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IIIPI

THE RESOLUTION PROFESSIONAL

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)

ABOUT IIIPI

The Insolvency and Bankruptcy Code, 2016 (Code) provides that no entity shall carry on its business as Insolvency Professional Agencies under this Code and enrol insolvency professionals 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 the backdrop of the Code and the IBBI (Insolvency Professional Agencies) Regulations, 2016 (IPA Regulations) the Institute of Chartered Accountants of India (ICAI) has 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 Insolvency and Bankruptcy Code, 2016 read with its Regulations. IIIPI has been registered with Insolvency and Bankruptcy Board of India (IBBI) to act as Insolvency Professional Agency under the IBBI (Insolvency Professional Agencies) Regulations, 2016.

IIIPI is the First Insolvency Agency to be registered with IBBI and the certificate was handed over by the Hon'ble Union Finance Minister Shri Arun Jaitley on 28th November, 2016.

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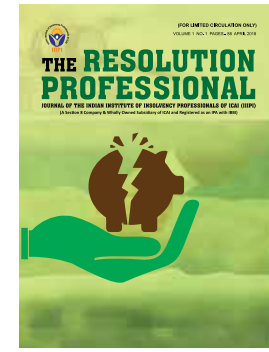

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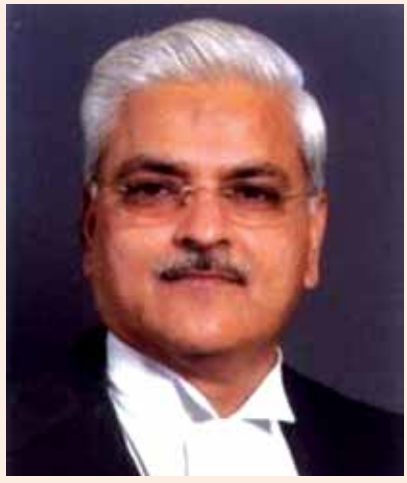
Message from the Chairman, IIIPI



I am very happy to have before me the first issue of "The Resolution Professional", a quarterly Journal of IIIPI.

The name of the journal, itself, is a representation of the true spirit behind the introduction of a revolutionary Insolvency and Bankruptcy Code (IBC) in India. Belying its name, the new IBC regime has resolution of stressed assets as its primary objective. Only in the event of the inability of the stakeholders to evolve a consensus on restoration of an asset or failure of the Resolution Plan, is liquidation proposed to be considered as an option.

The Code has significant points of departure from the hitherto conventional approach to management of stressed assets. The emphasis on prescribed time-lines is one. It has been the experience of most lenders that delays lead to increasing loss of asset values. The Code seeks to provide a commercial solution to a commercial issue by establishing the structure of COC and an empowered IRP/RP.

Another unique feature is that of clear priority of distribution (waterfall) upon liquidation, with government dues subservient to those of secured creditors and unsecured financial creditors – something unheard of in a generation brought up to subscribe to the view that 'Sovereign dues take precedence over commercial dues'. In case of fraudulent diversion of funds, the personal contribution may be sought and imprisonment may be possible.

One of the critical tests of an IP's capabilities would lie in providing a comprehensive Information Memorandum (IM) to Resolution Applicants and recommending an effective Resolution Plan to COC. Typically, the plan would need to be holistic. It should not focus only on financial re-engineering but should follow a multi-faceted approach that brings back the company to good health.

The key factor in the entire process is the Insolvency Professional (IP), himself. The challenges faced by an IP in working through a Corporate Insolvency Resolution Process (CIRP) cannot be minimised. The capability of the IP is the fundamental asset which he takes into an arena fraught with multi-dimensional challenges. However, if this were to be supplemented with adequate support and appropriate skills, the quality of outcomes would obviously be superior.

India is one of the growing community of nations that have adopted the Insolvency and Bankruptcy framework for dealing effectively with a burgeoning menace of stressed assets. The IBC has, however, been rapidly evolving with unique domestic characteristics and represents a broad national ethos.

The year 2018 promises to be full of interesting developments vis-à-vis the IBC, particularly with regards to the recommendations of the Insolvency Law Committee, fruition of the insolvency proceedings of the 12 large debtors, further developments in some of the major cases and the fate of the 24 accounts identified by the RBI.

As the Chairman of the Governing Board of the country's largest IPA, I am confident that this journal will be a step in the direction of providing useful information on a regular basis to IPs. The IPA seeks to play a meaningful role for promoting the professional development of and regulation of Insolvency Professionals. I also expect that, along with other initiatives to be taken by IIIPI in the days ahead, this would establish a qualitative differentiator.

My best wishes to the IIIPI Editorial Team.

Hon'ble Mr. Justice Anil R. Dave (Retd.)
Chairman, IIIPI
New Delhi, 16th March 2018

Message from President ICAI

Newspapers have recently been replete with references to the Insolvency and Bankruptcy Code (IBC), 2016. It will be interesting to see how, going forward, its implementation impacts the strategic opportunity matrix for existing and new entrepreneurs, while throwing up new areas of business and professional opportunities.

In the heady environment of change introduced by IBC, the approach to resolution of stressed assets, itself, has undergone a metamorphosis. The Code has consolidated the existing framework by creating a single law for insolvency and bankruptcy of corporations, partnerships and individuals. It seeks to achieve reorganization and, failing that, liquidation of the concerned entity. It has made fundamental changes to the existing insolvency resolution process, procedurally as well as substantively.

Challenges

As with every evolving jurisprudence, IBC also faces its fair share of challenges. Some of the critical factors that are receiving attention at the highest quarters include:

- How to safeguard against cartelisation witnessed in existing/previous frameworks?
- Exclusion of limitation during moratorium to guarantors in addition to corporate debtor.
- Treatment of group companies under resolution.
- Cross border insolvency.
- Treatment of Contingent Liabilities.
- Resolution costs management.
- Treatment of Shares of Promoters of the Corporate Debtor.
- Carry forward of losses, depreciation, tax, etc.
- Decisions pending constitution of COC.
- Code of Conduct for Committee of Creditors, etc.

It is noteworthy that the Government has recently constituted an Insolvency Law Committee (ILC) to comprehensively review the Code for ensuring its effectiveness. The report of ILC should make a significant difference to the implementation of the Stressed Assets Resolution regime in India.

Insolvency Professionals – Expanding Horizons

With the recent withdrawal of various Stressed Assets Resolution processes by RBI, viz., SDR, CDR, S4A, etc., the Insolvency and Bankruptcy Code has acquired a pole position for Corporate Insolvency Resolution Process (CIRP). The likely number of references under this channel is expected to grow significantly. Further, with the proposed introduction of the Insolvency process for Individuals and Firms, there is every likelihood of a substantial increase in eligible cases from this area also.

The role of the Insolvency Professional assumes great significance in this context. His/her ability to effectively manage the asset under resolution, make a comprehensive presentation of the case before NCLT/NCLAT or the related authority, ensure compliance with all related laws, prepare Information Memoranda, obtain Resolution Plans, maintain strict adherence to the Code of Conduct and all aspects of Good Governance, ensure proper reporting to the defined authorities, etc., is a daunting responsibility.

IIIPI – The road ahead

With over 60% of the Registered IPs as their members, IIIPI has a significant role to play in the development of the profession and helping evolve a preferred cadre of Insolvency Professionals.

The coming days are likely to present both challenges and opportunities to IIIPI and the insolvency profession itself. Dealing successfully with these would require Enterprise Management capabilities, Negotiating Skills, Raising of Finances and other Resources, Cost control, Drafting, Communication and Minuting ability, Report preparation and submission, Legal and Regulatory Compliances, Timelines management, Effective Disclosures, etc.

I look to IIIPI to take the lead in devising effective capacity building and reskilling opportunities for their members. The following initiatives taken by them in the past need to be followed up for ensuring that the outcomes are impactful:

- Exclusive Knowledge Partnership arrangement with ICAEW
- Select IP Training Programs jointly with the World Bank Group/Affiliates and Associates.
- IIIPI-IBA Workshops for improved coordination between Banks and IPs.
- NIBM based trainings for Bank Staff associated with stressed assets management, etc.

Some areas, which are still on the drawing board, need to be fleshed out without delay and action taken:

- Establish a Knowledge SBU to address Training needs and provide reference papers, manuals, guidelines, etc.
- Publish Journals, Compendiums, etc.
- Organise National Conferences on issues relevant to the Insolvency Profession.
- Activate a Research program to help develop Best Practices.
- Facilitate the understanding and adherence to the Code of Conduct.
- Increase engagement with the vast range of associated services, viz, Valuers, Legal Consultants, Forensic experts, Business Managers, Bankers, etc.

Launch of "The Resolution Professional"

I am happy to note that IIIPI has taken steps to carry forward some of the tasks set out above. I have the 1st issue of "The Resolution Professional", a quarterly Journal of IIIPI, before me. The Journal reflects some of these expectations and has presented curated contents, substantially addressing this objective.

My best wishes to the IIIPI Team for the success of the initiative, which I am confident is the first of many to come.

CA. Naveen ND Gupta
President, ICAI & Director, IIIPI
New Delhi, 16th March 2018

A word from the CEO

The first year of the existence of IIIPI was marked by a sharp focus on managing the enrolment and registration challenges of the new IPA. With a share of over 60% of the total IPs on the rolls of IBBI as on 15th of March, 2018, the agency now seeks to build on the strength of its parent ICAI. With improved resources at hand, IIIPI has set itself revised goals for taking its various initiatives forward.

This Journal is one such step, which will grow with your support and inputs. We have named the publication as "The Resolution Professional" to address the spirit behind IBC, which looks at Insolvency and Bankruptcy as an option only in the event of a failure to arrive at a resolution.

In order to address the capacity building requirements of the Insolvency Professionals, IIIPI conducted the 1st Select Program for IPs in India jointly with the World Bank Group at Mumbai from 18th to 20th of January, 2018. The program was very well received and feedback from participants was improvised on during the sessions themselves to improve content and delivery. More such programs are scheduled in the days ahead.

Apart from this, the Knowledge Partnership with ICAEW was rolled out with the first enrolments advised to our foreign partners for registration of membership.

IIIPI also hosted 3 Roundtables for generating suggestions for submission to the Insolvency Law Committee and conducted a Joint Program with IBA for improving coordination between Banks and IPs and sessions for Bankers at NIBM, Pune.

The complexities of the assets to be managed by the IPs and the critical nature of the outcomes requires a strong adherence to the Code of Conduct for the profession. This is necessary not only from the perspective of a value based approach but also as a safeguard against challenges to the ethical basis of actions and omissions of an IP. The recent Disclosure Regime unveiled by IBBI is one of the steps to pre-empt future conflicts arising out of opacity of information.

Apart from the above, the increasing number of CIR Processes following withdrawal of alternate Stressed Assets Resolution avenues like CDR, SDR, S4A, etc., by RBI, is likely to increase in the regulatory emphasis on Monitoring and Follow-up.

Despite being one of the most recently enacted legislations, the Insolvency and Bankruptcy Code has witnessed a tremendous growth in the related jurisprudence due to the complexity and importance of the insolvency resolution mechanism. This requires constant upgrading of knowledge and the capacity of IPs to address the multifarious demands made on them. IIIPI is taking steps to bridge knowledge gaps through new initiatives proposed in this regard.

The role and responsibilities of the Insolvency Professionals is all set to widen and deepen in scope. IIIPI seeks to position itself as a partner with IPs for the development of their skills and capabilities to enable them to manage their professional engagements with greater effectiveness.

Sunil Pant
CEO- IIIPI
New Delhi, 16th March 2018

Knowledge Partnership

Indian Institute of Insolvency Professionals of ICAI (IIIPI) and Institute of Chartered Accountants in England & Wales (ICAEW)

Indian Institute of Insolvency Professionals of ICAI (IIIPI) has entered into a Knowledge Sharing Arrangement with the Institute of Chartered Accountants of England and Wales (ICAEW) on the 15th of September, 2017 for training of Insolvency Professionals enrolled with IIIPI.

ICAEW is the largest regulator of insolvency professionals in the UK, with over 30 years of experience in this field. The arrangement covers knowledge sharing and seeks to enhance the skills of Insolvency Professionals in India.

Under the arrangement, the Insolvency Professionals can subscribe to the ICAEW's online Insolvency and Restructuring Group (IRG) through IIIPI and will be provided access to Live and pre-recorded webinars, E-newsletters, Help sheets on specialised areas of insolvency practice, Access to ICAEW's online specialist insolvency community. Registered participants will be provided facilities at a discounted rate, including ICAEW's annual insolvency conference, etc.

Services Available:

i. IIIPI Licensed Insolvency Professionals who are registered as Subscribers will have access to up to ten (10) live or pre-recorded webinars per year via the IRG online resource and the R3 platform.
ii. The webinars will be delivered in English and will last up to 60 minutes (including a Questions and Answers session).
iii. Each live webinar will be recorded so that listeners can re-access the content at a later date to review or discuss any learning points.
Each Subscriber will have access to the online IRG as soon as practicable.

Fees:

IIIPI has negotiated for a very competitive scale of fees for enrolment under this arrangement as follows:

Enrolment Phase	Validity	Subscription Amt. (GBP) #		
		ICAEW Fee	IIIPI Facilitation	**Total**
January 1 to June 30	Remaining Calendar year starting from date of enrolment with ICAEW or January 1, of the subsequent Calendar Year, subject to renewal subscription having been paid before that date	100	30	**130**
July 1 to 31 December	----- AS ABOVE -----	50	15	**65**

Excluding Taxes as applicable

Payment Details:

The Subscription should be sent by EFT/NEFT to Account No. 37177148205, IFSC Code: SBIN0005222 of Indian Institute of Insolvency professionals of ICAI with State Bank of India, Sector-61, NOIDA - 201301, followed by an email giving the following details:

1. Name of IP:
2. IPA Name and Enrolment Number:
3. IBBI Registration Number:
4. EFT/NEFT Transfer Details with Amount in GBP and the conversion rate applied by the Bank:
5. Address for Correspondence:
6. Email Address:
7. Mobile/Landline No:

Visit www.iiipicai.in for details

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Role of an Insolvency Professional Agency -A Crucial Pillar of the Insolvency and Bankruptcy Code, 2016

Introduction

The Government of India with a view to study the corporate bankruptcy legal framework in India and for overseeing the design and drafting of a new legal framework for resolving matters of insolvency and bankruptcy formed Bankruptcy Law Reforms Committee.

This Committee had the mandate of comprehensive reform, covering all aspects of bankruptcy of individuals and non financial firms, i.e., the reforms are not restricted to limited liability corporations. It evaluated the working of present arrangements in India, and the difficulties faced with these present arrangements.

The objectives of the Committee were to resolve insolvency with: (i) lesser time involved, (ii) lesser loss in recovery, and (iii) higher levels of debt financing across instruments.

The question was what can a sound bankruptcy law achieve? A sound legal framework of bankruptcy law can achieve

- **Improved handling of conflicts between creditors and the debtor:** It can provide procedural certainty about the process of negotiation, in such a way as to reduce problems of common property and reduce information asymmetry for all economic participants.
- **Avoid destruction of value**: It can also provide flexibility for parties to arrive at the most efficient

CA. Dhinal A. Shah
The author is a Chartered Accountant, Insolvency Professional and Director, IIIPI.

solution to maximise value during negotiations. The bankruptcy law will create a platform for negotiation between creditors and external financiers which can create the possibility of such rearrangements.

- **Drawing the line between malfeasance and business failure:** Under a weak insolvency regime, the stereotype of "rich promoters of defaulting entities" generates two strands of thinking: (a) the idea that all default involves malfeasance and (b) The idea that promoters should be held personally financially responsible for defaults of the firms that they control.
- **Clearly allocate losses in macroeconomic downturns:** With a sound bankruptcy framework, these losses are clearly allocated to some people. Loss allocation could take place through taxes, inflation, currency depreciation, expropriation, or wage or consumption suppression. These could fall upon foreign creditors, small business owners, savers, workers, owners of financial and non-financial assets, importers, exporters.

As stated by Mr. T. K. Viswanathan, Chairman, Banking Law Reforms Committee that "It was a mission to usher in sweeping changes to the country's bankruptcy law and the New Bankruptcy Law was Necessary for Reviving Economy".

The Insolvency and Bankruptcy Law has created five institutional pillars which will serve the objects and purposes of the law and ensure its effective implementation. They are as follows:-

- Insolvency Professionals- To conduct the corporate insolvency resolution process and includes an interim resolution professional; The role of the IP encompasses a wide range of functions, which include adhering to procedure of the law, as well as accounting and finance related functions.
- Insolvency Professional Agencies- To enrol and regulate insolvency professionals as its members in accordance with the Insolvency and Bankruptcy code 2016 and read with regulations.
- Information Utilities - to collect, collate and disseminate financial information to facilitate insolvency resolution
- Insolvency and Bankruptcy Board of India- A Regulator who will oversee these entities and to perform legislative, executive and quasi-judicial functions with respect to the Insolvency Professionals, Insolvency Professional Agencies and Information Utilities.
- Adjudicating Authority- The National Company Law Tribunal (NCLT), established under the Companies Act, 2013 would function as an adjudicator on insolvency matters under the Code.

As stated by Mr. T. K. Viswanathan, Chairman, Banking Law Reforms Committee that "It was a mission to usher in sweeping changes to the country's bankruptcy law and the New Bankruptcy Law was Necessary for Reviving Economy".

One of the most important pillars as envisaged in the Insolvency and Bankruptcy Code, 2016 is the formation of the Insolvency Professional Agencies (IPAs). Insolvency Professional Agency is a body formed for the purposes of registering and regulating the Insolvency Professionals (IPs). Section 3 (20) of the Code defines an Insolvency Professional Agency as any person registered with the Board under section 201 as an Insolvency Professional Agency.

Insolvency is a regulated profession under the Insolvency and Bankruptcy Code, 2016 and anyone who wishes to practise as an IP needs to enroll with an IPA and pass Insolvency Examination conducted by Insolvency and Bankruptcy Board of India (IBBI). As per the Code, the insolvency resolution processes are to be conducted by the Insolvency Professionals, who are required to be members of an Insolvency Professional Agency which in turn is to be registered with the Insolvency and Bankruptcy Board.

A major responsibility of the IP agencies involves the exercise of executive functions. This includes inspections, investigations, enforcement of orders and processing of complaints. The exercise of supervision and monitoring powers is fundamental to the effective enforcement of bye-laws by an authorised IP agency. It has been provided that all IPAs should have adequate governance and monitoring mechanisms and should follow a structured process for supervising the conduct of IPs at regular intervals, and enforcing their rules and standards through the bye-laws.

Registration as an IPA

As per the Code, IPA is constituted as a Company formed with charitable object under section 8 of

the Companies Act, 2013. These agencies are required to get registered and obtain certificate of registration from IBBI. According to Regulation 3 of Insolvency and Bankruptcy Board of India (Insolvency Professional Agencies) Regulations, 2016, its sole object shall be to carry on the functions of an insolvency professional agency.

Objectives and Principles of IPA

Insolvency Professional Agency is an intermediary between IPs and IBBI. It acts as a membership body for those in insolvency practice; those engaged in insolvency related work; and those with an interest in insolvency. The Code provides following guiding principles for insolvency professional agencies:-

- It shall promote the professional development of and regulation of insolvency professionals.
- It shall promote good professional and ethical conduct amongst insolvency professionals.
- It shall protect the interests of debtors, creditors etc.
- It shall promote the services of competent insolvency professionals to cater to the needs of debtors, creditors etc.
- It shall promote the growth of insolvency professional agencies for the effective resolution of insolvency and bankruptcy processes under the Code.

Functions of an IPA

The principal function of an IPA is to promote and maintain standards of performance and professional conduct amongst those engaged in insolvency practice. Section 204 of the Code provides that an insolvency professional agency shall perform the following functions:—

- It shall grant membership to persons who fulfil all requirements set out in its byelaws on payment of membership fee;
- It shall lay down standards of professional conduct for its members;
- It shall monitor the performance of its members;
- It shall safeguard the rights, privileges and interests of insolvency professionals who are its members;
- It shall suspend or cancel the membership of insolvency professionals who are its members on the grounds set out in its bye-laws;
- It shall redress the grievances of consumers against insolvency professionals who are its members; and
- It shall publish information about its functions, list of its members, performance of its members and such other information as may be specified by regulations.

The Insolvency Professional Agencies encourages wider knowledge and understanding of insolvency within and outside the insolvency profession through access to insolvency examinations, qualifications and membership and through exposure and discussion of insolvency issues which affect the profession, its stakeholders and the general public.IPAs have been entrusted to perform following key functions:-

1. **Regulatory functions**–IPAs draft detailed standards and codes of conduct through bye-laws that are made public and are binding on all members.
2. **Executive functions**–These agencies monitor, inspect and perform investigation of its members on a regular basis. They gather information about performance of its members, with the over-arching objective of preventing frivolous behaviour and malfeasance in the conduct of IP duties.
3. **Quasi-judicial functions** –IPAs act as quasi-judicial body for resolving the grievances of aggrieved parties, hearing complaints against members and taking suitable actions to discipline, monitor and redress the grievance of the Insolvency professionals and other stakeholders.
4. **Continuous Professional Development** - IPA performs a leading role in the development of professional insolvency standards. All professional IP agencies must abide by the two main objectives of ensuring quality and ensuring fidelity in their members carrying out their functions as IPs under the Code. The Insolvency Professional Agency continuously works towards the professional development of the member.
5. **Representation** - IPAs work towards protecting the interest of its members and from time to time make representation to the Government and other regulatory bodies for driving beneficial changes in the Insolvency and Bankruptcy law and procedure.

Role of Insolvency Professionals

The Code envisages and regulates the process of insolvency and bankruptcy of all persons including corporates, partnerships, LLP's and individuals. The Code lays down a time bound resolution process which is undertaken by Insolvency Professionals. Consequently the Code has opened up new possibilities for time bound resolution of stressed assets.

As provided in the Code, the Insolvency Professional form a crucial pillar upon which rests the effective, timely functioning of the entire mechanism of the insolvency resolution process. An Insolvency Professional may hold the role of Interim Resolution Professional/ Resolution Professional/ Bankruptcy Trustee/ Liquidator. He has to carefully plan and manage his actions and promptly communicate with all stakeholders involved for timely discharge of his duties under different processes.

Now the Code is in the initial stage of implementation. People have started using the Code and some of the Banks have also started to use the provisions of the Code for resolution. In this direction for expeditious resolution of stressed assets in the banking system the recent **Banking Regulation (Amendment) Act, 2017** enables the Central Government to authorize the Reserve Bank of India to direct banking companies to initiate insolvency resolution process in respect of a default under the provisions of the Insolvency and Bankruptcy Code, 2016. This action of the Government will have an impact on resolution of stressed assets as the RBI is empowered to intervene in specific cases.

Thus the role of Insolvency Professionals becomes even more significant in tackling the issue of resolution of Non-Performing Assets (NPA) which is affecting the economy.

The key roles of an interim resolution professional/ Resolution professional are:

- Issuance of public notice of the Corporate Insolvency Resolution process
- Handling the management and affairs of the company in its best interest in order to maintain going concern status of the company
- Collation of claims received
- Constitution of the Committee of Creditors
- Conduct of the meetings of the Committee of Creditors
- Approval of best resolution plan for the company

Key Practical challenges faced by Insolvency Professionals

As the Resolution process is on and reaching towards 300 cases have been admitted by National Company Law Tribunal, some of the practical challenges the insolvency professionals are facing are as follows:

- Lack of awareness of the Law amongst stakeholders
- Preparedness of Committee of Creditors constituents to support the process
- Regulatory and legislative challenges
- Protection available to Resolution Professional
- Information challenges including for valuation of assets
- Quality of information memorandum
- Dissenting financial creditors
- Alignment with other statues including Income Tax Act.

Insolvency Professional Agency formed by the Institute of Chartered Accountants of India

The Indian Institute of Insolvency Professionals of ICAI (IIIPI) is a section 8 Company formed by the Institute of Chartered Accountants of India to enroll and regulate insolvency professionals as its members in accordance with the Insolvency and Bankruptcy code 2016 and read with regulations. ICAI formed the Insolvency Professional Agency as it is an extended arm for regulating Chartered Accountants.

ICAI IPA has been designated as the first Insolvency Agency in India and 70% of the Insolvency Professionals are enrolled with ICAI IPA. The Governing Board of IIIPI is comprised of learned professionals who are independent directors on the Board of IIIPI

Besides, its role as a membership agency IIIPI takes initiatives for creating awareness and education of insolvency and bankruptcy law. It regularly reports the new developments in the field of insolvency and bankruptcy law and provides a brief update to its members on a regular basis. The details of case updates, news updates and related articles as well as other information is readily available on its website at the link http://iiipicai.in.

The following are some of the initiatives of IIIPI made for professional development of its members:-

- **Launch of Learning Management System for**

the IBBI Limited Insolvency Examinations

Indian Institute of Insolvency Professionals of ICAI has launched the Learning Management System to enable the professionals to prepare and complete the Limited Insolvency Examinations of the Insolvency and Bankruptcy Board of India. It is a platform which is available to all on a no cost basis comprises of the entire syllabus in the form of presentations and supplemented by mock tests in each component of the syllabus. A unique feature is that it enables the professionals to do practice at a modular level and prepare for the examination. It contains presentations, texts and practice test on various chapters of Insolvency and bankruptcy Code, 2016 and related laws provided in the syllabus for Insolvency Examination.

- **Frequently Asked Questions on the Insolvency and Bankruptcy Code, 2016**

  IIIPI published a book on Insolvency and Bankruptcy Code, 2016 titled as "Frequently Asked Questions on the Insolvency and Bankruptcy Code, 2016". The book has been designed in a question and answer format and it is comprehensive and a handy book for ready reference by the readers.

- **Awareness Programmes as well as Intensive Three Days training programmes on Insolvency and Bankruptcy Code, 2016 by ICAI**

  IIIPI organises various programmes on IBC, 2016 at various places all over the country. Also, it organises Three Days Intensive Class Room Training for Limited Insolvency Examination of IBBI.

- **Knowledge Partnership with the Institute of Chartered Accountants of England and Wales (ICAEW)**

  The Institute of Chartered Accountants of England and Wales (ICAEW) is the largest regulator of Insolvency Professionals in the UK. With over 30 years of extensive experience, they promote, develop and support more than 147,000 members worldwide.

  IIIPI's exclusive arrangement with ICAEW for knowledge partnership provides member IPs access to their online Insolvency and Restructuring Group (IRG) at heavily discounted rates. They are provided exposure to live and pre-recorded webinars, E-newsletters, Help sheets for Insolvency Professionals on specialised areas of insolvency practice, Access to online specialist insolvency community, concessional rates for ICAEW's Annual Insolvency Conference, etc.

  Initial enrolments have commenced for IPs in India with membership details available on www.iiipicai.in.

- IIIPI-World Bank Group : Select Training Program for IPs

  IIIPI and IFC from the World Bank Group (WBG) have commenced their training series for IPs in India. The 1st of such 3 days training programs in India for Insolvency Professionals was held in Mumbai from 18th to 20th January, 2018.

  The training held under the aegis of the Insolvency and Bankruptcy Board of India (IBBI), was conducted by a faculty of global experts and domestic practitioners who shared their knowledge and experiences covering the Corporate Insolvency Resolution Process, supported by an incisive Case Study.

Insolvency Professional Agency is crucial machinery driving the process of insolvency and bankruptcy law. The objective of Indian Institute of Insolvency Professionals of ICAI is to promote the professional development of its members, exercise supervision and monitor its members and ensure effective enforcement of law balanced with greater transparency and accountability.

Indeed the Insolvency and Bankruptcy are stark realities of the today's business world without which policy making of doing businesses cannot be imagined. India is no exception to this phenomenon, and in fact has recently put a renewed focus on this crucial aspect of bettering the Ease of Doing Business – one of the avowed objectives of the Government. And the result has been a well-thought-out 'Insolvency and Bankruptcy Code 2016', the biggest economic reform next only to GST, which has also opened a new vista of professional opportunity.

The Implementation of any system does not only depend on the law, but also on the institutions involved in administration and execution of the same. It depends on the effective functioning of all the institutions but the Insolvency Professionals Agency Insolvency Professionals have a vital role to play in the insolvency and bankruptcy resolution process.

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ARTICLE

Home Buyers Are Secured Financial Creditors Under IBC – An Analysis

Events in the Recent Past

The position of home /flat buyers have been debated in the recent past at different forums including in some decisions of Adjudicating Authority under Insolvency and Bankruptcy Law, however there is no clarity so far and the worried home buyers are knocking doors here and there including Supreme Court of India in the cases of Jaypee Infra and Amrapali Group of Companies.

