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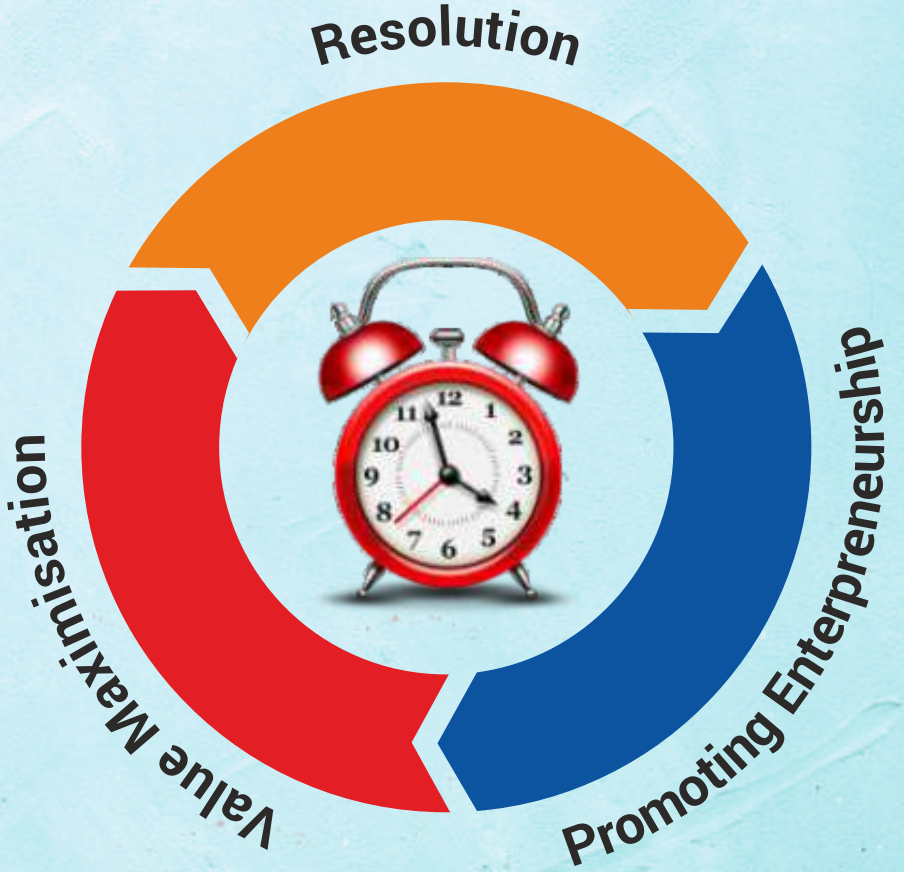
# THE RESOLUTION PROFESSIONAL

**RESEARCH JOURNAL OF THE INDIAN INSTITUTE OF INSOLVENCY PROFESSIONALS OF ICAI (IIIPI)**

(A Section 8 Company Promoted by ICAI and Registered as an IPA with IBBI)




## RESCUING THE CORPORATE LIVES

# ABOUT IIIPI

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

Against this backdrop of the Code and the IBBI (Insolvency Professional Agencies) Regulation, 2016 (IPA Regulation), The Institute of Chartered Accountants of India (ICAI) formed the Indian Institute of Insolvency Professionals of ICAI (IIIPI), a section 8 company to enrol and regulate IPs 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.

# STRATEGIC PRIORITIES

- Capacity building of members by enhancing their all-round competency for their professional development in global context.
- Capacity building of other stakeholders for facilitating efficient and cost effective insolvency resolution proceedings.
- Deploying an independent regulatory framework with focus on ethical code of conduct by the members.
- Working closely with the regulator and contributing to policy formulation including with respect to the best practices in the insolvency domain.
- Conducting research on areas considered critical for development of a robust insolvency resolution framework.

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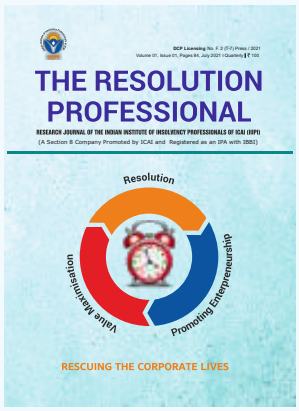


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# Message from Chairman, Editorial Board

**CA. Nihar N. Jambusaria**
President, ICAI
Chairman, Editorial Board-IIIPI

*Dear Members,*

The popular adage 'storms make trees take deeper routes' seems very relevant for the insolvency ecosystem in India. We have been witnessing this phenomenon in India's insolvency regime since the inception of the Insolvency and Bankruptcy Code (IBC), 2016. However, the IBC ecosystem had to undergo an emphatic trial by fire, during the Covid-19 pandemic that started in 2020 and continued even in 2021 as the second wave struck the Indian economy.

The ordeal so far, nevertheless, proves the resilience of the IBC regime, touted as a showcase legislation and a respite from the previous regimes. Of course, the sustained efforts made by various stakeholders – Ministry of Finance, Reserve Bank of India, Ministry of Corporate Affairs, Insolvency and Bankruptcy Board of India (IBBI), Banks, Insolvency Professional Agencies (IPAs), Insolvency Professionals (IPs) etc. - in a coordinated and integrated manner lie at the core which needs to be nourished as we go along. It is imperative to carry forward the momentum built so far in furtherance of ameliorative objectives that IBC regime is known for and to improve overall affairs of our economy. In the above backdrop, it would be worthwhile to carry out a scenario-analysis on how the insolvency regime in India has been handling the shocks arising from the black-swan event.

**Suspension of Fresh Proceedings under IBC**

Economic reform cannot be treated as a one-off act. Different stakeholders involved in the economic issues need to act in tandem like sense organs of the body for providing genuine feedback to the policy makers who should then react as central nervous system. Such process has it's own inherent benefit of constant monitoring and innovation to make the economic reform, a success. We have seen this happening in the context of IBC regime.

The second wave of COVID has been more disastrous, therefore, it was obvious for industrial associations and other stakeholders to demand suspension of Sections 7, 9 and 10 of the IBC, 2016 which deal with the filing of applications for initiation of Corporate Insolvency Resolution Process (CIRP) like it was done on June 05, 2020, with retrospective effect from March 25 and was later extended till March 24, 2021. As Pre-Packaged Insolvency Resolution Process for MSMEs (PPIRP) was already implemented, the concerns of the small businesses were addressed. If the suspension had been reintroduced, this would have been quite demoralizing for IBC Ecosystem which was facing suspension of new filings from March 25, 2020. It is because the conditions prevailing in 2020 paved way for better execution model being adopted during the second wave, across the board. Besides, the demand across a few sectors like energy, pharmacy, hospitals, steel, goods transport etc. was robust. Therefore, a targeted relief for some strained businesses rather than a blanket ban on initiation of new insolvency filings, was the logical and appropriate action.

The relief came in the form of 'Resolution Framework 2.0 for COVID Related Stressed Assets of Individuals, Small Businesses and MSMEs' announced by the Reserve Bank of India (RBI) on May 05, 2021. Besides, it also addressed

the concerns of the MSMEs not registered with 'Udyam Registration' portal by providing them a window for registration before the date of implementation of the restructuring plan. It also directed the lending institutions to put in place a transparent board-approved debt restructuring plan for MSMEs within three months from the date of notification. Furthermore, the framework was revised to increase the aggregate exposure, including non-fund-based facilities, of all lending institutions to the MSME borrower from ₹25 crore to ₹50 crore. Also, the RBI Governor held separate meetings with MDs/CEOs of the public and private banks respectively on May 19 and May 25 to ensure actual implementation of the Resolution Framework 2.0 while reviewing the impact of earlier Resolution Framework 1.0.

**Transformed Behavior of Debtors**

Another landmark success of IBC regime is the complete transformation in the behavior of debtors from Charvak's vision of 'Riṇaṃ kṛitvā ghṛitaṃ pibet' (availing debt to enjoy luxuries) to sustainable debt. As per the latest data released by IBBI till March 2021, 17,305 applications for initiation of CIRPs of Corporate debtors (CDs) having underlying default of ₹ 5,33,145 crore were resolved before their admission. This is a huge success which was not achieved by any of the previous legislations related to strained assets of companies. Furthermore, out of 2,653 CIRP cases which were closed during their insolvency process 23% have been closed on appeal or review or settled; 16% have been withdrawn.

IBC has also been successful in inculcating the values among the debtors that the ownership of business is not an inherent right. If you are unable to manage the debt, the ownership of your business will change hands. This credible threat of the IBC has made the promoters to resolve their debt at an early stage and before the situation goes out of hand. After the judgement of the Supreme Court in May'21 upholding the Central Government's notification on Personal Guarantors (PGs) to Corporate Debtors (CD), a similar transformation is expected in the behaviour of PGs as well. As per IBBI data, 132 applications were pending against PGs on March 31, 2021.

**Emerging Challenges**

Though we have travelled a long way, yet we have miles to cover, and the road ahead looks bumpy. While delays in litigations, need for proactive support from CoC members, need for legal frameworks on group/cross border insolvency and capacity building of professionals are some of the challenges where corrective efforts are already going on; the emerging challenges are also perceptible on account of parallel/frivolous proceedings and controversial tactics by promoters to wrest control of Corporate Debtor. The policy makers need to plug the loopholes which are prone to be misused by the existing promoters and other stakeholders. Let there be no space for manipulations or mala fides.

Though highly disruptive, the Covid-19 pandemic has taught us to use cutting-edge information technology in our functioning including at the Hon'ble courts - right from the online filling, online listing to virtual hearing and issuing soft copies of the judgments; the pandemic has proven to be catalyst in transforming societies in many ways. In this direction, the Gazette Notification of June 15, 2021, by the Ministry of Corporate Affairs (MCA) to permanently allow 'Virtual Board Meetings' of companies is highly appreciable. I am of the firm opinion that latest technologies will further streamline the court proceedings at Hon'ble NCLTs and NCLAT which will be helpful in reducing the pendency of insolvency cases.

It is high time that all the stakeholders in IBC ecosystem come together and collaborate to ensure a more resilient insolvency regime, as a nation-building measure.

Wish you all the best.

**CA. Nihar N. Jambusaria**
President, ICAI
Chairman, Editorial Board-IIIPI

# Message from Chairman, IIIPI-Board

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

***Dear Members,***

The second wave of Covid-19 has been quite devastating and disruptive. At the outset I offer my deep condolences for the insurmountable suffering and loss as many of us have lost someone close - relative, friend or acquaintance. Several of our insolvency professional (IP) members and officials of IIIPI were also affected by the Covid. The pandemic has reminded us of the fighting spirit and camaraderie while facing challenges convincingly and effectively. I pray for the good health of all and hope for normalcy to resume at the earliest. IIIPI has facilitated multiple Covid helplines for interaction among members, across four metro locations, the details of which are available on IIIPI's website.

How and to what extent, the second Covid wave can impact the economy and IBC regime in India? This vexed question has confounded one and all. Though many agencies are engaged in gauging the impact with a view to direct corrective actions needed, a recent report by the credit rating agency ICRA has sparked a glimmer of hope. As per its estimates, the lenders or financial creditors will realize about ₹ 55,000 – 60,000 crores from successful Resolution plans in FY22 which is more than double of ₹ 26,000 crore realized in FY 21. Obviously, these predictions come with riders like suppression of second wave because of vaccination drive and restoration of normal economic activity from second wave, etc. However, recent perceptible dip in Covid cases and mortality has resulted in gradual unlocking across different metros and states and this augurs well for a positive future.

## Insolvency Resolution During Jan-Mar 2021

The insolvency data released by the IBBI reveals that during January to March 2021, 29 Corporate Insolvency Resolution Process (CIRPs) resulted in resolution plans. In these cases, the average realization by Financial Creditors (FCs) in comparison to liquidation value has been 131.07%. Since inception a total of 4376 CIRPs have commenced by the end of Mar'21. Of these, 2653 have been closed. Of the closed cases, 48% cases ended in liquidation orders, 23% cases were closed on appeal or settled, 16% cases were withdrawn u/s 12 A, and 13% (or 348) cases resulted in resolution. It is worth noting that 74% of the CIRPs ending in liquidation (i.e., 946 out of 1272 cases) were legacy BIFR/defunct companies.

Furthermore, in the last quarter, 128 liquidations were closed by dissolution out of which six were sold as Going Concern which had claims amounting to ₹4325.16 crore, as against the liquidation value of ₹290.03 crore. The liquidators in these cases realized ₹336.76 crore while rescuing the businesses as going concern. This data indicates that despite the hurdles, IBC regime has been making credible progress albeit timeliness which continues to be a concern due to delays caused by litigations. On an average, it takes 459 days and 351 days since commencement of CIRP till resolution and till order of liquidation, respectively.

Replacement of Interim Resolution Professional (IRP) by another Insolvency Professional (IP) under Section 22 of IBC, 2016 has been one of the major concerns among IPs. As per IBBI data, a total of 1006 IRPs were replaced till March 2021 out of which 20% were replaced in CIRPs initiated by FCs, 34% in CIRPs initiated by Operational Creditors (OCs), and 43% in CIRPs initiated by CDs. In a recently concluded report of IIIPI's Study Group on 'COC's Role in CIRP Under IBC: Recommendations on Best Practices' as mentioned hereinafter, such issues have been highlighted to be addressed by relevant stakeholders to ensure transparency and professionalism.

## Bringing Stakeholders on Same Page

Recently the Study Group of IIIPI on 'COC's Role in CIRP Under IBC: Recommendations on Best Practices', concluded and submitted its report to IBBI and other market participants, which was a result of contribution by several IPs and other stakeholders. The said report brought to light many important issues that the members of

Committee of Creditors (CoC) and IPs need to be cognizant about while upholding the spirit of the IBC, 2016. The said report is accessible on IIIPI's website under the 'Resources-Publications' tab. The other such study group report, also concluded and published recently, is in respect of 'Procedural and Substantive Aspects of Group Insolvency: Learnings from the Practical Experiences', which is also available on IIIPI's website.

IIIPI being a frontline regulator and responsible for developing insolvency profession, we believe that due sensitization of various stakeholders is pertinent for development of a robust insolvency ecosystem. Having adopted the capacity building of the stakeholders, as one of the strategic thrust areas, we have taken and shall be taking several initiatives in this direction and to strengthen the fabric of IBC regime in India. As one such initiative, IIIPI recently organized training program for bank officials (2nd batch) with a view to build better and bridge the gaps in expectations. Some of the other events organized by the IIIPI during April to June include:

- To inculcate better Industry-Sector knowhow while managing CD as going concern by the IPs, a first of its kind, Executive Training Program was conducted jointly with CRISIL, covering Real-estate and Construction Industries..
- Brainstorm sessions on recommendations on Improving the insolvency resolution framework in the Wake of Covid Pandemic.
- Brainstorm Session on Enhancing Role of Small-Sized IPs under IBC.
- Study group recently constituted by IIIPI, is examining adoption of code of ethics for IIIPI's members aligned with international best practices in this context.
- Another Study group constituted by IIIPI, is examining the roles of IPs during and around implementation of PPIRP framework for MSMEs.
- Webinar on 'Decoding the Pre-Pack Framework for MSMEs" for dissemination of new framework among the stakeholders.
- 4th batch of 30 hours over 6 days - Executive Development Program (EDP) was successfully conducted.
- Roundtable on Impact of Covid Resurgence on Insolvency Regime: Challenges and Responses.

To have sustained effort and to build further momentum in this direction, IIIPI intends to join hands with national and international organizations of repute, to bring the best of knowhow for our members/stakeholders.

### Web Based Discussion Forum

Dialogue within peer groups is considered an effective mode of building knowledge among the professionals, especially in the ever-evolving fields like insolvency law. To facilitate our members' clearing their doubts and seeking professional inputs, we have launched a web-based 'Discussion Forum' which can be accessed on IIIPI website (http://15.206.84.226/forums/member) with many latest and user-friendly features. The members can post his/her queries or doubts related to matters under the broad headings of Corporate Insolvency Resolution Process (CIRP), Liquidation, Voluntarily Liquidation, Personal Guarantor and Prepack. As a mutual capacity-building measure, we encourage members to use this forum extensively for seeking and responding to queries of professional nature.

### Resolution Mechanisms Taking Wings

In the April -June quarter, the Indian economy in the context of resolution of stressed assets, witnessed addition of two more jewels to its crown i.e., Pre-Packaged Insolvency Resolution Process (PPIRP) for MSMEs and launch of National Asset Reconstruction Company Limited (NARCL). Though PPIRP mechanism has emerged as the primary and most preferable option for MSMEs to pursue, other out-of-court mechanisms like 'mediation' also deserve attention in the direction of orderly development of resolution-based dispensation. We can hope that PPIRP for MSMEs will pave way for introduction of the full-fledged Pre-Pack framework in India, which has been a successful model internationally. Moreover, formation of NARCL has the potential of upending the manner of management and resolution of stressed assets and is considered a positive step forward.

Moreover, the green shoots of recovery are visible across pockets of economy amidst abating second Covid wave. In this context, a recent message given by the RBI Governor Shri Shaktikanta Dash highlighting that economic cost of second wave may be limited to 1st quarter, augurs well for a healthier economic outlook in future.

With these words, I wish you a healthy and prosperous life.

**Dr. Ashok Haldia**
Chairman, Governing Board
IIIPI

# From Editor's Desk

*Dear Member,*

It's my great pleasure, to present you the 4th edition of 'The Resolution Professional.' With this we have completed first annual cycle of publishing and printing the research journal of IIIPI which was launched in October 2020. Secondly, this edition bears regulatory licence number which accords validity and is a prerequisite for registration with the Office of Registrar for Newspapers of India (RNI). This enables us to do away with the tag 'For Limited Circulation Only' and access the larger set of market participants/ stakeholders.

What are the main objectives of IBC? The professionals and various other stakeholders respond differently to this question. Clarifying the objectives of the IBC, the NCLAT in the matter of *BinaniIndustries Ltd. Vs. Bank of Baroda* said, "The first order objective is resolution. The second order objective is 'maximisation of value of assets of the Corporate Debtor (CD) and the third order objective is promoting entrepreneurship, availability of credit and balancing the interests. This order of objective is sacrosanct,". Timeliness is at core of these objectives. The cover page of this edition is aimed at disseminating this message across the stakeholders of the IBC.

In pursuance of our endeavour to present you the thoughts of an eminent personality on various aspects of the IBC in every edition, we are pleased to bring to you, perspective on many contemporary issues by Shri Sudhaker Shukla, WTM, IBBI, as an exclusive interview in this edition. He has candidly shared his experiences, thoughts and vision on various issues related to IBC regime.

Besides, in this edition you will get five research articles and a successful CIRP Case Study of "Resolution of Uttam Galva Metallics Limited & Uttam Value Steels Limited" by Mr. Rajiv Chakraborty.

Though the IBC regime is yet to provide a legal framework for cross border insolvency, Indian Insolvency Professionals (IPs) have handled the Corporate Insolvency Resolution Process (CIRP) of a couple of Corporate Debtors (CDs) that had businesses, units, and offices in the foreign countries. As an IP, you may be aware of several such cases where IRPs/RPs had handled or handling with foreign insolvency laws. In the coming days, the possibilities of such assignments is quite high which highlights the need for a legal framework on Cross Border Insolvency under the IBC Regime.

In this backdrop, the author of the opening article "Cross Border Insolvency: A Perspective", has analysed international laws and propositions on cross-border insolvency, and provides a perspective for developing cross border insolvency framework under the IBC. Furthermore, in the second article "Comparative Analysis of Indonesia's PKPU and India's PPIRP, the author has presented an overview of Indonesian Prepack – PKPU in comparison to the IBC's recently introduced Pre-Packaged Insolvency Resolution Process (PPIRP) for MSMEs. In the third article "Roadblocks in the IBC route" the authors have focused on delays caused by litigations and pendency in the NCLTs. The authors after analysing the reasons behind the delays have presented a list of recommendations to plug the loopholes to ensure the timeliness of CIRPs under IBC regime. The fourth article "The Test of Fitness and Propriety in the Context of Insolvency Professionals", is focused on how the idea of 'fitness' of an individual for the job of an IP has evolved through IBBI regulations and judgements in various cases. Finally, in the fifth article "Alternative Dispute Resolution (ADR) and IBC", the author, after analysing various hurdles in the path of timeliness, has proposed to utilize various tools of ADR/ ODR for speedy resolution of issues during CIRPs under IBC.

Furthermore, the write up on 'Guidance Note Revealing Scrutiny and Review by IIIPI on the Disclosures Submitted by IPs' is aimed at creating awareness among IPs so that they could avoid issues related to the appointment of professionals and valuers during CIRP. This will also act as guidebook for IRP/RP for submitting Relationship Disclosure and Valuation related records to IIIPI and IBBI. Besides, the journal also has its regular features, i.e., Legal Framework, IBC Case Laws, IBC News, IIIPI News, Services and Crossword.

Please feel free to share your candid feedback to help us improve the quality of the journal, by writing to us on iiipi.journal@icai.in

Wish you all the best.

**Editor**

# CoC Needs to be Fair towards all Stakeholders and Transparent in Discharge of its Responsibilities: Shri Sudhaker Shukla, WTM, IBBI

*Presently, the conduct and decision making of the CoC is not subject to any regulations, instructions, guidelines etc., however, the CoC must pursue upon the responsibilities and vested upon it by the Code. In that way, some form of self-regulation may be beneficial.*

**Shri Sudhaker Shukla**
Whole Time Member (WTM), Research and Regulation Wing, IBBI

Shri Sudhaker Shukla joined as a WTM of IBBI on 14th November 2019. He is currently looking after Research and Regulation Wing comprising Corporate Insolvency, Corporate Liquidation (including Voluntary Liquidation), Individual Insolvency and Individual Bankruptcy, Research & Publication, Data Management & Dissemination and Advocacy. In addition, he is also handling Human Resources, National Insolvency & Graduate Insolvency Programmes, Continuing Professional Education and Knowledge Management & Partnership divisions in the IBBI.

Shri Shukla served as a member of the Indian Economic Service (IES) for over 34 years in various capacities across Ministries and Departments of the Government of India. His last assignment was as Chief Economic Adviser in the Ministry of Rural Development. Earlier, he served as Adviser in African Development Bank. He had wide experience in dealing with various regulations.

In an Exclusive Interview with IIIPI for **The Resolution Professional**, Shri Shukla expressed his views on research, regulations and various other issues related to IBC Ecosystem. ***Read on to know more***....

**IIIPI: IBC, 2016 has completed over five years of its implementation. Covid pandemic has acted as a disrupting force putting brake on many initiatives that were envisaged earlier. On the other hand, Covid has prompted many ameliorative measures as well. What were the key challenges that IBC regime has faced during the journey so far and how they were responded?**

**Shri Shukla:** The introduction of IBC, 2016 (code) has been the most holistic and impactful insolvency resolution mechanism in India till date. The Code provided a time-bound framework for resolution of creditor situations in India. Beyond revival of firms and realisations for creditors, the behavioural change in debtor-creditor relationship prompting substantial recoveries for creditors outside the Code, while improving performance of firms have been some credible accomplishments which are captured well by significant leap in the ease of doing business rankings.

It is old saying foundation of success is laid through encountering tough challenges. IBC success story also had its fair share of challenges. To overcome them, the Code has witnessed several legislative quick fixes. The imperfect market conditions mature with time. The Hon'ble Supreme Court in the matter of *Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India* held that: *"An economic law is essentially empiric. It evolves continuously through experimentation. To stay experimentation in things economic is a grave responsibility, and denial of the right to experiment is fraught with serious consequences to the nation."* The Code has so far witnessed six legislative interventions and 75 amendments to various regulations; which stand as testimony to a resolve for continuous search for improvement.

Further, the beneficiaries of earlier regime are continuously making serious attempts to latch on to favourable systems leading to intense legal scrutiny of every provision of the Code. This added to some cost and time over runs in some processes and difficulties in implementation. However, good part of the story is the evolving jurisprudence has confirmed all the important

legislative interventions made to tighten the regime to make the regime out of the reach of ineligible corporate persons.

Another challenge has been that at the time of IBC coming into force, the ecosystem associated with implementation of provisions were altogether absent. Situation has improved in leaps and bound. Despite Ecosystem being strengthened, extra-ordinary delays be at the admission stage or in carrying out the insolvency processes or in the implementation of resolution plan remains a major concern in moving forward. While as compared to pre-IBC days, timelines for resolution of stressed assets have shown improvement from 4.3 years earlier to an average of 400 days now, yet we are no way near to timelines as prescribed under the statute. It is important to have shorter time period for resolution as it is well evidenced fact that time take in resolution and realization of value are inversely related.

Success of insolvency proceedings is dependent on quality of professional services. At times lack of professional acumen on behalf of some insolvency professionals and valuers despite being regulated entity and also lack of code of conduct in respect of unregulated entities i.e. CoC has invited a few adverse commentaries from the courts. Though these numbers are exceedingly small, but they largely drive the market perception on the functioning of the insolvency regime in the country and this is needed to be avoided.

**While as compared to pre-IBC days, timelines for resolution of stressed assets have shown improvement from 4.3 years earlier to an average of 400 days now, yet we are no way near to timelines as prescribed under the statute.**

Lastly, it will not be out of context that a major challenge to IBC has emerged recently in the form of force majeure situation posed by Covid Pandemic. With rise in stress levels and dearth of resolution applicants, a glut in the distressed asset market has been anticipated. This apart from raising the threshold limit of default to minimum one crore, led to one year suspension of Section 7, 9 and 10 of the Code. Indications are that NPA situation has not worsened during the pandemic period so far. Against projected figure of about 11%, actual GNPA in 2020-21 has recorded moderate number of 7.48%. Further, evidence suggests that NPA eventually translates into corporate stress but with a lag. These are early days to predict insolvency numbers, nevertheless, as pandemic is unfolding in waves, utmost vigil on emerging situation will be required.

**IIIPI: The experience so far shows that liquidation cases far exceed the resolutions under IBC. Though legacy cases seem to the primary reason here, how do you visualize the framework to be more resolution-oriented than being focused on recovery or liquidation.**

**Shri Shukla:** In the context of dealing with distressed assets, resolution not recovery is the first order priority under the Code. In *Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors* the Apex Court has noted that the Preamble 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. Even in liquidation, the liquidator can sell the business of the corporate debtor as a going concern.

Nevertheless, the processes under the Code have yielded liquidation of 1349 companies against resolution of 394 CDs. Three-fourth of these companies were either sick or defunct when they entered insolvency proceedings. The companies rescued had assets valued at Rs. 1.46 lakh crore, while the firms refereed for liquidation had assets valued at Rs. 0.52 lakh crore which was just about 7.5 % of total admitted claims when they were admitted to CIRP. Thus, in value terms, about 75% of distressed assets have been rescued. Though it can be concluded that in terms of sheer numbers, while about 3/4th of cases are ending in liquidation, in terms of value rescued, contribution of liquidation cases is just about 25%.

The government, the central bank and the judiciary in India have also been very proactive in ironing out issues with respect to the insolvency code and making it more effective. The newly introduced pre-packaged insolvency resolution process will also help the resolution of stress for MSMEs going forward and thus improve the efficiency of the Code.

However, it is to highlight that liquidation versus resolution debate is misnomer to start with as numbers in each segment needed to be seen as outcome of market driven processes. Successful resolution depends on several factors, including firm specific factors like nature of business, sector specific factors and larger economic conditions. Equally important is the stage at which IBC process is initiated. Value preservation is easier and

maximisation higher through resolution when insolvency proceedings are initiated at the early stages of stress and when the business continues as a going concern. The IBC endeavours to maximise the value of the existing assets, not of the assets which do not exist. Therefore, the cases coming with a legacy of litigation or contest under earlier option and representing specific sectors like services sector, despite having technically devoid of any asset base are not expected to end in a meaningful resolution. In such cases of economic distress, liquidation may remain a preferred choice of the market, in times to come.

**IIIPI: COCs are not regulated under IBC which at times causes differences with other stakeholders. How do you think self-regulation of COC could help improve the delivery?**

**Shri Shukla:** The Hon'ble Supreme Court in the matter of Committee of Creditors of *Essar Steel India Limited Vs. Satish Kumar Gupta & Ors.* held that the insolvency resolution is ultimately in the hands of the majority vote of the CoC. It established the primacy of CoC by stating that it is the commercial wisdom of the CoC to decide as to whether or not to rehabilitate the CD by accepting a particular resolution plan.

***"The companies rescued had assets valued at Rs. 1.46 lakh crore, while the firms refereed for liquidation had assets valued at Rs. 0.52 lakh crore which was just about 7.5 % of total admitted claims when they were admitted to CIRP. Thus, in value terms, about 75% of distressed assets have been rescued under the IBC regime."***

Under the Code, the CoC have a statutory duty to perform, and it discharges a public function. It must, therefore, apply the highest standards of duty of care. It must not only follow the due process, but also be fair towards all stakeholders and transparent in discharge of its responsibilities. Presently, the conduct and decision making of the CoC is not subject to any regulations, instructions, guidelines etc., however, the CoC must pursue upon the responsibilities and vested upon it by the Code. In that way, some form of self-regulation may be beneficial.

The Code has demarcated responsibilities of CoC and IP, while assigning certain responsibilities to them jointly. The CoC may neither encroach upon the role of IP and nor allow the IP to encroach upon its role. The CoC must have competent and empowered representatives of FCs. The representatives must attend the meetings, deliberate the maters, and take decisions in accordance with the provisions of the Code. This will prevent delay in concluding of the process and consequential depletion of value.

**IIIPI: How can pre-pack framework for MSMEs alter the dispensation for different stakeholders especially lenders in the backdrop of pandemic?**

**Shri Shukla:** MSMEs contribute significantly to gross domestic product and provide employment to a sizeable population. Further, as World Bank's study indicate MSMEs have been disproportionately affected by the pandemic. The COVID-19 pandemic has impacted their business operations and exposed many of them to financial stress. Resolution of their stress requires different treatment, due to the unique nature of their businesses and simpler corporate structures. Accordingly, PPIRP provides an efficient alternative insolvency resolution process under the Code for corporate MSMEs, that ensures quicker, cost-effective and value maximising outcomes. It is also least disruptive to the continuity of businesses.

As regards lenders, the process is based on mutual understanding and negotiation with the debtor in an informal setting which provides flexibility for the creditors. The process is quick and less costly which results in higher realisation for creditors. The chances of resolution are higher as the business continues to be a going concern, managed by the promoter, without any disruption in operation which prevents any erosion of value. The challenge mechanism ensures that there is value maximisation and also that the applicant gives his best efforts for resolution.

**IIIPI: IPs, especially those joining afresh, often highlight concerns about not getting assignments. Many others getting assignments complain about not getting a reasonable minimum fee. Is there a need for broad-basing the profession by enhancing roles of new or small-sized IPs, for orderly development of profession?**

**Shri Shukla:** A key supporting institution under the Code is insolvency profession. An insolvency professional (IP) exercises the powers of the Board of Directors of the firm under resolution, manages its operations as a going concern, and complies with applicable laws on behalf of the firm. He conducts the entire insolvency resolution process: he is the fulcrum of the process and the link between the Adjudicating Authority and stakeholders - debtor, creditors financial as well as operational, and resolution applicants. Thus, the Code casts a wide array of duties upon the insolvency professional.

Although there might be a large number of IPs, however, a large number of them decide not to take up insolvency practice and do not apply for AFA (Authorisation for assignment). It could be due to a variety of reasons like the insolvency practice is a full time practice rather than simply being an additional area of practice for the professional. Further, the insolvency profession like other professions is market oriented. The insolvency professionals would have to carve out a niche for themselves and make a mark in the market to get work. There are also young professionals coming into the market who have graduated from the Graduate Insolvency Programme.

However, newer avenues for work are opening for the professionals in the insolvency sphere. The newly introduced pre-pack process will provide opportunities to IPs regarding resolution for MSMEs. With the growth of insolvency landscape, the opportunities for the insolvency profession is also poised to grow. Further, with the roll out of provisions for individual insolvency and bankruptcy, the demand for services of IP will grow manyfold.

On the renumeration issue, Bankruptcy Law Reforms Committee (BLRC) opined that 'While the market is evolving, the Code tries to ensure that there is as much transparency about the behaviour and the performance of individual insolvency professionals that the professional, creditors and debtors are incentivised to behave optimally.....The Committee feels it is prudent to allow the market to develop and competition to drive charges of the RP rather than setting these in the Code, or in regulations."

**With the goals marked by the preamble of the Code in place, it is felt that the next phase of the law will definitely be in the areas of group insolvency, cross-border insolvency, and fresh start process for individuals.**

**IIIPI: How do you visualize the IBC regime or distress resolution in next 3 to 5 years taking the shape in terms of law, systems, and processes?**

**Shri Shukla:** In a limited span of 5 years, the Code has undergone numerous changes. With the goals marked by the preamble of the Code in place, it is felt that the next phase of the law will definitely be in the areas of group insolvency, cross-border insolvency, and fresh start process for individuals. These will require amendment to the law. After successful implementation of corporate insolvency, individual insolvency could be the next frontier. There will be challenges in implementing these provisions of the Code which surely will be addressed through stakeholders' consultations.

