of employees, as prescribed by the local authorities for COVID-19 symptoms, becomes mandatory before they are allowed to enter the factory/office premises.
- Mandatory testing of outstation employees/ visitors before they are allowed entry into the premises.
- Social distancing norms with masks are to be compulsorily implemented as per the guidelines prescribed by the local authorities.

Supply of sanitisers, Masks and PPEs

- Ensure every employee is wearing masks properly during the office hours.
- Adequate stocks of sanitisers, masks and personal protective kits (PPEs) to cater to all the employees as also to the visitors mentioned above are to be maintained so that the all the personnel in the factory are duly and adequately protected from either contracting and/or spreading the pandemic.

Working hours of employees: These are to be strictly implemented as per the guidelines prescribed by the local authorities to avoid big gatherings and crowds.

Transportation of employees to & from the work place: Transportation to the work place might pose a problem for some employees and particularly for women employees, some of whom may not be willing to attend to work, even when called for. The IP should make proper arrangements and ensure maximum employees give their maximum for the CD. Every effort should be taken to maximize the output/ productivity of the CD.

Salaries during the COVID-19: Salaries during the period of lock-down and thereafter need to be paid as per government guidelines. Though some private companies/firms chose to discharge the employees or not pay for the lockdown period, the IP might not have that luxury, being a court appointed officer. Finding adequate financial resources would pose a major challenge.

Working Capital and arrangement of Finance

- The adequacy of working capital and arrangement of finance will be the most critical and all-important factor for the operation of CD as a GC.
- During COVID-19 period, all systems and processes came to a grinding halt, including the operation of banks and transportation networks.

Major consequences of COVID-19 pandemic: The major consequences expected from the COVID-19 pandemic are as follows:

a. In spite of all the eulogizing slogans and statements, the willingness of bankers to release additional funds is highly doubtful, particularly because of COVID-19 crisis, as the banks are already having sizeable NPAs even before COVID-19 pandemic set in.

b. Because of the huge disruption of financial stability of majority of the companies, it would be difficult to find even investors willing to become Resolution Applicants (RAs).

c. In view of the above challenges and likely paucity of Resolution Applicants, the fate of the majority of the companies under CIRP, hangs by a fine thread. In all probability, most of these companies would be heading for liquidation.

Evolving Role of ARCs in Resolution of Stressed Assets and Current Challenges

Asset Reconstruction Companies (ARCs) have been playing an important role in the resolution of stressed assets by adapting their business models and aligning with evolving regulatory changes. ARCs are enhancing their role in stressed assets space by co-investing with various investors and leveraging on the unique advantages available with ARC structure and becoming a source of alternative capital for banks. More and more ARCs are bidding for large accounts under Insolvency and Bankruptcy Code, 2016 (IBC) and distressed Non-Banking Financial Companies (NBFCs) portfolios which demonstrate active participation on its own and/or on behalf of investors to tap large pool of capital available. However, ARCs face multiple challenges before it takes quantum jump to tap these opportunities.

Satish Kumar Gupta
(The author is a professional member of IIIPI)

Current Scenario

As per Financial Stability Report of Reserve Bank of India (RBI) released in July 2020, the gross and net non-performing asset (GNPA and NNPA) ratios of all Scheduled Commercial Banks (SCBs) were at levels of 8.5 per cent and 3.0 per cent in March 2020. As per above report, given the fact that impact of moratorium is still uncertain and evolving, the exact nature of how the same will play out on the quality of banking assets is difficult to ascertain accurately. The stress tests indicate that the GNPA ratio of all SCBs may increase from 8.5 per cent in March 2020 to 12.5 per cent by March 2021 under the baseline scenario. If the macroeconomic environment worsens further, the ratio may escalate to 14.7 per cent under the very severely stressed scenario. Similarly, the GNPAs of the NBFCs which were at 6.3% of advances as of September 2019 are expected to reach above 9 per cent level in FY 2020-21 as per various reports. The Government and RBI have announced various schemes and measures to reduce stress and NPAs which may not allow NPAs rising to such high levels. Still on account of large number of earlier NPAs, failure or non-fructification of earlier restructuring schemes, contraction in economy, fresh slippages etc., pool of NPAs and stressed assets is expected to increase significantly.

ARCs acquire NPAs from banks through Special Purpose Vehicle (SPV) in the form of a trust. The SPV funds its acquisition by issuing Security

Table 1: Details of Financial Assets securitized by ARCs in last four years till June 2019

	Item	Jun-16 (Rs in crore)	Jun-17 (Rs in crore)	Jun-18 (Rs in crore)	Jun-19 (Rs in crore)
1.	Book Value of assets Acquired	2,37,653	2,62,733	3,30,563	3,88,069
2.	Security Receipts issued by ARCs	79,020	93,918	1,20,308	1,46,409
3.	**Security Receipts Subscribed to by:**				
	a) Banks	65,119	77,653	95,951	1,01,733
	b) ARCs	11,406	14,159	20,165	27,480
	c) FIIs	326	326	505	1,735
	d) Others (QIB)	2,170	1,779	3,686	15,521
4.	Amount of Security Receipts completely redeemed	7,200	7,355	8,830	12,906
5.	Security Receipts Outstanding	64,117	78,312	98,118	1,14,615

Source: *RBI Report (Quarterly statements submitted by ARCs to RBI)*

Difference of SRs of Rs 18,888 crore, though not explained in aforesaid RBI report, may be attributed to SRs written-off or loss assets/ zeroing them after completion of maximum resolution period of 5 to 8 years. Data regarding break-up of outstanding SRs held is not available.

Receipts (SRs) to Qualified Institutional Buyers (QIB) investors. ARCs act as both principal and agent. The ARCs are required to invest and hold an amount not less than 15% of SRs issued by the trust set up for the purpose of securitization under each scheme. SRs are redeemed only out of realization from financial assets held under the trust and carry no fixed returns. SRs can be traded/sold in secondary markets.

With banks currently sitting on large NPAs and stressed assets against which significant provisions have been made, banks would be able to undertake sale of these assets comfortably. In large assets, banks can undertake consortium sale of stressed assets to ARCs and distressed debt investors for its expeditious resolution. The details of financial assets scrutinized by ARCs in last four years till June 2019 are displayed in Table 1.

As may be observed, 70% of SRs have been subscribed by banks and accordingly 70% of outstanding SRs may have public money at risk. The latest figures of total financial assets securitized, break-up of SRs outstanding held by ARCs, Banks, Foreign Institutional Investors, other QIBs as on March 31, 2020 were not available in public domain.

Regulatory and Operational Issues

ARCs as entity are registered with the RBI and are under its administrative control. Further, ARCs are subject to the audit and inspection of the RBI. ARCs are required to meet compliance requirements such as submission of quarterly statement on its operations to RBI.

In December 2019, RBI issued circular that ARCs shall not acquire financial assets on a bilateral basis from (i) a bank/ financial institution which is the sponsor of the ARC; (ii) bank/ financial institution which is either a lender to the ARC or a subscriber to the fund, if any, raised by the ARC for its operations; (iii) an entity in the group to which the ARC belongs. However, such ARCs may participate in auctions of the financial assets provided such auctions are conducted in a transparent manner, on arm's length basis and the prices are determined by market forces. Above shall provide level playing field and will discourage asset acquisition by ARCs on intra-group basis and sale by sellers to its captive entities.

In view of above restrictions, in future many of captive/in-house ARCs may find it challenging to continue business on account of sub-optimal operations and may therefore yield space to large ARCs by quitting or consolidating. However, some of the distressed investors may find it operationally convenient to invest with their own ARC on account of issues of sharing of fee and process of decision making through a third-party ARC.

Financial Performance and Funding of ARCs

As per regulations, there is 15% 'invest and hold' requirement on the part of the ARCs in relation to each class of SR. ARCs cannot transfer this holding, which was Introduced as 'skin in the game' as long as class of SR is in existence. ARCs have been seeking from RBI to reduce above 15% requirement. ARCs have to raise funds and maintain leverage keeping in account the risks associated with the distressed asset sector and the volatility of their earning profiles. ARCs mainly rely on the following sources of funds:

i) Equity capital – 100% FDI is permitted in ARC sector;

ii) Bank borrowings or Non-Convertible Debentures;

iii) Principal protected market linked debentures; and

iv) Raising of funds against its or third party Fixed Deposits, inter-corporate deposits

Above borrowings by ARCs are normally *inter alia* secured by mix of following securities:

i) Mortgage of premises/office;

ii) charge on receivables;

iii) secured by exclusive pledge of ARCs own held SRs with cover from 1-2 times; and

iv) backed by an unconditional and irrevocable corporate guarantee issued by holding/ parent company

ARCs *inter alia* raise funds by pledging its own invested SRs with its lenders; however, same can lead to breach of RBI regulations in certain situations. If lenders invoke pledge of 15% mandatorily held SRs on ARC defaulting to its lender, ARC may find itself not in compliance with RBI regulations. However, ARCs have been borrowing conservatively and no such situation has arisen so far.

ARCs have been strengthening their balance sheets with infusion of equity and long term borrowings and have reduced reliance on short term commercial papers significantly in last year. Edelweiss ARC with total borrowing of Rs 4,375 crore has diversified sources of funding including asset specific borrowing wherein repayments are linked to recoveries of Rs 1,539 crore as on March 31, 2020. To raise capital, one of entities of *Caisse de Depot et Placemt du Quebec* (CDPQ), one of Canada's funds, has invested funds by convertible instruments in the Edelweiss group and is expected to hold 20% stake in Edelweiss ARC.

Various funding routes by different ARCs are being used and explored; however, they should stand regulatory tests as per the provisions of the Trust Act and the Companies Act, 2013. The financial results of ARCs for FY 2019-20 have been mixed.

JM Financial Ltd had also infused Rs 183 crore in Q1 FY 2020 by subscribing to the rights offer made by JM Financial Asset Reconstruction Company Ltd. (JMF-ARC) for the issue of Compulsorily Convertible Debentures. JMF-ARC had total borrowings of Rs 2,317 crore as on March 31, 2020. Asset Care Reconstruction Enterprise Ltd. raised capital of Rs 70.77 crore during FY 2018-19 which was largely subscribed to by its existing shareholders.

Various funding routes by different ARCs are being used and explored; however, they should stand regulatory tests as per the provisions of Trust Act and the Companies Act, 2013. The financial results of ARCs for FY 2019-20 have been mixed. Whereas Edelweiss ARC, the largest ARC in the country, has reported net profit of Rs 301 crore, Phoenix ARC has reported net loss of Rs 5.5 crore (after expensing/providing net loss on account of fair value changes and impairment of financial instruments of Rs 114 crore). Edelweiss ARC's improved performance for year 2020 was as a result of significant recoveries made from some of large IBC accounts as well as recoveries from a large number of NPA accounts acquired. Results of most of other ARCs are not available as these companies are unlisted. The financial performance of some of the ARCs for the year 2019 or 2020 as mentioned available in public domain are provided in Table 2.

70% of SRs have been subscribed by banks and accordingly 70% of outstanding SRs may have public money at risk.

Table 2: Financial performance of some of the ARCs for year 2019 or 2020

Particulars	AUM (Rs in crore)	Net Worth (Rs in crore)	Total Income (Rs in crore)	Net Profit/ (Loss) (Rs in crore)
Edelweiss ARC $	43,188	2,036	1,166	301
JM Financial ARC &	11,489	1,450	414	42
Phoenix ARC	9,000(est.)	443	183	(5.5)
ARCIL #	11,902	1,945	329	149
UV ARC @	1,044	138	31	2.6
ACRE ARC %	9,353	161	168	41
Reliance ARC *	2,019	211	70	22

$ Covid related impairment on asset quality of ~ Rs 200 crore taken in Q4 2020. As per para 8 of financial results, Impairment Reserve has been created out of reserves.
& Year 2020
# Year 2019 Audited. Year 2020 - N.A.
% Audited Year 2019- From Brickwork Rating Rationale dated November 4, 2019
@ provisional - Year 2020– From Brickwork Rating Rationale dated July 13, 2020
* provisional – Year 2020 -From Brickwork Rating Rationale dated April 30, 2020

Table 3: Parameters of leverage of some of the ARCs, based on Rating Reports and information in public domain

Particulars	Year	Debt Equity	Debt Service Coverage Ratio	Interest Service Coverage Ratio
Edelweiss ARC	2020	2.15	0.86	1.47
JM Financial ARC	2020	1.77	N.A.	N.A.
Phoenix ARC	2020	1.35	0.12	0.96
ARCIL	2019	0.14	N.A.	N.A.
UVARC	2020	1.15	N.A.	N.A.
ACRE ARC	2019	0.52	N.A.	N.A.
Reliance ARC	2020	0.64	N.A.	N.A.

In order to promote quality and consistent implementation of Indian Accounting Standard (Ind AS), as well as facilitate comparison and better supervision, RBI has framed regulatory guidance on Ind AS which will apply to ARCs for preparation of their financial statements from the financial year 2019-20 onwards. The guidelines mandate ARCs to put in place board-approved policies that clearly articulate and document their business models and portfolios requiring detailed analysis, application of judgment and detailed documentation to support judgments. These guidelines focus on the need to ensure consistency in the application of the accounting standards. Above guidance will have significant changes and will require board, audit committees, auditors of ARCs to be well versed with ARCs business policies.

Some of the ARCs are already following above guidelines such as JMF-ARC, which is already providing impairments under Expected Credit Loss (ECL) method. For quarter ended June 2020, Edelweiss has also provided Rs 132.97 crore towards change in valuation of credit impaired loans which represents valuation movement of loans originated by consolidated ARC trusts.

On account of Covid-19, ICRA Ltd, rating agency has observed a higher share of downgrade in recovery ratings due to a delay or a decline in the expected recovery on the SRs. In its latest surveillance carried out on the basis of SRs

outstanding as on June 2020 compared to the previous surveillance cycle December 2019, ICRA's ratings downgraded were at 37% as compared with 21% in previous period. Above downgrade would result in further provisioning requirements for ARCs on its investment in SRs and thereby adversely impact their profitability.

Fair Practices Code of RBI

By its circular dated July 16, 2020, RBI has advised ARCs to adopt 'Fair Practices Code' (FPC) so as to ensure transparency and fairness in their operation. Some of the major features of FPC are as follows:

Transparency in the process of sale of assets

As per FPC, in order to enhance transparency in the process of sale of secured assets, (i) invitation for participation in auction shall be publicly solicited; the process should enable participation of as many prospective buyers as possible; (ii) terms and conditions of such sale may be decided in wider consultation with investors in the SRs as per the Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (SARFAESI Act); (iii) spirit of section 29A of IBC may be followed in dealing with prospective buyers.

RBI has emphasized on ARC to carry out sale through public auctions and have wider consultation with SR holders for sale rather than sharing information only. As currently majority of the SRs are subscribed to by banks (70% as per RBI report), RBI has therefore suggested above step. It is understood that sale here will also include any measure on asset reconstruction adopted by ARC under section 9(1) of the Act.

It may be noted here that as per section 7(3) of the Act, in the event of non-realization under sub-section (2) of financial assets, the qualified buyers of an ARC, holding SRs of not less than 75% of the total value of the SRs issued under a scheme by such company, shall be entitled to call a meeting of all the qualified buyers and every resolution passed in such in meeting shall be binding on the ARC.

Thus, SR holders with 75% value have right to call the meeting of all SR holders and pass resolution for taking further action by ARC which shall be binding on ARC but above right at present is only in the event of non-realization of financial assets. As per current practice, ARCs periodically submit status reports to SR holders, have periodic review meetings and share audited financial statements of trusts with SR holders, Net Asset Value reports from rating agencies, etc. on regular basis.

RBI has emphasized on ARC to carry out sale through public auctions and have wider consultation with SR holders for sale rather than sharing information only. As currently majority of the SRs are subscribed to by banks (70% as per RBI report), RBI has therefore suggested above step. It is understood that sale here will also include any measure on asset reconstruction adopted by ARC under section 9(1) of the Act.

FPC prescribes wider consultation with SR holders which may seem to delay actions to be taken. The objective of SR holders is to maximize their recovery in minimum period. As per discussion with certain large seller banks, they feel that consultation under FPC will further improve co-ordination amongst seller banks and ARCs and accelerate recoveries. It was also felt that sometimes long time is taken to decide on recovery plan in view of perceived sub-optimal recoveries/resolutions and assets were held for a long period in Trusts.

One of the issues faced by some of SR holders is that in some cases, recovery gets delayed as ARCs are not able to aggregate debt which is beyond control of ARCs. The SR holders perceive that they can assist ARC in debt aggregation or ask ARC to proceed with resolution on 'as is and where is' basis. Thus, by consultation with SR holders and with their involvement, optimal decision can be taken expeditiously which won't be questioned later by SR holders. Above is in line with IBC, as during CIRP Committee of Creditors (CoC) is formed and during liquidation proceedings also, liquidators form Stakeholders' Consultation Committee for oversight and monitoring of liquidation process.

An ARC may have multiple trusts which have acquired financial asset of the same company funded by different investors. A scenario may be imagined wherein ARC has acquired NPA

asset for external investor as well as has itself subscribed to 100% SRs. Different investors may have different action plans based on their outstanding, securities, charges, acquisition pricing etc. The ARCs will have to co-ordinate amongst these investors and manage conflicts to reach consensus on asset reconstruction measure to be taken forward. In IBC situation, therefore, various ARC trusts may vote different resolutions proposed in CoC meetings.

Further, as ARCs have multiple assets from small to large assets to work-on, regular monitoring and consultation by SR holders will ensure all assets acquired irrespective of size will get attention for recovery/resolution.

In the context of some of the ARCs being part of larger group and as ARCs move towards acquisition of bigger ticket assets and retail loans, it is important and imperative that confidentiality of information relating to assets acquired, their businesses, customers, assets, resolution status, etc. is maintained. Some of the information could be price sensitive also. As per provision, information may be shared only if required by law or with borrowers' permission and may be shared through information memorandum only at the time of sale or bidding.

Compliance with section 29A of IBC is an effort to harmonize the provisions on sale of assets across various statutes. IBC in both CIRP and liquidation does not allow persons connected to defaulting borrowers not to bid for assets. In the event promoters or connected persons wants to resolve, they should approach ARCs and adopt other measures available to ARC under section 9 (1) of the Act such as settlement, rescheduling of debt, etc.

Outsourcing of activities by ARCs

As per FPC, ARCs intending to outsource any of their activity shall put in place a comprehensive outsourcing policy, approved by the Board, which incorporates, *inter alia*, criteria for selection of such activities as well as service providers, delegation of authority depending on risks and materiality and systems to monitor and review the operations of these activities/ service providers. ARC shall ensure that outsourcing arrangements neither diminish its ability to fulfill its obligations to customers and the RBI nor impede effective supervision by RBI. Further, as per FPC, the outsourced agency, if owned/controlled by a director of the ARC, such arrangements may be made part of the disclosures specified in the Master Circular of ARCs.

Above provision is in line with earlier direction issued to NBFCs by RBI in 2017 on outsourcing activities which required a board approved code of conduct for recovery agents, clear demarcation of resources like premises and personnel in case of sharing of back-office.

Outsourcing may include activities such as running process of sale of assets, raising funds, monitoring, etc. which are carried out by group/associate companies to achieve management, operational and financial synergies. Importantly, it has been clarified further that if any outsourcing agency is owned/controlled by a director of the ARC, suitable disclosures have to be made for greater transparency. ARCs therefore have to carry out dealings with group companies on arms' length basis on these outsourcing activities.

Confidentiality of Information

As per FPCs and ARCs shall keep the information, they come to acquire in course of their business, strictly confidential and shall not disclose the same to anyone including other companies in the group except when (i) required by law; (ii) there is duty towards public to reveal information; or (iii) there is borrower's permission.

In the context of some of the ARCs being part of larger group and as ARCs move towards acquisition of bigger ticket assets and retail loans, it is important and imperative that confidentiality of information relating to assets acquired, their businesses, customers, assets, resolution status, etc. is maintained. Some of the information could be price sensitive also. As per provision, information may be shared only if required by law or with borrowers' permission and may be shared through information memorandum only at the time of sale or bidding.

Critical Role in Stressed Assets Resolution

On ARC acquiring debt in a stressed company, ARC may initiate insolvency proceedings against the Corporate Debtor. ARC may acquire debt in single or multiple trusts as per its or investors' requirement. On initiation of Corporate Insolvency Resolution Process (CIRP), the ARC becomes a member of CoC to pursue the resolution process. However, during the pendency of CIRP, moratorium is imposed upon creditors' rights, including rights under the SARFAESI Act. ARC during this period can continue to aggregate debt from various creditors. SRs are also traded amongst various investors in the secondary market and, of late, many transactions of SRs sale have been reported among distressed debt investors.

ARC as partner of bidder or Resolution Applicant provides flexibility to investors as:

1) No further fresh security to be created with assignment of existing debt to ARC;
2) Restructuring of existing debt into various instruments such as non-convertible debentures, OCDs, equity, etc.;
3) Low stamp duty on assignment of debt;
4) Enhanced enforcement rights of ARCs compared to other legal entities;
5) ARCs can pursue piece-meal sale/ monetization of assets of the Corporate Debtor on approval of resolution plan over a period of time and pay lenders from sale proceeds; and
6) In the event of sale under the Act, priority of dues of secured creditors over government dues as per section 26 of the Act.

In landmark resolution, acquisition of Alok Industries Ltd by Reliance Industries Ltd. along with JMF- ARC was completed in March 2020. In Essar Steel CIRP (wherein the author was the Resolution Professional), Edelweiss ARC held about 15% of financial debt and played significant role on the resolution of account.

Recent Development on ARCs as Resolution Applicant

RBI has recently rejected resolution plan approved for Aircel because it "did not conform to the guidelines under the SARFAESI Act, 2002". Currently, ARCs can acquire shareholding in companies by first acquiring debt and then converting debt into equity.

ARCs are companies registered with RBI under section 3 for the purposes of carrying on the business of asset reconstruction. SARFEASI Act, 2002 defines functions of ARC and asset reconstruction is defined as acquisition of any right or interest of any bank or financial institution in any financial assistance (any loan or advance granted etc. by bank/FI as per section 2(k) of the Act) for the purpose of realization of such financial assistance. Therefore, ARC role in stressed asset resolution commences on the acquisition of debt.

As per section 10 of the Act, 2002 ARCs business activities are restricted. ARCs are not required to commence or carry on any business other than that of asset reconstruction or securitization, without prior approval of RBI. ARCs therefore will have to ensure as per present provisions that their business proposed complies with activities permitted under the Act and do not require any prior approval of RBI under section 10(2) of the Act.

Section 238 of the IBC is a non-obstante clause which stipulates that the provisions of the Code shall have an over-riding effect over anything inconsistent therewith in any other law. Though IBC is a later law, question arises whether under a later law, RBI's regulatory powers and approval can be dispensed with. In addition, as per IBC, any Resolution Plan will have to conform to existing laws as per section 30(2) of IBC for approval by CoC and NCLT, therefore, without RBI approval, resolution plan submitted by ARC won't conform to provisions of section 30(2) of the IBC.

As per section 29A of IBC, an ARC can act as a resolution applicant and can submit resolution plan itself or with other investors jointly as a consortium or partnership. Further, as per section 29A, expression "related party" shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity

shares, prior to the insolvency commencement date. As section 29A deals with eligibility only, above clarifies eligibility of ARC in case ARC hold equity from conversion of debt.

As an entity running management of the reconstructed company, question is will ARC be treated as promoter as per the Companies Act, 2013 which defines promoters as the persons who control the affairs of the company? Additionally, will ARC be subject to regular compliances, consolidation etc., as per the Companies Act, 2013 or be exempted from these provisions? RBI's clarifications will provide answers to above issues.

The association of ARCs and banks have followed up with RBI to provide clarity in this respect and allow ARCs acquire equity directly in stressed companies sold under IBC as Resolution Applicant. Above will have positive impact and ARCs will play enhanced role in resolutions.

Most of distressed players have set up diversified platforms such as ARC, Alternative Investment Fund (AIF) and NBFC to participate and bid for the distressed opportunities.

In a number of accounts, as per the resolution plans proposed under IBC, ARCs will hold majority of equity and will manage day-to-day affairs of the acquired company. ARCs may develop hybrid structure under section 9(a) of the SARFAESI Act, 2002 to take over management of companies. On ARC taking over controlling interest in these units independently and wherein there is no managing/operating partner, ARC in future may become a holding platform like PE firm with controlling interest of many businesses through its subsidiaries or through any other structure. ARC will also commit to infusion of capital and funds for revival of stressed company.

