

# THE RESOLUTION PROFESSIONAL

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

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



**RESCUING THE CORPORATE LIVES**



## ABOUT IIPI

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 (IIPI), a section 8 company to enrol and regulate IPs as its members in accordance with the Code read with its regulations. The Company was incorporated on 25th November 2016.

IIPI 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 Late 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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## Message from Chairman, Editorial Board



**CA. Nihar N. Jambusaria**

President, ICAI

Chairman, Editorial Board-IIPI

*Dear Member,*

The Indian Institute of Insolvency Professionals of ICAI (IIPI) will celebrate its 5th Foundation Day on November 25, 2021, which coincides with the 75 years of India's Independence being celebrated throughout the country on the theme 'Azadi Ka Amrit Mahotsav'. On this historic occasion, I extend my warm greetings and heartily congratulations to IIPI family.

The IBC is not just a legislation but a whole ecosystem as it includes several institutions besides, a pool of over 3,670 highly experienced Insolvency Professionals (IPs) drawn from different professional backgrounds from across the country for conducting Corporate Insolvency Resolution Process (CIRP), of financially stressed companies in their capacity as IRPs, RPs, and Liquidators. All the organisations under IBC and professionals work in tandem as per the plethora of rules, regulations, notifications, circulars, and guidelines of the regulator.

In these five years the IBC has witnessed several challenges some of which were predictable while some others like Covid-19 pandemic came as a black swan event. These all tested the robustness, flexibility, and resilience of the IBC. With coordinated efforts we all made

several tangible achievements such as improvement in global insolvency rank from 136 in 2017 to 52 in 2020; average time taken for resolution reduced from 4.3 years to 1.6 years, rank in Ease of Doing Business improved from 155 to 63, getting credit rank improved from 62 to 25 and starting a business rank improved from 151 to 136 among others.

Various amendments in IBC in last five years shows the strength of the IBC ecosystem that reveals the sense of ownership from across the stakeholders and their dedicated and synchronized efforts to make it a success. It also shows the sensitivity, receptibility and flexibility of policy makers who worked hard to make it successful.

Undoubtedly IBC's achievements deserve accolades! However, at the same time we should not overlook the concerns that may provide the insights to revisit various provisions of the Code and introduce innovations. I am very happy to know that the IBBI has invited suggestions on various new proposed features across CIRP and Liquidation processes including code of conduct for COC members.

It would not be wrong to say that what was sown as a seed in 2016, has grown up into a tree and is yielding fruits. The Standing Committee of the Parliament in its report 'Implementation of the Insolvency and Bankruptcy Code: Pitfalls and Solutions' released in August 2021, has not only recognized the achievements of the IBC Regime but has also set new goals and benchmarks. I am quite confident that with the coordinated and integrated efforts of the law makers and the stakeholders, we would be able to provide reasonable solutions to all the concerns and carry the caravan forward.

Wish you all the best.

**CA. Nihar N. Jambusaria**

President, ICAI

Chairman, Editorial Board-IIPI



## Message from Chairman, IIPI-Board



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

### *Dear Member,*

IBC regime completing 5 years since its inception in 2016, is indeed a major milestone in the journey chequered with several testing moments. Drawing the analogy with proverbial glass and wondering whether it is half full or empty, the glass seems to be half full and filling up fast. The efficacy of IBC should not only be measured in terms of end game or final numbers but subjected to a holistic assessment. The higher incidence of liquidations and heavy haircuts, for instance, are not the fault of IBC per se but an outcome of market forces. As per data available, cases where creditors were staring at a haircut of 78% before invoking IBC, were not only rescued under the Code but haircuts were also lower at 61%.

Many achievements under its belt, the IBC 2.0 is raring to go forward with more focus and better insights. In August 2021, we have seen Prepack framework for MSMEs, originally promulgated as ordinance in April 2021, being assented to by Parliament and Hon'ble President of India. Moreover, IBBI released draft amendments in CIRP and Liquidation Regulations along with code of conduct for

COC members, for public comments. Swiftly thereafter, on Sept. 30, the regulations for CIRP and Liquidation have been amended to further aid the objectives of value maximization, timeliness, and transparency in the processes.

On November 25, 2021, the Indian Institute of Insolvency Professionals of ICAI (IIPI) is going to celebrate its fifth foundation day. On this occasion, I extend my heartiest congratulations and wishes to all the professional members of IIPI. As a frontline regulator, IIPI has worked in tandem with the IBBI to ensure that the best talents are enrolled and registered as Insolvency Professionals (IPs). Over last five years of IBC regime, IIPI has consistently remained as the largest IPA of India by holding confidence and support of ~63% IPs registered with the IBBI. Our members also enjoy the distinction of managing ~75% of the total assignments so far initiated under the IBC. We reiterate our commitment to providing the quality services and making IIPI a world class institution.

### **Capacity Building**

The Last year and a half was marked by the worst ever medical crisis. However, with the coordinated efforts of all the stakeholders, we have not only shaped the organization but also made significant strides in terms of providing newer facilities and building capacity for our members. Some of the key recent capacity building measures are:

Multiple educational/training programs, workshops and roundtables were organized, including national and international conferences.

IIPI also made collaborations and hosted joint programs with industrial and institutional bodies such as CII, FICCI, UK-FCDO, WASME, CIBC-ICAI, IBBI, IBA, NFCG, NeSL, CRISIL and ET-CFO among others.

The quarterly research journal 'The Resolution Professional' by IIIPI has been gaining traction and earning accolades nationally as well as internationally. There are weekly publications too like IIIPI Newsletter and IBC Case Law Capsules.

To enhance specialized skills among the IPs, Executive Development Programs (EDP) have been designed and conducted in respect of (i) managerial skills for managing CD as going concern and (ii) legal, drafting skills and managing court processes.

In order to enable prospective professionals to learn the nuances of entry level Limited Insolvency Examination (LIE), LIE (Preparatory) Programs are also being conducted virtually. This is in addition to virtual learning management system (eLMS) made available on IIIPI's website.

Launch of Discussion Forum (on website) for interaction among IIIPI's members on professional matters, has been appreciated by members at large. I would like to encourage IIIPI's members to actively participate through this platform, for better dissemination of ideas and best practices.

The proposed initiatives in near future include CPE policy for IIIPI's members and mentorship program for providing hand-holding and practical exposure to new entrants in this profession.

### Research Focus

Our focus on conducting quality research and its publications for knowledge dissemination have yielded results. It is my pleasure to share with you that the some of the recommendations made by the Study Groups of IIIPI such as Code of Conduct for Committee of Creditors (CoC) have attracted attention of policy makers.

In the past one year, IIIPI constituted six study groups and conducted two online surveys among IPs. Some of the Research Reports have been published while some others

are undress progress. The published Research Reports are as follows:

- Study Group Report Roles of IPs Prior to, During and Post Pre-packaged Insolvency Resolution Process (PPIRP) for MSMEs
- Frequently Asked Questions (FAQs) On Pre-packaged Insolvency Resolution Process (PPIRP) Framework for MSMEs
- Procedural and Substantive Aspects of Group Insolvency: Learnings from Practical Experiences
- COC's Role in CIRP under IBC: Recommendations on Best Practices
- Research cum Study on Timeliness & Effectiveness of Litigation under IBC

The other ongoing and proposed research initiatives include Code of Ethics, Enhancing Role of small-sized IPs, and Quality Assurance for Services by IPs.

A research fund is also being instituted by IIIPI to support the research initiatives, in a more focused manner.

We seek your active participation in the endeavor to establish IIIPI as a world class institution in the insolvency domain, and in this direction, welcome your suggestions for improvement in all our publications and services.

Wish you all the best.

**Dr. Ashok Haldia**

Chairman, Governing Board

IIIPI

## From Editor's Desk

*Dear Member,*

This year we are commemorating five years of IBC. IIPI shall also observe its fifth Foundation Day on November 25, 2021. On this occasion, I extend my best wishes and heartiest congratulations to all the Professional Members of IIPI, various stakeholders of IBC and our readers.

In the five years of IBC regime, India has covered several milestones in terms of resolution of corporate persons and strengthening the economic environment. This has been made possible by Insolvency Professionals (IPs) through synergising across various stakeholders under the efficient and vibrant legal framework of the IBC. Fortunately, three verticals of the Government – Legislature, Judiciary and Executive – have responded and quickly addressed each and every concern related to the IBC. There may be hardly any parallel law which has witnessed many timely amendments, experiments, and initiatives. Moreover, a series of landmark judgements from the Hon'ble Supreme Court in such a short span of time, are unique to the IBC.

National Asset Reconstruction Company Ltd. (NARCL) or bad bank is yet another initiative to strengthen banking system and facilitate resolution of financially strained corporates. The Government of India has also recently set up India Debt Resolution Company (IDRCL) which will work in tandem to manage the NPAs of the banks. In this edition you will get to read an exclusive interview of Shri Sunil Mehta, Chairman and Director, National Asset Reconstruction Company Ltd. (NARCL). He has candidly shared his experiences, thoughts and vision on various issues related to IBC regime.

Besides, in this edition we have presented four research articles and two successful CIRP Case Studies -- Ruchi Soya Industries Ltd. by Shailendra Ajmera, IP and Monnet Ispat & Energy Limited (MIEL) by Sumit Binani, IP.

In the backdrop of 5 years of the IBC, the author of the opening article "Five Years of IBC: A Touchstone for Promoting Entrepreneurship", has revisited 5 years of operation of IBC and presented a critical analysis of

achievements and challenges on different fronts. Besides, he has also made some futuristic recommendations.

Furthermore, in the second article "The Genesis of Higher Haircuts in Resolution Plans", the author has analysed the causes behind the issue of massive haircuts which has been recently in the limelight of media and also a matter of debate among various stakeholders of the IBC. After a detailed deliberation, the author has suggested some practical solutions and legal reforms to minimise the haircuts. In the third article "Liquidator's conundrum on PF and Gratuity dues under IBC" the author has focused on the issues of employees' dues in Liquidation i.e., Provident Fund, Gratuity and Pension. In the backdrop of legal provisions and jurisprudence, he presents a practical roadmap to handle these issues during the liquidation process. The fourth article "Role and Responsibilities of RPs: PPIRP Vs. CIRP" presents a comparative analysis between the roles, rights, and responsibilities of a 'Resolution Professional' in Pre-Packaged Insolvency Resolution Process (PPIRP) of MSMEs and CIRP.

Furthermore, the Statement of Best Practices: "Meetings of the Committee of Creditors Under Corporate Insolvency Resolution Process" (Joint paper by all the IPAs) provides an insight on various aspects of the CoC. In this edition, we have dedicated a special feature on Five Years of IIPI to showcase our journey since 2016.

Besides, the journal also has its regular features, i.e., Legal Framework, IBC Case Laws, IBC News, IIPI News, Media Coverage, 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](mailto:iiipi.journal@icai.in)

Wish you all the best.

**Editor**



## Objective of Resolution of a Stressed Asset through NARCL & IDRCL Mode will be to Facilitate the Entity in Gaining its Health Back: Shri Sunil Mehta

*IBC ecosystem would further facilitate the resolution on a faster mode paving way for the value maximization and realization in a quicker timeline. NARCL, IDRCL and IBC would complement activities of one another.*



**Shri Sunil Mehta**

Chief Executive, Indian Banks' Association (IBA)  
&  
Chairman, National Asset Reconstruction  
Company Ltd (NARCL)

Shri Sunil Mehta has been appointed as Chairman of recently constituted National Asset Reconstruction Company Ltd (NARCL), commonly referred as Bad Bank. He is the Chief Executive of Indian Banks' Association (IBA) which acts as a representative of over 248 member banks and associate members operating in India and plays a collaborative role between banks, regulators, and government in improving customer service with a focus on digital banking.

Prior to this Shri Mehta served as the MD & CEO of Punjab National Bank. He is a seasoned banker with over 38 years of rich experience. He is part of various Committees representing IBA. Shri Mehta is recipient of "Top Rankers Excellence Award for Entrepreneurial Path Breaker" at 20th National Management Summit organized by Top Rankers Management Club, Delhi in 2019.

In an Exclusive Interview with IIPI for **The Resolution Professional**, Shri Mehta expressed his views on the concept and operational strategy of Bad Bank and other issues related to the IBC Ecosystem. *Read on to know more....*

**IIPI:** IBC, 2016 has recently completed first five years of operation. How do you visualize the journey so far towards resolution/reorganization of stressed business in India?

**Shri Mehta:** The Insolvency and Bankruptcy Code (IBC), 2016 has been brought in to rescue the Stressed Assets in financial sector and facilitate the entities for treatment as Going Concern (GC). The Code facilitates enhancement/ maximisation of the value of the stressed assets for all the stake holders. IBC being a crucial structural reform, would yield desired results if implemented effectively and in a time bound manner to produce major gains for the corporate sector and the economy as a whole. IBC played an indisputable role in improving India's Ease of Doing Business (EODB) ranking from 130 in 2016 to 63 in 2020.

Five years down the line, we need to see the working and performance of the in totality. If one looks at rescuing of stressed assets referred under IBC, it could be observed that in value terms, the cases accounting for 70% of the stressed assets were rescued, while the cases accounting for 30% of the stressed assets proceeded for liquidation. The provisions under the IBC, while acting as facilitators for resolution of stressed cases, also instilled a sense of discipline and integrity on the part of the promoters.

Like any other economic law, IBC is evolving in the context of life. It has been responsive to emerging market realities and has undergone prompt course corrections to stay in sync. In less than five years, IBC has witnessed six major legislative interventions in tune with the changing times. The recent one being the introduction of Pre-Packaged Insolvency Resolution Process (PPIRP) for Micro, Small and Medium Enterprises (MSMEs). The IBBI is continuously reviewing the working of IBC to identify issues impacting efficiency and effectiveness of processes and makes recommendations to address them.

In the words of the former Chairperson of IBBI Shri M S Sahoo ji, there is a need for evolving a comprehensive and objective framework to assess the working of the insolvency law to make prompt course corrections.

Undoubtedly, the IBC has been effective to a great extent so far, however, compliance to timelines remains an issue. The delays on most cases, are due to delay in court proceedings, as the NCLT and NCLAT are overburdened. Another challenge being the sole authority being vested with the Committee of Creditors (CoC) to control the RPs. The need of the hour is to enhance institutional capacity of the NCLT benches and bring in more transparency in the selection of RPs. It is learnt that the IBBI in consultation with all the stake holders is in the process of a Model Code of Conduct for the members of the CoC. IBA has also submitted a suggestive code in this regard.

**IIPI:** NARCL or Bad Bank has been touted to be a major reform in consolidating efforts for stress resolution in Indian banking ecosystem. What has prompted the policy makers to create such model? How different is the proposed model as compared to current dispensation involving ARCs, for instance?

**Shri Mehta:** Formation of National Asset Reconstruction Company Limited (NARCL) is a major structural reform in the recent times. It is a time-tested resolution framework already implemented successfully elsewhere in the world. Such initiative is relevant in our country in today's context where the existing set of ARCs (Asset Reconstruction Company) are not able to cater to the requirement. A Govt backed ARC of the magnitude of NARCL combined with the strength of a professionally managed Debt Management Company in the form of India Debt Resolution Company Ltd (IDRCL) and the ability to create a secondary market to the SRs issued in the process which are duly backed by the Sovereign Guarantee will make the concept a successful venture and a right fit in the current context.

Under the proposed set up, an ARC, and Asset Management Company (AMC) will facilitate aggregation and take over the existing legacy stressed debt and then manage and dispose of the assets to Alternate Investment Funds and other Potential Investors for better value realisation.

A consortium of banks under the aegis of IBA has taken steps for formation of the NARCL. The majority of the equity is proposed to be held by Public Sector Banks

(PSBs). NARCL has already approached the RBI for obtaining the ARC licence which is expected shortly. All other regulatory formalities in this connection have also been initiated.



**IIPI:** What is the road map and scope envisioned for Bad bank? Particularly how do you see Bad Bank's regime dovetailing into IBC's ecosystem?

**Shri Mehta:** The proposed setup involving formation of NARCL and IDRCL would function within the boundaries of the existing regulatory framework for resolution of stressed assets. IBC ecosystem would further facilitate the resolution on a faster mode paving way for the value maximization and realization in a quicker timeline. NARCL, IDRCL and IBC would complement activities of one another.

**IIPI:** The resolution (of stressed assets) is often considered as preferable route as compared to mere recovery. And in this direction, IDRC is being created to meet such objective. What are the contours of such modus operandi involving combination of NARCL and IDRC?

**Shri Mehta:** The objective of Resolution of a stressed asset through NARCL & IDRCL mode will be to facilitate the entity in gaining its health back and continue to be productive in the economy. Recovery of the dues is not the prime objective of IDRCL. Accordingly, the role of IDRCL will be to manage the stressed asset in a way which would enhance and maximize the value of the entity, facilitating early resolution within the timelines and enhance the public confidence through professional approach in the process of resolution. The majority of the equity in IDRCL is proposed to be held by private players.

**IIPI:** How do you envisage the emerging framework

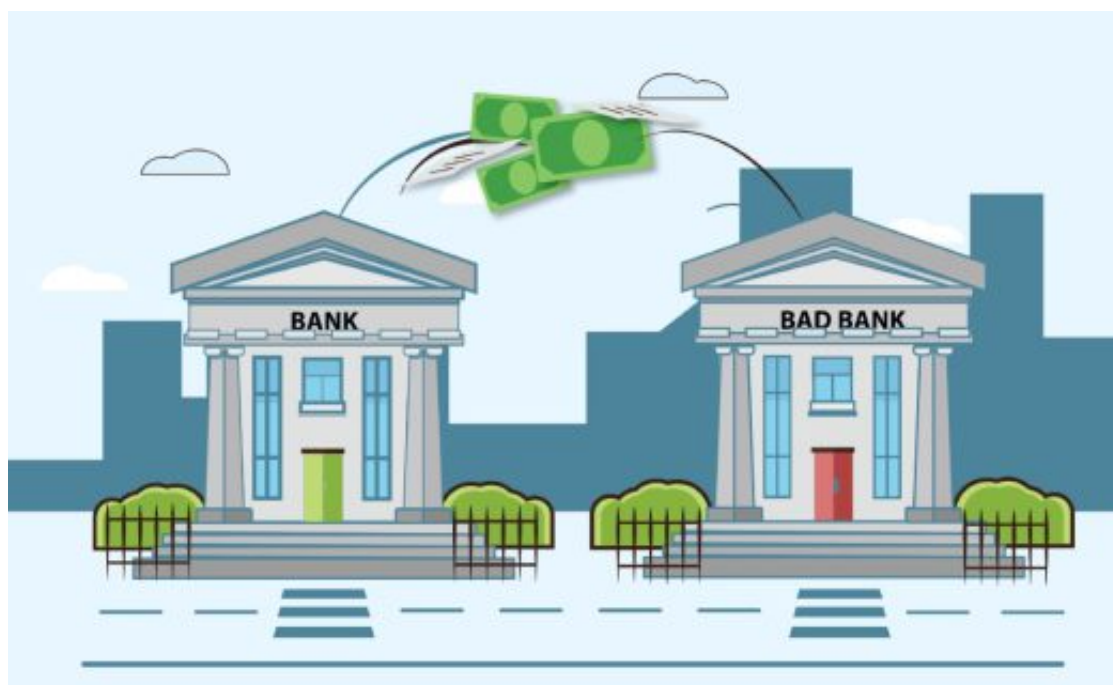
and effective implementation of Code of Conduct for CoC members under IBC?

**The insolvency profession is still in its infancy and establishing its legitimacy and now is the time to lay a strong foundation of professionalism.**

**Shri Mehta:** The Discussion Paper brought out by IBBI dealt with the subject of code in a 360-degree view. Public Comments on the Discussion Paper are already under consideration. IBA on its part also facilitated suggesting a Model Code of Conduct through a participative process involving all the Member Banks, Professional Bodies such as IIP of ICAI. I am sure IBBI would soon come out with a comprehensive Code of Conduct for the CoC.

**IIPI:** What words of wisdom and guidance, would you like to offer to IPs, Creditors and Debtors to make IBC a robust framework in near future, especially keeping in view the learnings arising out of Covid pandemic?

**Shri Mehta:** Institutions are foundations of a well-functioning market economy. Dealing with the role of IPs, one would agree that insolvency profession is a key institution of market processes under the IBC. An insolvency process demands the highest level of competence as well as the highest standards of integrity of the Insolvency Professionals (IPs). I believe they have performed exceedingly well, in the face of vested interests. Although a few instances have brought criticism to the profession, the overall contribution of IP community to the cause is laudable. The profession is still in its infancy and establishing its legitimacy and now is the time to lay a strong foundation of professionalism. Creditors and Debtors are defined with a definite framework under the IBC and adherence thereto shall give much needed impetus in speedier resolution of the cases.



## Five Years of IBC: A Touchstone for Promoting Entrepreneurship



*In the past five years, the IBC has made several landmarks in the field of insolvency and resolution of corporates at national and international level. The recent data of IBBI reveals that till June 30, 2021, 396 companies were rescued through Resolution Plans which yielded ₹2.54 lakh crore. This reveals the relevance of the IBC in rescuing the businesses that were sinking due to genuine business failures besides providing safe exit route for promoters and reasonable recovery of bankers' investments. The Global Insolvency Rank has improved from 136 in 2017 to 52 in 2020 and ease of doing business (EODB) rank improved from 155 to 63. Although this improvement reflects well on the implementation of the Code and the behavioural changes in the ecosystem, there are challenges that need to be resolved as we move forward. Read on to know more...*



**Dhinal Shah, Rigved Bapat, and Manav Thacker**

The author is an Insolvency Professional member of IIPI, and Co-authors are CAs. He can be reached at [dhinal@dshahassociates.com](mailto:dhinal@dshahassociates.com)

### 1. Introduction

Before the Insolvency and Bankruptcy Code 2016 (IBC or Code) came into existence, the insolvency processes in India were governed through a highly fragmented framework with powers of the creditor and debtor under bankruptcy processes being provided for under different legislations and requiring multiple judicial fora to adjudicate. Since the implementation required different judicial settings, the process of resolution was often long drawn. In a situation where one forum decides on matters relating to the rights of the creditor, while another would decide on those relating to the rights of the debtor, the decisions were readily appealed against and either stayed or overturned in a higher court. Furthermore, the insolvency process was marred by delays and extensions in arriving at an outcome thus impacting the time taken and recovery from such cases. This naturally impacted the investment environment in India to the extent it required a predictable and transparent framework for dealing with bankruptcy cases.

### 2. IBC in Rescuing Businesses

The data released by the Insolvency and Bankruptcy Board of India (IBBI) reveal that by the end of June 2021,



396 companies were rescued through Resolution Plans which yielded ₹2.44 lakh crore. The recovery amount in these cases over and above the liquidation value (i.e value of the Corporate Debtor (CD) at the time of Corporate Insolvency Resolution Process (CIRP) commencement date) is mainly due to the provisions of value maximisation enshrined in the IBC. Besides rescued CDs, 461 CIRP applications were withdrawn which shows the relevance of settlement through various instruments of arbitration. Furthermore, 653 were closed on appeal or review or settled. About 254 companies which were liquidated have yielded ₹1,207 crore against their asset value of ₹1,195 crores<sup>1</sup>. From this perspective, this indeed is a big achievement which would have been otherwise not possible prior to the IBC regime. These achievements have transformed the economic scenario in India thereby reposed confidence of entrepreneurs and investors in the Indian economy. Besides this, the resolutions through IBC has helped saving current jobs not just for the Corporate Debtor but also for its suppliers, customers and other related stakeholders and in fact has helped in creating new ones. Imagine the scenario if the financially strained companies were collapsed. What would have been consequence due to job losses and overall impact on economic activity? This reveals the relevance of the IBC in rescuing the businesses that were sinking due to genuine business failures besides providing safe exit route for promoters and reasonable recovery of bankers' investments.

**The increase in recovery over and above the value of the CD at the time of CIRP commencement date i.e., liquidation value is on account of the objectives of value maximisation for stakeholders as enshrined in the IBC.**

The IBC has established a structured way of initiating CIRP, and at the same time ensured effective management of affairs of CD during CIRP. As regards commencement of proceedings, the World Bank considers it positive if an insolvency framework enables direct liquidation of a corporate debtor (CD). The IBC enabled the committee of



creditors (CoC) to decide to liquidate a CD at any time, even before the preparation of information memorandum i.e the first step towards finding an investor. Furthermore, the IBC provides several relaxations under moratorium to ensure that the CD continues as a going concern (GC) during CIRP. The moratorium on legal cases i.e., protection against offences committed by previous management, the licenses, permits, concessions etc. cannot be terminated or suspended during the moratorium period, continuous supply of goods and services which are critical to protect and preserve the value of CD and moratorium from all the taxes and liabilities during CIRP have enabled rescue of financially strained corporates. Furthermore, the creditor in control regime, enables creditors to take decisions on the CD during insolvency proceedings.

### 3. Global Economic Achievements under IBC Regime

In the past five years, the IBC regime in India has made several remarkable achievements<sup>2</sup> which include improvement in Global Insolvency Rank from 136 in 2017 to 52 in 2020; average time taken for resolution reduced from 4.3 years to 1.6 years, rank in ease of doing business (EODB) improved from 155 to 63, getting credit rank improved from 62 to 25 and starting a business rank improved from 151 to 136 among others.

### 4. Behavioural Changes Across Stakeholders

The Code, with its structure and accompanying intent has earned recognition across corporate circles and has become the preferred route for corporate distress

<sup>1</sup> Insolvency and Bankruptcy News, April- June 2021, p. 14 and p. 19-20 (<https://www.ibbi.gov.in/uploads/publication/f4656f120a5161c281cff40189353824.pdf>)

<sup>2</sup> Thirty Second Report, Standing Committee on Finance (2020-21): Implementation of Insolvency and Bankruptcy Code- Pitfalls and Solutions, p.20 <https://ibbi.gov.in/uploads/resources/fc8fd95f0816acc5b6ab9e64c0a892ac.pdf>



investments including for foreign investors. While the full impact of the new insolvency regime is not expected to be visible in the short term, some successes have already been recorded.

The ability and willingness of the stakeholders- Financial Creditor (FC), business owners, IPs, and trade creditors, to work towards a common goal has led to some initial gains under the Code and their sustained coherent support will determine the success of this regime for the time to come.

The Code has been able to achieve a significant behavioural change among stakeholders which has resulted in substantial recoveries for creditors outside the regime of the Code. It is further motivating them to make the best efforts to avoid default/make good their default. As per the Report of Standing Committee of Finance (on IBC), ~50% of the applications have been withdrawn prior

**With the Code in place, non-repayment of loan is no more an option and ownership of the firm is no more a divine right.**

to admission of application by NCLTs. With the Code in place, non-repayment of loan is no more an option and ownership of the firm is no more a divine right. The change in behaviour of promoters of the corporate debtors has also been emphasised by Swaminathan J., Managing Director, State Bank of India (SBI) in an interview. “Borrowers have understood that owing business is not a birthright. In case they do not run their business efficiently, they stand to lose control of it,” said Swaminathan<sup>3</sup>.

The Code has had an impact on the credit market as well. Through provision for resolution and liquidation, the Code reduces incidence of default, and enables creditors to recover their dues through revival of the firm or sale of liquidation assets. It incentivises creditors to extend credit at a lower cost for projects and thereby enhances availability of credit. While the debate concerning the development of India is still ongoing, strong, and efficient laws like the IBC is helping to develop a conducive atmosphere for a strong business environment to flourish.

<sup>3</sup> The Resolution Professional (2021): Settlement Will always remain the first resort but we also need Prepack and CIRP on the table, April 2021, p. 10.

## 5. Ease of Doing Business Ranking

The World Bank started publishing the Doing Business (DB) Report or EODB Rankings in 2003 and continuously published it till 2019. Though the World Bank decided to discontinue<sup>4</sup> publishing the DB Report due to allegations of data manipulations in 2018 and 2020 DB Reports, the EODB Rankings are considered benchmark for comparing world economies in facilitating businesses and promoting entrepreneurship. The internal audit of the World Bank did not find any irregularities in the data provided by India, but China was found using its clout for data manipulation<sup>5</sup>.

The DB Report used to measure<sup>6</sup> the processes for business incorporation, getting a building permit, obtaining an electricity connection, transferring property, getting access to credit, protecting minority investors, paying taxes, engaging in international trade, enforcing contracts, and resolving insolvency. On the basis of this analysis, each country is provided EODB Rank, which helps investors make informed decisions about investments. Within the 'resolving insolvency' parameter of the EODB, the World Bank measures indices viz. recovery rate, time taken, costs involved, creditor participation, reforms etc. The purpose behind this is to measure the insolvency regime in a country in the context of the overall economic and investment climate that it seeks to improve – making business decisions easier for investors, government, and other stakeholders. Thus, ease of resolving insolvency is a major component of EODB report. The increasing ranks of India in EODB Rankings is evidence of global recognition of reorganisation procedure available in India under IBC regime. Today, under the IBC Ecosystem, companies have effective tools to restore financial viability. Besides, creditors have better tools to successfully negotiate and have greater chances to realise their investments.

<sup>4</sup> The World Bank (2021): World Bank Group to Discontinue Doing Business Report, September 16 (<https://www.worldbank.org/en/news/statement/2021/09/16/world-bank-group-to-discontinue-doing-business-report>)

<sup>5</sup> The Hindu Business Line (2021): World Bank clears India, blames China for pressuring, September 18 (<https://www.thehindubusinessline.com/economy/world-bank-group-to-discontinue-doing-business-report/article36510519.ece>)

<sup>6</sup> World Bank Ease of Doing Business Report and Methodology <https://www.doingbusiness.org/en/doingbusiness>

The recovery rate, as per the World Bank methodology, is a function of time, cost, and outcome of insolvency proceedings. While reviving ailing firms, certain resolution plans have returned about 200 per cent of liquidation value for creditors. This means that the creditors got ₹200 while they could have got at best ₹100 minus costs of liquidation if these CDs were liquidated. The outcome should improve with the amendment in December 2019 that released the CD from the liability arising from an offence committed under the erstwhile management prior to the commencement of the CIRP.

**The recovery rate, as per the World Bank methodology, is a function of time, cost, and outcome of insolvency proceedings.** ”

As per the latest DB Report, India is the best performer in South Asia on resolving insolvency and does better than average for OECD high-income economies in terms of the recovery rate, time taken and cost of proceedings. This is even though the World Bank index does not consider bigger gains from the IBC i.e., revival of 396 companies, some of which were in deep distress; changed the debtor-creditor relationship, where the defaulter's paradise<sup>7</sup> is lost, as noted by the Supreme Court; and most importantly changed the credit discipline in our country.

## 6. Areas of Improvement

Though the IBC has made significantly achieved its objectives<sup>8</sup> – Resolution, Maximisation of Value of Assets of the CD and Promoting Entrepreneurship, availability of credit and balancing interests of stakeholders – there are some areas which still need improvement. The market recognises that areas of improvement need to be addressed before the regime becomes an embedded, robust, and consistent framework which can support resolutions and supply necessary credit into India's economy. Following broad themes emerge<sup>9,10,11</sup> that represent the current scenario and opportunities for further development to support the insolvency regime:

<sup>7</sup> Business Standard (2019): SC upholds Insolvency code, says defaulters' paradise is lost, January 25 ([https://www.business-standard.com/article/pti-stories/sc-upholds-insolvency-code-says-defaulters-paradise-is-lost-119012501273\\_1.html](https://www.business-standard.com/article/pti-stories/sc-upholds-insolvency-code-says-defaulters-paradise-is-lost-119012501273_1.html))

<sup>8</sup> Company Appeal (AT) (Insolvency) No. 82 of 2018, NCLAT (<https://nclat.nic.in/Useradmin/upload/744324065bebc1bd0ef4a.pdf>).

### 6.1. Legislative hurdles

- a) Various judgements and judicial interpretations of the IBC by the Supreme Court and decisions by NCLTs and NCLATs have brought clarity on several conceptual issues. However, the evolving nature of law has resulted, in various litigations and delays in process affecting recovery for creditors and investor confidence. However, some contradictory judgements across NCLTs and time delays in resolving matters at the judiciary have led to some negative market sentiments towards the effectiveness of the Code.
- b) Investigative issues create hurdles in resolution process and for creditors. Deferring / delaying implementation of approved resolution plan for such issues has significant adverse impact on valuations. Clarity on this front will be something to see in near future.
- c) The insolvency process is often interrupted by last-mile effort/intervention by promotor in trying to get back the control over the assets. Earlier it has

**While the focus is required in strengthening insolvency institutions, training of IPs also remains a key area for developing a robust insolvency system.** ”

been seen that if the defaulting promoter of the ailing company is allowed to put up a resolution plan, he would submit resolution plan at substantially discounted rates. Now the law has been changed by way of certain amendments and hence a defaulting promoter, along with various others mentioned in section 29A, have been made ineligible to be a resolution applicant. However, efforts are still made by promoters with help of

<sup>9</sup> The Report on Bankruptcy Law Reform Committee, Volume I, Rationale and Design, 2015, IBBI ([https://ibbi.gov.in/BLRCReportVol1\\_04112015.pdf](https://ibbi.gov.in/BLRCReportVol1_04112015.pdf))

<sup>10</sup> Transcript of Dr. M.S. Sahoo's speech at webinar on “Digitalisation of India's Mortgage Lending and Valuation Process”, organised by Valocity on August 19, 2021.