Some progress has already made in this direction. The Hon'ble Supreme Court has in the matter of *Lalit Kumar Jain Vs. Union of India & Ors*. upheld the Central Government notification dated 15th November 2019, which brought into force provisions relating to the personal guarantors (PGs) to CDs. This would complement the corporate insolvency regime and put personal guarantors and corporate guarantors on a level playing field. Further, the resolution of Jet Airways and Videocon Industries cases exemplified a need for a comprehensive cross-border insolvency group insolvency regime under the Code.

# Cross Border Insolvency – A Perspective

*Though the IBC regime is yet to provide a legal framework for cross border insolvency, Indian Insolvency Professionals (IPs) have handled the Corporate Insolvency Resolution Process (CIRP) of a couple of Corporate Debtors (CDs) that had businesses, units, and offices in the foreign countries. Jet Airways is a new landmark in the experience of Indian IPs. Besides, there are several cases with Cross Border dimensions progressing under the IBC and restructuring frameworks while more may come in future. In this backdrop the author, after analyzing the existing legal frameworks and propositions, provides a perspective to the cross-border insolvency.* ***Read on to know more…***

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## Introduction

Cross Border Trade has been a feature of our economy for much of known history. Although the concept of sovereign states emerged late and tribal or national borders were loosely defined, traders would engage in neighborhood or regional transactions, unmindful of political boundaries. Much of this trade was in the form of merchandise produced or procured locally. The growth of trading cities or markets along the Silk and Spice routes, as well as other flourishing centers drew the attention of various satraps claiming a share of the benefits, often leading to wars for enforcing their perceived right to do so.

The resulting turmoil established the necessity for creation of a framework for a peaceful and economically productive co-existence. This led to the Peace of Westphalia which was a series of peace treaties signed between May and October 1648. It ended the Thirty- and Eighty-Years Wars in Europe and set the basis for modern international relations. The concepts of state sovereignty, mediation between nations, and diplomacy all find their origins in the text of this treaty written more than three hundred and fifty years ago.

This treaty has promoted extended periods of peace and has had a salubrious impact on the economies of the nation's bound by this arrangement and inter-se trade flows. As the 19th century French Liberal economist Frederic Bastia reportedly said, "When goods don't cross borders, soldiers will". While creation of these states did quell conflicts it also created a raft of locally administered laws with distinctive focus and remedies. This was acceptable when commercial activity was simple and settlements easy. However, with the growing volumes of trade, new technologies, improved logistics and communication, MNC operations, etc., the complexities have also increased, emphasizing the difficulties in coordinated application and execution. This has underscored the need for a comprehensive law to deal with cross border investments and resulting insolvencies.

## Global Supply Chain Management

Modern technology has made it possible to distribute parts of a process on the basis of their most efficient fulfillment and cost advantage. This approach has resulted in a significant thrust towards outsourcing or relocation of production chains based on optimal benefits. This was also highlighted by Thomas L. Friedman in his book, "The World is Flat". While multinational issues relating to the establishment of the production chains may be dealt with by WTO, in case of bankruptcy proceedings against the company or its units by local or external entities, a suitable legally binding mechanism to address the nature of exposure across different countries would be necessary.

**"In case of bankruptcy proceedings against the company or its units by local or external entities, a suitable legally binding mechanism to address the nature of exposure across different countries would be necessary."**

To gauge the nature of this problem it may be seen that the global Trade in Goods increased from about US$10 trillion in 2005 to more than US$18.8 trillion in 2019, and Trade in Services also increased from about US$2.5 trillion to close to US$6 trillion during this period[1].The quantum of Foreign Direct Inflows (FDI), representing in part private cross border investment, increased from USD 19.9 trillion in 2010 to USD 36.5 trillion in 2019. Following recovery in 2017, global economic conditions started on a downslide in the later part of 2018. These deteriorated further in 2019, due to trade tensions between the United States of America and China, fears of a disorderly Brexit in Europe and a negative global output outlook more generally. Along with COVID, this may have also been majorly responsible for a fall in Global FDI to USD7.4 trillion in 2020.

## Impact of COVID-19

The downturn in international trade in 2019 was visible across all geographic regions with Merchandise trade registering the largest decline while trade in services registered low growth during the year. Global data available for 2020 shows a steep fall in trade growth (about 8 per cent), largely due to the COVID-19 pandemic. Meanwhile, the story for 2021 is still a mixed bag with the initial optimism, evident at the beginning of the calendar year, dented subsequently by the resurgence of the pandemic in the form of 2nd and 3rd waves. The impact of the World-wide upheaval was also reflected in the nearly 80% decline in FDI in 2020, as noted in the preceding paragraph.

The USA – China trade wars and subsequent deterioration of global trust in international supply chains has also pushed a move towards greater self-reliance. While it will not be possible to immediately unravel the multiple commercial links forged over the past 3-4 decades, realignment of relationships could be a likely outcome. It would not be surprising to see a spurt in cross border insolvencies arising from the heightened hostility in evidence between competing politico-economic groups. With many countries having taken measures to defer recoveries or otherwise mitigate the impact of Bankruptcies, the immediate consequences of COVID induced stress may be limited. However, unless there is a significant improvement in the overall commercial environment, clearly framed rules and structures will be needed for dealing with the challenges in near future.

[1] World Investment Report 2020, Available at https://unctad.org/webflyer/world-investment-report-2020

### Insolvency and Bankruptcy Code (IBC) 2016

IBC was introduced as a measure to reduce time spent on the Insolvency process, improve realization of claims, reduce the multiplicity of applicable laws &courts, and prevent value loss to the economy by emphasizing resolution over recovery. It was a unique measure to improve the health of Creditors in the background of the deleterious impact of rising NPAs on their balance sheets. The impact of the Code on various aspects addressed by it is significant but will need a separate paper for assessment. However, among the later additions, Cross Border Insolvency is likely to be of major consequence. As noted by the Joint Committee on the Insolvency and Bankruptcy Code, 2016, (IBC) contains provisions in Sections 234 and 235 relating to cross-border issues. These are, summarized below for a reference, but are yet to be enacted by the Central Government:

**(i) Sec 234. Agreements with foreign countries**

The Central Government may enter into an agreement with the Government of any country outside India for enforcing the provisions of the IBC. It may, where reciprocal arrangements exist, also direct by a Gazette Notification the application of provisions of this Code, as applicable, subject to conditions as may have been specified.

> **"To facilitate a uniform approach, the United Nations Commission on International Trade Law proposed the UNCITRAL Model Law in 1997 on Cross-Border Insolvency which has been accepted in 44 countries, including the USA and the UK."**

**(ii) Sec 235. Letter of request to a country outside India in certain cases**

In the course of an approved process under the IBC the related resolution professional, liquidator or bankruptcy trustee, may make an application to the Adjudicating Authority, supported by evidence of offshore location of assets in connection with such process or proceeding, and request for action thereon. Having regard to the existence of reciprocal arrangements under section 234, the Adjudicating Authority on being satisfied that the desired action is warranted, may issue a letter of request to a court or an authority of such country competent to deal with such request.

In the absence, however, of the required enactment, Reciprocal Arrangements u/s 234 are still to materialize and the line of action u/s 235 remains a mere option for the future.

### UNCITRAL Model Law

It has been noted by the World Bank that insolvency proceedings may involve diverse interests. Consequently, the legal system of a nation must provide for an unambiguous law concerning jurisdiction, recognition of foreign proceedings, cooperation with foreign courts, and choice of law. For the purpose of facilitating a uniform approach, the United Nations Commission on International Trade Law proposed the UNCITRAL Model Law in 1997 on Cross-Border Insolvency. The Model Law has been accepted in 44 countries, including the USA and the UK.

Further, in the light of the growing incidence of cross-border insolvencies, the International Monetary Fund (IMF) has shown itself to be in favor of States adopting the Model Law as it advocates an effective mechanism for recognition of foreign proceedings and cooperation among different courts and administrators. The Model Law seeks to provide a uniform approach to cross-border insolvency proceedings by exploring the feasibility of harmonizing national insolvency laws dealing with it. It allows the States to draft their national laws in consonance with the Model Law after modifications, as deemed necessary by them.

The 2ndInsolvency Law Committee (ILC), constituted by the Ministry of Corporate Affairs, submitted its Report on 16th of October 2018, on a comprehensive framework based on the UNCITRAL Model Law on Cross-Border Insolvency, 1997. It recommended[2] for including the Model law provisions as a part of the Code and noted its four main principles, as summarized below:

[2] Report of Insolvency Law Committee on Cross Border Insolvency (2018): Ministry of Corporate Affairs, Government of India, October, Available at https://www.coursehero.com/file/64623226/CrossBorderInsolvencyReport-22102018pdf/

(i) **Access:** The Model Law allows foreign insolvency professionals and foreign creditors direct access to domestic courts and confers on them the ability to participate in and commence domestic insolvency proceedings against a debtor.

(ii) **Recognition:** The Model Law allows recognition of foreign proceedings and provision of remedies by domestic courts based on such recognition. Relief can be provided if the foreign proceeding is either a main or a non-main proceeding.

**"The Jet Airways proceedings may be said to be the first Cross Border Insolvency case in India, which saw the need to reconcile the differences between the "universalist approach" and "territoriality approach".**

If domestic courts determine that the debtor has its Centre of Main Interests (COMI) in the foreign country, such a foreign insolvency proceeding is recognised as the main proceeding. If domestic courts determine that the debtor has an establishment (applying a test based on carrying on of non-transitory economic activity), such a foreign insolvency proceeding is recognised as the non-main proceeding.

Recognition as a main proceeding will result in automatic relief, such as a moratorium on transfer of assets of the debtor and allow the foreign representative greater powers in handling the estate of the debtor. For non-main proceedings, such relief is at the discretion of the domestic court.

(iii) **Cooperation:** The Model Law lays down the basic framework for cooperation between domestic and foreign courts, and domestic and foreign insolvency professionals

(iv) **Coordination:** The Model Law provides a framework for commencement of domestic insolvency proceedings when a foreign insolvency proceeding has already commenced or vice versa. It also provides for coordination of two or more concurrent insolvency proceedings in different countries by encouraging cooperation between courts.

It may be worth noting that the Model Law is a guidance document for the state to introduce legislation with broad universal acceptability and enforceability. It is not a multilateral convention with a rigidly enforceable framework and provides due flexibility by giving weightage to local laws and conventions. In fact, Article 6 of Model Law expressly states that, "nothing in this law prevents the court from refusing to take an action governed by this law if the action would be manifestly contrary to the public policy". Thus, many countries, including the USA, UK and Singapore, have incorporated public policy exemptions, as necessary, in their adopted version of the Model Law.

## Issues Relating to Cross Border Insolvency

Even as Cross Border Insolvency evolves as a powerful multinational asset stress resolution tool, the following issues present possible complexities in the way ahead:

### (i) Jurisdiction and COMI

In his article on Cross Border Insolvency: Challenges and Opportunities, published on 16th of October 2019, Dr. T. K. Vishwanathan has referred to two main challenges which must be addressed while dealing with cross-border insolvencies:

a. Judicial cooperation between bankruptcy courts of different jurisdictions and
b. Concept of Centre of Main Interests (COMI).

Concerns that debtor could 'forum shop' by changing their Centers of Main Interest (COMI) are sought to be dealt with in the proposed Indian law by providing that the Registered Office (RO) of the debtor is the COMI. However, the RO should not have been moved to another jurisdiction within three months prior to the commencement of insolvency proceedings. This may, however, not be acceptable to all creditors or to other courts and countries though in accordance with UNCITRAL guidelines.

**(ii) Conflict in Legislative application**

Even as India readies to join the Global initiative on Cross Border Insolvencies, the emerging incidence of conflict between the rights and expectations of Creditors and Debtors with local Private International Law features is an area it will need to watch out for. There has been neither a genesis nor an evolution of such law in India. The closest to this could be said to be the pre-Independence procedures for resolving Conflict of Laws arising from the need for compatibility of court decisions of the Princely states with those of British India.

**"As India stands poised for a new paradigm of growth, the importance of arming itself with suitable tools for dealing with Cross Border Insolvencies becomes paramount."**

**(iii) Acceptability of Model Law**

A globally binding scheme may appear to be an answer for uniform Cross Border application. However, its feasibility may be limited by a number of factors, including the fact that the Model Law has not been adopted in a number of active jurisdictions (such as Hong Kong and China). Besides, the continued application of the "Gibb's rule" in England (and potentially in other common law jurisdictions) will likely detract from the effectiveness of any Model Law recognition. The rule in Gibbs is a long-standing, but much criticised, principle of English common law, which provides that a discharge of a debt is not effective unless it is in accordance with the law governing the debt[3].

**(iv) Relevant date for determining COMI**

Different Approaches to the Relevant Date for determining COMI in Cross-Border Recognition Proceedings is a vexatious issue. The UK, EU, Australia, Singapore, and USA have divergences of varying extent in this area. It will be interesting to see whether the UK courts start to converge with the US and Singaporean approaches, particularly if the UK is obliged to rely more heavily on the Model Law as a gateway to the recognition of foreign insolvencies after Brexit[4]. Meanwhile, the clock will continue to run on the question of timing.

**(v) Universalism versus Territoriality**

Reconciling the "universalist approach" with "territoriality approach" of cross-border insolvency may be challenging when one or more countries involved may subscribe to different systems. The "universalist approach" stipulates[5] the institution and administration of insolvency proceedings by one court in the jurisdiction where the corporate debtor is domiciled or has the registered office, taking into account all the assets of the Corporate Debtor irrespective of their location. However, the "territoriality approach" limits the jurisdiction of the court only to the assets present within the territory of the State and restrains the administrator from taking charge of the assets not situated within its territory. This often encourages "Forum Shopping" and may prevent the realization of funds or assets diverted to other centers.

In practice, countries do not adopt either of the aforesaid approaches and this gives rise to the concept of "modified universality". Under the Principle of Modified Universality, the main proceeding is opened in a country where the COMI is determined and secondary proceeding in another country. This also broadly underpins the UNCITRAL Model Law on Cross-Border Insolvency[6].

## Cross Border Insolvency: Disputes and Resolution

The Jet Airways proceedings may be said to be the first Cross Border Insolvency case in India, which saw the need to reconcile the differences between the "universalist approach" and "territoriality approach".

Resulting from payment defaults, recovery suits were filed by two vendors in Netherlands, where Jet Airways

[3] UtzClayton (2019): Practical issues of private international law arising in cross-border insolvencies, July 29, Available at https://www.lexology.com/library/detail.aspx?g=3b78584f-ebbe-47da-9e4f-8aa0cc3a0569

[4] Jeremiah, H. and Koh, K. J. (2019): Singapore: Timing Is Everything: Different Approaches To The Relevant Date For Determining COMI In Cross-Border Recognition Proceedings, August 15, Available at https://www.mondaq.com/insolvencybankruptcy/837102/timing-is-everything-different-approaches-to-the-relevant-date-for-determining-comi-in-cross-border-recognition-proceedings

[5] Arora, M. and Kumar, R. (2021): India's tryst with cross-border insolvency law: How series of judicial pronouncements pave the way? SSC Online, Available at https://www.scconline.com/blog/?p=247207

[6] Vyas, V. (2019): Jet Airways Cross Border Insolvency Proceedings, M&A Critique, November, Available https://mnacritique.mergersindia.com/jet-airways-cross-border-insolvency-proceedings/

(Corporate Debtor) had a regional business hub, and in Mumbai, India, by the SBI led Consortium of lending Banks, where the company was headquartered. The parallel proceedings in two different territorial jurisdictions led to bankruptcy being ordered by the Dutch Court with the appointment of an Administrator who approached his Indian counterpart for access to the financials[7] as well as assets of the Corporate Debtor. The National Company Law Tribunal in India dismissed the prayer for intervention by the Dutch Bankruptcy Trustee in the Corporate Insolvency Resolution Process (CIRP) against Jet Airways in India, citing the lack of authority to recognize the order of bankruptcy of a foreign court, especially given that Sections 234 and 235 of the IB Code were still not in force.

The National Company Law Appellate Tribunal ("Appellate Authority") took cognizance of the simultaneous insolvency proceedings on the basis of an appeal by SBI. The Appellate Authority also took note of an appeal filed by the Dutch Trustee, submitting inter-alia to the jurisdiction of the Indian courts. Accordingly, the Appellate Authority directed that a joint CIRP of the Corporate Debtor be considered instead of two separate proceedings being conducted in two different jurisdictions. Pursuant to the direction of the Appellate Authority, an insolvency co-operation protocol (Jet Protocol) was negotiated and entered into between the Dutch Bankruptcy Trustee and the Indian insolvency Resolution Professional which was approved by both the Indian Appellate Authority and the Dutch Bankruptcy Court.

The Jet Airways case presents an interesting precedence where legal pragmatism resolved a complex matter. However, it also highlighted the need for a well-defined Law to meet the exigencies of Cross Border Insolvencies.

## Conclusion

While the pace of globalization may have slowed down in the recent past with most countries seeking to in-shore the vital portions of their production chains for reducing vulnerabilities, protecting trading advantages and preventing IPR losses, the commercial advantages provided are unlikely to be surrendered in the long run. A case in point could be India's rising trade with China despite border conflict and political intention to the contrary. As noted earlier, trade flows are also the biggest guarantors of peace in a world riven with rivalries.

As the global GDP rises, inter nation collaboration is the only option to the age-old prospects of military conquests for wealth creation and distribution. As such, the rise of entities geared towards creating value from cross border investments is a very likely scenario. This is also likely to give rise to financial failures requiring the timely introduction of appropriate laws and structures to deal with these efficiently.

As India stands poised for a new paradigm of growth, the importance of arming itself with suitable tools for dealing with Cross Border Insolvencies becomes paramount.

[7] Wikipedia: https://en.wikipedia.org/wiki/Modified_universalism#:~:text

# Overview of Indonesian Pre-Pack

*COVID-19 pandemic has catalysed several reforms in the insolvency and bankruptcy regime throughout the world to provide safeguard to businesses from the slowdown caused the worldwide lockdowns. In this backdrop, the President of India, though an ordinance on April 04, 2021, introduced Pre-Packaged Insolvency Resolution Process (PPIRP) of MSMEs.*

*Similarly, the Southeast Asian nation Indonesia also amended its pre-pack law known as Suspension of Debt Payment Obligations (PKPU) which is regulated under the Indonesian Bankruptcy Law 2004 and subsequently the new 'Guidelines for the Handling of Bankruptcy and Suspension of Debt Payment Obligation Proceedings' were issued on January 14, 2020. In this article the author has presented a comparative study of both the insolvency laws.* ***Read on to know more...***

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## Introduction

A pre-pack is broadly defined as the resolution of the debt of a distressed company through an agreement between secured creditors and investors before public bidding process. Though Pre-Pack has been a long-cherished demand of various stakeholders of the Insolvency and Bankruptcy Code, 2016 in India since its inception, it was expedited by the lockdown related slowdown caused by the COVID-19 pandemic which necessitated the need for a mechanism to safeguard the small businesses. In pursuance to this, the President of India on April 04, 2021, promulgated an ordinance[1] allowing the use of Pre-Packs as an insolvency resolution mechanism for Micro, Small and Medium Enterprises (MSMEs) under the IBC. Subsequently, the rules[2] and regulations[3] of Pre-packaged

[1] The Gazette of India, CG-DL-E-04042021-226365, The Insolvency and Bankruptcy Code (Amendment) Ordinance 2021 dated April 04, 2021.

[2] The Gazette of India, CG-DL-E-09042021-226474, The Insolvency and Bankruptcy (Pre-Packaged Insolvency Resolution Process) Rules, 2021, dated April 09, 2021.

[3] The Gazette of India, CG-DL-E-10042021-226500, The Insolvency and Bankruptcy Board of India (Pre-Packaged Insolvency Resolution Process) Regulations, 2021 dated April 09, 2021.

Insolvency Resolution Process (PPIRP) for MSMEs were notified under which it is presently applicable for MSMEs a with minimum default of INR 10 lakhs. As per the law, the approval of a minimum of 66 per cent of Financial Creditors[4] (FCs) that are unrelated to the Corporate Debtor (CD) would be required before a resolution plan is submitted to the NCLT. Further, NCLTs are also required to either accept or reject any application for PPIRP of MSME before considering a petition.

**PKPU can be easily converted into a bankruptcy if it is clear that this would not be successful. Unlike India where a default of minimum INR 10 lakh is mandatory for MSMEs, only foreseen default is adequate to file PKPU petition.**

Similarly, Indonesia also has a Pre-Pack framework known as The Suspension of Debt Payment Obligations (PKPU) which is Regulated under the Indonesian Bankruptcy Law 2004, particularly in Articles 222 – 294. This law was also facing various challenges such as lack of transparency, consistency in its application which was often detrimental to foreign lenders, and rights of dissenting secured creditors among others[5]. Responding to call for reform, it was recently amended and Guidelines for the Handling of Bankruptcy and Suspension of Debt Payment Obligation Proceedings[6] were issued on January 14, 2020.

## Features of PKPU

PKPU is a step before bankruptcy provided by the bankruptcy law to be initiated by either the debtor or the creditor to provide opportunity for the debtor to submit a Composition Plan (or a Restructuring Plan) to all its creditors which proposes its future payment method basically a court-supervised debt restructuring. PKPU proceedings are conducted in the Indonesian commercial courts, which are part of the District Court system. There are presently five commercial courts in Indonesia: Central Jakarta, Medan, Semarang, Surabaya, and Makassar. Each court hears cases involving debtors domiciled in its area of jurisdiction[7]. In India Pre-Pack is applicable to MSMEs only while PKPU is applicable to all kinds of businesses.

A creditor who foresees that its debtor would not be able to continue to pay its debt when they become due and payable and a debtor that is unable or predicts that it would be unable to pay its debts when they become due and payable, may file a PKPU petition before the relevant court. The PKPU is intended to provide the debtor with more time either to meet its obligations or to come to an agreement with its creditors to restructure the debts. Please note that a PKPU can be easily converted into a bankruptcy when it is clear that the PKPU will not be successful[8]. Unlike India where a default of minimum INR 10 lakh is mandatory for MSMEs, only foreseen default is adequate to file PKPU petition.

## Commencement of the PKPU Proceedings

The PKPU petition must be signed by the petitioner and its legal counsel admitted to practice before the Court. If the petitioner is the debtor itself, the petition must be accompanied by a schedule list comprising the nature of its debts/claims and the creditors to whom these debts are owed (i.e., the creditors' names, addresses and amount of receivables), and other relevant documentary evidence. If the PKPU petition is filed by the creditor, the Court must summon the debtor (through the court bailiff) with registered mail at the latest seven (7) days before the hearing. Pursuant to the Bankruptcy Law, a debtor may also file a PKPU petition after the Bankruptcy petition has been filed against it by its creditor. If petitions for both

[4] *The Indian Express* (2021): Pre-pack: Insolvency resolution option for MSMEs, April 07 https://indianexpress.com/article/explained/explained-how-does-the-pre-pack-under-insolvency-and-bankruptcy- code-work-7260652/

[5] Sulaiman, D. et all (2020): Indonesia's Bankruptcy Law in Urgent Need of Reform, November 16 https://globalrestructuringreview.com /review/asia-pacific-restructuring-review/2021/article/indonesias-bankruptcy-law-in-urgent-need-of-reform

[6] Conventus Law (2020): Indonesian Bankruptcy And PKPU Proceedings In A Time Of Covid-19, August 07 (https://www.conventuslaw.com/report/indonesian-bankruptcy-and-pkpu-proceedings-in-a/)

[7] Dewi S. Reni and Michael S. Carl (2013): AmCham Indonesia (2013): *What Are Suspension of Debt Payment Obligations*?, February 04 https://www.amcham.or.id/en/news/detail/what-are-suspension-of-debt-payment-obligations

[8] Allen & Overy (2020): *Restructuring Across Borders, Indonesia: Bankruptcy and Suspension of Payment Proceedings,* September, p. 12. file:///C:/Users/User/Downloads/Indonesia_Bankruptcy%20(1).pdf

PKPU and Bankruptcy are reviewed by the Court at the same time, the PKPU petition prevails and must be decided first. Although it is not a form of a legal remedy (such as appeal or civil review), a PKPU petition will effectively postpone the Bankruptcy process for a certain period.

### Composition Plan under PKPU Proceedings

In India we have Base Resolution plan whereas, Indonesia has composition plan. The Indonesian Bankruptcy Law also allows for a settlement under the PKPU proceedings by way of submission of a Composition Plan.

> **Notwithstanding the administrator's obligation to summon the creditors to attend the hearing, each creditor will have the right to attend it, even if it did not receive the summons.**

The Bankruptcy Law requires the debtor petitioning the PKPU (the Applicant) to submit its Composition Plan with its creditors at the time of or after the debtor files the PKPU petition. A Composition Plan with creditors is an agreement made between the Applicant and its creditors for the settlement or discharge of the debts of the Applicant. The Composition Plan should set out the proposed timetable under which the Applicant will repay its debts and whether the debts will be fully or partially repaid. The Applicant and all its creditors (In India only Financial creditors) are free to agree any terms of payment they choose. The Bankruptcy Law does not contain any requirements with respect to the contents of the Composition Plan.

The Composition Plan shall be automatically aborted if after its submission but before its approval by the creditors, the PKPU proceedings are terminated (at the end of its intended period or earlier, by the Court upon its own initiative, or upon request of either the Supervisory Judge, the Administrator, or one or more of the creditors, on any of grounds stipulated in Article 255 of the Bankruptcy Law). The PKPU proceedings may also be terminated by the Court upon request of the Applicant on the grounds that the assets of the Applicant are sufficient to allow it to undertake repayment of its debts again.

One distinguishing feature with the Composition Plan under the Bankruptcy proceedings is that the Composition Plan under the PKPU proceedings will bind all of the unsecured creditors and, those secured creditors that voted in favour of the Composition Plan.

### Provisional PKPU

Within two weeks after the registration of a PKPU petition, the Court is obliged to issue its decision on the petition for provisional PKPU, and (if the petition is granted) appoint a Supervisory Judge and (an) administrator (s) after receiving the PKPU petition. The provisional PKPU is effective from the date of the PKPU order until the date of the next court hearing determined in the order, but this period shall not exceed 45 days.

Immediately after the provisional PKPU has been declared, the Court, through the administrator, would summon the Applicant and all recognized creditors, by registered mail or courier, to attend a hearing held at the latest 45 days after the granting of the provisional PKPU. Under the Indonesian Bankruptcy Law, the hearing is technically called a judge's deliberation meeting (the Hearing).

> **If the Permanent PKPU is agreed, the period for the PKPU and any other extension of it may not exceed 270 days. This is unique provision of PKPU.**

The administrator must announce the provisional PKPU no later than 21 days before the planned hearing and must include an invitation to attend the hearing, with the date, venue and time of the hearing, identity of the Supervisory Judge and the name and address of the administrator, as well as the Composition Plan (if any). Notwithstanding the administrator's obligation to summon the creditors to attend the hearing, each creditor will have the right to attend it, even if it did not receive the summons.

### Verification of Meeting

After its appointment, the Court appointed administrator will arrange a meeting (s) known as a verification meeting (s) to verify the amount of each creditor's claim. The result

of this meeting determines the calculation of the number of votes that each creditor may have. A verification meeting should be attended by the Supervisory Judge, the administrator, the debtor and the creditors.

Permanent PKPU: Composition Plan under the Bankruptcy Proceedings and Voting Rights

If the Composition Plan is not available in this first hearing or the creditors have not yet cast votes on the Composition Plan, the creditors, at the request of the Applicant, must decide whether or not to grant a permanent PKPU, so that the Applicant and the creditors may continue to negotiate the Composition Plan during the permanent PKPU.

If the Permanent PKPU (New concept which is not in India) is agreed, the period for the PKPU and any other extension of it may not exceed 270 days. If it is not agreed, or if at the expiry of the PKPU there is no decision on the Composition Plan, the administrator must notify the Court, which will forthwith declare the Applicant as bankrupt.

**"Under the PPIRP of MSMEs the Corporate Debtor is responsible for management of operations while under PKPU a supervisory judge and curator is appointed for this purpose."**

The permanent PKPU will be granted if it is approved by:

a) more than ½ of the unsecured creditors (or their proxies) present, provided that the majority represents at least 2/3 of the value of all accepted unsecured claims held by the concurrent creditors present at the hearing or meeting; and

b) more than ½ of the secured creditors (or their proxies) present, provided that the majority represents at least 2/3 of the value of all accepted secured claims held by the secured creditors present at the hearing or meeting. Should there be any disagreement among the administrator and the creditors on the creditors' voting rights, the disagreement will be settled by the Supervisory Judge.

As mentioned above, if the creditors decide not to grant or extend the permanent PKPU, the debtor would immediately be declared bankrupt. It is therefore mandatory for the Applicant to ensure at the very beginning (before submitting the PKPU application) that a sufficient number of its unsecured creditors (or their proxies) who represent the qualified acknowledged debt claims will be present at the hearing or meeting[9] and would consistently approve the granting of the permanent PKPU. The Court will then have to ratify the approved PKPU.

## Termination of PKPU Proceedings

A PKPU proceedings may be terminated by the Court on a request submitted by either the Administrator, the Supervisory Judge, or any of the creditors, or on the Court's own initiative, if:

(a) The Applicant, in bad faith, takes action during the PKPU proceedings which is detrimental to its assets or the interests of its creditors.

(b) During the PKPU, the Applicant performs actions of management or transfers rights over any part of its assets, without authorization from the Administrator.

(c) The Applicant neglects to do what the Court ordered at the time or after the PKPU was granted, or neglects to do what the Administrator requires in the interests of the debtor's assets.

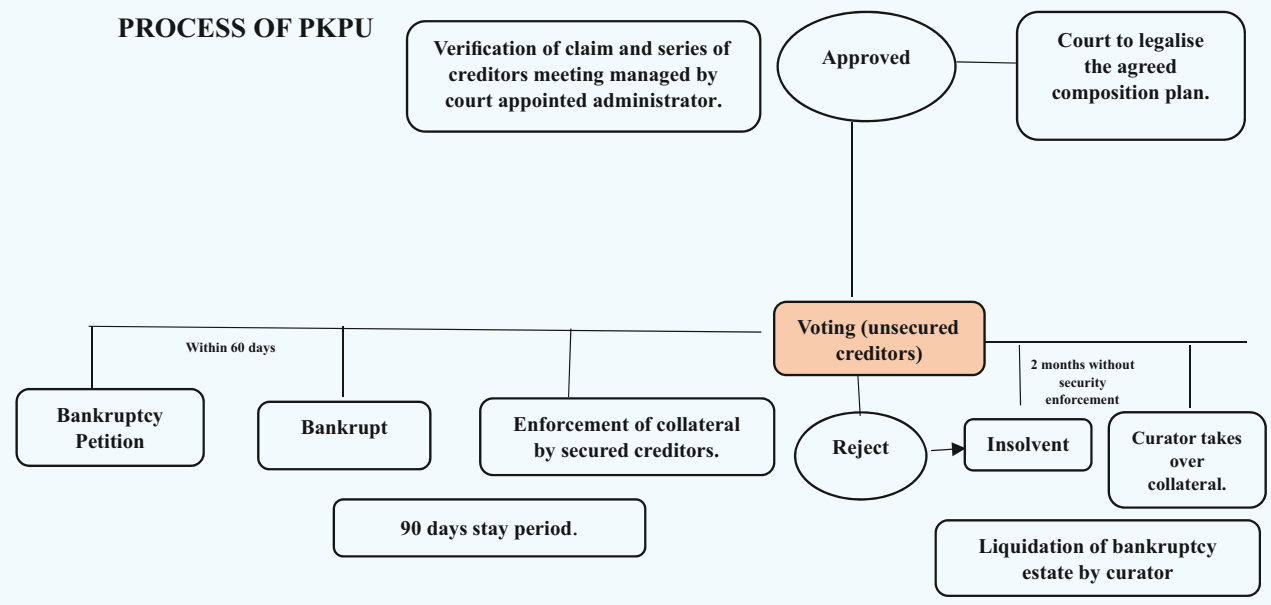
(d) The Applicant's assets are in such a state that a PKPU would no longer be feasible.

