

# 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)



**BUILDING A FUTURE READY PROFESSION**



## 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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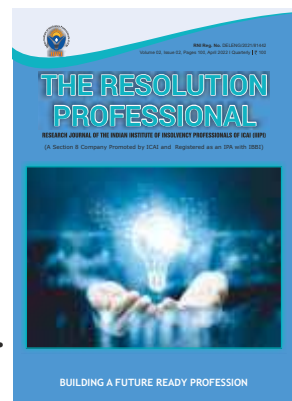
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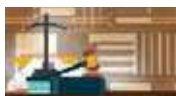
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✉ [iiipi.journal@icai.in](mailto:iiipi.journal@icai.in)

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## Message from Chairman, Editorial Board



**CA. (Dr.) Debashis Mitra**  
President, ICAI  
Chairman, Editorial Board-IIIPI

*Dear Member,*

Over the last five years, the Insolvency and Bankruptcy Code, 2016 (IBC) regime has helped the country in overcoming several economic challenges and establish India as a much sought-after destination for investors. Improvements in the Global Insolvency Rank from 136<sup>th</sup> rank in 2017 to 52<sup>nd</sup> rank in 2020, reduction in average time for resolution from 4.3 years to 1.6 years and improvement from 62<sup>nd</sup> to 25<sup>th</sup> rank in credit ranking, are few among many achievements resulting from the IBC as a beneficial economic legislation in India. In addition, the IBC regime has also produced several tangible achievements as a testimony to its success. As per the recent data released by the Insolvency and Bankruptcy Board of India (IBBI), a total of 4,946 cases were admitted for Corporate Insolvency Resolution Process (CIRP) out of which ~66% have been closed by December 31, 2021. Further analysis of the data shows that out of 3,247 closed cases, ~53% Corporate Debtors (CDs) were settled as going concern some of which through resolution plans while some others through settlements with applicants and other stakeholders. Imagine about the loss of job and loss to the economy if these businesses had succumbed to the financial distress or disputes in the absence of effective resolution process implemented through the IBC 2016.

In comparison to the previous 'recovery regime' which used to take several years, the time taken in insolvency processes has been significantly reduced. Moreover, another beneficial aspect of IBC is the positive shift in behaviour of stakeholders. The stakeholders must exercise caution while abiding the timeline prescribed under the Code. Technological interventions could be of great help in reducing time at various levels of the insolvency processes thereby facilitating time bound outcomes. The technological innovations, for instance, Platform for Distressed Assets (PDA) services provided by Information Utilities (IUs) /market players can provide a greater flexibility, accuracy, and efficiency in managing affairs across Corporate Debtors (CD), Insolvency Professionals (IPs) and other stakeholders. The proposed 'National Dashboard for Insolvency Data', NCLTs digital courts and IBBI's initiative on IBC-21 (integrated portal for IBC processes across IBBI, IPAs, and IPs) are a welcome step in this direction.

Under the IBC regime especially in the context of futuristic Cross Border framework, IPs are expected to deal with assignments which involve multidisciplinary and multidimensional aspects. Interaction and sharing of experiences across global economies on emerging jurisprudence becomes crucial. In this backdrop, IIIPI, on March 26, organized an International Conference on 'IBC in India and International Perspective' in which, besides the eminent personalities from India, thought leaders from UK, Australia, Singapore, and South Africa have also shared their perspectives. I appreciate the efforts of IIIPI in bringing out publications on background guidance on Code of Ethics, Quality Control Mechanism and also on the Peer Review Policy. These initiatives shall go a long way in further standardization and enhancing quality of insolvency services provided by professional members of IIIPI. I am confident that with a united and cohesive approach by all the stakeholders, we can achieve all the objectives of the IBC resoundingly.

Wish you all the best.

**CA. (Dr.) Debashis Mitra**

President, ICAI  
Chairman, Editorial Board-IIIPI

## Message from Chairman, IIIPI-Board



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

*Dear Member,*

The dialogues and deliberations are crucial to the capacity building of professional members in any profession. It is even more pertinent in the context of the insolvency profession, which impacts multiple stakeholders and is considered one of the most complex professions. On the shoulders of an insolvency professional as an important pillar, lie critical responsibilities, which are onerous at times, during and around the process of rescuing the corporate lives. In this backdrop, it can be said that the performance of the IBC ecosystem, to a great extent, is directly linked to the capacity building of IPs.

In the first five years, the foundation for the insolvency regime in India has been set and cemented. The evolving jurisprudence, regulatory pro-activeness, and newer frameworks on an anvil like Cross Border Insolvency, Group Insolvency, full-fledged Individual Insolvency, and Pre-Pack Insolvency for all corporates, have heightened the prospects of insolvency law as a global profession. IIIPI, the largest IPA in the country, has taken up this challenge as an opportunity to lead by example.

Most recently, IIIPI, jointly with IBBI, organized International Conference (Virtual) on “IBC in India & International Perspective” on 26<sup>th</sup> March. On this

occasion, we had the opportunity to listen to the views of Shri Bhupender Yadav, Hon'ble Union Minister, Ministry of Labour and Employment, and Ministry of Environment, Forest & Climate Change. As the Chairperson of the Joint Parliamentary Committee on Insolvency and Bankruptcy Bill 2015, Shri Yadav has been one of the architects of the IBC. Speaking as the Chief Guest, Hon'ble Minister appreciated the role of IIIPI in strengthening the IBC in past five years and emphasized that given the rising globalization, it is imperative to align the Indian Insolvency system with best international practices for managing Cross Border Insolvency. He also expressed confidence that IBC would continue to evolve and reach many more milestones before its 10th anniversary. In addition to the Insolvency Professionals (IPs), experts and officials, insolvency/bankruptcy professionals/experts from five nations including UK, South Africa, Australia, and Singapore participated in the conference. Besides, the representatives of IBBI, Ministry of Law & Justice, World Bank Group, State Bank of India, INSOL International, High Court of London, were also among the guest speakers.

During the conference, three publications were also released viz. Peer Review Policy, Background Guidance on Quality Control Mechanism and Background Guidance on Code of Ethics. Trust, quality and ethical conduct constitute the key benchmarks for assessing credibility of professional services. The insolvency profession is synonym for integrity and independence. These three documents shall help IPs to deliver outcomes in accordance of law and meet stakeholders' expectations in letter and spirit. Further, in near future IIIPI shall also be organizing capacity building training on Cross Border/ Group Insolvency matters, in association with reputed international professional organization(s).

### **Peer Review Mechanism, Guidance on Quality Control and Code of Ethics**

An independent peer-review is considered as an effective mechanism for ensuring quality control and enthusing confidence in the stakeholders. A Study Group constituted

by the IIPI after wider consultations, has come up with draft of a Peer Review Policy, the publication of which was released by CA. (Dr.) Debashis Mitra, President-ICAI during the International Conference on 26<sup>th</sup> March. The peer review process allows the review of qualitative aspects by another experienced professional, which can be seen as an independent process among equals. This would also enhance the image of profession and enthuse confidence of stakeholders. With this proactive initiative, IIPI has become the first IPA in India to have a peer-review policy. This mechanism shall be rolled out soon. 'Background Guidance on Quality Control' provides guidance to IPs in maintaining and enhancing quality of their services while discharging responsibilities in relation to the professional assignments under IBC. The guidance in this document is based on international best practices, directory in nature. We hope that these guidelines will help the IPs in designing a system of quality control to provide reasonable assurance that the IP and his team comply with professional standards, best practices, regulatory and legal requirements.

'Background Guidance on Code of Ethics' aims to provide an ethical framework within which the IPs need to discharge their professional responsibilities keeping in mind. Drawing upon the international best practices, this document lays down the fundamental principles and the conceptual framework, etc. to be followed by IPs in all their actions, whether carried out with or without reward and in other circumstances where to fail to do so would bring discredit to the insolvency profession.

We are confident that being the largest IPA with about 63% IPs in India who hold about 75% of professional assignments and have experience of conducting most of marquee resolutions so far, IIPI will be able to pioneer more such initiatives in future as well.

### Research Initiatives

In yet another initiative, IIPI has become the first IPA to constitute a dedicated 'Research Committee' to produce high quality research in the field of insolvency and bankruptcy on various topics related to insolvency ecosystem. This initiative is aimed at sponsoring research projects and publishing the research outputs on various

platforms for wider knowledge dissemination to various stakeholders. Moreover, IIPI has decided to commission studies/best practices on contemporary topics viz Valuation under IBC, Individual Insolvency (Personal Guarantor to CD), and Role of IPs across Value Chain of Distress Asset Resolution.

### Recent Amendments

IBBI has recently amended the IBBI (Voluntary Liquidation Process) Regulations, 2017. Through such amendments, timelines have been modified for certain stipulated activities undertaken during the voluntary liquidation process, with a view to curtail delays and ensure faster exit for firms. Such amendment is another example of prompt regulatory intervention to ensure smooth functioning of IBC. Further, IBBI has also issued two discussion papers, for public comments, on 'Review of Redressal and Enforcement Mechanism' and 'Enhancing Effectiveness of Information Utility' respectively. The members are requested to provide their feedback on the same, through the online platform provided by IBBI.

The overall success of the IBC regime depends on capacity of its various stakeholders. IIPI's responsibilities, inter alia, lies in enhancing such capacity and thus strengthening the ecosystem. IIPI has been making sustained efforts to pursue the objectives and goals carved out for it under the IBC regime. In the past three months, IIPI conducted eight webinars, five Executive Development Programs (EDPs), three Pre-Registration Educational Courses (PRECs), among other initiatives.

With this I request and invite all the professional members of IIPI to active participation in various initiatives of the institute, give their best and provide feedback for the further betterment of the profession.

Wish you all the best.

**Dr. Ashok Haldia**

Chairman, Governing Board - IIPI

## From Editor's Desk

*Dear Member,*

As the government is preparing to launch a framework for the Cross Border Insolvency, it is time to build the capacity of our professional members enabling them to discharge their responsibilities at the global platform. In pursuance to this endeavour, the IIPI jointly with IBBI organized an International Conference on 'IBC in India and International Perspective' on March 26, 2022, to have a thorough understanding of insolvency/bankruptcy regimes in major overseas economies. The conference was quite fruitful in the sense we were enriched with the perspectives of various national and international experts representing insolvency/bankruptcy regulators, professional bodies, and practicing professionals from India, UK, Australia, South Africa, and Singapore. On the occasion, three publications were released by IIPI aimed at standardization of professional services and ensuring delivery of high-quality services at par with the global best practices. The International Conference was graced as the Chief Guest by Shri Bhupender Yadav, Hon'ble Union Minister for the Ministry of Labour and Employment, and the Ministry of Environment, Forest & Climate Change. We have presented the transcript of his address as such in this edition of the journal, for the benefit of our members. Besides, 'Key Takeaways' from the addresses of dignitaries and Sessions have also been presented.

Starting from this edition, all the coming editions of The Resolution Professional for FY 2022-23 will be dedicated in building capacity of the professional members of IIPI. Accordingly, we have coined a new tagline 'Building a Future Ready Profession' for the journal. Further, from this edition we have added a new section in the journal - 'Know Your Ethics', to bring focus of members and stakeholders towards the ethical aspects.

The journal has been registered with the Registrar of Newspapers for India (RNI). This provides a legal status to the journal and all the related rights meant for RNI registered publications.

This edition has five research articles and a successful CIRP Case Study on Orchid Pharma Limited. In the opening article "Interplay between IBC and PMLA" the author has highlighted conflict of jurisdictions between the two legal frameworks in the light of jurisprudence. The author of the second article "Expediting Approval of Resolution Plan – Need of the Hour", has analysed reasons behind delays in various stages of the IBC processes and presented recommendations in the form of legislative and judicial reforms. In the third article "Issues in CIRP of CD with Assets primarily on Lease/License from Third Parties", the authors have focussed on leased assets related issues from the perspective of various legal provisions and case laws. In the fourth article "eXtensible Insolvency Reporting Language (XIRL)" the author has focussed on implementation of advanced technology for filing various reports of the insolvency/ bankruptcy assignments which would ensure user friendly access of the insolvency data at national and international level. The author of the fifth article "Ineligible Resolution Applicants - Supreme Court on Section 29A(h) of IBC" has analysed the challenges faced during implementation of Section 29 A (h) of the IBC in the light of a recent judgement of the Supreme Court.

You will also get to read the perspectives of experts who graced the inaugural session of the "06<sup>th</sup> Batch EDP on Managing Corporate Debtors as Going Concern Under CIRP (For IPs)" organized by the IIPI on 22<sup>nd</sup> – 26<sup>th</sup> February 2022, in the form of articles.

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**



## ADDRESS BY THE HON'BLE MINISTER SHRI BHUPENDER YADAV

*Chief Guest at the International Conference (Online) organized by IIPI jointly with IBBI on March 26, 2022*



**Shri Bhupender Yadav**

Hon'ble Union Minister  
Ministry of Labour and Employment,  
and Ministry of Environment,  
Forest & Climate Change

Shri Bhupender Yadav is the Union Cabinet Minister for Ministry of Labour and Employment, Environment, Forest & Climate Change since July 07, 2021. He is a Member of Rajya Sabha (Upper House) from Rajasthan.

He has contributed immensely to legislation as Chairperson and Member of several committees of the Parliament. Some important committees headed by him include – Chairman of the Joint Committee on the Insolvency and Bankruptcy Code, 2015 (January- April 2016); Chairman, Joint Committee on the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Bill, 2016; and Chairman, Joint Committee on the Financial Resolution and Deposit Insurance Bill, 2017 etc.

He has co-authored the book - Supreme Court on Forest Conservation (2005); and regularly writes on various issues in leading newspapers and magazines.

Speaking as the Chief Guest in the International Conference – “IBC in India & International Perspective” organized by IIPI jointly with IBBI on March 26, 2022; Shri Yadav shared his views on insolvency regime in India and its future prospects. *Read on to know more....*

I take this opportunity to congratulate the Indian Institute of Insolvency Professionals of The Institute of Chartered Accountants of India (IIPI) for organizing this international conference with the focus on evolving current Indian insolvency ecosystem and bring it at par with best international practices.

The recent pandemic has reinforced the need to future-proof our businesses, reorganize and resolve our businesses to limit the negative impact of destruction such as the pandemic through the development of effective legislative framework. The IIPI's international conference, I think, provides an excellent platform for experts to share varied experiences as well as offer unique perspectives towards the evolution and development of insolvency law and take the IBC regime to greater heights. Since the inception of the Insolvency and Bankruptcy Code, 2016 (IBC), offering protection to business professional firms, ensuring profitability and promoting Ease of Doing Business (EODB) have been key focus areas of the government under the leadership of Hon'ble Prime Minister, Shri Narendra Modi Ji. Guided by the above objectives, IBC, which was launched by our government in December 2016, is regarded as one of the most successful and revolutionary reforms in the recent years in India.

The IBC has evolved and emerged to be a successful economic legislation to reorganize and revive corporate entities which would otherwise have faced liquidation. At the same time, it has helped maximize the value of assets and availability of credit and clean up the banks' books. Further, IBC has successfully altered the behaviour of lenders and borrowers. Moreover, in view of the rapidly changing business environment, both domestically and internationally, introduction of the IBC ensured good corporate governance within organization by balancing interests between stakeholders and company. Although, IBC had its share of challenges and bottlenecks, those were dealt with through several legislative amendments.

Very briefly, I would like to touch upon some of the benefits derived post-implementation of the IBC including

the various amendments introduced over the years which has collectively helped businesses to stay competitive, remain profitable, and facilitate Ease of Doing Business despite the disruption caused by the Covid pandemic. On the Ease of Doing Business parameter, as per the recent World Bank's Ease of Doing Businesses Report 2020, India has improved its ranking by 79 positions in five years from 2014 to 2019 and jumped to 63<sup>rd</sup> position among 190 nations. Similarly, as per the latest report of Resolving Insolvency Index, India jumped 56 places to be at 52<sup>nd</sup> position in 2019 from the previous 108<sup>th</sup> rank in 2018. The recovery rate increased to 71.6% in 2019 from 26.5% in 2018. The improvement in ranking of 56 places in a single year is a typical indicator of ease of exit from business, which makes us believe that we are finally on the path of breaking the proverbial *chakravyuh* of exit from business. We also improved in the recovery time from 4.3 years in 2018 to 1.6 years in 2019 compared to the world average of 2.47 years. Evidently, the IBC turned out to be the most potent instrument to address the sick business environment and ballooning debt of corporate India thereby acting as a job creator for the economy.

**Insolvency resolution alone facilitated job creation and allowed an increased registration of resolution professionals (RPs).**

The new corporate insolvency regime has expedited the move from promoter-driven to professionally run businesses. Insolvency resolution alone facilitated job creation and allowed an increased registration of resolution professionals (RPs). In this context, I would like to highlight the increased participation of insolvency professionals (IPs) and associated firms in recent years to help businesses develop the much-needed resilience. Following the enactment of IBC 2016, the Code has evolved and is still evolving. In wake of current pandemic, the IBC regime in India is gearing up for the next phase comprising Cross Border, Pre-Pack Individual and Group Insolvency frameworks. The most pressing need right now is to bring into force pre-pack insolvency concept which allows players to decide a plan and zeroing on a buyer ahead of the company going through insolvency. Although, as of now, this approach can be used in India for MSMEs, the need of the hour is to allow players to use it for all corporate debtors. This will allow for better resolution or recovery value which remains a major concern.



In my opinion, the high degree of globalization in recent times coupled with successful implementation of proposed development of the existing IBC, it is imperative to align the Indian insolvency ecosystem with the best international practices for managing Cross Border Insolvency. In this context, I would like to briefly discuss the major steps undertaken by India. The first major step in this direction has been the invitation extended by the Ministry of Corporate Affairs to publicly expose the changes to Corporate Insolvency Resolution Process (CIRP) and Liquidation Framework under the IBC. The Insolvency Law Committee (ILC) has continued to evaluate the stakeholders' comments and assess the implementation of the provision of the Code. During the evaluation, the ILC analyzed and provided its recommendations on existing and emerging issues highlighted by the stakeholders such as financial creditors, industry chambers, associations, professionals, and various thought leaders. It is important to support policy makers to build and improve the insolvency and bankruptcy system and support MSMEs because they are quite important for our economy.

The World Bank with the assistance of international financial institutions, leading insolvency organizations and international insolvency experts, has developed principles for sound insolvency and creditors' rights around the world. These principles instill international best practices in the design of insolvency and creditor rights, mechanism, and are used as benchmark to understand weaknesses in existing systems. They allow flexibility in the domestic policy choices and take comparative domestic laws and institutions into account.

**It is critical to further develop the existing framework of IBC in line with the best international practices for managing insolvencies across borders.**

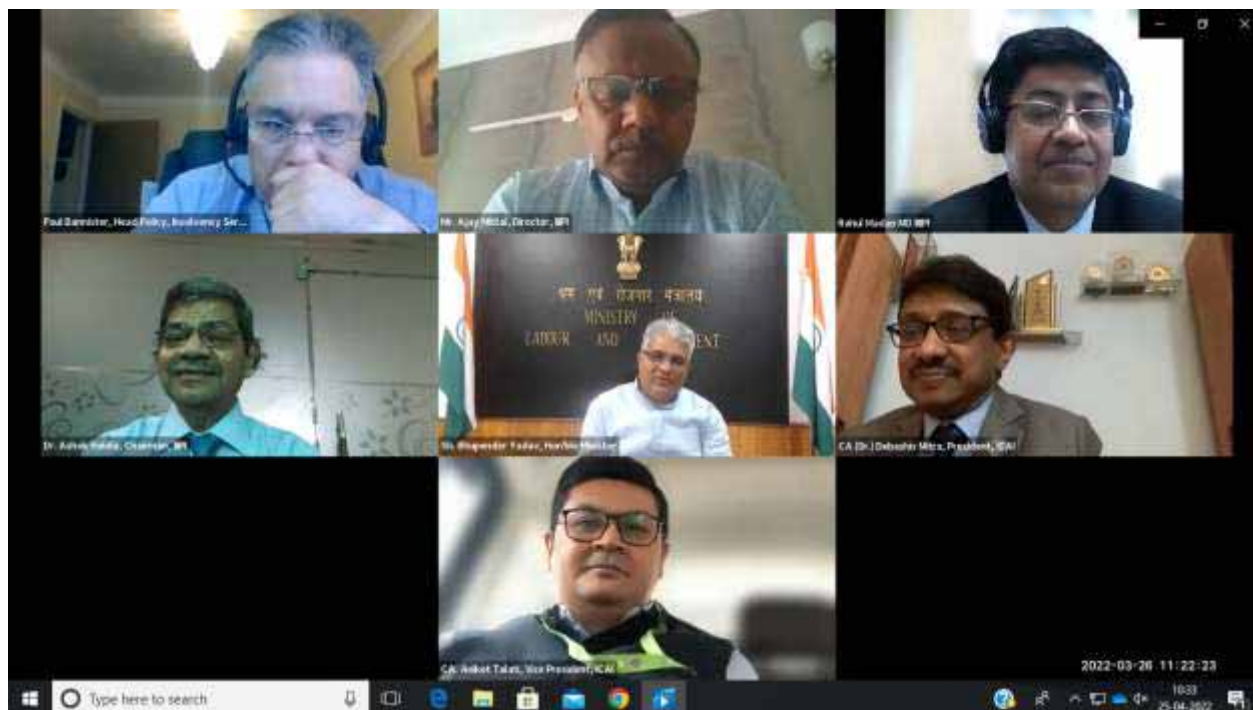
I must say that the pandemic induced disruptions, have affected the proper functioning and effectiveness of IBC in resolving insolvency cases on time. In view of such adversities associated with the proper functioning of the IBC 2016, we may conclude that it is critical to further develop the existing framework of IBC in line with the best international practices for managing insolvencies across borders. Further, although a niche segment, opportunities in the insolvency profession are immense,

and there is a growing need to prepare insolvency professionals for future. Despite all odds and associated challenges, it is beyond doubt that the IBC has emerged to be one of the most successful laws introduced by the Government under the leadership of our Hon'ble Prime Minister, Shri Narendra Modi Ji.

The scheme has greatly helped to improve the Ease of Doing Business in the country particularly in COVID-19 environment. I solely believe that over the next five years, the IBC framework will continue to evolve in sync with emerging market realities and reach more pivotal milestones by its 10<sup>th</sup> anniversary.

Thankyou.

Jai Hind!



## Key Takeaways from the International Conference Organized by IIIPI Jointly with IBBI on March 26, 2022

IIIPI jointly with the Insolvency and Bankruptcy Board of India (IBBI) organized an international conference (Virtual) on 'IBC in India & International Perspective' on March 26, 2022. The Inaugural Session of the conference was graced by Shri Bhupender Yadav, Hon'ble Minister for the Ministry of Labour and Employment, and Ministry of Environment, Forest & Climate Change, as the Chief Guest. It was followed by three technical sessions on the contemporary topics viz. International Perspectives on Insolvency Law, Individual Insolvency: Perspectives and Challenges, and Changing Expectations of Stakeholders. In addition to the Indian Insolvency Professionals (IPs), experts and officials, insolvency/bankruptcy professionals/experts from four nations including UK, South Africa, Australia, and Singapore participated in the conference as panellists. Furthermore, the representatives of World Bank Group, INSOL International, London High Court, IBBI, Ministry of Law & Justice, State Bank of India, etc., also addressed the conference.

On this occasion, CA. (Dr.) Debashis Mitra, President-ICAI released three publications of IIIPI viz. 'Background Guidance on Code of Ethics for Insolvency Professionals', 'Peer Review Policy', and 'Background Guidance on Quality Control by Insolvency Professionals'. Here we are presenting the key takeaways of the conference.

*Read on to know more...*

### Welcome and Opening Address

**Dr. Ashok Haldia**

Chairman, Governing Board-IIIPI

1. The topic of the day 'IBC in India and International Perspective' is consistent with the role that the Insolvency Professional Agencies (IPAs) are expected to play as the pillar of the IBC, and the role that IIIPI, as one of the largest and most proactive IP in the country, is playing.
2. IIIPI's previous International Conference on the 'Changing Perspectives of the IBC' organized in October 2020, brought together the global minds on the issues related to IBC Version 2 such as Cross-Border, Pre-Pack, Mediation, Individual Insolvency, and Group Insolvency etc. It provided valuable inputs to the regulators and the Government on new framework, and also in preparing the IPs on what lies ahead.
3. This conference today brings together the regulators, corporate debtors, CFOs of the stressed companies, CFOs of the investor companies, IPs, chartered accountants, and other professionals including the media.
4. Corporate Stress is common throughout the world in terms of finance, investment, and business etc. Therefore, sharing the international perspective is very important.
5. As a proactive organization, IIIPI always endeavours to meet the expectations of stakeholders and win over their trust and confidence.
6. IIIPI has been the largest IPA in India with over 60% IPs



as its members who have handled over 75% of insolvency assignments under the IBC. These are not the numbers alone but also reveal the quality of services IIIPI delivers to its professional members.

7. The IPs are one of the three pillars of the IBC. The success of the IBC, as it is widely acknowledged, is dependent upon efficacy, efficiency, trust, and confidence with which IP's carry on their onerous responsibilities. This should not only be trustworthy but should enthuse confidence among stakeholders.
8. Today, IIIPI released three publications - 'Background Guidance on Code of Ethics for Insolvency Professionals', 'Peer Review Policy', and 'Background Guidance on Quality Control by Insolvency Professionals'. The first publication pertains to the perimeter within which the IPs need to discharge their professional responsibilities, second is related to quality control system within their own organizations and also to be overseen by external organisations, and third publication is regarding peer-review process of the IPs by the IIIPI.



**Guest of Honor****CA. Aniket Sunil Talati**

Vice President, ICAI

1. Since IBC came into being in 2016, IIIPI has remained active and ensured that it continues to engage with stakeholders specially during the Covid-19 pandemic.
2. The successful achievement of IBC's objectives depends on the cohesive functioning of the key pillars which include not just the IBBI, IIIPI, IPs and CoC but also the judiciary which plays very important role.
3. Initially, a lot of the provisions which were envisaged in IBC were in the form theory but once the IPs started getting into the field and faced the challenges that we faced, jurisprudence developed gradually.
4. The stakeholders deserve appreciations what we have achieved in the past five years, however, many challenges prevail particularly in the form of delayed processes. Presently, against prescribed 180 days, an insolvency process takes on an average 428 days. Judiciary has important role to play on how these timelines can be met. .



5. IBBI, IPAs, and IPs should discuss and deliberate, through such conferences, on practical challenges and opportunities.
6. For any legislation, regulation is important but also important is development of the profession. Therefore, important challenges of the profession being faced by IPs should also be discussed.

**Guest of Honor****CA. (Dr.) Debashis Mitra**

President, ICAI

1. The Indian Institute of Insolvency Professionals of ICAI (IIIPI) has been promoted and founded by The Institute of Chartered Accountants of India (ICAI), which is the second largest accounting body of the world, on November 25, 2016. Set up on July 01, 1949, the ICAI, currently, has 3,50,000 members and over 7.5 lakh students.
2. ICAI has 44 overseas chapters. It has presence in 47 nations and 73 cities of the world.
3. IIIPI has grown from strength to strength over time. It is getting better and better and trying to be more professional in its functioning.
4. IBC 2016 has come a long way. The most important aspect of the Code has been the timeline – quick disposal of the cases. Whether you resolve or liquidate timeliness becomes very important.



5. The role of CAs in successful implementation of the Code has been very important. More than 55% of IPs in India are CAs, and more than 75% of insolvency assignments in value terms are handled by the professional members of the IIIPI. That is how the IIIPI has grown over a period of time. That is the way IIIPI has attracted the best of talent.
6. When the Government of India talks of Pre-Pack and Cross-Border Insolvency, the IIIPI makes sure that

there is capacity building amongst the insolvency professionals.

7. What is challenging now is the technology that is changing. IIPI need to work to ensure professionals are abreast with the latest technologies.
8. Today, IIPI has released publications related to the insolvency profession - Peer Review Policy, Code of Ethics and Quality Control. I am glad to see, the IIPI is getting into these kinds of domains quality and standards of IPs.



### Guest of Honour

**Mr Paul Bannister,**

Head Policy- Insolvency Services, Govt. of UK

- 1) There are not many sectors in the Indian economy that are more regulated than IBC. Such strong regulatory framework boosts the investors' confidence to invest.
- 2) The three publications that were released by the IIPI, shall provide necessary confidence to the stakeholders.. We too have similar documents in the UK. In such a short period of time, the journey travelled by the IIPI is highly commendable.
- 3) As we emerge from the Covid-19 pandemic, priorities revolve around restoring regulatory framework particularly in the insolvency profession.
- 4) Cross Border Insolvency and Individual Insolvency are big issues in the UK as the focus areas in coming months. On Cross-Border Insolvency framework, the UK is committed to develop Cross-Border co-operation across territories. If a foreign court issues a judgment relating to an English law contract, provided the conditions are met, foreign judgments would have to be recognized by the courts in the UK.
- 5) There has been quite a bit of difference in opinion internationally over how the original model law and



Cross-Border Insolvency should be interpreted.

- 6) Group Insolvency pertains to a group of companies that are to be coordinated under a single insolvency process to which our insolvency regimes are not explicitly geared up. The UK is working on a Group Insolvency Model of which the main premise is where an overall plan will be developed involving all the relevant companies that each company in the group can individually sign up to. The court will then be empowered to enforce a group plan that would enable resolution of a business that is spread across several companies to be treated as one whole rather than dealing with each insolvent company to give better possible outcome.

## Session 1: Panel Discussion on 'International Perspectives on Insolvency Law'

**Moderator:** CA. Hansraj Chugh, Director, IIPI

### Panellists:

Dr. Eric Levenstein Chairman, SARIPA, South Africa and Board Member, INSOL International,

Mr. Michael Brereton, President ARITA and Director Williambuck, Australia

Mr. Rob Armstrong MD, Restructuring Advisory, Kroll, UK

Mr. Ashok Kumar, Partner, Blackoak LLC, Singapore

Mr. K.R. Saji Kumar, Joint Secretary, Ministry of Law & Justice

Mr. Sandip Garg, ED, IBBI

### Key Takeaways

1. The principles that underline the UNCITRAL model law, particularly providing a timeline for the insolvency processes could help to address the issues of timeliness. This is imperative the chances of resolution of a corporate debtor decreases with deterioration of the value of assets.
2. While introducing Cross Border Insolvency framework in India, many complexities would need to be solved. The law will have to deal with the various rights of stakeholders according to the laws in various countries besides protecting the interests of Indian stakeholders.
3. Australia introduced the Cross-Border Insolvency law almost ten years ago, and it is essential to sign the Cross-Border Law for conducting insolvencies across the countries.
4. UNCITRAL's principles have been incorporated in South Africa. The insolvency law has become more relevant than ever before. The banks have been supportive and have saved companies in trouble.
5. Business Rescue provides apt assistance, and also includes increasing employment opportunities that is the priority of South African Government. An insolvency practitioner sits with the stakeholders and works out the plan which needs to be voted at 75% or more by the creditors to pass it.
6. In the UK, the revamping of the insolvency law is currently taking place including of framework on Pre-Packaged Insolvency. There has been substantial increase in voluntary liquidations, in UK.
7. In Singapore, the ecosystem is shifting towards more inclusive approaches including training of Insolvency practitioners with a course for the postgraduates to learn country-oriented approaches. Fair amount of jurisprudence has been developed to inculcate international laws' framework, Pre-Pack System. The priority is to attract new investment through these reforms.



## Session 2: Panel Discussion on 'Individual Insolvency-Perspectives and Challenges'

**Moderator:** CA. Durgesh Kabra, Director, IIPI

### Panellists:

Ms Kanika Kitchlu, Connolly Partner, TLT LLP, UK

Mr David Kerr, IP, UK

CA Sajeve Deora, IP

Adv. Shradul Shroff Partner, Amarchand Mangaldas

Mr. Sanjeev Pandey, Head & DGM (NCLT), State Bank of India

CA Sumit Binani, IP

### Key Takeaways

1. The efficacy of IBC processes lies in identifying the threat earlier and come up quickly. Whether you are a Corporate Debtor or Guarantor, the moment you find your company is in difficulty trigger this process quickly. The same is recommendable in the case of Individual Insolvency.
2. The simultaneous proceedings against CD and the Personal Guarantor, ensure better recovery in value terms because the soft assets of the CD such as brand name and trade names etc. are owned by the promoters of the company who are also the Personal Guarantors to the CD.
3. Funding of the corporate debtor is a major challenge across economies including the UK. There are some circumstances where there are no upfront assets or no upfront cash. However, the market is quite evolved and so one has funders, insurers, and creditors who could be asked to fund as well.
4. Acting promptly, initiating the process on time, coordination across jurisdictions, protection of assets, different enforcement options, and finally creditors' support, are main ingredients of success in bankruptcy process.
5. IBC regime should learn from foreign insolvency regimes such as the UK to expedite the cases in the courts.
6. Intermingling assets of the Personal Guarantor, and the Corporate Debtor is a major issue under the IBC regime which is leading to failure of resolution processes. For instance, land of the CD belongs to the promoter but the building and machines etc. belong to the CD. Therefore, the land cannot be part of the insolvency process.
7. Individual debtors generally borrow low amount of debt involving monthly dues of say, only a few thousands. Dealing with the volume of individual insolvencies involving low values, is a tough task due to shortage of sufficient judges. If the government wants to implement this framework effectively, a vast infrastructure would be needed across India.
8. Due to long pendency of cases in the courts, the CDs face value deterioration which causes adverse impact on their resolution. Besides, even the bank recovery processes are going extremely slow. So, this needs a drastic amendment in terms of the number of judges in the tribunals.