The Regulator i.e. IBBI also created a third category of creditors and introduced a new Form 'F', which was perceived as if this new form is prescribed for home / flat buyers without any such indication by IBBI in the regulations or otherwise.

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Bankruptcy Law Reforms Committee (BLRC) had also envisaged only two categories of creditors i.e. financial creditors and operational creditors and therefore, for initiating insolvency proceedings against any defaulters only these two kinds of applicants were perceived and empowered. There is no third category of creditor who is empowered to initiated insolvency of a defaulter.

In case we consider flat buyers as third category of creditors, then there are no matching provisions in the code for triggering insolvency of the defaulters by this category and also this category has no place in COC or decision making to safe guard their own interest. As such, the third category can not be the intention of law makers.

Detailed Analysis of the Provisions of IBC, 2016

We can also not assume that the law makers have missed this category of the creditors from the ambit of insolvency and bankruptcy law.

Therefore, a detailed analysis of relevant provisions can be done as under.

Linkage between 'Creditor' to 'Debt' and then from 'financial debt' to 'financial creditor'

The following definitions would provide us the linkage which is prescribed under Insolvency and Bankruptcy Code, 2016 between 'Creditors' and 'Debt' and then from 'financial debt' to 'financial creditors'

Section 3(10) defines: "creditor" means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder

Section 3(11) defines: "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;

Section 5(7) defines: "financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;

Section 5(8) defines: "financial debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes—

- money borrowed against the payment of interest;
- any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;
- any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;
- the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;
- receivables sold or discounted other than any receivables sold on non-recourse basis;
- any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;
- any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;
- any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;
- the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;

Section 5(20) defines: "operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;

Section 5(21) defines: "operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;

Advance given for any forward (future) sale or purchase agreement

Section 5(8)(f) is reproduced to invite focused reading:

Section 5(8) defines: "financial debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes—

f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

Major requirements for a debt to be qualified as 'financial debt'

- **<u>It should be a 'debt':</u>** Any advance given to purchase any product or service or both is a debt as it is a claim and anyone who has taken an advance is under a liability and obligation to pay back or to deliver the goods. Such advances are very common for purchase of any capital goods, plant and machinery, made to order products and also include a flat or home
- **<u>Along with Interest, if any:</u>** The interest clause is not mandatory as it may or may not

have an interest clause. The words used in the definition is "along with interest, if any"

- **Disbursed:** The amount of advance is disbursed to the person who is entering into any contract for sale in future. The evidence of disbursement of money would be required. In most cases of home buyers, the money is disbursed to builders against an agreement to purchase
- **Time Value of Money:** Any product or service purchased would have different pricing, one for advance payment of consideration and one for payment on delivery and another for payment after the delivery depending upon the period of credit. The costing of the seller also changes depending upon the cost of working capital during manufacturing / construction of the product. In case the cost of commercial borrowing is borne by the seller, it is added to the price of the product or service. The time value of money is always reckoned while making such advances or while entering into any future sale or purchase agreement.
- **Amount raised under any other transaction:** Any advance raised from any person under a transaction would qualify for section 5(8)(f) and the word 'transaction' has been defined under section 3(33) as under: *"transaction" includes an agreement or arrangement in writing for the transfer of assets, or funds, goods or services, from or to the corporate debtor;*

  Section 3(34) further defines the word 'transfer' as under:

  "transfer" as includes sale, purchase, exchange, mortgage, pledge, gift, loan or any other form of transfer of right, title, possession or lien;

  Section 3(35) further defines 'transfer of property' as under:

  "transfer of property" means transfer of any property and includes a transfer of any interest in the property and creation of any charge upon such property;

As such any amount raised under the transaction of property sale or purchase would be covered under section 5(8)(f).

As such any amount raised under the transaction of property sale or purchase would be covered under section 5(8)(f).

- **Forward Sale or Purchase Agreement:** This 'forward' may also be read as future sale or purchase. Any money raised in a transaction of future sale or purchase would qualify for financial debt as defined under 5(8)(f). The product may be a plant, machine or a flat or a home.
- **Having the Commercial effect of borrowing:** All transactions of raising advance against the future sale or purchase is having the commercial effect of borrowing as it provides funds to seller for working capital. The seller may raise working capital loan from regular lenders or may raise advance from customers against sale of products or services including flats.

Taking advance is a regular mode of borrowing for some industry segments:

There are some industry segments which are raising commercial borrowings from customers against future sale of products or services and such commercial borrowings constitute very large part. Some of the examples are:-

- Land development agencies for housing, industrial use or commercial use;
- Builders (organised or grey market) who are constructing flats, villas, farm houses or row houses;
- Capital Equipment Manufacturers such as Cement plants, Sugar plants, chemical plants, plant and machinery, etc.
- Contractors for infrastructure projects, where they seek advance for working capital
- Design, Engineering, Supply, Installation, Testing and Commissioning services. Taking advance from customer is very regular way of raising borrowing for working capital.
- Automobile Industry: Booking of vehicles against advance payment of deposits.
- White Goods Industry: Booking of some kind of gadgets are done against advance from future customers and this transaction would also have an impact of commercial borrowing.
- Professionals: various professions also take the advance payment against future supply of services.

Home Buyers are Financial Creditors:

The transaction of home buyers with the builders generally have following features which are matching with the definitions given under the IBC:

- The amount of advance given by a home buyer to a builder is a 'debt' for the builder as he is under obligation and liability to pay back or deliver the agreed product or service.
- It is not important if the payment of interest is mandated in the agreement or not
- The amount of advance is disbursed to builder by home buyer
- The consideration of giving such advance by home buyer to builder is time value of money as the price for ready home/flat would be much higher than the price in advance booking against advance payment.
- The builder has raised debt under a transaction of future sale of home /flat and the nature of transaction is covered in the definition of transfer as per section 3(34) & 3(35) of IBC, 2016
- The transaction of taking advance against an agreement to sell in future is a transaction of future sale as defined under section 5(8)(f) of IBC, 2016
- The transaction of taking advance against future sale of flat is a transaction having the commercial effect of borrowing for the builder.

In view of the above, the nature of transaction where a builder take advance from a home /flat buyer against future sale of home /flat matches with the provisions of IBC, 2016 and the debt of the builder is 'Financial Debt' and the home buyers are 'Financial Creditors'

Hon'ble NCLT have already held in cases that flat buyers are not 'Operational Creditors' as they are not covered under the definition provided in IBC, 2016.

Home Buyers are Secured Financial Creditors:

The following definitions provided in the IBC, 2016 needs careful reading before the issue of secured or unsecured is deliberated:

Section 3(30) defines: "secured creditor" means a creditor in favour of whom security interest is created;

Section 3(31) defines: "security interest" means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person:

Provided that security interest shall not include a performance guarantee;

Section 3(33) defines: "transaction" includes an agreement or arrangement in writing for the transfer of assets, or funds, goods or services, from or to the corporate debtor;

Section 3(34) defines: "transfer" includes sale, purchase, exchange, mortgage, pledge, gift, loan or any other form of transfer of right, title, possession or lien;

Section 3(35) defines: "transfer of property" means transfer of any property and includes a transfer of any interest in the property and creation of any charge upon such property;

Salient Features of Transaction Between A Home Buyer and Builder in View of the Transfer of Property Act.

- The builder has an unfettered right to sell a property for future delivery
- The builder enters into an agreement with the home buyer for the sale of specific identifiable property /asset /flat /home.
- The consideration is being paid in installments by the home buyers to builder against that agreement to sell and receipts are issued against that agreement to sell
- 'Contract for Sale' is defined under section 54 of the Transfer of Property act, 1882 as under: "a contract for sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties. It does not, of itself, create any interest in or charge on such property"
- The buyer in a contract for sale obtains a right to get the sale deed executed in his favour.
- Section 55(6)(b) of the Transfer of Property Act, 1882 deals with the rights of buyers of property under an Agreement to Sell. Some of the relevant part of the provisions are reproduced hereunder for ready reference:

"The buyer is entitled to a charge on the property, as against the seller and all persons claiming under him, to the extent of the seller's interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount and to compel specific performance of the contract or to obtain a decree for its rescission."

- Section 55(6)(b) provides that an agreement to sell creates following rights of buyer on the property: -
  - It creates a charge on the property
  - To compel specific performance of the contract; or
  - To obtain a decree for its rescission

- Any transaction which secures payment or performance of an obligation is considered a 'security interest' as defined under section 3(31) of IBC, 2016

Conclusion

The analysis done above leads to following conclusion: -

- The amount of advance given by home buyer to builder is a debt in the books of builder and the home buyer is a creditor for builder as per definition of debt u/s 3(11) and definition of creditor u/s 3(10);
- The home buyer is a financial creditor as per section 5(7) as the amount of advance given by home buyer to builder is a financial debt as per section 5(8)(f);
- The home buyers are secured creditor as defined u/s 3(30) as home buyers are having a security interest as defined u/s 3(31) on the property developed by builder, which is specifically identified.

Challenge

The only challenge to the entire concept is regulation 21 of The Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, which reads as under: -

"Proving security interest: - The existence of a security interest may be proved by a secured creditor on the basis of: -

(a) the records available in an information utility, if any;

(b) certificate of registration of charge issued by the Registrar of Companies; or

(c) proof of registration of charge with the Central Registry of Securitisation Asset Reconstruction and Security Interest of India."

It would be difficult for a home buyer to prove its security interest as per regulation 21(supra). However, regulations are subordinate to Code and all other provisions are available in the code, which overrides the regulations. May be an amendment is needed in the liquidation regulations for proving security interest, which is otherwise also a challenge for most car loans as they are not able to prove their security interest.

Insolvency and Bankruptcy Code – Key Issues, Challenges and Way Forward

Exemplar Statute

The Insolvency and Bankruptcy Code (Code) is an exemplar statute propelling the financial discipline in the business environment. A framework of long forgotten business trust and ethics is sought to be re-built on the edifice of new law. The stark reality of a stranger managing an enterprise or business replacing the promoters is too harsh to be taken insouciantly. The new law has shaken the corporate world from its deepest slumber. The banks, the biggest lenders in India, have started exercising their right for resolving the insolvency of its defaulting borrowers.

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The creditors particularly operational creditors have found a new tool in their hands to recoup their money stuck with the corporate debtors. Demand notice under section 8 of the Code has empowered the beleaguered suppliers of goods and services. The promoters and directors of the corporate debtors, on the other hand, have suddenly realised where the shoe is pinching. The concept of 'creditor-in-possession' as opposed to earlier regime of 'debtor-in-possession' has changed the thinking and the way the business will be done in future. Judicial interpretation of 'insolvency' has been replaced with 'matter of fact' default to trigger insolvency resolution process. The results of this historic law will be assessed in some years from now. One definite and immediate outcome is the improvement of cash flow of the creditors besides providing an abundant and expansive opportunity to professionals known as Insolvency Professionals.

Problems Requiring Resolution

Amongst the bouquets, however, lies the glitches requiring an immediate ironing out. The BLRC report is a brilliant elucidation of the new concept with clear exposition. Drafting of law is, however, another matter. The confusion is compounded with Benches of National Company Law Tribunal struggling to cope up with the workload. The members sitting on these Benches are doing their best to understand the way corporate world functions and also acquainting themselves with concepts of insolvency laws and financial statements. The areas requiring immediate attention of the law makers, executive machinery, regulators and adjudicators are stated hereinafter.

Singular Location of Appellate Tribunal Bench

The insolvency law is applicable throughout India except Part III which does not extend to the State of Jammu and Kashmir. The National Company Law Tribunal (NCLT) constituted under the Companies Act, 2013 is the adjudicating authority for the purposes of Corporate Insolvency Resolution Process under Part II of the Code. The appeal from the orders of NCLT lies with the National Company Law Appellate Tribunal (NCLAT/Appellate Tribunal). NCLAT benches are located in New Delhi. The litigants across India aggrieved with the order of NCLT are expected to travel to New Delhi for filing appeal. Denial of access of justice near the doorstep is equal to denial of justice. Many small corporate debtors, located outside New Delhi, who are aggrieved with the order of initiation of resolution process find it cumbersome and exorbitant to pursue the appeal remedy. The idea of establishing NCLAT at New Delhi is regressive. The two-tier Tribunal structure has no success story in this country. The High Courts are better option for handling appeals from the orders of NCLT. A designated Insolvency Court within the High Court with the consent of Chief Justice of each High Court would have provided easy access to justice with judicial consideration.

Inconsistency in the Code

No doubt it takes some time for a new law to settle down but with large number of issues cropping up while interpreting the Code and extant Rules and Regulations, it is nobody's guess when the dust will settle. For example, while in Part II, the procedural aspects are relegated to Regulations to be framed by the Insolvency and Bankruptcy Board of India (Board) with the use of expression 'as may be specified', Part III uses the expression 'as may be prescribed' implying that Rules will be framed by the Central Government. For example, the contents of the public notice under section 130 of the Code shall be as prescribed in the Rules. In contrast, the contents of public announcement in CIRP and Liquidation are specified in the Regulations. Similarly, the creditors have to file their claims with the bankruptcy trustee in the manner as may be prescribed in the Rules whereas in Part II, the manner of filing claims by the creditors is specified in the Regulations. Another instance of using different expressions under similar circumstances is handed out in Section 7 and Section 9. Section 7(7) mandates that the Adjudicating Authority shall communicate the *'order'* to the financial creditor and the corporate debtor, Section 9(5) provides that the Adjudicating Authority shall admit the application and communicate such *'decision'* to the operational creditor and the corporate debtor. The consistency in the new law is missing.

Time limit for Corporate Insolvency Resolution Process

The time limit for completion of corporate insolvency resolution process has been stipulated as 180 days from the insolvency commencement date. The appointment of Interim Resolution Professional may be simultaneous with the order of admission of application for initiation of corporate insolvency resolution process or may be later than such an order. Though the time begins to run from the insolvency commencement date, yet the appointment of Interim Resolution Professional is made after some time. The time lost between the insolvency commencement date and the date of appointment of Interim Resolution Professional cannot be made up. At times, the order of the NCLT is not notified to the Interim Resolution Professional in time. A confusion also reigns whether the Interim Resolution Professional should start functioning on the basis of information received by him over phone of his appointment or on the basis of order placed on the website or should he wait for the certified copy of the order. In the era of digitisation, this problem can be resolved by transmitting digitally signed copy of the order by electronic means to the Interim Resolution Professional. The Code does not provide any flexibility to the Adjudicating Authority to exclude the period lost due to administrative delays. The initial delay results in shorter period being made available to the creditors for filing and proving their claims.

The time limit for completion of corporate insolvency resolution process can be extended up to 90 days by the NCLT. No useful purpose is served by restricting the power of the NCLT to grant extension only once. The outer limit of 90 days is in itself a control measure to keep a check on the misuse of the power of the extension. The proviso relating to the power of NCLT to grant extension once is too restrictive. There may be circumstances where one extension of 30 days may require to be extended again but with this restriction, the corporate debtor will have to mandatorily go under liquidation. Empirical data will reveal that Committee of Creditors, knowing fully well that extension cannot be sought more than once, are seeking extension of 90 days in each case and the Benches of NCLT are also acceding to their request. In practice, the proviso restricting the power of NCLT to grant extension only once has become redundant.

Applicability of Law of Limitation

The NCLT and NCLAT have been struggling to arrive at an acceptable conclusion whether the law of limitation is applicable to proceedings under the Code or not. A provision similar to Section 433 of the Companies Act, 2013 would have put at rest any speculation as to its applicability. The NCLAT earlier ruled that the provisions of Limitation Act, 1963 do not apply to the proceedings under the Code and also ruled out making Section 433 applicable to such proceedings stating that it is applicable to proceedings before the Tribunal under the Companies Act, 2013. With the result, creditors with stale claims started lining up the doors of NCLT with applications for initiation of corporate insolvency resolution process. NCLAT recently modified its ruling stating that even assuming limitation law applies, the limitation will commence from the date from which the provisions of the Code were first enforced, reading into Article 137 of the Schedule attached to the Limitation Act, 1963 on the basis that the cause of action first accrues on the date of commencement of the Code.

Let us understand the impact of allowing stale claims to initiate corporate insolvency resolution process. The result of corporate insolvency resolution process could be either approval of resolution plan or liquidation. If the resolution plan is approved, the management of the corporate debtor is handed over to its new promoters. If the creditor with stale claim demands the amount from the corporate debtor, the stand of the corporate debtor would be to reject the claim, being stale. Similarly, if the company goes for liquidation, the liquidator is also bound to reject the claim being stale. Under both the alternatives, the creditor with stale claim is not likely to recover the amount. But he gets the power to put the corporate debtor into the rigours of the Code. This asymmetry leads to a conclusion that Limitation Act, 1963 should be applicable to filing of applications for initiation of corporate insolvency resolution process.

Homebuyers Have No Home to Go

The major flaw remains in leaving out a large chunk of creditors outside the domain of the Code. The homebuyers do not fall under the definition of either financial creditor or operational creditor. They are left to the mercy of the unscrupulous and dishonest promoters who finance their projects from the instalments paid by the homebuyers. In reality, homebuyers are the ones who are financing the projects of developers. Their exclusion is arbitrary. Not only homebuyers, many other creditors such as security deposit by a tenant or customer also falls in this category. They are neither financial creditors nor operational creditors. The solution lies in amending the definition of operational creditor to *"a creditor other than financial creditor"*. The distinction between financial creditor and operational creditor is acceptable for the purpose of process of making application for initiation of corporate insolvency resolution process and constitution of committee of creditors or priority in distribution waterfall. But no useful purpose is served the way the operational creditor has been defined. A minor amendment in the definition will pave way for 'residuary creditors' to initiate corporate insolvency resolution process. For false and malicious proceedings by creditors, the provisions in the Code have been embedded for protection of corporate debtors.

Suspension of Powers of Board of Directors

Section 17 has caused confusion amongst corporate debtors and practitioners. From the date of appointment of Interim Resolution Professional, *"the powers of the board of directors or the partners of the corporate debtor, as the case may be, shall stand suspended and be exercised by the interim resolution professional"*. This has been interpreted by some as suspension of powers of the board of directors and not their duties and responsibilities. The adjudicating authorities and the Supreme Court have freely used the term 'suspended directors' or 'erstwhile director'. Careful reading of the provision makes it clear that there is no suspension of directors; it is their powers that are in suspended animation. The Board is fastened with the responsibility of running and

managing the company's affairs[1]. If the powers of the board are suspended and the management of the affairs of the corporate debtor vests with the Interim Resolution Professional after his appointment, then the responsibility also lies with the Interim Resolution Professional. The suspension of the powers of the board of directors means suspension of the role of directors, and responsibilities emanating from such role. The amendment in the provision would help in clarifying the role and responsibilities of the directors during corporate insolvency resolution process.

Compromise or Settlement after Initiation of Corporate Insolvency Resolution Process (CIRP)

The CIRP

once starts has to run through its course. There is no provision of compromise or settlement once it is initiated. The Adjudicating Authorities are allowing withdrawal of applications on the ground of settlement before admission of the application. But no withdrawal is permitted after the admission of application by NCLT. The Supreme Court, using its powers under Article 142 of the Constitution, is permitting withdrawals after compromise or settlement between the creditor and the corporate debtor even after admission of the applications under the Code. A question arises is whether such a settlement between the creditors and corporate debtor is valid in view of the fact that the settlement should be through Interim Resolution Professional as he is managing the affairs of the corporate debtor and the promoters or directors cannot enter into any settlement on behalf of the corporate debtor after the appointment of Interim Resolution Professional. In this sense, the Code becomes a recovery tool in the hands of creditors. A school of thought does not consider it to be violative of the spirit of the Code as the creditor gets the money which was in the ordinary course of business due and payable. Will it amount to preferential treatment over other creditors is a question which has to be answered in the light of facts of each case? A suitable amendment in the Code granting powers to the NCLT would be a welcome measure by clearly defining the stage of corporate insolvency resolution process up to which the settlement between the creditor and the corporate debtor could be considered for withdrawal of corporate insolvency resolution process. The stage could be defined as prior to public announcement for receipt of claims. Once the claims are received, the corporate debtor should be asked to make payment or secure payment of such claims.

Insolvency Professional Entity

The Regulations recognise formation of Insolvency Professional Entity (IPE). But the Code does not recognise IPE's in so far as appointment of insolvency professional is concerned. The work is allocated to an insolvency professional in his personal name, which means that responsibility remains with the insolvency professional and the fee is paid to him. The purpose of IPE stands defeated with legal and practical difficulties of sharing fee and resources between insolvency professional and the IPE. The idea of forming IPE is good as it provides comfort to the corporate debtor and creditors as to the infrastructure and enhanced capabilities of insolvency professionals. There is no clarity as to the regulatory framework of IPE and the work allocation to IPEs. This calls for an immediate intervention of the Board.

Personal Guarantors to Corporate Debtors

This is the subject that is hanging fire for quite some time. There have been conflicting judgments of the benches of NCLT. Even NCLAT has given conflicting judgments in two cases involving properties of personal guarantors to corporate debtors. One view is that essentially the corporate insolvency resolution process will cover personal guarantor also and hence the lenders should abide by the stand still period before invoking personal guarantees. From the point of view of lenders, the liability of surety is co-terminus with the borrower and that the lenders have a choice to recover from any one of them under the general law of contract. Accepting a haircut under a resolution plan may also lead to discharge of the personal guarantor. If the intent of the Code is to enforce a standstill period for personal guarantors to corporate debtors, it should include a provision in specific terms under section 14.

Corporate Guarantors to Personal Debtors

This situation has not been envisaged under the Code. A corporate guarantor may also be taken to task by the lender for a loan to an individual. Such a lender will be considered as a financial creditor under the Code and the lender can proceed against such a corporate debtor initiating corporate insolvency resolution process under Part II of the Code before NCLT. The individual borrower can additionally be proceeded against under Part III of the Code by the lender before Debt Recovery Tribunal (DRT). Here, there is no provision of transfer of proceedings to one adjudicating authority. It is

1*Corporate Directors – Roles, Responsibilities, Powers and Duties of Directors* by Ashish Makhija, published by Lexis Nexis, India, First Edition, 2016

significant to consider such cases also for combined resolution but this calls for an amendment.

Section 29A is too restrictive

Section 29A inserted by Insolvency and Bankruptcy (Amendment) Act of 2018 provides eligibility criteria of a resolution applicant. The major flaw in the provisions is the exclusion of categories of persons having an account classified as non-performing asset. Most of the promoters of the corporate debtor will fall under this category and hence would be ineligible to file a resolution plan. The account may be classified as NPA for valid business reasons, but no distinction is made on this account. If the promoter had the capacity to pay, there is no reason why he would let the company go for corporate insolvency resolution process where the chances of the business being gobbled up by competitors is high. The resolution plan should be allowed to be filed by promoters of accounts classified as NPA as it is on the combined wisdom of committee of creditors to accept it or reject it. In committee of creditors, the promoters have no say and hence the decision making is independent. This will also bring in more value to the creditors.

Delay in Filing of Claims in Liquidation

The creditors of a corporate debtor may not gain knowledge of the invitation of claims despite the public announcement by the liquidator. The Code is silent as to what will be the fate of the claims received after the last date of submission of claims. Neither the Code nor the Regulations provide for the status of claims filed after the expiry of last date of submission of claims. In contrast, the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides that a creditor, who fails to submit proof of claim within the time stipulated in the public announcement, may submit such proof to the interim resolution professional or the resolution professional, as the case may be, till the approval of a resolution plan by the committee. Similar provision does not exist in the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016. If the claim is received on the thirty first day, whether the liquidator should verify the claim or reject it out rightly having been not received in time. The liquidator does not have any power to accept claims after the due date of submission of claims. He is bound to refuse to entertain such delayed claims. This seems to be harsh and hence a suitable amendment allowing filing of claims by creditors and other stakeholders beyond the prescribed time upon condonation of delay by the NCLT is desirable.

Conclusion

The issues highlighted above are illustrative. They require active intervention of the Regulator, Executive and the Legislature. This will go a long way in diffusing the confused status currently prevailing. The Board as a Regulator has a wider role to play in guiding the Insolvency Professionals as the subject is new. The impulsive amendments in the Code, Rules and Regulations may be avoided, particularly the advisory circulars. The new law has the capacity to lay foundation to new order amongst the corporate fraternity. It is producing results better than the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 or the cheque bouncing provisions in the Negotiable Instruments Act, 1881. The last word is yet to be written.

ARTICLE

Insolvency and Bankruptcy Code, 2016 Judicial Somersault and Key Challenges for Insolvency Professionals

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Background

Insolvency and Bankruptcy Code, 2016 (IBC) has rightly been dubbed as the game changer of Indian business scenario. It has been one of the key factors contributing to India's steep climb up in the ladder of 'Ease of Doing Business Index' by 30 notches to the 100th position[1]. For the first time, in India, large borrowers of public money seems to be a worried lot and are desperately trying to put their houses in order to avoid insolvency proceedings. The administration, regulator and judiciary, all are working in tandem and at an unprecedented pace to achieve the desired results. Within a little more than a year, the Hon'able Supreme Court (SC) has decided about 17 cases settling the key issues; IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, have been amended four times and an ordinance was brought in to amend IBC to plug the loop holes and the possible misuse of the law.

The legacy of politically sponsored and hyped loan *melas* and write offs; strong nexus of politicians, bureaucrats, bankers, professionals, industry and business; lax monitoring and lack of stringent corrective action by regulators lead to the accumulation of mindboggling *Everest* of the non- performing assets (NPAs). The creative nexus influenced policy making, tinkering with it and devising new and innovative means to siphon off public money. Lenders hived off bad loans to a new creature called 'Assets Reconstruction Companies' (ARCs) to clean up their balance sheets and start all over again with the lending spree. When NPAs reached alarmingly levels again, ARCs came to their rescue. A very senior judge observed in an open court that it is only in India that the banks give new loans for the payment of interest on their old loans.

Interest rates on small savings of lower and middle classes were curtailed to make cheaper loans available for the large business houses. It was supposedly

1World Bank Report- Doing Business 2018: Reforming to Create Jobs, Published on October 31, 2017

done to accelerate economic development and thereby generating employment and higher income levels for people at large. But in the process most of the public money was lost to fraudsters or the poor management. A growing population of senior citizens, without adequate social security and being dependent on the interest income from their life savings, were hit the hardest.

Judicial Somersault

The Insolvency Law is evolving and settling down with pronouncements of NCLAT and SC and amendments in the Act and Regulations. But this process is adding to the challenges of the Insolvency Professionals (IP).

NCLAT setting aside the order for CIRP

NCLAT while setting aside the order for the CIRP, declares illegal all the actions taken by the Interim Resolution Professional (IRP), including the publication of notice, though graciously directing the Adjudicating Authority (AA) to fix the fee of IRP for the period he has functioned and directing the Corporate Debtor (CD) to pay the same[2].

Withdrawal of application after Admission by the Adjudicating Authority

Rule 8 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016 permits withdrawal of the application made for the CIRP by the applicant before its admission by AA. But there is no provision for withdrawal after the application has been admitted and CIRP has commenced.

National Company Law Appellate Tribunal (NCLAT) upheld that once CIRP application is admitted, it cannot be withdrawn, the matter cannot be closed till claim of all the creditors are satisfied by the corporate debtor following the procedures laid down under IBC. The reason for such order was that Rule 11 of NCLT and NCLAT Rules, for exercising inherent power has not been adopted for the purpose of IBC[3]. In appeal against this order of NCLAT, the Hon'ble Supreme Court (SC), held that the NCLAT could not utilise the inherent power under Rule 11 but utilized its own powers under Article 142 of the Constitution of India and allowed settlement. Following this, SC has also approved settlement in a number of other cases resulting in termination of CIRP and removal of IRP/ Resolution Professional (RP)[4].

2 NCLAT in S3 Electrical & Electronics Pvt. Ltd Vs Brian Lau
3 NCLAT in Lokhandwala Kataria Construction Pvt. Ltd. Vs Nisus Finance and Investments Managers LLP
4 SC in Lokhandwala Kataria Construction Pvt. Ltd. Vs Nisus Finance and Investments Managers LLP and Mothers Pride Dairy India Pvt. Ltd. Vs Portrait Advertising and Marketing Pvt. Ltd.