As an entity running management of the reconstructed company, question is, will ARC be treated as promoter as per the Companies Act, 2013 which defines promoters as the persons who control the affairs of the company? Additionally, will ARC be subject to regular compliances, consolidation etc. as per the Companies Act, 2013 or be exempted from these provisions? RBI's clarifications will provide answers to above issues.

The Way Forward

In the backdrop of rising stress in the financial sector including NBFCs, increasing participation of distressed debt players in stressed asset market, ARCs in partnership with investors and as Resolution Applicant are bidding for bigger and large distressed companies and financial assets, which shows the tremendous potential for growth.

In order to retain growth trajectory and for conclusion of major bidding under IBC, ARCs need to raise significant capital as reliance on debt for acquisitions wherein cash flows are uncertain may not be a prudent measure.

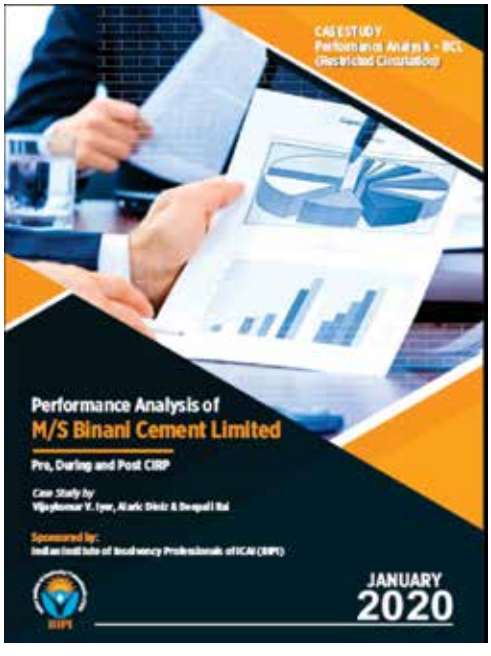
The support of the Government of India to the SARFAESI Act, 2002 is evident from the amendment in December 2019, as per which, after the registration of security interest with Central Registry of Securitisation Asset Reconstruction and Security Interest of India (CERSAI), the debts of the secured creditor i.e. banks, FIs, NBFCs, ARCs, etc. shall be paid in priority over all other debts exception being IBC proceedings. Therefore, the Central Government and RBI have harmonized the provisions of IBC on priority of dues of secured creditors and section 29A with that of SARFAESI Act, 2002 and made applicable to ARCs to enable them to play larger role in the resolution of stressed assets.

ARCs have played significant and mature role under assets under IBC by adapting and re-orienting their business model and aligning with ongoing ever evolving regulatory changes. Clarity on ARCs to act as Resolution Applicants by RBI will go a long way in serving its supporting role of resolution of stressed assets. The challenge before ARCs will be to maintain transparency in its operations, manage increased participation of SR holders, raise long term capital, demonstrate superior resolution skills and share its success stories with financial eco-system to capture opportunities available so as to attract more investment in this sector.

Case Study : Performance Analysis of Binani Cement Limited (BCL)

Binani Cement Limited (BCL), a flagship subsidiary of Binani Industries was engaged in the production and sales of cement with a brand name of 'Binani Cement' and clinker in Rajasthan, Maharashtra, Haryana, Delhi and some other states of India. In pursuance of insolvency application of the Bank of Baroda (the Creditor), the Kolkata Bench of the National Company Law Tribunal (NCLT) vide an order on July 25, 2017, admitted CIRP (Corporate Insolvency Resolution Process) of the Company (the Debtor). The NCLT also appointed Mr. Vijaykumar V. Iyer (Vijay) as the Interim Resolution Professional who was subsequently confirmed as the Resolution Professional by the Committee of Creditors. Vijay and his team successfully completed the CIRP of the company that resulted in a 100% recovery for the lenders. The team, with the support of stakeholders, restarted manufacturing and sale operations reinforcing the going concern status of the Company. This enabled the team to market the company, generate interest and obtain six compliant resolution plans before handing it over to Ultratech Cement Ltd, the successful resolution applicant.

The present case study, sponsored by IIIPI, was developed by Vijay with his colleagues, Mr. Alaric Diniz and Ms. Deepali Rai. In this study, the research team has provided a first-hand step by step guide to resurrect a corporate life. Read on to know more....



Vijaykumar V. Iyer (Vijay)
(The author is a professional member of IIIPI)

Introduction

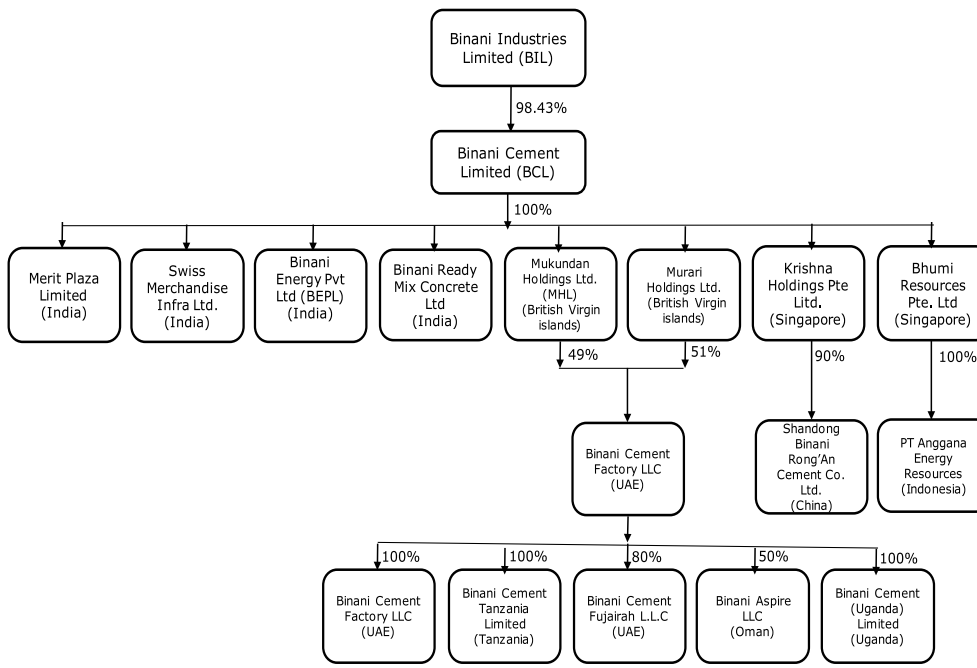
Binani Cement Limited (BCL), the Corporate Debtor (CD)/the Company, was engaged in the manufacturing, sales and distribution of branded cement since its foundation in 1996. The case of Corporate Insolvency Resolution Process (CIRP) was admitted against the company under the Insolvency & Bankruptcy Code, 2016 (IBC)/the Code in the Kolkata Bench of the National Company Law Tribunal (NCLT) in July 2017.

During the CIRP, the Resolution Professional (RP), as per the provisions of the Code, successfully restarted the operations of the CD and maintained it as a Going Concern. Besides, the RP also finalized a list of feasible resolution applicants (RAs) for consideration of the Adjudicating Authority (AA) i.e., NCLT, Kolkata Bench. The NCLT, Kolkata Bench finally approved the Resolution Plan of a Resolution Applicant (RA) that had proposed 100% plus resolution to the financial, operational and other creditors. Subsequently, the CD was successfully transferred to the RA.

The present case study fundamentally discusses the operational parameters - the challenges and steps taken for sustained and improved operations, and cash position of BCL during the CIRP, thereby, facilitating a successful resolution as envisaged under the Code.

Company Profile

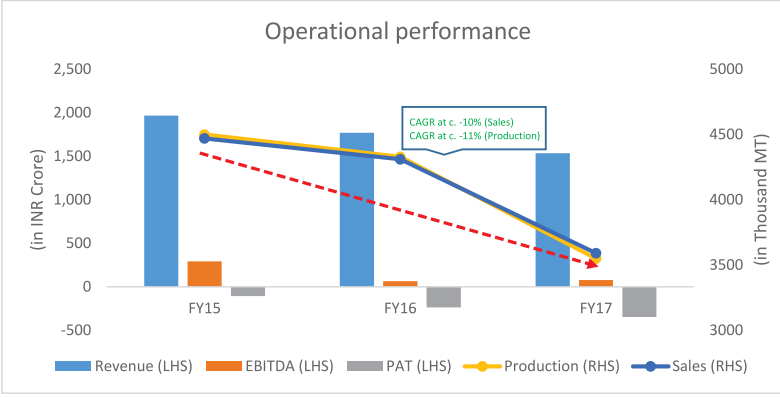
- Binani Cement Limited, listed at Bombay Stock Exchange (BSE) and National Stock Exchange of India Limited (NSE), was a part of the Braj Binani Group and a subsidiary of Binani Industries Limited (BIL), India.
- BCL used to manufacture and market 'Ordinary Portland Cement' (OPC) (43 and 53 grade)
- The production capacity in India was 6.25 Metric Tonnes Per Annum (MTPA) with 70 MW captive power plants. Besides, it had clinker capacity of 3 MTPA at China and grinding unit of 2 MTPA at Dubai. The total global capacity of the Company was 11.25 MTPA.
- The Company had developed sizeable facilities (~300 hectare of land) and had substantial raw material reserves (limestone mining lease at Amli and Thandi Beri in village-Binanigram (BGR) spread across 256 hectares (ha.) and 468 ha. respectively), and was operating the following cement units in the state of Rajasthan:
- An integrated unit (IU) of 4.85 MTPA of cement production capacity with 2 lines of cumulative clinker capacity of ~14,200 Tonnes per Day (TDP) in village-BGR, Tehsil-Pindwara, District- Sirohi, Rajasthan.
- The IU had captive power plants of 70MW.
- Additionally, a second plant consisting of grinding unit (GU) with an installed cement capacity of 1.4 MTPA in village-Sirohi, Tehsil- Neem Ka Thana, District-Sikar, Rajasthan.
- Both, the integrated cement unit and the grinding unit, had railway facilities for inward and outward movement of materials.
- The Company had captive limestone reserves which are near BGR, and this was capable of serving its needs for the next 30 years.
- The Company had also acquired coal mines in Indonesia for meeting the energy requirements of its global presence.
- In India, BCL had a widespread distribution network, comprising ~3,000 dealers in core markets (Rajasthan, Gujarat and Haryana) and ~1,100 dealers in non-core markets as on November 2018.
- All the plants were ISO 9001:2008, 14001:2004 and OHSAS 18001:2007 certified.
- Furthermore, the Corporate Debtor had a number of subsidiaries and step down subsidiaries as follows:



Source: *Annual Report of FY 2016-17 of BCL*

Pre-CIRP Performance

a. Performance in Three Previous Years



Source: *Company's Financial Statement*

b. Reasons of Financial Stress

Year	Liquidity Issues	Financial Stress
2012-13	Overseas expansion	• Project to expand the company's production base with a new plant in Mauritius was scrapped by October 2012, when Binani Cement could not secure enough land for a site for the factory. • The Chinese authorities prohibited further cement capacity expansion in China.
2013-15	Divestment for debt reduction	• Binani Industries was under pressure to sell 40% stake in Binani Cement to raise capital. • In February 2015, company sought to sell its 1.2 MTPA Neem Ka Thana grinding unit in Rajasthan to further reduce its debt; the deal didn't go through.
2016-17	Penalties and working capital issues	• Penalties imposed by the Competition Commission of India impacted ~50 per cent of the company's net profits from 2009 to 2011. • Receivables accumulation / unrealized sales for the finished product supplied, majorly to related parties resulting in working capital shortage.

Source: *HDFC securities retail research FY 17-18 dated March 23, 2018.*

The lower capacity utilisation had impacted profitability due to paucity of working capital support from the bankers on account of the financial stress within the company. The Earnings before Interests, Taxes, and Depreciation and Amortisation (EBITDA) margins declined from 15% in FY 2014-15 to 5% in FY 2016-17 while the Profit after Tax (PAT) margins had considerably deteriorated from (negative) -5% in FY 2014-15 to (negative) -23% in FY 2016-17. The sales volumes had declined at CAGR of about 10% while the production had declined at CAGR of about 11%.

Apart from the above factors, construction slow down further created pressure on price realization for cement due to over-capacity and lower demand from the commercial real-estate segment. Furthermore, high input costs also impacted profitability negatively.

c. Failure of Corrective Action Plan

The restructuring of the existing term loans was necessitated on account of lackluster demand, decline in realizations, increase in costs and other extraneous circumstances including on account of Rajasthan VAT.

The consortium of banks had agreed to restructure the account under Joint Lenders Forum (JLF) Mechanism. While a Corrective Action Plan (CAP) was finalized by JLF and Master Restructuring Agreement was signed, some of the consortium lenders had not sanctioned the facilities as per CAP and other lenders who had sanctioned facilities as per CAP did not disburse or partially disbursed the facilities as per CAP. As a result, the CAP could not be implemented in full within the time frame prescribed by Reserve Bank of India.

Due to non-disbursement of facilities and partial implementation of CAP, Company could not honour its debt obligation in time resulting

in the CAP being "declared as failed" by the lenders, and the Company being taken to NCLT under the Code.

Corporate Insolvency Resolution Process (CIRP)

a. Appointment of IRP/RP

Pursuant to an application by the Bank of Baroda (Applicant) filed before the NCLT, Kolkata Bench (NCLT) against Binani Cement Limited in terms of Section 7 of the Insolvency and Bankruptcy Code, 2016 read with its Rules and Regulations, the NCLT, Kolkata Bench appointed Mr. Vijaykumar V. Iyer as the Interim Resolution Professional (IRP) vide its order dated July 25, 2017 (Insolvency Commencement Date, ICD). He was confirmed as the Resolution Professional (RP) by the Committee of Creditors (CoC) pursuant to the voting at the first CoC meeting held on August 22, 2017. The entire CIRP was completed with the active support of financial creditors and other stakeholders. The summary of the CIRP timeline is provided in Annexure 1.

b. Initial Assessment

Upon receipt of the NCLT order, the IRP along with authorized representatives from Deloitte Touche Tohmatsu India LLP (DTTI - the firm providing support services to the IRP) met with the applicant bank and with management team/ advisors of BCL at their Corporate Office in Mumbai to take charge of assets of the Corporate Debtor. After initial meetings at the corporate office, the IRP team travelled to the plant at BGR and took charge of the assets of the Corporate Debtor on July 29, 2017 as a majority of operations were carried out from the plant location. These initial procedures including to meet with the promoters, directors, KMPs, to further understand the issues and financial situation of the company – concerns and pain points, to explain the procedure of CIRP and roles & responsibilities of the IRP/RP, and to explain the expectations and cooperation sought from the promoters, directors, KMPs to achieve a successful resolution. Following are some of the key takeaways from these initial discussions.

1. **Plant operations had been stopped prior to ICD:** The cement plant operations had been stopped since July 23, 2017 (before commencement of CIRP) due to non-supply of coal and shortage of working capital. During initial discussions, the management of the Corporate Debtor tried to dissuade the IRP and his team from visiting the plant at BGR citing non-payment of dues and possible local unrest.

After initial meetings at the corporate office, the IRP team travelled to the plant at BGR and took charge of the assets of the Corporate Debtor on July 29, 2017 as a majority of operations were carried out from the plant location.

2. **Condition of plants:** It was observed by the technical advisors that the general condition of major equipment specifically Kiln 2 and its associated equipment like VRMs and Cement Mills needed extensive repair and maintenance, and which had not been carried out on account of the lack of adequate cash flows in the Company.

3. **Security and safeguarding the assets:** The IRP with his team evaluated the security services and their positioning especially considering the vast area over which the plant facilities were spread, the mining area near the plant and the large number of employees and workmen living within the BGR Township. A security agency was deployed to take over the security requirements and to safeguard plant locations and assets

4. **Large number of employees:** As on ICD, the total number of employees was ~700 and contract labour were ~2,000.

5. **BCL** was sole source of employment/income for the employees and workmen at BGR/ NKT. The extent of dependency meant that the non-operation of the plant was a very emotive issue resulting in a highly charged environment.

6. **Key employees of BCL on deputation:** Key employees i.e., Chief Financial Officer (CFO), Company Secretary (CS), marketing manager, bank liaison and operations were not on the rolls of BCL but were employed by BIL (holding company) and were being deputed to BCL.

7. **Majority of the operations carried out from the plant, which was both in a remote location as well as in a sensitive tribal belt:** During initial meetings it was highlighted that except for the deputed employees all other major day to day operations were carried out from the plants. It was also important to note that the major exits / highways from the plants to the nearby cities were non-operational from sunset to sunrise on account of potential threats from local miscreants.

8. **Marketing, sales and distribution operations were carried out from the Delhi office of the Company:** Though the manufacturing and dispatch activities were carried out from the plant, the marketing, sales and distribution operations were carried out from the Delhi office of the Company which entailed additional monitoring and coordination activities especially given the spread of the markets across Rajasthan, Gujarat, Haryana, Delhi, Punjab, MP and Maharashtra.

The IRP was informed that transport costs had been paid by BCL to DSPL; however the IRP team learned that the same was still outstanding to be paid to the transporters by DSPL.

9. **Cash and Bank Balance:** Bank balance for operational accounts as on ICD was ~INR 4.0 Crore whereas the minimum fixed cost for the company just for a month was ~INR 9.47 Crore; a shortfall of over INR 5 crores.

10. **Inventories:** As on ICD, reported inventories value was ~INR 60.33 crores (break up as given in Annexure 2). Coal stock as on July 24, 2017 was reportedly 25,311 MT out of which 24,954 MT were lying at port in accordance with high-seas sales agreement; only 357 MT of coal was available at the plant which was insufficient for restarting the plant.

11. **High amount of receivables from related parties:** As on ICD, the company had ~INR 616 Crores of receivables out of which ~INR 590 Crores receivable were from 3 companies which were related parties of the company (indirect relation through common directors with the holding company BIL). Sales were carried out on a credit basis to these parties. Sarswati Sales (SSPL) which owed ~INR 488 Crores to the Company was a Market Organiser (MO), the regional dealer that had a sub-dealer network under the MO, and sales happened in the states of UP, Delhi, Maharashtra, Punjab, and MP through SSPL. The Company had a different arrangement with SSPL as compared to other MOs wherein sales are directly made and invoices are raised to SSPL.

12. **Routing of dealings with transporters via a related party:** The Company had entered into various transactions with transporters via a related party entity Dhaneshwar Solution (DSPL) for all the logistic requirements of BCL. The IRP was informed that transport costs had been paid by BCL to DSPL; however the IRP team learned that the same was still outstanding to be paid to the transporters by DSPL.

13. **Manpower Services by a related party:** Nirbhay Management Services Pvt. Ltd (NMSPL) was providing manpower services to BCL at various locations (BGR, NKT, Jaipur, Mumbai, Ahmedabad etc). These services were pertained to guest house, medical hospital/clinic, school, bagging services at plant, etc. and were essential for smooth continuity of operations. NMSPL was a wholly owned subsidiary of Binani Metals Pvt. Ltd.; a related party to BCL.

14. **Relatively new senior management team:** The senior management team of the Company was relatively new with most of them joining BCL in 2017.

15. **Influence of the promoter:** Promoters had continuing influence on the management team and on other stakeholders. Similar to other debt restructuring and recovery processes, and as the IBC was still in its nascent stage, stakeholders considered the CIRP as a transition period and expected the promoters to come back. There was uncertainty with respect to participation by promoters in the resolution process (this case commenced prior to 29A restrictions), and stakeholders were unclear as to which side to support.

16. **Hostile situation and strike at plant locations by trade unions, transporters, dealers, and market organisers, etc.:** Hostile situation and strike by the various stakeholders was on account of non-payment or delayed payments resulting in non-cooperation and stalling of business activities of the Corporate Debtor. Threats, both physical and otherwise, were made by trade unions and transporters to members of the IRP team.

17. **Perception of stakeholders on Company's future post initiation of CIRP:** Low morale of all stakeholders due to commencement of CIRP and non-payment or adjustment of their outstanding dues

18. **Non-payment of statutory dues:** During CIRP commencement, statutory dues pertaining to PF and TDS for the month of March 2017 to June 2017 amounting to INR 3.82 crores remained outstanding.

19. **Overseas operations:** Only two of the step-down subsidiaries of BCL i.e. Shandong Binani Rong'an Cement Company Ltd. (China) and Binani Cement Factory LLC. (UAE) were cement manufacturing units of which management of BCL have submitted that the operations of China plant was shut down on account of environmental regulations in China and that the operations in Dubai were not profitable.

c. Concerns/Challenges faced by the IRP/RP

1. To protect and preserve a sizeable asset with a large area in a remote location, large employee and workmen residing in the township were attached to the plant.

2. Convert the hostile situation to a more constructive working environment at the plant and in the company upon commencement of CIRP

3. To restart the plant and maintain sustainable operations in order to achieve optimal resolution

4. Managing day to day operations despite huge outstanding dues including to various statutory bodies.

5. Managing the large MO/dealer network spread over both core (Rajasthan, Gujarat) and non-core markets (Haryana, Delhi, Punjab, MP and Maharashtra) covering seven states.

6. Addressing the various issues highlighted in the point above and finding solutions to each of them that would be workable and in agreement to the concerned stakeholders.

7. Addressing control over the overseas subsidiaries as a shareholder, as the IBC gives only 'ownership rights' as recorded in the balance sheet of the Corporate Debtor to the IRP/RP over these entities under the Code.

d. Measures taken to address challenges, maintain sustainable operations and achieve optimal resolution

The measures taken by the IRP/RP and team to meet the challenges and maintain sustainable operations can be considered in terms of short-term, medium-term and long-term measures to achieve optimal resolution at the earliest and not more than the 270 days (180 days + 90 days of extension provided by the Adjudicating Authority) as prescribed in the Code.

Measures taken to address challenges, maintain sustainable operations and achieve optimal resolution along with Processes and Achievements

S.N.	Short Terms Measures (STMs)	Mid Term Measures (MTMs)	Long Term Measures (LTMs)
1	STM 01	MTM 01	LTM 01
2	STM 02	MTM 02	LTM 02
3	STM 03	MTM 03	LTM 03
4	STM 04		
5	STM 05		
6	STM 06		
7	STM 07		

(i) Short Term Measures (STMs)

The STMs were concerned to ensure protection and security of the Corporate Debtor, while restarting of plant operations and generating positive cash flows to ensure sustainability of the company as a going concern. They could be

described in three sub-heads (Measure, Process Followed and Achievements) as follows:

STM 01: Takeover and secure assets of the Corporate Debtor

Process Followed

- Visited all the Company sites i.e., at Mumbai, BGR, NKT and others,
- Intimations were sent to all stakeholders. The banks were intimated for change in authorized signatory and all bank accounts were taken over, and statutory authorities were intimated regarding the proceedings.
- Appointed external security agency to take care of the assets of the company and to increase security arrangement at plant and offices of the corporate debtor.
- Appointed legal advisors to RP in relation to the legal issues of BCL, insolvency proceedings, drafting of petitions, reply and rejoinder applications and appearances before courts
- Photos and videos of the plant were captured on "as-is -where-is basis".

Achievements

- Assets were secured for commencing and sustaining operations.

STM02: Imparting knowledge about the CIRP to all stakeholders.

Process Followed

- Imparting education about the Insolvency & Bankruptcy Code and process to be followed for successful resolution of the company to all stakeholders. Multiple meetings were conducted with management of the corporate debtor, employees, vendors, transporters and dealers to patiently and repeatedly explain the CIRP and motivate them to provide the support envisaged from each stakeholder during CIRP.
- This being one of the first cases, the immediate reaction of the stakeholders was that the company was 'insolvent' and undergoing 'liquidation'. Concern was about their outstanding dues and how/ what needed to be done to achieve some settlement; as all groups of stakeholders had substantial amounts outstanding.

Achievements

- Positive outlook for the process and support from stakeholders for sustainable operations.
- Understanding of the CIRP, filing of claims, role and responsibility of the IRP/RP and the stakeholders, and the responsibility and role of the promoters.
- Stakeholders got a sense of the high possibility of a recovery and likely resolution for the company.

STM 03: Meeting with the key stakeholders.

Process Followed: The IRP also held meetings with the following key stakeholders along with the management of the Company to seek their effective support during the CIRP to achieve successful resolution.

