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21ST WORLD CONGRESS OF ACCOUNTANTS
2022 | 18-21 NOVEMBER | MUMBAI INDIA

BUILDING TRUST ENABLING SUSTAINABILITY

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

SPECIAL EDITION

ABOUT IIIPI

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

Against this backdrop of the Code and the IBBI (Insolvency Professional Agencies) Regulation, 2016 (IPA Regulation), The Institute of Chartered Accountants of India (ICAI) formed Indian Institute of Insolvency Professionals of ICAI (IIIPI), a Section 8 company to enrol and regulate IPs as its members in accordance with the Code read with its Regulations. The Company was incorporated on 25th November 2016.

IIIPI is the first Insolvency Professional Agency (IPA) of India registered with IBBI. The certificate of registration was handed over to the agency by the then Hon'ble Minister of Finance 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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SPECIAL EDITION
NOVEMBER 2022
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Message from Chairman, Editorial Board

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

Dear Member,

As we are celebrating 75th year of our independence, it's a matter of great pride and pleasure for the whole ICAI family to host World Congress of Accountants (WCOA) for the first time in India since its inception in 1904. Delegates from about 130 countries are expected to attend this 'Olympics of Accountants' being organized on the theme 'Building Trust Enabling Sustainability'. I would urge you to actively participate in this historic event.

The competition is the soul of a vibrant economy and free market. This includes promoting entrepreneurship, ensuring availability of credit, providing facilitating services and freedom to exit in case of a genuine business failure due to various reasons. Based on the principles of creative destruction, the Insolvency and Bankruptcy Code, 2016 (IBC) envisions to ensure free exit to entrepreneurs if they fail to deliver as per the expectation, which is measured in terms of default, rescue the corporate life, and release the idle resources in an orderly manner for efficient use in the economy.

Highlighting the long term economic and societal consequences of Covid-19 pandemic, the World Economic Forum in its latest 'Global Risk Report-2022' has estimated that by 2024, developing economies (excluding China) will have fallen 5.5% below their pre-pandemic expected GDP growth, while advanced economies will have surpassed it by 0.9%—widening the global income gap. Besides, the World Bank in a report released in September 2022, has mentioned that global economy may be edging towards recession in 2023 and a string of financial crisis is expected in emerging market and developing economies. In this scenario, the recent data of the International Monetary Fund (IMF) showing India overtaking the United Kingdom to become the fifth largest economy of the world will boost the confidence of national and international investors in the Indian economy.

The IBC ecosystem has contributed immensely to the economy and helped the country in making landmarks. Further, as per the latest data released by the IBBI, total 5,636 CIRPs commenced by the end of June, 2022 out of which 1,934 companies were rescued under the IBC of which 517 cases were resolved through resolution plans and rest were saved on appeals, settlements, and withdrawals. Out of the 517 CDs resolved through resolution plans, 91 had admitted claims against of over ₹1,000 crore. Further, the resolution plans of 87 such CDs have collectively realized ₹2.17 lakh crore, which is 184.95% of their liquidation value.

India's becoming fifth largest economy is an excellent achievement, but this should not stop us from aspiring for the dream of $5 trillion economy. I can proudly say that IIIP of ICAI (IIIPI) since inception is continuously leading the insolvency profession from the front by introducing innovations in capacity building, research, policy recommendations, standardisation of profession, hand holding of professionals, collaborations with industry and academia. Further, to provide international exposure to its members, IIIPI has collaborations and organized several programs in association with institutions, regulators, insolvency experts and insolvency professional bodies in developed economies such as the USA, UK, Australia, Singapore etc.

This Special Edition of *The Resolution Professional*, brought out by IIIPI on the occasion of WCOA 2022, comprises articles on various aspects of insolvency framework by Indian as well as foreign experts. I am confident, various stakeholders of the IBC would be tremendously benefitted from this edition.

Wishing you all the best.

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

Message from the Vice President, ICAI

CA. Aniket Sunil Talati
Vice-President, ICAI
Director, IIIPI

Greetings!

The work environment and the norms of competitiveness in the corporate sector have undergone a radical upheaval due to which the businesses need to quickly adapt to latest technologies, innovate, and revise their business models to remain in the competition. The same has accelerated the use of Artificial Intelligence (AI), Internet of Things (IoT), Big Data, Robotics, and other tools of the fourth industrial revolution thereby heralding us into the era of 5th Industrial Revolution.