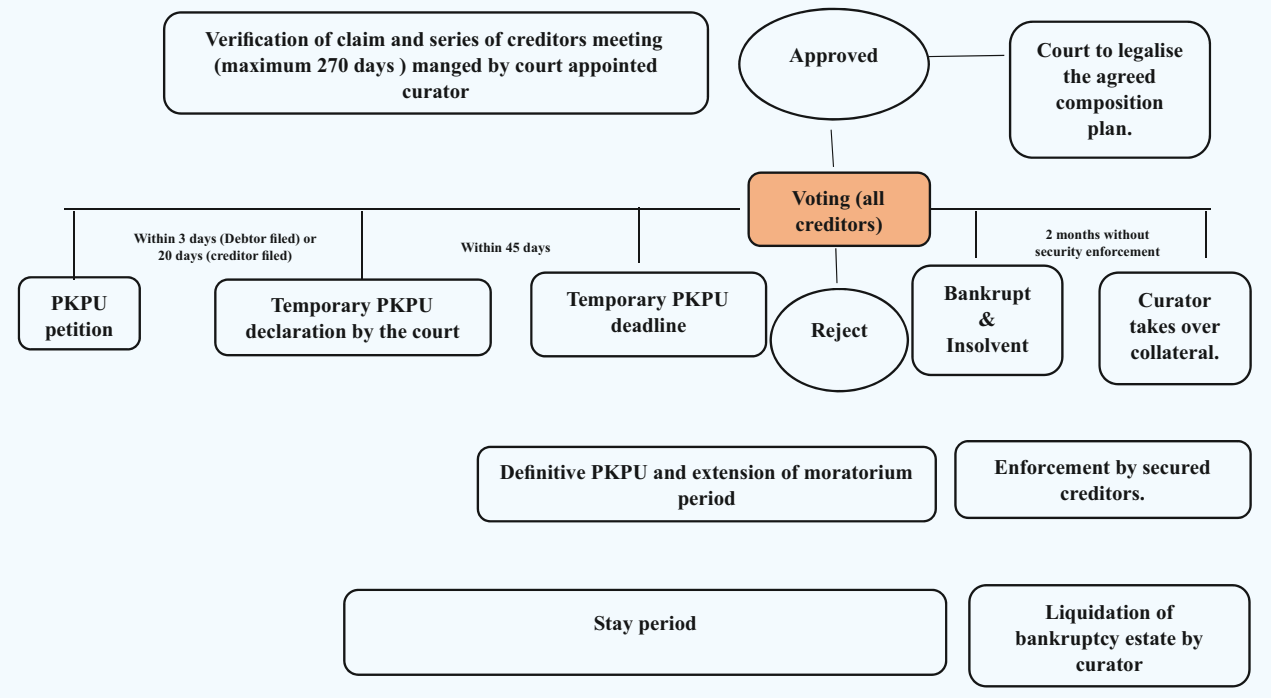
The Applicant is in such a condition that it cannot be expected to fulfil its obligations towards the creditors on time.

Though there is still need for further reforms for more clarity on dissenting secured creditor[10], Indonesia's bankruptcy and insolvency regime under the Indonesian Bankruptcy Law and particularly the process under the

[9] Chan, J et all (2020): Overview of the Insolvency and Restructuring Regime in Indonesia, https://www.milbank.com/images/content/1/5/v2/150985/Overview-of-Insolvency-Restructuring-Regime-in-Indonesia-REDD.pdf

[10] Nurmansyah, E. et all (2020): Law and Practice in Indonesia, Chambers and Partners, November 19 (https://practiceguides.chambers.com/practice-guides/comparison/513/5964/9343-9345-9352-9358-9362-9368-9385-9389-9394-9398-9401)


PROCESS OF PKPU
Verification of claim and series of creditors meeting managed by court appointed administrator.
Approved
Court to legalise the agreed composition plan.
Voting (unsecured creditors)
Within 60 days
2 months without security enforcement
Bankruptcy Petition
Bankrupt
Enforcement of collateral by secured creditors.
Reject
Insolvent
Curator takes over collateral.
90 days stay period.
Liquidation of bankruptcy estate by curator


Verification of claim and series of creditors meeting (maximum 270 days ) manged by court appointed curator
Approved
Court to legalise the agreed composition plan.
Voting (all creditors)
Within 3 days (Debtor filed) or 20 days (creditor filed)
Within 45 days
2 months without security enforcement
PKPU petition
Temporary PKPU declaration by the court
Temporary PKPU deadline
Reject
Bankrupt & Insolvent
Curator takes over collateral.
Definitive PKPU and extension of moratorium period
Enforcement by secured creditors.
Stay period
Liquidation of bankruptcy estate by curator

| Points | Pre-Pack under IBC in India | PKPU |
|---|---|---|
| Eligibility | Only MSME eligible | All Businesses |
| Default | Minimum Rs 10 lacs | No Limit |
| Party initiating Petition | Only Corporate Debtor post approval by shareholder and unrelated financial creditors | Debtor (voluntary) or creditors (involuntary) |
| Management of Process | Insolvency Professional | PKPU Administrator |
| Management of Operations | CD | Supervisory judge and curator's |
| Timeline | 90 days to submit resolution plan to adjudicating authority, 120 days for entire process. No extensionc | 45 days for the first phase (temporary PKPU), extendable by up to 225 days if approved by the majority of the shareholders (permanent PKPU) |
| Plan | Base resolution plan | Composition plan |
| Composition plan / Base resolution plan | CD to submit Base Resolution Plan. If COC rejects, or if Operational Creditors not paid in full, competing bids can be invited. | The Composition Plan under the PKPU proceedings will bind all of the unsecured creditors and those secured creditors who voted in favour of the Composition Plan |

PKPU proceedings is growing popular amongst debtors and creditors alike.

It should also be noted that the bankruptcy and insolvency regime under the Bankruptcy Law is a considerably new development in Indonesia, particularly when compared against the bankruptcy and insolvency regimes in other Southeast Asian jurisdictions and, within less than two decades of being in existence, has provided debtors and creditors with much more streamlined and predictable alternative to litigation proceedings.

The COVID-19 pandemic has introduced several additional impediments to Indonesian debtors' ability to remain solvent and there has been a significant surge in the number of both bankruptcy and PKPU petitions in 2020 compared to in 2019. The growth in the number of bankruptcy and PKPU petitions will continue to challenge the courts to optimize and refine the overall bankruptcy and insolvency regime.

# Roadblocks in the IBC route

*Despite the clear deadlines for each end process under the IBC, 2016, long delays in CIRP have been a serious concern of the IBC regime. Besides the procedure related delays at NCLT/NCLAT, there seems an increasing attempt from promoters for deliberate delays through frivolous and frequent litigations. This causes deterioration of the assets which is against the very founding principle of IBC i.e., value maximization of the CD. Furthermore, the long delays cause suspicion and uncertainty in the minds of investors which further deteriorates the value of the assets of the CD and makes it difficult to run it as a Going Concern (GC). It is high time to reform the IBC to bring the CD out of this vicious circle of delays.* ***Read on to know more…***

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## Introduction

The Government of India introduced Insolvency and Bankruptcy Code, 2016 (IBC), an innovative legislation after scrapping, amending, and consolidating plethora of laws relating to insolvency, resolution and liquidation of business enterprises. The key objectives of the IBC code are to promote entrepreneurship, availability of credit and maximisation of the value of assets. On introduction of this code, it was felt that this law will radically smoothen and speed up the resolution or liquidation of the stressed business entities.

A key parameter to assess the efficacy of IBC code is the time taken to complete the entire process. First time in the history of Indian legislation a fixed timeline was stipulated for performing large number of activities by Insolvency Professionals (IPs) to conduct and complete Corporate Insolvency Resolution Process (CIRP).

In majority of the cases the timelines could not be adhered to due to multiple factors. Because of the inordinate delays taking place in resolving the cases, the IBC may lose its sheen. The IBC code is no more alluring to Financial Creditors (FCs) as well as Operational Creditors (OCs).

As of now, the overall timeline for completing a CIRP stands at 330 days. It's the outer limit within which resolution of stressed assets of the Corporate Debtor (CD) must take place. Beyond this period the CD is to be liquidated. As per data published by the Insolvency and Bankruptcy Board of India (IBBI), the average period for resolution in the 242 CIRPs completed by March'2020 was 414 days. Similarly, the 1277 CIRPs that ended up for liquidation took an average of 351 days for conclusion[1]. While the latest trends and progress banking report from RBI shows a recovery rate of ~45% under IBC compared to other resolution methods being at sub 25%, a careful examination of data published by IBBI shows that recovery rates are swayed by top nine accounts and barring those recovery rates are ~24% under IBC. The top nine accounts had large steel accounts where recovery rates have been good, but for other accounts especially in infrastructure sectors like power, there haven't been a lot of takers for these assets[2].

According to a report in *The Economic Times*, in view of absence of time bound resolution, significant haircuts and mounting pile of unresolved cases, more lenders are opting for negotiated settlements[3]. It further reported that the percentage of cases withdrawn from bankruptcy tribunals are more than those resolved under the mechanism. Furthermore, the findings of a study[4], regarding assessment of corporate insolvency and resolution has suggested, the following as main reasons for delay:

1. Inadequate capacity of NCLT
2. Difficulty in marketing stressed assets.
3. Non-cooperation by the Corporate Debtor
4. Improper documentation model of companies

The team also suggested that maximum delay is taking place at the stages of admission of CIRP and approval of resolution plan by the AA and suggested for need to strengthen the capacity of the courts which could adjudicate cases of insolvency in a timely manner.

**Litigation related Delays of CIRPs:** The delays in CIRPs have been mainly attributed to delays taking place at NCLT level. These tribunals have inadequate capacity mainly due to many vacant seats. The pending cases in NCLTs, as in other courts have started piling up. NCLTs have significant role in the entire CIRP. It is a quasi-judicial authority, incorporated for dealing with corporate disputes that are of civil in nature arising under the Companies Act. It works on the lines of a normal court of law in the country. The NCLTs were constituted by the Central Govt. under the Companies Act 2013, w.e.f. June 01, 2016.

> **Timely completion of the CIRP is essential for achieving the key objectives of the IBC. The more the delay, the less will be the value of assets, due to erosion of their value with the passage of time.**

Timelines have been prescribed under IBC for the NCLTs, in order to ensure completion of the process within the prescribed period. It is not a moot point, whether these timelines for NCLT are mandatory or directory in nature. Timeline is the essence of the Code for fulfilment of its objectives. On the one hand IP has to jostle with so many timelines, whereas when the matter reaches NCLT, it comes to a grinding halt in large number of the cases. The speedy and timely completion of the process is essential for achieving the key objectives of the code. The more the delay, the less will be the value of assets, due to erosion of their value with the passage of time. Similarly, the delay in resolution of cases will keep the invested funds blocked. As such timely movement and completion of the process is the uppermost ingredient for success of the Code.

In over five year of IBC regime, we observe that the timelines prescribed in the Code have been mostly crossed. Though strict timelines have been provided in the Code for completion of each step, to ensure timely and speedy completion of the process, yet the overall results have not been encouraging. Out of 1,723 on going cases

[1] IBBI Newsletter Jan. to Mar.'21 (https://www.ibbi.gov.in/uploads/publication/2021-05-29-204331-atxcy-3363461de858b06bfa1afdbf13151b90.pdf)
[2] The Economic Times (2021): Ever wondered how much money has been recovered through IBC? Here's the data, June 10 (https://economictimes.indiatimes.com/news/economy/finance/ever-wondered-how-much-money-has-been-recovered-through-ibc-heres-the-data/articleshow/83363743.cms?from=mdr)
[3] Ibid, 1.
[4] Shikha, N. and Shahi, U. (2021): Assessment of Corporate Insolvency and Resolution Timeline, IBBI Research Initiative, RP-01/2021/ February, (https://ibbi.gov.in/uploads/publication/2021-02-12-154823-p3xwo-8b78d9548a60a756e4c71d49368def03.pdf)

as of end of March'2021, 79% or over 1361 cases have breached the outer limit of 270 days for resolution[5].

There are several stakeholders in any CIRP such as promoters, Committee of Creditors (COC), IRP/RP/ Liquidators, Employee's union, Resolution Applicants etc. Sometimes frivolous applications are filed by the stakeholders having vested interest to delay the process. There is urgent need to curtail filing of such applications. The NCLTs should summarily dismiss these applications together with awarding exemplary cost.

**"Sometimes frivolous applications are filed by the stakeholders having vested interest to delay the process. This needs to be dealt with firm hand."**

The delay in most of the cases has been attributed to the slow movement at NCLTs. After filing of case, NCLT has to admit or reject the application within a period of 14 days. There are number of incidents where the NCLTs did not take any decision within the prescribed / reasonable time. Litigations related delays have adverse effect on the financial health of the CD and minimize its resolvability. In some cases, resolution plans submitted for approval to NCLT, become non-viable due to inordinate delays.

One of the main reasons for delays has been the shortage of members across NCLTs. There are 15 benches including principal bench at New Delhi having sanctioned strength of 63 judges, nearly half of which are lying vacant[6]. The shortage of members in the NCLTs has led to delay in their functioning. The overload in NCLTs is the biggest hurdle for IBC code in achieving its objectives. As on December 31, 2020, the number of pending cases[7] in the NCLTs were 21,259.

The concerned stakeholders have filed three petitions[8] at the Supreme Court and the Madras High Court seeking extension for the retiring NCLT judges, so that bankruptcy cases do not pile up. It has been argued that due to a large number of unfilled vacancies, the members of NCLT have no other option but to handle multiple benches at once, due to which the smooth functioning of the tribunals is being affected." The fact that the NCLT and Appellate Tribunal Bar Association has had to file a writ petition to the SC, is a telling commentary on the state of affairs." It is heartening to note that the Supreme Court has very recently ordered the Govt. to complete the reappointment of NCLT judges within two months. It's hight time the Govt. should understand the urgency and importance of the smooth and efficient functioning of NCLTs and take immediate steps not only for filling the vacant seats but also evolve mechanism for assessing the requirement on regular basis.

**Non-Cooperation by CDs:** The CDs / promoters sometimes create hurdles in the process by adopting hostile approach towards the RP. In some cases, the RP had to approach local police authorities / NCLT for obtaining the required documents / information.

**Improper Documentation:** Generally, in small size companies' improper documentation leads to delays in valuation of assets / preparation of information memorandum. Financial statements / other information is not readily available. Record and vouchers are not made available to the auditors for verification. The low percentage of just 13% of cases where resolution plans were materialised and 46% of cases gone under liquidation[9] indicates the need to examine the reasons behind it and initiating the steps for developing the market for stressed assets. The improper documentation is also one of the major reasons of delays in NCLTs/NCLATs due to lack of adequate records, the courts defer the matter.

## Adverse Impact of Delays in CIRPs of CDs

The position of our country[10] in the ease of doing business index of world bank during the year 2020 has improved 17 notches ranking 63rd position amongst 190 economies due to various initiatives taken in recent years. Execution

[5] MINT (2021): Over 21, 250 cases pending before NCLTs at End of December 2020, February 09 (https://www.livemint.com/news/india/over-21-250-cases-pending-before-nclt-at-end-of-december-2020-11612810900359.html).
[6] The Economic Times (2021): Reappoint NCLT Judge within two months: SC to Government , May 31 (https://economictimes.indiatimes.com/news/india/reappoint-nclt-judges-within-two-months-sc-to-govt/articleshow/83120448.cms)
[7] Ibid, 5.
[8] The Economic Times (2021): Petitions filed in SC seeking extension of NCLT judges, May 24 (https://economictimes.indiatimes.com/news/india/petitions-filed-in-sc-seeking-extension-of-nclt-judges/articleshow/82916445.cms?from=mdr).
[9] IBBI Newsletter Oct. to Dec.20 (https://www.ibbi.gov.in/uploads/publication/9c804e45a2741e109a6cab56f48a140b.pdf).
[10] Indian Express (2019): India jumps 14 spots to 63 on World Bank's ease of doing business ranking, October 24 (https://indianexpress.com/article/business/india-jumps-14-spots-to-63-on-world-banks-ease-of-doing-business-ranking/).

of law is more important than bringing of new law. As is commonly said that in India there is no dearth of laws. What is lacking, is the effective execution. How can an overburdened NCLT do justice to the law? The things are to be analysed from the perspective of NCLTs keeping in mind ground realities.

**Deeply concerned with long delays, IBC stakeholders have filed three petitions at the Supreme Court and the Madras High Court seeking extension for the retiring NCLT judges, so that bankruptcy cases do not pile up.**

The persistent delays in the resolution / liquidation of cases under IBC will send a wrong signal not only to the Indian stakeholders but also to the potential foreign investors. It is high time that Govt. fills the vacant posts immediately, otherwise it may lead to loss of faith of the stakeholders in the efficacy of the code. The pendency in the NCLTs will pile up hugely as in all other courts. The accumulation of cases will further add to the period of delays.

The delay in cases leads to increase in the insolvency costs, depletion of value of assets, non-availability of credit for productive purpose, higher legal and other professional costs. Sometimes resolution applicants back out due to proposal becoming non-viable on account of delays by the NCLT in taking the decision about Resolution Plan. Thus, we see speed of resolution which is at the centre of entire edifice of IBC has been severely hit by the delays. There is no doubt that still the IBC code is at nascent stage and has been evolving. That may take little more time as the legal brains hired by the defaulting borrowers have been filing frivolous cases raising trivial issues just to protect their clients or to procrastinate the process. The Govt. / IBBI has been actively following such court matters and have brought suitable amendments to plug the loopholes. The pre-packaged insolvency rules for MSMEs have already been announced which has been designed to complete the entire process within 120 days. As the value of the CD deteriorates, it becomes very difficult to run it as Going Concern (GC) which is one of the main objectives of the IBC regime.

In view of the above, it becomes all the more important that NCLTs be supported by providing adequate staff in order to curtail the delays at NCLT level and for effective implementation of a brilliant and innovative legislation. It will contribute to the growth of economy by ensuring better utilisation of scarce economic resources and will further enhance index of ease of doing business in real sense.

Even after approval of resolution plan by NCLT, the plans are challenged in NCLAT. Though resolution plan can take effect unless there is a stay passed by NCLAT on the plan, the parties to the matter are uncertain about final outcome. The resolution plans of Essar Steel and Alok Industries are examples of plans that lingered in the appellate body for months. More often, the issues which are placed before the NCLT involve commercial judgements and decisions which in normal course would be justiciable. This makes the decision process under IBC very slow since every commercial decision remains subject to challenge by aggrieved party before the courts. One way out of this could be to have a commercial threshold below which no person can file a case with NCLT unless it is clearly shown that it is about a point of law. The NCLT may also consider deciding on matters summarily rather than engaging into long drawn arguments and pleadings.

### Difficulty in Marketing Stressed Assets

The data[11] published by IBBI shows that as on 31st March'21, 501 companies went into liquidation due to non-receipt of any Expression of Interest (EOI). Stressed assets are not easily marketable. Any Investor would like to put his funds only after satisfying himself about the viability of the project. The Govt. may come out with the concessions by way of reduced taxes, interest subsidy, capital subsidy to class A promoter having proven track record to attract the potential investors. Information asymmetry has been one of the biggest problems in distressed asset market in India. Moreover, the regulatory and judicial landscape makes it difficult for new entrants/foreign players to envisage timelines of the

[11] Ibid, 1.

process and hence prefer to stay away from such distressed market deals.

**Way Forward**

The Govt. by bringing the amendments swiftly, seems to have played its part appreciatively. Many lacunae in the IBC code have been plugged and the interpretation by the courts by way of several judgements pronounced have since provided the clarity and removed the ambiguities to a great extent. It will reduce the potential litigations to a great extant. However, recovery from avoidance transactions has been one area which remains undeveloped. The potential to seek recovery from such transactions is hampered by the long-drawn litigation process associated with it. This also makes these claims non-monetizable through routes such as litigation funding. Followings are some of the recommendations for improvement in the IBC regime in India:

1. Adequacy of staff at NCLTs must be accorded top priority by the Govt. Meticulous manpower planning is required to ensure that no seat at any NCLT remains vacant even for a single day. The requirement of new benches / seats be reviewed at regular intervals to cope up with expected surge in the cases after the end of COVID period.
2. Platforms for marketing of stressed assets be created to enhance the visibility of stressed assets available in the market. ARCs be allowed to acquire the stressed assets by allowing them to participate as resolution applicants.
3. Non-cooperation by CDs be made a cognizable offence.
4. It is suggested that the company secretary / auditors be entrusted with the responsibility of reporting any deviation / violation related to documentation, record keeping and statutory compliances to the Ministry of Corporate Affairs (MCA). Besides, certification by auditors / CS be made a mandatory periodical requirement.
5. The utter confusion over the assets of the company under Prevention of Money Laundering Act (PMLA) and IBC persists despite several judgments. The Govt. can remove the confusion once for all by a clearly defined legislative change in both the acts.

6. Collective wisdom acquired so far during the last 4 years of execution be converted into legislative amendments to avoid further litigation on issues which are since settled by judiciary, so that the amended law becomes binding on all stakeholders and arbitrary discretion on these issues is removed to the extent possible.
7. Let there be legislative clarity on the timelines, where it is mandatory or directory in nature and consequential punishment over their non - adherences be prescribed to maintain sanctity of the timelines in keeping with the objectives of the company.
8. An institute like The Institute of Chartered Accountants of India (ICAI) should be entrusted with the responsibility to certify avoidance transactions so that NCLTs could pronounce prompt decision without going in details. It may hasten the decision on avoidance transactions.

We hope and trust that after plugging the loopholes, this innovative and revolutionary legislation, the cases under IBC will proceed smoothly towards timely resolution / liquidation of stressed business entities.

# The Test of Fitness and Propriety in the Context of Insolvency Professionals

*The Regulation 4(g) of the IBBI (IP) Regulations, 2016, has laid down a basic criterion to test the fitness of an individual for the job of an IP but the Insolvency Bankruptcy Board of India (IBBI) may go beyond that. In the present article, the authors outline the issues of fairness, ambiguity, and accountability involved with the test, and attempt to provide solutions to the same by analysing relevant judgements and past orders of the IBBI. Besides, they point out that the factual matrix of a case only assumes relevance if the context of the test of fitness and propriety being conducted allows for it. .* ***Read on to know more...***

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## Introduction

Insolvency Professionals (IPs), when appointed as officeholders, act as fiduciaries – a position where they are required to put the interest of stakeholders, often creditors of an insolvent person, before their own. Their role is extraordinary, of great importance to society, and requires the utmost level of competence, professionalism, integrity, and a sense of justice, for it seeks to bring an equitable closure to multiple broken contracts, with limited resources, by maintaining a status quo between an insolvent debtor and its creditors while a resolution is explored, alternatively preserve and realize the value of businesses and/or assets and distribute that value per the absolute priority rule, all the while maintaining a fine balance between making adequate efforts to find a resolution and avoiding impairment in the value of the insolvent estate.

Therefore, for a person seeking the privilege of practicing as an IP, per Regulation 6, the eligibility criteria are listed negatively in Regulation 4 of the IBBI (Insolvency Professionals) Regulations, 2016, one of which is that of a 'fit and proper' person.[1]

[1] Regulation 4, Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016

At first blush, the test of fitness and propriety, which follows after several other criteria, read with the explanation provided in the regulations, appears to be a catch-all clause – a carte blanche for the regulator to refuse registration to an aspirant or take disciplinary action against a fellow, as the case may be, for any reason whatsoever. To the contrary, it is sought to be shown that the test is delimited by reference to the role – such that only those factors that might weigh on the mind of a stakeholder of an insolvent person shall be considered – and it is justiciable – so a person aggrieved, inter-alia, by irrelevant facts being considered or relevant facts being ignored may bring a challenge against such a decision.

**"It would be ill-advised to appoint a person who has been found to have breached applicable securities laws in the recent past as Resolution Professional of a publicly listed company."**

In doing so, the authors outline issues of fairness, ambiguity, and accountability involved with the test, and attempt to provide solutions to the same by analysing relevant judgements and past orders of the Insolvency and Bankruptcy Board of India (IBBI).

## Issues Involved

### I. Is the test 'Good Character'?

The fitness and propriety of a person should always be assessed from the perspective of the person whose interest needs to be protected. By way of example: a person is deemed fit for appointment as guardian for a minor in a suit, inter-alia, on the basis that they have no interest adverse to that of the minor;[2] a person's fitness to acquire shares or voting rights in a banking company is assessed keeping in mind the interest of the banking and financial system in India;[3] a person's fitness to act as an intermediary in securities markets would be assessed from the point of view of a reasonable and prudent person concerned with the markets[4].

Since an IP has a significant role in the resolution/ liquidation process, the test can similarly not be generalized, or for that matter, be made into a test of character simpliciter. Notably, the explanation to Regulation 4(g) of the IBBI (IP) Regulations, 2016 states[5]:

"For determining whether an individual is fit and proper under these Regulations, the Board (IBBI) may take account of any consideration as it deems fit, including but not limited to the following criteria-

(i) integrity, reputation, and character,

(ii) absence of convictions and restraint orders, and

(iii) competence, including financial solvency and net worth."

As Ms. Alice Woolley puts it, "Character is what makes us as individuals, who we are."[6] The determination of good character links in additional traits like morality and ethics. It is the ability of an individual to make the 'morally right' decision every time he is faced with a dilemma. However, the focus on the prospective applicant requiring a good character is somewhat misleading. The purpose of the test is not to ensure that the candidate has a good character, it is to weed out all such individuals whose behaviour suggests bad character.[7]

The use of the good character test as an assessment for a person's fitness and propriety to be registered as an IP is problematic as it suffers from a risk of being too broad and may result in casting individuals out as unfit for actions that lack nexus with the profession – such as those in one's personal family life – and in the personal opinion of an assessor fall short of good character. Factors taken into consideration while assessing the fitness and propriety of a person to discharge duties entrusted in with an IP must, therefore, have sufficient nexus with the type of harm apprehended by a person who will suffer from misconduct by an unfit IP in the course of their performance of those duties. For example, it would be ill-advised to appoint a person who has been found to have breached applicable

[2] *Khaja Majeedullah v. Jameelunnisa Begum*, (2002) 1 AP LJ 21

[3] Section 12-B. Regulation of acquisition of shares or voting rights, Banking Regulation Act, 1949

[4] *Jermyn Capital LLC v. Securities & Exchange Board of India*, [2006] SAT 243

[5] Explanation, Regulation 4(g), Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016

[6] Alice Woolley, "Tending the Bar: The "Good Character" Requirement for Law Society Admission" (2007) 30:1 Dal LJ 27.

[7] Hugh Breakey, Charles Sampford & Justine Rogers, 'Fit and Proper Person'Test, Professional Standards Councils. https://www.psc.gov.au/sites/default/files/Fit%20and%20Proper%20Person.pdf

securities laws in the recent past as Resolution Professional of a publically listed company.

To further exemplify this principle, in *R. (Grant) v. Sheffield Crown Court*[8], the London High Court (Chancery Division), while deciding a matter under Section 4(B) of the Dangerous Dogs Act, 1991 stated that "The meaning of fit and proper person to be in charge of the dog must be understood in its context. That context is the requirement that the dog should not constitute a danger to public safety. That requirement is a precautionary one. In that context, the conclusion that a person is not fit and proper does not necessarily say anything about that person's character." In that case, while the dog was less likely to be a danger to the public, the owner was a mother to two children who were quite young and required constant attention. The Court believed that while the woman possessed the physical strength to keep the dog tamed, there was a possibility of an accident happening when she would be busy caring for the children. Thus, her fitness and propriety were judged accordingly and her being in charge of the dog was declared a risk to society.

**An assessment of past behaviour and existing traits are the only available options for a vigorous check on an individual's good character.**

**II. Relevancy Of Past Acts**

In a profession where there are no set criteria or standards for measuring competence, one of the knottier questions produced by the regulations is the assessment of integrity, reputation, and character for a prospective IP. While the above may be assessed subjectively, issues such as a criminal background require strict objectivity with legal outcomes. The objective of the 'fit and proper' person test is to ensure high ethical conduct and social trust in professional standards. An assessment of past behaviour and existing traits are the only available options for a vigorous check on an individual's good character. Since behaviour keeps changing, assessing an individual based on their past behaviour is a flawed test. However, in the absence of any alternative, the test remains the only viable option.

Notably, the 'fit and proper' person test does not include assessing pending disciplinary proceedings. This is made fairly obvious from the fact that Section 16 of the Insolvency and Bankruptcy Code, 2016 (IBC/Code) provides for appointment and tenure of IRP and states that an IRP shall be appointed if no disciplinary proceedings are pending against him/her[9]. If the legislature had envisioned the inclusion of this criterion under the test, it wouldn't have separately inserted the provision in the Code. Thus, this requirement is distinct from the criteria in the 'fit and proper' person test.

The authors suggest that the aspirants should be provided with complete clarity in terms of the criterion since not all convictions have the same gravity attached to them. Further, it is critical for the quality of the test that it be limited to only those indiscretions that are relevant to the profession. Confidentiality and data privacy would also go a long way in ensuring that the applicants feel secure while making sensitive disclosures.

Analysing past IBBI orders, a few broad heads for disqualification emerge. They are:

**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.**

**(a). Lack of Relevant Experience**

As per Regulation 5(c)(iii) of the IBBI (IP) Regulations, 2016, an individual is required to have 15 years of experience in management after completing his/her bachelor's degree from a recognized university/college.

[8] *R. (Grant) v. Sheffield Crown Court* [2017] EWHC 1678 (Admin)

[9] Section 16, Insolvency and Bankruptcy Code,2016.

[10] https://ibbi.gov.in//webadmin/pdf/order/2019/May/IP%20Registration%2014may19_2019-05-14%2020:53:44.pdf

[11] ibid

Those who do not meet the 15 years criterion as per the registration application cannot later on, in the hearing before the IBBI, submit new evidence stating that they 'inadvertently forgot' to include certain documents in the registration application[10]. Further, having 13+ years of managerial experience does not equate to 15 years and the same, in no condition, will be considered for registration as an IP[11].

**(b). Pending Criminal Proceedings**

As per Regulation 4(g)(ii) of the IBBI (IP) Regulations, 2016, conviction for an offence with a punishment of less than six months does not make the prospective IP an ineligible candidate. But what happens when an applicant is accused in a criminal case initiated by the CBI? The IBBI held that while an accused person is not guilty unless proven by the competent court, the severity of the accusations holds substance in the assessment process. Being accused of offences such as criminal conspiracy, dishonestly inducing delivery of property, cheating, forging documents, etc. would disqualify the applicant under Regulation 4(g)(i) as they are a reflection of his integrity, reputation, and character.

> **"If a person is debarred, and subsequently able to establish that they have regained their ability to be admitted, their fitness and propriety for re-admission shall not depend on the fact that they had previously been debarred."**

Further, in the case of aspirants accused of offences such as rioting, criminal trespass, house-trespass after preparation for hurt, assault or wrongful restraint, and criminal intimidation, all of which attract imprisonment up to seven years, the IBBI held that it does not matter if the applicant has been 'wrongly accused' in the charge sheet and has filed a discharge application. 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[13]. In another case, pendency of a proceeding under section 498 of the Indian Penal Code, 1860 along with sections 3 and 4 of the Dowry Prohibition Act, 1961 made him ineligible to be an IP[14].

**(c). Concealment of Facts**

The IBBI has held that suppression of facts while registering would result in cancellation of the registration granted to the IP. Concealment of the fact that there are pending criminal proceedings against the candidate in the registration application would indicate that the reputation and integrity of the IP does not meet the continued requirement of the 'fit and proper' person test[15].

**(d). Stale Convictions**

Consistency in human behaviour across context and time has been a recurring topic of debate in contemporary psychology. The consensus is the same – there is a distinct lack of cross-situational consistency in human behaviour[16]. That is to suggest that an individual proving to be honest in one scenario may then prove to be dishonest in another scenario. Moreover, past infractions don't necessarily prove a pervasive character defect or are an indication of future behaviour.

Justice T. V. R. Tatachari and Justice S. K. Kapur's opinions in the case of The Rampur Distillery and Chemical Co. Ltd. v. The Company Law Board[17] are worth mentioning. While discussing the validity and sanctity of the 'fit and proper' person test, Justice Tatachari opined that assuming that past behaviour of a person would continue to define his present actions is unreasonable and irrational. Past behaviour along with subsequent activities that show improvement in his character is relevant[18].

Justice Kapur, in the same case, remarked that an infraction done 20 years ago should not be the ground for

[12] https://ibbi.gov.in//webadmin/pdf/order/2017/Oct/12.10.2017%20In%20the%20matter%20of%20IP%20registration_2017-10-15%2010:51:03.pdf; See also, 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

[13] https://ibbi.gov.in//webadmin/pdf/order/2018/Jun/Order%20in%20the%20matter%20of%20IP%20Registration_2018-06-21%2018:15:13.pdf

[14] https://ibbi.gov.in//webadmin/pdf/order/2019/Mar/Order%20in%20the%20matter%20of%20IP%20Registration%2020%20Mar%202019_2019-03-20%2018:56:10.pdf

[15] https://ibbi.gov.in//uploads/order/0d56f83a49eef8d8e2f4895f6f3f0212.pdf

[16] http://www.columbia.edu/~ms4992/Pubs/2010_Weisbuch-Slepian-ClarkeAmbady_VanderWeele_Personality_JNB.pdf.

[17] The Rampur Distillery and Chemical Co. Ltd. V/s. The Company Law Board ILR (1969) Del 220

[18] ibid

[19] ibid

rejection of an application. While such acts are a reflection of one's character, the assessment should be in the context of the duties a selected applicant is required to fulfil[19].

**Peer review is controversial, in the sense that on the one hand, it has the obvious advantage that senior leaders in the profession are best placed to take a view on the relevancy of actions that might impair an individual's fitness to function as an IP.**

Further, where a person is debarred, and is subsequently able to establish that they have regained their ability to be admitted, their fitness and propriety for re-admission shall not depend on the fact that they had previously been debarred[20].

### III. Appropriate Authority to Assess Fitness and Propriety and Enforcement of Standards

In India IPs are regulated by the IBBI, the standards are enforced at two points.

