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THE RESOLUTION PROFESSIONAL

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

RESCUING THE CORPORATE LIVES

ABOUT IIIPI

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

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

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

OUR VISION

To be a leading institution for development of an independent, ethical and world-class insolvency profession responding to needs and expectations of the stakeholders.

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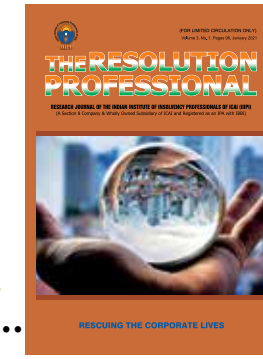

JANUARY 2021
IN THIS ISSUE...

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From Editor's Desk

Dear Member,

Happy New Year 2021 and Republic Day!!!

It my pleasure to present January 2021 issue of The Resolution Professional, the first edition of the year 2021.

We feel indebted to Dr. Navrang Saini, WTM, IBBI who carved out time from his busy schedule and provided systematic reply to the questions posed by IIIPI. This has been presented in the form of his 'INTERVIEW' in this edition of The Resolution Professional.

In our endeavour to make The Resolution Professional a world class research journal, we are trying to ensure compliance of the international standards in letter and spirit. In pursuance to this commitment, all the articles and case studies received for publication in this edition were subjected to a systematic process of peer-review by internal and referred experts. In this process we had to reject several articles while authors were consulted time and again to revise their articles up to the satisfaction of reviewers. I express my sincere thanks to all the authors who contributed their write ups for this edition and patiently revised their manuscripts as many times as requested by the Team IIIPI.

In this edition, you will read five analytical articles and an in-depth case study on CIRP of Essar Steel Ltd by its Resolution Professional Mr. Satish Kumar Gupta.

In the lead article *"Integrity and Objectivity of Insolvency Professionals"* Mr. Dhinal A. Shah has highlighted various dimensions of ethical conduct in the insolvency profession which are crucial in conducting the CIRP in a credible, effective and time bound manner. The IPs should keep in mind them to avoid unnecessary allegations of bias and maintain high standards of professionalism. This is followed by Mr. Rajeev Babel's piece on *"Initiation of CIRP against the Guarantor (s) under Judicial Scanner"* in which he has analysed the status of guarantor under IBC.

Mr. David A. Kerr has presented an UK's perspective on Pre-Pack Insolvency in his piece *"Pre-Packs: Sensible Safeguards or Pandering to the Misinformed?"* which is an insight in shaping the pre-pack policies under IBC. Mr Ayush Arora in his article *"CCI's Green Channel for Regulating Business Combination and Approval of Resolution Plan"* has analysed an issue falling at the interface of Competition Commission of India (CCI) and Insolvency and Bankruptcy Board of India (IBBI). Finally, Mr. S.L. Narasimha Rao Sista in his article *"Liquidation of Stressed Enterprises under IBC: Tips for IPs"* has presented a stepwise guideline for IPs working as liquidators.

Besides, in this edition, you will have a thorough understanding of the monitoring process of IIIPI in the 'Monitoring by IIIPI' prepared by the Monitoring and Inspection Department of IIIPI. Besides, the journal also has its regular features, i.e., Legal Framework, Legal Snippets, IBC News, IIIPI News, Services and Crossword.

Hope you all will continue to contribute your articles in the upcoming April 2021 edition. Under the able guidance of IIIPI's Governing Board and the Editorial Board, your continuous support, and sustained efforts of the Team IIIPI, we are hopeful in making The Resolution Professional, a world class journal.

Editor

Message from the Chairman, Editorial Board

CA. Atul Kumar Gupta
Chairman
Editorial Board

Dear Member,

Wish you a happy and prosperous 2021.

The year gone by was indeed a year nobody probably wants to remember. However, Insolvency and Bankruptcy Code (IBC) not only overcame challenges posed by the COVID-19 pandemic but emerged stronger. In this fight against the pandemic induced lockdowns which snowballed into the biggest ever economic crisis, India has developed a more robust resolution ecosystem which includes online (virtual) programs, virtual courts, and virtual modes of record preservation. These innovative practices in communication have saved time and millions of tonnes of paper which would have been required in the pre-pandemic era.

This fight against the pandemic was not only to save human lives but the corporate lives as well. In these days of economic crisis, the Ministry of Finance, and the Ministry of Corporate Affairs (MCA) emerged as a guardian of corporates while the regulator i.e., the Insolvency and Bankruptcy Board of India (IBBI) was seen pacing with the Central government in updating and revising the IBC as per the changing circumstances and requirements.

With the near conclusion of DHFL's insolvency resolution process, India has made inroads in the insolvency resolution of FSPs (Financial Service Providers). The experiences gained in the insolvency resolution of this first ever FSP will go a long way in revisiting the insolvency framework for FSPs.

Need to Increase Resolutions

As the COVID-19 vaccination has been started, we hope the conditions will gradually improve to normalcy. However, we need to strengthen the IBC ecosystem to overcome imminent challenges and make it more efficient in saving the corporate lives.

As per IBBI, up to September 2020 a total of 4008 CIRPs were commenced, out of which 473 have been closed on appeal/review/settled and 291 were withdrawn under Section 12A. In this period, the resolution plans of 277 CDs were approved while 1,025 CDs faced liquidation. It further reveals that the resolution plans of 20 CDs were approved in the first quarter (Q1) of FY 2020-21 while 25 were liquidated. The corresponding figures for Q2 were 22 and 68, respectively. By the end of September 2020, 1942 CIRPs were pending at various stages. The primary objective of the IBC framework is resolution but not the liquidation. There should be synergized efforts of the stakeholders to increase resolution and minimize liquidation.

Furthermore, the delays of CIRP have been a major concern of IBC regime. The recent Financial Stability Report released by the Reserve Bank of India (RBI), indicates that till September 2020 average time taken by CIRP took 433 days which is much higher than statutory 330 days to complete the process.

The Year Ahead

The MCA has recently invited suggestions on recommendations of Insolvency Law Committee on "Pre-packaged Insolvency Resolution Process (PPIRP)". The committee headed by IBBI Chairperson Dr M.S. Sahoo

has designed a pre-pack framework within the basic structure of the IBC for the Indian market. We hope the Ministry will soon come out with a Pre-Pack resolution framework for out-of-court workouts for speedier resolutions. This will indeed be a new milestone for IBC and help in rescuing the corporate lives.

Soon, we will hopefully see introduction of Resolvability Index to measure the extent of resolvability of a company. This will go a long way in keeping a company resolvable to increase competition among resolution applicants that increases the likelihood of resolution in case of need. Besides, we hope, the Index will set up a culture of healthy competition among the corporates and ultimately ensure better financial health of companies which is a prerequisite for a vibrant economy.

These initiatives along with the IBBI (Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Regulations, 2019, against which some petitions are pending in the Supreme Court, will bring a welcome change in the IBC regime of India.

The Institute of Chartered Accountants of India (ICAI) has taken several initiatives in the field of research and continuous professional education (CPE) to keep its members updated, vibrant and performance oriented thereby providing them an edge into insolvency profession. Besides, we possess an exhaustive curriculum which is continuously being updated on a rolling stock basis to ensure the availability of best brains for the insolvency framework. It is due to these initiatives, the Chartered Accountants continue to make the largest share of the IPs. This is evident from the fact that by September 2020 out of 3,182 registered IPs in the country ~ 54.4% of are CAs.

ICAI along with IIIPI will continue to contribute to strengthening IBC thereby ensuring a robust insolvency ecosystem for the nation.

CA. Atul Kumar Gupta
President, ICAI
&
Chairman, Editorial Board,
The Resolution Professional,
IIIPI, New Delhi

January 19, 2021

Message from the Chairman, IIIPI

Dr. Ashok Haldia
Chairman, Governing Board,
IIIPI

Dear Member,

Happy and Prosperous 2021!

The year 2020 had thrown us into the biggest ever health and economic crisis of the era. The lockdown which was considered as the most effective measure to save human lives came heavily on corporate lives, rescuing of which has become the primary objective of the IBC regime. The pandemic made us to introspect, improvise and improve.

Now that India is witnessing and hoping for normalcy soon, the insolvency profession may need to be even more responsive as insolvencies are expected to rise, post lifting of suspension, likely in March 2021. Among many measures announced by Govt., of particular importance is pre-pack insolvency framework which would allow stakeholders to negotiate terms out of court and achieve resolution faster. IBBI is also working on other frameworks including on MSME, group insolvency and cross border insolvency. These would go a long way in streamlining resolution process in complex conglomerates on one end, and MSMEs on the other. IPs,therefore, need to equip themselves for the requisite changes in their approach and competencies. IIIPI has been facilitating the same through organizing programs and/or webinars with participation of experts including from other countries.

Union Budget 2021 announced recently, highlighted that India may experience a V-shape recovery with double digit growth in GDP expected during next year as compared to 7.5% contraction expected during current year, to tide over the Covid-blues. The said growth is expected to be led by infrastructure and healthcare related spending. Challenges however may arise on account of higher fiscal deficit and resultant inflationary pressures. The creation of bad bank through AMC/ARC route and capitalization of PSBs would provide boost to resolution of NPAs, while easing availability of credit to the industry and consumers.

In this backdrop, we at IIIPI, have been trying our best to not only sustain the momentum but also keep launching several initiatives to meet the expectations of our stakeholders.

I would also take this opportunity to share some of the key initiatives taken by IIIPI.

Pandemic leading to new strategic directions

While ensuring compliance of precautionary measures during lockdown period, IIIPI banked on the technology to deliberate, plan, and roll out initiatives. A multi- pronged strategy is being adopted focusing on issues arising because of Covid-19 to plan, aim and meet expectations of members and other stakeholders. IIIPI launched many new programs to help the members in overcoming gaps in knowledge and practice, faced before,during and after CIRP. Some of these initiatives are:

1. IIIPI is focusing on developing knowhow through research and studies with the participation of members and other stakeholders. To begin with, it carried out research/study on the 'Timeliness and Effectiveness of Litigation under IBC'. The report has since been shared with IBBI and is also exhibited on IIIPI's website. On an average, time taken in all litigation per CIRP worked out to ~113 days, involving a cost of Rs.18 lacs per CIRP.

Following studies are nearly complete and soon shall be shared with members/stakeholders:

(a) Legal & Substantive aspects of Group insolvency: Learning from practical experience,

(b) Grey areas and best practices for COC conduct during CIRP,

(c) Engagement of professionals by IPs during CIRP.

These studies may not only streamline the relationship between COC and IP but also may address many operational issues during CIRP/ Liquidation.

2. New research/studies are being commissioned on areas of critical importance viz. pre-pack insolvency framework, cross-border insolvency,

and best practices during liquidation process, etc.

3. Capacity building of members through knowledge sharing and experience of CIRP by IPs, facilitating interactions on the global practices with IPs, regulators, and multilateral and bilateral institutions. These include:

a. IIIPI facilitated sharing of international experience in responding to challenges from Covid -19 through conference held jointly with IFC/World Bank, Washington. It is heartening to note that initiatives in India, in line with global response to Covid 19, focused on preserving the value of distressed assets besides alleviating stress through economic and fiscal measures.

b. First ever international conference on Insolvency Resolution Paradigm: Global Headwinds & Responses" was held on 24th – 25th October 2020 over six technical session on topics of national and international relevance. A brief report on proceedings is given in this edition and a detailed report is available at *(https://www.iiipicai.in/wp-content/uploads/2021/02/Report-IIIPIs-International-Conference-on-24-25-Oct-2020.pdf)*. The conference provided international exposure in law and practice of Insolvency and bankruptcy globally including that on emerging areas of IBC in India like pre-pack, group insolvency,cross-border insolvency.

c. Program together with British Council on pre-pack insolvency and implications on the role of insolvency professionals.

4. Redesigning of 'LIE Preparatory Classroom (Virtual Program)' to respond to new syllabus and broad basing the same with practical insights. First program was held with very encouraging response from the aspirants.

5. The members are facing challenges in managing CDs undergoing CIRPs as a going concern, after assuming the role of CEO. Realizing the need, an Executive Development Program (EDP) has been structured. In response, during last 3 months, three 5-day batches have been organized, with support from faculty comprising IPs and experts having demonstrated successful track record.

The 30-hours program received a highly enthusiastic response from the IP community.

a. As a unique feature these EDPs would have a follow-up program for sharing experiences by the participants.

b. Above EDP is designed to give exposure to base level competencies needed to act as a CEO of a CD. At the second stage, an advanced level program would be organized for the participants to give exposure to complexities faced in management and governance of CD as a going concern.

6. The quarterly journal 'The Resolution Professional', was launched in October 2020. The journal was released by the Mr. Arijit Basu, MD (CCG), SBI. and Shri Atul Gupta President ICAI. The journal has been restructured to be a wholesome source for knowledge, experience and research on insolvency and bankruptcy. The first edition has articles contributed by the members on contemporary issues. Importantly it also carried address of Dr. MS Sahoo, Chairperson, IBBI, giving excellent exposition on the role and governance of IIIPI and of insolvency professionals.

7. There has been increasing focus on emerging and newer areas for enhancing knowledge and practice. During pandemic, IIIPI conducted over 25 webinars on contemporary topics including NPA resolution, public interest/ethics, case-studies, COC conduct, liquidation etc.: 8 roundtable conferences in consultation with IBBI on areas like avoidance transaction-best practices, new MSME framework, record retention policy etc. Besides, IIIPI also conducted 11 Pre-Registration Online Courses.

8. IIIPI has designed capacity building program aimed for COC members. The first of such programs is scheduled in first week of March 2021. Programs for industry participants are also planned together with leading industry associations.

These newer initiatives have helped not only in meeting aspirations of members but also in positioning of IIIPI and Indian insolvency professionals at national and international pedestal.

At IIIPI, we would continue to add value to our stakeholders including regulator, banks, industry, and media by conducting many awareness programs, debates, and conferences. This would not only help in adhering to the IBC in letter and spirit but also help build the stakeholders' capacity.

As on December 31, 2020 out of total 3324 Insolvency Professionals registered with Insolvency and Bankruptcy Board of India (IBBI), 2053 are with IIIPI. We thank our members for their support and reposing faith in IIIPI. We hope the same to continue by strengthening IIIPI's initiatives including by contributing their knowledge and experience through journal and participating in research and other initiatives.

With our members' support, we shall endeavor to make IIIPI truly a world class institution.

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

A robust insolvency framework is built on the standards and professionalism exhibited by the IP: Dr. Navrang Saini

The Code casts strenuous responsibilities on an IP to run the affairs of the firm in distress. An IP plays a significant role wherein he ought to protect and preserve the value of CD's property, comply with all applicable laws on its behalf, conduct the entire resolution process with fairness and equity, retrieve value lost through avoidance transactions, etc.

Dr. Navrang Saini

Whole Time Member (WTM)

Insolvency and Bankruptcy Board of India (IBBI)

Dr. Navrang Saini took charge as WTM, IBBI on 31st March 2017. He has PG degrees in Management and Law along with PhD in Corporate Law and professional qualification as a Company Secretary.

Dr. Saini has served the Ministry of Corporate Affairs in various capacities. During his tenure as Registrar of Companies, Delhi, and Haryana, Dr. Saini implemented the first mission mode e-governance project of the country 'MCA21' as a major pilot project. His last assignment was as Director General at the Ministry.

In IBBI, he is presently looking after Registration & Monitoring Wing comprising Insolvency Professionals, Insolvency Professional Entities, Information Utilities, Insolvency Professional Agencies, Registered Valuers, Registered Valuers Organisations, Inspection, Investigation, Surveillance and Grievance Redressal. In addition, he is in-charge of the Legal Affairs Division and Establishment Division.

*In an **Exclusive Interview** with **IIIPI** for **The Resolution Professional**, **Dr. Saini** expressed his views on various issues related to IBC Ecosystem. Read on to know more....*

IIIPI: How can the past four years of operation of the insolvency regime in India through the IBC, 2016, be summarized while juxtaposing the same with the previous regime?

Dr. Saini: Since its notification, the Insolvency and Bankruptcy Code, 2016 (Code) has created a cohesive and comprehensive ecosystem that cements the processes and the service providers together towards the achievement of its objectives in a time bound manner.

The Code has rescued 308 Corporate Debtors (CDs) as of December 2020 through resolution plans in which the creditors have realised more than 192 per cent of realisable value of the CDs. Recovery for financial creditors (FCs), as compared to their claims, was found to be more than 43 per cent for all the years since the inception of the Code.

Although the Code has rescued 308 CDs, 1121 CDs went into liquidation. In this context, it is pertinent to note that appx. 74 per cent of cases undergoing liquidation and 33 per cent of cases undergoing resolution were sick or defunct. The value of assets of these CDs had significantly eroded away by the time they entered CIRP. In fact, the CDs rescued had assets valued at ₹ 1.03 lakh crore, while the CDs (for which data are available) referred for liquidation had assets valued at ₹ 0.43 lakh crore when they entered the CIRP. Thus, in value terms, around three fourth of distressed assets were rescued.

By the end of December 2020, CIRPs rescued took on average 441 days for conclusion of the process while CIRPs which ended up in orders for liquidation, took on average 328 days for conclusion. The cost details available for 260 CDs resolved indicates that the cost works out on average 0.79 per cent of liquidation value and 0.42 per cent of resolution value.

The Code has brought about significant behavioural changes among the creditors and debtors thereby redefining debtor-creditor relationship. It encourages the debtors to settle default expeditiously with the creditor at the earliest, preferably outside the Code. Since the enactment of the Code in 2016, of the 18,892 applications that were dealt with, as many as 14,884 cases involving defaults of ₹ 5.15 lakh crore were withdrawn by September 2020 from various benches of the NCLT, before these applications were admitted by the Adjudicating Authority, and 913 processes were closed mid-way by December, 2020.

The above outcomes under the Code show that they are a far cry from the previous regime which yielded a recovery of 25 per cent for creditors through a

process which took about 4+ years and entailed a cost of 9 per cent.

The achievements of the Code have been recognised globally. In the World Bank Group's Doing Business Reports, India's rank moved up from 136 to 52 in terms of 'resolving insolvency' in the last four years. In the Global Innovation Index, India's rank improved from 111 in 2017 to 47 in 2020 in 'Ease of Resolving Insolvency'. India was also awarded the Global Restructuring Review Award for the Most Improved Jurisdiction in restructuring and insolvency regime.

IIIPI: Sometimes it is not the fault of the business model or the entrepreneurs but the issues like international relations, economic crisis, natural calamities, and pandemics such as COVID which cause distress. In this backdrop, how would the safeguards in the current framework including those introduced recently, help the industry cope up with the challenges?

Dr. Saini: The COVID-19 pandemic necessitated calibration of the insolvency framework in India to prevent otherwise viable enterprises from being forced into insolvency proceedings on account of COVID-19 induced financial stress. Typically, in normal circumstances, the resolution of insolvency under the Code requires a resolution applicant, to rescue a firm in distress by offering a resolution plan to revive the firm. When the world is in the grip of COVID-19, prospective resolution applicants may themselves be facing liquidity crunch or be in distress. When every other firm is under stress at this time, it is unlikely to find adequate number of resolution applicants to rescue all firms in distress. In response to the ensuing adverse impact of COVID-19 on solvency of businesses, the Government of India vide notification dated March 24, 2020, increased the threshold amount of default required to initiate an insolvency proceeding from Rs. 1 lakh to Rs. 1 crore. Further, the Government suspended initiation of the CIRP of a corporate debtor (CD) under section 7, 9 and 10 for any default arising on or after March 25, 2020. The Government extended this suspension of the Code twice for 3 months each on September 24, 2020 and December 22, 2020 to provide relief to the firms undergoing stress due to ongoing COVID-19 pandemic.

The IBBI also took cognizance of the difficulties for the IPs to continue to conduct the process, for members of Committee of Creditors to attend the meetings, and for prospective resolution applicants to prepare and submit resolution plans, during the period of lockdown. To address these difficulties, IBBI amended the CIRP and Liquidation regulations to provide that the period of lockdown imposed by the Central Government in the wake of COVID-19 outbreak shall not be counted for the purposes of the timeline for any activity that could not be completed due to the lockdown, in relation to a CIRP and Liquidation process, subject to the provisions of the Code.

IIIPI: Insolvency Professionals often highlight avoidable litigations and long pendency of cases with adjudicating authorities as the key reasons for delays in CIRPs which bring disrepute to the profession. What more measures are desirable in order to have an effective delivery system?

Dr. Saini: A number of measures and developments in the near future are envisaged to strengthen the delivery system, making it more efficient, certain and efficacious. One of the important measures would be to strengthen the Adjudicating Authority (AA). The bench capacity needs to increase commensurate with the responsibilities under both the Code and the Companies Act, 2013. The AA should have strong administrative support to manage the cases with the help of information technology that releases members to focus on adjudication. Efforts need to be made to resolve stress by mediation and conciliation or through processes such as pre-pack, which do not use or make minimum use of the AA.

The next important measure would be to strengthen the insolvency profession further. To this end, to take the insolvency profession to the next level, the IBBI has conceived a two-year Graduate Insolvency Programme (GIP) for young and bright minds having a professional qualification or a degree in a relevant discipline but with no experience. On completion of GIP, one would be eligible for registration as an IP. GIP is the first of its kind in the world to create tailormade IPs and is an endeavour to create insolvency as a discipline of knowledge. The second batch of GIP has commenced at the Indian Institute of Corporate Affairs (IICA) in July, 2020. In addition, several measures, such as advanced training in niche areas, continuing professional education, are being undertaken to build the capacity of insolvency professionals.

As regards the valuation profession, a Committee of Experts has recently recommended enactment of an exclusive statute to provide for the establishment of the National Institute of Valuers to protect the interests of users of valuation services in India and to promote the development of, and to regulate the valuation profession and market for valuation services.

In recognition of the uniqueness of MSMEs and that a typical CIRP style resolution may not be conducive for them, as part of the '*Atma Nirbhar Bharat*, Part V: Government Reforms and Enablers', the Government proposed to notify a special insolvency resolution framework for MSMEs. The framework is likely to be a blend of CIRP and individual insolvency as some MSMES are corporates while others are individuals.

Pre-packs is another area that is gaining traction. A sub-committee of the Insolvency Law Committee has submitted its report proposing a detailed scheme and regulatory framework for implementing pre-packaged insolvency resolution process in India.

IIIPI: Under the resolution framework, COC or Committee of Creditors enjoys a pre-dominant role.

While on one hand, this dispensation is welcome in the interest of a market-driven process, concerns have been raised about COC not being subject to regulatory control, leading to frictions of varied nature. What direction, in your opinion, IBC framework should move forward, to obviate such issues?

Dr. Saini: The IBC framework and jurisprudence that has evolved over time upholds the commercial wisdom of the CoC. The CoC, which comprises of financial creditors (FCs), has responsibility to decide the fate of the firm in distress, whether to rescue or liquidate it. The decisions of the CoC are not generally open to any analysis. The stakeholders, including the Government, are bound by the resolution plan, which is a commercial decision/wisdom of the CoC. A wrong decision can destroy an otherwise viable firm or place the firm in the hands of wrong people. The CoC deciphers whether the firm is in economic distress and if so, it may release the resources of the firm to other competing uses and the entrepreneur to pursue emerging opportunities. If the firm is in financial distress, the CoC rescues the firm from the clutches of current management and puts it in the hands of a credible and capable management to avoid liquidation. It creates the visibility of the underlying value of the firm and a market for competing, feasible and viable resolution plans from capable and credible people. It assesses feasibility and viability of resolution plans and capability and credibility of RAs. These decisions are not amenable to a mathematical equation and require tremendous business acumen.

The supremacy of the commercial wisdom of the CoC has been upheld by the courts. In the matter of *K. Sashidhar Vs. Indian Overseas Bank & Ors.,*[1] the Supreme Court has held that AA has no jurisdiction to evaluate commercial decision of CoC much less to enquire into the justness of rejection of plan by dissenting FCs.

Further, in the other judgments of the Supreme Court, it has been held that the commercial wisdom of the CoC cannot be interfered with judicially.

Given that the consequences of decisions of the CoC are grave, in order to develop their expertise, IBBI has also been organising CoC workshops to build the capacity of FCs in the area of insolvency and bankruptcy.

IIIPI: Going by the international experience, many new features in IBC dispensation are expected to be unveiled viz. pre-pack resolution, frameworks for group and cross-border insolvency, Individual/ fast track mechanism, MSME framework. Individual insolvency is also being touted as 'next big thing' in this context. What can be the ideal pace of such developments in near future, from the point of view of priority and suitability to Indian conditions?

Dr. Saini: Due to the current vulnerability pandemic situation caused by the COVID-19, the business in general landed in an unprecedented risky landscape. It is projected in the recent Financial Stability Report released by RBI that GNPA ratio of all SCBs may increase from 7.5 per cent in September 2020 to 13.5 per cent by September 2021[2]. Further, World Economic Outlook – October 2020[3] observed that prolonged liquidity shortfalls can readily translate into bankruptcies. Moreover, prolonging existing support to companies could limit insolvencies in the short term, however it is observed in global reports that there is a danger of Zombie Companies[4] , raising the risks of more insolvencies in the medium and long term. The pandemic situation has undoubtedly thrown up multiple challenges, for which an unconventional solutionis warranted to mitigate this unprecedented crisis.

In this regard, among all the tools available in the toolkit, of addressing the distressed assets, the idea of Pre-pack that is calibrated to the Indian scenario is worth considering. Similarly, a special framework for MSMEs needs to be rolled out given that liquidity and solvency risks are bound to increase, putting both SME jobs and debt at risk. There is a high possibility that an MSME CD may end up in liquidation if it enters CIRP, in the current situation. This explains the need to enable effective out-of-court restructuring of MSME. As presently there is no set of laws, rules and regulations under the Code to deal with a special situation resolving group insolvency, a feasible model on group insolvency needs to be worked out at the earliest.

With globalization, the investment of different countries in India has also multiplied. Formal cross border insolvency law is quintessential need of the hour to protect the rights of domestic as well as foreign investors. The upcoming model is expected to cover mechanisms to ensure judicial cooperation between bankruptcy courts of different jurisdictions, developed theory of Centre of Main Interest, alignment with best international practices and reciprocal arrangements.

Owing to the recent developments aftermath of the pandemic crisis, it is recommended by various global agencies[5], that policy measures such as Special out-of-court restructuring frameworks may need to be strengthened (or established) to expedite processing of rising insolvencies. Further, efficient corporate bankruptcy frameworks such as pre-packs and special insolvency framework for MSMEs,

1. Civil Appeal No. 10673 of 2018 and other appeals.

2. https://www.rbi.org.in/Scripts/BS_PressRelease Display.aspx?prid=50949

3. https://www.imf.org/en/Publications/WEO/Issues/ 2020/09/30/world-economic-outlook-october-2020

4. https://www.allianz.com/en/economic_research/ publications/specials_fmo/16072020_Insolvencies.html

5. file:///C:/Users/Administrator.COM046/Downloads/ text%20(5).pdf

6. https://www.allianz.com/en/economic_research/ publications/specials_fmo/16072020_Insolvencies.html

will be central in dealing with any backlogs that may arise. As it is further estimated that a stronger rise in insolvencies, will be seen in 2021 than in 2020[6] - particularly for India, due to the major effects of lockdowns on business courts activity and suspension of insolvency laws playing up to the end of 2020 or even until further notice. Hence considering the grave consequences and to avert the impact of the rising insolvencies, it is important to implement the pre-pack schemes and special framework for MSMEs after weighing the various conditionalities and calibrating to the Indian scenario, for efficient reallocation of resources in the economy.

IIIPI: Indian insolvency regime is based on 'Creditors in Control' model of the UK and UNCITRAL, which at times is seen as averse to the interests of entrepreneurs leading to avoidable litigation and delays. In the proposed framework for MSMEs, a variation of the said model is also being tested. One view is that similar (or any other) variation can be introduced even for the larger segment, in the direction of seeking more cooperation from existing business owners while ensuring timely resolution. Would you like to provide any comments?

Dr. Saini: The Hon'ble Minister of Finance and Corporate Affairs, detailing the '*Atma Nirbhar Bharat*, Part V: Government Reforms and Enablers' on 17th May, 2020, inter alia proposed that Special insolvency resolution framework for MSMEs under section 240A of the Code is to be notified soon.

The special framework of MSMEs is proposed to be implemented through a notification under section 240A of the Code. This section allows the Central Government, in the public interest, by notification, to direct that any of the provisions of the Code shall: (i) not apply to MSMEs; or (ii) apply to them, with certain modifications. MSMEs, both corporate and non-corporate, are creditors to other CDs. They can initiate insolvency proceedings against CDs for defaults exceeding Rs.1 crore, other than defaults arising during COVID-19 period. Most of the MSMEs are sole proprietorship or partnership firms which constitute around 95.17% of MSMEs, while corporate MSMEs (private company and public limited companies) constitute around 0.8% of total MSMEs. As per MCA 21 database, there are 5,03,324 companies in micro category, 1,06,672 companies in small category and 13,799 companies in medium category, as per the modified definition of MSME.

Regarding *Debtor-in-control Vs Creditor-in-control,* it is pertinent to note that, before the introduction of IBC, India had a debtor in control frameworks, however for various reasons they could not deliver to the desired level of impact. Further, shifting the onus on the creditor from the debtor also gives the creditors an incentive to take a greater interest in developments relating to, and performance of, the debtor. Also, it is even significant to mention that the proposed framework for MSMEs which may be in debtor-in-possession have the merit due to the various unique features the MSMEs hold such as - almost every MSME debtor is also an operational creditor, MSMEs face issues such as scarcity of working capital, higher interest rates and larger collateral requirements, thus making it difficult to raise finance in situations of financial distress, market for resolution plans for MSMEs is limited and, at best local, while the entire globe is the market for bigger firms, MSMEs may lack sufficient assets to fund a complete CIRP style insolvency procedure, etc.

Considering the various unique features of the MSMEs, particularly in the Indian landscape it is significant to note that the argument of introducing debtor in control model as proposed for MSMEs, even for the larger segment (Non-MSMEs) doesn't hold water.

IIIPI: Insolvency profession being a newer evolving profession in India, called a profession of professionals and is often compared to healthcare profession being able to rescue corporate lives. What words of wisdom and guidance, would you like to offer to IPs for becoming a successful professional and being able to serve effectively and fearlessly?

Dr. Saini: Insolvency proceedings require high-end, sophisticated professional services. The Code casts strenuous responsibilities on an IP to run the affairs of the firm in distress. An IP plays a significant role wherein he ought to protect and preserve the value of CD's property, comply with all applicable laws on its behalf, conduct the entire resolution process with fairness and equity, retrieve value lost through avoidance transactions, etc.

As the Code has granted substantial powers, enshrined in the regulations, from time to time, an IP needs to be mindful of the reasons of vesting such powers in her work process, as there exists an equal responsibility of dealing with the distressed CD. As mentioned under regulation 4 of the IP Regulations, integrity is the essential requirement for being a 'fit and proper' person. An IP's integrity is put to test, wherein she makes sure that assets are not stolen from the company and initiates a careful check of the transactions of the company for the last two years, to look for illegal diversion of assets. A scar or dent on the professional once cast will have a huge impact on the professional and the profession itself. A robust insolvency framework is built on the standards and professionalism exhibited by the IP. While dealing with the resolution of the CD, an IP may experience various unexpected situations, wherein the IP may have to go beyond the call of duty and deliver. She may need to steer through uncertain times. Further, as the objective of the Code is the 'timely resolution' of the CD, an IP needs to adhere and comply with each timeline to prevent further erosion of value of the CD. An IP is expected to communicate fearlessly, whilst being mindful of balancing the interest of all the stakeholders. An IP should have soft skills such as people management, entrepreneurship, emotional quotient, and ethics and integrity beyond doubt.

Integrity and Objectivity of Insolvency Professionals

A profession is as good as its professionals. This responsibility, in respect of the institution of the Insolvency & Bankruptcy Code (Code), squarely lies upon the insolvency professionals (IPs) to ensure the insolvency process is conducted in an ethical, credible, effective and time-bound manner. This article, besides various dimensions of ethical conduct in insolvency profession also discusses several practical issues at micro-level that, if addressed properly while discharging their duties, will help the IPs to avoid unnecessary allegations and maintain high standards of professionalism. Read on to know more....

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Introduction

While the role of IPs require them to deliver on several obligations pertaining to revival of the Corporate Debtor (CD) which includes running it as going concern, preserving its assets, and maximising value for the stakeholders, a specified code of conduct, both in letter and spirit, needs to be adhered to by the IPs and their team while performing their duties under the Code. An ethical conduct is quintessential in providing credibility to the entire edifice and eco-system under the Insolvency and Bankruptcy regime.

In order to ensure the credibility and conduct of the IPs are duly monitored, the Code has set in place a two-tiered mechanism; the first tier being the Insolvency Professional Agencies (IPAs), which oversee the registration and continuous development of IPs, and the second tier being the Insolvency and Bankruptcy Board of India (IBBI) itself, which confirms the appointment of an IP based on review of any pending disciplinary actions and validity of Authorisation for Assignments and consent forms. Further, the First Schedule of the Insolvency & Bankruptcy Board of India (Insolvency Professional) Regulation, 2016 (IP

Regulations) also specifies a detailed Code of Conduct for IPs which needs to be duly followed by them.

The Code of Conduct essentially sets a benchmark of actions that the eco-system at large perceives to be as responsible, righteous and necessary for an individual to perform to strengthen the regime. Amongst others, two of the most important and fundamental principles that guide how an IP should conduct themselves are - integrity (IPs should be straightforward and honest in all professional relationships) and objectivity (IPs should not allow any bias or conflict of interest to cloud their decisions).

1. Integrity

Integrity implies fair dealings and truthfulness and is an attribute that the IP should imbibe in his character and conduct. It requires that at no point, the individual interests of the IP or any of the individual stakeholders involved in the process, be placed above the letter and spirit of the standards and laws governing the profession.

Integrity also calls for an IP to dissociate from any correspondence or information where the IP believes that it:

- contains a materially false or misleading statement; or
- contains statements or information provided recklessly; or
- omits or obscures required information, rendering it as misleading.

An IP should safeguard the reputation of the profession while undertaking any promotional activities, and refrain from exaggerated claims for the services offered, or the qualifications or experience of the IP or disparaging references or unsubstantiated comparisons to the work of others.

Further, an IP should safeguard the reputation of the profession while undertaking any promotional activities, and refrain from exaggerated claims for the services offered, or the qualifications or experience of the IP or disparaging references or unsubstantiated comparisons to the work of others.

Under regulation 4 (g) of the IP Regulations, integrity is one of the pre-requisites to being considered as 'fit and proper' for registration as IP. In one of the matters where an individual was declined registration as an IP on account of certain criminal proceedings pending against him, the Board observed[1] :

"... What is material is that what others feel about the applicant who has been charge sheeted for offences such as criminal conspiracy, cheating ... Does such a person inspire confidence of the stakeholders who can entrust him with property of lakhs of crores for management under corporate insolvency resolution process? Pendency of serious criminal proceedings against the applicant adversely impacts his reputation and makes him not a person fit and proper to become an IP."

2. Objectivity

Objectivity on the other hand is a state of mind which requires the IP to form judgements and take decisions free of any bias, coercion, conflict of interest or undue influence of others, whether directly or indirectly. Objectivity calls for the RP to act in an honest, unbiased and fearless manner bearing in mind the best interests of all concerned stakeholders.