Professionals are expected to remain updated and stay ahead but also provide sustainable competitive solutions to the businesses. The Insolvency and Bankruptcy Code 2016 (IBC) came into being on December 01, 2016. Since then, it has evolved to address several challenges some of which were considered invincible at the time of inception. The Code aims to save corporate life by replacing the promoters of failed businesses with more effective and competitive entrepreneurs through the resolution plan procedure. However, if there is no chance of survival, the IBC also provides a legal framework of liquidation for better utilization of remaining resources into the economy. In this scenario, the contribution of Insolvency Professionals (IPs) in economy becomes crucial as their role starts only after the businesses fail. As an officer of court, the IP is expected to give opportunity of being heard, to various stakeholders, and balance their divergent and often conflicting interests. These complexities and challenges warrant a multidisciplinary and transdisciplinary approach to deal with insolvency processes.

One of the main benefits of the bankruptcy framework, aside from saving corporate life, has been the behavioural change among debtors, leading to increased financial discipline, stronger corporate governance, and prompt payment to lenders, suppliers, contractors, etc. This has improved business ambience in the country which has further enabled rise in entrepreneurship and foreign direct investment (FDI) in India. As per the recent reports, India witnessed a rise of 15,400% in registered Startups since the launch of Startup India initiative in 2016. Further, currently India ranks 3rd in Global Start up Ecosystem and the number of Unicorns.

In a recent set of reforms, The Insolvency and Bankruptcy Board of India (IBBI) has allowed Insolvency Professional Entities (IPEs) to get registered as IPs, issued guidelines for minimum fee and performance-based initiatives for IPs, empowered Committee of Creditors (CoC) to invite expression of interest for resolution plans for a second time and partial sale of assets. I am confident about these reforms shall go a long way in the direction of maximising resolution value, incentivizing IPs, increasing transparency, and reducing timelines in processes.

In this age of information technology, the businesses have transcended boundaries. The cross-border businesses have assumed prominence and size so is the need for cross border dialogues and discussions, for shaping a new global business culture. It is our proud privilege to mention that this time ICAI is the Proud Host of **21st World Congress of Accountants (WCOA) from 18th to 21st November 2022 in Mumbai.** I congratulate IIIPI for bringing out special edition of '*The Resolution Professional*' on this global event of accountancy profession.

I am also thankful and extend my best wishes to all the eminent personalities who have contributed articles for this special edition and hope that it would greatly benefit the stakeholders.

Wish you all the best.

CA. Aniket Sunil Talati
Vice-President, ICAI
Director, IIIPI

Message from Chairman, Governing Board- IIIPI

Dr. Ashok Haldia
Chairman, Governing Board- IIIPI

Dear Member,

At the outset, I congratulate ICAI, promoter of IIIPI, for hosting 21st World Congress of Accountants (WCOA) being organized in India for the first time since 1904, from 18th to 21st November, 2022.

As a matter of pride, this special edition devoted to WCOA has articles/addresses authored by eminent personalities national and international, on contemporary topics that may give unparalleled insights into the evolutionary journey of insolvency resolution regime in India. I thank all the guest authors for their priceless contribution and look forward to their continued association with IIIPI in its future endeavors.

Last couple of months have been quite hectic from the perspective of bringing reforms in the Insolvency and Bankruptcy Code, 2016 (IBC), often referred to as IBC 2.0. The Regulator - Insolvency and Bankruptcy Board of India (IBBI), exhibiting agility and alacrity, has notified several regulatory amendments vis-à-vis Insolvency Professionals, IPAs, COC, IPEs, CIRP, Voluntary Liquidation, Liquidation processes. Many of these amendments are aimed at bringing transparency, improving value maximization, cutting timelines, and bridging information gaps in the CIRP/Liquidation processes. Noteworthy is the fact that these amendments have been carried out after series of dialogues and consultation across various stakeholders involved. IIIPI was also instrumental in organizing multiple roundtables to deliberate on such modifications at the draft stage and contributed a great deal in providing suggestions to IBBI.

The provisions related to a minimum remuneration for the IPs coupled with introduction of optional performance-based incentives, is commendable indeed. This will prevent IPs from quoting an unreasonably high or low fee, ensure standardization of insolvency profession and improve the outcomes of professional assignments. The professionals need to continue to ensure excellence, independence and integrity in discharging their responsibilities under IBC.

Besides, through another set of regulatory amendments in IBBI (IP) Regulations, IPEs which hitherto were only allowed to provide support service to individual IPs, have been now allowed to be enrolled/registered as 'Juristic IP'. In line with the said amendments, IIIPI has rolled out the framework for enrolling such IPEs in the capacity of Juristic IP, as its members. The rationale behind such dispensation is to improve organizational capabilities while undertaking professional assignments, particularly large in size.