<sup>11</sup> <https://ibbi.gov.in/uploads/resources/a71d2cbe4d20a900eef4d234282a16b3.pdf>  
Where Next for IBC – A Keynote address by Dr. M. S. Sahoo, Chairperson, IBBI, at the Seminar on 'Bankruptcy and distressed investment market in India: Opportunities, perspectives and the road ahead' organised by the High Commission of India at London on 10th February 2020.  
<https://ibbi.gov.in/uploads/resources/cdd1a571ad503a8166c9220df1ade7eb.pdf>

various legal avenues, trying to disrupt the insolvency process and get back the control of assets.

- d) The Indian Judiciary has been facing capacity constraints. The lack of members in judiciary has impacted timely closure of cases. The option may

**The insolvency process usually gets elongated due to appeals and counter appeals, thereby eroding the value of the Company under insolvency.**

be evaluated to set up Circuit benches at the earliest, to clear off long pending cases. Also, technology to use cross-reference precedents may be implemented to enable swift disposal of routine cases.

- e) Lack of well-defined bidding criteria and evaluation matrix for evaluation of resolution plan by CoC.
- f) Currently, there is lack of clarity in the roles and responsibilities of CoC, RP and the Resolution Applicant after the Resolution Plan. Suitable additions in CIRP regulation may be made to identify the roles and responsibilities of CoC, RP and the Resolution Applicant after approval of Resolution Plan by NCLT. The period between NCLT approval and before transfer of control to the Resolution Applicant is a grey area currently, which needs to be addressed.
- g) The liquidation provisions currently lack transparency and clarity on sale of assets in liquidation.
- h) The requirement now is to also focus on the law for individual insolvency, pre-pack for large corporates, cross border insolvency, and group insolvency which are yet to come into force or be available. These provisions will be the next big thing dominating the insolvency space and helping in effective resolution.

## 6.2. Capacity constraints for Stakeholders

- a) New law and jurisprudence require constant updating of skills to meet market need. While the

focus is required in strengthening insolvency institutions, training of IPs also remains a key area for developing a robust insolvency system. The first step in the direction already seems to have been taken by IBBI, by launching Graduate Insolvency Programme which aims to groom tailor made IPs and inculcate all that an IP needs.

- b) The need of the hour is also development and regulations for tailor-made insolvency valuation professionals, for transparent and credible determination of asset value.
- c) Creditors are playing a key role in the insolvency regime. The FCs usually constitute a CoC which has responsibility to decide the fate of the firm in distress. FCs are expected, to take a step back and reflect on IBC journey so far and incorporate the learnings into the decision. Effective training measures to creditors will also be critical to support effective decision making, as all the stakeholders are bound by decisions of the CoC and the resolution plan, which is a commercial wisdom of CoC.
- d) Capacity building for regulators and judiciary – through trainings and knowledge sharing is also a key area of development.

## 6.3. Asymmetric information

- a) Information being the most key requirement for a successful resolution. Therefore, there is a need to solve the information asymmetry that exists currently.
- b) Use of technology to manage information leading to more transparent and evidence based decision making by stakeholders especially investors.
- c) Lack of depth in the stressed asset market is affecting the resolution potential. There is a need for developed stressed market which will enable price discovery for distressed assets.

## 6.4. Constraints for Successful Resolution Applicant

- a) Post-closure litigation by operational creditors including tax authorities and other litigants.
- b) Litigation by unsuccessful bidders often results in the successful bidders getting frustrated and this

has created negative sentiments in the mind of potential bidders.

- c) Inability to comply with resolution plan, due to delay caused due to litigations.

### 6.5. Timeliness of CIRP

Although the average time involved in IBC is 1.6 years, the NCLT takes considerable time to admit cases. During this time the company remains under the control of the defaulting owner enabling value shifting, funds diversion, and assets transfer. Post admission, although the overall timeline prescribed as per Code is 180 days, (additional 90 days extension), more than 71% of the cases have already crossed the timeline of 180 days. The process usually gets elongated due to appeals and counter appeals, thereby eroding the value of the Company under insolvency. The long duration also impacts the interest of investor in bidding for the asset. In order to iron out this issue and further expedite the insolvency process, the minimum threshold of default has been increased to one crore. This will ensure that only large cases go to NCLT, and the adjudication is faster. However, some issues still need to be addressed to efficaciously expedite the resolution process under the Code. While Pre-Pack (so far release for MSMEs) is a step in the right direction, the efficacy of this can only be seen with the predictability of outcomes over the next 1-2 years.

### 7. Conclusion and Way Forward

The IBC is one of the most impactful economic law reforms to have been implemented in India with an intent to change the way distressed asset resolution and insolvency works here. It has shown remarkable progress in terms of handling large cases and recovery of dues. Notwithstanding this, creditor actions and appetite towards insolvency, readiness of infrastructure to support the speed of implementation, bandwidth of the legal system and the ability of the IPs to manage large and complex cases have been subjects of scrutiny. The provisions relating to CIRP including fast track resolution, corporate liquidation and voluntary liquidation have been executed with considerable success thus far and those related to Personal Insolvency, Cross-Border, Group, Pre-

Pack etc. are in pipeline for consideration. The IBC provides a safe exit route for companies that have failed despite making all the efforts to revive it.

**If the World Bank had continued publishing EODB rankings, there is a high chance that India's rank would have gone up further as the Code matures and the ecosystem develops.**

Though EODB rankings has not been published after 2019, various landmark judgements have been passed, and certain landmark cases like Videocon, Jet Airways, DHFL etc., have been resolved in last one year, impact of which on the ease of doing business ranking remains to be seen. While a recent statement by World Bank indicates a discontinuation of the Doing Business Report, the framework developed by it will be helpful in the long run for the developing countries to assess their insolvency regimes and making regulatory decisions, which will reflect the expectations of investors seeking for a transparent and predictable regime and which will treat business failures as a cyclical event. If the World Bank had continued publishing EODB rankings, India's rank would have gone up further.

Several amendments and judicial discourse since the inception of the IBBI have helped plugged the loopholes in the framework and ring-fence both lenders and borrowers. However, in the near future, structural changes which would strengthen the banking system are necessary. Besides, Cross border insolvency, which is currently in pipeline, will also be instrumental in providing legal comprehensive framework, considering the fact that corporates transact business in more than one jurisdiction and have assets across many jurisdictions.

Certain other changes in the IBC regime have also been the long-standing demand of the industry, as the move will help safeguard CDs, protect last mile funding, boost investments in financially distressed sectors, speed-up CIRP, strengthen the overall IBC framework thereby facilitating and promoting entrepreneurship.



## The Genesis of Higher Haircuts in Resolution Plans



*The financial offer made by an investor in the resolution plan depends on several facts such as economic and market conditions, deepening of financial markets, valuation of available assets, and legal impediments in implementation of the Resolution Plan among others. Any potential investor will look into the value of the assets of the CD and benefits it will generate on its acquisition. The IBC entrusts this responsibility of commercial wisdom on the CoC in a transparent manner which has also been affirmed by the Supreme Court in its various judgments. However, 90% to 96% haircuts in some recent cases have raised doubts on working of CoC. The author has deliberated on this issue and also suggests some way forward. **Read on to know more...***



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### 1. Background

The basic requirement for a Corporate Debtor to be admitted for initiation of Corporate Insolvency Resolution Process (CIRP) is proven default in payment of debts due to financial stress. This results in deterioration of the performance of the CD and consequent erosion in the value to various stakeholders. To come out of this problem, the Code provides for inviting resolution plans from Prospective Resolution Applicants (PRAs) which provides financial offer to Financial Creditors (FCs), Operations Creditors (OCs) and Other Stakeholders and also a blueprint for revival of the CD. But before inviting Expression of Interest (EOI) for resolution plans, the Resolution Professional (RP) is required to run the Corporate Debtor (CD) as a Going Concern (GC) for value maximisation. Thus, the main objective<sup>1</sup> of the IBC can be achieved only if a viable and feasible Resolution Plan is received and the same is voted by the CoC and approved by the Adjudicating Authority (AA).

<sup>1</sup> "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," *Binani Industries Ltd. Vs. Bank of Baroda*, Company Appeal (AT) (Insolvency) No. 82 of 2018, NCLAT (<https://nclat.nic.in/Useradmin/upload/744324065bebc1bd0ef4a.pdf>)



Here, the moot question is what should be financial offer that is considered reasonable and acceptable. This issue has been raised at various forums and still continue to be debated especially where the offer amount is low compared to the claims admitted from FCs and OCs. The matter is again debated especially in high value accounts where the haircut is above 90% of the admitted claims. On the issue of acceptance of the Resolution Plan, the IBC trusts on CoC provided it is approved with minimum 66% of vote share<sup>2</sup>. The supremacy of the commercial wisdom of the CoC has also been reiterated by the Supreme Court in several of its judgements. Most recently on May 13, 2021, in the matter of *India Resurgence ARC Private Limited Vs M/S Amit Metaliks Limited & Ors*, the Supreme Court held that the AA may not adjudicate on the commercial wisdom of the CoC. The Court observed<sup>3</sup> “The NCLAT was, therefore, right in observing that such amendment to Sub-section (4) of Section 30 only amplified the considerations for the CoC while exercising its commercial wisdom so as to take an informed decision in regard to the viability and feasibility of resolution plan, with fairness of distribution amongst similarly situated creditors; and the business decision taken in exercise of the commercial wisdom of CoC does not call for interference unless creditors belonging to a class being similarly situated are denied fair and equitable treatment.” The Court also cited similar judgement in the matter of *CoC of Essar Steel India Limited v. Satish Kumar Gupta and Ors.*(2020) as precedence.

However, in regard to various Resolution Plans put up for approval of the AA recently, the question regarding approving of resolution plan with a high hair cut and value offered in plan being less than liquidation value has again arisen. The most latest judgement in this regard was passed by NCLAT, New Delhi on July 19, 2021 in which the Appellate Tribunal ordered stay<sup>4</sup> on AA's judgement dated June 08, 2021 approving the resolution plan submitted by Twinstar Technologies in CIRP of Videocon Group. It was argued that the haircut of 90-96% has been taken and the amount offered in the resolution plan was close to the

liquidation value.

In this connection, Fair Value (FV) and Liquidation Value (LV) of the CD plays a vital role. The valuation is carried out as on the Insolvency Commencement Date (ICD) by the two Registered valuers that helps members of CoC to decide on the financial offer. However, in most cases the valuation of assets arrived at is low compared to the claims admitted.

**Any potential investor will look into the value of the assets available and what benefits it will generate after taking into account various impediments in the implementation of the Resolution Plan.**

This raises the question about the factors that go into the determination of the financial offer in the Resolution Plan. It is the interplay of economic and market conditions, deepening of financial markets, availability of investors to invest in stress assets, valuation of available assets and assumptions that go with valuation, information asymmetry and legal impediments in the implementation of the Resolution Plan. Any potential investor will look into the value of the assets available and what benefits it will generate after taking into account various impediments in the implementation of the Resolution Plan. The AA do not have the available information on the market dynamics and nitty-gritty of valuation to come to the conclusion whether the haircut is reasonable. An attempt has been made in this article to deliberate on these issues.

## 2. Fair Value (FV) and Liquidation Value (LV)

Regulation 35 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016; provides a three step procedure for determination of FV and LV<sup>5</sup>. Furthermore, Regulation 2 (hb) defines FV and Regulation 2 (k) defines LV. Generally, as a common practice, three methodologies are adopted by the Registered Valuers to

<sup>4</sup> Business Standard (2021): NCLAT stays NCLT's nod to Twinstar's resolution plan for Videocon Group, July 19 [https://www.business-standard.com/article/companies/nclat-stays-nclt-s-nod-to-twinstar-s-resolution-plan-for-videocon-group-121071900823\\_1.html](https://www.business-standard.com/article/companies/nclat-stays-nclt-s-nod-to-twinstar-s-resolution-plan-for-videocon-group-121071900823_1.html)

<sup>5</sup> Fair Value and Liquidation Value, Chapter IX, Resolution Plan, Section 35 of the IBC, 2016. <https://ibbi.gov.in/uploads/legalframework/af0143991dbbd963f47def187e86517f.pdf>

<sup>2</sup> Section 30 (4) of the IBC, 2016.

<sup>3</sup> Supreme Court (2021): Civil Appeal No. 1700 of 2021, Para 12 (<https://indiankanoon.org/doc/174927818/?type=print>)

arrive at Fair and Liquidation Value i.e. Cost Basis Approach, Market Approach and Income Approach.

Various assumptions and disclaimers are made by Valuers in arriving at the valuation especially in cases where complete information with regard to the assets are not available with the CD. Assumption are also made where the legal ownership of assets is disputed before authorities resulting in lower valuation of such assets. Some machineries may be having better upkeep but the value is adjusted with depreciation owing to the policy. Hence, valuation is best estimate depending on various assumptions. The price at which the asset is sold may not be same as valuation and depends on the various other factors that include economic environment, market conditions, legal issues and information asymmetry.

**The resolution applicants are not provided these Valuation Reports and they are expected to carry their own due diligence before submitting a Resolution Plan.**

The members of CoC while receiving the resolution plan (s) are provided the valuation reports from the two valuers to look to the FV and LV and negotiate with the Resolution Applicant to maximize the financial offer. The resolution applicants are not provided these Valuation Reports and they are expected to carry their own due diligence before submitting a Resolution Plan.

### 3. Claims Admitted and Actual Realization

As per the provisions of the IBC, the Interim Resolution Professional (IRP)/ Resolution Professional (RP) is required to collate claims from FCs, OCs and other Creditors as on the ICD. The amount of claims admitted is generally higher than the available value of assets of the CD.

The claims from FCs include interest debited and accrued since the account has become irregular and thereafter classified as Non- Performing Asset (NPA) with FCs (i.e.Banks) and the interest component increases the claim amount by around 20-30% in normal instance as it takes around 2-3 years to initiate CIRP after the accounts has become irregular followed by declaration of NPA by the lending bank/s. This includes time taken by banks to



decide on filing application for initiating CIRP after examining possibility of unilateral and multilateral restructuring of the credit facilities. Further, while the IBC provides time of 14 days for initiation of CIRP after filing of application by FCs, but in practice it takes a long time at AA to order for admitting the CD into CIRP. Thus the amount of claim admitted get inflated to the extent of interest accrued and charged since the CD was in default, while at the same time the value of the assets deteriorates during this period. The longer the time spent, higher the mismatch between claims admitted and value of assets.

The CD avails credit facilities from FCs for acquiring fixed assets and also for meeting working capital. The credit facilities availed for meeting working capital include financing of current assets that include raw materials, stock in process, finished goods and receivables. It is generally observed that these current

**The CDs which are admitted in CIRP do not maintain in most cases updated books of accounts. There is information asymmetry.**

assets get fast depleted and realization become difficult in the case of CD in default due to various reasons. This could be due to operating losses incurred either declared or suppressed prior to commencement of CIRP that first impact depletion of the current assets. Realization of current assets goes first to fund these losses. Further, trade receivables become difficult to realize as CD loses its

bargaining power especially when these debtors are more than 6 months old. The valuers while arriving at valuation of current assets, thus have to put some discount to arrive at its realization owing to the uncertainty regarding their realization based on the market analysis.

The fixed assets that are available also suffer and deteriorate on account of normal depreciation and poor maintenance. Some of the machineries become obsolete and lose value. If the activity is stopped or at a low level, the condition of the plant and various assets is adversely impacted. There are instances of pilferage of various assets prior to the commencement of CIRP. All these factors impact valuation and overall recovery.

**“If the claims increase by 20% due to accrued interest and value of assets goes down by 20% during the same period, the overall impact will be more than 40% alone due to these two factors.”**

The CDs which are admitted in CIRP do not maintain in most cases updated books of accounts. There is information asymmetry. Besides, the balance sheets contain lot of qualifying remarks and disclaimers by the auditors and thus cannot be fully relied. The complete details of the fixed assets are not available. The location of some of the fixed assets are not properly available. Details of the various parties from whom any dues are recoverable are also not available along with supporting documents. The Valuers takes all these factors into consideration and accordingly provides estimate of FV and LV.

There are some instances of mismanagement and diversion of funds by the management for which the RP is required to determine and file an application under Sec 43, Sec 45, Sec 50 and Sec 66 of the IBC for Preferential, Undervalued, Extortionate and Fraudulent (PUF) transaction with the AA. There are also instances of bogus entries with regard to account receivables. The purpose is to bring back such amount to CD so that the amount for stakeholders is enhanced. However, a number of such applications are pending with the AA. The problem is to get such amount identified and recovered as in most cases other parties from whom the amount is to be recovered are either not in existence or not in a position to pay back.

Hence, while the claims admitted get enhanced due to accumulated liabilities during the period of financial stress before commencement of CIRP but during the same period, the assets show deterioration. If the claims increase by 20% due to accrued interest and value of assets goes down by 20% during the same period, the overall impact will be more than 40% alone due to these two factors. Thus the claim admitted and value of assets available find large variation. The resolution applicants after carrying due diligence provide their financial offers based on the value of assets that are available and factor adequate discount due to information asymmetry and legal impediments. This partly explains higher hair cut in the resolution plans in relation to claims admitted.

#### 4. Economic and Market Environment

The economic environment at present is subdued with lower GDP growth and limited fresh investments in various sectors. The situation has been further impacted due to Covid-19 pandemic. Hence, economic environment is not at present conducive for potential investors to acquire stress assets. Various industries are suffering due to low demand and excess capacity. This has created dearth of getting serious PRAs to submit resolution plans. In this situation, PRAs due to limited competition have got better bargaining powers to get plans approved by CoC which are favourable to them.

The market for purchase of stressed asset in India is still at its infancy and there are not sufficient investors/ hedge funds/ sovereign funds to acquire these assets. The financial market in India especially for acquiring stress assets is yet to develop of which one of the main reason is transparency in disclosures of financial information in the audited financial statements. Many of the stress asset funds floated abroad are not active in India due to lack of complete transparency in the financial statements and also legal impediments in approval and implementation of the plans. As large number of accounts are in stress and admitted in CIRP, hence sufficient funds are required to revive these companies which is difficult without specialized funds created for the purpose.

The PRAs do not have readily available funds to meet the

financial offer. Further, financial institutions do not readily provide 'Line of Credit' or prior arrangement with the PRAs to meet the shortfall to acquire these assets. No separate scheme is presently available with banks to have a prior arrangement with the prospective investors to fund those assets. The time required to submit such resolution plan is around 1 month or in case of any extension could go at most to three months. During this period, it is difficult for PRAs to get the tie up of funds from banks and hence not able to submit a resolution plan. There have been instances when the PRAs whose plan was approved could not arrange funds leading to further litigations. Hence, there are not many serious bidders to submit a resolution plan.

**Deliberations of CoC on resolution plan/s are not disclosed which sometimes casts doubt whether the CoC has acted diligently after considering all the factors.**

Banking and Financial Institutions (FIs) do not encourage restructuring as a part of the Resolution Plan wherein the new investors will be given sufficient time to make the payment. The preference of the FCs is to come out of these stress assets through upfront payment by the Resolution Applicant and only limited time is given for remaining payment. It has been observed while a number of PRAs submit EOIs but only very a few submit resolution plans. There are not many investors who have got available funds/credit lines to take the resolution plan to its logical end. The restructuring of debt or taking over of debt by FIs will boost the stressed asset acquisition market. Further, Asset Reconstruction Companies (ARCs) do not still have active participation.

It has been observed that in most cases either single resolution plan is received while some other get 2 to 3 plans. In case of single resolution plan, the PRA have got better bargaining power and tries to carry out hard negotiation on the offer amount. The time taken in CIRP is longer and number of litigations have damped the enthusiasm of many investors to participate in the submission of the resolution plans. Hence, the potential investors put discount on the offer amount to provide for

various uncertainties.

### **5. Liquidation Value and Actual Realisation during the Liquidation can be different**

The important decision that CoC have to take while considering the Resolution Plan for approval is whether it will be beneficial for the creditors to accept the plan or to allow it to go for liquidation. Negotiations with the resolution applicants are mainly to ensure that the offer is much above than what the recovery will be through liquidation. The members of CoC are often not fully aware about the recovery expected to come through in case the CD is admitted into liquidation. However, some estimates can be made that help CoC to decide on the acceptability of the resolution plan/s presented before it for consideration.

The members of CoC have got FV and LV as on ICD while as actual liquidation process takes another 2-3 years in case the CD goes into liquidation. Hence, the liquidation costs will be additional burden which have to be first met before making any distribution to creditors as per Section 53 of the IBC. Further, there could be further deterioration in the value till the assets are fully sold in liquidation due to time gap between CIRP and liquidation.

The members of CoC try to understand how much actual realisation will come under liquidation based on the LV arrived as on ICD. There may be instances where it will be decided by the members of CoC that the realisation during the liquidation will be still lower than the LV and offer made in the Resolution Plan. However, these deliberations are not known and disclosed during the meetings of CoC and this sometimes casts doubt whether the CoC has acted diligently after considering all the factors. Besides, there have been instances where the realizable value as on the Liquidation Commencement Date (LCD) were lower than the valuation arrived as on ICD, thereby establishing that with time, value of asset deteriorates. The exception may be only value of immovable property such as land. It is also to be noted here that the claim amount as on LCD further increases specially in case of financial creditors due to additional interest component claimed since the commencement of CIRP (in most cases, liquidation commences around 1-2 year after CIRP) whereas the



value of assets deteriorates.

## 6. Reasons for Higher Hair Cuts in Resolution Plans

The factors that go into higher hair cuts in CIRP may be summarised as follows:

**A panel of experts drawn from professionals from Industry, Valuation, Accounts and Audit and Legal may be constituted to provide their views to the AA if offer in the CoC approved Resolution Plan is too low.**

- a) Delays in deciding to file CIRP application and then admission by the AA.
- b) Mismanagement including instances of preferential, undervalue, extortionate and fraudulent transactions.
- c) Information asymmetry that includes books of accounts not complete and proper records not available/missing.
- d) Market conditions not conducive with limited demand.
- e) Financial market for stress assets yet to develop.
- f) Legal issues takes long time and hampers timely approval and implementation of the approved Resolution Plan.

## 7. The Way Forward

The issues regarding hair cut in the Resolution Plan are of wide ramifications and any adverse findings could dampen

the spirit of the IBC. Necessary safeguards and transparency needs to be built up in the system so that the IBC achieves its objective in resolving the stress assets. Some of the suggestions for improvement are as follows:

- a) As per the present practice all resolutions plans received by RP are deliberated and negotiations are held between the CoC and PRAs on the offer amount. The members of CoC while approving the Resolution Plan do not disclose the reason. Going forward, members of CoC may disclose the justification as why the Plan was approved with higher haircut so that the same is known to the AA and they are well appraised of the various dimensions in which CoC have gone before taking such a decision. The reasons for rejecting other resolution plans should also be recording in writing.
- b) A panel of experts drawn from professionals from Industry, Valuation, Accounts and Audit and Legal may be constituted who will, if required, provide their views on such matters where the offers are too low so that they examine the issue from different perspective and provide the report to AA.

The market for stress assets need to be widened and necessary policy changes are required at the level of the Reserve Bank of India (RBI) and Central Government to ensure more resolution plans. The operational efficiency at various levels need to be emphasised.





## Liquidator's conundrum on PF and Gratuity dues under IBC



*Employees' dues is a crucial aspect in operations of a company. Though IBC gives second order of priority to employee's dues in waterfall mechanism, there seems to exist some loopholes in terms of employees' social security such as Provident Fund, Gratuity, Pension etc. in Liquidation vis a vis the NCLAT has given contradictory judgements in some cases such as Lanco Infratech and Moser Baer. In the present article, the author makes an attempt to analyse the issue from the perspective of judicial pronouncements and presents a practical approach to deal with the same. Besides, the author also provides suggestions for improvement in the process. Read on to find out more...*



### **R. Dharmarajan**

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### **1. Introduction**

One of the key tasks of the Liquidator is to distribute the proceeds from realisations as per the provisions of Section 53 of the IBC. The Liquidation process itself needs to be completed within one year, and here often, the Liquidator may face challenges with respect to dealing with statutory dues such as PF, Gratuity, ESIC and often had to deal with attachment of any of the properties or assets of the Corporate Debtor (CD) by the government agencies such as EPFO, pending payment of the full dues by the Liquidator, where he is in dilemma in dealing with these issues.

### **2. Distribution of Statutory Dues by the Liquidator**

Some of the components of the statutory dues, which are significant for the Liquidator to consider, are as follows:

#### **(a) Gratuity**

Gratuity refers to the sum payable by the employer to his workers upon completing service for the prescribed period of time. The obligation falls on the Liquidator once the Corporate Debtor (CD) is under Liquidation. The Insolvency and Bankruptcy Code, 2016 (IBC or the Code) provides for the formation of 'Liquidation Estate' containing all the assets of the CD. It is these assets that will be distributed to the respective stakeholders in terms of the 'waterfall mechanism' under

<sup>1</sup> Section 53 of the IBC, 2016 available at <https://ibbi.gov.in/uploads/legalframework/af0143991dbbd963f47def187e86517f.pdf>

Section 53 of the IBC which provides an order of priority for distribution of proceeds obtained from sale of assets of the CD. As per this order of priority<sup>1</sup> after full and final payment of the insolvency resolution process costs and the liquidation costs, two dues have been kept in second priority firstly, workmen's dues for the period of 24 months preceding the liquidation commencement date; and secondly, debts owed to a secured creditor that has relinquished security as per Section 52.

While the Payment of Gratuity Act<sup>2</sup> has not explicitly defined the term 'gratuity', it can be understood to be a sum payable by the employer to his workers/employees upon completing service for the prescribed period of time. The issue arises here is if the Gratuity falls under the 'Liquidation Estate' and is to be distributed in terms of Section 53 of the IBC, then the workers or employees may not get their share of the dues.

#### (b) Provident Fund (PF)

Under PF, it is essential to note the different components of Employees' Provident Fund Organization (EPFO) during Liquidation:

EPFO Components	Description
Workers or Employee's contribution that is deducted from wages or salaries of the workers or employees	The amount deducted from the wages or salaries of the workmen and employees for remittance to EPFO credit into the respective account of the workmen or employee is fundamentally not the assets of the CD <sup>3</sup> : They are the assets of the workers/employees in possession of the CD, in the capacity of trustee or guardian.
Employers Contribution	Matching contribution amount by the employer to the respective account of the workers or employees.
Interests and Penalties	Interest payable to the EPFO on account of delays in remitting the sum by the employer to the respective worker or employees share of the PF dues (employee or employer's portion) and the resultant penal charges levied by the EPFO for the delays in remittance.

<sup>2</sup> Payment of Gratuity Act, 1972  
<https://clc.gov.in/clc/sites/default/files/PaymentofGratuityAct.pdf>

### 3. Provisions of IBC for Distribution of Liquidation Proceeds

As per Section 53 (b)(i) of the IBC:

- Workmen's dues for the period of twenty- four months preceding the liquidation commencement date and debts owed to the Secured Creditors in the event such secured creditor has relinquished security in the manner set out in Section 52 of the IBC shall rank Pari-passu and should be distributed equally.

**Section 36 of the IBC specifically excludes certain assets which shall not be forming part of the Liquidation Estate and shall not be used for recovery in the liquidation.**

- Followed by wages and unpaid dues owed to employees other than workmen, for a period of twelve months, preceding the liquidation commencement date.

Under the code, Workmen dues is defined under Section 3(36) as, 'workman' shall have the same meaning as assigned to it under clause(s) of section 2 of the Industrial Dispute Act, 1947, meaning workmen as per companies act Section 326, which means all salary, wages, allowance, accrued dues, compensations on death or disability and basically all sums due to a workman. This effectively means PF, Gratuity, and any other dues payable to the workman are also included under workmen dues.

### 4. Exclusions to Liquidation Estate- Section 36(4) (a) (iii)

Section 36 of the IBC specifically excludes certain assets which shall not be forming part of the Liquidation Estate and shall not be used for recovery in the liquidation, and specifically exclude 'all sums due to any workman or employee from the provident fund, the pension fund and the gratuity fund'.

The above provision is inserted possibly to avoid financial crisis arising out due to low proceeds of liquidation. This could be explained with an example. In case, the CD has no assets other than say Gratuity Fund of about 1 crores and employee contribution amount under PF of about 50

lakhs. Now if these sums form part of the Liquidation Estate then the Liquidator has to first allocate the above to pay for any unpaid corporate insolvency process costs and liquidation expenses, and if the CIRP and liquidation expenses amount to say Rs 50 lakhs, then the balance of 1 Crores alone will be available for distribution and that too to workers for the period of 24 months and employee dues

**In the matter of UCO Bank, Asset Management Recovery Branch Vs. the Recovery Officer, EPFO, and other, the NCLT Chennai held that there is no hesitation in holding that the EPFO was within its power to issue the order of attachment.**

for the period of 12 months and other dues following the waterfall mechanism under Section 53 of the IBC, then the workers or employees may get just a paltry sum as their dues and their assets will be used in paying other stakeholders, and thus this could be the intent of this provision in the code under Section 36(4) of the IBC to avoid a situation like this.

The dilemma for the Liquidator here is that, there is a legal fiction contained in Sec 36(4)(a) which specifically provides for exclusion of assets owned by third parties and further Sec 36(4)(a)(iii) specifically provides that PF, pension fund and Gratuity funds are excluded from the Liquidation Estate. Where the CD has not specifically provided funds for PF and or Gratuity then it is a further complication for the liquidator as EPF or Gratuity dues does not fall under the waterfall mechanisms under Section 53 of the IBC.

### 5. Judicial Pronouncements on Sec 36(4)

In the matter of *Alchemist Vs Moser Bear India Private Limited*, NCLT, 2019 it was held that even if there is a deficiency in pension fund, provident fund or Gratuity Fund, the Liquidator has to ensure that the funds are created and distributed to the workmen outside the Sec 53 waterfall. In this judgement the tribunal held that the liquidator must provide these funds, even if there was no diversion of such funds by the CD. Further, in the case of *Precision Fasteners Limited Vs EPF*, the liquidator appealed against the attachment of properties by the EPFO

and prayed for treating them as null and void. NCLT, Mumbai bench, vacated the attachment and held, that the entire arrears towards the EPF should be paid, before paying off the other creditors

Reiterating the importance of the PF dues, the NCLT, Chennai Bench, in the case of *The Assistant Provident Fund Commissioner & Recovery Officer, EPFO vs. Florind Shoes Private Limited*<sup>3</sup> and another held that the Liquidator can sell the assets of the CD as stated under IBC and first pay off the dues payable to the applicant before distributing the assets as stated under Section 52 and Section 53 of the Code.

In the matter of *UCO Bank, Asset Management Recovery Branch Vs. the Recovery Officer, EPFO, and others*, the Recovery Officer, EPFO, attached the immovable properties belonging to Pondicherry Textile Corporation Limited against which the Corporate Insolvency Resolution Process (CIRP) was initiated on a later date. During the pendency of the CIRP, the Recovery Officer, EPF, proposed to sell off the properties attached by him. Auction-sale of the properties was contested by the UCO Bank. The Division Bench concluded – 'What is sought to be recovered by the petitioner-Bank from Respondent No.2 is its debts which are included in Section 11(2) of the EPF Act. Therefore, there is no hesitation in holding that the EPFO was within its power to issue the order of attachment'. Furthermore, in the matter of *Standard Chartered Bank Vs. JVL Agro Industries Ltd*, the NCLT Ahmedabad directed the Liquidator to procure a new gratuity policy for the 403 employees whose premiums were not paid by the CD to the Insurance Fund created by the CD. However, in *Somesh Bagchi V NiccoCorpn Ltd*, the NCLAT held 'Gratuity does not form part of the Liquidation Estate'.

The above rulings and pronouncements make it difficult for the Liquidator to deal with distribution from the Liquidation Estate, where there is either the assets of the workers in the form of PF or Gratuity is part of the Liquidation Estate or deemed to be part of the Liquidation Estate as per some of these judicial pronouncements.

<sup>3</sup> NCLT Chennai, M.A.278 of 2019 in CP/522/IB/2018, decided on 5-12-2019.

## 6. Right to Life

In some of the judicial pronouncements, the Judiciary used the term 'Right to life', when it considered the workers dues such as PF, Gratuity or pension dues which are to take precedence over the other dues. In the Precision Fasteners Ltd V. EPFO case, the NCLT, Mumbai tribunal held that the 'right of all other creditors over the assets of the company is a property right, whereas workmen dues, more specially PF dues of workmen, are interwoven with Right to Life. The workmen all through their life save some portion of the hard earnings for their later life after retirement, and they cannot be treated on par with the creditors who are having a property right'.

**NCLAT, in Lanco Infratech case specifically held that it is not the liability of the Liquidator if no separate funds were created by the CD and thus there is a contradiction from the Moser Baer judgement.**

## 7. Overriding Effect of IBC over other laws, Section 238

IBC, to have overriding effect over any other laws, where there is a conflict, is the intent of this section under the code. Does, Section 238's overriding effect be applicable to distribution of dues payable to workmen with regards to the provisions under the EPFO Act or provisions of the Payment of Gratuity Act.