## Session 3: Changing Expectations of Stakeholders

### Special Address

**Mr. Sagar Siva Shankar**

Operations Officer, Market Advisory, IFC,  
World Bank Group



1. Insolvency reform is important because it increases the availability of the credit, lowers the cost of credit, promotes culture of entrepreneurship, and facilitates setting up of Startups.
2. World Bank Group has convened several task forces on various topics of relevance on insolvency, the most relevance being MSME insolvency task force. The report was released in 2021 which is available online. Besides, the World Bank Group works with different jurisdictions on various aspects of insolvency.
3. To assess the impact of Covid-19 on businesses, World Bank Group conducted Business Pulse Survey across 40 plus countries. We found a disproportionate impact of the Covid-19 pandemic on female-owned businesses across economies. Every jurisdiction has taken some measures for insolvency related reforms.
4. Increased usage of alternate dispute redressal measures especially in the pre-insolvency stage to resolve disputes and defaults, can help develop accessible and affordable procedures for MSMEs.
5. During the pandemic, we focused on judicial training on insolvency and information technology. In March 2020, we carried out the judicial sensitization program for over 50 members of the NCLT as well as the NCLAT from across India. We have developed a training module for judges across the world which they can take online.

### Special Address

**Mr Akhil Gupta**

Vice Chairman, Bharti Enterprises



1. There is near unanimity in corporate and banking circle that the introduction of IBC has been the most important and transformational reforms in India in recent times.
2. Before the IBC, there was a perceived immunity among the promoters against any serious consequence if they defaulted the debts owed by creditors because creditors had no powers to step into their businesses. Those promoters were suffering from "too big to fail syndrome" but IBC has made them believe that their business can be taken over by creditors.
3. Though pendency of cases at NCLTs and NCLATs are biggest concerns under the IBC, we have resolved several cases. There is need to appoint more judges to ensure justice is given timely.
4. If a Resolution Plan is passed by the CoC with due procedure, the courts should not be allowed to intervene on the ground of 'fair and equitable' except in the criminal matters.
5. Pre-Pack Insolvency should be extended to all the businesses. Besides, Section 29 (a) should be made more robust to prevent promoters from interfering in the insolvency process by filing resolution plans through themselves or associated firms.

### Special Address

**Mr. James Pickering**

Deputy Judge of London High Court  
and Chairman of Enterprise Chambers  
and Queen's Counsel

1. If you are successful, you are less likely to change. But the reality is, whether we like it or not, the world is always changing. In short, whether we like it or not we have to adapt. We have witnessed this during lockdowns induced by Covid-19 pandemic.
2. During such times, we started virtual hearing of cases through video conferencing. I used to receive instructions on WhatsApp and documents on email. Thus, we adapted, and carried on, even if it was not like real-life hearing.
3. It helped us to avoid the postponing the hearings for months and reduce pendency of cases. Now, it takes hours not months to finish hearings. In the perfect world, we disclose documents, so there has to be some kind of compromise.



4. Justice delayed is justice denied. Is that justice which makes you to wait for years? If everything is over or its tool ate or tool costly, justice is deemed to be denied. One cannot spend all the time or money for justice.

### Special Address

**Ms. Rashmi Verma**

IAS (retd.) and Director, IIPI

1. The events like ongoing war between Russia and Ukraine, which is affecting the energy prices, will adversely impact businesses especially MSMEs.
2. Public interest and ethics are inherent elements and crux of insolvency resolution process. This has two components, firstly, objectives and outcomes of decision-making process should be in public interest, and secondly process and procedures adopted by decision makers should be in public interest.
3. In the IBC processes, the responsibility of acting in public interests falls on the shoulders of the IPs, who are required to balance the divergent and often conflicting interests of various stakeholders. Therefore, it is quite fair to call insolvency profession a private profession in public interest which is often compared to medical profession.



4. Then the insolvency professional should comply the principles of natural justice i.e., giving all stakeholders equal opportunity. They should listen to all the stakeholders, take their interest into account and act reasonably in a trustworthy, confidential and

transparent manner in asset management under all the IBC processes.

5. The IPs, therefore, needs to work efficiently, effectively and in a cost-effective manner. IBC has been evolving

and continues to evolve. It is adapting to the changing economic and social scenarios. The publications of IIPI on Code of Ethics, Quality Controls and Peer Review will go a long way in ensuring that the conduct of the IPs is ethical, time bound and in the public interest.

### Special Address

**Mr D. R. Chaudhuri**

MD, NeSL

1. During the Covid-19 pandemic, the use of IT tools helped to ensure continuity of businesses. The tools we used during the lockdown may continue to be used effectively in some manner.
2. Digital Document Execution (DDE) platform of NeSL is highly user friendly. The banks are also securing themselves from any eventuality, including the delinquency of the loan on this platform. Now, the Digital Stamp Duty related documents of various state government are also permitted on this platform.
3. All information or documents required for initiation of insolvency proceedings against a person are readily available to the IPs at NeSL platform including documents which are evidence to the creation of debt.



4. Banks and financial institutions can go for increased digitization in debt related processes. They may get rid of obsessions for physical signatures on documents and identification which will save their resources from storing the documents and avoid risk of fire and forgery.

### Moderator

**CA. Rahul Madan**

MD-IIPI

1. In its journey of over five years, the IBC is considered a revolutionary legislation. Its achievements are credible including changing behaviour of promoters, facilitating ease of doing business and other parameters.
2. Of course, there are challenges but at the same time these challenges do provide avenues and potential for future growth and the course correction. In this globalised economy advanced features in the IBC like Cross-Border and Group Insolvency should be backed by international experience.
3. Exchange of knowledge and sharing of experiences provides the way to take this agenda forward. In this context, mutual cooperation and cohesive ecosystem



are the recipes for success. Besides, the role of technology needs to be further strengthened.

## Interplay between IBC and PMLA



*IRP/ RP of a CD is required to take immediate custody of all its properties which are crucial for value maximization which is aimed at successful resolution of the CD. The authentic information on the status of all the properties of the CD is important for investors/ prospective resolution applicants (PRAs) in preparing their resolution plans. However, the PMLA empowers the Enforcement Directorate to attach properties of the CD in violation of the PMLA Act 2005. Interestingly, both PMLA and IBC have obstante sections which provide them superseding effect over conflicting provisions of the previous enactments. There have been cases wherein ED had attached properties of the CD prior to or during the CIRP. However, in the course of time the judiciary has adjudicated on this issue.*

***Read on to know more...***



### **Rajeev R. Shah**

The author is an Insolvency Professional (IP) Member of IIPI. He can be reached at [iiipi.journal@icai.in](mailto:iiipi.journal@icai.in)

### **1. Introduction**

The Insolvency & Bankruptcy Code, 2016 (IBC/Code) was introduced in 2016 to bring about a speedy resolution and revival of stressed assets. The core intent of IBC is to maximize the value of assets and keep the Corporate Debtor (CD) as a Going Concern (GC). The provisions of IBC are aimed at speedy resolution in a time bound manner. The erstwhile frameworks of resolution like SARFAESI Act and Debt Recovery Tribunal (DRT) could not be successfully implemented on account of complex and delayed recovery. Besides, their focus was on recovery instead of revival. In the erstwhile frameworks, the custody and control of the assets of the CD used to lie with the corporate debtor/its directors which was a major hindrance and delayed the resolution of the stressed assets. To resolve these issues, IBC was implemented with the concept of “creditors-in-control”.

Under the framework of IBC, an Insolvency Professional (IP) in his/her capacity as Interim Resolution Professional (IRP) or Resolution Professional (RP) is appointed by the Adjudicating Authority (AA) i.e., NCLT, to control the CD and undertake measures to keep it as a GC. As per Section 25 of IBC, the IRP/RP is duty bound to undertake



immediate control and custody of all the assets of the CD. The IRP/RP acts on behalf of the Committee of Creditors (CoC), invites Expression of Interest (EoI) from Prospective Resolution Applicants (PRAs) /bidders that submit their respective resolution plans. These resolution plans are vetted by the RP for its compliance and are presented to the CoC for its approval after ascertaining their feasibility and viability. The final Resolution Plan is approved through minimum 66% voting by the CoC and the same is thereafter presented to the AA, for its approval. The AA further ensures that the plan is in accordance with Section 30(2) of the Code and approves the Resolution Plan. Thereafter, the successful Resolution Applicant takes over the management and control of the CD.

## 2. Prevention of Money Laundering Act, 2002 (PMLA)

PMLA was introduced to prevent money laundering and ensure that the assets from illegally gained proceeds are attached, seized, or confiscated. The Enforcement Directorate (ED), the enforcement agency under the PMLA has powers to attach/ confiscate properties which are purchased from the proceeds of crime.

## 3. Understanding the conflict between PMLA and IBC

This article attempts to address the concern, conflicts, and interplay between the provisions of IBC and PMLA. Here, the debatable question is whether provisions of the PMLA need to be applicable to the corporates undergoing through IBC processes. The provisions of PMLA seem to tamper with the intent of IBC and hinders just and fair resolution process since both the legislations are conflicting with each other. The aim of PMLA is to confiscate assets that are derived from money laundering while IBC aims at value maximization and to maintain the GC status of the CD.

Under Section 5 of PMLA, the ED attaches the property of the company and prevents it from transferring, converting, disposing, or moving. However, at the same time upon commencement of CIRP, the IP has to take over the assets of the CD and invite the resolution plans. The attachment done by ED may lead to uncertainty in the entire process and also discourages the PRAs. Any PRA would be inclined to take over a CD only if it is given custody,

control, and possession of all the assets of the CD after making payment under the Resolution Plan. However, both IBC and PMLA seems to have conflicting clauses. In pursuance to the IBC, the NCLTs have exercised their discretion and have differently opined on the same issue thereby creating confusion rather than bringing out clarity on this matter.

**The attachment done by ED under Section 5 of the PMLA may lead to uncertainty in the entire process and also discourages the resolution applicants/bidders.**

## 4. If Property of CD is attached during CIRP

The landmark judgement passed under CIRP of *Bhushan Power & Steel Limited*<sup>1</sup> (BPSL) is a classic example of the conflicting provisions of IBC and PMLA. In this case, resolution plan was submitted by M/s JSW Steels in the CIRP of BPSL. While the plan was under consideration, the ED attached the assets worth ₹4,025 crores of BPSL in accordance with provisions of PMLA on the grounds that the assets were acquired from proceeds of crime. The RP knocked the doors of National Company Law Appellate Tribunal (NCLAT) to seek protection from attachment by the ED. NCLAT stayed both - attachment order and approval of resolution plan.

While the NCLAT's final judgement was awaited, there was an amendment in the Code and Section 32A was introduced in IBC. According to Section 32A "*the liability of a corporate debtor for an offence committed prior to the commencement of the corporate insolvency resolution process shall cease and the corporate debtor shall not be prosecuted for such an offence from the date the resolution plan has been approved by the Adjudicating Authority under Section 31.*"

Based on the amendment, the NCLAT upheld the Resolution plan submitted by M/s JSW Steels and the proceedings initiated against BSPL were abated including the attachment of assets as per PMLA provisions. This judgement is an example where the assets of the CD under PMLA were attached post initiation of CIRP.

<sup>1</sup> *Bhushan Power & Steel Limited (BSPL)*, NCLAT, New Delhi, Company Appeal (AT) (Insolvency) No. 957 of 2019, Date of order: Feb. 17, 2020.

## 5. If Property of CD was attached before CIRP Commencement Date

In many cases, the assets are already attached prior to initiation of CIRP. In such scenario also, provisions of IBC will supersede PMLA provisions based on judicial precedents. In the matter of *Sterling SEZ Infrastructure Limited*<sup>2</sup> and *Sterling International Enterprises Limited*<sup>3</sup>, the Mumbai NCLT bench directed RP to take custody of the assets which were attached under PMLA provisions prior to commencement of CIRP. An appeal was filed against the NCLT order by the ED. The NCLAT held that even if ED had attached the assets of the CD under PMLA, it must vacate its claim by de-attaching the assets upon commencement of CIRP as IBC has superseding effect on PMLA provisions.

**In many cases, the assets are already attached prior to initiation of CIRP. In such scenario also, provisions of IBC will supersede PMLA provisions based on judicial precedents.**

Another landmark judgment passed by NCLAT was in the case of *The Directorate of Enforcement Vs. Sh. Manoj Kumar Agarwal & Others*<sup>4</sup> on the interplay between the provisions of PMLA and IBC in April 2021. The matter of concern before the NCLAT was whether imposition of moratorium under Section 14 of IBC following the initiation of the CIRP would impact an attachment of property made under the provisions PMLA. It was held that the assets which are attached under PMLA would be available under IBC. Since the very objective of IBC is revival of the CD, the same shall be nullified if the assets are attached and not handed over to the RP for its custody and control.

## 6. Noteworthy Observations and Conclusions of Judiciary on conflicting provisions of PMLA and IBC

The core objective of PMLA is attachment, seizure and confiscation of property involved in money laundering

i.e., to recover the assets from the laundered money and prevent money laundering. However, to achieve successful resolution under IBC, it is important that assets of the corporate debtor are in custody and control of the IRP/RP. The judgement passed by NCLAT in *Manoj Kumar Agarwal*<sup>5</sup> seeks to uphold the objective of IBC by ensuring that the assets of corporate debtor are available to the IRP/RP and in turn the same is transferred to the successful Resolution Applicant. Similar kind of judgments also passed by the Delhi High Court in the matter of *Nitin Jain, Liquidator, PSL Limited*<sup>6</sup>. These judgments are beneficial for the PRAs as it will boost confidence in them as the provisions of PMLA will not remain in force once the CIRP commences and in a way, these judgements are in the interests of the economy. The noteworthy observations and conclusions that can be deciphered from the above stated two judgments are as follows:

### 6.1. Effect of applicability of Section 14 of IBC i.e., imposition of moratorium on attachment proceedings under the PMLA

- a) The attachment of properties would be quasi-criminal in nature and are thus hit by Section 14, moratorium, of the Code till the time special courts do not establish the criminality of the accused. On commencement of CIRP, Section 14 would be triggered and the institution and continuation of such proceedings before the AA under the PMLA would be barred.
- b) The judgement of *Alchemist ARC Vs. M/s Hotel and Gaudavan Private Limited & Ors*<sup>7&8</sup> is a fine example of supremacy of moratorium under the IBC. In this case, the CD failed to repay the loan of State Bank of India (SBI) and thus petition was filed before DRT. In accordance with Section 5 of

<sup>2</sup> *Sterling SEZ Infrastructure Limited*, NCLT, Mumbai Bench, Date of order: Feb. 12, 2019.

<sup>3</sup> *Sterling International Enterprises Limited*, NCLAT, Principal Bench, New Delhi, Company Appeal (AT) (Insolvency) No. 575 and 576 of 2019, Date of order: April 09, 2021.

<sup>4</sup> *The Directorate of Enforcement Vs. Sh. Manoj Kumar Agarwal*, NCLAT, Principal Bench, New Delhi, Company Appeal (AT) (Insolvency) No. 575 and 576 of 2019, Date of order: April 09, 2021.

<sup>5</sup> *Manoj Kumar Agarwal*, NCLAT, Principal Bench, New Delhi, Company Appeal (AT) (Insolvency) No. 575 and 576 of 2019, Date of order: April 09, 2021.

<sup>6</sup> *Nitin Jain, Liquidator, PSL Limited*, High Court, Delhi, W.P.(C) 3261/2021, Date of order: Dec. 15, 2021.

<sup>7</sup> *Alchemist ARC Vs. M/s Hotel Gaudavan Private Limited & Ors*, High Court, Delhi, W.P.(C) 11814/2015, Date of order: Feb 04, 2016.

<sup>8</sup> *Alchemist ARC Vs M/s Hotel Gaudavan Private Limited & Ors*, Supreme Court of India, CIVIL APPEAL NO. 16929 OF 2017 (Arising out of S.L.P. (C) No. 18195/2017), Date of order: Oct. 23, 2017.

SARFAESI Act, SBI transferred its debt to Alchemist ARC. The Financial Creditor (FC) i.e., Alchemist ARC, had supplanted SBI in the ongoing proceedings before DRT. Simultaneously, the CIRP under IBC commenced against the CD by the FC and moratorium under Section 14 was imposed. The CD invoked the arbitration clause between the FC and the CD and appointed an arbitrator as per the loan agreement. The conflict between arbitration and insolvency proceedings was put to rest through this judgement. The Supreme Court held that the appointment of an arbitrator and the arbitration proceeding is non-est in law on account of imposition of moratorium.

## 6.2. Overriding effect of IBC

- a) Since the IBC was introduced and enacted later than PMLA, the same will override the PMLA by virtue of section 238, which provides that the provisions of IBC shall have over-riding effect notwithstanding anything contained in any other law. Thus, the authorities under the PMLA are compelled to hand over the custody and control of the attached properties of the CD to the IRP/RP to assist him/her to maintain it as a GC until the successful resolution plan is achieved. If the CIRP admission order is set aside or if the application admitted under Section 7 of the IBC is withdrawn under Section 12A of the IBC, then the provisions of PMLA will prevail over IBC and the assets shall remain attached.

The over-riding effect of Section 238 of the IBC was also upheld in the matter of *Anand Rao Korada, RP Vs. Varsha Fabrics P Ltd*<sup>9&10</sup>. In the said case, a writ petition was filed before Orissa High Court and interim order was passed. The Varsha Fabrics P Ltd. had inked Share Purchase Agreement on July 10, 2006, with M/s Varsha Fabrics Pvt.

Ltd, India Finance Ltd., Mudrika Commercial Pvt. Ltd., Hirakud Industrial Works Ltd., and Industrial Development Corporation of Orissa Ltd. This agreement was cancelled

**In the matter of *Anand Rao Korada, RP Vs. Varsha Fabrics P Ltd*, the Supreme Court upheld that Section 238 of the IBC has an over-riding effect and hence interim order of Orissa High Court ought not to proceed with the auction.**

and dispute regarding payment of arrears and salaries to workmen arose. The High Court further directed the assets to be sold through public auction and the proceeds to be utilised for disbursement of the arrears. Meanwhile, during the pendency of these proceeding, CIRP was initiated. An appeal was filed by the RP to challenge the interim orders passed by Orissa High Court in writ petition and sought auction proceedings to be stayed on account of imposition of moratorium. The Supreme Court directed that Section 238 gives an over-riding effect and hence interim order of High Court ought not to proceed with the auction.

- 6.3. **Section 32A of IBC:** The Section 32A of IBC provides immunity against prosecution of the CD, to successful Resolution Applicant in relation to any offence committed by directors/promoters prior to the commencement of the CIRP, and immunity against CD's assets. Section 32A (2) also provides for immunity to the property of the CD if the said property is covered under sale of liquidation assets and is transferred to a person who was not a promoter/in management or control of the CD/related party. The said provisions were referred to by NCLAT in these judgements.

<sup>9</sup> *Anand Rao Korada, RP Vs. Varsha Fabrics P Ltd*, Orissa High Court, W.P. (Civil) No. 7939/2011, Date of order: Aug. 14, 2019 & Sept 05, 2019.

<sup>10</sup> *Anand Rao Korada, RP Vs. Varsha Fabrics P Ltd.*, Supreme Court of India, CIVIL APPEAL NOS. 8800-8801 OF 2019 (Arising out of S.L.P. (C) No. 23349-23350/2019), Date of order: Nov. 18, 2019.

#### 6.4. Jurisdiction of AA under Section 60(5) IBC:

What is interesting is to refer to the Supreme Court's judgment in the matter of *Embassy Property Developments Pvt. Ltd.*<sup>11</sup>. is that the Apex Court held that Section 60(5) of the Code cannot be used to claim everything under the sky.

**The Supreme Court, in the matter of *Embassy Property Developments Pvt. Ltd.* held that Section 60(5) of the IBC cannot be used to claim everything under the sky.**

However, in the present case, both the NCLAT and High Court noted the insertion of new Section 32A in the Code which intends to de-clog the assets of the CD from the clutches of the different criminal proceedings. The NCLAT held that the NCLT has the necessary jurisdiction to interfere with the provisional attachment orders passed under the PMLA as it is the duty of the RP under section 18(1)(f)(vi) to take over the control and custody of the assets of the CD even if the ownership status thereof is subject to determination by court/competent authority. The NCLAT took a pragmatic view that since the attachment would directly interfere with the duty of the IRP/RP to take over the assets and management of the CD, the question of detachment of assets under PMLA could very well lie before the NCLT under the IBC as it would be a question of priority arising out of or in relation to the CIRP or liquidation proceedings of the CD to be decided by the AA under Section 60 (5)(c).

#### 6.5. Contradiction between two Non-Obstante

**Clauses:** As we all know that Section 238 of the Code notified in the year 2016 contains a non-obstante clause giving it precedence over other contrary laws. Similarly, the PMLA, notified in the year 2005, also contains a non-obstante Section 71 which has an overriding effect

notwithstanding anything contained in any other laws. Through further amendments made in the year 2019, another non-obstante Section 32A was inserted in the IBC. After noticing the rationale behind introduction of Section 32A to the IBC, the Court upheld the supremacy of the IBC on account of following reasons:

- a) IBC being later in time would prevail over the PMLA, being the former one as the legislature was oblivious of the reach and ambit of the earlier legislation while introducing the later one. This rationale is also supported by the Latin maxim '*Leges posteriores priores contrarias abrogant*' which states that "*the later laws shall abrogate the earlier laws that are contrary or in conflict with the subsequent laws*"
- b) Once the Legislature has chosen to step in and introduce a specific provision for cessation of liabilities and prosecution (Section 32A), it is that alone which must govern, resolve and determine the extent to which powers under the PMLA can be permitted in law to be exercised while a resolution/liquidation process is ongoing.
- c) If the Authorities under PMLA, based on the attachment or seizure done or possession taken under the said Act, resist handing over the properties of the CD to the IRP/RP/Liquidator, the operations of the CD could not be managed as a GC during and after the CIRP.

To summarize the substance of the above stated judgments; it can be concluded that the assets of the CD are available for achieving the successful resolution/auction under the IBC. The Parliament upon due consideration deemed it appropriate and expedient to infuse the clean slate doctrine by introduction of Section 32A in the Code bearing in mind the larger economic results sought to be achieved with the introduction of the IBC.

<sup>11</sup> *Embassy Property Developments Pvt. Ltd.*, Supreme Court of India, Civil Appeal No. 9170 of 2019 (Arising out of S.L.P. (C) No. 22596 of 2019), Date of order: Dec. 03, 2019.



**Section 14, 18, 32A and 238 of the Code makes it abundantly clear that IRP/RP/Liquidator is fully empowered to take over the assets of the CD even if the same is subject to attachment under any other law.**

Section 14, 18 and 32A of the Code makes it abundantly clear that IRP/RP/Liquidator is fully empowered to take over the assets of the CD even if the same is subject to attachment under any other law. It has been further clarified that the AA under the IBC is duly posed with the jurisdiction to order for detachment or unfreezing of the assets as held in the case of *Manish Kumar Vs. Union of India and Another*<sup>12</sup> by the Supreme Court. The PSL Limited judgment has further clarified that all the protection of Section 32A is also available for sale of the CD as a GC and accordingly no embargo will have effect on such sale which is covered under the provisions of the Code. Meanwhile, the constitutional validity of Section 32A of the Code has already been upheld by the Supreme Court in the matter of *Manish Kumar Vs. Union of India and Another*. Certainly, owing to the insertion of section 32A, the present NCLAT ruling is an overturn of its own judgment rendered in *Varrsana Ispat Vs. Deputy Director, Directorate of Enforcement*<sup>13</sup> wherein the tribunal held that the proceedings under the PMLA are criminal in nature and had further declined to intervene in the said proceedings.

Also, though attachment proceedings are civil in nature but even if the same could not come within the ambit of Section 14, owing to their quasi-criminal nature, Section 32A and 238 would still apply and the IBC, being a subsequent enactment, will override anything inconsistent contained in the PMLA. Having regard to the duties of the RP in relation to the assets of the CD, which includes management of its operations as a GC, and having regard to the offering of CD to the RP on a clean slate, it goes to establish the efficacy of the IBC proceedings, and any obstruction created by attachment or other proceedings



under the PMLA would be vitally detrimental to the interests of the CD and the concerned stakeholders.

## 7. Conclusion

The recent NCLAT and Delhi High Court rulings have brought back the focus on the IBC's overriding powers under Section 238 read with Section 32A. Attachments by various law enforcement agencies like Serious Fraud Investigation Offices (SFIO), Central Bureau of Investigation (CBI), Enforcement Directorate (ED), Economic Offences Wing (EOW) has been a major concern while taking over the assets of the CD and further inviting resolution plan or putting such assets on auction. The judgments are laudable ones and will go a long way in making IBC a more stable and reliable resolution statute in India. The inclination of NCLAT to do a constructive interpretation of Section 32A to apply it even during the concurrency of the CIRP/liquidation, rather than waiting till achievement of successful resolution, will enable the RP/Liquidator to take better control of the assets of the CD. This would surely result in the CoC commanding better commercial bargaining powers against the PRAs as the detached assets would give them more confidence and bring maximization of value of underlying assets thereby serving the objective of the IBC.

<sup>12</sup> *Manish Kumar Vs. Union of India and Another*, Supreme Court of India, Civil Original Jurisdiction Writ Petition(C) No.26 of 2020, Date of order: Jan. 19, 2021

<sup>13</sup> *Varrsana Ispat Vs. Deputy Director, Directorate of Enforcement*, NCLAT, New Delhi, Company Appeal (AT) (Insolvency) No. 493 of 2018, Date of order: May 02, 2019.

## Expediting Approval of Resolution Plan- Need of the Hour



*Completing the insolvency process with the prescribed time limit, has been a major concern on IBC across stakeholders. The delays cause deterioration in the value of assets due to pilferage, obsolescence, diversion of funds, poor maintenance, low-capacity utilisation, and operational losses. In this backdrop, the author has presented a step-by-step analysis of delays at various levels of the insolvency process along with recommendations to save time wherever possible thereby completing the entire CIRP process within the prescribed limit i.e., 180 days. Some of the major suggestions include doing away with the two-stage process of inviting EOI and resolution plans, giving more time to investors and design a format for submission of the resolution plans. **Read on to know more...***



**Ashok Kumar Gulla**

The author is an Insolvency Professional (IP). He can be reached at [akgulla@yahoo.com](mailto:akgulla@yahoo.com)

### 1. Introduction

One of the objectives of the Insolvency and Bankruptcy Code, 2016 (Code) is to ensure insolvency resolution of the Corporate Debtors (CD) in a time bound manner. In over past five years, the Code has been instrumental in achieving resolution in many cases and thus unlocking funds of banks/ Financial Institutions that can be utilized for availability of credit. However, resolution within the prescribed time limit has not been fully achieved which is one of the major concerns of various stakeholders of the IBC. It is apprehended that in case this issue of achieving timely resolution is not resolved, the Code may not fully achieve its objectives and may somewhat meet the same fate as previous measures introduced to deal with stressed assets. The resolution of the large number of insolvent companies has a major ramification on the financial Sector and the economy as a whole as it helps in unlocking the funds and achieving overall economic growth.

Hence, the moot question in the mind of various stakeholders is whether this problem of delays occurring in the Insolvency Resolution can be addressed by reducing the duration of various processes for having an

implementable resolution plan in place within the time limit fixed by the Code. It is desirable that necessary changes in the policy and procedures are made, and process efficiency improved at various levels to achieve this objective. An attempt has been made in this article to elaborate on various issues that need to be dealt with to achieve the desired objectives of the Code.

## 2. Prescribed Time Limit for Completion of CIRP

As per Section 12 (1) of the Code, the Corporate Insolvency Resolution Process (CIRP) shall be completed within a period of 180 days from the date of admission of the application to initiate such process. Further, as per Section 12 (2) of the Code, the same can be extended up to 270 days with the approval of resolution passed at a meeting of the committee of creditors (CoC) by a vote of sixty-six per cent of the voting shares.

The Section 12 (3) of the Code mandates that if the Adjudicating Authority (AA) is satisfied that CIRP cannot be completed within 180 days, it may by order extend the duration of such process beyond 180 days by such further period as it thinks fit, but not exceeding 90 days. Further as per Section 12 (4) of the Code, the CIRP shall mandatorily be completed within a period of 330 days from the insolvency commencement date, including any extension of the period of CIRP granted under this Section and the time taken in legal proceedings in relation to such resolution process of the CD.

## 3. Average Time Taken in Completion of CIRP

While the maximum time limit for completion of the CIRP is 330 days, but in actual the average time taken in completion of CIRP resulting in approval of resolution plan as per the IBBI Newsletter<sup>1</sup> (July-September) is more than 408 days as of March 31, 2021, and 584 days as of September 30, 2021. This time is exclusive of the time taken from the date of submission of the application to AA to the order of the AA for commencement of CIRP.

There are several factors resulting in such delays, starting from the time taken by Financial Creditors to take the CD into CIRP, time taken by the AA to admit the application

for initiating CIRP, time taken in getting Prospective Resolution Applicants (PRAs) to submit Expression of Interest (EOI) and thereafter submission of Resolution Plan leading to seeking several extension from AA; long time taken by CoC to negotiate with PRAs on the Resolution Plan and these negotiations stretch to several meetings, legal issues challenging the process on account of eligibility of PRAs, non-admission of claims of creditors by RP, dispensation provided to various stakeholders and finally time taken by the AA to approve the Plan.

**The entire process so far has been time consuming, and, on an average, it may take around 4 to 5 years from the time the account is in default till implementation of the Resolution Plan**

The entire process so far has been time consuming, and, on an average, it may take around 4 to 5 years from the time the account is in default till implementation of the Plan to deal with the insolvency resolution.

## 4. Time taken from Filing Application to order by AA for initiating CIRP: The duration involved at various stages are as follows:

- a) As per Section 7 (4), Section 7 (5), Section 9 (5) and Section 10(4) of the Code, the AA shall within a period of 14 days of the receipt of the application by an order, admit the application if it is in order. The CIRP shall commence from the date of admission of the application by AA. However, in practice, the application takes much longer time to get admitted for commencement of CIRP.
- b) The Supreme Court in its order on September 19, 2017, in the matter of *M/s Surendra Trading Company vs M/s Juggilal Kamlapat Jute Mills Company Limited & Ors*<sup>2</sup>, upheld that the timeline fixed in the Code is not mandatory but directive in nature.
- c) There are instances where the application submitted under Section 7 of the Code by the

<sup>1</sup> The Quarterly Newsletter of the Insolvency and Bankruptcy Board of India (July –September 2021) Vol.20 available in IBBI Web Portal

<sup>2</sup> Supreme Court, *Civil Appeal No. 8400 of 2017 & Anr., M/s Surendra Trading Company v/s M/s Juggilal Kamlapat Jute Mills Company Limited and Others*, Order dated 19.09.2017.

Financial Creditor is not admitted even for more than a year. The reason for such delays could be many and one main factor is that promoters try to delay the admission of the CD in CIRP for frivolous reasons. Similarly, for the applications filed under Section 9 of the Code, dispute with the Operational Creditor remains main hurdle in admission of the application for initiation of CIRP.

- d) The CD remains in default in payment to the Financial Creditor (FC) before it is turned Non-Performing Asset (NPA). Even, after the account is turned NPA, the efforts are made by lenders to arrive at some restructuring package under various schemes of Reserve Bank of India (RBI). Thus, time is taken before the FCs decide on filing an application for initiation of CIRP.
- e) The time taken in admission of the application for initiation of CIRP is the period when maximum deterioration in the value of assets takes place due to pilferage, obsolescence, diversion of funds, poor maintenance, low-capacity utilisation and operational losses. This leads to a situation where so many cases admitted into CIRP do not achieve revival through insolvency resolution and are ultimately dealt under liquidation. If a timely action is taken for admission of these CDs into CIRPs, it can help in revival of these corporates.
- f) In order to preserve the value of the CD, it is of utmost importance to make necessary changes in the policies of the FCs to submit application for initiation of CIRP within a maximum period of six months from the date of account classified as NPA and changes desirable in the Code to fix maximum time of 30 days for AA to admit the application into CIRP.

## 5. Time Involved in inviting Expression of Interest (EOI)

- a) Inviting EOI from all the eligible parties is the first step for resolution of the Corporate Debtor

(CD). The Section 25 (2) (h) of the Code directs the RP to invite resolution plans from PRAs that fulfil such criteria as may be laid down by him with the approval of CoC 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 Insolvency and Bankruptcy Board of India (IBBI) to submit resolution plan/s.

- b) Regulation 36A of the IBBI (Insolvency Resolution for corporate persons) Regulations, 2016, 'Form G' for invitation of EOI is to be issued within 75 days of commencement of CIRP. The invitation of EOI provides at least 15 days from the issue of EOI, Provisional List of PRA to be issued by RP within 10 days from the last day of receipt of EOI and submission of objections to Provisional List within another 5 days from the date of Provisional List. The Final List of PRAs to be issued within 10 days of the receipt of the objections. Hence entire process from publishing of 'Form G' to Release of Final List of PRAs is expected to be completed by 115th day from the commencement of CIRP.

**In fact, the 15 days time provided for inviting EOI is too short as not many PRAs become aware of such invitation in most cases. This requires reissuance of Form G by the RP.**

- c) In fact, the 15 days time provided for inviting EOI is too short as not many PRAs become aware of such invitation in most cases. Therefore, the RP with the approval of the CoC is required to re-issue 'Form G' to get more PRAs to submit EOI so that to ensure large participation for maximization of the value of the CD. Thus, entire process of inviting of EOI and finalization of Final List of PRAs takes more than prescribed time limit of 115th Day from Commencement of CIRP.
- d) As in practice, more than four months are consumed in completing the process for inviting





of EOI and Release of Final list of PRAs, it leaves little time for the PRAs to complete due diligence and submit a Resolution Plan. Thus, RP with the approval of the CoC seeks extension of time from AA to complete the process.