In both the above situations i.e. a set aside order by the NCLAT or a settlement before the SC, the uncertainty of the process coming to an abrupt end remains at large and also puts in jeopardy the payment of his fee and other expenses incurred. IRP/RP has to approach NCLT for fixing his fee and for directions to the CD for payment. In many CIRP cases IRPs/RPs are facing non-cooperation by CD in getting payment of their fee and expenses. One such case is also pending before the SC.

A. **Right of homebuyers to initiate CIRP**

NCLT as well as NCLAT in Col. Vinod Awasthy v. AMR Infrastructure Limited have held that the flat buyers are neither financial creditors nor operational creditors under the IBC, as there is no supply of any goods nor rendering of any service. But in Nikhil Mehra vs. AMR Infrastructure Limited, NCLAT held the flat buyer with assured annual return is a financial creditor.

The Insolvency Law is evolving and settling down with pronouncements of NCLAT and SC and amendments in the Act and Regulations. But this process is adding to the challenges of the Insolvency Professionals (IP).

This position does not seem to be in line with the recommendations in the Report of Banking Law Reforms Committee "The Committee proposes that **any creditor, whether financial or operational, should be able to initiate the insolvency resolution process** under the proposed code"[5]. So exclusion of home buyers from the definition of operational creditors deprives them of their basic rights. After moratorium, they cannot even approach Consumer Courts and they are neither considered financial nor operational creditors. Due to this precarious situation, homebuyers filed a writ petition before the Hon'able SC in Jaypee case. Excerpts from the BLRC Report as given in **Box 1** indicate that there was no intention to exclude homebuyers from the definition of operational creditors.

Role of Committee of Creditors (CoC)

With the concept of Creditors in Control under IBC, after the initiation of Corporate Insolvency Resolution Process (CIRP), the CoC assumes decision

5 The report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design November 2015

making powers for the management of the CD. IRP/RP is an independent professional to take care of the interests of all the stakeholders. Thus both IRP/RP and CoC have to work in tandem and in the overall interest of resolution while balancing the interests of all stakeholders. But in practice there is a clash of interest among the members of CoC per se and other stakeholders. Independence of IP is impacted by such a situation. A few areas of concern are being highlighted in this regard.

Replacement of IRP/RP

Section 22 (2) of the IBC provides that the CoC, may, in the first meeting, by a majority vote of not less than seventy-five per cent of the voting share, either resolve to appoint the IRP as RP or to replace the IRP with another RP. Similarly section 27 provides that the CoC may at any time replace RP with another RP. The well meaning provisions are generally twisted for furthering vested interests. Same is happening with this provision. Invariably in most of the CIRP cases initiated by an operational creditor (OC) or CD or a financial creditor (FC) other than the financial institutions, the CoC comprising of financial institutions, replaces the IRP with an RP of their choice and comfort. This not only puts a question mark on the credibility of the process of registration of IPs by the Insolvency and Bankruptcy Board of India (IBBI) but also hints at a nexus and leads to delay in the time bound process of resolution.

There is a mandatory timeline of 180 days to complete the CIRP, off course with a onetime extension of up to 90 days. Getting node of the AA for this change may take 30 to 60 days, which is a very crucial time in the total 180 days' time period for CIRP. Such change also leads to a request for extension of time beyond 180 days.

Apart from replacing the IRP, in some cases the CoC has gone to the extent of disapproving the fee of IRP and valuers appointed by him and asking the applicant to bear all the expenses, till the RP of their choice takes over. This is a brazen exercise of powers vested under IBC. There have also been cases where CoC tried even to malign the IRP/RP to bring in a RP of their choice at a very high fee.

One can imagine how independent an RP can be in line with the spirit of law when his appointment and fee is to be approved by the CoC, which is only one of the stakeholders. An RP, in such a situation, will surely be humanly inclined to please and impress the CoC, and may even cross the *laxman rekha* of his independence.

Interim Finance

Most the CoC members avoid agreeing to provide interim finance and put the responsibility to manage it on the RP. Such an attitude is the biggest handicap for IRP/RPs in managing the affairs of the CD as a going concern. Have they been so risk averse earlier the NPAs would not have piled up so much. The CoC members with adequate security interest are more inclined towards liquidation so that they can recover the full dues by spiking the resolution process.

Negative bias towards CD/Applicant

Both borrowers and lenders have been responsible for the unsustainable high levels of NPAs. But in the CIRP process the CD is always seen with an eye of suspicion as if there has been no fault on the part of lenders. In one case, an ex director of CD authorised his representative to attend the CoC meeting due to the exigency of death of his brother. His authorised representative was not allowed to attend the meeting by CoC. Legally the RP could have prevailed upon the CoC in allowing the representative to attend the meeting, but the RP toed the dictate of the CoC probably looking for more lucrative assignments or even fearing replacement.

Regulations 21(2) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, permits authorised representative for every participant. Regulation 21 (2) reads as " The notice of the meeting shall provide that a participant may attend and vote in the meeting either in person or through an authorised representative". Regulation 2 (1) (l) defines 'Participant' as a person entitled to attend a meeting of the committee under section 24 or any other person authorised by the committee to attend the meeting. Under section 24 members of suspended Board are also participants.

Further Proviso to Regulation 23 (3) allows the differently abled persons to make a request to the resolution professional to allow a person to accompany them at the meeting. A suspended Board member could also be a disabled person.

Therefore, as per the law there is no restriction on the authorised representative of suspended Board members attending the CoC meeting.

Thus, there is an urgent need to have a check on the arbitrary decision making by the Committee of Creditors specially regarding replacement of IRP/RP, approval of CIRP cost, Interim Finance and interference with the independent functioning of

IRP/RP. The mindset of CoC members needs a change that is oriented more towards resolution.

Box 1 Excerpts from the BLRC Report

Enterprises have financial creditors by way of loan and debt contracts as well as operational creditors such as employees, rental obligations, utilities payments and trade credit. (Pg 22)

Liabilities fall into two broad sets: liabilities based on financial contracts, and liabilities based on operational contracts. Operational contracts typically involve an exchange of goods and services for cash. (Pg 54)

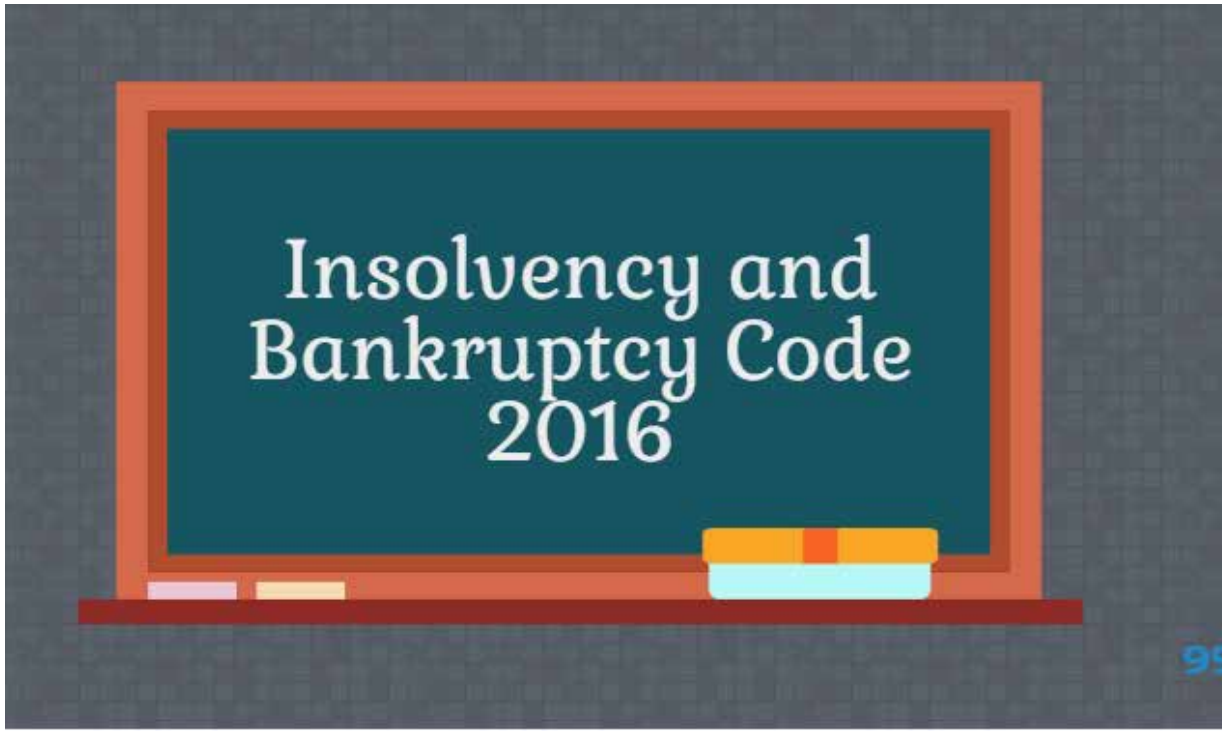
The second set of liabilities are operational liabilities, which are more difficult to centrally capture given that the counterparties are a wide and heterogeneous set. (Pg 54)

Operational creditors are those whose liability from the entity comes from a transaction on operations. (Pg 77) (Para 5.2.1).

Enterprises have financial creditors by way of loan and debt contracts as well as operational creditors such as employees, rental obligations, utilities payments and trade credit. (Pg 22)

ARTICLE

Enterprise Group Directors' Obligations in Period Approaching Insolvency



Insolvency of enterprise groups has long remained an enigmatic and untouched issue in the realm of international insolvency law. Recently, the Working Group V of United Nations Commission on International Trade Law (UNCITRAL WG V) has taken up the onerous task to fill this void and to draft an instrument/ model law to govern international aspects of insolvency resolution of enterprise groups (two or more enterprises that are interconnected by control or significant ownership)[1] including obligations of directors of group companies for acts done in the 'twilight zone'. In September 2017, the WG published a note dealing with the abovementioned issue. In this paper, a contrast is drawn between the obligations of directors of individual companies and those of group companies belonging to an enterprise group in the period approaching insolvency. Reference has been made to the Bell Group case of Australia.

1United Nations Commission on International Trade Law, UNCITRAL's Legislative Guide on Insolvency Law, Part Three: Treatment of enterprise groups in Insolvency, 2, (New York: United Nations, 2012) available at https://www.uncitral.org/pdf/english/texts/insolven/Leg-Guide-Insol-Part3-ebook-E.pdf.

Single Entity Approach V. Enterprise Approach

Separate entity status of a corporation allows a corporation to own assets in its name, distinct from the personal assets of its owners, in addition to other benefits like perpetual existence, right to sue and be sued, common seal etc.[2] In context of enterprise groups, adherence to the 'single entity' or 'limited liability' principle typically requires directors to promote the success and pursue the interests of the company they direct,

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2 H. Hansmann & R. Kraakman, The Essential Role of Organizational Law, 390, (2000) 110 Yale Law Journal 387.

respecting the limited liability of that company and ensuring that its interests are not sacrificed to those of the enterprise group.[3] Some authorities contend that the current economic analysis of corporate law supports this 'limited liability' or 'entity' approach in dealing with the corporate groups on the grounds of efficiency as it facilitates in minimizing the transaction costs of stakeholders and maximizing shareholder returns.[4]

However, after the rise of globalization, the 'single entity' approach has created many practical problems in dealing with insolvency of group members of enterprise groups, especially those which have highly interdependent operations. This is particularly true for large multi-national groups which may have a large number of subsidiaries, sometimes even up to 1200, making it almost impossible for an outsider to discern true legal relations between all group members.[5] Working Group V noted some common problems associated with adherence of 'single entity' principle in relation to group members like: effect of insolvency on the enterprise group where multiple group members are dependent upon the insolvent group member for supply of raw material, finance, logistics etc.; identifying interests of different group members by a director who acts as such, or holds a managerial or executive position in one or more group members of same enterprise group; where a group member enters into cross-guarantees with other group members to assist the group as a whole to use its assets more effectively in financing group operations etc.[6] It was aptly noted by Rogers CJ in *Qintex Australia Finance Ltd v Schroders Australia Ltd*[7] that:

"In the everyday rush and bustle of commercial life in the last decade it was seldom that participants to transactions involving conglomerates with a large number of subsidiaries paused to consider which of the subsidiaries should become the contracting party."

The 'enterprise approach', on the other hand, disregards the fiction of separate legal personality for corporate group members and adopts a more realistic view of the corporate enterprise where such groups operate economically as a unified whole.[8] As far as insolvency of group members of enterprise groups or enterprise groups as whole is concerned, this is the most practical approach which takes into account array of factors such as position of a group member in the group, degree of integration between enterprise group members etc. which are not considered under 'single entity' approach. However, most legal systems, especially those of common law countries, subscribe to 'single entity' approach in their corporate laws and have not yet legislated upon treatment of insolvency of enterprise group. It is important to note that the recommendations contained in the section two of part four of UNCITRAL's Legislative Guide on Insolvency Law (2017), have been drafted by adhering to the enterprise approach.

Nature of Obligation of Directors

In case of an individual company, as long as it is solvent, the liability of the directors is mainly towards the company i.e. liability is towards the shareholders of the company. Whereas, it has been widely accepted that when a company becomes insolvent, the focus of directors ought to shift from 'earning profit for wealth maximization of the shareholders' to 'minimizing the loss to and safeguarding the interests of the creditors.'[9] The rationale behind this system was succinctly explained by the Bankruptcy Law Reform Committee (India) as:[10]

"As long as debt obligations are met, equity owners have complete control, and creditors have no say in how the business is run. When default takes place [i.e. when the entity becomes insolvent], control is supposed to transfer to the creditors; equity owners have no say."

Insolvency laws in most countries expressly provide for various liabilities of the directors in period approaching insolvency. These liabilities include liability for avoidance transactions (i.e. preferential transactions, undervalued transactions etc.), wrongful trading, fraudulent trading, misfeasance etc. Different legal systems provide for different ways for apportionment of liability for aforementioned acts like

3 Working Group V (Insolvency Law), United Nations Commission on International Trade Law, Directors' obligations in the period approaching insolvency: enterprise groups, 4, (Vienna: United Nations, 2017) available at https://daccess-ods.un.org/TMP/6749956.6078186.html.
4 Jenny Dickfos, Directors' Duties under an Enterprise Approach, 5, (2014) available at https://www.researchgate.net/publication/45109411_Directors%27_Duties_under_an_Enterprise_Approach.
5 Supra note 1 at 10
6 Supra note 3 at 4-5.
7 (1990) 3 ACSR 267.
8 Adolf A. Berle, Jr., The Theory of Enterprise Entity, 47 Columbia Law Review, 343.
9 Winkworth v. Edward Baron Development Ltd., 4 [1986] 1 W.L.R. 1512, 15; Kinsella v. Russell (1986) 4 A.C.L.C. 215; 10 A.C.L.R.; Re Frederick Inns Ltd., 2 [1993] I.E.S.C. 1 at [47]; Geyer v Ingersoll Publications Co, 621 A 2d 784 (Del Ch 1992) and In re Healthco International Inc. ((1997) 208 B.R. 28.
10 Bankruptcy Law Reform Committee, The Report of Bankruptcy Law Reform Committee Volume I: Rationale and Design, 10, (November, 2015), available at http://ibbi.gov.in/BLRCReportVol1_04112015.pdf.

under some laws provide for general rule making all directors jointly and severally liable for failure to meet obligations, some give court discretion to determine the extent of liability of each director while other provide for different liabilities for independent and internal directors.[11]

Whereas in case of enterprise groups, an addition dimension is added to the liability of the directors in the period approaching insolvency. Directors of a group company, not only have the liabilities towards the group company under the applicable corporate laws but may also be required to promote and safeguard the interests of the enterprise group as a whole. The *Bell Group* Case[12] perfectly exemplifies this phenomenon where directors neglected the interests of the group companies directed by them in interest of the group as whole. In this case, the enterprise group was in financial difficulties and a consortium of 20 banks agreed to lend around $300 million to the major group members by taking security that said group companies didn't have. Ultimately, Bell Group went into liquidation and unsurprisingly, the banks got paid out quickly. However, the liquidator of proceedings, acting on behalf of unsecured creditors, claimed that the directors of Bell Group had breached their duties towards the group companies and that the banks were in a sense knowing participants in that breach of duty. This claim was accepted by the court of first instance and later upheld by Court of Appeals and the High Court of Australia, which, nonetheless, struck down the Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Act 2015 (WA) upon finding it inconsistent with provisions of the Income Tax Assessment Act 1936 (Cth) and the Taxation Administration Act 1953 (Cth) (collectively, the Tax Acts).[13]

Where an enterprise group has members situated in different countries, the task of affixing liability upon directors becomes even harder. International character of a multinational enterprise group enables the top management to commit misfeasance, frauds etc. in a number of different ways viz. assets may be shuttled outside the jurisdiction to a foreign subsidiary; a particular foreign subsidiary may be abandoned (although it may have been previously presented as supported by the international group) in order to evade liability as the jurisdiction of the subsidiary may lack remedies for such situations etc.[14] Moreover, very few jurisdiction provide for laws governing insolvency of domestic enterprise groups let alone multinational enterprise groups.

In this regard, Working Group V notes that sometimes director of group company might resort to actions for benefit of the enterprise group as whole which might appear to be detrimental to the interests of the directed company, on the first glance, but will ultimately achieve a better result for it and ensure the continuation of its business and maximization of its value.[15] It further recommended that directors of group companies, in order to avoid liability for their actions during the 'twilight period', to follow the 'no worse off' principle i.e. creditors will be no worse off under the steps that are taken for benefit of the entire group, than they would have been had those steps not been taken.[16] Additionally, a director may 'organize informal negotiations with creditors, such as voluntary restructuring negotiations, with a view to devising a solution for the enterprise group as a whole or some of its parts where that will benefit the directed group member.'[17]

WHO IS A DIRECTOR?

There is no universal definition given to the term 'director', especially in the context of insolvency laws. Generally, a director is a person who is appointed as such and who has the responsibility for determining and implementing the company's policy.

In the case of individual companies, as per part four of UNCITRAL's Legislative Guide on Insolvency Law (which deals with duties of directors in period approaching insolvency), a director would include owners of a company, formally appointed directors, (who may be independent outsiders or officers or managers of a company serving as executive directors, referred to as "inside directors") and non-appointed

11 *Supra* note 1 at 20.

12 *Westpac Banking Corporation v. The Bell Group Ltd (In Liq) [2012] WASCA 157* CACV 52 Of 2009. See also, Summary of the case as available on http://www.parliament.wa.gov.au/parliament/commit.nsf/($lookupRelatedDocsByID)/4D8C92EB836E6BBF48257EE3002FEA90/$file/Bell+Group+Litigation+Presentation+by+SSO+(redacted+version).pdf.

13 *Bell Group N.V. (in liquidation) v Western Australia; W.A. Glendinning & Associates Pty Ltd v Western Australia; Maranoa Transport Pty Ltd (in liq) v Western Australia*, [2016] HCA 21.

14 Irit Mevorach, *Insolvency within Multinational Group*, 286, Oxford Scholarship Online (2009).

15 *Supra* note 3 at 6.

16 *Supra* note 3 at 6.

17 *Ibid* at 7.

individuals and entities, including directors who third parties acting as de facto or "shadow" directors. 'De-facto' means a person acting as a director but who has not been formally appointed as such. 'Shadow director' would mean a person in accordance with whose instructions the directors of a company are accustomed to act. It is to be noted that term 'shadow director' has not been used under Indian Companies Act, 2013, nonetheless, definition of promoter under S. 2(69) of the Act includes within its meaning 'shadow director' as defined under S. 251 of Insolvency Act, 1986. Furthermore, in some cases special advisors, lenders and bankers may also be treated as 'shadow directors'.[18]

As for enterprise groups, in addition to the persons mentioned above, parent company may be deemed as director of a subsidiary company. If the group is 'integrated centralized' via the parent company, the parent company may be liable for the harmful mismanagement. This might be the case where subsidiary has no significant autonomy and overall strategic control of the subsidiary lies with the parent company.[19] Beyond the parent-subsidiary relationship, lack of autonomy of a group member may make it difficult to identify directors who were truly responsible for its affairs in many other circumstances like where the boards of the two members consist of substantially the same persons ; where one group member controls the management and financial decision-making of the group etc. Even shadow director of another group member might be considered director of another group member.[20]

Determination and Enforcement of Liability

A. Determination of Liability

Over the years, many different standards have been chosen under different legal systems for determination of liability of directors for 'wrongful trading' or 'insolvent trading' etc. The most crucial aspect of determination of such liability is to find the point from which a company could be deemed to have become insolvent i.e. to find the starting point of 'zone of insolvency'. Some laws consider 'factual insolvency' i.e. when insolvency proceedings where initiated, as starting point of 'zone of insolvency' while others, including UK and India, consider insolvency to have begun from the moment director knew or ought to have known of the insolvency of the company, object and subjective tests are applied for determining knowledge of the director.

As for quantification of the liability, different laws provide for different standards. Under some laws, difference between the value of the company's assets at the time it should have ceased trading and the time it actually ceased trading is considered. While under some laws, difference between the position of creditors and the company after the breach and their position if the breach had not taken place, is considered.[21]

In case of enterprise groups, law related to determination of liability of the directors is not as clear as in the of individual companies. The reason for this is that there are many problems peculiar to enterprise groups which arise while determining liability of the directors. One such problem is of determining liability of a person who is appointed as, or functioning, as director in more than one group companies. This issue was recently addressed by UNCITRAL's Working Group V. In a situation where a director is to look after interests of one or more directed group members in addition to interest of enterprise group as whole, conflict of obligation may arise and nature and complexity of such conflict may relate to the position of the directed entities in the group hierarchy, the related degree of integration between group members, and the incidence of control and ownership. The Working Group prescribed certain reasonable steps in Recommendation 270 which a director faced with conflicting obligations could take to manage such conflicts and these steps are:[22]

- Obtaining advice to establish the nature and extent of the different obligations;
- Identifying the parties to whom the conflict of obligations must be disclosed and disclosing relevant information, including, in particular, the nature and extent of the conflict;
- Identifying when the director should not (i) participate in any decision by the boards of directors of any of the relevant group members on the matters giving rise to such conflicts, or (ii) be present at any board meeting at which such issues are to be considered;
- Seeking the appointment of an additional director when the conflicting obligations cannot be reconciled; and
- As a last resort, where there is no alternative course of action available, resigning from the relevant board(s) of directors.

18 Supra note 1 at 16-17.
19 Supra note 14 at 316.
20 Supra note 3 at 9.
21 Supra note 1 at 20 & 22.
22 Supra note 2 at 11.

B. Enforcement of Liability

In case of individual companies, for both domestic insolvency and cross-border insolvency, enforcement of liability is mainly done through domestic law of the concerned state and UNCITRAL's Model Law on Cross Border Insolvency, if adopted and as far as applicable.

Conclusion

As for enterprise groups, as it was mentioned earlier, very few jurisdictions have laws governing insolvency of enterprise groups and hitherto, no significant development has been made in international law on this subject as well. However, Working Group V has recently published draft legislative provisions for facilitating the cross-border insolvency of multinational enterprise groups. It provides for provisions for cooperation and coordination of proceedings in different jurisdiction regarding a same enterprise group and further a mechanism for conducting group insolvency proceedings (called 'planning proceedings') by appointing a single group insolvency representative with an aim of designing a 'group insolvency solution' which would applicable to the enterprise group at large. These provisions could become either supplement to existing Model Law on Cross-Border Insolvency or separate model law, to induce more uniform application of international insolvency law.[23] Nonetheless, opting for 'planning proceedings' mechanism is only discretional as per Art. 11(6) of the draft provisions and the cooperation and coordination provisions could be applied independently. It has been opined that situations may arise where some group members may refuse to cooperate and coordinate or some local courts might be reluctant in surrendering their control in the home jurisdiction, diluting the effect of these provisions.[24]

It must be noted that the above said draft provisions are silent about directors' obligation for insolvent trading etc. and therefore, in absence of such provision these matters would be dealt by the domestic law of the host jurisdiction (which is likely to be the jurisdiction where center of main interests (COMI) of the enterprise group lies),[25] if it exists, or else by applying law derived from other sources of international law viz. opinions of jurists, foreign judgments etc. As far as enforcement of judgments is concerned, in order to facilitate enforcement of insolvency related judgments, the Working Group has published draft legislative provisions related to Recognition and enforcement of insolvency-related judgment', efficacy of which is dependent upon its universal adoption.

In case of individual companies, for both domestic insolvency and cross-border insolvency, enforcement of liability is mainly done through domestic law of the concerned state and UNCITRAL's Model Law on Cross Border Insolvency, if adopted and as far as applicable.

The contemporary debate in India is still focused around whether to adopt the Model Law on Cross-Border Insolvency 1997. The contemporary deliberations in the international forums like UNCITRAL is now focused upon insolvency resolution of enterprise groups and drafting a suitable instrument towards that objective. Whether this instrument ought to be in the form of a Model Law or a Convention Treaty? is the contemporary discourse. Nearly two decades have passed since the Model Law on Cross-Border Insolvency was adopted on 30 May 1997[26]. After enacting the IBC, it is trite for India to focus upon the present day needs along with the current global law reform process, whilst drafting/adopting an appropriate law governing cross-border insolvencies in India.

23 Irit Mevorach, The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps, 230, 1st Ed., Oxford University Press (2018).
24 Ibid at 234.
25 Ibid at 237.
26 http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html

Handling case with complex situation: A write up on practical experience by an Insolvency Professional

With a view to use this platform to share my experience in handling complex case under IBC, 2016 so that my colleagues can have benefits in facing such situation, if any that may come to their way, I mention here below the facts of the case, action taken by me etc.

- The case is related to two companies from the same group, engaged in the activity of selling Holiday plans to retail individual investors. Naturally there are lacs of such investors who invested their funds in the scheme floated by these companies. They were promised to get their money back on due date with interest. The total applications for buying the holiday plan was approx. 18 lacks value involve of Rs. 8000 Crore approx.
- However, due to various reasons, the plan could not work and the funds collected from the creditors was also utilized. As such the companies are not having sufficient funds to pay back on due date. Consequently, funds of lacs of small individuals were blocked and they felt like being cheated – as most of them had invested their life time savings /retirement funds etc.
- With the IBC, 2016 coming into existence, some of the creditors initiated proceedings and made application to NCLT which was admitted and I was appointed as IRP and subsequently as RP. As such, promoters of the CD were not extending adequate cooperation.