- **Management & Employees:** Various plans were discussed with management to restart the production including maintenance activities required and phasing of maintenance activities for sustained operations.
- **Trade union leaders:** Discussed and agreed on strategy to manage the workmen and labour to ensure uninterrupted operations and dispatch of materials.
- **Transporters:** Discussed and agreed settings aside past dues vide the claim mechanism under the CIRP and agreed a modus for payments in relation to dispatches during the CIRP.
- **Market Organizers (MOs) and dealers:** Discussed and agreed options for advance collection to increase liquidity and ensure minimal opportunity for payment default. Additionally, ensured that payment received for future sales are not adjusted against liabilities of the dealers prior to the CIRP.

Achievements

- Dispatch of cement started in August 2017 prior to restarting of the plant with the inventory available at the plant.
- The plant was restarted on August 11, 2017.

STM 04: Preservation of value and going concern status

Process Followed

- Business plan was drawn up in consultation with the management and technical team of the Corporate Debtor for/to:
- smooth and efficient running of the operations, gauge maintenance requirement,
- target production/sales volume to achieve breakeven,
- analysis of focus markets,
- monitoring and maintenance of the cash flows, and
- Interim finance requirement.

With liquidity generated out of cement sales made by clearing existing inventory, IRP team restarted plant operations on August 11, 2017.

- Appointed technical consultants to advise RP on technical matters pertaining to day to day operations of the plant and to assist RP on technical, operational, marketing, logistics and management aspects of the company.
- Engaged a separate team to carry out cash flow monitoring for assistance in and management of day to day operations of the Corporate Debtor to result in reduction of surprises and better visibility on business performance and for pre-audit of daily payments, receivables and deviation based on understanding of operational metrics.

Achievements

- Raised an interim finance line of INR 100 Crore.
- Better management of the day to day operations of the company including tracking performance and taking corrective actions on a real-time basis, as required.

STM 05: Restarting of Plant Operations

Process Followed

- Since the plant was non-operational at the commencement of the CIRP, the company was not able to generate production and dispatch for a period of 4 - 5 days which had an impact on cash flows.
- After several discussions, plant operations were resumed, using coal inventory with the Company, by restarting the kiln and captive power plants which also helped in power cost savings.

Achievements

- With liquidity generated out of cement sales made by clearing existing inventory, IRP team restarted plant operations on August 11, 2017 by running the plant.

STM 06: Controlling assets of overseas entities as only a shareholder.

Process Followed

- Taking custody of share certificates of the subsidiaries.
- RP having taken over control of BCL, the holding entity having ownership rights in the subsidiaries, issued letters to the directors of the subsidiaries to take his prior consent for any corporate action in respect of the subsidiaries, and to securing the assets of the subsidiaries.
- Facilitated site visits to overseas plants as requested by the resolution applicants.

Achievements

- The resolution plan considered full value to all creditors while considering control over the subsidiaries.

STM 07: Miscellaneous Measures

Process Followed:

The IRP team also instituted a process with the required checks and balances for monitoring the followings:

- Monitoring of procurement of material and services vide a transparent process while excluding related parties.
- Payments to transporters against dispatches on delivery basis as it were essential to the distribution of the products in the market.

- Transactions with related party, being a provider of essential manpower services to BCL at various locations after the approval of CoC in order to continue their services.
- Overseeing dispatch of finished goods and documentation in respect of cash collection prior to dispatch.
- Follow up for collection of receivables.
- Management Information System (MIS) reporting, the reports which are required by the management to track the performance of the company.

Achievements

- Increased overall capacity utilization of the company by pushing sale of both, cement and clinker.

(ii) Medium Term Measures (MTMs):

The MTMs pertain to sustaining the operations of the Corporate Debtor by ensuring availability of the adequate working capital and cash flow to enable immediate maintenance requirements. The key MTMs are as follows:

MTM 01: Interim Finance

Process Followed

- Interim finance was required to mitigate working capital shortages for managing day to day operations and to incur certain maintenance costs to adequately function above breakeven level.
- The IRP circulated the interim finance proposal to members of the CoC.
- The PSU banks could not support the interim finance proposal on account of the provisioning requirement as per the RBI guidelines.
- One of the CoC members provided a proposal for providing interim finance to the Corporate Debtor.
- After multiple detailed discussions on the achievability of the business plan and the necessity for maintenance expenses to achieve an optimal resolution plan, the term sheet for interim finance was presented.
- The interim finance term sheet was placed before the CoC and discussed in detail and an INR 100 Crore line was approved by the CoC and sanctioned. Accordingly, an inter creditor agreement was executed in October 2017.

Achievements

- Out of the sanctioned amount of INR 100 Crore, INR 85 Crore were withdrawn for utilization in 2 tranches (INR 55 Cr in October 2017 and INR 30 crore in December 2017).
- Furthermore, INR 20 crore was repaid as part repayment of interim finance availed from cash flows generated.

MTM 02: Continuous dialogue with authorities to ensure smooth functioning of the Corporate Debtor.

Process Followed

- Liaison with VAT authorities, requesting deferment of stringent actions due to non-payment of previous VAT dues pre-CIRP and modus-operandi for making payments given no payment of the prior period.
- Meeting with Indian railways authorities to ensure month on month increase in availability of rakes for cement and clinker dispatches.
- Meeting with Provident Fund (PF) authorities pertaining to unpaid PF dues to discuss situation of the Corporate Debtor and CoC approval taken for PF payments for the prior period.
- Meeting with Indian Railways' authorities for compliance pertaining to Dedicated Freight Corridor.

Achievements

- Ensured smooth functioning of the Corporate Debtor while also having a positive impact from vendors and suppliers to the CIRP.

MTM 03: Employees' Promotions, Bonus and Increments.

Process Followed

- RP proposed promotions and increments

which were effective from July 01, 2017 and had an additional cost of INR 20 lac. per month which was 6.41% of the overall Cost to the Company (CTC).

- The proposal was approved by the CoC.
- Out of 381 eligible employees, 85 were promoted.

Achievements

- These actions further reinforced the "going concern" status of the Corporate Debtor and helped boost confidence amongst the employees while eliciting their positive support throughout the process.

(iii) Long Term measures (LTMs):

The LTMs were aimed at improving the value of the Corporate Debtor for the future thereby increasing the possibilities for a successful resolution. The key LTMs used in the CIRP are as follows:

LTM 01: Operations & Maintenance Activities.

Process Followed

- Interim Finance was raised to meet the maintenance and repair requirements.
- Oversaw negotiations of credit terms with suppliers and transporters.
- Kiln-2 Maintenance in consultation with Holtec and commenced production from Kiln-2 on February 7, 2018.
- Preventive maintenance of Kiln-1 undertaken in February 2018.
- One captive power plant made operational from October 2017.

Achievements

- Ensured continuity in operations of the Corporate Debtor and maintained it to a sustainable level.

LTM 02: Sales & Marketing

Process Followed

- Continuous communications with employees and dealer network to restore confidence.
- Ensuring consistent material availability throughout the CIRP through proper monitoring of inventory, dispatches and collections.
- Appropriate branding and promotional activities undertaken like dealer's meet, distribution of Diwali gifts, and wall paintings etc.

Found out that BIL was supplying Binani branded cement in the Southern Indian market through alternative channels. The activity was stopped immediately.

- Key marketing employees were retained until conclusion of the CIRP.

Achievements

- Reinstated the sales in non-core markets by creating a dedicated marketing team for these regions.
- Increased capacity utilization by pushing sales of cement and clinker by additionally covering non-core markets as well.

LTM 03: Supply Chain Management

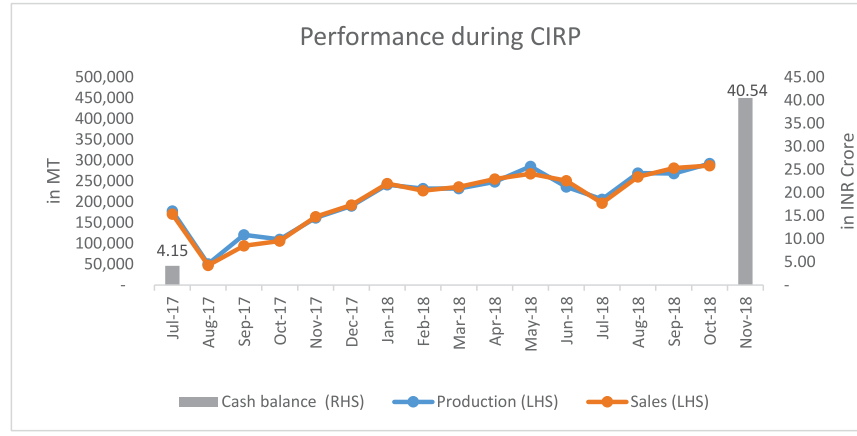
Process Followed

- Regular meeting with key vendors to reinstate continued short term and long term supplies and availability of key raw materials.
- Regular dispatches ensured and payments released in a timely manner to restore the confidence of transporters.
- Monitoring of material delivery and coordination with vendors to ensure non adjustment of previous dues.
- Maintenance of the safety stock level of finished goods and raw materials
- Organized inter-department meetings to address coordination problems.
- Coordination with NMSPL management to ensure continuity of operations.
- Implemented robust dispatch planning and route allocation process.

Achievements

- Found out that BIL was supplying Binani branded cement in the Southern Indian market through alternative channels. The activity was stopped immediately.

With pro-active, transparent approach during CIRP and the active support of all stakeholders including CoC members, operations of the plant were improved and sustained throughout the CIRP period.



The process of the sale of the Corporate Debtor generated interest among six global companies, 14 domestic companies, and seven financial bidders. Subsequently, six compliant resolution plans were received by the RP. After approval of the resolution plan, the lenders recovered 100% of their dues. A timeline along with summary of the key operational milestones is provided in Annexure 1.

e. Operational Performance

- Turnaround of the operations by bringing in the right expertise and strong project management: Cement production and sales volume both grew at cumulative monthly growth rate of ~11% over the CIRP period as compared to CAGR of ~ -11% and ~ -10% for production and sales over FY 2014-15 to FY 2016-17 prior to the CIRP.
- Regular maintenance & repair activities fuelled growth and increased the value of the asset for achieving resolution: Overall capacity utilisation remained in the range of ~50% during the CIRP, while substantial repair and maintenance activities were carried out from the cash flows of the Company post approval by the CoC.
- Once core-market operations were stabilised, the RP team focused on non-core markets as well, expanding the market coverage of the Company: Post discussion and consultation with the Company management and Holtec team, and the approval of the CoC, RP has authorized on boarding of 25 people on contract basis for non-core markets.

RP proposed promotions and increments which were effective from July 01, 2017 and had an additional cost of INR 20 lac. per month which was 6.41% of the overall Cost to the Company (CTC). Out of 381 eligible employees, 85 were promoted.

Post-CIRP Period

In pursuance to the NCLAT order dated November 19, 2018, Binani Cement Limited, the Corporate Debtor, was transferred to the successful Resolution Applicant and renamed as Ultratech Nathdwara Cement Limited (UNCL) w.e.f. December 12, 2018.

a. UNCL: Key Assets Acquired

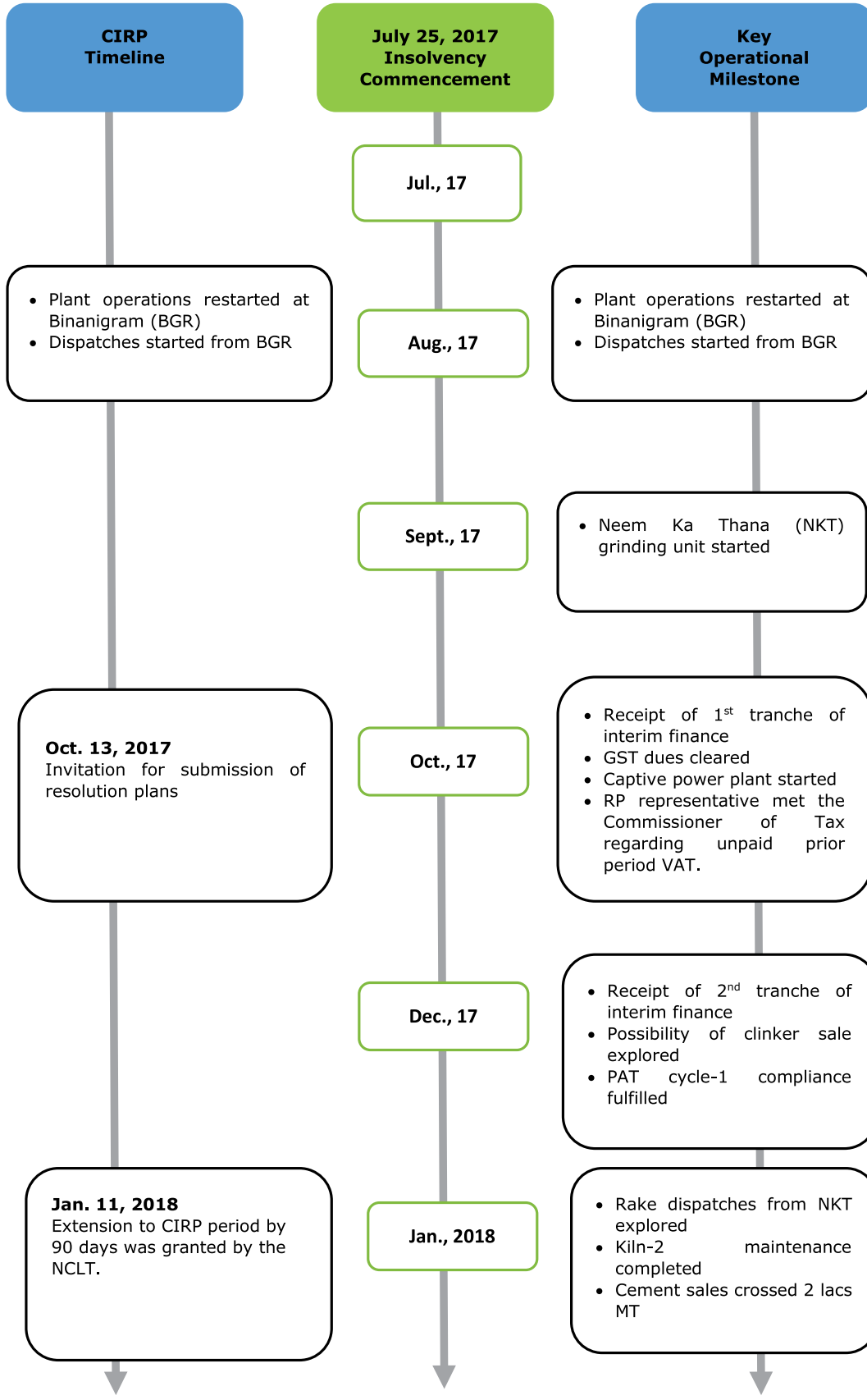
Indian Assets	Clinker Capacity- 4.59 MTPA in Rajasthan
	Cement Capacity- 6.25 MTPA in Rajasthan
	Thermal Power Plant- 70MW
	Superior Quality Sizeable Limestone Reserves
	Latest Technology European Plants
Overseas Assets	China- Clinker: 2.0 MTPA, Cement- 0.3 MTPA
	UAE: Cement GU: 2.0 MTPA

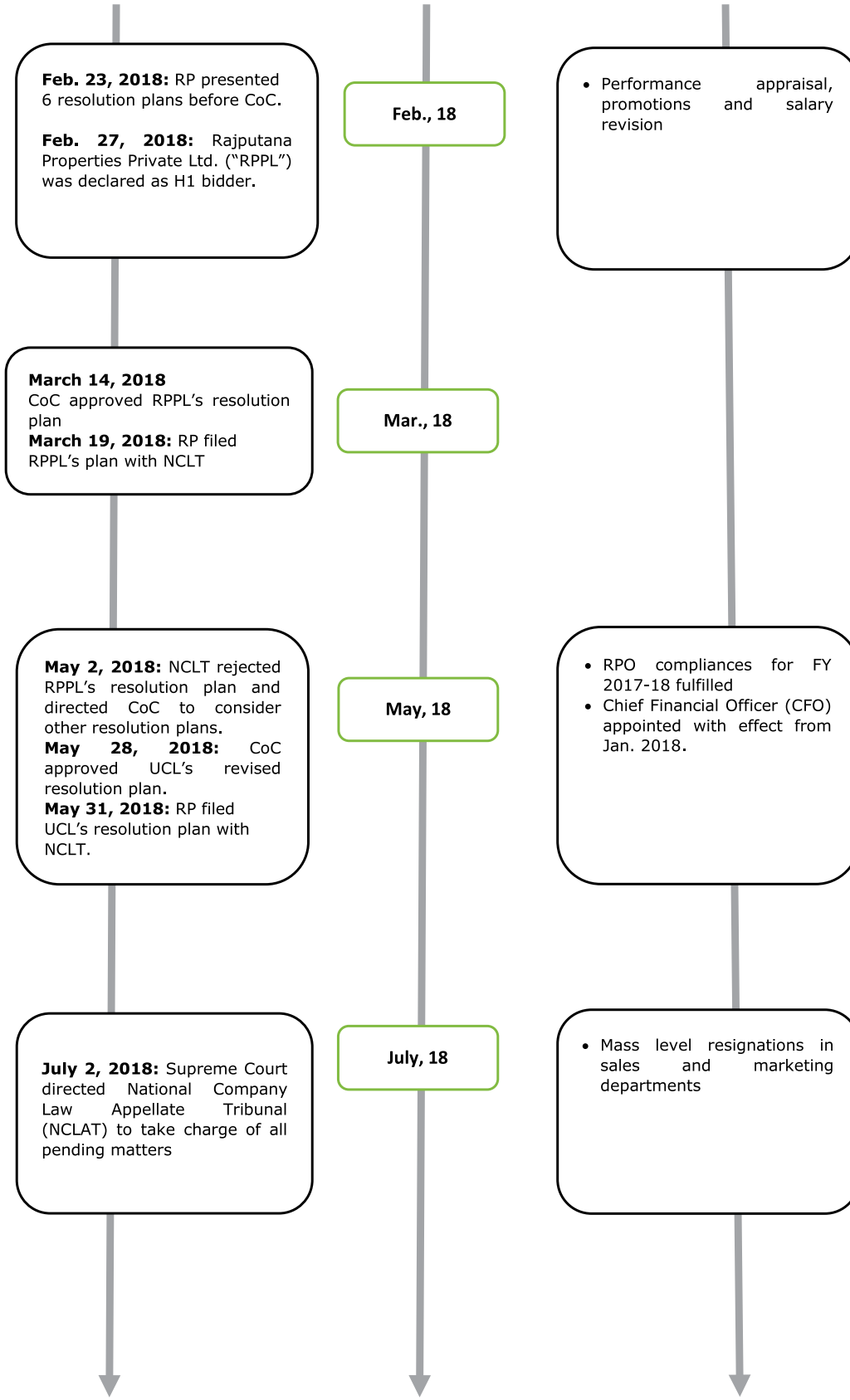
b. UNCL- Integration Update

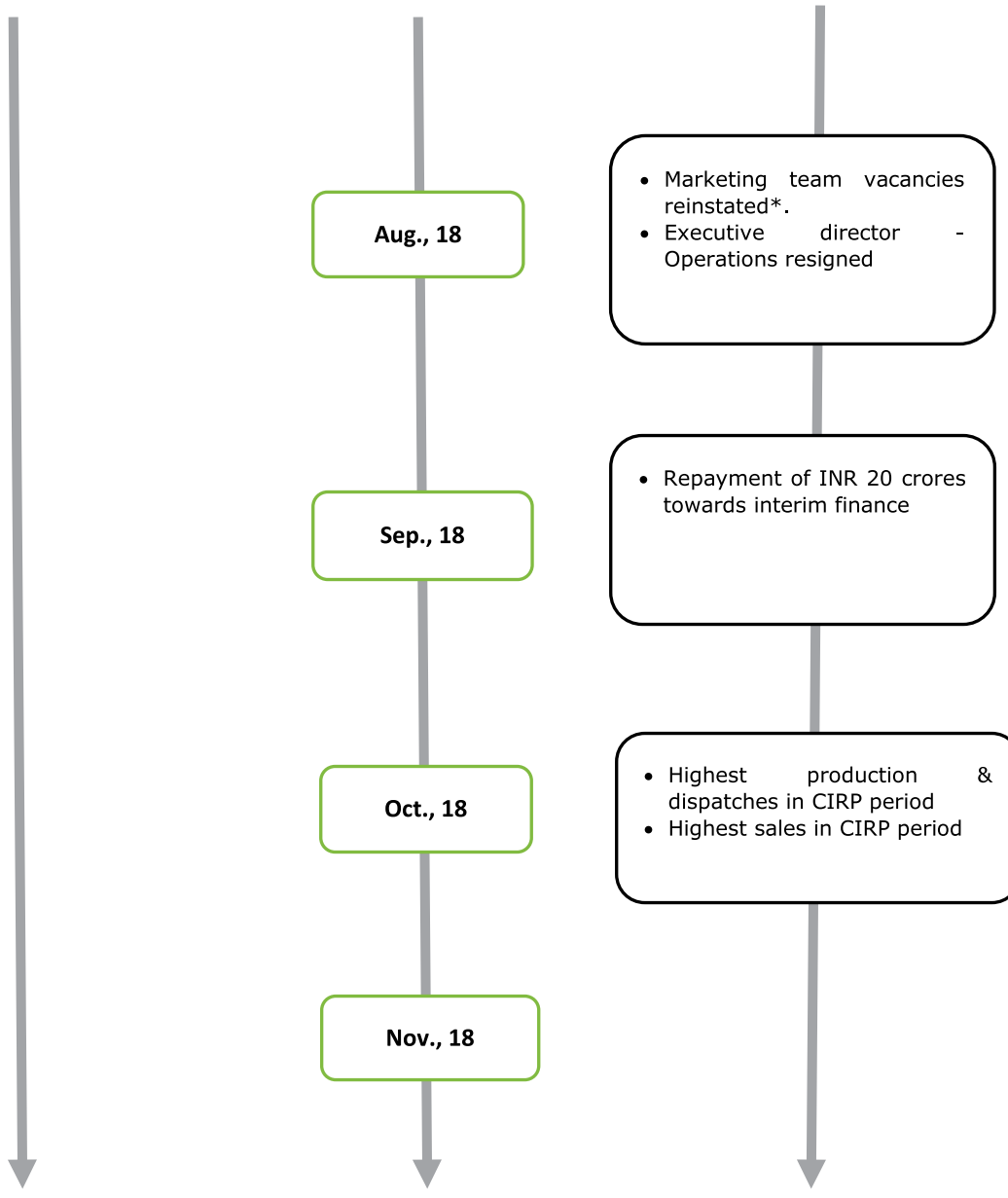
The following update is as per the disclosure of the UNCL in "Results Presentation" for Q2 FY 2019-20:

1. Assets consistently generating healthy EBITDA.
2. Continuing PAT positive performance in a seasonally weak quarter.
3. Cost improvement program in place- Capex initiated for 10.5 MW WHRS.
4. Disposal of non -core assets to improve returns.
5. Assets generated free cash flows of ~ INR 100 crores in the first half of FY 2019-20.

