

Role of Authorised Representative under IBC, 2016 – Neglected but Critical



*The provision of Authorized Representative (AR) was introduced by IBBI via Regulation 16 A of IBBI (Insolvency Resolution Process of Corporate Persons) Regulations 2016 through a notification on July 03, 2018. Though an AR can be appointed for debenture holders and fixed depositors etc., the numbers and complexities are perceived to be higher in case of real estate cases. The role of an AR in insolvency processes has gradually evolved with the judicial pronouncements and practice of the insolvency processes in past over five years of implementation of the IBC. However, there exists several loopholes related to the roles, responsibilities, and rights of the ARs. In the present article, the author deals with pros and cons of the roles of AR. **Read on to know more...***



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1. AR under Insolvency and Bankruptcy Code, 2016 (IBC)

The Insolvency and Bankruptcy Board of India (IBBI) under IBBI (Insolvency Process for Corporate Persons) Regulation, 2016 (hereafter, Regulations) provides the provision of AR which states, “The interim resolution professional shall select the insolvency professional, who is the choice of the highest number of financial creditors in the class in Form CA received under sub-regulation (1) of regulation 12, to act as the authorized representative of the creditors of the respective class...” However, IBC and Regulations thereof do not define the same under “definitions”.

2. Rationale behind introduction of Regulation 16A

The provision of AR has been introduced into the Corporate Insolvency Resolution Process (CIRP) so that representatives of various class of creditors can put their mandate at the CoC and thus take part in the process effectively. Otherwise, it will be practically difficult for the large number of members of each class to participate in the CoC meetings. The AR is appointed to communicate the decision taken by majority of creditors on the agenda items proposed for resolution at the CoC. The role of AR in the insolvency resolution process under IBC is found to be of paramount importance in case of real estate matters where

homebuyers constitute a class of creditors. There are AR appointments for debenture holders and fixed depositors etc., as well but the numbers and complexities are perceived to be higher in case of real estate matters.

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Moreover, seeking the vote or mandate of the class of creditors pose several challenges. In the context of discussion with regard to the issue of providing voting rights to operational creditors, the Report of the Insolvency Law Committee¹ (ILC), of March 2018 stated that “...a mechanism requires to be provided in the Code to mandate representation in meetings of ---and all classes of financial creditors which exceed a certain number, through an authorised representative, This can be done by adding a new provision to Section 21 of the Code. ...Additionally, the representative shall act and attend the meetings on behalf of the respective class of financial creditors and shall vote on behalf of each of the financial creditor to the extent of voting share of each such creditor, and as per their instructions.”.....The Insolvency Law Committee Report submitted in February 2020, para 10.8 states, “the committee suggested that in order to maintain the efficiency of the CoC, they should be represented by an authorised representative in the same manner as provided under section 21(6A) for security holders, deposit holders and other classes of creditors”(para 10.8). The role of an AR in CIRP gradually evolved with the judicial pronouncements and practice of the insolvency process during last five years of implementation of the IBC.

3. Eligibility Criteria for an AR

Regulation 4A of the Regulations deals with the choice of AR. As per this regulation, the basic criteria required to be fulfilled for an eligible AR is same as an IRP/RP i.e., the person concerned must be registered with IBBI as an IP, must be independent of the Corporate Debtor (CD) and the Resolution Professional (RP) and must not be subject to any disciplinary proceedings. He must have a valid Authorisation for Assignment (AFA) from the concerned Insolvency Professional Agency (IPA).

IBBI through a notification dated July 03, 2018, inserted a Regulation 4 A in the Regulation 4 which was further amended through notifications dated August 07, 2020, and July 14, 2021. The finally amended² Regulation 4A (2) is as follows:

For representation of creditors in a class ascertained under sub-regulation (1) in the committee, the IRP shall identify three IPs who are:

- (a) Not his relatives or related parties,
- [(aa) having their addresses, as registered with the Board, in the State or Union Territory, as the case may be, which has the highest number of creditors in the class as per their addresses in the records of the corporate debtor:
- Provided that where such State or Union Territory does not have adequate number of insolvency professionals, the insolvency professionals having addresses in a nearby State or Union Territory, as the case may be, shall be considered;]
- (b) eligible to be [resolution professional] under regulation 3; and
- (c) willing to act as authorized representative of creditors in the class.