Before an applicant is registered as an IP the applicant is required to submit an application under Regulation 6 of the IBBI (Insolvency Professionals) Regulations, 2016, which in turn provides the regulator with three measures to assess the applicant's fitness. The first check is that the IBBI, at any point, during the assessment of the candidate, may request additional documents as necessary for proof of the fitness and propriety of a person[21]. Second, it may require the applicant to appear, within reasonable time, before the IBBI in person, or through his authorised representative to clarify any doubts during the processing of the application[22]. And third, the applicant is mandated to sign an affirmation at the end of Form A that declares the candidate's competency to be an IP[23].

After an IP is registered, the IBBI is empowered to take continuing action to enforce the standards. Regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016 states that a show-cause notice may be issued by the IBBI, and a Disciplinary Committee may subsequently be constituted if the prima facie opinion is that a sufficient cause exists[24]. IPs not meeting the standards at any point would be penalized on a case-by-case basis. Consequences include but are not limited to suspension, expulsion, limitation to practice, any unlawful gain or averted loss[25] and compensating for such loss[26]. The alternates available against an independent regulator-driven process are assessment by (i) a committee of peers, and (ii) by a court or tribunal.

The UK Court of Appeal in the case of C. C. & C. Ltd. v. H. M. Commissioners of Revenue and Customs (HMRC)[27] held that it would be correct for an independent body to decide such matters. The regulators, in this case, had withdrawn an approval granted to the appellant company taking the view that it was not 'fit and proper' to be a warehousing agent for duty-free goods. The appellants preferred an appeal before the jurisdictional tribunal, and in a subsequent appeal the Court of Appeal held that the regulator was, in fact, best placed to assess the appellant's fitness and propriety, and held thus:

*"15. ... The decision whether a registered owner remains a fit and proper person to trade in duty-suspended goods is a good example of the kind of decision which the HMRC are peculiarly well-fitted to judge since it requires what is necessarily to some extent a subjective – albeit evidence-based – assessment of such matters as the attitude of the trader and its principal employees to due diligence issues and their sensitivity to the risk of becoming involved, albeit unintentionally, in unlawful activities."*

Peer review is controversial, in the sense that on the one hand, it has the obvious advantage that senior leaders in the profession are best placed to take a view on the relevancy of actions that might impair an individual's fitness to function as an IP. On the other hand, there is the risk that policies formulated may benefits only the existing members all the while making it difficult for new

[20] A. Sundaram, In re, (1939) 2 Mad LJ 630 (FB)

[21] Regulation 6(3), Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016.

[21] Regulation 6(3), Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016.

[22] Regulation 6(4), Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016.

[23] Form A, Schedule 2, IBBI Regulations, Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016.

[24] Regulation 11(1), 11(5), Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016.

[25] 220(4), Insolvency and Bankruptcy Code, 2016.

[26] 220(5), Insolvency and Bankruptcy Code, 2016.

[27] [2014] EWCA Civ 1653

professionals to enter the market. Existing professionals may be judged against a standard much lower than which they apply to fresh applicants and that could be fraught with allegations of perceived and/or actual bias.

**"Given the extensive remit of IPs, they are often charged with maintaining high-value estates, which may include businesses and assets with whose nature they only have a passing familiarity."**

Courts and Tribunals are also not necessarily in possession of relevant expertise concerning such matters nor do they have the time or infrastructure. An assessment of a professional's fitness in a specialised area, such as insolvency resolution, requires consideration of facts and circumstances with a perspective sympathetic towards the stakeholders of the insolvent estate. Whereas courts and tribunals are charged with the role of delivering justice on a wide range of issues, to burden them with the additional role of assessing fitness at first instance may be an inefficient use of judicial time – given the level of details that a judge might be expected to traverse before giving a finding.

**IV. Justiciability of an Adverse Finding**

In the case of *Rampur Distillery and Chemical Co. Ltd. v. Company Law Board*[28] Mr. Justice T. V. R. Tatachari, of the Delhi High Court, allowed a petition for administrative review of an adverse finding on grounds of unreasonableness, i.e., when it was found that certain irrelevant facts were considered and other relevant facts had been ignored by the adjudicating authority in administering the test of fitness and propriety in respect of a person proposed to be appointed as managing agent under Section 326(2) of the Companies Act, 1956.

The Supreme Court, in a subsequent appeal in the case of *Rampur Distillery Company Ltd. v. Company Law Board and Anr.*[29], upon discussing whether the courts could review an adverse finding of the Company Law Board wherein, as per, the 'fit and proper' person test was applied, held thus:

*"13. The courts are not concerned with the sufficiency of the grounds on which the satisfaction is reached but if in reaching its satisfaction, the Government misappre hended the nature of the conditions in clauses (a), (b), and (c) of Section 326(2) or proceeds on irrelevant materials or ignores relevant materials, the jurisdiction of the courts to examine the satisfaction is not excluded apart from its powers to adjudge mala fides."*

The Supreme Court, thus, upheld the decision of the Delhi High Court and concluded that an adverse finding is justiciable on the administrative side, and stated that the past and present conduct and acts of the directors of the company were all relevant factors to be considered in administering the 'fit and proper' person test when a challenge was brought by an aggrieved person.

The UK Court of Appeal in the case of *C. C. & C. Ltd. v. H. M. Commissioners of Revenue and Customs (HMRC)*[30] went a step ahead and held that a tribunal was empowered to intervene only if the regulator's decision was found to be unlawful and not merely unreasonable.

The width of this test has been tried by the Securities Appellate Tribunal in India, in numerous proceedings in the context of securities and banking regulations, where it has allowed appeals against adverse finding by the regulator, inter-alia, where it observed that the grounds made out did not have a reasonable basis[31], or un-professional conduct – findings on the basis of observations outside those in the show-cause notice, lackadaisical approach, lack of purposeful application of facts, etc[32].

Non-application of principles of natural justice – such as lack of opportunity to represent in person – may also form the basis of an appeal against an adverse finding, however, the principles are rather flexible, and a regulator cannot be expected to adopt a straitjacket approach. Their application varies from case to case depending upon the factual aspect of the matter. Whereas the general practice is to provide a personal hearing an applicant is free to

[28] *The Rampur Distillery and Chemical Co. Ltd. v. The Company Law Board ILR (1969)* Del 220

[29] 1969 2 SCC 774

[30] [2014] EWCA Civ 1653

[31] *Jermyn Capital LLC v. Securities & Exchange Board of India,* [2006] SAT 243

[32] *Financial Technologies (India) Ltd. v. Securities and Exchange Board of India*, 2014 SCC OnLine SAT 119

[33] 3https://ibbi.gov.in/webadmin/pdf/order/2017/Nov/14%20Nov%202017%20In%20the%20matter%20of%20IP%20Registration_2017-11-15%2017:44:56.pdf

reject the same[33], or make a request where the regulator does not offer one[34]. However, a personal hearing is not considered to be necessary, where a written representation would be sufficient to comply with the principles of natural justice[35]. A reasonable order may not be held to be invalid by a court merely on the ground that before passing the said order the respondent was not given oral hearing[36]. The reasonable opportunity has to be governed according to circumstances and the domain of practicability[37].

## Conclusion

The test of fitness and propriety in the context of an Insolvency Professional registered with IBBI is designed to be positive in nature, over and above the normative requirements set out at Regulation 4(a) to (f)[38]. Given the extensive remit of IPs, they are often charged with maintaining high-value estates, which may include businesses and assets with whose nature they only have a passing familiarity. They may also be exposed to confidential information during the course of their dealings with the public. In respect of insolvent companies, IPs are also entrusted with management of their affairs, empowering them to exercise control otherwise vested in a board of directors. Furthermore, insolvent persons and stakeholders in an insolvent estate are often defenceless to poor and/or biased advice. The test acts as a counterbalance and emphasises that a license to practice as IP is a privilege – granted only to such persons who have demonstrated their trustworthiness through an independent assessment process.

[34] https://ibbi.gov.in//uploads/order/4b8250035b6854a0c043c3209125bd39.pdf

[35] MP Industries Ltd. v. Union of India and Others, AIR 1966 SC 671

[36] Union Of India vs Jesus Sales Corporation, 1996 AIR 1509

[37] Russel v. Duke of Norfolk, 1949 (1) All ER 109

[38] Regulation 4, Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016

# Alternative Dispute Resolution (ADR) and IBC

*Timeliness of the insolvency process has been a major concern of all the stakeholders of the IBC. This is because the long delays often lead to ambiguity on the fate of the Corporate Debtor (CD), deterioration in the value of assets and demoralize the potential investors thereby resulting in major haircuts to the creditors. Increasing the capacity of NCLTs could be a solution but the problems require a multipronged approach. Here the ADR/ Online Dispute Resolution (ODR) could be of great help in speedy resolution of disputes and unburdening the NCLTs. Furthermore, in litigations cases the NCLTs will also have the advantage of documentation, deliberations and expert opinions made during ADR. .* ***Read on to know more….***

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## Introduction

Clarifying the objectives of the Insolvency and Bankruptcy Code, 2016 (IBC/Code), the National Company Law Appellate Tribunal (NCLAT) on November 14, 2018, in the matter[1] of *Binani Industries Ltd. Vs. Bank of Baroda,* and a bunch of other petitions said, "The first order objective is resolution. The second order objective is 'maximisation of value of assets of the Corporate Debtor (CD) and the third order objective is promoting entrepreneurship, availability of credit and balancing the interests. This order of objective is sacrosanct,". This concept of resolution distinguishes the IBC from the previous laws which were primarily focussed on recovery. The Chairman of Insolvency and Bankruptcy Board of India (IBBI) Dr. M. S. Sahoo has also emphasised time and again that the main objective of the IBC is 'to save the company[2]'.

[1] Company Appeal (AT) (Insolvency) No. 82 of 2018, NCLAT (https://nclat.nic.in/Useradmin/upload/744324065bebc1bd0ef4a.pdf)

[2] *The Indian Express* (2021): Large haircuts under insolvency law are not uncommon: IBBI chief MS Sahoo, June 12 (https://www.newindianexpress.com/business/2021/jun/12/large-haircuts-under-insolvency-law-are-not-uncommon-ibbi-chief-ms-sahoo-2315132.html).

As per the recent data released by the IBBI, 79% of the CIRP cases were pending over 270 days[3], 4% between 180 to 270 days, 5% between 90 to 180 days and 12% were pending less than 90 days which shows the fresh filings. The data reveals that the pendency is not even but concentrated to the maximum i.e., beyond 270 days. Unresolved disputes are single major contributing factor resulting in delay of CIRP.

Though there is always scope for improvements, the data released[5] by the IBBI reveal that IBC regime has been successful in providing a legal framework for resolution of the distressed assets in comparison to it previous legislations particularly in terms of speedy decision, value maximization, realization of debts and saving the corporate lives. One of the main reasons behind the success of IBC is that it prescribes duration for each procedure to ensure speed of the Corporate Insolvency Resolution Process (CIRP). However, the IBC regime has provided speedy solutions to the creditors, promoters, and other stakeholders than previous laws related to restructuring of the strained assets, but it is criticised for not being able to complete the deadlines. The IBBI has also confessed publicly that the CIRP process takes an average 400 days[5] against the prescribed period of 180 days extendable to 270 days maximum. Besides, the 'large haircuts[6]" received by the banks, which is directly related to the maximisation of value of assets of the CD, has emerged as another area of serious concern. The article is aimed at finding out the bottlenecks and present their solutions from the perspective of ADR (Alternative Dispute Resolution)/ODR (Online Dispute Resolution).

[3] *IBBI Newsletter,* January-March 2021 (https://www.ibbi.gov.in/uploads/publication/2021-05-29-204331-atxcy-3363461de858b06bfa1afdbf13151b90.pdf)

[4] Ibid

[5] *Money Control.*Com (2021): Bankruptcy resolution plan takes average 400 days against intended 180/270 days: IBBI chief M S Sahoo, June 21 (https://www.moneycontrol.com/news/business/bankruptcy-resolution-plan-takes-average-400-days-against-intended-180270-days-ibbi-chief-m-s-sahoo-7061841.html)

[6] *The Mint* (2021): Banks Get Raw Deal as top banking resolutions get 80% raw deal, June 18 (https://www.livemint.com/industry/banking/banks-see-80-average-haircut-in-top-nclt-bankruptcy-resolutions-11623956020366.html).

## Disputes behind Delay

The moratorium is mechanism to persevere the value however if lasts too it becomes counterproductive. This is more damaging when the value of the CD is locked in disputed assets. If those disputes are not resolved in a satisfactory manner, they distort the value of the underlaying asset.

> **The RPs may hire mediators and third-party neutrals to conduct the mediation and conciliation to resolve the dispute during CIRP.**

Legal disputes and disagreements lie at the heart of insolvencies. Sometimes disputes are the reasons for the failure of the corporate debtor and invariably in all cases, disputes arise post failure of the corporate debtor. Therefore, it is difficult to isolate the process of insolvency resolution with dispute resolution. Dispute resolution is a slow process and courts take years to find just and fair resolution of the disputes. The IBC has been drafted for the speed and effectiveness and omits adjudication of the inter se disputes between the stakeholders in CIRP process.

The mechanism of the IBC relies upon four pillars[7] which includes AA (Adjudicating Authority/ NCLT), Committee of Creditors (CoC), IBBI (Insolvency and Bankruptcy Board of India) and Insolvency Professional (IP). There is clear demarcation of the powers between them. IBBI is the regulator, IPs regulated and licensed professionals, responsible for managing and overseeing the CIRP and/or the liquidation process of the CD, and the resolution and bankruptcy process for partnerships and individuals, COC takes all major commercial decisions and AA is vested with powers to take judicial decisions in respect of all or any legal issues arising during CIRP. At the time of admitting the CIRP, the AA appoints an IP as Interim Resolution Professional (IRP) of the CD who may be confirmed as Resolution Professional (RP) or replaced with another IP as RP in the first meeting of the CoC.

[7] Understanding the IBC, p. 18 (https://www.ibbi.gov.in/uploads/whatsnew/e42fddce80e99d28b683a7e21c81110e.pdf)

### Procedure adopted to Resolve Disputes and its Drawbacks

India is a common law country wherein the law uses adversarial system[9] to decide the disputes which means the judges listen arguments of both/ all the parties and decide the cases.

CIRP is not and should not be seen as an adversarial system. It is a collective effort by all the stakeholders to resolve the CD undergoing through CIRP. Presently, the procedure of deciding application by NCLT is adversarial in nature which is major reason of delay in litigations. Parties make every effort to protect their rights as if they are contesting a suit before the civil court. NCLT is bound to spend precious time and resources on adversarial applications rather than on resolution plans.

> **"It would not be against the spirit of the IBC in continuing the arbitration if the proceeding is not against the interests of the CD, such proceedings can continue even after the moratorium."**

Every stakeholder in the CIRP of a CD has the right to file an application before the NCLT. The IRP/RP is a party in all these applications. After giving preliminary hearing, the NCLT issues notice to the IRP/RP or the respondent in the application and seeks reply. The process of filing replies and rejoinders goes on for next few hearings spread over few months. Post completion of pleadings, applications are listed before the NCLT. By the time application come for hearing, the amount of information and documentation becomes huge. These applications raise several questions of facts and law. As the system is adversarial in nature, the stakeholder and RP are dependent on the AA to decide the matter. The party to the application tries the best to put forth every plausible argument in its favour. Number of contested applications filed before NCLT outnumber the regular applications aimed at resolution. NCLTs lack resources to decide all these applications within the time frame provided by the IBC. Besides, the NCLTs are not vested with powers to decide the application which raises questions other than IBC. This leads to appeal in NCLAT, High Courts and the Supreme Court. The consequent delays cause erosion in the value of the CD due to which all the parties and stake holders lose their time and money.

### Role of the IRP/RP

In the IBC, the IRP/RP is an NCLT-appointed officer/ facilitator to resolve insolvency of the CD. Role of resolution professional changes from a facilitator to an adversarial when applications are listed before the NCLT. The procedure increases difference between the stakeholder rather than unite them for the resolution.

The resolution professional is supposed to protect the assets of the company. The duty to protect the assets of the CD creates a conflict between the resolution professional and other stakeholders. These conflicts are brought before the NCLT in the form of application. Invariably, the relief sought in these application/s leads to variation of rights of the stakeholders. Gain of one stakeholder leads to loss to the other. These applications originate from the property disputes and affects the fundamentals of the IBC like voting, valuation, distribution, and resolution. All these applications have a potential to derail the entire process of the resolution. These applications force the RP to become party to proceedings and take a stand which benefits one stakeholder at the cost of other stakeholder and harms the concept of impartiality. The arguments and submissions made by the RP against stakeholder/s may create an acrimony and feeling of disgust towards him/her. The resolution professional cannot discharge his duty effectively without the cooperation of the stakeholders which further reduces his/ her scope for taking independent and impartial decisions. There is a need for an independent professional who can shoulder the burden of taking an independent stand without adversely affecting the role and duties of the RP.

### ADR Perspective in IBC

Legislature, executive and judiciary are the three independent branches of the State which work as per the

[8] Goswami, S. and Srivastava, P: The power of judge to put questions: An Exception to the Adversarial Justice System?, Indian Law Journal (https://www.indialawjournal.org/the-power-of-judge-to-put-questions-an-exception-to-adversarial-justice-system.php#:~:text=The%20adversarial%20system%20essentially%20advocates,largely%20decided%20by%20the%20parties)

division of power described in the Constitution. Judiciary is entrusted with function of dispute resolution. Like other branches of the State, judiciary heavily relies upon the resources of the State. Resources are limited, and there is always a gap between demand and supply of resources which adversely affect the functioning of the system. In order to run a traditional court, many resources are required including building, support staff and judicial officers. According to a report[10], Delhi, Uttar Pradesh, Gujarat, Karnataka, Maharashtra, Rajasthan, Tamil Nadu, West Bengal have spent more than Rs 1,000 crore for judiciary in 2018-19. Due to overwhelming number of cases, the court system is unable to decide the cases within a reasonable time. ADR on the other hand does not rely on resources of the State and is also a time bound process.

**"Section 73 of the Arbitration Act 1996 provides that when the parties sign the settlement agreement, it shall be final and binding on the parties and persons claiming under them, respectively."**

Deciding a dispute takes a lot of skill and time. The traditional court-system take years to resolve simple dispute of contractual nature which may range from months to years. It is very costly and time consuming. Since IBC is time bound process therefore litigation is not a solution. Hence ADR could be a feasible solution.

### Legal Hurdle in ADR

Insolvency proceedings are not subject matter of arbitration. The moratorium gets triggered when the application under Section 7, 9 or 10 of the IBC is admitted by the tribunal. The proceedings under the Arbitration Act can continue till the admission of the application under the IBC. The Supreme Court in the matter of the *Indus Biotech Private Limited Vs Kotak India Venture and Ors*[11] has held that in any proceeding which is pending before the Adjudicating Authority under Section 7 of IBC, if such petition is admitted upon the Adjudicating Authority recording the satisfaction with regard to the default and the debt being due from the corporate debtor, any application under Section 8 of the Act, 1996 made thereafter will not be maintainable.

In a situation, where the petition under Section 7 of IBC is yet to be admitted and, in such proceedings, if an application under Section 8 of the Act, 1996 is filed, the Adjudicating Authority is duty bound to first decide the application under Section 7 of the IBC by recording a satisfaction with regard to there being default or not, even if the application under Section 8 of Act, 1996 is kept along for consideration. In such event, the natural consequence of the consideration made therein on Section 7 of IBC application would befall on the application under Section 8 of the Act, 1996.

Section 14 of the IBC provides that the adjudicating authority while admitting the application for insolvency shall by order declare moratorium for prohibiting the institution of any proceedings against the CD. Section 14 creates additional hurdle in arbitrating the disputes arising during the pendency of the CIRP. The amount of jurisprudence available on Section 14 regarding arbitrability of the disputes is very limited. In the matter of the *SSMP Industries v Perkan*[12] (2019) DRJ 473, it was held by the High Court of Delhi that until and unless the proceeding has the effect of endangering, diminishing, dissipating, or adversely impacting the assets of the corporate debtor, it would not be prohibited under Section 14(1)(a) of the IBC.

However, continuing the ADR proceeding is not against the interests of the CD, such proceedings can continue even after the moratorium. Proceedings like mediation, conciliation and expert determination is not proceedings against the CD. Consent is the key element of the ADR proceedings. Parties are bound by the outcome of the ADR proceedings if they have consented to the same. Besides, under ADR proceedings no order, which disturbs the priority provided in Section 53 of the IBC, can be passed against CD.

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[9] *Hindustan Times* (2020): Money spent on judiciary less than 1% in all states except Delhi, says SC, March 04 (https://www.hindustantimes.com/india-news/money-spent-on-judiciary-less-than-1-in-all-states-except-delhi-says-sc/story-FRhIBeRWDv5iC2SfN1Px5M.html).

[10] Arbitration Petition (CIVIL) NO. 48/2019 (https://main.sci.gov.in/supremecourt/2019/39562/39562_2019_31_1501_27229_Judgement_26-Mar-2021.pdf)

[11] Delhi High Court, S (COMM) 470/2016 & CC(COMM) 73/2017 dated July 18, 2019 (https://indiankanoon.org/doc/115429771/)

### Most suitable form of ADR

The word ADR refers to all kinds of alternate dispute resolution. It includes mediation, conciliation, case evaluation, early neutral evaluation, med-arb, arb-med, expert determination, mini trial, adjudication, dispute review board. However, it is not possible to use all these methods in the CIRP. The arbitration is adversarial in nature and difficult to conclude within a very short period. Some of the methods like mini-trial and adjudication are not available and do not have any precedence in India. For effective implementation of the ADR in the CIRP process, the option available to the resolution professional are limited.

> **"Even if the ADR fails, both/ all the parties will have their documentation, arguments, pleadings, and other supporting material ready. This will save precious time of the NCLTs presently used in issuing notice and seeking rejoinders."**

Time is the essence of the CIRP process therefore the most efficient method for resolving the disputes during the CIRP is mediation and conciliation. Both these methods have been statutorily recognised in India and the parties can enter into a binding understanding/agreement, in case, the dispute is resolved. Conciliation is a confidential, voluntary dispute resolution process in which an impartial professional/ person helps the parties reach a negotiated and mutually acceptable settlement. Section 73 of the Arbitration Act 1996 provides that when the parties sign the settlement agreement, it shall be final and binding on the parties and persons claiming under them, respectively. The process of mediation and conciliation are similar. Mediation is considered as a structured process whereas in conciliation, conciliator has more liberty to decide the process.

At present, the RPs are doing the work of negotiation themselves. That is a commendable effort on their part. There is a possibility to make the things more efficient. The RPs may hire mediators and third-party neutrals to conduct the mediation and conciliation to resolve the dispute during CIRP. Third party expert will increase the chance and number of disputes resolved. Regulations can be framed, and a panel of experts can be prepared for facilitating the process of mediation and conciliation during the CIRP process.

The mediation and conciliation are not suitable to resolve all kinds of disputes. There may be some stakeholders who wants to get their dispute decided on merits. Parties who wish to get decision on merits are filing application before the NCLT. The RP may convince these applicants to agree for expert determination of their dispute. Since these disputes are complex in nature and the parties involved in the transaction have different perspective, therefore, it is in the interest of the parties to get an expert determination. In case the parties are not satisfied with the expert determination then they may approach the NCLT.

A combination of mediation, conciliation and expert determination can reduce the number of applications before the NCLT significantly. The dispute will not go to NCLT, if the parties have reached a definitive agreement through mediation and conciliation. After failure of the mediation or conciliation process the parties can explore the option of expert determination. There are two possibilities after the expert determination. The first possibility is that the parties agree with the opinion of the expert and the dispute is put to rest. The second possibility is that one of the parties is not satisfied with the expert opinion and decides to agitate his cause before NCLT. In the second situation, the RP and the other party to the application have their documentation, arguments, pleadings, and other supporting material ready. This will save precious time of the NCLT of issuing notice and seeking reply and rejoinder from the parties.

Thus, the ADR can facilitate the process in the following manner:

a) Some disputes will be resolved through ADR and it will reduce the number of applications filed before the NCLT.

b) Since one attempt has been made in the ADR, the compete documents and pleadings regarding the application can be made available to NCLT on the first date of hearing as well and precious time spent in completion of pleadings will be saved.

c) NCLT will have advantage of expert opinion and their task will be limited to checking the justification/ legality of the opinion only.

**How can ADR help in expediting CIRP?**

The dispute under the IBC includes following among other: Verifying the claims of outstanding dues payable by CD, Categorisation of the creditors, Dispute over claims, Undervalued transactions, Extortionate transactions , Fraudulent transactions, Related party transactions, Dispute related to ownership, Dispute related to the allotment, Dispute related to valuation and Contingent liability.

> **Use of ADR or expert determination to resolve the valuation dispute will significantly reduce the work of the NCLT. The expert can examine contrary arguments given by the stakeholders to the valuation submitted by the valuers.**

Though it is not practically possible to completely avoid disputes in the commercial transactions, the RPs can use various tools of ODR/ADR which will make the process more efficient and thus leads to value maximisation and helpful in achieving the objectives of the IBC. Followings are the recommendations to minimise litigations and unburden NCLTs:

a) Post-pandemic stakeholders are familiar with the online hearing and resolution of disputes without having physical hearings. The RPs can use online dispute resolution which may include mediation, conciliation, arbitration, and expert evaluation to resolve the dispute between the CD in the CIRP and its debtors. Resolution of these disputes will increase the liquidly of the corporate debtor and the amount can be utilised to meet the CIRP cost. The RP may try to convince the debtors that failure of ADR will lead to litigation where the parties have not agreed for arbitration which will be more costly and time consuming. RP should also explain to debtors that approval of the resolution plan or liquidation will not mean end of the liability. The resolution applicant or assignee of the actionable claim may continue with the litigation post approval of the resolution plan or liquidation of the corporate debtor.

b) **Petitions against IRP/RP:** Some claimants file applications before the NCLT against the IRP/RP for different reasons. It is common to find exaggerated claims of Financial Creditors (FCs) and Operational Creditors (OCs). A significant number of these claims are related to interest, damages, calculations, quality, and breach of obligations. Many claimants insist on relying upon the acknowledgement of CDs despite the fact in their own account, the claims are not recorded in the amount receivables in the relevant year. Some of these claims pertain to pre-existing disputes including contingent claims. Besides, due to lack of proper communication between the claimants and the RP and/or team members/ agencies engaged to assist the RP in assessment and verification of the claims give rise to various disputes which end up in the NCLTs. To minimize such disputes, the RPs should inform all the claim holders that in case they are not satisfied by the process of determination of the claims, he will be happy to appoint independent neutral person for expert opinion.

c) **Petitions against incorrect valuation of the Assets:** Valuers are independent professionals duly certified by IBBI. The problem arises when the valuation arrived by the bankers at the time of giving loans and the valuation arrived by the valuers appointed by the RP are significantly different. One of the reasons of this difference may be subjectivity due to variety and complexity of assets of the CD. For example, there are no rules for valuation of disputed asset. It is difficult to frame any guidelines for valuing disputed assets. Thus, it becomes very difficult to know the amount of distortion of value taking place during the CIRP proceedings which gives rise to many disputes. Approval of the resolution plan or liquidation of companies without resolution of

the disputes will not unlock the value of underlying assets. These assets will be converted into actionable claims which hardly anyone is ready to buy. Even if these assets are sold at distressed price, the buyer will take years to realise their potential. This system of unresolved claims is not healthy for the economy. Use of ADR or expert determination to resolve the valuation dispute will significantly reduce the work of the NCLT. The expert can examine contrary arguments given by the stakeholders to the valuation submitted by the valuers. Any application regarding challenge to the valuation can be decided by the NCLT with the help of expert determination.

**"RPs should inform all the claim holders that in case they are not satisfied by the process of determination of the claims, he will be happy to appoint independent neutral person for expert opinion."**

d) **Avoidance Transactions:** These are the most difficult kind of cases. The RPs are required to make an independent opinion regarding those transactions. These transactions are peculiar in nature. Most of them are legal and valid contract under the law of contract when they were executed. Categorisation of a transaction in avoidable transaction is going to affect the third-party rights which have attained finality. It is also important to understand that the exercise of judging these transactions is done at later point of time. Here decisions are made in present, and judgement is passed in future.

The decision on avoidable transactions depends upon many subjective criteria such as the transaction was influenced by the desire to protect a preferential distribution, or value of the consideration was significantly less, or deliberate act on the part of the corporate debtor, or excessive rate of interest etc. The report of forensic auditors will only point out suspicion and it is not a conclusive proof that such transaction has taken place. The RP cannot solely rely upon the report of forensic auditor and need additional evidence to prove the existence of these transactions. Forensic auditor reports are not prepared after considering the submission of the parties to the transaction and therefore lacks the necessary ingredients to prove avoidable transactions. Therefore, an expert determination which considers the report prepared by the forensic auditor as well as the arguments of the parties to the transaction will make the system more efficient.

# Presentation to the Chairman, IBBI, the Recommendations of "Roundtable on Impact of COVID Resurgence on Insolvency Regime: Challenges and Responses" and findings of "Survey on Usage & Effectiveness of Technology/ PDA solutions by IPs"

*While IBC regime in India had been gearing up for the next phase comprising cross-border, pre-pack, and group insolvency framework(s), the country has been struck hard by the Covid pandemic waves, one after another. This unfortunate development has crippled many businesses leading to defaults and distress. After uplifting of suspension of fresh insolvencies placed with effect from March 25, 2021, insolvencies are expected to rise. On the other hand, many ameliorative steps have been undertaken by Govt. and central bank to ease the impending crisis. In the wake of second wave of the Covid-19 pandemic, IIIPI conducted a roundtable 'Impact of Covid Resurgence on Insolvency Regime: Challenges and Responses' during June 2021, with an aim to deliberate upon the new challenges faced by stakeholders and likely solutions thereto which was attended by several experienced Insolvency Professionals (IPs) and other stakeholders. The initiative led to the recommendations on further improvement and guidance of the professional members and stakeholders, besides providing insights for policy interventions. This shall also help the stakeholders to prepare well in advance in the eventuality of third Covid wave, if at all, striking in future.*

*Moreover, in pursuance to one of the recommendations an online survey was also conducted by IIIPI among IPs around the issues faced by them in adopting technological/PDA solutions.*

*The recommendations along with the Report on the survey were presented to Dr. M. S. Sahoo, Chairperson, IBBI through video conference in the presence of Dr. Debashis Mitra, Vice President, The Institute of Chartered Accountants of India (ICAI) by Dr. Ashok Haldia, Chairman-IIIPI and CA. Rahul Madan, MD-IIIPI on July 13, 2021. The gist of the said recommendations and the outcomes of the survey are as follows:*

## Recommendations (R) of Roundtable on "Impact of Covid Resurgence on Insolvency Regime: Challenges and Responses"

### CD's Operations Related Issues

**Issue 1:** Taking control and managing operations of Corporate Debtor (CD)

**R:** IRPs/RPs should use latest technologies for remote monitoring, communication, reaching out to Govt. authorities and hire local professionals. They should not abdicate responsibilities while taking services of other professionals.

**Issue 2:** Compliance of regulatory filings and submissions.

**R:** IPs should use tech support, take advantages of relaxations provided by Govt. authorities in filing besides enlisting active support from stakeholders. IBBI, IPAs, ROCs, etc may facilitate such online filing providing necessary support by removing duplicity in filings.

**Issue 3:** Cash Flow Management in running CD as Going Concern.

**R:** CoC should extend support to manage escalated costs at CD including employee related - increments, bonus, medical expenses, and insurance etc. IRPs/RPs to focus on various schemes and measures announced by Govt. to manage 'cash flows' of the CD.

**Issue 4:** Increase in input cost to comply with Covid-19 guidelines and other related expenses.

**R:** FCs need to come forward and actively provide interim finance to meet such expenses.

**Issue 5:** Arrears and monetary assistance to employees during medical emergencies caused by Covid.

**R:** CoC should come forward to meet the deficit in the cash flows of the CD on compassionate grounds to ensure that this section of society is not deprived of right to life.

### IBC Process Related

**Issue 1:** Low number of IPs have shown interest in digital platforms and facilities of IBC Ecosystem.

**R:** Usage of technology for instance PDA services provided by IU/market players can provide a greater


flexibility, accuracy, and efficiency in managing affairs across CD, IPs and other stakeholders. Moreover, PDAs should also provide marketing facilities such as data of potential sellers and buyers etc.

IIIPI may carry out a survey to assess the extent of usage of digital platforms by IPs and issues faced them, if any. The outcomes could be shared with IBBI and PDA service provider/s.

**Issue 2:** Need of expeditious decisions by CoC, especially when Resolution Plan is in final stage.

**R:** CoC members needs to be sensitized on importance of running CD as GC and value maximization for attracting suitable investors through resolution plans. The virtual meetings during Covid restrictions resulted in fast-track decision making as senior officials used to participate. This should be continued as 'best practices' even after normalcy resumes.

**Issue 3:** Requirement of physical verification of records for Conducting Transaction Audit, Valuation and/or forensic audit (PUEF) etc.