CA. Devendra Jain
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Other Challenges were as under

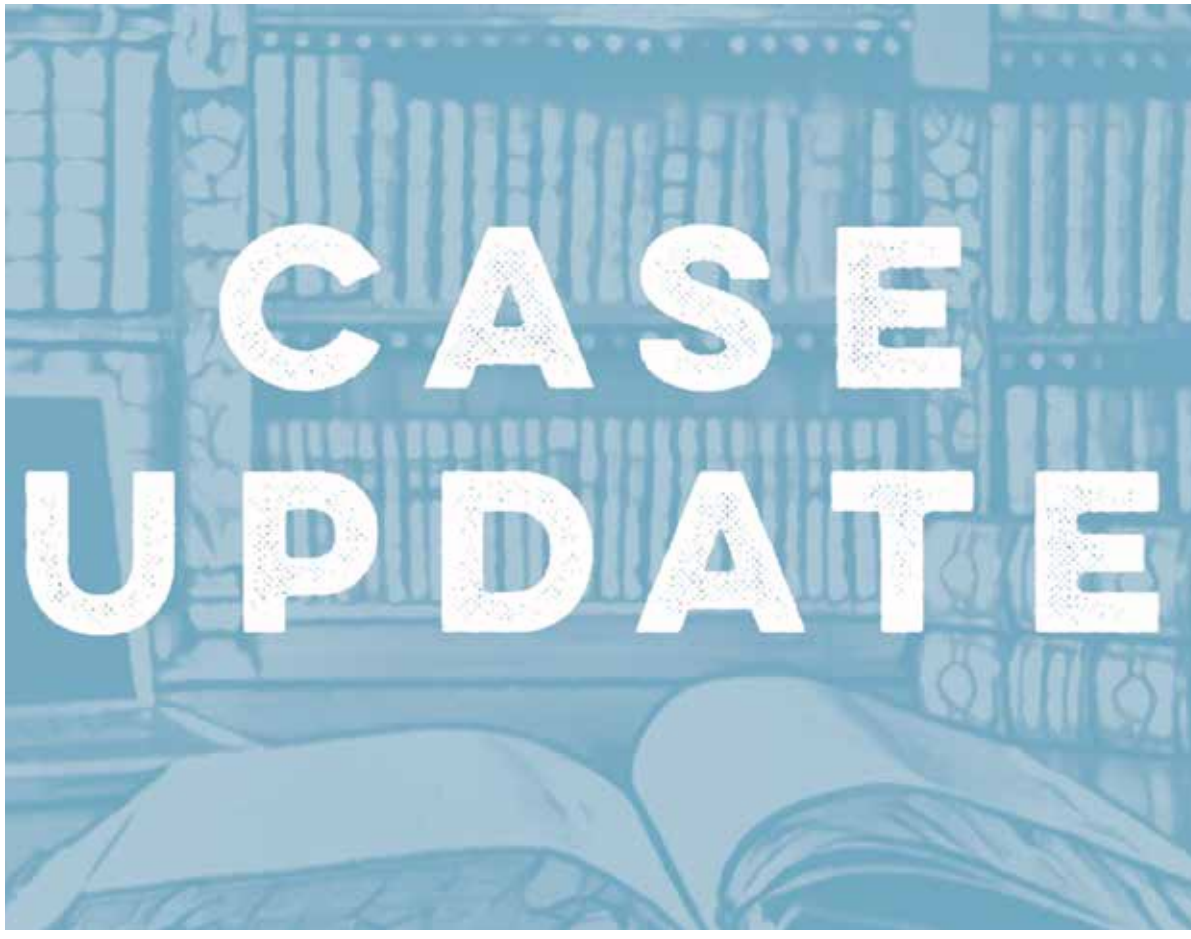
- There was no employee in the office /company to assist me willingly.
- On taking the charge I found that there were lacs of such Individual investors and there are not any other Financial creditors. Now almost all had investment in holiday plans amount ranging in Rs.10,000/- to Rs.1.00 lac i.e. small operational creditors. The investors are mostly from Maharashtra, Gujarat, Karnataka & Goa, which means large spread of geographical area.
- Out of such large number of creditors, the first question to me was to form a credit committee. Of course, as per provisions, 18 largest operational creditors by value could have been included in the committee. However, if I go by that, it would not give true representation of all the creditors out of such large interest of public. This might have not served the purpose of law. As such, I constitute the committee by taking the one representative from different group of creditors. And also included some outside prominent persons in the advisory capacity and ensure that adequate representation is given.
- Also the creditors were so disturbed and annoyed that every day, at the office of corporate debtor, individual or group of creditors would come to either represent or to express their agony and would make noise, shout and disturb the entire office environment. However, I used to remain calm and allowed to meet every such investor and explained them about the provisions of the law, proceedings under IBC, 2016 and satisfied them.
- Required documents /information and other such record were not readily available. Some of the employees looking after software had left the company.
- Funding arrangement was not done by the Directors /responsible officers. It was not even possible to make the daily necessities payment, salary to staff or payment for the various utilities like – phone bill, internet supply bill etc.
- On 08th September, 2017 evening around 5 o'clock, I was about to leave the office of the M/S. CITRUS CHECK INNS LTD. I just came out of the office premises and discussing some issues with some creditors. Before I complete the discussion and enter my car, a set of 3 persons came in a separate car and forced me physically in their car. Soon I realized that they abducted me. However, fortunately, the Mumbai police was able to trace our location, reached to us in next 24 hrs and arrested the kidnappers. That was horrible experience for me.
- One thing I want to share you all IPs that even after such big tragedy happened to me, no support or any action or even no courtesy mail received from any stake holder including AA, IBBI. I realized that IPs to be ready for all such circumstances and accidents, nobody will protect you. You are required to fight by your own.

HOW I MANAGED THE MATTER:

- I started taking into confidence all the persons be it from staff /employee, public /investor, and others.
- Banking details were gathered and arranged to know latest position. Sale plan was studied.
- Gradually started regenerating confidence in the Directors with discussion and dialogue and making them comfortable with legal system and provision understanding.
- Also I included some special knowledgeable and experiences person in the Committee as Special Advisory so as to have their views and guidance in the matter. Many of the investors have their individual personal problems like – medical, marriage of children for which there is urgent need of funds. As per suggestions made by Special Advisory, we represented such matter as special case to NCLT, which is pending for consideration.
- Further, I also found that SEBI has also conducted some investigations in respect of transactions relating these two companies. I therefore, met the executives of SEBI and briefed them about the proceedings going on in respect of IBC, 2016 and also assured them to keep them informed of the further development.
- Also there was demand to appoint Forensic Audit in respect of the accounting of the company – as to where the funds of investors has gone. This was the doubt raised by the Committee to know where exactly their investment money has gone? As such work of Forensic Audit was entrusted and report obtained.
- The committee also is of the view to appoint an investigative agency to verify the routes of the property related transactions made by the company so that any malpractice of investing

outside OR for other than the purpose for which the funds were collected can be known. The work is yet to be allotted.

- To safeguard the repayment to the investors, I have also arranged to issue notice for withdrawal of the amount invested by both the companies in some outside companies etc.
- The Promoter of CD submitted the assets list duly signed by one of the Chief Promoters of CD. The list of assets included all assets including **Group and personal assets.**
- Finally decision of Liquidation was done in last COC and application filed with NCLT, also taken interim relief for attachment of the properties worth of Rs. 3550 Crores of related parties and promoters, which declared by the promoters and ban on the foreign travel and impounding of their passport. The said order was biggest achievement in this case.
- However some intervener approached to Supreme Court for derailing the process of NCLT after their application rejected by the NCLT and NCLAT both. Now matter is pending with Supreme Court.
- With such hard work and sincere efforts with threat of life, I done my job under the CIRP successfully and maximize the results for the poor creditors. I hope that they will get their money back to some extent after the decision of the Hon'ble Supreme Court of India.



CIRCULAR & NOTIFICATIONS

Given below are recent Circulars and Notifications issued by the Insolvency & Bankrupty Board of India (IBBI) and MCA. Readers are requested to submit their Feedback and suggestions on the Column at ipa@icai.in.

A. CIRCULAR

1. Insolvency professional to use Registration Number and Registered Address in all his communications – IBBI Circular No. IP/001/2018 dated 3rd January, 2018

It has been observed that a few insolvency professionals are using different addresses and emails while communicating with the stakeholders, despite repeated advice from the Insolvency Bankruptcy Board of India (IBBI) to use the addressees and emails registered with the IBBI in all their communications.

1. It is hereby directed that in all his communications, whether by way of public announcement or otherwise to a stakeholder or to an authority, an insolvency professional shall prominently state:
(i) his name, address and email, as registered with the IBBI,
(ii) his Registration Number as an insolvency professional granted by the IBBI, and
(iii) the capacity in which he is communicating (Example: As Interim Resolution Professional of XYZ Limited, As Resolution Professional of ABC Limited, etc.).

2. Additionally, an insolvency professional may use a process (Example: CIRP, Liquidation, etc.) specific address and email in its communications, if he considers it necessary subject to the conditions that:
(i) the process specific address and email are in addition to the details required in Para 2 above, and
(ii) the insolvency professional continues to service the process specific address and email for at least six months from conclusion of his role in the process.

2. Insolvency professional to ensure compliance with provisions of the applicable laws – IBBI Circular No. IP/002/2018 dated 3rd January, 2018

A corporate person undergoing insolvency resolution process, fast track insolvency resolution process, liquidation process or voluntary liquidation process under the Insolvency and Bankruptcy Code, 2016 (Code) needs to comply with provisions of the applicable laws (Acts, Rules and Regulations, Circulars, Guidelines, Orders, Directions, etc.) during such process. For example, a corporate person undergoing insolvency resolution process, if listed on a stock exchange, needs to comply with every provision of the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, unless the provision is specifically exempted by the competent authority or becomes inapplicable by operation of law for the corporate person.

1. It is hereby directed that while acting as an Interim Resolution Professional, a Resolution Professional, or a Liquidator for a corporate person under the Code, an insolvency professional shall exercise reasonable care and diligence and take all necessary steps to ensure that the corporate person undergoing any process under the Code complies with the applicable laws.

2. It is clarified that if a corporate person during any of the aforesaid processes under the Code suffers any loss, including penalty, if any, on account of non-compliance of any provision of the applicable laws, such

loss shall not form part of insolvency resolution process cost or liquidation process cost under the Code. It is also clarified that the insolvency professional will be responsible for the non-compliance of the provisions of the applicable laws if it is on account of his conduct.

3. Insolvency professional not to outsource his responsibilities – IBBI Circular No. IP/003/2018 dated 3rd January, 2018.

The Insolvency and Bankruptcy Code, 2016 (Code) read with regulations made thereunder cast specific duties and responsibilities on insolvency professional. An insolvency professional is required to perform certain tasks under the Code while acting as an Interim Resolution Professional, a Resolution Professional, a Liquidator or a Bankruptcy Trustee for various processes. For example, an insolvency professional is required to manage the operations of the corporate debtor as a going concern. He is also required to invite resolution plans, examine them and present to the committee of creditors for its approval such resolution plans which comply with the provisions of the Code. To assist him in carrying out his responsibilities, the Code read with regulations allow insolvency professional to appoint accountants, legal or other professionals, as may be necessary.

2. It has been observed that a few insolvency professionals are advising the prospective resolution applicants to submit a certificate from another person to the effect that they are eligible to be resolution applicants. This requirement amounts to outsourcing responsibilities of an insolvency professional to another person. Further, this adds to cost of the resolution applicant and delays submission of resolution plans. The Code read with regulations do not envisage such a certification from a third person.

3. It is hereby directed that an insolvency resolution professional shall not outsource any of his duties and responsibilities under the Code. He shall not require any certificate from another person certifying eligibility of a resolution applicant.

4. Fees Payable to an insolvency professional and to other professionals appointed by an insolvency professional– IBBI Circular No. IP/004/2018 dated 16th January, 2018

Section 206 of the Insolvency and Bankruptcy Code, 2016 (Code) provides that only a person registered as an insolvency professional with the Insolvency and Bankruptcy Board of India (IBBI) can render services as an insolvency professional under the Code. Section 23 read with section 5(27) of the Code requires that an insolvency professional, who is appointed as an interim resolution professional or a resolution professional, shall conduct the entire corporate insolvency resolution process, including fast track process. In terms of section 5(13) of the Code, 'the fees payable to any person acting as a resolution professional' is included in 'insolvency resolution process cost', which needs to be paid in priority.

2. The Code of Conduct for Insolvency Professionals under the IBBI (Insolvency Professionals) Regulations, 2016 require that an insolvency professional must provide services for remuneration which is charged in a transparent manner, and is a reasonable reflection of the work necessarily and properly undertaken. He shall not accept any fees or charges other than those which are disclosed to and approved by the persons fixing his remuneration.

3. In view of the above, it is clarified that an insolvency professional shall render services for a fee which is a reasonable reflection of his work, raise bills / invoices in his name towards such fees, and such fees shall be paid to his bank account. Any payment of fees for the services of an insolvency professional to any person other than the insolvency professional shall not form part of the insolvency resolution process cost.

Similarly, any other professional appointed by an insolvency professional shall raise bills / invoices in his / its (such as registered valuer) name towards such fees, and such fees shall be paid to his / its bank account.

5. Disclosures by Insolvency Professionals and other Professionals appointed by Insolvency Professionals conducting Resolution Processes– IBBI Circular No. IP/005/2018 dated 16th January, 2018

The Insolvency and Bankruptcy Code, 2016 read with regulations made thereunder provide for appointment of an insolvency professional [(Interim Resolution Professional (IRP) / Resolution Professional (RP)] to conduct the resolution process (Corporate Insolvency Resolution Process and the Fast Track Process) and discharge other duties. These authorise the Insolvency Professional to appoint registered valuers, accountants, legal and other professionals to assist him in discharge of his duties in resolution process.

1.In the interest of transparency, it has been decided that an insolvency professional and every other professional appointed by the insolvency professional for a resolution process shall make disclosures as specified in Para 3 to 5 hereunder.

2. An insolvency professional shall disclose his relationship, if any, with (i) the Corporate Debtor, (ii) other Professional(s) engaged by him, (iii) Financial Creditor(s), (iv) Interim Finance Provider(s), and (v) Prospective Resolution Applicant(s) to the Insolvency Professional Agency of which he is a member, within the time specified as under:

3.

Relationship of the Insolvency Professional with	Disclosure to be made within three days of
Corporate Debtor	his appointment.
Other Professionals [Registered Valuer(s) /	appointment of the other Professional.
Accountant(s) / Legal Professional(s) / Other	
Professional(s)] appointed by him	
Financial Creditor(s)	the constitution of Committee of Creditors.
Interim Finance Provider(s)	the agreement with the Interim Finance
	Provider.
Prospective Resolution Applicant(s)	the supply of information memorandum to
	the Prospective Resolution Applicant.
If relationship with any of the above comes to	of such notice or arising.
notice or arises subsequently	

3. An insolvency professional shall ensure disclosure of the relationship, if any, of the other professional(s) engaged by him with (i) himself, (ii) the Corporate Debtor, (iii) Financial Creditor(s), (iv) Interim Finance Provider(s), and (v) Prospective Resolution Applicant(s) to the Insolvency Professional Agency of which he is a member, within the time specified as under:

Relationship of the other Professional(s) with	Disclosure to be made within three days of
The Insolvency Professional	the appointment of the other Professional.
Corporate Debtor	the appointment of the other Professional.
Financial Creditor(s)	constitution of Committee of Creditors.
Interim Finance Provider(s)	the agreement with the Interim Finance Provider or three days of the appointment of the other Professional, whichever is later.
Prospective Resolution Applicant(s)	the supply of information memorandum to the Prospective Resolution Applicant or three days of the appointment of the other Professional, whichever is later.
If relationship with any of the above comes to notice or arises subsequently	of such notice or arising.

4. For the purpose of Para 3 and 4 above, 'relationship' shall mean any one or more of the four kinds of relationships at any time or during the three years preceding the appointment:

Kind of Relationship	Nature of Relationship
A	Where the Insolvency Professional or the Other Professional, as the case may be, has derived 5% or more of his / its gross revenue in a year from professional services to the related party.
B	Where the Insolvency Professional or the Other Professional, as the case may be, is a Shareholder, Director, Key Managerial Personnel or Partner of the related party.
C	Where a relative (Spouse, Parents, Parents of Spouse, Sibling of Self and Spouse, and Children) of the Insolvency Professional or the Other Professional, as the case may be, has a relationship of kind A or B with the related party
D	Where the Insolvency Professional or the Other Professional, as the case may be, is a partner or director of a company, firm or LLP, such as, an Insolvency Professional Entity or Registered Valuer, the relationship of kind A, B or C of every partner or director of such company, firm or LLP with the related party

5. An Insolvency Professional Agency shall facilitate receipt of disclosures as required above. It shall disseminate such disclosures on its web site within three working days of receipt of the disclosure. A model schematic presentation of disclosures for guidance of Insolvency Professional Agencies and Insolvency Professionals is enclosed at Annexure A.

6. The Insolvency Professional shall provide a confirmation to the Insolvency Professional Agency to the effect that the appointment of every other professional has been made at arms' length relationship.

7. The disclosures shall be made in respect of ongoing resolution processes as on date and all subsequent resolution processes. The disclosures due on date in respect of the ongoing processes shall be made to the respective Insolvency Professional Agency by 31st January, 2018.

8. The Insolvency Professional shall ensure timely and correct disclosures by him and the other Professionals appointed by him. Any wrong disclosure and delayed disclosure shall attract action against the Insolvency Professional and the other Professional as per the provisions of the law.

Annexure A

Disclosures by the Insolvency Professionals and other Professionals appointed by the Insolvency

IP/Other Professional engaged by the IP	Name of Professional	Professional Membership No.	PAN	Relationship with					
				IRP / RP	Other Professional (Registered Valuer /Accountant/Advocate / Any other Professional)	Corporate Debtor	Name of Financial Creditor (s)	Interim Finance Provider (s)	Name of Prospective Resolution Applicant (s)
IRP / RP				**NA**					
Registered Valuer					**NA**				
Accountant					**NA**				
Advocate					**NA**				
Any other Professional (Write kind of Profession)					**NA**				

Professionals conducting Resolution Processes of ……..(Corporate Debtor)

Notes:

i.NA: Not Applicable.

ii. Additional rows and columns to be inserted, as required, where there are more than one professional, financial creditor, interim finance provider or prospective resolution applicant.

iii. Where an Accountant has relationship of kind A with a Financial Creditor, relevant cell will display 'A', as indicated in the above table. One may click on 'A' to find details of relationship.

6. Designated website for publishing Forms under the Regulations – IBBI Circular No. IP(CIRP)/006/2018 dated 23rd February, 2018

The Insolvency and Bankruptcy Board of India (Board) has specified Forms for publishing Public Announcements and Brief Particulars of Invitations of Resolution Plans on the website, if any, designated by the Board for the purpose under the Insolvency and Bankruptcy Code, 2016 (Code) and the regulations made thereunder. The Board hereby designates the website www.ibbi.gov.in and details of the manner

of publishing such Forms on the designated website.

2. The interim resolution professional, the resolution professional or the liquidator, as the case may be, shall send the Forms to the Board for publishing the same on the designated website, namely, www.ibbi.gov.in in the manner provided in Table under this Para. For example, an Interim Resolution Professional shall send Public Announcement in Form A under regulation 6 (2) (b) (iii) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 in pdf format by mail from his e-mail address registered with the Board to public.ann@ibbi.gov.in within the timeline as specified in the respective regulations.

Sr No.	Public Announcement / brief Particulars of Invitation of Resolution Plans	Form under Regulations	Form to be send on E-mail address	Manner of Sending
1	Public Announcement by the Interim Resolution Professional	**Form A** under regulation 6 (2) (b) (iii) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016	public.ann@ibbi.gov.in	The Insolvency Professional shall mail the Form in pdf format from his e-mail address registered with the Board.
2	Brief particulars of Invitation of resolution Plans by the resolution Professional	**Form G** under regulation 36A (5) (b) of the IBBI (Insolvency Resolution Process for Corporate Persons)	invite.rp@ibbi.gov.in	
3	Public Announcement by Interim Resolution Professional	**Form A** under regulation 6 (2) (b) (iii) of the IBBI (Fast Track Insolvency Resolution Process for	public.ann@ibbi.gov.in	

		Corporate Persons)		
4	Brief particulars of Invitation of Resolution Plans by the Resolution Professional	**Form G** of the Schedule under regulation 35A (5) (b) of the IBBI (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017	invite.rp@ibbi.gov.in	
5	Public Announcement by Liquidator	**Form B** of Schedule II under regulation 12 (3) © of the IBBI (Liquidation Process) Regulations, 2016	public.ann@ibbi.gov.in	
6	Public Announcement by Liquidator	**Form A** of Schedule I under regulation 14 (3) (c) of the IBBI (Voluntary Liquidation Process) Regulations, 2017	public.ann@ibbi.gov.in	

3. The interim resolution professional, the resolution professional or the liquidator, as the case may be, shall ensure that the Form mailed is complete and accurate, and complies with the provisions of the Code and the regulations made thereunder. He shall be liable for consequences for deficiencies in the Form. The Board shall cause to upload the Form as received by it on the designated website.

4. This circular is issued in exercise of the powers conferred under sub-section (1) of section 196 read with clause (e) of sub-section (2) of section 208 of the Code.

5. The letter No. IBBI/IP/PUBLIC.ANN/218 dated 1st February, 2017 issued by the Board shall cease to have effect from the date of issue of this circular.

7. Confidentiality of Information relating to Processes under the Insolvency and Bankruptcy Code, 2016 – IBBI Circular No. IP(CIRP)/007/2018 dated 23rd February, 2018

Attention is drawn to provisions of clause 21 of the Code of Conduct appended to the First Schedule to the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016. The said clause reads as under:

"1. An insolvency professional must ensure that confidentiality of the information relating to the insolvency resolution process, liquidation or bankruptcy process, as the case may be, is maintained at all times. However, this shall not prevent him from disclosing any information with the consent of the relevant parties or required by law.".

2. Besides, there are specific provisions for keeping the information confidential or for providing information to stakeholders under confidentiality agreement. For example, section 29 (2) of the Insolvency and Bankruptcy Code, 2016 (Code) reads as under:

"(2) The resolution professional shall provide to the resolution applicant access to all relevant information in physical and electronic form, provided such resolution applicant undertakes—(a) to comply with provisions of law for the time being in force relating to confidentiality and insider trading; (b) to protect any intellectual property of the corporate debtor it may have access to; and (c) not to share relevant information with third parties unless clauses (a) and (b) of this subsection are complied with.".

3. The disclosure of information, except as provided for in the Code, or rules, regulations or circulars issued thereunder, is restricted. Unauthorised access to or leakage of such information has the potential to impact the processes under the Code. An Insolvency Professional, whether acting as Interim Resolution Professional, Resolution Professional or Liquidator, except to the extent provided in the Code and rules, regulations or circulars issued thereunder, -

(i) shall keep every information related to confidential; and
(ii) shall not disclose or provide access to any information to any unauthorised person.

B. NOTIFICATIONS

Ministry of Corporate Affairs Order dated 23rd October, 2017

S.O. 3400.(E).—Whereas, sub-section (1) of section 247 of the Companies Act, 2013 (18 of 2013) (hereafter referred to as the said Act) provides that where a valuation is required to be made in respect of any property, stocks, shares, debentures, securities or goodwill or any other assets or net worth of a company or its liabilities, it shall be valued by a person having such qualifications and experience and registered as a valuer in such manner, on such terms and conditions as may be prescribed and appointed by the audit committee or in its absence by the Board of Directors of that company. Sub-section (2) of section 247 provides for the functions and duties of registered valuers. Sub-sections (3) and (4) of said section provide for the punishment and the liability of the valuers;

And, whereas, a difficulty has arisen in view of the fact that there are a number of different organisations dealing with various, distinct group of assets, such as land and

building, machinery and equipment, having separate set of valuers for valuation;

And, whereas, unless these different organisations are recognised, it would be difficult to ensure the required level of regulation for the valuers by registering them directly with the Central Government and further, it is necessary to recognise the varying standards of internal procedures and conduct practiced in these organisations to improve the standards in valuations in order to register the valuers under the said section;

And, whereas, although the said section provides for valuation to be made by a person having such qualifications and experience and registered as a valuer in such manner, on such terms and conditions as may be prescribed, there is a need to provide clarity and remove the difficulty of having no reference to an organisation to which the valuer may belong;

Now, therefore, in exercise of the powers conferred by sub-section (1) of section 470 of the Companies Act, 2013 (18 of 2013), the Central Government hereby makes the following Order to remove the above said difficulties, namely:-

1. Short title and commencement-

(1) This Order may be called the Companies (Removal of Difficulties) Second Order, 2017.

(2) It shall come into force from the 23rd day of October, 2017.

2. In the Companies Act, 2013, in section 247, in sub-section (1), for the words "a person having such qualifications and experience and registered as a valuer in such manner, on such terms and conditions as may be prescribed", the words "a person having such qualifications and experience, registered as a valuer and being a member of an organisation recognised, in such manner, on such terms and conditions as may be prescribed" shall be substituted.

C. IBBI PRESS RELEASE

1. Amendments to (i) the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, and (ii) the Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017- dated 1st January 2018.

1. The Insolvency and Bankruptcy Board of India (IBBI) has amended (i) the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, and (ii) the Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017 on 31st December, 2017.

2. According to the regulations, a resolution plan needs to identify specific sources of funds to be used for paying the liquidation value due to dissenting creditors. For this purpose, the 'dissenting financial creditor', according to amended regulations, means a financial creditor who voted against the resolution plan or abstained from voting for the resolution plan, approved by the committee of creditors.

3. As per the amendments, it is not necessary to disclose 'liquidation value' in the information memorandum. After the receipt of resolution plan(s) in

accordance with the Insolvency and Bankruptcy Code, 2016 (Code) and the regulations, the resolution professional shall provide the liquidation value to every member of the committee of creditors after obtaining an undertaking from the member to the effect that such member shall maintain confidentiality of the liquidation value and shall not use such value to cause an undue gain or undue loss to itself or any other person. Also, the interim resolution professional or the resolution professional, as the case may be, shall maintain confidentiality of the liquidation value.

4. According to the amendments, a resolution applicant shall submit the resolution plan(s) to the resolution professional within the time given in the invitation for the resolution plans in accordance with the provisions of the Code. This will enable the committee of creditors to close a resolution process as early as possible subject to provisions in the Code and the regulations.

4. The amendments have come into force from today on their publication in the Gazette of India. The amendments are available at www.mca.gov.in and www.ibbi.gov.in.

2. No Association with "IBBI Insolvency Practitioners LLP- dated 29th January 2018.

It has come to the notice of the Insolvency and Bankruptcy Board of India (IBBI) that there is a Limited Liability Partnership (LLP) by the name "IBBI Insolvency Practitioners LLP".

1. It is clarified that:

a) IBBI has not authorised any person to use it's name in any form, whether abbreviated or otherwise;

b) "IBBI Insolvency Practitioners LLP" is not registered as an Insolvency Professional Entity with IBBI; and

c) IBBI has no association whatsoever with "IBBI Insolvency Practitioners LLP".

2. The stakeholders are advised to consider the above clarification while dealing with "IBBI Insolvency Practitioners LLP".

3. Amendments to the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016- dated 6th February 2018.

The Insolvency and Bankruptcy Board of India (IBBI) amended the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 today.

2. According to the amendments,

a. The resolution professional shall appoint two registered valuers to determine the fair value and the liquidation value of the corporate debtor. After the receipt of resolution plans, the resolution professional shall provide the fair value and the liquidation value to each member of the committee of creditors in electronic form, on receiving a confidentiality undertaking. The resolution professional and registered valuers shall maintain confidentiality of the fair value and the liquidation value.

b. The resolution professional shall submit the information memorandum in electronic form to each member of the committee of creditors within two weeks of his appointment as resolution professional and to each prospective resolution applicant latest by the date of invitation of resolution plan, on receiving confidentiality undertaking.

c. The resolution professional shall issue an invitation, including the evaluation matrix, to the prospective resolution applicants. He may modify the invitation as well as the evaluation matrix. However, the prospective resolution applicant shall get at least 30 days from the issue of invitation or modification thereof, whichever is later, to submit resolution plans. Similarly, he will get at least 15 days from the issue of evaluation matrix or modification thereof, whichever is later, to submit resolution plans. An abridged invitation shall be available on the web site, if any, of the corporate debtor, and on the web site, if any, designated by the IBBI for the purpose.

d. While the resolution applicant shall continue to specify the sources of funds that will be used to pay insolvency resolution process costs, liquidation value due to operational creditors and liquidation value due to dissenting financial creditors, the committee of creditors shall specify the amounts payable from resources under the resolution plan for these purposes.

e. A resolution plan shall provide for the measures, as may be necessary, for insolvency resolution of the corporate debtor for maximization of value of its assets. These may include reduction in the amount payable to the creditors, extension of a maturity date or a change in interest rate or other terms of a debt due from the corporate debtor, change in portfolio of goods or services produced or rendered by the corporate debtor, and change in technology used by the corporate debtor.

f. The resolution professional shall submit the resolution plan approved by the committee of creditors to the Adjudicating Authority, at least 15 days before the expiry of the maximum period permitted for the completion of the corporate insolvency resolution process

4. Amendments to the Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017 - dated 7th February 2018.

The Insolvency and Bankruptcy Board of India (IBBI) amended the Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017 today.

2. According to the amendments,

a. The resolution professional shall appoint registered valuers to determine the fair value and the liquidation value of the corporate debtor. After the receipt of resolution plans, the resolution professional shall provide the fair value and the liquidation value to each member of the committee of creditors in electronic form, on receiving a confidentiality undertaking. The resolution professional and registered valuers shall maintain confidentiality of the fair value and the liquidation value.

b. The resolution professional shall submit the information memorandum in electronic form to each member of the committee of creditors within two weeks of his appointment as resolution professional and to each prospective resolution applicant latest by the date of invitation of resolution plan, on receiving confidentiality undertaking.

c. The resolution professional shall issue an invitation, including the evaluation matrix, to the prospective resolution applicants. He may modify the invitation as well as the evaluation matrix. However, the prospective resolution applicant shall get at least 15

days from the issue of invitation or modification thereof, whichever is later, to submit resolution plans. Similarly, he will get at least 8 days from the issue of evaluation matrix or modification thereof, whichever is later, to submit resolution plans. An abridged invitation shall be available on the web site, if any, of the corporate debtor, and on the web site, if any, designated by the IBBI for the purpose.

d. While the resolution applicant shall continue to specify the sources of funds that will be used to pay insolvency resolution process costs, liquidation value due to operational creditors and liquidation value due to dissenting financial creditors, the committee of creditors shall specify the amounts payable from resources under the resolution plan for these purposes.

e. A resolution plan shall provide for the measures, as may be necessary, for insolvency resolution of the corporate debtor for maximization of value of its assets. These may include reduction in the amount payable to the creditors, extension of a maturity date or a change in interest rate or other terms of a debt due from the corporate debtor, change in portfolio of goods or services produced or rendered by the corporate debtor, and change in technology used by the corporate debtor.

f. The resolution professional shall submit the resolution plan approved by the committee of creditors to the Adjudicating Authority, at least 15 days before the expiry of the maximum period permitted for the completion of the fast track corporate insolvency resolution process.