Further, another set of regulatory amendments now allow inviting Resolution Plan a second time and part-sale assets of the Corporate Debtor in cases where no Resolution Plan is received at first attempt. Besides, the provisions related to better marketing of assets of CD, facilitating reach out to wider potential resolution applicants, would help in maximizing value of the assets.

Engaging with Hon'ble NCLT

Being a frontline regulator, IIIPI's role is to facilitate a conducive ecosystem encompassing various pillars and stakeholders under IBC. Hon'ble judiciary is one such critical pillar. Sensing the need to create a bridge between Hon'ble NCLT and insolvency professionals, recently on Octover 08, 2022, IIIPI organized an interactive program (physically in Delhi) facilitating an open dialogue/ interaction of IPs with Hon'ble President and Hon'ble

Members (New Delhi Bench) of NCLT. The said program titled "Insolvency Professionals as Officers of Court – Roles & Responsibilities" allowed exchange of thoughts and expectations among the key pillars of IBC. IIIPI may carry out similar programs at few other locations as well, in near future.

Other Key Initiatives of IIIPI

IIIPI has to its credit, commencement of first ever Peer-Review Mechanism and Mentorship Program in the field of insolvency profession. While Peer Review Mechanism is aimed at improving quality of professional services through review by fellow and experienced IPs, Mentorship Program can facilitate ease of entry for newer professionals, substantially. I would urge the professional members of IIIPI to actively use and benefit from these programs through online portals made available on IIIPI's website.

Besides, IIIPI has recently launched IIIPI Research Project Scheme, under which research proposals shall be selected from applicants having diverse academic and professional backgrounds and be funded as well. The research outputs as such, may provide food for thought to the policy makers in a credible manner.

IIIPI has so far carried out, through various Study Groups, 14 studies. Of these, eight studies have been published are available on IIIPI's website. Presently, six Study Groups, comprising members from across different professional backgrounds, are at various stages of completing their reports. These Study Groups are in respect of:

- Individual Insolvency – Personal Guarantor to Corporate Debtor.
- Valuation Under IBC
- Avoidance Transactions under IBC – Improving Outcomes
- New Roles and Responsibilities of IPs across the entire value chain of stress asset management ecosystem
- Usage of Taxonomy as Technology Solution for IBC Processes
- Contribution of IPs in timebound Resolution Under IBC

IIIPI's Executive Development Programs (EDPs), launched in October 2020 in the domain of 'Managing Corporate Debtors as Going Concern as CIRP (For IPs)' were later diversified in two more fields – 'Mastering Legal Skills, Pleadings and Court Processes Under IBC' and 'Mastering Avoidance/ PUFE/ Forensics Under IBC'. Several batches of these EDPs have been conducted so far, enhancing the capacity of professionals as an ongoing process.

As IIIPI is completing six years of its existence on Nov. 25, 2022, our efforts are aimed at establishing sound insolvency ecosystem. In this direction, we welcome your suggestions for further improvement in our services, research, and publications.

I am confident that this edition will be quite beneficial for all the stakeholders. I wish the readers a very happy and prosperous Diwali.

Let us come together to build a stronger insolvency profession as contribution to nation building.

Dr. Ashok Haldia
Chairman, Governing Board - IIIPI

From Editor's Desk

Dear Member,

The present edition of *The Resolution Professional* has been dedicated to the 21st World Congress of Accountants (WCOA) 2022, the first ever in India since its inception in 1904, being hosted by The Institute of Chartered Accountants in India (ICAI) in Mumbai on 18th - 21st November 2022. I am deeply grateful to the ICAI for giving IIIPI the opportunity to bring out Special Edition for WCOA-2022 thereby contributing our bit in making the occasion rousing and memorable.

While retaining basic character of the journal, this Special Edition of 'The Resolution Professional' has been aligned with the theme of WCOA-2022. The present edition carries articles/messages authored by national and international experts from varied professional and academic backgrounds, on invitation basis. I hope, these perspectives will provide a holistic understanding of the current and potential challenges before the Indian insolvency ecosystem and ignite the minds to work towards innovative solutions.