## 6. Proposed Modification in inviting EOI and submission of Resolution Plan

- a) The existing two stage procedure for inviting EOI and then Resolution Plan creates delay and opportunity is lost to bring all the PRAs to participate in the process. A time limit of around 20-25 days given to the PRAs to submit the EOI without carrying full due diligence does not attract sufficient number of PRAs. At the initial stage, without getting full information like IM, access to Virtual Data Room (VDR) and physical inspection, not many PRAs decide in favour of submitting EOI.

**In most cases, finally not more than 10 to 20 EOIs are received. Hence, there is no need to have two step approach – inviting EOI followed by inviting resolution plans.**

- b) This preliminary scrutiny of eligibility criteria could have been useful where large number of PRAs submit EOI. In most cases, finally not more than 10 to 20 EOIs are received. Hence, there is no need to have two step approach.
- c) Hence, 'Form G' be released directly to invite submission of the Resolution Plan by PRAs till the last date of such submission i.e., RP releases

'Form G' latest by the 60th day of commencement of CIRP and provides 75 days to submit a Resolution Plan and gives another 30 days for negotiation and discussion of the Plan with the CoC. Accordingly, CoC can approve the Resolution Plan within 165th day from the commencement of CIRP and the Plan can be submitted within 180 days of the Commencement of CIRP to AA. These timelines may need to be mandatorily adhered by PRAs and CoC.

- d) The advantages of this modification in the process for submission of the Resolution Plan and doing away with the inviting of EOI will be as under:
  - i. It will give enough time for PRAs to carry due diligence and to submit Resolution Plan. PRA within this period can arrange for tie up of funds to meet Resolution Amount and can deal with the issues more appropriately.
  - ii. There will be lesser chances that any potential and deserving PRA has been left out even after such timelines and may not need to approach AA for not including in the list for submission of the Resolution Plan.
  - iii. It is expected that higher number of Plans may be received as there is no time limit separately for submission of EOI and Resolution Plan.

## 7. Model Draft for Submission of Resolution Plan

- a) The Resolution Plan submitted has to meet the conditions and requirements as stipulated in Section 30 (2) of the Code and Regulations 37, 38 and 39 of IBBI (insolvency Resolution for Corporate Persons) Regulations, 2016. These contents in the Resolution Plan be captured in the Model Format at appropriate places. This modification can save a lot of time at the stage of negotiation of the Resolution Plan with members of CoC and scrutiny at AA.

- b) There is no standardized format for submission of the Resolution Plans by PRA and hence in most cases, these Plans do not contain relevant information/ declarations at one point.

**There is no standardized format for submission of the Resolution Plans by PRAs. Therefore, the scrutiny of plans becomes a time-consuming process.**

- c) Hence, lot of time is involved by RP and his legal counsel to examine that the Plan is in compliance of the Code. This time can be saved in scrutiny of the Resolution Plan by RP, Legal Counsel to RP, members of CoC, and at AA, if there is a standardized Format to submit a Resolution Plan. A team of experts from existing IPs and IBBI can design such Model Format.
- d) The Model Format may have following Chapters:
- i. Chapter 1: Particulars of the Resolution Applicant giving Name address, Type of Business, Name of Directors/ Promoters, Financial Position, reason for submission of the Resolution Plan, source for meeting the Resolution Amount along with documentary proof regarding eligibility.
  - ii. Chapter 2: Particulars of the CD giving Name, Registered office, CIN, claim admitted, particulars of asset, business, reason for default and how the resolution Applicant propose to revive the Company.
  - iii. Chapter 3: Financial offer to meet Insolvency Resolution Process Cost, Payment to both assenting and dissenting Financial Creditors, Payment to Operational creditors, Payment to other creditors, Treatment to shareholders, Treatment to workmen and employees and other liabilities, if any.
  - iv. Chapter 4: Term of the Plan and Monitoring and supervision of the Plan



- v. Chapter 5: Various Waivers and Concession and Prayers
- vi. Chapter 6: Other content if any

#### **8. Limit on time taken in negotiation of Resolution Plan by CoC**

- a) After the Resolution Plan (s) are submitted by the PRAs, the next step is to seek approval of the Plan from CoC. The meetings of the CoC prolong and at times it takes more than 10 to 15 meetings to decide on the Resolution Plan.
- b) The representatives of the FCs attending the CoC meeting do not have the requisite power to decide on the amount expected to be in the Resolution Plan. The FCs have such deciding powers vested in the higher authorities/ sanctioning Committees or Board. The members of CoC keep on bargaining till the last and this process stretches over a series of meetings. There are number of instances where RP with the approval of CoC had requested for extension of time to AA so that CoC decide on the Resolution Plan.
- c) It may be preferable if such meetings are restricted to be held within a maximum period of 30 days. Hence, a maximum time of 30 days may be given to members of CoC to negotiate with the Resolution Applicant to decide and approve/ reject the Plan.

## 9. Approval of the Plan by NCLT

- a) As per Section 31 (1) of the Code; if the AA is satisfied that the resolution plan as approved by the CoC under Section 30 (4) meets the requirements as referred to in sub-Section (2) of Section 30, it shall by order approve the resolution plan.
- b) Hence, role of the AA is to examine whether the Plan is in compliance of Section 30 (2) of the Code. However, in number of instances, AA has taken a broader role on itself to raise a point - whether the financial offer is reasonable for various stakeholders - and referring the same to CoC for reconsideration. This has resulted in the delay on approval of the Plan.
- c) Further, there are number of legal issues that are to be dealt by AA before approval of the Plan including attachment by various authorities on assets of CD during CIRP such as by Enforcement Directorate (ED) under PMLA. Despite having clarity in law, the authorities still continue to attach the assets of CD in CIRP which delays the process.
- d) There is a scope for improvement in the process by making necessary changes in the Code, regulations and other laws prevailing currently.

## 10. Way Forward

There's a scope to reduce the delays and achieve the objective of completing the CIRP in the prescribed time limit under the Code. This can be possible with certain changes in the Code, Regulations, and other laws and to improve efficiency of the process at each level. Some of the suggestions are as follows:

- a) Lenders to decide within six months of the account turning NPA to initiate CIRP. Within this period, Lenders should examine all possible options of restructuring outside IBC. RBI may consider issuing detailed guidelines to meet these timelines.



**There is a scope to reduce the delays and achieve the objective of completing the CIRP in the prescribed time limit under the Code.**

- b) The AA based on the available documents may decide on the application for initiating CIRP within a period of 30 days after giving one opportunity to the CD to represent the case if found necessary.
- c) The RP to issue invitation for submission of Resolution Plan directly by PRAs without need for first submission of EOI.
- d) Model Form for submission of the Resolution Plan be decided by IBBI to bring uniformity in approach and reduce the time taken in scrutiny of the Plan at various levels.
- e) CoC to decide on the Resolution Plan within a period of maximum 1 month.
- f) Necessary changes in the Code, Regulations and other laws to take care of various issues regarding attachment on assets of Corporate Debtor during CIRP by statutory, regulatory authorities and ED. internationally.

## Issues in CIRP of CD with Assets primarily on Lease/License from Third Parties



*Assets of the Corporate Debtor which are on lease/ license from third parties play a crucial role in the resolution of companies during CIRP. They may also be crucial for running the CD as Going Concern, preparing Information Memorandum (IM) for the Prospective Resolution Applicants (PRAs). Nonavailability of Third-Party Assets (TPAs) such as impounding of airplanes in another jurisdiction, land, classes of contractual agreements, and national security etc. may lead to complete cessation of the business. Besides, the actual information related to the TPAs are important for PRAs in preparing Resolution Plan which also facilitative during implementation of the Plan. Read on to know more...*



### Devarajan Raman & Sunita Umesh

The author is an Insolvency Professional (IP) and co-author is an IP member of IIPI. He can be reached at [devarajan.raman@gmail.com](mailto:devarajan.raman@gmail.com)

### 1. Introduction

“The first order objective is resolution. The second order objective is 'maximization 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,” said the NCLAT in the matter of *Binani Industries Ltd. Vs. Bank of Baroda*<sup>1</sup> on November 14, 2018. Thus, value maximization is second in the order of the three primary objectives of the IBC. In pursuance to this objective, the IRPs/ RPs are required to make list of assets of the respective CDs and plan a strategy for value maximization. The present article is focused on the issues related to the assets of the CD which are on lease/ license from third parties at the time of CIRP. This would enable the IRPs/RPs to imbibe the finer details which are critical for value maximization of the CD.

### 2. Third Party Assets (TPAs): Meaning, Type, Holding, Use in Business

#### 2.1. Definition

Asset's tangible or intangible, taken on license or lease by Corporate Debtor (CD) from a Third Party (TP) who is the owner of such assets. These include:

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



- i. Assets where CD holds custody, but which are owned by a TP.
- ii. Assets owned or under the control of contractor or a visitor to the property including vans, trucks, vehicles, storage equipment etc.

## 2.2. Type of Contractual Relationship

The TPAs may be governed under varied contractual relationship between CD and TP which includes:

- i. Assets Owned by TP and used by CD
- ii. Asset held in trust for any TP
- iii. Assets held under bailment contract with TP
- iv. Assets held under hire purchase/ lease
- v. Assets owned by Related Party
- vi. Contractual Arrangements which may not stipulate transfer of title but only use of assets

## 2.3. Use in Business

Depending on utility and requirements of the CD, the TPAs can be used for varied purposes. However, their use can be classified on the basis of their bearing on the business of the CD as under:

- i. Critical Assets (for CD's operations):  
Airplanes on lease and intangible assets on licence to CD such as Patents, copyrights, trademarks, designs etc.
- ii. Non-critical (General-purpose asset):  
Vehicle on hire for general use.

## 2.4. TPA: Type of Ownership

The TPAs can be owned by different parties, but are broadly classified into two categories:

- i. Owned by Government/Governmental bodies, such as sovereign assets and others. Sovereign assets are restricted to those assets which are to be used only for public good.
- ii. Owned by Private Party

Though sovereign assets are not defined in the IBC, in general parlance, it means:

- i. Scarce natural resources like land, water, spectrum, agriculture and animal husbandry, forest, wildlife, and minerals.

- ii. Strategic assets such as airways, waterways, nuclear assets, space technology, defense assets, scientific assets such as patents & licenses for use of these assets, strategic PSU assets, exclusive economic zone of 200 nautical miles and assets to be used for the benefit of the public of the country.
- iii. Other assets of the Government / PSUs which are not strategic in nature.

**Though sovereign assets are not defined in the IBC, in general parlance, it means scarce natural resources, strategic assets and other assets of the government which are of non-strategic nature.**

## 3. Provisions of IBC Related to TPAs

**3.1. Protection to CD during Moratorium:** Section 14(1)(d) of the IBC prohibits any recovery during the moratorium period of the property by owner/ lessor where such property is occupied by or in the possession of the CD.

- i **Protection to CD for Critical Assets - Section 14(2A):** If the supply of goods or services is critical to protect and preserve the value of the CD and manage the operations of such CD as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such CD has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.
- ii **Protection to CD for certain assets held under trust, bailment, or any other contractual arrangement :** Section 18(f) - explanation - provides that TPA held under trust, or under contractual arrangements including bailment, cannot be taken under control or custody by IRP/RP. In case of license, permits registration etc., issued by Central Government, State Government, or any authority constituted under law, the same shall not be suspended or terminated on the grounds of insolvency, however subject to payment of current dues.

This TPA's of private parties are not covered under the above protection except to the extent of supplies and services are determined as critical u/s 14(2A). The IP can negotiate with them, if the assets are critical to the operations of the CD or seek direction from NCLT.

### 3.2. Asset exclusions

Section 18 – duties of IRP

- Explanation. – For the purposes of this [section], the term “assets” shall not include the following, namely:

- (a) Assets owned by a third party in possession of the CD held under trust or under contractual arrangements including bailment.

### 3.3. Insolvency resolution process costs

Regulation 31(b)

Insolvency resolution process costs under Section 5(13)(e) shall mean-

- (b) Amounts due to a person whose rights are prejudicially affected on account of the moratorium imposed under section 14(1)(d).

## 4. Impact of Critical and Non-Critical TPAs on Business of CD during CIRP

### 4.1. Critical Assets

Non-availability of critical assets, may lead to complete cessation of business like:

- a) Impounding of airplanes in another jurisdiction
- b) Land Development Authority may revoke lease and ask for vacation of property
- c) Agreement terms may provide for automatic cancellation on initiation of CIRP [e.g., Termination clause in Container Freight Station agreements, etc.]
- d) Similar cancellation clauses exist in contractual arrangements for use of intangible assets such as patents, copyright, trademarks etc. in case of non-payment of license fee or royalty
- e) Strategic assets may have termination clause in view of national security

### 4.2. Non-Critical Assets

The TPAs owner may take recourse to the followings in case of non-critical assets

- a) Seek re-possession of assets
- b) Seek cancellation of contracts
- c) Demand past dues settlement before permitting further use

- d) Insist on revision of contract with additional conditions which may not be favorable to CD
- e) Can claim back Hire Purchase (HP) assets (shown as assets in the books, whereas the title transfers only on payment of the last installments) which are strictly third-party assets.

## 5. Issues faced by IP during the Resolution Process: Value / Renewal / Eligibility Criteria for RA to Qualify for Replacement of CD / Current Structuring of Agreements

**5.1 Issues faced by IP:** Some of the issues encountered by IP's during the resolution process are:

- a) Directors may not disclose the criticality of these TPAs for the business.
- b) Many contracts might have expired which require renewal/renegotiation. The renewal terms [when the CD is a going concern] can be negotiated easily by the IP. Whereas, in case of closed units, the value can be ascertained only upon commencement of operations, and in such scenario the RA will be in dark to that extent.
- c) Valuation of right to use of critical assets, licenses, patents etc. depend on future operations and the terms of the arrangement which may not be easy for IRP/RP to estimate /project.
- d) The requirement of the Resolution Applicant (RA) to ensure that they fulfil the eligibility criteria and qualify to take over the CD prior to submission of Resolution Plan, may be difficult as the RA can't put this as a 'condition precedent' in his/ her plan (this will be tantamount to a conditional plan).

**5.2 Current Structuring of Agreements:** Current structuring of agreements particularly some Public Private Partnerships (PPPs) are generally not addressing the concern of treatment of TPAs during CIRP.

- a) The PPP concession agreements may be only between the Grantor and the CD (Concessionaire), and the lender may not be a party to the same.
- b) Agreements may not be having the cure rights, step in rights, substitution, and novation clause etc.

- c) Change in ownership or control to a nominee of lender is generally not perceived
- d) Share pledge of existing concessionaire in favour of lenders are not envisaged
- e) Clause of indemnification by the concessionaire to substituting entity does not include
- f) Substitution clause of concessionaire agreement may not be included in other supporting agreements
- g) Substituting entity faces delay in obtaining permits etc. in its name as all the authorities are not taken on Board at the time of initial signing

## 6. Suggested Approach for IP (Key Considerations in Information Memorandum / CoC Meetings / Resolution Plan Request etc.)

### 6.1 While preparing Information Module (IM)

- a) Include the details of the critical third-party assets (both tangible and intangible) and the salient features of the terms of use and the critical clauses governing termination of such agreements.
- b) In case of intangible assets - include the unexpired period of the license along with the terms and conditions of such license.
- c) The responsibility of the RA to satisfy the owner that they fulfill the criteria set by the owner of the assets for being eligible to use the assets.

### 6.2 While conducting CoC Meetings

- a) The CoC members should be appraised regarding the terms of use and the eligibility requirement for obtaining right to use of critical TPA by the Prospective Resolution Applicant (PRA).
- b) In cases of critical TPA where resolution is not possible due to the contractual arrangement requiring reworking with the TPA owner; the concerned government/ statutory/ local authorities/TPA owner may be invited to the CoC meeting to hear their stand for the continuation of such contracts by the CD, post approval of the plan [including the due diligence requirement to determine the eligibility of the RA].

- c) Discuss with the CoC members, the eligibility criteria to be included in the EOI in light of such TPA's. Also, to decide on appropriate clauses to be included in the Request for Resolution Plan (RFRP).
- d) The role of the CoC is more of a facilitation than approvals, as there is no mandatory requirement to involve CoC [not covered u/s 28 of the Code]. However, as the final resolution plan approval is in the domain of CoC engaging them is essential.

### 6.3 Involving TPAs owners in CIRP

- a) The PRA may need an option to work out arrangement with the TPA owner before submitting a resolution plan, in the case of Critical TPAs. This will facilitate implementation of the Resolution Plan [RP] in the event of the RA becoming the successful resolution applicant [SRA].
- b) There can be a suggested structuring of Agreements to deal with issues of substitution, novation, cure rights etc. One may refer certain NHAI agreements in this regard which contains remedial measures like 110412 concession agreement – NHAI – Kerala. Certain extracts are reproduced hereunder:

**The PRA may need an option to work out arrangement with the TPA owner before submitting a resolution plan, in the case of Critical TPAs.**

#### Page 28 of said Agreement:

- The Concessionaire shall procure that each Subcontract shall contain provisions that entitle the Authority to step into such agreements, in substitution of the Concessionaire, if this Agreement is liable to be terminated due to a Concessionaire Event of Default or a Force Majeure Event. However, the step-in rights of the Authority shall be subject to the rights of the Lenders under the direct agreements (if any) between the Lenders and the Subcontractors.

#### Page 30 of said Agreement:

Subject to Clauses 6.1(c) and 6.1(f), no Change in Ownership may occur during the Lock-in Period.

- c) Clause 6.1(b) shall not apply: (i) where the Change in Ownership arises as a consequence of the grant or enforcement of security in favour of the Lenders over or in relation to any of the shares of the Concessionaire, provided that any document conferring security over any of such Capital of the Concessionaire has been approved by the Authority. If the Authority has not granted or withheld its approval for any document conferring security over any Capital of the Concessionaire within forty-five (45) days of an application being made by the Concessionaire, such approval shall be deemed to have been granted;

- Page 44 of said Agreement:
- Clause 12.3 – direct agreement
- Page 114 of said Agreement:

#### Lenders' Rights

Subject to the provisions of the Concession Agreement, the Lessor hereby expressly agrees that in the event of exercise of rights of the Lenders under the Direct Agreement or any similar right, the Parties hereto shall assign or novate this Lease Agreement in favour of the Lenders', or any other person duly authorized by the Lenders', within [10 (ten)] days of such an occurrence.

#### 6.4 While issuing RFRP

- a) The IP should set out the eligibility criteria for the use of the assets by the owner and the eligibility criteria for replacing the CD.
- b) The claims (prior to commencement of CIRP) of private TPAs needs to be tactfully handled as the TPA owner reserves the right to cancel the arrangement.
- c) If IRP/RP has declared the use of these assets are critical for the CD to be operated as a going concern, this shall also be indicated in RFRP to facilitate PRA's discussion with the TPA owner.
- d) There may be multiple owners owning one or more assets like leased land held by more than one party and the total land being used to put machine for manufacturing. In such cases, make appropriate disclosure in RFRP so that PRA can separately negotiate with

each lease owner and file a draft memoranda agreement with Resolution Plan. If pre-negotiated by PRA, the Plan may accompany signed or agreed upon extended lease agreements which guarantees TPA continuity in plan implementation.

#### 7. Some Important Judgement on Issue of TPAs

Law in India on IBC is nascent and evolving. However, certain principles are already settled by supreme court as enumerated hereunder:

- a. Approval from Statutory authorities is a must where required to be taken prior to disposal of property upheld the Supreme Court in the matter of *Ram Singh Vijay Pal Singh & Ors. Vs. State of U.P. & Ors.* (2007).
- b. Treatment of natural resources and national assets should be done in fair and transparent method consistent with the fundamentals of the equality clause enshrined in the constitution, upheld the Supreme Court in the matter of *Dr. Subramanian Swamy Vs. Union of India* W.P. (Civil) 10 of 2011.
- c. In the matter of *Embassy Property Development Pvt. Ltd. Vs. State of Karnataka* [C.A.No.9170 of 2019], the Supreme Court ruled that IBC Code does not apply to right conferred by mining lease<sup>3</sup>.
- d. Any authority cannot terminate the agreement since Section 14(1)(d) grants protection to CD for right to use, said the Supreme Court in the matter of *Rajendra K. Bhutta Vs. Maharashtra Housing and Area Development Authority & Anr.* [Civil Appeal No. 12248/2018] – Guru Ashish CHSL (SC).
- e. A Resolution Plan cannot restructure liability of CD by creating fresh debt and mortgage of land which directly affected Third party rights - *Municipal Corporation of Greater Mumbai (MCGM) Vs. Abhilash Lal & Ors.* [Civil Appeal No. 6350 of 2019 SC]
- f. NCLAT in April 2021 ruled that spectrum can be transferred as part of the Resolution Plan but only after clearing all government dues, thus

<sup>2</sup> *Ram Singh Vijay Pal Singh & Ors vs State of U.P. & Ors* on May 01, 2007 (<https://indiankanoon.org/doc/586046/>)

<sup>3</sup> *Embassy Property Development Pvt. Ltd. Vs. State of Karnataka* ([https://main.sci.gov.in/supremecourt/2019/33953/33953\\_2019\\_4\\_1501\\_1875\\_7\\_Judgement\\_03-Dec-2019.pdf](https://main.sci.gov.in/supremecourt/2019/33953/33953_2019_4_1501_1875_7_Judgement_03-Dec-2019.pdf))



upholding that the rights of the asset owner under a contract with the CD, overrides the provisions of IBC - Aircel Judgement [Civil Appeal No. 6328-6399 of 2015 SC]. The judgment has been challenged in SC by the CoC, UAVRCL on the grounds that IBC overrides the universal access service license conditions, tripartite agreement and spectrum trading guidelines. Further, such a decision gives preferential treatment to Government Departments, an Operation Creditor, and amounts to discrimination against other creditors.

## 8. Recommendations for Amendments in IBC

The author recommends following modifications in the Code, for better on ground implementation:

- a) Define 'Sovereign Assets' in the Code and enumerate the list of such assets [may be an inclusive definition].
- b) Appropriate amendment of provision for right to use third-party assets [like sovereign asset usage in Explanation to sec 14(1)], which are critical to the operations of the CD in section 14(2A).

**Appropriate amendment is required in the provision for right to use third-party assets [like sovereign asset usage in Explanation to sec 14(1)], which are critical to the operations of the CD in section 14(2A).**

- c) Stipulate prior approval of concerned authority (for transfer of such critical sovereign rights to RA), prior to approval of the Resolution Plan by CoC, similar to the approval by Competition Commission of India (CCI) in proviso to section 31(4) of the Code when it involves enterprises contemplated in Section 5 of the Competition Act.
- d) The implementation and monitoring committee post approval, be cast with an obligation to monitor such 'right to use' up to the completion of the implementation period.
- e) Incorporate appropriate provisions for dealing with cross border assets of third parties, irrespective of its criticality for the operations of the CD.



## eXtensible Insolvency Reporting Language (XIRL)



*The resolution plans offered in an iXIRL “tagged format”, would make them more machine readable, comparable, and cost-effective. Various elements of the plan would be wrapped around “unique tags” and thus associated with specific pieces of information. Resolution plan in iXBRL format can not only be directly read by humans, but also directly consumed by computers for analysis and scoring. At present XBRL filings with ROC are not user-friendly statements for readability and analysis purpose. These challenges can be sorted out when XBRL is extended under IBC.*

***Read on to know more...***



### **Atul Grover**

The author is an Insolvency Professional (IP). He can be reached at [iiipi.journal@icai.in](mailto:iiipi.journal@icai.in)

### **1. Introduction**

XBRL stands for eXtensible Business Reporting Language. It is a computer language designed to expedite financial reporting needs. XBRL is used to tag financial statement items so that machines can automate comparison and financial analysis. Chartered Accountants and Company Secretaries have been filing financial statements in XBRL formats with the Ministry of Corporate Affairs (MCA) as per the Companies (Filing of Documents and Forms in Extensible Business Reporting Language) Rules, 2015. The Section 137 of the Act mandates the specified class of companies to file their financial statements and other documents with the Office of Registrar of Companies in e-Form AOC-4 XBRL, within 30 days of the date of annual general meeting<sup>1</sup>.

Financial bodies around the world have appreciated the benefits of standardizing the formats of financial documents. Software using XBRL to prepare, analyze and communicate financial documents have resulted in

<sup>1</sup> TaxGuru.in. (2018), Reporting of financial statements by a Company in XBRL, (<https://taxguru.in/company-law/reporting-financial-statements-company-xbrl.html>)

decrease in costs, increased efficiency, improved accuracy and reliability for makers and consumers of financial data. Furthermore, consistent, and unambiguous data is critical for data-analysis using conventional technologies, and is imperative for preparing, creation and analysis of resolution plan. The XIRL is proposed to be an extension of XBRL. Existing XBRL software could be expanded and used for the purposes of preparation, and analysis of resolution plans.

Insolvency regulators from around the world have adopted rules requiring Insolvency Professionals (IPs) to provide insolvency information in an interactive, machine-readable (i.e., structured XML) format, which inter-alia enables investors to capture and analyze information more effectively as well as help professionals automate their regulatory filings and business information processing, eventually reducing both maker and investor costs. The insolvency information filing practices in some of the economies are as follows:

1. In United Kingdom, the insolvency information is to be submitted by IPs in XML format using online forms<sup>2</sup>.
2. In Canada, the IPs use insolvency software to generate XML formatted information, which is mandatory for e-filing<sup>3</sup>.
3. In Australia, the Australian Financial Security Authority<sup>4</sup>, Australian Government provides online services for such filings.
4. Australian Securities & Investment Commission make extensive use of XML as means of information exchange<sup>5</sup>.

<sup>2</sup> The Gazette: Official Public Record, Insolvency web forms now Live (<https://www.thegazette.co.uk/insolvency/content/102301>)

<sup>3</sup> Innovation, Science and Economic Development Canada, eFiling: Guide for Insolvency Professionals ([https://www.ic.gc.ca/eic/site/bsf-osb.nsf/vwapj/E-Filing-Manual\\_EN\\_F\\_2013-04-30.pdf/\\$file/E-Filing-Manual\\_EN\\_F\\_2013-04-30.pdf](https://www.ic.gc.ca/eic/site/bsf-osb.nsf/vwapj/E-Filing-Manual_EN_F_2013-04-30.pdf/$file/E-Filing-Manual_EN_F_2013-04-30.pdf))

<sup>4</sup> Australian Financial Security Authority, Australian Government (<https://www.afsa.gov.au/online-services/b2g-system-integration/development-tools>)

<sup>5</sup> Australian Securities and Investments Commission (<https://sitesearch.asic.gov.au/s/search.html?query=xml&collection=asic&profile=asic>)

## 2. What is Taxonomy

Taxonomy is a set of tags which are standardized to contain specific information. These clearly defined tags capture the specific piece of information required in a typical resolution plan. These taxonomies will be developed by market forces using best practices, and may eventually be ratified by the regulator, and the Adjudicating Authority (AA). The resolution plans if offered in a “tagged format”, would make them more readable, comparable, and cost-effective. Besides, various elements of the plan would be wrapped around 'unique tags' and be associated with specific pieces of information. Plan taxonomies will include comprehensive definitions and accurate data tags to clearly define information that needs to be reported upon, which will eventually allow for preparation, validation, consumption, and its analysis.

Information in resolution plans reports prepared using the XIRL standards is interchangeable between different information systems in entirely different organizations across different countries and jurisdictions. The XIRL will create business rules that constrain the information being reported in a resolution plan. These rules can be logical or mathematical and will be used to:

- a) Stop poor quality information being added
- b) Stop poor quality information being accepted by the IPs
- c) Flagging or highlighting questionable information, allowing prompt follow up, correction or explanation.
- d) Create ratios, aggregations and other kinds of value-added information, based on the fundamental data provided.

**XIRL is a language for e-communication of financial health and insolvency status of CD. XIRL proposes to extend XBRL to e-communicate insolvency reporting by an RP and resolution planning by a Resolution Applicant.**

XIRL is proposed as a language for e-communication of financial data for insolvency reporting. It is proposed as a standardized communication language in electronic form to express financial health and insolvency status of a

Corporate Debtor (CD). XIRL taxonomy would define the elements and their relationships based on the requirement of the Insolvency and Bankruptcy Board of India (IBBI), the Regulator under IBC. IPs will be required to prepare CIRP instance documents by mapping the insolvency-data generated during their IBC assignments.

### 3. Resolution Plan Taxonomy

A typical resolution plan contains paragraphs such as investor profile, business plan, terms of resolution etc. These paragraphs contain chunks of unstructured information which makes it hard to compile within the plan and hard to compare across other resolution plans.

The AA is expected to legally analyze each piece of information contained in the resolution plan in order to ensure that the plan is just and equitable. This can be very time consuming since hundreds of paragraphs contain disparate chunks of information in an unstructured text, which makes it very difficult to analyze. The resolution plan taxonomies will enable

- a) The resolution applicants to prepare their resolution-plan in a consistent manner which will reduce time and cost of preparation.
- b) The insolvency professional uses computer software to check for any inconsistencies in the information provided in the plan.
- c) The committee of creditors to analyze various plans since similar information will be embedded in similar tags.

### 4. From XBRL to XIRL

The X in XBRL stands for extensibility, which means that new data-elements can be added to existing XBRL taxonomies (or new taxonomies can be developed using XBRL rules) in order to generate platform independent data in new domains. Extending XBRL into the domain of the IBC would offer the same benefits to IBC stakeholders as are being enjoyed by the financial community. Such extended XBRL taxonomy for the domain of IBC would enable several benefits of XIRL for various stakeholders which could be summarised as follows:



#### a) Insolvency Professionals (IPs)

- i. to automate the preparation and comparison of CIRP documents using existing XBRL software.
- ii. to publish CIRP documents and reports with confidence that the information contained in them is complete and ready to be consumed by any existing XBRL software.

**This will help resolution applicants to compare potential investment opportunities by analysing performance across different companies in disparate domains and geographies.**

#### b) Resolution Applicants

- i. to use existing XBRL software to analyze insolvency information in order to understand the relative risk of investing in insolvent companies.
- ii. to compare potential investments opportunities by analyzing performance across different companies in disparate domains and geographies.

#### c) Regulators (IBBI and IPAs etc.)

- i. to regulate the performance of IPs in order to ensure their legal compliance, quality and completeness of insolvency information they make available for international investors.



- ii. to simplify the process of insolvency reporting to other regulators by harmonizing data definitions and consolidating reporting obligations.

**d) Data Providers:**

- i. to use performance and risk information published into the marketplace and create comparisons, ratings and other value-added information products for other market participants.

## 5. Cross Border Resolution

With the advent of cross-border insolvency resolution, there will be tremendous increase in the flow of information across various jurisdictions. This will require the information in to be compiled and presented in a standardized format so that insolvency/ bankruptcy professionals across economies can use them without hassle. After implementation of the legal framework for cross border insolvency, which is pending the approval of the Parliament, insolvency/ bankruptcy professionals will demand information in a format which can be easily, and seamlessly consumed across national boundaries.

Therefore, there is an impending need to develop data-exchange systems that would facilitate standardized flow of information in order to enable machine-to-machine communication and data processing of information. Similar need arose in the context of exchange of financial information, which led to the development of (eXtensible Insolvency reporting language) XBRL, that successfully provided for common, electronic formats for business & financial reporting. It enabled communication of financial information between businesses and other users of financial information, such as analysts, investors and regulators.

**Most of the countries have published their version of XBRL taxonomies for financial statements to be prepared in accordance with IFRS, as issued by the International Accounting Standards Board.**

Most of the countries, today, have published their version of XBRL taxonomies for financial statements to be

prepared in accordance with International Financial Reporting Standards (IFRS), as issued by the International Accounting Standards Board (IFRS). In a similar fashion, regulatory authorities around the world will eventually adopt rules requiring resolution applicants to provide resolution information in an interactive, machine-readable (i.e., structured XIRL) format. Use of XIRL will significantly reduce time and cost for preparers and consumers of relevant information and will enable:

- a) The IPs to compare resolution plans, from different applicants, especially for cross-border resolutions.
- b) The CoC to effectively analyze and compare various resolution plans.
- c) The resolution applicants to prepare their plans with confidence so that the information contained in them are complete and can be compared and analyzed accurately.
- d) The Adjudicating Authorities (AA) can analyze the plans and ensure their compliance with various laws.

## 6. XIRL Applications: Followings are the applications of XIRL:

- a) Document Creation: During the lifecycle of an IBC process, stakeholders are required to prepare several documents. They could be as under:
  - i. IPs are required to prepare investment teasers, Information Memorandum and Request for Resolution Plans (RFRP) for analysis and preparation of plans by resolution applicants.
  - ii. Resolution Applicants are required to prepare resolution plans for IP, CoC and AA.
  - iii. Other professionals are required to prepare documents like asset valuations, forensic audit reports, eligibility verification reports etc.

Most stakeholders use generic tools like MS-Word or MS-Excel and convert them into pdf formats, then exchange

them via emails. IPs would use existing XBRL software to create CIRP documents. Standardized way of preparing CIRP documents will:

- i. Simplify the collection of data, by avoiding inefficient, error-prone and time-consuming information and data.
- ii. Lower the cost and time for preparation of such documents.
- iii. Enable automatic validation of the data thereby highlighting errors and gaps which could be addressed while CIRP documents are being created.
- iv. Enable automatic data handling thereby cutting out time-consuming and costly collation of information.

**b) Document Transmission:** The storage, aggregation and analysis of the data contained in the instance documents, as well as the metadata are contained in the relevant taxonomy within relevant business intelligence systems. Besides, the XBRL API is designed to standardize the method used to request XBRL data from any database containing XBRL-formatted data<sup>6</sup>.