5. Insolvency and Bankruptcy Board of India signs a Memorandum of Understanding with the Reserve Bank of India-dated 12th March 2018.

The Insolvency and Bankruptcy Board of India (IBBI) signed a Memorandum of Understanding (MoU) today with the Reserve Bank of India (RBI). The MoU was signed by Mr. Sudarshan Sen, Executive Director of the RBI and Dr. (Ms.) Mamta Suri, Executive Director of the IBBI in the august presence of Mr. Injeti Srinivas, Secretary to Government of India, Ministry of Corporate Affairs; Dr. M. S. Sahoo, Chairperson, IBBI and other distinguished Members of the Insolvency Law Committee (ILC) on the side-lines of the 4th meeting of the ILC at New Delhi.

1. The Insolvency and Bankruptcy Code, 2016 (Code) provides for reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of the value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders and, for this purpose, has established an institutional infrastructure comprising of Adjudicating Authorities, the IBBI, insolvency professionals, insolvency professional agencies and information utilities. The IBBI exercises regulatory oversight over the Insolvency Professionals, Insolvency Professional Agencies and Information Utilities. It writes and enforces rules for processes, namely, corporate insolvency resolution, corporate liquidation, individual insolvency resolution and individual bankruptcy under the Code.

2. Both the RBI and the IBBI are interested in the effective

implementation of the Code and its allied rules and regulations, through a quick and efficient resolution process. Therefore, they have agreed under the MoU to assist and co-operate with each other for the effective implementation of the Code, subject to limitations imposed by the applicable laws.

3. The MoU provides for: (a) sharing of information between the two parties, subject to the limitations imposed by the applicable laws; (b) sharing of resources available with each other to the extent feasible and legally permissible; (c) periodic meetings to discuss matters of mutual interest, including regulatory requirements that impact each party's responsibilities, enforcement cases, research and data analysis, information technology and data sharing, or any other matter that the parties believe would be of interest to each other in fulfilling their respective statutory obligations; (d) cross-training of staff in order to enhance each party's understanding of the other's mission for effective utilisation of collective resources; (e) capacity building of insolvency professionals and financial creditors; (f) joint efforts towards enhancing the level of awareness among financial creditors about the importance and necessity of swift insolvency resolution process of various types of borrowers in distress under the provisions of the Code, etc

D. IBBI GUIDELINES

1. Insolvency Professionals to act as Interim Resolution Professionals or Liquidators (Recommendation) Guidelines, 2017 - Dated 15th December 2017.

Provisions in the Insolvency and Bankruptcy Code, 2016

1. Section 16(3)(a) of the Insolvency and Bankruptcy Code, 2016 (Code) requires the Adjudicating Authority (AA) to make a reference to the Insolvency and Bankruptcy Board of India (Board) for recommendation of an insolvency professional (IP) who may act as an interim resolution professional (IRP) in case an operational creditor has made an application for corporate insolvency resolution process (CIRP) and has not proposed an IRP. The Board, within ten days of the receipt of the reference from the AA, is required under section 16(4) of the Code to recommend the name of an IP to AA against whom no disciplinary proceedings are pending.

2. Section 34(4) of the Code requires the AA to replace the resolution professional, if (a) the resolution plan submitted by the resolution professional under section 30 was rejected for failure to meet the requirements mentioned in sub-section (2) of section 30; or (b) the Board recommends the replacement of a resolution professional to the AA for reasons to be recorded in writing. The AA may direct the Board to propose the name of another IP to be appointed as a liquidator. The Board is required under section 34(6) to propose the name of another IP within ten days of the direction issued by the AA.

Guidelines

3. When a reference or direction is received from AA for recommending / proposing the name of an IP, the Board has no information about the volume, nature and complexity of the CIRP or Liquidation Process and the resources available at the disposal of an IP. The Board

believes that every IP is equally suitable to act as IRP/Liquidator of any CIRP/Liquidation, if otherwise not disqualified. Therefore, it is necessary to have guidelines to prepare a Panel of IPs for the purpose of section 16(4) and 34(6) from amongst all registered IPs.

Panel of IPs

4. The Board will prepare a Panel of IPs for appointment as IRP or Liquidator and share the said Panel with AA. The AA may pick up any name from the Panel for appointment of IRP or Liquidator for a CIRP or Liquidation, as the case may be. The Panel will have Bench wise list of IPs based on the registered office of the IP. It will have a validity of six months and a new Panel will replace the earlier Panel every six months. For example, the first Panel will be valid for appointments during January - June, 2018, the next panel will be valid for July - December, 2018 and so on.

5. An IP will be eligible to be in the Panel of IPs if –

(a) there is no disciplinary proceeding pending against him;
(b) he has not been convicted at any time in the last three years by a court of competent jurisdiction; and
(c) he expresses his interest to be included in the Panel for the relevant period.

6. An IP will be included in the Panel against the Bench under whose jurisdiction his registered office is located. For example, an IP located in Kolkata will be included in Panel against the Kolkata Bench of the AA. The areas covered in respect of different Benches of the AA are as under:

Benches at	**Area covered**	
New Delhi	1	State of Rajasthan
	2	Union territory of Delhi
Ahmedabad	1	State of Gujarat
	2	State of Madhya Pradesh
	3	Union territory of Dadra and Nagar Haveli
	4	Union territory of Daman and Diu
Allahabad	1	State of Uttar Pradesh
	2	State of Uttarakhand
Bengaluru	1	State of Karnataka
Chandigarh	1	State of Himachal Pradesh
	2	State of Jammu and Kashmir
	3	State of Punjab
	4	Union territory of Chandigarh
	5	State of Haryana
Chennai	1	State of Kerala
	2	State of Tamilnadu
	3	Union territory of Lakshadweep
	4	Union territory of Puducherry
Guwahati	1	State of Arunachal Pradesh
	2	State of Assam
	3	State of Manipur
	4	State of Mizoram
	5	State of Meghalaya

	6	State of Nagaland
	7	State of Sikkim
	8	State of Tripura
Hyderabad	1	State of Andhra Pradesh
	2	State of Telangana
Kolkata	1	State of Bihar
	2	State of Jharkhand
	3	State of Odisha
	4	State of West Bengal
	5	Union territory of Andaman and Nicobar Islands
Mumbai	1	State of Chhattisgarh
	2	State of Goa
	3	State of Maharashtra

Expression of Interest

7. The Board shall invite expression of interest in Form A to act as an IRP or Liquidator by sending an e-mail to IPs at their email addresses registered with the Board. The expression of interest must be received by the Board in Form A by the specified date. For example, the Board shall invite expression of interest by 20th December, 2017 from IPs for inclusion in the Panel for January - June, 2018. The interested IPs may express their interest by 27th December, 2017. The Board will send the Panel to the AA by 31st December, 2017.

Ongoing Assignments

8. The eligible IPs will be included in the Panel in order of the volume of ongoing assignments they have in hand. The IP who has the lowest volume of ongoing assignments will get a score of 100 and will be at the top of the Panel. The IP who has the highest volume of ongoing assignments will get a score of 0. The difference between the highest volume and the lowest volume will be equated to 100 and other IPs will get scores between 0 and 100 depending on volume of their ongoing assignments.

Take an example:

IP	Volume of ongoing assignments	Difference between the highest volume and the volume of ongoing assignments of the IP	Formula	Score
1	20	100	100 /100 *100	100
2	40	80	80 / 100 * 100	80
3	60	60	60 / 100 * 100	60
4	80	40	40 / 100 * 100	40
5	100	20	20 / 100 * 100	20
6	120	00	00 / 100 * 100	00

9. An ongoing assignment shall be valued as under:

Ongoing assignments	Volume
IRP of a Corporate Insolvency Resolution Process	5
RP of a Corporate Insolvency Resolution Process	10
IRP of a Fast Track Process	3
RP of a Fast Track Process	6
Liquidation / Voluntary Liquidation	5
Individual Insolvency	1
Bankruptcy Trustee	1

10. Where two or more IPs get the same score, they will be placed in the Panel in order of the date of their registration with the Board. The IP registered earlier will be placed above the IP registered later.

11. The above process will be undertaken by a team of officers of the Board, as may be identified by a Whole-Time Member.

12. Review these guidelines will be reviewed by the Board from time to time.

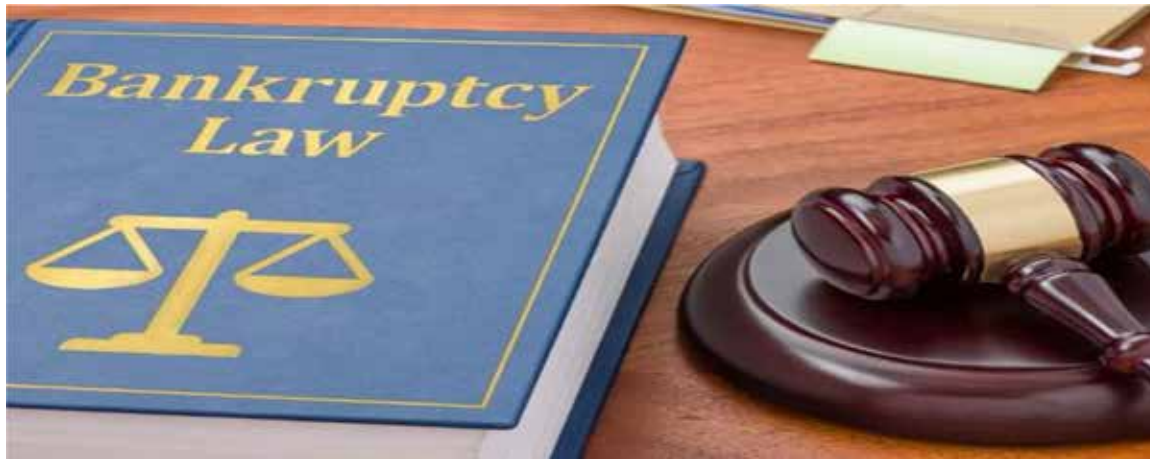
13. For the purpose of these Guidelines, unless otherwise mentioned,

(a) 'CIRP' includes Fast Track CIRP; and

(b) 'Disciplinary Proceeding' means a proceeding initiated by a show cause notice issued under section 219 of the Code.

14. These Guidelines shall come into effect for appointments as IRP or Liquidator with effect from 1st January, 2018.

15. These Guidelines replace the Insolvency Professionals to act as Interim Resolution Professionals (Recommendation) Guidelines, 2017.



Form A

EXPRESSION OF INTEREST TO ACT AS AN IRP/LIQUIDATOR OF A CIRP/LIQUIDATION

1	Name of Insolvency Professional		
2	Registration Number		
3	Address and contact details, as registered with the Board: a. E-mail b. Mobile c. Address		
4	Number of ongoing assignments on hand:		
		a. As IRP of CIRP	
		b. As RP of CIRP	
		c. As IRP of Fast Track	
		d. As RP of Fast Track	
		e. Liquidation/Voluntary Liquidation	
		f. Individual Insolvency	
		g. Bankruptcy Trustee	
5	Number of assignments completed:		
		a. As IRP of CIRP	
		b. As RP of CIRP	
		c. As IRP of Fast Track	
		d. As RP of Fast Track	
		e. Liquidation/Voluntary Liquidation	
		f. Individual Insolvency	
		g. Bankruptcy Trustee	
6	Whether IP has been convicted at any time in the last three years by a court of competent jurisdiction? (Give details)		
7	Whether any disciplinary proceeding is pending against the IP? (Give details)		

Declaration

1. I hereby confirm and declare that the information given herein above is true and correct to the best of my knowledge and belief. I hereby express my interest to act as IRP/Liquidator, if appointed by the Adjudicating Authority.

2. In case there is any change in the status of the position indicated above, the same shall be communicated to the Board forthwith.

LEGAL PRONOUNCEMENTS

SUPREME COURT OF INDIA
Macquarie Bank Limited
Vs.
Shilpi Cable Technologies Ltd.
Date of order: 15-12-2017

Sections 8, 9 and 238 of the Insolvency and Bankruptcy Code, 2016 read with Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Section 30 of the Advocates Act - A fair construction of Section 9(3)(c), in consonance with the object ought to be achieved by the Code, would lead to the conclusion that it cannot be construed as a threshold bar or a condition precedent - The non-obstante clause contained in Section 238 of the Code will not override the Advocates Act as there is no inconsistency between Section 9, read with the Adjudicating Authority Rules and Forms referred to hereinabove, and the Advocates Act - A conjoint reading of Section 30 of the Advocates Act and Sections 8 and 9 of the Code together with the Adjudicatory Authority Rules and Forms thereunder would yield the result that a notice sent on behalf of an operational creditor by a lawyer would be in order.

The present appeals raise two important questions which arise under the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "Code"). The first question is whether, in relation to an operational debt, the provision contained in Section 9(3)(c) of the Code is mandatory; and secondly, whether a demand notice of an unpaid operational debt can be issued by a lawyer on behalf of the operational creditor.

The Supreme Court held as follows:

The true construction of Section 9(3)(c) is that it is a procedural provision, which is directory in nature, as the Adjudicatory Authority Rules read with the Code clearly demonstrate. The Code cannot be construed in a discriminatory fashion so as to include only those operational creditors who are residents outside India who happen to bank with financial institutions which may be included under Section 3(14) of the Code. It is no answer to state that such person can approach the Central Government to include its foreign banker under Section 3(14) of the Code, for the Central Government may never do so. Argument that such persons ought to be left out of the triggering of the Code against their corporate debtor, despite being operational creditors as defined, would not sound well with Article 14 of the Constitution, which applies to all persons including foreigners. Therefore, as the facts of these cases show, a so called condition precedent impossible of compliance cannot be put as a threshold bar to the processing of an application under Section 9 of the Code.

It is true that the expression "initiation" contained in the marginal note to Section 9 does indicate the drift of the provision, but from such drift, to build an argument that the expression "initiation" would lead to the conclusion that Section 9(3) contains mandatory conditions precedent before which the Code can be triggered is a long shot. Equally, the expression "shall" in Section 9(3) does not take us much further when it is clear that Section 9(3)(c) becomes impossible of compliance in cases like the present. It would amount to a situation wherein serious general inconvenience would be caused to innocent persons, such as the appellant, without very much furthering the object of the Act, therefore, Section 9(3)(c) would have to be construed as being directory in nature.

It is unnecessary to further refer to arguments made on the footing that Section 7 qua financial creditors has a process which is different from that of operational creditors under Sections 8 and 9 of the Code. The fact that there is no requirement of a bank certificate under Section 7 of the Code, as compared to Section 9, does not take us very much further. The difference between Sections 7 and 9 has already been noticed by this Court in Innoventive Industries Ltd. v. ICICI Bank & Anr., Civil Appeal Nos. 8337-8338 of 2017 decided on August 31, 2017. The

fact that these differences obtain under the Code would have no direct bearing on whether Section 9(3)(c).

A fair construction of penal statutes based on purposive as well as literal interpretation is the correct modern day approach. Any arbitrary interpretation, as opposed to fair interpretation, of a statute, keeping the object of the legislature in mind, would be outside the judicial ken. The task of a Judge, when he looks at the literal language of the statute as well as the object and purpose of the statute, is not to interpret the provision as he likes but is to interpret the provision keeping in mind Parliament's language and the object that Parliament had in mind. With this caveat, it is clear that judges are not knight-errants free to roam around in the interpretative world doing as each Judge likes. They are bound by the text of the statute, together with the context in which the statute is enacted; and both text and context are Parliaments', and not what the Judge thinks the statute has been enacted for. Also, it is clear that for the reasons stated by us above, a fair construction of Section 9(3)(c), in consonance with the object ought to be achieved by the Code, would lead to the conclusion that it cannot be construed as a threshold bar or a condition precedent.

Supreme Court on Notice issued by Lawyer on behalf of Operational Creditor:

Section 8 of the Code speaks of an operational creditor delivering a demand notice. It is clear that had the legislature wished to restrict such demand notice being sent by the operational creditor himself, the expression used would perhaps have been "issued" and not "delivered". Delivery, therefore, would postulate that such notice could be made by an authorized agent. In fact, in Forms 3 and 5 of the Adjudicating Authority Rules, it is clear that this is the understanding of the draftsman of the Adjudicatory Authority Rules, because the signature of the person "authorized to act" on behalf of the operational creditor must be appended to both the demand notice as well as the application under Section 9 of the Code.

The position further becomes clear that both forms require such authorized agent to state his position with or in relation to the operational creditor. A position with the operational creditor would perhaps be a position in the company or firm of the operational creditor, but the expression "in relation to" is significant. It is a very wide expression, as has been held in Renusagar Power Co. Ltd. v. General Electric Co., (1984) 4 SCC 679 at 704 and State of Karnataka v. Azad Coach Builders (P) Ltd. (2010) 9 SCC 524 at 535, which specifically includes a position which is outside or indirectly related to the operational creditor. It is clear, therefore, that both the expression "authorized to act" and "position in relation to the operational creditor" go to show that an authorized agent or a lawyer acting on behalf of his client is included within the aforesaid expression.

The non-obstante clause contained in Section 238 of the Code will not override the Advocates Act as there is no inconsistency between Section 9, read with the Adjudicating Authority Rules and Forms referred to hereinabove, and the Advocates Act.

Since there is no clear disharmony between the two Parliamentary statutes in the present case which cannot be resolved by harmonious interpretation, it is clear that both statutes must be read together. Also, we must not forget that Section 30 of the Advocates Act deals with the fundamental right under Article 19(1)(g) of the Constitution to practice one's profession. Therefore, a conjoint reading of Section 30 of the Advocates Act and Sections 8 and 9 of the Code together with the Adjudicatory Authority Rules and Forms thereunder would yield the result that a notice sent on behalf of an operational creditor by a lawyer would be in order.

The expression "an operational creditor may on the occurrence of a default deliver a demand notice….." under Section 8 of the Code must be read as including an operational creditor's authorized agent and lawyer, as has been fleshed out in Forms 3 and 5 appended to the Adjudicatory Authority Rules.

Case Review: Judgment of NCLAT, set aside.

SUPREME COURT OF INDIA
Mobilox Innovations Private Limited
Vs.
Kirusa Software Private Limited
Date of order: 21-09-2017

Section 9 read with Section 8 of the Insolvency and Bankruptcy Code, 2016 – Application for initiation of corporate Insolvency resolution process by operational creditor - The expression "and" occurring in section 8(2)(a) may be read as "or" in order to further the object of the statute and/or to avoid an anomalous situation - once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility - So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application - A "dispute" is said to exist, so long as there is a real dispute as to payment between the parties that would fall within the inclusive definition contained in Section 5(6).

In terms of purchase order issued by the Appellant/Corporate Debtor the Respondent/Operational Creditor provided certain services and raised monthly invoices between December, 2013 and November, 2014. The bills so raised were payable within 30 days of receipt by the appellant. It is pertinent to note here that a non-disclosure agreement (NDA) was executed between the parties on 26th December, 2014 with effect from 1st November, 2013. In view of non-payment of dues, a demand notice dated 23rd December, 2016 was sent by the respondent under Section 8 of the Code. To this notice, the appellant responded that there exists serious and bona fide disputes between the parties and that nothing was payable as the respondent had been told on 30th January, 2015 that no amount would be paid to the respondent since it had breached the NDA.

The NCLT rejected the application filed under section 9 of the Code on the ground that the default payment being disputed by the Corporate Debtor and that, the operational creditor has admitted that the notice of dispute has been received, the claim made is hit by Section (9)(5)(ii)(d) of the Code.

On appeal the NCLAT set aside the order of the NCLT and remitted the case for consideration with the following observation:

> "In the present case the adjudicating authority has acted mechanically and rejected the application under sub-section (5)(ii)(d) of Section 9 without examining and discussing the aforesaid issue. If the adjudicating authority would have noticed the provisions as discussed above and what constitutes 'dispute' in relation to services provided by operational creditors then it would have come to a conclusion that condition of demand notice under sub-section (2) of Section 8 has not been fulfilled by the corporate debtor and defence claiming dispute was not only vague, got up and motivated to evade the liability."

On appeal, the Supreme Court held as follow:

The adjudicating authority, when examining an application under Section 9 of the Act will have to determine:

(i) Whether there is an "operational debt" as defined exceeding Rs.1 lakh? (See Section 4 of the Act)
(ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? and
(iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?

If any one of the aforesaid conditions is lacking, the application would have to be rejected.

Apart from the above, the adjudicating authority must follow the mandate of Section 9, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act.

Another thing of importance is the timelines within which the insolvency resolution process

is to be triggered. The corporate debtor is given 10 days from the date of receipt of demand notice or copy of invoice to either point out that a dispute exists between the parties or that he has since repaid the unpaid operational debt. If neither exists, then an application once filed has to be disposed of by the adjudicating authority within 14 days of its receipt, either by admitting it or rejecting it. An appeal can then be filed to the Appellate Tribunal under Section 61 of the Act within 30 days of the order of the Adjudicating Authority with an extension of 15 further days and no more.

Section 64 of the Code mandates that where these timelines are not adhered to, either by the Tribunal or by the Appellate Tribunal, they shall record reasons for not doing so within the period so specified and extend the period so specified for another period not exceeding 10 days. Even in appeals to the Supreme Court from the Appellate Tribunal under Section 62, 45 days time is given from the date of receipt of the order of the Appellate Tribunal in which an appeal to the Supreme Court is to be made, with a further grace period not exceeding 15 days. The strict adherence of these timelines is of essence to both the triggering process and the insolvency resolution process. One of the principal reasons why the Code was enacted was because liquidation proceedings went on interminably, thereby damaging the interests of all stakeholders, except a recalcitrant management which would continue to hold on to the company without paying its debts. Both the Tribunal and the Appellate Tribunal will do well to keep in mind this principal objective sought to be achieved by the Code and will strictly adhere to the time frame within which they are to decide matters under the Code.

It is, thus, clear that so far as an operational creditor is concerned, a demand notice of an unpaid operational debt or copy of an invoice demanding payment of the amount involved must be delivered in the prescribed form. The corporate debtor is then given a period of 10 days from the receipt of the demand notice or copy of the invoice to bring to the notice of the operational creditor the existence of a dispute, if any. The notes on clauses annexed to the Insolvency and Bankruptcy Bill of 2015, in which "the existence of a dispute" alone is mentioned. Even otherwise, the word "and" occurring in Section 8(2)(a) must be read as "or" keeping in mind the legislative intent and the fact that an anomalous situation would arise if it is not read as "or". If read as "and", disputes would only stave off the bankruptcy process if they are already pending in a suit or arbitration proceedings and not otherwise. This would lead to great hardship; in that a dispute may arise a few days before triggering of the insolvency process, in which case, though a dispute may exist, there is no time to approach either an arbitral tribunal or a court. Further, given the fact that long limitation periods are allowed, where disputes may arise and do not reach an arbitral tribunal or a court for upto three years, such persons would be outside the purview of Section 8(2) leading to bankruptcy proceedings commencing against them. Such an anomaly cannot possibly have been intended by the legislature nor has it so been intended. One of the objects of the Code qua operational debts is to ensure that the amount of such debts, which is usually smaller than that of financial debts, does not enable operational creditors to put the corporate debtor into the insolvency resolution process prematurely or initiate the process for extraneous considerations. It is for this reason that it is enough that a dispute exists between the parties. It is settled law that the expression "and" may be read as "or" in order to further the object of the statute and/or to avoid an anomalous situation.

In the first Insolvency and Bankruptcy Bill, 2015 that was annexed to the Bankruptcy Law Reforms Committee Report, Section 5(4) defined "dispute" as meaning a "bona fide suit or arbitration proceedings…". In its present *avatar*, Section 5(6) excludes the expression "bona fide" which is of significance. Therefore, it is difficult to import the expression "bona fide" into Section 8(2)(a) in order to judge whether a dispute exists or not.

It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding

relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.

On Facts of the Case:

1. *According to the respondent, the definition of "dispute" would indicate that since the NDA does not fall within any of the three sub-clauses of Section 5(6), no "dispute" is there on the facts of this case.*

The Supreme Court held that:

First and foremost, the definition is an inclusive one, and that the word "includes" substituted the word "means" which occurred in the first Insolvency and Bankruptcy Bill. Secondly, the present is not a case of a suit or arbitration proceeding filed before receipt of notice – Section 5(6) only deals with suits or arbitration proceedings which must "relate to" one of the three sub clauses, either directly or indirectly. A "dispute" is said to exist, so long as there is a real dispute as to payment between the parties that would fall within the inclusive definition contained in Section 5(6). The correspondence between the parties would show that on 30th January, 2015, the appellant clearly informed the respondent that they had displayed the appellant's confidential client information and client campaign information on a public platform which constituted a breach of trust and a breach of the NDA between the parties. They were further told that all amounts that were due to them were withheld till the time the matter is resolved. On 10th February, 2015, the respondent referred to the NDA of 26th December, 2014 and denied that there was a breach of the NDA. The respondent went on to state that the appellant's claim is unfounded and untenable, and that the appellant is trying to avoid its financial obligations, and that a sum of Rs.19,08,202.57 should be paid within one week, failing which the respondent would be forced to explore legal options and initiate legal process for recovery of the said amount. This email was refuted by the appellant by an e-mail dated 26th February, 2015 and the appellant went on to state that it had lost business from various clients as a result of the respondent's breaches. Curiously, after this date, the respondent remained silent, and thereafter, by an e-mail dated 20th June, 2016, the respondent wished to revive business relations and stated that it would like to follow up for payments which are long stuck up. This was followed by an e-mail dated 25th June, 2016 to finalize the time and place for a meeting. On 28th June, 2016, the appellant wrote to the respondent again to finalize the time and place. Apparently, nothing came of the aforesaid e-mails and the appellant then fired the last shot on 19th September, 2016, reiterating that no payments are due as the NDA was breached.

Going by the aforesaid test of "existence of a dispute", it is clear that without going into the merits of the dispute, the appellant has raised a plausible contention requiring further investigation which is not a patently feeble legal argument or an assertion of facts unsupported by evidence. The defence is not spurious, mere bluster, plainly frivolous or vexatious. A dispute does truly exist in fact between the parties, which may or may not ultimately succeed, and the Appellate Tribunal was wholly incorrect in characterizing the defence as vague, got-up and motivated to evade liability.

2. *According to the respondent, the breach of the NDA is a claim for unliquidated damages which does not become crystallized until legal proceedings are filed, and none have been filed so far.*

The Supreme Court held that:

The period of limitation for filing such proceedings has admittedly not yet elapsed. Further, the appellant has withheld amounts that were due to the respondent under the NDA till the matter is resolved. Admittedly, the matter has never been resolved. Also, the respondent itself has not commenced any legal proceedings after the e-mail dated 30th January, 2015 except for the present insolvency application, which was filed almost 2 years after the said e-mail. All these circumstances go to show that it is right to have the matter tried out in the present case before the axe falls.

Therefore, the appeal was allowed and the judgment of the Appellate Tribunal was set aside.

Case Review: Order dated 24-05-2017 of NCLAT in Kirusa Software Private Ltd. Vs. Mobilox Innovations Private Ltd, Company Appeal (AT) (Insolvency) 6 of 2017, *set aside*. (Reported in IIIPI Update # 5 Part II July 2017_Case Updates)

Supreme Court of India
M/s. Innoventive Industries Ltd.
Vs.
ICICI Bank & Anr.
Date of Order: 31-08-2017

Section 238 of the Insolvency and Bankruptcy Code, 2016 read with Section 4 of the Maharashtra Relief Undertaking (Special Provisions) Act, 1958 read with Article 254 of the Constitution of India – Provision of this Code to override other Laws - Once an insolvency professional is appointed to manage the company, the erstwhile directors who are no longer in management, obviously cannot maintain an appeal on behalf of the company - The Insolvency and Bankruptcy Code, 2016 is an Act to consolidate and amend the laws relating to reorganization and insolvency resolution, *inter alia*, of corporate persons – The Insolvency and Bankruptcy Code is a Parliamentary law that is an exhaustive code on the subject matter of insolvency in relation to corporate entities - On reading of section 238 of the code it is clear that the later non-obstante clause of the Parliamentary enactment will also prevail over the limited non-obstante clause contained in Section 4 of the Maharashtra Act and therefore, the Maharashtra Act cannot stand in the way of the corporate insolvency resolution process under the Code - There would be repugnancy between the provisions of the two enactments

In its order dated 17th January 2017 the NCLT held that the Insolvency and Bankruptcy Code, 2016 (Code) would prevail against the Maharashtra Relief Undertaking (Special Provisions) Act, 1958 (Maharashtra Act) in view of the non-obstante clause in Section 238 of the Code. It, has further, held that the Parliamentary statute would prevail over the State statute and this being so; it is obvious that the corporate debtor had defaulted in making payments, as per the evidence placed by the financial creditors. Hence, the application was admitted and a moratorium was declared. The second application with a different plea filed by the Corporate Debtor was rejected by the NCLT vide its order dated 23rd January 2017 on the ground that it was filed belatedly and thus, not maintainable.