A visible demonstration of objectivity would be in the form of:

- transparency in all dealings, interactions and decisions of the IP
- a collaborative and consultative approach followed in conduct with all stakeholders of the process
- participative decision-making to the extent possible, avoiding clear domineering by any single participant or the IP himself

An IP should ensure there are no conflicts of interest which may impair his objectivity. Such conflicts typically arise from any professional or personal relation that the IP may have or has had in relation to his appointment as resolution professional. Thus, it is important for the IP to take reasonable steps to identify circumstances

1. Order, 26.02.2018 passed by Whole Time Member of IBBI, Available Online (https://ibbi.gov.in//webadmin/pdf/order/2018/Feb/26%20FEB%202018%20In%20the%20matter%20of%20IP%20Registration_2018-02-27%2016:50:39.pdf)

and relationships that might create a conflict of interest, and provide timely disclosures in this regard immediately upon identification thereof, including seeking consents from various stakeholders to continue the appointment where necessary.

Objectivity calls for the RP to act in an honest, unbiased and fearless manner bearing in mind the best interests of all concerned stakeholders.

Accordingly, objectivity not only vests as an attribute innate to the IP, but also as a perception that other stakeholders may have with respect to the dealings of an IP. In it order dated April 17, 2019; the Disciplinary Committee of IBBI opined[2] that:

"When relationship triumphs over merits in professional matters, there is no place for independence, integrity and impartiality. A professional must not only be impartial, but also appear to be impartial... Any conduct, whether explicitly prohibited in the law or not, is unfair if it impinges on independence, integrity and impartiality of an IP or inconsistent with the reputation of the profession."

3. Practical issues faced by IPs

Over the last 4 years, IPs have evolved much in their understanding of and dealings with complexities of the insolvency law and have played a pivotal role to enable creditor-in-control process. While the Code vests considerable powers in the IRPs/RPs towards fulfilment of his/her obligations, there are several situations where they experience significant constraints in conducting their jobs with integrity and objectivity, for example:

3.1 Inadequate cash flows to meeting employee salaries: This may lead to a stand-off between the IRP/RP and the employees. The IRP/RP may resort to false promises or seek coerced support or deal with employees in a manner which is not straightforward. In such circumstances where the co-operation from employees is not forthcoming, the Code enables the IRP/RP to file an application before the Adjudicating Authority (AA) and seek directions to such persons to comply with the instructions of the IRP/RP and co-operate with him. However, time being of essence in these matters, IRPs/RPs are required to act with promptitude. Yet, there have been instances where the IRPs/RPs have either failed to file such application or filed it so late that it lost its purpose and effectiveness. Any delay in filing applications despite continuing non-cooperation may reflect undue influence of promoters or certain employees on the IRP/RP and endanger the life of the CD.

3.2 Discreet top management and/or suspended board of directors: The IRP/IP may act with a bias suspecting that they may render hurdles in smooth conduct of the CIRP / operations of the Corporate Debtoror continue to operate under the influence of the promoters.

3.3 Appointment of professionals at the instance of a stakeholder: The Code empowers the IRP/RP to appoint accountants, legal and other professionals as may be necessary to preserve and protect the value of the CD. However, IRP/RP should be satisfied that there is need for such services, that they are not available within the CD, that they are being rendered by persons suitable and reasonable for the purpose and should refrain from a conflicting situation of appointing his relatives or related parties. However, there are cases where IPs have appointed persons who are not professionals or are have been appointed at the instance of a stakeholder, thus compromising his integrity, objectivity and independence.

3.4 Legacy issues and lapses in regulatory compliance: These issues often arise where IRP/RP acts under threat of adverse actions or undue influence of certain stakeholders. The code mandates the RP to comply with the requirements under any law for the time being in force on behalf of the CD. Any non-compliance has a cost and penal consequences for the CD and its stakeholders. These obligations are even more stringent in listed entities undergoing CIRP. A failure to comply with such laws / regulations may not only reflect incompetence of the IRP/RP, but also burdens the CD with liabilities and impacts the interest of stakeholders.

3.5 Significant reliance of certain critical vendors: The IRP/RP may act with a bias to ensure continuity of operations for the CD.

2. Order dated 26.02.2018 passed by Whole Time Member of IBBI

While the Code provides for the creditors to submit their claims as on insolvency commencement date (ICD), the IRP/RP cannot clear the dues of any creditor during the CIRP, as this amount to giving preferential treatment to one creditor over others. A payment towards pre-CIRP dues of certain creditors not only impacts the interest of other creditors but also compromises the independence and integrity of the IRP/RP.

3.6 Inclusion of costs in Insolvency Resolution Process Costs (IRPC): Here the IRP/RP may act under undue influence of certain stakeholders to include certain costs. CIRP regulations clearly specify the costs that are necessary and may be considered as IRPC. There are instances where IRP/RP have burdened the IRPC with costs such as travel costs incurred by a member of COC to attend meetings of COC, legal and professional costs incurred by the COC on certain matters, pre-CIRP costs incurred by the CD, or penalties levied on the IRP/RP or the CD for any non-compliance of laws during CIRP. This may reflect undue influence of beneficiaries on the IRP/RPP, in addition to causing diminution of value of the CD.

3.7 Sale of assets, directly or indirectly, to any relatives or significant relationships: This leads to an actual or perceived conflict of interest and thus a threat to objectivity. To ensure transparency and enable stakeholders to take informed decisions, the Code requires the IRP/RP to make relationship and cost disclosures in a timely manner. Failure to disclose these details creates a suspicion in the mind of stakeholders about impartiality and objectivity of the IRP/RP and possibly, conflict of interests, he may have.

3.8 Recently, some of these issues have also been flagged by the IBBI in its facilitation letter dated November 13, 2020 (Facilitation / 005 / 2020) wherein the IBBI has summarised a list of mistakes being committed by some of the IRPs/RPs in conduct of CIRP. While the IBBI recognises that the most of these are probably unintentional and can be avoided with a little more care and diligence, these mistakes are costs to the CD and the economy, and often amount to contravention of provisions of the law.

3.9 An IRP/RP should always consider the expectation of others in performing his role while assessing any possible lapses in his integrity or objectivity in an insolvency appointment. S/he should consider if a reasonable and informed third party could weigh all the specific facts and circumstances of the IRP/RP and consider it as a threat to his integrity and objectivity. Accordingly, the IRP/RP should document:

a) the facts,

b) any communications with, and parties with whom the matters were discussed,

c) the courses of action considered, the judgements made and the decisions that were taken,

d) the safeguards applied to address the threats when applicable,

e) how the matter was addressed, and

f) where relevant, why it was appropriate to accept or continue the insolvency appointment.

IBBI in its facilitation letter dated November 13, 2020 (Facilitation / 005 / 2020) has summarised a list of mistakes being committed by some of the IPs in conduct of CIRP. The regulator, however, recognises that the most of these are probably unintentional and can be avoided with a little more care and diligence.

3.10 It may be noted that consultation with various stakeholders does not relieve the IRP/RP from his responsibility to exercise professional judgment to resolve the threat or, if necessary, and unless prohibited by law or regulation, disassociate from the matter creating the threat.

4. Disciplinary Mechanism of IBBI

While the Code of Conduct lays down the key actionable guidelines to administer integrity and objectivity, the IBBI has constituted a Disciplinary Committee to consider and evaluate any contravention of the Code by IPs, IRPs, RPs, IPAs and Information Utilities (IUs). No authority except the disciplinary committee appointed by IBBI/IPA is authorised to initiate, hear and dispose of disciplinary proceedings against professionals. These committees are constituted under various provisions of the

Code and have the power to impose penalties or suspend or cancel the registration of the IPs / IPAs / IUs, as the case may be. The Disciplinary Committee acts upon findings of an investigation or inspection conducted by the Investigating Authority. IP is duty bound to provide appropriate documentation / information and timely responses to the Show Causes Notices issued by the Disciplinary Committee with respect to any matter being investigated / inspected.

Recently, several judgements have been issued by the Disciplinary Committee towards conduct of the IPs. Some of those pertinent to illustrate a non-compliance of these fundamental principles of integrity and objectivity are summarised below.

Case 1: Non-performance of obligations under the Code[3]

Contravention

a) IP did not conduct the CIRP as required under the Code.
   i. Public announcement were not made
   ii. CoC meetings convened with inadequate notice
   iii. Resolution plan invited from the sole member of the CoC
   iv. No information memorandum provided to the sole resolution applicant
   v. The sole resolution applicant was sought to submit a resolution plan in four days

b) Operations of the Corporate Debtor were not run as going concern, neither did the IP take over the management of the CD nor did he seek directions from AA in case of any non-operation from the CD.

c) IP resigned as RP from two CIRPs without prior permission of the AA

Submission by IP

a) The IP submitted that he did not have funds to make public announcement, there was lack of co-operation from the CD and that he was not well.

b) Further, while in his letter of resignation to the CoC it was mentioned that he resigned on personal reason, in his response to the AA he mentioned that he resigned because he did not get fee and the Corporate Debtor did not co-operate.

Findings

a) Excuses towards non-cooperation from CD are not acceptable as there was no evidence that the IP wanted to or tried to take over the management of the CD. Nor was this brought to the notice of the AA for any appropriate directions.

b) While prolonged sickness could be an excuse, it is not justified to indefinitely delay the CIRP until the IP recovers. Further the sickness could be communicated on time to the AA, which may have appointed other IRP.

c) The IPs excuse for resignation also had no merit. He had been appointed by the AA with a solemn objective and a statutory responsibility. He cannot run away just because he did not receive fee.

d) Accordingly, the IP has violated provisions of sections 18, 20, 23, 25(2)(g), 25(2)(h), 29, 208(2)(a), and 208(2)(e) of the Code and regulation 7(2)(a) and 7(2)(h) of the IP Regulations and had failed to maintain integrity and did not act with objectivity.

Case 2: Third Valuer appointed at the desire of the COC[4]

Contravention

RP appointed third valuer, at the desire of the COC, to determine fair value and liquidation value of the Corporate Debtor.

Submission by IP

a) Third valuation was done for the satisfaction of the stakeholders only.

b) Decision of the CoC in this regard was pursuant to its commercial wisdom to better equip the CoC to take a final call on resolution plans.

c) Conduct of a third valuation at the desire of CoC does not invalidate the decisions or actions taken by the RP and has not, in any way, affected the acceptance or rejection of

3. IBBI Disciplinary Committee Case No. IBBI/DC/14/2018; Order, January 28, 2019

4. IBBI Disciplinary Committee Case No. IBBI/DC/22/2020; Order, April 21, 2020

resolution plan.

Findings

a) As per regulation 35(1) of the CIRP regulations, the third valuer is to be appointed only if in the opinion of the RP the estimates submitted by the two valuers appointed earlier are significantly different

b) Thus, the act of RP in appointing third valuer at the instance of the CoC shows that he abdicated his authority in favour of the CoC. Further, the fee incurred on the third valuer is an added financial burden on an already ailing CD which is entangled in a web of debts.

c) Accordingly, the RP has violated Section 208(2)(a) and (e) of the Code and Regulation 7(2)(a) and 7(2)(h) of the IP Regulations and failed to act with objectivity by taking decisions under the influence of CoC.

IPs should note that their reputation once dented, not only impairs their own ability to render professional services, but also impacts the credibility of the insolvency and bankruptcy eco-system at large.

Case 3: Fee for Services as IRP / RP and Appointment as RP[5]

Contravention

a) IP sought appointment as IRP in Nov2017 basis a revised term sheet entered into with the CIRP applicant, which was for a fee at only 8% of the fee quoted in the initial term sheet.

b) The term sheet affixed his fee for both as IRP and RP of the Corporate Debtor

c) Upon securing appointment as IRP, approval was sought from COC for a fee which was much higher compared to revised term sheet filed with the AA towards appointment as IRP i.e. 500% higher for IRP phase (from Rs. 1 lakh to Rs. 6 lakhs) and 300% higher for RP phase (from Rs. 1 lakh per month to Rs. 4 lakh per month)

Submission by IP

a) Initial term sheet was entered into basis old financials of the Corporate Debtor i.e. for 2014-15

b) Subsequently, the revised term sheet was agreed upon basis recent financials i.e. for 2016-17

c) The charging of Fee is the discretion of the Professional considering the volume of work.

d) That the IP did not conceal anything in this regard. He placed the two term sheets, which provides for fee for both as IRP and RP, before the AA prior to appointment.

e) After taking over as IRP, it was found that the Corporate Debtor had some more creditors and hence approval of CoC was sought for a higher fee.

Findings

a) The IP attempted to charge abnormally high fee in relation to the services and acted malafide by seeking increase of his fee after approval of fee by the AA

b) That the IP displayed professional incompetence by using stale information for decision making

c) That the revision in fee / term sheet was at the instance of the AA, when vide its order dated 3rd Nov 2017 it expressed its concerns and sought the IP to file his income tax returns for past 3 yrs (vs. order for appointment of IRP being dated 17th Nov 2017 post filing of revised term sheet and tax returns)

d) While transparency is welcome, it cannot be used to override the explicit statutory provisions and cannot justify an illegal conduct.

e) As an IP, he knew well that a CIRP applicant is not legally competent to affix fee of an IP as RP in the matter or appoint him as RP. This is an attempt to lock in his appointment as RP before the competent authority, that is CoC, is born and thus denude the competent authority of its rights to choose an IP of its choice as RP and fix his fees. An agreement with the CIRP applicant establishes his collusion, indicating compromise of professional independence.

f) Therefore, the IP contravened the provisions of sections 22, 208(2)(a) and (e) of the Code,

5. IBBI Disciplinary Committee Case No. IBBI/DC/16/2019; Order, April 17, 2019

regulations 33 and 34 of the CIRP and regulations 7 (2) (a) and (h) of the Insolvency Professional Regulations, 2016 and had not maintained integrity, objectivity and independence in his conduct.

5. Professional Protection to IPs

In view of the above, it is essential that IPs conduct with the highest standards of professionalism and observe high levels of performance whilst remaining in compliance of the Code and any regulations made thereunder, including those specified in the bye-laws of the IPAs of which he is a professional member, and take reasonable care and diligence while performing the duties. Section 233 of the Code (Protection of action taken in good faith) provides relief in that no suit, prosecution or other legal proceedings shall lie against the IRP/RP or the liquidator for anything which is done or intended to be done in good faith under this Code or the rules or regulations made there under.

Meanwhile, the regulators may support a more conducive environment for performance of duties by the IP, in that, a more pragmatic view be adopted by the AA / Disciplinary Committee / IBBI on the conduct of the IP so long as the actions of the IP are bona fide and in good faith and based on rational professional judgement considering all necessary and available facts of the situation and interest of all stakeholders. Penal actions, while necessary, may be administered after due moderation and warnings to the IP.

Conclusion

To concludes, the conduct of an IP must go hand-in-hand with integrity and objectivity. IPs should note that their reputation once dented, not only impairs their own ability to render professional services, but also impacts the credibility of the Insolvency and Bankruptcy eco-system at large. Further, the IPs actions have a direct bearing on the various aspects of the CIRP process and the value that vest therein for each stakeholder. Thus, their accountability towards their own professional judgement and conduct in an ethical manner is non-negotiable. An IPs conduct should be of highest professional standards, whether or not they are being observed in this regard. Further, it is the IPs responsibility to not only remain independent, impartial and free of conflict, but also demonstrate being so in the opinion of the various stakeholders. These aspects are quintessential to building credibility for the IP, thus allowing him to strengthen the predictability of the process and driving the value maximisation for the Corporate Debtor and its stakeholders.

Initiation of CIRP against the Guarantor(s) under Judicial Scanner

When a default is committed, the principal borrower and the surety are jointly and severally liable to the creditor, and the creditor has the right to recover its dues from either of them or from both simultaneously.
Under the IBC, some judicial pronouncements permit a creditor to initiate CIRP against both the principal borrower and its surety. The creditor is at liberty to proceed against either the debtor alone, or the surety alone, or jointly against both the debtor and the surety. Read on to know more...

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1. Contract of Guarantee under Contract Act

In terms of Section 127 of the Indian Contract Act, 1872, a "Contract of Guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety"; the person in respect of whose default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor".

Section 128 further states that the liability of the surety is co- extensive with that of the principal debtor unless it is otherwise provided by the contract.

When a default is committed, the principal borrower and the surety are jointly and severally liable to the creditor, and the creditor has the right to recover its dues from either of them or from both simultaneously[1].

1. Pollock and Mulla, *Indian Contract and Specific Relief Acts* vol. II (12th edn., LexisNexis Butterworks 2006) p. 1814-1816

2. Guarantee under the Code

2.1. Personal Guarantor

In terms of Section 5(22) of Insolvency and Bankruptcy Code, 2016 (the Code), "Personal Guarantor" (PG) means an individual who is the surety in a contract of guarantee to a corporate debtor.

2.2. Corporate Guarantee

Where a corporate person gives a guarantee for another corporate person, it is called a corporate guarantee. Section 5(5A) of the Code defines "Corporate Guarantor", which means a corporate person who is the surety in a contract of guarantee to a corporate debtor.

The companies under the same management or group also provide corporate guarantees for their group companies to avail the line of credit from the banks/ financial institutions.

While extending the credit facility to any company, the banks/financial institutions insist from that company (the prospective borrower) to provide adequate security to safeguard the loan amount. Such securities may be the hypothecation/ pledge of assets, mortgage of the land and building etc. The companies under the same management or group also provide corporate guarantees for their group companies to avail the line of credit from the banks/ financial institutions.

3. Default by the Corporate Debtor – A condition precedent for initiation of CRIP

Section 3 (12) of the Code defines the meaning of "Default", 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 paid by the debtor or the corporate debtor, as the case may be.

4. Initiation of Corporate Insolvency Resolution Process (CIRP) by Financial Creditor (FC)

Section 7 of the Code deals with the initiation of the CIRP by the financial creditor. Sub-section (1) of Section 7 provides that a financial creditor either by itself or jointly with other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Governmentmay file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.

5. Whether concurrent CIRP proceedings can be maintained in respect of a Corporate Debtor (CD) and a Guarantor.

Section 60(2) of the Code provides that where a CIRP or liquidation proceeding of a CD is pending before a NCLT, an application relating to the insolvency resolution or liquidation or bankruptcy of a corporate guarantor or personal guarantor of such corporate debtor shall be filed before the NCLT.

From this it is very much clear that CIRP proceeding can be initiated concurrently with the CD and the Guarantor.

6. Some Judicial Pronouncements

6.1. Proceedings pending before the DRT is stayed till the finalisation of CIRP or till the NCLT approves the resolution plan:

In *Sanjeev Shriya Vs. State Bank of India & Others*, Writ Petition No. 30285 & 30033 of 2017, September 6, 2017, the Allahabad HC opined that sufficient safeguards are provided in the IBC, 2016 & the regulations framed thereunder to the bank, and even the liability has not been crystallized either against the principal debtor or guarantors/mortgagors at present, then the proceeding, which is pending before the Debt Recovery Tribunal, Allahabad cannot go on and the same is stayed till the finalisation of CIRP or till the NCLT approves the resolution plan under sub section (1) of Section 31 or passes an order for liquidation of corporate debtor under Section 33, as the case may be. [Para 31]

6.2. Section 14 applies only against the corporate debtor in insolvency and not a third party such as a guarantor - Bombay HC:

The Bombay HC took a divergent view in *M/s. Sicom Investments and Finance Ltd. Vs. Rajesh Kumar Droliaand Another,* (Summons for Judgment No. 221 of 2010 in Commercial Suit

No. 44 of 2010)and opined as under:

> **Para 61:** On reading this decision, I find that the Allahabad High Court does not give any reason why the proceedings against the guarantor are per se bad when the moratorium under Section 14 has already been issued and even in the said proceeding the parties have appeared before the insolvency professional. There is absolutely no discussion on this point at all by the Allahabad High Court. As mentioned earlier, under Section 14, an order of moratorium is passed in favour of a corporate debtor and not in favour of a guarantor. The Allahabad High Court has also come to the aforesaid conclusion because according to it once the liability is still in a fluid situation and the same has not been crystallized, then in such situation two parallel/split proceedings in different jurisdictions should be avoided, if possible. Firstly, I fail to understand as to how two proceedings are either parallel/ split proceedings. The proceedings under the IBC, 2016 are not recovery proceedings but proceedings for either insolvency resolution or liquidation and/or bankruptcy as the case may be. On the other hand, the suit filed in this Court against the present Defendants (as guarantors), is a proceeding for recovery of money. The two proceedings operate in totally different fields. Hence, to my mind at least, the same cannot be equated as parallel/split proceedings as held by the Allahabad High Court. This is more so when one takes into consideration that the proceedings before the NCLT and initiated under the provisions of the IBC, 2016 are in relation to the corporate debtor whereas the present suit is for recovery of money against the guarantor. It is now well settled that one can initiate proceedings against the guarantor without initiating action against the principal borrower. If one requires any authority on this subject, it would be apposite to reproduce paragraphs 37 to 40 of the decision of the Supreme Court in the case of United Bank of India v/s Satyawati Tondon and Others reported in (2010) 8 SCC 110.
>
> "37. The question whether the appellant could have issued notices to Respondent 1 under Sections 13(2) and (4) and filed an application under Section 14 of the

Important Definitions and Judgements related to Guarantor (s)

- Co-extensive-Surety's liability is co-extensive with that of the principal debtor.
- A surety's liability to pay the debt is not removed by reason of the creditor's omission to sue the principal debtor. The creditor is not bound to exhaust his remedy against the principal before suing the surety, and a suit may be maintained against the surety though the principal has not been sued."
- "Prima facie the surety may be proceeded against without demand against him, and without first proceeding against the principal debtor."- Chitty on Contracts, 24th Edition Volume 2, Para 4831, p. 1031.
- "It is not necessary for the creditor, before proceeding against the surety, to request the principal debtor to pay, or to sue him, although solvent, unless this is expressly stipulated for." - Halsbury's Laws of England, 4th Edition,Para. 159, p. 87.
- In the case of Bank of Bihar Ltd. v. Damodar Prasad & Anr[2], the Apex Court referred to a judgment in the case of *Lachhman Joharimal v. Bapu Khandu & Tukaram Khandoji* [3], in which the Division Bench of the Bombay High Court held-"The court is of opinion that a creditor is not bound to exhaust his remedy against the principal debtor before suing the surety and that when a decree is obtained against a surety, it may be enforced in the same manner as a decree for any other debt."
- The Hon'ble Supreme Court of India has taken a similar view, in the case of *Industrial Investment Bank of India Ltd. v. Biswanath Jhunjhunwala* [4]. It observed: "The very object of the guarantee is defeated if the creditor is asked to postpone his remedies against the surety. In the present case the creditor is a banking company. A guarantee is a collateral security usually taken by a banker. The security will become useless if his rights against the surety can be so easily cut down."

SARFAESI Act without first initiating action against the borrower i.e., Respondent 2 for recovery of the outstanding dues is no longer res integra. In Bank of Bihar Ltd. v. Dr. Damodar Prasad [AIR 1969 SC 297: (1969) 1 SCR 620] this Court considered and answered in affirmative the question whether the Bank is entitled to recover its dues from the surety and observed: (AIR p. 299, para 6) "6. … It is the duty of the surety to pay the decretal amount. On such payment he will be subrogated to the rights of the creditor under Section 140 of the Contract Act and he may then recover the amount from the principal. The very object of the guarantee is defeated if the creditor is asked to postpone his remedies against the surety. In the present case the creditor is a banking company. A guarantee is a collateral security usually taken by a banker. The security will become useless if his rights against the surety can be so easily cut down."

38. In *SBI v. Indexport Registered* [(1992) 3 SCC 159] this Court held that the decree-holder Bank can execute the decree against the guarantor without proceeding against the principal borrower and then proceeded to observe: (SCC p. 164, para 10) "10. … The execution of the money decree is not made dependent on first applying for execution of the mortgage decree. The choice is left entirely with the decree-holder. The question arises whether a decree which is framed as a composite decree, as a matter of law, must be executed against the mortgage property first or can a money decree, which covers whole or part of decretal amount covering mortgage decree can be executed earlier. There is nothing in law which provides such a composite decree to be first executed only against the [principal debtor]."

39. In *Industrial Investment Bank of India Ltd. v. Biswanath Jhunjhunwala* [(2009) 9 SCC 478] this Court again held that the liability of the guarantor and principal debtor is coextensive and not in alternative and the creditor/decreeholder has the right to proceed against either for recovery of dues or realisation of the decretal amount.

40. In view of the law laid down in the aforementioned cases, it must be held that the High Court completely misdirected itself in assuming that the appellant could not have initiated action against Respondent 1 without making efforts for recovery of its dues from the borrower, Respondent 2." [Para 61]

6.3. Simultaneous application under section 7 to initiate CIRD against Principal Debtor as well Corporate Guarantor(s) or both the Guarantors:

In the case of *Dr. Vishnu Kumar Agarwal V/s. Piramal Enterprise Ltd.* CA (AT) (Insolvency) No. 346 of 2018, January 8, 2019, the NCLAT opined that there is no bar in the 'I&B Code' for filing simultaneously two applications under Section 7 against the 'Principal Borrower' as well as the 'Corporate Guarantor(s)' or against both the 'Guarantors'. However, once for same set of claim application under Section 7 filed by the 'Financial Creditor' is admitted against one of the 'Corporate Debtor' ('Principal Borrower' or 'Corporate Guarantor(s)'), second application by the same 'Financial Creditor' for same set of claim and default cannot be admitted against the other 'Corporate Debtor' (the 'Corporate Guarantor(s)' or the 'Principal Borrower'). Further, though there is a provision to file joint application under Section 7 by the 'Financial Creditors', no application can be filed by the 'Financial Creditor' against two or more 'Corporate Debtors' on the ground of joint liability ('Principal Borrower' and one 'Corporate Guarantor', or 'Principal Borrower' or two 'Corporate Guarantors' or one 'Corporate Guarantor' and other 'Corporate Guarantor'), till it is shown that the 'Corporate Debtors' combinedly are joint venture company.[Para 32]

Under the Contract of Guarantee, it is only when the Creditor would receive amount, the question of no more due or adjustment would arise. It would be a matter of adjustment when the Creditor receives debt due from the Borrower/Guarantor in the respective CIRP that the same should be taken note of and adjusted in the other CIRP.

The Appellate Tribunal further stated that while we uphold the initiation of the CIRP initiated under Section 7 of the Code against Corporate Guarantor No.2 by impugned order dated 24th May 2018, we hold that the impugned order

dated 31st May 2018 initiating CIRP under Section 7 against the Corporate Guarantor No.1, for same very claim/debt is not permissible and the application under Section 7 was not maintainable. [Para 33]

An omission or failure to pay the debt by guarantor, when principal sum is claimed, comes within the scope of default under section 3(12). Therefore, CIRP can be initiated by an FC who had taken guarantee from the corporate guarantor, who extended guarantee on behalf of a proprietorship firm.

6.3.1. In the case of *State Bank of India v/s Athena Energy Ventures Pvt Ltd*, Company Appeal (AT) (Ins) No. 633 of 2020 dated 24th November 2020, the NCLAT opined as under, in the following paras:

Under the Contract of Guarantee, it is only when the Creditor would receive amount, the question of no more due or adjustment would arise. It would be a matter of adjustment when the Creditor receives debt due from the Borrower/ Guarantor in the respective CIRP that the same should be taken note of and adjusted in the other CIRP. This can be conveniently done, more so when IRP/RP in the CIRP is same. Insolvency and Bankruptcy Board of India may have to lay down regulations to guide IRP/RPs in this regard. [Para 16]

6.3.2. ILC Report of February 2020

The Insolvency Law Committee (ILC)in its Report of February 2020 stated that while, under a contract of guarantee, a creditor is not entitled to recover more than what is due to it, an action against the surety cannot be prevented solely on the ground that the creditor has an alternative relief against the principal borrower. Further, as discussed above, the creditor is at liberty to proceed against either the debtor alone, or the surety alone, or jointly against both the debtor and the surety. Therefore, restricting a creditor from initiating CIRP against both the principal borrower and the surety would prejudice the right of the creditor provided under the contract of guarantee to proceed simultaneously against both of them. [Para 7.3 of ILC-Feb 2020]

Further, Section 60(2) of the Code provides that when a CIRP or liquidation process against a corporate debtor is pending before an Adjudicating Authority, any insolvency resolution, liquidation or bankruptcy proceeding against any guarantor of that corporate debtor should also be initiated before the same Adjudicating Authority. Similarly, Section 60(3) requires transfer of any such proceeding which may be pending before any court or tribunal to the Adjudicating Authority dealing with the CIRP or liquidation process of the corporate debtor. Therefore, as the Code does require proceedings against a corporate debtor and its guarantors to be simultaneously heard by the same Adjudicating Authority, the Committee was of the view that the Code in fact, envisages initiation of concurrent proceedings against both a corporate debtor and its sureties. Given this, the Committee recommended that a creditor should not be prevented from proceeding against both the corporate debtor and its sureties under the Code. [Para 7.4 of ILC-Feb 2020]

However, the Committee noted that the Appellate Authority has, in certain cases, taken a view contrary to its decision taken in the Piramal Enterprises Ltd.31 case. For example, in Edelweiss Asset Reconstruction Company Limited v Sachet Infrastructure Pvt. Ltd. & Ors., the Appellate Authority has permitted simultaneous initiation of CIRP against the principal borrower and its corporate guarantors. Further, the Appellate Authority has also admitted a petition to review its aforesaid judgement in the Piramal Enterprises Ltd. case. Given this, the Committee decided that no legal changes may be required at the moment, and this issue may be left to judicial determination. [Para 7.5. of ILC-Feb 2020]

6.4. Where an application filed by the FC is admitted against either the principal borrower or the corporate guarantor, a second application filed by the same FC for the same set of claims cannot be admitted against the other:

In case of *Bijay Kumar Agarwal, Ex-Director of M/s Genegrow Commercial Pvt. Ltd. Vs. State Bank of India & Anr*, CA(AT)(Ins) No. 993/2019, January 23, 2020, the NCLAT opined that a contract of Guarantee is a contract to perform

the promise or discharge the liability of 3rd party, in case of his default. In this connection, it is to be pointed out that it may not be necessary to start 'Corporate Insolvency Resolution Process' against the 'Principal Borrower' before initiating against the 'Corporate Debtor'. Even without resorting to 'Corporate Insolvency Resolution Process' against the 'Principal Borrower' it is always open to the 'Financial Creditor' to commence 'Corporate Insolvency Resolution Process' u/s 7 of the 'I&B' Code against the 'Corporate Debtor' / Guarantor. [Para 21]

There is no two opinion of a prime fact that there is no fetter in 'I&B' for projecting simultaneously two applications u/s 7 of IBC against (i) the Principal Borrower as well as (ii) the Corporate Guarantor(s) or against both the Guarantors but if, for the same set of claim, when an Application filed by the 'Financial Creditor' is admitted against one of the 'Corporate Debtor'/'Principal Borrower' or Corporate Guarantor, the second application filed by the same 'Financial Creditor' for the same set of claim and default is not to be admitted against the other 'Corporate Debtor' (The Corporate Guarantor(s) or the Principal Borrower. [Para 22]

6.5. Whether the liability of a corporate guarantor/ surety is co-extensive with that of the principal borrower and can Corporate Insolvency Resolution Process be initiated against such Corporate Guarantor/Corporate Debtor.

As per the settled principle of law of guarantee, liability of a guarantor arises only when the 'principal borrower' defaults in repayment of the demand made by the Lender.[Para 12]

This question came in consideration before the NCLAT in the case of *Export Import Bank of India (Appellant/Financial Creditor) V/s. CHL Limited (Respondent/Corporate Debtor)*, Company Appeal (AT) (Insolvency) No. 51 of 2018, January 16, 2019. The NCLAT opined that the 'Corporate Guarantees' given by the Respondent can be invoked only "In the event of a default on the part of the borrower". The said 'Corporate Guarantee' cannot be invoked as on date, since there is no fresh demand made by the Appellant to the 'principal borrower' for the recalculated interest and consequently there is no debt that is due and/or payable hence there is no default by the 'principal borrower' with respect to interest. [Para 23]

The Appellate Authority further stated that the process under the 'I&B Code', once set-in motion, is irreversible and leads to exceptional and serious consequences. If the appeal is allowed that would mean suspension of the Board of Directors of the 'Corporate Guarantor', appointment of 'Interim Resolution Professional', so on and so forth. A running business which has made no default, would be put under resolution process. On the other hand, if the 'principal borrower' pays the amount, if any, found payable upon reconciliation of accounts, it would confirm that there never existed any debt which is due and payable or defaulted by the 'Corporate Guarantor'. The actions that would follow on allowing of this appeal cannot be reversed and the 'Corporate Guarantor' cannot be compensated in any manner. [Para 24]

6.6. Whether initiation of CIRP against the Corporate Debtor is a condition precedent to the CIRP against the Corporate Guarantor

In the case of *Ferro Alloys Corporation Ltd. (Appellant) v/s Rural Electrification Corporation Ltd. (Respondent)*, Company Appeal (AT) (Insolvency) No. 92 of 2017, January 08, 2019, the NCLAT opined that the I&B Code does not exclusively delineates and/or prescribes any inter-se rights, obligation, and liabilities of a guarantor qua 'financial creditor'. Thus, in absence of any express provision providing for inter-se rights, obligation and liabilities of guarantor qua 'financial creditor' under the Code, the same will have to be noticed from the provisions of the Indian Contract Act, which exclusively and elaborately deals with the same. [Para 35]

In *"Bank of Bihar v. Damodar Prasad and Anr.*– (1969) 1 SCR 620" the Hon'ble Supreme Court referred to a judgment of Hon'ble Bombay High Court in *"Lachhman Joharimal v. Bapu Khandu and Tukaram Khandoji*– (1869) 6 Bom HCR 241", in which the Division Bench of the Hon'ble Bombay High Court held as under: "The court is of opinion that a creditor is not bound

to exhaust his remedy against the principal debtor before suing the surety and that when a decree is obtained against a surety, it may be enforced in the same manner as a decree for any other debt."[Para 36]

It is not necessary to initiate 'Corporate Insolvency Resolution Process' against the 'Principal Borrower' before initiating 'Corporate Insolvency Resolution Process' against the 'Corporate Guarantors'. Without initiating any 'Corporate Insolvency Resolution Process' against the 'Principal Borrower', it is always open to the 'Financial Creditor' to initiate 'Corporate Insolvency Resolution Process' under Section 7 against the 'Corporate Guarantors', as the creditor is also the 'Financial Creditor' qua 'Corporate Guarantor'. [Para 39]

6.7. Moratorium period is not applicable on surety:

In the matter of *Sandip Kumar Bajaj & Anr. Vs. State Bank of India & Anr.* I.A. No. G.A. 1/2020 in W.P.O. 236/2020, September 15, 2020, the petitioners challenged the show cause notice issued by State Bank of India calling upon the petitioners to show cause as to why their names should not be included in the list of willful defaulters as per RBI Guidelines. They are the erstwhile promoters/directors/ guarantors of a CD, which is undergoing CIRP since March 17, 2020. They contended that by reason of moratorium in respect of the CD, the proceedings under the RBI Guidelines should be stayed. The HC of Calcutta held that section 14(3)(b), that the prohibits institution or continuation of suits and other proceedings against the CD, does not extend to a surety.