**R:** IPs should usage of technology-based solutions, hire local professionals, follow due-diligence and support from stakeholders. Besides, Artificial Intelligence (AI) based facilities should be used for People Tracing, Asset Tracing and Transaction Tracing etc.

**Issue 4:** Valuation Fairness Opinion

**R:** IPs may obtain a valuation fairness opinion from a new valuer. The fairness opinion can provide a guide to the IP and the CoC, and they may decide to go in for a fresh valuation or not.

**Issue 5:** Long pendency of Resolution Plans before NCLTs.

**R:** In addition to sprucing up the infrastructure, the NCLT should consider continuing 'virtual courts' even after normalcy restores. In virtual courts, senior officials can participate, without travelling from remote offices, which helps in fast decision making and reduces pendency.

**Issue 6:** Frivolous litigations in NCLTs

**R:** Section 60 (5) (a) of IBC may be amended to restrict and specify the grounds on which any applicant can approach NCLT for redressal. IBBI is urged to take up the issue on priority.

**Issue 7:** Frequent Deferment of cases in NCLTs

**R:** In their capacity as court officer, an IRP/RP should work to ensure that the pleadings/prayers in the applications are clearly mentioned, and it should be complete in all aspects to avoid unnecessary deferments by the NCLT such as Approval of the CoC, Valuation

Report, and suitable case laws etc. Furthermore, IBBI/ IPAs can facilitate interaction of IPs with NCLT(s) for better coordination in this regard.

**Issue 8:** Use of latest information technology in reducing pendency of cases in NCLTs.

**R:** NCLT should use AI based technological solutions for legal proceedings. The software-based disposal can deal with, completion of pleadings, and with applications for matters like, extension of time for various processes and reports to be taken on record etc.

### Miscellaneous

**Issue 1:** Delays in resolution related decisions

**R:** The indecisive approach by various stakeholders of CIRP needs to be revisited in the interest of value maximization.

**Issue 2:** Time-bound approval process for Registration of IPs, Statutory Filings, Regulatory Filings, CIRP Form amendments, CPE application on the lines of AFA approval.

**R:** IBBI/IPA(s) may consider automating their processes to the extent possible to help managing the same more efficiently.

**Issue 3:** Method of Preparing Panel of IPs for NCLTs

**R:** The panel may be made on-line based on current data of IPs interested to participate in the panel. IBBI and NCLT should take up the matter.

**Issue 4:** Making IUs more user friendly and cost effective.

**R:** Strengthening IUs to be more cost effective and with wider acceptance by stakeholders including lenders and debtors, may help ensuring more accurate flow of information needed for time bound CIRPs.

**Issue 5:** Sustaining and broad-basing IP profession.

**R:** Success should be measured not only by recovery but by employment generation and putting productive assets to reuse. Moreover, restricting number of assignments per IP can help broad base the assignments across larger number of IPs and allow them to focus better on the outcomes. IBBI and IPAs are urged to take initiatives.

**Issue 6:** Problems of survival posed by Covid before MSMEs and other vulnerable companies.

**R:** A guidance on restructuring through 'mediation' could be a way to go, with proper training to RPs, for such out-of-court arrangements thus reducing load on judiciary. IBBI is urged to pursue required legislative amendments on the lines of international practices.

The Mediation Panel may preferably be set up by IPAs which, in case of failure of mediation process, should file 'Mediation Proceeding Sheet' directly to NCLT.

Besides, the experiences of MSME State Councils under MSME Act should also be recognized by IBC regime.

**Issue 7:** Avoidance Applications

**R:** The Applications for Avoidance filed by an IP, in cases wherein the respondent has not appeared after Notice, should be fixed by NCLTs on priority for appearance of beneficial owner/Respondent. This will facilitate early disposal of the applications involving claw back, to maximize the value.

**Issue 8:** Best practices for the benefit of IPs to deal with situations of pandemic

**R:** IBBI/IPAs may consider issuing a 'Statement of Best Practices' to be followed by IPs engaged in works under IBC during Covid pandemic.

### IIIPI's Survey on Usage & Effectiveness of Technology/PDA solutions by IPs during CIRPs

In pursuance to the aforementioned recommendation on "IBC Process Related: Issue-1", IIIPI conducted a survey in the last week of June 2021 with a view to understand the underlying usage patterns, issues, etc. to identify the causes in the direction of pursuing corrective actions, if any. Accordingly, a questionnaire consisting of thirteen questions was designed and circulated among all registered IPs via online mode. Finally, sixty-six responses were collected, tabulated, and analysed.

In nutshell, around three-fourth of the respondents have not been using most or all of digital/PDA services made available by IUs and other service providers. The reasons for restricted usage, as expressed by respondents, mainly refer to lack of enablers like user-friendly features, awareness/training, cost-effectiveness, COC's support among few other reasons. Respondents have also indicated many new areas to be included in future such as prepack related features, market for distressed assets, linkages across NCLTs and regulators (IBBI and IPAs), claim verification process, business intelligence features, among others. The findings, as given hereinafter, can provide an insight into the psyche of the intended users of digital services, which then can be utilized in strengthening the offerings in this space and bridging the digital divide.

# Case Study: Uttam Galva Metallics Limited & Uttam Value Steels Limited

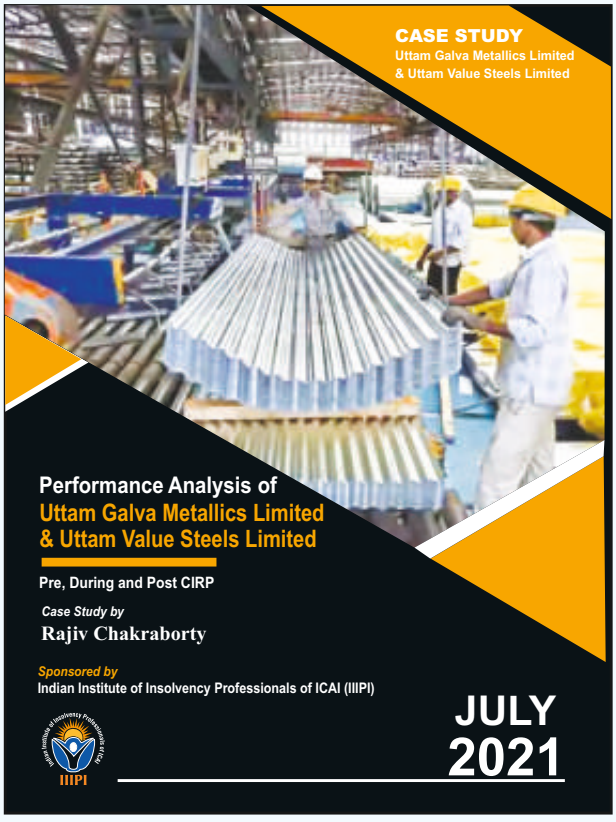
*The facilities of UGML and UVSL were closely intertwined with the railway siding used for transport of raw material and finished goods which was the property of UGML whilst the staff township and the water tanks which were integral to the unit was the property of UVSL. There were various other linkages of utilities between UGML and UVSL. Considering these synergies and close interlinkages, the value of one unit was totally dependent on the other and hence both the companies required to be resolved in co-ordination to achieve maximization of value.*

*A lenders consortium, led by State Bank of India, had initiated insolvency proceedings against the two entities in 2017 and 2018. Lenders to Uttam Metallics had submitted claims worth Rs 4,263 crore, of which Rs 4,176 crore was admitted by the resolution professional. A total claim of Rs 3,014 crore was admitted against Uttam Value Steels. Finally, the NCLT approved the Resolution Plan in May 2020 which involves an upfront settlement amount and deferred and contingent payments to financial creditors worth Rs 1,567 crore and Rs 1,078 crore, respectively.*

*Besides, running the Corporate Debtors (CDs) as Going Concern (GC), the challenges also include Payment of GST dues for Moratorium Period, Related Party Linkages, handling bidding process and conditional Resolution Plans, recovering cost of CIRP, and implementing the Resolution Plan.* ***Read on to know more...***

## 1. Background

Uttam Galva Metallics Limited ("UGML") was a part of Uttam Group. UGML is engaged in the business of manufacturing hot metal/ pig iron and has an iron making capacity of 0.60 MTPA at Wardha, Maharashtra. It was a major supplier of hot metal to Uttam Value Steels Ltd ("UVSL") a listed company of the same group. Both the plants are located adjacent to each other at Wardha along with a captive power plant Indraprastha Power Private Limited ("IPPL"). Both UGML and UVSL derive substantial business synergies from the combined operations of the iron making (hot metal) facility of UGML with the steel plant of UVSL and together with IPPL constituted the integrated steel manufacturing complex.




**Rajiv Chakraborty**
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*The Case Study is also available on IIIPI website, www.iiipicai.in (Resources – Success Stories of IP https://www.iiipicai.in/success-story-of-ip/).

## 2. Reasons for Financial Stress

The saga of financial stress started with the Uttam group acquiring Uttam Value Steels Limited, the erstwhile Lloyds Steel Industries Limited ("LSIL"), in March 2012. The acquisition of the UVSL made strategic sense as the unit was a located adjacent to the other plant owned by the Uttam group. There were significant synergies between the two units. To leverage these synergies Uttam group embarked upon an ambitious expansion plan of its primary steel plan in UGML.

> **"Further as the plants were already operating in a working capital deficient scenario, most of the sale was done with a 7 to 10 days credit cycle and the same had also been monetized."**

The acquisition of UVSL and the investments made in the expansion project in UGML stretched the financial and operational resources of the Uttam group. During the same time starting 2014-15 the steel market in the India went through a sustained slowdown and a brutal price correction. This market weakness put further pressure on the financial position of the group. Pursuant to the Company's account being categorized as SMA-2, in May 2016, a Joint Lenders Forum was formed by the lenders as the SDR (Strategic Debt Restructuring), Guidelines[1] of the Reserve Bank of India in June 2016. However, no proposals were received from any prospective investor, the lenders decided not to convert debt into equity. Consequently, SDR for the companies failed and in January 2017 the accounts were classified as non-performing asset. In December 2017, the JLF agreed to initiate the insolvency resolution proceedings against the companies.

## 3. Co-ordinating Corporate Insolvency Resolution Process (CIRP)

The facilities of UGML and UVSL were closely intertwined with the railway siding used for transport of raw material and finished goods which was the property of UGML whilst the staff township and the water tanks which were integral to the unit was the property of UVSL. There were various other linkages of utilities between UGML and UVSL. Considering these synergies and close interlinkages, the value of one unit was totally dependent on the other and hence both the companies required to be resolved in co-ordination to achieve maximization of value.

As a first step towards achieving this objective, the consortium of lenders of both UGML and UVSL agreed to appoint a common interim resolution professional for both UGML and UVSL. The Interim Resolution Professional was then confirmed as the Resolution Professional for both the companies. A petition was filed before the NCLT, Chandigarh Bench in December 2017 by State Bank against UGML in Chandigarh. At the same time State Bank filed a similar application against UVSL before the NCLT Mumbai Bench. In the case of UVSL, an application was submitted by the promoters before the NCLT, Principal Bench, with a prayer for transfer of the UVSL petition from NCLT, Mumbai to NCLT, Chandigarh. However, the NCLT, Principal Bench, ordered transfer of the Company Petition of UGML listed before the NCLT, Chandigarh Bench to the NCLT, Mumbai bench. In terms of aforesaid order, the NCLT, Chandigarh Bench transferred the Company Petition pertaining to UGML to the NCLT, Mumbai Bench which passed orders dated 26th June 2018 and 11th July 2018 admitting UVSL and UGML respectively into CIRP.

In the effort to run a co-ordinated process after the 1st CoC meeting in both the companies. Each of the subsequent 13 CoC meetings held for both the companies conducted over the next 10 months happened on the same days. The Expression of Interests for both the companies were called on the same date i.e., September 24, 2018, the resolution plans were submitted by the bidders on the same date i.e., January 21st, 2019, and then again on March 18th, 2019, for both the companies. As was expected all the bidders made conditional bids in both for both companies making their being declared as a successful bidder in one company as a condition for their bid in the other company. This impediment was brought to the notice of the Adjudicating Authority which allowed the CoC to approve the interlinkage and vote on the conditional plans.

[1] RBI Notification, RBI/2015-16/330 DBR.BP.BC.No.82/21.04.132/2015 -16Available at https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=10293&Mode=0

After this the respective resolution plan were approved by the CoC meetings held on April 21st, 2019, for both the companies. The resolution plan submitted by the same bidder was approved resolution plans was approved by the CoC of the respective companies. The application for approval of resolution plans of both UGML and UVSL was submitted to NCLT together on the May 08, 2019, and finally the resolution plans of both the companies were approved by the NCLT together on 6th May 2020 thus successfully culminating probably one of the first co-ordinated CIRP under IBC.

### 4. Commencement of CIRP

The timing of the admission order of UVSL and UGML could not have come at a worst time. It was just plain unlucky that both the admission orders dated 26th June 2018 and 11th July 2018 were passed during a period when both the plants were in the midst of a planned maintenance shutdown.

> **This effort put in at the start of the process helped maintain both the companies as going concerns and led to an incremental working capital in the range of INR 400 crores during the CIR period.**

This unfortunate timing made the task daunting as the market perception of the companies plummeted as the market felt that the admission order was like curtain for both the companies and the shutdown of the plants were orchestrated with the admission order on purpose. Moreover, this inconvenient timing of the orders also made the working capital situation adverse. The plants had hardly any raw material or finished goods in its inventory. Further as the plants were already operating in a working capital deficient scenario, most of the sale was done with a 7 to 10 days credit cycle and the same had also been monetised.

### 5. Reception from Employees and Workmen

One of the remarkable points of the CIRP of both the companies was the unequivocal co-operation and respect that the RP and his team received from the entire management and staff. This relationship survived through the entire period of the CIRP.

### 6. Challenges faced during CIRP

**6.1. Challenge to run the Corporate Debtor (CD) as Going Concern (GC):** The first challenge which was faced by me as a resolution professional was to restart the plant post the maintenance shutdown.

**How was it resolved:** The first few weeks were intense and me and my team along with the management team of both the companies were engaged in explaining the meaning of the CIRP to the vendors suppliers and customers of UGML and UVSL. With the support of the existing management, we were able to convince the vendors and the customers about the concept of moratorium and the protection that the CIRP provided to all their credit exposure taken during the CIRP period. With a lot of efforts, the suppliers and vendors were convinced to deliver raw materials on credit to both the plant on credit and the plant restarted production in late July 2018. The efforts of all the stakeholders resulted in a situation where vendors and suppliers took credit exposures to the tune of INR 250 crores in UGML and UVSL post the insolvency commencement date. This effort of communication with the customers increased their confidence to maintain their order books with the companies.

This effort put in at the start of the process helped maintain both the companies as going concerns and led to an incremental contribution in the range of INR 400 crores during the CIR period.

**6.2. Payment of GST dues for Moratorium Period**

Whilst with the combined efforts of the RP, his team and the existing management, most of the vendors and suppliers co-operated and extended additional credit for both the companies and help it restart, there were certain critical vendors and suppliers who blackmailed and used arm-twisting techniques to recover their dues for the period prior to the insolvency commencement date. Interestingly the biggest beneficiary of these prior period payments was the GST department, whose officers despite the moratorium on both UGML and UVSL threatened to take coercive actions including threats to seal the plants and raid the customers of the companies in their zeal to collect the GST dues of the company pertaining prior to the insolvency commencement date.

# Consolidated Summary Uttam Galva Metallics Limited and Uttam Value Steels Limited

**Part I : Claims Overview** **INR in crores**

| | Particulars | Admitted |
|---|---|---|
| 1 | Financial Creditors (FC) | 6,113.58 |
| 2 | OperationalCreditor(OC) | - |
| 3 | Non Related Parties | 1,050.29 |
| 4 | Related Party | 1,023.06 |
| 5 | Employees & Workmen | - |
| 6 | Any other | - |
| | **Total Claims admitted (1+2+3+4+5)** | **8,186.93** |

**Part II: Upfront Commitment** **INR in crores**

| | Particulars | Admitted |
|---|---|---|
| I | Debt infused by Resolution Applicant | 515.00 |
| II | Debt infused by ARC | 110.00 |
| III | Equity infusion by Resolution Applicant | 110.00 |
| IV | Debt infusion by Resolution Applicant | - |
| | **Total Upfront Funds Commitment (I+II+III+IV)** | **725.00** |

**Part III: Deferred Commitment** **INR in crores**

| | | |
|---|---|---|
| V | Deferred Payment to FC | 1,200.00 |
| VI | Equity share capital offered to FC | 5.00 |
| | **Total deferred committed value to FC (V+VI)** | **1,205.00** |

**Part IV: Contingent Value Offered** **INR in crores**

| | | |
|---|---|---|
| VII | Recovery from trade receivables | 198.00 |
| VIII | recovery from Mega incentive receivables upto March 31, 2031 | 262.00 |
| IX | Recovery from Advance given | 256.00 |
| | **Contigent value to FC (VII+VIII+IX)** | **716.00** |

**INR in crores**

| | | |
|---|---|---|
| | **Total value of offer** | **2,646.00** |

**Resolution Applicant means a consortium of Carval and NIthia**

(i) CVI CVF IV Master Fund II LP, CVI AA Master Fund II LP, CVI AV Master Fund II LP, CVIC Master Fund LP, Carval GCF Master Fund II LP, CarVal GCF Lux Securities S. à r. l., CVI AA Lux Securities S. à r. l., CVI AV Lux Securities S. à r. l., CVI CVF IV Lux Securities S. à r. l. and CVIC Lux Securities Trading S. à r. l. ("Carval"); and

(ii) Nithia Capital Resources Advisors LLP and Mr. Jai Saraf ("Nithia")

**How was it Resolved:** Interestingly the biggest beneficiary of this pre-CIRP period payment was the GST department, whose officers despite the moratorium on both UGML and UVSL warned to take coercive actions including sealing of the plants and raid the customers of the CD in their zeal to collect the tax dues. If the GST officials had taken any action of sealing, we would have the option to approach the NCLT for stay order. This is because being an Operational Creditor (OC), the tax dues of GST department are also covered under Section 14 of the IBC. The various provisions of the Section 14 provide legal protection to the assets of the CD from previous liabilities, if any. However, at that time in all matters some amount of prior period payments were being made with the approval of the CoC to keep the corporate debtor as a Going Concern (GC). In this matter, the CoC was of the view that conflict approach with the GST officials would have an adverse effect in running the CD as GC. Any litigation with GST would have taken two to three months to be adjudicated and in the meantime GST officials would have sealed the plant. This would have a significant impact on the value of the assets. Hence the NCLT route was not chosen.

After detailed deliberations in the CoC meetings, the CoC took a decision to approve payment of these pre-CIRP period tax dues to ensure both UGML and UVSL are run as GCs and the GST department got benefitted to the extent of more than INR 100 crores which was not in concurrence to the spirit of the IBC.

### 6.3. Related Party Linkages and Transactions Affecting Operations

As explained above the integrated steel facility was housed across three entities: (a) UGML- The primary steel plant (c) UVSL- The Secondary Steel plant and (c) IPPL- the captive power plant.

This led to a situation where there was a plethora of large value related party transactions viz.

(a) Almost 100% of the production of UGML was sold to UVSL

(b) IPPL was the captive supplier of power to UVSL.

(c) UGML sold coke oven gas to IPPL as fuel by IPPL for power production.

(d) IPPL sold steam to UVSL.

(e) UGML paid lease rent to UVSL for using the railway siding and staff quarters and other facilities.

In addition to these related party transactions, the senior level staff was in the rolls of another group company Taam Galva Steels Limited ("UGSL") and their costs was allocated across all the four entities.

As is evident from the above, each of these transactions were critical for the functioning of the plant but under the IBC, all these understandings and pricing had to be explained to the CoC and ratified by the CoC and then tracked and reported regularly to maintain transparency and independence. The related parties in this instance were captive to each other and arm's length pricing was also being done on a cost-plus basis. Furthermore, the option of market pricing was not available as these materials like hot metal at 1400 degrees Centigrade, steam, gas could not have been transported to the plant from a third party. On the power front, comparative pricing studies were conducted using experts to arrive at a reasonable billing price.

**How was it resolved:** This activity of understanding, validating, and confirming the geniuses of these transactions took a significant amount of time and bandwidth of the RP and the CoC during the entire process but was resolved post receiving CoC approvals for these transactions.

### 6.4. Bidding Process

The bidding process of both the companies started on September 24, 2018, eight potential resolution applicants had subscribed to the EOI.

After extensions on the request of the prospective resolution applicants on January 21, 2019, two resolution plans each were received for both UGML and UVSL.

Subsequently the CoC declared that the bids received from the resolution applicants were unsatisfactory and proposed a re-bid. Because the period remaining in the CIRP of both the companies was not enough to re-initiate

the bidding from the EOI stage.

**How was it resolved:** CoC and the RP along with their respective legal advisors interpreted Regulation 36B (7) of the CIRP Regulations and in the interest of value maximization of the companies decided to directly issue an advertisement on February 8th, 2019, without going through the EOI process.

**Both the resolution plans were conditional plans, stating that the respective applicant will purchase the companies only if they are selected as the successful bidder for the other company.**

### 7. Resolution Plan for the CD

Finally on March 18, 2019, two resolution plans were received from two applicants for both the companies. One of the resolution applicants was a repeat bidder who had participated in the first round of bidding and the other resolution applicant was one who entered the race in the second round.

Both the resolution plans were conditional plans, stating that the respective applicant will purchase the companies only if they are selected as the successful bidder for the other company.

As the IBC did not give the Resolution Professional powers to declare such conditional bids as compliant, an application was filed by the Resolution Professional, seeking directions from this tribunal to approve the said conditional resolution plans. Vide an Order dated April 1, 2019, this tribunal directed the CoC to analyse the said conditional resolution plans and approve the same if appropriate. It is interesting to note this was the first miscellaneous application which was filed in the entire CIRP of both the companies barring the procedural ones for constitution of the CoC, extension of time period of the CIRP.

On March 29, 2019, the RP on behalf of the CoC intimated the resolution applicant who had entered the bidding in the second round that they had been selected as the sole shortlisted resolution applicant based on the evaluation of the resolution plan. The other bidder after receiving the communication that it had been declared unsuccessful revised its bid and resubmitted the amended plan to the Resolution Plan. On April 21, 2019, the CoC decided not to consider the amended plan submitted by the other bidder and voted on the resolution plan of the applicant who was declared successful on 29th March 2018.

### 8. Post-Bidding Litigations

The CIRP of UGML and UVSL was unprecedented in the sense that probably these were the only processes amongst the first list of 12 and 28 cases where there was no litigation from the time of admission till the date of the filing of the resolution plan with the NCLT. This run of good fortune was broken by the flurry of litigants who landed up at the door of the adjudicating authority. Each UGML and UVSL had two litigants each one the unsuccessful bidder and the other the respective largest operational creditor.

The unsuccessful resolution applicant tried hard to find a way around the judgement of the Supreme Court of India in the matter of *K. Shashidhar Vs. Indian Overseas Bank & Others*[2] which fortified the commercial wisdom of the CoC and the only approach the litigants had was to take shelter behind the allegations of "gross irregularity in the conduct of the process". The operational creditor on the other hand after losing their fangs basis the judgement of the Supreme court in the judgment of the Supreme Court of India in the matter of Committee of Creditors of *Essar Steel India Limited Vs. Satish Kumar Gupta & Ors*[3] matter teamed up with the unsuccessful resolution applicant trying to raise fundamental questions on the conduct of the CIRP by the RP.

After rounds of hearings stretched over hours and days, the Mumbai Bench of NCLT came up with an unprecedented "split" verdict in the matter on 31st December 2019 and the saga moved to the principal bench in New Delhi where after rehearing the matter at length the Principal Bench rejected the claims of the unsuccessful bidder and the operational creditors and held that the conduct of the CIRP was compliant as per Insolvency and Bankruptcy Code, 2016 (IBC) and related regulations. The order was pronounced by the Principal Bench in front of an empty court on the last day before the nationwide lockdown in March 2020.

[2] Civil Appeal No. 8766-67/2019 and other petitions.

[3] Civil Appeal No.10673 of 2018 and other petitions.

After this affirmation, the resolution plans were heard online during the lockdown in the month of April 2020 and the resolution plans were the first to be approved by the NCLT Chennai Camp Bench in early May 2020 through the online hearing mode. As per the Plan the successful bidder was required to pay an upfront settlement amount and deferred and contingent payments to financial creditors worth Rs 1,567 crore and Rs 1,078 crore, respectively[4].

**"The advisors of the RP coordinated with the agency appointed by the successful resolution applicant to verify all assets and inventory of the CD and link them back to the assets as per the financial statements drawn up by the RP as on the CIRP commencement date."**

### 9. Hiatus surrounding the High unpaid CIRP Cost

The CIRP of UGML and UVSL was plagued by the issue of high unpaid CIRP costs. This was on account of two reasons. As explained earlier both the plants were in a maintenance shutdown at the time of the admission into CIRP and lacked any sizeable receivables or inventory. In the absence of any interim finance support the plants were restarted by using the credit period extended by the raw material suppliers as working capital, this always kept the unpaid CIRP cost high during the entire process.

Because of the location of the plant which was away from the traditional coal and iron ore belt the cost of production of the plant was traditionally high and the EBIDTA (Profit) of the plant was only on account of an indirect tax subsidy of 7.5% offered by the Maharashtra government. There was a timing gap of 18 months between the accrual and realization of this said government subsidy. This combination of peculiar circumstances kept the unpaid CIRP costs of the process high although during the CIRP period more than INR 400 crores of incremental assets were built up in the companies. This situation was a cause for concern for the members of the CoC.

This issue was explained in detail to the members of the CoC and in the spirit of transparency the RP requested the CoC members to appoint an independent auditor to review the CIRP costs and validate the twin premise. The RP also agreed to get the unpaid CIRP cost as on the date of approval order certified separately by the statutory auditors of both the companies.

### 10. Takeover Tantrums

During the implementation period the successful resolution applicant raised questions on the realisability of more than INR 100 crores of customer receivables which was built up during the CIRP period and requested for detailed review of the assets and inventory of the companies in a bid to try and find a way to angle for a discount of the bid price.

Even after the approval of the resolution plan the RP was engaged with the Monitoring Agency of the companies and the customers to ensure realization of the customer receivables during the implementation period. The Monitoring Agency comprised of two representatives of the CoC, two representatives of the Resolution Applicant and an independent expert. The advisors of the RP coordinated with the agency appointed by the successful resolution applicant to verify all assets and inventory of the companies and link it back to the assets as per the financial statements drawn up by the RP as on the insolvency commencement date.

Finally in end December 2020, three years to the day from the day when the insolvency professional had signed the consent form to become the IRP of both the companies, the resolution plan was implemented, and the successful resolution applicant took over the control of the companies after making the payments to the stakeholders bringing down the curtains to an interesting journey leading to the successful resolution of both UGML and UVSL.

[4] *Bloomber-Quint* (2020): NCLT Approves Resolution Plans For Uttam Galva Metallics, Uttam Value Steels, May 07, Available at https://www.bloombergquint.com/business/ibc-news-nclt-approves-resolution-plans-for-uttam-galva-metallics-uttam-value-steels

# 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

## RULES

### Central Government amends Securities Contracts (Regulation) Rules, 1957

Though a Notification on June 18, the Central government has amended the "sub-clause (iii) of Rule 19, (2), (b) of the Securities Contracts (Regulation) Rules, 1957 wherein after the words- four thousand crore rupees‖, the words ―but less than or equal to one lakh crore rupees shall be inserted. Besides, sub-clause (iv) has been inserted and changes are also made in Rule 19A, sub-rule (5).

**Source:** *Gazette Notification, CG-DL-E-19062021-227722, dated 19 June 2021*

https://drive.google.com/file/d/1gdI2sIiYkBAr4QLMUvdLOxnCZ-MOci6N/view

### COVID Takeaways: 'Virtual Board Meetings' to Stay Forever

Indian corporates can now organize 'Virtual Board Meetings' even after the COVID-19 restrictions are over and consider resolutions via video conference or audio-visual mediums. This has been made possible by the Ministry of Corporate Affairs (MCA) which though a Gazette Notification dated June 15, 2021, amended the Companies (Meetings of Board and its Powers) Rules, 2014. As per the amendment, the resolutions related to the approval for mergers and acquisition, approval for restructuring, approval of financial statements, and conducting AGMs could be considered in the Virtual Board Meetings.

**Source:** *Gazette Notification, CG-DL-E-15062021-227614 dated June 15, 2021.*

https://egazette.nic.in/WriteReadData/2021/227614.pdf

## NOTIFICATION

### NCLT resumes regular hearing in all bcenches from July

National Company Law Tribunal (NCLT) passed as order


on June 25 to start regular hearing in NCLT Benches throughout the country w.e.f. 1.07.2021 through Video Conference on all working days.

**Source:** *NCLT File No. 10/03/2021 https://ibbi.gov.in//uploads/legalframwork/ac543006840abd6a5bc2a21849507cc5.pdf*

### NCLT gets new President

Union Ministry of Corporate Affairs (MCA) through a Gazette Notification dated June 21, 2021, has appointed Shri Bhaskara Pantula Mohan, Member (Judicial) as President, NCLT for a period of three months w.e.f. June 10, 2021, or until a regular President is appointed or until further orders.

**Source:** *Gazette Notification, CG-DL-E-21062021-227746 dated 21 June 2021*

https://egazette.nic.in/WriteReadData/2021/227746.pdf

## GUIDELINES

### IBBI shared panel of IPs with AA for July – December 2021

Due to difficulties posed by the ensuing COVID-19 pandemic, the Insolvency and Bankruptcy Board of India (IBBI) on June 10 announced extension of the date for submitting 'Expression of Interest' (EOI) by Insolvency Professionals (IPs) under "Insolvency Professionals to act as Interim Resolution Professionals, Liquidators, Resolution Professionals and Bankruptcy Trustees (Recommendation), Guidelines, 2021", to June 25, 2021. Accordingly, the IBBI also decided to send the panel to

NCLTs by June 30. The IBBI has shared the panel with the AA (Hon'ble NCLT and Hon'ble DRT) for appointment as IRP, Liquidator, RP, and BT. This Panel will have validity of six months and a new Panel will replace the earlier Panel every six months. These new guidelines shall come into effect for appointments as IRP, Liquidator, RP, and BT with effect from July 1, 2021.

**Source:** *Insolvency Professionals to Act as Interim Resolution Professionals, Liquidators, Resolution Professionals and Bankruptcy Trustees (Recommendation) Guidelines, 2021 Dated 01st June 2021.*

https://ibbi.gov.in//uploads/legalframwork/57df52b9084e184d7dd15a6f4c3e314b.pdf

**IBBI Guidelines for Summer/Winter/Short Term/ Certificate Courses with various institutions**

The IBBI in its endeavour to create awareness about the IBC, 2016 and its ecosystem, amongst the students of higher education courses, academicians, trainee civil and judicial officers, Insolvency Professionals (IPs) registered with IBBI and Registered Valuers (RVs), wishes to promote Summer/Winter/Short Term/Certificate Courses through "Institutes of Learning".

In reference to these Guidelines, the term Institutes of Learning includes Universities, Deemed Universities, Professional Institutes (Institute of Chartered Accountants of India, Institute of Cost Accountants of India, and Institute of Company Secretaries of India), Civil Services Academies (Central & State Government), Judicial Academies, IIMs, IITs, NITs and Institutes of National Importance as may been designated by the Ministry of Education. The Guidelines further inform about Potential areas of support from IBBI, Proposal to be submitted to IBBI, Obligations of IBBI and Guidelines for association of IBBI. These courses shall not have as a sponsor, a Corporate Debtor/ Financial Creditor/ Operational Creditor/ Personal Guarantor/ Service Provider/ Professional engaged by the Service Provider, who is/are involved in any ongoing processes under the IBC.

**Source:** *Insolvency and Bankruptcy Board of India (IBBI)- Guidelines for Association for Summer/ Winter/Short Term/Certificate Courses with Academic Institutions/ Civil Services Academies/ Judicial Academies, 2021 Dated 05th May 2021.*

https://ibbi.gov.in//uploads/legalframwork/084be521e24d0f9d894191296bdb4b32.pdf

## Press Releases

**Mr. Amit Pradhan takes Charge as Executive Director, IBBI**

Insolvency and Bankruptcy Board of India (IBBI) appointed Mr. Amit Pradhan as Executive Director, IBBI in New Delhi. Mr. Pradhan before joining IBBI was serving as Chief General Manager and Adjudicating Officer in the Securities and Exchange Board of India (SEBI). Mr. Pradhan has been with the securities market regulator, SEBI since 1997. He has been serving in various capacities in different departments, including as Regional Director of the Northern Regional Office of SEBI at New Delhi. He has also served as Adviser in the Competition Commission of India. Mr. Pradhan was a member of the Bankruptcy Law Reforms Committee which conceptualised the Insolvency and Bankruptcy Code, 2016.