Annexure 1: CIRP / Timeline of Key Operational Milestones




Feb. 23, 2018: RP presented 6 resolution plans before CoC.
Feb. 27, 2018: Rajputana Properties Private Ltd. ("RPPL") was declared as H1 bidder.
Feb., 18
• Performance appraisal, promotions and salary revision
March 14, 2018
CoC approved RPPL's resolution plan
March 19, 2018: RP filed RPPL's plan with NCLT
Mar., 18
May 2, 2018: NCLT rejected RPPL's resolution plan and directed CoC to consider other resolution plans.
May 28, 2018: CoC approved UCL's revised resolution plan.
May 31, 2018: RP filed UCL's resolution plan with NCLT.
May, 18
• RPO compliances for FY 2017-18 fulfilled
• Chief Financial Officer (CFO) appointed with effect from Jan. 2018.
July 2, 2018: Supreme Court directed National Company Law Appellate Tribunal (NCLAT) to take charge of all pending matters
July, 18
• Mass level resignations in sales and marketing departments



Nov. 14, 2018: NCLAT approved revised resolution plan submitted by UCL

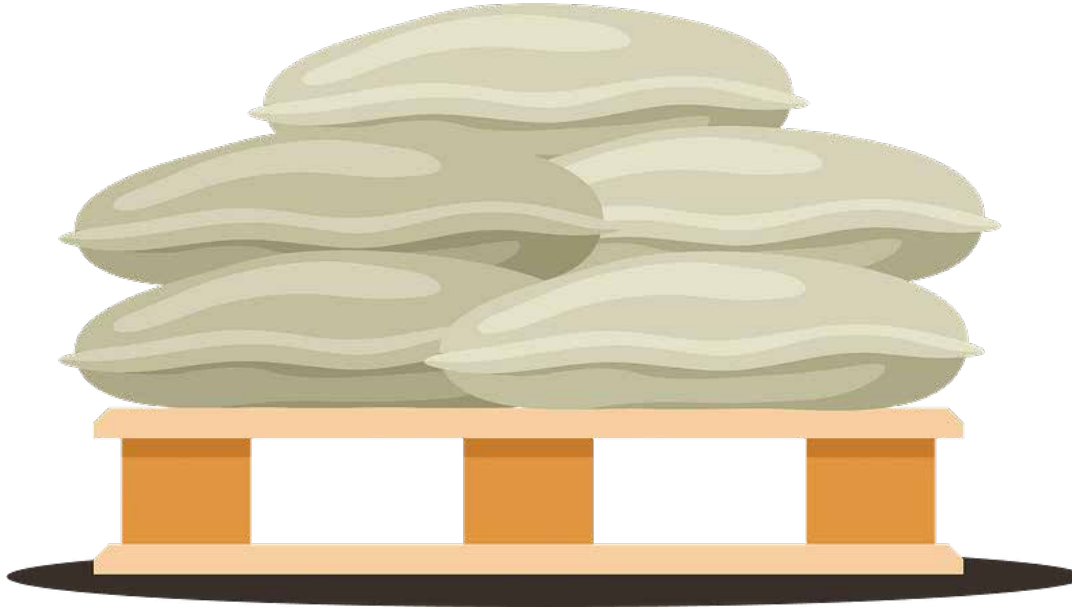
Nov. 19, 2018: Supreme Court upheld the order passed by the NCLAT

**Reinstated: Reinstatement is in context of reactivating the marketing organisation by reinstating the positions.*

Annexure 2: Major Raw Material and Finished Goods Stock as on Insolvency Commencement Date (ICD)

Particulars	Unit	As on July 25, 2017
Clinker	MT	2,256
Cement	MT	23,147
Cement (Depot Stock)	MT	18,351
Coal (Imported)*	MT	25,311
PP Bags (OPC & PPC)	No's	21,93,300
Gypsum	MT	9,831
Fly Ash / Pond Ash	MT	4,166
Limestone	MT	1,01,245
Iron Ore / Red Ocher	MT	2,378
Silica Sand	MT	772
Raw Meal	MT	36,168
Fine Coal	MT	32

Source: *Daily Production Report, Post-CIRP*



Circulars & Notifications

Here are some important circulars and notifications recently issued by the Insolvency and Bankruptcy Board of India (IBBI) and the Ministry of Corporate Affairs (MCA). You are requested to submit your feedback and suggestions at iiipi.pub@icai.in

Circulars

1. **Pre-registration Educational Course under the IBBI (Insolvency Professional) Regulations, 2016; IBBI Circular No. IBBI/IPA/031/2020 dated 20th March, 2020.**

   In view of the advisories issued by various authorities in the wake of COVID-19, it may be difficult for the IPAs to deliver pre-registration educational courses through class room sessions. To minimise difficulties for the prospective IPs, it has been decided that preregistration educational courses completed online will be accepted for registration. Therefore, the IPAs are encouraged to deliver pre-registration educational courses online for their professional members.

   The dispensation in Para (2) above will be available till 30th September, 2020 for a professional member, provided he submits an application for registration to the Board by 31st October, 2020. This means that a pre-registration educational course completed online before 30th September, 2020 will be considered for registration for application submitted before 31st October, 2020.

2. **Feature for modification of CIRP Forms (including IP-1 Form) submitted by an Insolvency Professional (IP) in compliance of regulation 40B of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016; IBBI Circular No. IBBI/CIRP/030/2020 dated 17th March, 2020.**

   The Board has enabled a feature on the platform for modification of an already submitted Form. An IP may modify a Form already submitted by him by submitting a modified Form on the platform on payment of the applicable fee. However, such modification till 31st March, 2020 shall not attract any fee.

   IPs are advised to exercise due care and diligence while submitting a Form to avoid modification. They are also advised to submit the Forms in time. Modification of Forms or failure to file a Form in time does not reflect well on an IP and may invite action for non-compliance with sub-regulation (3).

Notifications

1. **Extension of term of office of Shri Bethala Shantha Vijaya Prakash Kumar, Member (Judicial), as Acting President, NCLT, New Delhi**

   S.O. 3266(E), [F. No. A-45011/49/2019-Ad.IV (Pt.I)] dated 24th September, 2020: In continuation of this Ministry's notifications S.O. No. 72(E), dated 03rd January, 2020, S.O. 1393(E), dated 29th April, 2020, S.O. 2377(E), dated 17th July, 2020 and S.O. 2796(E), dated 18th August, 2020, the term of office of Shri Bethala Shantha Vijaya Prakash Kumar, Member (Judicial), as Acting President, NCLT is further extended for a period of one month with effect from 05.09.2020 or until a regular President is appointed or until further orders, whichever is earliest.

2. **Notification under section 10A of the Insolvency and Bankruptcy Code, 2016**

S.O. 3265(E), [F. No. 30/33/2020-Insolvency] dated 24th September, 2020: In exercise of the powers conferred by section 10A of the Insolvency and Bankruptcy Code, 2016 (31 of 2016) [as inserted by section 2 of the Insolvency and Bankruptcy Code (Second Amendment) Act, 2020 (17 of 2020)], the Central Government hereby notifies further period of three months from the 25th September, 2020 for the purposes of the said section.

3. **Order of NCLT in modification of earlier order dated 12th May 2020 regarding filing of defult record from the IU for application under section 7 of the Code, New Delhi**

Regarding Modification of Order File No. 25/02/2020 – NCLT/ 12th May 2020 dated 13th August, 2020: All concerned are directed to file default record from the information utility along with the new petitions filed under section 7 of the Insolvency and Bankruptcy Code, 2016 wherever available with the information utility.

The authorised representatives/ parties in the cases pending for admission under aforesaid section of the IBC are also directed to file default record from the Information Utility wherever available with the information utility.

4. Notification under section 4 of the Insolvency and Bankruptcy Code, 2016

S.O. 1205(E), [F. No. 30/9/2020-Insolvency] dated 24th March, 2020: In exercise of the powers conferred by the proviso to section 4 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Central Government hereby specifies one crore rupees as the minimum amount of default for the purposes of the said section.

5. **Notification under section 5(15) of the Insolvency and Bankruptcy Code, 2016**

S.O. 1145(E), [F. No. 30/9/2020-Insolvency] dated 18th March, 2020: In exercise of the powers conferred by clause (15) of section 5 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Central Government hereby notifies a debt raised from the Special Window for Affordable and Middle-Income Housing Investment Fund I, for the purposes of the said clause.

Explanation: For the purposes of this notification, the expression "Special Window for Affordable and Middle-Income Housing Investment Fund I" shall mean the fund sponsored by the Central Government for providing priority debt financing for stalled housing projects, as an alternate investment fund and registered with the Securities and Exchange Board of India, established under sub-section (1) of section 3 of the Securities and Exchange Board of India Act, 1992 (15 of 1992), to provide financing for the completion of stalled housing projects that are in the affordable and middle-income housing sector.

Guidelines

A. Guidelines for Appointment of Insolvency Professionals as Administrators under the Securities and Exchange Board of India (Appointment of Administrator and Procedure for Refunding to the Investors) Regulations, 2018 dated 5th September, 2020.

1. The Securities and Exchange Board of India (Appointment of Administrator and Procedure for Refunding to the Investors) Regulations, 2018, [Regulations] provide for appointment of Insolvency Professionals (IPs) as Administrators for the purposes specified therein. A copy of the said Regulations is at 'Annexure A'. These Guidelines have been prepared in consultation with SEBI to facilitate appointment of IPs as Administrators.

2. The IBBI and the SEBI have mutually agreed upon to use a Panel of IPs for appointment as Administrators for effective implementation of the Regulations. The IBBI shall prepare a Panel of IPs keeping in view the requirements of SEBI and the Regulations and the SEBI shall appoint the IPs from the Panel as Administrators, as per its requirement in accordance with

the Regulations. A Panel shall be valid for six months and a new Panel will replace the earlier Panel every six months. For example, the first panel under these Guidelines will be valid for appointments during April - September, 2020, the next panel will be valid for appointments during October, 2020 - March, 2021 and so on.

3. An IP will be eligible to be included in the Panel of the IPs if-

   a) there is no disciplinary proceeding, whether initiated by the IBBI or the IPA of which he is a member, pending against him;

   b) he has not been convicted at any time in the last three years by a court of competent jurisdiction;

   c) he expresses his interest to be included in the Panel for the relevant period; and

   d) he undertakes to discharge the responsibility as an Administrator, as and when he may be appointed by the SEBI.

   e) he has made the compliance under Regulation 7(2) (ca) of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 for the year 2019-20.

   f) he holds an Authorisation for Assignment (AFA), which is valid on the date of expression of interest.

4. The Panel shall have Zone wise list of IPs. An IP will be included in the Panel against the Zone where his registered office (address as registered with the IBBI) is located. For example, an IP located in the city of Surat (Gujarat) will be included in Ahmedabad Zone, which covers the State of Gujarat. The areas covered in different Zones are as under:

Zone	Areas Covered	
New Delhi	1	Union territory of Delhi
Ahmedabad	1 2 3	State of Gujarat Union Territory of Dadra and Nagar Haveli Union Territory of Daman and Diu
Allahabad	1 2	State of Uttar Pradesh State of Uttarakhand
Amravati	1	State of Andhra Pradesh
Bengaluru	1	State of Karnataka
Chandigarh	1 2 3 4 5 6	State of Himachal Pradesh State of Punjab State of Haryana Union Territory of Chandigarh Union Territory of Jammu and Kashmir Union Territory of Ladakh
Cuttack	1 2	State of Chhattisgarh. State of Odisha
Chennai	1 2	State of Tamil Nadu Union Territory of Puducherry
Guwahati	1 2 3 4 5 6 7 8	State of Arunachal Pradesh State of Assam State of Manipur State of Mizoram State of Meghalaya State of Nagaland State of Sikkim State of Tripura

Zone	Areas Covered	
Hyderabad	1	State of Telangana
Indore	1	State of Madhya Pradesh
Jaipur	1	State of Rajasthan
Kochi	1 2	State of Kerala Union Territory of Lakshadweep
Kolkata	1 2 3 4	State of Bihar State of Jharkhand State of West Bengal Union Territory of Andaman and Nicobar Islands
Mumbai	1 2	State of Goa State of Maharashtra

Expression of Interest

5. The IBBI shall invite expression of interest from IPs in 'Form A' to act as Administrator by sending an e-mail to IPs at their email addresses registered with it and hosting the guidelines on its website. The expression of interest must be received by the IBBI in Form A in the manner and date as specified. For example, the IBBI shall invite expression of interest by 7th September 2020 from IPs for inclusion in the Panel for October, 2020 – March, 2021. The interested IPs shall express their interest by 15th September 2020. The IBBI will send the Panel to SEBI by 25th September 2020. This process will be repeated every six months.

6. It must be explicitly understood that an IP, who is included in the Panel based on his expression of interest, must not:

   (a) withdraw his interest to act as an Administrator; or

   (b) decline to act as Administrator, if appointed by SEBI; or

   (c) surrender his registration to the IBBI or membership or AFA to his IPA; during the validity of the Panel; or

7. It must also be explicitly understood that:

   a. an IP in the Panel will be appointed as Administrator, at the sole discretion of SEBI;

   b. the submission of expression of interest in accordance with these guidelines, is an unconditional consent by the IP to act as Administrator in accordance with the Regulations; and

   c. an IP who declines to act as Administrator, on being appointed by SEBI, shall not be included in the Panel for the next five years, without prejudice to any other action that may be taken by the IBBI.

Inclusion of IPs in the Panel

8. The IBBI shall include the IPs, who have expressed their interest, in the Panel based on the three parameters the weights of which are as under:

Sl. No.	Parameter	Weight (%)
1	Number of Ongoing Processes (A)	40
2	Number of Completed Processes as IRP / RP (B)	20
3	Number of Completed Processes as Liquidator / Bankruptcy Trustee (C)	40

For more details, please visit

https://ibbi.gov.in//uploads/legalframwork/b170e0eac8657f5ee91d3557eaacd848.pdf

B. Guidelines on Use of Caveats, Limitations and Disclaimers by the Registered Valuers in Valuation Reports dated 1st September, 2020

These Guidelines provide guidance to the RVs in the use of Caveats, Limitations, and Disclaimers in the interest of credibility of the valuation reports. These also provide an illustrative list of the Caveats, Limitations, and Disclaimers which shall not be used in a valuation report.

These Guidelines are divided into three sections, as presented in the annexure. The first section elaborates on the need for Caveats, Limitations, and Disclaimers in a valuation report. The second section provides a guidance note on the use of Caveats, Limitations, and Disclaimers, while the third section provides an illustrative list of Caveats, Limitations, and Disclaimers for each asset class provided in the Rules.

For more details, please visit:

https://ibbi.gov.in//uploads/legalframwork/e5e1300db2dd6a8bebe289ba579a7c14.pdf

C. The Insolvency and Bankruptcy Board of India Research Initiative, 2019 (updated on as on 31st July, 2020) dated 1st August, 2020

This Initiative aims to promote research - legal, economic and interdisciplinary - and discourse in areas relevant for the evolving insolvency and bankruptcy regime in general, and that in India. For the purpose of this Initiative, 'researcher' means an individual, a team of individuals or an academic Institute, who or which undertakes research under this Initiative. Where it is a team of individuals, the individuals shall identify one of them as the lead researcher who will be corresponding with the Insolvency and Bankruptcy Board of India (Board). Where it is an academic institution, the Institute shall identify a faculty member as the researcher who will be corresponding with the Board. However, all individuals in the team, or the academic Institute, as the case may be, shall be collectively responsible for the obligations under this Initiative.

This Initiative shall open from 1st August, 2019. The research proposals may be submitted from 1 st August, 2019 onwards.

The Researcher shall complete the research in six months from the date of approval of the research proposal by the Board. On completion of the research, the researcher shall submit :(a) the research paper, (b) a 1,000-word non-technical summary of the paper. The paper shall not explicitly or implicitly divulge the name and identity of the researcher anywhere, except on the front page.

If the referee accepts the paper, the researcher shall be paid a research scholarship of Rs.70, 000 (Rupees seventy thousand only) (US$ 1,000 for a foreign researcher) to partially meet the expenses incurred by him for or on the research.

Publication

(1) The Board may publish the research paper on its website. It may invite, at its expense, the researcher to make a presentation of the research paper to an appropriate audience.

(2) The Researcher may publish the research paper anywhere or use it in any other manner with an acknowledgement that the paper is prepared under the IBBI Research Initiative.

(3) The Board shall be free to publish the research paper or use it in any other manner for non-commercial purposes, while acknowledging that the paper is the work of the researcher under the IBBI Research Initiative.

For more details, please visit,

https://ibbi.gov.in//uploads/legalframwork/244e5a00f261e8e918bc68577b074934.pdf

D. Insolvency and Bankruptcy Board of India(Online Delivery of Educational Course and Continuing Professional Education by Insolvency Professional Agencies and Registered Valuers Organisations) Guidelines, 2020 dated 10th July, 2020

Delivery of Education

It has been specified, in discussion with IPAs and RVOs, through circulars, guidelines and minutes of monthly meetings with them, that the educational courses and continuing professional education shall be delivered in classroom mode. However, in the wake of COVID-19, it was felt that it would be difficult for RVOs and IPAs to deliver educational courses and continuing professional education through classroom mode due to social distancing norms mandated by the Central Government. To minimize difficulties for the registered valuers, IPs, valuer members and prospective IPs, the Board, vide its advisories No. IBBI/IPA/031/2020 dated 20th March, 2020 and No. IBBI/RVO/032/2020 dated 20th March, 2020, allowed online delivery of courses by RVOs and IPAs and continuing education by RVOs till 30th September, 2020.

Online Delivery of Education

The menace of COVID-19 continues with no resolution in sight. It is considered necessary to continue online delivery of education beyond 30th September, 2020, in addition to classroom mode, wherever possible. However, it is necessary that such delivery is as effective as class-room delivery of education. Therefore, the following Guidelines are issued to govern the online delivery of education by IPAs and RVOs.

For more details, please visit,

https://ibbi.gov.in//uploads/legalframwork/27b396627077e4426e0b8fbfd5a69727.pdf

E. Insolvency Professionals to act as Interim Resolution Professionals, Liquidators, Resolution Professionals and Bankruptcy Trustees (Recommendation) Guidelines, 2020 dated 2nd June, 2020

Panel of IPs

The Board will prepare a common Panel of IPs for appointment as IRP, Liquidator, RP and BT and share the same with the AA (NCLT and DRT) in accordance with these Guidelines. 7.2 The Panel will have Zone wise list of IPs based on the registered office (address as registered with the Board) of the IP. 7.3 Keeping in view, the issuance of large number of AFAs by the IPAs in last week of November and December 2019, to facilitate maximum possible coverage, instead of two six monthly panels, now for 2020-21, the first Panel under this guidelines will have a validity of 4 months and 25 days and upon its expiry, a new Panel having validity of 7 months and 5 days will replace it . For example, the first Panel under the Guidelines will be valid for consideration for appointment during 1 st July, 2020 – 25 th November, 2020, and the next Panel will be valid for being considered for appointment during 26 th November, 2020 – 30th June, 2021. 7.4 The NCLT may pick up any name from the Panel for appointment of IRP, Liquidator, RP or BT, for a CIRP, Liquidation Process, Insolvency Resolution or Bankruptcy Process relating to a corporate debtors and personal guarantors to corporate debtors, as the case may be. 7.5 The DRT may pick up any name from the Panel for appointment as RP or BT, for an Insolvency Resolution or Bankruptcy Process for personal guarantors to corporate debtors, as the case may be.

For more details, please visit,

https://ibbi.gov.in//uploads/legalframwork/71d50e11656190259af4e3fe5427d943.pdf

Press Releases

1. Insolvency and Bankruptcy Board of India celebrates the Fourth Annual Day, IBBI Press Release No. No. IBBI/PR/2020/14

The Insolvency and Bankruptcy Board of India (IBBI) celebrated its Fourth Annual Day today. Hon'ble Minister of State for Finance and Corporate Affairs, Shri Anurag Singh Thakur graced the occasion as the Chief Guest. In his address, he elaborated several measures taken by the Government to ameliorate the pains of citizens in the aftermath of the COVID-19 pandemic. He pointed out that amendment to the Insolvency and Bankruptcy Code, 2016

(IBC) to suspend the filling of corporate insolvencies in respect of COVID-19 defaults was one such step required to save businesses from being closed prematurely. He expressed hope that the economy would revive soon on the back of picking up of demand and increased domestic and foreign investments. He commended the IBBI for having lived up to the expectations of the Government by being a dynamic and proactive regulator of a nascent law, the IBC. He fondly remembered the architect of the IBC, the late Mr. Arun Jaitely, former Minister of Finance and Corporate Affairs.

To commemorate its establishment, IBBI has instituted an Annual Day Lecture Series. Mr. Girish Chandra Murmu, Comptroller and Auditor General of India delivered the Fourth Annual Day Lecture on "IBC: Adaptability is the Key to Sustaining Reforms in Times of a Pandemic". He observed that the insolvency law has led to a significant behavioural shift among borrowers as non-repayment of loan is no more an option and ownership of a firm is no more a divine right and equity is no more the only route to own a firm. He observed that this behavioural shift had resulted in substantial recoveries for creditors outside the IBC and improved the performance of firms. Adaptability, he said, was most required for a law, like the IBC, to remain relevant to the times. Going forward, he said that once the pandemic is behind us, a few issues that need to be handled through the IBC would be making provisions for group insolvency and cross-border insolvency, and implementing various provisions related to individual insolvency.

Hon'ble Minister released the annual publication, "Insolvency and Bankruptcy Regime in India: A Narrative" on the occasion. This publication presents the thoughts and perspectives of practitioners, policymakers, subject experts, and academicians that elucidate and stimulate thought around the journey of the IBC thus far and road ahead. It is an attempt to contribute to the scholarly and policy discourse around insolvency law.

The Comptroller and Auditor General of India released the Handbook for Insolvency Professionals titled "Understanding the IBC: Key Jurisprudence and Practical Considerations" prepared by International Financial Corporation, World Bank Group, in pursuance of a co-operation Agreement with the IBBI. The Handbook captures the evolving discipline of insolvency with all its nuances and is intended to serve as a single point of reference for insolvency professionals, and all others in the ecosystem, who wish delve into this emerging area of law and practice.

IBBI, in collaboration with MyGov.in, had conducted a 'National Online Quiz on Insolvency and Bankruptcy Code, 2016' from 1st to 31st July, 2020 to promote awareness and understanding of the Code among various stakeholders across the country. The Quiz received overwhelming response with 1.26 lakh participants. There were in fact participants from every State and every Union Territory of India. The Comptroller and Auditor General of India gave away the medals and cash awards to the top three performers of the quiz.

Insolvency resolution has opened markets for distressed assets in terms of resolution plans, interim finance, and liquidation assets. Price discovery in any market is efficient if it has many participants and there is complete transparency. In the interest of efficient price discovery, IBBI has empanelled National e-Governance Services Limited to provide an electronic platform for market for distressed assets. Hon'ble Minister inaugurated the platform on the occasion.

In his welcome remarks, Dr. M. S. Sahoo, Chairperson, IBBI, thanked all stakeholders who joined the journey of IBBI and IBC's ecosystem and ensured that it was operationalized in shortest time, unprecedented in the history of any economic legislation in the country and that of that of any insolvency regime around the world. He shared the several small steps IBBI has been taking to earn credibility as an institution.

The Annual Day witnessed presence of limited number of dignitaries in person in the wake of COVID-19 pandemic situation. However, many stakeholders witnessed the event live through e-mode.

Dr. Mukulita Vijayawargiya, Whole Time Member, IBBI extended a hearty vote of thanks at the conclusion of the event.

2. Performance of NCLTs, PIB Release ID: 1656753 dated 19th Sep 2020

As on 31st July, 2020, total 19,844 cases were pending before National Company Law Tribunal (NCLT), including 12,438 cases under Insolvency and Bankruptcy Code (IBC). This was stated by Shri Anurag Singh Thakur, Union Minister of State for Finance & Corporate Affairs in a written reply to a question in Lok Sabha today.

Giving more details about regular staffing positions in NCLTs, Shri Thakur said that total 320 posts of officers/staff have been created in NCLT. Recruitment Rules (RRs) for these posts have been notified on 21.01.2020 and NCLT has initiated action to appoint employees on these posts on regular basis. Presently, 40 posts are filled on regular basis.

The Minister said that e-court project is being implemented in all 16 benches of NCLT. So far, e-filing has been started in 9 benches and it will be extended to remaining benches also. During COVID-19 pandemic, all benches are hearing cases through Video Conferencing.

3. The Insolvency and Bankruptcy Board of India announces results of the National Online Quiz on the Insolvency and Bankruptcy Code, 2016, IBBI Press Release No. IBBI/PR/2020/11 dated 1 st September, 2020.

The Insolvency and Bankruptcy Board of India (IBBI), in collaboration with MyGov. in, conducted a 'National Online Quiz on Insolvency and Bankruptcy Code, 2016' from 1st July to 31st July, 2020 to promote awareness and understanding of the Code among various stakeholders across the country. The Quiz was open for all Indian citizens above 18 years of age, except for individuals working in IBBI, service providers registered with IBBI, and also their immediate family members.

The Quiz received overwhelming response with 1,25,781 (One lakh twenty-five thousand seven hundred and eighty-one) participants. There were participants from every State and every Union Territory. Uttar Pradesh accounted for the highest participation with 15.7% of total participants, followed by Maharashtra with 11.7% and Delhi with 6.9%.

In terms of the Guidelines on the Quiz, top 10% of the participants, as per their performance, are entitled to receive 'Certificates of Merit'. The names of these top 10% of participants are available at https://ibbi.gov.in/uploads/whatsnew/2020-09-01-180818-3911c-d0d470965bd50a663be643b5d8bb2a1c.pdf. The 'Certificates of Merit' are being emailed to these meritorious participants by 10th September, 2020.

Among the top 10% participants, Maharashtra returned the highest number, accounting for 15% of them, followed by Delhi with 11.7% and Uttar Pradesh with 11.4%. About 51% of the top 10% participants are in the age group of 18 to 25 and more than 82% of them are in the age group of 18 to 35.