- c) **Document Analysis:** During an IBC assignment life cycle, several documents are analyzed and reviewed by various stakeholders.
  - i. IPs consume financial statements from MCA, documents from SEBI, and Listing documents from BSE/NSE relating to the CD.
  - ii. Resolution Applicants consume investment teasers, Information Memorandum, and RFRP documents.
  - iii. RP/CoC and AA consume Resolution Plans submitted by the resolution applicants for risk analyzing risk in various plans.

**7. Additional Benefits of XIRL:** XIRL will enable consumers of insolvency documents to switch resources away from costly manual processes, typically involving time-consuming comparison, assembly, and re-entry of data. They can focus on insolvency data-analysis, aided by software which can manipulate machine-readable XIRL data in any format desired by the stakeholders. Use of XIRL in data analysis will:

**At present XBRL for financial statements in Registrar of Companies (ROC) are not user-friendly statements for readability and analysis purpose.**

- a) Facilitate automatic exchange and reliable extraction of insolvency information across diverse software applications by various stakeholders.
- b) Generate trust amongst disparate stakeholders thus enabling effective cross-border resolutions.
- c) At present XBRL for financial statements in Registrar of Companies (ROC) are not user-friendly statements for readability and analysis purpose. It is very difficult to understand. These challenges can be sorted out when XBRL is developed under IBC.

## 8. What's next for Regulator/ Government

XIRL is possibly going to be the most important new technology to be developed for insolvency stakeholders. It will make previously expensive and/or hard to gather information almost costless. XBRL has been used for financial and prudential reporting in India for several years. It is time for XBRL to be deployed in the field of insolvency & bankruptcy to facilitate filings and collect high-quality digital data that is easy to access, analyze and compare. Taxonomies take time to mature. Any new taxonomy will have inconsistencies and missing elements that need to be worked overtime. The more a taxonomy is used, the more feedback is received, the better the taxonomy becomes.

The XBRL standard provides two different formats of

<sup>6</sup> XBRL Application Programming Interface (API)  
(<https://fddocuments.in/document/xbrl-application-programming-interface-api-2019-9-18-xbrl-api-version-1.html>)

electronic reports: XBRL and Inline XBRL (iXBRL). Both types of report provide tagged data in the form of a set of facts. Documents in iXBRL format can not only be directly read by humans, but also directly consumed by computers for analysis and scoring. At present XBRL filings with ROC are not user-friendly statements for readability and analysis purpose. These challenges can be sorted out when XBRL is developed under IBC. XIRL can be planned to be in the "inline" format. This will allow for the same resolution-plan document to be both machine and human-readable by default. IPs can easily verify the plan for its compliance with existing laws, CoC can easily analyze and score the plan, and NCLT can approve the plan in shorter time.

## 9. Sample Section of Resolution Plan Taxonomy

### Proposed Elements

05. Business Plan  
 05.00 Cause of Default & Remedies  
 05.00.01 Cause of Default  
 05.00.02 Addressal of Default - Reg  
 38(3)(a)  
 05.00.03 Feasibility of Plan - Reg:38(3)(b)  
 05.01 Financial Restructuring  
 05.01.02 Reformation of Financial Stmts.  
 05.01.03 Amendment in Constitution - Reg:37(h)  
 05.02 Operational Restructuring  
 05.02.01 Transfer of Assets - Reg:37(a)  
 05.02.02 Sale of Assets - Reg:37(b)  
 05.02.03 Change Goods Produced - Reg:37(j)  
 05.02.04 Change in Services Rendered - Reg:37(j)  
 05.02.05 Change in Technology - Reg:37(k)  
 05.02.06 Critical Shared Services  
 05.02.07 Operational Interconnectedness  
 05.02.08 Capital Management Policy  
 05.03 Organizational Restructuring  
 05.03.01 ~Proposed Ownership  
 05.03.02 Proposed Board  
 05.03.03 Proposed Management  
 05.04 Ownership Structure  
 05.04.01 Cancellation of shares -

**IBBI should initiate a discussion with insolvency and technology professionals for the preparation of a taxonomy that captures and standardized specific reporting requirements.**

IBBI should initiate a discussion with insolvency and technology professionals for the preparation of a taxonomy that captures and standardized specific reporting requirements. Besides, the Information Memorandum should be made using the IM taxonomy. This should be easy since most CA/CS are already conversant with XBRL software. The Resolution Applicants should be encouraged to submit their resolution plans in XIRL format (besides pdf). Thus, the resolution plans can be checked for IBC compliance, and can be easily compared and automatically scored.