This edition starts with the article by Shri Swaminathan J., MD-SBI on 'Insolvency Proceedings, Recent Judgments and Way Forward' in which he thoroughly analyses the predicament faced by various stakeholders of the IBC, 2016 in the light of recent judgement(s) of the Apex Court. The second article is authored by Dr. M. S. Sahoo on 'PUFE Transactions' wherein he impressively explains the adverse impact of PUFE transactions on financial health of the company while charting path for effective claw-backs towards meaningful resolution. Dr. Navrang Saini, in his article 'Meeting Timelines under the Insolvency and Bankruptcy Code, 2016' has analysed reasons for delays at various stages and suggested use of automation techniques to plug the loopholes right from filing of cases to admission to resolution, which will reduce burden from Adjudicating Authorities (AAs). Shri Debajyoti Ray Chaudhuri in his article 'Bank Guarantee: It's Time to Go Digital with eBank Guarantee (e-BG)' has highlighted the importance of digital records in insolvency process from the perspective of e-Bank Guarantee.

Shri Shardul S. Shroff and Ms. Kritika Poddar in the article 'Insolvency Proceedings, Recent Judgments and Way Forward' has deeply analyzed various provisions of resolution and highlighted certain provisions which push the corporate debtors towards liquidation even if the business is otherwise viable and could be sold as a going concern. Ms. Rebecca Parry from UK, in her article 'Insolvencies Involving New Technologies: Challenges Ahead' focusses on latest technologies that may be encountered and made use of, drawing upon international examples to illustrate the unique solutions. The seventh article 'Insolvency Professionals, Resolution Process, and the Courts: A Call for a Management Education' by Prof. M. P. Ram Mohan of IIM Ahmedabad (IIMA), deals with various aspects of the insolvency regime from the perspective of managerial skills as a must-have skill for IPs while taking control of and resolving corporate debtors. Adv. Ashish Makhija in his article 'Analysing Impact of Rainbow Judgment – One Step Forward, Two Steps Backward?' has analysed the impact of 'Rainbow Judgement' of the Apex Court on various processes of the IBC and has recommended necessary amendments. The night article- 'Pre-Pack Framework: A Step in the Right Direction' by Shri Vijaykumar V. Iyer and Shri. Vaibhav Indalkar is focused on various aspects of Pre-pack insolvency in India and its effective usage. The tenth article 'Cross Border Insolvency: The Utility of Alternate Dispute Resolution (ADR) Mechanism' by Shri Sunil Pant explains the relevance of ADR in Cross Border Insolvencies. The last article 'Sales Tax Now a Priority 'Secured' Creditor: Reversing Waterfall!' authored by Shri Nipun Singhvi and Shri Mayur Jugtawat, highlights the need to protect the sanctity of Section 53 of the Code, which has been on the radar of several agencies since the IBC, 2016 came into existence.

We have also included a special feature focussing on various activities of the IIIPI. Besides, the journal also has its regular features, i.e., Legal Framework, IBC Case Laws, IBC News, Know Your Ethics (Code of Conduct for IPs,) IIIPI News, IIIPI's Publications, Media Coverage, and Services.

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

Wish you a happy reading.

Editor

IIIPI organized Seminar on Insolvency Professionals as Officers of Court: Roles & Responsibilities

Indian Institute of Insolvency Professionals of ICAI (IIIPI) organized a Seminar on "Insolvency Professionals as Officers of Court: Roles & Responsibilities" on October 08, 2022, in New Delhi.

Chief Justice (Retd.) Shri Ramalingam Sudhakar, Hon'ble President, National Company Law Tribunal (NCLT), New Delhi graced the seminar as Chief Guest of the Inaugural Session and CA. (Dr.) Debashis Mitra, President, The Institute of Chartered Accountants of India (ICAI) was the Guest of Honour. Dr. Ashok Haldia, Chairman, Governing Board- IIIPI delivered the Welcome and Opening Remarks, and CA. Rahul Madan, MD-IIIPI presented 'Vote of Thanks' for the Inaugural Session, which was followed up with Interactive Session and Panel Discussion.

In the Interactive Session, the Members (Judicial and Technical) of NCLT, Insolvency Professionals (IPs), Senior officials of IBBI and NeSL exchanged views in an open discussion. The Panel Discussion was moderated by CA. Hans Raj Chugh, CCM-ICAI & Director IIIPI, in which CA. Sripriya Kumar, CCM-ICAI & Director, IIIPI, Adv. Sajeve Deora, IP; CA. Dhinal Shah, IP; Mr. Abhilash Lal, IP; and Shri D. R. Chaudhury, MD&CEO, NeSL participated as panelists.