In *Alchemist Vs Moser Bear India Private Limited*, NCLT, 2019' it was held that even if there is a deficiency in pension fund, PF or Gratuity fund, the Liquidator has to ensure that the funds are created and distribute that to the workmen outside the Sec 53 waterfall. In this judgement the tribunal held that the Liquidator to provide these funds, even if there was no provision of such funds by the CD. Further, the tribunal, has held that the overriding effect of section 238 of the IBC over any other law for the time being in force, will not have any bearing over the assets of the workmen (relating to PF, Pension Fund, and Gratuity), lying in the possession of the CD, because the asset is not considered as the part of the Liquidation Estate.

This order was impugned by the Financial Creditor (FC)

State Bank of India, a secured Creditor of Moser Baer in *SBI Vs. Moser Baer* (Karamchari Union), where the limited question before the NCLAT, was whether gratuity dues formed part of the liquidation estate. NCLAT, in this case decided not to interfere with the order of the NCLT.

## 8. Contradicting Pronouncements

A contradictory view has been taken in the case of *The Regional Provident Fund Commissioner-I Vs. Karpagam Spinners Private Limited*. In this case, it was held by the NCLAT that, pursuant to Section 238 of the IBC, it will override anything inconsistent with the Code including the EPF Act and that the workmen dues as payable under the EPF Act, will not be considered in priority, to priority of payment under Section 53 of the IBC.

However, in the matter of *Savan Godiwala, (Liquidator of Lanco Infratech Ltd) vs. Apalla Siva Kumar* the Appellate Tribunal; the Liquidator submitted that, if there is no separate fund for gratuity payments, the same cannot be done from the running accounts of the CD. The NCLAT, in this case held among other considerations including the judicial precedent in Moser Baer case (NCLT), referred to Section 36(2) of the IBC to reason that the Liquidator holds the funds in the Liquidation Estate, in a fiduciary capacity for the purposes of distribution amongst creditors in terms of Section 53 of the IBC and further held that 'In a case, where no fund is created by a company, in violation of the Statutory provision of the Sec 4 of the Payment of Gratuity Act, 1972, then in that situation also, the Liquidator cannot be directed to make the payment of gratuity to the employees because the Liquidator has no domain to deal with the properties of the Corporate Debtor, which are not part of the liquidation estate'.

**In Somesh Bagchi Vs. Nicco Corpn Ltd, the NCLAT held 'Gratuity does not form part of the Liquidation Estate'.**

Contradictions in the NCLAT pronouncements between the Lanco Infratech and Moser Baer are explained in the table below:



Lanco Infratech case	Moser Baer Case
NCLT directed that Liquidator should pay Gratuity dues to the employees even when the CD has not created separate Gratuity funds and held that Gratuity Fund do not form part of the Liquidation Estate even when no specific funds were created by the CD.	NCLT by order held that PF dues, Pension fund dues, Gratuity Fund dues do not form part of the Liquidation Estate and cannot be part of Section 53 dues
NCLAT, while hearing the appeal held that where there are no specific funds created for Gratuity, the Liquidator should not have been directed to make the payment for Gratuity as per the workers entitlement.	NCLAT upheld the stand of NCLT
NCLAT, in this judgement specifically held that it is not the liability of the Liquidator if no separate funds were created by the CD and thus there is a contradiction from the Moser Baer judgement.	NCLAT, in this judgement held that, the Liquidator cannot avoid the liability to pay Gratuity dues to the employees, on the premise that no separate fund was created by the CD.

### 9. Whether Interest and damages form part of PF dues

Under Section 7Q of the EPFMP Act 1952, an employer (CD) is liable for payment of simple interest at the rate of 12% on the PF contributions due to the EPFO, from the date on which the amounts become payable and due. Under the IBC context, where the CD has not provided funds to the EPFO, then the interest liability under this section accrues till the date of settlement of the dues and the EPFO, when they submit the claims to Liquidator under liquidation calculate interest under Section 7Q, till the date they submit the claim and often update the claims with additional interest till there is a settlement of dues of the EPFO. Thus, interest under EPFO is a running liability for the Liquidator to settle during the distribution under Liquidation.

In the case of *Tourism Finance Corporation of India Ltd.*

*vs. Rainbow Papers Ltd.*, and others, the RP stated that the approved Resolution Plan has duly taken care of all the statutory dues, and the principal amount of PF has been taken into consideration. In contrast, the order of levying of interest by the PF authorities after the commencement of the CIRP is not permissible under the law. He further claimed that the provisions contained in Section 7Q and Section 14-B of the EPFMP Act, 1952, cannot be relied upon as the provisions of the IBC have an overriding effect on the same in terms of Section 238 of the Code.

The NCLAT, New Delhi, directed the RP to release the full amount of Provident Fund, including the interest thereon in terms of the provisions of the EPFMP Act, 1952 immediately, as these dues are not to be included as an asset of the CD.

### 10. Conclusion

While it is justifiable that the right to life is a very crucial fact to be considered by a liquidator while dealing with the distributions of dues to the workmen and Sec 36(4)(a)(iii) rightfully protects the dues of the workers even when a CD has not provided for PF or Gratuity Fund. Suggestions on how the PF and Gratuity dues payable can be dealt with under Section 53 of the IBC waterfall mechanism. Considering the provisions and various judgements, the present status of dealing with PF, Gratuity Fund and Pension Fund could be explained as follows:

**There is need to amend waterfall mechanism prescribed in Sector 53 of the IBC. The Central Government should take a clear stand and initiative on this issue. Besides, the IBBI should come out with the revised set of Regulations**

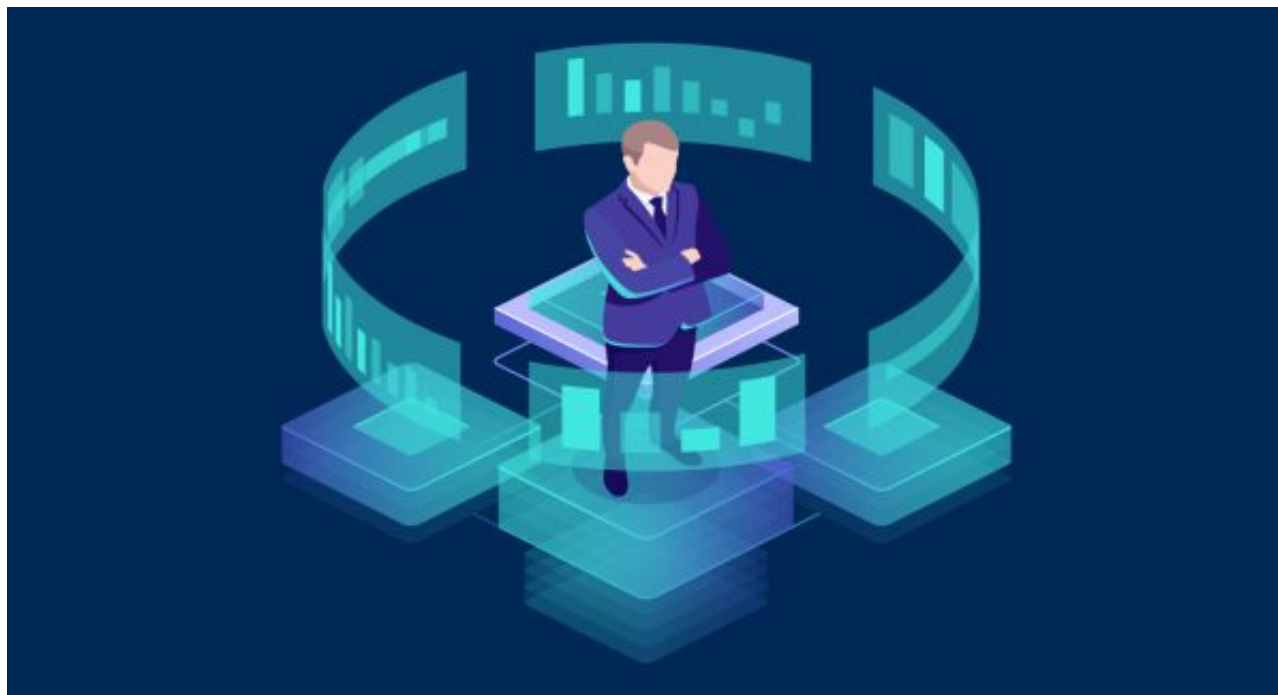
There is need to amend waterfall mechanism prescribed in Sector 53 of the IBC. The Central Government should take a clear stand and initiative on this issue. Besides, the Insolvency and Bankruptcy Board of India (IBBI) should come out with the revised set of Regulations on treating PF, Gratuity dues and the treatment of Interest and penal charges where they do not directly accrue to the workers. This can save the Liquidator from dilemma related to treatment of these crucial dues under the IBC and also save time in litigation and to allow for timely completion of the Liquidation under the IBC.



Heads	Fund Created or Not
<b>PF Principal Dues</b>	If the CD has created PF Fund, then the same to be not forming part of the Liquidation Estate and the Liquidator to exclude that as per Sec 36(4)(a)(iii). If No fund Created by the CD, then the PF Principal dues payable to the EPFO be paid by the Liquidator, as a priority from the Liquidation estate.
<b>Interest Payable Under Section 7Q of the EPFO &amp; MP Act 1952</b>	Interest payable under Section 7Q is more of a late payment charge and does not accrue to the workers or employees and is a Government due for delays by the CD. It is agreed that had the CD deposited the principal dues on time the workers/employees would have earned their interest contributions from the Government. However, when interest is claimed as default due under Section 7Q, the same is not being credited to the workers. Hence, interest which is an accrued liability under Section 7Q of the EPFO and payable to EPFO from the time there is a default on payment of EPFO dues till the date of actual payment. However, interest under this section does not accrue to the workers/employees and is more of a statutory dues to the Central Government agency and hence this be treated as Statutory dues payable to the Government agencies and be accorded lower priority in line with the waterfall mechanism under Section 53.
<b>Penalties and damage payable under Section 14B of the EPFO</b>	As suggested for interest payments under Section 7Q, the penal payments for damages be also treated as Governmental dues as these do not accrue to the workers and accordingly clubbed under other Statutory dues to Government and dealt in accordance with the waterfall mechanism under Section 53 of the IBC.
<b>Gratuity</b>	If Gratuity Fund is created separately by the CD, then the same to be excluded by the Liquidator under Section 36(4) of the Code for distribution. If no specific fund created by the CD for Gratuity, then the Liquidator to estimate two years dues of Workers and one-year dues of Employees and provide that as per Sec 53 Waterfall mechanism.



## Role and Responsibilities of RPs: PPIRP Vs. CIRP



*The concept of Pre-packaged Insolvency Resolution Process (PPIRP) was introduced by way of an amendment in the IBC through an Ordinance w.e.f. April 4, 2021, which has replaced with an Act of the Parliament in August 2021. One of the important features of the PPIRP for MSMEs is that it allows the company, if eligible under section 29A, to submit the Base Resolution Plan (BRP) which may be exposed to challenges for value maximisation. In the present article the author analyses the provisions of the law from the perspective of an Insolvency Professional (IP) and highlights the roles and responsibilities an Interim Resolution Professional (IRP)/ Resolution Professional (RP) before and during the initiation of PPIRP. **Read to know more...***



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### **1. Introduction**

The Insolvency and Bankruptcy Code, 2016 (IBC or the Code) provides for insolvency of corporate persons facing financial distress. The Code provides two broad processes for resolution of corporate persons, firstly the Corporate Insolvency Resolution Process (CIRP) and secondly, Pre-packaged Insolvency Resolution Process (PPIRP) which is limited to Micro Small and Medium Enterprises (MSMEs). The concept of PPIRP for MSMEs is rather new which was introduced in the IBC by the IBC (Amendment) Ordinance, 2021 on April 4, 2021. It is available for MSMEs as an alternate option for stakeholders and is being considered favourable to promoters in particular. IBC defines the PPIRP as the insolvency resolution process for corporate persons under Chapter III-A of Part II of the Code<sup>1</sup>. It involves five phases - Pre-initiation, Application for Initiation, Post-initiation, Approval of Resolution Plan, and Closure of PPIRP.

### **2. Classification of MSMEs**

As the PPIRP is presently applicable only for financial

<sup>1</sup> Rule 3(b) of the Insolvency and Bankruptcy (Pre-packaged Insolvency Resolution Process) Rules, 2021

stressed MSMEs, it becomes pertinent to have an understanding of the MSMEs as per the government

Manufacturing Enterprises and Enterprises Rendering Services			
Classification	Micro	Small	Medium
Investment in Plant & Machinery	Not more than ₹ 1 crore	Not more than ₹ 10 crore	Not more than ₹50 crore
Annual Turnover	Not more than ₹ 5 crore	Not more than ₹ 50 crore	Not more than ₹ 250 crore

norms. The classification of the MSME has been revised w.e.f. July 1, 2020, which is as under<sup>2</sup>:

### 3. Difference between CIRP and PPIRP for MSMEs

The PPIRP for MSMEs is covered under Chapter III-A of the IBC consisting of Section 54A to 54P, which was inserted by the IBC (Amendment) Ordinance, 2021 and

the same was replaced by the IBC (Amendment) Act 2021 in August 2021. Pursuant to the enactment, the IBC (PPIRP for MSMEs) Rules, 2021 and the IBBI (PPIRP for MSMEs) Regulations, 2021 were laid down. The Rules provide a Form for filing 'Application by Corporate Applicant to initiate PPIRP' and the Regulations prescribe 13 different Forms to be completed during the process. The

CIRP	PPIRP
The CIRP is applicable for all Corporate Debtors (CDs) including the MSMEs.	The PPIRP is applicable for a CD classified as MSME only.
It is formal.	It is informal upto a point and formal thereafter.
CIRP application can be filed by Financial Creditor/s, Operation Creditor/s, and also voluntarily by promoters of the CD under Section 10 of IBC	Only promoters can file for PPIRP
It is creditors in possession.	It is a hybrid model of debtor-in possession and creditor in control.
It is fully public process.	It is neither fully private nor a fully public process.
It is more rigour than PPIRP.	Less rigorous than CIRP, but keeps spirit of CIRP sacrosanct.
No concept of Base Resolution Plan (BRP).	It allows the company, if eligible under section 29A to submit the Base Resolution Plan (BRP) which may be exposed to challenges for value maximisation.
It has comprehensive role of the Adjudicating Authority (AA) and the IPs.	It entails a limited role of the AA and IPs

difference between the two processes could be explained as follows:

### 4. Eligibility for initiation of PPIRP

An application for initiating PPIRP may be made in respect of a CD classified as a micro, small or medium enterprise (MSME) under sub-section (1) of section 7 of the Micro, Small and Medium Enterprises Development Act, 2006<sup>3</sup>. Thus a CD is eligible for initiation of the PPIRP, if:

- It has been classified as MSME having a valid Udyam registration certificate;
- It has committed a default of at least ₹10 lakh<sup>4</sup>;
- It is eligible to submit a resolution plan under section 29A of the IBC read in conjunction with section 240A;
- It has not undergone a PPIRP during the three years preceding the initiation date;
- It has not completed a CIRP during the three years preceding the initiation date;

<sup>2</sup> Gazette Notification No. S.O. 1702(E) dated 1st June, 2020 (May be you want to explain here in a line or two how plant & machinery is calculated)

<sup>3</sup> Section 54A(1) of IBC, 2016

<sup>4</sup> Notification No. S.O. 1543(E) dated 9th April, 2021

- f) It is not undergoing a CIRP; and
- g) It is not required to be liquidated by an order under section 33 of the Code.

### 5. Eligibility of Resolution Professional

Resolution professional (RP) is an IP appointed to conduct the CIRP or the PPIRP, as the case may be, and includes an IRP<sup>5</sup>. The IP to be appointed as IRP/RP should be independent of the CD<sup>6</sup>. The law provides that an IP shall be considered as independent of the CD, if:

- a) He is eligible to be appointed as an independent director on the board of the CD under section 149 of the Companies Act, 2013 (18 of 2013), where the CD is a company;
- b) He is not a related party of the CD; or
- c) He is not an employee or proprietor or a partner-
  - (i) of a firm of auditors or secretarial auditors or cost auditors of the CD; or
  - (ii) of a legal or a consulting firm, that has or had any transaction with the CD amounting to five per cent. or more of the gross turnover of such firm, in any of the preceding three financial years.

**PPIRP is a hybrid model of debtor-in possession and creditor in control while CIRP under IBC is purely 'creditors in possession' model.**

The RP, who is a director or a partner of an Insolvency Professional Entity (IPE), shall be ineligible to continue as RP in a process, if the IPE or any partner or director of such IPE represents any of the stakeholders in the same process.

### 6. Duties of RP in CIRP

- a) Before, we discuss the role of RP in PPIRP, it is also important to discuss the duties of the RP as provided in Section 25 of the Code. The following points highlight the duties of RP:
- b) To preserve and protect the assets of the CD.
- c) To continue business operations of the CD.

<sup>5</sup> Section 5(27) of IBC, 2016

<sup>6</sup> Regulation 7 of The IBBI (Pre-packaged Insolvency Resolution Process) Regulations, 2021.

- d) To take immediate custody and control of all the assets of the CD, including the business records of the CD.
- e) To represent and act on behalf of the CD with third parties, exercise rights for the benefit of the CD in judicial, quasi-judicial or arbitration proceedings.
- f) To raise interim finances subject to the approval of the committee of creditors under section 28.
- g) To appoint accountants, legal or other professionals in the manner as specified by Board.
- h) To maintain an updated list of claims.
- i) To convene and attend all meetings of the committee of creditors.
- j) To prepare the Information Memorandum (IM) in accordance with section 29.
- k) To invite prospective resolution applicants, who fulfil such criteria as may be laid down by him with the approval of committee of creditors, having regard to the complexity and scale of operations of the business of the CD and such other conditions as may be specified by the Board, to submit a resolution plan or plans.
- l) To present all resolution plans at the meetings of the committee of creditors.
- m) To file application for avoidance of transactions in accordance with Chapter III, if any.

### 7. Duties of RP in PPIRP

The duties of RP in the case of PPIRP can be discussed in two phases: Before Initiation of PPIRP and During the Course of PPIRP.

#### 7.1. Before initiation of PPIRP

PPIRP Commencement date is the date of admission of an application for initiating the pre-packaged insolvency resolution process by the AA under clause (a) of sub-section (4) of section 54C<sup>7</sup>. In case of CIRP, there is no role of IRP/RP before the commencement date of CIRP but here in PPIRP for MSMEs the role of IP starts before the date.

<sup>7</sup> Section 5(23B) of the IBC, 2016



So, before the PPIRP commencement date, the IP have certain duties which have been mentioned in section 54B of the Code. This section provides that the IP, proposed to be appointed as the RP, shall have the following duties commencing from the date of the approval under clause (e) of sub-section (2) of section 54A, namely:

- (a) prepare a report in such form as may be specified, confirming whether the CD meets the requirements of section 54A, and the base resolution plan conforms to the requirements referred to in clause (c) of subsection (4) of section 54A. The report under section 54B (1) (a) shall be prepared in Form P8.
- (b) file such reports and other documents, with the Board, as may be specified; and
- (c) perform such other duties as may be specified.



**Before the PPIRP commencement date, the Insolvency Professional (IP) have certain duties which have been mentioned in section 54B of the IBC.**

#### 7.1.1. Disclosure of cost by RP

The RP shall make disclosures at the time of his appointment and, thereafter, in accordance with the code of conduct as set out in the IBBI (Insolvency Professionals) Regulations, 2016<sup>8</sup>. Furthermore, the RP is mandatorily required to disclose item wise process costs in such manner as may be required by the IBBI (Board).

#### 7.1.2. Cessation of duties of IPs

The duties of the IP shall cease<sup>9</sup>, if, —

- (a) the CD fails to file an application for initiating PPIRP within the time period as stated under the declaration referred to in clause (f) of sub-section (2) of section 54A; or

- (b) the application for initiating PPIRP is admitted or rejected by the AA, as the case may be.

#### 7.2. During the course of PPIRP

The RP during the course of PPIRP of a CD shall perform the following duties<sup>10</sup>:

- a) To confirm the list of claims submitted by the CD under section 54G, in such manner as may be specified: The RP shall confirm the details of the list of claims submitted by the CD under section 54G(1) in Form P10 and shall inform every creditor regarding its claims and seek objections, if any, and may also call for the evidence or clarifications from a creditor for substantiating the whole or part of its claim<sup>11</sup>.
- b) To maintain an updated list of claims, in such manner as may be specified
- c) To monitor management of the affairs of the CD
- d) To constitute the Committee of Creditors (CoC) and convene and attend all its meetings;
- e) To inform the CoC in the event of breach of any of the obligations of the Board of Directors or partners, as the case may be, of the CD, under the provisions and the rules and regulations made thereunder.
- f) To prepare the information memorandum on the basis of the preliminary information memorandum submitted under section 54G and any other relevant information, in such form and manner as may be

<sup>8</sup> Regulation 11 of the IBBI (Pre-packaged Insolvency Resolution Process) Regulations, 2021

<sup>9</sup> Section 54B(2) of the IBC, 2016

<sup>10</sup> Section 54F(2) of the IBC, 2016

<sup>11</sup> Regulation 20 of the IBBI (Pre-packaged Insolvency Resolution Process) Regulations, 2021

<sup>12</sup> Regulation 19 of the IBBI (Pre-packaged Insolvency Resolution Process) Regulations, 2021

specified.

- g) To file applications for avoidance of transactions under Chapter III or fraudulent or wrongful trading under Chapter VI, if any; and such other duties as may be specified.

**The RP is required to preserve a physical as well as an electronic copy of the records relating to the process of the CD as per the record retention schedule.**

### 7.2.1. Public announcement

The RP shall make a public announcement within two days of the commencement of the process<sup>12</sup>.

The public announcement referred to in sub-regulation (1) shall be-

- (a) in Form P9;
- (b) sent to every creditor listed in Form P2;
- (c) sent to information utilities; and
- (d) published on the website, if any, of the CD and the Board.

### 7.2.2. Determination of amount of claim<sup>13</sup>

(1) where the amount of claim of a creditor is not precise due to any contingency or other reason, the RP shall make the best estimate of the amount of the claim based on the information available with him.

(2) The RP shall revise the amount of claims confirmed, including the estimates of claims made under sub-regulation (1), as soon as may be practicable, when he comes across additional information warranting such revision.

### 7.3. Preservation of records<sup>14</sup>

The RP shall preserve a physical as well as an electronic copy of the records relating to the process of the CD as per the record retention schedule, as may be required by the IBBI in consultation with Insolvency Professional

Agencies (IPAs).

## 8. Powers of the RP during the PPIRP<sup>15</sup>

The RP shall exercise the following powers:

- a) To access all books of accounts, records and information available with the CD: The RP may access the books of account, records, and other documents to the extent relevant for discharging his duties under the Code<sup>16</sup>, of the CD held with-
- b) members, promoters, partners, directors and joint venture partners of the CD;
- c) professionals and advisors engaged by the CD;
- d) depositories of securities;
- e) registries that records the ownership of assets; and
- f) contractual counterparties of the CD.
- g) To access the electronic records of the CD from an information utility having financial information of the CD.
- h) To access the books of accounts, records and other relevant documents of the CD available with Government authorities, statutory auditors, accountants and such other persons as may be specified.
- i) To attend meetings of members, Board of Directors and committee of directors, or partners, as the case may be, of the CD.

**The role as an IP in PPIRP ceases when the CD fails to file for initiation of PPIRP within the prescribed time or the AA admits or rejects the application.**

- j) To appoint accountants, legal or other professionals in such manner as may be specified: Regulation 10 provides that the resolution professional may appoint a professional under clause (e) of sub-section (3) of section 54F. The following persons shall not be appointed as a professional, namely:
  - i. a person who is not registered with the regulator of the profession concerned;
  - ii. a related party of the CD;
  - iii. an auditor of the CD at any time during the five

<sup>12</sup> Regulation 21 of the IBBI (Pre-packaged Insolvency Resolution Process) Regulations, 2021

<sup>14</sup> Regulation 12 of the IBBI (Pre-packaged Insolvency Resolution Process) Regulations, 2021

<sup>15</sup> Section 54F(3) of the IBC, 2016

<sup>16</sup> Regulation 9 of the IBBI (Pre-packaged Insolvency Resolution Process) Regulations, 2021

years preceding the pre-packaged insolvency commencement date;

- iv. a partner or director of the insolvency professional entity of which the resolution professional is a partner or director; or
  - v. a relative of the resolution professional or of a partner or director of the insolvency professional entity of which the resolution professional is a partner or director.
- k) To collect all information relating to the assets, finances and operations of the CD for determining the financial position of the CD and the existence of any transactions that may be within the scope of provisions relating to avoidance of transactions under Chapter III or fraudulent or wrongful trading under Chapter VI, including information relating to:
- i. business operations for the previous two years from the date of pre-packaged insolvency commencement date.
  - ii. financial and operational payments for the previous two years from the date commencement of PPIRP.
  - iii. list of assets and liabilities as on the initiation date and such other matters as may be specified.

## 9. Conclusion

In the case of CIRP, once admitted by the AA, the IP is designated as IRP which is required to be confirmed as RP or replaced with another RP in the first meeting of the CoC. There is no role of the IP before the admission of the application of CIRP by the AA. However, the case of PPIRP, the Code has cast some duties on IP as shown in Section 54B i.e., before the initiation of the PPIRP. Accordingly, the IP is required to prepare a report confirming whether the CD meets the eligibility criteria for PPIRP. The provision of Base Resolution Plan (BRP) conforms to the requirements of Section 54A(4)(c) and to file certain reports and documents with the IBBI. The role as an IP ceases when the CD fails to file for initiation of PPIRP within the prescribed time or the AA admits or rejects the application for initiation of PPIRP. After admission of the application for PPIRP by the AA, the nomenclature of the IP will change to RP and duties as specified in section 54F shall be applicable.

Thus, the PPIRP extends the jurisdiction of an MSME prior to the commencement date. This provision seems in the interest of small businesses as they would get professional assistance. However, the actual benefits to the financially distressed MSMEs will depend timely decisions and coordination among stakeholders.





## Case Study of Ruchi Soya Industries Ltd.

*The Corporate Insolvency Resolution Process (CIRP) of Ruchi Soya Industries Limited (RSIL), the CD (CD) has been an exciting and thought-provoking case of resolution under Insolvency and Bankruptcy Code, 2016 (IBC) with many firsts. It has not only resulted in a successful resolution and turnaround of CD but also established legal precedence and benchmarks in the Indian distressed asset resolution and turnaround space.*

*RSIL was part of the second list of 28 defaulters that Reserve Bank of India (RBI) flagged for resolution in August 2017. Pursuant to petitions filed by Standard Chartered Bank and DBS Bank Ltd under Section 7 of the IBC, the National Company Law Tribunal (NCLT), Mumbai Bench, vide order dated December 15, 2017 admitted application for initiation of CIRP for RSIL. Shri Shailendra Ajmera, Insolvency Professional (IP) was appointed as Interim Resolution Professional (IRP) who was later confirmed as Resolution Professional (RP) to manage the affairs of the CD.*

*With more than ₹ 12,000 crore of creditor claims, 26 members in the Committee of Creditors (CoC) and 11,000 employees and workers, timely crisis management and stabilization, stakeholder management, strategic focus, and process improvement initiatives during CIRP not only resulted in a successful resolution but also laid a strong foundation for the turnaround of the CD. A joint effort by the CoC, RP, Resolution Applicant, advisors of all parties and dedicated team of the CD led to the successful resolution of RSIL which was being watched very closely. Read on to know more...*



**Shailendra Ajmera**

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### 1. Business Profile of the Corporate Debtor

Starting its journey in 1986 at Indore, Ruchi Soya Industries Ltd (RSIL), the Corporate Debtor (CD) features among the leading FMCG (Fast Moving Consumer Goods) player in India. Known as a pioneer of Soya Foods in India, the RSIL has also been a manufacturer and marketer of a healthy range of consumer products including edible oils, vanaspati, and bakery fat. With access to more than two lac hectares of land for oil palm plantation and exclusive procurement rights thereof, it is one of the largest palm plantation companies in India.

The company (CD) had plants at 23 locations in India (Figure - 1), giving access to markets across the country. Majority of the plants are strategically located with access to national highways, railway rakes, ports, and pipelines. RSIL has more than 90 depots with storage and other logistical facilities, which serve 4,000+ distributors across the country reaching over one million retail outlets. More than 35% of distributors were associated with RSIL for over 10 years.

The company operated its business under various business segments - Crushing, Refining, Soya Products (food),




**CASE STUDY**  
CASE STUDY OF RUCHI SOYA  
INDUSTRIES LTD.

**Performance Analysis of**  
**CASE STUDY OF RUCHI SOYA**  
**INDUSTRIES LTD.**

Pre, During and Post CIRP  
Case Study by  
**Shailendra Ajmera**

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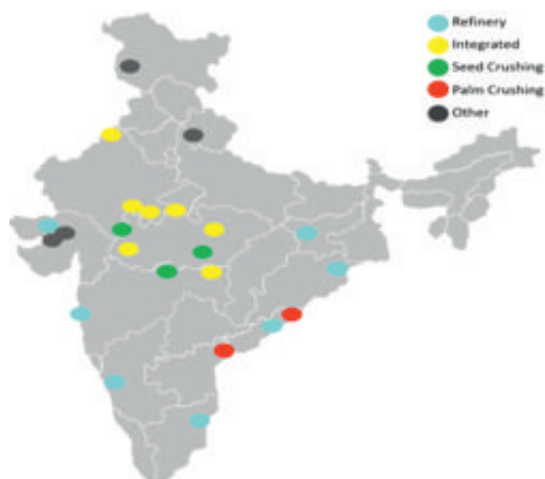


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**2021**



Wind Power Generation and Palm plantations. With more than 3.3 million MTPA (Metric Tonn Per Annum) of edible oil refining capacity and 3.7 million MTPA of oilseed extractions capacity, RSIL was one of the largest FMCG players in the country. The oil refining plants located near ports provided easier access to imported edible oil. Crushing units were located around an area conducive to seed cultivation.

**Figure 1: RSIL's pan-India presence**



The Company had more than 150 registered brand names - Nutrela (premium segment), Mahakosh, Sunrich, Ruchi Gold, Ruchi Star, Soyumm, Ruchi No. 1, and Bakefat being active ones. Further, RSIL enjoyed a significant 'consumer equity' and market leadership position in many branded product categories. With an experienced team, the average employee tenure was ~10 years. The Company had implemented SAP in 2008, with a majority of the operations automated with a strong control process. As on December 31, 2017 the CD has maximum 57% shareholding in Promoter Group followed by 41% shareholding in Public (Table-1).

**Table 1: RSIL shareholding as on December 31, 2017**

Sr. No.	Category	Shareholding (%)
1	Promoter group	57%
2	Public	41%
3	Institutional investors	01%
4	Others	01%

## 2. Pre-CIRP Performance: Reasons Behind Financial Stress

Since 2015, the symptoms of corporate decline were building up due to macro-economic as well as company-

specific factors. While the revenue was on a down-trend (Chart -1), the liabilities were rising at a fast pace. For the sake of simplistic understanding, the reasons behind financial stress could be presented as under:

### 2.1. Castor Seeds Trading

A large portion of revenue for the company was generated from commodity trading activities. The company actively traded in commodities like crude palm oil, crude soyabean oil, crude sunflower oil, and castor seeds. In 2015, prices of castor seeds rose to ~₹ 50,000/MT. Because of the bullish market scenario, the company had booked sizeable long positions in Castor Seed Contracts with the expectation to book huge profits. It held ~40% of the total market open position in February 2016 without hedging any of its exposure. However, on account of bumper new crop arrival of castor seeds and weak global demand, the February 2016 contract for castor seed fell by 20% in January 2016 leaving the company with huge cash loss in the quarter ending March 2016. The unexpected steep fall and sustained low prices of castor, unfavorable global demand factors and market environment intensely impacted the performance of the Company's castor business and significantly contributed to the unfavorable performance of the Company.

**With more than 3.3 Million MTPA of edible oil refining capacity and 3.7 Million MTPA of oilseed extractions capacity, RSIL was one of the largest FMCG players in the country.**

Securities and Exchange Board of India (SEBI) observed that there was a very high concentration on Open Interest in February 2016 Castor Seed Contract. This led National Commodity and Derivatives Exchange (NCDEX) to suspend the trading in Castor Seed Contracts on January 27, 2016. A detailed investigation by SEBI revealed that the company was in violation to the norms of Forward Market Commission (FMC), Government of India by holding such huge positions and was charged with manipulating the commodities market. The company, along with its other group company, was later suspended in May 2016 from dealing in the securities market to led to fall in its shares<sup>1</sup> by ~15%.

### 2.2. Low Capacity Utilisation

The company had set up its plants across the country which made it one of the largest players in the edible oil

<sup>1</sup> The Economic Times (2016): Ruchi Soya Shares Slide 15% on SEBI ban, May 25 <https://economictimes.indiatimes.com/markets/stocks/news/ruchi-soya-shares-slide-15-on-sebi-ban/articleshow/52430032.cms?from=mdr>

industry. RSIL had seven port-based refineries, seven fully integrated plants that could cater to both crushing of seeds and refining the oil extracted therefrom, and five exclusive crushing units. The total capacity of refining plants was 3.3mn MTPA and crushing plants was 3.7mn MTPA.

The widening disparity between international and domestic prices of Soya bean since 2015 reduced the competitiveness of exports of Soya bean from India. Consequently, several crushing plants of Ruchi Soya became non-viable due to low-capacity utilisation. Even at the peak turnover in 2015, the combined capacity utilisation of refineries was only 67%, which further dropped to 35% in 2017, and that of crushing units was 23% which dropped to a meagre 13%.