Furthermore, Regulation 4 A (3) states that the IRP shall obtain the consent of each IP identified under Regulation 4 A (2) to act as the AR of the creditors in the class in Form AB of the Schedule.

4. Choice of an AR: How much say does the Homebuyers/Class of Creditors have

It is necessary that the class of creditors must be able to choose their representative. But as explained earlier, the initial choice of an AR is a nomination process where the IRP only decides and put the choice before homebuyers to select the IP. But the creditors in reality are not aware of the traits or capabilities or his past records as an IP.

As a good practice some of the IRPs provide a brief profile of the IPs interested in the role of AR to facilitate those who want to understand his background, education, and experience etc. This helps the creditors to make an informed decision. In some cases, the class of creditors (or

¹ Report of the Insolvency Law Committee, March 2018, paragraph, 10.8, Ministry of Corporate Affairs, Government of India.

² IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (Amended up to 30.09.2021)

their spokesperson) meet the proposed IPs for a discussion to make their decision. But this is possible only if the class of creditors have an organized association or body which in turn have some representative to speak on common issues of the class. Such association/s can take a call based on the information provided about the proposed choice of AR and accordingly give their mandate while submission of claim before the IRP.

5. Evolving role of the AR

IBBI through a circular³ dated July 13, 2018, clarified that wherever the approval of resolution plan under Regulation 39 (3) is at least 15 days away, the Resolution Professional (RP) shall expeditiously obtain, by electronic means, the choice of the IP from creditors in a class to act as AR of the class and proceed further in the manner as specified in Regulation 16A.

The role of an AR was further strengthened in the Supreme Court judgement in August 2019 in the matter of *Pioneer Urban Land & Infrastructure Vs. Union of India*⁴ which upheld the amendment in the IBC and conferred the homebuyers the status of financial creditors. As a consequence, the homebuyers are treated at par with banks and financial institutions and form a part of the Committee of Creditors (CoC). The homebuyers, as a class of creditors, are entitled to be represented in the CoC through their ARs.

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Out of total 5,258 insolvency cases admitted under IBC by March 31, 2022, about 20% came from Real Estate sector⁵. The number of real estate cases has been steadily rising from 209 in September 2018 to 500 in September 2019 to 793 as of September 2020. Therefore, this can be stated that in real estate sector cases alone an approximately 800 ARs were appointed till 2020. Based on the experience regarding role of ARs in CIRP, necessary amendments were made in IBC in December 2019.

³ IBBI CIRCULAR No. IBBI/CIRP/015/2018 13th July 2018 (https://ibbi.gov.in/webadmin/pdf/legalframework/2018/Jul/ClarificationNo.%20IBBI-CIRP-015-2018%20dated%2013072018-Approved_2018-07-13%2020:07:34.pdf)

⁴ *Pioneer Urban Land & Infrastructure Vs. Union of India*, WP (Civil) 43/ 2019, Supreme Court of India, Date of Judgement, August 09, 2019.

⁵ IBBI Quarterly Newsletter for January – March 2022, pp. 12-13.

6. A critical analysis of the Role of AR

6.1. Challenges to AR: The role of an AR as per the IBC and Regulations may appear very simple with limited responsibilities. This is because, as per the IBC an AR is required only to communicate the agenda for CoC meetings and getting the mandates of homebuyers either in physical or electronic form but in reality the challenges faced by the AR and the practical difficulties that he / she has to keep in fulfilment of the role are many. This could be summarised as follows:

- (a) Generally, the homebuyers do not have the knowledge regarding various provisions of the IBC and Regulations that govern the appointment, role, and responsibilities of the AR.
- (b) The homebuyers lack familiarity or information regarding IPs proposed for their choice of AR.
- (c) ARs usually go by the IBC and Regulations with or without being able to relate to the big group of the class that presumably considers him / her as their advocate or nominee to take up all possible issues with the developers at the CoC.
- (d) The AR may at times require to manage too many queries, emails and phone calls from the various homebuyers on issues concerning their claims, issues in updating the right contact details, technical issues faced in e-voting and so forth.