The key thoughts of this seminar are as follows:

1. Hon'ble NCLT acts as a critical interface in the IBC ecosystem.
2. In a study it has been found that CIRPs take about 450 days out of which IPs take only 270 days and rest goes into litigation delays. The time is highly precious in value maximization and resolution of corporate debtors. So, these days should be rather utilized in the interest of the corporate debtors.
3. The success of IIIPI has encouraged and facilitated The ICAI to decide on setting up a new body – *Indian Institute of Social Auditors.*
4. Stakeholders should come together and work as a family to make IBC, 2016 success.
5. India has a very robust, vibrant, and divergent economy. We have billionaires as well and small ventures like MSMEs. While big corporates are suffering primarily due to mismanagement, MSMEs suffered the most due to Covid-19.
6. IPs should have a good understanding of the general principles on corporate functioning, finance, and human relationships. The issue of humane touch matters the most in cases like real estate wherein homebuyers are involved.
7. There should be efforts at institute level to reach out the MSMEs. IPs should reach out the MSMEs' promoters and tell them how their ventures can be resolved to their benefits.

Chief Justice (Retd.) Shri Ramalingam Sudhakar, President, NCLT, addressing the Seminar as Chief Guest.

CA. (Dr.) Debashish Mitra, President-ICAI, addressing the Seminar as Guest of Honour.

8. The ICAI is spread across the length and breadth of the country and CAs can help the MSMEs in remote areas.
9. As an officers of the Court, the IPs should try to be independent and unbiased. Let the IBC rest on the strengths and capabilities of the IPs.

10. The IPs should apply the principle of 4Es – Efficient, Effective, Economical and Ethical.
11. The going concern sale of companies undergoing liquidation should be encouraged.
12. A framework like Global Insolvency Network Guidelines (GIN) of Singapore should be developed for court-to-court communication across countries.
13. Financial creditors should take larger responsibility of funding the corporate debtor to be run as going concern and fee of the IPs as they are the biggest beneficiaries under the IBC, 2016.
14. Properties mortgages by financial creditors are not generally saleable due to title and permission issues. The financial creditors and other secured others should verify and update their records on mortgaged properties.

Dr. Ashok Haldia, Chairman, Governing Board- IIIPI, delivering welcome address in the Seminar.

Members of NCLT, New Delhi and representative officials of IBBI and NeSL interacting with IP Members of IIIPI during the 'Interactive Session' in the Seminar.

Panel Discussion in the Seminar.

Insolvency Proceedings, Recent Judgments and Way Forward

Over the time, the IBC, 2016 has undergone many changes, overcome barriers while adapting to the growing corporate and economic needs of the country, providing for reorganisation to rescue a distressed company if its business is viable or close it if it is unviable, through a market driven process. While the IBC has certainly helped in resolving companies with larger financial value, it has faced limitations in addressing distress situations for smaller enterprises. The PPIRP for MSMEs has made sincere effort to provide a legal framework to rescue small businesses out of the court settlement. However, some recent judgements by the Supreme Court, though related to individual cases, seem to have derailed the entire process of the Code. ***Read on to know more…***

Swaminathan J.
The author is Managing Director, Corporate Banking (CAG & CCG) & Subsidiaries (CB & Subsidiaries), State Bank of India. He can be reached at iiipi.journal@icai.in

The enactment of Insolvency and Bankruptcy Code (IBC) in May 2016 was a watershed moment in India's resolution to embrace a pragmatic, business conducive environment aligned with the globalised economy. Built on the fallen ramparts and edifices of Presidential Towns Insolvency Act (1909), Provincial Insolvency Act (1920), Sick Industrial Companies (Special Provisions) Act 1985, Recovery of Debts due to Banks and Financial Institutions Act (1993) as also the SARFAESI Act of 2002 which individually, and in conjoined way did not yield desired results, the IBC act was instrumental in improving India's ranking in ease of resolving insolvency indicators internationally. India's rank moved up to 52 from 136 in terms of 'resolving insolvency' in three years in the World Bank's Doing Business reports (overall rank now 63 from 142 in 2014) as IBC framework has been compared to those prevailing in better rated Organisation for Economic Co-operation and Development (OECD) countries. In the Global Innovation Index, India's rank improved from 111 in 2017 to 47 in 2020 in 'Ease of Resolving Insolvency'.

The history of evolution of insolvency laws globally shows how public perception of insolvency of businesses has changed from time to time. Overtime, insolvencies

came to be decoupled from moral failure and got allied more to economic reasons for failure. It became easier for entrepreneurs to exit in case of non-wilful/honest business failure and come up with a new business wherever feasible.

Experiences demonstrate the extent to which the absence of orderly and effective insolvency procedure mechanisms can exacerbate economic and financial crises. Without effective procedures that are applied in a predictable manner, creditors may be unable to collect on their claims, which will adversely affect the future availability of credit. Without orderly procedures, the rights of debtors (and their employees) may not be adequately protected, and different classes of creditors may not be treated equitably. In contrast, the consistent application of orderly and effective insolvency procedures plays a critical role in fostering growth and competitiveness and also assists in the prevention and resolution of financial crises, such procedures induce greater caution in the incurrence of liabilities by debtors and greater confidence in creditors when extending credit or rescheduling their claims.