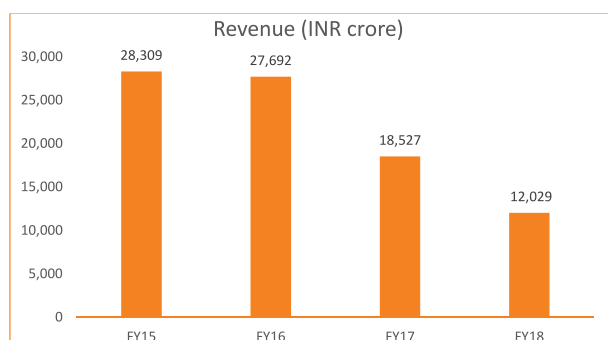
The company, being primarily engaged in agro-commodities, was heavily subject to the vagaries of nature. Since the country suffered from severe drought, the crop output/ area under cultivation for soya beans, a major raw material for the company, had significantly reduced which subsequently resulted in a decline in capacity utilisation of the crushing business segment.

## 2.3. Inadequate Working Capital

The EBITDA (Interest, Taxes, Depreciation, and Amortization) margins in the edible oil industry are already wafer thin on account of price volatility and high input and processing costs. Due to business being high volume driven and working capital intensive, the losses on account of castor trading (discussed above) lead to working capital constraints, and consequently lower capacity utilisation – further deteriorating EBITDA margins. Further due to weak economic outlook, the realisation of debtors was delayed leading to elongated working capital cycle. This led to an acute shortage of working capital required for maintaining such profitable operations.

With mounting financial troubles, the company defaulted on meeting its multiple financial obligations, thereby forcing the lender banks to refer the company to NCLT under the IBC.

**Chart-1: RSIL Revenue from FY 15 to FY 18**



## 3. Activities Prior to Commencement of CIRP

### 3.1. Restructuring Efforts Prior to CIRP Filing

To resolve the financial crisis, a Techno Economic Viability (TEV) study was reportedly carried out as per directions of the lenders. The outcome of the study showed that RSIL's business model had potential based on its strong brand position, goodwill and rich industry experience of the management. However the debt was not sustainable and had to be restructured.

**Widening disparity between domestic and international prices of Soya bean since 2015 reduced the competitiveness of exports of from India. Consequently, several crushing plants became non-viable due to underutilisation.**

Accordingly, the lenders discussed options to restructure the account under prevailing RBI guidelines. However, the restructuring efforts did not proceed further due to multiple issues such as forensic issues, the requisite majority of lender support etc.

### 3.2. IPs Study of the RSIL for Getting Sector Insights

While CIRP application of RSIL was pending before NCLT, Mumbai Bench, the IP and his team conducted a study of financially strained Company and its competitors for getting sector insights. Besides, SWOT (Strengths, Weaknesses, Opportunities, and Threats) was also prepared. After getting the assignment, this study proved vital in managing the business of the CD and also in discussions with the potential investors.

Some of the key sector trends that we gauged from the SWOT Analysis are summarized below:

- Imports accounted for nearly 65-70% of the total oil consumption in India for 2016-17.
- In 2017, India had become the largest importer of palm and soya oil in the world, as domestic production was not able to keep pace with the demand.
- The demand-supply gap widened due to the limited availability of oilseeds which in turn was caused by the shifting of acreage of oilseeds crops to other crops.
- In 2017, the total demand for edible oil was 23.5mn MT - palm and soya bean oil constituted ~45% and ~22% of total demand respectively

- v. Market demand grew at 6% between 2012 to 2017. The fastest-growing categories were soya bean and sunflower oil with CAGR of ~ 11.5%
- vi. In 2017, annual per capita consumption of oil was 16kg in India i.e., 24kg in developed markets.
- vii. Region wise oil consumption in India in 2015: West India accounted for 29% of the total oil consumption., followed by East (26%), North (25%) and South (20%)

#### 4. Key Events During CIRP Period

##### 4.1. Initial Assessment and Setting Ground Rules for an Efficient CIRP

Post receipt of the National Company Law Tribunal (NCLT), Mumbai order<sup>2</sup> admitting RSIL under CIRP, the IRP Shri Shailendra Ajmera along with his team, held meetings with the incumbent management of RSIL to take charge of its assets. There were series of discussions with key executives of the CD to understand the existing status of business operations and the organization structure. The IRP also informed the management regarding the provisions of the IBC, 2016, and laid down the roadmap for maintaining the business of the CD as a Going Concern (GC) during CIRP, including co-operation of and expectations from the incumbent management. Thereafter, RSIL's point of contact for critical functions such as Treasury and Finance, Human Resource, Plant Operations, Sales and Marketing, etc., were identified and mapped with IRP's representatives with a view to closely monitor and ensure seamless business performance at such a critical juncture.

As the IPs team had consciously developed sector knowledge before admission of the case, the team managed to understand the key intricacies of the business in the first few weeks of CIRP period. Further, potential concerns and risks associated with maintaining the business as a were identified, and measures were undertaken to address the same - some of which have been highlighted here:

##### (a) Constitution of the Committee of Creditors (CoC)

After the commencement of CIRP, claims were invited from all the financial and operational creditors. The total

claims admitted were ~₹ 12,145 crore of which ~₹ 9,384 crores pertained to financial creditors and ~₹ 2,761 crore pertained to operational creditors. The CoC constituted of 26 financial creditors comprising of SBI being the lead bank with ~20% share followed by Central Bank of India with ~9% share and Punjab National Bank with ~8% share. Pursuant to the first meeting of CoC held on January 12, 2018, the CoC, unanimously confirmed the IRP as RP.

**Since the cash balance of CD was nil and it no longer enjoyed working capital credit facilities, a system of 13-week rolling cash flow forecast was formulated and cash needs were determined. Short-term cash generation was the top priority.**

##### (a) Protection of RSIL's Assets: Teams Deployed at Plants

As soon as CIRP commenced, the IRP team visited plants and established contact with the operations' team on the ground, and laid out an action plan to win the confidence of all the local stakeholders, including but not limited to employees, suppliers, customers, statutory bodies, etc. These efforts not only provided clarity about CIRP to the stakeholders but also served as a significant step towards maintaining the business as a GC.

Further, additional external security teams were deployed at 13 plants, based on an initial assessment, to ensure the safety of the existing asset base. The CD had strategically located port-based refineries and inland crushing units, which could cater to respective geographic demand. Further, oil palm plantations and windmill operations were also critical business segments. To generate the investor interest and maximize the value of the CD, protecting these assets was vital.

##### (b) Operational Dependence on Related Parties: Requisite Approvals Sought Prior to Transactions

Certain assets such as storage tanks and crude oil pipelines between port and plants were controlled by related parties. Considering the nature of business, continuation of these services (storage, rental, etc.) was critical for maintaining the business as a GC. Therefore, RP with his team reviewed the contracts, visited the relevant sites, held meetings with representatives of supplier entities, and benchmarked the transaction and market prices. Further, requisite approvals of CoC were obtained periodically, so that transactions could be undertaken on an arm's length

<sup>2</sup> Business Standard (2017): Videocon, JP Associates, IVRCL on RBI's 2nd list of loan defaulters: Report, August 29 ([https://www.business-standard.com/article/companies/rbi-s-second-list-of-loan-defaulters-contain-40-companies-reports-117082900686\\_1.html](https://www.business-standard.com/article/companies/rbi-s-second-list-of-loan-defaulters-contain-40-companies-reports-117082900686_1.html))

price. Pursuant to these steps, contracts were extended with a view to maintain the business as a GC.

**“As per terms of the process, if the interested parties decided to withdraw, their EMD was to be refunded and access to VDR withdrawn. If they decide to submit the resolution plan an additional EMD of ₹ 50 crore was required.”**

### **(c) Cash Crunch and Working Capital Challenges: Implemented Stringent Controls and Unlocked Opportunities**

During the period leading up to the commencement of CIRP, the company faced with severe liquidity crunch on account of declining revenue, negative EBITDA margins, and increased finance costs. On CIRP commencement day, the CD had a nil cash balance. Since the company no longer enjoyed working capital credit facilities, it was evident that maintaining it as a GC would be an uphill task.

To mitigate the above risk, a system of 13-week rolling cash flow forecast was formulated and cash requirements were determined. The short-term cash generation was the top priority. Liquidity opportunities were identified to generate cash and bridge the cash gap. A detailed plan was drawn to generate liquidity from the existing balance sheet including recovery of outstanding dues from sticky debtors, tax refunds, windmill receivables from government agencies, inventory optimization, etc. Further, a robust payment approval process was set up to ensure there were no financial leakages in the system. All the bank accounts of the CD were reviewed, and appropriate actions were taken to ensure increase liquidity like closure of non-consortium accounts, levying debit freeze, change of signatories and transfer of funds to central a/c.

Focus on liquidity throughout the CIRP period, helped improve the cash balance from nil on commencement of CIRP to ₹ 400 crore within 18 months.

### **(d) Large Creditor Base with Substantial Overdue across Suppliers – Procurement from Intermediaries/Financers**

On account of inadequate working capital availability, the overdue amount to all suppliers and other stakeholders had piled up to huge sums. Out of total claims received from creditors against the CD, ₹ 2,761 crore was due to Operational Creditors (OCs).

Additionally, as the CD was amongst the first few large accounts on which CIRP was initiated, suppliers were still coming to terms with the process and with the possibility of loss of their dues. This increased the risk perception in the eyes of the vendors making it further difficult to obtain critical materials and services necessary to maintain the business as a GC.

Owing to the uncertainties looming over recovery of their existing dues, key raw material suppliers and transporters abstained from offering any credit period to the CD for future transactions. Further, certain stakeholders agreed to continue solely in the event of a revision of existing payment terms i.e. a shift to terms requiring advance payments.

As stated earlier over 80% of the input costs pertained to imported raw materials where payment through letter of credit was a norm. Palm-based raw materials were imported through countries such as Indonesia and Malaysia where shipment times ranged from 7 to 14 days. On the other hand, Sunflower and Soyabean based materials were imported from South American countries where shipment times were close to 45-60 days. Given the crunch in working capital, the RP team in consultation with the supply chain heads determined that imports from South American countries which had longer lead times be done through reputed intermediaries who would carry the stock on their book till it arrived in India. RSIL would pick it up once goods arrived in India relieving critical working capital which would have otherwise been stuck.

While this arrangement led to additional finance costs, it resolved the short-term cash requirements and allowed the company to steadily increase its capacity utilization levels from ~35% to ~55% - thereby stabilize revenue (₹ 12,000 crore per annum) and improve profitability. Despite being in CIRP, the Company was able to generate EBITDA of ₹ 222 crores and PAT (Profit After Tax) of ₹ 77 crores for the year ended 31st March 2019.

### **4.2. Getting Resolution Plan for the CD**

Since RSIL was among the second list of 28 defaulters<sup>3</sup> flagged by RBI for resolution, there were limited domestic precedents on the manner in which the resolution process be conducted. RP's team involved members having rich and practical experience of dealing with insolvency laws in the United Kingdom, and a detailed plan was outlined

<sup>3</sup> NCLT Mumbai (2017): CP 1371 & CP 1372/ I&BP/ NCLT/ MAH/ 2017, December 15



on the manner in which the resolution process be conducted.

Subsequently, on February 05, 2018, the RP published an invitation for expression of interest (EOI) in the newspapers. The published invitation for EOI also had stated timelines and parameters based on which the entities would be eligible to submit their EOI. The RP and his team interacted with ~150 prospective strategic and financial investors via emails, calls, and meetings, and explained the investment opportunity and shared a teaser.

RP received EOIs from 28 parties. After an interested party had furnished Earnest Money Deposit (EMD) of ₹ 25 lacs and signed a non-disclosure agreement, access to the Virtual Data Room (VDR) was provided for sharing Information Memorandum (IM) and relevant details to help them evaluate the investment opportunity.

RP's team worked with the legal counsel to put a well-defined Process Memorandum in place which was placed before the CoC for inputs and their feedback was incorporated. The Process Memorandum established the guidelines about sharing information with the Potential Resolution Applicants (PRAs), and evaluation of resolution plans, contents of the plan, T&C for submission of resolution plans, conditions subsequent, EMD/ Performance deposit, etc. Manner of information sharing, the mechanism for redressal of queries, key milestones for the data diligence etc. were clearly laid down in the process memorandum itself to avoid any ambiguities.

**Pursuant to discussions among RP, CoC and legal advisors, the Swiss challenge system was adopted for the first time under the IBC**

Out of 28 EOIs that were received, 26 met the eligibility criteria and were given data room access. 24 of these shortlisted investors paid EMD of ₹ 25 lacs and started the first round of due diligence. RP, along with his team, provided detailed clarification to every query raised by the parties which would facilitate their decision making.

As per terms of the process, in case the interested parties decided to not invest in the CD, the EMD received was refunded and access to VDR withdrawn. However, in case the interested parties decided to move ahead and submit the resolution plan, they were required to furnish an additional EMD of ₹ 50 crore.

While 28 EOIs were received, as the process progressed with due diligence, plant visits, management meetings,

etc., the resolution plans were received only from four parties. Further, compliant resolution plans were received from two parties i.e. Adani Wilmar Limited (AWL) and Patanjali Group lead by Patanjali Ayurveda Ltd. (PAL).

To compare the two resolution plans, an evaluation criteria was proposed by the RP, discussed at CoC meetings and reviewed by an independent process advisor appointed by CoC. Thereafter, the CoC finalised the criteria and an evaluation matrix was formulated, which formed part of a comprehensive process memorandum. This matrix would result in scoring of the resolution plan on seven parameters, listed herein below:

- i. Upfront cash recovery
- ii. NPV factoring upfront cash recovery based on certain stated discount rates
- iii. Equity upside
- iv. Fresh equity infusion for improving operations
- v. Reasonableness of financial projections
- vi. Ability to turnaround distressed companies
- vii. Standing of the bidder in the sector

The CoC conducted commercial negotiations with above qualified applicants during which applicants could improve their commercial offer in a two step Swiss Challenge process. The offer could be improved only on identified criteria (upfront cash recovery, NPV, equity upside, and fresh equity infusion) which were aligned to the evaluation matrix. The negotiation process was consented to by the RAs and supervised by an independent bid advisor. Also, discussions w.r.t legal aspects (drafting and compliance) were conducted among the legal advisors of RP, CoC and Resoluiton Applicants (RAs).

Few members of RP team had an extensive experience of handling insolvency resolutions under insolvency laws of the United Kingdom. Accordingly, the team was successful in developing innovative and practical approaches/ solutions to maximize the value of the asset. Pursuant to discussions among RP, CoC and legal advisors, the Swiss challenge system was adopted for the first time under the IBC, with an objective of resolution of RSIL. Under this system, lower bidders were given chance to match the higher bidder and if matched then highest bidder was asked to improve its bid. After all rounds of bidding were completed, AWL stood as the highest bidder with the total bid amount of ~₹ 4,300 crore against total claims of ~₹ 12,000 crore while PAL stood H2 with a total

bid amount of ~₹ 4,064 crore. AWL having secured a higher score as per the evaluation matrix (including commercial offer) was declared as the successful Resolution Applicant.

On August 23, 2018, the resolution plan of AWL was put to vote before the CoC and was approved with 96.8% CoC consent. However, PAL immediately filed an application before NCLT challenging the decision of the CoC's approval to AWL's Resolution Plan. PAL challenged the eligibility of AWL to submit the resolution plan under section 29A of IBC and the process adopted for negotiation.

**After extensive deliberations and multiple hearings, the NCLT vide its order dated September 06, 2019, approved the resolution plan of PAL with certain modifications which were duly accepted by PAL**

The resolution plan of AWL as approved by CoC couldn't be implemented due to matter pending before the NCLT. Citing delays in the resolution process and concerns over the deterioration of CD's assets, AWL withdrew its resolution plan in December 2018. Meanwhile, PAL also shown its inclination to match the offer made by AWL.

Pursuant to the above, PAL, being the only resolution applicant, increased its bid offer to ₹ 4,235 crore towards settlement of creditors and an additional equity infusion of ₹ 115 crore for improving the operations of the Company. CoC approved Resolution Plan submitted by PAL on April 30, 2019. NCLT approved the same on September 06, 2019

### 4.3. Crucial Litigations

Post commencement of CIRP, the CD was faced with multiple litigations which delayed the resolution process. Some of the contentious issues are briefly discussed as follows:

#### (a) Recovery by lender during CIRP

One of the financial creditors had recovered ~₹ 48 crore from the CD post commencement of CIRP. As this particular recovery happened during the period of moratorium, lender could not have taken any coercive recovery action against the CD. The RP approached NCLT to direct lender bank to reverse transaction since once moratorium has been effective in relation to the CD, neither any assets belonging to the CD can be transferred,

alienated or disposed off nor can any action for foreclosure or recovery of security interest created by the CD can be taken. While lender contested stating that these recoveries were in the normal course of business and that it was merely honouring the LC's issued in favour of third party suppliers, the relief was granted to the CD by NCLAT<sup>4</sup> and subsequently the amounts were reversed to the account of CD.

#### (b) Suspended Board of Directors to be Given Access to CoC Proceedings: Vijay Kumar Jain v/s Standard Chartered Bank & Others

IBC does not specify whether erstwhile directors be allowed to participate in CoC meetings. Accordingly, in this case, they weren't privy to any of the proceedings at CoC meetings.

Mr. VK Jain, erstwhile director of the CD, had filed an application before the Supreme Court of India seeking directions to the RP to provide all relevant documents including the resolution plans to the members of the suspended Board of Directors of the CD, which would facilitate them in participating in the CoC meetings. Based on directions of the Supreme Court<sup>5</sup>, RP shared the resolution plans with the suspended board of directors.

### 5. Approval of the Resolution Plan

The resolution plan submitted by the consortium led by PAL was approved by the NCLT Mumbai vide order<sup>6</sup> dated July 24, 2019 subject to filing affidavit by the RA regarding the acceptance of the modifications in the resolution plan and submitting other information as per the directions given in the order. With this order, the CoC members were elated hoping that once Resolution Applicant complies with the directions of the NCLT, they would be home soon (in the quarter ending September 2019) after driving through a long bumpy road.

However, the Resolution Applicant was not in agreement with one specific paragraph in the order which stated that "Any relief sought for in the Resolution Plan, where the contract/agreement/ understanding/proceedings/ actions/notice, etc. is not specifically identified or is for future and contingent liability, is at this moment rejected."

<sup>4</sup> NCLAT (2018): Company Appeal (AT) 390/2018, July 24

<sup>5</sup> Vijay Kumar Jain v/s Standard Chartered Bank & Others., Supreme Court, Civil Appeal No. 8430 of 2018 with Writ Petition (Civil) No. 1266 of 2018, January 31, 2019.

<sup>6</sup> NCLAT (2019): MA 1721/2019, MA 1428/2019, MA 1746/2019, & MA 1816/2019, In CP (IB) 1371 & 1372 (MB)/2017, Under Section 30 (6) of the IBC, July 24.

After extensive deliberations and multiple hearings, the NCLT vide its order dated September 06, 2019 approved the resolution plan of PAL with certain modifications which were duly accepted by PAL, the RA. In its order, NCLT also inter-alia clarified that "...it is to be made clear that while approving the resolution plan, we have dealt with every aspect of the resolution plan in details and all the claims which have been admitted during CIRP are being dealt with by us in terms of the resolution plan. Anyone who has not filed its claim then he will not have any right to agitate the same after the approval of the resolution plan."

## 6. Formation of Monitoring Committee

Now with absolute clarity in place, the Monitoring Committee (MC) was formed as per the terms of the resolution plan with three representatives from FCs, three representatives of the RA, the RP as Monitoring Agent (MA), and one observer from RA. The MC was entrusted with the responsibility to supervise the implementation of the Resolution Plan and manage the operations of the Company as a GC in the interim.

**In accordance with the approved Resolution Plan, the FCs received ₹ 4,093 cr against claims admitted of ₹ 9,385 cr which is about 44% of the total admitted claims.**

At that time, there was no major precedence available as to how would monitoring committee function and meet its end objective. However, the MA along with its legal and process advisors prepared a comprehensive document laying out terms of reference and charter for the MC to function. The document was well perceived by the representatives from the RA and CoC and was taken on record in the first monitoring committee meeting.

### The document broadly laid out:

- i. Background and Objective of the Monitoring Committee (MC)
- ii. Constitution of MC
- iii. Governance Structure
- iv. Manner of Voting and Decision Making
- v. By Rules of the MC Meeting
- vi. Routine Functioning and Controlling Mechanism
- vii. GC Activities
- viii. Compliances and Record-Keeping

With the rules now clearly laid down, the RA was required to implement the Resolution Plan and settle creditors within 75 days from the effective date.

## 7. Implementation of the Resolution Plan

During the next 2 months, MC met frequently to review the progress of the steps that were supposed to be taken for implementation of the Resolution Plan and the funding arrangement of the RA. The implementation of the Resolution Plan involved giving effect to the transaction structure proposed in the Resolution Plan which involved steps such as capital reduction, funding at Special Purpose Vehicle (SPV) level, and merger of SPV into the CD.

During the implementation process, creditor-wise distribution was worked out to the exact rupee and an Escrow Account was opened for funding and settlement of creditors. Finalization and execution of escrow agreement was a herculean task with 26 creditors. Some inter-creditor issues made the manner of distribution even more complex and required careful consideration.

The teams of the MA and CoC worked closely with the escrow agent to ensure that the creditor settlement files were made in accordance with the 'system acceptable formats'. In parallel, it was also made sure that all accounting entries for transaction closure are also kept ready to be passed on the transaction day.

However, in the course of preparations an unexpected roadblock emerged! The escrow agent informed that they would need lot more documents than that were currently not on the table, in order to settle the foreign creditors. Aware of the stringent FEMA rules and tight banking protocols, the same was accepted as a challenge by the team of the MA. The team assisted by certain employees of the CD burnt midnight oil to get the requisite compliance documents in place. In a record time, the documents were made available to the escrow agent's satisfaction for maximum cases. Only a handful of cases remained which were also provided in due course of time.

All set, it was now showtime! An evening worth remembering - Wednesday December 18, 2019, when the Resolution Plan amount was deposited in an escrow account and from thereon went straight to the creditors for settlement of their dues. A long process with innumerable battles fought valiantly was finally nearing a successful closure. In accordance with the approved Resolution Plan, the FCs received ₹ 4,093 cr against claims admitted of ₹ 9,385 cr which is about 44% of the total admitted claims.

Pursuant to successful implementation of the approved Resolution Plan, the RA requested the RP and his team to extend advisory and support services to the Company given the on-ground experience for more than two years. During this period, the Company continued to run as a GC and has explored several cost and revenue synergies. The matters related to avoidance and preferential transactions are pending before the NCLT.

### 8. Key Take-Aways and Best Practices Adopted

#### (a) Prior to NCLT filing and Pending Admission

Based on the information available, we understood key financial and business performance indicators and financial difficulties/ reasons for stress in the recent past. The loan documents made available by applicant FCs helped to understand additional details. Thereafter, we made a preliminary assessment of risks associated with business and manage the affairs on a GC basis. Further, an assessment of key stakeholders and bringing them on board before admission/ filing for IBC facilitated running the CD as a GC during IBC and avoid loss of value.

#### (b) Immediate Actions after CIRP Announcement

**As against no cash balance on the date CD entered into CIRP, it had cash and bank balance in ~ ₹ 400 crores, which continued to be retained by the Company post-implementation of the Resolution Plan.**

Once the CD is admitted in CIRP, the IRP is required to juggle many balls simultaneously. In the case of RSIL, as soon as CIRP commenced, RP and the team identified KMPs (Key Managerial Personnel) and finalized the organization structure delineating the roles and responsibilities of each KMP. This approach ensured that there are no internal disruptions at the initiation of CIRP. While the RP deployed resources at different plant locations, immediate control of CD's head office at Indore was taken. The head office was the control point from operations and strategy perspective. Further, a set of stringent controls were established for cash flow and working capital management. To build stakeholder confidence from Day 1, townhalls were conducted – assuring them that it was 'business as usual' during CIRP period with the only exception that RP would be in charge under the guidance of the COC and the IBC.

#### (c) Defining the Organizational Structure

The absence of erstwhile promoters, management, and experienced personnel results in a massive loss of organizational knowledge and experience. Accordingly, efforts were taken to retain senior management and harness their valuable knowledge base. Also, such personnel were entrusted with additional responsibility for the sake of company's revival.

#### (d) Robust Cash Management

Considering the huge volume of business and payments being processed to more than 100 vendors daily, a dedicated team of RP reviewed and approved the payments. A system of cash rationing was established to make critical payments and maintain CD as a GC. An action plan for cash-generating initiatives was developed. Realization of debtors / non-core assets and tax refunds, facilitated in improving the cash balance. Further, a periodic assessment of cash requirements of the business ensured improved the cash flow position. As against no cash balance on the date NCLT approved initiation of CIRP, the company had cash and bank balance in excess of ₹ 400 crores, which continued to be retained by the Company post the implementation of resolution plan

#### (e) Comprehensive Investor IM Created a Good 1st Impression

We prepared a robust investor IM covering - (a) Investment highlights (b) Industry overview (c) Company overview (d) Profiles of all KMP's (e) Business and operational details (f) Manufacturing facilities overview (g) Supply chain and distribution network. Team spent significant time reviewing internal data, discussions with KMP's and industry experts so that the IM reflects the true strengths and the value in the business. IM went through multiple rounds of iterations and we took feedback from KMP and senior management which helped refine the investor presentation which were ultimately shared with over 28 investors.

#### (f) Conducted Internal Due Diligence on the Data before Making it Available to Potential Investors

The RP team started putting data together for VDR from the EOI stage itself to ensure timely readiness. For every data to be put in VDR, a maker checker responsibility was established in the Company so as to ensure that data provided to investors is relevant and accurate. When the data room was made available to investors after obtaining confidential undertaking, SPOCs (Single Point of



Contacts) were established in the team for resolving any technical and operational issues in using the data room.

#### **(g) Defining Resolution Process Steps, Timelines and Protocols for Investor**

RP's team worked with the legal counsel to put a well-defined process memorandum in place which was placed before the CoC for inputs and their feedback was incorporated. The process memorandum clearly established the guidelines pertaining to sharing information with the PRAs, examination and evaluation of resolution plan, contents of the plan, T&C for submission of resolution plans, conditions subsequent, EMD/Performance deposit, etc. Manner of information sharing, mechanism for redressal of queries, key milestones for the data diligence etc. were clearly laid out in the process memorandum itself to avoid any ambiguities. The guidelines on all aspects were laid out in the process memorandum.

#### **(h) Swiss Challenge: Adopted for First Time under IBC**

Negotiations were conducted with qualified applicants under which qualified applicants were allowed to improve their commercial offer in a two step Swiss Challenge Process. The offer could be improved only on identified criteria's (upfront cash recovery, NPV, equity upside and fresh equity infusion) which was aligned to the evaluation

matrix. The negotiation process was consented to by the RA's and supervised by an independent bid advisor. The applicant with the highest score as per the evaluation matrix (including commercial offer) was declared as the successful resolution applicant.

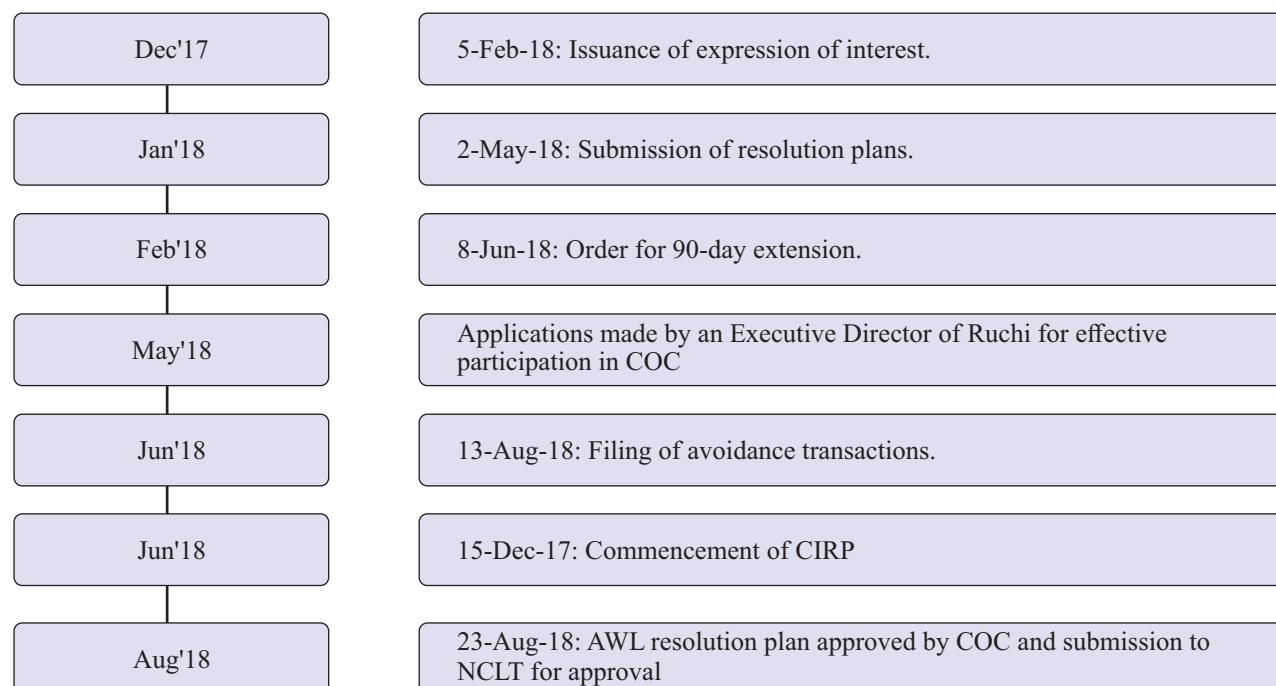
#### **(i) Preparing for Resolution Plan Implementation is the Key**

Even before resolution plan was approved by Adjudicating Authority (AA), we undertook preparation activities for setting up the MC. Since there were few precedents of on-ground operations during implementation phase, a document formalizing protocols such as mode and manner of operations, extent of control, information sharing was agreed amongst RA and FCs. Finally, a list of activities with timelines and responsibilities to be done by each stakeholder was agreed upon by all representatives keeping in mind the closing date.

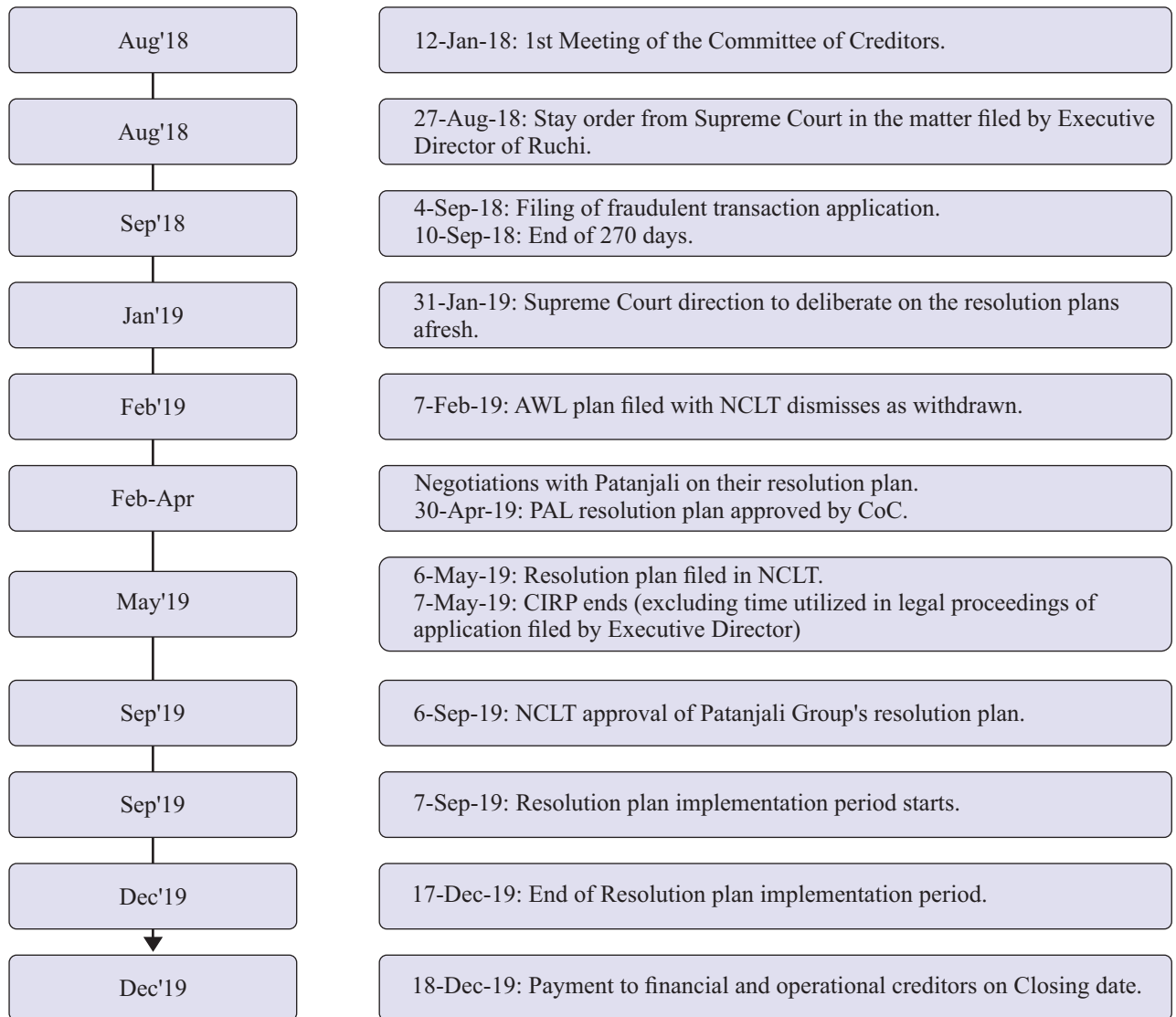
#### **(j) Post-NCLT Approval - Continuous Engagement with RA**

There were regular discussions with the RA in MC with respect to status of funding arrangements to ensure a successful implementation of approved resolution plan. A clear plan of action to be undertaken was established - disbursement mechanism and documentation, book closure, secretarial compliance, etc.