6.8. During the pendency of a CIRP of Corporate Debtor, an Application against the Personal Guarantor shall have to be filed:

In the case of *State Bank of India Vs. Anil Dhirajlal Ambani*, IA No. 1009 of 2020 in CP (IB) 916 (MB) of 2020, August 20, 2020, the NCLT, Mumbai opined that a plain reading of the provision would indicate that while an Application for corporate insolvency resolution process or liquidation proceedings of corporate debtors are pending before this Authority i.e. to say during the pendency of a process

In case of the contract of guarantee, the very purpose is to make effective recovery of dues from the debtor or surety or both, but the right to simultaneous remedy under a contract of guarantee does not entitle a creditor to recover more than what is due to her.

of corporate insolvency resolution of the Corporate Debtors, an Application against the Personal Guarantor shall have to be filed. This itself indicates that the process of corporate insolvency resolution of the Corporate Debtors in an Application relating to insolvency resolution etc. of a personal guarantor needs to be filed and can be prosecuted. The law doesnot envisage that the insolvency resolution of the personal guarantor should follow only when the process of corporate insolvency resolution of the corporate debtor has come to an end. [Para 14].

6.9. Notification dated November 15, 2019, of the Ministry of Corporate Affairs, Government of India:

By a notification dated November 15, 2019, the Ministry of Corporate Affairs, Government of India in exercise of its power conferred under Section 1(3) of the Insolvency and Bankruptcy Code, 2016 brought into force the following provisions of the Insolvency and Bankruptcy Code, 2016 insofar as they related to 'personal guarantors to corporate debtors' with effect from December 01, 2019: -

i. Clause (e) of Section 2;

ii. Section 78 (except with regard to fresh start process) and Sections 79;

iii. Sections 94 to 187 (both inclusive);

iv. Clause (g) to Clause (i) of sub-section (2) of Section 239

v. Clause (m) to Clause (zc) of sub-section (2) of Section 239;

vi. Clause (zn) to Clause (zs) of sub-section (2) of Section 240; and

vii. Section 249.

Writ Petitions were filed in the High Court of Delhi and other High Courts challenging the Notification dated November 15, 2019 and the Insolvency and Bankruptcy (Application to

Adjudicating Authority for Insolvency Resolution Process of Personal Guarantors to Corporate Debtors) Rules, 2019. The Writ Petitioners also sought a declaration that Section 95, 96, 99, 100, 101 of the Insolvency and Bankruptcy Code, 2016 are unconstitutional in so far as they apply to personal guarantors of corporate debtors.

The Insolvency and Bankruptcy Board of India (IBBI) filed before the Supreme Court for transfer of all such petitions vide Transfer Petition (Civil)No. (s) 1034 of 2020. The Supreme Court vide its order dated October 29, 2020 directed the transfer of the Writ Petitions giving rise to the above Transfer Petitions which are pending before the High Courts to this Court. The Registries of the High Courts were directed to transmit the records of the Writ Petitions forthwith.

6.10. Whether SARFAESI and DRT proceeding will extend the period of limitation

In the case of *Bimalkumar Manubhai Savalia Vs. Bank of India and Anr.* CA(AT)(Ins) No. 1166/2019, March 5, 2020, the NCLTA opined that CIRP initiated on an application of an FC was challenged by the appellant for being time barred. It was contended that under an OTS, payments were made by the guarantors, which had the effect of extending the period of limitation. The FC had also initiated proceedings under SARFAESI, before initiating CIRP and claimed that the same would increase the period of limitation. While allowing the appeal, the NCLAT held that SARFAESI and DRT proceeding will not extend the period of limitation since those proceedings are independent and that the Code has overriding effect under section 238. Further, since the OTS was not accepted by the FC, it cannot be treated as an acknowledgement under section 18 of the Limitation Act, 1963.

6.11. Whether CIRP can be initiated against Corporate Guarantor, where the principal debtor is a sole proprietorship firm:

In the case of *Laxmi Pat Surana Vs. Union of India and Anr.* CA(AT)(Ins) No. 77/2020, March19, 2020, the NCLAT opinedthat It was submitted that an insolvency proceeding can be initiated against a guarantor, where both the principal debtor and guarantor are corporate entities. In this matter, since an insolvency proceeding cannot be initiated against the debtor, which is a sole proprietorship firm, insolvency proceeding cannot be initiated against the guarantor company. The NCLAT observed that financial debt includes a debt owed to a creditor by a principal and guarantor. An omission or failure to pay the debt by guarantor, when principal sum is claimed, comes within the scope of default under section 3(12). Therefore, CIRP can be initiated by an FC who had taken guarantee from the corporate guarantor, who extended guarantee on behalf of a proprietorship firm.

Summing up

As per the settled principle of law of guarantee, the liability of a guarantor arises only when the 'principal borrower' defaults in repayment of the demand made by the Lender. Further when a default is committed, the principal borrower and the surety are jointly and severally liable to the creditor, and the creditor has the right to recover its dues from either of them or from both simultaneously.

One of the objects behind the enactment of the Insolvency and Bankruptcy Code was to amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders. Thus, the very purpose of enactment of the Code was not the recovery of the dues of the creditor, but for maximisation of the value of assets of the corporate debtor, while in case of the contract of guarantee, the very purpose is to make effective recovery of dues from the debtor or surety or both, but the right to simultaneous remedy under a contract of guarantee does not entitle a creditor to recover more than what is due to her. The ILC has also in its report of February 2020 at para 7.10 mentioned that upon recovery of any portion of the claims of a creditor in one of the proceedings, there should be a corresponding revision of the claim amount recoverable by that creditor from the other proceedings.

Pre-Packs: Sensible Safeguards, or Pandering to the Misinformed?

India is all set to move on its next landmark under IBC, 2016, i.e., Pre-Pack insolvency. The Insolvency Law Committee (ILC) headed by IBBI Chairperson Dr. M. S. Sahoo has designed a pre-pack framework[1] titled 'Pre-packaged Insolvency Resolution Process' for Indian market within the basic structure of the IBC, 2016.

The United Kingdom (UK) is practicing Pre-Pack insolvency since enactment of the Enterprise Act, 2002. In this article, the author presents UK's perspective on Pre-Pack insolvency which could provide some crucial takeaways for India. Read on to know more...

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Introduction

The subject of pre-packs featured in debates in the UK Parliament during the summer passage of the new Corporate Insolvency & Governance Bill (now Act[2]) (CIGA), which provoked some broader discussion on insolvency matters generally. Pre-packs were among the topics receiving an airing – notwithstanding the absence of any provisions in the Bill on this procedure. But in fact, that was precisely the problem; in that the government had let a pre-pack review deadline set in 2015 pass by in May 2020 without any announcement of its intention one way or the other on the need for further legislative measures on this procedure.

This brought about an amendment to CIGA, accepted by government, to mark this forward twelve months. So, with a new June 2021 deadline, what should the government now do about pre-packs? Much of the recent focus has been on the Pre-Pack Pool (PPP), although there are of course other regulatory

1. Pre-pack Insolvency Resolution Process under IBC, 2016 https://ibbi.gov.in/uploads/whatsnew/34f5c5b6fb00a97dc4ab752a798d9ce3.pdf

2. Pre-pack sales in administration, 8 October 8, 2020 https://www.gov.uk/government/publications/pre-pack-sales-in-administration

levers available, both to government and the Recognised Professional Bodies (RPBs) – the latter having responsibility for directly licensing and monitoring IPs. One such lever is the set of practice requirements (principally around transparency) in Statement of Insolvency Practice no.16 (SIP16) and the regulatory reviews of compliance with the SIP (though it should be noted that not all of the RPBs have been reviewing all of the SIP16 statements issued by IPs – some opting instead for sample reviews).

The regulatory requirements apply only to administrations and sales to connected parties. In the absence of a statutory definition of a pre-pack, SIP16 described it as 'an arrangement under which the sale of all or part of a company's business or assets is negotiated with a purchaser prior to the appointment of an administrator, who affects a sale immediately on or shortly after appointment.

1. Pre-Pack Pool (PPP)

A good place to start unravelling the present problem is with a reminder of the Pool and its role, and here I should start with a declaration of interest, or confession. Along with others from the two main RPBs and the insolvency 'trade' body, I was involved in establishing the PPP in its present form and sat on its oversight group. Its origins lie amongst the recommendations to government in the Graham Report 2013. Graham attempted in her review and subsequent report to strike a compromise, by making a considerable effort to avoid treading on the toes of IPs. She sought to achieve this by steering the PPP away from directly reviewing or second-guessing the sale of business decisions of IPs (given that they aretrained, qualified and regulated professionals) while at the same time aiming to provide creditors with some assurance around transactions which they sometimes questioned.

Though based on voluntary referrals, the Pre-Pack Pool (PPP), since its inception in November 2015 following recommendations in the Graham Report 2013, continue to provide an independent opinion on connected party pre-packs.

So, the PPP was established to provide a mechanism through which an independent opinion might be sought about the proposed sale of a business through administration by an IP via a pre-pack. In seeking to implement that slightly flawed proposition, the PPP was to be based on applications by prospective purchasers, with a regulatory imposition on IPs via SIP16 to bring the PPP (and the 'potential for enhanced stakeholder confidence') to the purchaser's attention, in the case of a connected party sale. Moreover, as the PPP was one of a number of recommendations to the profession and the wider business community, all with a view to bringing about a suite of voluntary measures to improve stakeholder confidence and avoid the need for legislation (save for the five-year backstop provision), the connected purchaser application was to be one of those voluntary steps. No compulsion.

The PPP operates independently to some degree of the regulators and profession, but subject to oversight by the RPBs and the government's Insolvency Service and other interested bodies representing IPs, directors, and creditors. It was funded by contributions from those organisations to varying degrees (but with the two largest RPBs picking up the lion's share). So, it is in effect a joint regulatory/professional/business initiative, exactly as Graham envisaged.

Its aim in terms of its finances was merely to cover its operating costs – including the fixed costs of insurance etc. – and to this end the fee payable by applicants was set at a level designed to meet the reviewer's fee in each case, and make a contribution to those fixed costs. APPP referral increases the costs of a transaction, but the PPP itself is not intended to make a profit from its operations.

Take-up initially was slow, but the general expectation was that activity levels would pick up in a year or two. In fact, usage fell away to the point where in 2019 PPP confirmed that it had just 21 referrals[3], representing 8% of eligible cases (i.e. connected party purchases from administrators through a pre-pack process). This was reportedly lowest in the Pool's 4 years of operation. The year 2016 had witnessed only 36 referrals out of 163 eligible transactions which came down to 18 referrals in 2018. It is perceived that the 'voluntary' nature of the referrals is the main reason behind the low

3. PPP: Annual Review for the Year end 2019, file:///C:/Users/HP/Downloads/PPP-Annual-Review.pdf (www.prepackpool.co.uk)

number of referrals to the Pool, therefore, the demand are being raised to make it mandatory[4].

2. Failure

There is unfortunately a perception that the PPP has failed to meet its objective of addressing stakeholder (i.e. mainly, creditor) concern about connected party pre-pack deals – concerns that these deals can sometimes look at least a little too cosy, perhaps not generating the best outcome for creditors. PPP's brief was to look at pre-pack sales to connected parties, where those parties decided to submit an application for a review, and to do so quickly (within 48 hours) so as not to hold up and potentially jeopardise a sale which might be time critical to preserve goodwill, jobs etc. it did what was asked of it, often turning round opinions with 24 hours. But the lack of referrals has meant that its coverage of connected party transactions through administrations has been limited.

In 2019 out of 260 connected party pre-packs just 21 were referred to the Pool. However, the RPB received 473 pre-pack reports suggesting that approximately 55% of pre-packs were related to connecting party. Of course, critics will point out that with only a minority of cases being referred to the PPP, no-one can be sure that it is seeing the transactions that give rise to question.

The Insolvency Service has now published its long-promised review of the position, and so we now know the main thrust of its policy objective. It was never going to ban these pre-pack sales, not least because it is on record as recognising the value that the pre-pack process can bring, not least the ability to facilitate the swift transfer of businesses and assets into new ventures that have the potential to rescue viable enterprises (note the emphasis on the underlying business, not the corporate entity). Instead, responding to the occasional creditor noise about these deals, the government has decided to bolster the pre-pack review process by making it mandatory in every connected party case.

So perhaps the PPP has not failed after all; maybe it was merely a victim of an initial concept that was slightly flawed at the outset. But if that is fair analysis of the position of the PPP, where does the new government proposal leave it now?

3. Review independence

PPP has reviewed more than 100 cases since its inception and most of its opinions have concluded that the pre-pack deals were not unreasonable in the circumstances – sometimes going further, as in the recently reported Everest case where the Pool member commented that the pre-pack was the best course of action for customers and staff. Of course, critics will point out that with only a minority of cases being referred to the PPP, no-one can be sure that it is seeing the transactions that give rise to question.

Some stakeholders have come out publicly in support of mandatory referrals in connected (phoenix) cases; and the PPP comfortably has the capacity to cope with the 200+ referrals per annum that could result from a compulsory review.

If necessary, PPP membership could be reviewed, expanding beyond the current crop of chartered accountants, chartered directors, and the small number of retired IPs.

One advantage of the PPP that should not be underestimating is the independence it provides in the opinions given. PPP members are engaged on a rota basis that is largely automated and free of any manipulation or undue influence – least of all by the prospective purchaser; while the purchaser pays and submits the information (though at present the IP can, and sometimes does, submit information as well) – the purchaser doesn't choose the reviewer and cannot easily discard or ignore the opinion provided. Creditors should value that independence.

4. New regulations

In October 2020, the UK government published a set of draft regulations, mapping out the way ahead in 2021. These make it clear that the administrator will need either creditor approval for a sale to a connected party or the purchaser will need to obtain an 'independent' opinion from an evaluator. This will apply to any such transaction in the first 8 weeks of an administration, widening the scope of the present regulatory arrangements.

4. Pre-pack sales in administration, 8 October 8, 2020 https://www.gov.uk/government/publications/pre-pack-sales-in-administration

The new proposals though are rather less precise than might have been expected in terms of the evaluator and in particular who would be eligible to carry out this role. The evaluator can self-declare their knowledge and experience to perform the task, provided that they are not disqualified from acting by virtue of some association with the insolvency company or the IP, or indeed the purchaser, nor by their own insolvency!

If the arguments about pre-packs sometimes seem a bit like a propaganda war, then there are weapons at the IP's disposal that perhaps have not always been used to best effect. Now seems a good time to draw on that arsenal – to help defend the reputation of the insolvency profession!

What's more, the government envisages that the purchaser might obtain more than one opinion, giving rise to the perhaps unintended consequence that purchasers might shop around for a positive evaluation. In circumstances where the purchaser can select their own opinion-provider, commission that person to undertake a review and pay them to do so, how reassured will creditors be that the opinion given will be truly independent?

The PPP at least has the advantage of providing genuinely independent opinions from insured individuals who cannot be chosen by the applicant; they are assigned tasks by the PPP system on a rota basis, and so the mechanism through which an opinion is sourced is not subject to any influence by the purchaser.

Before anyone considers dismantling the PPP, some careful thought should be given to what might come in its place, how the independence of its opinions might be preserved, and whether its replacement will address the fundamental question of trust that lies at the heart of this debate.

Some observers argue convincingly that the pre-pack concept is so closely associated with directors dumping debts that no amount of gloss will hide the rotten appearance of some of these transactions, but most IPs seem content to live with the occasional criticism and justify the process on the strength of the jobs and business saved, emphasising that IPs have an obligation to deal with highest bidders, whether or not they happen to be connected parties, and that a connected party may be well placed to offer best value.

5. The sell

SIP16 compliance may be detailed and mostly to the required standard, but it is by its very nature and construction a regulatory requirement. It is not always the whole story. IPs could (and sometimes do) expand the narrative to really 'sell' to creditors the rationale behind the transaction, the efforts made by the IP and perhaps by the directors to help protect the business, jobs and creditors' interests in the face of challenging and probably stressful circumstances. Perhaps also, if it is the case, the extent to which the directors have pledged personal assets to secure new funding for newco – may be negating to some degree the 'dumping debt' tag.

If the arguments about pre-packs sometimes seem a bit like a propaganda war, then there are weapons at the IP's disposal that perhaps have not always been used to best effect. Now seems a good time to draw on that arsenal – to help defend the reputation of the insolvency profession!

While reassurance should not ideally be necessary, most recognise that there is a need to plug that gap in trust (however well founded, or not as the case may be). It is the perception of others that has the potential to taint the profession and the good work most of its practitioners do most of the time.

CCI's Green Channel for Regulating Business Combination and Approval of Resolution Plan

Corporate Insolvency Resolution Process (CIRP) is a complex procedure which is not only influenced by but also influences several other legislations related to corporate sector. The Green Channel clearance by the Competition Commission of India (CCI) on August 19, 2019 for Mergers and Acquisitions of combinations is such a system having multi-dimensional impacts. In this article, the author presents an analysis on interdependence of IBC and CCI regimes from the perspective of Green Channel and in the backdrop of Covid-19 pandemic. Read on to know more...

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Introduction

With the ongoing Covid-19 pandemic, the global trade is witnessing turmoil of the storm. This serves as an opportunity for trade acquirers, who are also privy of the risk exposure faced by them due to financial situations of the target companies and the regulatory safeguards. The convolution caused by regulatory policies for distressed mergers and acquisitions (M&A), which flows from Approval of Resolution Plan (ARP) hinders the ease of doing business and also contributes to the sluggish structural reforms for such acquired distressed M&A. For this, firms in Indian context, resort to 'failing firm defense' under competition regime, and Corporate Insolvency Resolution Process (CIRP) under the Insolvency and Bankruptcy Code (IBC) regime.

1. Acquisition Strategy during COVID-19

The most recent trends of mergers and acquisitions (M&A) have remained robust and

expressed faith in the financial regimes and regulatory frameworks. It comes as no surprise that a few sectors despite the bearish overall moment, continue to soar on bullish tendencies, for instance technology, pharmaceutical and so on. Since the global financial crisis of 2008-2009, many companies have indulged in expending their investments in target acquisitions where balance sheets convey a solid runaway[1]. The situation for the market is somewhat similar to what it had been in during the global financial crisis, and for some it may be a question of barely making through the Covid-19 pandemic; however, others may take this as an opportunity for an expansion at cheaper expense.

2. Acquirer be Aware

During such times, the crucial question which is often asked is what and how can the buyer safeguard his rights since the conventional indemnification clause may not be of any avail, for such defense can be sought in the IBC. Buying distressed assets and entering into distressed M&A exposes the acquirer with unwanted and unassumed liabilities which may flow in due to tax, product liability, environmental impact assessment and other regulatory burden. Amidst all this, the buyer must ensure, under many regulatory regimes that the resultant combination of transactions does not ameliorate the competition in the market.

3. Approval of Resolution Plan (ARP) under IBC and Regulation of Combination under Competition Law

The convolution caused by regulatory policies for distressed M&A which flows from Insolvency Resolution Plan (IRP) hinders the ease of doing business and also contributes to sluggish structural reforms for such acquired distressed M&A. The two common defenses available to such distressed M&A are 'failing firm defense'[2] under competition regime, and IRP under insolvency and bankruptcy regime[3].

3.1. Under the Competition Act, 2002

Section 5 of the Competition Act 2002, deals with the Combinations. This section puts monetary limits of combined assets or turnover, which if exceeds, will attract section 6. The threshold value is defined for individuals and groups in India and abroad. Furthermore, the Competition Act, 2002 lays down the procedure to file a notice informing the Competition Commission of India (CCI) regarding targeted transaction which results into a combination; and other mandatory timelines to be followed. It is pertinent to mention here that the Competition Act, 2002 vide its Section 6(1) provides that no person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void.

The CCI, in furtherance, of the ease of doing business has introduced 'Green channel'[4], whereby the entity, so created, self-declares that the resultant combination of the transaction would not result in or cause any appreciable adverse effect on competition. It is required by this regulation to give a notice to CCI and the proposed combination shall be deemed to have been approved by the CCI.

The situation for the market is somewhat similar to what it had been in during the global financial crisis, and for some it may be a question of barely making through the Covid-19 pandemic; however, others may take this as an opportunity for an expansion at cheaper expense.

1. Jennifer F. Fitchen, Sidley Austin LLP, 'Strategic Acquisitions of Distressed Companies in the COVID-19 Environment', May 21, 2020, as available on https://corpgov.law.harvard.edu/2020/05/21/strategic-acquisitions-of-distressed-companies-in-the-covid-19-environment/ last accessed on September 25, 2020.

2. See Sec 20(4)(k), Competition Act 2002 provides when inquiring into a Combination, for assessing whether any appreciable adverse effect on competition can be caused by such notified transaction, due regard shall be given to the criteria of failing business. As available on http://cci.gov.in/sites/default/files/cci_pdf/competitionact2012.pdf last accessed on September 25, 2020.

3. See Sec 5(26), The Insolvency and Bankruptcy Code, 2016 defines "resolution plan" as "a plan proposed by resolution applicant for insolvency resolution of the corporate debtor as a going concern in accordance with Part II", as available on https://ibbi.gov.in//uploads/legalframwork/2020-09-23-232605-8ldhg-e942e8ee824aa2c4ba4767b93aad0e5d.pdf last accessed on September 25, 2020.

4. Regulation 5A, Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2019, as available on https://www.cci.gov.in/sites/default/files/notification/210553.pdf last accessed on September 25, 2020.

3.1.1. What is Green Channel?

The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2019, which came into force effective form 15th August, 2019, introduced new Regulation 5A and deals with the notice for approval of combinations under Green Channel.

Sub-regulation (1) provides that for the category of combination mentioned in Schedule III, the parties to such combination may, at their option, give notice in Form I pursuant to regulation 5 along with the declaration specified in Schedule IV.

Sub-regulation (2) states that upon filing of a notice under sub-regulation (1) and acknowledgment thereof, the proposed combination shall be deemed to have been approved by the Commission under sub-section 31[5] of the Act.

Thus, by insertion of Regulation 5A, the door of automatic approval from the Competition Commission of India (CCI) has been opened.

3.1.2. During October-December 2019, five out of the total 25 combination notices were notified under the green channel route. The number of such notifications was five between January-March 2020, out of the total 23 combinations notices. Out of 15 combination notices filed between April-June 2020, four were notified under the green channel, the tweet by the regulator noted[6].

3.2. Under the IBC, 2016

Section 31of the IBC deals with the Approval of the Resolution Plan for debtors under CIRP. The provision to sub-section (4) provides that where the resolution plan contains a provision for combination, as referred to in section 5 of the Competition Act, 2002, the resolution applicant shall obtain the approval of the CCI under that Act prior to the approval of such resolution plan by the committee of creditors.

CCI, in furtherance to the ease of doing business has introduced the provision of 'Green Channel', whereby the entity, self-declares that the resultant combination of the transaction would not result in or cause any appreciable adverse effect on competition.

Thus, the IBC provides obtaining of prior approval form the CCI by the Resolution Applicant. Since the entire process from the day of filing of the Corporate Insolvency Resolution Process (CIRP), acceptance of CIRP application, appointment of IRP, Constitution of Committee of Creditors (COC) and convening the meetings of the COC, inviting resolution applicants and finally getting approval of the Adjudicating Authority is a time bound process of 180 days or extendable up to further 90 days, is a tedious task and the condition prescribed in the IBC to obtain the approval of the CCI by the Resolution Applicant, prior to submission of the Resolution Plan is also a tedious job; the provision of the Green Channel introduced by the CCI by way of amendment in the Combination Regulation is a welcome step.

4. Failing Firm Defense in Practice

The concept of failing firm defense usually requires three parameters to be satisfied:

a) there exists a likelihood, attributable to such failing firm's financial condition, that such a firm would in the future exit the market,

b) there exists no less harmful alternative to the competition in market then the combination in question, and

c) The resources owned by the targeted firm would cease to be in the market[7].

These criteria are more or less universally followed by all agencies[8]. The operational and practical aspects of the 'failing firm defense' could be summarized as follows:

5. Section 31 of the Competition Act, 2002 deals with the orders of Commission on certain combinations.

6. https://www.business-standard.com/article/companies/1-out-of-5-combinations-given-approval-under-green-channel-route-cci-120081701599_1.html accessed on December 25, 2020.

7. Para 90, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03), as available on https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0205(02)&from=EN last accessed on September 25, 2020; See also Supra note 2.

8. See Horizontal Merger Guidelines, Department of Justice and Federal Trade Commission (2010), § 11 ("Horizontal Merger Guidelines"); see also Citizen Publ'g Co. v. United States, 394 U.S. 131 (1969).

4.1. The failing firm defense, an exception to merger regulations under competition regime is often used for decoupling the post-merger market concentrations and its effect on Competition. This defense, by nature, requires a different approach than any other in the ordinary course of business, since the counterfactuals are analyzed, in post-merger situations, for a firm or its asset exiting the market as opposed to the ordinary approach of analyzing the effect of competition when the two firms existed in the market.

4.2. Usually, during insidious exigencies such as the great recession, the global financial crisis and the current pandemic, it is expected from the regulatory agencies - to be lenient in their interpretation and enforcement, however, this is not the case, at least not for FTC, USA[9]. With Covid-19 pandemic, it may not be difficult to show the first prong of this defense via financial and auditing precursors such as insufficient flow, operational costs of a firms far increase its revenue, similarly liabilities exceeding total assets (this also is a part of the last prong of the defense)[10]. It is in these times, firms may increasingly sight financial reasons such as aggressive competition; oversupply or excess capacity in the market; plummeting consumerism/behavior, failed business strategy including weak leadership, outdated technology affecting product quality or brand value[11]. Additionally, the regulators take enough time to investigate these matters, a fact which by itself leaves the threat of imminent danger to future of a firm questionable[12].

4.3. Fair market conduct regulators often seek evidence that controverts anti-competitive resultant combinations to support the proposed combinations; and, while the failing firm defense is a plea under competition law it places reliance not on competitive effect of the proposed combination but on the financial situation of the firm[13]. Furthermore, the mere fact of economy suffering from severe economic downturn alone does not guarantee loosening the standards of application of antitrust law on firms seeking this defense, as echoed by many agencies[14]. Described also as 'flailing but not failing', some regulators may even frown upon, on the sight of an opportunity for a loan may be afforded to such a firm[15].

While the role of both regulators is essential in their respective domains, weight draws down to maintain fair trade market conduct, which if left unchecked may wreak havoc later.

4.4. In arguendo, the big may consolidate their positions by buying such failing or flailing firms but counterfactuals for the post notified combination is the assumption for competition to thrive; therefore, in any case the regulators would ensure that anti-competitive effects are offset with such notified combination[16]. To the contrary, from efficiency point of view, some may in favor of this defense may retort to remark that low productivity, obsolete technology (as the case may be with the such firm) may be attributed to regulators for creating hurdle and allowing such zombie firms to slowly, dry & die, depleting resources[17].

4.5. But for the governments (globally) which are yearning to keep the economy afloat, the numero uno target is keeping businesses alive at all costs. Fiscal packages, moratorium

9. Ian Conner, Bureau of Competition, 'On "Failing" Firms — and Miraculous Recoveries', May 27, 2020. As available on https://www.ftc.gov/news-events/blogs/competition-matters/2020/05/failing-firms-miraculous-recoveries last accessed on September 25, 2020.

10. James A. Fishkin, Brian Rafkin& Blair W. Kuykendall, 'Epic Fail: Why it is Better to Focus on a Competitive Effects Analysis than the Failing Firm Defense', Pg 9, CPI Antitrust Chronicle September 2020

11. Supra note 8, Pg 12.

12. Supra note 8, Pg 9.

13. Supra note 8, Pg 13

14. See For FTC - Ken Heyer, Failing Firm Analysis and the Current Economic Downturn', Pg 14, CPI Antitrust Chronicle September 2020; See also CMA 2020 Failing Firm Guidance - Antonio Bavasso& Jessica Bowring, 'Pandemic, Economic Crisis, And The Failing Firm Defense', Pg 25,CPI Antitrust Chronicle September 2020; See also Supra note 7; See also 'Position paper - Macroeconomic Effects of Mergers in the Context of the COVID-19 Crisis', issued by Federal Competition Authority (BWB) - Austria, 15 July 2020, Pg 4, As available on https://www.concurrences.com/IMG/pdf/austrian_competition_authority_position_paper_-_macroeconomic_effects_of_mergers_in_the_context_of_the_covid-19_crisis_july_2020.pdf?61863/4ca8e36790b4623bc7b3444e46d65ca35d531a6a September 30, 2020.

15. Ken Heyer, Failing Firm Analysis and the Current Economic Downturn', Pg 17, CPI Antitrust Chronicle September 2020.

16. Supra note 13, Pg 17.

17. Antonio Bavasso& Jessica Bowring, 'Pandemic, Economic Crisis, and the Failing Firm Defense', Pg 21,CPI Antitrust Chronicle September 2020

extension on insolvency proceedings, are all targeted to one long-term economic recovery. Within the conspectus of these actions lies the primal fear - whether the firms which ought to have failed, with the help of such support packages, have survived through the pandemic[18]. In this connection, the action of the government should be to sustain the public and not the job[19]. The argument advanced in favor of the aforesaid is usually the cost of recovery of businesses against the cost of setting up a new business including the factors such as if a breather can be given; some of the businesses can actually rally through and recalibrate, adapt themselves to conduct trade in 'new normal', for regulators this may seem to be an important policy aspect to be given thought[20].

Conclusion and Outlook

In recent times of covid-19 pandemic, the world trade amidst turmoil witnesses an opportunity for trade acquirers. Business houses by now are geared up and well informed about the risk exposure faced by them due to financial situations of the target companies' and the regulatory safeguards.

As per the IBBI newsletter[21] only 13.86% of Corporate Insolvency Resolution Process (CIRP) out of the 52.96% CIRP (that were closed) concluded with the resolution plan. It is pertinent to point out, that no IRPs are required to be competition law compliant by IBC proceedings, thus, warranting a must scrutiny. However, the CCI within the gamut of the Competition Act, 2002 is required to close its investigation within 210 days[22]. While the role of both regulators is essential in their respective domains, weight draws down to maintain fair trade market conduct, which if left unchecked may wreak havoc later.

In this scenario, the provision of 'Green Channel' can significantly contribute to the ease of doing business but like most self-disciplined, self-declaration regulations; one will have to resort to regulators for checks and balances for maintaining level playing field. The ensuing Covid-19 pandemic indeed warrants leniency for businesses to tide over the crisis. While the government have come up with various fiscal measures and stimuli; and regulators announced relaxations in enforcement via amendments (as is the case in IBC), numerous other policy instruments were introduced with an endeavor to keep economy afloat. In this scenario, the fair market regulators need to ensure that the post-pandemic economy is not only sustainable, but also is safeguarded till that time.

The job is tedious, the task is daunting and herculean but as the history has a habit of repeating itself, the economics shall recover, as the regulators must from past experiences draw lessons to keep ablaze the hope and be on the right path to recovery.

18. The Economist, 'What to do about zombie firms', Sep 26, 2020, As available on https://www.economist.com/leaders/2020/09/26/what-to-do-about-zombie-firms last accessed on September 30, 2020.

19. Ibid.

20. From Chairperson's Desk, Insolvency and Bankruptcy News, April- June 2020, Volume 15, Pg 2, As available on https://ibbi.gov.in/uploads/publication/b58ce20ca4be9285b54e0aaf7752d5c1.pdf last accessed on September 30, 2020.

21. Ibid Pg 16.

22. See Sec 6(2A), The Competition Act, 2002, as available on http://cci.gov.in/sites/default/files/cci_pdf/competitionact2012.pdf last accessed on September 25, 2020.

Liquidation of Stressed Enterprises under IBC: Tips for IPs

During CIRP when all the attempts to find a suitable resolution plan within the stipulated time frame are failed, the Committee of Creditors (COC) decides to liquidate the Corporate Debtor (CD) and realize the dues of the creditors. Though initiation of liquidation is an unwarranted situation in the IBC, the Liquidator has a huge responsibility to realize the maximum values of the assets of the CD to payback the creditors.
This article discusses various practical steps and measures to be adopted by the Liquidator to manage the CD as a Going Concern (GC) during the Liquidation Process and to realize maximum value for its assets. Read on to know more…

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Introduction

During the Corporate Insolvency Resolution Process (CIRP), an Insolvency Professional (IP) is required to manage the CD as a 'GC' (apart from discharging various statutory duties prescribed in the IBC), as per the judgements delivered by various NCLTs, NCLAT and the Supreme Court.

In addition to the above, the NCLTs and NCLAT have also decided in many liquidation cases that the CD should continue to be managed as a GC, by the Liquidator, during the Liquidation Process as well, to maximize the liquidation yields.

1. Initiation of liquidation

Any CD which is undergoing through CIRP can be ordered to be liquidated by the Adjudicating Authority (AA) as per section 33 (Chapter III) of IBC under the circumstances listed therein. A couple of the important circumstances are:

a) A viable resolution plan acceptable to the members of COC and meeting the parameters of Sec 30(2) of IBC could not be obtained within the time frame of 270 days including the extension and 330 days including the time taken in legal proceedings (Sec 33 (1) read with Sec 12 of IBC).

b). During CIRP, if the COC comes to the conclusion, by a vote of not less than 66% [Sec 33 (2)], that the unit should be liquidated.

1.1 Appointment of Resolution/ Insolvency Professional (RP/IP) as Liquidator:

In general, the RP handling the CIRP will be continued as the Liquidator, except under special circumstances as specified in Sec 34 (4) under which existing RP can be replaced by another IP to function as the Liquidator.

1.2. Adjudicating Authority (AA) replacing existing RP and appointing a new IP as the Liquidator

The AA also, on its own, can replace the RP of CIRP with another IP as the Liquidator, if AA finds the performance of RP (during CIRP) as not satisfactory. In the following examples of case laws, the AA replaced the RP with a new IP as the Liquidator:

a) Indian Bank vs Kadevi Industries Ltd (KIL) – CP (IB) 10/7/HDB/2017, by the AA of NCLT Hyderabad, in its liquidation order dated Feb 23, 2018.

b) Small Industries Development Bank of India (SIDBI) Vs. Tirupati Jute Industries Limited [CP (IB) 508/KB/18 and connected matters].

c) Sandeep Kumar Gupta RP vs. Stewarts & Lloyd India Ltd – NCLAT

In both the cases a) & b) above, RP was replaced because the AA was not satisfied with the performance of RP while in the case c), the AA replaced RP because of misconduct. The RP appealed to NCLAT, which opined, "While we hold that the observations of AA were not to be construed as misconduct of RP, but as we find that the AA was not satisfied with the performance of RP, we hold that the AA was well within its jurisdiction to appoint another RP as the Liquidator".

d) **COC managing to replace RP of CIRP for Liquidation:** Also, of late, there have been cases (1) where COC, before passing the resolution for Liquidation, have considered it fit to propose to the AA, the appointment of a different RP (different from the one during CIRP) as it was increasingly being felt by the FCs that the skill sets required for the Liquidation are different[1] from that of a CIRP.

1.3 Provisions of Liquidation

Sec 36 of IBC is related with the provisions of liquidation. These provisions authorize the Liquidator to carry the business of the CD as a GC with a view to maximize its values and maximization of liquidity yields to payback the creditors. Section 36 (2) of the IBC clearly states that the Liquidator shall hold the liquidation estate as a fiduciary for the benefit of all the creditors.