**Source:** *IBBI Press Release No. IBBI/PR/2021/13 dated June 21, 2021*

https://ibbi.gov.in//uploads/press/7da4ac6cd4d21cfb2d42e478b86019db.pdf

**IBBI invites Comments on all Regulations of IBC, 2016 issued till June 17, 2021**

In a landmark decision which is considered as overhaul of IBC, 2016; the Insolvency and Bankruptcy Board of India (IBBI) has invited comments from the public, including the stakeholders on the regulations already notified under the Code till date of notification i.e., June 17, 2021. "The comments received between 17th June 2021 and 31st December 2021 shall be processed together and following the due process, regulations will be modified to the extent considered necessary. It will be the endeavor of the IBBI to notify modified regulations by 31st March 2022 and bring them into force on 1st April 2022," reads the notification. The suggestions have been invited from 11 categories of stakeholders of the IBC i.e., i. Corporate Debtor: ii. Creditor to a Corporate Debtor; iii. Insolvency Professional; iv. Insolvency Professional Agency; v. Insolvency Professional Entity; vi. Personal Guarantor to a Corporate Debtor; vii. Proprietorship firms; viii. Partnership firms; ix. Academics; x. Investors; xi. Others.

**Source:** *IBBI Press Release No. IBBI/PR/2021/12 dated June 17, 2021*

https://ibbi.gov.in//uploads/press/985d3ef60a8caf32a5e3ad55382d9137.pdf

**Consolidation and consequent achievement in a short span of 5 years is pointer towards the challenges ahead: Shri Rajesh Verma, Secretary, MCA**

Shri Rajesh Verma, Secretary, Ministry of Corporate Affairs (MCA) has said that consolidation and consequent achievement in a short span of 5 years is pointer towards the challenges ahead, which the IBBI as regulator along with MCA have to deal with as the regime matures with time.

He was speaking as Chief Guest in a virtual event on May 28, 2021, organized by Insolvency and Bankruptcy Board of India (IBBI) to mark the 5th Anniversary of enactment of Insolvency and Bankruptcy (IBC), 2016. He also highlighted the need for greater consultation and engagement with stakeholders to ensure the best use of the provisions of the Code so that that it can meet the aspirations of all the stakeholders," said Shri Verma.

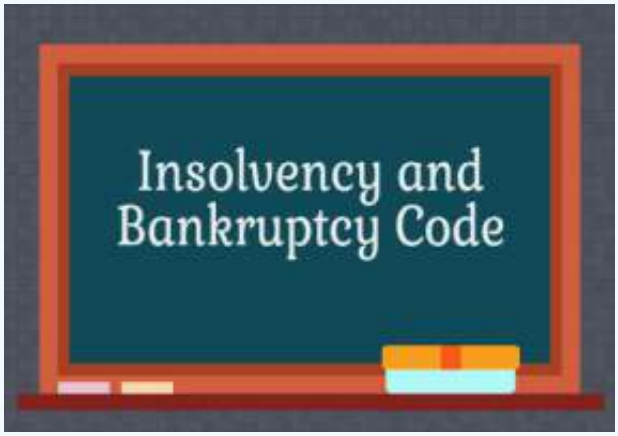
On this occasion, Dr. M. S. Sahoo, Chairperson, IBBI, thanked all stakeholders who joined the journey of IBC's ecosystem and ensured that it was operationalized in shortest time, unprecedented in the history of any economic legislation in the country and that of that of any insolvency regime around the world. He highlighted that the implementation of a law of such significance threw up several challenges. All concerned took the challenges head on and resolved them expeditiously.

**Source:** *IBBI Press Release No. IBBI/PR/2021/09 dated May 28, 2021*

https://ibbi.gov.in//uploads/press/87c39fb8e98bf1fc0f280219f6479acd.pdf

**Cabinet approves Loan Guarantee Scheme for Covid Affected Sectors (LGSCAS) and to enhance the corpus of Emergency Credit Line Guarantee Scheme (ECLGS)**

Due to the disruptions caused by the second wave of COVID 19 specially on healthcare sector, the Union Cabinet, chaired by the Prime Minister Shri Narendra Modi on June 30, 2021, approved Loan Guarantee Scheme for Covid Affected Sectors (LGSCAS) enabling funding




to the tune of Rs. 50,000 crore to provide financial guarantee cover for brownfield expansion and greenfield projects related to health/ medical infrastructure. In addition, the Cabinet also approved additional funding up to Rs. 1,50,000 crore under Emergency Credit Line Guarantee Scheme (ECLGS). The LGSCAS scheme would be applicable to all eligible loans sanctioned up to March 31, 2022, or till an amount of Rs. 50,000 crore is sanctioned, whichever is earlier. ECLGS, which is a continuing scheme, would be applicable to all eligible loans sanctioned under Guaranteed Emergency Credit Line (GECL)till 30.09.2021, or till an amount of rupees four lakh fifty thousand crore is sanctioned under the GECL, whichever is earlier. The enhanced ECLGS is expected to provide much needed relief to various sectors of the economy by incentivizing lending institutions to provide additional credit of up to Rs. 1.5 lakh crore at low cost, thereby enabling business enterprises to meet their operational liabilities and continue their businesses. Besides supporting MSMEs to continue functioning during the current unprecedented situation, the Scheme is also expected to have a positive impact on the economy and support its revival.

**Source:** *Press Information Bureau, 30th June 2021, Release ID: 1731455*

https://pib.gov.in/PressReleasePage.aspx?PRID=1731455

# IBC Case Laws

## Supreme Court of India

***Lalit Kumar Jain Vs. Union of India & Ors. Transferred Case (Civil) No. 245/2020 with Ors. Date of Judgment: May 21, 2021.***

**The Approval of a Resolution Plan does not Ipso Facto discharge a Personal Guarantor of a Corporate Debtor of her or his Liabilities under the Contract of Guarantee.**

**Background of Case**

The Central Government, vide notification dated 15th November 2019, brought into force provisions relating to the personal guarantors (PGs) to CDs with effect from 1st December 2019. Several petitions were filed in different High Courts challenging the said notification and related rules and regulations. While directing transfer of petitions from High Courts to itself, the Supreme Court stated that the matters involved interpretation of common questions of law, in relation to provisions of the IBC, 2016. However, during the course of submissions, the parties stated that the challenge would be confined to the impugned notifications.

The petitioners under Article 32 claim to be aggrieved by the notification. At some stage or the other, petitioners had furnished personal guarantees to banks and financial institutions which led to release of advances to various companies which the petitioners were associated with as directors, promoters, chairman or managing directors. In many cases, the personal guarantees furnished by the petitioners were invoked, and proceedings are pending against companies which they are or were associated with, and the advances for which they furnished bank guarantees.

**Supreme Court's Observations**

The Supreme Court noted that the Parliamentary intent is to treat PGs differently from other categories of individuals. The intimate connection between such individuals and corporate entities to whom they stood guarantee, as well as the possibility of two separate processes being carried on in different forums, with its attendant uncertain outcomes, led to carving out PGs as a separate species of individuals, for whom the adjudicating authority was common with the CD to whom they had stood guarantee. The fact that the process of insolvency in Part III is to be applied to individuals, whereas the process in relation to CDs set out in Part II is to be applied to such corporate persons, does not lead to incongruity.

The Court stated that the rationale for allowing directors to participate in meetings of the CoC is that the directors' liability as PGs persists against the creditors and an approved resolution plan can only lead to a revision of amount or exposure for the entire amount. Any recourse under section 133 of the Contract Act, 1872 to discharge the liability of the surety on account of variance in terms of the contract, without her or his consent, stands negated. Further, the sanction of a resolution plan and finality imparted to it by section 31 does not per se operate as a discharge of the guarantor's liability. However, an involuntary act of the principal debtor leading to loss of security would not absolve a guarantor of its liability.

The Court further stated that the Approval of a resolution plan does not ipso facto discharge a PG of a CD of her or his liabilities under the contract of guarantee. The release or discharge of a principal borrower from the debt owed by it to its creditor, by an involuntary process, i.e., by operation of law, or due to liquidation or insolvency proceeding, does not absolve the surety/guarantor of his or her liability, which arises out of an independent contract.

**Order**

The Supreme Court dismissed writ petitions, transferred cases and transfer petitions stating that the impugned notification is legal and valid. It was also held that approval of a resolution plan relating to a corporate debtor does not operate so as to discharge the liabilities of personal guarantors (to CD).

**Case Review:** *Appeals Dismissed.*

***Sandeep Khaitan, RP for National Plywood Industries Ltd. Vs JSVM Plywood Industries Ltd. & Anr. Criminal Appeal No.447 of 2021, Date of Judgment: April 22, 2021.***

**Section 14 is Emphatic, Subject to the Provisions of Sub Section (2) and (3). The impact of the Moratorium includes Prohibition of Transferring, Encumbering, Alienating or Disposing of by the Corporate Debtor of any of its Assets.**

**Background of Case**

This appeal was filed against the order of the Hon'ble High Court of Guwahati. In the impugned order, the High Court had allowed an interlocutory application filed by the Respondent to allow it to operate its bank account maintained with the ICICI Bank Bhubaneswar and to unfreeze the bank account of its creditors over which the lien had been created and the accounts frozen pursuant to the lodging of an FIR by the appellant.

The Appellant claimed that the former Managing Director of the CD in conspiracy with the Respondent engaged in an illegal transaction to the tune of Rs. 32.50 lakhs without authority from the Appellant and in violation of Section 14 of the IBC, 2016. He complained that initially, the Managing Director made a transaction of Rs. 500. Thereafter, he proceeded by virtue of four consecutive transactions to transfer a sum of Rs. 32.50 lakhs to the Respondent. Further the Appellant also claimed that the former Managing Director proceeded to transfer another sum of Rs. 3.29 lakhs from another account and the amount were transferred to his close associate.

**Supreme Court's Observations**

The Apex court stated that the contours of the jurisdiction under 482 of the Cr.P.C. are far too well settled to require articulation or reiteration. Undoubtedly, in this appeal an application was filed and admitted under section 7 of the IBC, the appellant was appointed as the IRP and what is more a moratorium declared.

With the declaration of the moratorium the prohibitions as enacted in section 14 came into force. The assets of the company would include the amounts lying to the credit in the bank accounts. There cannot be any dispute that well after the order under section 14 was passed, a sum of Rs. 32.50 lakhs were remitted into the account of Respondent company. Further it is definite that the Respondent has had business relations with the CD for more than 15 years and that the amount remitted in its account represented the price of the materials supplied to the CD. Apart from this amount a sum of rupees more than Rs.39 lakhs is still due. It was noticed that though an appeal was filed against the order admitting the petition under Section 7 the same was dismissed by the NCLAT. The appellate order was undoubtedly set aside by this court and the appeal remanded to the AA for its consideration. The Court thought that setting aside the appellate order of the NCLAT and remanding the appeal would not have the effect of setting aside the order admitting the application. The ambiguity created by the said order was removed by the subsequent order of the Tribunal. The Court further stated that it need not say anything further particularly in view of the fact that an FIR is pending consideration in the High Court also. It is significant only for Court to notice that the Appellant is essentially aggrieved by the transactions representing a sum of Rs. 32.50 lakhs all of which took place after order of the High Court.

**Order**

The appeal was allowed with modification to the order passed by the High Court. The Respondent was allowed to operate its account subject to first remitting the amount in the account of the CD, which stood paid to it by the management of the CD. The assets of the CD to be managed strictly in terms of the provisions of the IBC. The Appellant as RP will bear in mind the provision of Section 14 (2A) and the object of IBC. The apex court further stated that the order shall not be taken as pronouncement

on the issues arising from the FIR including the petition pending under Section 482 of the Cr.P.C. Further, the judgment will not stand in the way of the Respondent pursuing its claim about its entitlement to the said amount and any other sum from the CD or any other person in the appropriate forum and in accordance with law.

**Case Review:** *Appeal Allowed.*

## High Court

***M/S. Dreams Infra India Pvt. Ltd. Vs. the Competent Authority, Dreamz Infra India Pvt. Ltd., and Other Allied Companies/Entities Writ Petition No.13477/2020(GM-RES) Date of Judgment: May 24th, 2021, Karnataka High Court.***

**IBC, 2016 Prevails Over the State Enactments.**

**Background of Case**

This petition was filed under Articles 226 and 227 of the Constitution of India and Section 482 of Cr.P.C. to issue a writ of certiorari to quash the proceedings initiated against the petitioner pending in the Principal City Civil and Sessions Judge (Special Judge), Metropolitan Area, Bengaluru 'Spl. Judge' and direct the respondent to handover the properties to the RP as directed by Hon'ble NCLT, Bengaluru.

The facts of the case are that the petitioner (M/S. Dreams Infra India Pvt. Ltd) a real estate Company involved in the development of various housing and apartment projects. The petitioner had executed Agreement of Sale and MoU with many homebuyers for sale of apartments in its construction projects. After collection of certain amount as advance money to book apartments, the apartments were not handed over to the home buyers.

The respondent (constituted authority appointed by the Government of Karnataka) initiated proceedings under Section 7(1) of the Karnataka Protection of Interest of Depositors in Financial Establishment Act, 2004 'Act', against the petitioner and the same was admitted by the Spl. Judge. The respondent stated that the petitioner accepted deposits from 3668 depositors to the tune of Rs. 385 Crores and failed to repay same. Subsequently, three homebuyers being aggrieved by the actions of the petitioner moved a petition before the Hon'ble NCLT 'AA' under Section 7 of IBC, 2016 seeking to declare the petitioner as insolvent. The AA admitted the petition and CIRP under IBC, 2016 was commenced.

It was contended that the respondent despite being informed about the proceedings under IBC, 2016 and that due to Section 14 of IBC, 2016 the proceedings in Spl. Judge against the petitioner has been stayed, the respondent did not hand over the properties as per law and initiated action under Section 7 of the Act.

**High Court's Observations**

The Court stated that in its various Judgements it has discussed regarding the repugnancy of State law, regarding Sections 14 and Section 238 of the IBC, 2016 in respect of the moratorium which has got overriding effect over other laws and that the IBC, 2016 prevails over the State enactments.

It further stated that in the present case, the matter has been presented before the AA before initiating of the present proceedings. Further in its recent Judgment it has held that there cannot be any other civil proceedings when the matter has been ceased and already some homebuyers have approached the NCLT, and RP was also appointed. Under the circumstances, the Court was of the opinion that there is a force in the contention of the petitioner that the provisions of the IBC, 2016 have overriding effect over other laws and the same would prevail in view of Section 238 of the IBC, 2016 and that the proceedings initiated against the petitioner under the Act should be quashed.

Judgement: The High Court allowed the writ petition and the proceedings initiated against the petitioner under the Act were quashed. Further, it stated that the other reliefs sought to hand over the properties to RP does not arise as he has already been replaced by the AA and the petitioner can seek appropriate order from the AA where the matter is still pending. Further, if need arise the respondent can also proceed in accordance with law after the disposal of the matter pending before AA.

**Case Review:** *Petition Allowed.*

# National Company Law Appellate Tribunal (NCLAT)

***Bank of India & Ors. Vs. Bhuban Madan Company Appeal (AT) (Insolvency) No. 590 of 2020 & I.A. No. 156 of 2020 Date of Judgment: May 28, 2021.***

**Section 31 of the IBC Provides that the terms of the 'Resolution Plan' is Binding on the Company, its Employees, Creditors and all Stakeholders.**

**Background of Case**

The Appellants (Bank of India, Central Bank of India, Syndicate Bank and State Bank of India) preferred an appeal 590 against the Impugned Order passed by the Adjudicating Authority 'AA" whereby the AA allowed the application filed by the Resolution Professional 'RP' under Section 14 read with Section 17 and Section 60(5) of the IBC, 2016 with the directions to the banks to reverse the due amount.

The Respondent (Resolution Professional) had earlier filed an application in AA seeking direction against the Appellant Banks and Financial Institutions to reimburse all the amounts appropriated by them after the Insolvency Commencement Date, together with the amount appropriated towards interest payments and further to resume the working capital limits as available to the Corporate Debtor 'CD' as on the Insolvency Commencement Date.

**NCLAT's Observations**

The Appellate Tribunal stated that in its various Judgements it has held that Banks cannot debit any amounts from the account of the CD after the order of moratorium, as it amounts to recovery of amount. Further the Banks cannot freeze accounts, nor can they prohibit the CD from withdrawing the amount as available on the date of moratorium for its day-to-day functioning. Section 14 of the IBC, 2016 overwrites any other provision contrary to the same and any amount due prior to the date of CIRP cannot be appropriated during the moratorium period.

Further, merely because the CD had enough liquidity to run the Company as a going concern, the act of the Appellant Banks to adjust the credit balance in the Cash Credit Account towards the debit balance after CIRP commenced, cannot be justified. Appellate Tribunal held that the Claims were already preferred by the Appellant Banks and filed before the RP, hence they are not entitled to recover the amounts otherwise available in the Credit Accounts or Working Capital Accounts of the CD. (Para 15, 16).

An I.A 506 was filed by new management of the CD seeking release of the title deeds of the Immovable Properties of the Company which are in possession of Bank of India. The appellate tribunal stated that Section 31 of the IBC, 2016 provides that the terms of the Resolution Plan is binding on the Company, its employees, creditors and all stakeholders. A perusal of the Resolution Plan evidences issuance of non-convertible Debentures to the Financial Creditors which was required to be secured inter-alia by creating security interest over all Immovable Properties of the CD. It is significant to mention that Clauses of the Plan contemplate that title deeds are required to be released immediately upon distribution of Resolution Process. It was of the view that the debt has been legally extinguished and therefore withholding of the title deeds preventing the Company from being able to create security interest for securing the non-convertible Debentures issued to the Debenture Holders, in terms of the Plan, is unjustifiable.

**Order**

The Appellate Tribunal dismissed the appeal stating that adjusting the Claims by the Appellant Banks during the CIRP out of the funds of the CD results in unjust enrichment of the Banks and further, crediting amounts towards non-fund and fund-based accounts during the moratorium period is against the provisions of Section 14 of the Code. Further it allowed the instant appeal stating that the Resolution Plan had been implemented earlier and directed the non-Applicants to release the title deeds for effective implementation of the terms of the Resolution Plan as provided for under Section 31 of the IBC, 2016.

**Case Review:** *Appeals Dismissed and I.A 506 l Allowed.*

***New Okhla Industrial Development Authority (NOIDA) Vs. Mr. Anand Sonbhadra, Resolution Professional Company Appeal (AT) (INS) No. 1183 of 2019 Date of Judgement: April 16, 2021.***

**There is no substance in the argument that when land is leased out, if premium is fixed and instalments are given, it should be treated as a financial lease.**

**Background of Case**

This appeal was filed by the Appellant – New Okhla Industrial Development Authority (NOIDA) against the Respondent – Resolution Professional (RP) of Corporate Debtor (CD) – M/s. Shubhkamna Buildtech Pvt. Ltd. In the Corporate Insolvency Resolution Process (CIRP) started against the CD, the Appellant a Statutory Authority filed Form 'B' as Operational Creditor (OC) for dues outstanding against lease of plot granted in favor of the CD which amount was of Rs.99,32,55,183. The Representative of the Appellant even attended Committee of Creditors (COC) meeting as OC. Later, the Appellant filed claim in Form 'C' seeking status as Financial Creditor (FC). As the Appellant did not receive any response from the RP, he moved Adjudicating Authority (AA) which passed Orders to treat Appellant as FC and sent matter to the RP but still when the Appellant was not treated as FC, an application was filed claiming that RP had disobeyed earlier directions and that Appellant deserved to be treated as FC and should be permitted to participate in COC with voting rights. The matter was taken up before the AA and the AA after hearing both sides held that the lease deed concerned was not a financial lease as per the terms laid down under the guidelines of Indian Accounting Standards (IAS).

**NCLAT's Observations**

The Appellate Tribunal stated that it had gone through the Lease Deed and found that the lease deed in question cannot be said to be a finance lease. Keeping in view the IAS, what appears broadly is that when lease involves real estate (like land in present matter) with a fair value different from it carrying amount, the lease can be classified as a finance lease if the lease transfers ownership of the property to the lessee by the end of the lease term or there is bargain purchase option. The lease must transfer substantially all the risks and rewards incidental to ownership of the asset. The argument of the Appellant trying to mix up transfer of ownership of the asset which is land with right to transfer flats to be constructed has no substance. Merely, because the lessee was given right to fix the price of the dwelling units to be constructed, that by itself is not sufficient to say that the lease of the land is a finance lease. The argument of the Appellant that lessee has an option to pay onetime lease rent and if it were exercised lessee would not be required to pay further rent and it shows that present value of the lease payment amounts to at least substantially all of the fair value of the asset, is also baseless. No material is brought to show as to what is and would be the fair value. Further, the right to cancel lease is reserved with lessor and not lessee. The Appellant further argued that the question of cancellation of lease deed by lessee would not arise as lessee would build and transfer dwelling units. The Tribunal Stated that this is speculative and cannot be helpful in construing the document.

Further, in the present matter, there is no sale of land. It is lease, for premium/rent with almost all rights controlled by the Lessor. Hence, the tribunal stated that it was unable to accept the submission that when land is leased out, if premium is fixed and instalments are given, it should be treated as a financial lease.

**Order**

The Appellate Tribunal did not find any substance in appeal. However, the Bench clarified that it was not finding fault with the various terms and conditions in the Lease Deed. It is a Lease Deed from a development authority which has the object of developing the township and thus wants to control the manner in which the constructions of housing come up. That purpose is alright. However, such lease does not fit in with the requirements of Indian Accounting Standards. Just to be part of COC, the lease of land between developing authority and the builders cannot be considered or treated as a financial lease.

**Case Review:** *Appeal Dismissed.*

***Mr. K.N. Rajakumar Suspended Director, Aruna Hotels Ltd. Vs. V. Nagarajan, Resolution Professional, M/S. Aruna Hotels Ltd. Company Appeal (AT) (CH) (INS) No.48 of 2021 Date of Judgment: April 30, 2021.***

**The Resolution Professional has no 'Adjudicatory Power' under the IBC, 2016.**

**Background of Case**

This appeal was filed against the impugned order passed by the Adjudicating Authority (AA) - NCLAT, Chennai. The Learned Counsel for the Appellant pointed out that the AA in the order had directed the 'RP to convene the meeting of the CoC of the Members, who constituted the CoC originally, soon after the order of admission was passed by this Tribunal' initiating the CIRP and report to this Tribunal about the decision of the Members of the CoC constituted in the year 2017. The CoC constituted afterwards by the IRP/RP in derogation of the Order passed by the AA shall stand suspended and shall not exercise any of the powers as provide under the Provisions of IBC, 2016.' It was further submitted that AA should not have directed the Resolution Professional to call for a meeting of the CoC of CD constituting of members, who originally constituted the CoC, soon after the order of admission of CIRP of the CD, without considering the present status of the Financial and Operational Creditors and claims filed to that extent. Further, the AA had not appreciated the fact that most of the Members who initially constituted the CoC, soon after the order of admission of CIRP of the CD, are no longer Creditors of the CD as on the date of Order and hence, had committed an error in directing the RP to convene a CoC including such Members.

**NCLAT's Observations**

The Appellate Tribunal pointed out that once the CoC is/was formed, the RP cannot alter the same. The RP has no Adjudicatory Power under the IBC. In fact, the CD was admitted into CIRP by the AA. However, the Appellate Tribunal had later set-aside the Order of the AA.

Later, the Hon'ble Supreme Court of India had set-aside the Judgment of the Appellate Tribunal. Subsequently the Hon'ble Supreme Court in the matter of N. Subramanian v Aruna Hotels Ltd. & Anr. (IA 37894/2021) had granted liberty to withdraw the application with liberty to approach the CoC for settlement under Section 12A of the IBC.

The Respondent/RP had demanded action from the Suspended Directors and the Statutory Auditors by sending messages through E-mail and WhatsApp modes, but there was no response. The CIRP is more than three years old. On a careful consideration the NCLAT was of the considered view that the RP has no Adjudicatory Power under the IBC, 2016 and further that when once the Committee of Creditors is/was formed, the RP cannot change the CoC. Suffice it for the Appellate Tribunal to make a pertinent mention that the RP cannot constitute a CoC afresh, in negation of the earlier constituted CoC.

**Order**

In the light of foregoing, and also on going through the Impugned Order passed by the AA, the NCLAT came to a consequent conclusion that the observation made by the AA, that CoC constituted presently by the IRP/RP in derogation of the order passed by it shall stands suspended and shall not exercise any of the powers as provided under the Provisions of IBC, 2016 and the directions issued to the IRP/RP to comply with the directions therein within a period of 10 days from the date of the order and to report before it about the outcome of the CoC meeting required to be called and convened are free from legal infirmities. Consequently, the instant Appeal failed.

**Case Review:** *Appeal Dismissed.*

***Deccan Value Investors L.P Vs. Dinkar T. Venkatasubramanian & Ors. Company Appeal (AT) (Insolvency) No.654 of 2020 Date of Judgment: April 16, 2021 (NCLAT-Delhi Bench).***

**The Resolution Plan which has been Approved in terms of the order leaves no scope for the applicant to resile from and wriggle out of the implication of the offer made by him i.e., The Resolution Plan.**

**Background of Case**

The Appellant is aggrieved of the impugned order passed

by the AA, whereby the AA inter alia approved the Appellant's Resolution Plan. The impugned order is assailed on the ground that the AA has gone beyond its jurisdiction in concluding that the requirement of the prior written consent of the mortgagee as provided in the Resolution Plan has been rendered infructuous. This conclusion is said to be erroneous as the same is against the agreed terms of the Resolution Plan between the Appellant and COC. It is urged in Appeal that the AA while approving the Resolution Plan cannot re-write the same nor can it waive any condition of the Resolution Plan, that too without the express consent of the Appellant. It is further urged that the execution of the long-term lease was a condition precedent and an integral part of the Resolution Plan and the business of the CD as a going concern is dependent on the availability of this leased land as admitted by Respondents. It is further urged that the AA failed to consider that the parties had agreed that the long-term lease they executed and prior written consent of the mortgagee was to be acquired and orders to be obtained with respect to the same in terms of the Resolution Plan. Further as a consequence of wrong findings recorded by AA, an additional burden has been placed on the Appellant to invest huge sums to furnish the balance Performance Bank Guarantee (PBG).

**NCLAT Observations**

The Appellant is the successful Resolution Applicant whose Resolution Plan in respect of CD came to be approved by the COC with majority. The RP filed IA u/s 30(6) read with 31(1) of IBC for approval of Resolution Plan. Meanwhile, IA was filed by the Appellant before Hon'ble Apex Court seeking withdrawal of its offer came to be dismissed.

The Hon'ble Apex Court, while rejecting the prayer for withdrawal of the offer, warned the Appellant that if he indulged in such kind of practice, it will be treated as Contempt of Court in view of various orders passed at his instance. Furthermore, the Court stated that any further attempt made by the Appellant to enact a U-turn and try to wriggle out of the obligations under the offer would be treated as contumacious conduct inviting action for Contempt of Court.

In this backdrop, the NCLAT observed that the question for consideration, is whether the issue raised in this Appeal, in the context of prayer sought for setting aside of impugned order, can be looked into when curtain has been drawn on the endeavors of Appellant to seek withdrawal of its offer by declining the same. For determining the issue raised viz. whether the lease could be extended without the prior written consent from mortgagee, it is inevitable to peep into the development during CIRP, which ultimately culminated in approval of Appellant's Resolution Plan for the Corporate Debtor and rejection of various IAs.

In conclusion, the Appellate Tribunal stated that it was of the considered view that the execution of the long-term lease for the Mortgaged property with Acceptable Terms was not a condition precedent in regard to approval of Resolution Plan but only in regard to effective date. The impugned order does not travel beyond the scope of enquiry under Section 31 of I&B Code. The condition in regard to execution of a long term lease for the Mortgaged Property having already been complied with by RP who executed the lease, when the prior lease has expired and lender not having assailed the impugned order for any material irregularity in the insolvency resolution process resulting in prejudice, the Appellant would not be justified in assailing the impugned order which, in effect, is nothing but yet another effort to wriggle out of its obligations and seek withdrawal of Resolution Plan in a different garb.

**Order**

The appeal was disposed of by the Tribunal stating the appeal not only lacks merit but also is frivolous. We, while dismissing the appeal, impose costs to the tune of Rs.1/- Lakh (Rupees One Lakh Only) on the Appellant which shall be deposited in this Appellate Tribunal within 15 days.

**Case Review:** *Appeals Dismissed.*

***The Directorate of Enforcement Vs Sh. Manoj Kumar Agarwal & Ors. Company Appeal (AT) (Insolvency) No.575& 576/2019 & Company Appeal (at)(Insolvency) No.576/2019 Date of Judgment: April 09, 2021 (NCLAT-Delhi Bench).***

**If a property has been attached in the PMLA which is belonging to the Corporate Debtor and CIRP is initiated, the property should become available to fulfil objects of IBC till a Resolution takes place or sale of Liquidation asset occurs.**

**Background of Case**

The appeals have been filed by the Appellant being aggrieved by impugned order passed by the AA in the matter of Corporate Debtor. The Miscellaneous Application was filed by the RP of the Corporate Debtor and after hearing the parties the AA by the impugned order directed that the attachment order issued by the deputy Director, Directorate of Enforcement, under the provisions of Prevention of Money Laundering Act, 2002 (PMLA in short) which has been confirmed by the AA under PMLA was nullity and no nest in law in view of Sections 14(1) (a), 63 and 238 of IBC, 2016. By the impugned order the AA permitted the RP to take charge of the properties and deal with them under IBC as if there is no attachment order. The AA clarified that the attachment only in respect of the properties of Corporate Debtor were covered by this impugned order.

The appellant claimed that the impugned order needs to be set aside, as the properties were validly attached under the provisions of PMLA. It was stated that in another proceeding before another Bench of the same Tribunal in the matter of *Sterling Biotech Ltd Vs Andhra Bank* where quashing of attachment was sought, the concerned Bench did not interfere and observed that the appeal could be filed only under the provisions of PMLA. It was claimed that there is no moratorium applicable in criminal proceedings.

**NCLAT Observations**

The Tribunal stated that after the attachment when matter goes before the AA under PMLA, proceeding before Adjudicating Authority for confirmation would be civil in nature.

In present matter, the Provisional Attachment took place before the corrigendum was issued. The CIRP started later. Once moratorium was ordered, even if the Appellant moved the AA under PMLA, further action before AA under PMLA must be said to have been prohibited. Even if confirmation has been done as stated to have been done, the same will have to be ignored. Section 14 of IBC will hit institution and continuation of proceedings before AA under PMLA. The CIRP will of course not affect prosecution before Special Court, till contingencies under Section 32A of IBC occur.

NCLAT stated that in regard to quasi-criminal proceeding against Corporate Debtor, applicability of Section 14 has been found. Considering this as well as the nature of proceedings that takes place before the AA under PMLA, it appears to us that even if the AA issues order of provisional attachment, the institution and continuation of proceedings before the AA for confirmation would be hit by Section 14 of IBC.

Alternatively, even if for any reason it was to be held that Section 14 of IBC would not help, it appears to us that Section 238 of IBC would still apply. Although it is argued that PMLA is a special statute and has an overriding effect still Section 238 of IBC is also a special statute, and which is subsequent statute. If this Section is perused, the provisions of this Code would have effect notwithstanding anything inconsistent therewith contained "in any other law" for the time being in force.

**Order**

The appeals were disposed of by the Tribunal stating there is no conflict between PMLA and IBC and even if a property has been attached in the PMLA which is belonging to the Corporate Debtor, if CIRP is initiated, the property should become available to fulfil objects of IBC till a resolution takes place or sale of liquidation asset occurs in terms of Section 32A.

**Case Review:** *Appeals Dismissed.*

# National Company Law Tribunal (NCLT)

***C. Raja John Vs. R. Raghavendran IA/33/CHE/ 2021 and IA/5OO/CHE/2021 In CP/158/IB/ 2018 (NCLT-Division Bench I, Chennai) Date of Judgment: June 18th, 2021.***

**Section 240A of the IBC, 2016 Exempts Applicability of only Section 29A(C) and 29A(H) in terms of eligibility to be a Resolution Applicant as a medium level enterprise under MSME Development Act, 2006.**

**Background of Case**

This Interlocutory Appeal 'IA' was filed by Applicant (Promoter / suspended Director of the Corporate Debtor 'CD') seeking for early listing of IA/33/CHE/2021 which is an application filed by the Applicant, aggrieved against the rejection of the Resolution Plan by the Resolution Professional 'RP' and seeking direction against the RP to consider the same. The Applicant has moved the present IA seeking relief to fix the date of hearing and to take up this matter on priority basis and allow applicant to participate in EOI process, to issue necessary direction to RP to consider the Applicant as an eligible "resolution applicant" and also issue necessary directions that until a decision is taken by the Hon'ble NCLT on this matter, the resolution process followed by the Respondent shall be kept in abeyance or stayed and to issue necessary order as the Hon'ble NCLT may deem fit.

**NCLT Observations**

The Tribunal stated that as far as hearing of present IA before earlier IA is concerned, since it came up for this Tribunal only on 17.06.2021 and the is posted for hearing on 02.07.2021, hence the prayer sought become infructuous.