### JSON/XML Output

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"tags": "[[05. Business Plan]]",
"modified": "20200425100802659",
"created": "20200420153808999"
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"text": "",
"title": " 05.02 Operational Restructuring",
"tags": "[[05. Business Plan]]",
"modified": "20200425134955569",
"created": "20200425100017125"
},
{

```

Reg:37(ca)

05.04.02 Acquisition of shares - Reg:37(cc)

05.04.03 Issuance of securities - Reg:37(i)

05.05 Future Projections

05.05.01 Cash Flow Projections

05.05.02 Operational Efficiencies Expected

05.06 Plan Implementation

05.06.01 Implementation capability -

Reg:38(3)(e)

05.06.02 Post Approval of Resolution Plan

05.06.03 Effect of the order of NCLT

05.06.04 With effect from the Effective Date

05.06.05 Effect Date Actions

05.06.06 Entitlement to RA on Eff. Date

05.06.07 Provisions for Effective Implementation -

Reg:38(3)(cc)

05.06.08 Resolution Plan Implementation - Sec 30(2)(d)

05.06.09 Term & implementation schedule - Reg 38(2)(a)

05.06.10 Management of Business - Reg 38(2)(b)

05.06.11 Revision of plan after approval by CoC

05.06.12 Withdrawal of Plan prior to approval by CoC

05.06.13 Amendments to the Resolution Plan

05.07 Plan Monitoring

05.07.02 Means of supervision - Reg:38(2)(c)

05.07.03 Management of CD - Sec 30(2)(c)

05.07.04 Communications and Reporting

05.07.05 Risk Governance & Measurement

05.08 Cost & Funds

05.08.01 Total Cost of Plan

05.08.02 Sources of Funds

05.08.03 Proposed Timeline for Funding

05.08.04 Proposed Instruments for Infusion

05.08.05 Security for Residual Payment

05.08.07 Security Interest Satisfaction - Reg:37(d)

05.08.08 Waiving of Breach of Terms - Reg 37(e)

05.08.09 Change in terms of debt - Reg:37(g)

05.08.10 Fresh Fund Infusion

05.08.11 Upfront Cash

05.08.12 Net Present Value for FC

05.08.13 Payment to other Creditors

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# “Ineligible Resolution Applicants” - Supreme Court on Section 29A(h) of IBC



*For the first time since its introduction, Section 29A(h) of the IBC came up for interpretation before the Supreme Court (SC) in the case of Bank of Baroda Vs MBL Infrastructures Ltd (2019). On perusal of facts of the case and the law involved, the SC held that the resolution applicant, a Personal Guarantor to the Corporate Debtor, was barred by provisions of Section 29A(h) of IBC from submitting a resolution plan. This judgement is exceptional because, although the SC concluded that the resolution applicant was not allowed to submit a resolution plan, yet, on peculiar facts of the case, the implementation of resolution plan was allowed to continue in the overall interests of the Corporate Debtor. Read on to know more...*



## Rajeev Mawkin

The author is an Insolvency Professional. He can be reached at [rajeevip2020@gmail.com](mailto:rajeevip2020@gmail.com)

## 1. Introduction

Section 29A of the Insolvency and Bankruptcy Code, 2016 (IBC) is one of the most adversarial (qua the promoters/their related parties/connected persons) and talked about provisions, that has thrown a spanner in the world of corporate planning and restructuring vis-à-vis resolution of companies, who are undergoing through financial stress. This provision bars and restricts the entities and persons, who defaulted on payment of debts to creditors, from attempting to reclaim their business entity, although, the doors of Section 12A are open to them for withdrawal of CIRP.

Introducing the Section 29 A in the Parliament, the Government said, “Concerns have been raised that the persons who, with their misconduct contributed to defaults of companies or are otherwise undesirable, may misuse this situation due to lack of prohibition or restrictions to participate in the resolution or liquidation process, and gain or regain control of the Corporate Debtor (CD). This may undermine the processes laid down in the Code as the unscrupulous person would be seen to be rewarded at the expense of the creditors. In addition, in order to check that the undesirable persons who may have submitted their resolution plans in the absence of such a

provision, responsibility is also being entrusted on the committee of creditors to give a reasonable period to repay overdue amounts and become eligible.” The plain reading of this quoted text gives a clear picture about the intent and purpose of the legislature in formulating and introducing Section 29A in the IBC, although a little later after the enactment of IBC in the year 2016. At time of introduction of IBC, there was general perception amongst public that the errant promoters, who defaulted on payments to banks and other creditors, will definitely try to retain the ownership and control of their enterprise in one way or another. There were expectations in financial and corporate circles that there will, possibly, be some extraordinary corporate and financial structuring exercises, which would be undertaken by business entities, in order to ensure that the ultimate ownership and control of the enterprise was not taken away from the present promoters.

The legislature, too, in its wisdom, was conscious of the possibility of such efforts that may be undertaken by erring entities. The law makers realized that there was no provision in the IBC to prevent defaulters of creditors from submitting resolution plans for CD. So much so, there was, also, no deterrent in the IBC, which could come to the aid of the judiciary, to interpret any provision against such mischief. This was the genesis for introduction of Section 29A in the IBC in year 2017, which was subsequently amended in year 2018, to enhance its scope and effectiveness.

One particular provision relating to Personal Guarantors (PG) to CD was included as sub-Section (h) of Section 29A of IBC. This sub-Section was to ensure ineligibility of 'person', who provide personal guarantees to creditors and bars them from becoming a resolution applicant once their personal guarantee is invoked by such creditor.

## 2. Judicial Scrutiny of Section 29A

*Bank of Baroda (BOB) Vs. MBL Infrastructures Ltd.*<sup>1</sup> (2022) is the first case, wherein the SC analyzed the provisions of Section 29A(h) of IBC in detail and delivered its judgement on January 18, 2022. The fact of the case is as follows:

- a) This case brought up an issue before the SC with regard to interpretation of provisions of Section

29(A)(h) of IBC. This Section of IBC provides an express bar on a person from becoming a resolution applicant, who has executed a guarantee in favour of a creditor in respect of a CD, against whom an application for initiating resolution process has been made by such creditor and such a guarantee, when invoked by the creditor, has remained unpaid in full or in part.

- b) Two resolution plans were received by RP out of which, one resolution plan was submitted by a person, who was a PG to the CD with the creditor that had initiated CIRP of CD.
- c) Section 29A of IBC was introduced in IBC with effect from November 23, 2017. Section 29A(h), specifically, after its introduction, was amended on January 18, 2018, and again on June 06, 2018.

**NCLT held that the PG to CD was not disqualified as the guarantee given by him had not been invoked by the particular creditor, that had initiated the resolution process of CD.**

- d) On an application moved by RP before AA, the AA, vide its order on December 18, 2017, held that the PG to CD was not disqualified from submitting a resolution plan as the personal guarantee given by him “had not been invoked by the particular creditor, who had initiated the resolution process of CD”.
- e) On appeal, the NCLAT also decided in favour of the guarantor and held that the guarantor did not suffer from the ineligibility provided under Section 29A(h) of IBC. However, the interpretation on the question of law was left open and unanswered.
- f) Meanwhile, the resolution plan submitted by the guarantor of CD was accepted by CoC on the basis of its techno-commercial feasibility and viability and the CoC voted in favour of this resolution plan with more than 75% voting share.
- g) On appeal before the SC, the appellant (BOB) submitted that as per provisions of Section 29A of IBC, the guarantor of CD, being a promoter, could not have submitted a resolution plan for the CD as the personal guarantee given by him in

<sup>1</sup> *Bank of Baroda Vs. MBL Infrastructures Ltd*  
([https://main.sci.gov.in/supremecourt/2019/36841/36841\\_2019\\_36\\_1501\\_32](https://main.sci.gov.in/supremecourt/2019/36841/36841_2019_36_1501_32))

favour of various other lenders (financial creditors/banks) had been invoked prior to commencement of resolution process.

- h) In response, the respondent submitted before the SC that the personal guarantee had not been invoked by the creditor, who had filed the application before AA for resolution of CD and “the invocation of guarantee by other creditors, who had not invoked the jurisdiction of AA, could not be a ground for ineligibility of resolution applicant”.
- i) It was further contended by the respondents that the CD was now a Going Concern (GC) and the successful resolution applicant had infused substantial funds and resources in the CD post completion of resolution process. Thus, it would be a travesty to disturb the smooth implementation of the resolution plan at this stage.

### 3. Statutory Interpretation by the SC

- a. While deep diving into the realm of interpretation of statutes, the SC quoted extensively from previous judgements of the SC as well as other International Courts. Citing from a previous judgement in the matter of *RBI Vs Peerless General Finance*<sup>2</sup> by the SC “The information must depend on the text and colour. If the text is the texture, context is what gives the color. Neither can be ignored.... No part of a statute and no word of a statute can be construed in isolation....”
- b. The principle laid down by such decisions became the basis of judgements pronounced by SC in the CIRP matters related to Arcelor Mittal<sup>3</sup>, Phoenix Arc<sup>4</sup>, Jindal Steel & Power Ltd<sup>5</sup>, Swiss Ribbons<sup>6</sup> and Essar Steels<sup>7</sup>.

### 4. General Observations of SC on IBC

The Supreme Court observed that -

- a) The IBC recognizes a way to rehabilitate and revive the corporate debtor and it recognizes two principal players in this respect – CoC and CD.
- b) All other persons and parties, like IRP, RP, Liquidator, AA, etc. are facilitators. They just facilitate the process of resolution, but it is the CoC, which makes the final call with regard to commercial and viable resolution of a CD, and it is the CD that ultimately benefits from the whole resolution process.

**As and when CoC takes a decision in favour of a resolution plan in the overall interest of CD, the facilitators need to ensure that such a decision finally receives approval of authorities, observed the SC.**

- c) While the facilitators play a major role in putting the CD on the path of recovery by ensuring that the most suitable resolution plan is brought before the CoC in order to help CoC to take a commercially viable decision, it is also ensured that the same is done efficiently and transparently. As and when CoC takes a decision in favour of a resolution plan in the overall interest of CD, the facilitators ensure that such a decision finally receives approval of authorities.
- d) All decisions taken by the facilitators of resolution process are aimed at maximization of value of the CD so as to ensure that the CoC has the most suitable resolution plans to consider and decide upon. All these processes go a long way in acting as a catalyst in the overall revival and rehabilitation of the CD.

### 5. Specific Observations of SC with regard to Section 29A(h) of IBC

- a) The main intent behind introduction of Section 29A of IBC was to avoid unwarranted and unscrupulous elements from getting into the resolution process in order to protect their personal interests. The involvement of such elements, that were expressly disqualified under Section 29A of IBC, would take away the

<sup>1</sup> *Reserve Bank of India Vs. Peerless General Finance and Investment Company Limited*, (1987) 1 SCC 424.

<sup>2</sup> *Arcellor Mittal India Pvt. Ltd. Vs. Satish Kumar Gupta*, (2019) 2 SCC 1

<sup>3</sup> *Phoenix Arc (P) Ltd. Vs. Spade Financial Services Ltd.*, (2021) 3 SCC 475

<sup>4</sup> *Arun Kumar Jagatramka Vs. Jindal Steel & Power Limited*, (2021) 7 SCC 474.

<sup>5</sup> *Swiss Ribbons (P) Ltd. Vs. Union of India*, (2019) 4 SCC 17

<sup>6</sup> *Committee of Creditors, Essar Steel India Ltd. Vs. Satish Kumar Gupta* (2020) 8 SCC 531.2611\_Judgement\_18-Jan-2022.pdf)

credibility of the entire resolution process.

- b) The word “person” used in Section 29A(h) of IBC includes a promoter and/or a director of the CD and there is no exclusion provided in any provision of IBC to these persons. Therefore, the persons mentioned in Section 29A alone were not eligible to be resolution applicants. No other person was barred from becoming a resolution applicant under IBC.
- c) If a person executes a personal guarantee in favour of any creditor in respect of a CD and the creditor initiates CIRP against such CD and invokes the personal guarantee issued by such a guarantor, then the bar provided under Section 29A(h) of IBC will come into play, if the amount remains unpaid.
- d) If there are more than one creditor, who are part of resolution process initiated against the CD, then invocation of personal guarantee by any one creditor will be sufficient to act as a bar against the guarantor under Section 29A(h) of IBC.
- e) It is not necessary that each and every creditor should have invoked the personal guarantee given by the guarantor as the proceedings of CIRP are in rem. Therefore, all creditors, falling under the same class (financial creditors), will have the same rights, which are at par with such other creditors.
- f) There could be a case, where an application is filed under Section 7 of IBC by one creditor, who also invokes the personal guarantee, while there could be other creditors in the same class, who did not file such application, but they became part of the resolution process on constitution of CoC. The SC observed that it could not be said that the rights of creditors, who became members of CoC at a later stage, were in anyway, inferior to the rights of the creditor, who had filed the application under Section 7 of IBC and/or invoked the personal guarantee given by the guarantor.
- g) The ineligibility of the “person”, who may submit a resolution plan, has to be seen from the point of view of the resolution process. It can never be said that there can be ineligibility vis-à-

vis one creditor as against others. The ineligibility operates with regard to the “person”, who is to submit the resolution plan, and not in relation to the creditors.

- h) There can never be any other interest than that of the CoC and the CD. If there is a bar under Section 29A of IBC as on the date of submission of the resolution plan, then the resolution plan cannot be submitted by such a person. Even if such a bar under Section 29A of IBC becomes applicable at a later date before the resolution plan is accepted by CoC, then also the bar is applicable against such person and the CoC cannot accept such a resolution plan.

**The submission of resolution plan by a person does not create any right in his favour and no right gets extinguished, if the resolution plan is not accepted.**

- i) The submission of resolution plan by a person does not create any right in his favour and no right gets extinguished, if the resolution plan is not accepted. The resolution applicant is considered as a facilitator in the entire resolution process, the main pillars of resolution process being the CoC and CD.
- j) It cannot be said that if the resolution applicant was not barred on day one of the CIRP, then he cannot be barred at a later date. The entire resolution process revolves around the interests of CoC, and CD and all decisions are to be taken as per law to safeguard their interests solely.

## 6. Conclusion of the SC with regard to Section 29A(h)

The SC concluded as follows:

- a) In this case, the personal guarantee given to three financial creditors were invoked by them, even prior to filing of application for initiating CIRP. Therefore, the rigors of Section 29A(h) were attracted in such a case. Due to this reason alone, the ineligibility of resolution applicant was applicable with respect to all creditors (and not only to three creditors) in the same class. Ineligibility has to be seen from the point of view of the resolution process. It can never be said that there can be ineligibility qua one creditor as



against others. Rather, the ineligibility is to be seen in relation to the participation of a person in the resolution process of the CD.

- b) Although the application under Section 7 of IBC was filed by one creditor, while the personal guarantee was invoked by other creditors, yet the bar under Section 29A(h) was squarely applicable in this case and the resolution applicant could not have submitted the resolution plan for the CD.
- c) The AA and NCLAT were not correct in rejecting the contention of the appellants on the ground that the issue with regard to eligibility could not be raised for second time as all earlier appeals on this matter had been withdrawn.
- d) Although the resolution plan submitted by the resolution applicant was ineligible, yet lot of time had gone by, when the matter came up before the SC, and the resolution applicant had already taken significant steps to provide funds for the CD and had also executed several projects of national importance and the CD was now a Going Concern.
- e) It was also expected that the interests of all dissenting financial creditors had been addressed and no prejudice had been caused to them under the resolution plan as they would receive, at least, the liquidation value of their credit limits under the resolution plan approved by CoC.
- f) The CoC had accepted the resolution plan by requisite majority and the AA has approved such resolution plan. Only the question relating to ineligibility of the resolution applicant was pending for final decision of the SC.
- g) Considering the overall objective of IBC that being to put the business of CD back on track and in the light of significant steps taken by the resolution applicant to implement the resolution plan and ensuring that the CD remains a going concern, it was held that the resolution plan should not be disturbed at this stage and should be allowed to proceed further.
- h) The SC specifically mentioned that such a decision was being made, considering the

peculiar set of circumstances in this particular case, although as per the provision of Section 29A(h) of IBC, the resolution plan could not have been accepted by the CoC as the resolution applicant was ineligible.

## 7. Author's Views

The provisions of Section 29A of IBC have served as a big roadblock in the way of promoters, who had the keen desire to retain ownership and control of their enterprise even after defaulting on payments to creditors which resulted in initiation of resolution process against the enterprise. Many judgements pronounced by SC have dealt with this issue on multiple occasions wherein the waters were tested by “related parties” and/or “connected persons”, who were desirous of becoming resolution applicants of CD.

**In this case, the SC pronounced an exceptional judgement to bring out the real intent and purpose of the amendments made in Section 29A(h) of IBC.**

In this case, the SC pronounced an exceptional judgement to bring out the real intent and purpose of the amendments made in Section 29A(h) of IBC. Such elaborate consideration of all issues, which are related to the invocation of personal guarantee given by the guarantors to the creditors of CD, gives much needed guidance on this contentious issue. The effect of invocation of personal guarantee by any creditor in the same class and ineligibility of the guarantor of the CD from becoming a resolution applicant has been explained in great detail.

Although the resolution applicant did succeed, basis peculiar circumstances of this case, when the SC held that the resolution plan should not be disturbed at an advanced stage of implementation, yet this judgement will serve as a guiding light in all such cases, where the resolution applicants, specially the personal guarantors of CD whose guarantees have been invoked and they remain unpaid, suffer from inherent ineligibility right on day one of the resolution process or any time during the resolution process. It is expected that all the facilitators of resolution process will follow the guidelines laid down by the SC in this judgement whenever they are called upon to decide on Ineligible Resolution Applicant/s.

## Perspectives: Sixth Batch EDP on Managing Corporate Debtors as Going Concern Under CIRP (For IPs)

*Launched on October 07, 2020, the Executive Development Program (EDP) is one of the flagship initiatives of IIPI to build the capacity of insolvency professionals (IPs) on various dimensions of the insolvency ecosystem.*

*The “06th Batch EDP on Managing Corporate Debtors as Going Concern Under CIRP (For IPs)” was organized by the IIPI on 22nd – 26th February 2022. This 30 hours Program was spread over five days and had a CPE 20-hour credit for participants. The Inaugural Session of the program was graced by Shri Amit Harlalka, Deputy Director and Deputy Chief Financial Officer at ArcelorMittal Nippon Steel India; as the Guest of Honor, and Shri Anil K. Agarwal, President-Cosmos Group and Past President-ASSOCHAM, the Chief Guest. Based on their vast experience, they presented a highly insightful account of the insolvency process from their perspectives. Here we present a brief version of their views. **Read on to know more...***

I was actively involved in the acquisition of Essar Steel through the IBC process. Here, I really learned the nuances and details of the IBC processes. So far, we have acquired five assets through IBC processes out of which three were through resolution plans and two were through liquidation processes. Thus, we gained experience of IBC processes, understanding the nuances of how it works, the challenges, and the good work that the insolvency professionals put into the whole journey of the insolvency process to ensure that the company or corporate debtor is hand-held from start to the end.

When you work as a CFO, you are required to have a strong technical knowledge of your assignment/s in hand and coordinate with various professionals such as Chartered Accountants (CAs), legal experts, regulatory experts etc. One of the backdrops on which a successful process could be launched is - to have a strong technical knowledge of what an IP should be doing from a regulatory perspective. You should have a strong team, whether small or a big depending upon the size of the IBC process, to help and assist you in taking care of all the nuances so that you are able to focus on your role as the Chief Executive Officer (CEO) of the Corporate Debtor. IBC processes come up with highly versatile roles. Today, you may be required to play role of the CEO of a steel manufacturing company. After one year you move to become the CEO of a pharmaceutical manufacturing company, and so forth. So, the journey is quite exciting. This requires you to have a comprehensive view beyond your technical knowledge, and the most important area in

**Amit Harlalka**  
Guest of Honor  
Deputy Director and Deputy  
Chief Financial Officer at  
ArcelorMittal Nippon Steel  
India since Dec 2019.



this process is communication - communication with various stakeholders and most importantly with the management team. The success of the corporate debtor rises with the management team. So, it is very important that you are able to identify key sources in the existing management team, communicate with them, give them assurance, and put your trust on them. Because they will be the team whom you could rely on for smooth operations of the business. Your communication with them becomes very important channel to ensure that the objectives for the going concern are met, and the business is properly supported. Communication with the CoC or the lenders' forum is equally important because you have to ensure that the interests of the CoC members and the lenders are protected, and the value is maximised for better recovery. So proper design of communication material, regular follow-up in terms of meetings with them, and understanding the nuances are equally important. Also, communication with the employees of the company is needed to ensure that they are not leaving the ship. This is because the moment the IBC process starts, there is a lot of insecurity in the whole organisation, and it is important to ensure that this insecurity is taken care of.

Once the process moves forward, the communication becomes very critical in working with the prospective resolution applicant as well. This is where value-maximisation happens. Here, the role of a resolution professional is to ensure that data-room or data provided for due diligence is adequate, and provides insight into the business to the prospective resolution applicant, showcases the company's value and the opportunities that the prospective buyer can bring in. Therefore, communication with the management team, CoC members, prospective resolution applicants, and employees become a critical factor to ensure that the IBC processes run smoothly. From a CA's or legal expert's perspective, once you are appointed as an RP you are no longer a functional or a technical expert but supposed to run the whole business as its CEO. So, you need to ensure that you understand the business, industry in which you are operating, and add value to that business.

**The most important area in this process is communication - communication with various stakeholders and most importantly with the management team.**

This would require professional training for which all of you, including myself, will have to go through. As I went through the curriculum of this program for next four and a half days and it is very exhaustive, interesting and covers all the aspects. In addition, you need to develop an understanding of the business by studying more about it. Some businesses are very capital intensive like the steel industry. The nuances of the steel industry are very different from the nuances of a pharmaceutical company, and those of the engineering company are different from the manufacturing set up. So, to have some sense of business, is critical for you to help the management team in taking appropriate decisions and to save the company as a going concern but not at the expense of long-term vision or long-term sustainability of the company. I would just give you an example of Essar Steel - there was mining license allotted to Essar Steel in 2017 just before the company went into the IBC. As per the regulations these mines were supposed to be opened within five years of getting the license and a bank guarantee of some amount had to be put in a certain time frame. Then the company



went into insolvency. Any normal RP might have taken a stand that this was not important for a going concern at that point of time. But in this case the RP went out of the box. He convinced the banks to submit a huge amount of bank guarantee to protect these mines in the interest of value maximisation. The banks also understood and got convinced that it was important for the future of the company. This helped the company to garner higher evaluation. This is one example where a long-term perspective was taken by the RP who was running the operations. Since past six months, we have started operating those mines and realize their immense value for the business.

IT is the heart of the operations in today's world. When you look at various facets of the company you people need take care of the IT and assets equally during the CIRP period. Lastly, I would like to point out that there are various facets of a Corporate Debtor.

All I wanted to give was a business perspective and an insight into the huge responsibility that you people carry once you become an IRP/ RP of a Corporate Debtor. It is very challenging role because a very wide-ranging area of expertise is required. With your knowledge, qualifications, degrees, and programs like this, I think, you would be well-prepared to take this challenge. Please remember, every assignment will be a new one because every business is different, and every company is different.

As Dr. Ashok Haldia mentioned, the IBC processes has added tremendous value to the country's economy through wealth-creation, putting the non-functioning assets into operation and converting non-productive assets into productive ones. It is really contributing to the wealth creation in India. I would really congratulate all of you and hope you will continue to do that and keep going forward.



**Anil K. Agarwal**  
Chief Guest  
President, Cosmos Group and  
Past- President  
ASSOCHAM.

I highly appreciate IIPI for what it is doing for the country – providing training to young IPs from various professional background such as CAs, company secretaries, advocates, and the management professionals; to become a successful Resolution Professional (RPs). Today, we are talking about how to run a company as a going concern. Let me now give you the perspective from the other side. You might remember the Satyam Computer Services' episode which happened in 2008, much before the IBC came into being in 2016.

At that time, the Ministry of Corporate Affairs (MCA), Government of India, decided for the first time how to let the company and associated firms not go down into liquidation or be closed. It was for the first time, the government decided to take over a company. Subsequently, the Satyam Group was taken over and professionals were appointed to run its operations. I was among the four professionals who were nominated by the Government in the Board of one of firms under Satyam Group.

At that time, the firm had contracts with various vendors amounting about ₹ 10,000 crores which were of national and international importance. They were related to the government as well as private corporations and had diversified portfolio such as roads, airports, metros, railways, seaports, irrigation, water, power generation plants, power transmission lines, etc. There were almost 20 private sector and government sector banks with their thousands of crores of money being stuck. Besides, thousands of employees, hundreds of sub-contractors and suppliers, the company also had government obligations in the form of income tax, sales tax, VAT, court cases etc.

As soon as we took over the charge, we set up sector wise divisions and divided jobs among us. These sectors were - ongoing business contracts under execution, obligations, human resource planning (technical, administration, legal

and financial), statutory compliances, regulatory compliances, legal, and banking & finance. We also appointed a special team to secure the assets of the company and recover the maximum amount that we could from the process. These divisions were placed under an Admin Team Leader which was asked to make weekly, bi-weekly, and monthly presentations.

We personally started to negotiate with the buyers, suppliers, sub-contractors, financial institutions, and the government authorities. We put special emphasis on the fund-flow position of the company to continue business with them. We ensured that the assets are not deteriorated. Besides, we ensured that the debtors paid their dues to the company. There were several instances when debtors abruptly denied. Who are you? We have no money. Come next week. These were responses. But we continued to hammer them. Finally, we were able to resolve the cases and get the money into the system. We also met the creditors and evolved a process to pay their dues and claims. We prepared a Corporate Debtor Restructuring (CDR), which was one of the largest CDRs, and convinced ICICI Bank, IDBI Bank, State Bank of India and 20 other banks to agree to the CDR plan.

Finally, we started to look for a new promoter, which was the most important job that the government had assigned to us. We were able to identify two leading corporations. Meanwhile, we approached a retired judge of the Supreme Court to get the process vetted independently thereby ensuring transparency. After vetting all the available records, he recommended the proposal of Infrastructure Leading & Financial Services (IL&FS) as more suitable. In our monthly reports to the Company Law Board (CLB) and MCA, we apprised the matter to the authorities. Thus, within six months we were able to find investors/promoter for the company. Subsequently, CLB passed the order and company was handed over to IL&FS.

In the process of our working, we were able to do many things like continuation of the execution of the orders, secure the assets, realise the money from the debtors, met leading state government officials and functionaries to ensure they continue with the order book, streamline the human resources and ensuring their best performance, and



arrange payments of most of the creditors, contractors, and suppliers. We appointed law firms to take up the legal cases in the courts, completed the statutory and obligatory compliances, successfully managed the CDR, coordinated with the original promoters to resign from the company and convince them to accept IL&FS as the new promoter. We convinced the IL&FS to hold at least 37% of the equity, bring in ₹ 55 crores as liquidity support and continue at least for two years at the helm of management. We also coordinated with SEBI, Income Tax, Sale Tax and other statutorily authorities to finally bring the company back on the track as going concern.

For me, personally it was a great learning experience. As in the ICAI, presidency in the ASSOCHAM, is for one year. ASSOCHAM has over 50 committees, and each of the committee is chaired by an industry leader of the concerned sector such as steel, cement, glass, taxation, international taxation, and international businesses etc. Thus, in about a year's time you have great learning experience of varied businesses. What I want to say is that my experience with ASSOCHAM, ICAI, FICCI continued to help me in giving something back to the society. We are very happy and feel proud that we could



save the company which otherwise would have been closed. Of course, we received a lot of appreciations and compliments from the CLB and the MCA.

I am very happy that the IIPI, through this EDP, is providing training to the IPs on how to work across the sectors. Whether you become an RP for a pharma company, textile company, or steel company, you need to hone your skills in communication and negotiation. You should see that you are able to pass on the company as a going concern to a new promoter or to resolve it in the best manner or best interest of the lenders and the company.

Thank you and best wishes to all of you.



# Resolution of Orchid Pharma Limited

*Orchid Pharma Limited (OPL) was part of the second list of 28 defaulters that Reserve Bank of India (RBI) had flagged for resolution in August 2017. Pursuant to petitions filed by Lakshmi Vilas Bank, an Operational Creditor (OC) under Section 9 of the IBC, the National Company Law Tribunal (NCLT), Chennai Bench, vide order dated August 17, 2017, admitted application for initiation of CIRP for OPL. Mr. CMA CS Rajendran, Insolvency Professional (IP) was appointed as Interim Resolution Professional (IRP) and Mr. Sripatham Venkatasubramanian Ramkumar, IP was later confirmed as Resolution Professional (RP) vide order of NCLT, Chennai Bench dated October 27, 2017, to manage the affairs of the Corporate Debtor (CD). With more than ₹3,600 crore of creditor claims, 24 members in the Committee of Creditors (CoC) and 1,600 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 OPL during the first phase of Covid-19 lockdown.*

*The present case study, sponsored by IIIPI, was developed by Mr. Ramkumar in which he has provided a first-hand step by step guide to resurrect a corporate life even in adverse situations. **Read on to know more...***



**S. V. Ramkumar**

The author is an Insolvency Professional (IP) member of IIIPI. He can be reached at [sripatham@gmail.com](mailto:sripatham@gmail.com)

## 1. Introduction

The Corporate Insolvency Resolution Process (CIRP) of OPL, the 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. Key highlights and takeaways in this resolution are:

- Maintaining the CD as a Going Concern (GC) during the entire 31 months of CIRP
- Cost reduction and optimisation achieved across different expense heads resulting in efficient and sustainable operations
- Retention of major customers in regulated markets by building trust and meeting their requirements in time
- Retention of key employees and rewarding them suitably to ensure that operations are run unhindered



- e) Handling the litigations faced from unsuccessful resolution applicants and non-implementation of resolution plan by a resolution applicant leading to annulment of plan
- f) Lastly, implementation of the resolution plan during 1st wave of Covid-19 induced lockdown

## 2. Business Profile of the CD

Established in 1992 as an export-oriented unit (EOU), Orchid Pharma Ltd (CD) is a vertically integrated company spanning the entire pharmaceutical value chain from discovery to delivery with established credentials in research, manufacturing, and marketing. The CD ranked among the top 50 pharmaceutical companies in India and had multi-therapeutic presence across segments like anti-infectives, anti-inflammatory, Central Nervous System (CNS), Cardio-Vascular Segment (CVS), nutraceuticals, other oral and sterile products.

**The CD ranked among the top 50 pharmaceutical companies in India. It is listed on India's NSE and BSE and Luxemburg Stock Exchange, Luxemburg.**

The CD also provides pharmaceutical solutions including Active Pharmaceutical Ingredients (API) and finished dosage forms. It had global presence across 40+ countries through alliances and partnerships with globally reputed majors. The API facility is located at Alathur, Tamil Nadu and formulations facilities at Alathur and Irungattukottai (IKKT), Tamil Nadu. The facilities have from time to time been inspected and approved by global regulatory authorities including United States Food and Drug Administration (USFDA), United Kingdom Medicines and Healthcare products Regulatory Agency (UK MHRA), European Directorate for the Quality of Medicines & HealthCare (EDQM), Pharmaceuticals and Medical Devices Agency, Japan (PMDA), Directorate of Medical Affairs (DMA), Medicines Control Council, South Africa (MCC) and Therapeutic Goods Administration, Australia (TGA). The API facility is one of the largest manufacturers of broad-spectrum antibiotics and had a capacity of 900 MT per annum and FDF units specialised Non-Penicillin, Non-Cephalosporin drugs and had a combined capacity of 1 billion tablets/ capsules per annum. Further, the CD is listed on India's NSE and BSE and Luxemburg Stock Exchange, Luxemburg.

This Case Study is divided into three stages – Pre-CIRP Performance, CIRP and Post-CIRP. Each stage had its

separate set of challenges requiring the RP and team to adapt to the dynamic environment and simultaneously cope up with the then ongoing pandemic during implementation of resolution plan.

## 3. Pre-CIRP performance

### 3.1. Performance during three years before CIRP commencement:

- a) The Company was under severe stress from 2012 onwards and was admitted to restructuring under Corporate Debt Restructuring (CDR) scheme in 2014.
- b) The sales of the company reduced gradually by ~168% during the said period, however the pre- EBITDA costs during the said period increased from 82% of sales to 98% of the sales. Given the same, the EBITDA margins reduced drastically from 18% to 2%. Below is the snapshot of the same:

**Table 1: EBITDA Percentage**

Particulars	2013-15	2015-16	2016-17	2017-18
	<b>18M</b>	<b>12M</b>	<b>12M</b>	<b>12M</b>
Revenue (₹ Crores)	1,736	879	755	649
Operating expenses (₹ Crores)	1,416	705	663	635
EBITDA (₹ Crores)	320	174	92	14
<b>EBITDA %</b>	<b>18%</b>	<b>20%</b>	<b>12%</b>	<b>2%</b>

- c) Despite the decrease in the operating levels, the company was unable to control the proportionate costs which has resulted in erosion of margins.

### 3.2. Reasons of Financial Stress: Major reasons of financial stress were as following:

- a) Due to the liquidity crunch and ongoing debt restructuring exercise (CDR), OPL's plants were running at lower capacity utilization. The lower capacity utilization resulted in delay in supply of orders to customers, thus affecting the 'order book' of the company.
- b) Costs (Direct material cost and fixed overheads) were significantly higher than competitors due to lower capacity

utilization.

- c) The company has lost orders from major customers due to delay in fulfilling the 'order book' which has severely affected the cash flows.

## 4. Corporate Insolvency Resolution Process (CIRP)

NCLT vide its order<sup>1</sup> dated August 17, 2017, initiated the CIRP of the CD under Section 9 of the IBC. The CoC in the first meeting proposed to appoint Mr. Sripatham Venkatasubramanian Ramkumar as the RP of the CD which was also confirmed by Adjudicating Authority (AA) vide order dated October 27, 2017.

### 4.1. Initial Assessment

Post receipt of the order from the NCLT, the RP along with his team met with the incumbent management team of the CD, to take charge of its assets and to understand the existing business operations and the organizational structure. The RP also informed the management regarding the provisions of the IBC and laid down the roadmap for maintaining the going concern of the business during CIRP and for future co-ordination and expectations from the incumbent management.

The meeting helped in identifying key Point of Contacts for critical functions and in identifying critical functions, current status of licenses and approvals and steps to be undertaken for maintaining the regulatory licenses.

During these meetings and visits, the RP and team managed to understand the key intricacies of the business and potential concerns/ risks in maintaining the going concern of the business, some of which have been highlighted here:

- a. **Large employee base with salary delays for both on-roll and contractual employees:** With over 1600+ employees, the company was a major source of employment and livelihood in the part of country where it operated. The declining profits and cash crunch had resulted in salary delays of two-three months across locations and also created a huge uncertainty among

the employees. Initiation of CIRP also largely depleted the morale of the employees.

- b. **Working capital challenges and cash crunch:** During the year preceding the commencement of insolvency, the company faced severe cash crunch due to reducing business operations which eventually resulted in payment delays across stakeholders including employees, suppliers, statutory agencies, and financial creditors.
- c. **Trust deficit with customers and risk of business loss:** Given that the company had long-term contracts with customers, liquidity issues and subsequent initiation of CIRP created concerns on the ability of the company to satisfy its contractual obligations. The customers also panicked and started inducting alternate supply sources for securing their inputs. This led to a fall in the order book of the company and was also unable to attract new customers.

**The declining profits and cash crunch had resulted in salary delays of two-three months across locations and also created a huge uncertainty among the employees.**

### 4.2. Key Concerns/Challenges faced by the RP

- a. **Absence of CFO / COO / Sales / Procurement Heads:** Company did not have full time Chief Financial Officer (CFO), Chief Operating Officer (COO), Sales Head, and Procurement Head. This resulted in respective teams working without proper guidance and direction. The entire operations of CD were done under the guidance of RP and his team for 31 months of CIRP period (Oct 2017 to March 2020) with no promoter involvement.