Some excerpts from the Bankruptcy Law Reforms Committee (BLRC) of November 2015, providing insight into why the IBC Code was enacted and the purpose for which it was enacted, give a peep into the requirements that stressed upon preambles woven around low time to resolution, low loss in recovery and higher levels of debt financing across a wide variety of debt instruments:

(i) India is one of the youngest republics in the world, with a high concentration of the most dynamic entrepreneurs. Yet these game changers and growth drivers are crippled by an environment that takes some of the longest times and highest costs by world standards to resolve any problems that arise while repaying dues on debt.

(ii) the recovery rates obtained in India are among the lowest in the world. When default takes place, broadly speaking, lenders seem to recover about 20% of the value of debt, on an NPV basis.

When creditors know that they have weak rights resulting in a low recovery rate, lesser inclination to lend is not uncommon.

The key economic question in the bankruptcy process is that when a firm (referred to as the corporate debtor in the IBC act) defaults, the question arises about what is to be done. Many possibilities can be envisioned. One possibility is to take the firm into liquidation (hitherto, done by High Courts). Another possibility is to negotiate a debt restructuring, where the creditors accept a reduction of debt on an NPV basis and expect that the negotiated value exceeds the liquidation value. Another possibility is to sell the firm as a going concern and use the proceeds to pay creditors. Many hybrid structures of these broad categories can be envisioned.

"Under IBC mechanism, the trigger for a financial creditor's application is non-payment of dues when they arise under existing loan agreements."

Under IBC mechanism, the trigger for a financial creditor's application is non-payment of dues when they arise under existing loan agreements. It is for this reason that Section 433(e) of the Companies Act, 1956 (If the company is unable to pay its debts) has been repealed by the Code, bringing a change in approach. Legislative policy now is to move away from the concept of "inability to pay debts" to "determination of default". The cited shift enabled the financial creditor to prove, based upon documentary evidence, that there was an obligation to pay the debt and that the debtor has failed in discharge of such obligation.

Over the time, the Code has undergone many changes, overcome barriers while adapting to the growing corporate and economic needs of the country, providing for reorganisation to rescue a distressed company if its business is viable or close it if it is unviable, through a market driven process. Progress made under the Code and problems encountered have now opened up avenues for further refinements in the resolution processes. The code has been instrumental in getting rid of the 'negative sum game' where all the creditors would rush to stake claims and recover thereupon individual priority basis, triggering a run on the assets of the company in insolvency thereby jeopardising the economic interests without recourse for other concerns in stress and the business environment.

While the IBC has certainly helped in resolving companies with larger financial value, it has faced limitations in addressing distress situations for smaller enterprises. The IBC (Amendment) Ordinance, 2021 was promulgated with a focused agenda for the corporate micro, small and medium enterprises (MSMEs) in the form of the pre-packaged insolvency resolution process (PPIRP/ pre-pack) that involves very limited role of courts and thus aims to provide a faster and efficient corporate

rescue plan, broadening the scope and capacity of the IBC. It is a major advancement towards adopting out of court workouts as the way forward for achieving faster resolution and minimum distortion of value of assets. This not just impacts the corporate health of the country but translates into the overall growth prospects. Such provisions will act as incentives for greater investments and improve India's position on several global indices.

The objective of the code has three underlying elements that benefit the entire ecosystem as it gears towards better efficiency and transparency viz.:

Prevention: The Code resolves financial stress where it could not be prevented. The enactment of the Code and its rulings have created a conducive environment where management and promoters of the company are motivated to make their best efforts to avoid default, thereby avoiding ceding control of their enterprise. It also encourages them to settle default with the creditor(s) at the earliest, preferably outside the Code. Also, the CIRP undoes avoidance transactions, and necessitates the beneficiary of such transactions to disgorge the value, thus taking away the incentive to indulge in vulnerable transactions.

Time value of Money: The Code necessitates resolution in a time bound manner as excessive delay is most likely to diminish the organisational capital of the company. When the company is not in the best of its health, protracted uncertainty about its ownership and control makes the prospects of resolution remote, thereby impinging on economic growth. The Code requires that a CIRP shall mandatorily be completed within a timeline. Timeline is, in essence, the USP of the Code.