**Graph 4: CIRP timeline - Significant events during CIRP process of RSIL**



## CASE STUDY



# CIRP of Monnet Ispat & Energy Limited (MIEL)

*Monnet Ispat and Energy Ltd. (MIEL) is one of the 'Twelve Large Accounts', the CIRPs of which were initiated by banks on directions of the Reserve Bank of India (RBI). The Resolution Plan of MIEL yielded 123% of its value of assets at the time of CIRP commencement date i.e., liquidation value.*

*The major reasons behind MIEL's financial stress have been influx of cheap Chinese steel products, impact on account of government policies in making available key natural resources namely coal & iron ore for the steel industry, de-allocation of coal mine by the Supreme Court in September 2014, delay in ramp-up of the integrated steel plant, and higher interest rates among others. There were 39 members in the CoC, total admitted claims were ₹ 11,014.92 Crore. The CoC after considering the feasibility and viability of the Resolution Plan approved the same with 98.97% vote share but subject to certain conditions.*

*The present case study, sponsored by IIPI, has been conducted and developed by Shri Sumit Binani and his Professional Advisors Shri Ashish Chhawchharia, and Shri Surendra Raj Gang. Shri Binani has handled the MIEL account as IRP, RP, and Monitoring Agent for implementation of the Resolution Plan. In this Case Study, the author has covered various stages pertaining to the CIRP of MIEL and has summarized the key highlights including challenges faced during the process. **Read on to know more...***



**Sumit Binani**

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## 1. Introduction

MIEL had availed fund based and non-fund-based loan facilities from various banks and financial institutions including the State Bank of India (SBI), the lead creditor, and its erstwhile associate banks, viz. State Bank of Patiala, State Bank of Mysore, State Bank of Bikaner and Jaipur, State Bank of Hyderabad, and State Bank of Travancore.

The company had been facing financial stress since few years before being considered as Non-Performing Assets (NPA) and admitted to insolvency, due to several factors including influx of cheap Chinese steel products, impact on account of government policies in making available key natural resources namely coal & iron ore for steel industry, de-allocation of coal mine by the Supreme Court in September 2014 and also various other factors e.g., delay in ramp-up of the Integrated Steel Plant, higher interest rates etc. Due to default in repayment of the loans and pursuant to a directive<sup>1</sup> of the Reserve Bank of India (RBI) on June 15, 2017, the process was initiated for resolution of the Company.

Pursuant to the petition filed by the SBI, a Financial Creditor (FC) of the Corporate Debtor (CD), under



Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC) for initiation of CIRP, the National Company Law Tribunal (NCLT), Mumbai Bench vide its order on July 18, 2017, admitted the CD into CIRP and appointed Shri Sumit Binani as its Interim Resolution Professional (IRP). He was later confirmed as the Resolution Professional (RP) in the first meeting of the Committee of Creditors (CoC) on August 23, 2017. The MIEL was amongst the first list of 12 large cases referred<sup>1</sup> by the Reserve Bank of India (RBI) for initiation of CIRP.

## 2. Profile of the CD

Monnet Ispat & Energy Limited (MIEL), the CD or Company was, one of the leading sponge iron players in India, which eventually graduated to an integrated steel making facility. It also had expertise in the business of mineral beneficiation and had partnerships with leading global players.

Incorporated in the year 1990 as Monnet Ispat Limited, the company was principally engaged in manufacture and sale of steel intermediaries e.g., Sponge Iron, Billets, Ferro alloys and long (rebar's) steel products through its facilities at Raipur and Raigarh. Its main finished products included TMT, Billets, DRI, Pellets, Structural Steel, Plates and Coils (Future Products) and Ferro Alloys. The company had two plant facilities located in Raipur and Raigarh.

MIEL's products were catering to Automobiles, Infrastructure, Construction, Equipment and Machinery Manufacturing, Ships and Railways, and Electrical Equipment, etc.

**Table 1: Pre-CIRP Financial Performance**

Particulars	Amount in ₹ Crores	
	FY 2015-16	FY 2016-17
Net Sales	2,021	1,373
EBITDA	-369	-86
Loss After Tax	-1,705	-1,734

**Source:** Annual Report of MIEL, FY 2016-17.

<sup>1</sup> Live Mint (2017): RBI tells banks to file cases against 12 big loan defaulters in a month, June 17 (<https://www.livemint.com/Politics/bTsvglK63zmErEicmIbf3I/Bhusan-Essar-Steel-among-12-firms-being-moved-to-insolvenc.html>)

## 3. Corporate Insolvency Resolution Process (CIRP)

### 3.1. Initiation of CIRP

NCLT Mumbai through an order<sup>2</sup> on July 18, 2017, admitted the CIRP of the MIEL and appointed Shri Sumit Binani as Interim Resolution Professional (IRP). The same was made available on the website of the NCLT on July 24, 2017. After the receipt of the order, the IRP along with his team immediately visited the office of the CD at New Delhi. IRP appointed Grant Thornton (GT) as his professional advisor. After being confirmed as RP by CoC, the RP confirmed GT as professional advisor or RP Support Team w.e.f. July 24, 2017. GT provided support services by nominating a team of professionals right from the commencement of CIRP. The erstwhile management was cooperative and facilitated smooth take over.

**MIEL's products were catering to Automobiles, Infrastructure, Construction, Equipment and Machinery Manufacturing, Ships and Railways, and Electrical Equipment, etc.**

The requisite team members were deployed at the respective plant locations at Raigarh and Raipur to assist in managing the operations of the CD. Considering the scale of operations and activities to be carried out during the CIRP, respective teams were formed for overseeing the activities of plant operations including sector specialists, procurement and payment approval process, sales, Management Information System (MIS) and other reporting, claim verification, legal matters, treasury and collection, human resource and payroll, financial accounting, and taxation. Besides, insurance advisors were also engaged for assessing the extent of insurance coverage of the CD.

Upon initiation of the CIRP, the IRP and his support team met key management personnel and understood operations and immediate priorities. Considering that the IBC was new and evolving, its awareness and the impact was not known to various stakeholders. The IRP and his support team therefore also reached out to various stakeholders, such as customers, raw material suppliers, employees of the CD, labour contractors, other vendors, creditors, government authorities and apprised them about

<sup>2</sup> Live Mint (2017): Bankruptcy proceedings against Monnet Ispat, Alok Industries get NCLT nod, July 19 (<https://www.livemint.com/Industry/KuE9WpmdwB20kpoNdg9i4J/Bankruptcy-proceedings-against-Monnet-Ispat-Alok-Industries.html>)



the commencement of CIRP of the CD and its impact. They were also appraised that all the necessary approvals would be reviewed by IRP or his authorised team members. Besides, the team took particular effort to explain the concept of moratorium, submission of claims, embargo on payment relating to pre-CIRP period to creditors as well as various government departments. The RP along with the RP Support Team also undertook the following key activities as mentioned below:

**Customers were also assured that in case of any complaints raised by them because of inferior quality and non-adherence to the delivery timeline, it would be addressed instantly.**

#### **(a) Formation of CoC**

There were 39 members in the CoC, with total admitted claims was ₹ 11,014.92 Crore out of which the State Bank of India had maximum admitted claim amounting was ₹ 2,265.63 Crore with 20.78% voting share. The other big creditors were ICICI Bank Ltd., IDBI Bank Limited, and Indian Overseas Bank etc. ICICI Bank Limited's admitted amount was ₹ 902.54 Crore with 8.28% voting share, IDBI Bank Limited had admitted amount of ₹ 740.73 Crore and 6.79% voting share, and Indian Overseas Bank with the claim admitted amount of ₹ 458.87 Crore and 4.21% voting share. Requisite assurance was accorded to the Banks, OCs and company employees that there would be no disruption in the ongoing process and the payment process would be streamlined. Customers were also assured that in case of any complaints raised by them because of inferior quality and non-adherence to the delivery timeline, it would be addressed instantly. The RP Support Team assisted the IRP/RP in reviewing the pricing methodology of customers and vendors. The CoC in its meeting on August 23, 2017, confirmed the IRP as RP for the CD to conduct the CIRP.

#### **(b) Analysis of CD Operations and Preparing Strategy for CIRP**

The respective plant personnel apprised his team about the nature of facility, current capacity, and the extent of enhancement in the capacity level, status of operations at both the plant locations. The support team also assisted the IRP/ RP in carrying out assessment pertaining to the supplier and technology utilised and at the respective plant units. Extensive deliberation was done on the capacity utilisation of all the units and process of eliminating the

bottlenecks being observed in the process. Besides, technical experts also assessed the product range of both the units in comparison to the current demand and supply level both in the domestic and international market. The RP support team also reviewed compliance status of all the environmental rules and regulations of Central and State governments and set up a system to ensure their timely compliance. Furthermore, major focus was also accorded to the process for procurement of raw material and quality which played role in operations of the CD. The RP team also evaluated maintenance schedule of the plants and communicated various suggestions to senior plant personnel for improvement. Thereafter, periodic maintenance activities were carried out at all the units. For better compliance and management, daily meetings of the plant head and heads of departments (HODs) were initiated. The minutes of meeting (MoM) of these meetings used to be shared with IRP and his team. Besides, 'plant performance review meetings' were started on weekly and monthly basis.

**Assurance was given to the workers and employees that their salaries for CIRP period would be cleared without any delay. The intent of the IRP and his team was to encourage open door policy.**

#### **(c) Communication with the Employees**

Since there were many employees' exits in six months prior to the commencement of CIRP, it was necessary to address employees' concerns, make them aware about the process, and assure them that the endeavor of the IRP/ RP & his support team would be to continue the operations and maintain the CD as a going concern (GC). The IRP/ RP assisted by his support team conducted an open house session for the employees of the CD at the corporate office, which was live streamed at all the plant locations of the CD. The intent of this session was to apprise the workers and employees about the basic provisions of the IBC with a view to curtail the psychological pressure of job insecurity and to build a cohesive environment for a successful resolution of the Company. Assurance was given to the workers and employees that their salaries for CIRP period would be cleared without any delay. The intent of the IRP and his support team was to encourage open door policy. There were around 4,000 employees including ~1,800 contractual staff at initiation of CIRP.

### (d) Deployment of Company Security Personnel and Mapping with the External Security Supervisors

The RP Support Team assessed the current deployment of the company security personnel at all the locations of its operations, status of the various check posts at plant locations. The security head of the company was duly informed about the change in the reporting mechanism. External security supervisors were appointed and adequately mapped with the company security personnel. The appointed security supervisors were directed to provide daily reports to the RP team and also about any untoward incident within the plant premises.

### (e) Correspondence with External Stakeholders

The IRP/RP duly assisted by his team reached out to the various external stakeholders such as customer representatives, selling agents, raw material suppliers, contractual workers, vendors, statutory authorities. They were apprised about relevant procedures of CIRP, CoC and the revised processes of decision making in the Company.

### (f) Banking, Procurement and Payment Related Functions

The IRP took control over all the operative and non-operative bank accounts of the CD. Requisite communication was sent to the respective branches of the bank for updating in the list of authorised signatories. One bank account at the respective site was kept operational for routine and small transactions with the instruction of transferring any balance above the specified limit to the Trust & Retention Account (TRA) account. The respective company personnel were apprised that all expenses are incurred with prior approval from RP Team as per the delegation of authority matrix approved by IRP/RP and CoC. Procedure of reporting bank balance on daily basis was also established for direct oversight on fund allocation. Mechanism was also established for approval and monitoring of procurement/ purchase order process.

### (g) Accounting, Finance and Legal Functions

Timely completion of books of accounts and its reconciliation with physical status and site accounts was also one of the objectives of the RP Support Team. With the recent introduction of GST at that time, another major area of focus was on the transition and streamlining various processes to ensure that the invoices were promptly booked to enable timely filing of GST returns. IRP/ RP and support team also took an update on the status of the ongoing direct and indirect tax related litigations and assessments, and details of major statutory disputed

demands.

The RP Support Team also engaged with the legal team of the CD to understand key litigations, arbitrations, and awards. Key performance indicators of the respective HODs were aligned with the performance of the CD.

## 3.2. Operational Challenges to run CD as GC

### (a) Incomplete Facilities at Raigarh Plant

Some of the facilities of the CD as on the date of its CIRP commencement date were not commissioned due to financial constraints. The commissioning and operationalisation of Electric Arc Furnace, Slab caster, Plate Mill and Lime Kiln required additional significant capital expenditure. As the CD did not have the required finances, it was found feasible to operate the blast furnace only after the aforesaid downstream facilities are commissioned so that hot metal from the Blast Furnace can be used in the Melting Furnace to make steel. However, the same was not possible due to paucity of funds and status quo was maintained.

**Production cost of the company had been significantly higher than industry benchmarks. The Company had very high conversion costs, overheads, and marketing expenses.**

### (b) High Fixed and Conversion Costs

Production cost of the company for 2017-18 was ₹1245 crore which had been significantly higher than industry benchmarks. The Company had very high conversion costs, overheads, and marketing expenses. Due to small-scale operations of less than 1 MTPA, the company lacked economies of scale. It was suggested that once the operations are stabilised at the optimum level capacity, the cost structure could be rationalised due to increased turnover. This would lead to higher operating margin.

### (c) Operational Efficiency of Raipur Unit

The unit was designed to produce 0.15 MTPA finished products from 0.23 MTPA steel making units. The plant was set up in 1993 and had a less-efficient route of steel making, i.e., Induction Furnace route. Substantial capital expenditure was required to be infused to complete the said requirements.

### (d) Working Capital

At the CIRP commencement date, the CD did not have sufficient working capital and only part of the company's integrated facility at Raigarh was operational due to

working capital constraints. Substantial portion of the working capital was stuck in the slow-moving receivables. Due to negative news about the company, majority of the suppliers were reluctant to accord any credit on the supply.

**Dismissing the appeal filed by the Income Tax department, the Supreme Court held that the Section 238 of the IBC has overriding effect on anything inconsistent in any other enactment, including the Income Tax Act.**

### 3.3. Key Legal Matters Related to CIRP

#### (a) Moratorium under IBC, 2016 Vs. Income Tax Act

This case was finally decided by the Supreme Court<sup>3</sup> on August 10, 2018, on appeal filed by the Income Tax Department against the order of Delhi High Court. In the instant case, the Income Tax Department has challenged the moratorium granted to the CD from recovery of Income Tax to the tune of ₹152.99 Crore. This case was among few cases where overriding effect of the IBC got reinforced over other enactments.

In the instant case, question to decide before the High Court was whether the order given by the Income Tax Appellate Tribunal (ITAT) against the CD will be stayed by the moratorium applicable under Section 14 of the Code. While addressing the question in affirmative, High Court had quoted the judgment of the Supreme Court in the matter of *M/s Innoventive Industries Ltd. v. ICICI Bank* wherein the Supreme Court has observed that Section 238 of the IBC unambiguously provides that the IBC will apply, notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Section 14(1)(a) of the Code states, inter alia, that on the 'Insolvency Commencement Date' the Adjudicatory Authority (AA) shall by order declare moratorium for prohibiting 'the institution of suits or continuation of pending suits or proceeding against the CD including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority'. Following the precedence of the *Innovative Industries Ltd vs. ICICI Bank Case*, the Delhi High Court held that the execution of the order of the ITAT in respect of the tax liability would be stayed until the approval of the

Resolution Plan. The Delhi High Court adjudged the similar question in *CCT South Delhi vs. Monnet Ispat & Energy Ltd.*, wherein relying on the order of the above-mentioned case, held that the moratorium period would be applicable to the execution of Order passed by the ITAT.

Dismissing the appeal filed by the Income Tax department, the Supreme Court held that the Section 238 of the IBC has overriding effect on anything inconsistent in any other enactment, including the Income Tax Act. The Supreme Court cited the order in the matter of *Dena Bank vs. Bhikhabhai Prabhudas Parekh and Co. & Ors.* (2000), to clarify that Income Tax dues, being of the nature of Crown Debts, do not take precedence even over secured creditors who are private persons.

#### (b) Short-Term Open Access for Wheeling of Power

On an application moved by the RP to direct Chhattisgarh State Power Distribution Company Ltd. (CSPDCL) and Chhattisgarh State Power Transmission Company Ltd. (CSPTCL) to provide short-term open access permission for wheeling of power from Raigarh plant of the CD to its Raipur plant. The NCLT extended its earlier order<sup>4</sup> dated October 09, 2017, until further orders, on payment of the prescribed fee. The status quo was maintained till the implementation of the Resolution Plan.

**The CD reported a positive EBITDA of about ₹ 70 Crores in FY 18, as compared to reported losses in the past two years which were ₹ 291 Crores in FY 16 and ₹ 52 Crores in FY 17.**

#### (c) Termination of Gare Palma, Coal Block

MIEL had received allocations for captive coal mines which were later de-allocated as per the order of the Supreme Court of India. Subsequently, MIEL, participated in fresh round of auctions, conducted by Ministry of Coal, Government of India in January 2015 and emerged successful bidder for Gare Palma IV/7 coal block in Mand Coalfields, Chhattisgarh which an opencast mine with total mineable reserves of 60.47 million metric tonnes (MMT). This mine was again cancelled by the Ministry due to non-submission of Performance Bank Guarantee by MIEL. The RP had filed an application before the NCLT praying to keep the status unchanged during CIRP. However, this petition was dismissed by NCLT vide order dated January 16, 2018. Thereafter, an

<sup>3</sup> NCLT, Mumbai (2017): CP No. 1139/(MAH)/2017 and M.A. No. 470/2017, November 27, 2017 (<https://www.legitquest.com/case/parties-state-bank-of-india-v-monnet-ispate-energy-limited/193C87>)

<sup>4</sup> NCLT, Mumbai (2018): MA 199/2018, MA 223/2018, MA261/2018 in CP 1139/2017, April 04.

appeal was preferred before the NCLAT which was also dismissed on the ground that the government was incurring revenue loss of about ₹314 Crore annually.

**“The RP and his team ensured that Corporate Social Responsibility (CSR) initiatives undertaken by the Company prior to CIRP commencement date are continued to the extent possible.”**

### **(d) Claims by ICICI Bank, IFCI Limited and Standard Chartered Bank**

Three lenders – ICICI Bank, IFCI Ltd. and Standard Chartered Bank – approached the NCLT against the decision of the RP to not include them as Financial Creditors (FCs).

ICICI Bank contended that the bank had lent \$75 million (~₹486 Crore) to Monnet Power Company Limited (MPCL), a subsidiary of MIEL in external commercial borrowing (ECB) in which MIEL was a guarantor. The company had raised that money to build a power plant in Odisha. As the corporate guarantee was invoked after filing of the CIRP application, the RP did not include this claim under the category of Financial Creditor (FC). Similarly, IFCI had lent ₹158 Crore to MPCL where MIEL was corporate guarantor. In pursuant to the order<sup>5</sup> of the AA on April 04, 2018, the claims were admitted by the RP.

### **(e) Stay on CoC scheduled for Voting on the Resolution Plan**

ICICI Bank Limited filed a petition before NCLT on March 27, 2018. After hearing the RP counsel, the Court adjourned the matter to April 03, 2018, and restrained the RP from convening the CoC meeting. In view of this sudden development, the CoC meeting scheduled on April 03, 2018, for voting on the Resolution Plan could not be held. In the next hearing, the NCLT disposed of the matter<sup>6</sup> with directions to the RP to admit the claims pertaining to uninvoked guarantees and also allowed to convene the CoC meeting.

Pursuant to this order, additional claims of State Bank of India, ICICI Bank Limited, IFCI Limited, Standard Chartered Bank and IndusInd Bank were admitted and the revised list of creditors was shared with the Resolution Application (RA). Subsequently RA revised the Resolution Plan to include impact of above additional claims. In order to ensure that the amounts payable to the assenting FCs of the CD (as currently provided in the

Resolution Plan) in respect of the Accepted Debt of ₹ 10,123.95 Crore are not altered and parity of treatment for the Additional Claims of ₹ 777.92 Crore, the RA proposed additional amount for the additional claims against corporate guarantee.

### **4. Performance of the CD during CIRP**

- a. The turnover of the CD in FY 2017-18 was recorded at ₹1,419 Crore which was ₹1,375 Crore in the immediate previous FY 2016-17.
- b. The Company reported a positive EBITDA of about ₹ 70 Crores in FY 2017-18, as compared to reported losses in the past two years which were ₹ 369 Crores in FY 2015-2016 and ₹ 86 Crores in FY 2016-2017.
- c. By the end of CIRP, the RP Team was not only able to maintain the existing term deposits but also increased the same from ₹ 20 Crores to a level of ₹115 Crore.
- d. Streamlined salary payout to all levels of employees.
- e. Managed an agitation cum strike by the employees at the Raigarh plant site including demands from workers to form an employees' union.
- f. Restarting of Atmospheric Fluidised Bed Combustion (AFBC) Boiler at Raigarh unit after more than one year. AFBC Boiler offers benefits like fuel flexibility, high efficiency, low emissions and reduced cost as compared to other alternatives. This also helped in the consumption of surplus F grade coal available at the Raigarh unit and the surplus power could be wheeled to Raipur unit. The RP team assessed the additional start-up cost of running the AFBC as per the plan, safety measures at the site, periodical monitoring of the progress to get the desired results and proper regulation on supply of coal. The restart process helped the company in not only liquidating the 26,000 MT low grade coal but also saved cash flow up to ₹6.5 Crore.

### **5. Continuation of CSR Initiatives**

The RP and RP Support Team, addressing the interest of nearby villagers and public at large, ensured that Corporate Social Responsibility (CSR) initiatives undertaken by the Company prior to CIRP commencement are continued to the extent possible. Some of the major CSR activities carried out, with appropriate

<sup>5</sup> Ibid.



approvals from the CoC, during the CIRP are as follows:

- a. Supported health care facilities at 15 beds Maina Devi Hospital in Raipur and 27 beds hospital in

**Resolution Plan was successfully implemented in a record time of 30 days including payment under plan of CIRP cost to FCs and issuance of equity shares to the FCs.**

Raigarh.

- b. Assistance to Monnet DAV Public Schools at Raipur and Raigarh. Besides, conducting various literacy campaigns in nearby villages with the mission to achieve 100% literacy.
- c. Providing training courses in diverse spheres of crafts and skills such as stitching, embroidery, knitting for women, white phenyl making, candle making, backyard poultry farming etc. for sustainable livelihood and women empowerment. Besides sewing machines were also distributed among needy women.
- d. Beautification and landscaping of airports at Raipur.

## 6. Resolution Process of the CD

At the time the concept and proforma of advertisement for Expression of Interest (EOI) and Request for Resolution Plan (RFRP) were in nascent stage. MIEL was the first among the Twelve Large Accounts<sup>6</sup> to issue advertisement for EOI. It was also among a few CDs to come up with a detailed RFP

EOI was invited from prospective investors for investment in MIEL through resolution plans vide advertisement dated September 16, 2017. In response, eight prospective resolution applicants shown interest. MIEL was among very few CDs in Twelve Large Accounts which received interest from such credible potential investors. As per the invitation, November 17, 2017, was fixed as the date for submission of resolution plans.

On November 07, 2017, the Insolvency and Bankruptcy Board of India (IBBI) notified amendments, inter alia, to Regulations 38 and 39 of the CIRP Regulations and subsequently on November 23, 2017, the Government of India amended the IBC through the IBC (Amendment) Ordinance, 2017 and prescribed eligibility criteria for

submission of a resolution plan by inserting Section 29A in the IBC. In view of the above amendments in the CIRP Regulations and the Ordinance, many potential resolution applicants requested for extension of the last date for submission of resolution plan. Accordingly, the last date for submission was first extended to November 27, 2017, and thereafter, till December 12, 2017, to enable the potential resolution applicants to submit resolution plans. Though four potential resolution applicants had shown extensive interest, finally RP received only one resolution plan from a consortium consisting of 'AION Investments Private II Limited' and 'JSW Steel Limited' (AION-JSW).

As the period of 180 days was to end on January 13, 2018, the CoC, decided to seek extension for 90 days primarily to understand and negotiate on the resolution plan. Subsequently, the RP filed a petition before the AA under Section 12 of the IBC. The same was allowed on January 19, 2018. Thereafter, CoC meeting was scheduled on March 31, 2018, but it could not be convened due to the order of AA on the petition of ICICI Bank. [See, 4.3 (e)]. Though the CIRP was at advanced stage, the RP was not able to convene the CoC meeting, and extension of 90 days was about to expire. Finally, the AA vacated its previous order on April 04, 2018.

After detailed deliberations and submission of records, the RP agreed to accept the claim of ICICI Bank which were considered as due from the date of CIRP commencement. Furthermore, pursuant to the order of AA, the next CoC meeting was convened on April 07, 2018, for voting on the Resolution Plan submitted by AION-JSW. The CoC after considering the feasibility and viability of the Resolution Plan approved the same with 98.97% vote share but subject to certain conditions which were mentioned in the 'Letter of Intent' issued to the RA on behalf of CoC. However, 2.03% vote shareholders did not cast their votes. Thus, the Resolution Plan was submitted to the AA within the stipulated time of 270 days. The RP and RP Support Team was engaged in regular dialogues with various stakeholders to complete the CIRP on time. Thus, MIEL became first among a few CDs to get approval for the Resolution Plan.

## 7. Implementation of the Resolution Plan

In pursuance to the terms of the 'Letter of Intent' issued to the RA, it deposited the amount of upfront payment and also completed replacement of the necessary bank guarantees as per the Resolution Plan and amendment letter thereto. Subsequently, the process of releasing the payments to the FCs was initiated and the Resolution Plan

<sup>6</sup> Insolvency and Bankruptcy News (2021): Twelve Large Accounts, April-June 2021, p.18.  
<https://www.ibbi.gov.in/uploads/publication/f4656f120a5161c281cff40189353824.pdf>

was successfully implemented in a record time of 30 days including payment under plan of CIRP cost to FCs and issuance of equity shares to the FCs. This was done with coordinated and integrated efforts of the RP Support Team, Secretarial Team, Legal Team of Monnet Ispat, and team of the RA.

## 8. Preferential, Undervalued, Extortionate and Fraudulent (PUFE) Transactions

The RP filed an application under Section 43 of the IBC pertaining to preferential transactions before submitting the Resolution Plan before AA for approval. Two transactions aggregating to ₹29 crore were identified to be preferential in nature.

These preferential transactions were related to the loans the CD availed from two purportedly related parties amounting to ₹24 Crore and ₹5 Crore at an interest rate of 18% p.a. and 15% p.a. respectively within two years look back period prior to initiation of CIRP. The same were paid with interest to the related party lenders around three to four months prior to initiation of CIRP.

Though not in a position to repay its debts due to financial stress, the CD was found to be extending preferential treatment to its related party creditors by repaying their loans along with interest just months prior to CIRP initiation i.e., while the CIRP petition was pending before AA. The RP sought directions from the AA to issue orders to related preferential creditors for refund. In its order on July 25, 2018, the AA allowed the petition but partially. The AA held that the beneficiary creditors were not related

**The AA held that the beneficiary creditors were not related parties within the meaning of related party under the IBC. However, it concluded that the transaction of ₹23 Crore preferential in nature.**

parties within the meaning of related party under the IBC. However, it concluded that the transaction of ₹23 Crore was preferential in nature. In case of the second transaction of ₹5 Crore, only ₹2.84 Crore was admitted as a preferential transaction within the meaning of Section 43 of the IBC. The respective creditors were ordered to refund the aforesaid sums along with relevant interest to the CD within 30 days of the order. An appeal against the said order is currently pending adjudication before the Supreme Court.

## 9. Status of the Company

In FY 2019-20, the Company had restarted production at the 2 million tonne per annum pellet plant at Monnet Ispat and Energy and ramped up the Direct Reduced Iron (DRI) production to its optimal capacity to bring down the cost. DRI plant was operating at lower capacity Monnet was buying iron ore and pellet from open market and now the cost will come down after commissioning of the pellet plant. While DRI plant is working at its full capacity, the pellet is now operating at 60 per cent utilisation and will be ramped up progressively.

**Table 2: Performance Overview in Post CIRP**

S.No.	Overview	FY 2020-21 (₹Crore)	FY 2019-20 (₹Crore)	FY 2018-19 (₹Crore)
1.	Revenue	4,187	2,638	1,879
2.	Net Profit /Loss	(104)	(488)	(1,900)
3.	EBIT	170	(234)	(3,015)

**Source:** JSW Ispat Special Products Ltd.

(<https://www.moneycontrol.com/india/stockpricequote/steelspongeiron/jswispatsspecialproducts/MI16>).

Resolution of the Company by JSW Steel and AION is playing a pivotal role in the turnaround of the company and is significantly optimising the operations. Leading with guidance on strategy, operations, and Environmental, Social and Governance (ESG) practices, the JSW Steel

management is helping the company in becoming truly better, every day. With the guidance and support from JSW Steel, company is able to harness the latest industry knowledge, market intelligence, training expertise and experience across all business functions.

**Table 3: Date of Major Events in CIRP of MIEL**

S.No.	Date of event	Description of Activity
1.	18-07-2017	Order passed by NCLT for CIRP commencement of MIEL.
2.	24-07-2017	Order communicated to the IRP regarding his appointment.
3.	26-07-2017 27-07-2017	Public announcement to invite proof of claims from the Financial Creditors (FCs) of the CD.
4.	31-07-2017	Appointment of two registered valuers.
5.	07-08-2017	Last date for submission of proof of claim as per the Public Announcement.
6.	14-08-2017	Based on the claims received and verified by the RP, a list of FCs was finalized.
7.	16-08-2017	Constitution of the Committee of Creditors (CoC)
8.	21-08-2017	The first list of FCs and report on constitution of CoC filed with NCLT. Due to claim being received from a new FC, the list of FCs was updated and accordingly the CoC was reconstituted.
9.	22-08-2017	Preparation of information memorandum
10.	23-08-2017	First meeting of CoC held, where the CoC confirmed the appointment of IRP as RP.
11.	16-09-2017	An advertisement inviting EOIs from interested investors was published in newspapers.
12.	25-09-2017	Last date for submitting EOI.
13.	26-09-2017	Third meeting of CoC was held. In this meeting, the CoC members discussed the criteria for evaluation of resolution plans.
14.	26-09-2017 to 10-10-2017	Signing of Non-Disclosure Agreement (NDA) with potential resolution applicants. Request for proposal document inviting resolution plans from qualified persons was issued to the potential resolution applicants who had executed the NDA.
15.	17-11-2017	Last date for submitting resolution plans. The date for submission of resolution plan was initially extended till November 27, 2017, and thereafter, till December 12, 2017, to enable the potential resolution applicants to submit resolution plans in due compliance of section 29A introduced vide IBC (Amendment) Ordinance, 2017.

## CASE STUDY

16.	12-12-2017	One resolution plan received from a consortium consisting of AION Investments Private II Limited and JSW Steel Limited.
17.	16-12-2017	CoC decided to seek extension of the period of CIRP for a further period of 90 days under section 12 of the IBC and authorized the RP to file an application before the AA.
18.	09-01-2018	NCLT passed an order extending the CIRP period by 90 days.
19.	01-03-2018	AION-JSW consortium submitted a revised resolution plan.
20.	26-03-2018	The RP through email informed the members of the CoC that a meeting of Coc will be convened on March 31, 2018.
21.	27-03-2018	NCLT passed an order on an application of ICICI Bank Limited, a FC, granting a stay on the meeting of the CoC to be held on March 31, 2018, till further directions.
22.	04-04-2018	NCLT vacated its earlier order dated March 27, 2018, of stay on holding a meeting of the CoC and directed the admission of claims filed by ICICI Bank, IFCI, and Standard Chartered Bank.
23.	07-04-2018	Eighth meeting of the CoC was held where the Resolution Plan submitted by the AION-JSW was considered.
24.	09-04-2018 to 10-04-2018	The Resolution Plan of AION-JSW was approved by the CoC with 98.97% majority voting share.
25.	13-04-2018	In accordance with section 30 (6) of the IBC, application was filed before AA seeking approval for the Resolution Plan.
26.	24-07-2018	Resolution Plan approval by AA.
27.	31-08-2018	Completion of the handover of MIEL to the successful the RA and take-over of the control by the new management.





## Legal Framework

Here are some important amendments, rules, regulations, circulars, notifications and press releases related to IBC Ecosystem.