- b. **Ability to retain required workforce and reduce the employee cost:** The company's operation essentially mandated to have experienced workforce and with the long outstanding employee dues, the RP had to convince and keep the talented workforce

<sup>1</sup> NCLT Chennai, *Laxmi Vilas Bank Ltd. Vs. Orchid Pharma Ltd.*, CP/540/IB/2017, Date of Order, August 17, 2017.



motivated throughout the entire CIRP period. On another hand, the company had huge employee strength which essentially meant huge payroll expenses which is not commensurate to the level of operation at the initiation of CIRP.

- c. **Stoppage of LC issuance by banks:** The lead bank which was supporting with LC facility against 100% margins stopped issuing LC in April 2018. This has resulted in paying vendors in advance for securing supply of Key Starting Materials (mostly imported) thereby extending the working capital cycle by at least 90 days which has put further stress of cash flows and corresponding production.
- d. **Cap on limit of Forex advances:** Due to restrictions in FEMA regulations, the FOREX advances were limited to \$ 200,000 per vendor at any given time resulting in longer lead time for procurement and receipt of Key Starting Materials (KSMs) from China which were essential for uninterrupted production.
- e. **Crisis in electricity supply:** Company was procuring power from a power generating company under captive consumption. However, CIRP was initiated on the power generating company in March 2019 that stopped production due to liquidity issues which meant that the CD had to procure power from Tamilnadu Electricity Board (TNEB) at 50% higher rates which would further erode margins heavily as power is a major cost contributor in the manufacturing process.
- f. **Disproportionate cost structure:** The company did not have adequate systems in place to monitor the expenditure incurred for production and other overheads. This has led to a situation wherein no control was exercised in the manner expenses were incurred.
- g. **Continuous monitoring of Regulatory aspects:** Since the company is operating in a highly regulated environment, the RP and

team has to ensure all necessary compliances required as per Good Manufacturing Practice (GMP) standards on a continuous basis. Further, RP had to facilitate completion of USFDA inspections and EU GMP inspections during his tenure. Since the cost of non-compliances are huge and the RP and his team had to regularly monitor and spend extended hours to ensure timely compliance of GMP standards.

**Increments of ~10% to ~30% for the performing employees were given twice during CIRP period with the approval of the CoC.**

#### 4.3. Solutions / steps taken by the RP

- a. **Sales and marketing functions:** RP headed the entire sales function wherein he was directly meeting customers to provide them necessary assurances and ensured that additional products with higher margins are sold to them as well thereby increasing capacity utilization and better realisation from limited production.
- b. **Retaining workforce:** Employee payroll was rationalized during CIRP period resulting in ₹ 8.65 Crores savings a year and employee strength came down from ~1,600 at the start of CIRP to ~1300 towards the end of CIRP. RP also ensured elimination of unnecessary costs like doing away with idle contract manpower, etc. Increments of ~10% to ~30% for the performing employees were given twice during CIRP period with the approval of the CoC (Feb 2019 and Dec 2019) to retain the talented workforce from the savings obtained through rationalising workforce.
- c. **Alternate power purchase:** Given that the company was staring at a power crisis, the RP was quick in identifying alternate power sources, i.e., RP started procuring power from IEX energy exchange which also resulted in savings of electricity cost by ₹ 70-80 lakhs per month compared to procurement from state distribution utility.

**d. Optimisation of fixed overheads:**

The RP and team have put in budgeting systems in place and started evaluating the nature and scope of recurring expenses incurred by the CD. Unnecessary costs incurred in manpower, overheads, electricity, insurance and other areas are identified and reduced which has resulted in contributing to the increase in EBITDA from 2% at the start of CIRP to ~15% during the CIRP period.

**e. Change in product mix:** The company focused on products yielding higher margins and meeting needs of regular customers thereby improving the EBITDA levels from being negative (pre-CIRP) to 12-15% during CIRP period (~31 months of operations). The capacity utilization levels also increased from 35% to 40% with better realization of product mix produced.

**f. Implementation of MIS systems:** RP introduced monitoring systems to streamline the payments and push for early collections. Further, RP implemented cross-functional MIS systems and deployed business intelligence tools to enable data driven decision making within the organisation.

**g. Maintenance of compliance calendar and facilitate completion of regulatory inspections:** RP successfully completed 3 USFDA and 2 EU GMP inspections during his tenure. The inspecting authorities recommended continuation of the respective licenses / approvals. Extension of the regulatory approvals helped the company not only to continue as a going concern but also in attracting Potential Resolution Applicants (PRAs). RP also maintained compliance and license calendars to ensure that the renewals were applied for within the prescribed time limits and all necessary approvals are kept up to date.

**h. Identifying alternate vendors:** Given the FEMA cap on advances, RP identified/

approved new vendors and material requirement was spread across multiple vendors within the limit prescribed. This has resulted in securing the necessary supply of KSM without any delays which otherwise would have hampered production.

**i. Alternates to Letter of Credit (LC):** Negotiation with customers explaining the constraints faced by the company resulted in receipt of part advances for orders placed and elongation in credit period offered keeping the working capital cycle in control.

**4.4. The Resolution Process****4.4.1. Failure in Implementation**

The RP published an advertisement for inviting Expression of Interest (EoI) for the CD on February 09, 2018. An application for liquidation was filed on 270th Day i.e., May 14, 2018, by the RP, when no plan was received till 270 days and CoC voted in favour of it. Applicant-1 approached the NCLT for their plan to be considered and NCLT vide letter dated May 28, 2018, directed the RP to consider the same. Subsequently, the plan of Applicant-1 was put for voting and passed with requisite majority. NCLT also approved plan of Applicant-1 vide its order dated September 17, 2018.

**After detailed arguments on the potential for revival of the CD by the RP, NCLT granted an additional 105 days' time for fresh round of bidding.**

However, Applicant-1 failed to implement the resolution plan citing various frivolous reasons despite directions and orders from NCLT.

Given the failure to implement the plan, the CoC proceeded to request NCLT to annul the Applicant's plan and filed an application with the NCLT on November 29, 2018, and the same was confirmed by the NCLT vide order dated February 28, 2019, and IBBI initiated civil and criminal proceedings against the Applicant-1 in concerned courts at Chennai. After detailed arguments on the potential for revival of the CD by the RP, NCLT granted an additional 105 days' time for fresh round of bidding to rerun the process once again.

#### 4.4.2. Issues faced by the RP post annulment of the plan

In the second round of investor process, plan of Applicant-2 was voted in favour by the CoC and the same was approved by NCLT vide its order dated 27 June 2019. One of the resolution applicants appealed against the order of NCLT on July 26, 2019, citing that a lender Punjab National Bank (International) Limited (PNBIL) had after voting in favour of resolution plan had dissented later over email and the minimum voting of 66% is not achieved in favour of the resolution plan by the CoC (reference is drawn to the Stock Exchange intimation made by the CD by the contesting resolution applicant). Upon NCLAT setting aside<sup>2</sup> the approved Resolution Plan, several external stakeholders interpreted that the company was staring at liquidation and RP had to meet with key customers/vendors to address their concerns on 'going concern' status of the company:

- a) Major Customers sought for legal status of the CD in the aftermath of media articles surfacing on NCLAT order.
- b) Major concern for customers being whether the company would be able to supply their orders without any disruption.
- c) RP and sales team worked on addressing these concerns raised by customers;
- d) RP and sales team were also working on getting additional orders from existing customers;
- e) Vendors supplying KSM were restricting supplies for the CD fearing cancellation of contract entered with them;
- f) Vendors preferred other customers even though CD was making 100% advance payment for KSMs fearing their contracts would be terminated in case the CD heads to liquidation;
- g) RP and Procurement team visited key vendors to ensure allocation of KSMs and to assure that CD will honour the contracts entered on time;

<sup>2</sup> NCLAT New Delhi, *M/s. Accord Life Spec Private Limited Vs. M/s. Orchid Pharma Limited, and Ors*, Company Appeal (AT) (Insolvency) No. 761 of 2019, Date of Order: November 13, 2019.

**Upon NCLAT setting aside the approved Resolution Plan, several external stakeholders interpreted that the company was staring at liquidation.**

- h) RP and Procurement team worked on adding alternate vendors for key KSMs to safeguard the CD from any supply chain disruption.

#### 4.4.3. Legal disputes before the courts

##### Issue 1: Litigations surrounding resolution plan approval

Basis the NCLT order, the RP published an advertisement inviting EoI for the CD on April 10, 2019. Subsequently, the CoC voted for the resolution plan of Applicant-2 and the NCLT vide its order dated June 27, 2019, approved the plan of Applicant-2.

However, shortly thereafter, a stay was granted by the NCLAT on the approved resolution plan on July 27, 2019 based on the appeal filed by one of the resolution applicants citing that a lender PNBIL had after voting in favour of resolution plan had dissented later over email and the minimum voting of 66% is not achieved in favour of the resolution plan by the CoC (reference is drawn to the Stock Exchange intimation made by the CD by the contesting resolution applicant).

Subsequently, on November 13, 2019, the NCLAT set aside the order of NCLT on the ground that the value of the resolution plan of Applicant-2 was less than the liquidation value.

On December 06, 2019, the Supreme Court stayed the order of NCLAT based on the appeal filed by one of the members of the CoC argued that the member who ascended to the plan first in the e-voting platform but later descended has not objected to the implementation of resolution plan (as this is the primary reason raised by NCLAT for setting aside the order of NCLT). Finally, the NCLAT, on February 28, 2020, set aside the order of NCLT paving way for implementation of Applicant 2's plan.

##### Issue 2: Appropriation made by a lender post CIRP initiation reversed

One of the financial creditors had recovered ~₹ 184 crore from the CD post-commencement of CIRP. As this particular recovery happened during the period of

moratorium, lender should have restrained from taking 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, no assets belonging to the CD can be transferred, alienated or disposed of 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 NCLT which was later contested by the lender in NCLAT<sup>3</sup> and Supreme Court<sup>3</sup> which was dismissed and subsequently an amount of ₹ 184 crores was reversed to the account of the CD.

#### 4.4.4. Hustles caused by Covid-19

January 2020 to March 2020 saw unfolding of the Covid-19 pandemic and imposition of severe lockdowns curbing the economic activities and physical movements which were then critical in execution of legal documents and in implementation of resolution plan. In particular, the RP was faced with the following issues:

##### a) Issues faced in sourcing of KSMs

- i. Company was sourcing 80% of the Key Starting materials (KSMs) for its Active Pharmaceutical Ingredient (API) business from China. Due to Chinese New Year shutdown in mid-Jan 2020 and subsequent Covid-19 pandemic, there was no clarity on the time by which Chinese vendors would resume supplies.
- ii. Company had stock of KSMs for the months of February 2020 and March 2020 for few products only. Company would have faced a complete stock out situation in April 2020 and would not have been able to produce few products from March 2020 onwards which would have resulted in EBITDA losses.

- iii. Procurement of KSMs were also impacted by the limit of \$200,000 on advances made to foreign vendors as per FEMA regulations (in the absence of any LC support from banking system).
- iv. Since the entire pharma industry was facing a stock out situation due to the epidemic in China and there would have been high demand for KSMs once Chinese vendors had resumed production, RP proposed to the CoC for relaxation of limit of \$200,000 per vendor to \$500,000 (which can be approved by the AD banker as delegated by RBI) for the critical vendors to ensure continuity in production.

**Once the proposal was approved by the CoC, the RP approached the AD banker for relaxing the limit on advances for above vendors from \$ 200,000 to \$ 500,000.**

- v. Once the proposal was approved by the CoC, the RP approached the AD banker for relaxing the limit on advances for above vendors from \$ 200,000 to \$ 500,000 and ensured supplies are secured during this period and the operations continued without any issues.
- vi. Ensuring continuous operation at the beginning of covid induced lockdown was critical as the appeals against the resolution plan was turned down by Supreme court during this period and the resolution applicant was in the process of implementing the plan. Any stoppage of operations would have made the resolution applicant to delay or back out from implementation of resolution plan.

<sup>3</sup> NCLAT New Delhi, *State Bank of India Vs. Punjab National Bank & Ors.*, Company Appeal (AT) (Insolvency) No. 329 of 2018, Date of Order: April 11, 2019.



**b) Issues faced during implementation of resolution plan due to covid lockdown**

- i. Obtaining Stamp Paper required for execution of documents from stamp vendor when the lockdown was imposed.

**Solution adopted by RP** - RP team member physically visited the office of OPL during lockdown to get the stamp papers arranged.

- ii. Submitting signed Escrow Bank Account opening forms to banks when the lockdown was imposed

**Solution adopted by RP** - RP team member ensured that the signed forms are arranged from RP who was stuck at another city at that time and physically went to the escrow bank for submission of account opening forms during lockdown

**RP identified a platform for digitally signing the documents and convinced all the lenders and resolution applicants to onboard and execute the required documents using the digital platform.**

- (iii) Obtaining the audit report from the MC appointed CA, on the working capital changes between March 31, 2019 and Plan approval date (February 28, 2020) as required under resolution plan for implementation and arriving at surplus cash payable to Financial Creditors.

**Solution adopted by RP** – All details were provided to auditors remotely and clarifications were sorted out by RP and team to get the report on time before implementation.

- (iv) Execution of documents including documents for implementation of the plan.

**Solution adopted by RP** – RP identified a platform for digitally signing the documents and convinced all the lenders and the resolution

applicants to onboard and execute the required documents using the digital platform.

**4.4.5. Successful implementation of the plan**

Around 25+ plus stakeholders signed the Escrow and NDC documents digitally using digital platform on March 28, 2020, in a record time of six hours. On March 31, 2020, the successful Resolution Applicant-2 infused funds into the company.

Noticing the performance of the company as part of Monitoring Committee (MC), (Positive EBITDA and surplus cashflows) even during the period Jan 2020 to March 2020 wherein entire pharma industry was facing issues with procurement of KSM and supply of end products, the Resolution Applicant-2 decided to pay the entire consideration to various stakeholders as upfront payment while implementing resolution plan by fast-tracking deferred payment proposed as well and hence, the plan was implemented on March 31, 2020.

**5. Key Achievements by the RP**

- a) The CD was run as a Going Concern for the entire CIRP period of ~31 months in spite of various challenges faced in the form of litigations, loss of customers, liquidity issues and covid outbreak.
- b) The RP maintained consistent revenue of ~₹ 100-120 crores and operating EBITDA of ~10%-12% throughout CIRP on a quarter-on-quarter basis by supplying high margin products and products with minimal credit period.

**Table 2: Operating EBITDA**

Particulars	FY18	FY19	FY20
Period	CIRP	CIRP	(Feb 20)
Revenue from operations (₹ Crores)	649	555	485
Operating EBITDA (₹ Crores)	86	56	45
EBITDA %	13.3%	10.2%	9.3%

This has also created confidence in the Resolution applicants to take over the CD during

the first wave of Covid-19 without any second thoughts by implementing the resolution plan.

- c) Surplus Cash of ₹ 440 Crores were generated in CIRP period from the operations of CD during CIRP period subject to change in WC capital of ₹46.23 Crores (which was paid out to secured FCs i.e., CD had a cash balance of ₹440 Crores and Net working capital of ₹56.35 crore on the date on which Supreme court held the NCLT order as correct in comparison to a cash balance of ₹ 2.94 Crores at the time of CIRP initiation and Net working capital of ₹ 180.82 crore.
- d) Retention of major customers and addition of new customers in the regulated and less regulated markets during CIRP period by maintaining good and transparent relationships with customers.
- e) ₹ 1,100 Crores (~31% of claims admitted) has been recovered by different class of creditors in the course of the resolution process.

### 6. Key takeaways and Best Practices Adopted

#### (a) Prior to NCLT filing for IRP to RP change

Based on the information available, we understood key financial and business performance indicators and financial difficulties/ reasons for stress in the recent past. Discussion with applicant's FCs helped to understand additional details on reason for failure of CDR scheme prior to admission of CIRP. Thereafter, we made a preliminary assessment of risks associated with business and manage the affairs on a going concern basis. Further, an assessment of key stakeholders and bringing them on board before admission/ filing for IRP to RP change facilitated running the CD as a GC during IBC and avoid loss of value.

#### (b) Immediate Actions after NCLT order appointing RP

Once the application for change in IRP to RP was approved, the RP is required to juggle many balls simultaneously. In the case of OPL, as soon as RP change happened, 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 due to CIRP process. While the RP deployed resources at different plant locations, immediate control of CD's head office at Chennai was taken. The head office was

**The company had cash and bank balance in excess of ₹ 440 crores at the time Supreme court held that the resolution plan approved is valid.**

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 flow management

Considering the huge volume of business and payments being processed to more vendors on a daily basis, a dedicated team of the RP reviewed and approved payments. A system of cash rationing was established to make critical payments and maintain CD as a going concern. An action plan for cash-generating initiatives was also developed. Realization of debtors, tax and GST refunds and realisation of export credit scrips, facilitated in improving the cash balance. Further, a periodic assessment of cash requirements of the business ensured improved the cash flow position. As against a cash balance of ₹ 2.97 Crores on the date NCLT approved initiation of CIRP, the company had cash and bank balance in excess of ₹ 440 crores at the time Supreme court held that the resolution plan approved is valid, which was later passed on to the secured financial creditors as additional consideration during implementation of resolution plan net of working capital adjustment of ₹ 46.29 Crores for the CIRP period.

#### (e) Comprehensive Investor IM Created a Good First 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 (h) regulatory

approvals in place. 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 50 investors in both rounds of investor process.

**(f) Establishing relationship with key suppliers and customers**

The RP and his team spent considerable time in visiting key customers and vendors in different locations around the world and establishing good relationship with them. This has ensured that Customers continued to have trust on the CD with order book was built over such relationship and vendors ensuring adequate supplies are made for meeting customer order book when KSMs imports from China was facing environmental and supply chain hurdles.

**(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, terms, and conditions

(T&C) for submission of resolution, 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) Preparing for Resolution Plan Implementation is the Key**

Even before resolution plan was approved by 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.

**(i) Continuous Engagement with RA – Post NCLT approval**

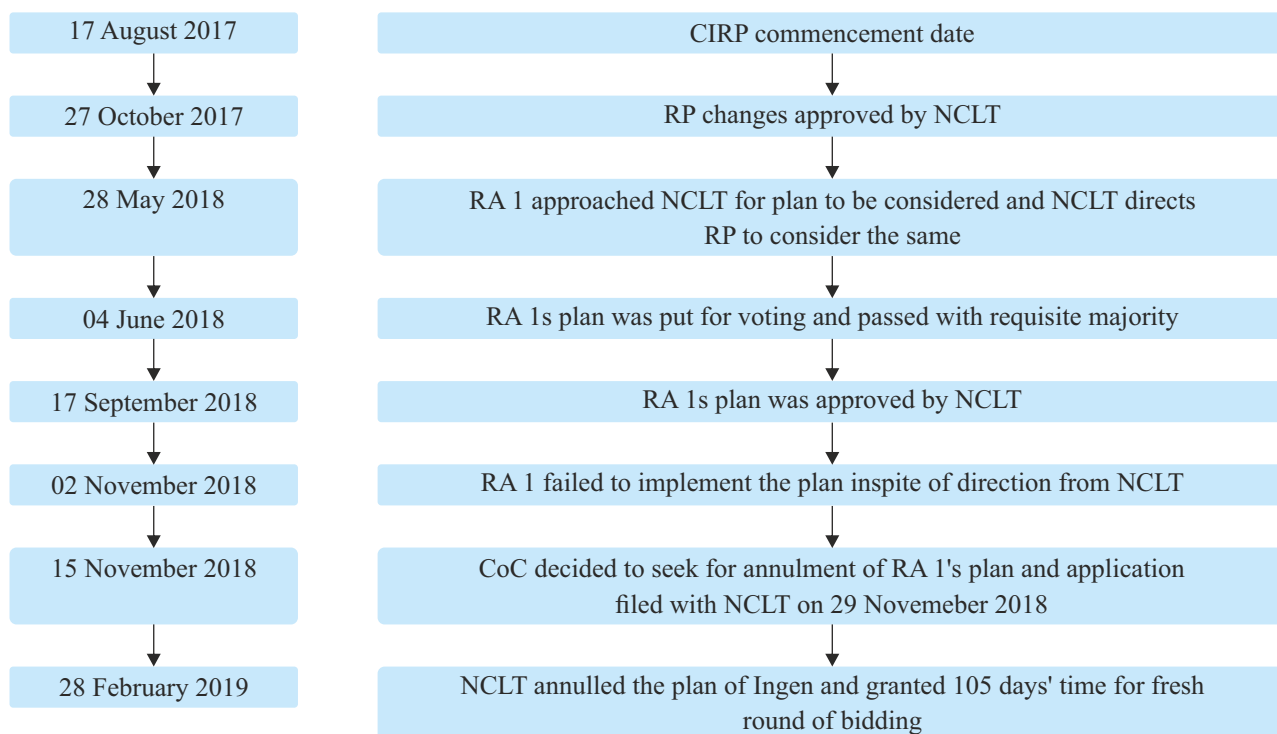
There were regular discussions with the RA in MC with respect to status of funding arrangements to ensure a successful implementation of approved resolution plan. A clear plan of action to be undertaken was established with regard to disbursement mechanism, documentation, bookend secretarial compliances,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



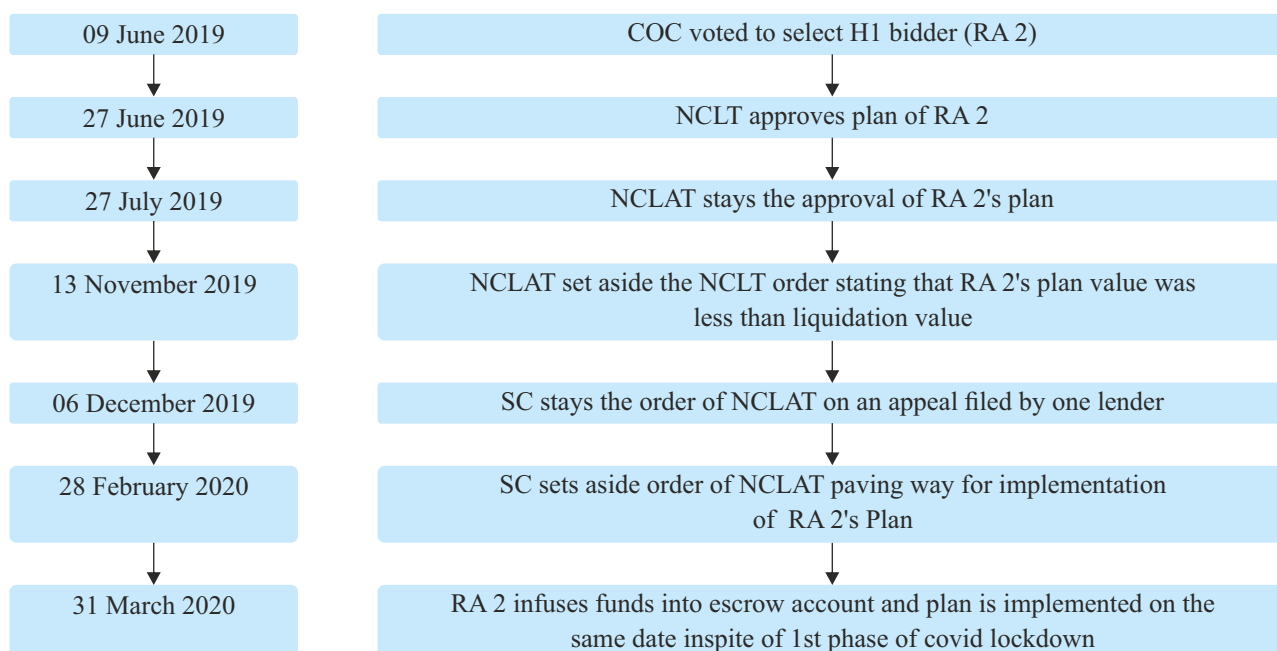
## CASE STUDY

### 7. Key timelines

#### First Round of Investor Process



#### Second Round of Investor Process





## Legal Framework

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

### CIRCULAR

#### 'Temporary Surrender of Professional Membership,' ceases to exist

IBBI through a clarification dated April 11, 2022 has said that In view of the provisions relating to 'temporary surrender of professional membership' contained in clause 26 of the Schedule to the IBBI (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016, have been substituted vide Notification No. IBBI/2019-20/GN/REG043, dated 23rd July, 2019 (w.e.f. 23-07-2019) and in pursuant to the introduction of provision of 'Authorisation for Assignment', it is clarified that the process of 'Temporary Surrender of Professional Membership,' ceases to exist with issuance of above mentioned notification.

**Source:** <https://ibbi.gov.in/uploads/legalframework/ea6f70f852d6c2ad103efcf5d5b158c8.pdf>

### NOTIFICATION

#### Appointment Of Shri Ravi Mital as Chairperson of IBBI

Ministry of Corporate Affairs 'MCA' in exercise of power conferred u/s 189 of IBC appointed Sh. Ravi Mittal as the Chairperson of Insolvency and Bankruptcy Board of India (IBBI) for a period of Five years or the age of sixty-five years whichever is earlier. Sh. Mittal assumed office from 09th February 2022.

**Source:** <https://ibbi.gov.in/uploads/legalframework/620f27fc08fae95b7a27200a18b15f5a.pdf>

### GUIDELINES

#### IBBI Extends online Educational Course till September 30, 2022

IBBI has extended online educational courses and professional development sessions on IBC till September 30, 2022. With respect to each course, the IPA/RVO is supposed to provide a compliance report to the IBBI within seven days after course completion. Essentially, according to the guidelines issued in July 2020, the records



of every course must be maintained for at least three years.

**Source:** <https://ibbi.gov.in/uploads/legalframework/a3928106022ce5ea0abce2ce87ea7487.pdf>

### PRESS RELEASES

#### IBBI Releases Publication of “Frequently Asked Questions (FAQs) on Insolvency and Bankruptcy Code, 2016”

IBBI in association with the Committee on Insolvency & Bankruptcy Code of ICAI has released a publication titled “Frequently Asked Questions (FAQs) on Insolvency and Bankruptcy Code, 2016”, during the 72nd Annual Function of ICAI on February 4, 2022. This publication is the revised, enriched version of the publication released by ICAI in 2017.

It aims at creating awareness and disseminate knowledge about the Code, in easy-to-understand FAQs format. Further it covers the developments in the Code and subordinate legislation during the period between editions. The book was released in the presence of Dr. Bhagwat Kishanrao Karad, Hon'ble Minister of State for Finance, Government of India who was chief guest at the function.

**Source:** IBBI Press Release No. IBBI/PR/2022/09 dated 07th February 2022

#### IBBI signed Memorandum of Understanding (MoU) with Indian Banks Association (IBA)

IBBI and IBA on March 04, 2022, signed an MoU to collaborate in conducting awareness and capacity building programs, primarily for financial creditors, on topics related to insolvency, bankruptcy, and other related subjects, at a workshop on “Committee of Creditors: An

Institution of Public Faith” organised jointly by IBBI, SBI and IBA at New Delhi.

The MOU has been signed by Mr. Amit Pradhan (Executive Director, IBBI) and Mr. Sunil Mehta (Chief Executive, IBA).

**Source:** IBBI Press Release No. IBBI/PR/2022/12 dated 04th March 2022

### IBBI Publishes Syllabus, Format, Frequency and Other Details of Valuation Examinations

IBBI vide its press release dated March 31, 2022, has published the syllabus and format of the 'Valuation Examinations' to be conducted from July 01, 2022, for the three asset classes i.e., Land and Building, Plant and Machinery, & Securities or Financial Assets.

The examinations of all three class will be conducted online (computer-based in a proctored environment) with objective multiple-choice questions and will be conducted on every working day. The Press release includes syllabus, details of topics covered and weightage of each topic in the examination.

**Source:** IBBI Press Release No. IBBI/PR/2022/14 dated 31st March 2022


### IBBI amends the IBBI (Voluntary Liquidation Process) Regulations, 2017

The IBBI with an objective to expedite the Voluntary

Liquidation Process under the IBC has amended the IBBI (Liquidation Process) Regulations, 2017. The Amendment Regulations modify timelines for some stipulated activities undertaken during the process as under:

- The liquidator shall prepare the list of stakeholders within fifteen days (against the previously stipulated forty-five days) from the last date for receipt of claims, where no claim from creditors has been received till the last date for receipt of claims.
- The liquidator shall distribute the proceeds from realization within thirty days (against the previously stipulated six months) from the receipt of the amount to the stakeholders.
- It has been further provided that the liquidator shall endeavour to complete the liquidation process of the corporate person within two hundred and seventy days from the liquidation commencement date, where the creditors have approved the resolution under section 59(3)(c) or regulation 3(1)(c), and ninety days from the liquidation commencement date in all other cases (against the previously stipulated 12 months in all situations).

**Source:** [https://ibbi.gov.in/uploads/press/b\\_82d135ca92a7dfac6399146ef68634d.pdf](https://ibbi.gov.in/uploads/press/b_82d135ca92a7dfac6399146ef68634d.pdf)



## Indian Institute of Insolvency Professionals of ICAI

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

### EXECUTIVE DEVELOPMENT PROGRAM (For IPs)


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## IBC Case Laws

### Supreme Court of India

*SVG Fashions Pvt. Ltd. Vs. Ritu Murli Manohar Goyal & Anr. & Ors. Civil Appeal No. 4228 of 2020, Date of Judgment: 29<sup>th</sup> March 2022*

#### Facts of the Case

This Appeal was filed by Appellant (Operation Creditor 'OC' of the Corporate Debtor) aggrieved by the order of the NCLAT whereby it reversed the order of the NCLT (Adjudicating Authority 'AA') and held that the application filed under Section 09 of the IBC, 2016 was barred by limitation.

The facts of the case are that the Appellant filed an application under Section 9 of IBC on 20.04.2018 against M/s Arpita Filaments Pvt. Ltd. (Corporate Debtor 'CD') stating that the CD had started dealing with them from 2013 by selling and delivering various fabrics to the CD. The CD was irregular in making payments of the bills raised. Hence a demand notice under section 08 of IBC read with Rule 05 was issued to the CD to which there was no response.

The CD raised 04 major objections before AA, one of which was that the claim was barred by limitation. The AA found on a basis of letter dated 28.09.2015 produced by OC that six cheques had been issued in favour of OC, which returned dishonoured when presented for payment. The CD had taken stand that those cheques were lost by the CD in March, 2017 and it had already issued stop payment instructions to the bank on 04.03.2017. He also claimed that the letter dated 28.09.2015 relied upon by OC was issued by Shree Adeshwar Textiles and the same cannot be relied upon. However, the AA by its order dated 26.09.2019 overruled the objections and held that there was acknowledgement of liability on the part of CD, therefore the application was within the period of limitation and ordered the admission of same.

On appeal, the NCLAT reversed the decision of the NCLT on the ground that the acknowledgment of liability in terms of Section 18 of the Limitation Act ought to have been on or before 07.10.2016 for the dues that arose between 11.08.2013 to 02.09.2013, but the cheques were dated December, 2017.



#### Supreme Court's Observations

The Apex Court observed that the NCLAT had not considered the letter dated 28.09.2015. It noted that the cheque numbers mentioned in the letter were the same as the ones allegedly lost by the CD in March, 2017. Further the 01st respondent had claimed in his affidavit that the CD had issued stop payment instructions, he had conceded later that the acknowledgement issued by the banker was dated 01.01.2018. The Apex Court further stated that the failure of the NCLAT as the first appellate authority to look into a very vital aspect such as this, vitiates its order, especially when NCLT has recorded a specific finding of fact on this. The Apex court also stated its judgment in *Asset Reconstruction Company (India) Limited Vs. Bishal Jaiswal and Anr.* whereby it had held that while applying Section 18 of the Limitation Act, it had even went to the extent of holding that an entry in the balance sheet of the company could also be treated as an acknowledgement in writing. Further, the Apex Court also stated that the law as it has developed on the applicability of Section 18 of Limitation Act and the circumstances in which it would apply were also not examined by NCLAT.

#### Order

The Apex Court in view of the above observations allowed this appeal and remanded back the matter for fresh consideration to NCLAT. The impugned order of NCLAT was set aside.

**Case Review: - Appeal Allowed**

***Amit Katyal Vs. Meera Ahuja and Ors. Civil Appeal No. 3778 Of 2020 with IA No. 105732/2021 and 18679/2022, Date of Judgment: 03<sup>rd</sup> March 2022***

## Facts of the Case

This Appeal was filed by Appellant (Promoter/Majority Shareholder of Jasmine Buildmart Pvt. Ltd. (Corporate Debtor 'CD')) feeling aggrieved and dissatisfied with the impugned order passed by the NCLAT, New Delhi in Company Appeal (AT) (Insolvency) No. 1380 of 2019, by which the NCLAT dismissed the above appeal preferred by the Appellant and confirmed the order passed by the NCLT, New Delhi (Adjudicating Authority 'AA') in admitting the petition under Section 7 of the IBC, 2016.

The facts of the case are that CD had come out with housing project (Krrish Provence Estate) which it could not complete even after a period of eight years, resulting in Section 7 application being filed before AA by respondent nos. 1 to 3 (Original applicants and Home buyers). The original applicants sought refund of an amount of Rs. 7 crores approx. due to delay in the completion of project and failure to handover possession within the stipulated time. The Appellant challenged the order of AA before the NCLAT and during the hearing tried to settle the matter with the original applicants, however, the settlement did not go through. The NCLAT by the impugned order dismissed the appeal and upheld the admission order and directed commencement of CIRP.

Subsequently, the appellant preferred the present appeal and the Apex Court by its order stayed the operation and implementation of the impugned order, subject to the Appellant depositing the amount of Rs.2,75,55,186/- and interest @ 6% per annum within two weeks from the order, which was deposited by the same. However the present appeal was adjourned from time to time on the ground that the dispute between the appellant and original applicants was being settled and the CD was prepared to complete the project within a period of nine months, if the home buyers make payments, as scheduled.

Further, the respective parties (Appellant & 82 Homebuyers) settled the dispute with the CD under which, it was agreed that the CD shall complete the entire project and hand over the possession to the home buyers (who want the possession), within a period of one year. The Appellant agreed to refund the amount of Rs.3,36,02,000/- with applicable/accrued interest to the original applicants. Hence it was requested under Article 142 of the

Constitution of India read with Rules 11 and 12 of the NCLT Rules, 2016 to record the settlement and permit the original applicants to withdraw CIRP proceedings pending before the AA and dismiss all matters pending between the appellant and original applicants.

## Supreme Court's Observations

The Apex court stated the matter of Swiss Ribbons Private Limited and Another v. Union of India whereby it had held that at any stage before a COC is constituted, a party can approach AA directly and AA may in exercise of its powers, allow or disallow an application for withdrawal or settlement. Hence, in the present case, although the COC was constituted on 23.11.2020, there was a stay on CIRP proceedings on 3.12.2020 and no proceedings took place before the COC. Further the COC comprises of 91 members, of which 70% were the members of the Flat Buyers Association who are willing for the CIRP proceedings being set aside, subject to Appellant and CD honouring its undertaking.

The Apex court in view of the above stated that when the withdrawal of the CIRP proceedings initiated by the original applicants is allowable by the NCLT and instead of relegating the original applicants to approach the AA by moving an application under Section 12A of the IBC, Apex Court was of the opinion that this is a fit case to exercise powers under Article 142 of the Constitution of India as the settlement arrived at between the home buyers and the appellant and CD shall be in the larger interest of the home buyers as out of 128 home buyers, 82 home buyers are likely to get possession within a period of one year, for which they are waiting since last more than eight years after they have invested their hard earned money. This shall be in furtherance of the object and purpose of IBC.

## Order

The Apex Court in view of the above observations allowed the appeals and directed the Appellant and CD to abide by the settlement plan and to submit 05 separate undertakings which included that they shall complete the entire project within one year from 01.03.2022 and offer the possession to the respective home buyers, to complete the entire project including all the apartments, common areas, amenities, etc. as specified in the ABA, to be filed within a period of one week from the date of order.

**Case Review: - Appeal Allowed.**



***M/s Consolidated Construction Consortium Limited Vs. M/s Hitro Energy Solutions Private Limited Civil Appeal No 2839 of 2020, Date of Judgment: 04<sup>th</sup> February 2022***

**Facts of the Case**

This Appeal was filed under Section 62 of the IBC, 2016 and arises out of the judgment of the National Company Law Appellate Tribunal 'NCLAT' by which it reversed the decision of the National Company Law Tribunal, Chennai Bench (Adjudicating Authority 'AA'). The Facts of the case are that AA had admitted an application filed by the Appellant, under Section 9 of the IBC for the initiation of the CIRP against the Respondent. While admitting the application, the AA held that the Respondent's Memorandum of Association, proved that it took over a proprietary concern, Hitro Energy Solutions, and that the proprietary concern owed the Appellant an outstanding operational debt. Further, the AA declared a moratorium under Section 14 of the IBC vide its order.

The NCLAT set aside the order of the AA and dismissed the application of the Appellant filed under Section 9 of the IBC and released the respondent from the ongoing CIRP. Further in support of its conclusions, the NCLAT held that Firstly, the Appellant was a 'purchaser', and thus did not come under the definition of 'operational creditor' under the IBC since it did not supply any goods or services to the Proprietary Concern/respondent; Secondly there was nothing on record to suggest that the Respondent has taken over the proprietary concern and Thirdly, the appellant cannot move an application under Sections 7 or 9 of the IBC since all purchase orders were issued on 24th June 2013 and cheques were issued on advance basis.

The Apex Court issued a notice and stayed the operation of NCLAT's judgment. It further stated that the issues arising before it were as follows: -

- Whether the appellant is an operational creditor under the IBC even though it was a 'purchaser'?
- Whether the Respondent took over the debt from the proprietary concern?
- Whether the application under Section 9 of the IBC is barred by limitation?

**Supreme Court's Observations**

The Apex Court regarding the first question stated that in the present case, the phrase "in respect of" in Section 5(21)

of IBC has to be interpreted in a broad and purposive manner in order to include all those who provide or receive operational services from the CD, which ultimately lead to an operational debt and the appellant clearly sought an operational service from the Proprietary Concern. Further, when the contract was terminated the Proprietary Concern nonetheless encashed the cheque for advance payment, it gave rise to an operational debt in favor of the appellant, which now remains unpaid. Hence, the appellant is an operational creditor under Section 5(20) of the IBC.

Regarding the second question, the Apex Court stated that the dispute resolved around the MoA of the Respondent whereby the MOA stated that one of its main objects is to take over the Proprietary Concern. However, the respondent produced a resolution passed by its Board of Directors, purportedly resolving to not take over the Proprietary Concern. In this regard the respondent provided no proof that the procedure prescribed Companies Act 2013 was followed to amend the MoA. Hence the MOA of the respondent remained unchanged and conclusive proof that the respondent took over the Proprietary Concern and was liable to re-pay the debt to the appellant. Regarding the Third question, the Apex Court held that the application under Section 9 of the IBC was not barred by limitation as a letter was addressed by the Appellant to the proprietary concern on 27 February 2017, demanding the payment and the same was replied by the proprietary concern on 2 March 2017, finally refusing to make re-payment to the Appellant.

**Order**

The Apex Court in view of the above allowed the appeal and consequently set aside the order of the NCLAT.

***Case Review: - Appeal Allowed***

***Bank of Baroda & Anr Vs. MBL Infrastructures Limited & Ors. Civil Appeal No. 8411 Of 2019, Date of Supreme Court Judgment: 18<sup>th</sup> January 2022***

**Facts of the Case**

This Appeal was filed to seek the judicial interpretation of Section 29A(h) of the Insolvency and Bankruptcy Code, 2016 'IBC', as amended by the Act 26 of 2018 from the Hon'ble Supreme Court.

The brief facts of the case are that M/s. MBL Infrastructures Limited (Respondent No.1) 'MBL' set up by Mr. Anjanee Kumar Lakhotiya (Respondent No. 3)

availed loans/ credit facilities from consortium of banks. On the failure of MBL to act in tune with the terms of repayment, forced few banks to invoke the personal guarantees extended by the Respondent No.3. Subsequently RBL Bank issued a notice under Section 13(2) of the SARFAESI Act, after duly invoking the personal guarantee which was followed by a similar action at the hands of other banks. Later in the context of above, RBL Bank filed an application under Section 7 of IBC before the NCLT, Kolkata (Adjudicating Authority 'AA') to initiate CIRP against MBL which was admitted, and two resolution plans were received of which one was by Respondent No. 3 which was prior to the introduction of Section 29A of the Code.

Thereafter the CoC in its meeting deliberated upon the impact of the amendment and the eligibility of Respondent No. 3 in submitting a resolution plan, who in view of the same filed an application praying for a declaration that he was not disqualified from submitting a resolution plan under sub-section (c) and (h) of Section 29A of the Code, whereby the AA, vide its order held that it was eligible for the same. It ruled that since the personal guarantee having not been invoked and the Respondent No.3 merely having extended his personal guarantee, as such there is no disqualification per se under Section 29A(h) of IBC as the liability under a guarantee arises only upon its invocation.

The resolution plan was approved by more than 75% of voting share after considering the technoeconomic viability and feasibility of the plan and the same was approved by the AA as well. Further the other appeals and IAs including that of Appellant were dismissed on the above grounds by AA as well as Appellate Tribunal. The Appellate Tribunal further confirmed the order of the AA.

Meanwhile the IBC went further amendments. The Appellant challenged the order of the Appellate Tribunal confirming the order of the AA in this appeal.

## Supreme Court's Observations

The Apex Court was of the view that the Respondent No.3 executed personal guarantees which were invoked by three of the FCs even prior to the application filed which attracted Section 29A(h) of the Code. The eligibility can never be restricted to the aforesaid three creditors, but also to other financial creditors in view of the import of Section 7 of the Code. Thus, in the interpretation of Section 29A(h), the plan submitted by the Respondent No.3 ought not to have been entertained. The AA and the Appellate

tribunal were not right in rejecting the contentions of the appellant on the ground that the earlier appeals having been withdrawn without liberty, the issue qua eligibility cannot be raised for the second time.