On appeal, the NCLAT upheld the order passed by the NCLT, however, held that the Code and the Maharashtra Act operate in different fields and, therefore, are not repugnant to each other and therefore, the appellant cannot derive any advantage from the Maharashtra Act to stall the insolvency resolution process under Section 7 of the Code.

The appellant/Corporate Debtor filed this appeal against the order of NCLAT which had upheld the order passed by the NCLT before the Supreme Court.

On maintainability of the appeal the Apex Court held:

> Once an insolvency professional is appointed to manage the company, the erstwhile directors who are no longer in management, obviously cannot maintain an appeal on behalf of the company. In the present case, the company is the sole appellant. This being the case, the present appeal is obviously not maintainable.
>
> However, we are not inclined to dismiss the appeal on this score alone. Because this is the very first application that has been moved under the Code, we thought it

necessary to deliver a detailed judgment so that all Courts and Tribunals may take notice of a paradigm shift in the law.

Entrenched managements are no longer allowed to continue in management if they cannot pay their debts.

After going through the Statement of Objects & reasons and various relevant provisions of the Code the Supreme Court held as follows:

The Insolvency and Bankruptcy Code, 2016 has been passed after great deliberation and pursuant to various committee reports. One of the important objectives of the Code is to bring the insolvency law in India under a single unified umbrella with the object of speeding up of the insolvency process. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor.

The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing – i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.

On the other hand, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise.

The rest of the insolvency resolution process is also very important. The entire process is to be completed within a period of 180 days from the date of admission of the application under Section 12 and can only be extended beyond 180 days for a further period of not exceeding 90 days if the committee of creditors by a voting of 75% of voting shares so decides. It can be seen that time is of essence in seeing whether the corporate body can be put back on its feet, so as to stave off liquidation.

As soon as the application is admitted, a moratorium in terms of Section 14 of the Code is to be declared by the adjudicating authority and a public announcement is made stating, inter alia, the last date for submission of claims and the details of the interim resolution professional who shall be vested with the management of the corporate debtor and be responsible for receiving claims. Under Section 17, the erstwhile management of the corporate debtor is vested in an interim resolution professional who is a trained person registered under Chapter IV of the Code. This interim resolution professional is now to manage the operations of the corporate debtor as a going concern under the directions of a committee of creditors appointed under Section 21 of the Act. Decisions by this committee are to be taken by a vote of not less than 75% of the voting share of the financial creditors. Under Section 28, a resolution professional, who is none other than an interim resolution professional who is appointed to carry out the resolution process, is then given wide powers to raise finances, create security interests, etc. subject to prior approval of the committee of creditors.

Under Section 30, any person who is interested in putting the corporate body back on its feet may submit a resolution plan to the resolution professional, which is prepared on the basis of an information memorandum. This plan must provide for payment of insolvency resolution process costs, management of the affairs of the corporate debtor after approval of the plan, and implementation and supervision of the plan. It is only when such plan is approved by a vote of not less than 75% of the voting share of the financial creditors and the adjudicating authority is satisfied that the plan, as approved, meets the statutory requirements mentioned in Section 30, that it ultimately approves such plan, which is then binding on the corporate debtor as well as its employees, members, creditors, guarantors and other stakeholders. Importantly, and this is a major departure from previous legislation on the subject, the moment the adjudicating authority approves the resolution plan, the moratorium order passed by the authority under Section 14 shall cease to have effect. The scheme of the Code, therefore, is to make an attempt, by divesting the erstwhile management of its powers and vesting it in a professional agency, to continue the business of the corporate body as a going concern until a resolution plan is drawn up, in which event the management is handed over under the plan so that the corporate body is able to pay back its debts and get back on its feet. All this is to be done within a period of 6 months with a maximum extension of another 90 days or else the chopper comes down and the liquidation process begins.

In answer to the application made under Section 7 of the Code, the appellant only raised the plea of suspension of its debt under the Maharashtra Act, which, therefore, was that no debt was due in law. The adjudicating authority correctly referred to the non-obstante clause in Section 238 and arrived at a conclusion that a notification under the Maharashtra Act would not stand in the way of the corporate insolvency resolution process under the Code.

The Supreme Court observes its various judgments and yields the following proposition:

i. Repugnancy under Article 254 arises only if both the Parliamentary (or existing law) and the State law are referable to List III in the 7th Schedule to the Constitution of India.
ii. In order to determine whether the Parliamentary (or existing law) is referable to the Concurrent List and whether the State law is also referable to the Concurrent List, the doctrine of pith and substance must be applied in order to find out as to where in pith and substance the competing statutes as a whole fall. It is only if both fall, as a whole, within the Concurrent List, that repugnancy can be applied to determine as to whether one particular statute or part thereof has to give way to the other.
iii. The question is what is the subject matter of the statutes in question and not as to which entry in List III the competing statutes are traceable, as the entries in List III are only fields of legislation; also, the language of Article 254 speaks of repugnancy not merely of a statute as a whole but also “any provision” thereof.
iv. Since there is a presumption in favour of the validity of statutes generally, the onus of showing that a statute is repugnant to another has to be on the party attacking its validity. It must not be forgotten that that every effort should be made to reconcile the competing statutes and construe them both so as to avoid repugnancy – care should be taken to see whether the two do not really operate in different fields qua different subject matters.
v. Repugnancy must exist in fact and not depend upon a mere possibility.
vi. Repugnancy may be direct in the sense that there is inconsistency in the actual terms of the competing statutes and there is, therefore, a direct conflict between two or more provisions of the competing statutes. In this sense, the inconsistency must be clear and direct and be of such a nature as to bring the two Acts or parts thereof into direct collision with each other, reaching a situation where it is impossible to obey the one without disobeying the other. This happens when two enactments produce different legal results when applied to the same facts.

vii. Though there may be no direct conflict, a State law may be inoperative because the Parliamentary law is intended to be a complete, exhaustive or exclusive code. In such a case, the State law is inconsistent and repugnant, even though obedience to both laws is possible, because so long as the State law is referable to the same subject matter as the Parliamentary law to any extent, it must give way. One test of seeing whether the subject matter of the Parliamentary law is encroached upon is to find out whether the Parliamentary statute has adopted a plan or scheme which will be hindered and/or obstructed by giving effect to the State law. It can then be said that the State law trenches upon the Parliamentary statute. Negatively put, where Parliamentary legislation does not purport to be exhaustive or unqualified, but itself permits or recognises other laws restricting or qualifying the general provisions made in it, there can be said to be no repugnancy.

viii. A conflict may arise when Parliamentary law and State law seek to exercise their powers over the same subject matter. This need not be in the form of a direct conflict, where one says "do" and the other says "don't". Laws under this head are repugnant even if the rule of conduct prescribed by both laws is identical. The test that has been applied in such cases is based on the principle on which the rule of implied repeal rests, namely, that if the subject matter of the State legislation or part thereof is identical with that of the Parliamentary legislation, so that they cannot both stand together, then the State legislation will be said to be repugnant to the Parliamentary legislation. However, if the State legislation or part thereof deals not with the matters which formed the subject matter of Parliamentary legislation but with other and distinct matters though of a cognate and allied nature, there is no repugnancy.

ix. Repugnant legislation by the State is void only to the extent of the repugnancy. In other words, only that portion of the State's statute which is found to be repugnant is to be declared void.

x. The only exception to the above is when it is found that a State legislation is repugnant to Parliamentary legislation or an existing law if the case falls within Article 254(2), and Presidential assent is received for State legislation, in which case State legislation prevails over Parliamentary legislation or an existing law within that State. Here again, the State law must give way to any subsequent Parliamentary law which adds to, amends, varies or repeals the law made by the legislature of the State, by virtue of the operation of Article 254(2) proviso.

After going through the Maharashtra Act, the Apex Court held that there is no doubt that this Maharashtra Act is referable to Entry 23, List III in the 7th Schedule to the Constitution. On the other hand, the Insolvency and Bankruptcy Code, 2016 is an Act to consolidate and amend the laws relating to reorganization and insolvency resolution, *inter alia*, of corporate persons.

There can be no doubt, therefore, that the Code is a Parliamentary law that is an exhaustive code on the subject matter of insolvency in relation to corporate entities, and is made under Entry 9, List III in the 7th Schedule which reads as, "9. Bankruptcy and insolvency".

On reading its provisions, the moment initiation of the corporate insolvency resolution process takes place, a moratorium is announced by the adjudicating authority *vide* Sections 13 and 14 of the Code, by which institution of suits and pending proceedings etc. cannot be proceeded with. This continues until the approval of a resolution plan under Section 31 of the said Code. In the interim, an interim resolution professional is appointed under Section 16 to manage the affairs of corporate debtors under Section 17.

It is clear, therefore, that the earlier State law is repugnant to the later Parliamentary enactment as under the said State law, the State Government may take over the management of the relief undertaking, after which a temporary moratorium in much the same manner as that contained in Sections 13 and 14 of the Code takes place under Section 4 of the Maharashtra Act. There is no doubt that by giving effect to the State law, the aforesaid plan or scheme

which may be adopted under the Parliamentary statute will directly be hindered and/or obstructed to that extent in that the management of the relief undertaking, which, if taken over by the State Government, would directly impede or come in the way of the taking over of the management of the corporate body by the interim resolution professional. Also, the moratorium imposed under Section 4 of the Maharashtra Act would directly clash with the moratorium to be issued under Sections 13 and 14 of the Code. It will be noticed that whereas the moratorium imposed under the Maharashtra Act is discretionary and may relate to one or more of the matters contained in Section 4(1), the moratorium imposed under the Code relates to all matters listed in Section 14 and follows as a matter of course. In the present case it is clear, therefore, that unless the Maharashtra Act is out of the way, the Parliamentary enactment will be hindered and obstructed in such a manner that it will not be possible to go ahead with the insolvency resolution process outlined in the Code. Further, the non-obstante clause contained in Section 4 of the Maharashtra Act cannot possibly be held to apply to the Central enactment, inasmuch as a matter of constitutional law, the later Central enactment being repugnant to the earlier State enactment by virtue of Article 254 (1), would operate to render the Maharashtra Act void vis-à-vis action taken under the later Central enactment.

On reading of section 238 of the code it is clear that the later non-obstante clause of the Parliamentary enactment will also prevail over the limited non-obstante clause contained in Section 4 of the Maharashtra Act. For these reasons, we are of the view that the Maharashtra Act cannot stand in the way of the corporate insolvency resolution process under the Code.

The appellant argued that the notification under the Maharashtra Act only kept in temporary abeyance the debt which would become due the moment the notification under the said Act ceases to have effect.

The Supreme Court however held that the notification under the Maharashtra Act continues for one year at a time and can go upto 15 years. Given the fact that the timeframe within which the company is either to be put back on its feet or is to go into liquidation is only 6 months, it is obvious that the period of one year or more of suspension of liability would completely unsettle the scheme of the Code and the object with which it was enacted, namely, to bring defaulter companies back to the commercial fold or otherwise face liquidation. If the moratorium imposed by the Maharashtra Act were to continue from one year upto 15 years, the whole scheme and object of the Code would be set at naught.

The appellant then argued that since the suspension of the debt took place from July, 2015 onwards, the appellant had a vested right which could not be interfered with by the Code.

The Supreme Court however held that it is precisely for this reason that the non-obstante clause, in the widest terms possible, is contained in Section 238 of the Code, so that any right of the corporate debtor under any other law cannot come in the way of the Code. For all these reasons, we are of the view that the Tribunal was correct in appreciating that there would be repugnancy between the provisions of the two enactments. The judgment of the Appellate Tribunal is not correct on this score because repugnancy does exist in fact.

As regards to the rejection of second application the Tribunal as well as the Appellate Tribunal it was held by the Apex Court that the Tribunal and the Appellate Tribunal were right in not going into this contention for the very good reason that the period of 14 days within which the application is to be decided was long over by the time the second application was made before the Tribunal. Also, the second application clearly appears to be an after-thought for the reason that the corporate debtor was fully aware of the fact that the MRA had failed and could easily have pointed out these facts in the first application itself. However, for reasons best known to it, the appellant chose to take up only a law point before the Tribunal. The law point before the Tribunal was argued on 22nd and 23rd December, 2016, presumably with little success. It is only as an after-thought that the second application was then filed to add an additional string to a bow which appeared to the appellants to have already been broken.

The obligation of the corporate debtor was, therefore, unconditional and did not depend upon infusing of funds by the creditors into the appellant company. Also, the argument taken for the first time before us that no debt was in fact due under the MRA as it has not fallen due (owing to the default of the secured creditor) is not something that can be countenanced at this stage of the proceedings. In this view of the matter, we are of the considered view that the Tribunal and the Appellate Tribunal were right in admitting the application filed by the financial creditor ICICI Bank Ltd.

***Case Review*:** Order dated 17th January, 2017 and Order dated 23rd January, 2017 passed by NCLT, Mumbai Bench, Mumbai in ICICI Bank Ltd. Vs. M/s. Innoventive Industries Ltd. (C.P. No. 1/I&BP/NCLT/MB/MAH/2016) and order dated 15th May 2017 passed by the NCLAT in M/s. Innoventive Industries Ltd. Vs. ICICI Bank Ltd. (reported in IIIPI Update 4, Part 2, June 2017), *Upheld*.

Supreme Court of India
Lokhandwala Kataria Construction Pvt. Ltd.
Vs.
Nisus Finance & Investment Manager LLP
Dated of Order: 24-07-2017

Rule 8 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Rule 11 of the National Company Law Appellate Tribunal Rules, 2016 – Withdrawal of Application – In view of Rule 8 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, the National Company Law Appellate Tribunal (NCLAT) could not utilise the inherent power recognised by Rule 11 of the National Company Law Appellate Tribunal Rules, 2016.

An appeal was filed by the appellant/Corporate Debtor against the order passed by the Adjudicating Authority (NCLT, Mumbai Bench) whereby the application under section 7 of the Insolvency and Bankruptcy Code, 2016 (the Code) has been admitted. The parties have settled the dispute and part amount has already been paid. The NCLAT held that such settlement cannot be ground to interfere with the impugned order in absence of any other infirmity. The NCLAT further held that Rule 11 of the National Company Law Appellate Tribunal Rules, 2016 has not been adopted for the purpose of the Code and only Rules 20 and 26 have been adopted in absence of any specific inherent power and where there is no merit, the question of exercising inherent power does not arise.

On appeal, the Supreme Court held that:

In view of Rule 8 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, the National Company Law Appellate Tribunal (NCLAT) could not utilise the inherent power recognised by Rule 11 of the National Company Law Appellate Tribunal Rules, 2016 to allow a compromise before it by the parties after admission of the matter.

***Case Review*:** Order dated 13th July 2017 passed by the NCLAT in Lokhandwala Kataria Construction Pvt. Ltd. Vs. Nisus Finance & Investment Manager LLP**.** in CP (AT) (Insolvency) No. 95 of 2017, *upheld*.

HIGH COURT OF CALCUTTA
Sree Metaliks Limited and Anr.
Vs.
Union of India & Anr.
Date of Order: 07-04-2017

Section 7 read with section 61 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rules, 2016 and Section 424 of the Companies Act, 2013 – Initiation of Corporate Insolvency Resolution Process by Financial Creditor

Facts:

An application under section 7 of the Code of 2016 was filed against the first petitioner (Corporate Debtor) before the NCLT Kolkata Bench. According to the first petitioner it had received a notice from a firm of practicing company Secretaries with regard to the filing of the Company Petition however the notice does not contain any information as to the date of hearing of the company petition. The Corporate Debtor further contended that NCLT had proceeded to admit the company petition without affording any opportunity of hearing to it and therefore NCLT had acted in breach of the principles of natural justice in doing so. The order of NCLT was assailed by the Corporate

Debtor before the NCLAT. The Corporate Debtor submitted that it had no objection to the admission of the Insolvency petition but objected to the appointment of the IRP. However, it did not press the point of breach of the principles of natural justice before NCLAT. The NCLAT disposed the appeal and only replace the IRP appointed by the NCLT.

A writ petition was filed before the Calcutta High Court by the corporate debtor on the ground that Section 7 of the Insolvency and Bankruptcy Code, 2016 (Code of 2016) and the relevant Rules under the Insolvency and Bankruptcy (Application to the Adjudicating Authority) Rules, 2016 are vires as it does not afford any opportunity of hearing to a corporate debtor in a petition filed under Section 7 of the Code of 2016.

Decision:

In the scheme of the Code of 2016, an application under Section 7 of the Code of 2016 is to be first made before the NCLT. An appeal of the order of NCLT will lie before the NCLAT. NCLT and NCLAT are constituted under the provisions of the Companies Act, 2013 (Act, 2013). The procedure before the NCLT and the NCLAT is guided by Section 424 of the Companies Act, 2013.

Section 424 of the Companies Act, 2013 requires the NCLT and NCLAT to adhere to the principles of the natural justice above anything else. It also allows the NCLT and NCLAT the power to regulate their own procedure. Fretters of the Code of Civil Procedure, 1908 does not bind it. However, it is required to apply its principles. Principles of natural justice require an authority to hear the other party. In an application under Section 7 of the Code of 2016, the financial creditor is the applicant while the corporate debtor is the respondent. A proceeding for declaration of insolvency of a company has drastic consequences for a company. Such proceeding may end up in its liquidation. A person cannot be condemned unheard. Where a statute is silent on the right of hearing and it does not in express terms, oust the principles of natural justice, the same can and should be read into in. When the NCLT receives an application under Section 7 of the Code of 2016, therefore, it must afford a reasonable opportunity of hearing to the corporate debtor as Section 424 of the Companies Act, 2013 mandates it to ascertain the existence of default as claimed by the financial creditor in the application. The NCLT is, therefore, obliged to afford a reasonable opportunity to the financial debtor to contest such claim of default by filing a written objection or any other written document as the NCLT may direct and provide a reasonable opportunity of hearing to the corporate debtor prior to admitting the petition filed under Section 7 of the Code of 2016. Section 7(4) of the Code of 2016 requires the NCLT to ascertain the default of the corporate debtor. Such ascertainment of default must necessarily involve the consideration of the documentary claim of the financial creditor. This statutory requirement of ascertainment of default brings within its wake the extension of a reasonable opportunity to the corporate debtor to substantiate by document or otherwise, that there does not exist a default as claimed against it. The proceedings before the NCLT are adversarial in nature. Both the sides are, therefore, entitled to a reasonable opportunity of hearing.

The requirement of NCLT and NCLAT to adhere to the principles of natural justice and the fact that, the principles of natural justice are not ousted by the Code of 2016 can be found from Section 7(4) of the Code of 2016 and Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Rule 4 deals with an application made by a financial creditor under Section 7 of the Code of 2016. Sub-rule (3) of Rule 4 requires such financial creditor to despatch a copy of the application filed with the adjudicating authority, by registered post or speed post to the registered office of the corporate debtor. Rule 10 of the Rules of 2016 states that, till such time the Rules of procedure for conduct of proceedings under the Code of 2016 are notified, an application made under Sub-section (1) of Section 7 of the Code of 2017 is required to be filed before the adjudicating authority in accordance with Rules 20, 21, 22, 23, 24 and 26 or Part-III of the National Company Law Tribunal Rules, 2016.

Adherence to the principles of natural justice by NCLT or NCLAT would not mean that in every situation, NCLT or NCLAT is required to afford a

reasonable opportunity of hearing to the respondent before passing its order.

In a given case, a situation may arise which may require NCLT to pass an ex-parte ad interim order against a respondent. Therefore, in such situation NCLT, it may proceed to pass an ex-parte ad interim order, however, after recording the reasons for grant of such an order and why it has chosen not to adhere to the principles of natural justice at that stage. It must, thereafter proceed to afford the party respondent an opportunity of hearing before confirming such ex-parte ad interim order.

In the facts of the present case, the petitioner submits that, orders have been passed by the NCLT without adherence to the principles of natural justice. The petitioner was not heard by the NCLT before passing the order. It would be open to the parties to agitate their respective grievances with regard to any order of NCLT or NCLAT as the case may be in accordance with law. It is also open to the parties to point out that the NCLT and the NCLAT are bound to follow the principles of natural justice while disposing of proceedings before them.
In such circumstances, the challenge to the vires to Section 7 of the Code of 2016 fails

HIGH COURT OF GUJARAT
Essar Steel India Limited
Vs.
Reserve Bank of India
Special Civil Application No. 12434 of 2017
Date of order: 17th July, 2017

Section 35 (AA) and (AB) of the Banking Regulations Act, 1949 read with Sections 7 and 9 of the Insolvency and Bankruptcy Code, 2016 and Article 14, 19 and 226 of the Constitution of India – Power of Reserve Bank of India to give Directions

The petitioner Essar Steel India Limited has invoked jurisdiction of the Court under Article 14, 19(1)(g) and 226 of the Constitution of India in the matter of the provisions of Insolvency and Bankruptcy Code, 2016 (in short 'IBC') by challenging the Decision of the Reserve Bank of India (in short 'RBI') vide their Press Release dated 13.06.2017 directing banks to initiate proceedings against 12 Companies including the Petitioner under the Provisions of IBC and the decision of Consortium of Lenders to initiate Petition under Section 9 of The Insolvency and Bankruptcy Code, 2016 and failure of the Consortium of Banks led By State Bank of India (in short 'SBI') to implement the package of debt restructuring approved by the Board of Directors of the Petitioner – Company.

The Gujarat High Court held as under:

Filing of insolvency proceedings would be a decision of the concerned person, who is entitled to file such application and, therefore, to that extent, it cannot be said either respondent No. 2 (SBI) or 3 (SCB) can be restrained from filing such application in accordance with law.

It is undisputed fact that filing of such application itself cannot be questioned or that action cannot be quashed, but it goes without saying that such filing would not amount to admitting or allowing the petition for insolvency without offering reasonable opportunity to the company, which is requested to be taken into insolvency by any such person. Therefore, the adjudicating authority being NCLT herein, which is constituted in place of the Company Court, needs to decide on its own based upon factual details that whether the insolvency petition is required to be entertained as such or not.

For the purpose, adjudicating authority, certainly requires to extend hearing and reasonable opportunity to the company to explain that why such an application should not be entertained. In other words, filing of an application may not result into mechanical admission of application as seen and posed by RBI in impugned press release. It would be a decision based on judicial discretion by the adjudicating authority to deal with such application in accordance with law and based upon facts, evidence and circumstance placed before it.

Then, remains the only issue that whether RBI is empowered to publish press release dated 13.6.2017 or not. So far as directions to the Bank to initiate insolvency proceedings against companies, which are in debt to certain level or extent, the amended provisions of the Banking Regulation Act, 1949 in the form of Sections 35(AA) and (AB), certainly makes it clear that,

now, RBI has such powers to issue certain directions to certain Banks and banking companies so as to see that there is proper recovery of public money or for any other such purpose. Therefore, the issuance of press release alone, cannot be quashed and set-aside.

The issue that remains is now limited to the scrutiny that whether such press release is in accordance with law and whether it results into infringing any fundamental right of anybody, more particularly, present petitioner and whether it is arbitrary, discriminatory and without applying proper provisions of concerned law.

The bare reading of Section 35(AA) makes it clear that the RBI is authorised to issue directions to initiate insolvency resolution process in respect of a default, and explanation makes it clear that the default has the same meaning as assigned to it in Clause (12) of Section 3 of the Insolvency and Bankruptcy Code, which means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor as the case may be. Therefore, when it is undisputed fact that the petitioner company has not paid its debt to the tune of more than Rs.32,000 Crores at the end of 31.3.2017 and when total debt is more than Rs.45,000 Crores, it is clear and obvious that RBI is authorised to direct any banking company to initiate insolvency resolution process.

When RBI has categorically confirmed that their decision is based upon the advise received from their Internal Advisory Committee, and more particularly, when decision is to the effect that the companies which have outstanding debt with more than 60% non-performing accounts for more than a year beyond Rs.5,000 Crores, the concerned Bank should initiate insolvency proceeding at the earliest. It cannot be said that there is classification of companies in any nature whatsoever. So far as identifying disclosure in paragraphs 3 and 4 of press release dated 13.6.2017 as classification is concerned, in fact there is no classification because in paragraph 4 also, it is stated that for rest of the companies against whom advise is issued for initiating insolvency resolution proceedings at the earliest, wherein petitioner No.1 includes the concerned Banks, which finalised a resolution plan within six months and if resolution plan is not agreed upon by companies within six months, then in those cases also, Banks are required to file insolvency proceedings. Therefore, practically, there is no classification, but only time schedule is given that companies whose debt is more than Rs.5,000 Crores, which is totaling 25% of current gross NPA of the country, insolvency proceedings need to be initiated at the earliest and in rest of the companies, if resolution plan could not be finalised within six months, then, insolvency proceedings should be initiated. Therefore, there is no direction that insolvency proceeding is to be initiated only against particular company(ies) and not to be initiated against any particular company(ies). It goes without saying that any action is to be started with someone and may not lie against all at the time. It also goes without saying, as already recorded herein above that for filing any such proceeding, none of the financial company or Bank requires either the permission or direction from RBI for other agency or authority because it is their independent and absolute right to initiate any such proceeding/s. Therefore also, when respondents No.2 and 3 can initiate insolvency proceedings irrespective of any such directions, either by RBI or by any other authority, it cannot be said that direction by RBI or filing of petition by respondents No.2 and 3 is unwarranted or arbitrary. However, as already discussed herein above, filing of petition is different from admitting or allowing the petition and to that extent, this Court has issued notice to ascertain, affirm and reconfirm the position that it would be solely at the discretion of the adjudicating authority either to admit the petition and to proceed further in accordance with law or to refuse to admit the petition. It is also clear that such decision of the adjudicating authority, would be a judicial determination and, therefore, such authority has to deal with the rival submissions and factual details on the subject before taking any decision. Thereby, such adjudicating authority cannot be considered as mere rubberstamp authority at the hands of RBI or any other institution. In view of above facts, the petition needs to be disposed of with certain observations when petitioner is not entitled to any relief/s as prayed in this petition.

When petitioner has not challenged the provision of Insolvency and Bankruptcy Code, I have not to deal with such issue at this stage except to dispose of this petition, more particularly, when there is no scope of granting interim relief in favour of the present petitioner. Refusal of interim relief is obvious because petitioner company is in debt of more than Rs.45,000 Crores for couple of years, its NPA was more than Rs.32,000 Crores in last year and more than Rs.31,000 Crores in previous year. It is also clear that when total debt is more than Rs.45,000 Crores, there is no option, but to leave the issue at the discretion of the lenders to take appropriate steps in accordance with law, thereby, without interference of this Court under the constitutional mandate. However, at the cost of repetition, it is made clear that factual details and on-going process of restructuring plan and other details would be taken care of by NCLT before taking any decision on merits.

Conclusion:-

(A) The Respondent No. 1 RBI has to be careful while issuing press releases; it must be in consonance with the Constitutional Mandates, based upon sound principles of Law, but in any case should not be in the form of advise, guidelines or directions to judicial or quasi-judicial authorities in any manner what so ever.

(B) Since the press release is referring the earlier press release dated May 22, 2017, and since in such press release there is reference of S4A - Scheme for Sustainable Structuring of Stressed Assets, which is also introduced on the same day i.e. 13.6.2017; it would be appropriate for RBI to see that benefit of all its schemes is equally offered and extended to all without any discrimination. It is quite clear and obvious that Court has to see that there is no arbitrariness or discrimination by State or its authorities.

(C) It cannot be held that directions under reference is in nature of classification or such classification is irrational, unjust, arbitrary or discriminatory; but it would be appropriate for RBI to see that benefit of all its schemes is equally offered and extended to all without any discrimination..