### ACTS

#### **Insolvency and Bankruptcy Code (Amendment) Act, 2021**

The Insolvency and Bankruptcy Code (Amendment) Act, 2021, was enacted vide notification of the Central Government dated August 12, 2021. One of the key changes incorporated was to bring in Pre-packaged Insolvency Resolution Process for MSMEs along with definition of “Pre-Packaged Insolvency”. The Amended Act modifies the provisions of the Insolvency and Bankruptcy Code Act of 2016 and repeals the Insolvency and Bankruptcy Code (Amendment) Ordinance of 2021.

**Source:** *Gazette Notification CG-DL-E-12082021-228942 dated August 12, 2021.*

### REGULATIONS

#### **IBBI (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2016**

Insolvency and Bankruptcy Board of India (IBBI) has notified IBBI (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2016 w.e.f. September 30, 2021. The amendment is aimed at minimizing period of CIRP and value maximization by streamlining the procedure of receiving and finalizing resolution plans.

Sub-regulation 4 (A) has been inserted after Sub-regulation (4) of Regulation 36 A which reads “Any modification in the invitation for expression of interest may be made in the manner as the initial invitation for expression of interest was made: Provided that such modification shall not be made more than once.” Similar provisions have been inserted in Regulation 36 B (5). Sub-regulation 1 (A) of Regulation 39 has been substituted with Sub-regulation 1 (A) and 1(B) which make provisions to allow one modification of resolution plan, use of a challenge mechanism to enable resolution applicants to improve their plans, and restricting CoC from considering any resolution plan after the time as



specified by the CoC under regulation 36B, received from a person who does not appear in the final list of prospective resolution applicants or does not comply with the provisions of sub-section (2) of section 30 and sub-regulation (1).

**Source:** *CG-DL-E-30092021-230085, No. IBBI/2021-22/GN/REG078 dated September 30, 2021.*

#### **Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2021**

IBBI Exempts Fee and Caps Earnest Money in Liquidation Process to ensure large number of buyers The amended Schedule I, in paragraph 1, (i) in clause (3) of IBBI (Liquidation Process) 2016 prohibits requirement of any non-refundable deposit or fee for participation in an auction under the liquidation process and a cap pf maximum 10% to the Earnest Money Deposit. Further, the amended regulation provides for the Liquidator to intimate the reasons for rejection of the highest bid to the highest bidder and report the same in the next progress report. Besides, IBBI has provided an electronic platform on its website for hosting public notices of auctions of liquidation assets and directed Liquidators to upload the public notice of every auction of any liquidation asset, w.e.f. October 01, 2021, at IBBI website on the day of its publication in newspapers, through their designated login page.

**Source:** *CG-DL-E-30092021-230083, No. IBBI/2021-22/GN/REG079, September 30, 2021.*

## CIRCULARS

### **IBBI's Electronic Platform for hosting Public Notices of Auctions of Liquidation Assets under the IBBI (Liquidation Process) Regulations, 2016.**

IBBI has provided an electronic platform on its website for hosting public notices of auctions of liquidation assets and directed Liquidators to upload the public notice of every auction of any liquidation asset, w.e.f. October 01, 2021, at IBBI website on the day of its publication in newspapers, through their designated login page.

**Source:** *IBBI Circular No. IBBI/LIQ/44/2021*

### **IBBI Prescribes Monetary Penalty for 'Minor Non-Compliances' by IPs**

Insolvency and Bankruptcy Board of India (IBBI) has prescribed maximum and minimum monetary penalties for 'minor non-compliances' by Insolvency Professionals (IPs) while discharging their responsibilities under the IBC.

"IPAs will have the flexibility to impose a graduated system of penalties, where minor non-compliances will result in monetary fines, and major violations will result in expulsion from the agency," clarified IBBI in a circular dated July 28, 2021. Though this circular, IBBI has specified penalties for 14 specified breaches, including any violation of the charter of the concerned Insolvency Professional Agency. The minimum amount of penalty prescribed in the circular will either be Rs. 50,000/- or Rs. 100,000/- depending on case to case. Though this provision, IBBI aims to ensure 'objectivity and uniformity' in disciplinary actions against IPs across IPAs. The breaches such as accepting an assignment having conflict of interests with the stakeholders, failure to comply with directions issued by NCLT/NCLAT, failure to appoint Registered Valuers, failure to reject Resolution Plan from ineligible applicants, failure to make public announcements in the manner provided in the relevant Regulations, outsources his duties and obligations, fails to take action in respect of Preferential etc. will attract maximum penalties.

**Source:** *Circular No. No. IBBI/IPA/43/2021, dated July 28, 2021.*

### **IBBI introduces CIRP Form 8**

Through a circular on July 20, 2021, the Insolvency and Bankruptcy Board of India (IBBI) has made it mandatory for the IRPs/RPs to file a new form - CIRP Form 8.

"The CIRP Form 8 is required to be filed for all CIRPs

ongoing or commencing on or after 14th July 2021," reads the Circular. "It is directed that the Form CIRP 8 shall be filed in accordance with regulation 40B of the CIRP Regulations on the Board's website, like other CIRP Forms," it added. The CIRP Form 8 has been introduced in pursuance to the Regulation 35A of the IBBI (IRPCP) Regulations, 2016 which requires an RP to form an opinion on transactions covered under sections 43, 45, 50 and 66 by 75th day, make determination on such transactions by 115th day, and file an application before the Adjudicating Authority by 135th day of the insolvency commencement date. Further, Regulation 40 B (1B) requires the RP to file Form CIRP 8 intimating details of his opinion and determination under regulation 35A, by 140th day of the insolvency commencement date.

**Source:** *Circular No. No.: IBBI/CIRP/42/2021 dated July 20, 2021.*

## NOTIFICATIONS

### **IBBI Tweaks Min. Experience Criteria for IPs**

IBBI via a Notification titled "IBBI (Insolvency Professionals) (Second Amendment) Regulations, 2021" has substituted subclause (iii) of Regulation 5 (c), namely, "(iii) experience of - (a) ten years in the field of law, after receiving a Bachelor's degree in law; (b) ten years in management, after receiving a Master's degree in Management or two-year full time Post Graduate Diploma in Management; or (c) fifteen years in management, after receiving a Bachelor's degree". However, for the purposes of this regulation, only professional and managerial experience shall be considered, reads Explanation 1.

**Source:** *No. IBBI/2021-22/GN/REG077 dated July 22, 2021.*

## GUIDELINES

### **IBBI Extends validity of online courses till December 31, 2021**

The Insolvency and Bankruptcy Board of India (IBBI), through a Guideline dated 03rd September 2021 has extended the validity of the IBBI (Online Delivery of Educational Course and Continuing Professional Education by Insolvency Professional Agencies and Registered Valuers Organizations) Guidelines, 2020 till 31st December 2021. This has been done in the wake of the ensuing Covid-19 pandemic.

**Source:** *Amendment to the Insolvency and Bankruptcy Board of India (Online Delivery of Educational Course and Continuing Professional Education by Insolvency Professional Agencies and Registered Valuers Organizations) Guidelines, 2020 dated September 03, 2021.*

### **Amendment to the guidelines for technical standards for the performance of core services and other services under the IBBI (IU) Regulations, 2017**

In exercise of the powers conferred by section 196 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Insolvency and Bankruptcy Board of India (IBBI) vide its Guideline dated July 26, 2021, made certain amendments to guidelines for technical standards for the performance of core services and other services under the IBBI (Information Utilities) Regulations, 2017.

The key changes include mandatory registration with PAN or C-KYC, mandatory assignment of a Unique Identification Number (UIN) by the IU to all the registered users in accordance with these Guidelines and a process for assignment of UIN among others.

**Source:** *Guidelines for Technical Standards for the Performance of Core Services and Other Services (Amendment), 2021 under the Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017 dated July 26, 2021.*

### **REPORT**

#### **'Report of The Insolvency Law Committee on Pre-Packaged Insolvency Resolution Process'**

'Report of The Insolvency Law Committee on Pre-Packaged Insolvency Resolution Process' was published by the Ministry of Corporate affairs on July 16, 2021.

The 125-page report aimed at providing a comprehensive framework for effective and speedy insolvency resolution mechanism for MSMEs in order to make the process less disruptive for MSME Corporate Debtors in challenging times especially given the distressful situation during the COVID-19 pandemic. The Committee recommended a pre-pack process for corporate MSMEs on voluntary basis which includes a hybrid model involving 'creditor-in-control' and 'debtor-in-possession' features. The recommendations of the committee proved to be vital to the much-needed structural reforms concerning MSMEs in need of robust mechanism at times of financial crisis.

**Source:** *Report Of The Insolvency Law Committee On Pre-Packaged Insolvency Resolution Process, Ministry of Corporate affairs, Government of India dated July 16, 2021.*

<https://mca.gov.in/bin/dms/getdocument?mds=RFjZ0L9xYyx1jkhf%252BogMGA%253D%253D&type=open>

### **PRESS RELEASES**

#### **IBBI signs MoU with IGNOU to utilize tele-lecturing facility for Gyan Darshan Channel**

The IBBI on Thursday entered into a MoU with Indira Gandhi National Open University (IGNOU) with an objective to increase its advocacy initiative through tele-running initiatives to help learners who aim to educate themselves through distance learning.

Dr. M S Sahoo, Chairperson, IBBI appraised IGNOU's efforts of emerging as a "front runner people's university extending cost-effective solutions." He mentioned that IGNOU had seamlessly provided access to sustainable and learner centric quality learning initiatives and awareness programmes through innovative technologies. He emphasized upon the synergies between IBBI's mandate and that of IGNOU, to be realised through this initiative. This MoU was signed by Shri Santosh Kumar Shukla, Executive Director, IBBI and Shir Banmali Singh, Registrar, IGNOU in the presence of Dr. Sahoo, Prof. Rajendra Prasad Das, Officiating Vice-Chancellor, IGNOU, Shir Sudhaker Shukla, WTM, IBBI, Dr. Srikanth Mohapatra, Director, IGNOU among others.

**Source:** *No. IBBI/PR/2021/18 dated September 16, 2021.*

#### **IBBI sings MoU with NSE for Research Collaboration**

IBBI and NSE inked a Memorandum of Understanding (MoU) on August 06, 2021, for a research partnership. The collaboration's goal is to establish a robust research environment in the field of Insolvency and Bankruptcy in India.

"Evidentiary or research-based foundations for policy making, devoid of discretion, fosters transparency and help in bringing complete harmony between policy initiatives and market expectations," said Shri Sudhaker Shukla, WTM highlighting the relevance of research for developing IBC regime. "The synergy between IBBI and NSE will harness the research potential of both the organizations, aiding and improving evidence-based policy discourse in the country," he added. Speaking on this occasion, Shri Vikram Limaye, MD & CEO, NSE said, "Insolvency and bankruptcy laws play an important role in an economy as they enable efficient and orderly allocation of productive resources and provide an effective resolution mechanism for debtors and creditors. We are happy to collaborate with IBBI for developing an extensive research framework in the field of insolvency and bankruptcy in India".

## IBC Case Laws

### Supreme Court of India

*National Spot Exchange Ltd. Vs. Mr. Anil Kohli, RP for Dunar Foods Ltd. Civil Appeal No 6187 Of 2019, Date of Judgment: September 14, 2021*

**What cannot be done directly considering the statutory provisions cannot be permitted to be done indirectly, while exercising the powers under Article 142 of the Constitution of India.**

#### Background of Case

This appeal was filed by Appellant (National Spot Exchange Limited) under Article 142 of the Constitution of India against the judgement of NCLAT. It is pertinent to note that the Appellant had earlier filed a money suit against one PD Agro Processors Pvt. Ltd. (PD Agro) and later through investigation it was revealed that PD Agro had siphoned off funds to the Corporate Debtor 'CD' (Dunar Foods Limited) and the High Court of Bombay had passed a decree against PD Agro. When NCLT commenced the CIRP against the CD under the provisions of the IBC, the IRP invited the claims from the creditors of the CD and the Appellant herein submitted its claim citing the decree of the High Court. IRP rejected the claim of the Appellant on the ground that there is no privity of contract between the Appellant and the CD. The decision of IRP was challenged by the appellant before NCLT which rejected the said application and upheld the decision of the IRP. Subsequently, being aggrieved and dissatisfied with the order passed by the NCLT, the appellant preferred an appeal before the NCLAT. However, there was a delay of 44 days in filing of the mentioned appeal and the learned Appellate Tribunal dismissed the same on the ground that it has no jurisdiction to condone the delay beyond 15 days and thereby the appeal was barred by limitation. The appellant challenged the order of NCLAT in the present appeal by stating that it had failed to uplift the corporate veil as PD Agro is the sister concern of CD and had committed "fraud and collusion" by syphoning off funds.

#### Supreme Court's Observations

The Supreme Court stated that the Appellant had preferred an appeal before the NCLAT under S. 61(2) of IBC which



requires an appeal to be preferred within prescribed limitation period of 30 days. The Appellate Tribunal may allow an appeal to be filed after the expiry of the said period of 30 days if it is satisfied that there was sufficient cause for not filing the appeal, but such period shall not exceed 15 days. Therefore, the Appellate Tribunal has no jurisdiction at all to condone the delay exceeding 15 days from the period of 30 days, as contemplated under Section 61(2) of the IBC. The Appellant in the present appeal preferred the appeal after 44 days of delay and hence the appeal was dismissed by NCLAT as it was barred by limitation. The Apex court further cited the case of *Popat Bahiru Goverdhane Vs. Special Land Acquisition Officer* and held that, "it is a settled legal position that the law of limitation may harshly affect a particular party, but it has to be applied with all its rigour when the Statute so prescribes". The Court observed that it has no power to extend the period of limitation on equitable grounds and that the statutory provision may cause hardship or inconvenience to a particular party, but the Court has no choice but to enforce it by giving full effect to the same. It further observed that what cannot be done directly under S. 61(2) of IBC i.e., condonation of delay not exceeding 15 days from the completion of 30 days, cannot be permitted to be done indirectly, while exercising the powers under Article 142 of the Constitution of India.

#### Order

The Apex Court dismissed the appeal stating that no



interference was called for in the matter. The order passed by NCLAT was in confirmation with the law as the appeal was barred by limitation and the Appellate Authority has no jurisdiction to condone delay extending 15 days. The present appeal failed and was accordingly dismissed.

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

***Kay Bouvet Engineering Limited Vs. Overseas Infrastructure Alliance (India) Private Limited Civil Appeal No 1137 Of 2019, Date of Judgment: August 10, 2021***

**An application to initiate a Corporate Insolvency Resolution Process has to be rejected if a dispute truly exists in fact, and is not spurious, hypothetical or illusory.**

**Background of Case**

This appeal was filed by Kay Bouvet Engineering Ltd. (Kay Bouvet) under Section 62 of the IBC, 2016, against the order of the NCLAT, which had set aside the NCLT order rejecting the application filed by Overseas Infrastructure Alliance (India) Private Limited (Overseas) seeking initiation of CIRP against the appellants. This CIRP application was filed by Kay Bouvet Engineering Ltd. in its capacity as Operational Creditor (OC). The facts of the case are that Overseas were awarded an engineering construction contract by Mashkour Sugar Mills, Sudan which funded by Government of India's Dollar credit through Exim Bank. Subsequently, Kay Bouvet was appointed as the sub-contractor through a tripartite agreement. On the advice of Mashkour, overseas paid an amount of Rs.47.12 crore to Kay Bouvet. There were certain disputes with regard to exchange rate, on account of which, Kay Bouvet informed Mashkour that it ought to have been paid more in Indian Rupees. In the meantime, there was certain exchange of communications between the Ministry of External Affairs, Government of India (GOI) and the Sudan Government. In pursuance to such exchange of communications, on 17th April 2017, the Ambassador of Sudan to India addressed to the GOI and advised to terminate the contract of Mashkour with

Overseas and in turn to appoint Kay Bouvet as a Contractor. On 15th June 2017, Mashkour terminated the contract with Overseas for failure on its part to perform the duties. A Demand Notice under Section 8 of the IBC was served upon Kay Bouvet by Overseas alleging default under the Tripartite Agreement.

**Supreme Court's Observations**

It has been held that however, at this stage, the Court is not required to be satisfied as to whether the defense is likely to succeed or not. It has been held that so long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the Adjudicating Authority has no other option but to reject the application. The Court also referred the Mobilox Innovations Private 18 Limited (supra), wherein the Supreme Court has considered the terms "existence", "genuine dispute" and "genuine claim". The material placed on record amply clarifies that the initial payment which was made to Kay Bouvet as a Subcontractor by Overseas who was a Contractor, was made on behalf of Mashkour and from the funds received by Overseas from Mashkour. It was also clear that when a new contract was entered into between Mashkour and Kay Bouvet directly, Mashkour had directed the said amount of Rs.47 crore to be adjusted against the supplies to be made to Mashkour Sugar Company Ltd. for the purpose of completing the Project. On the contrary, the documents clarify that the termination of the contract with Overseas would not absolve Overseas of any liability for the balance of the LoC 1st tranche of 25 million disbursed to them other than USD 10.62 paid to Kay Bouvet.

**Order**

The Apex Court upheld the decision of the NCLT stating that it had rightly rejected the application of the respondent seeking initiation of CIRP against the appellant. Hence the NCLAT had patently misinterpreted the factual and legal position and had erred in reversing the order of NCLT by allowing admission of proceedings under section 9.

**Case Review:** *Appeal Dismissed*

*Pratap Technocrats (P) Ltd. & Ors. Vs. Monitoring Committee of Reliance Infratel Limited & Anr. Civil Appeal No 676 Of 2021, Date of Judgment: August 10, 2021*

**The jurisdiction of the adjudicating authority and the appellate authority cannot extend into entering upon merits of a business decision made by a requisite majority of the CoC in its commercial wisdom.**

### Background of Case

This appeal was filed by Appellant (Pratap Technocrats (P) Ltd.) under Section 62 of the IBC, 2016, against judgment of the NCLAT. The appellants are operational creditors “OC” of the Reliance Infratel Limited-Corporate debtor “CD”. NCLT-Mumbai Bench had approved the resolution plan formulated during the CIRP of the Corporate Debtor and the same was upheld by NCLAT. The facts of the case are that during the Corporate Insolvency Resolution Process “CIRP”, Reliance Digital Platform and Project Services Limited “Resolution Applicant” had successfully submitted a Resolution Plan which was duly approved by the CoC of the CD and subsequently approved by the NCLT. The Appellants challenged the decision of NCLT in the Appellate Tribunal stating that the Appellants were kept unaware of the CIRP and no details were provided regarding the disposal of the fund towards their claims, their claims had not received a fair and equitable treatment, the fair market value and the liquidation value of the CD had not been taken into account and value of certain preference shares, did not form a part of the corpus of payments to the OC, material irregularities in the accumulation and disbursement of funds that constituted the corpus of the CD; and the appellants were made to suffer a reduction of total & Substantial claims. NCLAT rejected the appeal of the Appellants stating that it did not find any substance in the Appeal.

### Supreme Court's Observations

The Court stated that the submissions made by the Appellant failed to substantially prove by any concrete material before the Court that there has been a failure to maximise the value of the assets, apart from the reference to the preference shares. Whether the interest of all

stakeholders, including the OCs, has been adequately balanced has to be determined within the four corners of the statutory provisions of the IBC. Further, the jurisdiction of the AA is circumscribed by the terms of the provisions conferring the jurisdiction. In the present case, the approved resolution plan has provided for the payments to OCs, the percentage of recovery being 19.62 per cent. On the other hand, the payment to financial creditors is 10.32 per cent. It further reviewed various previous judgements and stated that the previous decisions have laid down that the jurisdiction of the AA and the Appellate Authority cannot extend into entering upon merits of a business decision made by a requisite majority of the CoC in its commercial wisdom. Nor is there a residual equity-based jurisdiction in the AA or the Appellate Authority to interfere in this decision, so long as it is otherwise in conformity with the provisions of the IBC and the Regulations under the enactment.

### Order

The Apex Court dismissed the appeal stating that it found no merit in the appeal. The apex court stated that the resolution plan was duly approved by a requisite majority of the CoC. Hence, once the requirements of the statute have been duly fulfilled, the decisions of the AA and the Appellate Authority are in conformity with law.

**Case Review:** *Appeal Dismissed*

*M/S Orator Marketing Pvt. Ltd Vs. M/S Samtex Desinz Pvt. Ltd. Civil Appeal No. 2231 Of 2021, Date of Judgment: July 26, 2021.*

**The definition of 'financial debt' under IBC, 2016 does not expressly exclude an interest free loan. Financial debt would have to be construed to include interest free loans advanced to finance the business operations of a corporate body.**

### Background of Case

This Appeal was filed by the Appellant (Orator Marketing Pvt. Ltd.) under Section 62 of the IBC, 2016 against the order of the Hon'ble NCLAT, New Delhi. The Appellate Tribunal had dismissed the appeal of the Appellant and confirmed the order of the Adjudicating Authority 'AA',

NCLT, New Delhi, dismissing the petition filed by the Appellant under Section 7 of the IBC stating that the Appellant was not a Financial Creditor of the Respondent (Samtex Desinz Pvt. Ltd.) The question stated in this Appeal was, whether a person who gives a term loan to a Corporate Person, free of interest, on account of its working capital requirements is not a Financial Creditor, and therefore, incompetent to initiate the Corporate Resolution Process under Section 7 of the IBC. According to the Appellant, a term loan of Rs.1.60 crores was advanced to the Corporate Debtor 'CD' for a period of two years, to enable the CD to meet its working capital requirement. The loan was due to be repaid by the CD in full and the CD made some payments but Rs.1.56 crores were still outstanding. Subsequently the Appellant filed a Petition under Section 7 of the IBC in the NCLT for initiation of the Corporate Resolution Process. However, the same was rejected by AA. The AA stated that the claim does not constitute as financial debt and Appellant does not come within the meaning of FC. Being aggrieved by the above the Appellant filed an appeal under Section 61 of the IBC, 2016 which was dismissed by the Hon'ble NCLAT. The NCLAT affirmed the judgement and order of AA.

#### Supreme Court's Observations:

The Apex Court stated that both the NCLAT and NCLT have misconstrued the definition of 'financial debt' in Section 5(8) of the IBC, 2016 by reading the same in isolation and out of context. It stated that definition of 'financial debt' cannot be read in isolation, without considering some other relevant definitions. The Apex Court stated that both NCLT and NCLAT have overlooked the words "if any" in the definition which could not have been intended to be otiose. They failed to notice 16 clause (f) of Section 5(8), in terms whereof 'financial debt' includes any amount raised under any other transaction, having the commercial effect of borrowing. Furthermore, sub-clauses (a) to (i) of Sub-section 8 of Section 5 of the IBC are apparently illustrative and not exhaustive. The Apex Court further stated that the trigger for initiation of the CIRP by a FC under Section 7 of the IBC is the occurrence of a default by the CD and default means non-payment of debt in whole or part when the debt has become due and payable and debt means a liability or

obligation in respect of a claim which is due from any person and includes financial debt and operational debt. The definition of 'debt' is also expansive and the same includes financial debt. Further, the definition of 'Financial Debt' does not expressly exclude an interest free loan. Financial Debt would have to be construed to include interest free loans advanced to finance the business operations of a corporate body.

#### Order:

The Apex Court allowed the appeal, and the judgment and impugned order were set aside. The order of the AA, dismissing the petition of the Appellant under Section 7 of the IBC was also set aside. The petition under Section 7 was directed to be revived and to be decided afresh, in accordance with law and findings of the Supreme Court.

**Case Review:** *Appeal is partially allowed.*

## High Court

***SKS Power Generation (Chhattisgarh) Ltd Vs. Canara Bank, Commercial Summary Suit No. 234 of 2020, Date of Judgment: August 11, 2021 (Bombay High Court)***

**In order to invoke court's jurisdiction in "Unconditional Bank Guarantee", it must be shown decisively to the satisfaction of the Court that there is no possibility of restitution in this amount.**

#### Background of Case

This Commercial Summary Suit was filed by SKS Power Ltd. (SKS) against Canara Bank after it refused to pay the amount guaranteed vide unconditional bank guarantees for amount of Rs.121.65 lakhs. These bank guarantees were issued to SKS Power Ltd. in 2012 on request of Cethar Constructions (Cethar) as part of their agreement to build a power plant in Chhattisgarh. This was in the form of five bank guarantees, all of which were unconditional and payable on demand. In 2017, Cethar was admitted for CIRP resulting in an immediate moratorium. SKS Power invoked their bank guarantees and demanded Canara Bank to remit the whole amount. Canara Bank declined the payment, claiming that recovering the amount would be difficult because Cethar was in liquidation. As a result,

it is a cause of irretrievable prejudice. At this time, Nagarajan (Cethar's Resolution Professional and Liquidator) filed an interim motion for impleadment (right to sue), alleging that Cethar is, if not a necessary party, at least a proper party. Nagarajan claims that there was "fraud and collusion" between Cethar and SKS Ipat, the erstwhile parent company of SKS. The major questions before the court were whether principal debtor (Cethar Ltd.) can file 'impleadment' application and whether courts should get involved when it comes to enforcing unconditional bank guarantees?

### High Court's Observations

Bombay High Court relied on the Supreme Court's ruling in the matter *Hindustan Steelworks Construction Ltd Vs. Tarapore & Co & Anr* (1996) that in the matter of unconditional bank guarantee court should interfere only "in case of fraud or in a case where irretrievable injustice would be done if bank guarantee is allowed to be encashed". The court concluded that there was no fraud in none of the three matters i.e., (i) the underlying power plant construction contract; or (ii) the issuance of the bank guarantees; or (iii) the invocation. Referring to the case of *UP State Sugar Corporation Vs. Sumac International Ltd* as precedent, the court stated that "in commercial dealings, an unconditional bank guarantee will be realized irrespective of any pending disputes. The bank must honour it according to its terms; else its purpose is lost". The Court also cited the Supreme Court judgement in the matter of *Dwarikesh Sugar Industries Ltd v Prem Heavy Engineering Works (P) Ltd & Anr* (1997), to derive the point that "irretrievable injury, has to be such a circumstance which would make it impossible for the guarantor to reimburse himself, if he ultimately succeeds". Additionally, the court dismissed the interim motion on the grounds that a bank guarantee is an independent contract, and the primary debtor (Cethar) is never a required party while executing it. While denying relief to the Canara Bank, the Court said they are nonetheless entirely without substance.

### Order

The summons for judgement was made absolute, and the suit was decreed in plaintiff's favour. No costs.

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

***Maitreya Doshi Vs. Anand Rath Global Finance Ltd. and Kanak Jani, RP, Company Appeal (At Insolvency) No. 191 of 2021, Date of NCLAT Judgment: August 25, 2021.***

**National Company Law Appellate Tribunal (NCLAT)  
A Corporate Debtor cannot be permitted to back out from the documents and promises made as Co-borrower on account of being a Pledgor.**

### Background of Case

Maitreya Doshi, the Appellant, erstwhile Director of M/s Doshi Holdings Pvt. Ltd. (Corporate Debtor) challenged the NCLT, Mumbai order for initiation of CIRP on the ground that it was not a debtor of the loan because it had only pledged shares. In this case, Anand Rath Global Finance Ltd. (Respondent -1), an NBFC, disbursed loan to the tune of Rs.6 Crore to M/s Premier Ltd. under three separate Loan cum Pledge Agreements. The terms of the said loans were extended by way of various addendums. According to Appellant, in the amounts disbursed to M/s Premier Ltd., the Doshi Holdings had pledged shares held by it in M/s Premier Ltd in favour of the Respondent No. 1, the Financial Creditor (FC). Citing Loan Pledge Agreements, the Appellant argued that the sole obligation of Doshi Holdings was limited to only pledging shares held by it in M/s Premier Ltd. and that Doshi Holdings was not liable and/or obliged towards Respondent No.1 for the amounts disbursed to M/s Premier Ltd. The Appellant also claimed that the Doshi Holdings was not a beneficiary from the loan disbursed to M/s Premier Ltd. and is not liable to pay the amounts. When default occurred, it is claimed that the Appellant sought payment of the amount defaulted from M/s Premier Ltd. and not from the Doshi Holdings.

### NCLAT's Observations

The Court while referring to a catena of landmark judgements of *Phoenix ARC Pvt. Ltd. Vs. Ketulbhai Ramubhai Patel*, and *Anuj Jain Vs. Axis Bank Ltd.* etc. stated that the obligation of Doshi Holdings was limited to that of a pledgor of shares. "If there had been 'only a security interest' like pledging of shares, it would have



been different,” said the NCLAT. However, the scrutiny of loan agreement and other records reveal that Doshi Holdings and M/s Premier Ltd. were co-borrowers of the loan. The Loan cum Pledge Agreements were found to have various clauses binding Premier Ltd. and Doshi Holdings to repay the loan and the Appellant signed this Agreement on behalf of Premier Ltd. as well as separately for Doshi Holdings as Authorized Signatory. (p.13) The Court expressed surprise that the Appellant was denying liability on account of Doshi Holdings after signing joint documents in favour of Respondent No.1 as Authorised Signatory for both the Companies. Besides entering into Agreement with the Financial Creditors as Co-borrower, Doshi Holdings also received loan as Co-borrower.

### Order

NCLAT held that Doshi Holdings is Co-borrower of the loan. Therefore, it is Corporate Debtor under the IBC. The Court decline to interfere in the order of NCLT.

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

***M/S Mohan Gems & Jewels Private Limited Vs. Vijay Verma and Insolvency and Bankruptcy Board of India (IBBI), Company Appeal (Insolvency) No. 849 of 2020, Date of NCLAT Judgment: August 24, 2021.***

**Legality and Propriety of any Regulation/ Notification/ Rules/ Act cannot be looked into by NCLT or NCLAT**

### Background of Case

This appeal was filed by the Corporate Debtor (CD) M/S Mohan Gems & Jewels Private Ltd. (Appellant) through its Liquidator seeking closure of the Liquidation Process as per Regulation 45(3)(a) of IBBI Liquidation Process Regulations, 2016, as the 'Corporate Debtor' was being sold as a Going Concern (GC) through an e-auction in which Mr. Vijay Verma (Respondent No. 1) was the highest bidder at a bid price of Rs. 4.52 crore. The Adjudicating Authority (AA) had in the impugned order rejected the request for closure of liquidation process and stated that it could not found any merit in the IBBI's CIRP Regulations and Liquidation Process Regulations which are set up as foundation to say that by virtue of liquidation

Regulation 45 (3), dissolution shall be dispensed with for closure of liquidation.

Three legal questions had emerged in the impugned order of the AA:

- Whether the Liquidator sell the CD as a GC in pursuant to Regulation 32 of IBBI (Liquidation Process) Regulation 2016.
- Whether the AA was correct in concluding that Regulations 39C of CIRP Regulations and 32A, 45(3) of the Liquidation Process Regulations are inconsistent with Section 54 of the Code.

Whether the interpretation by the AA of the provisions of the IBC and 'Liquidation Process Regulations' in the Order impugned is contrary to the scope and spirit of the IBC.

### NCLAT's Observations

The Court while referring to a catena of landmark judgements of the Supreme Court like Arcellor Mittal India Pvt. Ltd.(supra), Swiss Ribbons Pvt. Ltd. (supra) and M/s. *Innovative Industries Ltd.' Vs. 'ICICI Bank and Anr.*, observed that that 'Liquidation' should be the last resort only if the Resolution Plan submitted is not up to the mark and even in Liquidation, the Liquidator can sell the business of the 'Corporate Debtor' as a 'going concern'. Asserting that the Regulations referred by the AA were in conformity to the IBC, NCLAT observed that it is a well settled proposition that the legality and propriety of any Regulation/Notification/Rules/Act cannot be looked into by NCLT or NCLAT. The Tribunal can only ascertain whether the procedures provided for under the IBC, 2016 and Companies Act, 2013 are being followed or not. AA cannot go beyond this. NCLAT also mentioned that the NCLT had overstepped its jurisdiction.

### Order

NCLAT overruled the decision of the AA and set aside the order of NCLT stating that keeping in view the scope and spirit of the IBC, read with Section 54 of the IBC, Regulation 39C of CIRP Regulations, Regulations 32(e)&(f), 32A and 45(3) of the Liquidation Process Regulations, we are of the view that the sale of the 'CD' was carried out by the Liquidator in accordance with the Regulations.

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

*NTPC Limited, Barh Super Thermal Power Project Vs. Ram Ratan Modi, Liquidator of D C Industrial Plant Services Pvt. Ltd., Company Appeal (At) (Insolvency) No. 309 of 2021, Date of Judgment: July 19, 2021.*

**It is duty of liquidator to examine the claim as provided by regulations and regulation 25 to come at best estimate of the amount and give the benefit to the Appellant.**

## Background of Case

This Appeal was filed by Appellant 'NTPC Limited' against impugned order passed by the Adjudicating Authority 'AA' (NCLT-Kolkata Special Bench). In the impugned order, Appeal filed under Section 42 of the IBC, 2016 by Appellant was partially rejected. The Appellant claimed that it had awarded two contracts to the Corporate Debtor 'CD'- 'DC Industrial Plant Services Pvt. Ltd.'. The Appeal states that the Respondent failed to carry out the contracts awarded to it and the Appellant claims that the Appellant was constrained to terminate the contract and to get balance work executed through third party. Accordingly, CD referred the disputes to adjudication. The facts of the case are that Application under Section 7 of the IBC, 2016 was admitted against the CD and the Appellant filed proof of claim as an “other creditor” under Form 'F' and the Resolution Professional 'RP' published list of the Creditors. Subsequently, Liquidation order was passed, and the Appellant filed claim under Form 'G' to the Liquidator. The Liquidator however, sent an e-mail rejecting the claim and the Appellant moved AA. The AA recorded that it was partly allowing the claim to the extent mentioned in the impugned order. Further, CD had filed a counter claim on the Appellant and the Appellant had called for Arbitration which was suspended due to CIRP process. Subsequently the adjudicator in its award rejected the counter claim of the CD. However, with regard to the claim made by the Appellant, the Adjudicator recorded that the “same may further be worked out and exact amount which is assessed at the risk and cost of CD”. Thus, the figure only remained to be worked out. Further, after the Adjudicator gave Award, the matter was referred to the Expert Settlement Council 'ESC' which heard both the parties, but ESC also could not bridge the gap between the parties.