However, the very resolution plan submitted by the Respondent No. 3, being ineligible is not maintainable, much water has flown under the bridge. The requisite percentage of voting share has been achieved and majority of the creditors have given their approval to the resolution plan. The AA rightly noted that it was accordingly approved after taking into consideration, the techno-economic report pertaining to the viability and feasibility of the plan. The plan has also put into operation and as of now MBL is an on-going concern. Further the interest of over 23,000 shareholders and thousands of employees of MBL needs to be taken in Consideration and Rs. 300 crores (approx.) has also been approved by the shareholders to be raised by MBL.

The Apex court further stated that the ultimate object of the Code is to put the CD back on the rails and no prejudice would be caused to the dissenting creditors as their interests would otherwise be secured by the resolution plan itself, which permits them to get back the liquidation value of their respective credit limits. Thus, on the peculiar facts of the present case, the Court did not wish to disturb the resolution plan leading to the on-going operation of the MBL.

## Order

The Apex Court in view of the above observations disposed of the case.

## Case Review: - Appeal Disposed

*Devarajan Raman Vs. Bank of India Limited Civil Appeal No 3160 Of 2020, Date of Judgment: 05<sup>th</sup> January 2022*

## Facts of the Case

This Appeal challenged the order passed by the National Company Law Appellate Tribunal 'NCLAT'. The issue of the case arises in dispute related to the payments of costs and expenses incurred by the Resolution Professional (Appellant). The Facts of the case are that pursuant to respondent (Financial Creditor of Poonam Drums and Containers Private Limited (Corporate Debtor 'CD')), the appellant had submitted his technical and financial bid for appointment as an Interim Resolution Professional 'IRP' in

the CIRP of CD which was initiated by respondent by filing a petition under Section 7 of IBC, 2016 and the same was admitted by Adjudicating Authority 'AA'.

Later, the order of AA was set aside in appeal by the NCLAT at the behest of the Directors of the CD. The NCLAT remitted the proceedings to AA to decide upon the fee and costs of the CIRP incurred by the appellant which was to be borne by the respondent. An amount of Rs 14,75,660/- was payable as fee and costs and the Respondent had reimbursed an amount of Rs 5,66,667 leaving Rs 9,08,993/- in balance, according to the appellant. Hence, the appellant moved AA for obtaining the release of the remaining fee and costs. The respondent confirmed the details of the fee and costs as stated by the appellant and stated that it would release the payment, upon receipt of an order of AA. Subsequently, AA in its order disposed of the application directing the Respondent to pay all the expenses incurred by RP and Rs. 5,00,000 /- plus GST towards the fee of the RP.

Aggrieved by the above order, the Appellant filed an Appeal before NCLAT stating that AA passed the impugned order reducing the CIRP cost and fee quoted by the appellant, without citing any reasons for the same. However, NCLAT upheld the order of AA stating that the appellant had worked for about three months as RP. Further, the expenses had been allowed in full and the consolidated amount of Rs 5,00,000/- plus GST allowed as fee of the RP for the entire period was not unreasonable and fixation of the fee is not a business decision depending on the commercial wisdom of the CoC. Hence, the appellant filed this appeal.

### Supreme Court's Observations

The Apex Court was of the view that after the NCLAT set aside the order of the AA initiating the CIRP, the proceedings were remitted back for determining the insolvency resolution costs. The Court materially noted that the appellant had addressed a letter to the respondent prior to the filing of the application to which the respondent, upon verification had stated that the costs and fees were in conformity with both the technical and financial bid, based on which the assignment was awarded. Further, in the application, which was filed by the appellant before the AA, the appellant annexed a statement of costs, the amount, which was reimbursed

with the balance dues, however, the order of the AA reveals that none of the submissions of the appellant were considered. The AA merely directed the respondent to pay the expenses incurred and an amount of Rs 5,00,000 plus GST towards the fee of the RP. Neither the basis of the claim nor its reasonableness was considered by the AA. Further, the NCLAT merely proceeded in an ad hoc manner on the ground that the amount of Rs 5,00,000 as fee, in addition to the expenses, appears to be reasonable. The Apex Court stated that both the orders suffer from an abdication in the exercise of jurisdiction and in the absence of any reasons in both the order, it is impossible to deduce the basis on which the payment of an amount of Rs 5,00,000 together with expenses has been found to be reasonable and an order of remand becomes necessary.

### Order

The Apex Court in view of the above observations allowed the appeal and set aside the impugned judgment and order of the NCLAT and AA. Further it restored the misc. appeal of the AA for a fresh decision and directed AA to expedite the disposal of appeal and to complete the process within a period of one month from the date of receipt of a certified copy of this order on its record.

*Case Review: - Appeal Allowed*

## High Court

*Angre Port Private Ltd. Vs. Tag 15 (Imo. 9705550) & Anr. Commercial Admiralty Suit(L) NO. 4 of 2020, Date of Bombay High Court Judgment: 03<sup>rd</sup> January 2022*

### Facts of the Case

This Appeal was filed to seek a summary judgment against Tag Offshore Ltd. (Defendant) whose vessel had been occupying berth space in the port of Angre Port Private Ltd (Plaintiff), wherein the basic premise states that the Defendants had admitted the dues of the Plaintiff.

The brief facts of the case are that the vessel of the Defendant had entered and occupied berth space in the Plaintiff's Port. The Plaintiff charged the Defendant berthing charges as per its Tariff Booklet. However, Exim Bank, a secured creditor of Tag Offshore Ltd invoked the admiralty jurisdiction of the Court by filing Commercial Admiralty Suit against the Defendant's Vessel and obtained an order of arrest.

Accordingly, the said Vessel continued under arrest and started to incur berthing charges and port dues, in addition to other dues and charges, as the same had been occupying the berth at the Plaintiff's port. Thenceforth, insolvency proceedings were initiated against the Defendant by R.H. Petroleum Ltd. under section 9 of the IBC, 2016, which resulted in severe unrest amongst the crew on board the vessel since neither EXIM Bank nor the IRP took any measures to provide supplies, stores, bunker etc. to the said vessel or its crew resulting in the crew to abandon the said vessel.

Thereafter the NCLT ordered the CoC to secure the assets of Defendant and take possession of the vessel, if necessary, and proceed in terms of Sections 51 and 52 of the Merchant Shipping Act, 1958 and also directed the CoC to explore the liquidation option and move the Vessel to a safer place without creating problems for the Port Trust. Finally, the NCLT ordered the liquidation of the Defendant resulting in the present appeal as the invoices of the Plaintiff remained unpaid.

### High Court's Observations

The Court, therefore, directed sale of the vessel wherein the Court also opened the bids received from the prospective buyers in presence of Liquidator and the other stakeholders of the said Vessel/ CoC of Defendant. After considering the point of view of the advocates for the Defendants and EXIM Bank, the Court confirmed the sale of the vessel in favour of J. T. Marine Services Pvt Ltd, for a consideration of Rs. 10.75 crores whereby Liquidator as well as EXIM Bank stated that they had no objection if the vessel was sold to the highest bidder.

The Court stated that under the provisions of the IBC, 2016, admittedly, Liquidator would have no jurisdiction to adjudicate any claim against the vessel. Apart from this, Liquidator accepted berth hire charges as well as penal berth hire charges. Once having accepted that the amounts are payable to the Plaintiff, Liquidator may not argue that the Plaintiff is not entitled to any penal berth hire charges as it would be a penalty which will be required to be proved.

Hence, a decree in favour of the Plaintiff was awarded. Out of the sale proceeds of the vessel a sum of approx. Rs. 5.51 crores will be paid to the Plaintiff. Further an interest of 18% per annum will be payable on the above sum from 18th December 2020 till payment and/or realization. The

claim towards Salvage operations shall not be granted and will have to be proved at the trial of the suit. The Plaintiff, along with their claim for Salvage operations, shall also be entitled to agitate their claim for interest and legal costs, at the trial of the suit.

### Order

The High Court in view of the above disposed of the Interim Application in the aforesaid terms.

*Case Review: - Appeal Disposed*

## National Company Law Appellate Tribunal (NCLAT)

*S. Rajendran Vs. Mr. B. M Anand & Ors. Company Appeal (AT) (CH) (Insolvency) No. 37 Of 2022, Date of Judgment: 11<sup>th</sup> March 2022*

### Facts of the Case

This Appeal was filed by Appellant being aggrieved of the order dated 07.01.2022, passed by the NCLT Chennai (Adjudicating Authority 'AA') whereby, the AA disposed of the Application filed by the Respondents herein. The Appellant herein is the Resolution Professional of M/s Vasan Healthcare Pvt. Ltd. (Corporate Debtor 'CD'). He stated that the AA vide impugned order directed the Appellant to pay to the Respondents a sum of ~Rs. 1.13 crores from the CIRP cost within a period of 14 days from the date of order. Further, the AA directed the Appellant to pay monthly rent to the Respondents during the CIRP Period till such time the CD is in occupation of the premises. However, AA rejected the prayer of the Respondents seeking handing over of vacant possession of the property.

The Appellant submitted that the CD was admitted into CIRP on 21.04.2017 to which he was appointed as IRP and subsequently confirmed as the RP. He took necessary steps to take control of the CD and to ensure increase in the revenues generated by the CD to meet the CIRP Costs. Subsequently due to lockdown, the revenue generation was adversely impacted and only 50% of the payments to the Landlords towards rental dues could be paid for the month of May 2021. However, from June 2021 onwards due to the improvement in the pandemic situation and increase in the operations of the CD, he was able to meet the 100% of payment towards CIRP Costs. Further the CIRP of the CD was dependent on the revenues generated from its business.



Appellant submitted that the CD operates its business, out of leased premises wherein substantial amount towards interior development has been invested and it is important to retain the leased premises to continue the CD as a going concern based on which the Resolution Plans were received. In view of the above the Appellant prayed to allow the Appeal by setting aside the impugned order.

The Respondent submitted that the Appellant is duty bound to pay the CIRP Costs as per the provision of Section 5 (13) (c) read with regulation of 31 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and that the Appellant instead of implementing the impugned order and in order to overcome the obligation arising out of the above impugned order, is merely seeking to state that the other Landlords would also claim such legitimate dues based upon the order which would entail huge outlay on the part of the CD.

#### NCLAT's Observations

The Appellate Tribunal stated that the main issue in the present appeal for consideration is whether the impugned order passed by the AA is sustainable in law or not. Keeping in view that the Appellant is in obligation to pay the dues to the Respondents, the Appellate Tribunal was of the view that the issue for consideration is mixed question of fact and law. The fact remains that the premises in which the CD is carrying on its business belongs to the Respondents and the Appellant is duty bound to pay the dues to the Respondents. Therefore, it stated on facts, that the AA did not commit any error while passing the impugned order. Further, in so far as the law is concerned, the status quo is to be maintained with respect to the premises which the business of the CD is carrying on, when the CD went into CIRP. After admitting the Application, the AA would declare moratorium as per Section 14 of the IBC. Admittedly the CD was into CIRP and declared moratorium by the AA on admission of the Application against the CD. In pursuance of clause (d) of Sub- Section 1 of Section 14, which provides that during the moratorium period the lesser or an owner of the property cannot recover the possession of the property from the CD. In view of the law, the CD continuing its business in the premises leased to it. For the above reason the AA had rejected the prayer of the Respondents seeking handing over of vacant possession of the premises.

#### Order

The Appellate Tribunal in view of the above observations dismissed this appeal and upheld the order passed by AA and directed the Appellant to implement the order of the

AA within a period of two weeks from passing of this order and report compliance before the AA.

**Case Review: - Appeal Dismissed.**

***Damodar Valley Corporation Vs. Kharkia Steels Pvt. Ltd & Ors. Company Appeal (AT) (Insolvency) No. 119 of 2022, Date of Judgment: 15<sup>th</sup> March 2022***

#### Facts of the Case

This Appeal was filed by Appellant under section 61 of the IBC, 2016 which arised out of the order dated 25.11.2021 passed by the Adjudicating Authority ' AA' (NCLT, Kolkata Bench). On an IA filed by the Successful Resolution Applicant of Kharkia Steels Pvt. Ltd. 'KSPL' (Corporate Debtor 'CD') for a new connection on temporary basis the AA directed by its Order that KSPL shall deposit the requisite security deposit amount for the new connection to Appellant, whereafter Appellant shall process the application within ten days and provide the new connection for electricity supply to KSPL. The Appellant was aggrieved by this order, that while his appeal was pending for consideration before the NCLAT, wherein he assailed the approval of the resolution plan, the AA provided a final relief in the form of direction for providing new connection to the successful resolution applicant.

The facts of the case are that the Appellant entered into a Power Purchase Agreement with CD and due to large quantum of unpaid dues, a notice of disconnection of power supply was sent by the DVC to the CD. Thereafter in September 2019, by filing an application under section 7 of the IBC by Dena Bank, a Financial Creditor 'FC' CIRP was initiated. Upon completion of the CIRP, the Resolution Plan proposed by Amritvani Exim Private Limited 'AEPL' (Successful Resolution Applicant) was approved by the Committee of Creditors 'CoC' and subsequently approved by the AA vide order dated 21.9.2020.

Subsequently, AEPL applied for reconnection of power supply to the premises of the CD through the IA and aggrieved by the Order in the IA, the Appellant filed the present appeal. The Appellant contended that by allowing the IA the AA gave final and substantive relief to AEPL through an interim order when the appeal assailing the resolution plan approval was pending, which is not proper. Further the legality of the approval of the resolution plan should have been decided first before granting any relief in this matter to AEPL.

Further, the payment of past dues and reconnection of electricity supply after depositing security deposit are

covered under the West Bengal Electricity Regulatory Commission (Electricity Supply Code) Regulations made under the Electricity Act, and thus the AA exceeded its jurisdiction by approving a resolution plan which, inter alia, takes away the right of the Appellant available under the Electricity Act and WBERC Regulations.

### NCLAT's Observations

The Appellate Tribunal stated that the main issue in the present appeal is whether the relief granted by the AA directing the DVC to provide new connection to AEPL after payment of the security deposit could have been given by the AA while the main appeal was pending before Appellate Tribunal and whether the jurisdiction under IBC is not proper in granting such a relief?

The NCLAT considered the legal validity of the resolution plan as approved by the AA which was assailed by Appellant and upheld the approval of resolution plan. NCLAT noted that the Successful Resolution Plan has to be implemented in a certain time frame as contained therein and as the pending appeal has been disposed upholding the legality of the approval of resolution plan. Therefore, the plan has to be implemented in letter and spirit. Further the plan directs DVC to ensure availability of continuous power to the plant at the same rate at which it is supplied power to the adjoining units. However, it needs slight modification since the conditions that are applicable for supplying power to the CD under a new agreement shall be at the tariff rate and conditions that would prevail at the time of signing of the agreement for a fresh connection by DVC with AEPL.

### Order

The Appellate Tribunal in view of the above observations disposed the appeal and modified the clause of the plan as follows: (i) AEPL to apply for fresh connection, payment of security deposit and any other charges that may be admissible under WBERC Regulations will have to be paid by AEPL, and (ii) The supply of electricity to the CD should be in accordance with the WBERC Regulations made under the Electricity Act.

Further the direction given by the AA to DVC to provide temporary connection to the SRA is in accordance with a legally approved resolution plan and therefore suffers from no illegality.

**Case Review: - Appeal Disposed.**

***Dr. Periasamy Palani Gounder Vs. Mr Radhakrishnan Dharmarajan. & Ors. Company Appeals (AT) (CH)(Insolvency) No.164, 176, 218 & 219 Of 2021, Date of Judgment: 17<sup>th</sup> February 2022***

*A Valuation Consisting of Mere Naked Values Without A Detailed Report Is Not Valid. It Is a Settled Proposition That The Valuation Exercise Is Conducted To Facilitate The Coc's Decision-Making Process.*

### Facts of the Case

These Appeals were filed against a common impugned order passed by the NCLT-Chennai Bench (Adjudicating Authority 'AA') whereby the AA approved the Resolution Plan for the revival of the Appu Hotels Limited (Corporate Debtor 'CD'). The Appellant is the Promoter and erstwhile Director of the CD. The CIRP was initiated by a Financial Creditor whereby Respondent No. 01, was appointed as the Resolution Professional 'RP'.

The Appellant also initiated the measures under Section 12A of the IBC for withdrawal of CIRP. However, the proposal of the Appellant was not placed before the CoC, leaving the proposal unconsidered. Further, the Appellant filed an application before the AA for fair Valuation and objected that the Valuation of the CD was done in violation of the statutory mandates, as a result of which, CoC was deceived into approving the Resolution Plan submitted by Respondent No. 2, i.e. M.K. Rajagopalan, thereby allowing him to acquire the assets of the CD for a price less than 25% of the actual market value.

The Appellant stated that there was a violation of section 88 of the Indian Trust Act, 1882 and it can be seen from the final list of prospective Resolution Applicants that Respondent no. 02 is the founder and Managing Trustee of Sri Balaji Vidyapeeth whose resolution plan was approved and who is ineligible on the ground that it is a charitable trust and it cannot run a profit making entity.

The Appellant stated that the estimate of the Fair Value and Liquidation Value of the CD was computed without physical verification of the CD's assets and the Resolution Applicant is disqualified under Section 164 (2) (b) of the Companies Act 2013 hence ineligible under Section 29 A (e) of the IBC to submit a Resolution Plan.

### NCLAT's Observations

The main issue before the Appellate Tribunal was that whether the approved Resolution Plan contravenes

Section 30 (2) and Sec 61(3) of the IBC, 2016?. The Appellate Tribunal stated that a valuation consisting of mere naked values without a detailed report is not valid. It is a settled proposition that the valuation exercise is conducted to facilitate the CoC's decision-making process. Therefore, the existence of a valid and accurate valuation report is a sine qua non for the CoC to exercise its commercial wisdom. Further the observations of AA, that a statutory provision regulating a matter of practice or procedure will generally be read as a directory and not mandatory is erroneous. Compliance with statutory requirements in regulating a matter of practice and procedure are mandatory. The AA is a creature of statute, and by interpretation, it cannot dilute the statutory compliances.

The Appellate Tribunal further stated that as the Prospective Resolution Applicant, 'Sri Balaji Vidyapeeth' was ineligible as the 2nd Respondent, cannot permitted to act as its alter ego in implementing the Resolution Plan and attain any financial advantage or gain, which is barred by Section 88 of the Indian Trusts Act. NCLAT also stated that the revised Resolution Plan was not approved by CoC. It was further modified, and the final Revised Resolution Plan was never laid before the CoC for approval. Thus, the approval of the Resolution Plan by the AA cannot be treated as valid under Sec. 31(1) of the IBC, 2016.

### Order

The Appellate Tribunal in view of the above observations allowed the appeals and stated that the approved Resolution Plan is in contravention of Section 30 (2) of the IBC, 2016. Further it set aside the resolution plan approved by AA and directed RP to proceed with the CIRP from the publication stage of Form 'G' for inviting Expression of Interest afresh as per CIRP Regulations and also directed to put up the Appellants Settlement proposal for consideration before the CoC.

NCLAT directed the RP to call the CoC within 15 days from the date of order and settlement proposal should be put to the vote and if approved with 90% vote share of the CoC, then proceeding for withdrawal of the CIRP under Section 12 A read with Regulation 30A of CIRP Regulation.

**Case Review:** - Appeals Allowed.

**Sumit Bansal, Insolvency Professional. Vs. Committee of Creditors of JP Engineers Pvt. Ltd. & Ors. Comp. App. (At) (Ins.) No. 160 Of 2022, Date of Judgment: 18<sup>th</sup> February 2022**

*IBBI is fully clothed with jurisdiction to regulate payment of remuneration of RP and IRP both by framing regulation or by issuing executive instructions till regulation are not framed to regulate the subject*

### Facts of the Case

This Appeal was filed against the order dated 07.01.2022 passed by the NCLT-New Delhi (Adjudicating Authority 'AA') on an I.A. filed by the Appellant. The facts of the case are that Appellant was appointed as Interim Resolution Professional 'IRP' by the AA on 26.02.2020 of the Corporate Debtor and in the first CoC meeting, IRP had claimed that he should be paid Rs. 2 Lakhs per month. The matter of fee, however, could not be decided by the CoC and ultimately CoC ratified payment of Rs. 50,000/- per month only.

The Appellant claimed that he worked till 27.01.2021 after which he was replaced by the Resolution Professional (Respondent No.2). The Appellant thereafter filed above mentioned I.A. before the AA claiming the payment of fees at Rs. 2 Lakh per month whereby the AA decided to refer the matter to the Insolvency and Bankruptcy Board of India 'IBBI' to examine the claim of IRP and his agreement with the CoC. It further directed to submit their specific recommendations and thereafter the matter be directed to be listed again before the AA.

The Appellant challenged the order stating that the IBBI had no jurisdiction to decide the question of payment of his fees. He further submitted that the AA should not have asked for recommendation of the IBBI regarding his fee and should have itself decided the matter regarding fee.

The Respondents submitted that the amount as approved by the CoC has already been paid to the Appellant i.e. Rs. 50,000 per month and on the sufficiency of fee, it is the CoC which has jurisdiction to take a decision and Appellant should not have filed the I.A. before the AA.

### NCLAT's Observations

The Appellate Tribunal referred to the judgment of Hon'ble Supreme Court in the matter of "Alok Kaushik Vs.

*Mrs. Bhuvaneshwari Ramanathan and Ors.* - Civil Appeal No. 4065 of 2020” and stated that there is no quarrel to the preposition that it is the AA which has power to take a final decision regarding payment of fee to which IRP or RP may be entitled.

Further, the issue which has been raised in this Appeal, that IBBI has no jurisdiction nor AA should have referred the matter for a recommendation. The Appellate Tribunal stated that from pursuing the order, it is clear that the ultimate decision regarding this issue raised in I.A was to be taken by the AA and the AA had not directed the IBBI to decide the issue and only recommendations were called for from IBBI and it did not agree with the submissions of the Appellant that IBBI has no jurisdiction with regard to question of fee which is entitled to be paid to the IRP/ RP, stating that the IBBI is clothed with Regulations making power under Section 240 of the IBC.

It further stated that as per the Regulation 7(2)(h) of IBBI (Insolvency Professionals) Regulations, 2016, an IRP has to abide by the Code of Conduct specified in the First Schedule to these Regulations which requires an IP to provide services for remuneration which is charged in a transparent manner and is a reasonable reflection of the work.

## Order

The Appellate Tribunal in view of the above observations stated that IBBI has jurisdiction to regulate payment of remuneration of RP and IRP both by framing regulation or by issuing executive instructions till regulation are not framed to regulate the subject. Further, in the present case, it dismissed the appeal by stating that the AA may dispose of I.A immediately after receiving recommendations from the IBBI.

## Case Review: - Appeal Dismissed

***Standard Surfa Chem India Pvt. Ltd Vs. Kishore Gopal Somani. Company Appeal (AT) (Insolvency) No. 684 of 2021, Date of NCLAT Judgment: 14<sup>th</sup> February 2022***

*Satisfaction of creditor claims while ensuring asset maximization is the underlying principle of the IBC, which cannot be overridden on account of meagre delays induced by a force majeure event.*

## Facts of the Case

This Appeal was preferred by Standards Surfa Chem India Private Limited (Appellant), who is successful auction

purchaser of the Pondicherry unit of the property of Advanced Surfactants India Ltd (Corporate Debtor 'CD') in liquidation. The Appellant in this appeal was concerned with the auction sale of only the 'Pondicherry unit' of the CD in an E-Auction. In the E-Auction conducted the Appellant had emerged as the successful bidder in the proceeding with a bid of ₹ 3.3 crores and the Liquidator had issued a letter of intent dated 05th March 2021 stipulating 90 days timeline for making the full payment to complete the auction proceeding expiring on 03rd June 2021. Before the expiry of the said 90 days the Appellant preferred an IA before the NCLT (Adjudicating Authority 'AA'), seeking time extension in complying with auction proceedings, under Rule 11 of the NCLT Rules, 2016. However, the AA dismissed the IA vide impugned order, which stated that the application had become infructuous.

The Appellant stated that the grounds of this appeal are that the Liquidator refused to grant any extension of time for completion of the auction process, despite being empowered to do so and despite recognizing the difficulties faced by the Appellant on account of the 2nd wave of Covid 19 outbreak, in securing the loan from its bankers within the stipulated timelines. Further, the Liquidator also failed to take note of Regulation 47 A of the Liquidation Process Regulation 2016 according to which the Appellant was entitled to complete exclusion of the period from May 2021 on account of Lockdown.

The Appellate Tribunal raised two points for decision in this Appeal, Firstly, Whether the NCLT and Liquidator were justified in refusing extension to the Appellant without considering Regulation 47 A of the Liquidation Process Regulation 2016? and Secondly, Whether the Appellant is entitled to the exclusion/extension of time for the period of Lockdown due to Covid 19 as stipulated under Regulation 47 A of the IBBI (Liquidation Process) Regulation, 2016?

## NCLAT's Observations

The Appellate Tribunal in view of the observations of Hon'ble Supreme court in the matter of Pioneer Urban Land and Infrastructure Ltd. v. Union of India, (2019) stated that the applicant had sought an extension of 3 months on the ground of the 2nd wave of the Covid 19 outbreak. Regulation 47 A provided that the period of Lockdown imposed by the central government in the wake of the Covid 19 outbreak shall not be counted for computation of timeline for any task that could not be



completed due to Lockdown in relation to any liquidation process. Hence the Appellate was doubtful about the relevance of Regulation 47 A in the instant case because Lockdown was declared by Tamil Nadu State.

However, it mentioned that Regulation 47 deals with the Model Timeline for Liquidation Process and is only directory in nature. It cannot be considered a deadline. It is provided under Regulation as a guiding factor to complete the liquidation process in a timebound manner. In exceptional circumstances it can be extended. Further, Hon'ble Supreme Court, while dealing with the timeline provided under Section 7 of IBC 2016, has held that the timeline provided under Section 7 of the IBC is directory in nature and in special exceptional circumstances, it can be extended.

Further, it stated that E-Auction Process Information Document also provided discretion to the Liquidator to extend the timeline. The impact of the 2nd wave of Covid 19 was everywhere in India, of which judicial notice can be taken. In the special circumstances, the Liquidator ought to have sought permission of the AA to extend the timeline. However, the AA did not consider that the satisfaction of creditor claims while ensuring asset maximization is the underlying principle of the IBC, which cannot be overridden on account of meagre delays induced by a force majeure event.

### Order

The Appellate in view of the above observations allowed the appeal and dismissed the impugned order passed by the AA.

**Case Review:** - Appeal Allowed.

***Edelweiss Asset Reconstruction Company Limited Vs. Peter Beck and Peter Vermoögensverwaltung Limited. Company Appeal No 161 of 2021, Date of Judgment: 5<sup>th</sup> January 2022***

*The successful resolution applicant has claimed to be unsecured financial creditor of the CD, and therefore has interest in maintaining the CD as a going concern.*

### Facts of the Case

The present appeal arises from the impugned order of the NCLT in the matter of *Edelweiss Asset Reconstruction Company Ltd. (Edelweiss) Vs. Peter Beck and Peter Vermoögensverwaltung Ltd. and Anr.* (Peter Group) and Company Appeal AT 169 of 2021 filed by the State Bank

of India, authorized by other financial creditors to file the appeal on their behalf, against the Peter Group. The appeal was filed against the order of the AA, providing an extra period of two weeks to Peter Group, the successful Resolution Applicant (Respondent No. 1) to deposit Rs. 10 crores.

In this matter, AA vide an order 28 February 2018 approved the Resolution Plan of Peter Group (Respondent No. 1) to takeover Sharon Biomedicine Ltd. (Corporate Debtor). This was also approved by the Supreme Court. Alleging failure of the Peter Group to implement the Resolution Plan as per its provisions, the Appellant approached AA demanding that CIRP should be re-initiated along with reinstating the previous Resolution Professional and 90 days of extra period should be given to invite Expressions of Interest (EOI) for resolution plans. However, the Peter Group claimed to issue four bank guarantees. It also submitted that Appellants are arm twisting the Successful Resolution Applicant for appropriation of cash Corporate Debtor and sharing of profits generated by the Corporate Debtor, which is completely outside the terms and conditions of the Approved Resolution Plan and contrary to law.

The Counsel for the State Bank of India stated that when asked to renew the Bank Guarantee, Peter Group sent an e-mail on November 18, 2019, to the monitoring agency claiming that Rs. 10 crores, which was deposited in Abhyudaya Cooperative Bank Limited, was in respect of share application money and sought its return as per applicable laws in respect of the share application money.

### NCLAT's Observations

The NCLAT considered two issues arising in the appeal, firstly, whether the default of Respondent No. 1 in implementing the successful resolution plan is justified due to pending appeals, and secondly, whether any more time could be granted as prayed by the Appellants.

NCLAT relied on the submission of the Peter Group that the CoC agreed to infusion of funds amounting to Rs. 10 crores in the Corporate Debtor in the lieu of bank guarantee and based on this agreement it infused Rs. 10 crores in the Corporate Debtor before the expiry of the bank guarantee and honor its commitment and this amount remains with the Corporate Debtor till date. The Successful Resolution Applicant has claimed to be unsecured Financial Creditor of the Corporate Debtor, and therefore has interest in maintaining the Corporate Debtor as a going concern.

NCLAT stated that the main hindrance in implementation of the approved resolution plan was submission of a proper bank guarantee of Rs. 10 crores and other payments and actions that had to be taken from zero date in accordance with the approved resolution plan. Thus, the NCLAT was of the opinion that it would serve the interests of justice if the Corporate Debtor was not sent into liquidation, but its insolvency was resolved so that it continued to be a going concern as that would be in the interest of the Corporate Debtor's stakeholders and creditors.

## Order

The Appellate Authority partially modified the order of the AA and directed that an enforceable bank guarantee of Rs. 10 crores should be submitted by the Successful Resolution Applicant within 30 days of this order. All the payments which are overdue should be done by the Successful Resolution Applicant within two months of this order. If the bank guarantee of Rs. 10 crores have already been deposited, the amount will be either adjusted against the pending amounts or refunded within a period of 30 days.

## Case Review: - Appeal Disposed

***Krishi Realtech Private Limited Company Appeal (At) (Insolvency) Nos. 1008, 1009 & 1010 Of 2021, Date of Judgment: 21<sup>st</sup> December 2021***

## Facts of the Case

This Appeal was filed under Section 61 of the IBC 2016, for challenging three orders passed by the National Company Law Tribunal, New Delhi (Adjudicating Authority 'AA'). The Appeal raised a limited issue as to whether the AA while considering Application of pre-packaged insolvency 'pre-pack' under Section 54C of the IBC can, before admission of the Application, hear Objectors/Intervenors.

The facts of the case are that the Appellant (Corporate Debtor 'CD') who claimed to be under a debt of Rs.673.00 crore (approx.) instituted an application for pre-pack. Subsequently, the CD issued an e-mail addressed to its stakeholders that it intended to take recourse to pre-pack and in the e-mail indicated that it shall be appointing Resolution Professional 'RP'. Further, the CD claimed that the RP was appointed and approval of FCs to pre-pack was also obtained. Then, the CD filed an application before the AA to initiate pre-pack and when the matter first came up

for hearing before the AA, several objectors appeared who opposed the Application. The AA granted one-week time to the objectors to file their objections.

After the Objectors filled their applications and when the matter was again taken up by the AA, it passed the order that the Applicant is directed to file reply to each of the IAs along with a synopsis of the pointwise reply within 2 weeks. Rejoinder, if any, be filed within 1 week thereafter. The Applicant was also directed to file replies to the objections already uploaded on the Data Management System. Aggrieved by the above order, the Applicant filed this Appeal.

## NCLAT's Observations

The Appellate Tribunal noticed that cardinal principle of procedure to be followed by the AA is the adherence of Rules of natural justice which is statutorily provided for under Section 424 of the Companies Act, 2013. The time given for objection to the objectors in this case, is in accordance with principle of natural justice which is to be followed by the AA. Further, there is no violation of any Regulations or Rules or provisions of the IBC in giving opportunity to objectors to file their objection nor any such violation has been pointed out before us. It is further relevant to notice that all the objectors who have filed different IAs for objection are the persons who are included in list of unrelated FCs as disclosed by the Appellant itself in his Application filed for pre-pack except few objectors who claimed that although they are allottees, but their names have not been shown in the list.

The Appellate Tribunal was of the view that no error has been committed by the AA in giving opportunity to the objectors to file their objections. The Appellant was also given opportunity to file his rejoinder and reply to the objections, hence he cannot claim that any prejudice is caused to him only because objectors have been given time to file objection. The objectors who have appeared before the AA have huge stakes since they are all homebuyers/allottees and have paid substantial amount to the Appellant running in lakhs and crores. No exception can be taken to their anxiety to ensure that prepack is resorted to in accordance with the procedure prescribed in law. They have come up before the Court only to protect their claims and point out the Court about the non-compliance of the statutory provisions and it is for the AA to consider the objections and take decision on merit. Further, the Appellate reiterated its observations that any observations

made by it in this judgment are only for the purpose of considering as to whether AA has committed any error in granting time to the intervenors/ objectors to file objection. The Appellate made it clear that it has not expressed any opinion on merits of the claim of any of the objectors and it is for the AA to consider and ultimately take a decision as to whether Application under Section 54C deserves to be admitted or rejected.

### Order

The Appellate Tribunal in view of the above observations did not find any merit in the appeal and did not find any error in the orders passed by the AA. Further it stated that no error has been committed by the AA in granting time to objectors to file their objections within a week.

*Case Review: - Appeal Dismissed*

## National Company Law Tribunal (NCLT)

*Outlook Tracom Private Limited Vs. Toshniwal Enterprises Controls Limited, IA (IB) No. 142/KB/2022 in CP (IB) No. 1175/KB/2019, Date of Judgment: 04<sup>th</sup> April 2022*

### Facts of the Case

This application was filed by the Resolution Professional with the approval of the Committee of Creditors 'CoC' seeking liquidation of the Toshniwal Enterprises Controls Limited (Corporate Debtor 'CD'), on the ground that the CoC rejected the submitted Resolution Plan and decided to liquidate the CD. The reliefs sought by Applicant were to pass an order requiring the CD to be liquidated in the manner as laid down in Chapter III as provided under section 33 of the IBC, 2016 or to appoint Mr. Kamal Nayan Jain to act as Liquidator as provided under section 34(1).

The Adjudicating Authority 'AA' had vide its order dated 22.11.2019 on a Petition filed by the Outlook Tracom Private Limited (Financial Creditor 'FC') under section 7 of the IBC, 2016 directed initiation of the Corporate Insolvency Resolution Process 'CIRP' against the CD and had appointed Mr. Kamal Nayan Jain as the Interim Resolution Professional 'IRP' and as the Resolution Professional 'RP'.

In the 17th COC meeting held on 18.01.2022, the COC had voted against the submitted resolution plan with

79.04% voting share and approved the decision to liquidate the CD under section 33 of the IBC. The CoC further decided to sell the CD as per regulation 39C of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and appointed RP as the liquidator.

### NCLT's Observations

The NCLT considered the submission made by the Applicant and perused the record and stated that Section 33(1) of the Code enjoins the AA to pass an order for liquidation of the CD where before the expiry of the insolvency resolution process period or the maximum period permitted for completion of the CIRP the AA does not receive a resolution plan under sub-section (6) of section 30.

### Order

The NCLT in view of the above observations allowed the appeal and ordered the liquidation of the CD. Further it appointed RP as the liquidator of the CD and ordered liquidator to initiate the liquidation process.

*Case Review: - Appeal Disposed*

*ICICI Bank Limited Vs. Prashant Bothra, CP (IB) No. 181/KB/2021, Date of Judgment: 24<sup>th</sup> March 2022*

### Facts of the Case

The Petition was filed under section 95(1) of the IBC, 2016 read with Rule 7(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtor) Rules, 2019 'IRP Rules' and regulation 4(2) of the IBBI (Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Regulations, 2019 'IRP Regulations' by ICICI Bank Limited, seeking to initiate Insolvency Resolution Process against Prashant Bothra, the Personal Guarantor of Kohinoor Paper and Newsprint Private Limited 'KPNPL'.

The facts of the case are that Petitioner had given various loan facilities to KPNPL through facility agreement dated 24th June 2011 which was restructured from time to time. The Deed of Guarantees were executed on 30th March 2015. KPNPL and the Personal Guarantor failed to make payment as per the terms of the Facility Agreement of Rs.34 Crores approx. The default of KPNPL was adjudicated vide an order passed by DRT-III, Kolkata filed by ICICI Bank Limited.

Further KPNPL was admitted under CIRP by Adjudicating Authority 'AA' vide order dated 26 September 2019 on a petition filed by Sendoz Commercials Private Limited. The Resolution Professional 'RP' appointed in the CIRP submitted his report and requested the Personal Guarantor to provide documents to prove that the Personal Guarantor had made payment to ICICI Bank Limited but the IRP did not receive any reply from the Personal Guarantor. Hence, the RP recommended the acceptance of the Petition filed by ICICI Bank Limited under section 95(1) of the Code as the debts owned by KPNPL was guaranteed by Mr. Prashant Bothra and he failed to pay the debts within fourteen days of the service of the notice of demand sent by ICICI Bank Limited.

### NCLT's Observations

The NCLT stated that the petition made by the Petitioner was complete in all respect as required by law. Further, NCLT accepted the Report of the RP that the Personal Guarantor was in default of a debt due and payable.

### Order

The NCLT in view of the above observations admitted the appeal under section 95 of the Code read with rule 6(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 for initiating resolution process against Prashant Bothra, the Personal Guarantor and announced moratorium under Section 101 of the Code.

*Case Review: - Appeal Admitted*