2. Powers and Duties of Liquidator

2.1 Legal Provisions: Section 35 of IBC enumerates the duties and powers of the Liquidator which are more tilted towards safeguarding the assets of the Corporate Debtor, evaluating the assets of CD for the purpose of a successful sale and following the applicable laws. Further, IBBI has also issued[2] regulations for Liquidation Process and the latest is dated Aug 05, 2020.

a) Facilitation Letter[3] by IBBI: In addition to the above functions enumerated in the Code and IBBI's regulations for Liquidation Process, IBBI has also issued a Facilitation letter, Facilitation/002/2020 dated August 5, 2020, 'In aid of Insolvency Professionals conducting Liquidation Process', mentioning the broad functional areas of the IP-Liquidator, which is very informative and useful.

b) Section 35 (e) for running CD as a Going Concern during Liquidation: In addition to enumerating the powers and duties of the Liquidator, Sec. 35 (e) of IBC essentially means that the CD should be run as a GC, even during the liquidation phase.

1. Bankers have proposed to the AA, the appointment of M/s AAA Insolvency Professionals LLP as the Liquidator (different from the RP during CIRP) –- in the cases of Nirav Modi group of companies and Gitanjali Group (Mehul Choksi) of companies (https://ibclaw.in/ibbi-asseverates-its-disciplinary-stance-on-the-dutiful-profession-of-an-insolvency-professional-by-adv-aditya-gauri/).

2. IBBI Regulation No. IBBI/2016-17/GN/REG005. Available online (https://ibbi.gov.in//uploads/legalframwork/96336966a318bbeff79f7dc0c115f08e.pdf)

3. Facilitation Letter No. Facilitation/002/2020 dated August 5, 2020. Available Online (https://ibbi.gov.in//uploads/legalframwork/c3b3b6a01a710b85c8e12d12db52c33f.pdf)

2.2 Judicial pronouncements for running CD as a Going Concern during Liquidation: Further, the NCLTs, NCLAT and the Supreme Court have also decided in many liquidation cases that the Corporate Debtor should continue to be managed as a Going Concern, by the Liquidator during the Liquidation Process as well, to maximize the liquidation yields.

a) *Swiss Ribbons Pvt. Ltd. & Anr. Vs. UoI & Ors.* [WP (Civil) No. 99/2018]

In the above case, the Supreme Court (SC) has ruled as under:

"The preamble of the IBC does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plans submitted are not up to the mark." Therefore, "even in liquidation, the Liquidator can sell the business of the CD as a Going Concern".

b) *Y. Shivram Prasad & Ors. Vs. S. Dhanapal & Ors.* [CA (AT) No. 224 & 286/2018]

In this case, NCLAT has observed that during the Liquidation Process, it is necessary to take steps for revival and continuance of the CD by protecting it from its management and from a death by liquidation. The revival and continuance of the CD during the Liquidation Process essentially means running the CD as a 'Going Concern'.

c) *Edelweiss Asset Reconstruction Company Ltd. Vs. Bharati Defence and Infrastructure Ltd.* [MA 170/2018 in CP 292/I&B/NCLT/MAH/2017]: In this case, NCLT Mumbai rejected the resolution plan and ordered for liquidation of the CD. "…we direct that the Liquidator shall endeavour to sell the Corporate Debtor company as a going concern" ordered the court.

3. General Work & Responsibilities of the Liquidator

The Liquidator is responsible to manage the affairs of the CD as stipulated in section 35 of the IBC and as per the regulations prescribed by IBBI for the Liquidation Process and take all such actions as are necessary to keep the CD as a GC, as per Sec 35 (e) which empowers the Liquidator "to carry on the business of the corporate debtor for its beneficial liquidation as he considers necessary".

However, these are more elaborate provisions for safeguarding the assets of CD, proper & extensive reporting by the Liquidator and following the applicable laws.

Further, as per the IBBI (Liquidation Process) Regulations (amended upto) August 5, 2020, the Liquidator shall:

i. As per regulation 5 (1), submit all the reports mentioned therein

ii. As per regulation 5 (2), keep both physical and electronic copies of all such reports as above for a period of 8 (Eight) years after the dissolution of the CD.

iii. As per regulation 6, maintain all the registers and books of account mentioned therein.

It can be seen that paperwork as above is extensive and substantial for the Liquidator.

In the case of *Sandeep Kumar Gupta RP vs. Stewarts & Lloyd India Ltd*, the NCLAT absolved the RP from the charges of misconduct but allowed his replacement on the ground that the AA was not satisfied with the performance of RP.

IP has also an onerous task of keeping on the right side of the law by operating within the parameters set by IBC, regulations stipulated by IBBI and existing legal framework not inconsistent with IBC.

All deviations from IBC (including mistakes) are punishable.

4. Liquidation Process in Actual Practice

The section 35 (e) of IBC and Sec 32A of IBBI's liquidation regulations authorize the Liquidator to take all such actions as are necessary to carry on the business of CD as a GC for its beneficial liquidation and maximize the yields.

It may be noted that no law can guide fully as to how to execute the functions, while laying down the law and functions to be carried out. Hence, Liquidator is presumed to apply its knowledge and experience to perform its duties. It is the responsibility of the team tasked with implementing the law to devise ways and means

to implement the same. This, in a way, is both a boon and bane for the Liquidator in as much as everything needed to keep the CD as a GC is left to the imagination and practical experience of the Liquidator, as there are many problems in keeping a manufacturing CD as a GC during Liquidation Process.

Accordingly, the Liquidator is expected and presumed to devise practical steps of the Liquidation Process by applying his/her knowledge and experience to perform the duties envisaged by Sec 35 of IBC and IBBI regulations. Further, when operations are kept alive, the value of the assets and the enterprise value of the CD are enhanced. The buyers/ investors will be more interested to bid for a running enterprise or a unit ready for operation and offer a higher price, which will increase the monetary pie available to all the stakeholders.

4.1 Possible Scenarios of CD with respect to Insolvency Professional during Liquidation:

In view of the possibility of RP during CIRP being replaced with a new IP to function as a Liquidator; there are two scenarios as under:

a). RP, handling the CIRP, continuing as the Liquidator:

b). A new IP appointed as the Liquidator in place of the RP during CIRP

4.2 Caveat of Sec 33 (7)

Sec. 33 (7): The order for Liquidation under this section shall be deemed to be a notice of discharge to the officers, employees and workmen of the CD, except when the business of the CD is continued during the Liquidation Process by the Liquidator with a Caveat 'Except when the business of the CD is continued during the Liquidation Process by the Liquidator".

5. 'Going Concern' is an Audit Concept

Standard on Auditing (SA) 570 - Going Concern - is effective for audits of financial statements for periods beginning on or after April 01, 2017. Under the going concern basis of accounting, CD is required to prepare the financial statements on the assumption that:

a) the entity is a going concern;and

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

The auditor would examine the above financial statements and give his opinion to assist the management in ensuring the CD as GC.

The dilemma for the Liquidator, particularly if he is a new IP (having been appointed in the place of the earlier RP during CIRP), is that which of the employees he needs to keep in order to discharge the above functions.

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

6. Practical Meaning of a Going Concern

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

For a service CD, the same thing as above applies, except that in place of manufactured goods, the personnel of CD will execute all projects/assignments generating positive cash flows. The ideal situation for an IP would be operation of a CD at the break-even point (with no cash loss) and, if possible, generate more cash which can be paid towards the dues of the creditors.

6.1. CD as a Going Concern during CIRP – Manageable

During CIRP, it is not profoundly difficult to manage the operations of the CD as a GC, if it has already been functioning as a commercial enterprise till admission to CIRP, in view of

a). Almost all the employees are on the rolls of CD, drawing monthly salaries.

b). Banks, in general, do not disturb the Working Capital arrangement for a running unit.

c). And everyone from RP, employees to banks are hopeful of a viable resolution plan, which would not only protect most of the jobs, but would also repay the dues of creditors in an orderly manner.

6.2. CD as a Going Concern during Liquidation: There are two possibilities as follows:

a). CD is already running as a GC during CIRP: If the unit has already been functioning as a commercial enterprise during CIRP, it would be quite easy for the Liquidator to manage the same as a GC during Liquidation as well. The challenges, if any, are mostly related to the operational aspects of the CD. The Banks, employees, and creditors etc., would all likely cooperate for the successful operation of CD as a Going Concern, as its sale would fetch a much better price than the liquidation value.

b.) Drastic change in Scenario - CD is not running as a GC and is shutdown during CIRP:

When a shutdown (or non-functioning) CD is ordered for Liquidation, the entire scenario of CD changes drastically in the following manner:

i. First implication for the CD is that it cannot be revived as a commercial enterprise.

ii. Banks will not be willing to renew the working capital arrangements, as any further lending would attract 100% provisioning in the balance sheet of the banks.

iii. In the absence of working capital, it would be impossible to keep the Operational creditors happy, who have supplied inputs and services and kept the unit running.

iv. Sundry debtors, who have so far been responsive, will suddenly become unresponsive/ uncommunicative/ elusive and would delay/avoid payments due to CD.

v. Non – availability of skilled manpower:

Section 33 (7) of IBC comes into play and the liquidation order as a discharge notice to all the employees looms large on the heads of employees as also on the Liquidator.

The security of the unit, as a whole, is to be maintained at all costs by employing security guards through a security agency. It is preferable to engage a new security agency as the old agency could be loyal to the earlier management.

c) Shutdown down CD - Not possible to be run as a GC:

Because of the change in scenario as explained above, the caveat in Sec 35 (e) (carrying on the business of the Corporate Debtor as a GC for its beneficial liquidation) would be a non-starter as it would require enormous amount of money, substantial manpower and efforts to revive a closed/ shutdown unit.

6.3. Action points, Practical Steps/ suggestions and tips for the Liquidator to manage a non-functioning CD during Liquidation:

a). Constitute the Consultation Committee (CC) of Stake holders as per the Sec 31 A (1) of IBBI's Liquidation Process Regulations (amended upto Aug 05, 2020), as early as possible.

b). Further, the Liquidator has to take up the following minimum activities immediately from CD.

i. Maintenance of Plant & Machinery (P&M):

Maintain all the P&M in running condition, so that the prospective buyer can be assured that the unit can produce. If the P&M are ready for operations, potential buyers would likely pay a higher price. Liquidator should convince the bankers to provide money for the maintenance of Plant & Machinery, citing the advantage of a possible higher price for the assets.

ii. Recovery of Receivables (Debtors):

Next activity of the Liquidator would be to pursue recovery of receivables from all the debtors. An early/speedy collection/recovery of receivables would reduce the pressure on the Liquidator for finding adequate monetary

resources. The recovery would be easier if the right man from the accounts dept of CD is retained.

Here, diplomacy and negotiating skills of IP would be crucial and play a major role for the collection of receivables with minimum disputes.

iii. Industrial Relations and Human Resources (HR):

Skilled manpower is required for the above activities, as also for general upkeep of the office and plant premises. The Liquidator can retain some of the existing employees for these activities.

However, the dilemma for the Liquidator, particularly if he is a new IP (having been appointed in the place of the earlier RP during CIRP), is that which of the employees he needs to keep in order to discharge the above functions. Whomsoever the Liquidator decides to keep, the balance employees will agitate leading to a HR problem and possible political overtones. Further, there will always be interference by local politicians including MLAs/MPs/ Ministers etc., through the leaders of employees' union/s to pressurize the Liquidator to retain all persons or maximum number of people. The Liquidator needs to handle these issues with diplomacy, negotiation and power of convincing arguments. Though the knowledge, managerial and communication skills of the Liquidator are very important as several decisions are required to be made instantaneously, some of the following points may help the Liquidator:

- The security of the unit, as a whole, is to be maintained at all costs by employing security guards through a security agency. It is preferable to engage a new security agency as the old agency could be loyal to the earlier management.
- The next problem for the Liquidator is finding money to pay for the salaries of the employees retained, for maintenance activities and for the security services. FCs (existing banks) are the only monetary source for the above expenses, who would be very reluctant to put in more money, even though the same would be covered under liquidation cost and would be repaid first from the sale proceeds. Enormous delays are common in FCs sanctioning the required funds.
- Another likely problem is that the promoter directors and some of the senior employees (loyal to the promoter) would play hard ball and will not come out readily with any information needed for pursuing the recovery from the elusive Debtors. Most of the times proper records are not available.
- Further, the promoter directors as shareholders indulge in protracted litigation, going to all available legal fora for making a case for insolvency resolution of the CD.

Liquidator has to be in continuous follow up with all the FCs having first charge on the assets of the CD for relinquishment of their security interest to the Liquidation estate.

- One of the important aspects that the Liquidator has to take care of, is forming an opinion on 'Avoidance Transactions' under sections 43, 45, 49, 50 & 66 of IBC and report to the AA within the time limits prescribed. In this regard the "Statements of Best Practices: Role of IPs in Avoidance Proceedings" developed jointly by all the three IPAs in collaboration with IBBI, which has been released in the First week of Nov 2020, is to be followed. If it has not already been done by the earlier RP, it is all the more important that the Liquidator initiates action immediately. Best course of action would be to initiate a 'Transaction Audit' with a detailed scope and approach of work as per the model format provided in the above mentioned "Statements of Best Practices".

7. Valuation of Assets

Section 35 of the Liquidation Process Regulations (Aug 05, 2020) gives the rules & methodology for valuation of assets of CD. For practical purposes, the following may be kept in mind.

a) If the valuation of assets has been done during CIRP for the operating (running) CD and if the date is within one year, the Liquidator might utilise the same.

b) If it is a closed/shutdown unit that has come for liquidation, it is essential that the Liquidator takes up the valuation of assets

immediately as per Sec 35 of regulations mentioned above.

8. FCs relinquishing security interest – Sec 21A

For presumption of Security Interest, the Liquidator may follow the following procedure:

a) In general, the decision-making process in FCs is lengthy and time consuming. Therefore, the Liquidator has to be in continuous follow up with all the FCs having first charge on the assets of the CD for relinquishment of their security interest to the Liquidation estate.

b) It is preferable and advisable that the Liquidator advises all the FCs in writing about the Presumption of Security Interest as per Sec 21 A of the Liquidation Process Regulations.

c) If and if any FC does not respond either way, it is also preferable that the Liquidator, after expiry of 30 days from the LCD, writes to that FC about their assets becoming a part of the Liquidation estate as per Sec 21 mentioned above, as an abundant precaution of sharing information with an important stakeholder.

9. Sale of Assets

As per the Sec 35(f) of IBC "Subject to section 52, (the Liquidator is) to sell the immovable and movable property and actionable claims of the corporate debtor in liquidation by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels in such manner as may be specified." The legal provisions, guidelines and experiences related to Sale of Assets could be summarized as follows:

a) IBBI's Liquidation Process Regulations (amended upto Aug 05, 2020): Sec 32 (e) prescribes that the CD be sold as a going concern while Sec 32 A as a whole speaks of different scenarios of selling the CD as a 'Going Concern'.

i. Sec 32 A (1) states that "Where the CoC has recommended sale under clause (e) or (f) of regulation 32 or where the Liquidator is of the opinion that sale under clauses (e) or (f) of regulation 32 shall maximise the value of the corporate debtor, he shall endeavour to first sell under the said clauses". It may be noted that the recommendation of CoC mentioned above arises from the regulation 39 C (2) of CIRP regulations (amended upto Aug 07, 2020).

ii. 'In particular Sec 32 A (2) states that the group of assets and liabilities of the CD, as identified by CoC under sub-regulation (2) of regulation 39C of IBBI's CIRP Regulations, (amended upto Aug 07, 2020), shall be sold as a going concern.'

iii. Sec 32 (3) further states that in case CoC has not done its job as envisaged in Sec 32 A (2), then the Liquidator shall identify and group the assets and liabilities to be sold as a going concern, in consultation with the Consultation Committee, of which FCs are important members.

b) Practical Possibilities and Action Points:

i. As mentioned above, the sale of CD as a GC in terms of Sec 32 of the regulations, during liquidation phase is possible only if the CD was being run as a GC during CIRP. If the unit is already shutdown it is impossible to revive the unit and run it as a GC. Then, the Liquidator has to resort to Asset sale only.

ii. Asset sale as a bundle (Plant & Machinery, land and buildings together) is preferable. Sale of individual assets would, in all likelihood, result in a lower price realisation.

c) Relationship with Financial Creditors (FCs) & Stake Holders (SH) and FC/SH Management:

i. During Liquidation phase, as per Sec 35 (1), the Liquidator's powers and duties are subject to the directions of the Adjudicating Authority. The Liquidator is the sole in charge and he is wholly and solely responsible to the AA. However, this does not work that way in practice.

ii. The Financial Creditors (FCs) are the most important among the stakeholders, as they hold the purse strings. They are the first and the only source of funds for the Liquidator till some sale takes place. In pure practical terms, it is essential that an IP keeps them in good humour and has the best working relationship with them.

iii. Also, as per the Sec 31 A (1) of IBBI's Liquidation Process Regulations (amended upto Aug 05, 2020), the Liquidator shall constitute a Consultation Committee (CC) of the stake holders, within sixty days (60) from the LCD, to advise him on the matters relating to sale under regulation 32.

iv. The CC comprises of the FCs, Operational Creditors (OCs) and representatives of CD's officers & workers.

v. However, as per the Sec 31 A (10) of the above mentioned regulations, the advice of the CC is not binding on the Liquidator, provided that where the Liquidator takes a decision different from the advice given by the CC, he shall record the reasons for the same in writing.

10. Implications of Sec 31 (A) for the Liquidator

a) Thus, it can be seen from the above that the seemingly independent Liquidator (answerable only to AA) is not all that independent in actual, practical terms.

b) Going against the advice of CC and recording reasons for the same will create litigation problems for the Liquidator.

c) Any of the stakeholders (particularly the workmen) might feel aggrieved by the decision of the Liquidator and challenge it before NCLT/NCLAT. The Challenge would be for the reasons recorded, attributing motives and malafide intentions to the Liquidator.

d) Also, FCs (banks) are bound by IBC to propose the name of an IP for each case taken to NCLT under Sec 7 of IBC, which name is generally approved by the NCLT. Thus, FCs become the largest employers of/assignment givers to the Insolvency Professionals.

e) Now it is upto the Liquidator whether he gets convinced by the advice of the Consultation Committee or he convinces them of his ideas.

f) But he has to necessarily present a unanimous decision to the AA, if he does not want to record reasons in writing and face subsequent litigation.

11. Practical problems for the Liquidator and Suggested Approach

a) The sale by private contract is fraught with the danger of humungous amount of litigation, because there is every possibility of either the disgruntled promoters and/ or aggrieved members of CC would try to malign the Liquidator, by challenging the decision before NCLT and NCLAT, by attributing motives and malafide intentions.

b) In view of the Sec 31 (A) of IBBI's Liquidation Process Regulations (amended upto Aug 05, 2020), the Liquidator has toput up the proposal for sale of assets of CD by private contract to the CC giving all the details of the party and its offer. It is suggested and it would be better to get the proposal approved by a majority vote (of not less than 75% of the members, which of course is a suggestion only).

c) After getting it passed through the CC as above, the Liquidator should submit the proposal to the Adjudicating Authority and get the final approval, so as to minimize future problems/difficulties.

d) Time is the essence of Liquidator's function in as much as he is supposed to complete the Liquidation Process within one year as per Sec 44 of Liquidation Process Regulations.

Conclusion

Invariably, the Liquidator would have to approach the AA for an extension of time. Here the most important problem for the Liquidator arises - the enormous delay in getting his fee and to pay for the experts and staff he employed. All these people will be working pro-bono till such time. The liquidator has the enormous task of legal compliance on one hand and realizes enough value of the assets of the CD so that the creditors are repaid maximum with satisfaction. The success of a Liquidator depends on a very strong compliance team which is not only updated with legal provisions and judicial orders but also have analytical capabilities to foresee the possible wrong impact of any decision. This is because all the actions are not only under the scrutiny of the AA but also under the eyes of creditors through CoC, the Liquidator should weigh all the decisions before implementation. The same shall be recorded with reason to avoid any unwarranted allegation in future.

The Journey of Resolution of Essar Steel India Limited (ESIL) under IBC

The resolution of Essar Steel India Limited (ESIL), the largest of the 12 accounts in the first list referred to insolvency under the IBC, 2016 (Code) by the Reserve Bank of India (RBI) in June 2017, has been significant for the financial eco-system from various dimensions. Apart from the single largest resolution under IBC, it resulted in the highest ever realization from a stressed asset to the banks in terms of quantum and percentage of amount realized by creditors.

ESIL was admitted into corporate insolvency resolution process (CIRP) on August 2, 2017 and Satish Kumar Gupta was appointed as Interim Resolution Professional (IRP) who was confirmed as Resolution Professional (RP) by the Committee of Creditors (CoC). During the course of resolution of ESIL, IBC as a resolution mechanism for stressed assets has been comprehensively tested in a large and complex account like ESIL with two rounds of litigations going right up to the Supreme Court thereby establishing the credibility, effectiveness and transparency of the CIRP. Besides, during the CIRP several precedents were established in litigations and courts interpreted/ clarified various key issues under the IBC which have added value to the IBC regime.

It also demonstrated that not only CoC regime can be implemented successfully under IBC, but operational excellence can also be achieved during this period. This journey also shows that other than multi-domain knowledge, inter-personal skills to manage stakeholders with different interest and ability to resolve conflicts are very important competencies of insolvency professional.

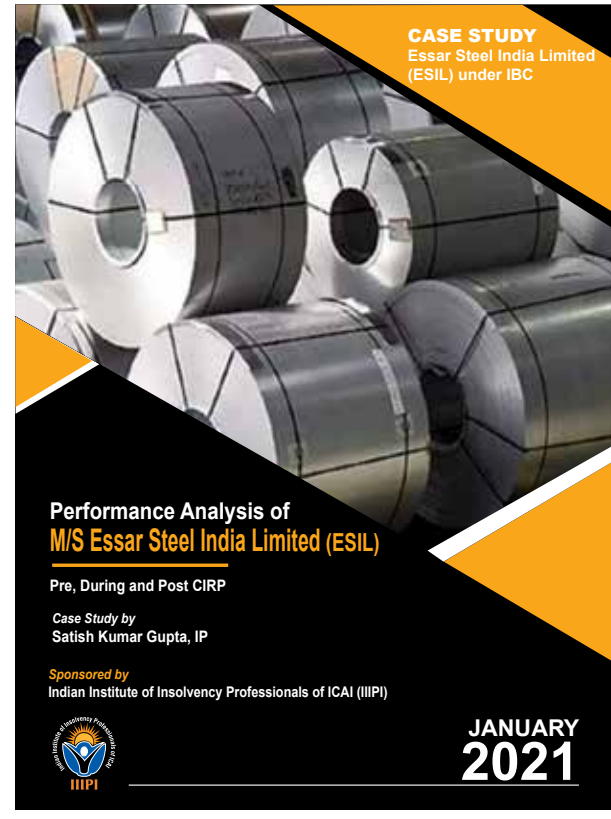
The case is interesting with sunshine and clouds in its path and is valuable for IBC ecosystem for constructive roles played by various stakeholders for the maximization of value of assets in spite of having, at times, conflicting objectives. Read on to know more…

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

Introduction

Essar Steel India Limited (ESIL), an integrated steel producer with an installed steel-making capacity of 9.6 million tonnes per annum (MTPA), was promoted by the Ruia/Essar group. ESIL, in top four steel manufacturers in India and the largest integrated steel manufacturer in the Western India, has manufacturing operations strategically located in the Western India in close proximity to the major steel market. Its product portfolio includes hot rolled steel, cold rolled steel, galvanised and colour coated coils, plates, pipes, etc.

ESIL has produced steel used in some of India's most iconic public works projects such as the Bogibeel Bridge (India's longest railway bridge) on Brahmputra River in Assam and Chenab Bridge on Chenab River in Jammu & Kashmir. It also produces bullet proof steel used in warships, battle tanks, armoured vehicles and steel used in many of India's most recognizable automobile and industrial products.



ESIL's manufacturing facilities primarily comprise:

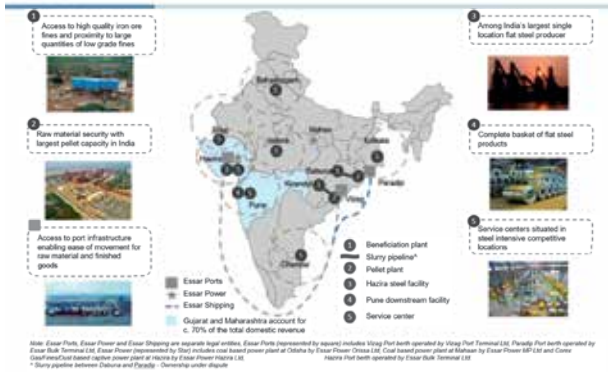
1. Beneficiation plant at Kirandul and Dabuna (Odisha and Chhattisgarh) and pelletisation plants at Paradip and Vizag (Odisha and Andhra Pradesh).
2. Integrated steel complex situated in Hazira, Surat, Gujarat;
3. Downstream capability hub located in Pune, Maharashtra; and
4. Seven service centres in various parts of India to cater to needs of its end-customers

The equity share capital of ESIL, an unlisted company, was 97.5% owned by the Ruia group (the promoters) and the balance by the public shareholders.

1. Complexity of ESIL's Operations

Unlike other fully-integrated steel manufacturers, ESIL's facilities are spread over Eastern and Western India. Iron fines are converted into slurry and carried through pipelines to pellet plants. ESIL's Paradip and Vizag pellet plants are linked to iron ore mines through 253 kms and 267 kms slurry pipelines from Dabuna to Paradip (Odisha) and Kirandul to Vizag (Andhra Pradesh) respectively. Above pipelines provide very significant competitive cost advantage to ESIL as transporting through slurry pipeline is cost effective and environmental-friendly mode. Pellets are thereafter transported through ships from pellet plants to ESIL's steel manufacturing plant at Hazira, Gujarat.

Graph 1: Steel Facilities of ESIL at the time of CIRP



Source: ESIL Operational Information

ESIL's Hazira steel plant is the only plant in the world to have three crucial iron-making technologies at a single location – blast furnace, direct reduced iron (DRI) or midrex, and corex or smelting reduction process.

In view of spread out of various facilities, logistics plays very important role in ESIL's operations. Ports, shipping infrastructure are owned by separate legal entities of the promoter group and in some of these entities ESIL had non-majority shareholding. Each entity has its own set of lenders and has independent contract for providing services to ESIL. The Essar Ports Ltd includes Vizag Port Berth operated by Vizag Port Terminal Ltd, Paradip Port Berth operated by Essar Bulk Terminal Paradip Ltd, Hazira Port Berth operated by Essar Bulk Terminal Ltd. Power suppliers include coal based power plant at Odisha by Essar Power Orissa Ltd, coal-based power plant at Mahan, Madhya Pradesh by Essar Power MP Ltd, gas-based 500 MW Bhander Power Limited and Corex Gas/Fines based captive power plant at Hazira operated by Essar Power Hazira Ltd. The title of slurry pipeline between Dabuna and Paradip, which was very critical for operations of ESIL, was disputed.

Above structure of operations and ownership resulted in a lot of inter-dependence of operations of ESIL on other Essar group companies. Any potential acquirer would be carefully evaluating such structure as any non-cooperation from these companies will put the operations of ESIL into jeopardy.

2. How did ESIL reach here? Major problems which led to Financial Distress

ESIL's financial problems were a result of expansion of plant facilities fuelled by debt, addition of plants based on availability of natural gas for production. ESIL's DRI units were dependent on the supply of natural gas for production. Due to fall in gas production in India, ESIL did not get its critical fuel and had to purchase the shortfall of gas at spot prices, which was at times three times higher than the earlier contracted price. As a result, the financial performance of ESIL suffered on account of sudden escalation of input costs (primarily gas), an overly dispersed supply chain, highly leveraged balance sheet and strong competition.

To mitigate its dependence on natural gas, ESIL operationalized 2 Corex production modules at Hazira, thus replacing about 30% of ESIL gas requirement through own generated Corex gas. It also shifted from gas- based power to coal based power for meeting its requirement and established 400KV transmission system to facilitate ESIL's connectivity to the National Grid to source power from across the country at competitive prices. ESIL also undertook various capital expenditure projects to mitigate above risk as well as to improve its competitive edge which overleveraged its balance sheet. Many of these projects could not be completed due to liquidity issues. ESIL's performance suffered adversely on account of high debt with operations at low-capacity utilization due to shortage of working capital. The account of ESIL also became Non-Performing Asset (NPA) with its banks.

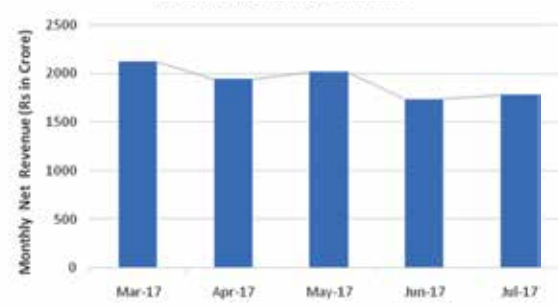
In April 2016, lenders of ESIL retained SBI Capital Limited and ICICI Securities Limited as advisors for the purpose of induction of a strategic/financial investor in the company. However, above efforts did not succeed mainly inter alia on account of concerns of inter-dependence of ESIL's operations on group entities and disputed ownership of one of the slurry pipelines.

3. ESIL's Pre-Corporate Insolvency Resolution Process (CIRP) Performance

In October 2016, ESIL's promoters submitted a restructuring proposal to the banks which included restructuring of debts, infusion of funds by the promoters, conversion of a portion of debt into share capital, segregation of sustainable and unsustainable debt, etc. Pending decision on the debt restructuring proposal, the banks permitted 'holding on operations' arrangement to the company. The 'holding on operations' facility from the working capital consortium banks, enabled the company to conduct its day-to-day banking operations like opening of Letter of Credits (LCs) upon funding of 100% cash margin, issuance of bid bond and other guarantees, etc. Above restructuring scheme could not be finalized as no agreement on terms of restructuring could be reached between the promoters and banks.

In the period leading to insolvency, ESIL developed significant structural and operating problems.

Graph 2: ESIL Performance in Pre-CIRP period



Source: ESIL performance in FY 2017-18

Most obvious was the huge unsustainable debt the Company had accumulated. By mid-2017, ESIL had total debt of approx. Rs 50,000 crore with annual interest payments more than a few multiple of the Company's EBITDA. Under such circumstances, following actions inter alia worsen the situation as in most of the distressed cases:

a. Most of the cash generated by ESIL was appropriated by its lenders towards its defaulted dues leaving little for ESIL to upkeep its assets or increase its capacity utilization; and

b. Remuneration of top professional management was not approved by banks as per Sections 196 and 197 of the Companies Act, 2013

Most of ESIL's steel capacity were dependent on the supply of natural gas for production. Due to fall in gas production in India, ESIL did not get its critical fuel and had to purchase the shortfall of gas at higher prices, which increased its cost of production and led to liquidity issues.

On account of liquidity constraint, the senior management was managing crises on a day-to-day cash management strategy as they attempted to keep the Company afloat. At the same time, ESIL had not provided any salary raise to its employees during FY2017, whereas its competitors were providing an annual increment of about 7%, which affected its employee's morale.

4. Pre-CIRP Litigations

On June 16, 2017, RBI directed banks to initiate insolvency procedure against 12 large

loan defaulters. The State Bank of India (SBI) and Standard Chartered Bank (SCB) filed application under Section 7 of IBC, 2016 for initiating CIRP against ESIL with Adjudicating Authority (AA) i.e., NCLT, Ahmedabad. However, ESIL challenged reference to IBC by the banks and filed writ petition in Ahmedabad High Court. ESIL contended that its operations are very complex, involve large number of stakeholders and highlighted potential risk to its operations and value under the hands of Interim Resolution Professional (IRP). Infact, during early days of IBC in May 2017, in one of the IBC account, Starlog Enterprises Limited, its directors had raised issue of mismanagement of the company's operations by IRP and NCLAT had declared the appointment of IRP as illegal on other grounds[1]. Due to above, there were wide-spread apprehension that the promoters of companies referred to IBC will not co-operate and CIRP processes will not be smooth. On July 17, 2017, Gujarat High Court dismissed ESIL's writ petition[2] and thereafter hearings for admission of insolvency application commenced at NCLT.

5. Commencement of CIRP

5.1. Initiation and Appointment of IRP/RP

At the time of admission in NCLT, ESIL again inter-alia contends whether IRP can manage such complex operations. NCLT stated that as per the Code, IRP runs the operations along with the existing management and admits insolvency petition[3] on August 2, 2017. With August 2, 2017 as Insolvency Commencement Date (ICD), NCLT appointed Satish Kumar Gupta as IRP. It was therefore really a testing time of IBC and for IRP/RP and lenders as any failure or disruption in operations or value loss could have led to loss of credibility to the process under IBC as was contended by the promoters in legal proceedings.

On initiation of CIRP, IRP issued a public announcement under Section 15 of the Code. From ICD, the management of the affairs of ESIL vested with IRP and the powers of the Board of Directors were suspended and were exercised by IRP. As per Section 20 of the Code, IRP has to make every endeavour to protect and preserve the value of the property of the company and manage the operations of the company as a going concern. IRP verifies the claims received and forms the CoC. The CoC confirmed the appointment of Satish Kumar Gupta as the RP in its first meeting.

On account of liquidity constraint, the senior management was managing crises on a day-to-day cash management strategy as they attempted to keep the Company afloat. ESIL had not provided any salary raise to its employees during FY 2017, whereas its competitors were providing an annual increment of about 7%, which affected morale of its employees.

With the context given, as may be visualized, IRP faces numerous challenges of hostility from many quarters including aggrieved creditors and has to ensure co-operation from various stakeholders such as promoters, management, creditors, etc. to ensure the value preservation as well as to continue the operations of the company under such demanding circumstances. Subsequent paras delineate various measures and steps taken to ensure meeting of the above objectives.

5.2. Communication with Stakeholders including employees of ESIL

Immediately on initiation of insolvency, communication was sent to all stakeholders informing them about CIRP and asking to file claims wherever applicable. Meetings, discussions, townhall meetings, etc were held with senior management, Key Managerial Personnel (KMP) of the Corporate Debtor (CD) i.e., ESIL, employees, vendors, customers to explain the process of CIRP, its impact and how the resolution of the company will be beneficial to these stakeholders. Their roles as delineated in IBC were also clearly communicated. ESIL personnel were informed of new authorization and were also made aware that any non-compliance and non-cooperation would be dealt with under Section 19 of the Code.

1. NCLAT Order in Company Appeal (AT) (Insolvency) No. 5 of 2017 in the matter of *Starlog Enterprises Limited v. ICICI Bank Limited* May 24, 2017

2. Gujarat High Court order in the matter of *Essar Steel India Ltd v. Reserve Bank of India* dated July 17, 2017 https://indiankanoon.org/doc/28218075/

3. NCLT, Ahmedabad Order admitting ESIL into insolvency https://ibbi.gov.in/2ndAugust17inthematterofEssarSteelsLtdCPIBNo407NCLTAhm2017.pdf

Statutory authorities, in particular, were communicated of commencement of CIRP and its impact on their dues was explained so that no coercive action would be initiated by them. These authorities were also advised to file their claims.

Transparency and fairness plays important role in RP's functioning. RP faces conflicts on a daily basis for running operations and has to take decisions. Whenever there was a situation in which a difficult decision was to be made by RP or conflict among different stakeholders, decision was taken based on the basis of two principles, firstly which complied with laws and, secondly which maximized the value of the company. RP was supported by its team, management, legal teams etc. Above enshrined principles provided guidance to RP and his team while taking decisions and enabled us to take right decision which stood scrutiny over a period.

As IBC was under evolution, communication was initially mostly meant to be in terms of the compliance and educating various stakeholders of the provisions of the Code and impact thereof. However, with time, communications became bidirectional and purposeful. Various issues and concerns were noted in meetings with various stakeholders that enabled us to deal with some of the critical issues with co-operation of these stakeholders. Above process ensured active support, less disputes and obviated much litigation.