Referring to the same the Liquidator sent an e-mail and observed that since the claim amount of Appellant has been subjected to dispute by the CD and the books of CD does not show the said claim amounts as claimed by the Appellant, the claim was not admissible.

## NCLAT's Observations

The Appellate Tribunal stated that as per IBBI (Liquidation Process) Regulations, 2016, the Liquidator was required to process the claims submitted in Form 'G' by the Appellant as claim by “Other Stakeholder”. Regulation 20 provides for processing of claims by other stakeholders and the Appellant was required to prove its claim inter alia based on relevant documents which adequately establish the claim. Under Regulation 23, the Liquidator has power and duty to call for such other evidence or clarification as he deems fit from a claimant for substantiating the whole or part of its claim. Further, Regulation 28 even makes provisions for contingencies where debt is payable at future time and Regulation 29 provides for Mutual Credits and set-off. Further the Appellate Tribunal stated that it was inappropriate on the part of the Liquidator to inform the Appellant in the e-mail that because the CD had disputed the amount and the same did not reflect in the record of the CD, the claim filed by the Appellant was not admissible. It was his duty to examine the claim as provided by Regulations and Regulation 25 to come at best estimate of the amount and give the benefit to the Appellant. The Appellate Tribunal found that the Liquidator had avoided performing the duty as was required to be performed under the IBC, 2016 and the Regulations.

## Order

The Appellate Tribunal disposed the appeal directing the Liquidator to take steps as mentioned in judgment and process claim of the Appellant as 'other creditor' and arrive at best estimate of the amount of claim made by the Appellant and give the necessary benefit to the Appellant. The communication sent by the Liquidator were quashed and set aside.

**Case Review:** *Appeal Disposed.*

## IBC News

### IBC does not include 'Success Fee' for Resolution Professionals: NCLAT

The NCLAT in the matter of Jayesh N Sanghrajka, Erstwhile R.P. of Ariisto Developers Pvt Ltd v. The Monitoring Agency nominated by the CoC has ruled that 'Success Fee' charged by RPs is not legally valid as per the IBC, 2016. "We hold that 'success fees' which is more in the nature of contingency and speculative is not part of the provisions of the IBC and the Regulations and the same is not chargeable," said the NCLAT. RP had challenged the decision of NCLT Mumbai on the ground that 'Success Fee' was approved by the CoC which is a commercial decision in which the AA does not have jurisdiction to interfere with. NCLAT not only disallowed the payment of Success Fee but also expressed its concerns over the practice.

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

<https://www.livelaw.in/news-updates/nclat-says-success-fees-paid-to-irp-contingent-and-speculative-not-part-of-ibc-182247>

### Failing Firms in US paid \$165 Million as Bonus

The Government Accountability Office has urged the US Congress to consider amending the U.S. Bankruptcy Code to include oversight of retention bonuses paid in the weeks preceding a Chapter 11 filing. The agency reviewed 7,300 bankruptcies that occurred during fiscal 2020 and found that 42 troubled companies awarded about \$165 million of retention pay shortly before seeking court protection.

**Source:** *Bloomberg.com, September 30, 2021.*

<https://www.bloomberg.com/news/articles/2021-09-30/failing-firms-paid-165-million-in-bonuses-ahead-of-bankruptcy>

### Bad Bank's IDRCL starts with paid-up capital of ₹80.5 lakh on an authorized capital of ₹50 crore

India Debt Resolution Company Ltd (IDRCL) will act as Asset Management Company (AMC) for the National Asset Reconstruction Company Ltd (NARCL), the Bad Bank, and work in tandem with will work in tandem to clean up bad loans, according to documents available with the Registrar of Companies (RoC).

The primary objectives of the company are to undertake all kinds of debt management, operational management,



resolution advisory, support and consultancy services in relation to debt resolution, and insolvency resolution. Arvind Sadashiv Mokashi has been appointed on the board as State Bank of India's (SBI's) nominee director. The other directors are Narayan Keelveedhi Seshadri and Anilraj Chellan. Shareholders of IDRCL include Bank of Baroda (BoB), Punjab National Bank (PNB), Bank of India (BoI), Bank of Maharashtra, SBI, Union Bank of India, Canara Bank, Indian Bank and IDBI Bank.

**Source:** *Live Mint, September 22, 2021*

<https://www.livemint.com/industry/banking/govt-sets-up-asset-management-company-for-bad-bank-11632310419226.html>

### The need is for at least four-five more SBI-sized banks: Finance Minister

Union Finance Minister Ms. Nirmala Sitharaman has said that there is an urgent need to scale up banking to not only meet the growing needs of the industry, but also to ensure that all economic centres of the country are covered with at least one physical or digital banking presence.

"We need to scale up banking. The need is for at least four-five more SBI-sized banks," said Ms. Sitharaman in her address to the 74th Annual General Meeting of Indian Banks' Association (IBA) in Mumbai on September 26, 2021. Ms. Sitharaman also lauded the change brought by digitisation and emphasised on futuristic thinking to keep pace with evolving technology. "The country's optic fiber network has covered two-third of about 7.5 lakh panchayats. This could be used to deliver banking services

in unconnected areas as well,” said the FM. She also asked the IBA to conduct a digitised mapping of each district of the country with regard to the presence of bank branch operation and their location. The finance minister asked banks to develop models and better understanding of businesses focused on exports as the country has set a \$2 trillion export target by 2030.

**Source:** *MoneyControl.com, September 26, 2021.*

<https://www.moneycontrol.com/news/business/banking-sector-needs-to-be-scaled-up-with-4-5-sbi-sized-banks-fm-sitharaman-7509791.html>

### **Moratorium under the IBC is only applicable to Corporate Debtors and not promoters: SC**

The Apex Court has held that the provisions for initiation of fresh proceedings or for withdrawal of existing ones do not protect the promoters of the stressed company but only the CD.

The judgement was delivered by a bench of Justices DY Chandrachud, Vikram Nath and Hima Kohli allowing the home buyers to move against the promoters of the first respondent CD (Today Homes and Infrastructure Pvt Ltd), even though a moratorium was in effect due to ongoing CIRP. The said home buyers had invested in a Group Housing Project in Gurugram which was being developed by the respondent, but it was later abandoned. The home buyers contended that as per their agreement with the realty firm, the possession of the apartments was to be delivered within a period of thirty-six months, which in almost all cases was to be in 2014. The NCDRC allowed this claim and directed refund of the principal amount to the petitioners, following which the CD approached the Delhi High Court claiming protection under section 14 of the IBC. The High Court on March 27, 2019, directed that no coercive steps shall be taken against the Managing Director of the company in terms of the order passed by the NCDRC. This matter then reached SC.

**Source:** *The Business Standard, September 17, 2021.*

[https://www.business-standard.com/article/companies/moratorium-under-ibc-applies-only-to-corporate-debtor-not-to-promoters-sc-121091601418\\_1.html](https://www.business-standard.com/article/companies/moratorium-under-ibc-applies-only-to-corporate-debtor-not-to-promoters-sc-121091601418_1.html)

### **NCLTs, NCLAT should stick to 330- day deadline for resolution plans: SC**

The Supreme Court bench led by Justice D. Y. Chandrachud has instructed NCLTs and NCLAT to

maintain the sanctity of the 330-day deadline provided by the legislature under the IBC, 2016. The apex court dismissed an appeal filed by Ebix Singapore against the NCLAT order which refused withdrawal of the company's resolution plan for the bankrupt Educomp Solutions. NCLAT had quashed NCLT's order which had allowed Ebix Singapore to withdraw its resolution plan, as the CoC led by the SBI had already given their approval.

**Source:** *ETNOWNEWS.COM, September 13, 2021*

<https://www.timesnownews.com/business-economy/economy/article/wont-allow-ibc-to-fail-due-to-long-delays-or-depreciation-of-assets-of-corporate-debtor-sc/811482>

### **Financial Creditors realized ₹ 42,630 crore through CIRP in Q1 of FY 2021-22**

The latest data released by the Insolvency and Bankruptcy Board of India (IBBI) in its quarterly Newsletter reveal that the Financial Creditors (FCs) have realized ~ 25.46% of their total admitted claims through Corporate Insolvency Resolution Process (CIRP) in April – June quarter of the current financial year FY 22.

In this quarter, 36 Corporate Debtors (CDs) including Videocon Group were rescued with the Resolution Plans while 62 CIRP cases ended in liquidation. Furthermore, the realization of debts in comparison to the liquidation value of the CDs was recorded at 127.94% which stood at 25.46% in comparison to their total admitted claims.

The IBC regime has recently completed five years of its operations. As per the data of IBBI, total 4,541 CIRP cases were initiated till the end of June, 2021 out of which 2,859 were closed. During this period, the lenders could recover just ₹ 2.45 lakh crore or 36% of the total claims amounting to ₹ 6.82 lakh crore from 396 companies that were resolved till June 30. “About 75% of the CIRPs ending in liquidation (1,011 out of 1,349) were earlier with the Board for Industrial and Financial Reconstruction and/ or defunct. These corporate debtors had assets, on average, valued at around 7% of the outstanding debt amount,” reported the Newsletter.

**Source:** *The New Indian Express, September 08, 2021*

<https://www.newindianexpress.com/business/2021/sep/08/ibbi-financial-creditorsrealised-just-25-per-centof-total-claims-under-insolvency-2355838.html>



## **FSDC Flags Need to Keep a Continuous Vigil by Govt. and all Regulators on the Financial Conditions**

The high-powered Financial Stability and Development Council (FSDC) headed by the Union Finance Minister Ms. Nirmala Sitharaman has emphasized on the need to keep continuous vigil on various financial sectors during rollback of the Covid-19 relaxations. Besides the Minister, the meeting was also attended by RBI Governor Shaktikanta Das, SEBI Chairperson Shri Ajay Tyagi, IBBI Chairperson Dr. M. S. Sahoo and other senior officials. FSDC also deliberated on various issues related to the economy such as financial inclusion, framework for resolution of financial institutions and issues related IBC processes, data sharing mechanisms of government authorities, internationalization of Indian Rupee and pension sector related issues among others

**Source:** *Financial Express, September 04, 2021*

<https://www.financialexpress.com/economy/finance-minister-led-financial-stability-and-development-council-discusses-stressed-asset-issue/2323691/>

## **Unitech Group's new Board of Management allowed to negotiate with ARCs**

The Supreme Court on 24th August allowed Unitech Group's new Board of Management (BOM) to negotiate with the three Asset Reconstruction Companies (ARCs) i.e., Suraksha ARC, JM Financial ARC and Edelweiss ARC and apprise on development in four weeks. In pursuance to the judgement, a sub-committee of four directors will negotiate with the ARCs, which collectively holds around 8,000 out of the 15,000 total flats, for one time settlement of the mutually agreed dues. Presently, there are 74 (residential) and 10 (Commercial) under construction projects out of which 35 projects have been assigned to ARCs. In its resolution plan, the BOM has submitted that the construction of 15,000 units must be done for delivery of possession to homebuyers in 3 to 4 years and at current price levels with an estimated cost of ₹5,500-6,000 crores.

**Source:** *Business Today, August 26, 2021*

<https://www.businesstoday.in/latest/corporate/story/sc-allows-unitech-group-sub-panel-to-hold-negotiations-with-three-arcs-305214-2021-08-26>

## **Nirav Modi's flagship firm now undergoing liquidation**

A special Prevention of Money Laundering Act (PMLA) Court has ordered release of properties worth ₹440 crore which were mortgaged by Nirav Modi's companies with the Punjab National Bank for liquidation.

**Source:** *The Economic Times, August 16, 2021*

<https://economictimes.indiatimes.com/news/india/nclt-passes-liquidation-order-against-nirav-modis-flagship-firm-firestar-international/articleshow/85408323.cms>

## **Recovery for secured Financial Creditors in peer economies should be actual benchmark of IBC's evaluation: Jayant Sinha**

Lok Sabha MP Shri Jayant Singh has expressed serious concerns on low recovery of debts from financially stressed corporates under the IBC Regime. Speaking to media persons, Shri Sinha said "If you take out some of the high-profile cases, recovery tends to be quite low, and in some cases, people are thinking of liquidation as the benchmark,". He suggested that the liquidation should not be seen as the benchmark; instead, we should be looking at insolvency resolution around the world, especially in our peer economies. The recovery for secured financial creditors (in peer economies) should be the actual benchmark, he opined.

Shri Sinha also suggested that the Insolvency Professionals (IPs) should be allowed to dispose of the assets of Corporate Debtors in parts for value maximization. Shri Sinha is heading the Parliamentary Standing Committee on Finance that has recently submitted report to the Parliament on operation of the Insolvency and Bankruptcy Code (IBC, 2016) in the country. The House panel, led by Shri Sinha, also advocated for a Pre-Pack resolution mechanism for major businesses (which is presently confined to just MSMEs) and a common regulator for both IPs and IPAs. Currently, the IPs are governed by the Insolvency and Bankruptcy Board of India (IBBI), whilst the IPAs are supported by organizations like as the ICAI and ICSI, which are governed by separate laws.

**Source:** *The Financial Express, August 16, 2021*

<https://www.financialexpress.com/economy/insolvency-and-bankruptcy-code-peer-economies-should-be-our-benchmark-says-jayant-sinha/2311386/>

## CIRP initiation by Financial Creditor is not 'time barred': Supreme Court

Allowing an appeal of Dena Bank (now Bank of Baroda), the Supreme Court on August 05 observed that the plea by Financial Creditor (FC) for initiation of CIRP against a Corporate Debtor (CD) before the Adjudicating Authority (AA) will not get time barred on the ground that it had been filed beyond a period of three years from the date of declaration of the loan account as NPA, if there were an acknowledgement of the debt by the Corporate Debtor before expiry of the period of limitation of three years, in which case the period of limitation would get extended by a further period of three years. The SC set aside the order of NCLAT and upheld the decision of NCLT to admit the CIRP case of Kaveri Telecom Infrastructure Limited and its director.

**Source:** *Mint*, August 04, 2021

<https://www.livemint.com/news/india/insolvency-plea-by-financial-creditors-exempt-from-3-year-time-limit-sc-11628093099518.html>

## Videocon Promoter approaches NCLAT to set aside Resolution Plan

In the appeal to the NCLAT, Mr. Venugopal Dhoot, former Chairman of Videocon Group, has said that the commercial wisdom exercised by lenders is "arbitrary and irrational and does not reflect any applicability of mind by rejecting a proposal which was 10 times higher and submitted at an early stage of the process". He has demanded the Appellate Tribunal to set aside the order of NCLT accepting the Resolution Plan and direct it to consider his settlement offer under Section 12 A of the IBC.

**Source:** *Mint*, August 02, 2021

<https://www.livemint.com/companies/news/venugopal-dhoot-moves-nclat-against-approval-to-twin-star-s-resolution-plan-11627818466464.html>

## Provide papers to assess 'pay-outs' for baby powder victims, US panel to Jhonson & Jhonson

The panel is trying to learn how J&J's bankruptcy plans may affect people who have filed litigation alleging its baby powders were carcinogenic. The pharma faces legal actions from tens of thousands of plaintiffs, including women suffering from ovarian cancer and others with mesothelioma, alleging that its baby powder and other talc products contained asbestos and caused cancer. J&J is

reportedly exploring a plan to offload liabilities under USA's bankruptcy law.

**Source:** *The Economic Times*, July 29, 2021

<https://www.reuters.com/business/healthcare-pharmaceuticals/us-house-subcommittee-asks-jj-info-baby-powder-bankruptcy-plans-letter-2021-07-28/>

## Pegasus maker Israel firm to face liquidation

London-based Novalpina Capital, which bought the NSO Group in 2019, is being dissolved after a dispute between its co-founders, said media reports. Its liquidation leaves the future ownership of NSO unclear, just as the company is grappling with the fallout of a vast electronic espionage scandal.

**Source:** *The Economic Times*, July 28, 2021

<https://www.ndtv.com/world-news/pegasus-scandal-israeli-spyware-firm-nsos-owner-to-be-liquidated-pegasus-scandal-fallout-2496849>

## Supreme Court dismissed PIL seeking to prohibit NCLT from acting as Appellate Authority

The petitioner demanded the SC to declare that the matters decided by the SC should be considered as fundamental rule by NCLTs. Besides, the SC was also urged to issue directions to NCLTs not to act as an appellate authority to the decisions of the top court and find flaws to circumvent the "rule of law" laid down. Justifying the invocation of Article 32, the petitioner submitted that the NCLT has misinterpreted the judgments of the SC.

However, the court did not agree with the argument. "It is not necessary for this court to return any finding on the question sought to be raised in the abstract without any live challenge to an order of the NCLT. In any event there are appellate remedies available under the IBC," said the judgement delivered by Justices D. Y. Chandrachud and M. R. Shah.

**Source:** *The Economic Times*, July 24, 2021

<https://economictimes.indiatimes.com/news/india/sc-junks-pil-to-declare-that-nclt-cannot-act-as-appellate-authority/articleshow/84703358.cms>

## Creditors got ₹ 2.37 trillion through approved Resolution Plans of top 100 CIRPs: Minister in Lok Sabha

Responding to a query in Lok Sabha on July 19, Union Minister of State for Finance Shri Pankaj Chaudhary

informed that the financial creditors have realized ₹ 2.37 trillion through approved resolution plans of top 100 CIRPs, which is over 36 per cent of the admitted claims. He further informed that the first quarter of FY 22, the creditors have realized ₹ 2.45 trillion from 394 resolution plans approved under the Insolvency and Bankruptcy Code (IBC), 2016. "Separate framework for resolution of systemically important Financial Service Providers (FSPs) other than banks, has led to approval of a resolution plan that will help in realizing ₹ 37,167 crore," said Shri Chaudhary.

It is pertinent to mention that DHFL has been the first FSP of which the Resolution Plan was recently approved by the NCLT. He also acknowledged the adverse impact of Covid-19 pandemic in financial recovery by creditors during FY21. "Scheduled Commercial Banks (SCBs) recovered ₹ 4.18 trillion during the last three financial years, with recovery as a percentage of their gross NPA increasing from 13.1 per cent in FY18 to 15.1 per cent in FY19. The recovery increased to 15.8 per cent in FY20 to drop to 12.8 per cent in FY21 in the backdrop of the pandemic," he added.

**Source:** *Business Standard*, July 19, 2021

[https://www.business-standard.com/article/finance/creditors-got-rs-2-45-trn-from-394-resolution-cases-under-ibc-finmin-121071901160\\_1.html](https://www.business-standard.com/article/finance/creditors-got-rs-2-45-trn-from-394-resolution-cases-under-ibc-finmin-121071901160_1.html)

### Resolution Plan can't be subjected to statutory claims which weren't known prior to its approval: NCLAT

In the matter of DHFL, the NCLAT has ruled that the successful Resolution Applicant is not liable for dues which were not known till the time of approval of the Resolution Plan. Therefore, Piramal Group need not move to statutory authorities for waiver of such dues. All such dues will be considered as waived off. Through this order, the NCLAT has nullified the part of the NCLT Mumbai order while approving the Resolution Plan that had made it mandatory for the successful Resolution Applicant to approach various authorities for waiver of statutory liabilities. The order of the Appellate Tribunal is line to the 2019 Essar steel judgement and 2020 Ghanshyam Mishra judgement of the Supreme Court

**Source:** *Times News*, July 12, 2021

<https://www.timesnownews.com/business-economy/companies/article/nclat-relief-for-piramal-capital-to-speed-up-dhfls-insolvency-process/783899>

### NCLT revokes liquidation of Lotus City Project on Yamuna Expressway, asks RP to invite fresh Resolution Plans

Lotus City Plot Buyers Associations, an association of over 250 homebuyers, argued that NCLT had not included the ₹211 crore due to allottees which would stand satisfied after giving possession of flats. Furthermore, the NCLT had not included ₹50.5 crore, the Resolution Applicant had paid to the former promoters of the project. Launched in 2012 by 3 C Homes Pvt. Ltd., the Lotus City project went for insolvency on September 06, 2019. Ace Infrastructure was the lone bidder to submit the Resolution Plan which was approved by the CoC. However, the NCLT rejected the Plan contending that the liquidation value of the project amounting ₹480 crore was much higher than the ₹95 crore required to complete it.

**Source:** *The Times of India*, July 10, 2021

<https://timesofindia.indiatimes.com/city/noida/lotus-city-not-to-be-liquidated-tribunal-rules-on-plot-buyers-plea/articleshow/84280159.cms>



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# Statement of Best Practices: "Meetings of the Committee of Creditors Under Corporate Insolvency Resolution Process"

(Joint paper by all the IPAs)

## Introduction

In a Corporate Insolvency Resolution Process (CIRP), the commercial wisdom of the Committee of Creditors (CoC) is final subject to approval of the resolution plan by the Adjudicating authority. The CoC decides various matters in a CIRP, including acceptance or rejection of a resolution plan. It takes decisions through its meetings which are recorded in the minutes of the meetings. In CIRP, thus the role of CoC is akin to that of a protagonist, giving finality to the process.

This Statement of Best Practices (Statement) on the meetings of the Committee of Creditors (CoC) is one of a series of Best Practices issued and recommended to Insolvency Professionals (IPs) with a view of maintaining high standards by setting out best practices and harmonising approach to particular aspects of insolvency resolution process.

Adherence by an Insolvency Professional to this Statement is recommendatory. It prescribes a set of guidelines for convening and conducting meetings of the Committee of Creditors constituted under Chapter II of the Insolvency and Bankruptcy Code, 2016 (IBC/Code) and matters related thereto.

## This Statement of Best Practices sets out-

- (a) The legal provisions on meetings of Committee of Creditors as provided under the Code and Rules/Regulations/IBBI facilitation letters;
- (b) Practice of observance of the legal provisions in letter and spirit; and
- (c) Suggested best practices in conducting and convening the CoC meetings, basis the observations of IPAs from the inspections conducted of their registered Insolvency Professionals (IPs).

The following is the text of the Statement of Best Practices on "Meetings of the Committee of Creditors", prepared

jointly by ICSI Institute of Insolvency Professionals (ICSI IIP), Indian Institute of Insolvency Professionals of ICAI (IIPI) and Insolvency Professional Agency of the Institute of Cost Accountants of India (IPA-ICMAI).

## Scope

This Statement is applicable to Insolvency Professionals while conducting the CoC meetings. This Statement is in conformity with the provisions of the Code and the rules/regulations made thereunder. However, if, due to subsequent changes in the Code and the Rules/Regulations made thereunder, a particular Statement or any part thereof becomes inconsistent with the Code or the regulations, the provisions of the Code or rules or the regulations shall prevail.

## 1. Convening a Meeting of Committee of Creditors

### 1.1 Authority

- 1.1.1 The first meeting of the committee of creditors shall be held within seven days of the constitution of the committee of creditors. The Resolution Professional appointed by the Adjudicating Authority to conduct the CIRP, may as and when he considers necessary summon subsequent meetings of the CoC.
- 1.1.2 The Resolution Professional shall summon a meeting of CoC if a request to that effect is made by the members of the committee representing thirty three per cent. of the voting rights.
- 1.1.3 The Resolution Professional shall act as a chairperson for all the meetings of CoC. The Resolution Professional shall himself conduct all the meetings of CoC. The number of persons accompanying the RP for the meetings may be limited to three and these persons should not ordinarily speak unless specifically



directed by the RP to speak on a specific issue.

## 1.2 Serial Number, Day, Time, Place and Mode of Meeting

### 1.2.1 Every Meeting shall have a serial number.

A Meeting may be convened on any day, at any time and place as the Resolution Professional deems fit. The Resolution Professional may keep in mind that a meeting may not preferably be kept on a National Holiday, unless absolutely necessary.

### 1.2.2 Date, time and place of the meeting must be fixed and intimated keeping in mind the convenience of members of COC and having regard to their geographical location.

### 1.2.3 The Resolution Professional may convene the meeting of COC at the premises of corporate debtor/financial creditor or his/her own premises or any other place as the Resolution Professional deems fit. The decision of the Resolution Professional will be final and binding.

*Provided, when choosing the venue for the meeting, the Resolution Professional should not only fulfil the legal requirement to choose a place which is convenient for persons who are invited to attend, but he/she should also ensure that the accommodation is adequate for the number of persons likely to attend.* Where a meeting is conducted through video conferencing or other audio and visual means, the venue of the meeting as set forth in the notice convening the meeting, which shall be in India, shall be deemed to be the place of the said meeting and all recordings of the proceedings at the meeting shall be deemed to be made at such place.

### 1.2.4 The members of the CoC may meet in person or through such other electronic means as provided in CIRP Regulations.

### 1.2.5 Where a meeting is conducted through video

conferencing or other audio and visual means, the venue of the meeting as set forth in the notice convening the meeting, shall be deemed to be the place of the said meeting and all recordings of the proceedings at the meeting shall be deemed to be made at such place. The link for joining the meeting shall be communicated, in advance, to all the members of the COC with clear advice to attend the meeting at the scheduled time by joining the link.

## 2. Notice

### 2.1 Service of Notice

#### 2.1.1 Notice Period

A meeting of the CoC shall be called by giving not less than five days' notice in writing along with notes on agenda to every participant, at the address it has provided to the Resolution Professional and such notice may be sent by hand delivery, or by post but in any event, be served on every participant by electronic means in accordance with Regulation 20 of CIRP Regulations.

Illustrative list of items of business for the Agenda for the first and subsequent meetings of Committee of Creditors is placed at Annexure A and B, respectively.

#### 2.1.2 The CoC may reduce the notice period from five days to such other period of not less than twenty-four hours, as it deems fit.

#### 2.1.3 The CoC may reduce the period to such other period of not less than forty-eight hours if there is any authorised representative.

### 2.2 Notice to be served on

#### 2.2.1 The Resolution Professional shall give notice of each meeting of the CoC to:

- (a) All its members including the authorised representatives referred to in sub-section (6) and (6A) of Section 21 and sub-section (5) of

## Section 21:

Provided that when Authorised Representatives are present, then the Financial Creditors or Operational Creditors or Home buyers they represent, would not be allowed to attend the meeting.

- (b) Members of suspended Board of Directors or Partners of the Corporate Debtor as the case may be;
- (c) Operational creditors or their representatives if the amount of their aggregate dues is not less than ten percent of the debt.

**Note:** If the claim of Operational Creditors, on verification is found to be less than ten percent, the Operational Creditors have no right to claim representation in the meeting of the Committee of Creditors.

2.2.2 The Resolution Professional may, if required, invite such persons relating to the CIRP, as invitees to participate in a particular meeting, where presence of such invitee is required. Such persons may include statutory auditors / senior management personnel of Corporate Debtor, Registered Valuers, Forensic Auditors, if any, etc.

2.2.3 A foreign insolvency practitioner or Administrator of any given case may be allowed to attend the CoC proceedings in India, subject to the approval of Adjudicating Authority.

2.2.4 A notice by electronic means may be sent to the participants through email as a text or as an attachment to e-mail or as a notification providing electronic link or Uniform Resource Locator for accessing such notice.

Further, the subject line in e-mail sharing notice of CoC meeting shall state the name of the corporate debtor, the place (if any), the time and the date on which the meeting is scheduled.

2.2.5 A record of each recipient to whom notice has

been sent and copy of such record and notices of any failed transmission and subsequent re-sending shall be retained as "proof of sending".

2.2.6 The notice for convening the meeting should, where possible be sent simultaneously to all members as specified in 2.2.1. The Resolution Professional should take all reasonable steps to ensure that the list of creditors is complete.

## 2.3 Contents of Notice

2.3.1 The notice shall provide the participants the details of day, date, time and venue of the meeting and of the option available to them to participate through video conferencing or other audio and visual means, and shall also provide all the necessary information to enable participation through video conferencing or other audio and visual means.

2.3.2 The notice of the meeting shall provide that a participant may attend and vote in the meeting either in person or through a representative duly authorised:

*Provided* that such participant shall provide the Resolution Professional, in advance, the identity of the authorised representative, who will attend and vote at the meeting on its behalf.

2.3.3 The notice of the meeting shall contain the following-

- (a) a list of the matters to be discussed at the meeting;
- (b) a list of the issues to be voted upon at the meeting; and
- (c) copies of all documents relevant to the matters to be discussed and the issues to be voted upon at the meeting.

2.3.4 Each item of the business requiring approval at the meeting shall be supported by a note setting out the details of the proposal, relevant material facts that enable the members of the

committee of creditors to understand the meaning, scope and implications of the proposal.

2.3.5 The notice of the meeting shall-

- (a) state the process and manner for voting by electronic means and the time schedule, including the time period during which the votes may be casted;
- (b) provide the login ID and the details of a facility for generating password and for keeping security and casting of vote in a secure manner; and
- (c) provide contact details of the person who will address the queries connected with the electronic voting.

2.3.6 The members of the CoC having atleast 33 percent of the voting rights may request the RP to convene a meeting of the CoC. Such request shall include a note proposing the matters to be discussed or issues to be voted upon, along with relevant documents, if any. The RP shall forthwith convene a meeting of the CoC for consideration of the note, or place the note for consideration in a meeting of the CoC if it is already scheduled or in the ensuing meeting of the CoC.

2.3.7 When members of the CoC having less than 33 percent of voting rights request the RP, along with a note, to place the note for consideration in a meeting of the CoC, the RP shall consider the request expeditiously on merits. If he considers it necessary, he shall place the note for consideration in the meeting of the CoC if it is already scheduled or in the ensuing meeting of the CoC.

2.3.8 Notice of CoC meeting enclosing agenda should separately record the items to be discussed and items to be voted upon in the meeting for better understanding as a whole.

### 3. Appointment of representative duly authorised by financial creditor in COC meetings

3.1 Every notice shall be accompanied by a form for appointment of representative duly authorised by financial creditor (form) and shall contain the name of the Corporate Debtor and the date of the meeting.

3.2 The form must not be sent out with the name or description of any other person inserted on it.

3.3 The form is valid only if it is presented by the time stated in the notice convening the meeting.

3.4 The form which is incorrect or incomplete will be considered invalid.

3.5 The Form which is unsigned or which do not explain the authority under which it is signed, will, therefore, be invalid. However, the form should not be rejected simply because of a minor error in its completion provided:

- a) the form sent with the notice of the meeting (or a substantially similar form) has been used;
- b) the identity of the creditor and the authorised representative, the nature of the his/her authority and any instructions given to the authorised representative are clear.

3.6 Resolution Professional will be the deciding authority in what is to be considered a 'Minor error' in the form.

3.7 The RP should intimate to the applicant who wish to be appointed as representative authorised by the financial creditor, in cases where the form is not being accepted for being invalid.

3.8 A person may be authorised to represent a creditor which is a body corporate. Where a person is so authorised, he must produce to the RP a copy of the Board resolution from which he derives his authority. The copy of the resolution shared must be signed by the Board of Directors of the Company or Company Secretary of the company.

## 4. Authorised Representatives for class of Creditors

The authorised representative for a class of creditors shall attend all the meetings of COC either in person or through video conferencing or other audio-visual means.

### 4.1. Voting by Authorised Representative:

Where the Corporate Debtor has at least ten financial creditors in a class, the resolution professional shall offer a choice of three insolvency professionals and a creditor in the class may indicate its choice of an insolvency professional, from amongst the three, to act as its authorised representative. The insolvency professional, who is the choice of the highest number of creditors in the class, is appointed as the authorised representative of the creditors of the respective class. The authorised representative shall circulate the agenda to creditors in a class, and may seek their preliminary views on any item in the agenda to enable him to effectively participate in the meeting of the committee;

Provided that creditors shall have a time window of at least twelve hours to submit their preliminary views, and the said window opens at least twenty-four hours after the authorised representative seeks preliminary views;

Provided further that such preliminary views shall not be considered as voting instructions by the creditors.

The authorised representative shall cast his vote in respect of each financial creditor or on behalf of all financial creditors he represents in accordance with the provisions of subsection (3) or sub-section (3A) of section 25A, as the case may be.

The procedure for voting and representation will be in accordance with Section 21 (6A) (b) of the Insolvency and Bankruptcy Code, 2016 (Code) read with regulation 16A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (Regulations).

## 5. Participation through video conferencing

- 5.1 The Resolution Professional shall make necessary arrangements to ensure uninterrupted and clear video or audio and visual connection.
- 5.2 The Resolution Professional shall take due and reasonable care-
  - 5.2.1 to safeguard the integrity of the meeting by ensuring sufficient security and identification procedures;
  - 5.2.2 to ensure availability of proper video conferencing or other audio and visual equipment or facilities for providing transmission of the communications for effective participation of the participants at the meeting;
  - 5.2.3 to record proceedings and prepare the minutes of the meeting;
  - 5.2.4 to store for safekeeping and marking the physical recording(s) or other electronic recording mechanism as part of the records of the corporate debtor;
  - 5.2.5 to ensure that no person other than the intended participants attends or has access to the proceedings of the meeting through video conferencing or other audio and visual means; and
  - 5.2.6 to ensure that participants attending the meeting through audio and visual means are able to hear and see, if applicable, the other participants clearly during the course of the meeting.