The Quiz received interest from a wide range of stakeholders, including students, professionals, and employees. About 29% of the top 10% performers are students or members of chartered accountancy, 9% are students or members of company secretaryship, and 7% are employees of banks and financial institutions.

In terms of the Guidelines on the Quiz, the best performer is to be awarded a Gold Medal with a cash prize of Rs.1,00,000 (One lakh rupees), the second best performer is to get a Silver Medal and a cash prize of Rs.50,000 (Fifty thousand rupees), and the third best performer, a Bronze Medal and a cash prize of Rs.25,000 (Twenty-five thousand rupees). The following are the three best performers in the Quiz: Best Performer:

Mr. Aritra Saha, aged 23 years (User ID-5292314). He has a Bachelor of Engineering degree from Army Institute of Technology and is currently working with Vodafone Shared Services, Bengaluru. Second Best Performer: Mr. Pawan Khandelwal, aged 25 years (User ID- 25404624). He is a Chartered Accountant, currently working with GAIL (India) Limited, and posted in Bengaluru. Third Best Performer: Ms. Vakati Venkata Gnanusha, aged 24 years (User ID- 24778204). She is pursuing LLM from Osmania University, Hyderabad, after completing BSL LLB from ILS Law College, Pune.

The awards to the best performers will be given away at an appropriate function of the IBBI.

The IBBI extends heartiest congratulations to the best performers and all the top 10% performers in the Quiz.

4. The Insolvency and Bankruptcy Board of India amends the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, IBBI Press Release No. IBBI/PR/2020/10 dated 07th August, 2020.

The Insolvency and Bankruptcy Board of India (IBBI) notified the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fourth Amendment) Regulations, 2020 today.

The Insolvency and Bankruptcy Code, 2016 (Code) envisages appointment of an authorised representative (AR) by the Adjudicating Authority to represent financial creditors in a class, like allottees under a real estate project, in the committee of creditors. For this purpose, the Regulations require the interim resolution professional to offer a choice of three Insolvency Professionals (IP) in the public announcement, and the creditors in a class to choose one of them to act as their authorised representative. The amendment made to the Regulations today provides that the three IPs offered by the interim resolution professional must be from the State or Union Territory, which has the highest number of creditors in the class as per records of the corporate debtor. This will facilitate ease of coordination and communication between the AR and the creditors in the class he represents.

The Regulations currently envisage that the authorised representative shall seek voting instructions from creditors in a class at two stages, namely, (i) before the meeting; and (ii) after circulation of minutes of meeting. The amendment made to the Regulations today provides that the authorised representative shall seek voting instructions only after circulation of minutes of meeting and vote accordingly. He shall, however, circulate the agenda, and may seek preliminary views of creditors in the class before the meeting, to enable him to effectively participate in the meeting.

The Regulations provide that the committee of creditors shall evaluate all compliant resolution plans as per evaluation matrix to identify the best of them and may approve it. The amendment made to the Regulations today provides that after evaluation of all compliant resolution plans as per evaluation matrix, the committee of creditors shall vote on all compliant resolution plans simultaneously. The resolution plan, which receives the highest votes, but not less than sixty-six percent of voting share, shall be considered as approved.

The amendment Regulations are effective from 07th August, 2020. These are available at www.mca.gov.in and www.ibbi.gov.in.

5. The Insolvency and Bankruptcy Board of India amends the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, IBBI Press Release No. IBBI/PR/2020/08 dated 05th August, 2020.

The Insolvency and Bankruptcy Board of India (IBBI) notified the Insolvency and Bankruptcy Board of India (Liquidation Process) (Third Amendment) Regulations, 2020 today.

The Regulations require the committee of creditors to fix the fee payable to the liquidator. Where the fee has not been fixed by the committee of creditors, the Regulations provide for a fee as a percentage of the amount realised and of the amount distributed by the liquidator. There have been instances where a liquidator realises the amount while another liquidator distributes the same to stakeholders. The amendment made to the Regulations today clarifies that where a liquidator realises any amount, but does not distribute the same, he shall be entitled to a fee corresponding to the amount realised by him. Likewise, where a liquidator distributes any amount, which is not realised by him, he shall be entitled to a fee corresponding to the amount distributed by him.

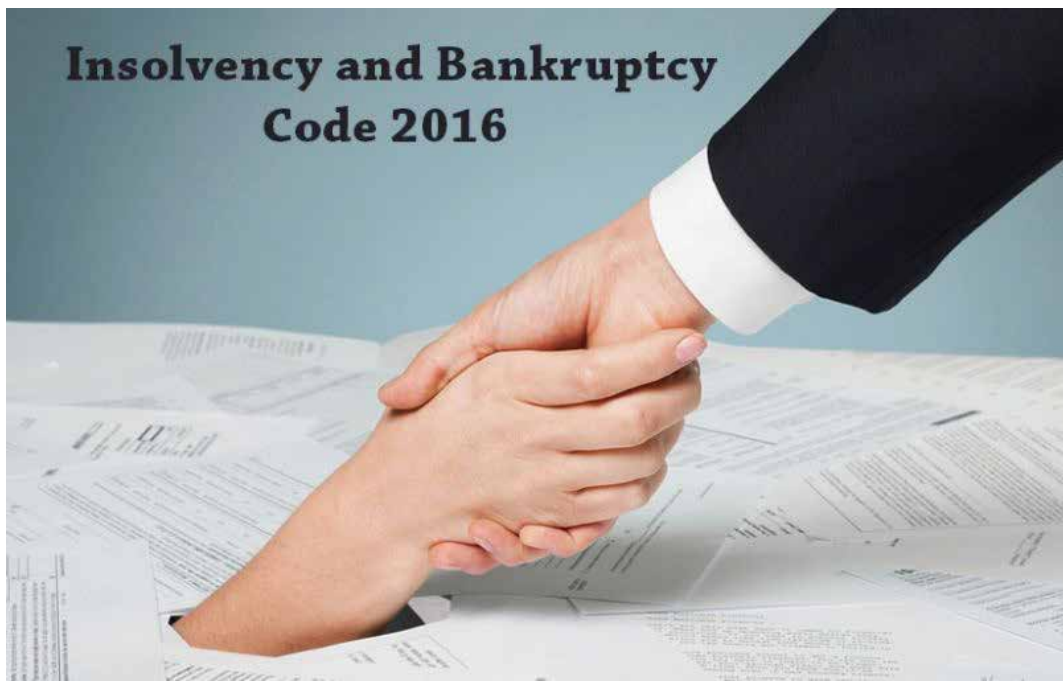
The amended regulations are effective from 05th August, 2020. These are available at www.mca.gov.in and www.ibbi.gov.in.

6. The Insolvency and Bankruptcy Board of India amends the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017, IBBI Press Release No. IBBI/PR/2020/09 dated 05th August, 2020.

The Insolvency and Bankruptcy Board of India (IBBI) notified the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) (Second Amendment) Regulations, 2020 today.

The Insolvency and Bankruptcy Code, 2016 enables a corporate person to initiate voluntary liquidation process if it has no debt or it will be able to pay its debts fully from the proceeds of the assets. The corporate person appoints an insolvency professional to conduct the voluntary liquidation process by a resolution of members or partners, or contributories, as the case may be. However, there can be situations which may require appointment of another resolution professional as the liquidator. The amendment made to the Regulations today provides that the corporate person may replace the liquidator by appointing another insolvency professional as liquidator by a resolution of members or partners, or contributories, as the case may be.

The amended regulations are effective from 05th August, 2020. These are available at www.mca.gov.in and www.ibbi.gov.in.



Legal Snippets

National Company Law Appellate Tribunal (NCLAT)

Indian Overseas Bank

Appellant (s)

Vs.

Arvind Kumar Resolution

(Professional/Liquidator)

Company Appeal (AT) (Insolvency) No. 558 of 2020

Date of Order: 28th September, 2020

The Resolution Professional/IRP is only entitled to those payments to which the Corporate Debtor is entitled if no orders of Moratorium would have been passed under Section 14 of the Code. The Corporate Debtor had no right to claim the margin money after the invocation of Bank Guarantee.

This Appeal emanates from the Impugned Order dated 29th April 2020 passed by the Adjudicating Authority/National Company Law Tribunal, Chandigarh Bench, Chandigarh in CA No. 95 of 2019 in CP (IB) No.80/CHD/HRY/2018 in the matter of M/s Arvind Kumar, Resolution Professional Vs Indian Overseas Bank by which the Application filed by the Resolution Professional was partly accepted and a payment of Rs 51,27,591/- was ordered to be released to the Resolution Professional of the Corporate Debtor M/s Richa Industries Limited. The said amount was retained by the Appellant Bank, being the margin money of the irrevocable Bank Guarantee, which was already invoked during the Moratorium period, issued U/S 14 of the Code. The Parties are represented by their original status in the Company Petition for the sake of convenience.

Brief Facts of the case are as follows

The Appellant, Indian Overseas Bank, is one of the Financial Creditors of the Corporate Debtor M/s Richa Industries Limited from whom the Corporate Debtor had availed various loan facilities including an irrevocable Bank Guarantee. The Corporate Debtor deposited margin money of Rs.40, 50,000/- in the form

of FDR to secure the said Bank Guarantee. One of the Operational Creditor M/s Tata Blue Steel Limited initiated the CIRP against the Corporate Debtor. The Application was admitted by order of the Adjudicating Authority dated 17th December 2018 and Moratorium declared under Section 14 of the I&B Code, 2016. The IRP was appointed on 21st December 2018.

The Bank Guarantee in question, which was issued in favour of M/s Tata Steel Processing & Distribution Limited was invoked, given the request, received vide letter dated 24th December 2018 and 26th December 2018 and the payment was made to the beneficiary to the tune of Rs.4,01,94,954/-. The margin money of the Corporate Debtor M/s Richa Industries Limited amounting to Rs.40,50,000/- accrued interest of Rs.10,77,591/-, and as such the total margin lying with the Appellant bank was Rs.51,27,591/- During CIRP, the Resolution Professional/Respondent demanded the aforesaid margin money from the Bank. The Appellant Bank, after the invocation of the Bank Guarantee by M/s Tata Steel Processing & Distribution Limited, adjusted the margin money amount in honouring the bank guarantee.

NCLAT Upheld

Thus, it is clear that 'Security Interest' does not include the 'Performance Bank Guarantee'. The Performance Bank Guarantee is not covered by Section 14 of the Code.

It is pertinent to mention that the 'margin money' is not a security as has been argued by the Respondent and does not require any

registration of charge. Only the assets gave by the Company as securities are required to be registered under Section 77 of the Companies Act, 2013.

The 'margin money' is the contribution on the part of the borrower who seeks 'Bank Guarantee'. The said margin money remains with the Bank, as long as the Bank Guarantee is alive. If the Bank Guarantee expires without being invoked, then the margin money reverse back to the borrower, and in case the bank guarantee is invoked by the beneficiary, the margin money goes towards payment of bank guarantee to the beneficiary, and nothing remains with the financial institutions, which can be reversed to the Corporate Debtor.

In this case, Bank Guarantee was invoked on 27th December 2018 by the beneficiary M/s Tata Steel Processing & Distribution Limited, and the margin money amount was used towards the payment of the Bank Guarantee. Once this margin money was used to honour the bank guarantee, nothing remained with the Bank, and as such, the Respondent Resolution Professional cannot demand that amount.

The Resolution Professional/IRP is only entitled to those payments to which the Corporate Debtor is entitled if no orders of Moratorium would have been passed under Section 14 of the Code. The Corporate Debtor had no right to claim the margin money after the invocation of Bank Guarantee.

In the circumstances, as stated above, we are the considered opinion that Appeal deserves to be partly allowed and the direction of the Adjudicating Authority 'to release the margin money, i.e. Rs.51, 27,591/- kept in fixed deposit for issuance of Bank Guarantee, which was utilized by the invocation of bank guarantee on 27th December 2018 by the beneficiary' is set aside. No order as to costs.

Case Review: Appeal deserves to be partly allowed.

National Company Law Appellate Tribunal (NCLAT)

Rita Kapur

Appellant (s)

Vs.

Invest Care Real Estate LLP & Ors.

Respondent (s)

Company Appeal (AT) (Insolvency) No. 111 of 2020

Date of Order: 02nd September, 2020

Once the 'Debt' is converted into "Capital" it cannot be termed as 'Financial Debt' and the Appellant cannot be described as 'Financial Creditor'.

In the present case the Appellant filed Appeal under Section 61 read with Section 7 of the Insolvency and Bankruptcy Code, 2016 against the Impugned order dated 26.11.2019 passed by the Adjudicating Authority.

Facts of the case

The Appellant has given loan of Rs.40 Lakhs to the Respondent No.1 – Invest Care Real Estate LLP, and the same was to be repaid in four instalments but neither the principal amount nor interest were paid to her. Her grievance is that the 'loan' has been converted into 'equity' on 25.03.2014. She has also averred that there is irregularity in purchase of Non-judicial e-Stamp paper of dated 05th June, 2013 and amount paid from the account of Respondent No.1. It was further alleged that the loan has been converted into equity, which is against the terms and conditions of 'Loan Agreement' dated 09.07.2013.

Appellant has also disputed that how her "Loan" can be converted into "Equity" based on a certified copy of the Resolution signed by two 'Designated Partner' and not by other partners. She has also alleged of pre-planned acts to deceive and defraud and has alleged illegality.

She wants that CIRP be commenced immediately and the order of the Adjudicating Authority be set aside.

The Respondent submitted that the Appellant is not a Financial Creditor rather a related party and hence in no way she can be treated as a 'Financial Creditor' etc.

NCLAT observed that the provisions of Section 7 of the I&B Code, 2016 provides for initiation of the CIRP by 'Financial Creditor; only and

that too, if there is a 'Debt' and 'Default'. So, the first question is the Appellant must be a 'Financial Creditor'.

While taking into the consideration section 5[7], 5 [8] and section 7 of the IBC , and facts of this case NCLAT observed that it is latently & patently clear that once the 'Debt' is converted into "Capital" it cannot be termed as 'Financial Debt' and the Appellant cannot be described as 'Financial Creditor'.

Hence, the grievance of the Appellant does not fall under the provision of 'Insolvency and Bankruptcy Code, 2016'. Accordingly, the Appeal is devoid of merits and the same is hereby dismissed. However, the Appellant is at liberty to approach an appropriate forum for seeking necessary relief(s) for redressal of grievances, of course, in accordance with Law.

Case Review: Appeal dismissed.

National Company Law Appellate Tribunal (NCLAT)

Park Energy Pvt. Ltd.

Appellant (s)/ Corporate Debtor

Vs.

Syndicate Bank & Ors.

Respondent (s)

Company Appeal (AT)(Insolvency) No.270 of 2020

Date of Order: 24th August, 2020

The onus of proof of default on the part of Corporate Debtor lies on the Financial Creditor and it has to demonstrate that default has occurred on account of failure on the part of Corporate Debtor to discharge its liability.

Facts of the Case

The Corporate Debtor operates and develops power generation assets in India.The Corporate Debtor has set up a 2 x 150 MW Thermal Power Plant, at Bhadreshwar Kutch, Gujrat at a total project cost of Rs. 1996.54 Crores. For the purposes of setting up the Power Plant, the Corporate Debtor had obtained a term loan aggregating to Rs. 1497.40 Crores, which included Rs. 998.26 Crores from REC Limited; Rs. 252.74 Crores from Punjab National Bank and Rs. 246.40 Crores from State Bank of India. The promotors of the Corporate Debtor had invested towards equity an amount of Rs. 499.14 Crores towards the Power Plant. In order to meet theworking capital requirement of the project, the Corporate Debtor entered into a Working Capital Consortium Agreement dated December 17, 2015 (the "WCCA") with Punjab National Bank (as the lead Bank), Indian Bank, Vijaya Bank, State bank of Hyderabad and Syndicate Bank (RespondentNo.1).

The Appellant submits that Respondent No. 1 had sanctioned a total of Rs. 31 Crores by way of Fund based limits and Rs. 105 Crores by way of Non-fund based limits. After formation of the PNB Consortium lenders, Respondent No. 1 had unilaterally reduced its sanctioned facilities. Moreover, Respondent No. 1 refused to release even the sanctioned limits and reduced the non-fund based limits from Rs. 105 Crores to 98 Crores vide their sanction letter dated July 29, 2017, and thereafter with effect from December 05, 2018, Respondent No. 1 had reduced its cash credit (fund based facilities) from Rs. 31 Crores to Rs. 7.92 Crores. Furthermore, Respondent No. 1 did not release funds from sanctioned nonfund based limits. Furthermore, the Letter of Credit ("LC") Limit was reduced to nil from Rs. 74 crores, so as the Bank Guarantee limit.

The Respondent No.1 – Syndicate Bank (Financial Creditor) has claimed the total amount of Rs. 32,22,50,6660.16 as outstanding against the Appellant (Corporate Debtor) as on 29.07.2019. The Respondent No.1 – Syndicate Bank (Financial Creditor) has filed an application under Section 7 on 30.07.2019 and the Ld. Adjudicating Authority passed an order dated 27th January, 2020 which is impugned in this. Corporate Debtor had been subjected to restructuring of credit facilities as well as an inter-creditor agreement and a True Retention Agreement account. In terms of the aforesaid agreements, the Corporate Debtor's deposit would go to the TRA account and before the Corporate Debtor could repay back the financial debt to its various lenders, it had to seek the approval of the Lead Bank i.e. Punjab National Bank. The Lead Bank had insisted that the financial creditor would have to issue

a Letter of Credit before it would permit the release of payment by the Corporate Debtor, but the financial creditor refused to issue such a LoC even after the various repeated requests.

NCLAT held as Follows

After going through the whole case NCLAT observed that non-release of money out of the entire collection of Corporate Debtor does not render the Corporate Debtor liable for default who has performed his part of the contract. The fault lies somewhere else. In the inter-se dispute of Financial Creditors, Respondent No. 1 may have faced discrimination as regards release of money from TRA Account but that would not render the Corporate Debtor accountable for default.

The Corporate Debtor having performed his part of the contract by placing its entire collection in the Trust Retention Account (TRA) in accordance with the terms of the agreement cannot be said to be in 20 Company Appeal (AT) (Insolvency) No. 270 of 2020 default. Release of the amount due to Respondent No. 1 in terms of the 'Punjab National Bank Consortium Inter-se Agreement' read together with Trust Retention Account (TRA) Agreement is an in house contractual arrangement interse the Creditors for which the Corporate Debtor cannot be blamed. Initiation of Corporate Insolvency Resolution Process in the facts and circumstances, as noticed, cannot be appreciated as the same falls foul of the mandate of Section 7 of the I&B Code. Viewed thus, the impugned order cannot be supported.

Case Review: The Appeal, therefore, needs to be allowed.

Supreme Court of India

Babulal Vardharji Gurjar

Appellant (s)

Vs.

Veer Gurjar Aluminium Industries Pvt Ltd

Respondent(s)

Civil Appeal No. 6347 of 2019

Date of Order: 14th August, 2020

FACTS

On 22.12.2007, the lender banks viz., Corporation Bank, Indian Overseas Bank and Bank of India sanctioned and extended various loans, advances and facilities to the corporate debtor. The corporate debtor executed various security documents in favour of the lender banks in the years 2008 and 2009, including those of equitable mortgage against the facilities so obtained. The Corporation Bank proceeded to rephrase/enhance the facilities to the corporate debtor from time to time and lastly on 27.08.2010 where for, various additional security documents were executed by the corporate debtor.

The corporate debtor having defaulted in payment of the amount due against such loans, advances and facilities, its account with Corporation Bank was classified as Non-Performing Asset on 08.07.2011 and that with Indian Overseas Bank was classified as NPA on 05.08.2011.

Issues Involved

Whether the application made by respondent under Section 7 of the Code is within limitation?

Supreme Court Held as Followa

The application made by the respondent No. 2 under Section 7 of the Code in the month of March 2018, seeking initiation of CIRP in respect of the corporate debtor with specific assertion of the date of default as 08.07.2011, is clearly barred by limitation for having been filed much later than the period of three years from the date of default as stated in the application. In the interest of justice, we also make it clear that the observations in this judgment are relevant only in regard to the issue determined that the application under Section 7 of the Code is barred by limitation and not beyond. In other words, nothing in this judgment shall have bearing on any other proceeding that shall be dealt with on its own merits and in accordance with law.

Case Review: Appeal allowed.

National Company Law Appellate Tribunal (NCLAT)

M/s Allied Silica Limited

Vs.

M/s Tata Chemicals Limited

Company Appeal (AT), Insolvency No. 1522 of 2019

Date of Order: 10th August, 2020

Sec 9 of IBC-Application for initiation of corporate insolvency resolution process by operational creditor.

In the present case the Appellant (Operational Creditor) and the Respondent (Corporate Debtor) entered into a Business Transfer Agreement (BTA) on 07April 2018 for the transfer of undertaking on a Slump Sale basis under Section 2(42C) of the Income Tax Act, 1961 at a lump sum amount of Rupees One Hundred Twenty Three Cores only (Rs 123 Crores) as per the provisions of Business Transfer Agreement.

After due compliance and completion of the "Condition Precedent", relating to the transfer of Undertaking on Slump Sale, the Compliance notice was submitted to the Corporate Debtor on 04 June 2018, and same was acknowledged by the Corporate Debtor. A satisfaction letter was issued to the Operational Creditor on 09 June 2018. Slump sale was consummated on 18 June 2018 and the possession of Undertaking was handed over by the Operational Creditor to the Corporate Debtor on the same day.

OC issued invoice Dt.18 June 2018 of Rs 123 Crores in respect of the consideration for the transfer of Undertaking and the Corporate Debtor made part payment of Rs 65, 19, 00,000 and balance outstanding consideration, as on 18 June 2018, remained Rs. 58 Crores. Appellant filed an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 before National Company Law Tribunal, Mumbai Bench but same was rejected on dated 15th November 2019 mainly on the ground of pre-existing dispute. Hence, present appeal.

NCLAT Held as Follows

On perusal of the documents submitted by the parties, it is evident from the Letter dated 08.01.2019 which is signed by both the parties, that the Applicant had failed to complete the Tranche II Conditions Precedent as a result of which the Corporate Debtor had exercised its right under the BTA and set-off and adjusted the Tranche III payment of Rs 6, 00, 00,000/-. It is further evident from the Letter of Corporate Debtor dated 06.03.2019, wherein the Corporate Debtor had demanded a refund from the Applicant of Rs 15.01 Crores along with interest for violation of terms of Letter dated 08.01.2019 by the Applicant, in the same Letter the Company Appeal (AT) (Insolvency) No. 1522 of 2019 18 of 18 Corporate Debtor had also disputed that the Applicant is in noncompliance of the BTA and therefore is not liable to receive Tranche II and Tranche III payment under the BTA. These disputes by the Corporate Debtor are raised before the receipt of demand notices. Further, it is also pertinent to note that the Corporate Debtor had replied to the Demand Notices within the statutory period of 10 (Ten) days raising disputes with regards to the claim of Applicant and noncompliance of the BTA by the Applicant. Therefore, in the facts and circumstances of the present case, we are satisfied that there is a plausible contention in the defence raised by the corporate debtor which requires further investigation and that the alleged "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence.

Case Review: Appeal dismissed.

National Company Law Appellate Tribunal (NCLAT)

Committee of Creditors of Educomp Solutions Ltd.

Appellant (s) /Corporate Debtor

Vs.

Ebix Singapore Pte. Ltd. & Anr.

Respondent (s) /Resolution Applicant

Company Appeal (AT), Insolvency No. 203 of 2020

Date of Order: 29th July, 2020

Withdraw of Resolution plan is not permissible once it's submitted to NCLT

In the present case the Appellant (Committee of Creditors of Educomp Solutions Ltd., through State Bank of India) has filed present appeal being aggrieved with the impugned order dated 02.01.2020 in Company Petition (IB) No. 101(PB)2017 passed by the NCLT , New Delhi. The Resolution Applicant filed approved Resolution plan(Approved by COC) before the NCLT but during the pendency of the matter Resolution Applicant filed an application for the withdraw of the Resolution plan due to initiation of SFIO Investigation of the corporate debtor.

The Adjudicating Authority by means of the Impugned Order had allowed the 1st Respondent / 'Successful Resolution Applicant' to withdraw its 'Resolution Plan' (approved 'Resolution Plan') which was approved by a majority of 75.36% of the 'Committee of Creditors' and pending approval before the Authority as per Section 31 of the 'I&B' Code.

NCLAT Held as Follows

Once the resolution plan is approved by the COC and thereafter submitted to the NCLT for its approval, then NCLT is to apply its judicial mind to the 'Resolution Plan' so presented and after being subjectively satisfied that the plan meets or does not meet the requirements mentioned in Section 34 of the Code may either approve or reject such plan. It was further held that the NCLT has wrongly allowed the application for withdrawal of the Resolution Plan.