> **The Code requires that a CIRP shall mandatorily be completed within a timeline. Timeline is, in essence, the USP of the Code.**

Freeing up economic resources for a circular economy: The Code provides a mechanism for a company, where resolution is neither possible nor desirable, to exit with the least disruption and cost and release idle resources in an orderly manner for fresh allocation to efficient uses since for a market economy to function efficiently, the process of creative annihilation should be adapted to weed out failing, unviable companies in a continual manner.

In its about six years existence, the IBC has walked a chequered path, meeting a formidable nemesis in the form

of Covid, delays and procrastination tactics through 'looking for loopholes' mentality and seeking multi-tiered legal recourses by certain promoters. Despite dwindling recovery for certain classes of creditors, it would be imprudent to deny its towering presence and overarching impact on creating a conducive environment, within the ambits of laid down rules, that fosters efficiency, innovation and competitive ecosystem, quintessential ingredients for success of businesses in a globalised world.

Going forward, a slew of reforms like mandating reliance on information utilities (IUs) for establishing default, bringing enhanced clarity on continuation of proceedings for avoidable transactions and improper trading after CIRP, change in threshold date for look-back period of avoidable transactions aligning it with date of filing of application for initiation of CIRP instead of the date of commencement, timeline for approval or rejection of resolution plan, guidelines for standard of conduct of the Committee of Creditors (CoC), mandatory consultation by liquidator with the Stakeholders Consultation Committee (SCC), amending secured creditor's contribution (of those who step out of the liquidation process) in workmen's dues or liquidator expenses in preserving assets, amending mechanism for terminating a voluntary liquidation process, amendment of Sec 224 of IBC to empower the Central government towards prescribing a detailed framework for contributions to and utilisation of the IBC funds and separate appellate mechanism for orders issued under Section 20 by the IBBI and its disciplinary committee should revive and reinvigorate this all-encompassing law. Also, the IBC provisions relating to individual insolvency dealing with fresh start process, proprietorship, and partnership firms and other individuals through DRT are yet to come into force.

The transformational law, in a short lifetime, has seen volleys of rulings and judgements, alongside some

conflicting ones that seemingly question the very essence of the purpose behind the enactment of the law. The most recently apex court judgement in the *Vidarbha Ind. Power Vs. Axis Bank* (12 July 2022) wherein the binding conditionality of NCLT admitting the CIRP moved by a Financial Creditor was set aside by the Hon. Bench, siding with the arguments that Section 7(5) (a) of the IBC enables NCLT to reject an application, even if there is existence of debt, for any reason that the NCLT may deem fit, for meeting the ends of justice and to achieve the overall objective of the IBC, which is revival of the company and value maximization. In the cited order, the court held that NCLT can not admit an insolvency application filed by a FC merely due to the fact that a financial debt exists, and the CD has defaulted in its repayment. Instead, the bench opined that the NCLT must consider additional grounds that the CD may raise against such admission by default. The interpretation (with the word 'may' instead of 'shall' in IBC act towards admission of CIRP initiated by FCs paving the way for the order) could fundamentally impact the IBC framework at the crucial admission stage itself. There are apprehensions that many Corporate Debtors may use the recent judgement to shield themselves from the IBC proceedings. This in fact can take the IBC to the road traversed by earlier legislations and their catastrophic consequences on the economic vigour and lending and borrowing discipline.

In the matter of *Vidarbha Ind. Power Vs. Axis Bank (2022),* the Supreme Court held that NCLT can not admit an insolvency application filed by a FC merely due to the fact that a financial debt exists, and the CD has defaulted in its repayment.

Some other important IBC related judgements having wide ramifications in recent times are *Asset Reconstruction Company (India) Ltd. Vs. Tulip Star Hotels Ltd. & Ors.* 2022 (Provisions of IBC and rules & regulations framed thereunder be construed liberally, in a purposive manner to further the objects of enactment of the statute), *Kotak Mahindra Bank Vs. A Balakrishnan* 2022 (a liability in respect of a claim arising out of a recovery certificate would be a financial debt within Sec 5(8) of IBC and a limitation period of three years starts from the date of the issuance of the recovery certificate), *NOIDA authority Vs. Anand Sonbhadra* in Supreme Court 2022 (Lease of land by NOIDA to Builders does not fall within the ambit of Financial Debt, to be treated as an Operational Debt) and the most quoted case of Swiss Ribbons wherein the apex court affirmed the IBC's constitutional validity.

Acts like IBC have ensured enactment of speedy laws and bodies like NCLT/NCLAT which are, in a sense, Governments within a Government, imperium in imperio, carrying out governance on behalf of Government in a defined framework. Let's hope the spirit of the Code is not diluted.