## IBC News

### Leveraging technology and filling up posts are two key factors in increasing the speed in rescuing companies: Rajesh Verma, Secretary MCA

Speaking at an event organized by the NCLT, Shri Rajesh Verma, Secretary-MCA has emphasized on the use of technology and having more manpower could help in speeding up rescuing companies undergoing bankruptcy proceedings. He also informed that the Central government is considering introduction of cross border insolvency framework under IBC to enhance its effectiveness. Pendency of cases in NCLT Benches have been a major concern of insolvency experts to which the government is expediting filling up of vacancies to reduce the backlog.

“Artificial Intelligence (AI) can be used in case resolution, especially in admission of cases,” said Chief Justice (Retd.) Ramalingam Sudhakar, who was the chief guest at the event. IBBI Chairperson Shri Ravi Mittal said that IBBI is always ready to collaborate with NCLT in simplification of the process of resolution. “With more standardization, the speed of resolution of cases can be increased,” added Mittal. Besides the insolvency and bankruptcy cases, the NCLT also handles other cases under the Companies Act. So far, the NCLT has disposed of about three fourth of over 83,000 cases filed before its various benches spread throughout the country since its inception in 2016.

**Source:** *LiveMint.com, March 26, 2022*

<https://www.livemint.com/companies/news/technology-more-manpower-can-speed-up-bankruptcy-resolution-official-11648306694590.html>

### As real estate giants make beeline for insolvency, UP Government orders to set up probe panel

The recent orders of insolvency on two real estate giants in less than a week – Supertech and Logix Citys – have left thousands of home buyers in lurch who have been paying EMIs of their home loans for years. This has prompted the Uttar Pradesh Chief minister Yogi Adityanath to order Industrial Development Department for a probe panel to find out the reasons behind financial strain of real estate



“Things are not streamlined. Uncertainty looms large even after the establishment of Real Estate Regulatory Authority (RERA). Why the developers are declaring themselves bankrupt needs to be probed,” writes media reports citing a senior official of the state government. Some of the major real estate companies going into insolvency due to financial strain include Wave Real Estate Group, Amrapali, Jaypee Group, 3 C Homes, Unitech and Sahara etc. The maximum projects of these companies are in the twin cities of Noida and Greater Noida. Here, most of the housing projects, launched during 2009-2014, remain incomplete.

**Source:** *The New Indian Express, April 02, 2022*

<https://www.newindianexpress.com/nation/2022/apr/02/up-govt-to-form-panel-to-probe-why-ncr-builders-are-going-bankrupt-leaving-buyers-in-the-lurch-2437198.html>

### SpiceJet Reaches an In-Principle Settlement with its Lender, Credit Suisse AG, which Sought its Insolvency

SpiceJet airlines' lender, Credit Suisse AG, had sought insolvency of the airlines over unpaid dues. The airline has now reached in-principal settlement on about \$24 million dues and is now on the way to file consent documents to resolve the dispute. Senior lawyer, Mukul Rohatgi, who is appearing for SpiceJet in a separate case against Kalanithi Maran, informed the Supreme Court regarding the same. The apex court suggested SpiceJet and Kalanithi Maran to sort their ongoing disputes as the April 12 hearing is deferred.

**Source:** *ETNow, March 31, 2022*

<https://www.timesnownews.com/business-economy/companies/relief-for-spicejet-as-airline-reaches-settlement-with-lender-which-sought-its-insolvency-article-90566431>

### Financial Creditors Recover 51% of Admitted Claims in 8 out of 12 Large Cases Recommended by RBI

RBI-recommended cases for resolution under the IBC 2016 framework got financial creditors recover 51% of their admitted claims in eight of the twelve large cases. The twelve firms owed approximately Rs 3.45 trillion to their financial creditors. However, for two stressed firms, Era Infra Engineering and Jaypee Infratech, the CIRP is still going on, and Lanco Infratech and ABG Shipyard are getting liquidated, said by Shri Bhagwat Karad, Minister of State for Finance, while he tabled a written reply in the Rajya Sabha.

**Source:** *Financial Express*, March 17, 2022.

<https://www.financialexpress.com/industry/cases-recommended-by-rbi-financial-creditors-recovered-51-in-eight-large-ibc-cases/2463470/>

### Bankruptcy Judge for LATAM Airlines Affirms \$734 Million to Finance Fees

A court approval of a deal with creditors has been attained by LATAM Airlines Group SA for financing a restructuring proposal. The junior creditors expressed their outcry, they opposed hundreds of millions of dollars in fees associated with the transaction. Due to pandemic, world travel came to a halt. In May 2020, LATAM had filed for Chapter 11 in the US Bankruptcy Court for the Southern District of New York. In Manhattan, US Bankruptcy Judge, James Garrity, approved LATAM's backstop agreement with a creditor group wherein the creditors assured to finance in case no one else steps for the same. The considered deal would provide the 15 backstop creditors with \$734 million in fees to ensure that \$5.4 billion in stock and debt offerings are fully financed. The judge also approved a deal with existing shareholders, including Delta, to backstop \$400 million of a common stock offering and up to \$1.3 billion of a debt offering. This does not include the fees but provides legal protections and expense reimbursements for the shareholders.

**Source:** *Reuters*, March 16, 2022

<https://www.reuters.com/legal/transactional/latam-airlines-bankruptcy-judge-oks-734-million-financing-fees-2022-03-15/>

### Projects with implementation risks should normally be financed by Capital Markets and not by banks using public deposits: Former RBI Deputy Governor

Former RBI Deputy Governor, Shri N. S. Vishwanathan, has opined that India needs a very strong bond market that can fund projects and manage its risks. Speaking at an event organized by industry body ASSOCHAM, Shri Vishwanathan suggested that projects with implementation risks should be funded by capital markets, not by banks using public deposits. He also expressed concerns on high ratio of Non-Performing Assets (NPAs) of Indian banks and suggested that Indian banking system should have NPAs of globally accepted standards.

On this occasion, Shri Santosh Kumar Shukla, Executive Director-Insolvency and Bankruptcy Board of India (IBBI) said that in 2014, the RBI had then thought creating a study of the asset quality review due to the huge NPAs the banks were sitting on. He noted that even though the IBBI has achieved a lot, it is still the beginning progress thenceforth. He informed that the time taken for the resolution deteriorates the value of the asset of the Corporate Debtor. If the CoC considers faster decisions and cooperates with other stakeholders, or if the entities play in the ecosystem in a constructive way, the amount of time will come down. Ajit Pai, NITI Aayog's distinguished expert on Economics and Finance, pointed out that as compared to most of the G20 countries India's debt to the GDP ratio is very high that needs to be brought down.

**Source:** *The Economic Times*, March 10, 2022

<https://economictimes.indiatimes.com/industry/banking/finance/banking/projects-with-implementation-risks-should-be-financed-by-capital-markets-former-rbi-deputy-governor/articleshow/90133289.cms>

### Tata Power's Singapore Joint Venture selected as Successful RP for UP's Power Transmission Firm

Resurgent Power, a joint venture of Tata Power, ICICI Bank and other international investors from abroad, has won the bid to acquire Southeast UP (Uttar Pradesh) Power Transmission Company Ltd. (SEUPTCL) through insolvency under the IBC. The Resolution Professional of SEUPTCL has reportedly provided a Letter of Intent (LOI) to the Resurgent Power as Successful Resolution Applicant of the Corporate Debtor on March 09, 2022.

As per the Resolution Plan, Resurgent Power will infuse equity and raise debt in SEUPTCL at a total enterprise value of more than ₹6,000 crore for implementing and commissioning the elements timely and turnaround the asset that will maximize value for all the stakeholders. The SEUPTCL was incorporated in 2009 as a special power vehicle (SPV) to operate the specified intra-state transmission system for a period of 35 years under public-private partnership model on build-own-operate-maintain & transfer basis. Resurgent Power acquired Prayagraj Power Plant in 2019 followed by System Strengthening Scheme in Northern Region NRSS XXXVI Transmission Limited.

**Source:** *The Economic Times*, March 09, 2022

<https://economictimes.indiatimes.com/industry/energy/power/tata-powers-singapore-jv-wins-bid-to-acquire-seuptcl/articleshow/90106613.cms>

### **No insolvency against deceased Guarantor: NCLT Principal Bench**

NCLT Delhi's Principal Bench has ordered closure of insolvency proceedings under Section 95 of the IBC against a guarantor who died during the process. "It is not a case for recovery of any amount because that will go contrary to the scheme of IBC, 2016, ..... question of continuing the proceedings against such a dead person will not arise," said the Bench. The case is related to Mr. Deepak Puri who stood as a Personal Guarantor (PG) to the Corporate Debtor (CD), namely Moser Baer India Limited. During inquiry under Section 99 of the IBC, it was found that the PG expired on October 02, 2021, at State of California, County of Santa Clara (USA).

**Source:** *Taxscan.in*, March 13, 2022

<https://www.taxscan.in/no-continuing-insolvency-resolution-process-against-personal-guarantor-after-his-demise-nclt/160419/>

### **Dubai implements amendments in Insolvency and other laws to align with the international best practices**

The amendments to the Insolvency Law 2019 (and Insolvency Regulations) bring bonding requirements in line with current practices in the UAE and ensure consistency in the liquidator's reporting obligations in respect of the different types of liquidation procedures available under the law. Besides the insolvency law,

amendments to Data Protection Law of 2020, Electronic Transactions Law of 2017, Trust Law of 2018, Strata Title Law of 2007, and Common Reporting Standard Law of 2018, as well as to the rules of interpretation in various DIFC Laws also came into effect from March 08.

**Source:** *Gulfnews.com*, March 08, 2022

<https://gulfnews.com/business/new-difc-law-amendments-come-into-effect-1.86281077>

### **SEBI asks for Debenture Holder's nod for M&A**

According to SEBI, clearance of any scheme of merger and acquisition (M&A) shall require mandatory prior approval of debenture holders. This initiative is aimed at empowering investors in debentures. The new rule will ensure that the debenture holders do not get short-changed. However, the companies which frequently issue debentures, particularly financial service providers, have argued that this would create duplicity as the process already requires approvals of NCLT and RBI.

**Source:** *Times of India*, February 28, 2022.

<https://timesofindia.indiatimes.com/business/india-business/debenture-holders-nod-needed-for-mas-sebi/articleshow/89878310.cms>

### **Suspended Board of Directors Has No Power to Appoint a Resolution Professional: NCLAT, Chennai**

The suspended Board of Directors under IBC has no power to appoint or replace a resolution professional, has held the NCLAT, Chennai. This power lies with Committee of Creditors (CoC) and Adjudicating Authority (AA). As per the terms of Section 27, the RP may be replaced during CIRP by the CoC with a 66% majority of voting share. In case no name is proposed by the CoC, the AA is called upon to propose a person's name on recommendations of the IBBI.

**Source:** *Live Law.in*, March 02, 2022

<https://www.livelaw.in/ibc-cases/nclat-chennai-ibc-resolution-professional-committee-of-creditors-coc-193138>

### **IBBI is fully clothed with jurisdiction to regulate payment of remuneration of RP and IRP: NCLAT**

In a landmark judgement, the NCLAT has said that the Insolvency and Bankruptcy Board of India (IBBI) has full jurisdiction to regulate payment of fee to IRP and RP by framing regulation and also by issuing executive

instructions till regulations are not framed. The court further said that the issue of payment of fee to the IRP/RP occur very frequently which needs to be regulated by IBBI, the Regulating Authority under the IBC.

In this matter *Insolvency Professional Vs. J P Engineers*, the IRP in the first meeting of the CoC demanded a fee of ₹ 2 lakh per month but the CoC approved ₹ 50,000 per month. Finally, the case reached to the Appellate Tribunal. Hearing the matter, the Principal Bench of the NCLAT comprising Justice Ashok Bhushan, Chairperson-NCLAT and Technical Member Mr. Sumit Bansal, relied on Section 240 (1) of the IBC under which IBBI (Insolvency Professionals) Regulations, 2016 has been made. The Regulation 7 (2) (h) states that the IP has to abide by the Code of Conduct specified in the First Schedule. Furthermore, the Item 25 of the First Schedule, requires an IP to provide services for remuneration which is charged in a transparent manner, is a reasonable reflection of the work. “The mere fact that IBBI has been asked to submit its recommendations by the AA, in the present case, we see no reason to question,” said the Court and directed the AA to dispose of the application after receiving recommendations from IBBI.

**Source:** *Live Law.in*, February 25, 2022.

<https://www.livelaw.in/ibc-cases/ibbi-nclat-irp-sumit-bansal-insolvency-professional-v-committee-of-creditors-of-jp-engineers-192785>

## Several Airlines heading to bankruptcy, Bloomberg Study

Though Covid-19 restrictions are being eased out but still the good days are a distant dream for airlines, globally. Bloomberg's analysis didn't cover non-operational and chartered airlines and removed carriers with the smallest fleets. Of the lowest scorers, six are in Asia, where inter-regional air passenger traffic is still 61% below pre-pandemic levels, versus about 25% for Europe and only 0.5% in the U.S., according to aviation analytics firm Cirium.

**Source:** *Bloombergquint.com*, February 25, 2022.

<https://www.bloombergquint.com/business/the-airlines-still-facing-risk-of-bankruptcy-as-travel-returns>

## Supreme Court rejects Customs' Claim for not applying to the Resolution Professional

In his rejoinder, the Commissioner of Customs argued that no notice was issued to the Authority at Mangalore and there was certain confusion as to whether the operational debt as defined under Section 5(21) of the IBC would cover the claim. However, the Supreme Court relied on the judgement in the matter of *Ghanashyam Mishra & Sons Pvt. Ltd. Vs. Edelweiss Asset Reconstruction Company Ltd. and others*, in which it was held that once a Resolution Plan is approved, no creditor can take steps to recover claims which are not part of the Plan. Accordingly, the claim of the Customs Department was not admitted, and the appeal of Ruchi Soya Ltd. against Karnataka High Court was allowed.

**Source:** *Livelaw.in*, February 24, 2022.

<https://www.livelaw.in/top-stories/ibc-claim-which-is-not-part-of-resolution-plan-doesnt-survive-supreme-court-192747>

## Session Court Judges Don't Have Jurisdiction to Try Offences under the IBC: Bombay High Court

The Bombay High Court has stated that the Session Court Judges are not empowered to try offences under the IBC 2016 but only the special courts constituted under the Companies Act. In this case the petitions had filed a plea, heard by Justice SK Shinde, assailing an order of the Mumbai Sessions Court according to which summons were issued to them in a complaint of the Insolvency and Bankruptcy Board of India (IBBI).

The petition stated that the Sessions Judge did not have the jurisdiction to entertain the complaint filed by the IBBI and added further that as per Section 236 of IBC, the Special Courts under the Companies Act were empowered to try offences under the IBC as Court of Sessions. It was further submitted before the High Court, that the objective behind Section 236 was speedy trial of offences under the IBC. Relying on the intent of the legislators to ensure speedy trial of offences under IBC, Justice Shinde noted, “If trials in offences under IB Code were also to be tried by the Special Court comprising of Sessions Judge or Additional Sessions Judge, it would frustrate to object of the speedy trial, for which the Special Courts have been established.”. The court further stated that the courts of



Sessions Judges are to try offences under the Companies Act and the ones of Magistrates to try offences under the acts other than the Companies Act. The order issued against the petitioners was reckoned as being without jurisdiction and unsustainable and was hence quashed.

**Source:** *Indiatoday.in*, February 17, 2022

<https://www.indiatoday.in/law/story/court-of-sessions-judge-not-empowered-to-try-ibc-offences-bombay-hc-1914407-2022-02-17>

### **Ireland's Property Developer Gets His Savings in 'Irish Pension Scheme' through UK's Bankruptcy Law Property**

Businessman Bernard McNamara and his wife had set up a property developing company 'Simcoe Industries' in Ireland. In 2012, on his bankruptcy application, the UK High Court declared him bankrupt. However, the matter of his pension became a contentious issue as it was allowed as per the UK law but not as per the Ireland's bankruptcy law. Accordingly, the joint trustees of McNamara's bankruptcy also had tried to claim his pension investments to use in the bankruptcy proceedings, arguing that these were part of his estate. The UK court referred the matter to the European Court of Justice (ECJ) due to the conflict between the laws of both the countries. In its judgement, ECJ held that the outcome depended on there being no public interest in McNamara's pension funds being handed over to creditors. Subsequently, the UK High Court confirmed its ruling on February 15, 2022, paving the way for McNamara to access his €8.4 million (~\$11.4 million). An LCP response to the ruling noted, "Once the ECJ had supported the original ruling it seemed unlikely the High Court would need to change the original decision."

**Source:** *Pensionsexpert.com*, February 17, 2022

<https://www.pensions-expert.com/Law-Regulation/High-Court-confirms-Irish-pension-exclusion-from-bankruptcy-case?ct=true>

### **Chinese Businessman, Guo Wengui, Approached US Bankruptcy Court for Individual Bankruptcy Protection**

Guo Wengui, a Chinese Businessman, has filed for individual bankruptcy protection in a U.S. bankruptcy court in Bridgeport. He had listed assets in the range of \$50,001 to \$100,000, and liabilities between \$100 million

and \$500 million. The list of creditors who have claims against Guo includes Pacific Alliance Asia Opportunity Fund's largest claim of around \$254 million. The fund had been engaged in a legal battle with him for four years. As per media reports, he has liability of about \$88 million unpaid loans borrowed between 2008 to 2011.

**Source:** *Reuters.com*, February 17, 2022

<https://www.reuters.com/markets/us/chinese-businessman-guo-wengui-files-bankruptcy-us-court-2022-02-16/>

### **Resolution Plan once approved by CoC leaves no Scope for Negotiation: NCLAT**

The NCLAT set aside the order of the NCLT-Mumbai bench, which directed the administrator of the debt-ridden DHFL to put the second settlement proposal before its lenders for consideration by erstwhile promoter Kapil Wadhwan. NCLAT stated that the direction of the NCLT was passed even after the CoC of DHFL had by an overwhelming majority approved resolution plan. "Once the requirements of the IBC have been fulfilled, the NCLT and the NCLAT are duty-bound to abide by the discipline of the statutory provisions. Neither of them has an unchartered jurisdiction in equity," said the NCLAT.

**Source:** *Business Standard*, January 31, 2022.

[https://www.business-standard.com/article/companies/dhfl-nclat-sets-aside-order-that-directed-to-consider-wadhwan-s-2nd-offer-122013000351\\_1.html](https://www.business-standard.com/article/companies/dhfl-nclat-sets-aside-order-that-directed-to-consider-wadhwan-s-2nd-offer-122013000351_1.html)

### **Even if Notice U/S 8 was Issued Pre-Amendment Insolvency, the Application must Meet Threshold as Per Amended S.4 of IBC**

The High Court of Kerala in the matter of M/s Tharakan Web Innovations Pvt. Ltd. v. National Company Law Tribunal & Ors. held that the litmus test is whether the default exists as defined in amended Section 4 of the IBC w.e.f. 24.3.2020, increasing the default amount from Rs. 1 Lakh to Rs. 1 Crore, on the date of the application, and not on the date when the notice was sent to the Corporate Debtor u/s 8 of the Code. The High Court observed that "From the date of the amendment, Part II of the IBC can apply only to matters relating to insolvency and liquidation of corporate debtors, where the minimum amount of default is Rs.1 Crore. Once that is the position,

the application of Part II itself is taken away with effect from 24.03.2020 as far as defaults less than Rs.1 Crore are concerned and hence no application can be filed after 24.03.2020 regarding an amount where the default is less than Rs.1 Crore."

**Source:** *Livelaw.in, February 01, 2022.*

<https://www.livelaw.in/ibc-cases/iinsolvency-application-must-meet-threshold-as-per-amended-s4-ibc-though-notice-u/s-8-was-issued-pr-e-amendment-kerala-high-cour-190906>

### **Increase in Insolvency numbers in U.K. by 20% than last year**

The latest insolvency figures for February 2022 have shown a 20% increase in corporate insolvencies compared to February last year in U.K. Further the figures released for December 2021 by the U.K. government's Insolvency Service also showed that it was 33% higher than the number registered in December 2019. In December 2021, there were 1,486 insolvencies, compared to 1,237 in December 2020, and 1,120 in December 2019.

**Source:** *Recuriter.co.uk, February 03, 2022*

<https://www.recuriter.co.uk/news/2022/02/insolvency-numbers-20-higher-last-year>

### **After approval of Resolution Plan, IT department cannot issue notices for dues prior to CIRP Commencement Date: High Court**

Nagpur Bench of the Bombay High Court has ruled that the Income Tax (IT) department cannot issue notices for raising fresh claims to a Corporate Debtor, after its resolution plan is approved under IBC, on the ground that its assessing officer believes the income chargeable has escaped assessment. The court quashed the notices issued by the IT Assessment Officer issued to the CD on March 25, 2021, seeking to reopen 2014-15 while the Resolution Plan was approved by NCLT on June 03, 2019. The same was subsequently approved by the NCLAT on January 24, 2020.

"The IT authorities ought to have been diligent to verify previous years assessment of a debtor as per the law and to raise claim within time before RP. In this case the authorities failed to do so, and therefore, the claim stood extinguished," said a division bench comprising Justice

Sunil Shukre and Justice Anil Pansare. The bench noted that there could be a contingency where statutory claim is raised after the approval of the Resolution Plan, owing to receipt of information of Corporate Debtor having suppressed certain facts while filing returns of previous years. The HC quashed IT notices issued to the Corporate Debtor, Murli Industries Limited, and made crystal-clear that the IT department cannot issue a notice to a corporate debtor asking it to submit a return for assessment year prior to resolution plan's approval date under the IBC. Earlier, the Corporate Debtor, had filed return for the assessment Year 2014-15 on September 09, 2014, declaring a loss of over ₹ 28 crore.

**Source:** *Times of India, January 26, 2022.*

<https://timesofindia.indiatimes.com/city/nagpur/no-i-t-notices-after-ibc-nod-to-resolution-plan-hc/articleshow/89124168.cms>

### **NCLAT directed CoC to Review Assigning ₹1 to DHFL's Bad Loans**

The NCLAT on January 28, 2022, directed the CoC to reconsider Piramal Capital and Housing Finance (PCHF) assigning a token value of only ₹1 to the bad loans of Dewan Housing Finance Corp. Ltd (DHFL). PCHF has acquired DHFL in 2021 through a Resolution Plan under the IBC. The petitioner, 63 Moons Technologies Ltd led by Jignesh Shah, questioned the "commercial wisdom" of the CoC in approving the resolution plan. It also pointed out that assigning a value of ₹1 would mean that the amount will be written off by the lenders, and recovery, as and when it happens, will be credited to the resolution applicant.

**Source:** *Livemint.com, January 28, 2022.*

<https://www.livemint.com/companies/news/nclat-asks-coc-to-reconsider-assigning-re-1-to-fraud-transactions-in-dhfl-case-11643275932167.html>

### **A claimant cannot be denied perusal of the approved Resolution Plan: NCLAT**

In the matter of Association of Aggrieved Workmen of Jet Airways (India) Limited v. Jet Airways (India) Ltd, the NCLAT has held that after approval by the Adjudicating Authority (AA), the Resolution Plan is no more a confidential document. Therefore, an aggrieved claimant

cannot be denied its perusal. This judgement has been delivered by a bench comprising of Justice Ashok Bhushan (Chairperson) and Dr Ashok Kumar Mishra (Technical Member). The question for consideration before the bench was whether the appellant, herein the Operational Creditors – an association of aggrieved workmen of Jet Airways (India) Ltd., who has filed an appeal against the order of the Adjudicating Authority is entitled to behold a copy of the Resolution Plan or any of its part in the proceedings? However, since the appellant was not entitled to participate in the meeting of the CoC, thus, during CIRP they were not entitled for the copy of the Resolution Plan. Section 24 of the IBC read with Regulation 21(3) (iii) of the Process Regulations 2016 explicates that the copy of the documents is for those who participate in the process.

**Source:** *Livelaw.in, January 23, 2022.*

<https://www.livelaw.in/ibc-cases/ibc-insolvency-and-bankruptcy-board-of-india-insolvency-professionals-regulation-2016-nclt-rules-2016-cirp-proceedings-190157>

### **NCLAT rejects SREI's Resolution Plan for Deccan Chronicle on the ground 'Discrimination' in the allocation of funds among the Creditors**

In its order, the NCLAT termed the Resolution Plan of SRIE Group for acquisition of the Deccan Chronical Holdings Ltd. (DCHL) 'nonsustainable' and directed the CoC to distribute the resolution amount in conformity to the provisions of IBBI (CIRP), 2016. DCHL, which has a payable dues of ₹ 8,180 crore from 37 Financial Creditors, is undergoing through insolvency process on a petition filed by Canara Bank. In its Resolution Plan, approved by the CoC, the SREI Group had offered an upfront cash of ₹350 crore to the financial creditors. However, IDBI, a financial creditor, challenged the Resolution Plan on the ground that the amount offered was less than its pro-rata basis entitlement and opposed classifying of financial creditors and it should be treated at par with others.

**Source:** *The Economic Times, January 24, 2022*

<https://economictimes.indiatimes.com/news/india/nclat-sets-aside-nclt-order-approving-sreis-resolution-plan-for-deccan-chronicle-holdings/articleshow/89097340.cms>

### **Section 29A(h) IBC will stand attracted on mere invocation of personal guarantee by a creditor, notwithstanding the fact that the insolvency process was initiated by another creditor: SC**

The SC has delivered a judgment on the scope of Section 29A(h) of the IBC specifying the categories of persons who are not eligible to be resolution applicants. Section 29A(h) refers to the persons whose guarantees stand invoked by the creditors of the corporate debtor. “Section 29A(h) IBC will stand attracted on mere invocation of personal guarantee by a creditor, notwithstanding the fact that the insolvency process was initiated by another creditor,” said a bench comprising comprising Justice Sanjay Kishan Kaul and Justice MM Sundresh. The Court noted that Section 29A protects and balances the interest of the CoCs and the CD.

**Source:** *Livelaw.in, January 18, 2022.*

<https://www.livelaw.in/ibc-cases/section-29ah-ibc-guarantor-barred-from-submitting-resolution-plan-if-guarantee-was-invoked-by-any-creditor-regardless-of-who-initiated-insolvency-supreme-court-189779?infinitescroll=1>

### **Sri Lanka's Financial Crisis puts the country on the Brink of Bankruptcy**

Sri Lanka has about \$7.3 billion in domestic and foreign loans which it needs to repay in next by the end of this year, said media reports. This includes \$500-million international sovereign bond repayment due in January. According to media reports, a spurt in printing money to square off domestic loans and foreign bonds drove inflation to 12.1% in December 2021 from 9.9% in November. The pandemic has led to loss of tourism, high-government spending, and tax-cuts eroding state revenues. In December 2021, food price inflation soared to 22.1 percent from 17.5 percent, the country's central bank announced.

**Source:** *Moneycontrol.com, January 03, 2022.*

<https://www.moneycontrol.com/news/business/sri-lanka-on-the-brink-of-bankruptcy-with-record-high-inflation-and-mounting-dues-7892791.html>

### MCA to Firm-Up the Framework for Cross-Border Insolvency

The IBC Amendment Bill is likely to get a push in the upcoming Budget session by the Government. As part of it, several changes to the CIRP are to be made to avoid delays in the resolution process. The framework when enacted as part of the IBC would further aid in doing business in India. “We are discussing the comments received on the consultation paper... We are approaching the suggestions with an open mind,” a senior official reportedly told to media. The MCA had in November 2021 invited public comments on the proposed legal framework for cross border insolvency.

**Source:** *The Indian Express*, December 31, 2021.

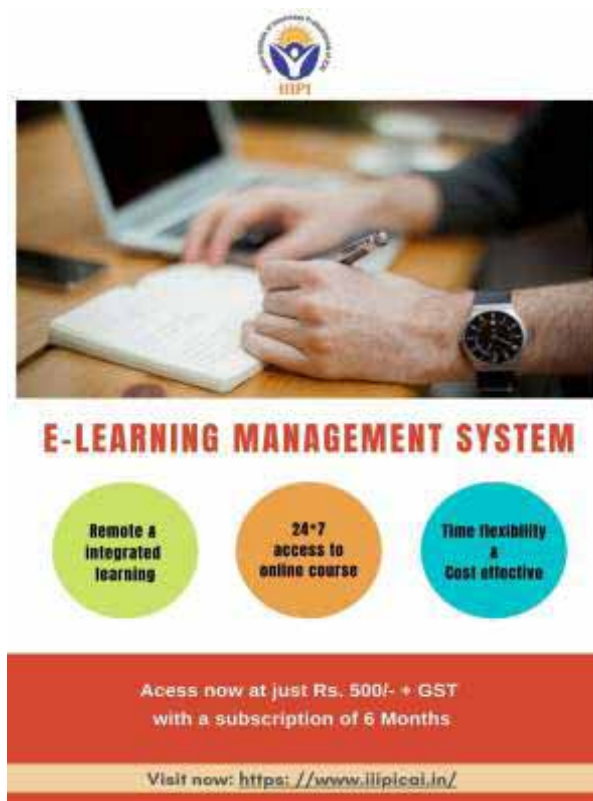
<https://indianexpress.com/article/business/panel-proposal-to-speed-up-resolution-30-days-for-nclts-to-decide-on-plan-7698836/>

NCLT orders CIRP of Ind-Barath Power Infra Ltd. promoted by MP Ram Krishan Raju

NCLT Hyderabad has given go ahead for Corporate Insolvency Resolution Process (CIRP) Ind-Barath Power Infra Ltd on a CIRP petition filed by the Punjab National Bank. The Company is promoted by Mr. Ram Krishan Raju, a rebel Lok Sabha MP of YSR Congress. According to media report, the company took about Rs. 1,384 crore loans from various banks. Aggrieved with the defaults the banks formed a consortium under in the leadership of Punjab National Bank which has about Rs. 327 crore dues to the Ind-Barath. In its order the NCLT also directed the registry to send a copy of the order to the Registrar of Companies to enable him to write appropriate remarks against the Company.

**Source:** *Times of India*, January 02, 2022

<https://timesofindia.indiatimes.com/city/hyderabad/insolvency-ordered-against-raju-firm-for-1-3-k-cr-loan-default/articleshow/88640796.cms>



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# Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016

## First Schedule

[1Under Regulation 7(2)(h)]

### Code of Conduct for Insolvency Professionals



#### Integrity and objectivity

1. An insolvency professional must maintain integrity by being honest, straightforward, and forthright in all professional relationships.
2. An insolvency professional must not misrepresent any facts or situations and should refrain from being involved in any action that would bring disrepute to the profession.
3. An insolvency professional must act with objectivity in his professional dealings by ensuring that his decisions are made without the presence of any bias, conflict of interest, coercion, or undue influence of any party, whether directly connected to the insolvency proceedings or not.

[3A. An insolvency professional must disclose the details of any conflict of interests to the stakeholders, whenever he comes across such conflict of interest during an assignment<sup>2</sup>.]

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

#### Independence and impartiality

5. An insolvency professional must maintain complete independence in his professional relationships and should conduct the insolvency resolution, liquidation or bankruptcy process, as the case may be, independent of external influences.
6. In cases where the insolvency professional is dealing with assets of a debtor during liquidation or bankruptcy process, he must ensure that he or his relatives do not knowingly acquire any such assets, whether directly or indirectly unless it is shown that there was no impairment of objectivity, independence or impartiality in the liquidation or bankruptcy process and the approval of the Board has been obtained in the matter.
7. An insolvency professional shall not take up an assignment under the Code if he, any of his relatives, any of the partners or directors of the insolvency

professional entity of which he is a partner or director, or the insolvency professional entity of which he is a partner or director is not independent, in terms of the Regulations related to the processes under the Code, in relation to the corporate person/ debtor and its related parties.

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

[8A. An insolvency professional shall disclose as to whether he was an employee of or has been in the panel of any financial creditor of the corporate debtor, to the committee of creditors and to the insolvency professional agency of which he is a professional member, and the agency shall publish such disclosure on its website.]

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

#### Professional Competence

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

....to be continued.

<sup>1</sup> Substituted by Notification No. IBBI/2017-18/GN/REG027, dated 27th March, 2018 (w.e.f. 01.04.2018). Before substitution, it stood as under: "[Under regulation 7(2)(g)]"

<sup>2</sup> Inserted by Notification No. IBBI/2019-20/GN/REG045, dated 23rd July, 2019 (w.e.f. 23.07.2019).

<sup>3</sup> Inserted by Notification No. IBBI/2017-18/GN/REG027, dated 27th March, 2018 (w.e.f. 01.04.2018)

### IIPI News



IBBI renewed IIIPI's Certificate of Registration as an IPA for next five years which will be valid till 27<sup>th</sup> November 2026. Dr. Ashok Haldia, Chairman, IIIPI-Board and CA. Rahul Madan, MD-IIIPI receiving renewed "Certificate of Registration" from Shri Sudhaker Shukla, WTM, IBBI.



Dr. M. S. Sahoo, former Chairman, IBBI addressing 02nd EDP Batch on "Mastering Avoidance/Pufe Forensics under IBC" organized by IIIPI on 22nd - 24<sup>th</sup> March 2022.



Shri Manishkumar M. Chaudhari, Chief General Manager, IBBI addressing Webinar on "Valuation under IBC: Challenges & Expectations" organized by IIIPI on Mar 11, 2022.



A snapshot of the 02nd EDP Batch on "Mastering Avoidance/Pufe Forensics under IBC" organized by IIIPI on 22nd - 24th March 2022.



Webinar on "Valuation under IBC - Challenges & Expectations" organized by IIIPI on Mar 11, 2022



CA. Durgesh Kumar Kabra, Director, IIIPI addressing Webinar on 'Common Issues On Monitoring/Inspection & Disciplinary Matter' organized by IIIPI on March 04, 2022.



Dr. Ashok Haldia, Chairman-IIIPI Board and CA. Rahul Madan, MD-IIIPI in a meeting with newly appointed IBBI Chairperson Shri Ravi Mittal on 15th February 2022.



Webinar Organised by IIIPI on “Union Budget – Tax Provisions on IBC” on 11th February 2022



EDP First Batch on “Mastering Avoidance/PUE Forensics under IBC” Organised by IIIPI from 8th to 10th February 2022



Shri Santosh Shukla (IBBI -ED) held inaugural session and Adv. Ashish Makhija & Adv. Madhusudhan Sharma spoke during the Webinar held by IIIPI on 04th February 2022 on Analysis of Recent IBC Case Laws.



Shri Sudhaker Shukla, WTM, IBBI, addressing IIIPI Webinar on “Office Infrastructure an Usage of Technology by IPs” on 28th January 2022.



Shri Shivram Bairwa, Registrar, NCLT addressing the EDP Legal 2nd Batch “Mastering Legal Skills, Pleadings and Court Processes under IBC” organized by IIIPI from 19th to 22nd January 2022 through online mode



## KNOW YOUR IIIPI



Mr. Sim Kwan Kiat, Head: Restructuring and Insolvency Practice Rajah & Tann, Singapore, addressing session on “Cross Border Insolvency” organized by IIIPI in association with British High Commission on Wednesday, February 23, 2022.



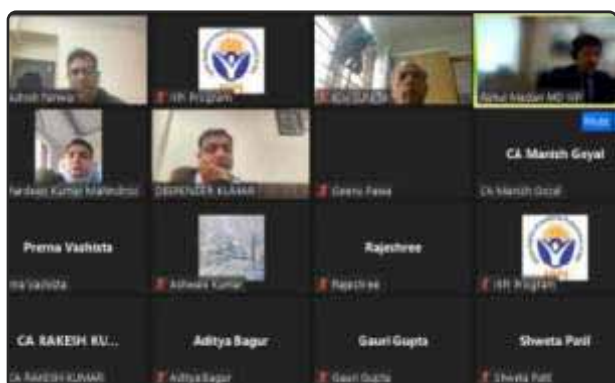
Ms. Shikha Parekh, Senior Financial Policy Advisor, British High Commission, FCDO addressing session on “Cross Border Insolvency” organized by IIIPI in association with British High Commission on Wednesday, February 23, 2022.



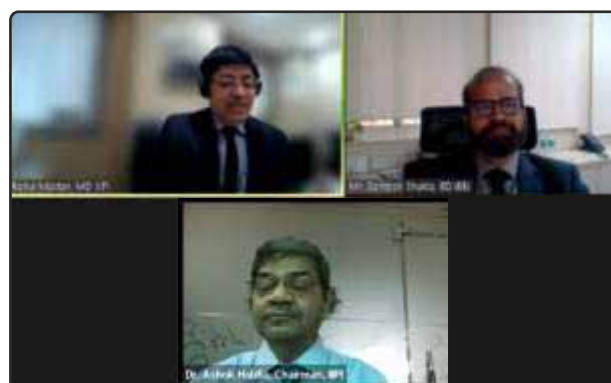
A snapshot of the EDP Legal 2nd Batch “Mastering Legal Skills, Pleadings and Court Processes under IBC” organized by IIIPI from 19th to 22nd January 2022 through online mode



EDP on “Mastering Legal Skills, Pleadings, and Court Processes under IBC” (Virtual Mode) organized by IIIPI from 9th to 12th March 2022



Snapshot of the ongoing LIE Preparatory Classroom (Virtual) Program on 14th January 2022

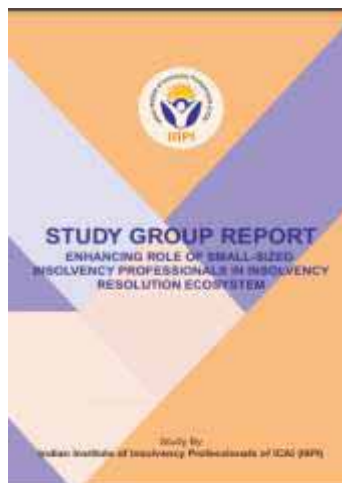


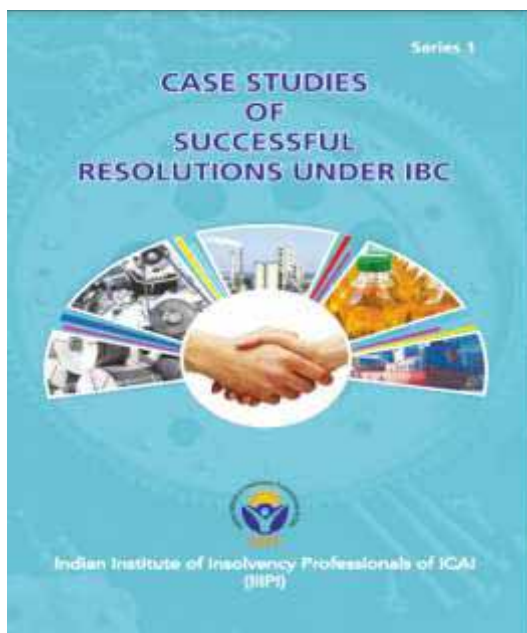
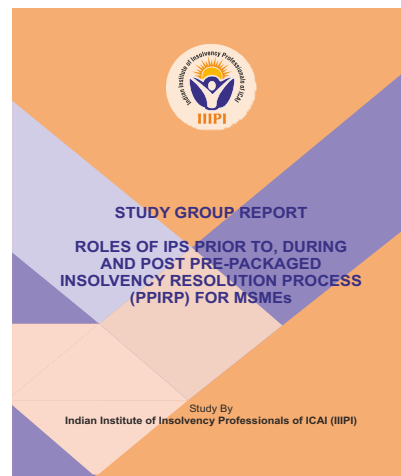
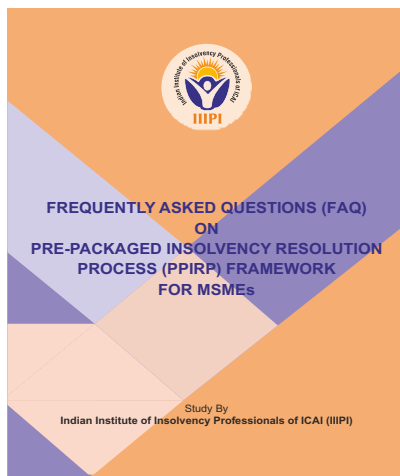
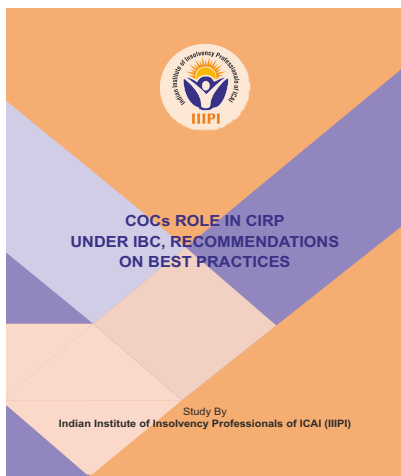
Shri Santosh Shukla, Executive Director, IBBI addressing Webinar on ‘Common Issues on Monitoring/Inspection and Disciplinary Matters’ Organized by IIIPI on January 14, 2022.



## IIPI's PUBLICATIONS

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 soft copies (downloadable PDF) of all these publications are available on IIPI website (<https://www.iiipicai.in/publications/>).





# Media Coverage

**BusinessLine**  
27 Mar 2022

## Yadav calls for expansion of pre-pack insolvency regime

Says all corporate debtors must be allowed to use it

**KR SRIVATS**  
New Delhi, March 26

The Centre must extend the facility of pre-packaged insolvency to all corporates and not only MSMEs as is the case now, Union Labour Minister Bhupender Yadav suggested on Saturday. This will allow lenders to improve their rate of recovery, Yadav said in his virtual address at an international conference on the IBC, organised by the Indian Institute of Insolvency Professionals of ICAI (IIPI) and insolvency regulator IBBI.

**'Need of the hour'**  
"The most pressing need right now is to bring in force the pre-pack insolvency concept which allows players



Bhupender Yadav

to decide on a plan and zero in on a buyer ahead of the corporate insolvency process. Although this approach can be used in India for MSMEs as of now, the need of the hour is to allow players to use it for all corporate debtors," said Yadav.

A pre-packaged insolvency is an arrangement where the resolution is negotiated with a buyer before the appoint-

ment of an insolvency professional. It is a cost effective mechanism that quickens the resolution process.

### Evolving code

"Given the high degree of globalisation in recent times together with successful implementation of proposed developments of the existing IBC code, it is imperative to align the Indian insolvency system with best international practices for managing cross border insolvency," Yadav said.

"Over next five years, IBC will continue to evolve in sync with emerging market realities and reach more pivotal milestones to discuss around its tenth anniversary," he added.

## Business Standard

IBC has brought change in attitude of lenders, borrowers: Goyal

Goyal said IBC is a game changing reform compared to the past, when resolution would take probably decades

Press Trust of India | New Delhi

Last Updated at November 25, 2021 11:04 IST

The Insolvency and Bankruptcy Code (IBC) has brought about change in the attitude of both lenders and borrowers, besides promoting ease of doing business, Commerce and Industry Minister Piyush Goyal said on Thursday.

Goyal said IBC is a game changing reform compared to the when resolution would take probably decades.

"...we have come to a situation where we can reasonably expect resolution to happen within a stipulated timeline with that credibility of India and its financial architecture."

credibility of India and its financial architecture.

Any borrower who does not pay back his dues will be called to task, Goyal said.

The minister also called upon IIPI members to guide principles in work — integrity, competence, confidentiality.

"And if we follow these five principles, that would kind of..."

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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)

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0120-2975680/81/82/83

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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.

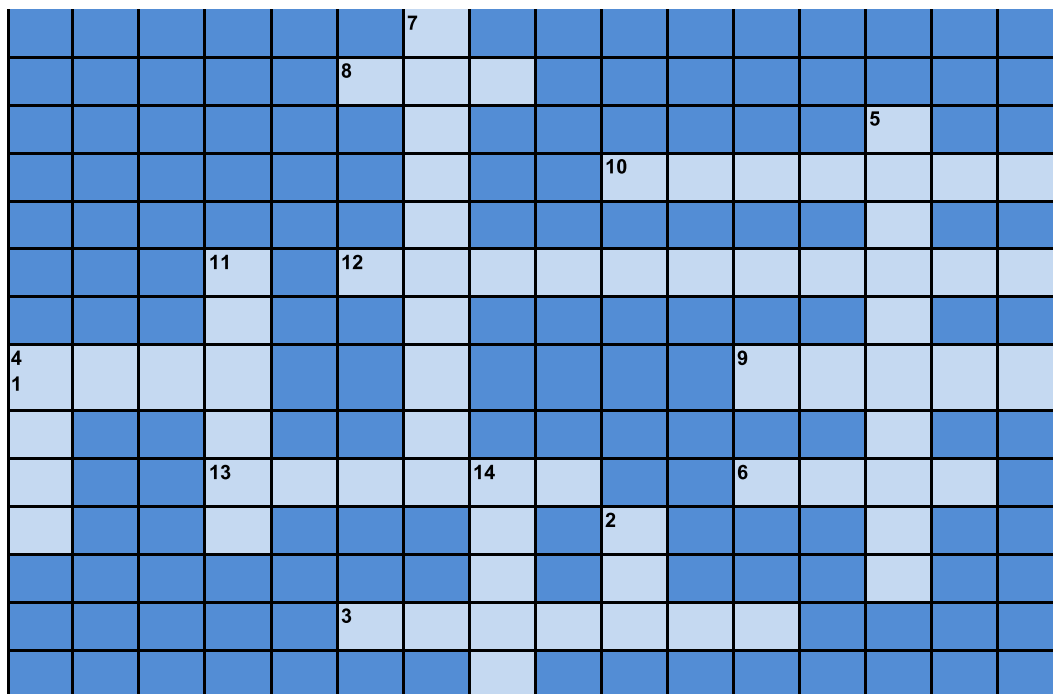
We welcome your feedback on the current issue and the suggestions for further improvement. Please write to us at [iiipi.journal@icai.in](mailto:iiipi.journal@icai.in)

### Editor

The Resolution Professional



## IBC Crossword



### Across

3. A \_\_\_\_\_ envisages the resolution of the debt of a distressed company through a direct agreement between secured creditors and the existing owners or outside investors, instead of a public bidding process.
4. The Supreme Court has held that limitation does not commence when the debt becomes due but only when a default occurs is related to the interpretation of which Section of the IBC?
6. The Supreme Court judgement in the matter of *Bank of Baroda Vs MBL Infrastructures Ltd* (2019) is related to the interpretation of which section of the IBC?
8. How many cases of CIRP were withdrawn under Section 12 A by the end of December 2021?
9. The IBBI (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017 states that a workman or an employee of the Corporate Debtor shall submit proof of claim to the IRP in person, by post or by electronic means in \_\_\_\_\_?
10. An insurance Company registered under the Insurance Regulatory and Development Authority can pick up to ..... % equity share capital of an Insolvency Professional Agency.
12. Section 11 of the Civil Procedure Code deals with \_\_\_\_\_?
13. Within how many days from the last date of submission of claims shall the claims be verified by the liquidator?

### Down

1. The International Monetary Fund (IMF) has reported that India's economy is projected to grow by \_\_\_\_\_ % in the next financial year (FY23).
2. Which section of the IBC, 2016, gives the Adjudicating Authority power to allow withdrawal on application by a CIRP applicant with 90 per cent voting share approval of CoC?
5. In the matter of which Corporate Debtor, the NCLAT has held that an approved resolution plan is not a confidential document?
7. Which day is observed as Samvidhan Diwas (Constitution of India Day)?
11. Related party in relation to a Corporate Debtor includes any person in whom the Corporate Debtor controls more than \_\_\_\_\_ % of voting rights on account of ownership or a voting agreement.
14. An IP has to maintain records in respect of assignments undertaken by him for a period of \_\_\_\_\_ years?

### Answer Key: IBC Crossword, January 2022

- |          |                  |               |         |                  |
|----------|------------------|---------------|---------|------------------|
| 1. 8.5   | 2. Sudarshan Sen | 3. 421        | 4. 19   | 5. Section 30    |
| 6. Micro | 7. NSE           | 8. UNCITRAL   | 9. SIX  | 10. GCCL I & P L |
| 11. SREI | 12. 4,093        | 13. Danaharta | 14. 238 | 15. Spain        |



## 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.
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  - In case the article is found suitable for publication, the same shall be communicated to the author/s at the earliest.

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