## 6. Quorum

- 6.1 Quorum shall be present throughout the meeting.
- 6.2 Quorum shall be present not only at the time of commencement of the meeting but also while transacting business.
- 6.3 A meeting of the committee shall be quorate if members of the committee representing at least thirty three percent of the voting rights are present either in person or by video



conferencing or other audio and visual means:

Provided that the committee may modify the percentage of voting rights required for quorum in respect of any future meetings of the committee.

- 6.4 Where a meeting of the committee could not be held for want of quorum, unless the committee has previously decided otherwise, the meeting shall automatically stand adjourned at the same time and place on the next day.
- 6.5 In the event a meeting of the committee is adjourned, the adjourned meeting shall be quorate with the members of the committee attending the meeting.
- 6.6 Participating through electronic mode in a meeting shall be counted for the purpose of Quorum.

## 7.Attendance Records

- 7.1 Attendance sheet should be complete in all respect and signing should be ensured within the meeting itself.
- 7.2 The attendance sheet shall contain the

following particulars: serial number and date of the meeting; name of the Corporate Debtor; date of initiation of CIRP; place of the meeting; time of the meeting; names and signatures of the members of COC, the Resolution Professional and also of persons attending the meeting by invitation and their mode of presence, if participating through electronic mode.

- 7.3 The attendance sheet shall be deemed to have been signed by the members of COC participating through electronic mode, if their attendance is recorded in the attendance sheet and authenticated by the Resolution Professional.
- 7.4 When the meetings are held through electronic mode, the attendance list may be generated through the Video Conferencing software.
- 7.5 An electronic copy of all records of CoC meetings (physical and electronic) should be kept as per the Record Retention Schedule advised by IBBI from time to time.

(....to be continued in next edition.)



## FIVE YEARS OF IIPI

The Indian Institute of Insolvency Professionals of ICAI (IIPI), is a wholly owned subsidiary of The Institute of Chartered Accountants of India (ICAI), a Section 8 Company promoted to enroll and regulate Insolvency Professionals (IPs) as its members in accordance with the Insolvency and Bankruptcy code 2016 (IBC). The IIPI was incorporated on 25th November 2021.

The IIPI has been awarded with the registration certificate as the First Insolvency Professional Agency (IPA) of India by Hon'ble Union Finance Minister Late Shri Arun Jaitley on 28th November 2016. It is the largest IPA in India with nearly two third IPs of the country. IIPI will celebrate its 5th Foundation Day on 25th November 2021. In this Special Feature, we present the journey of 5 Years of IIPI.



### Vision Statement

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

### Mission Statement

**IIPI-ICAI shall aim at promotion and development of a well-grounded insolvency profession by emphasizing on:**

- Capacity building of members through continuous professional advancement with focus on adherence to highest ethical standards and compliance in letter and spirit of IBC regime.
- Regulation of members in an independent and transparent manner sub-serving the public interest.
- Protection of the interests of various stakeholders in the insolvency and bankruptcy process in a judicious and optimal manner.

### Strategic Priorities

**The following areas of strategic significance have been identified towards realising the mission and eventually the vision of the organisation:**

- 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

### IIPI'S Role As IPA

REGULATORY	EXECUTIVE	CAPACITY BUILDING	QUASI-JUDICIAL
<ul style="list-style-type: none"> <li>• Preparing detailed standards and codes of conduct through Byelaws</li> <li>• Making such documents public and binding on all members enrolled with IPA</li> </ul>	<ul style="list-style-type: none"> <li>• Monitoring, inspecting, and investigating members</li> <li>• Objective of preventing frivolous behavior and misconduct by IPs</li> </ul>	<ul style="list-style-type: none"> <li>• Building knowhow and capacity of members and other stakeholders</li> </ul>	<ul style="list-style-type: none"> <li>• Addressing grievances of aggrieved parties, hearing complaints against members</li> <li>• Taking suitable disciplinary and corrective actions</li> </ul>

## IIPI Governing Board

### Independent Directors

**Dr. Ashok Haldia**, Chairman IIPI (Past Secretary ICAI)

**Ms. Rashmi Verma**, IAS (Retd.)

**Shri Ajay Mittal**, IAS (Retd.)

**Shri Satish K. Marathe**, Director at Central Board of RBI

### Directors

**CA. Nihar N. Jambusaria**, President, ICAI

**CA. Rahul Madan**, Managing Director, IIPI

## IIPI Committees

### Advisory Committee

### Membership Committee

### Monitoring Committee

### Grievance Redressal Committee

### Disciplinary Committee

### Audit Committee

### Appellate Committee

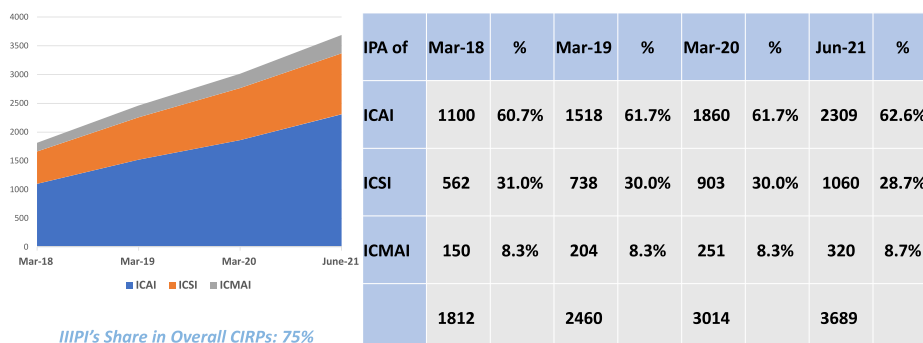
### Compensation Committee

### Strategy & Implementation Committee

## Professional membership of IIPI

Starting from a modest 33 professional members in FY 2016-17, IIPI family has increased to 2,551 professional members by September 24, 2021.

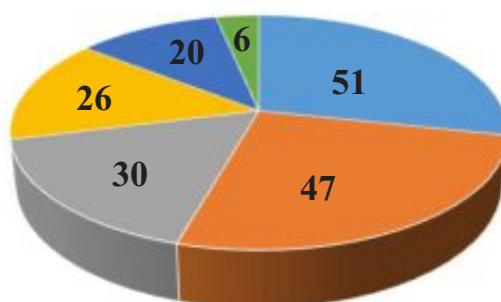
### Memberships Across IPAs



## IIPI'S Initiatives for Capacity Building

Till September 2021, 180 events have been conducted. Some of which were organized by IIPI while others jointly with industry/ institutional partners such as IBBI, ICAI, CII, UK-FCDO, CIBC-ICAI, IBA, CRISIL, ET-CFO among others.

### IIPI's Initiatives for Capacity Building



- Seminars & Webinars
- PREC
- Workshops & Trainings
- Awareness/Other Programs
- Roundtables & Study Groups
- International, National Conferences



## Special Initiatives of IIPI

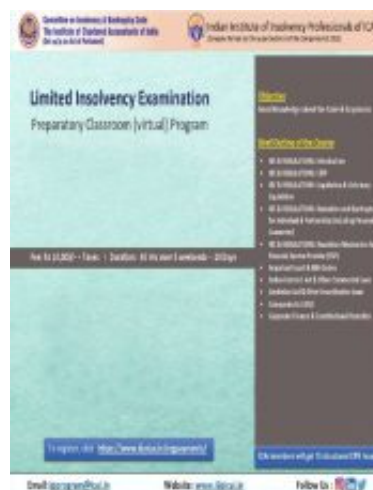
### Executive Development Program

IIPI on October 7, 2020 launched the first-ever five days online 'Executive Development Program on Managing Corporate Debtors as Going Concern as CIRP (For IPs)'. Till September 30, 2021 five EDPs have been conducted on various topics related to IBC Ecosystem.



### LIE Preparatory Classroom (Virtual) Program

Limited Insolvency Examination (LIE) Preparatory Classroom (virtual) Program launched on January 23, 2021, with an objective to facilitate IP aspirants in prestigious Limited Insolvency Examination. It has received accolades from IPs aspirants across academic and professional backgrounds.



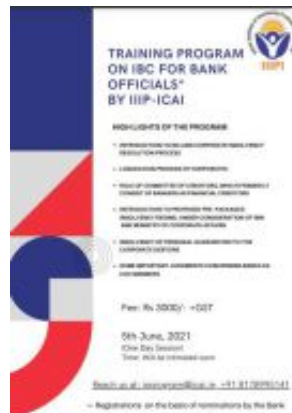
### E-LMS for LIE exam aspirants

This is an easy-to-use platform which delivers the concepts across the entire syllabus in the form of presentations and supplemented by mock tests in each component of the syllabus. A unique feature is that it enables you to take the tests at a modular level so that you can re-learn to improve the test scores!



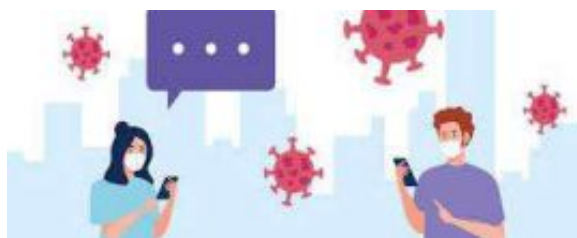
### Training Programs on IBC for Bank Officials

Bank Officials are at core of insolvency process for they represent the lenders in the Committee of Creditors (CoC). With a view to create awareness among bank officials IIPI launched first ever 'Training Program for Bank Officials' on January 20, 2021.



### Covid Helplines

Launched during the Covid-19 pandemic through social media platform – Telegram – in four metro cities of the country, the Covid Helpline was aimed at helping the professional members of IIPI in managing medical emergencies.



### 'Discussion Forum' (Online)

It acts as a vibrant 24x7 knowledge exchange platform among professional members of IIPI. Here the professional members of IIPI can post and respond to queries of professional nature related to CIRP, Liquidation, Voluntary Liquidation, Personal Guarantor to Corporate Debtors, and Pre-Pack.



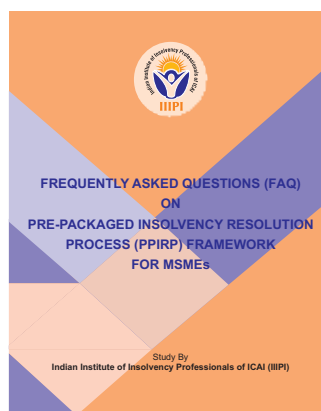
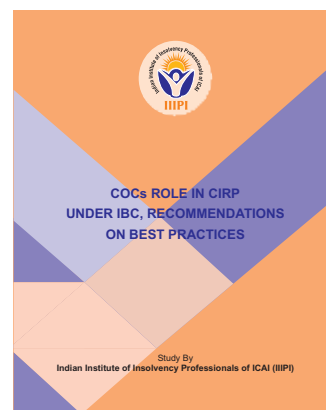
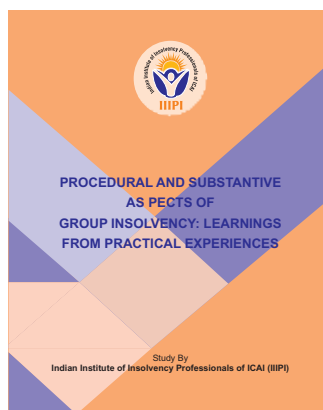
### International Conference (Virtual) on Insolvency Resolution Paradigm: Global Headwinds & Responses

Organized on 24th and 25th October 2020 the Conference was attended by insolvency experts from the United States of America (USA), the United Kingdom and South Africa among others. Besides, IPs, CAs, Bankers, Jurists, and Law Officers also participated.



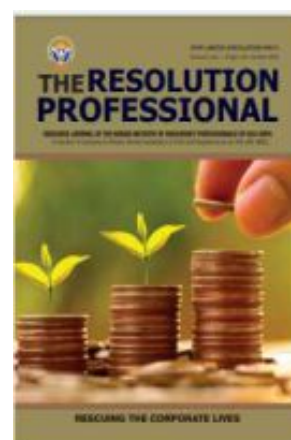
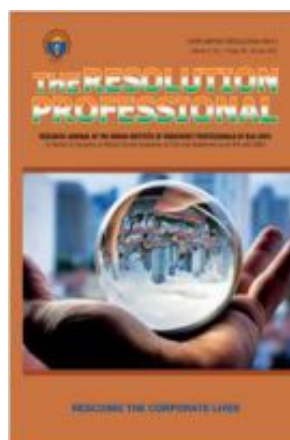
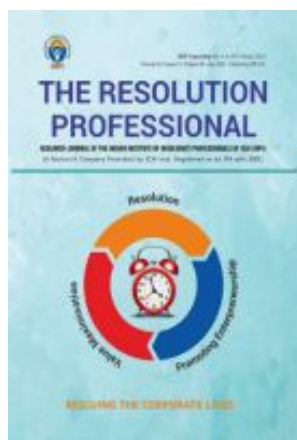
## Research Publications

In the past one year, IIPI has published five research publications based on the Reports submitted by various Study Groups. The Study Reports of some other Study Groups are under process.



## THE RESOLUTION PROFESSIONAL, Research Journal of IIPI

With the launch of The Resolution Professional as a peer-review, refereed, research journal on 24th October 2020, IIPI has published five issues of the Journal despite hurdles of Covid-19 pandemic. IIPI possess legal ownership of The Resolution Professional as per the Press and Registration of Books (PRB) Act, 1867.



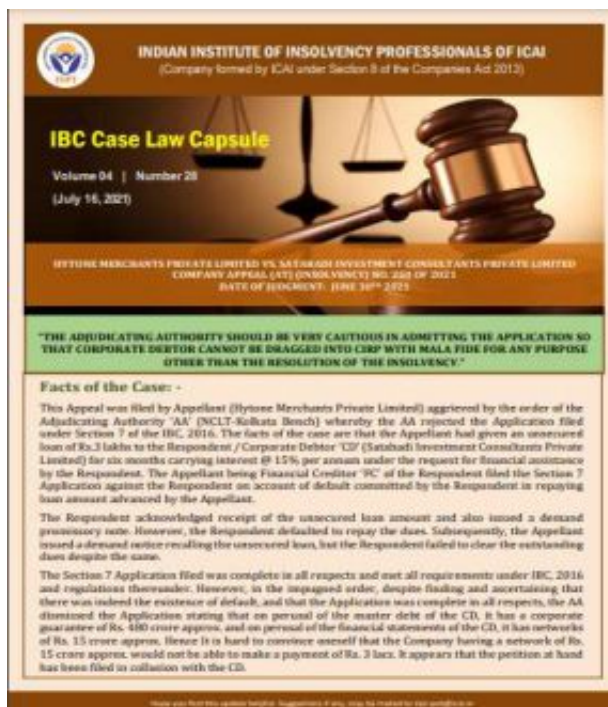
## Weekly Publications

IIPI Newsletter is an initiative of the IIPI to provide weekly updates to IPs on IBC regime in India and relevant international news on insolvency and bankruptcy while IBC Case Law Capsules provide summary of pathbreaking judgements from the Supreme Court, High Courts, NCLATs and NCLTs.

### IIPI Newsletter

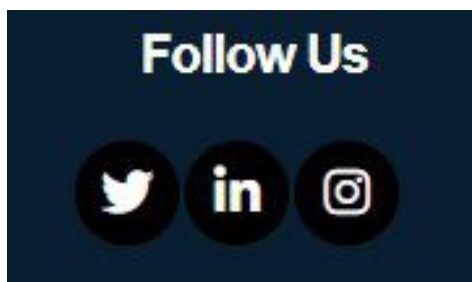


### IBC Case Laws Capsules



### IIPI on Social Media

Follow IIPI on Twitter, LinkedIn, and Instagram





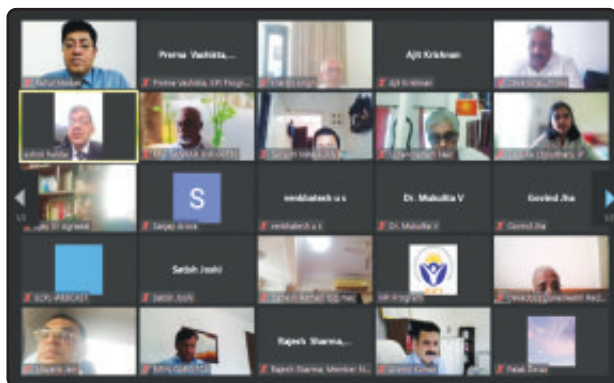
## IIPI News



CA. Nihar N. Jambusaria, President, ICAI addressing the inaugural session of Executive Development Program (EDP) on Legal Skills organized by IIIPI from 15th to 18th September 2021.



Shri Rajesh Sharma, Member-NCLT addressing the inaugural session of Executive Development Program (EDP) on Legal Skills organized by IIIPI from 15th to 18th September 2021.



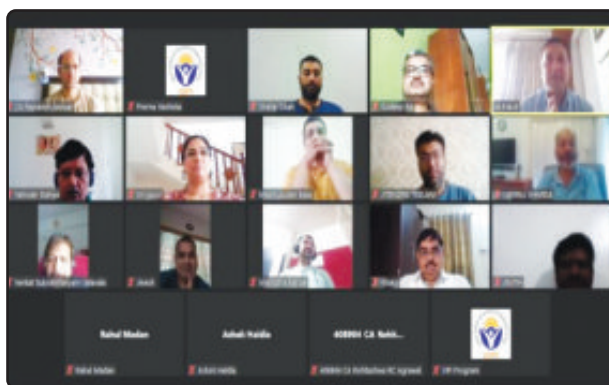
Snapshot of the inaugural session of Executive Development Program (EDP) on Legal Skills organized by IIIPI from 15th to 18th September 2021.



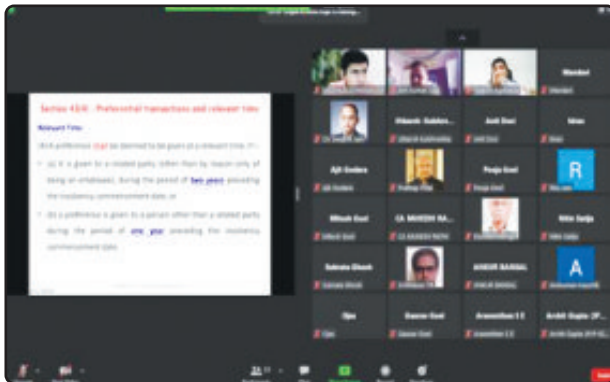
Snapshot of the National Virtual Conference on 'Demystifying Prepack Insolvency Framework for MSMEs' jointly organized by IIIPI and World Association of Small and Medium Enterprises (WASME) on September 10, 2021. On this occasion, IIIPI revealed two books based on the Report of Study Group 'Role of IPs prior to, during and post pre-packaged insolvency resolution process for MSMEs'.



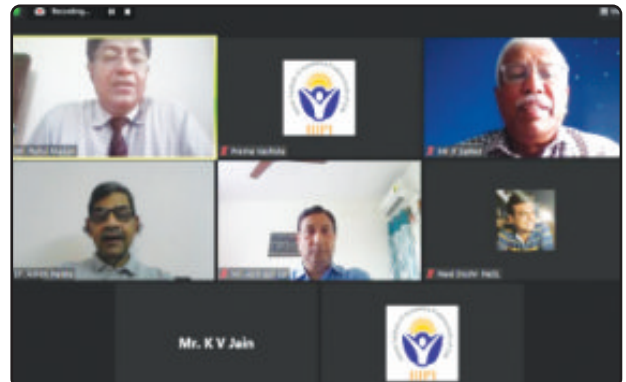
Shri Sudhaker Shukla, WTM, IBBI addressing National Conference (Virtual) "Insolvency and Bankruptcy Code – 5 Years of Bankruptcy Code and Beyond" on September 2, 2021. The conference was jointly organized by NFCG, IBBI, CII, IIIPI, Grant Thomson and SAM from 2nd to 3rd September 2021.



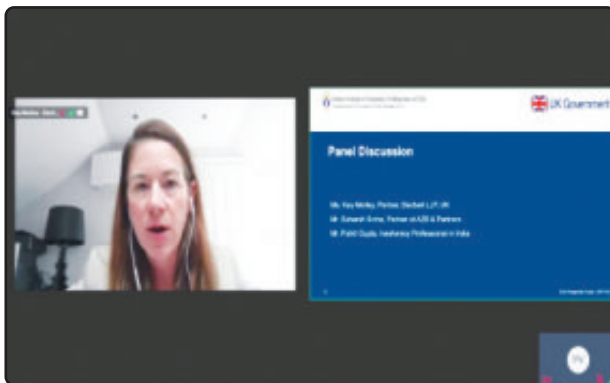
Snapshot of the 2nd Batch of LIE (Preparatory) Program on 29th August 2021.



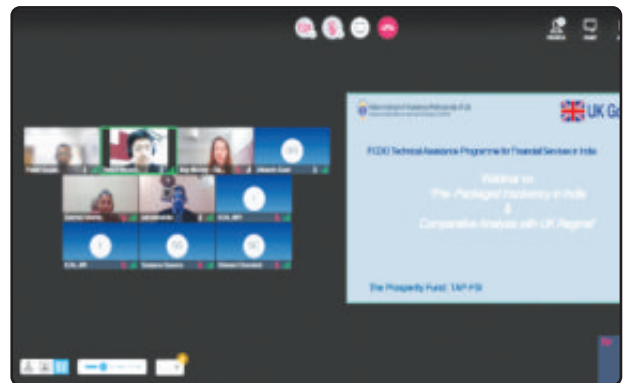
IIIPI with other IPAs organized 47th Batch of Pre-Registration Educational Course (PREC) Online from 23rd to 29th August 2021.



Webinar on 'Office Infrastructure and Usage of Technology by IPs' organized by IIIPI on Saturday, July 31, 2021.



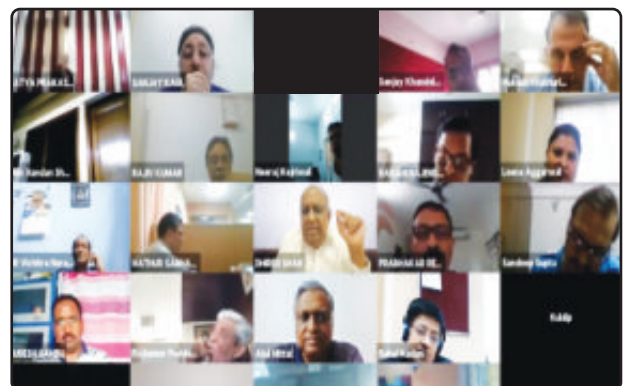
Ms. Kay Morle, Partner, Dechert LLP, UK, addressing 'Webinar on Pre-Package of MSMEs' jointly organized by IIIPI, and Foreign Commonwealth and Development Office (FCDO)/ British High Commission on August 10, 2021.



Snapshot of the 'Webinar on Pre-Package of MSMEs' jointly organized by IIIPI and Foreign Commonwealth and Development Office (FCDO)/ British High Commission on August 10, 2021.



CA. Rahul Madan, MD-IIIPI presenting memento to Dr. Navrang Saini, WTM, IBBI at IP Conclave jointly organized (hybrid mode) by IBBI and IPAs in Kolkata on September 18, 2021 as part of '75 years of Independence - Azadi ka Amrit Mahotsav'.



Snapshot of the "Draft Liquidation Forms and Record Retention Schedule" held on July 12, 2021.



## Media Coverage

### IIPI Panel Lays Out Norms for RPs in MSME Pre-pack

Personal guarantees likely to be made top priority for RPs under the resolution scheme

**Saikat.Das1@timesgroup.com**

**Mumbai:** Personal guarantees will likely get a disproportionate share of attention as experts craft the broad role definitions for professionals handling pre-packaged debt resolutions at MSMEs.

Personal guarantees seem to be a top priority in defining the role of an insolvency resolution professional (RP), said a source.

The RP needs to get it confirmed with lenders as to whether the resolution plan is a composite one covering personal guarantees, said an interim report on the subject. ET has seen a copy of the report.

"Group Company cross guarantees / cross personal guarantees also needs to be addressed before getting into the resolution process under this scheme," said the panel of the Indian Institute of Insolvency Professionals of ICAI or IIPI.

"It cannot be initiated on an apprehension of insolvency" says the special panel in the report.

RPs are advised to collect claims and finalise the list of creditors within 21 days.

An MSME should not have gone through any insolvency resolution process three years before applying for the pre-pack scheme.

The RP should invite resolution plans within 21 days from the date of commencement.

"If no plan is received by the last date of submission, the RP may seek the permission of the CoC to extend the timeline, provided that the total time period of 90 days to submit a plan ... is not compromised," said the report. The RP will file termination applications in case no plan is approved.

The study group is chaired by G Ramaswamy, IP & past president of ICAI and has nearly two dozen members. It is also coming out with an FAQ on the scheme.

The government has introduced the package for MSMEs with a minimum default sum of ₹10 lakh.



The Economic Times, October 01, 2021



URGALON | MONDAY | 23 AUGUST 2021 | WWW.ECONOMICTIMES.COM

### IIPI STUDY GROUP REPORT

## Insolvency Pros Bat for Virtual Courts, AI to Speed Up Resolutions

**Saikat.Das1@timesgroup.com**

**Mumbai:** India is considering several operational changes in the Insolvency and Bankruptcy Code (IBC), harnessing digital technology to help remove seemingly insurmountable obstacles of distance or time — and speed up the resolution of bad loans.

The Indian Institute of Insolvency Professional of ICAI (IIPI), which constituted a study group, has recommended greater adoption of digital modes, such as holding virtual meetings of creditors and CoC (committee of creditors) and deploying AI (Artificial Intelligence), even after the eventual restoration of normalcy due to the time-saving benefits of digital technology.

Under the aegis of Insolvency and Bankruptcy Board of India (IBBI), IIPI regulates insolvency professionals, who play a key role in the execution of bankruptcy resolution plans. It has submitted a set of recommendations made by the study group to the ministry of corporate affairs and IBBI.

The ministry of corporate affairs did not respond to ET's query.

"In addition to sprucing up the infrastructure, the NCLT should consider continuing 'virtual courts' even after normalcy restoration," IIPI said in a note viewed by ET. "In virtual courts, senior officials can participate without travelling from remote offices, which helps in fast decision making and reduces pendency."

It is necessary to learn from every crisis, which is what the said report seems to be doing on recommending best practices.

Virtual meetings during Covid restrictions, according to IIPI's study, resulted in quick decision making as senior officials used to participate.

"This should be continued as a 'best practice' even after normalcy resumes," said the note.

"Artificial Intelligence (AI) based facilities should be used for people tracing, asset tracing and transaction tracing," it recommended.

Dewan Housing Finance (DHFIL) is a classic case in point. The troubled non-banking finance company, for which the government amended the law to bring it under the IBC, has finally been sold. The resolution process ended successfully, albeit after multiple litigations.

**The IIPI has recommended continuing with digital modes as a best practice even after the Covid situation turns normal**

The Economic Times, August 23, 2021

## Services

### Indian Institute of Insolvency Professionals of ICAI (IIPI)

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

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

(Presently the office is following staggered timing due to COVID19, which are;

I. 9:00 am to 5:30 pm, ii. 9:30 am to 6:00 pm, iii. 10:00 am to 6:30 pm)

### Contact Details



0120-2975680/81/82/83

SI No	Department	Email Id
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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.

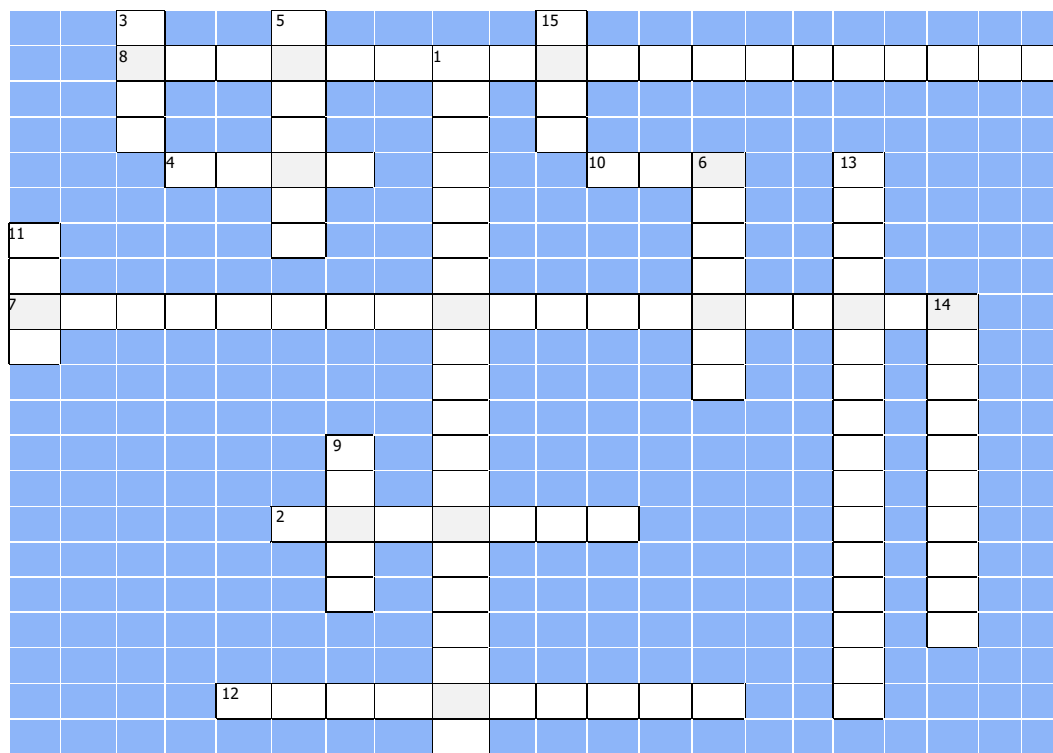
We welcome your feedback on the current issue and the suggestions for further improvement. Please write to us at [iiipi.journal@icai.in](mailto:iiipi.journal@icai.in)

### Editor

The Resolution Professional



## IBC Crossword



### Across

2. Minimum limit of corporate debtor's default for a creditor to initiate pre-packaged insolvency resolution process?
4. The withdrawal of petition for CIRP after constitution of CoC, has to be sanctioned by the members of CoC with a majority vote of at least \_\_\_\_\_
7. The judgement of Supreme Court in *State Bank of India vs V. Ramakrishnan* relates to the co-extensive liability of \_\_\_\_\_?
8. Where the debt for which an application has been filed by a creditor is registered with the \_\_\_\_\_, the debtor shall not be entitled to dispute the validity of such debt
10. How many fresh insolvency cases were filed between April – June 2021 after lapse of IBC suspension:
12. RP shall inform the approval of Resolution Plan by NCLT to Stock Exchanges within:

### Down

1. After successful resolution, which company took over Essar Steel India Ltd., after being referred to by the RBI under the Insolvency and Bankruptcy Code 2016.
3. A registered valuer in a corporate liquidation process cannot be an auditor of the corporate debtor in the past \_\_\_\_\_ years?
5. The application for withdrawal of CIRP must be filed in?
6. The fast-track corporate insolvency resolution process shall be extended by the Adjudicating Authority for a maximum of \_\_\_\_\_ days
9. The fee in Rs. for filing application by financial creditor (whether solely or jointly) to the Adjudicating Authority for initiating CIRP against a CD
11. Prepack Framework in Indonesia is known as
13. "The definition of 'Financial Debt' under IBC, 2016 does not expressly exclude an interest free loan". This interpretation of Section 5 (8) of the IBC on 26th July 2021 is related to which judgement of the Supreme Court?
14. The Section of the CPC that deals with *res judicata*
15. The Supreme Court of India can issue \_\_\_\_\_ types of writs

### Answers: IBC Crossword, July 2021

- |                         |                 |              |                         |                 |                     |
|-------------------------|-----------------|--------------|-------------------------|-----------------|---------------------|
| 1. Personal Guarantors, | 2. Section 238, | 3. 24 Hours, | 4. 75 days,             | 5. Individuals, | 6. 45 Days,         |
| 7. Section 77,          | 8. 90 Days,     | 9. Form H,   | 10. Creditor Concerned, | 11. Section 9,  | 12. Limitation Act, |
| 13. 15 Years,           | 14. 02 years,   | 15. 66%      |                         |                 |                     |



## GUIDELINES FOR ARTICLE SUBMISSION

**THE RESOLUTION PROFESSIONAL**, the quarterly peer-reviewed referred research journal of the Indian Institute of Insolvency Professionals of ICAI (IIPI), 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](mailto: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](mailto:iiipi.journal@icai.in)
  - In case the article is found suitable for publication, the same shall be communicated to the author/s at the earliest.

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

For further details, please contact:

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**Indian Institute of Insolvency Professionals of ICAI**  
(Company formed by ICAI as per Section 8 of the Companies Act 2013)

# Discussion Forum

For queries related to:

1. CIRP
2. Liquidation
3. Voluntary Liquidation
4. Personal Guarantor to Corporate Debtor
5. Pre-Pack

Post &  
Respond  
to  
professional  
Queries

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