6. Challenges in Managing the CD (ESIL) as a Going Concern (GC)

The most challenging part initially faced as IRP was to manage ESIL as a 'Going Concern' (GC) after its admission into insolvency. First and foremost, challenge was the liquidity position of ESIL and its adverse impact on operations.

6.1. Liquidity Issues and its impact on operations

As per the Code, the creditors' claims are frozen as on Insolvency Commencement Date (ICD). As a result, all suppliers of ESIL demanded payment of their old dues before resumption of supplies and quite a few vendors threatened to cut-off supplies/services. Thereafter, after explaining constraint under the provisions of IBC, most of vendors/suppliers agree to supply raw materials/goods against cash payment only or with almost no credit period. Major bulk raw materials such as coke, iron ore, gas, graphite, zinc, etc. are largely purchased by ESIL on cash basis only or imported by opening Letters of Credit (LCs).

ESIL's ground stock level (days of consumption) of key bulk raw materials with long lead times on ICD was running less than minimum level for smooth operation. Any disruption in plant operation will cause stoppage of plant for several days as shutting down and re-starting of a steel plant is time consuming and costly exercise. ESIL's Accounts Payables had increased by Rs 900 crore from March 2016 to July 2017. Post-ICD, banks also restricted opening of LCs for import of critical raw materials only against 100% to 110% cash margin.

Sudden adverse impact on liquidity threatened ESIL's operation but also led to lower production of value-added products. Lack of liquidity also impacted off-take of materials from ships at port and ESIL suffered additional cost of demurrage. Lower production volume, procurement of inputs at spot prices and other factors increased the cost of production per tonne.

Pre-CIRP, the lenders to the company had established a centralised Trust and Retention Account (TRA), wherein all collections were being received. Above TRA account also facilitated recovery of part collection of cash flows, called tagging, by existing lenders thereby reducing cashflows available with the company.

ESIL's requirement of funds therefore post-ICD increased significantly. The senior management of the company worked out infusion of Interim Financing of Rs 1,500 crore for disruption free operations at current run rate which after detailed granular assessment was scaled down to Rs 775 crore. In absence of such facility, it was expected that ESIL's production run rate will fall by about 20% to level of 400 KT (Kilo Tonnes) per month from 480 KT in July 2017 and EBITDA will fall drastically.

It therefore became imperative to improve liquidity by raising finance or credit lines to arrest ramp-down of capacity on account of low inventory of raw materials, thereby threatening its going concern basis. In a situation like

insolvency, raising large interim finance was not feasible as ESIL account was an NPA with banks and market for such finance did not largely exist. Therefore, instead of looking at external sources, focus was on looking internally to generate liquidity. Immediate challenge was to stabilise production by ensuring payments to vendors and ensuring availability of adequate raw materials to boost throughput.

6.2. Measures taken to improve Liquidity

a) **Credit Lines from Third party Suppliers:** ESIL had Cash and Carry facilities from MSTC Limited (MSTC) and other trade financiers for supply of bulk suppliers of raw materials which were revived. The purchase of major raw materials such as imported coal, coke; iron ore fines and pellets by ESIL required cash/advances or LCs which required availability of sufficient free cash flows. The working capital limit of ESIL from banks was fully drawn. In order to have access to working capital to fund raw materials, ESIL and MSTC entered into a Cash & Carry mechanism wherein MSTC opened LCs and financed ESIL's raw material requirements. These goods were retained by MSTC at site as custodian and released to ESIL only after payments on cash and carry basis. This arrangement obviated need for ESIL to open LCs, block cash and enabled ESIL to pay for raw materials at the time of its requirement. MSTC established credit line to the tune of Rs 850 crore, which it progressively released fully as ESIL's operations grew.

b) **No adjustment/ tagging by banks:** In view of liquidity issues and commencement of CIRP, banks were requested to defer tagging of amounts from bank account which banks agreed to. Tagging was eventually stopped after NCLT, Chandigarh order in case of Amtek Auto Limited[4] which held that any amount lying in the current account of the company has to be placed at the disposal of the RP without any scope of an adjustment in the manner. Above decision enabled companies under IBC to utilize their internal cashflows for operations and maintain going concern basis. An amount of about Rs 6 crore received by an NBFC during CIRP were recovered through legal process and was finally refunded to ESIL.

In order to have access to working capital to fund raw materials during CIRP, as one the measure ESIL and MSTC Limited entered into a Cash & Carry mechanism wherein MSTC opened Letter of Credits and financed ESIL's raw material requirements. These goods were retained by MSTC at site as custodian and released to ESIL only after payments on cash and carry basis.

c) **Support of certain working capital banks:** As the account of ESIL was NPA, working capital banks do not open LCs/issue guarantees despite 100% margin being provided as any additional exposure is also treated as NPA. However, SBI, Canara Bank, IDBI Bank, ICICI Bank, Punjab National Bank etc. continued to provide support to operations of the company by opening LCs/ issue guarantees. SBI also supported ESIL by renewing the guarantee for mining lease of iron ore wherein ESIL was declared a preferred bidder earlier.

d) **Optimisation of working capital and reducing costs:** Strict monitoring of utilisation of funds as provided under the Code mainly for maintaining ESIL's going concern basis was done. In addition, following measures were taken to improve liquidity position:

(i) Better inventory management and product-mix to lower requirement of working capital;

(ii) Review of all major procurement/ capital expenditures spends to reduce sourcing costs;

(iii) Reducing costs of outward freight by direct negotiation with transporters;

(iv) Renegotiating natural gas costs through bulk purchasing;and

(v) Optimization of power cost using cheaper sources such as Indian Energy Exchange (IEX) and cheaper power off-take from some of the group companies.

e) **Shorter credit periods and discounting of LC backed sales bills:** Exports of ESIL

4. NCLT Order in CA No.142/2017 IN CP (IB) No.42/Chd/Hry/2017 in the matter of *Corporation Bank v. Amtek Auto Limited* dated October 13, 2017

ranged from 15-20% of its total sales due to its focus on value-added products. During year 2017-18, ESIL achieved exports of 18% of total sales. Exports which entailed long credit period or to buyers with irregular payment record were not encouraged.

CoC also approved discounting of LC backed export sales bills for quicker realization of export sales to further improve liquidity. Marketing team kept its focus on exports even during periods of buoyant domestic market. This enabled ESIL to maintain its export volumes even during period when domestic market realizations declined from November 2018 onwards.

The impact of participative management during CIRP was soon felt on the operations of ESIL as senior management felt empowered to suggest solutions and take decisions with shared values to maximize value.

f) **Support from major customers:** Major customers also provided advances to ESIL to tide over liquidity issues. ESIL being a manufacturer of quality value-added steel had major automobile manufacturers such as Maruti Udyog, Tata Motors, Mahindra & Mahindra, Volvo Eicher, JCB, etc. as its major customers. These long-term customers were anxious whether ESIL would be able to continue its commitment of supplies during insolvency without any disruption. Initial period of insolvency is very vulnerable period as not only customers are anxious but competitors also attempt to gain additional market share. Automotive customers that buy from ESIL typically do so on a six monthly basis and needed to be re-assured about regular supplies. However, looking at stabilisation of production in a short time, these customers not only continued their purchase but also increased their off-take within a few months to absorb ESIL's additional production.

g) **Measures to improve performance:** Any liquidity crunch results in low asset upkeep and not undertaking adequate maintenance expenditures for plant & machinery to operate at optimal levels, which can lead to unsafe conditions as volume throughout is ramped up. Therefore, in addition to stabilisation of production, it was ensured that normal capital expenditure and repairs of plant and machinery are also taken on time. For example, repairing of Corex Module 2 was undertaken at a cost of Rs 35 crore with CoC approval. During CIRP, production from 3rd Strand CSP (Compact Strip Production) Caster was stabilized and it achieved rated capacity in its very first year of operation – with this ESIL became the first company in the world with three CSP Casters attached to single CSP Mill. Above measures not only enabled management team to increase throughput but also in a safe manner. Similarly, various, de-bottlenecking exercises were implemented at minimal costs to increase production, utilise resources better and to reduce costs.

6.3. Key to Success – Human Resources

"Clients don't come first. Employees come first. If you take care of your employees, they will take care of the clients", this age-old adage of Richard Branson holds true when it comes to management of human capital in any corporate entity.

ESIL suffered low morale of employees as most of them were anxious about uncertainty of the fate of the company and their jobs. In addition, their monthly salaries were considerably delayed. Realising the need for boosting morale of the personnel, it was ensured that salaries were paid on time. In addition, remuneration of some of the KMPs was regularised with the consent of CoC as per the Companies Act, 2013 which were pending for a long time in pre-CIRP period.

Though, salary can't be the only factor which can motivate, given circumstances, it was the best action to take as ESIL's human resources could have tapped into full potential of its available resources. In a distressed situation, decision making and allocation of resources becomes top-driven and involvement of employees is first casualty. It was therefore imperative to build positive momentum by empowering people to act. By having regular Management Committees meetings along with senior management with exhaustive agenda, it was ensured that operational decision making don't suffer as Board was suspended. The impact of participative management was soon felt as senior management felt empowered to

suggest solutions and take decisions with shared values so as to maximize value. RP's team also worked in tandem with the personnel of ESIL.

Employees' trust and co-operation was fully gained in a short time. It was ensured that employees' salaries were paid on first of every month against 15-20th day of month pre-IBC period. Further, their anxiety on fate of the Company also got addressed as production volumes stabilised. Annual average increments of 5.4% and 7.5% were given to employees for years 2018 and 2019 respectively. As a result, during CIRP, continuity of leadership was ensured and no major talent was lost which could have disrupted operations.

ArcelorMittal retaining most of ESIL's senior management and other personnel after its takeover is a testimony to the professionalism displayed by the personnel of ESIL during CIRP and dispelled the myth of non-cooperation of employees during insolvency.

6.4. Mantra for Promoters' co-operation

Shielding ESIL against the inter-connectedness with other group companies like Essar Ports Limited, Essar Shipping Limited, Essar Power Limited etc. whose discontinuance of services could have disrupted the operations of ESIL, was crucial for running CD as a GC. Continuance of Group companies' support in operations – ports, power, shipping, etc. at the time of ICD was very important. This is because, there were apprehensions that group companies' support may not be available and operations of ESIL will come to grinding halt. As financial position of some of the group companies were not satisfactory, lenders of these companies had also decided to take them to insolvency proceedings, if they defaulted, for joint resolution or group insolvency.

As production levels at ESIL increased on month on month basis, volumes handled by these entities also increased correspondingly. While on ICD, a number of these entities were handing volume below minimum guaranteed levels (MGL), some of these entities were under stress on their payments to banks and were Special Mention Accounts (SMAs). With improvement in volumes at ESIL, the financial position of these entities also improved significantly with enhanced volumes mostly above MGL and therefore, it was in these companies' own interest to co-operate with ESIL in continuing and supporting ESIL operations. As most of these services contract were at arm's-length basis, CoC also approved these related party transactions under Section 28 (1) (f) of the Code. As these Essar Group entities also performed better, economic interest of the promoters was aligned with disruption free operations of ESIL.

With improvement in volumes at ESIL, the financial position of group entities providing services to ESIL also improved significantly with enhanced volumes mostly above Minimum Guaranteed Level and therefore, it was in their own interest to co-operate with ESIL in continuing and supporting ESIL operations and economic interest of ESIL and promoters got aligned thereby resolving issue of inter-connectedness and disruption to the operations

On account of EBIDTA generated during initial period of CIRP, utilisation of cash and carry facilities from third parties, absence of tagging by banks, strict end-use monitoring of cash, measures taken to reduce costs and working capital cycle along with support of CoC and most of other stakeholders resulted in improved cashflow position. Timely current payment to vendors enabled ESIL to stabilise its production in a short time. This also infused confidence to vendors and customers in ESIL's ability to sustain its production volumes. Stabilization phase was followed by consolidation and growth phase over a period of time. As a result of all these measures, ESIL achieved its highest monthly production of 600 KT. Further, yearly production of ESIL[5] increased from 5.47 million tonnes (MT) in year 2016-17, 6.18 MT in year 2017-18 to its highest ever production of 6.78 MT in year 2018-19. ESIL achieved 23 percent increase in total income of Rs 31,974 crore in FY2019 as compared with total income of Rs 26,028 in FY2018.

During CIRP, it was ensured that ESIL's business results were presented to/shared with CoC on a monthly basis. Information on production, sales, cost, net sales realisations,

5. Annual Report - Essar Steel India Limited for years 2016-17, 2017-18 and 2018-19

EBITDA per tonne, changes in working capital, variance analysis, bottlenecks, payments made to related parties, etc were shared with CoC for their review, suggestions and co-operation wherever required.

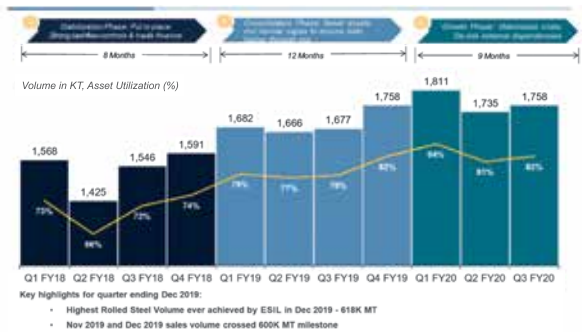
Operations at higher capacity utilization level along with profits generated demonstrated to bidders of ESIL that the plants of ESIL can be run at higher capacity and production can be increased further with minimal capital expenditure. This enthused and enabled bidder to provide higher offers for ESIL in their resolution plans.

The monthly measurement and monitoring led to generation of the largest profits during CIRP under IBC. CoC therefore first time under IBC stipulated in Request for Proposal (RFP) that profits earned during CIRP will go to the financial creditors account unlike many other IBC contemporary accounts wherein either profits went to successful resolution applicant or there is ambiguity around it.

The introduction of MIP (Minimum Import Price) and quality standards by the Government of India resulted in better sales realization and contained oversupply situation in the Indian steel market. Steel prices recovered and remain steady for most of 2018. That enabled ESIL to push up its production and to ensure suppliers are paid on time customers as mostly automakers absorbed the additional output. MSTC cash and carry facility reduced over a period of time with plough back of earnings and at the end of CIRP, utilization of above facility was almost nil.

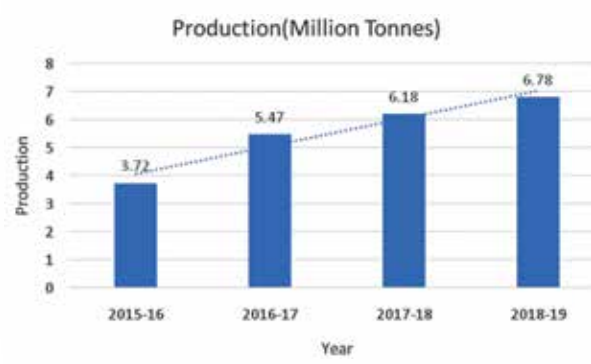
Operational turnaround demonstrated that ESL's plant could be run without hindrance in spite of inter-connectedness of group's facilities. In the past, the plant had not achieved production of above 6 million tonnes in a year and therefore higher production capacity of ESIL was untested. Operations at higher capacity utilization level along with profits generated demonstrated to bidders that the plants of ESIL can be run at higher capacity and production can be increased further with minimal capital expenditure. This enthused and enabled bidder to provide higher offers for ESIL in their resolution plans.

Graph 3: Progression of CD during CIRP Period



Source: ESIL CIRP Performance Report

Graph 4: CD's production during CIRP



Source: ESIL Annual Reports 2018-19

7. Resolving Claims of Creditors

Total claims of Rs 82,541 crore were submitted, out of which claims of Rs 54,565 crore were admitted on verification. A summary of ESIL's claims submitted and admitted is as follows:

Graph 5: Claims of Creditors

(Rs in crore)

Sl. No.	Category of Creditor	Amount Claimed	Amount Admitted
1	Financial Creditors	55,440	49,473
2	Operational Creditors other than Workmen and Employees	27,081	5,074
3	Operational Creditors - Workmen and Employees	20	18
Total		82,541	54,565

Source: ESIL CIRP List of Creditors

During CIRP, many FCs assigned their claims, more than 15% of claims of FCs, to foreign

distressed investors and Edelweiss Asset Reconstruction Company (EARC). HDFC Bank and Axis Bank assigned their claims to SC Lowy, Bank of Baroda, Laxmi Vilas Bank, etc. to EARC and Bank of Baroda and IDBI Bank to Duetsche Bank (DNA Article dated July 19, 2018- Foreign funds lapped up Essar Steel Loans from banks). Infact, on account of delays in closure of insolvency, SBI also initiated sale of its financial assets in January 2019, post-CoC approval of the Resolution Plan and its filing in NCLT; however, same was dropped subsequently.

As may be observed, a large number of claims of creditors were not admitted on account of these being disputed or having other issues in terms of provisions of IBC. Significant number of litigations was pursued by these aggrieved creditors. The HDFC Bank, of which initial claim till ICD was accepted, subsequently got a foreign decree against ESIL in a London Court in respect of its ECB. Subsequently, it re-filed higher claim amount with RP as per decree to be admitted. As the revised claim was not as per provisions of IBC, the same was rejected. It was followed by proceedings in AA wherein HDFC prayed for its higher amount to be admitted and challenged appointment of RP whereas RP also filed for violation of moratorium under Section 14 of the Code. Eventually, HDFC Bank assigned its claim admitted as on ICD to SC Lowy.

It is important for an IRP/RP to verify the claim documents, in particular claims including assigned to third party should be properly stamped as per Section 5 (7) and 5 (20) of the Code which require such debt to be legally assigned and give the creditor an opportunity to pay requisite stamp duty so that claim can be admitted. In ESIL, one of the major claims of Rs 5,325 crore filed by a related party creditor both as financial and operational creditor was not duly stamped. Above creditor undertook to pay differential stamp duty to authorities and to furnish duly stamped documents to RP. However, above creditor failed to submit stamped documents and therefore above claim was not admitted. There was no challenge to the non-admission of above claim by the creditor.

Some of the major precedents established in respect of claims as per on SC Order[6] dated November 15, 2019 are as follows:

a) **Under/Non-Stamped Document:** The RP rejected the claim of the Appellant on the grounds of non-availability of duly stamped agreements in support of their claims and the failure to furnish proof of making payment of requisite stamp duty as per Indian Stamp Act, 1899 despite repeated reminders sent. NCLT and NCLAT had agreed with the above finding and SC upheld the above position though the claimant had paid the requisite stamp duty post-NCLAT judgment.

b) **Disputed Claims:** Various disputed claims filed by operational creditors (~Rs 14,000 crores) were asked to be registered by NCLT and were admitted by NCLAT in its judgment dated July 4, 2019. SC held that RP was correct in admitting the claim at a notional value of Re 1 due to the pendency of disputes with regard to disputed claims. Notional value was admitted to keep such creditors involved in CIRP of ESIL.

c) **Claim filed after approval of resolution plan:** SC held that NCLAT rightly rejected the claim in view of the fact that said claim was filed after the completion of the CIRP period. However, the NCLAT's judgment which left it open for the creditor to pursue the matter in terms of Section 60(6) was set aside.

d) **Clean slate:** SC clarified that re-agitation of undecided claims cannot be permitted and that all claims must be submitted to and decided by RP so that prospective Resolution Applicant (RA) knows exactly what needs to be paid to take over and run the business. This ensures that successful resolution applicant starts running the business of the company with a "clean slate". Above is an extremely important judgment for successful Resolution Applicant's point of view so that it is not saddled with legacy claims.

8. Journey to Successful Resolution Plan of Arcelor Mittal Group

Based on Expression of Interest (EOI) issued in October 2017, various interested bidders carried out detailed due diligence of ESIL over

6. 2019 SCCOnline SC 1478 – Supreme Court judgment dated November 15, 2019 in the matter of CoC of *Essar Steel India Ltd v. Satish Kumar Gupta*

a period of almost 3 months. As a part of due diligence, RAs conducted various visits to the manufacturing units of ESIL, had structured meetings with the senior management of ESIL. Thereafter, in December 2017, Request for Proposal (RFP) was issued by RP after approval from CoC. In terms of RFP, ArcelorMittal, the largest producer of steel in the world and Numetal Limited, a company formed by the promoters of ESIL, submitted their resolution plans for ESIL along with requisite Earnest Money Deposit (EMD) of Rs 500 crore on February 12, 2018. The Graph 7 depicts entire insolvency process timeline.

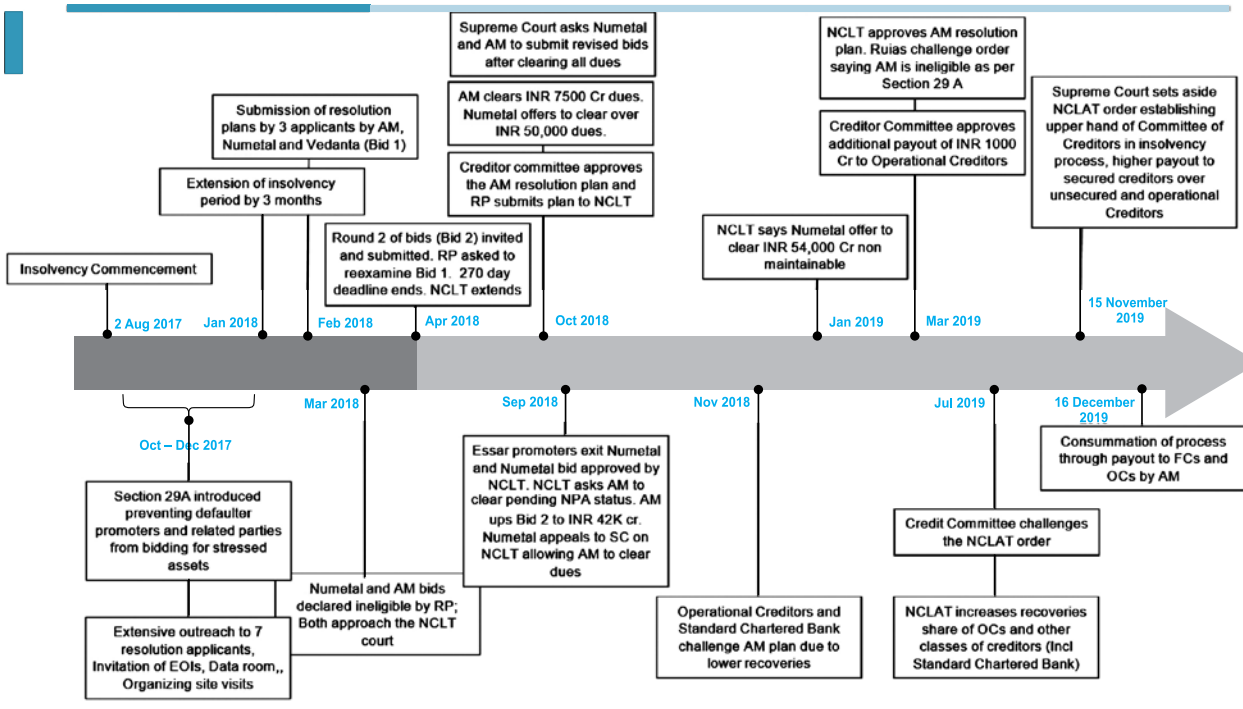
8.1. Introduction of Section 29A: While due-diligence process was ongoing, in order to prevent the promoters of defaulting companies from submitting resolution plans, the Government of India introduced an ordinance for amending the IBC on November 23, 2017 which introduced Section 29A setting out the eligibility criteria which must be satisfied in order for a person to be able to submit a resolution plan. The above Ordinance was replaced by the IBC (Amendment) Act, 2018 on January 18, 2018 (First Amendment). Section 29A of the Code as introduced by the First Amendment provided that a person will not be eligible to submit a resolution plan if such person or any other person acting jointly or in concert with such person or any connected person of such person fell within any of the criteria specified in Section 29A.

Based on media reports and apprehending that it would be held ineligible, Numetal, one of Resolution Applicant (RA), filed an application before NCLT on March 20, 2018 for obtaining stay on the process. NCLT orders that any decision of CoCin respect of eligibility will be subject to order passed by NCLT.

On examination of submitted resolution plans, on March 21, 2018, RP found both RAs, ArcelorMittal and Numetal ineligible to submit resolution plan for ESIL under various provisions of Section 29A and decision was conveyed to RAs. CoC decides to call fresh resolution plans. Accordingly, fresh resolution plans were submitted by ArcelorMittal, Numetal and a new RA, Vedanta Resources Limited. Thereafter, multiple litigations were initiated by RAs which revolved around challenging other RAs'eligibility and establishing their own eligibility.

8.2. NCLT Decision: On April 19, 2018, NCLT held that to determine eligibility, the date of

Graph 6: Timeline of CIRP



Source: Compiled from CIRP events

commencement of the CIRP of ESIL i.e. August 2, 2017 is relevant. It directed that CoC of ESIL (CoC) to follow due procedure while rejecting the bids of ArcelorMittal and Numetal and CoC to give an opportunity to both the bidders to remove their disability by paying the overdue amounts.

The CoC on May 8, 2018 after hearing both RAs found both ArcelorMittal and Numetal ineligible and held that in order to be considered eligible, both the bidders should pay the overdue amounts and interest pertaining to the NPAs of their related companies.

8.3. NCLAT Decision: On September 7, 2018, NCLAT pronounced its order in the appeal filed against the order of NCLT. NCLAT inter-alia held the following:

a) At the time of submission of the first resolution plan on February 12, 2018, Numetal was not eligible under Section 29A as Aurora Enterprises Limited (AEL), held by Rewant Ruia, was one of the shareholders of Numetal. However, at the time of submission of the second resolution plan on March 29, 2018, Numetal was eligible to submit a resolution plan as AEL was no longer a shareholder of Numetal, and the remaining shareholders were eligible under Section 29A.

b) AM Netherlands (a related party of Arcelor Mittal) was the promoter of Uttam Galva Steel Limited (UGSL) on the date when UGSL was classified as an NPA. Even though AM Netherlands sold its shares in UGSL thereafter, it would continue to be ineligible till payment of all overdue amounts relating to NPA account of UGSL is made. Further, LN Mittal Group (a connected person of Arcelor Mittal) had been the promoter and in the management and control of KSS Petron Limited (KSS Petron) since 2011. KSS Petron has been classified as an NPA by several banks. By merely selling all shares in KSS Petron, the ineligibility under Section 29A cannot be cured till payment of all overdue amounts relating to NPA account of KSS Petron is made.

8.4. Supreme Court's Judgement: Against the order of NCLAT, appeal was filed before the SC by RA. After hearing all parties in detail, the Supreme Court[7] vide its order dated October 4, 2018 put an end to multiple and also frivolous litigations by RAs even before any of the plans has been approved by CoC thereby maintaining focus on approval of resolution plan first. The actionable portion of the judgement could be summarized as follows:

The HDFC Bank, of which initial claim till ICD was accepted, subsequently got a foreign decree against ESIL in a London Court in respect of its ECB. Subsequently, it re-filed higher claim amount with RP as per decree to be admitted. As the revised claim was not as per provisions of IBC, the same was rejected.

a) RA has no vested right that his resolution plan be considered by the CoC, in light of which no challenge can be preferred before the NCLT by an RA, at a stage where (a) the Resolution Plan has been turned down by the RP for non-compliance of Section 30 (2) of the Code, or (b) a Resolution Plan as presented by RP is not approved by CoC. A challenge can be preferred only once a Resolution Plan is approved by the NCLT, before the NCLAT and thereafter the SC.

b) Purposive interpretation of Section 29A necessitates the lifting of corporate veil, so as to determine the eligibility of 'person' submitting a resolution plan. Above principle can be applied even to group companies so that one is able to look at the economic entity of the group as a whole.

c) Antecedent facts reasonably proximate to the time of submission of resolution plan can always be seen, to determine whether the persons referred to in Section 29A are, in substance, seeking to avoid the consequences of the proviso to sub-clause (c) before submitting a resolution plan.

d) Relevant time for disqualification is at the time of submission of the resolution plan

e) Interpretation of 'persons acting jointly or in concert' - to be seen whether certain persons have got together and are acting "jointly" in the sense of acting together

7. 2018 SCC Online SC 1733 – Supreme Court judgment dated October 4, 2018 in the matter of *ArcelorMittal India Pvt. Ltd v. Satish Kumar Gupta*

f) Issue and interpretation of 'management' and 'control' with respect to Section 29A of IBC are as follows:

   (i) "management" refers to the de jure (or actual) management of a CD in accordance with law

   (ii) "control" in Section 29A(c) denotes only positive control, which means that the mere power to block Special Resolutions of a company cannot amount to control.

g) Cure of ineligibility under Section 29A(c) – this ineligibility can only be removed if RA makes payment of all overdue amounts with interest thereon relating to the NPA in question before submission of a resolution plan.

8.5. Final Decision of SC in respect of eligibility of Resolution Applicants

Numetal was held ineligible as per Section 29 A(c) for both resolution plans on account of presence of Rewant Ruia, a person deemed to be 'person acting in concert' (PAC) with Ravi Ruia, promoter of ESIL. SC noted the content of affidavit submitted by trustee of Trust which owned shareholding of Numetal : "that the Trustee hereby confirm that AEL or Rewant Ruia neither are nor will, following the implementation of Resolution Plan, be a promoter of or have control over or have any management rights in the RA or ESIL...."

The SC further stated in its order that "the RP, after looking at this affidavit, correctly noted that statements of such a nature would not have been made by a truly independent trustee of a discretionary trust, which demonstrates that the trustee was under the complete control of promoters, this in turn indicates that Prisma Trust is one more smokescreen in the chain of control, which would conceal the fact ....."

ArcelorMittal was held ineligible as per Section 29 A(c) on account of UGSL as follows:

a) Shares of AM Netherlands in UGSL were sold at a time reasonably proximate to the date of submission of the Resolution Plan in order to get out of the ineligibility under Section 29A(c) and its proviso. Both AM India and AM Netherlands (promoter of UGSL) managed and controlled by LN Mittal and are deemed to be PAC.

ArcelorMittal was further held ineligible on account of KSS Petron as follows:

a) Fraseli, a group company of L N Mittal, exercised positive control over KSS Global and in turn KSS Petron

b) Sale of shareholding in KSS Global was a transaction reasonably proximate as in UGSL

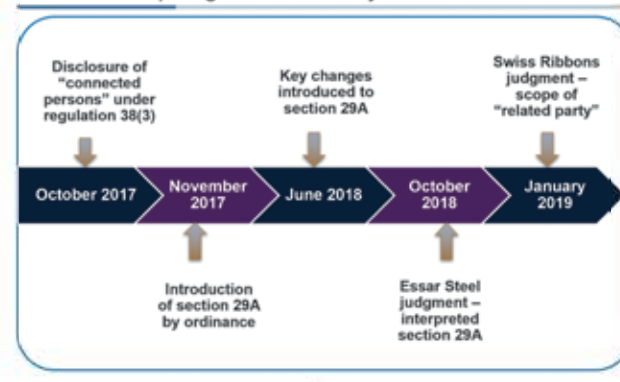
Thus, SC concluded that both ArcelorMittal and Numetal were not eligible to bid for ESIL under the IBC. In rendering this landmark decision, SC touched upon various management and control issues and in doing so, as mentioned in the judgement itself, laid down the law on Section 29A for the first time.

8.6. The Way Forward for Arcelor Mittal and Numetal: Above landmark decision at one point of time came to derail the CIRP process of ESIL as both bidders were disqualified. However, the opportunity given by SC under Article 142 of the Constitution to both ArcelorMittal and Numetal to pay off their dues relating to their NPAs in order to become eligible to bid for ESIL, provided way to pursue the resolution.

In terms of Section 43, 45, 50 and 66 of IBC, RP determined four avoidance transactions aggregating amount of Rs 299 crore, applications for which were filed with AA.

On October 18, 2018, ArcelorMittal in compliance with SC Order paid about Rs 7,500 crore to lenders of UGSL and KSS Petron to become eligible. Meanwhile, ArcelorMittal also obtained approval of Competition Commission of India (CCI) as per provisions of IBC for the acquisition of ESIL.

Graph 7: Key milestones of Section 29A during course of CIRP of ESIL



Source: Compilation from Regulations and Court orders

CoC evaluates resolution plans of ArcelorMittal and Vedanta on the basis of approved evaluation matrix and decides on ArcelorMittal plan as H1 or the highest bidder. CoC further negotiates with ArcelorMittal and approves its plan with more than 90 percent majority of CoC members. RP issues Letter of Intent to ArcelorMittal on behalf of CoC and ArcelorMittal submits Performance Bank Guarantee of Rs 3,950 crore in favour of CoC. On October 26, 2018, RP submits approved resolution plan of ArcelorMittalto NCLT for its approval.

Meanwhile, the promoters had also offered a settlement proposal to CoC through Essar Steel Asia Holdings Limited (ESAHL). CoC decided that same is not in terms of IBC and hence did not consider the same. In January 2019, NCLT rejected the settlement proposal of ESAHL filed under Section 60(5) of IBC as non-maintainable and held that ESAHL did not have a locus standi to make an offer for debt resolution as an RA. NCLT continued hearing approval of resolution plan of ArcelorMittal as approved by CoC which was challenged by many creditors.

On account of delays, on January 26, 2019, Mr. Amitabh Kant, CEO, Niti Aayog wrote in his article "No pendency for Insolvency"[8] that "the Essar Steel matter is a case in point, bogged down by delays linked, in large part, to litigations, to the point where it has been more than 530 days since it was admitted to the NCLT. Each day of delay is estimated to cost lenders a staggering Rs 17 crore in interest losses."

8.7. NCLT Decision

ArcelorMittal's resolution plan was conditionally approved by the NCLT, Ahmedabad Bench on March 8, 2019. In its order, the NCLT suggested that the CoC reconsider the manner of distribution of funds proposed to be paid under ArcelorMittal's resolution plan to ensure higher recovery to OCs and Standard Chartered Bank (SCB).

In deference of the NCLT order, CoC approved setting side of an amount up to a maximum of Rs 1,000 crore for OCs from their share in addition to amount being paid to OCs as per the Resolution Plan and retained the amount payable to SCB under the plan. Subsequent to approval of resolution plan by NCLT, a monitoring committee consisting of four members from CoC and four members from ArcelorMittal with RP as Chairman was formed to manage day-to-day affairs of ESIL.

8.8. NCLAT Decision

The order of the NCLT was challenged before the NCLAT by various creditors. By an order dated July 4, 2019 (NCLAT Order), the NCLAT:

a) approved ArcelorMittal's resolution plan;

b) held that a resolution plan should not differentiate between FC and OCs in the manner of payment of dues. The NCLAT ruled that the waterfall mechanism envisaged under Section 53 of the Code (applicable to the liquidation of a corporate debtor) could not be applied during the CIRP;

c) modified the distribution of amounts proposed to be paid to various creditors under such resolution plan so that all creditors (secured, unsecured and operational) were treated equally (resulting in approximately 60.7% recovery for all creditors);

d) increased the admitted claims of OCs to almost four times the original amount by admission of disputed claims etc.;

e) granted OCs whose claims had not been admitted by the NCLT or the NCLAT the liberty to institute or continue appropriate proceedings against ESIL even after the conclusion of its CIRP thereby adding more than Rs 14,000 crore of claims; and

f) held that the guarantees issued in respect of ESIL debt could not survive after the conclusion of CIRP as the underlying debt stood discharged.