6.2. Statutory Responsibilities of AR: As per the various provisions of the IBC and Regulations, an AR is expected to discharge following responsibilities:

- (a) Section 25A. Rights and duties of AR to financial creditors:
 - i. The AR under sub-section (6) or sub-section (6A) of Section 21 or sub-section (5) of Section 24 shall have the right to participate and vote in meetings of the CoC on behalf of the financial creditors he represents in accordance with the prior voting instructions of such creditors obtained through physical or electronic means.
 - ii. It shall be the duty of the AR to circulate the agenda and minutes of the meeting of the CoC to the financial creditor he represents.
 - iii. The AR shall not act against the interest of the

financial creditor/s he represents and shall always act in accordance with their prior instructions...”

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

Furthermore, the IBC puts stress on the AR's role in Section 25 A (3) which states “the AR shall not act against the interest of the financial creditor he represents and shall always act in accordance with their prior instructions”. Thus, the AR has to play the role of a spokesperson for the class and take required efforts to safeguard the interest of the creditors represented by him/her.

6.3. Practical Responsibilities of AR

In practice, the role of an AR involves a lot more than the voting at the CoC as per instruction of the creditors. As a representative of homebuyers, the AR is expected to discharge following responsibilities:

- (a) **Communicate the details of the provisions of the IBC and Regulations to homebuyers / class of creditors through individual emails and if opportunity is available, during meeting of homebuyers:** Once chosen by the majority of the creditors, an AR should make organized effort to inform and explain the class of creditors the various provisions of the IBC and Regulations which will be relevant for the creditors during the insolvency resolution process that is to follow. For this, the AR is required to have meeting with homebuyers either through physical or virtual mode. This process is critical as the average creditor will not be conversant with the IBC and Regulations thereof and there may be apprehensions or expectations which may not be relevant or beyond the scope of the law and rules concerned or they may not be aware of what the IBC provides for achieving their objective.
- (b) **The AR may not have any role in the matter of finalization of claim acceptance by the IRP/ RP but there is no bar in his communication of the queries / disputes that may be intimated to him**

concerning claims by any member of the class of creditors: Regulation 16 A (5) states that the AR shall have no role in receipt or verification of claims of creditors of the class he represents. The concerned AR must explain to the class of creditors he is representing that he / she cannot decide on their claims which is the prerogative of IRP/RP appointed for the CIRP. But as an extended role, since he is expected by the legislation to protect the interest of the creditors, he / she must take the time and effort to guide the individual creditors in filing their claims within timelines, correctly, and facilitate to remove any difficulty faced by them in filing the claim. Post submission and verification of the claims, the IRP/ RP is required to provide an updated claims list to the AR. The AR must share the same with the class of creditors. There can be instances when the claims admitted are not agreed by the creditors, the AR should be responsive in such cases where individual creditors raise some issues, or the IRP/RP cannot admit some claim for want of documentation or other issues. The AR shall play a very important role in such matters as a subject expert and counsel the creditors in the class he is representing and on the other hand the AR need to coordinate with the IRP / RP to facilitate admission of the claims.

The AR must attend to the queries from the creditors as the same will help in bringing the spread-out group to have faith in the process and will get their cooperation and participation to complete the process successfully.

- (c) **The AR should make best efforts to reply or revert on every email from the homebuyers/class of creditors on any concern which the AR may convey to the IRP / RP:** The members of the class of creditors have various issues to resolve and also at times there may be queries from creditors which are not relevant to the process as per the IBC or Regulations. The AR must attend to the queries from the creditors as the same will help in bringing the spread-out group to have faith in the process and will get their cooperation and participation to complete the process successfully. Some issues that require IRP/ RP's attention has to be communicated immediately for a resolution.

- (d) **The AR must give fair hearing to any of the issues raised by the homebuyers and communicate the practical position correctly:** This involves taking telephone calls at odd hours which at times could appear to be an intrusion on his or her plans. The AR who is able to respond to the individual members will definitely earn their trust and confidence which will help to take the process forward.
- (e) **The AR can explain the requirements for an agenda, a resolution plan, its implementation, and the likely effect of a plan being accepted or rejected:** The AR is looked upon by the homebuyers / class of creditors as their counsel. As the meetings of the CoC are conducted, various agenda items are taken up and resolution plans are put forth for creditors' mandate. At this stage the AR must be able to relate impartially with the members of the class of creditors he is representing and should explain the implication of the proposed resolution. This is more critical when the agenda relates to resolution plan by any resolution applicant / s as the same will affect the interest of the members going forward and will thus be the result achieved on completion of the process.
- (f) **The AR needs to take a balanced approach while engaging with the homebuyers, IRP / RP and encourage the homebuyers or class of creditors to participate in the e-voting process in large numbers so that the majority views of the class of creditors is reflected:** The essential aspect of the role played by an AR is to get maximum number of members in a class of creditors to participate in a process and give their mandate on agenda items through voting. The high percentage of voting by the homebuyers / class of creditors helps ascertain the majority views.