Case Review: Appeal allowed.

NCLT, Ahmedabad Bench

Fitcast Founders & Engineers Pvt. Ltd.

Appellant (s)

Vs.

Rjat Mukherjee RP for Shaifali Rolls Ltd & Ors

Respondent (s)

IA 240 of 2019 in IA 352 of 2019 C.P.(I.B) No. 162/NCLT/AHM/2018

Date of Order: 22nd July, 2020

Section 31 read with Section 60(5) of IBC, 2016- Approval of resolution plan - Relaxation of time frame due to COVID-19 and the relaxation of time frame of payment as well as completion of Resolution Plan due to nationwide lockdown because of COVID-19.

In the present case Respondent no. 3 in consortium submitted a resolution plan for the revival of the Corporate Debtor, and this very Adjudicating Authority approved the plan on 20.11.2019 with the specific directions that the Resolution Applicant is required to comply with monthly activities and has to submit cash flow statement and stock audit to the Monitoring committee duly appointed by this Adjudicating Authority. Resolution Applicant duly submitted Audit Reports and cash flow statement to Monitoring committee till February, 2020. On 25.03.2020 Government of India declared nationwide lockdown due to spread of Novel Corona Virus-19, which was time to time extended till 31.05.2020. Due to the sudden lockdown operations of the company was closed for the safety reasons.

As per the resolution Plan, the resolution applicant is required to make payment of Rs. 225 lakhs to FC by 20.05.2020. The Resolution Applicant requested to increase the overall timelines for completion of entire Resolution plan by four months i.e. from 20.11.2020 to 20.03.2021. Further, request to exclude the nationwide lockdown period from the resolution plan caused due to COVID-19 which starts from 24.03.2020 and extension till operations reach normalcy which shall not be less than 4 months for the proper and beneficial resolution of the company was also made by the Resolution Applicant. There was meeting held on 15.06.2020, where all concerned parties made a deliberation and arrived into consensus unanimously and mutually to extend the timelines.

NCLT Held as Follows

Taking into considerations all the facts and circumstances and also in view of RBI Guidelines, the application so filed for relaxation

of time frame of payment as well as completion of Resolution Plan as per meeting dated 15.06.2020 deserves to be allowed and said consensus shall be binding to all concerned parties as that have agreed for such proposal of the Resolution on 15.06.2020.

Case Review: Appeal Allowed.

NCLT, Kolkata Bench

SBER Bank

(Financial Creditor)

Deputy Director, Enforcement Directorate, Delhi

(Respondent)

Vs

Varrsana Ispat Limited through Anil Goel as Liquidator

Applicant (s)/ Corporate Debtor

I.A.(IB) No. /KB/2020 in C.P. (IB) No. 543 / KB/2017

Date of Order: 22nd July, 2020

An application u/s. 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 and an application u/s 60(5) and 32A of the Insolvency & Bankruptcy Code, 2016.

In the present case vide order dated 16/11/2017 CIRP was initiated against the corporate debtor. For want of a resolution plan, the CD was ordered to undergo Liquidation vide order dated 06/08/2019. While CIRP was initiated RP reported that there is FIR against one of the Corporate Debtor's group company, REI Agro Limited and its promoter/directors by CBI, BS & FC dated 26/10/2015 u/s 120-B, 420, 467, 468 and 471 of the IPC.Charge sheet dated 02/08/2017 was filed against REI Agro Limited and its promoter/directors wherein it was alleged that they had cheated the consortium of banks and committed offences punishable u/s 120B r/w 420, 467, 468 and 471 of the Indian Penal Code.

Provisional Attachment order No. 08/2017 dated 10/07/2017 was issued by the Respondent wherein the assets owned by the Corporate Debtor were attached alleging the assets acquired to be proceeds of crime as per Section 2(1)(u) of the Prevention of Money Laundering Act, 2002, considering that the Applicant Company was one of the group companies of REI Agro Limited.

The Ld. RP knowing the attachment had filed an application before this Adjudicating Authority for de-attachment of assets of the Corporate Debtor but same was dismissed. In fact, RP went into appeal upto Supreme Court against the said order but it was dismissed there also. RP filed present application under newly inserted Section 32A of the 'I & B Code' seeking permission to sell the assets of the CD which were attached by the respondent/ED.

NCLT Upheld as Follows

It was held that liquidator can proceed with the sale of the assets even if it is under attachment by the respondent, to continue the time bound process of liquidation under the provisions of the Code and upon completion of the sale proceedings the buyer can take appropriate steps to release the attachment. It appears to us that the attachment and confiscation of properties of a CD undergoing CIRP or liquidation become void under section 32-A of the Code.

Case Review: Appeal is allowed.

NCLT, Bengaluru Bench

Asset Growth Fund and Ors.

Appellant (s)

Vs

CMRS Projects Pvt Ltd C.P. (IB) NO 233/ BB/219

Respondent (s)

C.P. (IB) NO 233/BB/219

Date of Order: 23rd June, 2020

In the present matter the Corporate Debtor was engaged in the business of real estate and property development. Corporate Debtor approached various Financial Creditors to raise

funds for the project and an amount of Rs. 13, 00, 00,000/-was disbursed to the Corporate Debtor. The Financial Creditors had entered into a Trust Deed for the aforementioned amount lent.

The Corporate Debtor failed to pay back the amount and the debt fell due on 24.08.2018. Various settlement talks and some significant amounts were paid back towards the debt by the Corporate Debtor. Corporate Debtor and Financial Creditor entered into the One Time Settlement to the tune of Rs.14,50,00,000/-. But unfortunately due to COVID-19 Corporate Debtor is unable to adhere to settlement proposal and revised the payment term, which was in line with the earlier proposal to tune of Rs. 14,50,00,000 but the timeline of payment was varied. The Corporate Debtor is commercially solvent, and is currently undertaking various projects.

The Corporate Debtor has 17 employees whose monthly salaries are to the tune of Rs. 3,00,000/-, in addition to which he has engaged contract workers, who are migrants from various places, who have gone back to their native due to Covid-19. The Corporate Debtor has 110 homebuyers and other stakeholders on the line.

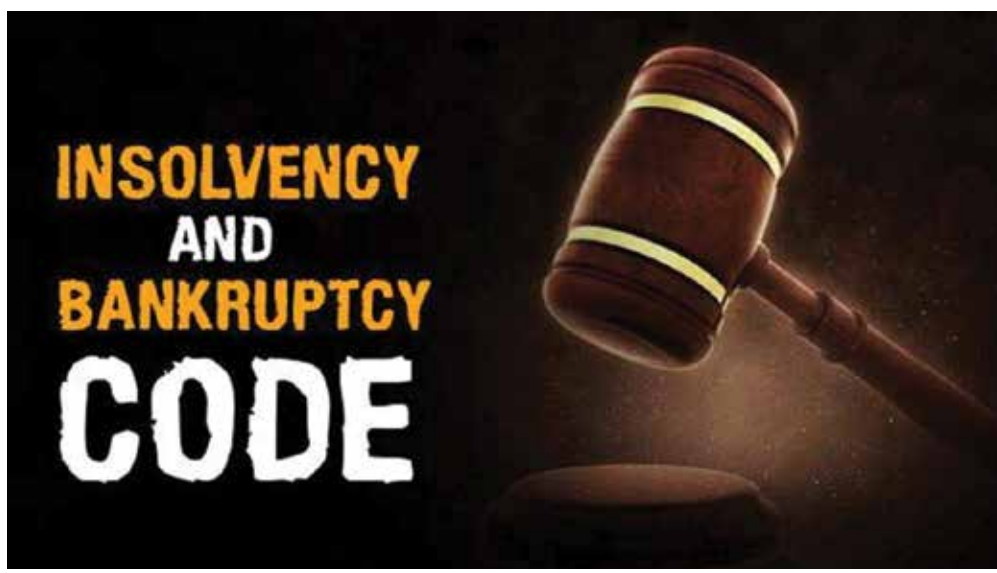
Issues before the tribunal

- Whether the initiation of CIRP is the only effective alternative available to the petitioner during this difficult time arising out of COVID -19?
- Whether the parties can be given one more chance to find a solution?

NCLAT Upheld as Follows

The Hon'ble Tribunal termed the initiation of CIRP proceedings at this instant would be a 'civil death' to the CD. This is considering the economic situation due to the pandemic and the continued payment of wages and other expenses as the company is solvent. The Tribunal further observed that it must be satisfied on the rounds for the initiation of such Petition by taking into consideration the object of the Code, financial status of the CD, whether the CD is a going concern, the effect of the initiation of CIRP on stakeholders and public at large. These conditions are to be considered, especially in this severe economic condition of the pandemic. It was further observed that the issue must be seen in a positive way and the Petitioner cannot first initiate the CIRP and then later resolve the issues during CIRP proceedings.

The initiation of CIRP of the Corporate Debtor is not justified and parties must resolve the issue considering the prevailing economic pandemic situation .After exhausting all remedies including the proposed settlement, the Financial Creditors can invoke the provisions under the IBC. The Financial Creditors are required to re-consider the settlement proposal due to the severe economic conditions and that the Corporate Debtor is in going concern. The Respondent was directed to extent full cooperation to settlement efforts.



IBC News

NCLAT to decide on Aircel spectrum sale

The Supreme Court on Friday said the National Company Law Appellate Tribunal (NCLAT) will decide whether lenders can sell spectrum rights of bankrupt telecom operator Aircel Group under the ongoing insolvency resolution process.

A two-judge bench headed by Justice S. Abdul Nazeer said the decision will be limited to Aircel, as the National Company Law Tribunal (NCLT) has already approved UV Asset Reconstruction Co. Ltd's resolution bid for the company. Two other bankrupt telcos—Reliance Communications Ltd (RCom) and Videocon Telecommunications Ltd—are at different stages of the resolution process.

On 9 September, Aircel's lenders had filed an application urging the apex court to modify its order that NCLT will look into the sale of spectrum held by bankrupt telcos. In its application, Aircel requested the court to allow NCLAT to take decisions related to spectrum sale as nothing was pending before NCLT. "We consider it appropriate that the aforesaid various questions should first be considered by the NCLT…Let the question be decided within the outer limits of two months," the Supreme Court said in its 1 September order in the adjusted gross revenue (AGR) case. SC had allowed telecom operators Vodafone Idea Ltd, Bharti Airtel Ltd and Tata Teleservices Ltd to pay their AGR dues in 10 years. However, the court did not decide whether spectrum could be sold under the insolvency process. While lenders argued that spectrum was an asset and an important part of the insolvency resolution process to recover dues, the DoT countered that it could not be sold as it was national property.

Source: *Live Mint Bureau, September 25, 2020*

Supreme Court rejects SBI plea for resuming IBC case against Anil Ambani

The Supreme Court on Thursday rejected a petition by State Bank of India, the nation's largest lender, to allow a personal bankruptcy

case against tycoon Anil Ambani to resume.

A three-judge panel headed by Justice L Nageswara Rao ruled that the bankruptcy case against the former billionaire will remain suspended and directed the Delhi High Court to decide on Ambani's challenge to provisions of India's insolvency law.

The case is among the first high-profile ones after rules were set for personal bankruptcy last year. Bankers and investors in stressed assets are keenly watching the case as its final outcome may decide the power of lenders in taking action against founders who guaranteed repayments of loans by companies that later went bankrupt.

"To declare a man as bankrupt has serious consequences," Harish Salve, the lawyer representing Ambani said in court. The argument by lenders citing tens of billions of rupees of loans was "delightful rhetoric," Salve said.

A bankruptcy tribunal had in August agreed to hear State Bank's petition to initiate proceedings against Ambani, who guaranteed loans worth about $160 million to his two telecommunication companies. The tribunal appointed a bankruptcy administrator to assess SBI's claims. Ambani challenged the case in Delhi High Court, which suspended the bankruptcy case proceedings against him in order to decide on his broader challenge to certain parts of the country's insolvency law.

The state-controlled lender appealed to the top court saying such a suspension of bankruptcy case was not legal and would frustrate the provisions of law.

Source: *BS Bureau, September 18, 2020*

No insolvency proceeding for Covid-related default, Sitharaman places Bill in Rajya Sabha

Finance minister Nirmala Sitharaman on Tuesday introduced in the Rajya Sabha a Bill to replace an ordinance that was promulgated in June to suspend insolvency proceedings for up to one year against fresh Covid-related default from March 25. The move was aimed at providing breather to thousands of firms battered by the pandemic.

The Insolvency and Bankruptcy Code (Second Amendment) Bill, 2020, will be made into law once Parliament clears it and replace the Ordinance the validity of which expires in six months.

The government had sought to suspend invocation of three sections – 7, 8 and 10 — of the IBC for fresh default from March 25. These sections deal with the initiation of the insolvency proceedings by financial and operational creditors and corporate debtors. However, insolvency applications filed for default before March 25 are being entertained.

The cut-off date of March 25 (for filing insolvency application) also came as a relief for the lenders who had filed applications or intended to do so against stressed firms that had defaulted before the pandemic started to spread, in sync with the central bank's June 7, 2019, circular. According to this circular, a default case will have to be referred to the NCLT under the IBC if no other resolution plan is firmed up within six months.

However, as some analysts have pointed out, the breather will potentially hit financial and operational creditors hard and bleed their balance sheet, apart from temporarily depriving them of a credible mode of bad debt resolution.

Source: *FE Bureau, September 16, 2020*

IL&FS concludes stake sale in education biz; cuts consolidated debt by over Rs 650 cr

Cash-strapped IL&FS Group on Wednesday said it has completed sale of its 73.69 per cent stake in education business, held under Schoolnet India Ltd (SIL), to Falafal Technologies. Falafal Technologies Pvt Ltd (FTPL) has paid Rs 7.37 crore as equity value for shares of SIL held by IL&FS Ltd and IL&FS Employee Welfare Trust, in addition to taking over SIL's fund based and non-fund based financial debt of nearly Rs 650 crore, a release said.

FTPL has also agreed to a deferred consideration of Rs 6.29 crore payable within 18 months from closure. "The transaction provides positive equity value to IL&FS and resolves nearly Rs 650 crore of consolidated fund based and non-fund based financial debt, without any haircut to lenders," IL&FS Group said in the release.

SIL provides ed-tech services to K-12 schools and students through proprietary digital content, devices, platforms and solutions. The sale was completed pursuant to the approval granted by the National Company Law Tribunal (NCLT), Principal Bench, vide an order dated August 31, 2020, the Group said.

The stake sale in SIL will reduce operating cost for IL&FS Group by nearly 19 per cent, it said. IL&FS Group holds 73.69 per cent stake in SIL. SIL holds 80 per cent stake in IL&FS Skill Development Corporation (ISDC) and also has two wholly-owned subsidiaries – IL&FS Cluster Development Initiative (ICDI) and Skill Training Assessment Management Partners (STAMP). The Group said as part of the sale transaction, the businesses of ICDI and STAMP have also been transferred to SIL through a slump sale for a consideration of Re 1 for each company.

Transfer of debt of nearly Rs 27 crore in ICDI and STAMP forms part of the slump sale, it said. The shares of ICDI and STAMP have been transferred to IL&FS Ltd. SIL will continue to retain 80.01 per cent stake in ISDC which will become a step-down subsidiary of FTPL, the release said.

Source: *FE Bureau, September 9, 2020*

RBI constituted KV Kamath committee names 26 sectors for restructuring

The KV Kamath committee has selected 26 sectors which will require restructuring based on its analyses of financial parameters hit due to the economic crash caused by the Covid-19 pandemic. In its report the five member

committee said power, construction, iron and steel, roads, real estate, wholesale trading, textiles, consumer durables, aviation, logistics, hotels, restaurants and tourism, mining are among the sectors that will need restructuring. The committee selected five financial parameters related to leverage, liquidity, debt serviceability etc.

The financial parameters included total outside liability to adjusted tangible net worth, debt to EBIDTA, current ratio, debt service coverage ratio (DSCR) and average debt service coverage ratio (ADSCR) "Time is of essence at the present juncture. Considering the large volume and the fact that only standard assets are eligible under the proposed scheme, a segmented approach of bucketing these accounts under mild, moderate and severe stress, may ensure quick turnaround. To complete this task simplified restructuring for mild and moderate stress may be prescribed. Severe stress cases would require comprehensive restructuring," the committee said.

The RBI had formed a five member committee under the chairmanship of former ICICI Bank Chief Executive KV Kamath to make recommendations on the financial parameters to be considered in the restructuring of loans impacted by the Covid 19 pandemic. Other members of the committee are former State Bank of India executive Diwakar Gupta, current Canara Bank chairman TN Manoharan, consultant Ashvin Parekh and Indian Banks' Association (IBA) Chief Executive Sunil Mehta who was also a secretary to the committee. The committee will also scrutinize restructuring of loans above Rs 1500 crore. The term of the committee has been extended till June 30, 2021.

The committee has recommended sector-specific thresholds for each ratio in respect of 26 sectors to be taken into account while finalizing the resolution plans. In respect of other sectors where certain ratios have not been specified, the lenders shall make their own assessment keeping in view the contours, Reserve Bank of India said in a press release. The committee has recommended sector specific parameters which it said may be considered as guidance for preparation of resolution plan for a borrower in the specified sector. The plan has to be prepared based on the pre-Covid-19 operating and financial performance of the borrower and impact of Covid-19 on its operating and financial performance in the first and second quarter of this fiscal and to assess the cash-flows for this, next and subsequent years.

Source: *ET Bureau, Sep 08, 2020*

Supreme Court reiterates that corporate debtor cannot raise dispute after committee of creditors approve resolution plan

The Supreme Court has in a recent case of Karad Urban Cooperative Bank Ltd vs Swwapnil Bhingardevay and Others passed a Judgment dated 04-09-2020 and reiterated that once the #committeeofcreditors have approved a #resolutionplan, the #corporatedebtor cannot raise dispute/issue in that regard except in certain circumstances.

In this case, the Appellant Bank, Karad Urban Cooperative Bank Ltd, had initiated a corporate insolvency resolution process (CIRP) against M/s Khandoba Prasanna Sakhar Karkhana Ltd (the Corporate Debtor Company) under Section 7 of the #InsolvencyandBankruptcyCode 2016 (the Code) before the #NCLT Mumbai Bench. The NCLT admitted the Section 7 Application on 01-01-2018 and thereby, appointed an Interim Resolution Professional (IRP).

Thereafter, one, Mr. Jitendra Palande, was appointed as the Resolution Professional (RP) by the NCLT on 06-03-2018 based on the decision of the Committee of Creditors (CoC). The RP then issued an advertisement on 30-03-2018 inviting Expression of Interest (EoI), based on the decision of CoC. Meanwhile, the Director/Promoter of the Corporate Debtor Company challenged the Orders of the NCLT of 01-01-2018 and 06-03-2018, which related to appointment of IRP and RP, in the Bombay High Court by way of a Writ Petition. But the Bombay High Court eventually dismissed the Writ Petition.

On the other hand, the CoC had resolved to approve the Resolution Plan submitted by one, M/s Sai Agro (India) Chemicals (the Resolution Applicant) on 09-02-2019. The said decision/resolution was submitted by the RP before NCLT. At this stage, the Director/Promoter of the Corporate Debtor Company sought

permission of NCLT to file a resolution plan under Section 10 of the Code. But the NCLT dismissed the Section 10 Application of the Corporate Debtor and approved the Resolution Plan submitted by the Resolution Applicant, vide Order dated 01-08-2019. Being aggrieved, the Director/Promoter of the Corporate Debtor Company filed an appeal in NCLAT against the said NCLT Order dated 01-08-2019.

The NCLAT passed an Order dated 02-06-2020, whereby, the NCLT Order was set aside on the ground that there were material irregularities in the CIRP Process and that the Resolution Plan suffered from issues of viability and feasibility. Thus, NCLAT directed the NCLT to have the Resolution Plan re¬submitted before the CoC for re-consideration. Being aggrieved, the Appellant Bank filed an Appeal before the Supreme Court against the NCLAT Order dated 02-06-2020.

The Supreme Court made certain significant observations in this case which are given below:

1. That if the CoC has taken a conscious decision about the viability and feasibility of the Resolution Plan and has decided about whether the Corporate Debtor Company can be kept running as a going concern, and then the Adjudicating Authority cannot interfere with the decision of the CoC.

2. But the Corporate Debtor can raise the issue of viability and feasibility of the #ResolutionPlan only in certain circumstances, i.e. if the Resolution Plan did not take care of certain relevant facts about the Company. For instance, in this case the ownership and possession of the Ethanol Plant of the Company was the subject-matter of dispute in another case. Therefore, it was likely that the Ethanol Plant and Machinery would not be eventually available to the Resolution Applicant. So, in case, the Resolution Plan did not take care of the said contingency, only then the Corporate Debtor Company could raise the issue of viability and feasibility of the Resolution Plan.

3. But the Resolution Applicant and the CoC had full knowledge about the aforesaid dispute and outcome in the said matter, where the possession of the Ethanol Plant and Machinery was handed over to one, M/s Sarvadnya Industries Pvt. Ltd. Thus, it implies that the CoC had taken a conscious decision to approve the Resolution Plan, after properly examining the question of viability and feasibility of the Resolution Plan.

4. Further, the total pay-out quoted by the Resolution Applicant in the Resolution Plan was Rs. 29.74 Crores, which was higher than the liquidation value calculated by the RP i.e. Rs. 13.53 Crores. This implies that the employees would be paid 100% of their dues, the statutory dues would be cleared 100% and the financial creditors in CoC would be paid 60% of their dues, etc. Thus, it could not be established that any unlawful benefit could have accrued to the Resolution Applicant or there was any mala fide intention behind quoting a sum higher than the liquidation value.

Therefore, the Apex Court set aside the NCLAT Order dated 02-06-2020 and upheld the NCLT Order dated 01-08-2019 on the ground that there were no material irregularities in the CIRP Process and that the Corporate Debtor Company could not have raised the dispute after the CoC had approved the Resolution Plan.

Source: *The Indian Lawyer, September 5, 2020*

Forensic audit finds fraudulent transaction worth Rs 14,000 crore in DHFL

An investigation carried out by Grant Thornton into the affairs of Dewan Housing Finance Corporation Limited has unearthed fraudulent transactions.

The preliminary estimation included in the application places the monetary impact of the concerned transactions at approximately Rs 14,046 Crores, as being the amount outstanding in the books of the Company as on June 30, 2019 and additionally Rs 3,348 Crores being the amount considered as due and outstanding towards notional loss to the Company on account of charging lower rate of interest to certain entities referred to in the Application as the Bandra Book Entities," the company said in a stock exchange filing.

The Administrator of Dewan Housing Finance Corporation Limited, appointed under the IBC Code had appointed Grant Thornton to conduct investigation of the affairs of the Company. As per the report prepared by the transaction auditor, the concerned transactions occurred during Financial Year 2006-2007 to 2018-19.

Based on the Transaction Auditor's report, the application has been filed with the NCLT, Mumbai against 87 respondents, including Kapil Wadhawan, Dheeraj Wadhawan, Township Developers India Ltd, Wadhawan Holdings Private Limited, Dheeraj Township Developers Private Limited, Wadhawan Consolidated Holdings Pvt. Ltd., Wadhawan Global Hotels & Resorts Pvt. Ltd, Wadhawan Lifestyle Retail Pvt. Ltd. and certain others entities as reported by the transaction auditor. The Application has been filed before the NCLT under Section 60(5) and Section 66 of the Code on August 30, 2020.

Earlier, on August 23 Dewan Housing Finance Corporation Ltd posted a net profit of Rs. 70.1 crore in the quarter ended June 30, 2020 but its auditors had once again flagged that its ability to remain a "going concern" will depend on its resolution process.

"The company has accumulated losses exceeding the share capital and reserves and its net worth has been fully eroded; and it is now under Corporate Insolvency Resolution Process (CIRP)," the auditors KK Mankeshwar and Co noted in their comments on the first quarter results of the housing finance company. DHFL became the first financial sector company to be taken into the corporate insolvency process in November last year.

Source: *The Hindu BL, September 03, 2020*

No corporate insolvency proceedings once debt converted into capital: NCLAT

The National Company Law Appellate Tribunal (NCLAT) on Wednesday said that insolvency proceedings cannot be triggered on the basis of debt which has been converted into capital such as equity of a company.