(D) It cannot be held that Banking Company is not entitled to initiate insolvency proceedings without the directions of the RBI u/s 35AA of BRA.

(E) It cannot be held that directives of RBI under reference by impugned press release is binding upon SCB and therefore SCB is bound to consider the restructuring proposal by the petitioner, wherein petitioner has offered to start payment of dues only after 25 years and that too only with 1 % interest. Therefore relief in terms of para 7(c) cannot be granted.

(F) Only because SCB has corresponded to SBI for its proposal with reference to JLF activities, it cannot be held that SCB could not have initiated insolvency proceedings but it has done it only because of RBI guidelines by way of press release.

(G) Provisions of IBC may be drastic to some extent, but since it is part of statue which is yet not declared unconstitutional and therefore they are to be followed, but in consonance with Constitutional mandate by all concerned i.e.

(1) Not to act upon it mechanically and that all provisions may not be treated mandatory but it could be treated directive only based upon facts, circumstances and evidence available before the authority (judgment dated 1.5.2017 in Company Appeal (AT) No.09 of 2017 between J.K. Jute Mills Co. Ltd. v. M/s. Surendra Trading Company by the National Company Law Tribunal);

(2) Without being guided by any advice or directions in any form or nature viz: impugned press release. There is reason to say so because RBI has tried to do so and changed its document when called upon to explain their stand; and

(3) Thereby it is obvious that adjudicating authority may though proceed in accordance with Law, there should not be undue pressure on it by administration and period of pendency of present petition can certainly be considered as reasonable ground to count the time limit from the date of receipt of writ of this order.

(H) So far factual details of Petitioner Company with reference to its activities and exercise of restructuring through JLF is concerned, it would be appropriate not to enter into any determination on such point since that would be the subject matter before the Adjudicating Authority under IBC (i.e. NCLT) and therefore it is left open for it to consider it for its determination in accordance with Law, to avoid any prejudice to either party by discussion and determination on any such issue at this stage by this Court, where core issue is whether there is reasonable classification by the RBI and not that whether insolvency proceedings should be admitted or continued or not.

(I) For the same reason, issue of suppression of material facts or false statement is not much material at this stage because to decide that information or fact if at all suppressed or false is whether material or not would require same exercise and that may prejudice either side. Moreover, petition can be disposed of even without determining such issue and therefore no determination is required on such issue.

(J) Pursuant to decision in Ionic Metaliks (supra), no writ can be issued against SCB and therefore petition stands dismissed against Respondent No. 3/SCB. Factual details between the Petitioner and SCB has been avoided to be discussed further because this Court has not to decide the validity or proprietary of action by SCB against the petitioner when petition by SCB against petitioner is pending before the NCLT and therefore discussion and determination on factual issues may prejudice either side

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National Company Law Appellate Tribunal (NCLAT)
M/s. Ksheeraabad Constructions Pvt. Ltd. (Appellant/ Corporate Debtor)
Vs.
M/s. Vijay Nirman Company Pvt. Ltd. (Respondent/ Operational Creditor)
Date of Order: 20-11-2017

Sections 9 and 238 of the Insolvency and Bankruptcy Code, 2016 read with Sections 34 & 36 of the Arbitration and Conciliation Act, 1996 - Application for Initiation of Corporate Insolvency Resolution Process (CIRP) by the Respondent - The provision under the 'I&B Code' with regard to finality of an Arbitral Award for initiation of 'Corporate Insolvency Resolution Process' will prevail the provisions of the 'Arbitration and Conciliation Act, 1996'. No person can take advantage of pendency of a case under Section 34 of the Arbitration and Conciliation Act, 1996 to stall 'Corporate Insolvency Resolution Process' under Section 9 of the 'I&B Code'.

The question arises for consideration before the NCLAT is:

> "Whether pendency of a case before a Court under Section 34 of the Arbitration and Conciliation Act, 1996 can be termed to be 'dispute in existence' for the purpose of subsection (6) of Section 5 of the 'I&B Code'."

The Appellate Tribunal held as follows:

It is true that under Section 36 of the Arbitration and Conciliation Act, 1996, an Arbitral Award is executable as a decree. It can be enforced only after the time for filing the application under Section 34 has expired and/or, if no application is made or such application having been made has been rejected. Therefore, for the purpose of Arbitration and Conciliation Act, 1996, an Arbitral Award reaches its finality after expiry of enforcement time or if the application under Section 34 is filed and rejected. However, for the purpose of 'I&B Code' no reliance can be placed on Section 34 of the Arbitration and Conciliation Act, 1996, for the reasons stated below.

The 'I&B Code' being a Complete Code will prevail over all other Acts including Arbitration and Conciliation Act, 1996. As per, Section 238, provision of 'I&B Code' is to override other laws, including Arbitration Act, 1996. Therefore, the provision under the 'I&B Code' with regard to finality of an Arbitral Award for initiation of 'Corporate Insolvency Resolution Process' will prevail the provisions of the 'Arbitration and Conciliation Act, 1996'.

For the purpose of Section 9 of the 'I&B Code', the application to be preferred under Form-5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as "Rules, 2016") as per which, the

order passed by Arbitral panel/Arbitral Tribunal has been treated to be one of the documents/ records and evidence of default, as apparent from Part V of Form 5.

The aforesaid provisions made in the Form-5 if read with subsection (6) of Section 5 and Section 9 of the 'I&B Code' it is clear that while pendency of the suit or Arbitral Proceeding has been termed to be an 'existence of dispute', an order of a Court, Tribunal or Arbitral Panel adjudicating on the default (commonly known as Award), has been treated to be a "record of Operational Debt".

In view of the aforesaid provisions of law and mandate of 'I&B Code', we hold that no person can take advantage of pendency of a case under Section 34 of the Arbitration and Conciliation Act, 1996 to stall 'Corporate Insolvency Resolution Process' under Section 9 of the 'I&B Code'.

Case Review: Order dated 29th August, 2017 passed by the NCLT, Hyderabad Bench in Company Petition (IB) No. 100/9/HDB/2017), upheld.

National Company Law Appellate Tribunal (NCLAT)
Black Pearl Hotels Pvt. Ltd.
Vs.
Planet M Retail Ltd.
Date of Order: 17-10-2017

Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Article 137 of the Limitation Act, 1963 – Application for Initiation of Corporate Insolvency Resolution Process by Operational Creditor - Insolvency and Bankruptcy Code, 2016 has come into force with effect from 1st December, 2016 and therefore, the right to apply under this Code accrues only on or after 1st December, 2016

The applicant/Operational Creditor filed an application under section 9 of the Code before NCLT, Mumbai Bench on the ground that the respondent/Corporate Debtor (CD) had failed to pay its agreed dues. The Adjudicating Authority by its impugned order dated 4th May 2017 dismissed the application on the ground that the application was barred by limitation.

On appeal, the NCLAT held as follows:

Insolvency and Bankruptcy Code, 2016 has come into force with effect from 1st December, 2016. Therefore, the right to apply under I&B Code accrues only on or after 1st December, 2016 and not before the said date (1st December, 2016). As the right to apply under section 9 of I&B Code accrued to appellant since 1st December, 2016, the application filed much prior to three years, the said application cannot be held to be barred by limitation.

In so far as the application under section 9 of the Arbitration and Conciliation Act, 1996 preferred by appellant, it has been specifically pleaded by the appellant and not disputed by the respondent that the appellant filed an application to withdraw the application under section 9 of the Arbitration Act, expressly reserving liberty to institute fresh proceeding for interim relief. In such circumstances and as no arbitral dispute is pending, the application cannot be rejected.

The Adjudicating Authority, Mumbai Bench was not correct in holding that the application was barred by limitation. For the said reason the order rejecting the application cannot be sustained.

Case Review: Order dated 04.05.2017 passed by the NCLT, Mumbai Bench, in Black Pearl Hotels Pvt. Ltd, Operational Creditor Vs. Planet M. Retail Ltd, Corporate Debtor, (C.P. No.464/I&BP/NCLT/MAH/201), *set aside*.

National Company Law Appellate Tribunal (NCLAT)
M/s. Starlog Enterprises Ltd. (Appellant/Corporate Debtor)
Vs.
ICICI Bank Ltd. (Respondent/Financial Creditor)
24th May 2017

Section 61 read with Sections 7, 9 & 75 of the Insolvency and Bankruptcy Code, 2016 – Appeals and Appellate Authority

Facts:
Financial Creditor/Applicant having failed to realise the outstanding dues filed an application under section 7 of the Code before the Adjudicating Authority/NCLT. The applicant filed proof for service of notice to the corporate

debtor. The NCLT satisfied that there was a default on the part of corporate debtor and passed an ex parte order admitting the application filed under section 7 of the Code declaring moratorium.

The corporate debtor/appellant filed an appeal against the order of NCLT on the following grounds:

1. In absence of notice given to the Appellant before admitting the case under Section 7 of the Code, the impugned order is violative of rules of natural justice.
2. The application under Section 7 by the Financial Creditor is incomplete, misleading and being not bona fide was fit to be rejected.
3. The impact of the appointment of Insolvency Resolution Professional on the business and management of the appellant was that in view of the mismanagement the appellant has incurred financial losses as one of its contracts was terminated and also suffered loss of several valuable human resources.

Decision:

It is clear that before admitting an application under Section 9 of the Code it is mandatory duty of the 'adjudicating authority' to issue notice. In the present case admittedly no notice was issued by the 'adjudicating authority' to the corporate debtor, before admitting the application filed under Section 9 of the Code. For the said reason the judgement order cannot be upheld having passed in violation of principle of natural justice.

Showing an incorrect claim, moving the application in a hasty manner and obtaining an ex-parte order from the 'adjudicating authority' which admitted such an incorrect claim, the Financial Creditor cannot disprove its mala fide intention by stating that the claim submitted is correct amount. The I&B Code does not provide for any such mechanism where post-admission, the applicant financial creditor can modify their claim amount.

In some of the cases, an insolvency resolution process can and may have adverse consequences on the welfare of the company. This makes it imperative for the 'adjudicating authority' to adopt a cautious approach in admitting insolvency applications and also ensuring adherence to the principles of natural justice.

For the reasons aforesaid, the appellate Tribunal set aside the ex-parte impugned order passed by NCLT.

In effect the appointment of Interim Resolution Professional, order declaring moratorium, freezing of account and all other order passed by 'adjudicating authority' pursuant to impugned order and action taken by the Interim Resolution Professional, including the advertisement published in the newspaper calling for applications are declared illegal. The 'adjudicating authority' is directed to close the proceeding. The appellant company is released from the rigour of law and allow the appellant company to function independently through its Board of Directors from immediate effect.

The Tribunal imposed a penalty of Rs. 50,000/- on Respondent/Financial Creditor.

Case Review: Order dated 17th February, 2017 passed by NCLT, Mumbai Bench, in ICICI Bank Ltd. Vs. M/s. Starlog Enterprises Ltd. (C.P. No.12/I&B/NCLT/MAH/2017), *set aside.*

National Company Law Appellate Tribunal (NCLAT)
M/s. Innoventive Industries Ltd. (Appellant/Corporate Debtor)
Vs.
ICICI Bank & Anr. (Respondents/Financial Creditor)
15th May 2017

Section 60 read with sections 7,8 & 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4(3) of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rules, 2016 read with Section 424 of the Companies Act, 2013 and Section 4 of the Maharashtra Relief Undertaking (Special Provisions) Act, 1958 – Adjudicating Authority for Corporate Persons

Facts:

Pursuant to default in payment of dues the financial creditor filed an application under section 7 of the IB Code. The corporate debtor filed an interim Application stating that the Industry, Energy and Labour Department of

Maharashtra has passed a relief under the provision of the Maharashtra Relief Undertaking (Special Provisions) Act, 1958 (Bombay Act XCVI of 1958) (hereinafter referred to as MRU Act 1958) suspending the liabilities of the Corporate Debtor and remedies against the debtor for one year from 22.7.2016 and therefore the financial Creditor could not have invoked this relief till 21st July, 2017.

The Adjudicating Authority/Tribunal held that IB Code has come into existence subsequent to MRU Act 1958 and therefore, Non-Obstante clause in section 238 of IBC prevails upon any other law for the time being in force, hence it could not be said that Notification given under MRU Act will become a bar to passing order u/s. 7 of the IB Code. Moreover, the objective under MRU Act, is to prevent unemployment of the existing employees of an industry which is recognized as relief undertaking, but by passing an order u/s. 7 it will not cause any obstruction to their employment until next 180 days, even if the company goes into liquidation, then also the rights of the employees are protected to the extent mentioned under IB Code. The Application filed by the Corporate Debtor was therefore dismissed. The Tribunal also dismissed the plea of the corporate debtor that notice has not been served on the ground that this plea pales into insignificance because this Bench has already heard the Corporate Debtor's application which was already been dismissed. The Adjudicating Authority/Tribunal on perusal of the documents filed by the financial creditor found that the application under section 7(2) is complete and therefore admitted the same declaring moratorium. Aggrieved with the order of the Tribunal the appellant/corporate debtor filed this appeal.

The questions involved in this appeal are:

(i) Whether a notice is required to be given to the Corporate Debtor for initiation of Corporate Insolvency Resolution Process under IB Code and if so, at what stage and for what purpose?

(ii) Whether MRU Act 1958 shall prevail over IB Code. In other words, whether a Corporate Debtor who is enjoying the benefit of MRU Act, can be subjected to IB Code? and

(iii) Whether in a case where Joint Lender Forum (JLF) have reached agreement and granted permission to the Corporate Debtor prior consent of JLF is required by financial creditor, before filing of an application under Section 7 of the IB Code?

Decision:

Ist issue: After considering various decisions of the Supreme Court it was observed that "useless formality" is another exception to the ratio of natural justice. Where on the admitted or undisputed facts only one conclusion is possible and under the law only one penalty is permissible, the Court may not insist on the observance of the principles of natural justice because it would be futile to order its observance. Therefore, where the result would not be different, and it is demonstrable beyond doubt, order of compliance with the principles of natural justice will not be justified.

Further from the decisions of Hon'ble Supreme Court, the exception on the Principle of Rules of natural justice can be summarised as follows:-

(i) Exclusion in case of emergency,
(ii) Express statutory exclusion
(iii) Where discloser would be prejudicial to public interests
(iv) Where prompt action is needed,
(v) Where it is impracticable to hold hearing or appeal,
(vi) Exclusion in case of purely administrative matters.
(vii) Where no right of person is infringed,
(viii) The procedural defect would have made no difference to the outcome.
(ix) Exclusion on the ground of 'no fault' decision maker etc.
(x) Where on the admitted or undisputed fact only one conclusion is possible - it will be useless formality.

There is no specific provision under the I&B Code, 2016 to provide hearing to corporate debtor in a petition under Section 7 or 9 of the I&B Code, 2016. I&B Code, 2016 empowers 'adjudicating authority' to pass orders under

Section 7, 9 and 10 of the Code, 2016 and not the National Company Law Tribunal. It is by virtue of the definition under sub-Section (1) of Section 5 read with section 60 of the I&B Code, 2016, the National Company Law Tribunal plays role of an "adjudicating authority".

As amended Section 424 of the Companies Act, 2013 is applicable to the proceeding under the I&B Code, 2016, it is mandatory for the adjudicating authority to follow the Principles of rules of natural justice while passing an order under I&B Code, 2016. Further, as Section 424 mandates the 'Tribunal' and Appellate Tribunal, to dispose of cases or/appeal before it subject to other provisions of the Companies Act, 2013 or IB Code 2016 such as, Section 420 of the Companies Act, 2013 was applicable and to be followed by the Adjudicating Authority. Thus it is clear that sub-Rule (3) of Rule 4 of I&B (Application to Adjudicating Authority) Rules, 2016, mandates the applicant to dispatch forthwith, a copy of the application "filed with the Adjudicating Authority". Thereby a post filing notice required to be issued and not as notice before filing of an application. The purpose for the same being to put corporate debtor to adequate impound notice so that the Corporate Debtor may bring to the notice of Adjudicating Officer "mitigating factor/records before the application is accepted even before formal notice is received."

The insolvency resolution process under Section 7 or Section 9 of I&B Code, 2016 have serious civil consequences not only on the corporate debtor - company but also on its directors and shareholders in view of the fact that once the application under Sections 7 or 9 of the I&B Code, 2016 is admitted it is followed by appointment of an 'interim resolution professional' to manage the affairs of the corporate debtor, instant removal of the board of directors and moratorium for a period of 180 days. For the said reason also the Adjudicating Authority is bound to issue limited notice to the corporate debtor before admitting a case under section 7 and 9 of the 'I & B Code', 2016.

The Adjudicating Authority is bound to issue a limited notice to the corporate debtor before admitting a case for ascertainment of existence of default based on material submitted by the corporate debtor and to find out whether the application is complete and or there is any other defect required to be removed. Adherence to Principles of natural justice would not mean that in every situation the adjudicating authority is required to afford reasonable opportunity of hearing to the corporate debtor before passing its order.

The Adjudicating Authority post ascertaining and being satisfied that such a default has occurred may admit the application of the financial creditor. In other words, the statute mandates the Adjudicating Authority to ascertain and record satisfaction as to the occurrence of default before admitting the application. Mere claim by the financial creditor that the default has occurred is not sufficient. The same is subject to the Adjudicating Authority's summary adjudication, though limited to 'ascertainment' and 'satisfaction'.

It is evident from Section 9 of the I & B Code that the Adjudicating Authority has to, within fourteen days of the receipt of the application under sub-section (2), either admit or reject the application. Section 9 has two-fold situations insofar as notice of dispute is concerned. As per sub-section (5)(i) of Section 9, the Adjudicating Authority can admit the application in case no notice raising the dispute is received by the operational creditor (as verified by the operational creditor on affidavit) and there is no record of a dispute is with the information utility. On the other hand, sub-section (5)(ii) of Section 9 mandates the Adjudicating Authority to reject the application if the operational creditor has received notice of dispute from the corporate debtor. Section 9 thus makes it distinct from Section 7. While in Section 7, occurrence of default has to be ascertained and satisfaction recorded by the Adjudicating Authority, there no similar provision under Section 9. Under Section 7 neither notice of demand nor a notice of dispute is relevant whereas under Sections 8 and 9 notice of demand and notice of dispute become relevant both for the purposes of admission as well as for the rejection.

While ascertaining, the 'Adjudicating Authority' to comes to a conclusion whether there is an existence of default for the purpose of section 7 or there is a dispute raised by the corporate debtor and all other purpose whether an

application is complete or incomplete, it is not only necessary to hear the Financial Creditor/Operational Creditor but also the Corporate Debtor.

The different decisions of the Hon'ble Supreme Court and exception of principles of natural justice as summarised in the preceding paragraphs is not applicable to the insolvency resolution process as it is not a case of emergency declared or prejudicial to public interest or that there is a statutory exclusion of rules of natural justice or it is impracticable to hold hearing. It is not the case that no right of any person has been affected, as immediately on appointment of an Interim Resolution Professional, the Board of Directors stand superseded. There are other persons who are also affected due to order of moratorium. Therefore, the 'adjudicating authority' is duty bound to give a notice to the corporate debtor before admission of a petition under Section 7 or Section 9.

In the present case though no notice was given to the Appellant before admission of the case but it was found that the Appellant intervened before the admission of the case and all the objections raised by appellant has been noticed, discussed and considered by the 'adjudicating authority' while passing the impugned order dated 17th January 2017. Thereby, merely on the ground that the Appellant was not given any notice before admission of the case cannot render the impugned order illegal as the Appellant has already been heard. If the impugned order is set aside and the case is remitted back to the adjudicating authority, it would be 'useless formality' and would be futile to order its observance as the result would not be different. Therefore, order to follow the principles of natural justice in the present case does not arise.

However, in some of the cases initiation of Insolvency Resolution Process may have adverse consequences on the welfare of the Company. Therefore, it will be imperative for the "adjudicating authority" to adopt a cautious approach in admitting Insolvency Application by ensuring adherence to the principle of natural justice.

IInd Issue: The Schedule to the MRU Act specifies only certain acts to which the restriction applies. Accordingly, the application of the MRU Act can only be extended to such acts as specified in the schedule and no other legislation. The legislations referred to in the 'schedule' to the MRU Act are employment welfare related which is in consonance with the objects and purposed of the MRU Act i.e. 'employment and unemployment'. The protection under the MRU Act, therefore, cannot be extended to other legislations especially to union legislation which is subsequent to the MRU Act and related to insolvency resolution i.e. I&B Code, 2016. Section 4 of the MRU Act, including Section 4 (iv), therefore, is limited in scope to the acts listed in the schedule thereto.

The MRU Act operates in a different field from the I&B Code, 2016. MRU Act is an Act to make temporary provisions for industrial relations and other matters to enable the State Government to conduct or to provide a loan, guarantee or financial assistance for the conduct of certain industrial undertakings 'as a measure of preventing unemployment or of unemployment relief.'

On the other hand the I&B Code, 2016 is an Act enacted 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 interest of all the stakeholders including alteration in the order of priority of payments of Government dues. The I&B Code, 2016, which is later act of greater specificity, seeks to balance the interests of all stake holders.

Section 238 of the I&B Code, 2016 is non-obstante clause which overrides the operation of the MRU Act. As per Section 238 of the I&B Code, 2016 the provisions of the Code are to be given effect to notwithstanding anything contrary contained *any other law* or any instrument having effect under such law.

In view of the aforesaid objects of the two enactments it is apparent that the two enactments operate in entirely different fields.

This is further made clear by the fact that the MRU Act is enacted under Entry 23 of List III while the Code has been enacted under Entry 9 of the List III. The MRU Act has received Presidential assent under Article 254(2) of the Constitution of India, which is only required for statutes enacted by the State Government in exercise of its legislative competence under the Concurrent List.

In light of the aforementioned non-obstante provision (which is a subsequent Union Law), the provisions of the I&B Code, 2016 shall prevail over the provisions of the MRU Act and any instrument issued under the MRU Act including the Notification.

Following the law laid down by Hon'ble Supreme Court in Yogender Kumar Jaiswal Vs. State of Bihar, (2016) 3 SCC 183 and Madras Pet Rochem Limited and Another Vs. Board for Industrial and Financial Reconstruction and Others," (2016) 4 SCC 1 it was held that there is no repugnancy between I&B Code, 2016 and the MRU Act as they both operate in different fields. The Parliament has expressly stated that the provisions of the I&B Code, 2016 (which is a later enactment to the MRU Act) shall have effect notwithstanding the provisions of any other law for the time being in force. This stipulation does not mean that the provisions of MRU Act or for that matter any other law are repugnant to the provisions of the Code.

In view above, it was held that the Appellant was not entitled to derive any advantage from MRU Act, 1958 to stall the insolvency resolution process under Section 7 of the I&B Code.

IIIrd Issue: The Tribunal has noticed that there is a failure on the part of appellant to pay debts. The Financial Creditor has attached different records in support of default of payment. Apart from that it is not supposed to go beyond the question to see whether there is a failure on fulfilment of obligation by the financial creditor under one or other agreement, including the Master Restructuring Agreement. In that view of the matter, the Appellant cannot derive any advantage of the Master Restructuring Agreement dated 8th September, 2014.

For initiation of corporate resolution process by financial creditor under sub-section (4) of Section 7 of the Code, the 'adjudicating authority' on receipt of application under sub-section (2) is required to ascertain existence of default from the records of Information Utility or on the basis of other evidence furnished by the financial creditor under sub-section (3). Under sub-section 5 of Section 7, the 'adjudicating authority' is required to satisfy:-

(a) Whether a default has occurred;
(b) Whether an application is complete; and
(c) Whether any disciplinary proceeding is against the proposed Insolvency Resolution Professional.

Once it is satisfied that it is required to admit the case but in case the application is incomplete application, the financial creditor is to be granted seven days' time to complete the application. However, in a case where there is no default or defects cannot be rectified, or the record enclosed is misleading, the application has to be rejected.

Beyond the aforesaid practice, the 'adjudicating authority' is not required to look into any other factor, including the question whether permission or consent has been obtained from one or other authority, including the JLF. Therefore, the contention of the petition that the Respondent has not obtained permission or consent of JLF to the present proceeding which will be adversely affect loan of other members cannot be accepted and fit to be rejected.

In the aforesaid circumstances the 'adjudicating authority' having satisfied on all counts, including default and that the application is complete and that there is no disciplinary proceeding pending against the Insolvency Resolution Professional, no interference is called for against the impugned judgment.

Case Review: Order dated 17th January, 2017 and Order dated 23rd January, 2017 passed by National Company Law Tribunal, Mumbai Bench, Mumbai in ICICI Bank Ltd. Vs. M/s. Innoventive Industries Ltd. (C.P. No. 1/I&BP/NCLT/MB/MAH/2016), *Upheld.*

NCLT- Ahmedabad Bench
State Bank of India / Standard Chartered Bank (Financial Creditor)
Vs.

Essar Steels Ltd. / Essar Steels India Ltd.
(Corporate Debtor)
Date of Order: 02-08-2017
Amount in Default - 4500 Cr.

Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 and 9 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rules, 2016 – Initiation of corporate Insolvency resolution process by Financial Creditor

State Bank of India (SBI) and Standard Chartered Bank (SCB) initiated Corporate Insolvency Resolution Process (CIRP) under section 7 of the IBC against the respondent corporate debtor/Essar.

The case of the ESSAR is that:

- The operations of the ESSAR are very complex involving large number of stakeholders including suppliers, creditors, employees, promoters, customers, Government exchequer over and above the financial creditors.
- ESSAR is on the path of improvement to carry on the operations at 80% capacity.
- Debt Resolution Process was undertaken and there were discussions between the Lenders and ESSAR till 13th June, 2017 on the day on which Reserve Bank of India (RBI) issued a Press Release.
- The directions given by RBI to SBI triggered the reference before National Company Law Tribunal. According to ESSAR, Resolution Process has two risks. First, the process of formulation of Debt Resolution Process will have to be reinitiated and further time will be lost due to fresh start. The second one is potential risk to the operations and value of the Company under the hands of IRP.
- ESSAR also stated that if the Company is in the hands of IRP who is an individual person it is difficult for him to oversee such complex operations in a short period of 180 days.
- Further, the funding supported by the creditors and suppliers which were available to the Company under the stewardship of Board of Directors and promoters may not be available to IRP. According to the ESSAR, promoters, lenders, employees, creditors, suppliers, customers have invested time, efforts and resources to revive the Company and implement a satisfactory Debt Resolution Plan and if at this stage the Insolvency Resolution Plan is invoked it would adversely affect the interest of the Company and all its stakeholders.
- It is further stated that in view of Section 13 and 16 of the IBC, the appointment of IRP shall be made only after the admission of the petition within 14 days.
- Further, there are 4500 people working in the Company and all would be affected in case of commencement of Insolvency Resolution Process.
- That National Company Law Tribunal has got discretion not to admit the petition in view of language used in Section 7.

Decision of the Tribunal:

There is no dispute about the proposition of law that in order to give appropriate meaning to the words "may" and "shall" used by the Legislature, the intent of the particular enactment and the attendant circumstances must be taken into consideration.

This Adjudicating Authority is of the view that the order of admission of an Application for initiation of Corporate Insolvency Resolution Process is a judicial order which should be according to the provisions of the Code, principles of natural justice, and taking the consequences of the order into consideration. Therefore, there this Adjudicating Authority shall exercise its discretion in either admitting or rejecting the Insolvency Resolution Applications. It is needless to say that discretionary power has to be exercised in a judicious manner taking into consideration all the facts and circumstances of the case, the provisions of the applicable laws and the object of the Insolvency and Bankruptcy Code. This Adjudicating Authority shall look into the aspect of the occurrence of default, and, while doing so, shall take into consideration various factual and legal pleas raised by both parties in order to record its satisfaction. Therefore, the argument that the word "may" in

Section 5(a) shall be read as "shall" and therefore it is mandatory on the part of the Adjudicating Authority to admit all the Insolvency Resolution Applications filed by the Financial Creditors, if they are complete, do not merit acceptance.

In the case on hand, from the material placed on record by SCB and SBI, it is clear that it is established that ESSAR has committed default in repayment of financial debt to SCB and SBI. The Applications filed by the SCB and SBI are complete in all respects. As can be seen from the Written Communications of proposed Interim Resolution Professionals filed by the SCB and SBI, no disciplinary proceedings are pending against them.

Whether Debt Restructuring Process or Debt Restructuring Plan is going to absolve the ESSAR, Corporate Debtor from the Insolvency Resolution Process?