The AR's role is extremely important in matters of e-Voting on the CoC resolutions which have direct bearing on the interest of the members of the class of creditors he / she is representing. NCLAT in the matter of *Amit Goel Versus Piyush Shelters India Pvt. Ltd. and Ors*⁶, passed order to redo the entire process of inviting expression of interest for resolution plans till submission of the plans before the Adjudicating Authority (AA) after seeking

necessary approvals through e-Voting by the creditors on the ground that the AR had not followed the timelines and due process of e-Voting while seeking mandate from the homebuyers on the approval of Resolution Plan.

7. Recommendations

As we discuss on the desired role of an IP as AR, their suitability to the process is critical and should not merely be taken as a role where the job is to put the creditors mandate before the CoC and facilitate the agenda items to be circulated. The AR is meant to represent the class of creditors.

IBC is silent on process for changing AR during CIRP. If CoC is allowed to change the Resolution Professional (RP) at any stage of CIRP then the class of creditors should have the right to change their representative if they are not satisfied with the conduct of his performance. The Code has got provisions to allow the CoC to change the Resolution Professional, during the CIRP, if they find it suitable for reasons of the performance of the RP or any other reason but presently the Code or Regulations do not have any such provision for the class of creditors to change their representative (AR) once chosen. This may be provided in the Code to allow the class of creditors to have some process of voting among the class to access the mandate, which can be 55 / 60 percent vote in favour of the mandate to make such change. Besides, there is need to clarify the law on who should take up the role of AR during the transition period i.e., whether an IP whom the majority of the class of creditors nominate or the RP can provide some choice of IPs or AA should put an IP from the IPs panel to take up this role. Furthermore, the term "Authorised Representative" should be defined in the IBC framework.

Furthermore, Regulation 16(A)(8) provides for the fees payable to AR which ranges between 15000 to 25000 per month. It is pertinent to mention that the AR is paid fee only for attending the CoC meetings but not the meetings of the class of creditors before or after the CoC or any other meetings with the class of creditors. The AR being an Insolvency Professional as per the mandate is expected to help the members of the class, he/she is representing to take critical decisions to safeguard their interests, it's very naïve to think that the AR only collates the query and puts before CoC. The AR is actually the guide for the class of creditors in this process and while he/she is executing the mandate before the CoC the AR is expected to take up the

⁶ NCLAT, New Delhi, CA 700/2021, Date of Order, January 18, 2022.

issues which affects the class and also need to raise objections is case the IBC is violated; this is required to protect the interest of the creditors. Considering the role and responsibilities of an AR, the IBBI may consider a reasonable remuneration depending on the assignment to encourage IPs in taking up this assignment and not merely putting a minimal role in the CIRP. Emphasizing on the crucial role of AR in insolvency process, NCLT Allahabad Bench in the matter of *Jaypee Greens Krescent Homes Buyers Welfare Association Vs. Jaypee Infratech Ltd*⁷. has observed, “there is a substantial responsibility thrust on the AR to take the CIRP to success in coordination with the IRP/ RP by using his knowledge and the trust imposed on him /her by the class being represented by him/her irrespective of their share in voting.”.

Last but not the least, the IBC or Regulations need to specify or provide the period, process, and timelines for completion of the role of the AR. It is assumed that the role of AR is completed when the Resolution Plan is placed before NCLT or the liquidation process sets in, as there are no more CoC meetings after the said action. But the AR keeps getting emails and meeting requests from the homebuyers or creditors in the class even when the Resolution Plan is under consideration other applications might be moved by different members before the AA concerning the proposed plan, so the IBC and Regulations thereof may provide suitable guidelines and process for the AA to conclude his / her involvement in the assignment.



⁷ NCLT Allahabad, CA No. 223/2018 & CA No.266/2018 in CP No. (IB) 77/ALD/2017.