Major FCs were aggrieved with disregard of their security interests as they felt that NCLAT order would make secured lending unattractive resulting in catastrophic consequences on the Indian banking sector. In addition, NCLAT decision that the distribution of amounts under a resolution plan is not a commercial decision also affected the rights of CoC. Aggrieved with the decision, the FCs amongst others challenged the decision of the NCLAT before the SC.

8. Amitabh Kant, 'No Pendency for Insolvency', The *Economic Times* dated January 26, 2019 https://economictimes.indiatimes.com/blogs/et-commentary/no-pendency-for-insolvency/

The delay in finality of resolution plan was causing anxiety to all stakeholders. On August 3, 2019, SBI Chairman Mr. Rajnish Kumar[9] said "Every quarter I am looking towards the sky and ask God when we will get all those decisions and recover that amount. Every morning I pray to God".

9. Subsequent Legislative Developments

While the appeals before the SC were pending, the IBC (Amendment) Act, 2019 dated August 6, 2019 (IBC Amendment Act) was introduced to:

a) modify the minimum payment to OCs under a resolution plan to the higher of the liquidation value and the amount payable to such creditors if the resolution amount was distributed in accordance with Section 53 of the IBC; and

b) provide for the minimum payment of liquidation value to dissenting FCs, and (iii) state that the CoC could determine the manner of distribution of funds under a resolution plan which could take into account the respective priority of creditors under Section 53(1) of the IBC.

An explanation to Section 30(2) (b) of the IBC was also introduced, which expressly clarified that a distribution in accordance with such section would be considered to be "fair and equitable". In Rajya Sabha, the Finance Minister said that the new changes to the IBC had been brought to clarify the interpretation problems that have arisen due to NCLAT ruling in ESIL insolvency case[10].

Writ petitions were filed by SCB and certain OCs challenging the constitutionality of the IBC Amendment Act. Creditors aggrieved by NCLAT order and challenge to IBC Amendment 2019 were tagged along with ESIL Resolution Plan proceedings in the SC.

10. Impact of Supreme Court's Judgement on November 15, 2019 on CIRP of ESIL

Through a judgment dated November 15, 2019, the SC settled several issues that plagued the insolvency resolution process in India since the inception of the IBC such as treatment of FCs and OCs, supremacy of CoC and the scope of review of the CoC's decisions. This could be summarized as follows:

a) The SC Judgment unequivocally held that the principle of "equality" could not be interpreted to mean that all creditors (irrespective of their security interest or their status as OCs or FCs) would be entitled to equal recovery under a resolution plan. The SC Judgement held that even within a class of secured FCs, differential treatment based on the value of security of such creditors would be permissible. The SC observed that if the security interest of the creditors was to be disregarded, such creditors would, in many cases, be incentivized to vote for liquidation rather than resolution of the corporate debtor. This would defeat the key objective of the IBC, i.e., to facilitate the revival of stressed assets.

Production of ESIL increased from 5.47 Million Tonnes (MT) in 2016-17, 6.18 MT in 2017-18 to its highest ever production of 6.78 MT in 2018-19 in spite of many challenges. Highest ever monthly production of 618 KT was achieved by ESIL in December 2019.

b) With respect to OCs, the SC recognized that the IBC itself contemplated OCs as a separate class of creditors. Certain safeguards, such as, priority in repayment were also built into the IBC to ensure the fair and equitable dealing of such OCs rights. Accordingly, the SC Judgement held that, as long as the provisions of the IBC were complied with, the CoC could approve resolution plans which provided for differential payment to FCs and OCs.

c) While the SC Judgment provides that the ultimate discretion of deciding the distribution of funds lies with the CoC, it states that such decision should indicate adequate consideration of the objectives of the IBC. The SC held that the NCLT and NCLAT can under no circumstances trespass upon a commercial decision of the

9. The *Economic Times* dated August 3, 2019,https://inshorts.com/en/news/every-morning-i-pray-to-god-sbi-chief-on-%E2%82%B916000-cr-recoveries-1564841131269

10. The *Business Standard* article dated September 23, 2019,https://www.business-standard.com/article/economy-policy/mca-defends-ibc-amendments-sticks-to-strict-deadlines-in-supreme-court-119092300088_1.html

majority of the CoC. The SC has clarified that the NCLT and the NCLAT have not been endowed with the jurisdiction to act as a court of equity or exercise plenary powers. The SC also stressed that while the ultimate discretion of what to pay and how much to pay each class or sub-class of creditors lies with the CoC.

d) Accordingly, the AA should ensure that the decision of the CoC takes into account the following factors: (i) CD (Corporate Debtor) should be kept as a going concern during the resolution process, (ii) value of assets of the CD should be maximized, and (iii) interests of all stakeholders should be balanced.

10.1. Extinguishment of claims and right to subrogation for payments made under the guarantees

While NCLAT had allowed creditors of ESIL whose claims had not been decided on merits by the NCLT or the NCLAT to pursue their claims against the CD even after the completion of the CIRP, the SC unequivocally held that all "undecided" claims of the CD stand extinguished once a resolution plan was accepted. The SC Judgment recognized that a prospective resolution applicant would need to know the total debt of the CD before acquiring it and start the business of the CD on a "fresh slate". It also held that there would be no right to subrogation in respect of any amounts paid under the guarantees extended in respect of the debt of the CD under the resolution plan.

10.2. Utilisation of profits of ESIL during the CIRP

The RFP issued in terms of the Code and consented to by ArcelorMittal and the CoC provided that the distribution of profits made during the CIRP would not go towards the payment of the creditors. The NCLAT, however, directed that the profits of the CD during the CIRP be distributed among all FCs and OCs on a pro-rata basis of their claims, provided that such amount did not exceed the admitted account of their claims. The SC set aside this direction and held that as per the RFP, the distribution of profits made during the CIRP could not be applied towards the payment of debt of any of the creditors.

10.3. Time period for completion of resolution process pursuant to the IBC (Amendment Act), 2019

IBC Amendment Act required all CIRP to be "mandatorily" completed within a period of 330 days from the ICD. For the resolution processes already underway, including if subject to litigation, a maximum period of 90 days from commencement of the IBC Amendment Act had been granted for completion of the process. The SC read down such provision by removing the word "mandatorily" before the stated timelines. The SC held that ordinarily the process should be completed within the prescribed timelines, failing which liquidation proceedings would be commenced. However, the AA could exercise judicial discretion and provide relief in exceptional cases where the failure to adhere to such timelines could not be attributed to any fault of the litigants.

The SC Judgment rightly set aside the principle of equality of all creditors as laid down in the NCLAT Order. The SC notes that the equality principle cannot be stretched to treating unequals equally, as that will destroy the very objective of the IBC. The NCLAT Order, if upheld, would have resulted in similar recovery for secured and unsecured creditors even though secured creditors are able to lend at lower interest rates only because of their ability to fall back on the security provided by the borrowers.

The SC's ruling on extinguishment of all past claims (including undecided claims) also brings much respite to bidders, who may otherwise have been unwilling to invest in insolvent companies under the IBC on account of threat of being subject to significant undisclosed liability and possibility of endless litigation upon acquisition of the insolvent company.

11. Conclusion of CIRP

On December 15, 2019, AMNS India, the 60:40 joint venture of world's largest steelmaker, ArcelorMittal and Japan's Nippon Steel Corporation, completed acquisition of ESIL by payment of Rs 42,785 crore after more than 800 days of initiation of insolvency proceedings. In addition, AMNS India also committed to infuse about Rs 18,000 crore into ESIL for improving its operations and revival prospects in the form of capex, etc. Mr. Aditya Mittal, President and CFO of ArcelorMittal, was appointed as Chairman of AMNS India and Mr.

Dilip Oommen, earlier MD and Dy CEO of ESIL, took over as its new CEO.

Mr. LN Mittal, Chairman and CEO of ArcelorMittal, a seasoned acquirer of steel companies globally, said: The acquisition of Essar Steelis an important strategic step for ArcelorMittal …. India has been identified as an attractive market for our company and we have been looking at suitable opportunities to build a meaningful production presence in the country for over a decade. Both India and Essar's appeal are enduring. Essar Steel has sizeable, profitable, well-located operations and the long-term growth potential for the Indian economy and therefore Indian steel demand, are well known. The transaction also demonstrates how India benefits from the Insolvency and Bankruptcy Code, a genuinely progressive reform, whose positive impact will be felt widely across the Indian economy.

Graph 8: Final distribution of proceeds to different classes

Particulars	Percentage
Secured FCs	90.95%
Secured FC- Standard Chartered Bank	1.72%
OCs with claim < Rs 1 crore	100%
OCs with claim > Rs 1 crore	20.49%
Workmen	100%

Note: *The % in the graph shows the percentage of claim filed by the respective creditor (s). This distribution is as per the SC judgement November 15, 2019.*

12. ESIL's Successful Resolution Achievements and Highlights under IBC

The successful resolution of ESIL demonstrated that complex operations can be managed and run successfully on 'going concern' basis by RP and CoC during CIRP thereby validating "Creditors in Control" regime in India. The myth and fear that employees of CD will not co-operate in resolution with IRP/RP was disproved. This could be summarized as follows:

a) **Operational turnaround during insolvency period:** Production of ESIL increased from 5.47 MT in 2016-17, 6.18 MT in 2017-18 to its highest ever production of 6.78 MT in 2018-195 inspite of many challenges. Highest ever monthly production of 618 KT was achieved by ESIL in December 2019.

b) ESIL achieved total income of Rs 31,974 crore in FY 2018-19 as compared with total income of Rs 26,028 in FY2017-18 thereby achieving an increase of 23 percent in total income. As submitted by CoC in the SC, payments of more than Rs 55,000 crore including taxes were made to operational creditors during CIRP for supplies and services. ESIL was fully compliant in payment of its statutory dues during CIRP.

c) Recovery of amount of Rs 7,500 crore by lenders of UGSL and KSS Petron paid by ArcelorMittal to its lenders in October 2018 to cure its ineligibility.

Graph 9: Financial Health of ESIL during post-CIRP

Source: ESIL Annual Reports

d) Realisation of more than Rs 42,500 crore by creditors of ESIL, highest realization under IBC in a single account. Most FCs realised about 100% of principal outstanding and 90% of claim. Such single recovery improved profitability of lenders involved and had a salutary impact of financial eco-system with major banks reporting their higher profits as may be observed from the following reports:

(i) As reported by livemint on January 31, 2020[11], SBI, the country's largest lender, reported its highest quarterly profit as it wrote back provisions on bad loans owing to recovery of Rs 11,000 crore from the resolution of bankrupt

11. Livemint article dated January 31, 2020https://www.livemint.com/companies/company-results/essar-steel-resolution-helps-sbi-post-its-best-quarterly-profit-ever-in-q3-11580491473058.html

ESIL. Net profit of SBI rose 41% to Rs 5,583 crore in the December 2019 quarter from Rs 3,954 crore in the year earlier.

(ii) Further, Livemint on January 25, 2020[12] reported that the private sector lender ICICI Bank reported a 158% year on year jump in net profit owing to one-time gain from ESIL resolution, which led to lower provisions. The bank's standalone net profit at the end of 31 December 2019 stood at Rs 4,146 crore as compared to Rs 1,605 crore during the same period a year ago.

e) Many under-performing group companies' assets providing services like port, power, etc performed much better and were able to meet their committemets to their lenders.

f) It was also the largest Merger & Acquisition transaction of the year 2019 and the largest Foreign Direct Investment (FDI) for the year having attracted FDI from ArcelorMittal, the largest producer of steel in the world.

g) Many legal precedents set in judicial orders of NCLT, NCLAT and SC which interpreted IBC for its smooth implementation in other accounts. Mr. Rajnish Kumar, Chairman, SBI stated that the Essar case had settled very issue in the IBC process (Business Standard – December 16, 2019).

13. Post- acquisition events and performance of AMNS India

Any overseas acquisition for an acquirer is always challenging. However, ArcelorMittal had its plan for ESIL well laid out for its transfiguration. Towards this end, AM/NS India continues to invest in securing backward and forward linkages and acquiring various assets as follows:

a) In February 2020, AM/NS India bagged Thakurani iron ore block in Keonjhar district, Odisha with an estimated reserve of about 179 million tonnes and commenced mining operations in July 2020 to supply iron ore to its plants.

b) In March 2020, Bhander Power Limited, a 500 MW natural gas-based power plant located in Hazira, Gujarat for captive use to ESIL plant and part of the Essar Group, was acquired by AMNS from EARC through SARFAESI route, thereby securing major source of cheaper power. ESIL benefitted from cheaper source of power as gas price has reduced significantly.

Supreme Court vide its order dated October 4, 2018 put an end to multiple and also frivolous litigations by RAs even before any of the plans has been approved by CoC thereby maintaining focus on approval of resolution plan first.

c) In July 2020, ArcelorMittal also acquired Odisha Slurry Pipeline Infrastructure Limited through bidding in CIRP process by payment of about Rs 2,350 crore to its creditors. However, litigations in respect of approved plan and other issues in respect of above pipeline continue.

d) As per release from ArcelorMittal, despite the Covid-19 pandemic, AMNS India did well in first three full quarters of 2020 since ESIL acquisition – it clocked $423 million (~ Rs 3,000 crore) as EBITDA in the January-September 2020 period. The Hazira unit produced 4.7 MT of crude steel during the nine-month period, of which the highest output was in the September quarter at 1.8 MT. AMNS India has already announced a plan to enhance the finished steelmaking capacity at Hazira to 12-15 MTPA.

Dr. MS Sahoo, Chairman, IBBI observes in IBBI Newsletter for quarter ended December 2019, "The IBC bifurcates the interests of the company from its promoters with a primary focus to ensure revival and it provides a competitive, transparent market process, which identifies the person who is best placed to rescue the company and selects the resolution plan which is the most sustainable under the circumstances. The process puts the company in the hands of a credible and capable management".

The resolution of ESIL achieved the objectives of the reforms undertaken by way of IBC and ESIL business emerged stronger and durable after going through intense pressure and heat under IBC.

12. Livemint article dated January 25, 2020:https://www.livemint.com/companies/company-results/icici-bank-q3-net-rises-158-to-rs-4-146-cr-asset-quality-improves-11579945921469.html

Legal Framework

Here are some important amendments, rules, regulations, circulars and notifications recently issued by the Insolvency and Bankruptcy Board of India (IBBI). Please submit your feedback and suggestions on the column at iiipi.pub@icai.in

Circulars

IBBI directs IRPs/RPs to preserve electronic copy of CIRP records for eight years and physical copy of physical records for 3 years

In a major decision, the IBBI, under regulation 39A of the CIRP Regulations, has directed the IPs to preserve electronic copy of all the physical and electronic records for minimum eight years and physical copy of physical records for minimum three years. If an IRP/RP had worked in the CIRP for a specific period, s/he will have to preserve the records of his tenure. As per the directions, an IP shall preserve:

a) an electronic copy of all records (physical and electronic) for a minimum period of eight years, and

b) a physical copy of physical records for minimum period of three years, from the date of completion of the CIRP or the conclusion of any proceeding relating to the CIRP, before the Board, the Adjudicating Authority (AA), Appellate Authority or any Court, whichever is later.

c) An IP shall preserve records relating to that period of a CIRP when he acted as IRP or RP, irrespective of the fact that he did not take up the assignment from its commencement or continue the assignment till its conclusion. For example, an IP served for three months as RP before he was replaced by another IP, who served till conclusion of the CIRP. The former shall preserve records relating to the first three months, and the latter shall preserve records relating to the balance period of the CIRP.

Besides preserving the records, the IPs are also required to ensure that these records are not accessed by unauthorised persons. The circular also provides a list of 15 categories of documents that shall be preserved by theI/RP of his/her CIRP assignment (s).

Source: *IBBI Circular No. IBBI/CIRP/37/2021/ dated 06 January 2021*

https://ibbi.gov.in//uploads/legalframwork/f8d420c06d50a94068157e0324067d26.pdf

Computation of fee payable for delay in filings under regulation 40B of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016

In response to quarries by some IPs, the Insolvency and Bankruptcy Board of India (IBBI) has clarified that as per the sub-regulation (4) of regulation 40B of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations), a fee has to be paid for delay after October 01, 2020.

Further, it is clarified that fee is payable for the period that lapses between the due date of filing a 'Form' or October 01, 2020, whichever is later, and the actual date of filing the said Form. The Board has also decided to refund the excess fee paid by IPs, if any.

Source: *IBBI Circular No. IBBI/CIRP Forms/2020 dated December 04, 2020*

https://ibbi.gov.in//uploads/legalframwork/60e18951f684c85b59ab3485e25081aa.pdf

Filing of list of creditors under clause (ca) of sub-regulation (2) of regulation 13 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016

The Insolvency and Bankruptcy Code read with the Insolvency and Bankruptcy Board of India

(Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations) require that the IRP/RP, as the case may be, shall maintain a list of creditors, with specified details and update it. The list of creditors shall, inter alia, be filed with the Adjudicating Authority and shall also be displayed on the website, if any, of the corporate debtor.

Clause (ca) of sub-regulation (2) of regulation 13 of the CIRP Regulations, 2016 requires the interim resolution professional or the resolution professional to file the list of creditors on the electronic platform of the Board for dissemination on its website. The purpose of this requirement is to improve transparency and enable stakeholders to ascertain the details of their claims at a central platform.

The above requirement is applicable to every corporate insolvency resolution process (a) on going as on the date November 13, 2020, that is, the date of commencement of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fifth Amendment) Regulations, 2020; and, (b) commencing on or after the said date.

Source: *IBBI Circular No. IBBI/CIRP/36/2020 dated November 27, 2020*

https://ibbi.gov.in//uploads/legalframwork/0bcad0b591e7289ec6b2d4b9adc7a066.pdf

IBBI has made available a facility on its website for serving copy of the application to the Board, as mandated under Rules 4, 6 and 7 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016

For convenience of applicants, the Board has made available a facility on its website at *https://www.ibbi.gov.in/intimation-applications/iaaa* for serving a copy of the application online to the Board. On submission of the application online, the applicant shall get an acknowledgement. This link can be used for Serving of copy of the application to the Board, as mandated under Rules 4, 6 and 7 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

Source: *IBBI Circular No. IBBI/LAD/35/2020 dated October 29, 2020*

https://ibbi.gov.in//uploads/legalframwork/5d5792eab74d44db2a58e184abd65ab7.pdf

NOTIFICATION

Order of NCLT on Automatic Case Number Generation

In pursuant to the Digital India campaign launched by the Hon'ble Prime Minister of India Shri Narendra Modi, to ensure the government services are made available to citizens electronically by improving the online infrastructure, the Registrar, National Company Law Tribunal (NCLT), on December 24, 2020 issued an order directing "that Automatic Case Number Generation should be mandatorily started from January 01, 2021 in all the benches across the country. The automatic number to be generated from E-filing portal i.e *efiling.nclt.gov.in*.

Source: *Order, File No. 25/02/2020-NCLT*

https://ibbi.gov.in//uploads/legalframwork/c0e9da77beb8bcef58bfe30414582903.pdf

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

The Ministry of Corporate Affairs (MCA), Government of India through a Gazette Notification on December 22, 2020 extended the suspension of CIRP due to COVId-19 pandemic for three months from December 25, 2020. The decision provides protection to corporate sector from insolvency proceedings till March 25, 2021.

Source: *Gazette Notification S.O. 4638(E) [F. No. 30/33/2020-Insolvency]*

https://ibbi.gov.in//uploads/legalframwork/df55d4f612f270d6c637ee4b3c8131c8.pdf

Extension of the term of office of Shri Bethala Shantha Vijaya Prakash Kumar, Member (Judicial), as Acting President, NCLT

The MCA, Government of India, through a Gazette Notification on November 10, 2020 extended the term of office of Shri Bethala Shantha Vijaya Prakash Kumar, Member (Judicial), as Acting President of NCLT further for a period of one month with effect from November 05, 2020 or until a regular President is appointed or until further orders, whichever is earliest.

Source: *Gazette Notification S.O.4039 (E) [F. No. A-45011/49/2019-Ad.IV (Pt.I)]*

https://ibbi.gov.in//uploads/legalframwork/c9f1505991548f8a5ab1ea18587f2856.pdf

GUIDELINES

IBBI's New Guidelines for preparing panel of IPs effective from January 01, 2021

IBBI on November 23, 2020 issued fresh guidelines for preparing panel of IPs to act as Interim Resolution Professionals, Liquidators, Resolution Professionals and Bankruptcy Trustees (Recommendation). The Guidelines titled "Insolvency Professionals to act as Interim Resolution Professionals, Liquidators, Resolution Professionals and Bankruptcy Trustees (Recommendation) (Second) Guidelines, 2020" has come into effect from January 01, 2021. These guidelines will supersede the earlier Guidelines [Insolvency Professionals to act as Interim Resolution Professionals, Liquidators, Resolution Professionals and Bankruptcy Trustee (Recommendation) Guidelines, 2020] issued on June 2, 2020.

The Board has emphasized that "every IP is equally qualified to be appointed as the IRP, Liquidator, RP or BT of any corporate or individual insolvency resolution, liquidation or bankruptcy process, as the case may be, if otherwise not disqualified, and in the interest of avoiding administrative delays, Page 3 of 6 the Board considers necessary to have these guidelines to prepare a Panel of IPs for the purpose of section 16(4), 34(6), 97(4), 98(3), 125(4), 146(3) and 147(3)". Besides providing the details of eligibility of the IPs for panels and its utility, the IBBI guideline also mentions the obligations of IPs in detail.

Important features of the panels of IPs are as follows:

i. The Board will prepare a common Panel of IPs for appointment as IRP, Liquidator, RP and BT and share the same with the AA (Hon'ble NCLT and Hon'ble DRT) in accordance with these Guidelines.

ii. The Panel will have Zone wise list of IPs based on the registered office (address as registered with the Board) of the IP.

iii. The Panel will have validity of six months and a new Panel will replace the earlier Panel every six months. For example, the first Panel under these Guidelines will be valid for appointments during January - June 2021, and the next Panel will be valid for appointments during July - December 2021, and so on.

iv. The NCLT may pick up any name from the Panel for appointment of IRP, Liquidator, RP or BT, for a CIRP, Liquidation Process, Insolvency Resolution or Bankruptcy Process relating to a corporate debtors and personal guarantors to corporate debtors, as the case may be.

v. The DRT may pick up any name from the Panel for appointment as RP or BT, for an Insolvency Resolution or Bankruptcy Process for personal guarantors to corporate debtors, as the case may be.

Source: *https://ibbi.gov.in//uploads/legalframwork/18c79bb7deb50c0ab7d0a195f155ff82.pdf*

Facilitation

IBBI published 'Section-wise Jurisprudence on IBC up to 30.09.2020'

IBBI on December 31, 2020 published 'Section-wise Jurisprudence on IBC up to 30.09.2020'. The 99-page document covers 436 landmark judgements of NCLTs, NCLAT, HCs and SC which shaped the jurisprudence on IBC since its inception.

Source: *https://ibbi.gov.in//uploads/legalframwork/e356f00d1da898542eef0dd47ee58925.pdf*

Common Mistakes Committed by IPs in conduct of CIRP

IBBI through a Facilitation Letter on November 13, 2020 has pointed towards common but avoidable mistakes committed by IPs. The seven-page letter gives a detailed description of the mistakes committed by IPs in their capacities as IRP, RP and liquidator.

These mistakes, according to IBBI, have costs to the CD and the economy, and often amount to contravention of provisions of the law. Most of these are probably unintentional and can be avoided with a little more care and diligence. The letter lists out a few such mistakes with a hope that these will not be committed by any IP, pre-empting the IBBI/IPA to initiate any disciplinary action.

Source: *Facilitation/005/2020*

https://ibbi.gov.in//uploads/legalframwork/33ce2304913fe3f24b7bd9b22b631b37.pdf

Press Releases

The Insolvency and Bankruptcy Board of India amends Regulations relating to corporate insolvency proceedings

The brief key changes are as follows:

a. The CIRP Amendment Regulations specify two 'other record or evidence of default', namely, (i) certified copy of entries in the bankers' book, and (ii) order of a court or tribunal that has adjudicated upon the non-payment of a debt.

b. As per the CIRP Amendment Regulations, the IRP/ RPs are required to submit the list of creditors on an electronic platform for dissemination on its website, including ongoing CIRP.

c. The CIRP Amendment Regulation mandates the Resolution Professional to intimate each claimant the principle or formulae for payment of debts under a resolution plan, within 15 days of the order of the Adjudicating Authority approving the resolution plan.

d. The Liquidation Amendment Regulations enables the liquidator to assign or transfer a 'not readily realisable asset' to any person in consultation with the stakeholders' consultation committee in order to facilitate quick closure of the liquidation process.

e. The IU Regulations have been amended to the effect to specify public announcement made under the provisions of the IBC as 'financial information'.

Source: *IBBI Press Release No. IBBI/ PR/2020/16 dated November 13, 2020*

https://ibbi.gov.in//uploads/press/2020-11-13-220539-eb6yn-50277513bcc7d94092ce4ee2b6591aad.pdf

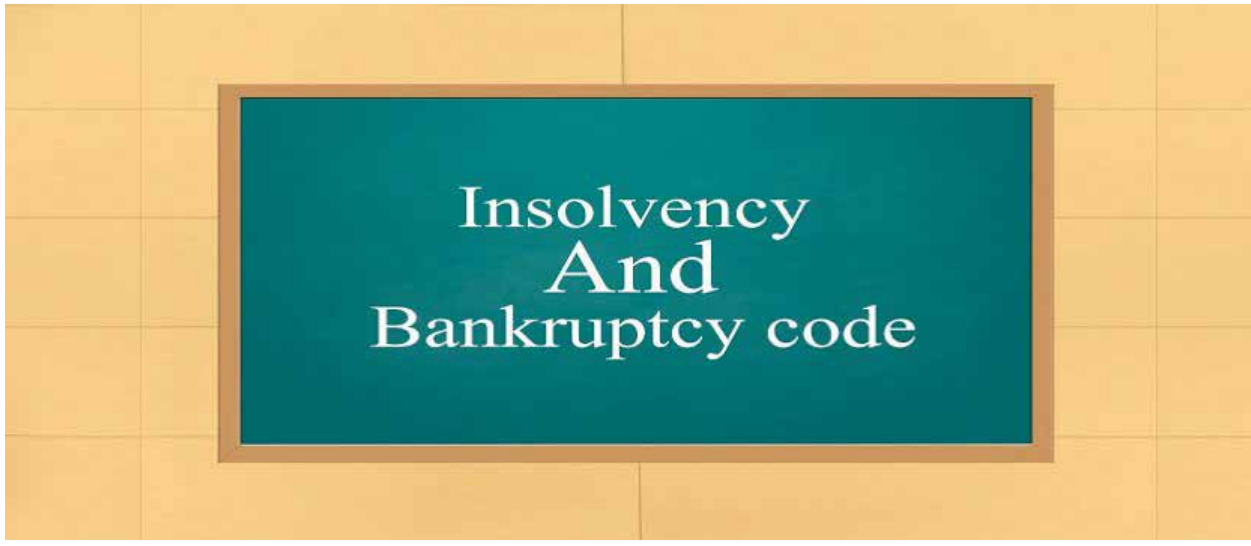
Mr Santosh Kumar Shukla takes charge as Executive Director

Mr Santosh Kumar Shukla took charge as Executive Director of Insolvency and Bankruptcy Board of India (IBBI). Immediately before joining IBBI, he was serving as Chief General Manager in the Enforcement Department of the Securities and Exchange Board of India (SEBI).

Mr Shukla has been with the securities market regulator, SEBI since September 1996. He has been serving in various capacities in Departments of Legal Affairs, Enforcement, Enquiries and Adjudication, etc. He has also served as Regional Director of the Western Regional Office of SEBI at Ahmedabad. He is a law graduate from Gorakhpur University, Gorakhpur, Uttar Pradesh.

Source: *IBBI; IBBBI Press Release No. IBBI/ PR/2020/15 dated October 19, 2020*

https://ibbi.gov.in//uploads/press/f589373ba773f60fa8a6eedc23a4f39d.pdf



Legal Snippets

High Courts

1. After the Resolution Plan is approved, neither NCLT nor RP has any authority in respect of the Company

M/s Venus Recruiters Pvt. Ltd. Vs. Union of India & Ors., W.P.(C) 8705/2019 & CM APPL,36026/2019, Date of Order: November 26, 2020, (Delhi High Court).

Background of Case

M/s Bhushan Steel Ltd. (now known as Tata Steel BSL Ltd. (hereinafter, 'Corporate Debtor') was the subject of CIRP before the NCLT Allahabad Bench. The RP filed an avoidance application wherein various transactions were enumerated as `suspect transactions' with related parties. Almost five weeks after filing of the said avoidance application, the NCLT approved the Resolution Plan proposed by Tata Steel Ltd. Insofar as the pending avoidance application inrespect of the suspect transactions was concerned, there was no separate order passed by the NCLT. After the new management took over the Corporate Debtor the NCLT vide a separate order impleaded the petitioner as a party and issued notice to it on the basis of a fresh memo of parties filed by the former RP.

The writ petition was filed by the Petitioner seeking issuance of a writ declaring the proceedings pending before the NCLT as void and non-est. The main question that arises whether under the Code, an application filed under Section 43 for avoidance of preferential transactions can survive beyond the conclusion of the resolution process and the role of the RP in filing/pursuing such applications. The jurisdiction of the NCLT to hear applications under Section 43 after the approval of the Resolution Plan was under challenge.

Court's Observations

a) NCLT has no jurisdiction after the conclusion of the CIRP

In this regard, the Court observed that once a resolution plan stands approved by the NCLT and the management of the corporate debtor is handed over to the successful resolution applicant, the NCLT has no further jurisdiction to adjudicate, except on issues pertaining to the resolution plan itself (if any). Therefore,

the Court held that since the resolution plan was approved by the NCLT on May 15, 2018, the CIRP came to an end on that date and the NCLT lacked jurisdiction to adjudicate upon the avoidance application subsequently.

b) Role of the RP cannot continue beyond the CIRP period

While examining this issue, the Court primarily relied on co-joint reading of Regulation 35A and Regulation 39, CIRP Regulations, 2016 along with Sections 43 and 44 of the Code. Besides, the Court also referred to Section 23 of the Code to observe that the RP manages the operations of the corporate debtor during the CIRP and therefore, the role of the RP commences from the initiation of CIRP and ends after the approval of the resolution plan is submitted to the AA.

c) The benefit is not meant for the Corporate Debtor in its new Avatar

An avoidance application for any preferential transaction is meant to give some benefit to the creditors of the Corporate Debtor. The benefit is not meant for the Corporate Debtor in its new avatar, after the approval of the Resolution Plan. This is clear from a perusal of Section 44 of the IBC, which sets out the kind of orders which can be passed by the NCLT in case of preferential transactions. The benefit of these orders would be for the Corporate Debtor, prior to approval of the Resolution Plan. Any property transferred or sum acquired in an order passed in respect of a preferential transaction would have to form part of the final Resolution Plan.

d) Civil and Other remedies for pre-CIRP agreements

The parties would have to be therefore left to their civil and other remedies in terms of the contract between them. The NCLT ought not to be permitted to now adjudicate the preferential nature of the transaction under a contract which now stands terminated, after the approval of the Resolution Plan.

e) Decision Not Applicable for Liquidation Process

The court also clarified that judgement is only in the context of Resolution processes and would however not apply in case of liquidation proceedings. In the case of a liquidation process, the situation may be different inasmuch as the liquidator may be able to take over and prosecute applications for avoidance of objectionable transactions. The benefit of orders passed in respect of such transactions may be passed on to the Corporate Debtor which may assist in liquidating the company at the final stage.

Case review: *Petition allowed.*

2. Regulation 7A of the IBBI (Insolvency Professionals) Regulations, 2016, read with Bye-law 12A IBBI (Model Bye-laws and Governing Board of Insolvency Professional Agencies) Regulations 2016 of IBC, is not unconstitutional

CA. V.Venkata Sivakumar Vs. Insolvency and Bankruptcy Board of India & Ors., W.P.No.13229 of 2020, Date of Order: November 03, 2020 (High Court of Madras.

Background of Case

The petitioner challenged that the Regulation 7A of the IBBI (Insolvency Professionals) Regulations, 2016 (the IP Regulations) read with Bye-Law 12A of the IBBI (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016 (Model Bye-Laws IPA Regulations) was violating to Article 14, 19 and 21 of the Constitution. In the matter, the petitioner has questioned the constitutional validity of the Authorization for Assignment (AFA) and argued, "Once a person is registered as an IP, he cannot be called upon to continually obtain an AFA on an ongoing annual basis".

Court's Observations

An Insolvency Professional Agency (IPA) is required to examine as to whether the IP concerned is eligible for an AFA as per the criteria stipulated in Regulation 12A (2). The criteria are, inter alia, that such person should be registered with the IBBI as an IP; he should be a fit and proper person in terms of the explanation to Regulation 4 (g) of the IP Regulations; he should not be debarred by any direction or order of the Agency or the Board; he should not have attained the age of seventy years there should be no disciplinary proceedings pending against him before the Agency or the Board; and he should have complied with requirements with regard to the payment of fees to the IPA and the IBBI, filings and disclosures, continuous professional education (CPE) and other requirements as stipulated in the IBC, regulations, circulars, directions and guidelines of the IPA and the IBBI. The Court did not find anything ex facie arbitrary about the specified criteria. Nonetheless, the court is of the view that the time limit prescribed in Regulation 12A (7) may be revisited by the IBBI by considering an appropriate amendment either providing for a larger time limit or by conferring power to condone delay for sufficient cause.

Therefore, in view of the High Court the measures are intended to regulate the profession and not to deprive a person of the right to practice the profession. Hence, it was concluded that Articles 14, 19 and 21 are not violated and the Regulation is not unconstitutional.

Case review: *Petition dismissed.*

National Company Law Appellate Tribunal (NCLAT)

1. Operational Creditors being different from the Financial Creditors not entitled to the same treatment. However, they are entitled to receive a minimum payment being not less than liquidation value which does not apply to Financial Creditors

Pratap Technocrats (P) Ltd. & Ors. Vs. Monitoring Committee of Reliance Infratel Ltd. & Anr. Company Appeal (AT) (Insolvency) No. 1134 of 2020 (NCLAT) Date of order: 04 January 2021.

Background of Case

Appellants 'Operational Creditors' of the Corporate Debtor (CD) i.e., Reliance Infratel Ltd. aggrieved with the impugned order passed by the Adjudicating Authority by virtue whereof

Resolution Plan in respect of CD submitted by the Resolution Applicant came to be approved. The impugned order was assailed primarily on the ground that the Appellants were kept unaware of the CIRP with no details provided by the Resolution Professional as regards disbursal of fund towards their claims and that their claims have not received a fair and equitable treatment.

NCLAT's Observations

The Hon'ble NCLAT based on the facts observed that the Appellants admittedly filed their claims during CIRP proceedings, and their claims have been partly admitted. On the face of the factual position, it is of no avail on their part to allege being excluded from CIRP proceedings. The Tribunal held that it is well settled that equitable treatment can be claimed only by similarly situated creditors. Operational Creditors stand at a different footing as compared to Financial Creditors and Secured Creditors. Operational Creditors are entitled to receive a minimum payment being not less than liquidation value, which does not apply to Financial Creditors. Further, it was observed by the Tribunal that the distribution mechanism adopted in this case not only conformable to the mechanism envisaged under Section 53 of the I&B Code but also according priority in upfront payment to Operational Creditors. The appeal was dismissed by the Tribunal.