The appellate tribunal also said that any investment cannot be "financial debt" and the provisions of Section 7 of the Insolvency & Bankruptcy Code provide for initiation of CIRP by a financial creditor only and that too, if there is "debt" and "default". The observations from a two-member NCLAT bench came as it upheld an order of the National Company Law Tribunal (NCLT), which on November 26, 2019, had dismissed the plea by an individual Rita Kapur seeking initiation of insolvency proceedings against Invest Care Real Estate LLP.

She had claimed that she was a financial creditor of the company on the basis of the investment in the firm, which had alleged defaulted her repayment and converted loans into equity. Citing Section 7 of the Code, the appellate tribunal said that it is latently and patently clear that once the 'debt' is converted into 'capital' it cannot be termed as 'financial debt' and the appellant cannot be described as 'financial creditor'.

Accordingly, the appeal is devoid of merits and the same is hereby dismissed, the NCLAT said in the order. However, the appellate tribunal also granted the appellant liberty to approach an appropriate forum for seeking reliefs for redressal of grievances.

Kapur had granted a loan of Rs 40 lakh to Invest Care Real Estate LLP, which was to repaid in four instalments. According to her, she has not been paid either the principal amount or interestand her grievance isthat the loan was converted into equity on March 25, 2014. This was against the terms and conditions of loan agreement dated July 9, 2013, she had submitted. In Care Real Estate LLP, her late husband had also invested Rs 1 crore and was not repaid.

She claimed to be a 'financial creditor' and moved the NCLT under Section 7 seeking to initiate insolvency proceedings against Invest Care Real Estate LLP. The plea was rejected by the NCLT.

Source: *BS Bureau, September 2, 2020*

SC allows 10 years for staggered payments of AGR dues, telcos to pay dues on Feb 7 annually

The Supreme Court has allowed 10 years for staggered payment of adjusted gross revenue (AGR) dues. The court also observed that the

payment of annual instalment to be made payable, otherwise, contempt proceedings will begin. Every year by 7th February, payments have to be made. While on the issue of whether spectrum could be subject to insolvency proceedings, the top court declined to decide and asked NCLAT to decide whether the spectrum of insolvent telecom companies can be sold in insolvency proceedings. A bench of Justices Arun Mishra, S Abdul Nazeer and MR Shah pronounced the verdict. Telecom companies have to pay AGR dues along with interest and penalty which is estimated to be around Rs 1.6 lakh crore.

Out of Bharti Airtel's nearly Rs 43,000 crore total dues, the company has paid nearly Rs 18,000 crore, Vodafone Idea has paid a total of Rs 7,854 crore to DoT towards the AGR dues, against its total AGR dues of around Rs 58,000 crore. While, total AGR dues for Tata Teleservices, as per the DoT, stands at Rs 16,789 crore. Out of which the company has Rs 4,197 crore so far.

Source: *FE Bureau, September 1, 2020*

Out-of-court M&A deals set to pick up pace on IBC suspension

India may see more out-of-court merger and acquisition deals for distressed assets with the government suspending the insolvency and bankruptcy process for a year in view of the covid-19 crisis, and with banks under pressure to resolve the bad loans issue, while stretched public finances and the need to revive growth will push the government to seek more divestment options, said advisory Alvarez and Marsal (A&M) in a report titled, Deal Making During Crises: The Indian Experience.

The report said the crisis will also see technology companies with healthy balance sheets making opportunistic acquisitions at bargain rates. M&As are likely to be seen through sale of non-core businesses, restructuring or deleveraging, besides consolidation and capital raising in financial services firms, including non-bank lenders.

"The earlier crises, such as the 2008 recession and dotcom crash, were majorly financial in nature, which involved loss of investor confidence and fall in demand. The supply side was impacted later. This is a health crisis, which has first led to a breakdown of the supply chain and then hit the demand side," Nandini Chopra, managing director, A&M India, said. The earlier crises were predictable as economies were likely to bounce back once investor confidence was back, she said.

"However, the current crisis is extremely unpredictable due to the impact and duration of the pandemic. Also, there is a chance that the consumption patterns may change for goods post-covid which makes the recovery of certain sectors uncertain," Chopra said.

According to A&M, the suspension on fresh insolvency proceedings will reduce the quantum of distressed M&As from the corporate insolvency resolution process under the Insolvency and Bankruptcy Code (IBC) for the short term. However, it also presents an opportunity for promoters and special situation funds to opt for a one-time settlement and negotiate with banks or markets to raise debt at reasonable rates.

Source: *Live Mint Bureau, September 1, 2020*

Home-buyers cannot invoke insolvency process to recover RERA awards: NCLAT

The National Company Law Appellate Tribunal (NCLAT) has ruled that home-buyers cannot drag realty companies through the insolvency process for recovering monies awarded to them by a real estate regulator.

The NCLAT ruled that a home-buyer cannot be treated as a financial creditor when the real estate company is unable to honour a decree awarded by the State-level Real Estate Regulatory Authority (RERA). Home-buyers need to take recourse to the civil law to recover the money.

Prashant Thakur, Director & Head – Research, ANAROCK Property Consultants, said the NCLAT's observation is in line with the 2019 amendment that only a minimum of 100 buyers or 10 per cent of all home-buyers in a project (whichever is lower) can file for bankruptcy.

"While the pros and cons of its impact on home-buyers and developers are debatable, the caveat of a minimum 100 home-buyers may prevent

developers from being unfairly dragged into insolvency by just one or two individuals. In some cases, vested interests may lead to work getting stopped in a project, thus affecting other home-buyers negatively. In some cases, there has also been misuse by some home-buyers of the sanctioned rights," Thakur told BusinessLine.

On the flipside, it may affect genuine home-buyers in projects where the builder is delaying work. These home-buyers will have to form a group to file a case against the builder. This process may be long drawn and tedious.

The NCLAT gave the ruling in a case related to Ansal Properties wherein two house allottees were given a decree for Rs. 73 lakh by the Uttar Pradesh RERA. The home-buyers then took recourse to the IBC rules to recover the money. In March, the National Company Law Tribunal upheld the home-buyers' stand and even appointed a resolution professional for Ansal Properties. Now, with the NCLAT's ruling, the company will be handed back to its earlier management.

Source: *The Hindu BL, August 17, 2020*

IBBI comes out with 'Red Flag' document to aid insolvency professionals

The Insolvency and Bankruptcy Board of India has come out with a 'Red Flags' document that would serve as a guide to insolvency professionals (IPs) during the corporate insolvency resolution process (CIRP) and help detect if the corporate debtor has been subjected to any 'avoidance transactions'.

'Avoidance transactions' include preferential, fraudulent, undervalued and extortionate transactions.

The Insolvency and Bankruptcy Code (IBC) casts an obligation on the IP to file an application to the Adjudicating Authority (AA) for appropriate directions if such avoidance transactions were to be detected. This Red Flag document is an initiative aimed at educating the IPs and providing information on the likely red flags that could be encountered during CIRP.

MS Sahoo, Chairman, Insolvency and Bankruptcy Board of India (IBBI), told BusinessLine that Insolvency law frowns on alienations of property prior to the commencement of the insolvency proceeding, if it vitiates the sanctity of equitable distribution (pari passu treatment of the creditors of the same class) and maximisation of the value of the assets of a corporate debtor.

"Such alienations are called avoidance transactions. They vitiate insolvency proceedings. An insolvency professional is duty bound to file an application with the adjudicating authority seeking claw back of the value lost in avoidance transactions. The red flags will alert an insolvency professional if and where the corporate debtor has been subjected to avoidance transactions, and facilitate him pursue the matter further," he said.

Sumit Batra, Partner, India Law Alliance, a law firm, said that the Red Flag document released by IBBI not only highlights various potential instances which require investigation by IPs but will also provide assistance on vital aspects while highlighting the problems/flaws that were being faced by the IPs since the introduction of IBC in 2016.

"This document is of assistive value to the IPs and not a binding document per se as duties of IP as enshrined under IBC already provide an exhaustive list of duties to be performed by the IPs. Such a document only provides insight into the procedure to be followed based on the experiences of IPs who have been handling CIRP cases since the introduction of IBC," he said.

Sushmita Gandhi, Partner, IndusLaw, said that IBBI's new initiative of Red Flag document comes in as breather to IPs guiding them to identify and determine if corporate debtor has been subjected to Avoidance transactions — such as preferential treatment, fraudulent/ undervalued transactions.

Rajiv Chandak, Partner, Deloitte India, said that going forward, resolution professionals will have the benefit of referring to this document to explore potential risk areas on a case by case basis.

Source: *The Hindu BL, August 17, 2020*

For more details, please visit

https://www.ibbi.gov.in/uploads/legalframwork/72438989cca02508e20db38d5f18958e.pdf

Need to unshackle banks, insurance sectors from 'over protection', says Finance panel chief

Asserting that banking and insurance sectors remain "overprotected" in the economy, the 15th Finance Commission Chairman NK Singh on Monday made a case for Indian policymakers to visit these sectors with the same kind of liberalisation process as was seen in rest of the economy in 1991.

"When we opened up the Indian economy in 1991, one of the sectors that did not really receive fundamental reform initiatives by way of liberalisation and opening up was banking and insurance. It remains overprotected even till this day," Singh said in his virtual address to All India Management Association's Council on the impact of Covid-19 on Indian economy.

On ownership of banks, Singh highlighted that although the circumstances behind nationalisation is well-understood, the fact remains that the daunting objective of nationalisation has proved to be somewhat elusive and even opaque.

Recap plan

"If government is to have ownership of banks, we need to have far more decisive banking recapitalisation plan. Over next five years, huge public outlay will be needed to keep PSBs properly and adequately recapitalised considering the erosion in NPA," he added.

Singh also stressed the need to look at changes in rules and regulations around Insolvency and Bankruptcy Code (IBC) so as to deliver timely outcomes and much faster resolution of pending bank cases.

He highlighted that Indian policymakers are currently faced with an impossible trinity — Covid-19 pandemic, defence security and economic recovery.

Singh said that the current pandemic is an ongoing one and is far from over with the number of deaths being significant. He said that the last word is yet to be written on the stimulus package even as lot is being said about its inadequacy, timing etc.

"The government has kept its options and ammunitions for rollout at the right time. This is even as many in the government feel that the appropriate time to go full throttle is now. The government is cognisant of this this and it could act sooner than later," he said.

V-shaped recovery

On economic recovery, Singh said that he expects a V-shaped recovery in Q3 and Q4 largely due to base effect although for the overall fiscal year the growth trajectory would still be negative.

On health sector financing, he said that current aggregate spend of Centre and States on health sector was unacceptably low at less than 1 per cent of GDP.

"This needs to be significantly enhanced and thinking (in 15th Finance Commission) is in that direction," he said.

The skewed pattern in availability of health workers across the country within budget constraints is another distortion that needs to be addressed sooner or later, he added.

Source: *The Hindu BL, July 27, 2020*

Foreign entity can file plea for initiation of corporate insolvency resolution process under Section 9 IBC: NCLT

NCLT, Mumbai Bench has held in Forever Glory Trading Limited vs Global Powersource (India) Limited that in view of Section 3(23) of IBC, 2016, even a foreign entity can file a petition for initiation of corporate insolvency resolution process under Section 9 IBC. Further, "the objection that the Petitioner is a foreign entity and cannot file the present petition is not tenable in view of Sec 3(23(g) and 25) of IBC, wherein, the definition of person includes person resident outside India".

With respect to dispute regarding warranty of goods supplied the court of the view that "Sale of Goods Act defines the term warranty as stipulation collateral to the main contract. The communication regarding warranty claims cannot be set up as a dispute of notice as raised

by the Corporate Debtor, the claims of warranty shall separately be considered by LCB (holding company).

The order was passed by a bench of Member (Judicial) Suchitra Kanuparthi.

Source: *Bar and Bench, July 3, 2020*

Insolvency regular IBBI expands role of insolvency professional entities

Allows IPEs to provide support services to all IPs, not just to IPs who are its partners or directors

In these trying times, insolvency regulator IBBI has given an opportunity for Insolvency Professional Entities (IPEs) to grow into the likes of the Big 4 in coming days. It has now broadbased the role of IPEs, which are usually created by 3-4 insolvency professionals — by allowing them to provide support services to any insolvency professional (IP) and not just the IPs who are its partners or directors of such entities.

Prior to the latest change, the Insolvency and Bankruptcy Board of India (IBBI) regulations stipulated that an IPE, which can take the form of an LLP, company or partnership, can provide support services only to the IPs who are its partners or directors. Its role earlier was to be a support organisation for its partners/ directors. Now, this role has been expanded and the amended regulation reads that "the sole objective (of an IPE) is to provide support services to insolvency professionals".

This latest IBBI move is also seen as one way of encouraging IPEs to operate as multi-disciplinary firms where chartered accountants, cost accountants, lawyers and company secretaries could be brought under one roof.

MS Sahoo, Chairman, IBBI, told BusinessLine this will further professionalise the field. "Insolvency Professionals will have access to regulated support services," he said.

Earlier, those IPs who were not having their own IPEs had to go out to unregulated places to get support services. They were then required to pay huge fees. For instance, there was a recent IBBI Disciplinary Committee order that showed the IP fee in a case was Rs.1.5 lakh, but the support services fee paid to a foreign service provider was Rs.20 lakh per month.

Now, the IBBI wants IPs to go to a regulated place without wasting money unnecessarily. Insolvency Professional Entities can now provide support services not only to their own members, but to any other IPs as well. Those not having an IPE will have a better way of getting support services, an economy watcher said.

Harish Kumar, Partner, L&L Partners, a law firm, said this would facilitate functioning of IPs as the enhanced scope of services of such Insolvency Professional Entitites, as per the amended definition, would enable these entities to provide relevant support services to all IPs and not only those who are directors/ partners of such IPEs as per the erstwhile definition.

Abir Lal Dey, Partner, L&L Partners, said this would remove the difficulties faced by IPEs earlier. "This will make the IPE support services more competitive as the IPEs can serve insolvency professionals outside their organisations," he said.

Source: *The Hindu BL, July 02, 2020*

Monitoring & Inspection

Monitoring Policy of IIIPI

In pursuance to the provisions of IBC, 2016 (the Code) and subsequent guidelines of Insolvency and Bankruptcy of India (IBBI), the Indian Institute of Insolvency Professional of ICAI (IIIPI) prepared its Monitoring Policy to monitor the professional activities and conduct of professional members/insolvency professionals (IPs) for their adherence to the provisions of the Code, rules, regulations and guidelines issued there-under, the bye-laws, the Code of Conduct and directions given by the Governing Board. The policy was last revised on September 16, 2020.

The Monitoring Policy of IIIPI is a comprehensive document with provisions regarding Monitoring Framework, Use and Analysis of Information and Records, Storage of Information and Records, Evaluation of Members, and Review of the Monitoring Policy. In light of various provisions of the Code and guidelines of IBBI, the policy sets out the approach to:

1. Monitor and evaluate the performance of its professional members with regard to the assignments undertaken by them.
2. Collect information about the conduct of its professional members and their compliance with the Code and rules, regulations, guidelines, circulars issued thereunder.
3. Develop systems and procedures to facilitate monitoring of professional members.

The policy is applicable on all the professional members of IIIPI irrespective of the fact whether they have undertaken assignments under the Code or not. We follow three core principles in monitoring the IPs enrolled with IIIPI:

1. Monitoring of professional members shall be carried out with due regards to their privacy.
2. Monitoring of professional members shall be carried out on non-discriminatory basis.
3. Confidentiality of information received from professional members should be maintained during monitoring except when disclosure of information is required by the IBBI or by law.

Inspection Policy of IIIPI

The Inspection Policy of IIIPI lays down a broad framework defining concept, scope, objective and types of inspection that Inspection Department of IIIPI is authorised to carry out of its enrolled IPs pursuant to Section 208 (2) (c) of the Code and Monitoring Policy adopted by IIIPI. Inspection is an important regulatory function which needs to be carried out in a disciplined manner without infringing upon the rights of IP under inspection. The policy provides for two types of inspection namely Routine Inspection and Event Based Inspection. The inspection can be carried out in on-site/ off-site mode. The ultimate goal of conducting inspection is to improve the performance of IPs, increase the confidence of stakeholders at large in insolvency framework and regulatory regime and also to ensure better and more consistent outcomes for all stakeholders.

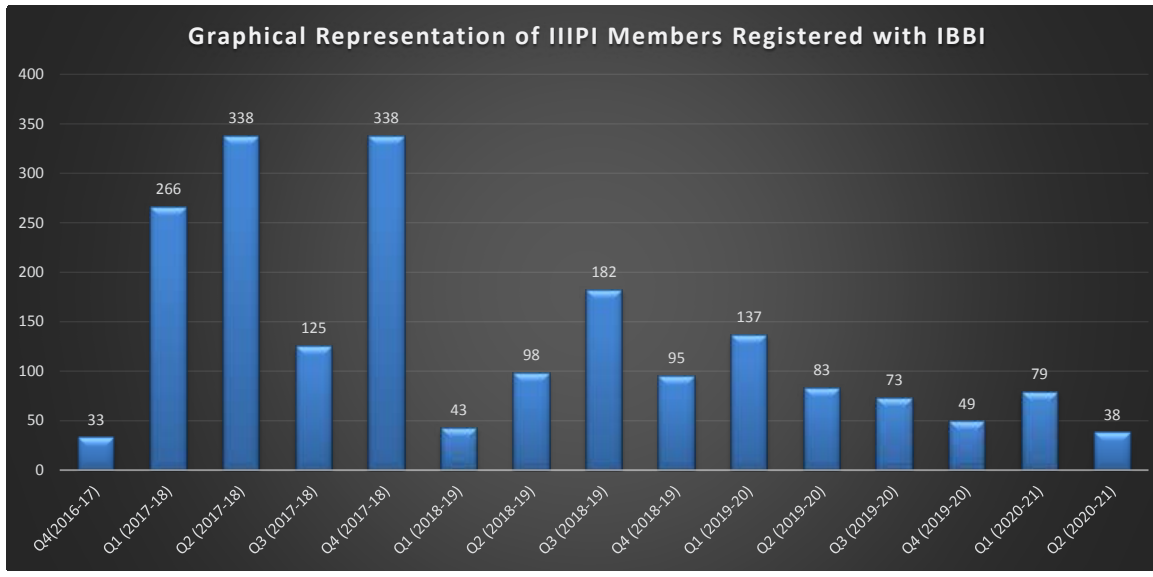
The professional members enrolled with IIIPI are required to report each assignment they undertake under the Code. For further details, please visit https://www.iiipicai.in/images/PDF/Revised-Monitoring-Policy.pdf

Monitoring Committee

Chairman Ms. Rashmi Verma

Members CA. Ajay Mittal
CA. Durgesh Kumar Kabra
CA. Rahul Madan

IIIPI Members Registered with IBBI as of September 2020: 1,977



Authorization for Assignment as of September 2020: 1,793

Particulars	No
AFAs approved	1387
AFAs Rejected	384
Under Process	3
Suspenstions	19
Total Applications Received	1793

Monitoring Data of Indian Institute of Insolvency Professionals of ICAI (IIIPI) as of September 2020

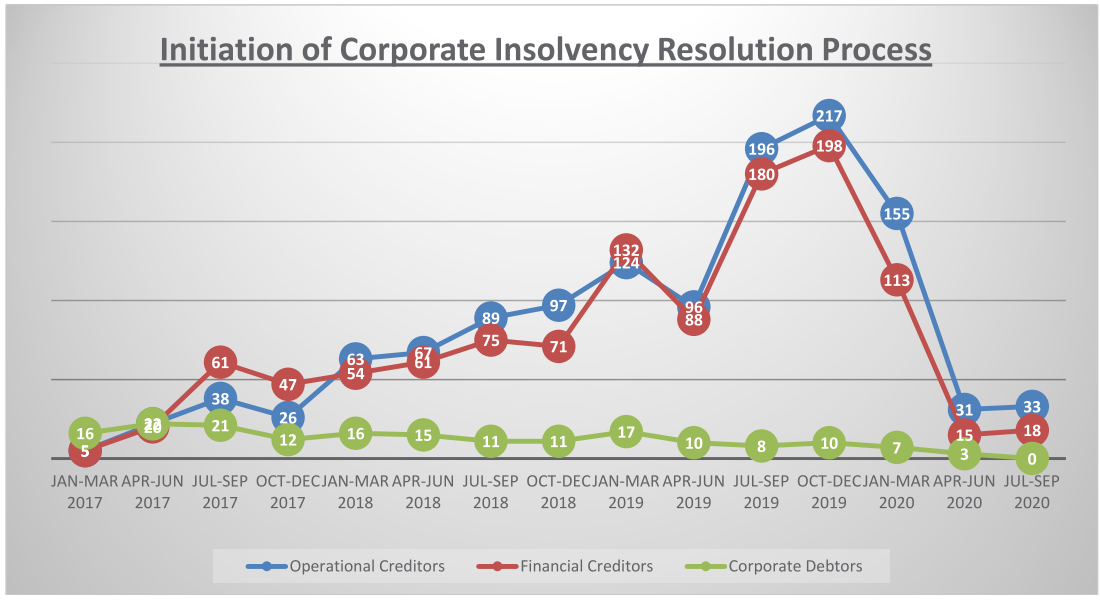


Table 1: Initiation of Corporate Insolvency Resolution Process (CIRP) under section 7,9 & 10

Quarter	No. of CIRPs initiated by			
	Operational Creditors	Financial Creditors	Corporate Debtors	Total
Jan - Mar, 2017	5	5	16	26
Apr - Jun, 2017	22	20	21	63
Jul - Sep, 2017	40	71	23	134
Oct - Dec, 2017	26	50	16	92
Jan - Mar, 2018	57	54	16	127
Apr - Jun, 2018	67	61	15	143
Jul - Sep, 2018	89	72	11	172
Oct - Dec, 2018	97	71	11	179
Jan - Mar, 2019	121	130	17	268
Apr - Jun, 2019	95	88	10	193
Jul - Sep, 2019	193	180	8	381
Oct - Dec, 2019	210	188	8	406
Jan - Mar, 2020	155	113	7	275
Apr - Jun, 2020	31	15	3	49
Jul - Sep, 2020	33	18	-	51
Total	1259	1138	179	**2576**

Table 2: Details of Ongoing, Resolved and Closed Cases

Particulars		No. of CIRPs	Percentage
Ongoing Cases			
(i)	CIRPs	1164	45.18
(ii)	Liquidation	588	22.80
Resolved CIRPs			
(i)	Resolution Plans approved	172	6.68
Closed cases			
(i)	CIRP Set Aside	108	4.20
(ii)	CIRP Withdrawn u/s 12A	268	10.40
(iii)	CIRP Stayed	41	1.60
(iv)	CIRP Withdrawn	145	5.63
(v)	Other Closures (Dismissed / Discharged / Dissolved)	51	2
(vi)	Liquidated / Dissolved	39	1.51
Total		**2576**	**100**

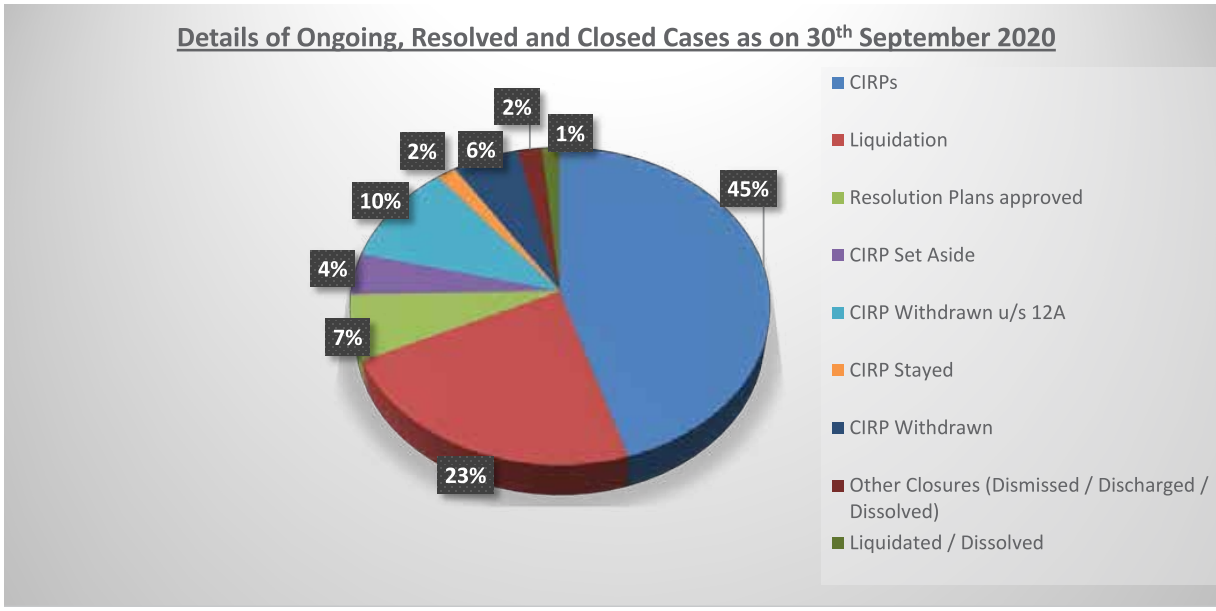


Table 3: Initiation of Voluntary Liquidations

Quarter	Voluntary Liquidations
Apr - Jun, 2017	2
Jul - Sep, 2017	5
Oct - Dec, 2017	20
Jan - Mar, 2018	23
Apr - Jun, 2018	18
Jul - Sep, 2018	16
Oct - Dec, 2018	15
Jan - Mar, 2019	34
Apr - Jun, 2019	20
Jul - Sep, 2019	17
Oct - Dec, 2019	26
Jan - Mar, 2020	30
Apr - Jun, 2020	3
Jul - Sep, 2020	8
Total	**237**