As far as second prayer is concerned, it was seen that in relation to this CIRP the CoC fixed the minimum eligibility criteria in relation to the submission of the Resolution Plan by the prospective Resolution Applicant and in pursuance of the same, the RP issued EOI, to which the Applicant also submitted the Resolution Plan to the RP which was rejected by RP stating that the applicant does not meet the eligibility norm of RS. 2 crore net worth and the DIN of applicant is under default category of Directors list and hence is disqualified to act as a Director under the Companies Act, 2013 and accordingly he is not eligible as per Section 29A(e) of the IBC, 2016.

Further, the applicant in present IA had submitted that the CD is an MSME and as such they are not disqualified to submit a Resolution Plan. The Tribunal stated that on perusal of the MSME Certificate it showed that the said certificate was obtained after initiation of CIRP. Hence, the Applicant was trying to play a fraud upon Tribunal, to gain backdoor entry to the assets of the CD in the guise of projecting themselves as MSME. Further, section 240A of the IBC, 2016 exempts applicability of only section 29A(c) and 29A(h) in terms of eligibility to be a resolution applicant as a medium level enterprise under MSME Development Act, 2006. In the present case, the Applicant suffers disqualification under Section 29A(e) and such a protection is not granted to the Applicant/ CD, under Section 240A of IBC, 2016 who claims itself to be an MSME.

The Respondent stated that they have issued a Fresh Expression of Interest and the last date for the submission of the Resolution Plan was fixed as 03.07.2021 (i.e., the next day of hearing earlier IA was scheduled). Thus, the Applicant, being the Promoter / suspended Director of the CD is trying to stall the process of CIRP on the guise of projecting themselves as MSME and thereby trying to gain a backdoor entry to the assets of the CD.

**Order:**

The Tribunal stated that in view of the reasoning and legal positions discussed, it was of the considered view that the Respondent was right in rejecting the Application of the Applicant for the Resolution Plan and as such the order passed by the RP was free from any legal infirmities and does not warrant any interference by this tribunal. As a result, thereof IA's stands dismissed.

**Case Review:** *Interlocutory Appeals Dismissed.*

**For More Updates, please visit IBC Case Law Capsules (https://www.iiipicai.in/case-snippets/)**

# IBC News

### Banks to face the prospect of a rise in NPAs, particularly in SME and retail portfolios: RBI

"While banks' exposures to better rated large borrowers are declining, there are incipient signs of stress in the micro, small and medium enterprises (MSMEs) and retail segments," said RBI's latest Financial Stability Report (FSR).

The FSR underscored that the demand for consumer credit across banks and non-banking financial companies (NBFCs) has dampened, with some deterioration in the risk profile of retail borrowers becoming evident. Subdued credit growth in a low-interest rate scenario could impact banks' net interest income levels, it warned. The RBI has suggested the banks to use favourable market conditions to shore up capital position.

**Source:** *The Hindu BusinessLine, July 01, 2021*

https://www.thehindubusinessline.com/money-and-banking/msme-retail-npas-may-rise-as-relief-measures-get-wound-down/article35084911.ece

### Central Government approved Rs. 6.29 lakh crore Relief Package to boost COVID hit Economy

Union Finance Minister Ms. Nirmala Sitharaman on June 29 announced Rs. 6.29 lakh relief package to bring the economy on track which is going through slowdown caused by COVID-19 pandemic lockdown. The package was approved by the Union Cabinet on July 01, 2021.

In the package, there is special allocation of Rs. 1.5 lakh crore for MSMEs. Besides, tourism, job creation, free visa for foreign tourists, healthcare, etc. are the main focus in the package. Together with previously announced Rs. 93,869-crore spending on providing free food grains to the poor till November and additional Rs. 14,775 crore fertilizer subsidies, the stimulus package, which is mostly made up of government guarantee to banks and microfinance institutions for loans they extend to COVID-19-hit sectors, totaled up to Rs. 6.29 lakh crore.

**Source:** *NDTV.Com, July 01, 2021.*

https://www.ndtv.com/india-news/cabinet-approves-rs-6-29-lakh-crore-covid-19-relief-package-announced-by-finance-minister-2476444


### SBI led consortium of banks recovered 80% loss in Vijay Malaya Case

On 23 June, SBI led consortium of banks recovered Rs 5,800 crore by selling Vijay Mallya's shares in United Breweries to Heineken international. The creditors sold 15 percent stake in the company to Heineken. Earlier, banks had sold Rs 1,357 crore worth of shares and are planning to sell Rs 800 crore worth of shares by June 25, according to media reports. So far, banks have recovered Rs 7,1 82 crore from Vijay Mallya through the share sales, which is a little over 70 percent of the amount what the liquor King owes to the lenders.

The shares were seized by the Enforcement Directorate, after banks alleged that Vijay Mallya had defrauded them. The bulk of the shareholding in United Breweries worth Rs. 58.25 billion were sold today, while Rs. 13.57 billion were recovered in 2019. The remaining Rs. 8 billion of shares are expected to be sold in the next two days, the probe agency said.

Malla owed around Rs 10,000 crore to a clutch of 17 Indian banks led by SBI, if one takes into account the accrued interest component, or even higher. Heineken got an open offer exemption from the Securities and Exchange Board of India (SEBI) to buy the additional stake.

**Source:** *The Times of India, June 23, 2021.*

https://timesofindia.indiatimes.com/business/india-business/sbi-consortium-sold-vijay-mallyas-share-worth-rs-5825-recovered-70-loss/articleshow/83772387.cms

### MCA modifies MSMEs Rules

As per the notification on June 23, the Small and Medium Company (SMC) are unlisted firms with a turnover not above ₹ 250 crore and with no borrowings more than ₹ 50 crore. A company shall qualify as an SMC, if the conditions mentioned therein are satisfied as at the end of the relevant accounting period.

**Source:** *Business Standard, 24 June 2021*

https://www.business-standard.com/article/news-cm/ministry-of-corporate-affairs-raises-threshold-turnover-and-borrowing-limits-in-definition-of-small-and-medium-companies-121062400331_1.html

### NCLT Approved Resolution Plan of Jet Airways

NCLT Mumbai Bench on June 22 approved the Resolution Plan of UK-based asset management company Kalrock Capital and UAEbased entrepreneur Murari Lal Jalan to acquire the Jet Airways through CIRP.

In the Plan, the Kalrock-Jalan consortium has reportedly offered ₹1,183 crore as repayment over a period of five years to Financial Creditors (FCs), employees, and other staff of the company. It has also offered about a 9.5 % stake in Jet Airways and a 7.5 % stake in Jet Privilege to the FCs. The CIRP of Jet Airways was initiated by SBI led consortium of lenders in 2019. It had payable claims of ₹ 15,000 crore including ₹ 7,776 core of FCs. As per the terms of the approved resolution plan, a monitoring committee is required to be constituted which will comprise of seven members, it said. The committee will supervise the implementation of the resolution plan.

**Source:** *IndiaToday.in, 23 June 2021*

https://www.indiatoday.in/business/story/jet-airways-shares-locked-at-5-upper-circuit-here-s-why-1818470-2021-06-23

### IBC rescued 70% of distressed assets via Resolution: Dr. M.S. Sahoo

IBBI Chairman Dr. M. S. Sahoo has said that the IBC has rescued 70% of distressed assets through resolution plans and has released remaining 30 per cent of such assets through liquidations. "As compared to previous regime which took nearly five years for conclusion, the process under the Code yielding a resolution plan takes on average 400 days. It, however, falls short of intended 180/270 days," said Dr. Sahoo. He further emphasized that the insolvency law is changing the way society perceives business failures as it becomes a reform by, for, and of the stakeholders.

**Source:** *MoneyControl.com, 21 June, 2021*

https://www.moneycontrol.com/news/business/bankruptcy-resolution-plan-takes-average-400-days-against-intended-180270-days-ibbi-chief-m-s-sahoo-7061841.html

### Dissenting secured creditor can't challenge Resolution Plan claiming more money commensurate to the security in possession: Supreme Court

In the matter of *India Resurgence ARC Pvt Ltd Vs. Amit Metaliks Ltd& Anr.*, the Supreme Court has held that dissenting secured creditor/s cannot demand a higher amount with reference to the value of the security interest. The appellant had challenged the Resolution Plan of the VSP Udyog Pvt Ltd. after approval by NCLT arguing that it was offered only ₹2.026 cores despite possessing a security to the tune of ~₹12 crore which was about 87% of the Resolution Plan. However, the court rejected the appeal on the ground that the payment to the appellant is at par with the percentage of payment proposed for other secured financial creditors.

**Source:** *Live Law.In, 14 June 2021*

https://www.livelaw.in/top-stories/ibc-creditor-resolution-plan-higher-amount-based-on-security-interest-supreme-court-175665

### NCLT approved Piramal's Resolution Plan for DHFL

NCLT Mumbai bench on June 07 approved the Resolution Plan of Piramal Group to acquire DHFL with some advice to the CoC to reconsider reallocation of funds under the approved plan in favour of small depositors and fixed Deposit holders.

**Source:** *CNBC TV 19.COM, June 07, 2021.*

https://www.cnbctv18.com/business/companies/dhfl-insolvency-case-nclt-nod-to-piramal-group-resolution-plan-with-conditions-9567451.htm

### Resolution Plans may yield double in FY 22 than FY 21: Report

Credit rating agency ICRA has estimated that in the current financial year, the creditors will realize about ₹ 55,000 – 60,000 crores from successful Resolution plans which will be more than double of ₹ 26,000 crore realized in FY 21.

The Report suggests that there have been some positive outcomes from the presence of the IBC, 2016 despite the delays. However, the agency has expressed concerns on litigations causing hurdles in the resolution of the DHFL, the first Financial Service Provider (FSP) and 8-9 large Corporate Debtors (CDs) which are stuck in litigations. The agency has also suggested that its estimate depends on duration of the second wave of COVID-19 which may cause slowdown leading to increase in haircuts for the lenders.

According to the Report, till March 31, 2021 the Financial Creditors have realized 39% of their claims through successful Resolution Plans which was around 180% of the liquidation value of the CDs. However, the number of CIRP cases referred to liquidation remained as high as 40% in comparison to resolution which stands at 13%. The COVID-19 pandemic has increased operational challenges for various parties and shrunk market demand which resulted in limited cases yielding a Resolution Plan, concluded the agency.

**Source:** *Business Standard, 07 June 2021*

https://www.business-standard.com/article/finance/ creditors-may-realise-rs-55-000-60-000-cr-through-ibc-in-fy22-report-121060700704_1.html

### A revision in claims cannot be permitted as that would mean changing the structure of the approved Resolution Plan: NCLAT

The NCLAT, Chennai Bench has observed that any revision in claims after approval of the Resolution Plan by NCLT amounts to revision of the Plan itself. "Once a Resolution Plan is duly approved by the AA, claims as provided in the Plan shall stand frozen and will be binding on the corporate debtor and its employees, members, creditors, including the central government, any state government or any local authority, guarantors and other stakeholders," the Bench in the matter of GVR Infra Projects Limited. The CD had not paid its EPFO dues since April 2014.

**Source:** *The Indian Express, 31 May 2021*

https://indianexpress.com/article/business/banking-and-finance/epfo-govt-bodies-cant-revise-claims-once-resolution-plan-approved-nclat-7337215/

### Finance Minister hints at Amendments in IBC, 2016 to prevent 'Sudden Spike in the Wheel'

In a media interview, the Union Finance Minister Ms. Nirmala Sitharaman has expressed strong reservations on last minute hurdles caused by the promoters in the resolution of the Corporate Debtor (CD).

"For companies this is the biggest burden, you go bid genuinely for a company and committee of creditors is willing to take an offer and then suddenly somebody puts a spoke in the wheel. So those kinds of things are the ones on which we have to apply our minds and seek some kind of an intervention, if necessary, by bringing in amendments," said Ms. Sitharaman on the allegation that 'the insolvency process has been bogged down by some promoters gaming the system'. The statement is being seen as government's concern on last minute litigations in the insolvency processes of DHFL and Siva Industries and Holdings Ltd.

Responding to a question regarding a large stimulus to revive economy facing slow down by second wave of the COVID-19, she said that the Budget for FY 2021-22 has been designed keeping in mind the necessities of a 'COVID affected economy' which needs to be implemented. She also described several schemes such as Atmanirbhar Bharat, Emergency Credit Line Guarantee Scheme (ECLGS), Swamih Fund and MGNREGA etc. She, however, informed that the government is yet to make a final call on impact of second wave of the economy.

**Source:** *The Times of India, 21st May 2021*

https://timesofindia.indiatimes.com/business/india-business/covid-19-let-budget-schemes-kick-in-before-asking-about-stimulus-says-finance-minister-nirmala-sitharaman/articleshow/83096518.cms

### Row over Siva Group – IDBI Bank Deal amid CIRP

While dissenters argue that it will a bad precedent for defaulting promoters to regain control of their companies by undermining the CIRP under IBC, IDBI Bank finds it better than liquidation. In this case the CD has a payable due to ~Rs 5,000 crore but most creditors agreed to the offer of Rs 500 by the promoter to avoid liquidation. Though this is only 10% of the payable amount.

The insolvency proceedings of the company were initiated in 2019 due to bank dues of about Rs 5,000 cr. The decision to withdraw CIRP has become controversial as the founder C. Sivasankaran who was also founder of Aircel and Barista among others, has a history of legal disputes.

**Source:** *MoneyControl.Com, May 19, 2021.*

https://www.moneycontrol.com/news/business/siva-group-idbi-bank-deal-divides-bankers-triggers-debate-on-weakening-bankruptcy-law-6911391.html

### Reverse Vesting Orders poised to become valuable tools in insolvency regime of Canada

After getting stamps from Quebec Superior Court and British Columbia Supreme Court, the Reverse Vesting Orders is set to become extremely valuable tools under insolvency and restructuring proceedings in Canada, particularly for the energy sector.

As per the new provisions, these orders RVOs effect the sale of an insolvent entity's shares in a transaction where assets and liabilities unwanted by the purchasers are excluded. The unwanted elements are transferred to a newly incorporated company, where the insolvency process continues. "The act of eliminating or 'vesting out' the liabilities and restoring solvency imbues the shares with value again," said David Bish, to media. "Without that cleansing, no one wants to own the shares of a company whose liabilities exceed its assets." According to media reports these Orders have been features of two insolvency proceedings in 2019 and nine in 2020.

**Source:** *Financial Post, 26 May 2021*

https://financialpost.com/commodities/energy/new-insolvency-rules-to-have-major-impact-on-energy-companies-with-environmentally-compromised-assets

### Supreme Court upheld Insolvency Resolution Process of Personal Guarantors to CD introduced by MCA in 2019

After this judgement, the creditors can now pursue parallel Insolvency Resolution Process of Personal Guarantors (PG) to Corporate Debtor (CD) and Corporate Insolvency Resolution Process (CIRP) against the CD. Thus, the IRP of PG to CD has become a new addition in the toolkit available to the creditors under the IBC regime. The judgement was delivered by a bench of Justices L Nageswara Rao and Ravindra Bhat on Mary 21, 2021.

Insolvency Resolution Process of PG to CD was introduced by the Ministry of Corporate Affairs (MCA), Central Government through a Notification titled - Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019, dated Nov. 15, 2019. The Notification introduced amendments to various provisions of the IBC including Section 2 (e), Section 78 and 79, Section 94 to 187, Section 239, 240 and 249. Subsequently, it was challenged in different high courts of the country. Finally, the Supreme Court summoned all those petitions. The judgement has also set aside the demand of petitioners to declare Sections 95, 96, 99, 100, 101 of the IBC, 2016 as unconstitutional.

**Source:** *Bar & Bench, 21 May 2021*

https://www.barandbench.com/news/litigation/supreme-court-upholds-provisions-insolvency-and-bankruptcy-code-insolvency-personal-guarantors

### MSME promoter allowed to submit resolution plan in Individual Capacity

NCLT Kochi has held that the promoter of an MSME can submit a Resolution Plan Application in his individual capacity, and that the Plan would be eligible to be along with those of other prospective Resolution applicants. Earlier, the RP, citing the eligibility criterion had rejected promoter's plan. However, the counsel of the promoter submitted that as per Gazette Notification on 26.06. 2020, the CD was an MSME, and promoter was eligible as per Section 240A of IBC because he was not a willful defaulter.

**Source:** *Live Law, 07 May 2021*

https://www.livelaw.in/news-updates/nclt-kochi-promoter-corporate-debtor-msme-resolution-plan-individual-capacity-173759

### Finance Minister handed over possession to 640 homebuyers of first Housing Project completed by SWAMIH Funding

Union Finance Minister Nirmala Sitharaman on 13th May handed over possession to 640 home buyers of Mumbai based Rivali Park Wintergreens in a virtual event. This is

the first Real Estate Project in the country to receive investment under the SWAMIH Fund which has also become the first completed project of the scheme.

The Central Government in November 2019 had announced Rs 25,000 crore SWAMIH Investment Fund to help in completing over 1,500 housing projects stalled due to financial issues including those going through Corporate Insolvency Resolution Process (CIRP) under IBC and also those declared Non-Performing Assets (NPAs) by the creditor (s). The initiative was to help 4.58 lakh housing units across country constructed under RERA registered housing projects.

"SWAMIH Fund will benefit 1.16 lakh Indian families. All of them will get houses which got stuck because of so many different reasons and hindrances, "said Sitharaman addressing the online event. So far, 72 stalled projects have received funding throughout the country while 132 others have received preliminary approvals. The total cost of stalled projects is about Rs 54,520 crore.

**Source:** *Money Control.Com, 13 May 2021*

https://www.moneycontrol.com/news/business/real-estate/swamih-fund-for-stuck-housing-projects-to-benefit-1-16-lakh-homebuyers-fm-6890101.html

### Power Purchase Agreements between the Power Generators and the Buyers will continue during CIRP: Supreme Court

In a major relief to the Creditors, the Supreme Court has upheld that the Power Purchase Agreements (PPAs) between the power generators and buyers will continue during the Corporate Insolvency Resolution Process (CIRP) of the Corporate Debtor. The decision which came in the matter of *Gujarat Urja Vikas Nigam Ltd. Vs. Amit Gupta* will help the Resolution Professionals in running the Corporate Debtor (s) of power sector as Going Concern (GC). "You cannot terminate a PPA and also take the generator to the NCLT for recovery of dues. This is because the moment a power buyer terminates a PPA under a clause in the agreement, the power generator ceases to be a going concern," observed the Court.

**Source:** *The Hindu Business Line, 03 May 2021*

https://www.thehindubusinessline.com/business-laws/the-fate-of-ppas-under-ibc-decided/article34465722.ece

### US Securities and Exchange Commission (SEC) to review rules after big companies' meltdown

The collapse of big business houses like GameStop and Archegos Capital has prompted the United States SEC to review enforcement measures and replace them with fresh one. The new enforcement measures will be focused on provisions related to disclosure by big investors about their short positions, or bets that stocks will fall, use of derivatives to bet on other stock moves and to protect small investors from trading apps that use features common to video games in order to boost risky trading activity.

"The SEC must remain attuned to rapidly changing technologies with an eye to freshening up our rules," said Gary Gensler, SEC's new chair to the US lawmakers on Thursday. The hearing follows an unusual bout of market volatility in recent months. In January, shares of GameStop surged as day traders snatched up low-performing stocks like Blackberry and AMC that massive hedge funds were shorting. In March, the overleveraged family office Archegos left banks with roughly $10 billion in losses as its bets on ViacomCBS and Discovery went south.

"Archegos shows that systemic exposures aren't being disclosed," Gensler said. "Transparency is at the heart of efficient markets," he added.

**Source:** *New York Post, 06 May 2021*

https://nypost.com/2021/05/06/secs-gary-gensler-eyes-crackdown-on-apps-that-gamify-trading/

### RBI rolls out 'Resolution Framework 2.0' to rescue small businesses and individuals from 2nd wave of COVID-19

Reserve Bank of India (RBI) on May 05 announced several relaxations to individual borrowers and small businesses that are not covered under Pre-Packaged Insolvency Resolution Process (PPIRP) for Micro Small and Medium Enterprises (MSMEs) to help them in handling the 2nd wave of the COVID -19 pandemic. The Central Bank has also directed that Creditors to frame Board approved policies at the earliest (but not later than four weeks from the date of this Circular), pertaining to implementation of viable resolution plans for eligible

borrowers under this framework, ensuring that the resolution under this facility is provided only to the borrowers having stress on account of Covid-19. The framework also includes moratorium and debt restructuring for individual debtors and small businesses.

Under this framework individuals who have availed of loans and advances for business purposes and small businesses, including those engaged in retail and wholesale trade, other than those classified as MSMEs as on March 31, 2021, and to whom the lending institutions have aggregate exposure of not more than Rs. 25 crores as on March 31, 2021. It further states that the resolution plans implemented under this window may inter alia include rescheduling of payments, conversion of any interest accrued or to be accrued into another credit facility, revisions in working capital sanctions, granting of moratorium etc. based on an assessment of income streams of the borrower. However, compromise settlements are not permitted as a resolution plan for this purpose.

**Source:** *Reserve Bank of India, 05 May 2021*

https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=12085&Mode=0

### Wirecard subsidiary in Vietnam sold through insolvency

"Despite the challenging circumstances of the international sales processes amidst a pandemic, we succeeded in preserving another Wirecard subsidiary in Asia as going concern and secured the sale of the shareholding in the best interest of the creditors," summarized the insolvency administrator Dr Michael Jaffé after the most recent successful sale. Wirecard Singapore Pte. Ltd., the subsidiary of Wirecard Sales International Holding GmbH divests its shareholding in Wirecard (Vietnam) Company Limited to South Korean credit card company BC Card Co., Ltd.

**Source:** *Taiwan News.Com, 29 April, 2021*

*https://www. taiwannews.com.tw/en/news/4190889*

### Citing 'longer payment cycles' due to COVID 2.0, MSMEs demand review of NPA classification norms

“Banking cannot be just excel-sheet based; the system ought to provide much needed flexibility to the banker so that these facts could be factored in,” said Federation of Indian Micro, Small and Medium Enterprises (FISME) in its suggestions to the Union Finance Ministry which is holding consultations with various stakeholders to assess the impact of the second wave of COVID-19 on the businesses.

FISME, according to media reports, has argued that the framework to classify accounts under Special Mention Account (SMA) was devised for normal times which needs a through revision to deal with the challenges posed by the pandemic before businesses. As per the existing SMA norms, the accounts are classified as SMA-0 if principal and interest is overdue from 1 to 30 days; SMA-1 and SMA-2 if repayment is overdue from 31 to 60 days, and from 61 to 90 days, respectively. The ensuing businesses has adversely affected businesses due to which the payment cycles have become longer, and markets are disrupted said the industry body. The other demands of the FISME includes, legislation providing protection from prosecution due to non-compliance during the pandemic up to March 31, 2022. It has also asked the Union government to ensure that no MSME is shut to due to the compliance related rigidity during the COVID period.

**Source:** *Business Standard, April 28, 2021*

https://www.business-standard.com/article/economy-policy/msmes-urge-fm-nirmala-sitharaman-to-review-npaclassification-norms-121042701411_1.html

### Emergency Credit Line Guarantee Scheme (ECLGS) rescued several MSMEs in COVID-19 pandemic

ECLGS scheme, approved by Union on May 20, 2020, has been formulated as a specific response to the unprecedented situation caused by COVID-19 and the consequent lockdown. The Scheme was aimed at mitigating the economic distress faced by MSMEs by providing them additional funding of up to Rs. 3 lakh crores in the form of a fully guaranteed emergency credit line.

According to a report of the HIS Markit, India's manufacturing PMI had expanded for the first time in August 2020 to 52 after contracting for five months in 2020, compared to 46 in July 2020 largely on the back of greater client demand for Indian goods and the resumption of business operations. Besides, the GST collections grew

4 per cent to Rs 95,000 crore in September, after the preceding six months of decline, hinting at economic activity recovery.

"ECLGS has been helpful for MSMEs, which were shut or inactive, to resume their operations by clearing payments to suppliers, salaries to employees, etc," said Govind Lele, National General Secretary at MSME body Laghu Udyog Bharati which has around 30,000 members in the country.

**Source:** *Financial Express, April 21, 2021*

https://www. financialexpress.com/industry/sme/ms me-fin-eclgs-how-modi-govts-rs-3-lakh-crore-creditscheme-put-covid-hit-msmes-back-on-recoverytrack/2237449/

### Section 14 and 17 of IBC can't be overlooked by Section 482 of CrPC: Supreme Court

In an important judgement, the Supreme Court ruled out an attempt by a Corporate Debtor (CD) to escape the provisions of 'moratorium' of section 14 and 17 of IBC, 2016 by invoking section 482 of the Criminal Procedure Code (CrPC). The Apex court also cautioned High Court(s) from using inherent power under Section 482 of CrPC.

"The power under Section 482 may not be available to the Court to countenance the breach of a statuary provision. The words 'to secure the ends of justice' in Section 482 cannot mean to overlook the undermining of a statutory dictate, which in this case is the provisions of Section 14, and Section 17 of the IBC," held Supreme Court in the matter of Sandeep Khaitan, RP v. JSVM Plywood Industries, OC on April 22, 2021. In this case, the former MD of the CD in conspiracy with the respondent was found engaged in an illegal transaction to the tune of Rs. 32.50 lakh without authority from the appellant (RP) and in violation to Section 14 of the IBC. The Hon'ble High Court, Gauhati had allowed the OC to operate its bank account and to unfreeze the bank account of its creditors over which the lien was created and the accounts frozen pursuant to the lodging of an FIR by RP.

**Source:** *Live Law.in, April 23, 2021*

https://www.livelaw.in/top-stories/delhi-police-approaches-supreme-court-seeking-handcuffing-of-arrested-persons-undertrials-to-ensure-safe-transit-in-pandemic-172982?infinitescroll=1

### As Aircel steering Liquidation, CoC appeals in Supreme Court against NCLAT order on Spectrum

The Committee of Creditors (CoC) has argued that the appellate tribunal failed to consider that the provisions of the Insolvency and Bankruptcy Code (IBC) overrides the universal access service license conditions, tripartite agreement and the spectrum trading guidelines.

If the order of NCLAT is implemented, the Resolution Plan of UV Asset Reconstruction Company Ltd. (UVARCL) for Aircel, which was approved in June 2020, will be unworkable and the company will be heading for liquidation, resulting in zero recovery for Rs 18,000 crore owed to the lenders, said media reports. Besides the financial damage to creditors, the decision of NCLAT seems contradictory to the SC judgement in *Ghanashyam Mishra and Sons Private Ltd. Vs. Edelweiss Asset Reconstruction Company Ltd*, wherein the Apex Court has held that operational creditors cannot claim any amount over and above the Resolution Plan as approved by Committee of Creditors (COC). The State Bank of India (SBI) is estimated to face a loss of Rs 5,000 crore followed by Bank of Baroda, Canara Bank, Punjab National Bank and China Development Bank.

**Source:** *The Financial Express, June 29, 2021.*

https://www.financialexpress.com/industry/aircel-resolution-banks-in-sc-say-ibc-overrides-telecom-licence-conditions/2280146/

### IBC Amendment (2019) to Section 31 has Retrospective Operation: Supreme Court

The Supreme Court has held that 2019 amendment to Section 31 of the IBC, 2016 has retrospective operation. The amendment will be effective from the date on which IBC, 2016 has come into effect and is clarificatory and declaratory in nature, the bench comprising Justices RF Nariman, BR Gavai and Hrishikesh Roy observed. Regarding the retrospectivity of Section 31, the bench observed that the word "other stakeholders" would squarely cover the Central Government, any State Government, or local authorities.

**Source:** *Live Law.in, April 13, 2021*

https://www.livelaw.in/top-stories/2019-amendment-section-31-ibc-insolvency-and-bankruptcycode-retrospective-operation-supreme-court-172545

**Timely completion of CIRP still a big challenge, over 86% of cases crossed upper limit of 270 days**

As per the latest data released by the Insolvency and Bankruptcy Board of India (IBBI), 1717 CIRP cases were pending by the end of December 2020 out of which 1481 had crossed the time limit of 270 days. The IBC mandates to complete the process of CIRP within 180 with a possible extension of 90 days provided by the Adjudicating Authority. However, the cases linger primarily due to litigations in different courts. The data further suggest that till December 2020, a total of 378 CIRPs have been withdrawn under section 12A of the Code. IBBI chairman M S Sahoo had recently said that 16,000 of the applications had been resolved even before the admission. Besides, out of the one dozen high profile cases nine have yielded results under IBC. Of these, resolution plan in respect of nine CDs were approved and orders for liquidation were issued in respect of two CDs. Thus, CIRP in respect of two CDs and liquidation in respect of another two CDs are ongoing, at different stages of the process.

**Source:** *The Times of India, April 06, 2021*

https://timesofindia.indiatimes.com/business/india-business/86-insolvency-cases-pending-over-270-days/articleshow/81922510.cms

# Guidance Note Revealing Scrutiny and Review by IIIPI on the Disclosures Submitted by IPs

In exercise of the monitoring, IIIPI has observed various lapses/shortcomings on the part of IPs while submitting the disclosures related to various provisions of the monitoring. Through this publication, the IIIPI aims to share the shortcomings which are informative and will act as guidance for effective reporting and compliances by its professional members (IPs).


## Background

The Insolvency and Bankruptcy Board of India (IBBI) has devised a legal framework to be abided by the Insolvency Professionals (IPs) for fair and transparent conduct of their duties under the Insolvency and Bankruptcy Code, 2016 (IBC). Para 16 of the Code of Conduct for Insolvency Professionals given in the First Schedule under regulation 7(2)(h) of the IBBI (Insolvency Professionals) Regulations, 2016, provides that an IP must maintain written contemporaneous records for any decision taken, the reasons for taking the decision, and the information and evidence in support of such decision. This shall be maintained to sufficiently enable a reasonable person to take a view on the appropriateness of his decisions and actions. Further, as per the provisions of section 208(2)(a) of the IBC, the IP is obliged to take reasonable care and diligence while performing his duties, including the expenses incurred.

IBC read with regulations made thereunder provide for appointment of an Insolvency Professional (IP) as Interim Resolution Professional (IRP)/ Resolution Professional (RP) to conduct the resolution process and discharge related duties. These authorise the IRP/RP to appoint registered valuers, accountants, legal and other professionals to assist him/her in discharge of his/her duties in the resolution process. Therefore, vide Circular No. IP/005/2018 dated 16.01.2018 (Disclosures by Insolvency Professionals and Other Professionals Appointed by Insolvency Professionals Conducting Resolution Process) and in the interest of transparency, it has been directed that the disclosures must be made in case of every insolvency professional and other professionals appointed by the IP in his/ her capacity as IRP/RP for a resolution process. The IRP/RP shall provide a confirmation to the concerned Insolvency Professional Agency (IPA) to the effect that the appointment of every other professional has been made at arms' length relationship. The IP shall ensure timely and correct disclosures for all professionals appointed by him. Any wrong disclosure and delayed disclosure shall attract action against the IP. In addition to above as per regulation 34A of the IBBI (Corporate Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the IRP/RP shall disclose item wise Corporate Insolvency Resolution Process (CIRP) costs in such manner as may be required by the IBBI. Therefore, vide Circular No. IBBI/IP/013/2018 dated 12.06.2018 (Fees and Other Expenses Incurred for Corporate Insolvency Resolution Process), the IP is directed to disclose fee and other expenses in the relevant form to the concerned IPA of which s/he is a professional member.

Clarifying the objectives of the IBC, the National Company Law Appellate Tribunal (NCLAT) on November 14, 2018, in the matter of *Binani Industries Ltd. Vs. Bank of Baroda*, and a bunch of other petitions said, "The first order objective is resolution. The second order objective is 'maximisation of value of assets of the

Corporate Debtor (CD) and the third order objective is promoting entrepreneurship, availability of credit and balancing the interests. This order of objective is sacrosanct,". Therefore, IPs should endeavour transparent and credible determination of value of the assets facilitate comparison and informed decision making. As per the guiding framework of Circular No. IBBI/RV/019/2018 dated 17.10.2018 (Valuation under Insolvency and Bankruptcy Code, 2016) read with Circular No. IBBI/RV/022/2019 (Valuation under Insolvency and Bankruptcy Code, 2016: Appointment of registered valuer), with effect from 01.02.2019, no person other than registered valuer with IBBI shall be allowed undertake any valuation under the IBC or any of the regulations made thereunder. Also, the payment made, for fees and cost to any person, other than registered valuer shall not form part of CIRP cost.

### Role of IIIPI

Indian Institute of Insolvency Professionals of ICAI (IIIPI) is the first Insolvency Professional Agency (IPA) set up by The Institute of Chartered Accountants of India (ICAI). Presently, IIIPI is the largest IPA under the IBC regime with over 60% of IPs as its professional members.

IIIPI continuously disseminates and strictly monitors the disclosures submitted by its IPs on the website as mandated by the IBBI circulars. The IIIPI also submits a monthly summary of non-compliance by its IPs with reference to the abovementioned circulars to the IBBI by 7th of every succeeding month and undertakes appropriate measures to ensure timely and accurate compliance by its professional members. As an outcome of the monitoring exercise, the IIIPI shares the 'list of defaulters' on its website at regular intervals on account of non-compliance of the aforesaid circulars. Further, such compliances are determined as a measure check before issuance or renewal of Authorisation for Assignment (AFA). Non-compliance may also result in initiation of any disciplinary action by the competent authority.