Case review: *Appeal dismissed.*

2. CoC has no adjudicatory power to decide as such whether a creditor who files its Claim is a 'Financial' or 'Operational' Creditor. If the RP has accepted a claim as a Financial Debt and Creditor as a Financial Creditor, then s/he cannot review or change that position in the name of updating the Claim

Rajnish Jain, Vs. Anupam Tiwari & Anr., Company Appeal (AT) (Insolvency) No. 519 of 2020, Date of Order: December 18, 2020.

Background of Case

The Appeal emanates from the order of the NCLT Allahabad Bench, the Adjudicating Authority (AA) in this case, whereby the AA had rejected the application filed by Appellant under Section 60 (5) of the IBC (Code) and declared that M/s BVN Traders 'Respondent No.3', as a 'Financial Creditor'. The Appellant challenged the impugned order on the ground that the AA has erred in facts and law; and the finding was mainly based on decision of the CoC.

NCLAT's Observations

NCLAT held that the CoC has no role in deciding the status of a creditor either as 'financial' or 'operational' creditor and such a decision of CoC can never be treated as an exercise under its commercial wisdom. In the opinion of the NCLAT, in a situation where there is a requirement of application of IBC, and in such situation if factor is left to CoC, there would be a serious conflict of interest. Whether a person or entity is 'Financial Creditor' as defined in Section 5(7) or 'Operational Creditor' as defined in Section 5(20) is a matter of applying the law to the facts of the case. It cannot be a matter of voting, and choice as discretion is not relevant.

Further, the NCLAT clarified that during Corporate Insolvency Resolution Process (CIRP), the Interim Resolution Professional (IRP) is authorized to collate the claims, and based on that s/he is empowered to constitute the CoC. The Resolution Professional (RP) may add to existing claims of claimants already received, or admit or reject further claims and update list of Creditors. But after categorization of a claim by the IRP/RP they cannot change the status of a Creditor. For example, if the RP has accepted a claim as a Financial Debt and Creditor as a Financial Creditor, then s/he cannot review or change that position in the name of updation the Claim.

Case review: *Appeal is disposed off with Reasons.*

3. CIRP can be initiated against Principal Borrower as well as Guarantor

State Bank of India, Stressed Asset Management Branch Vs. Athena Energy Ventures Pvt. Ltd. Company Appeal (AT) (Ins) No.633 of 2020; Date of Order: November 24, 2020.

Background of Case

The Appellant filed the application against Athena Energy Ventures Private Limited, the Corporate Debtor, which was Corporate Guarantor for "Athena Chhattisgarh Power Ltd." (Hereafter referred as "Borrower"). The application was filed as Borrower committed default in repayment of the financial assistance provided to the Borrower. Borrower was a joint

venture company promoted by the Respondent.

The Respondent was under obligation to see that amounts availed under the finance from the Appellant were repaid by the Borrower. The Borrower committed default and Appellant filed Application under Section 7 of IBC against the Borrower before the Adjudicating Authority. Appellant claims that the Appellant also filed present Application under Section 7 of IBC seeks initiation of CIRP against Respondent. The Respondent opposed the Application filed claiming that the Application was arising out of very same transaction. The Adjudicating Authority concluded that the Principal Borrower and Respondent could not be called joint venture company as they were independent companies having independent Memorandum of Association. Thus, the Application of the Appellant against the Respondent came to be rejected. The appeal was filed against the said judgement.

NCLAT's Observations

In pursuant to the IBC (Second Amendment) Act, 2018, if two Applications can be filed, for the same amount against Principal Borrower and Guarantor, they are maintainable. It is for such reason that Sub-Section (3) of Section 60 of the IBC provides that if insolvency resolution process or liquidation or bankruptcy proceedings of a Corporate Guarantor or Personal Guarantor as the case may be of the Corporate Debtor is pending in any Court or Tribunal, it shall stand transferred to the AA dealing with insolvency resolution process or liquidation proceeding of such Corporate Debtor.

Further, the NCLAT also relied on the judgment *State Bank of India Vs. Ramakrishnan & Anr.* (2018) 17 SCC 394, dated August 14, 2018 three days before the above Notification. The judgment of Ramakrishnan was read keeping in view the substituted provisions as per Act 26 of 2018. In place of Personal Guarantor, one can read "Corporate Guarantor" and with suitable changes, scheme of Section 60(2) and (3) can be appreciated from that angle also. The issue involved in the matter of Ramakrishnan was whether Section 14 of IBC will provide for a moratorium for the limited period mentioned in the Code; on admission of an insolvency petition would the same apply to Personal Guarantor of a Corporate Debtor. The issue was answered in negative by the Hon'ble Supreme Court.

Therefore, in conclusion the NCLAT held that in the matter of guarantee; CIRP can proceed against Principal Borrower as well as Guarantor.

Case review: *Appeal Allowed.*

4. Liquidator's remuneration to be governed as per recommendations of CoC

Narinder Bhushan Aggarwal Vs. M/s. Little Bee International Pvt. Ltd & Anr. Company Appeal (AT), (Insolvency) No. 980 of 2020, Date of Order: November 18, 2020.

Background of Case

The CoC approved the contribution of estimated expenses of the liquidation by the Financial Creditors in an escrow account in the ratio of their claims. The CoC also approved the remuneration of the Appellant for the conduct of liquidation proceedings at Rs.50,000/- per month or such proportion to the value of the liquidation estate assets as specified by the Board as per Regulation 4 (2) of the Liquidation Process Regulations, 2016.

The AA (NCLT, Chandigarh) was of the view that Regulation 39D provides for fixation of the fees separately by the CoC for the three periods given in Section 39D and the fees in the case was not governed by Section 39D as the order of liquidation came to be passed under Section 33(1) (a) of the 'I&B Code'. Appellant was aggrieved with the impugned order only to the extent of remuneration of Liquidator.

NCLAT's Observations

It is immaterial which provision of the IBC squarely governs the passage of order of liquidation. The fact remains that the CoC has taken a decision in regard to the liquidation costs, expenses and the remuneration payable to the liquidator which was in the light of the recommendation of the CoC with the requisite percentage brings it within the ambit of Regulation 39D. Therefore, it is not permissible to take resort to any other provision which would be attracted only if the action of CoC would fall beyond the purview of Regulation 39D. The remuneration of liquidator falling within the realm of the CoC in terms of Regulation 39D, and NCLAT holds that the impugned order

cannot be sustained. It is directed that the liquidator's remuneration will be governed in accordance with the recommendation of CoC.

Case review: *Appeal Allowed.*

5. Funding Agency can't claim status of 'Secured Creditor' if hypothecation charge is not registered under Companies Act 2013 & IBC

Volkswagen Finance Private Ltd. Vs. Shree Balaji Printopack Pvt. Ltd. & Anr., Company Appeal (AT) (Insolvency) No. 02 of 2020, Date of Order: October 19, 2020.

Background of Case

The Company (under Liquidation) namely Shree Balaji Printopack Pvt. Ltd. executed a Loan and Hypothecation Agreement on November 25, 2013, for an amount of Rs. 36,00,000/- payable in 84 monthly instalments of Rs. 61,964/- each from December 15, 2013 to November 15, 2020, for the purchase of an AUDI Q3 TDI 2.0 vehicle. It was stated by the Appellant that they have security of the vehicle in terms of Sections 52 and 53 of IBC. It was averred that a demand of Rs. 21,83,819.18/- was made which was not paid and hence there was a 'default', and the amount became 'due and payable'.

An appeal under Section 61 of the IBC, was filed against the order dated November 08, 2019 passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi, Bench-III), in CP (IB) No. 391/ND/2018, by which the AA dismissed the application seeking a direction to set aside the Order of the Liquidator rejecting the 'Claim' of the Appellant.

NCLAT's Observation

NCLAT holds that the 'Security Interest' was neither registered with the 'Information Utility', nor under Section 125 of the Companies Act, 1956/Section 77 of the Companies Act, 2013; no Application was preferred under Section 87 of the Companies Act, 2013. Also, 'Charge' was not registered in the Securitisation Asset Reconstruction and Security Interest of India. The NCLAT observed that Section 52(3)(b) of the Code and Regulation 21(b) of the (Liquidation Process), Regulation, 2016 are not complied with and the ratio laid down by the Supreme Court in *Kerala State Financial Enterprises Ltd. Vs. Official Liquidator*, High Court of Kerala, (2006) 10 SCC 709, and NCLAT in India *Bulls Finance Ltd. V/s. Official Liquidator*, High Court of Kerala, (2006) 10 SCC 709, are squarely applicable to the facts of this case.

Hence, the NCLAT holds that when in present matter 'Charge' was not registered as per the provisions of Section 77 (1) of the Companies Act 2013 and as envisaged under the IBC, the Creditor cannot be treated as a 'Secured Creditor'.

Case review: *Appeal dismissed.*

6. Serving an 'advance copy' of application to the CD cannot be construed / deemed as serving notice for initiation of CIRP. CIRP set aside, IRP/RP asked to handover records to CD and Cost Imposed on Financial Creditor.

Mr. Bhaskar Vs. M/s Sai Precious Traexim Pvt. Ltd. & Anr. Company Appeal (AT) (Insolvency) No. 531 of 2020, Date of Order: October 14, 2020.

Background of Case

The Appellant (one of the erstwhile Director of 'Corporate Debtor' – Pine View Portfolio Consultants Pvt. Ltd.) and Member of the Suspended Board of 'Corporate Debtor' has filed the Appeal, as an 'Aggrieved person', in respect of the order dated January 31, 2020 passed by the NCLT, New Delhi admitting the Section 7 application filed by the creditor.

NCLAT's Observations

a) **CIRP Set Aside:** NCLAT observed that the 'Corporate Debtor' was never issued with notice by the Adjudicating Authority and since the 'serving' of advance copy of the application to the 'Corporate Debtor' cannot be construed / deemed to be service of notice in the eye of Law, therefore the Tribunal holds that the 'Adjudicating Authority' while reserving orders in C.P. No. IB-3228 (ND)/2019 had committed error of jurisdiction in reserving orders and passed the impugned judgement without issuing notice to the 'Corporate Debtor' which is clearly unsustainable in the eye of law.

   When a plea is taken before this Tribunal that there was no 'Debt' extended by the 'Financial Creditor' to the 'Corporate Debtor' and added further there was no privity of contract between the 'Financial Creditor' and 'Corporate Debtor' this Tribunal is of the earnest opinion that in the impugned

order there was no finding rendered by the 'Adjudicating Authority' as to how a third party payment became a 'Financial Debt' or how a 'Financial Creditor' had become a 'Financial Creditor', in the absence of any 'Financial Debt'.

b) **Cost Imposed on Financial Creditor:** Since the instant Appeal is allowed with aforesaid observations, the 'Corporate Debtor' is released from the rigour of the 'Corporate Insolvency Resolution Process'. All actions taken by the 'Interim Resolution Professional' / 'Resolution Professional' and the 'Committee of Creditors', if any, are declared illegal and set aside. The 'Resolution Professional' is directed to hand over the records and assets of the 'Corporate Debtor' to the 'Promoter' / Directors of the 'Corporate Debtor' forthwith. Also, that the 'Adjudicating Authority' [National Company Law Tribunal, New Delhi Bench-VI, New Delhi] is to determine the fee and cost of 'Corporate Insolvency Resolution Process' as incurred by him, which is to be borne and paid by the First Respondent / 'Financial Creditor'.

Case review: *Appeal allowed.*

7 Providing advance against business dealings is not covered under the category of financial debt and thereby, an application under Section 7 of the Code would not lie for the same.

Niyati Chemicals Vs. Minepro Minerals Pvt. Ltd., Company Appeal (AT) (Insolvency) No. 861 of 2020, Date of Order: October 08, 2020.

Background of Case

The Appellant claimed that they have extended unsecured loan of Rs 20 lacs to Respondent and accepted that they purchased the Bentonite Powder of Rs 2,88,400/- from Respondent and adjusted the amount from said loan amount of Rs 20 lacs. The Appellant confirmed that they purchased 360 MTS of said powder from the Respondent for export to Dubai through chain transactions involving multiple parties. The Appellant has also submitted that it further provided unsecured loan of Rs 2,50,000/- to Respondent and the same was repaid to them. The grievance of the Appellant was that they have not been considered as Financial Creditor under IBC by the Adjudicating Authority under the impugned order.

NCLAT's Observations

The NCLAT opined that 'Financial Debt' means a 'Debt' along with interest, if any which is disbursed against the consideration for the time value of money as per section 5(8) of the IBC. The impugned order passed by the Adjudicating Authority records the reason and includes the ledger account in the book of Respondent about the flow of money and supply of goods. It is very much clear that the Appellant was advancing the money for supply of above-mentioned powder and the Respondent after manufacturing was supplying the same to the Appellant. No doubt, these are Commercial Advances during the business dealings. As far as IBC is concerned "providing advance against business dealings" is not covered under 'Financial Debt' and hence Section 7 of IBC cannot be invoked for such transactions. However, this order will not preclude the Appellant to take action for recovery of money under the relevant laws.

Case review: *Appeal dismissed.*

8. In the case of lease rentals arising out of use and occupation of a cold storage unit which is for commercial purpose, the same would fall under the category of Operational Debt as envisaged under Section 5 (21) of the Code.

Anup Sushil Dubey Vs. National Agriculture Co-operative Marketing Federation of India Ltd. & Anr., Company Appeal (AT) (Insolvency) No. 229 of 2020, Date of Order: October 07, 2020.

Background of Case

M/s. National Agriculture Co-operative Marketing Federation of India Ltd. (NAFED), the Operational Creditor and Umarai Worldwide Private Limited, the 'Corporate Debtor' entered into a Leave and Licence Agreement for the usage of cold storage facilities, for a period of three years. The Agreement provides for the payment of licence fee of Rs. 9,31,000/- payable on the 7th day of every calendar month with an increase of 10% in the monthly licence fee on or after the expiry of 12 months. As per Clause 1.14 of the said Agreement, in case of default in payment of any monthly licence fee, the Corporate Debtor would be liable to pay an interest @ 21% p.a. for the delayed period. It is stated by the NAFED that the Corporate

Debtor defaulted in the payment of monthly rentals from September 2017 onwards and an outstanding amount of Rs. 2,14,14,560/- is due and payable together with interest, electricity, and water charges. It was the case of NAFED that the Corporate Debtor acknowledged and confirmed the 'outstanding debt' in its letters, but despite several reminders and issuance of eviction notice, Corporate Debtor failed to make the necessary payments. Hence a Demand Notice in Form 3 under Section 8 of I&B Code 2016, was issued demanding payment of Rs. 1,83,45,278/-. The Corporate Debtor in their reply denied all the claims and sought for renewal of the Leave and Licence Agreement.

Appeal was preferred against the order passed by the NCLT, Mumbai Bench, by which order, the 'Adjudicating Authority' has admitted the Application filed by NAFED Corporate Debtor.

NCLAT's Observations

According to the observation given by the Supreme Court in the matter of *Mobilox Innovations Private Limited V/s. Kirusa Software Private Limited* (2018) 1 SCC 353 and based on the facts of the case the Appellate Tribunal opined that the subject lease rentals arising out of use and occupation of a cold storage unit which is for Commercial Purpose is an 'Operational Debt' as envisaged under Section 5 (21) of the Code. Further, in so far as the facts and attendant circumstances of the case on hand is concerned, the dues claimed by the NAFED in the subject matter and issue, squarely falls within the ambit of the definition of 'Operational Debt' as defined under Section 5 (21) of the Code.

The bench held that here was no illegality or infirmity in the Impugned Order of the 'Adjudicating Authority' in admitting the Application.

Case review: *Appeal dismissed.*

IBC News

DHFL resolution: USA's Oaktree Capital's rating claims under Question

"We would also like to categorically state that CARE Ratings Limited has not issued any Rating or any kind of Indicative Ratings under the proposal (to Oaktree)," the ratings agency said in a regulatory filing. It further added, "CARE Advisory Research and Training Limited (subsequently referred as CART) a subsidiary of CARE Ratings Limited had undertaken an advisory proposal for Oaktree".

Oaktree Capital Management, an American global asset management firm specializing in alternative investment strategies is regarded as the largest distressed securities investor in the world and is one of the largest credit investors in the world.

Since the conclusion of the fifth and final round of bidding last month for DHFL's resolution plan, Piramal Enterprises and Oaktree Capital have each claimed that their bids are the highest and fully implementable. Oaktree, in its bid, claimed that post resolution, DHFL's non-convertible debentures (NCDs) would be assigned an AAA rating if its resolution plan is accepted. Based on a complaint, markets regulator SEBI earlier this month asked the mortgage firm's administrator to explain the claim by the suitor. In a letter dated January 5, SEBI said it has received complaint against unnamed Credit Rating Agencies (CRAs) that have allegedly offered their views to a potential issuer or bidder (Oaktree Capital) on a future rating of DHFL resolution plan and instruments, which is in violation of regulations.

Source: *The Mint, January 13, 2021.*

https://www.livemint.com/companies/news/dhfl-resolution-oaktree-capital-put-on-spot-over-rating-claims-11610558003543.html

Resolution of Videocon fetches just 10% of its total outstanding

The CoC of Videocon Group in its meeting on January 12 reportedly agreed to less than Rs 3,000 crore offer of Twinstar Holdings Ltd, a Vedanta Group company. If finalized, the creditors will collectively get less than 10 % of the total outstanding amounting Rs 46,000 crore.

Earlier, the CoC had rejected an offer of

Rs 30,000 crore made by Dhoot family, the promoters of Videocon. According to banking sources, the offer by the Dhoot family entailed repayments until 2035, which was not acceptable to many banks in Videocon's CoC.

Source: *The Hindu Business Line, January 05, 2021*

https://www.thehindubusinessline.com/companies/videocons-lenders-give-nod-to-vedantas-3000-crore-offer/article33503769.ece

SC to decide petitions on 'Personal Guarantor' pending in HCs

The Supreme Court is hearing a batch of petitions challenging provisions of the Insolvency and Bankruptcy Code (IBC) that allow initiation insolvency proceedings against personal guarantors. These petitions were initially filed in various High Courts of the county but the Apex court summoned all of them for simultaneous hearing.

On November 15, 2019, the Centre published the IBBI (Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Regulations, 2019 with effect from December 1, allowing lenders to simultaneously haul companies and personal guarantors before the National Company Law Tribunal (NCLT).

This means, if an individual has executed a deed as a personal guarantor to avail a loan for a company, the lender can now recover dues from both parties.

The Court's decision in this regard is eagerly awaited as it would impact industrialists such as Anil Ambani, Prashant Ruia of Essar Steel, Amtek Auto's Arvind Dham, Venugopal and Saurabh Dhoot from Videocon Group, etc.

Source: *Barbench.com, January 04, 2021*

https://www.barandbench.com/news/litigation/supreme-court-of-india-what-to-expect-in-2021

SEBI tweaked minimum public shareholding norms for listed companies under CIRP

Post the SEBI board's decision, such companies will be mandated to have at least 5 per cent public shareholding at the time of their admission to dealing on stock exchange, as against no minimum requirement at present.

"Further, such companies will be provided 12 months to achieve public shareholding of 10 per cent from the date such shares of the company are admitted to dealings on stock exchange and 36 months to achieve public shareholding of 25 per cent from the said date," it said. The lock-in on equity shares allotted to the resolution applicant under the resolution plan shall not be applicable to the extent to achieve 10 per cent public shareholding within 12 months, added SEBI.

SEBI considered the move after the massive surge in Ruchi Soya's share price, post it's relisting, with the public shareholding at a meagre 0.97 per cent.

***Source**: Free Press Journal, December 16, 2020*

https://www.freepressjournal.in/business/sebi-rejigs-minimum-public-shareholding-norms-for-companies-under-insolvency-and-bankruptcy-code

Delays caused jump in Liquidations under IBC in Q2

Delays in completion of CIRP have forced several corporate debtors into liquidations. As per the government data, the number of liquidations under the IBC in the July-September period of this fiscal year (FY21) saw a jump, more than doubling compared to the previous quarter figures, even as admission of new applications remained subdued at almost the same level as April-June 2020. Almost three-fourth of the ongoing insolvency processes has crossed the 270-day time limit and nearly 60 per cent of total ongoing liquidations have crossed the one-year deadline.

***Source:** Business Standard, December 11, 2020*

https://mybs.in/2YSaCdJ

IBBI Chief hints at developing 'Resolvability Index' for corporate lives

"The key purpose of keeping a company resolvable is to increase competition among resolution applicants that increases the likelihood of resolution in case of need. The likelihood is more if the company has value, and such value is free from encumbrances, is visible to a discerning eye, and easily realisable by any resolution applicant," said Dr. M. S. Sahoo, Chairperson, IBBI in the quarterly newsletter of the board which was widely reported by media. He reiterated that A company should keep itself resolvable all the time and have a 'living will' on the shelf to guide its resolution should the need arise. It should vie for a higher resolvability index to command respect of the society and a premium from stakeholders.

Simply put, "resolvability" reflects the readiness of companies to implement rescue strategies.

Dr. Sahoo highlighted that a "resolvable" company would enjoy competitive advantage as compared to other companies in terms of better access to capital, which may even avoid the need for resolution. Every company should vie for higher resolvability index and the market should prefer to deal with a company which has higher index of resolvability, he added.

***Source:** The Hindu Business Line, December 01, 2020*

https://www.thehindubusinessline.com/economy/policy/ibbi-chief-sahoo-hints-at-development-of-resolvability-index-for-companies/article33205841.ece

IBBI tweaks norms to speed up Liquidation

"Thus, a liquidator shall attempt to sell the assets at the first instance, failing which he may assign or transfer an asset to any person, in consultation with the stakeholders' consultation committee, and failing which he may distribute the undisposed of assets amongst stakeholders, with the approval of the adjudicating authority (NCLT)," the regulator said.

Prior to this move, while the Insolvency and Bankruptcy Code (IBC) envisages early closure of the liquidation process so that assets of the stressed firm are quickly released for alternate uses, the process typically takes longer where the liquidation estate includes a 'not readily realisable asset'.

For the creditors who are unwilling to wait for the completion of liquidation process for realisation of their debt, the IBBI has also amended the regulations to enable the creditors to assign or transfer the debt due to them to any other person, subject to certain conditions.

The IBBI has also tweaked the regulations to mandate that the resolution professional intimate each claimant the principle or formulae for payment of debts under a resolution plan, within 15 days of the NCLT clearing the plan.

Source: *FE Bureau, November 19, 2020*

https://www.financialexpress.com/industry/liquidation-ibbi-tweaks-norms-to-speed-up-insolvency-process/2131361/

Supreme Court upheld claim of Financial Creditors on cash accruals of Corporate Debtor

The SC Bench led by Justice DY Chandrachud refused to interfere with the NCLAT's order that dismissed the Royale Partners' appeal, thus approving the claim of the financial creditors (FCs) on the cash accruals during the resolution process. The Royale Partners, the investor in the CIRP, had argued right on the cash accruals of the CD amounting Rs 209 crore.

The NCLT had approved the resolution plan of Royale Partners after the committee of creditors (CoC) had accepted its Rs 900-crore bid with 73.13% vote share. Banks had taken a haircut of 88%. EPC owed more than Rs 7,700 crore to its financial and operational creditors. However, ArcelorMittal India's bid was rejected by the CoC. Royale Partners senior counsel Mukul Rohatgi argued that the effect of the NCLAT order would be that the resolution applicant would be deprived of the cash balances of the corporate debtor amounting to around Rs 209 crore, thus frustrating its resolution plan.

However, the Supreme Court, refused to interfere in the order of the NCLT.

Source: *Financial Express, November 17, 2020*

https://www.financialexpress.com/industry/epc-construction-resolution-supreme-court-rejects-royales-plea-against-nclat-order-on-cash-accruals/2129657/

NCLT, New Delhi approved Rs 103 crore resolution plan for NIIL Infrastructures

The Principal Bench of NCLT, Delhi has approved Rs 103 crore bid to acquire debt-ridden NIIL Infrastructures, which is developing a housing project in Agra, Uttar Pradesh.

A two-member Principal bench of NCLT, headed by Acting President BSV Prakash Kumar, has approved the Rs 103.18 Crore resolution plan by a consortium of Rishabh Verma and Shilendra Khirwar along with N-Homes.

In March 2018, NCLT Delhi had admitted the application seeking resolution for NIIL Infrastructures under the Insolvency and Bankruptcy Code and appointed Nisha Malpani as the Resolution Professional (RP).

In its order, NCLT has observed that the resolution plan provides no lay off for the workmen of the debt-laden company and for the full and final discharge of their dues for the period of 24 months preceding the insolvency commencement date.

Source: *Money Control, November 15, 2020*

https://www.moneycontrol.com/news/india/nclt-approves-rs-103-crore-resolution-plan-for-niil-infrastructures-6122821.html

Amtek Auto's lenders invoked personal guarantee of former promoter

Lenders of Amtek Auto, one of the top twelve non-performing assets in RBI's list, have filed a petition invoking the personal guarantee of the company's former promoter Arvind Dham, according to people in the know.

Banks recently filed a writ petition in the matter at the National Company Law Tribunal's Chandigarh bench. Two public sector bank executives told Business Standard that even though they have filed their plea, they are 'very sceptical of meaningful recoveries' from the ex-promoter. "We still have to make all efforts and exhaust the legal option at our disposal," a senior bank executive said.

The bank executive also said that the structure of the company is very complicated and includes units that are spread across the globe.

Earlier, personal guarantees could be evoked in the debt recovery tribunals. The new rules introduced by the Insolvency and Bankruptcy Board of India (IBBI) in November last year say that if a company is undergoing corporate insolvency resolution process (CIRP) then matters relating to personal guarantee will be dealt at the concerned NCLT bench. The corporate insolvency process has made things even more complicated.

Source: *Business Standard, October 29, 2020*

https://www.business-standard.com/article/companies/amtek-auto-s-lenders-invoke-personal-guarantee-of-former-promoter-120102900999_1.html

NCLAT: Discoms can't cancel PPA amid corporate insolvency process

In a ruling that is likely to come as a breather for power companies undergoing liquidation or insolvency under the IBC, NCLAT has said that power distribution companies or Discoms cannot terminate, during the CIRP, the power purchase agreements (PPA) they had signed with power generation companies.

Upholding an order passed by the Hyderabad bench of the NCLT, the NCLAT agreed that the proposition that a power plant and its PPA "form one integrated economic asset" appeared to a rational one, and therefore the value of this asset must be protected by the moratorium rules under IBC.

"This asset (PPA) needs to be kept intact and preserved during the process of corporate resolution and liquidation so that the liabilities of creditors and other stakeholders can be taken care of," a two member bench of the NCLAT led by Justice Jarat Kumar Jain said in their judgment on October 20.

The ruling is likely to come as a breather for several power plants, including 15 coal-based thermal power plans with total PPA tie-up worth nearly 12,000 MW, which are currently undergoing insolvency. Of these 15, as many as six have signed PPA with discoms for their full capacity, while the other nine have inadequate or lesser than capacity PPAs signed.

Source: *Indian Express, October 22, 2020*

https://indianexpress.com/article/business/banking-and-finance/nclat-discoms-cant-cancel-ppa-amid-corporate-insolvency-process-6825263/

Corporate insolvency Default threshold of ₹1 crore to apply only prospectively: NCLAT

The revised default threshold of Rs 1 crore for trigger of corporate insolvency applies prospectively from March 24 and not retrospectively, the National Company Law Appellate Tribunal (NCLAT) has ruled.

This would mean that those applications before March 24 which had debt default of less than Rs 1 crore, but over Rs 1 lakh can be admitted for corporate insolvency process.

Dismissing an appeal (by a majority shareholder and director of Om Boseco Rail Products Ltd) against an order of the NCLT Kolkata bench, which had held that the Ministry of Corporate Affairs (MCA) notification increasing the default limit to Rs 1 crore applied prospectively, the NCLAT also ruled the revised default limit would not apply to those applications under the IBC which were pending for admission on March 24, when the minimum default limit was raised to Rs 1 crore from Rs 1 lakh.

Source: *The Hindu Business Line, October 14, 2020*

Corporate insolvency | Default threshold of □1 crore to apply only prospectively: NCLAT - The Hindu BusinessLine

IBBI to rope in agency to study individual indebtedness

With 'individual insolvency' now identified as IBBI's next big reform area, the insolvency regulator has decided to appoint an external institution or an agency for undertaking a research study on individual indebtedness and insolvency.

This external agency once selected by IBBI will have a maximum of one year to complete the research report. Insolvency and Bankruptcy Board of India (IBBI) has invited Expression of Interest from institutions / organisations/ agencies to undertake the research study, sources said.

The research questions that the external agency may be asked to look at include the levels and category of personal debts that could be covered under the individual insolvency framework; whether lack of health insurance correlated with personal insolvency; does individual bankruptcy offer families a better financial future and whether the law as laid out in the Code, need to be revisited to ensure its better usage by individuals or alternatively whether the requirements can be met through changes in the regulations framed under the Code.

Source: *The Hindu Business Line, October 05, 2020*

https://www.thehindubusinessline.com/news/national/ibbi-to-study-individual-ndebtedness/article32772272.ece

Monitoring by IIIPI

Reporting Almanac

Indian Institute of Insolvency Professional of ICAI (hereinafter referred to as IIIPI) is a public limited company registered under Section 8 of the Companies Act, 2013.

IIIPI has been awarded with the registration certificate as the First ever Insolvency Professional Agency of India by the then Hon'ble Finance Minister; Late Shri Arun Jaitely on 28th November 2016.

Congruent with Chapter VIII clause 15 of the Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016 read with Chapter VIII clause 15 of Bye Laws of IIIPI of ICAI, the Insolvency Professional Agency shall have a Monitoring Policy to monitor the professional activities and conduct of professional members for their adherence to the provisions of the Insolvency & Bankruptcy Code, rules, regulations and guidelines issued there-under, the bye-laws, the Code of Conduct and directions given by the Governing Board of IIIPI.

Provisions pertaining to the Reporting to be done by the Insolvency Professionals under the Code

- In conformity with Section 208 (2)(d) of the Code, every Insolvency Professional shall submit a copy of the records of every proceeding before the Adjudicating Authority to the Insolvency and Bankruptcy Board of India (IBBI) as well as to the Insolvency Professional Agency of which he is a member.
- Section 31(3)(b) of the Code requires Insolvency Professionals to forward all records relating to the conduct of the corporate insolvency resolution process and the resolution plan to the Board.
- In conformity with Chapter VIII Clause 16 of IBBI (Model Bye-Laws& Governing Board of Insolvency Professional Agencies) Regulations, 2016 and Chapter VIII Clause 16 of Bye Laws of IIIPI of ICAI; a professional

member shall submit information, including records of ongoing and concluded engagements as an IP, in the manner and format specified by the respective Insolvency Professional Agency at least twice a year.

- An IP shall abide by the Monitoring Policy adopted by the Insolvency Professional Agency with whom he/she is enrolled and shall make timely reporting in accordance with the policy.
- An IP shall maintain and preserve complete and proper record of all the assignments (corporate insolvency resolution process/ voluntary liquidation/ liquidation) handled by them. IBBI in consultation with IPAs will soon notify the retention schedule of records by an IP. The reference of the same has been given under Regulation 39A of the Insolvency and Bankruptcy Board of India (insolvency Resolution Process for Corporate Persons) (Fourth Amendment) Regulations,2018.

Reporting Requirements in compliance with Monitoring Policy of IIIPI/ Circulars and Regualtions

Copy of Public Announcement	Copy of Public announcement to be uploaded on the website of IIIPI

Every member shall submit the copy of public announcement in respect of CIRP/Liquidation assignments, within 07 days of his appointment as IRP/Liquidator in their respective cases via an online module available on the website of IIIPI.

IBBI Circular dated 16th January, 2018	Disclosures by Insolvency Professionals and other professionals appointed by Insolvency Professionals conducting Resolution Process to be submitted on the website of IIIPI

Events specific filing of Relationship Disclosure *(within 3 days from the occurrence of the event)*

- On Appointment as IRP/RP
- On Constitution of Committee of Creditors
- On Appointment of other professionals (Registered Valuers, Advocates etc.)
- On Raising of Interim Finance
- On Supply of Information Memorandum to the Prospective Resolution Applicants

Relationship shall mean any one or more of the four kinds of relationships at the time ofthe event or at any time whenever relation comes to the attention or during the three years preceding the appointment.

Kind 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.
Kind 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.
Kind 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 relatedparty.
Kind 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.

Important Instructions:

- File relationship disclosure on each event,even if there is no relationship
- Enter correct dates for everyevent.
- Choose the correct disclosure purpose while submitting the disclosure. (from the drop down menu)
- File disclosure on the event of appointment of every professional, e.g. Registered Valuer, Accountant, Forensic Auditor, Process Advisoretc.
- Declare whether the appointment/s have been made at arm's length relationship.
- File disclosure in the event of availing support services fromIPE.
- Properly evaluate existence of relationship (ifany).
- Submit the disclosures withindue dates.

Always make sure to file correct and complete disclosures.

IBBI Circular dated 12th June,2018	Fee and other Expenses incurred for Corporate Insolvency Resolution Process

Events for Filing Fee and Other Expenses Disclosure *(within 7 days from demitting office as an IRP/RP as the case may be)*

- Form I & II: Within 7 days from demitting office as IRP
- Form III: Within 7 days from demitting office as RP

Demitting means leaving office either on completion of term as IRP, resignation, removal, reappointment as RP or otherwise (Withdrawal, Settlement, Set aside etc.)

Important Instructions

- Enter correct dates regarding the appointment as IRP/RP.
- Select relevant head before putting value in respect of any expense.
- Fee paid for support services taken from IPE to be disclosed in the forms.
- Enter correct values under each head and same should in synchronization with the

supporting document of the respective fee/s and expense.

- If an expense is not required to be ratified by CoC, then write 0 under the head "Amount approved/ratified by CoC" and give a clarification in the Remarks column.
- Ensure synchronization between the relationship disclosure and cost disclosure especially regarding the appointment of the professionals.
- Submit the forms within the due dates.
- The fee and expenses incurred and entered in the form shall be with respect to the relevant period only i.e; with respect to Form I & II the relevant period is limited to the tenure of the IRP whereas with respect to Form III the relevant period is limited to the tenure of the RP only.

IBBI Circular dated 17th October,2018 and 13th August 2019	Valuation under Insolvency and Bankruptcy Code, 2016

- Appointment of any person, other than a 'registered valuer', i.e, a valuer registered with the IBBI under the Companies (Registered Valuers and Valuation) Rules, 2017, on or after 1st February, 2019, to conduct any valuation required under the Insolvency and Bankruptcy Code, 2016, or any regulations made thereunder, including the Insolvency and Bankruptcy Board of India (Insolvency Resolution for Corporate Persons) Regulations, 2016, and the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016,is illegal and amounts to violation of the aforesaid Circular.
- Any fees paid to any person, other than a 'registered valuer' appointed to conduct valuation required under the code or regulations thereunder on or after the effective date of the Circular as mentioned above i.e; 1st February, 2019 shall not form a part of the insolvency resolution process costs or liquidation cost.

For the purpose of valuation under the Code and engagement letter being entered into should be either with IBBI Registered Valuer or with Registered Valuers Entity transparently defining their name, address, IBBI registration number, their scope of work, fees and timeline within which report has to be provided.