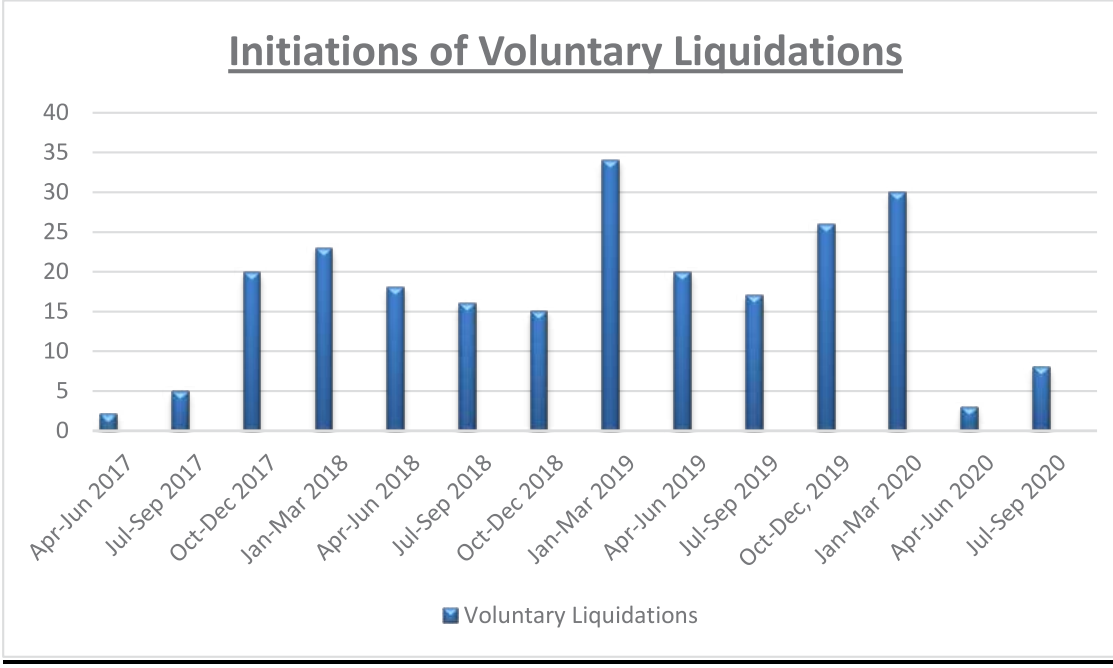


Table 4 : Geographical Distribution of Initiation of Voluntary Liquidations

Particulars	CIRPs	Liquidation	Total
Mumbai	640	101	741
New Delhi	394	39	433
Kolkata	375	22	397
Chennai	244	4	248
Hyderabad	166	12	178
Ahmedabad	222	5	227
Principal Bench, New Delhi	143	4	147
Chandigarh	133	14	147
Bengaluru	79	22	101
Cuttack	31	5	36
Jaipur	33	1	34
Allahabad	36	1	37
Special Bench, New Delhi	17	-	17
Guwahati	15	-	15
Amaravati	21	1	22
Kochi	17	-	17
Indore	10	6	16
Total	**2576**	**237**	**2813**

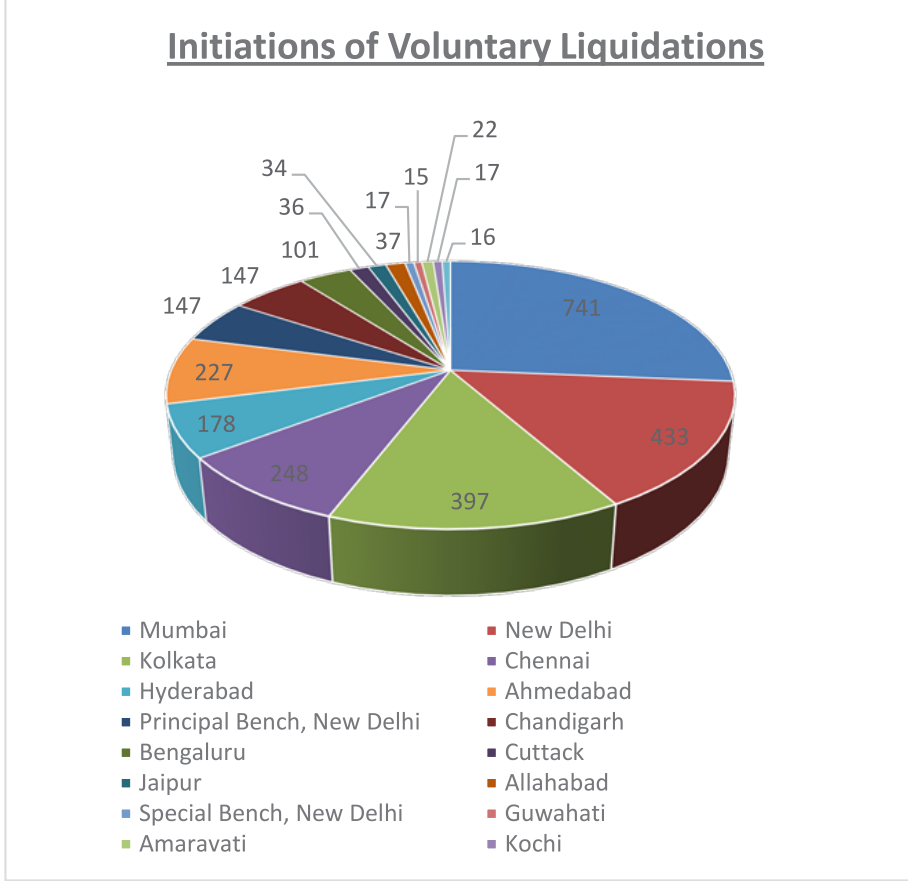
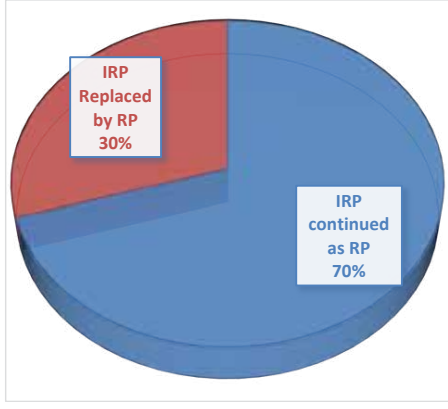
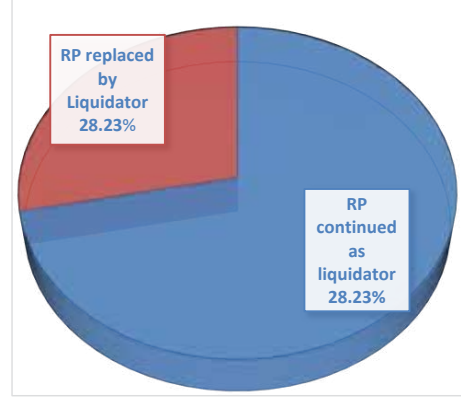


Table 5 : Replacement of IRPs, RPs and Liquidators





IRP continued as RP	70.30%
IRP Replaced by RP	29.70%

RP continued as liquidator	71.77%
RP replaced by Liquidator	28.23%

IIIPI News

Executive Development Program

IIIPI on October 7 launched its first-ever five days (7th – 11th October 2020) online 'Executive Development Program on Managing Corporate Debtors as Going Concern as CIRP (For IPs)". The 30 hours program received a highly enthusiastic response from IP community as all the 40 seats were filled weeks before the inauguration.

The inauguration ceremony of the EDP was graced with the presence of CA. Atul Gupta, President, Institute of Chartered Accountant of India (ICAI); CA. Nihar Niranjan Jambusaria, Vice President, ICAI; Mr. Arijit Basu, MD, Commercial Clients Group, SBI; Mr. Satish Kashinath Marathe, Director, Central Board RBI & Director, IIIPI; Dr. Ashok Haldia, Chairman, IIIPI and CA. Rahul Madan, Managing Director, IIIPI.

Inaugural Ceremony (online) of the Executive Development Program (EDP) on October 7, 2020

Web-Conference

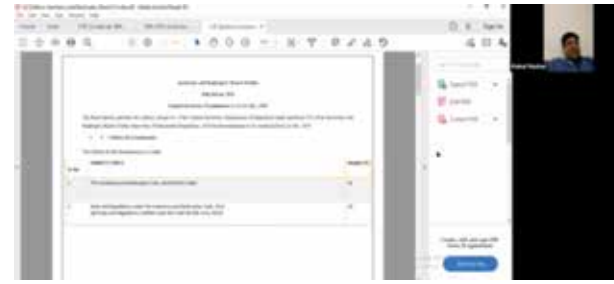
IIIPI organized a Web-Conference on the topic "IBC, a Boon for NPA Resolution: Myths Vs Realities" at **3.30 pm to 7.00 pm** on September 21, 2020. The panel speakers include Dr. M. S. Sahoo, Chairman, IBBI; Mr. Sudhaker Shukla, WTM, IBBI; Dr. Ashok Haldia, Chairman, IIIPI; Sh. Ashwani Bhatia, MD, SBI (IT & SARG), CA. Prafulla P Chhajed, Director, IIIPI; CA Hansraj Chugh, Director, IIIPI; Mr. Sanjay Jain, CEO, Aditya Birla ARC Ltd.; Mr. Raju Dodti, Chief Executive, Infrastructure Finance, L&T Financial Services, Mr. Ashish Chhawcharia, Insolvency Professional (IP) and CA Rahul Madan, Managing Director-IIIPI (Moderator).

The Web-Conference was Live Webcast and received 470 hits from throughout the country.

Web-Conference on IBC, a Boon for NPA Resolution: Myths Vs Realities, September 21, 2020.

Round Table Meeting

IIIPI conducted five round table meetings on various contemporary issues related to insolvency profession from January to September 2020. Most recently, a 'Round Table Meeting' conducted on 'Limited Insolvency Examination- Syllabus' on September 11, 2010 in which about 15 experts participated.

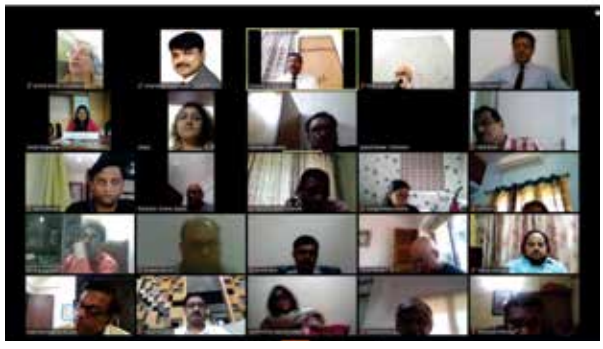


Round Table on Limited Insolvency Examination (LIE) – Syllabus, September 11, 2020

Pre-Registration Educational Course (Online)

IIIPI conducted 32nd Batch Pre-Registration Educational Course (Online) in association with

ICSI-IIP & ICAI-IPA (Cost) from August 16, 2020 to August 22, 2020. Earlier, this course was conducted physically but for the first time 29th Batch Pre-Registration Educational Course was conducted online on **April 21, 2020**. Though adopted due to ensuing COVID-19 crisis, the online program has become highly popular among the IPs.



29th Batch Pre-Registration Educational Course (Online), April 21, 2020.

International Webinar with International Finance Corporation

The international webinar was conducted on the topic "Impact of COVID 19 on the Insolvency and Bankruptcy regime - Global and Indian responses" at 4.00 PM to 6:00 PM on June 24, 2020. In the webinar, eminent personalities and experts such as Dr. MS Sahoo, Chairperson IBBI; Mr. Mahesh Uttamchandani, World Bank Group – Global Lead; Ms. Antonia Menezes, World Bank Group- Insolvency and Debt Restructuring Policy Advisor; CA Atul Gupta, President –ICAI; Dr. Ashok Haldia, Chairman, IIIPI; Dr. Anuradha Guru, ED-IBBI; CA Abizer Diwanji and Mr. Sunil Pant, CEO-IIIPI addressed the participants through online mode. The event received 1,784 hits.

International Webinar on Impact of COVID 19 on the Insolvency and Bankruptcy regime - Global and Indian responses, June 24, 2020.

Webinars

With a view to promote awareness, understanding, and advocacy of the IBC, IIIPI conducts webinars on contemporary issues closely related to IPs. The institute has conducted 13 national webinars from January to September 2020. Some of the important Webinars are -

Webinar on Impact of Covid-19 on IBC Regime (April 11, 2020), Webinar on Implementing Resolution Plan During Lockdown (April 20), Webinar on Forensic Audit: Conclusive or Prima Facie (April 25), Webinar on Running Business in CIRP During Lockdown (May 03), Webinar on Interactive Session with IRP/RPs - Issues faced by them in CIRPs w.r.t. COVID-19 pandemic (May 05), Webinar on Interactive Session with Liquidators on issues faced in liquidation in the wake of COVID-19 Pandemic (May 09), Webinar on Experience Sharing Session by Mr. Subramaniakumar R, Administrator, DHFL (May 13), Webinar on IBC (Amendment) Ordinance, 2929 (June 7), Webinar on Insolvency Resolution: Public interest & Ethics (June 12) and Webinar on Impact of COVID 19 on the Insolvency and Bankruptcy regime-Global and Indian responses. (June 24).

Webinar on Implementing Resolution Plan during Lockdown, April 20, 2020

IIIPI News

Services

Details of Checklist/SOP's/FAQ's for services issued by IIIPI as on September 05, 2020

SN	Activity	Web Link	Particulars
1	Membership	https://www.iiipicai.in/index.php?option=com_content&view=article&id=6&Itemid=125	• IIIPI Enrolment & Eligibility for Professional Member – Guidelines • Enrolment Procedure • Authorisation for Assignment • Frequently Asked Question – Authorisation for Assignment • Step by Step Guide for AFA • IBBI - Limited Insolvency Examination Frequently Asked Questions
2	Monitoring	https://www.iiipicai.in/images/PDF/Revised-Monitoring-Policy.pdf	• Monitoring Policy of IIIPI • Inspection Manual of IIIPI • The Reporting Almanac: A reference guide for Insolvency Professionals • FAQs on Verification of Claims • Common issues observed during Inspection of Insolvency Professionals. • Suggested best practices for common issues observed during inspection of Insolvency Professionals. • Statements of best practices: Role of IPs in avoidance proceedings • Common Errors committed while submitting the CIRP Forms in terms of IBBI Circular on filing the forms for the purpose of monitoring CIRPs dated 14th August, 2019
3	Grievance Redressal	https://www.iiipicai.in/images/Grievance-Redressal-Policy-for-IIIPI.pdf	• Grievance Redressal Policy of IIIPI • FAQs regarding the process of lodging a complaint against the IPs by stakeholders
4	Disciplinary	https://www.iiipicai.in/images/PDF/Revised-Disciplinary-Policy-IIIPI.pdf	• Disciplinary Policy of IIIPI

Indian Institute of Insolvency Professionals of ICAI (IIIPI)

ICAI Bhawan, 8th Floor, Hostel Block, A-29, Sector-62,
NOIDA, UP – 201309

Office Hours: 09:30 AM to 06:00 PM (Monday to Friday), except closed holiday.

(Presently the office is following staggered timing due to COVID19, which are;
i. 9:00 am to 5:30 pm, ii. 9:30 am to 6:00 pm, iii. 10:00 am to 6:30 pm, iv. 11:00 a.m. to 7:30 pm.)

Contact Details

Kindly reach us on the provided cell phone numbers in place of landline for time being to avoid any delay in the communication

Sl No	Department	Contact No	Mobile Number	Email Id
1	General Inquiry	+91 120-3045960		ipa@icai.in
2	Enrolment/ Registration	+91 120-3045960	+91 8178995143	ipenroll@icai.in
3	Grievance/ Complaint		+91 8178995139	ipgrievance@icai.in
4	Program	+91 120-3045986	+91 8178995141	ipprogram@icai.in
5	Monitoring		+91 8178995137 +91 8178995138	ip_monitoring@icai.in iiipi_monitoring@icai.in
6	Publication		+91 8178995136	iiipi.pub@icai.in
7	Authorization for Assignment	0120- 3045986	+91 8178995136	ip.afa@icai.in
8	CPE		+91 8178995141	iiipi.cpe@icai.in
9	Change of Address/ e-mail/contact number/any other required changes	+91 120-3045960	+91 8178995143	iiipi.updation@icai.in

Organisational Values of IIIPI

The values can be described by an acronym 'SHARE' a word for dividing the benefits among many. The acronym also alludes to IIIP-ICAI's enabling the 'sharing' of the know-how with stakeholders in insolvency regime:

Service before self: This quality refers to positive attitude and prioritizing the customer's interest selflessly. It also recognises the need to be knowledgeable, professionally competent and updated to be able to serve effectively. The customer could be internal (inter/intra departmental) or external (regulator, member, other stakeholders).

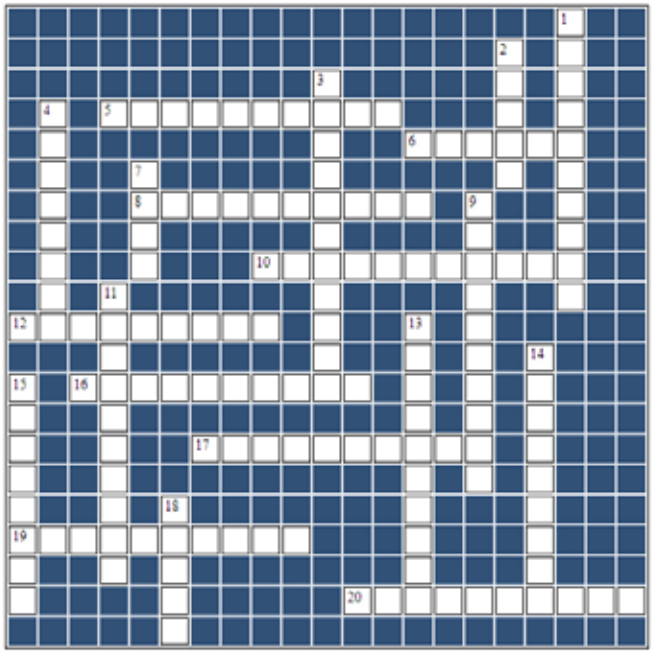
Humility: The quality of being humble, considered as a sine-qua-non for any service industry, is all the more desirable among the personnel involved in insolvency profession, given the sensitivities of multiple stakeholders at stake.

Assiduous: The quality of being assiduous refers to one's ability to dedicate one's actions to the underlying cause. Such actions backed by the right spirit and attitude can potentially yield optimal results effectively and efficiently.

Resilience: The quality of being resilient refers to the capacity to face challenges, as a proud member of the leading organisation engaged in development of a noble profession. It also refers to a feeling of empowerment and confidence to be able to make a difference in the society.

Ethical: Representing the organisation at the forefront of insolvency profession, strongly rooted in ethics and independence, the employees can further the agenda by being ethical in deed, word and conduct.

IBC Crossword



Down

1. A statement that recognizes the financial policies of a firm.
2. Any form of property owned by a debtor.
3. A party with an interest in an enterprise or project.
4. A person or company to whom money is owing.
7. A resolution mechanism for corporate debtors.
9. Another word for registration.
11. A rule or directive made and maintained by an authority
13. A person appointed to foreclose the affairs of a company or firm.
14. One who is deficient in his accounts.
15. A subsidiary body of the U.N. General Assembly responsible for helping to facilitate international trade and investment.
18. A systematic examination of financial records.

Across

5. A legal proceeding for people or businesses that are unable to repay their outstanding debts.
6. A process by which a judgment of a subordinate court is challenged before the superior authority.
8. A state of financial distress in which someone is unable to pay.
10. The word referring to international insolvency.
12. Formal complaint raised by an employee.
16. An individual who is the surety to a corporate debtor.
17. An official who visits to check that everything is correct and legal.
19. A written motion adopted by a deliberate body.
20. A delay or suspension of an activity or a law.

For answers, please visit IIIPI website: ***https://www.iiipicai.in/***

FEEDBACK

Dear Reader,

The Resolution Professional is aimed at providing a platform for dissemination of information and knowledge on evolving ecosystem of insolvency and bankruptcy profession and developing a global world view among practicing and aspiring insolvency professionals in India.

We firmly believe in innovations in communication approaches and strategies to present complicated information of insolvency ecosystem in a highly simplified and interesting manner to our readers.

We welcome your feedback on the current issue and the suggestions for further improvement. Please write to us at iiipi.journal@icai.in

Editorial Team
The Resolution Professional

INVITATION FOR CONTRIBUTING ARTICLE

THE RESOLUTION PROFESSIONAL, the quarterly research journal of the Indian Institute of Insolvency Professionals of ICAI (IIIPI) invites research based articles for its January 2021 edition. The article may be of 2,500-3,000 words in length and cover a subject with relevance to IBC and the practice of insolvency. The same will be considered for publication in the upcoming edition of **THE RESOLUTION PROFESSIONAL,** subject to approval by the Editorial Board.

The articles sent for publication in the journal should conform to the following parameters:

- The article should be original, i.e. not published/broadcast/hosted elsewhere including on any website.
- The article should:-
  - Contribute towards development of practice of Insolvency Professionals and enhance their ability to meet the challenges of competition, globalisation or technology, etc.
  - Be helpful to professionals as a guide in new initiatives and procedures, etc.
  - The article should be topical and should discuss a matter of current interest to the professionals/ readers.
  - The article should have the potential to stimulate a healthy debate among professionals.
  - It should preferably expose the readers to new knowledge area and discuss a new or innovative idea that the professionals/readers should be aware of. It may also preferably highlight the emerging professional areas of relevance.
  - The article should be technically correct and sound.
  - The main headline of the article should be clear, short, catchy and interesting, written with the purpose of drawing attention of the readers. The sub-headlines should preferably within 20 words.
  - The article should be accompanied with abstract of 150-200 words. The tables and graphs should be properly numbered with headlines, and referred with their numbers in the text. The use of words such as below table, above table or following graph etc., should be avoided.
  - The authors must provide the list of references at the end of article.
  - A brief profile of the author, e-mail ID, postal address and contact number along with his passport size photograph and declaration confirming the originality of the article as mentioned above should be enclosed along with the article.
  - The article can be sent by e-mail at iiipi.journal@icai.in
  - In case the article is found suitable for publication, the same shall be communicated to the author/s at the earliest.

NOTE: IIIPI has the sole discretion to accept, reject, modify, amend and edit the article before publication in the Journal. The copy right for the article(s) published in the Journal will vest with IIIPI.

For further details, please contact:
THE RESOLUTION PROFESSIONAL
Indian Institute of Insolvency Professionals of ICAI (IIIPI)
ICAI Bhawan, 8th Floor, Hostel Block,
A-29, Sector 62, NOIDA– 201309
☎ 0120-304 5960
8178995136

OUR VISION

To be a leading institution for development of an independent, ethical and world-class insolvency profession responding to needs and expectations of the stakeholders.

IIIPI

Indian Institute of Insolvency Professionals of ICAI (IIIPI)

(A Section 8 Company & Wholly Owned Subsidiary of ICAI and Registered as an IPA with IBBI)

Regd. Office: Post Box No: 7100, ICAI Bhawan, Indraprastha Marg, New Delhi - 110002.

Admin. Office: ICAI Bhawan, 8th Floor, Hostel Block, A-29, Sector-62, Noida-201309,

Phone: +91 120 3045960, Email: ipa@icai.in, Website: www.iiipicai.in