> **The IP shall ensure timely and correct disclosures for all professionals appointed by him. Any wrong disclosure and delayed disclosure shall attract action against the IP.**

In exercise of the monitoring, IIIPI has observed various lapses/shortcomings on the part of IPs while submitting the disclosures related to various provisions of the monitoring. Through this publication, the IIIPI aims to share the shortcomings which are informative and will act as guidance for effective reporting and compliances by its professional members (IPs). Circular wise analysis in detail is as follows:

### I. IBBI Circular No. IP/005/2018 dated 16th January 2018: Disclosures by Insolvency Professionals and other professionals appointed by Insolvency Professionals conducting Resolution Process required to be submitted by the IPs online on the website of IIIPI (www.iiipicai.in)

**(i) Non submission / Delay in submission of Disclosures**

The IPs often do not file the applicable Relationship Disclosures required to be filed citing the kind of relationship, if any with the professional so appointed. The disclosures shall be filed within three days from the date of appointments. However, delay in submission of such disclosures have been noticed. The IPs are advised to file the disclosures within the said timeline.

**(ii) Disclosure of kind of relationship other than the applicable kind of relationship**

The IPA on detailed analysis of the disclosures filed by IPs for relationship between IP with the corporate debtor/other professionals, have noticed that the IPs have mentioned incorrect kind of relationship. The IPs are required to

choose the applicable relationship category, if any and to mark the option as NIL, if no relationship is identified.

The IPs are advised to read the circular carefully explaining the kind of the relationships. Accordingly, they should identify and disclose the correct kind of relationship for every professional/s appointed.

**(iii) Incomplete / Blank Disclosures**

The relationship disclosures shall be complete in respect of the all the particulars required as per the form, incomplete form shall be considered as non-compliance from IP. The IIIPI observed that the incomplete information such as name of corporate debtor, date of appointment, PAN, professional membership number of IRP/RP/other professionals, name of financial creditor (COC), name of interim finance provider, name of prospective resolution applicant and kind of relationship, have been furnished. The IPs are required to file the disclosures with utmost due diligence.

**"The IPs are advised to read the circular carefully explaining the kind of the relationships. Accordingly, they should identify and disclose the correct kind of relationship for every professional/s appointed."**

**(iv) Disclosures are filed under a different disclosure purpose/ category**

The IIIPI provides for different categories of disclosure purpose for different categories. However, it has been observed that IPs have selected wrong disclosure purpose while submitting relationship disclosure, for instance IP has submitted the disclosure with the registered valuers appointed under the disclosure purpose category 'Appointment as IRP/RP' whereas the same shall be disclosed under disclosure purpose category 'Appointment of Registered Valuers'.

**(v) Multiple Submission of Disclosures**

The IPs have submitted the similar type of relationship disclosure more than one time. The IPs shall submit the disclosure at once with correct particulars, in case of

inadvertent multiple submission may contact IIIPI for remedy and action.

**(vi) Non-Disclosure for appointing an Insolvency Professional Entity (IPE) for Support Services**

While appointment of IPE to avail its support services, the IPs are required to file the relationship disclosure under the disclosure purpose 'Appointment of Other Professionals'. It is clarified that the appointment of IPE will be covered under the appointment of professionals by IRP/RP as per the provisions of the IBC, 2016.

**(vii) Non-submission of Disclosure Pertaining to all Registered Valuers Appointed**

It has been observed that the IPs disclose their relationship with only one or two valuers appointed, rather to file with respect to all the registered valuers or registered valuer entity so appointed for all class of assets applicable. The IPs are suggested to file the disclosure for all the valuers appointed.

**(viii) Mismatch in the Particulars Submitted in Relationship Disclosure and the Particulars Mentioned in CIRP Form/s**

Upon scrutiny of relationship disclosures filed with IIIPI and the CIRP forms submitted on the website of IBBI, it has been observed that the information submitted are not

uniform. For instance, relationship disclosure filed in name of individual professional appointed, however in CIRP form the detail of the firm has been mentioned to which such professional is associated with. The IPs shall submit uniform information on both the information portals of IBBI and IIIPI.

**II. IBBI circular No. IBBI/IP/013/2018 dated 12th June 2018: Fee and other Expenses incurred for Corporate Insolvency Resolution Process, Para 9 of the quoted circular requires disclosures to be submitted by the IPs for the fees and expenses incurred, online on the website of IIIPI (www.iiipicai.in)**

**(i) Non-Submission/ Delay in Submission of Disclosures**

The IP functioning as IRP/RP shall furnish fees and cost disclosure in Form I & II within seven days of demitting the office of IRP or RP. It has been noted that the several IPs do not file these disclosures or delay in submitting appropriate Form/s. The IPs are requested to file these disclosures on time without any fail.

> **While appointment of IPE to avail its support services, the IPs are required to file the relationship disclosure under the disclosure purpose 'Appointment of Other Professionals'.**

**(ii) Submission of incomplete/ incorrect particulars in the disclosures**

The IPs are required to state complete and correct information within the appropriate head in the forms filed by them in their capacities as IRPs or RPs. It has been noted in many cases that the IPs omits the details of fees and expenses such as publication expense of Form G/ Form A, fees payable to IRP/RP and other professionals so appointed. Further, on scrutinising of the disclosures along with the CIRP forms filed with IBBI, it is seen that the costs mentioned in forms filed with IIIPI and IBBI website are not in consensus.

It is also noted in cases where the Corporate Debtor (CD) is Going Concern (GC) entity, the expenses incurred for running the operations of the CD and maintaining it as a GC are not disclosed in fees and cost disclosures made with IIIPI.

**(iii) Multiple submission of Fee & Cost Disclosures**

It has been observed that IPs have submitted multiple disclosures with the IIIPI for the same assignment undertaken. It is advised that the IP should refrain from submitting multiple disclosures. However, if any incorrect information has been submitting inadvertently, the IPs may contact IIIPI for remedy and action.

**(iv) Non-disclosure of the relative costs of the professional appointed for which relationship disclosures have been filed**

Upon scrutinising the relationship and fees and cost disclosures it has been noticed that IPs has appointed professionals for which relationship disclosures have been submitted with IIIPI, however the fee payable to those professionals have not been disclosed in the fees and cost disclosure. The IPs shall ensure that the details mentioned in various disclosures submitted shall not be in disparity.

**(v) Reasonableness of the Costs Incurred**

The IP needs to be compensated for his professional services and the cost incurred on other expenses for various goods and services required for conducting the CIRP and or managing the operations of the CD as a GC. The IP shall ensure that the fees payable to him and the expenses incurred are reasonable. However, in some cases it has been observed that the costs incurred by IPs are not reasonable in terms of the framework provided by the Annexure B of the circular.

> **Further, on scrutinising of the disclosures along with the CIRP forms filed with IBBI, it is seen that the costs mentioned in forms filed with IIIPI and IBBI website are not in consensus.**

**(vi) Clubbing of Expenses in Wrong Head of Expenses**

Details of expenses submitted shall be bifurcated and reported in the appropriate head of expenses to reflect a clear viewpoint of the CIRP cost and to comply with applicable regulations and circulars.

### III. IBBI circular No. IBBI/RV/019/2018 and IBBI/RV/022/2019 dated 17th October 2018 & 13th August 2019 respectively - Valuation under the Insolvency and Bankruptcy Code, 2016: Appointment of Registered Valuers

**(i) Appointment of Valuers Not Registered with IBBI**

It has been directed by IBBI vide its circular dated 17.10.2018, that with effect from 01.02.2019, no insolvency professional shall appoint a person other than registered valuer to conduct any valuation under the IBC or any of the regulations made thereunder. However, it has been observed through scrutiny and analysis that the persons not being registered valuer were appointed to conduct the valuation. The IPs shall appoint only IBBI registered valuers.

Further it has been observed that the engagement letters are issued in the name of their firms/companies which are not IBBI Registered Valuer Entity. There are mismatches found in the particulars of valuers appointed as captured in the minutes of meeting of Committee of Creditors (CoC) and the relationship disclosures made by the IP and valuation reports submitted by valuers. There should be uniformity in the names of valuers in the minutes of CoC meetings, engagement letters issued, relationship disclosures made, and valuation reports so obtained.

> **It has been observed that some IPs had appointed professionals as recommended by the financial creditors (FCs) or leading financial creditors having more than 51% voting share.**

**(ii) Non-Appointment of Valuers for Each Applicable Class of Asset**

The IP shall appoint valuers to determine fair value and liquidation value for each applicable class of asset namely plant and machinery, land and building and securities or financial assets. It has been noted that some IPs do not assign the valuation for all applicable class of assets. In many cases valuation of securities or financial assets are ignored, which amounts to violation of the provision of the IBC.

**(iii) Non-submission of Relationship Disclosure for the Registered Valuers Appointed**

The IPs shall file the disclosures timely and ensure that the disclosures are submitted for each valuer appointed, be it individual registered valuer or registered valuer entity. It has been noted that IPs often disclose only one or few of the Registered Valuers (RVs) appointed instead of disclosing the names of the all the Registered Valuers & Registered Valuer Entity/ies (RVEs) appointed by them.

**(iv) Mechanism to Appoint Registered Valuers**

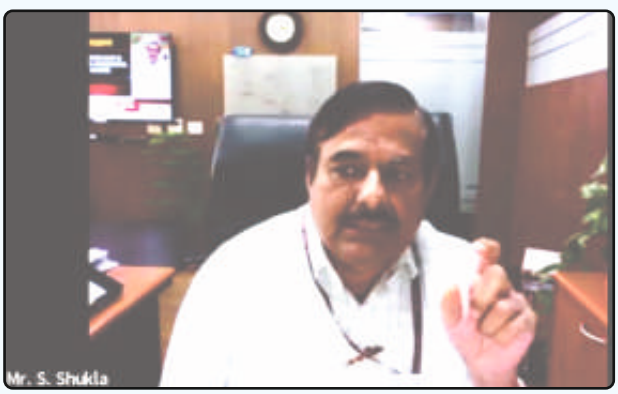
While appointing the valuers under the provisions of the IBC, the IP shall adopt a fair mechanism to choose the experienced and cost-effective professionals. The valuer so selected shall be independent and shall not attract any conflict of interest with any of the stakeholders. However, it has been observed that some IPs had appointed professionals as recommended by the financial creditors or leading financial creditors having more than 51% voting share.

# IIIPI News


CA. (Dr.) Debashis Mitra, Vice President, The Institute of Chartered Accountants of India (ICAI) addressing the Inaugural Session of 04th Batch of the Executive Development Program (EDP) of IIIPI on May 08, 2021.

Dr. M. S. Sahoo, Chairperson, IBBI speaking in the Webinar on "The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021" On Thursday, 8th April 2021 organized by IBBI in association with IIIPI and other IPAs.

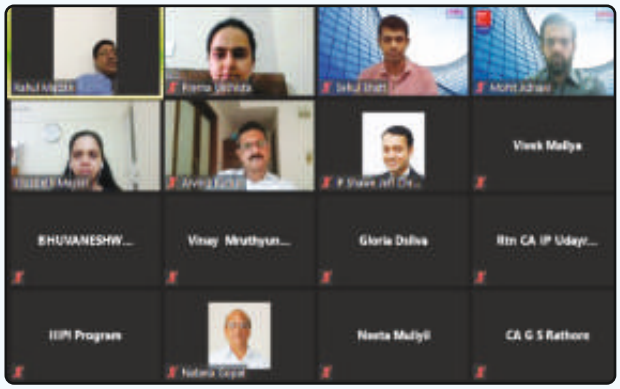
Shri David Kerr, Insolvency Professional, United Kingdom, addressing IIIPI's 02nd Training Program on IBC for Bank Officials on June 05, 2021.




Shri Sudhaker Shukla, WTM (Research and Regulation Wing) in the Virtual Webinar on "Decoding the Pre-Pack framework for MSMEs" organized by IIIPI on Apr 9, 2021.


NCLT Member Shri V. Nallasenapathy, addressing the IIIPI Roundtable titled 'Impact of Covid Resurgence on Insolvency Regime: Challenges and Responses' on June 01, 2021.

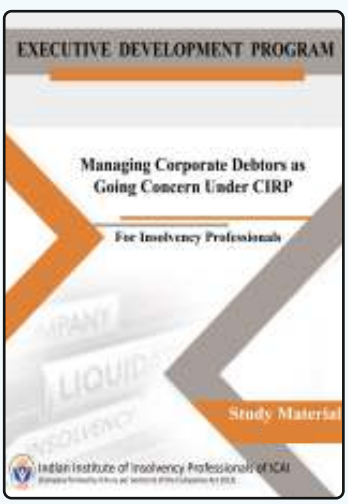
"Brainstorm Session on Enhancing Role of Smaller IPs under IBC" at 4pm, April 14, 2021, organized by IIIPI. In this session, IIIPI decided to form a Research Group on 'Smaller IPs' with a view to resolve the issues being faced by smaller Insolvency Professionals (IPs).



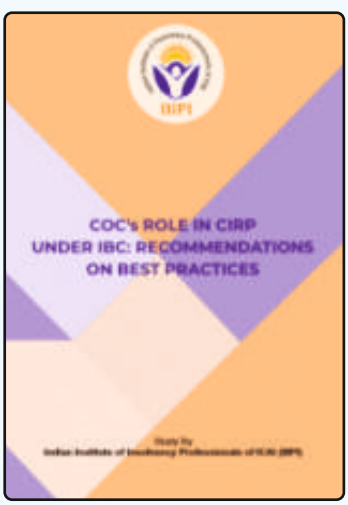

Glimpses of 'CRISIL Executive Training Programe Jointly Organized with IIIPI' (Virtual) on June 9, 2021.

Panel Discussion on Pre-packaged Insolvency Resolution Process for MSMEs under IBC on 20th June, 2021.

## IIIPI's PUBLICATIONS






## Media Coverage

8 Smart Investing

THE ECONOMIC TIMES | NEW DELHI

BID TO SPEED UP PROCESS Self-regulatory body proposes prepack MSME resolution, ethics code and cap on IP assignments

# Bankruptcy Pros may get a Code and More

Saikat.Das@timesgroup.com

Mumbai: The frontline regulator for India's new age bankruptcy professionals is drafting a four-point plan, including setting limits on the number of permissible assignments for each executive and crafting a bespoke package for MSMEs, to quicken the process of loan resolutions amid an anticipated surge in delinquencies due to the pandemic.

Two people familiar with the matter told ET that the Indian Institute of Insolvency Professionals of ICAI (IIIPI) is making the recommendations, including a standard on ethics, which will need the nod of both the Insolvency and Bankruptcy Code of India (IBBI) and the government.

"We have constituted study groups on four matters of contemporary topics on enhancing the role of small-sized IPs, response of insolvency regime to Covid, clarifying roles of IPs in respect of prepack framework for MSMEs, and creating code of ethics for our professional members," a senior executive from IIIPI said.

"The reports of these study groups are in different stages of finalisation and may take a month or so to complete," said the person.

The self-regulator and IBBI are aiming to strike a balance between resolution professionals coming from large institutions and standalone individual IPs, with the latter often finding themselves at a relative disadvantage in comparison with executives from top-draw consultancies.

"The plan could be to limit five cases or so per IP at a time instead of a dozen or more," said another person. At the same time, it is assessing the feasibility of limiting any upper or lower limit of remuneration. That should help enhance transparency.

**On the Agenda**

IBBI and the IIIPI aim to strike a balance between resolution professionals from large institutions and standalone individual IPs

IIIPI is also drawing up urgent "Covid response" measures for resolution plans

Borrowing from global best practices to structure MSME framework

IIIPI is also in the process of recommending urgent "Covid-response" measures that IPs will likely follow in proposing any resolution plan. Localised restrictions have made life difficult for any resolution professional working on a time-bound case.

A recommendation report will be submitted to IBBI and other government agencies soon.

The quasi-judicial body is also defining a prudent role of IPs in the prepacks, a dedicated resolution window for smaller debt-laden firms.

IIIPI is drawing on best practices to craft a role for MSMEs, where promoters face default, occasions due to macroeconomic environment or policy changes. It has tapped legal expertise in the United Kingdom where prepack packages are a hit.

IIIPI is drawing a code of ethics by adding more clauses to the IBBI statute already available. These are aimed at regulating them with strict compliance limiting the scope for manipulations.

**The Economic Times, p. 8, June 28, 2021**

BENCHMARKS CLOSED
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THE ECONOMIC TIMES | News
English Edition | E-Paper

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Business News › News › Economy › Policy › IBBI plans a best practice Code for Committee of creditors

# IBBI plans a best practice Code for Committee of creditors

By Saikat Das, ET Bureau • Last Updated: Jun 17, 2021, 10:24 PM IST

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*Synopsis*

*Indian Institute of Insolvency Professionals of ICAI (IIIPI) has submitted a report to IBBI, which is said to be in discussion with various stakeholders including the Reserve Bank of India, Indian Banking Association (IBA) and the government, three people with direct knowledge of the matter told ET.*


The Insolvency and Bankruptcy Board of India (IBBI) is tightening the process for resolution of defaulting companies to avoid charges of bias and prejudice after a few cases ended up in disputes. **Indian Institute of Insolvency Professionals of ICAI (IIIPI)** has submitted a report to IBBI, which issaid to be in discussion with various stakeholders including the Reserve Bank of India, Indian Banking Association (IBA) and the government, three people with direct knowledge of the matter told ET.The insolvency regulator jointly with other related agencies are planning a code of best practices for the Committee of Creditors that would prevent arbitrary change in Resolution Professionals, misrepresentation of data, interim funding that could quicken the process and realise better value. IBBI, RBI did not comment on the matter."Insolvency and Bankruptcy Code defines roles and duties of CoCs, but there is no mention on who should regulate them," said one of the persons cited above. Many times, resolution professionals are replaced as CoC mandates citing reasons based on doubts or perceptions. One of the considerations is to obtain a "No Objection" certificate on the lines of those provided for replacement of Statutory Auditors as a matter of professional ethics."An RP should not merely be replaced on grounds of cost consideration. This is likely to result in undercutting and unhealthy competition," it is recommended.CoC members, according to **IIIPI** have various expert reports like techno-economic feasibility reports, technical reports which should be shared with RP and resolution applicants (RA) to improve the quality of information available to RA for better bids, the "The CoC's as a best practice may be guided to provide all such data to the Resolution Professional," it said in the recommendations.In order to bolster the IBC framework IIIPI commissioned a Working Group under the convenorship of Hans Raj Chugh, Director, IIIPI, to carry out a study for identifying further challenges.In Swiss Ribbons Vs. Union of India and Essar Steel Vs. Satish Kumar Gupta, the Supreme Court emphasized on the commercial wisdom of CoC in approval of resolution plans and various aspects including distribution."The role of the CoC is one of a fiduciary duty with an implied covenant of good faith and fair dealing with all stakeholders," IIIPI wrote in the report submitted to IBBI."It is imperative that there are adequate safeguards in terms of conduct of such members of the CoC."The authorities are also highlighting the need of interim finance to any corporate debtor undergoing insolvency resolution process. Such companies naturally won't have free cash flows to support even legitimate spending, needed by any resolution professional. Provisions may be incorporated to enable basic contribution by the members of the CoC who are benefitted by the CIRP process."Provisions should also be incorporated on how a situation of non-contribution by CoC members is to be dealt with," IIIPI recommended. On many occasions non-agreement over interim financing leads to delays in resolution processes going well beyond the stipulated deadline of 330 days.

# Media Coverage of IIIPI's International Conference on 24-25 October, 2020

10/27/2020 The Hindu BusinessLine

THE HINDU BusinessLine (/Home/index)

e-Paper

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## Weigh pros and cons before further extending IBC suspension beyond Dec 25, says SBI's MD

OUR BUREAU
New Delhi, October 26

State Bank of India (SBI), the country's largest commercial bank, has advised a cautious approach in taking crucial decisions such as extension of insolvency and bankruptcy code (IBC) suspension beyond December 25, stating that one would have to weigh the pros and cons in continuing a relaxed environment.

"The RBI and government have rightfully (in the current Covid-19 times) given a relaxed environment till the months of September or October. Taking this beyond will actually give an impression that the borrowers are fundamentally weak and banks are likely to go back to square one where we are seen as promoting ever-greening etc. If that were to come as perception in the minds of investors, that would be a major negative for our economy," said Arijit Basu, Managing Director, SBI, at an international conference on IBC, organised by the Indian Institute of Insolvency Professionals of ICAI.

Arijit Basu, MD, SBI

### Suspension of IBC

In the wake of lockdown since March 25, the government had suspended the initiation of corporate insolvency resolution process (under sections 7, 9 and 10 of IBC) for six months till September 25. This was later extended by three months till December 25.

"We have to be a little careful in extending IBC suspension beyond December 2020 or say March 2021. How a global investor perceives India is very important. As we go ahead supporting our borrowers and corporate system, at the same time, we are mindful of rise in bad debts in system that may arise," said Basu.

Basu said that most of the mid-sized and large corporates have managed their cash flows well during the Covid times.

"There is lot of global investor interest in stressed assets of India. We are in touch with private equity players. As things open up, India will once again begin aspiring to become a $5-trillion economy as fast as possible. Our journey towards transparency and journey towards having mechanisms like IBC should not fall back. We should try and sustain those which have made our system look more transparent," said Basu.

पायनियर
नई दिल्ली, रविवार, 25 अक्टूबर, 2...

## कंपनी के कारोबारी मॉडल में अत्यधिक ऋण का होना बुनियादी समस्या का सूचक है : एसबीआई कार्यकारी

नई दिल्ली। भारतीय स्टेट बैंक (एसबीआई) के एक वरिष्ठ कार्यकारी ने शनिवार को कहा कि किसी कंपनी के कारोबारी मॉडल में क्षमता से अधिक कर्ज का होना बुनियादी समस्या का सूचक है। एसबीआई के वाणिज्यिक ग्राहक समूहों के प्रबंध निदेशक अरिजीत बसु ने कहा कि दिवाला और दिवालियापन संहिता (आईबीसी) ने कॉरपोरेट क्षेत्र और बैंकों को कारगर का मौका दिया है। वह आईसीएआई के भारतीय दिवाला पेशेवर संस्थान (आईआईपीआई) द्वारा आयोजित दो दिवसीय सम्मेलन में बोल रहे थे। यह सम्मेलन शनिवार से शुरू हुआ। किसी कंपनी के कारोबारी मॉडल में क्षमता अधिक का ऋण का होना बुनियादी समस्या का सूचक है। बसु ने कर्ज नहीं चुकाने वाली कंपनियों से निपटने में दिवाला कानून की उपयोगिता को रेखांकित करते हुए कहा, अगर आपके (कंपनी के) पास मजबूत ऋण समाधान योजना नहीं है, तो हमारे (बैंकों) पास आईबीसी के तहत एक व्यवहार्य समाधान योजना है। भारतीय ऋण शोधन-अक्षमता एवं दिवाला बोर्ड (आईबीबीआई) की सदस्य मृकुलिता विजयवर्गीय ने कहा कि इस संहिता का उद्देश्य कंपनियों का व्यवहार ठीक करना है और इस मोर्चे पर हमें काफी कामयाबी मिली है।

Sunday pioneer
NEW DELHI | SUNDAY | OCTOBER 25, 2020

## IBC raised confidence of all investors in Indian economy

IBC has changed the relationship between borrowers and creditors and provided a mechanism of insolvency

08 The Sunday ...
NEW DELHI, 25 OCTOB...

## 'Unsustainable debt symptom of fundamental issues in co's biz model: SBI executive

दैनिक जागरण
10

आईबीसी ने बढ़ाया भारतीय इकोनॉमी के प्रति निवेशकों का भरोसा

## 'Unsustainable debt symptom of fundamental issues in cos biz model'

## Unsustainable debt symptom of fundamental issues in co's biz model: SBI executive

NEW DELHI: Unsustainable debt is a symptom of fundamental issues in the business model of the company concerned, a senior SBI executive said on Saturday.

Arijit Basu, Managing Director of Commercial Clients Groups at State Bank of India (SBI), also said the Insolvency and Bankruptcy Code (IBC) has provided equal opportunity to corporate sector and banks.

He was speaking at a two-day conference organised by the Indian Institute of Insolvency Professionals of ICAI (IIIPI), that began on Saturday.

"Unsustainable debt is a symptom of fundamental issues in the business model of the concerned company.

"In case if you don't have a viable resolution plan, we (banks) have a viable resolution plan under IBC" Basu said.

Insolvency and Bankruptcy Board of India (IBBI) Member Mukulita Vijayvargiya said the purpose of the Code is to change the behaviour of the corporate. "We have achieved much on this front despite the shortcomings," she added.

IBBI Chairperson Ashok Haldia emphasised on strengthening the IBC to face new challenges.

NTRAL RAILWAY
NAGEMENT DEPARTMENT
pply of Stores, No. EPS/21/2020

# Services

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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.

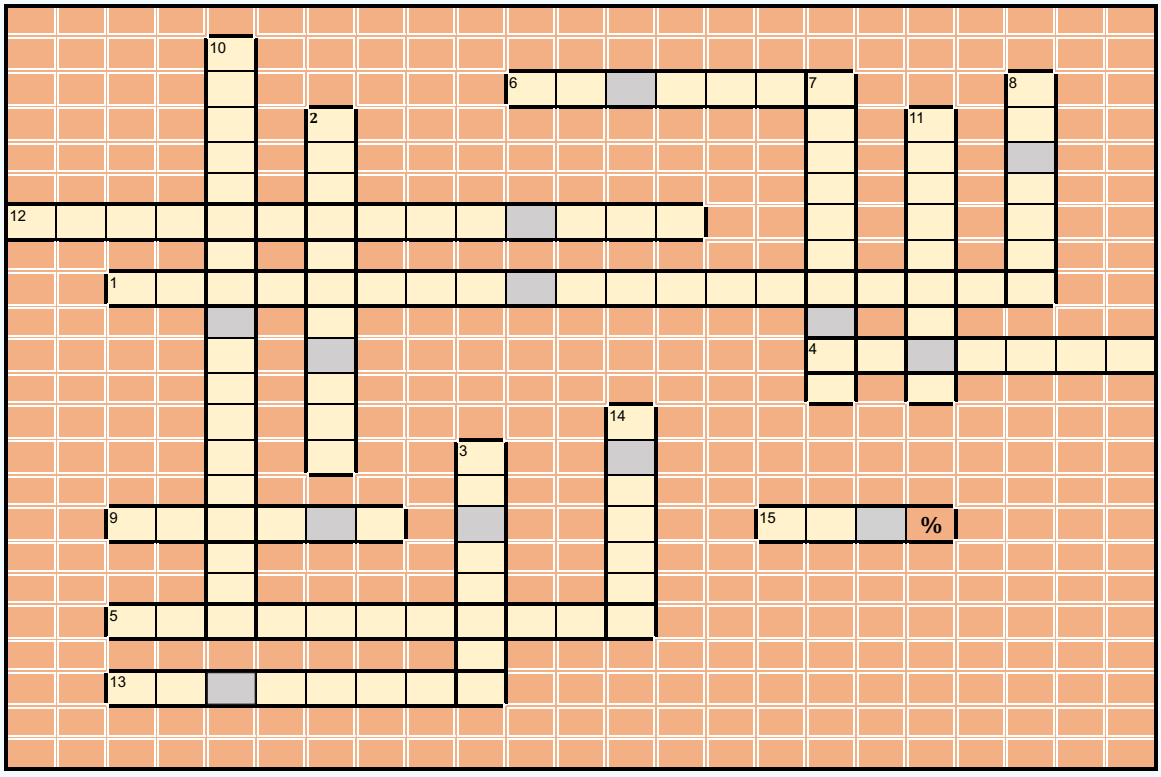
We firmly believe in innovations in communication approaches and strategies to present complicated information of insolvency ecosystem in a highly simplified and interesting manner to our readers.

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

**Editor**

The Resolution Professional

# IBC Crossword




## Across

1. The Judgment of Supreme court in *Lait Kumar Jain vs. Union of India* validated which notification of IBBI?
4. The liquidator submits preliminary report to the AA within_____ from the liquidation commencement date?
5. A fast track resolution process in not associated with insolvency of_____?
6. Time limit to appeal to the Supreme Court from the date of receipt of order of Adjudicating Authority?
9. In which form of the IBBI (Insolvency Resolution Process for corporate persons) Regulations, 2016, the RP submits a certificate/report to the CoC and/or Adjudicating Authority that a particular plan is compatible with the provisions of IBC, 2016 and regulations made thereunder?
12. *B.K. Educational Services P Ltd Vs. Parag Gupta* and associate Case Law pertain to?
13. What is the prescribed time period after which the unclaimed amount under the companies' liquidation account will be transferred to the general revenue account of Central government?
15. As per section 28 of the Insolvency and Bankruptcy code, 2016, the Interim Resolution Professional cannot raise interim finance without the approval of committee of creditors by ……. of total vote share.

## Down

2. State the section of IBC, 2016 which has overriding effect over other laws?
3. The RP has to circulate the results of the meeting of committee of creditors within ____ to all participants?
7. An Insolvency Professional is criminally liable under which section of IBC 2016?
8. As per IBBI (Inspection and Investigation) Regulations, 2017 when shall an Interim Order made in response to Interim Inspection Report expire?
10. FC's can be represented in the meeting of CoC by an IP. In this case the fee of the professional for attending such meetings will be borne by-?
11. In the case of *Era Infra Engg Ltd Vs. Pride Commercial Projects P Ltd,* NCLAT held that in case no notice was issued by the OC u/s of IBC, 2016 then the application under _____ of IBC 2016 stands dismissed being incomplete?
14. If the bankrupt has failed to account for any loss incurred on any substantial part of the property comprised in the estate of the bankrupt, he shall be punishable with imprisonment which may extent to?

**Answers: IBC Crossword, April 2021**

1. Fourteen Days, 2. Resolution Professional, 3. Seventy Five, 4. Overriding effect, 5. Two Thousand, 6. Estate, 7. Two Years, 8. Section 14, 9. Five, 10. Financial Creditor, 11. 66 percent and 12. Twenty Four hours 13. DHFL, 14. Twelve Months, 15. Whole-time members,

# GUIDELINES FOR ARTICLE SUBMISSION

**THE RESOLUTION PROFESSIONAL,** the quarterly peer-reviewed referred research journal of the Indian Institute of Insolvency Professionals of ICAI (IIIPI), an RNI verified Title (DELENG19833/ F. No.: 1364856/08.04.2021), invites research-based articles for its upcoming editions on a rolling stock basis. The contributors/authors can send their article/s manuscripts for publications in The Resolution Professional as per your convenience at iiipi.journal@icai.in. 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 articles sent for publication in the journal should conform to the following parameters:

- The article should be of 2,500-3,000 words and cover a subject with relevance to IBC and the practice of insolvency.
- 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.
  - Should be topical and should discuss a matter of current interest to the professionals/readers.
  - Should have the potential to stimulate a healthy debate among professionals.
  - 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.
  - Should be technically correct and sound.
  - Headline of the article should be clear, short, catchy and interesting, written with the purpose of drawing attention of the readers. The sub-headings should preferably within 20 words.
  - 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.
  - Authors may use citations as per need but one citation/ quote should have about 40 words only. Lengthy citations and copy paste must 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**
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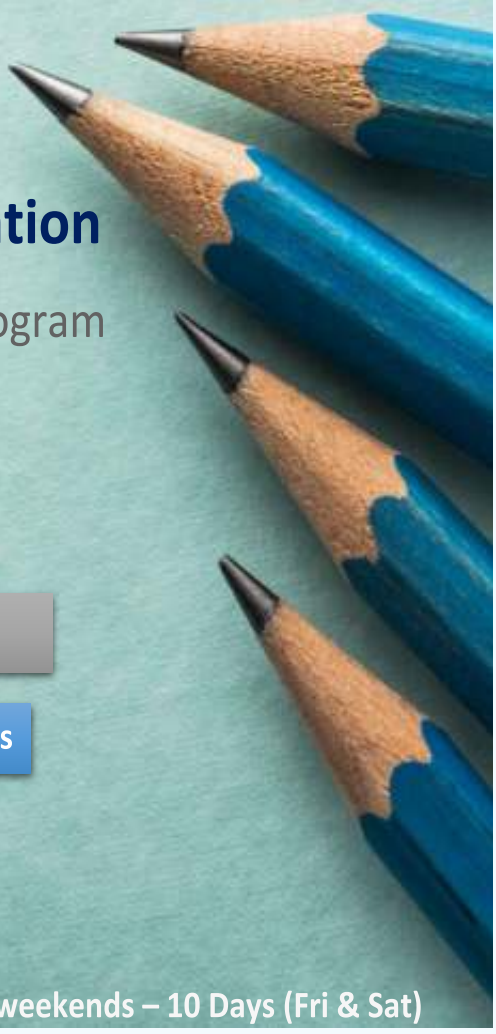
(Set up by an Act of Parliament)



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