Important Instructions:

- While making relationship disclosure, IPs should specifically mention the individual names of the Valuers registered with IBBI and shall disclose his/her IBBI valuer registration number along with the respective Asset Class to be valued.
- Make sure to appoint only those valuers in the process,which are registered with IBBI.
- Make sure that the valuation report is signed by the Individual Valuer registered with IBBI for the respective Asset Class.
- Make sure that the fee payable for the assignment has been paid to the Individual Valuer.
- Make sure that the appointment letter of Registered Valuer must contain the timeline of appointment also.

IBBI Circular dated 12th April, 2019	Compliance with Regulation 7(2)(ca) of the IBBI (Insolvency Professionals) Regulation,2016.

- The Circular dated 12th April, 2019 amended the IBBI (Insolvency Professionals) Regulation,2016 and insertedRegulation 7(2)(ca) and Regulation 13(2)(ca).
- As required under Regulation 7(2)(ca), the members are required to pay to Insolvency and Bankruptcy Board of India, a fee calculated at the rate of 0.25% of the professional fee earned for the services rendered by him as an IP in the preceding financial year, on or before the 30th April of every year, along with a statement in Form E of the Second schedule of the IBBI (Insolvency Professionals) Regulation, 2016. Form E is required to be submitted on the website of IBBI.

Important Instructions:

- Form E is required to be submitted by every IP even if he has not earned any professional fee or does not have any turnover during the financial year.

IBBI Circular dated 14th August, 2019 and Regulation 40B of CIRP regulations	Filing of Forms for the purpose of monitoring corporate insolvency resolution processes and performance of insolvency professionals under the Insolvency and Bankruptcy Code, 2016 and the regulations made thereunder

In the aftermath of notification of the above mentioned Circular and CIRP regulations, IBBI developed an electronic platform for filing of the CIRP Forms via online module. The said platform is hosted on the website of the IBBI. The IP shall access the said platform with the help of a unique username and password provided to him by the IBBI and upload / submit the Forms available online, along with relevant information and records, by affixing DSC or by e-signing.

An overview of these Forms congruent with the above-mentioned Circular, as available on the website of IBBI, is as per the Table below:

Form	Period Coverage and Scope	To be filed by	Timelines
IP 1	**Pre-Assignment:** This includes consent to accept assignment as IRP / RP, the details of IP and the Applicant, the details of the person which will undergo the process, terms of consent, terms of engagement, etc.	IP	Within three days of the relevant date.
CIRP 1	**From Commencement of CIRP till Issue of PublicAnnouncement:** This includes details of IRP, CD, and the Applicant; admission of application by AA; public announcement; details of suggested Authorised Representatives; non-compliances with the provisions of the Code and other laws applicable to the CD; etc	IRP	Within seven days of making the Public Announcement under section 13.
CIRP 2	**From Public Announcement till confirmation/ replacement of IRP:** This includes details of Authorised Representative selected by IRPs for a class of creditors; taking over management of the CD; receipt and verification of claims; constitution of CoC, first meeting of CoC; confirmation / replacement of IRP; applications seeking cooperation of management (if any); expenses incurred on or by IRP; relationship of IRP with the CD, Financial Creditors and Professionals; support services taken from IPE; non-compliances with the provisions of the Code and other laws applicable to the CD; etc	IRP	Within seven days of confirmation/ replacement of IRP under section 22.
CIRP 3	**From Appointment of RP till issue of Information Memorandum (IM) to Members of CoC:** This includes details of RP; details of registered valuers; handing over of records of CD by IRP to RP; taking over management of the CD; applications seeking co-operation of management (if any); details in IM; non-compliances with the provisions of the Code and other laws applicable to the CD; etc.	RP	Within seven days of issue of IM to members of CoC under regulation 36.

CIRP 4	**From Issue of IM till issue of Request for Resolution Plans (RFRP):** This includes expression of interest; RFRP and modification thereof; evaluation matrix and modification thereof; non-compliances with the provisions of the Code and other laws applicable to the CD; etc.	RP	Within seven days of the issue of RFRP under regulation 36B.
CIRP 5	**From Issue of RFRP till completion of CIRP:** Updated list of claimants, updated CoC, details of the resolution applicants, details of resolution plans received, details of approval or rejection of resolution RP Within seven days of the approval or rejection of the plans by CoC, application filed with AA for approval of resolution plan; details of resolution plan approved by the AA, initiation of liquidation,if applicable, expenses incurred on or by RP, appointment of professionals and the terms of appointment, relationship of the RP with the CD, financial creditors, and professionals, support services sought from IPE, non- compliances with the provisions of the Code and other laws applicable to the CD.	RP	Within seven days of the approval or rejection of the resolution plan under section 31 or issue of liquidation order under section 33, as the case may be, by the AA.
CIRP 6	**Event Specific:** This includes: a) Filing of application in respect of preferential transaction, undervalued transaction, fraudulent transaction, and extortionate transaction; b) Raising interim finance; c) Commencement of insolvency resolution process of guarantors of the CD; d) Extension of period of CIRP and exclusion of time; e) Premature closure of CIRP (appeal, settlement, withdrawal, etc.); f) Request for liquidation before completion of CIRP; and g) Non implementation of resolution plan, as approved by the AA.	I R P / RP	Within seven days of the occurrence of the relevant event.

Common errors observed on part of IPs while filing forms:

- Reason for delay in filing Public Announcement notprovided.
- Date of filing disclosure with IPAs notprovided.
- Reason for delay in submission of IM was notprovided.
- Date of filing the application to AA was notprovided.
- Date of filing of list of creditors with the AA was not given though the list is duly attached in theforms.
- Incomplete/corrupt attachments in theforms.
- Errors in date of admission, amount admitted as debt, date of confirmation ofRP.
- Wrong CIN details of CD

- Timelines are not correctly incorporated.
- Details of the orders passed by Adjudicating Authorities/Courts are incomplete like date of order; brief of order etc. is not captured.
- Details of Authorized Representative not provided.
- Mismatch in the information pursuant to the relationship and cost disclosure submitted on IPA website and provided in CIRP forms.
- Details/ Disclosure pertaining to the appointment of IPE not made to IPA.
- Difference in date of constitution of Committee of Creditors and actual date.
- Date of confirmation as RP not mentioned.
- Reason of liquidation not provided in the respective form.
- In case of withdrawal of CIRP, forms pertaining to the RP tenure are not filed.
- Values mentioned as preferential, undervalued, fraudulent and extortionate transactions do not correspond to the values mentioned in the Application filed before the Adjudicating Authority.

As we are aware that sub-regulation (3) of regulation 40B of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 mandates that an Insolvency Professional shall ensure that the Forms and its enclosures filed under this regulation are accurate and complete. Further, subsequent to the above mentioned Circular, sub-regulation (4) was inserted under Regulation 40 B of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016), which provides for the filing of a Form after due date of submission, whether by correction, updation or otherwise, shall be accompanied by a fee of five hundred rupees per Form for each calendar month of delay after 1st October, 2020.

IBBI Circular dated 17th March 2020 and Regulation 40B of CIRP Regulations	**Feature for modification of CIRP Forms (including IP-1 Form) submitted by an Insolvency Professional (IP) in compliance of regulation 40B of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.**

The IPs are advised to exercise due care and diligence while submitting a Form to avoid modification and submit the Forms in time. However, such modification till 31st March, 2020 later extended to 1st October, 2020 did not attract any fee.

The modification of Forms or failure to file a Form in time does not reflect well on an IP and may invite action for non-compliance. Thus, the IRP/RP, as the case may be, shall be liable to any action which the Board may take as deemed fit under the Code or any regulation made thereunder, including refusal to issue or renew Authorization for Assignment, for-

a) failure to file a form along with requisite information and records;

b) inaccurate or incomplete information or records filed in or along with a form;

c) delay in filing the form

Half Yearly Return	**Filing of submission of Half Yearly Return within 15 days from the end of respective Half Year**

In conformity with Chapter VIII clause 16 of Schedule of Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016 read with Chapter VIII clause 16 of Bye-Laws of Insolvency Professional Agency, every professional member shall submit information, including records of ongoing and concluded engagements as an insolvency professional, in the manner and format specified by the Agency, at least twice a year. Conforming to the said provisions, the Insolvency Professional shall submit relevant information online by visiting the following link on website of IIIPI-

https://www.iiipicai.in/forms/

The Professional Member shall submit the Half Yearly Report to IPA in the manner specified by IPA twice in a year as follows:

Reporting Tenure	**Last Date of submission**
From 1st April to 30th September	15th October
From 1st October to 31st March	15th April

Important

The amendment brought about on 16th September, 2020 inserted additional information under Clause 6.1.1 (i) (c) of the Monitoring Policy of IIIPI regarding the non-submission of Half Yearly Return. The said clause incorporates the penalty to be imposed and actions to be taken against the defaulters.

Actions against defaulters as mentioned in the revised Monitoring Policy of IIIPI dated 16.09.2020 for Non-submission of Half-Yearly Return are as follows:

i. In respect of the existing defaulters a final reminder letter giving 15 days' time for submission of Half Yearly Return with a late-fee of Rs.1000/- and in case not filed even after the expiry of fifteen days a late-fee of Rs. 500/- per month shall be levied.

ii. For any such future delay by IP, a late-fee of Rs.1000/- after two reminders each giving 15 days' time and in case not filed even after that a late-fee of Rs. 500/- per month shall be levied.

iii. Such cases of delay shall be referred by Monitoring Committee to Disciplinary Committee after allowing maximum period of 1 year.

(Explanation- For the purpose of this Clause, "existing defaulters" means IP who fails to submit return for the Half Year ending on 31st March 2019, 30th September 2019 and 31st March 2020, Half Yearly Return;

"For any future delay" means Delay in respect of submitting Half Yearly Return which become due on or after the period ending on 30th September 2020.)

IBBI Circular dated 29th October, 2020	Compliance with Rules 4, 6 and 7 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

An applicant is required to provide a copy of the application for initiating corporate insolvency resolution process against a corporate debtor, inter alia, to the Board, before filing the same with the Adjudicating Authority as per the format provided in the Annexure A and step by step guide provided in Annexure B of the Circular.

IBBI Circular dated 27th November, 2020	Filing of list of creditors under clause (ca) of sub-regulation (2) of regulation 13 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016

- As per the Clause (ca) of sub-regulation (2) of regulation 13 of the CIRP Regulations, 2016 requires the interim resolution professional or the resolution professional to file the list of creditors on the electronic platform of the Board for dissemination on its website. The purpose of this requirement is to improve transparency and enable stakeholders to ascertain the details of their claims at a central platform.
- The above requirement is applicable to every corporate insolvency resolution process (a) ongoing as on the date 13th November, 2020, that is, the date of commencement of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fifth Amendment) Regulations, 2020; and, (b) commencing on or after the said date.
- In pursuance of the above, the Board has made available an electronic platform at www.ibbi.gov.in for filing of list of creditors as well as updating it thereof. The platform permits multiple filings by the interim resolution professional or the resolution professional as and when the list of creditors is updated by him. The format of list of creditors for the purpose of filing has been placed as Annexure in the circular.

IBBI Circular dated 6th January, 2021	Retention of records relating to Corporate Insolvency Resolution Process

As per the Regulation 39A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations) which mandates the interim resolution professional (IRP) and the resolution professional (RP) to preserve a physical as well as an electronic copy of the records relating to the corporate insolvency resolution process (CIRP) of the corporate debtor (CD).

Thereafter, keeping in view the above provisions and in consultation with the IPAs, the Board has directed retention of records under regulation 39A of the CIRP Regulations as under:

- An IP shall preserve –
  a) an electronic copy of all records (physical and electronic) for a minimum period of eight years, and
  b) a physical copy of physical records for minimum period of three years, from the date of completion of the CIRP or the conclusion of any proceeding relating to the CIRP, before the Board, the Adjudicating Authority (AA), Appellate Authority or any Court, whichever is later.
- An IP shall preserve records relating to that period of a CIRP when he acted as IRP or RP, irrespective of the fact that he did not take up the assignment from its commencement or continue the assignment till its conclusion. For example, an IP served for three months as RP before he was replaced by another IP, who served till conclusion of the CIRP. The former shall preserve records relating to the first three months, and the latter shall preserve records relating to the balance period of the CIRP.
- An IP shall preserve copies of records relating to or forming the basis of:
  a) his appointment as IRP or RP, including the terms of appointment;
  b) handing over / taking over by him;
  c) admission of CD into CIRP;
  d) public announcement;
  e) the constitution of CoC and CoC Meetings;
  f) claims, verification of claims, and list of Creditors;
  g) engagement of professionals, registered valuers, and insolvency professional entity, including work done, reports etc., submitted by them;
  h) Information Memorandum;
  i) all filings with the AA, Appellate Authority and their orders;
  j) invitation, consideration and approval of resolution plan;
  k) statutory filings with IBBI and IPA;
  l) correspondence during the CIRP;
  m) insolvency resolution process cost;
  n) applications for avoidance transactions or fraudulent trading; and
  o) any other records, which is required to give a complete account of the CIRP.
- An IP shall preserve the records at a secure place and ensure that unauthorised persons do not have access to the same. For example, he may store copies of records in electronic form with an Information Utility. Notwithstanding the place and manner of storage, the IP shall be obliged to produce records as may be required under the Code and the Regulations.

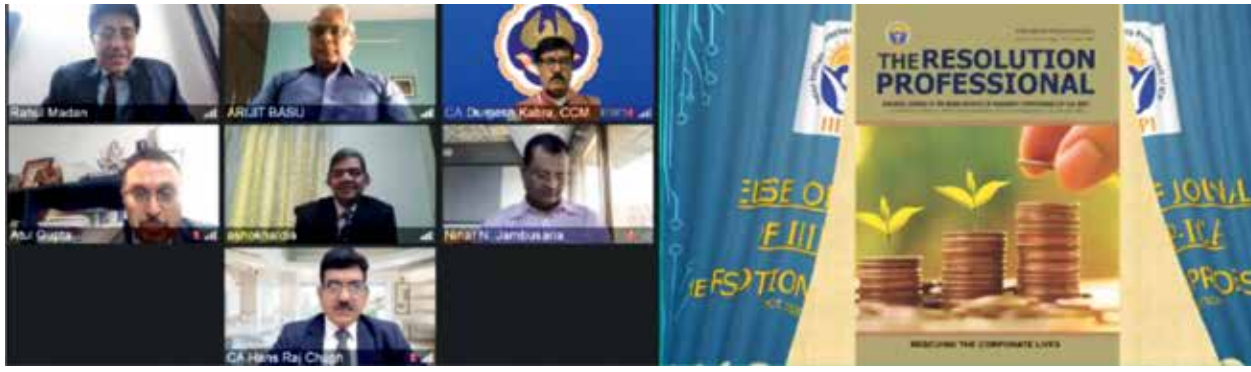
Other Reporting	Monthly submission of information on Ongoing and concluded cases of IPs

Monitoring Policy of Indian Institute of Insolvency Professionals of ICAI (IIIPI) requires an Insolvency Professional in other reporting to report status of each assignment they undertake under IBC periodically on monthly basis.

In accordance with the same, the professionals are required to update the status of every assignments i.e, CIRP, Liquidation, Voluntary Liquidation, Personal Guarantors to Corporate Debtors and Authorized Representatives through Google link shared by the IPA via email at the month end of every month to all registered members.

The IP is requested to kindly comply with the said reporting in the time bound & accurate manner.

Brief Report on International Conference organized by IIIPI



Inaugural Session of the International Conference

IIIPI organized an International Conference (Virtual) on "Insolvency Resolution Paradigm: Global Headwinds & Responses" on 24th – 25th October 2021.

The two days international conference constituted inaugural session, plenary session and six technical sessions.

With a view to preserve the treasure of knowledge, IIIPI also prepared a report on the proceedings of the conference which along with the recommendations was shared with the IBBI. Besides, the soft copies were also shared with all the professional members of the IIIPI. The full report may be accessed at .....Here, we reproduce the edited excerpts of the Report for ready reference of our readers:

Inaugural Session: October 24, 2020

Welcome Address

Dr. Ashok Haldia, Chairman, IIIPI

Initiation Address

CA. Nihar N. Jambusariya, Vice President, ICAI

Guest of Honour/ Keynote Address

Mr. Arijit Basu, MD (CCG), SBI

Inaugural Address

CA. Atul Kumar Gupta, President, ICAI

Vote of Thanks

CA. Rahul Madan, MD, IIIPI

Recommendations

1. Indian banks need to strengthen their balance sheets because for a healthy economy strong bank are the needs of the hour.
2. A cautious approach needs to be adopted while considering further suspension of IBC due to COVID-19 pandemic. The government will have to weigh pross and cons in continuing a relaxed environment.
3. Every effort must be taken to revive a company from financial crisis while liquidation should be only the last alternative.
4. As the IBC regime in India is still in the evolving, the insolvency professionals have the responsibility to test the existing provision in the practice and give their feedback for amendments.

Plenary Session: Perspective on Global Insolvency Regime

Guest Speakers

CA. Prafulla P. Chhajed, Director, IIIPI and CCM, ICAI

Mr. Paul Bannister, Head (Policy), Insolvency Service, Government of UK

Dr. Ms. Mukulita Vijaywargiya, WTM, IBBI

Mr. Gyaneshwar Kumar Singh, Joint Secretary, Ministry of Corporate Affairs, GOI

Special Address: Perspective on IBC

Mr. Rajesh Sharma, Member, NCLT, Mumbai Bench

Vote of Thanks

Dr. Ashok Haldia, Chairman, IIIPI

Recommendations

1. With IBC in place, the concepts of sick companies and sick banks shall hopefully fade away in future.
2. Judicial cooperation is a pre-requisite for the insolvency system. However, an ideal IBC ecosystem should completely rely on its

instruments such as COC and unburden the judiciary.

3. Insolvency regulations should be updated on an ongoing basis for which the feedback of insolvency professionals is very crucial.
4. Latest instruments of information technology are very crucial for insolvency ecosystem.

Technical Session 1: Balancing Rights of Stakeholders at Cross-Purpose

Moderator

CA. Hans Raj Chugh, Director, IIIPI

Panellists

Mr. Shardul S. Shroff, Shardul Amarchand Mangaldas

Mr. Abhilash Lal, Insolvency Professional

Dr. Eric Levenstein, Chair, SARIPA, South Africa

Mr. David Kerr, Insolvency Professional, UK

Vote of Thanks

Dr. Ashok Haldia, Chairman, IIIPI

Recommendations

1. IBC should be amended to give more powers to IPs to ensure regular supply of essential/ critical items for the debtors such as hospitals.
2. Various stakeholders need to be mindful of their rights and duties, keeping up the spirit of the law.
3. Effective communication is very important in achieving the objectives of balancing the rights of various stakeholders.
4. RPs should update themselves in line with the pace of evolving jurisprudence.

Technical Session 2: Group Insolvency Framework, Early Lessons

Moderator

CA. Hans Raj Chugh, Director, IIIPI

Panellists

Dr. Navrang Saini, WTM, IBBI

Mr. C. Scott Pryor, Professor, Campbell University Law School, USA

Mr. Sumit Binani, Insolvency Professional

Vote of Thanks

CA. Rahul Madan, MD, IIIPI

Plenary Session of the International Conference

Recommendations

1. Group insolvency should be developed in a phased manner as it is a complex issue and requires extensive deliberations.
2. USA's insolvency system of 'Debtors in Control' in not recommendable for other countries as experience shows and in line with UNCITRAC Model Law, 'Creditor in Control' is preferable framework.
3. There should be enabling framework in the law which could involve Adjudicating Authorities for 'substantiative consolidation' for smooth completion of CIRP on time. This may not be a mandatory framework but a voluntary framework.

Technical Session 3: Insolvency of FSPs and Individuals, Challenges Ahead on 25th October 2020

Moderator

CA. Durgesh Kabra, Director, IIIPI and CCM, ICAI

Panellists

Ms. Anuradha Guru, Executive Director, IBBI

Mr. R. Subramaniakumar, Administrator, Diwan Housing Finance Ltd. (DHFL) by RBI.

Mr. David Kerr, Insolvency Professional, UK

Vote of Thanks

CA. Rahul Madan, MD, IIIPI

Recommendations

1. There is a great need for the administrator to take all the stakeholders on board and develop a strong compliance team for insolvency of FSP.
2. There is a need for a dynamic resolution plan for FSPs.
3. Individual insolvency should not be implemented in one go but in phases i.e., learning phase and implementation phase.

4. A robust communication plan and use of latest information technology for constant communication with the stakeholders is very crucial for the FSPs insolvency.

Technical Session 4: International Perspective on Managing Cross Border Insolvency

Moderator

Mr. Sunil Pant, Past CEO, IIIPI

Panellists

Mr. Nilang Desai, Partner, AZB Partners

Dr. Mukulita Vijaywargiya, WTM, IBBI

Mr. Paul Bannister, Head (Policy), Insolvency Service, Govt. of the UK

Mr. Ashok Kumar, Partner, Black Oak LLC, Singapore

Mr. Ashish Chhawchharia, Insolvency Professional

Vote of Thanks

CA. Rahul Madan, MD, IIIPI

Recommendations

1. There is great need for the mutual understanding by various stakeholders in a cross- border insolvency.
2. The need of the hour is to develop global protocols to play a vital role in Cross Border Insolvency to have uniform procedures like in identifying the Centre of Main Interest (COMI).
3. Working harmoniously is the best way to implement cross-border insolvency.
4. Protocols in cross-border insolvency should be flexible and emphasise on cooperation but not binding on countries.

Technical Session 5: Ethical Conduct and Public Interest as underlying theme of Insolvency Resolution

Moderator

CA. Durgesh Kabra, Director, IIIPI

Presenters

Mr. Saji Kumar, ED, IBBI

Mr. Rashmi Verma, IAS (Retd), Director, IIIPI

Mr. Sharath P. Kumar, Insolvency Professional

Mr. Ashok Kumar, Partner, BlackOak LLC, Singapore

Vote of Thanks

CA. Rahul Madan, MD, IIIPI

Recommendations

1. IPs should discharge their duties with impartiality, objectively and integrity.
2. A strong system of peer-review and peer pressure should be developed to inculcate high ethical values among IPs.
3. RP should record the reasons of running the operations of the company in such a manner so that aspersions are not cast upon him/her.
4. RPs should also be familiar with the working of law enforcement and investigating agencies to save themselves from the hassles.
5. IPs should quote fee which is commensurate with the work but not exorbitant enough to make it un-affordable by the creditors.

Technical Session 6: Issues faced by Insolvency Professionals and Way Forward

Moderator

CA Rahul Madan, MD, IIIPI

Panellists

Mr. Pawan Kumar, Dy. MD, IIFCL

Mr. Ashish Makhija, Insolvency Professional

Ms. Sripriya Kumar, Insolvency Professional

Mr. Dilip Jagad, Insolvency Professional

CA. Hans Raj Chugh, Director, IIIPI

Dr. Eric Levenstein, Chair, SARIPA, South Africa

Vote of Thanks

Dr. Ashok Haldia, Chairman, IIIPI

Recommendations

1. IBBI should bring an elaborative code of conduct for the members of COC.
2. Maximum possible automation of IPs enrolment, registration, and other processes.
3. Capacity building of stakeholders is very important at all levels.
4. We need to develop best practices based on which conduct of IPs and COC members can be assessed.

IIIPI News

IIIPI launched 'LIE Preparatory Classroom (Virtual) Program'

Adding one more flower in its bouquet, IIIPI on January 23, 2021 launched an online program for Insolvency Professional (IP) aspirants to help them in their preparation for Limited Insolvency Examination (LIE). The first batch of LIE Preparatory Classroom (Virtual Program) will be conducted from 23rd January 2021 onwards for 10 days in two shifts 9.30 AM to 11.30 AM and 12.30 PM to 2 PM on every Saturday and Sunday.

In this program the IP aspirants will receive guidance from faculty members, established IPs and experts including Adv. G. P. Madan, CA. Sripriya Kumar, CS. Yogesh Gupta, CA. K. V. Jain, Adv. Mamta Binai among others. The first batch has witnessed XYZ enrolments.

Inauguration of LIE Preparatory Classroom (Virtual) Program on January 23, 2021

IIIPI conducted 2nd and 3rd Batch of EDP

After successful completion of the first-ever batch of virtual "Executive Development Program (EDP) on Managing Corporate Debtors as Going Concern as CIRP (For IPs)" on 07th to 11th October 2020, IIIPI organized two more batches of this program. The second batch was conducted on 07th to 11th November 2020 while the third batch was conducted on 26th to 30 December 2020. The numbers of participants in these batches were 37, 47 and 41, respectively.

The speakers of the third batch were CA. Dhinal A. Shah, Mr. Shailendra Ajmera, Mr. Ashish Makhija, and Mr. Rohit Sehgal. EDP is an initiative of IIIPI which is aimed at providing

managerial know how, regulatory framework, inter-disciplinary approach, developing soft skills and practical exposure via case studies. In this program the participants are also provided 'advance study material'. Besides, the participants are benefitted with the experiences of the best professionals in India and abroad. The objective of the 30 hours is to enhance managerial skill set of IPs so that they could effectively follow up with the resolution process.

Inauguration of the 3rd batch of EDP on December 26, 2020

E-PDP (Professional Development Program) on Professional Ethics and Regulations on Code of Conduct for Insolvency Professionals under IBC, 2016

IIIPI along with two other IPAs and the Indian Institute of Corporate Affairs (IICA) organized 3 days "E-Professional Development Program on Professional Ethics and Regulations on Code of Conduct for Insolvency Professionals under IBC, 2016" from 21st November to 22nd November 2020.

The program also marked the presence of foreign experts such as Prof. Juanitta Calitz, University of Johannesburg and Mr. H H James Pickering, Head of Enterprise Chambers. The objective of the program was to make insolvency professionals understand the professional ethics through case studies and create awareness of penal provisions on violations of code of conduct as well as Regulations. The program also allowed discussion related to the conduct of Insolvency Professionals.

PRECs

The 38th batch of Pre-Registration Educational Course (PREC) was conducted jointly by the three Insolvency Professional Agencies (IPAs) of the country from 18th to 24rd January, 2021 via online mode. Earlier, the three IPAs viz, viz., IIIPI, ICSI IIP and IPA ICAI, jointly conducted 33rd, 34th, 35th, 36th, and 37th batches of PREC respectively on 10th to 16th October 2020, 31st October to 07th November 2020, 23th to 29th November 2020, 21st to 28th December 2020, 06th – 12th January 2021 via virtual mode.

37th Batch of PREC (online) on January 06, 2021

Webinars

IIIPI conducted eight webinars from October to December 2020 on various issues related to the IBC ecosystem.

As the pre-pack insolvency is gathering momentum, IIIPI in association with the British High Commission conducted a webinar on "Pre-pack Insolvency Resolution as a Corporate Rescue Mechanism" on December 17, 2020. The webinar on "Common concern and issues while Monitoring & Inspection of IPs" conducted on November 19, 2020 received a record 700 Hits. Besides, IIIPI in association with NeSL (National E-Governance Services Ltd) and two other IPAs (ICSI IIP & IPA of ICAI) conducted three webinars on "Introduction: NeSL Platform for Distressed Assests for IPs" on October 27, November 5 and November 9, 2020.

IIIPI also organized a webinar on 'Common issues into Grievances & Professional Conduct" on October 28, 2020. The last webinar of 2020 was conducted on December 22 on the topic "Practical Issues, Recent Amendments & Implications under Liquidation." With the eight webinars from October to December, IIIPI completed 21 webinars in 2020 on IBC related topics.

Webinar on "Pre-pack Insolvency Resolution as a Corporate Rescue Mechanism" on December 17, 2020

Workshop on Demystifying Liquidation Process under IBC

IIIPI conducted 2 CPE hours virtual interactive workshop on December 02, 2020 related to the topics such as liquidation process, record keeping, compliances, grey, areas & best practices.

Workshop on Demystifying Liquidation Process under IBC on December 02, 2020

In this workshop, CA. Sripriya Kumar (IP), CA. Ravi Prakash Ganti (IP), CA. Mamta Binani (IP), CA. Parveen Bansal (IP) and CA. K. V. Jain (IP) were the main speakers. The workshop was attended by 390 insolvency professionals. The event provided an opportunity to insolvency professionals to update their knowledge base and widen their horizon on Liquidation process under the Code.

International Conference

IIIPI organized two days 'International conference on Insolvency Resolution Paradigm: Global Headwinds & Responses" on 24th - 25th October 2020. Mr. Arijit Basu, MD, CCG (SBI) was the Guest of Honour in the Inaugural Session. The Guest of Honour also released October 2020 edition of the Resolution Professional.

IIIPI also prepared a Report on the proceedings of the seminar to conserve the knowledge for future reference. The report was also circulated among speakers and various stakeholders including the professional members of IIIPI.

IIIPI Professional Member gets International Recognition

Mr. Satish Kumar Gupta, a professional member of IIIPI has been conferred with "TMA 2020: Mega Company Turnaround of the Year" Award by Chicago, USA based Turnaround Management Association (TMA) for turnaround and resolution of Essar Steel India Limited (ESIL) on September 30, 2020.

HELP US TO SERVE YOU BETTER

Dear Members,

With your continuous support and encouragement, the Indian Institute of Insolvency Professional of ICAI (IIIPI) has retained its position as the largest Insolvency Professional Agency (IPA) of India since 2016. Team IIIPI is proudly serving over 61% insolvency professionals (IPs) registered with Insolvency and Bankruptcy Board of India (IBBI) in terms Enrolment, Pre-Registration Educational Course (PREC), and Authorization for Assignment (AFA). Today, we have enrolled members from diverse professionals' streams including Chartered Accountancy, Company Secretary, Cost Accountancy, Law, Banking and Management.

IIIPI is committed to provide world class services to its present and aspiring members. We have resolved for timely disposal of all the Enrolment Applications within 10 days and AFA Applications within 15 days. However, we face challenges in achieving them due to deficiency in the documents submitted by the members. In the reference, certain 'Common Issues'are highlighted as follows:

Common Issues in 'Enrolment Formwith Application for Pre-Registration Educational Course' (PREC)

- All the required educational documents are not enclosed.
- Scanned copies are not clear i.e., important portions are cut, blurred, or blackened.
- Appropriate experience certificates are not enclosed.
- COP and employment clash not updated at ICAI records.
- Fetching CIBIL clarification (overdue and low score).
- ITR acknowledgement not received.

Common Issues in 'Authorization for Assignment' (AFA)

- Filing wrong Enrolment No. in the AFA application.
- IBBI Professional Fee is not paid.
- IIIPI Annual membership fees not paid by the member.
- Though IPAs are required to dispose AFA applications in 15 days, we make all efforts to dispose them at the earliest.

Services

Indian Institute of Insolvency Professionals of ICAI (IIIPI)

ICAI Bhawan, 8th Floor, Hostel Block, A-29, Sector-62,
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Office Hours: 09:30 AM to 06:00 PM (Monday to Friday), except closed holiday.

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

Contact Details

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

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FEEDBACK

Dear Reader,

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

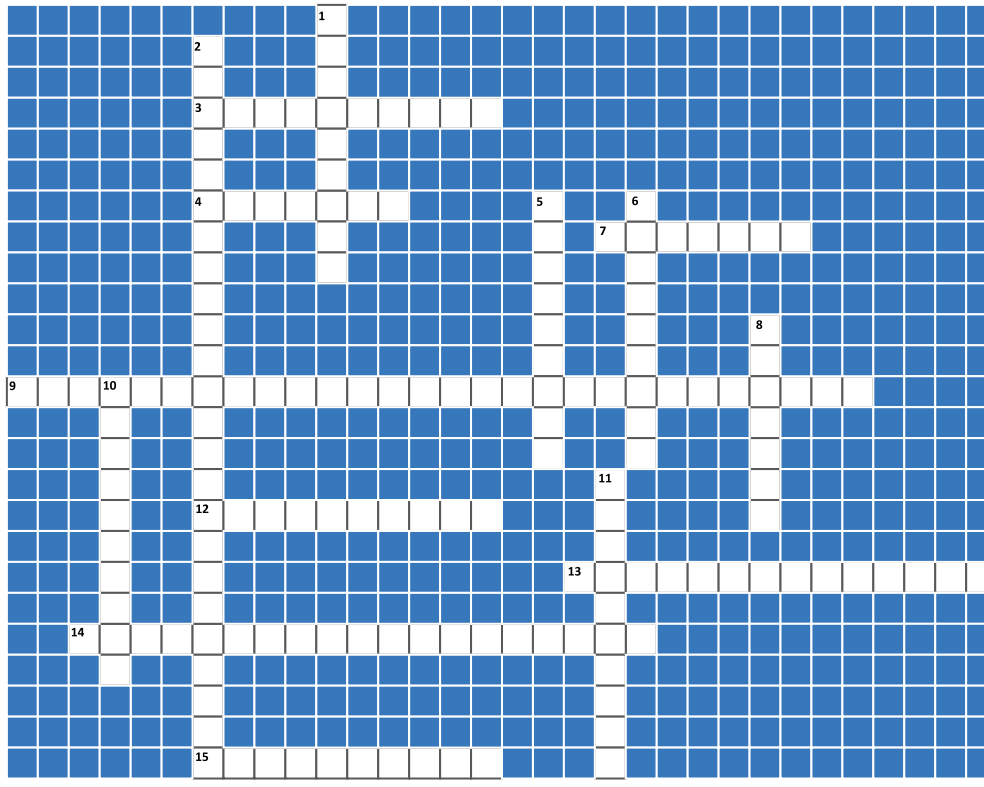
We firmly believe in innovations in communication approaches and strategies to present complicated information of insolvency ecosystem in a highly simplified and interesting manner to our readers.

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

Editorial Team

The Resolution Professional

IBC Crossword



Across

3. Under Fast Track framework, CIRP shall be completed within
4. Name of the country which promulgated the legislation "Statute of Bankrupts" in 1542
7. Which group acquired the bankrupt SBQ Steels?
9. What was the name the Corporate Debtor whose resolution plan order first pronounced under Insolvency and Bankruptcy Code, 2016?
12. Provision under IBC not applicable to the resolution in respect of CIRP of any MSME
13. Mr Krishnamurthy Subramanian,CEA holds the position with IBBI Governing Board, as___?
14. Name the framework by RBI which provides for early recognition, reporting and time bound resolution of stressed assets
15. A valuation report should not carry

Down

1. Not a resolution process associated with insolvency of individuals
2. Name the Corporate Debtor against whom the first case under IBC was filed?
5. Who is the chairperson of Advisory Committee on Corporate Insolvency and Liquidation formed in September 2020?
6. In the case of Edelweiss Asset Reconstruction Co. Pvt. Ltd. v. Adel Landmarks Ltd., the bench held Regulation 12 (2) CIRP to be
8. MCA in October 2020 forms a committee under the chairmanship of Dr M.S. Sahoo to recommend a regulatory framework for which type of insolvency resolution process?
10. The liquidator preserve the registers and books of CD for a period
11. What is the name of the Indian company, where a court in Netherlands appointed a bankruptcy trustee to take charge of its assets located in the Netherland?

Answers: IBC Crossword, October 2020

Down: 1. Disclosure 2. Asset 3. Stakeholder 4. Creditor 7. CIRP 9. Enrollment 11. Regulation 13. Liquidator 14. Defaulter 15. UNCITRAL 18. Audit

Across: 5. Bankruptcy 6. Appeal 8. Insolvency 10. Cross border 12. Grievance 16. Guarantors 17. Inspection 19. Resolution 20. Moratorium

INVITATION FOR CONTRIBUTING ARTICLE

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

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

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

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

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