From the material placed on record, it is in the year 2014 that Debt Reconstructing Process commenced. For one reason or the other, the Debt Reconstructing Process has not been finalised till today or till the date of filing of the Applications. It is not a case where ESSAR owed monies to Lenders in the previous year. The Lenders are there from the beginning of the ESSAR Company. As contended by ESSAR there are several reasons that prevented it from discharging the debts. No doubt, there are no allegations of siphoning of funds, diversion of funds or fraud. But, the fact remains that except showing a little progress in the last financial year, there appears to be no scope for the ESSAR to repay its debts till 25 years or in a span of 25 years. Therefore, the Debt Restructuring Process, which is going on for the last two years, may not be a factor not to enter into Insolvency Resolution Process. It is pertinent to mention here, that even in the Corporate Insolvency Resolution Plan, Debt Restructuring Plan can be taken into consideration by the Committee of Creditors as one of the Resolution Plans, if submitted by any of the Resolution Applicants. Therefore, commencement of Insolvency Resolution Process cannot be construed as putting an end to the Debt Restructuring Process which has been commenced. The apprehension of ESSAR, that, to again start Debt Restructuring Process would consume lot of time, appears to be not acceptable for the reason that Insolvency Resolution Plan is a time bound programme. There is no scope for the stakeholders to prolong the process without taking a decision and without finalising the Resolution Plan. Therefore, on the ground that when a Debt Restructuring Process is going on there is no need to commence the Insolvency Resolution Process under the IBC does not hold the field. If Insolvency Resolution Process is commenced by appointing Interim Resolution Professional, no doubt the Board of Directors would be suspended. That does not mean the entire machinery of the Company is suspended. Even after appointment of IRP, all the employees of the Company, top to bottom, would continue to function under the control of IRP instead of the Board of Directors. Therefore, the apprehension of ESSAR that suspension of Board of Directors may cause prejudice to the interest of the Company and the stakeholders may not be correct. The Object of the IBC is to chalk out a Resolution Plan to revive the Company, but not to liquidate the Company straightway. It is needless to say that a company like ESSAR need not be liquidated and there are several other alternatives to revive the Company. If all the eligible Creditors sit together; evolve a Resolution Plan, it would help not only the Company, its stakeholders, Steel Industry, and ultimately the economy of India. In chalking out such Resolution Plan, mainly the Lenders, must sacrifice to a great extent which makes the Company to revive. If a Resolution Plan is chalked out with such objectives in mind, the Resolution Plan will certainly help the Company and it would come out of the present situation. Therefore, as opined by the Hon'ble High Court of Gujarat (in Essar Steel India Ltd. Vs. RBI & others, Special Civil application No. 12434 of 2017), taking all the material facts, and the Debt Restructuring Plan, and the objects of the 1B Code, into consideration this Adjudicating Authority is of the view that it is only the Resolution Plan that would make the ESSAR Company survive which course would safeguard the interest of all the stakeholders of the Company. Therefore, there is no need for an apprehension that Resolution Plan is going to be detrimental to the interest of the Company. The finding of this Authority, after taking into all factual aspects, the complex activities of ESSAR, the ongoing Debt Restructuring Process, is that both Applications merit admission.

In view of the above discussion, this Adjudicating Authority is of the considered view that the Applications filed by the SCB and SBI are complete, there is occurrence of default in respect of financial debts, and there are no disciplinary proceedings pending against the Insolvency Resolution Professionals proposed by both the Applicants, i.e., SCB and SBI. Hence, this Adjudicating Authority is hereby admitting both the Applications filed by SCB and SBI.

Whether there is no need to appoint Interim Resolution Professional on the same day on which date admission order is passed and it can be passed within 14 days of the admission of the Applications?

In case of admission of an Application under Section 7 of the Code, the Corporate Insolvency Resolution Process commences. Section 13 of the code says that after the admission of the Application under Section 7, the Authority shall declare moratorium, cause public announcement of initiation of Corporate Insolvency Resolution Process, and call for submission of claims under Section 15 of the Code, and appoint Interim Resolution Professional in the manner laid down in Section 16.

No doubt, a reading of Sections 13, 14, 15 and 16 (1) of the Code goes to show that Adjudicating Authority need not appoint the Interim Resolution Professional on the same day on which Application under Section 7, 9 or 10 is admitted. But, there is no provision which bars the Adjudicating Authority from appointing Interim Resolution Professional on the same day on which the admission order was passed and simultaneously with the admission order. In an application filed under Section 9, in case if the Operational Creditor did not give the name of the IRP, then the Adjudicating Authority, availing the 14 days' time provided under Section 16(1), can appoint the Interim Resolution Professional within 14 days from the date of admission order. Suppose in a given case there is some omission in the Written Communication or there is some difficulty in the appointment of the recommended IRP, in such Cases the Adjudicating Authority may appoint IRP even in an application under Section 7 not on the date of order of admission, but on a subsequent date, but before 14 days from the date of admission. Therefore, there must be facts and circumstances that warrant the Adjudicating Authority to defer the appointment of IRP in an application filed under Section 7 of the Code. In the case on hand, no such circumstance exists which warrant deferring the appointment of Interim Resolution Professional to some other date but not on the date of admission order.

No two stages or no two separate hearings are contemplated under the Code, namely, the first stage is admission and the second stage is appointment of Interim Resolution Professional. The object of the Code is to complete the entire process in a time bound programme. When such is the object of the Code, without any compelling circumstances, there is no need to defer the appointment of Interim Resolution Professional only to give an opportunity to the Corporate Debtor to agitate the decision of this Adjudicating Authority twice in two Appeals.

The Corporate Debtor is entitled to prefer an Appeal against the order of admission and also against the appointment of Interim Resolution Professional. If both the orders, namely admission order and the order appointing Interim Resolution Professional are made separate, then the Corporate Debtor will file two Appeals at two stages and thereby gain more time, which is not the object of the Code. Therefore, the Code enjoins upon this Authority to declare Moratorium; to make public announcement of initiation of Corporate Insolvency Resolution Process; and to appoint Interim Resolution Professional on the date of commencement of Insolvency Resolution Process as Rule and the exception is differing the appointment of Interim Resolution Professional to some other date that depend upon the facts of the case.

NCLT- Mumbai Bench
M/s. Schweitzer Systemtek India Private Limited
Vs.
Phoenix ARC Private Limited
Date of Order: 03-07-2017
Amount in Default – 4.69 Cr.

Section 10 of the Insolvency and Bankruptcy Code, 2016 – Initiation of corporate Insolvency resolution process by Corporate applicant - The property not owned by the Corporate Debtor do not fall within the ambits of the Moratorium.

Facts of the Case:
The main issue before the Tribunal was that "Whether a property(ies) which is/are not 'owned' by a Corporate Debtor shall come within the ambits of the Moratorium? In the instant case the personal properties of the promoters have been given as security to the banks while taking loans.

Decision of the Tribunal:
This code of 2016 has prescribed certain limitations which are inbuilt and must not be overlooked. The "Moratorium" indeed is an effective tool, sometimes being used by the corporate debtor to thwart or frustrate the recovery proceeding.

The plain language of the Section 14 is that on the commencement of the Insolvency process the **'Moratorium' shall be declared for prohibiting any action to recover on enforce any security interest created by the Corporate Debtor in respect of "its" property.** Relevant section which needs in-depth examination is section 14 (1) (c) of The Code.

There are recognised canons of interpretation. Language of the Statute should be read as it existed. This is a trite law that no word can be added or substituted or deleted from the enacted Code duly legislated. Every word is to be read and interpreted as it exists in the statute with the natural meaning attached to the word. **Rather in this Section the language is so simple that there is no scope even to supply 'casus omissus'. I hasten to add that the doctrine of ' Noscitur a Sociis' is somewhat applicable that the associated words take their meaning from one another so that common sense meaning coupled together in their cognate sense be interpreted.** As a result, "its" denotes the property owned by the Corporate Debtor. **The property not owned by the Corporate Debtor do not fall within the ambits of the Moratorium.** Even Section 10 is confined to the Book of the Accounts of the Corporate Debtor, due to the reason that section 10(3) has specified that the Corporate Applicant shall furnish "its" Books of Accounts. This Bench has no legislative authority to expand the meaning of the term "its" even under the umbrella of 'Ejusdem generis'.

The outcome of this discussion is that the Moratorium shall prohibit the action against the properties reflected in the Balance Sheet of the Corporate Debtor. The Moratorium has no application on the properties beyond the ownership of the Corporate Debtor. As a result, the Order of the Hon'ble Court directing the Court Commissioner to take over the possession shall not fall within the clutches of Moratorium. Even otherwise, the provisions of The Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (the SARFAESI Act) may be having different criteria for enforcement of recovery of outstanding Debt, which is not the subject matter of this Bench. **Before I Part with it is necessary to clarify my humble view that The SARFAESI Act may come within the ambits of Moratorium if an action is to foreclose or to recover or to create any interest in respect of the property belonged to or owned Debtor, otherwise not.**

The Application under section 10 of the Code is hereby "Admitted".

Indian Institute of Insolvency Professionals of ICAI

(Company formed by ICAI as per Section 8 of the Companies Act 2013)

Welcome to Learning Management System of Indian Institute of Insolvency Professionals of ICAI

The Insolvency and Bankruptcy Code has been legislated in 2016 and is expected to be a decisive legislation that seeks to transform the Indian debt resolution landscape. This Code also envisages a new genre of Insolvency Resolution Professionals who are expected to be an important cornerstone of the Resolution process along with the Debtor and the Creditor.

The criteria for empanelment as an Insolvency Professional specifies that **any Chartered Accountant, Company Secretary, Cost Accountant and Advocate who has passed the Limited Insolvency Examination and has completed ten years as member of respective Institute/ Bar Council is eligible to be empanelled.** Additionally, a Graduate who has passed the Limited Insolvency Examination, and has fifteen years of experience in management, after he received a Bachelor's degree from a university established or recognized by law is also eligible to become an Insolvency Professional.

At this important juncture, it was decided to launch a State of Art Learning Management module. ICAI is very **happy to announce the launch of the IBBI Limited Insolvency Examinations Learning Module which would comprise of three parts**

1. Literature on the entire syllabus **(ready and launched)**
2. Video lectures on the above content (will be released shortly)
3. Over 500+ Multiple Choice Question mock exam learning **(ready and launched)** with additions to the question bank every day

NO FEES REQUIRED

This is a Knowledge initiative of Indian Institute of Insolvency Professionals of ICAI jointly with The Institute of Chartered Accountants of India. It is an easy to use platform which delivers the concepts across the entire syllabus in the form of presentations and supplemented by mock tests in each component of the syllabus. A unique feature is that it enables the professionals to do the practice tests at a modular level and prepare for the examination and to complete the Limited Insolvency Examinations with flying colours.

The members are requested to visit the E- learning platform and click on the Knowledge Gateway at the link http://www.iiipicai.in/index.php/learning for the Learning Management System(LMS).

Once the LMS Page opens, for the first time, members are required to register themselves and after which login details are provided. For subsequent uses, with the login details members can access the LMS.

For Feedback/ Suggestions/ Queries if any, please mail to ipa@icai.in

SBI drags five Kolkata-companies to NCLT

State Bank of India (SBI), the country's biggest lender, is likely to drag five Kolkata-based companies, including Burnpur Cement and four Patni group entities, to the National Company Law Tribunal for insolvency proceedings over Rs 3,250 crore in unpaid loans.

Three people familiar with the exercise told ET that the Patni group has defaulted on about Rs 3,000 crore of loans and dues, with Burnpur Cement accounting for the rest. The Patni group of companies in debt are Rohit Ferro Tech (Rs 1,300 crore), Ankit Metal & Power (Rs 700 crore), Impex Metal & Ferro Alloys (Rs 800 crore), and Impex Ferro Tech (Rs 200 crore).

The stock of Burnpur Cement, which has a consolidated market capitalization of about Rs 80 crore, lost 4.2% to end at Rs 9.25 apiece on the BSE Monday.

SBI didn't comment on the reported move to take the defaulting borrowers to court.

"All these companies availed credit facilities from the SBI's industrial finance branch, Kolkata, and these advances turned as non-performing assets or bad loans quite a few months ago," said one of the persons cited above.

SBI has even approached different resolution professionals for consultancy as it also aims to depute its own interim resolution professional before the matter comes up for hearing at the dedicated bankruptcy court, sources said.

United Bank of India, Allahabad Bank, and Bank of Baroda also have loan exposure to these companies. Loans to Rohit Ferro were earlier converted into equities under a debt restructure scheme, with banks led by SBI holding stock ownership.

Those loan accounts are now parked in the Stressed Assets Accounting Group (SAMG) Branch, Kolkata, after they turned NPA.

Source : ET Bureau , Date: 12th March,2018

Homebuyers may get a say in insolvency proceedings for real estate companies

Homebuyers could be treated on a par with unsecured financial creditors at insolvency proceedings for real estate companies.

If adopted, the move will cheer those who have acquired residences from companies such as Jaypee Inftratech, Unitech and Amrapali and find themselves at the back of the queue when it comes to seeking recompense.

This is among proposals made by a committee tasked with reviewing the Insolvency and Bankruptcy Code (IBC) and under consideration by the government, said two senior officials aware of the development.

Thousands have been left in the lurch after Jaypee Inftratech and Amrapali were referred to the NCLT by IDBI Bank and Bank of Baroda, respectively, after they failed to pay their dues. Besides this, the ministry of corporate affairs has moved the bankruptcy court to take control of realtor Unitech.

Corporate affairs secretary Injeti Srinivas told ET in an interview separately that the recommendations along with draft amendments to the IBC are likely to be presented toward the end of the month. If the measure on homebuyers is adopted, the biggest advantage for them will be the right to participate in the insolvency resolution process and be part of the committee of creditors. It would also give them voting rights on resolution plans.

A proposal is actively considered to give homebuyers a status of unsecured financial creditors — a move which is aimed to take care of the interests of all the stakeholders.

Source : ET Bureau , Date: 12th March,2018

PSBs recapitalisation should be part of broader package of financial reforms: IMF

WASHINGTON: The IMF has said that the recapitalisation of public sector banks (PSBs) should be part of a broader package of financial reforms to speed up the resolution of non-performing assets (NPAs), which has attracted more attention in view of the Nirav Modi case.

In the view of the International Monetary Fund , recent policy reforms to address vulnerabilities in the banking and corporate sectors in India have been significant, IMF Deputy Managing Director Tao Zhang said ahead of his visit to India.

The asset quality review, initiated by the Reserve Bank of India (RBI) in December 2015, prompted banks to take steps to recognise all nonperforming assets and ensure appropriately provisioned balance sheets by March 2017. Other important steps include the new Insolvency and Bankruptcy Code, adopted in May 2016; and more recently, the announcement of a major recapitalisation of India's PSBs, he said.

According to a recent Assocham-Crisil study, India's banking sector will be saddled with gross non-performing assets (GNPAs) worth a staggering Rs 9.5 lakh crore by March-end, up from Rs. 8 lakh crore in the year-ago period.

"While all are welcome steps, we think the PSB recapitalisation should be part of a broader package of financial reforms to speed up the resolution of NPAs, improve PSB governance, reduce the role of the public sector in the financial system, and enhance bank lending capacity and practices," Zhang told in an interview.

A team of experts recently conducted an assessment in the context of India's participation in the IMF/World Bank Financial System Stability Assessment Program (FSAP), he noted.

"The experts found that the RBI has made progress in strengthening banking supervision since the previous assessment in 2011. For instance, a risk-based supervisory approach has been introduced and Basel III norms have been implemented, as is now increasingly common around the world," Zhang said.

"Having said that, banks' operational risk management, risk culture, internal control frameworks and external audit function should typically play a central role in preventing fraud," Zhang said in response to a question.

Source : ET , Date: 11th March, 2018

Reid & Taylor, S Kumars head for bankruptcy after loan defaults of over Rs 5,000 crore

Reid & Taylor, a fashion brand and its parent company S.Kumars Nationwide, are headed for the bankruptcy courts after they defaulted on more than Rs 5,000 crore of loans.

Nitin Kasliwal, promoter of S.Kumars Nationwide, is declared a wilful defaulter by most lenders and will thus not be eligible to participate in the resolution plan.

IDBI Bank has initiated insolvency proceedings against S. Kumars Nationwide, while Edelweiss BSE 1.00 % Asset Reconstruction Company has dragged Reid & Taylor (India) to Insolvency court.

Lenders are looking at a comprehensive debt restructuring package for both companies since Reid & Taylor has synergies with S. Kumars Nationwide. Therefore, it was decided to appoint the same resolution professional for both the companies.

Source : Economic Times , Date: 9th March,2018

Finally, four firms in fray to acquire Jaypee Infratech

The race for acquiring beleaguered Jaypee Infratech, which is yet to deliver 25,000 flats and villas in and around Noida, has narrowed to four players — Adani Group, Sajjan Jindal's JSW, Suraksha Asset Reconstruction Company and a consortium comprising Kotak Realty Fund and Cube Highways.

The committee of creditors asked the four players to submit revised offers.
The fresh offers are expected over the next few days and will then be evaluated by the panel before a final decision is taken.

The resolution professional managing the company since August will move the National Company Law Tribunal, the insolvency court, once the creditors identify a resolution applicant.

Apart from the real estate projects, the company facing insolvency proceedings also manages the Taj Expressway and Jaypee Hospital.

The case is being closely watched by home buyers, who were initially jittery about the fate of their lifetime savings but are drawing comfort from the massive interest in the high-profile project which initially saw over 20 bids, including from a group of buyers, who wanted to build their own tower, as well as Jaiprakash Associates, the majority shareholder in Jaypee Infratech.

The field had narrowed to 10 players, including Chinese realtor Jieyang Zhonguci and Deutsche Bank, but the lenders have opted to seek bids from four players now. There were three bidders for acquiring the hotels, too, but the lenders have preferred to opt for players who are looking to take over the entire company instead of opting for split sale of assets.

The winning bidder will be decided on a mix of parameters, involving financial and technical

parameters, and the lenders would be keen to ensure that their money is recovered to the maximum extent possible, especially given the government's keenness to ensure that the 'haircut' taken by lenders to stressed projects is minimum.
Source : Times of India , Date: 9th March,2018

NCLT accepts Aircel's bankruptcy petition

National Company Law Tribunal (NCLT) accepted telecom operator Aircel's bankruptcy petition, and issued a directive that the directors, promoter and chairman and managing director of the company should not leave without permission till further offers.

According to people in the know, Vijay Iyer of consultancy firm Deloitte Haskins & Sells has been nominated as insolvency resolution professional (IRP) from Aircel's side to start the resolution process.
The tribunal rejected GTL Infrastructure's intervention application, saying that operational creditors can not be party at this juncture.
Two weeks back , the Chennai-based operator, and its two units -- Dishnet Wireless and Aircel Cellular -- filed for bankruptcy in the NCLT Mumbai bench after over four months of attempts to settle the matter with lenders. Banks had finally accepted the company's request to undertake strategic debt restructuring, when the Reserve Bank of India scrapped loan recast schemes and left Aircel with no option but to file for bankruptcy under the Insolvency & Bankruptcy Code, 2016.
Aircel and its units under a debt of Rs 50,000 crore to financial and operational lenders and had said am IRP was needed urgently since it would resolve issues around continuation of services, repayment of loans, payment of salaries and reiterated that there was threat to staff since security personal too were unpaid.
The court had ordered an interim injunction saying no assets of Aircel would be moved or sold without a petition for the same.
Source : Economic Times , Date: 8th March,2018

First under IBC: Tata Steel bags bankrupt Bhushan Steel, Rs 45,000 crore NPA all set for resolution

Bankrupt Bhushan Steel, one of the first 12 big bad loan accounts identified for resolution under the Insolvency and Bankruptcy Code (IBC), has got its highest bidder -- Tata Steel.

Bankrupt Bhushan Steel, one of the first 12 big bad loan accounts identified for resolution under the Insolvency and Bankruptcy Code (IBC), has got its highest bidder — Tata Steel. And if the deal is successfully sealed, this would be the first Non-Performing Asset (NPA) resolution under the mighty IBC.

Tata Steel said that it has been identified as the biggest bidder for acquiring the control of massive debt-hit Bhushan Steel undergoing insolvency proceedings. Sajjan Jindal-promoted JSW Steel and a consortium of the Bhushan Steels' employees were also in the fray.

UK-based Liberty House was also eyeing the company, however, its bid was rejected by Committee of Creditors (CoC) as it submitted the bid after the last day of submission, a PTI reports quoting unidentified source said.

Bhushan Steel, which calls itself the third largest secondary steel producer in the country, owes Rs 44,478 crore to banks and was the biggest loan defaulter identified by the Reserve of India (RBI) in its first list last June.

The National Company Law Tribunal (NCLT) admitted Bhushan Steel for resolution on July 26 last year on the petition filed by State Bank of India (SBI) and Punjab National Bank (PNB).

Not only that Bhushan Steel has got its bidder, it has got the bidder well before the deadline. According to reports, the deal with Tata Steel is all set to get sealed by April-end, much within the 270-day timeline of the resolution process.

Amid the big bad loan problem in the country, biggest from the Steel industry, this deal is a morale boost for not only the banks but the government too. The Tata Steel bid to take over Bhushan Steel also allays fears that stressed assets won't get any takers if promoters are barred from bidding and banks would have to take massive haircuts.

For Bhushan Steel, Tata Steel has Rs 17,000 crore to the lenders as the upfront amount and Rs 7,200 crore for operations of Bhushan, while JSW Group offered Rs 11,000 crore to the lenders and Rs 2,000 crore for the operations, PTI reported.

The RBI has so far identified about 40 accounts for resolution under the IBC, of which resolution process for many accounts is in progress.
Source : Financial Express , Date: 8th March, 2018

Code of Conduct of Indian Institute of Insolvency Professionals of ICAI for Insolvency Professionals

1. An insolvency professional must maintain integrity by being honest, straightforward, and forthright in all professional relationships.

2. An insolvency professional must not misrepresent any facts or situations and should refrain from being involved in any action that would bring disrepute to the profession.

3. An insolvency professional must act with objectivity in his professional dealings by ensuring that his decisions are made without the presence of any bias, conflict of interest, coercion, or undue influence of any party, whether directly connected to the insolvency proceedings or not.

4. An insolvency professional appointed as an interim resolution professional, resolution professional, liquidator, or bankruptcy trustee should not himself acquire, directly or indirectly, any of the assets of the debtor, nor knowingly permit any relative to do so.

Independence and impartiality.

5. An insolvency professional must maintain complete independence in his professional relationships and should conduct the insolvency resolution, liquidation or bankruptcy process, as the case may be, independent of external influences.

6. In cases where the insolvency professional is dealing with assets of a debtor during liquidation or bankruptcy process, he must ensure that he or his relatives do not knowingly acquire any such assets, whether directly or indirectly unless it is shown that there was no impairment of objectivity, independence or impartiality in the liquidation or bankruptcy process and the approval of the Board has been obtained in the matter.

7. An insolvency professional shall not take up an assignment under the Code if he, any of his relatives, any of the partners or directors of the insolvency professional entity of which he is a partner or director, or the insolvency professional entity of which he is a partner or director is not independent, in terms of the Regulations related to the processes under the Code, in relation to the corporate person/ debtor and its related parties.

8. An insolvency professional shall disclose the existence of any pecuniary or personal relationship with any of the stakeholders entitled to distribution under sections 53 or 178 of the Code, and the concerned corporate person/ debtor as soon as he becomes aware of it, by making a declaration of the same to the applicant, committee of creditors, and the person proposing appointment, as applicable.

9. An insolvency professional shall not influence the decision or the work of the committee of creditors or debtor, or other stakeholders under the Code, so as to make any undue or unlawful gains for himself or his related parties, or cause any undue preference for any other persons for undue or unlawful gains and shall not adopt any illegal or improper means to achieve any *mala fide* objectives.

Professional competence.

10. An insolvency professional must maintain and upgrade his professional knowledge and skills to render competent professional service.

Representation of correct facts and correcting misapprehensions.

11. An insolvency professional must inform such persons under the Code as may be required, of a misapprehension or wrongful consideration of a fact of which he becomes aware, as soon as may be practicable.

12. An insolvency professional must not conceal any material information or knowingly make a misleading statement to the Board, the Adjudicating Authority or any stakeholder, as applicable.

Timeliness.

13. An insolvency professional must adhere to the time limits prescribed in the Code and the rules, regulations and guidelines thereunder for insolvency resolution, liquidation or bankruptcy process, as the case may be, and must carefully plan his actions, and promptly communicate with all stakeholders involved for the timely discharge of his duties.

14. An insolvency professional must not act with *mala fide* or be negligent while performing his functions and duties under the Code.

Information management.

15. An insolvency professional must make efforts to ensure that all communication to the stakeholders, whether in the form of notices, reports, updates, directions, or clarifications, is made well in advance and in a manner which is simple, clear, and easily understood by the recipients.

16. An insolvency professional must ensure that he maintains written contemporaneous records for any decision taken, the reasons for taking the decision, and the information and evidence in support of such decision. This shall be maintained so as to sufficiently enable a reasonable person to take a view on the appropriateness of his decisions and actions.

17. An insolvency professional must not make any private communication with any of the stakeholders unless required by the Code, rules, regulations and guidelines thereunder, or orders of the Adjudicating Authority.

18. An insolvency professional must appear, co-operate and be available for inspections and investigations carried out by the Insolvency and Bankruptcy Board of India, any person authorised by the Board or Indian Institute of Insolvency Professionals of ICAI.

19. An insolvency professional must provide all information and records as may be required by the Insolvency and Bankruptcy Board of India or Indian Institute of Insolvency Professionals of ICAI.

20. An insolvency professional must be available and provide information for any periodic study, research and audit conducted by the Board.

Confidentiality.

21. An insolvency professional must ensure that confidentiality of the information relating to the insolvency resolution process, liquidation or bankruptcy process, as the case may be, is maintained at all times. However, this shall not prevent him from disclosing any information with the consent of the relevant parties or required by law.

Occupation, employability and restrictions.

22. An insolvency professional must refrain from accepting too many assignments, if he is unlikely to be able to devote adequate time to each of his assignments.

23. An insolvency professional must not engage in any employment, except when he has temporarily surrendered his certificate of membership with Indian Institute of Insolvency Professionals of ICAI.

24. An insolvency professional must not conduct business which in the opinion of the Insolvency and Bankruptcy Board of India is inconsistent with the reputation of the profession.

Remuneration and costs.

25. An insolvency professional must provide services for remuneration which is charged in a transparent manner, is a reasonable reflection of the work necessarily and properly undertaken, and is not inconsistent with the applicable regulations.

26. An insolvency professional shall not accept any fees or charges other than those which are disclosed to and approved by the persons fixing his remuneration.

27. An insolvency professional shall disclose all costs towards the insolvency resolution process costs, liquidation costs, or costs of the bankruptcy process, as applicable, to all relevant stakeholders, and must endeavour to ensure that such costs are not unreasonable.

Gifts and hospitality.

28. An insolvency professional, or his relative must not accept gifts or hospitality which undermines or affects his independence as an insolvency professional.

29. An insolvency professional shall not offer gifts or hospitality or a financial or any other advantage to a public servant or any other person, intending to obtain or retain work for himself, or to obtain or retain an advantage in the conduct of profession for himself.

PHOTOGRAPHS

Dr. Mukulita Vijaywargiya, Whole Time Member, IBBI with Other Dignitaries inagurating the World Bank-IIIPI 'Select Training Programme for IPs' at Mumbai. (18-01-2018)

Dr. M.S. Sahoo, Chairman, IBBI with Other Dignitaries during 'Unveiling the New Disclosure Rigime: Interaction with Insolvency Professionals and Press' organised by IIIPI. (31-01-2018)

Participants at the World Bank-IIIPI 'Select Training Programme for IPs' at Mumbai. (20-01-2018)

ICAI-IIIPI Round Table on IBC, at Hyderabad. (30-12-2017)

INVITATION FOR CONTRIBUTING ARTICLE

The Indian Institute of Insolvency Professionals of ICAI (IIIPI) will commence publishing a quarterly Journal '***The Resolution Professional***' w.e.f. April'2018.The focus of the Journal is to enhance the knowledge base of its readers and to keep them updated of the latest developments in all the spheres of Insolvency and Bankruptcy.

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- The length of the article should be 2500-3000 words.The article should also have an executive summary of around 100 words.
- 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 not cross the limit of 20 words.
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- A brief profile of the author, e-mail ID, postal address and contact numbers along with his **passport size photograph (scanned for e-mail)** and declaration regarding the originality of the article as mentioned above should be enclosed along with the article.
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