PUFE Transactions

PUFE transactions have a significant bearing on the life and death of a company. According to IBBI Newsletter, applications filed till June 2022 indicate that the companies admitted to CIRP have lost ₹2,21,104 crore through these transactions during the relevant period. If this value is clawed back, several of them would be rescued. If this value was not alienated, several of them would not have got into CIRP in the first place. It, however, appears that the outcome from disposal of applications does not seem encouraging. While several factors are responsible for poor outcomes and need to be addressed urgently, the author feels that insolvency professionals can make a difference. He suggests the IPAs to empower the market to reward the insolvency professionals who are good at clawing back the value lost through these transactions and punish those who are not so good.

Read on to know more…

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It has been six years since the Insolvency and Bankruptcy Code, 2016 (Code) has been in service. Like any other economic legislation, it has evolved, developing deeper and stronger roots. It has established the primacy of the markets, reinforced the rule of law in resolution of insolvency, and professionalised the insolvency resolution process, thanks to the advent of two professions of professions, namely, insolvency profession and valuation profession.

The Code has yielded some great successes. From providing the freedom of exit to rescuing companies in financial stress to releasing the resources stuck-up in inefficient businesses to freeing entrepreneurs from the chakravyuha of zombie businesses to helping creditors realise their dues, and most importantly, bringing about significant behavioural changes among the debtors and creditors alike, the list of achievements of the Code is a long one. As per the last 'Ease of Doing Business' Report of the World Bank released in October 2019, India made a giant leap in its ranking in terms of 'resolving insolvency' from 136th to 52nd position three years ago. The Global Restructuring Review conferred on India the award for 'the most improved jurisdiction' in 2018.

Duty of Insolvency Professional

The Code has identified two sets of transactions, whereby a CD may lose value, in the run up to commencement of CIRP. The first set, known as avoidance transactions,

comprises preferential transactions, undervalued transactions and extortionate transactions. The Code mandates the CIRP and liquidation processes to disregard these transactions to retrieve the value lost during the look back period, which is two years in respect of transactions with related parties and one year in other cases, notwithstanding the sanctity of the contract underlying the transactions. Relevant period has no time limit in case of fraudulent transactions. The second set, known as fraudulent transactions, comprises fraudulent trading or wrongful trading. The Code requires the CIRP to recover the loss made through these transactions. In common parlance, these avoidance transactions and fraudulent trading together are known as PUFE (preferential, undervalued, fraudulent and extortionate) transactions.

The law empowers the Adjudicating Authority (AA) to claw back the value lost through PUFE transactions, based on an application of an insolvency professional (IP), either as Resolution Professional (RP) or Liquidator. Section 25 of the Code casts a duty on the RP to preserve and protect the assets of the CD during the CIRP, including the continued business operations of the CD. For this purpose, it requires the RP to file applications with the AA for avoidance of transactions. Similarly, sections 43, 45, 50, 54F, and 66 of the Code require the RP or Liquidator to file applications in respect of PUFE transactions with the AA during the CIRP or liquidation process.

To ensure that the RP files an application without fail, the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations) provide timelines, requiring the RP to form an opinion if the CD has been subjected to any PUFE transactions, by 75th day of commencement of the CIRP, make a determination by 115th day, and file an application by 130th day with the AA, for appropriate relief. This timeline has been held to be directory because the CD must not suffer loss for lapse on the part of the RP. Section 47 of the Code, inter alia, provides that the AA shall require the Insolvency and Bankruptcy Board of India (IBBI) to initiate a disciplinary action against the RP or the Liquidator, where he has not reported undervalued transactions to the AA.

In the matter of *Ambit Finvest Pvt. Ltd. Vs. Rakesh Niranjan Ranjan & Ors*., an application was filed by a dissenting financial creditor for PUFE transactions. The AA dismissed the application on the ground, among other reasons, that a financial creditor has no right to file such an application under section 66 of the Code, which could be done only by the RP, while noting that the RP was satisfied that there was no cause to file an application. This has two implications. First, only the RP can file an application for PUFE transactions (except for undervalued transactions where a creditor, member or partner of the CD can file application) and no one else can. When the law says that only RP can do it, inaction of the IP frustrates the Code and CIRP, heightening the role of the IP in PUFE transactions. Second, it is the end of the matter if the IP is satisfied that there was no reason to file an application, indicating deference of the AA holds to the decision of the IP. The RP may take external help such as forensic auditors to help him detect and determine PUFE. He cannot escape the liability for failure of such external help. The law assigns this statutory responsibility to an IP in recognition of his ability, and thus cannot be outsourced.

"First, only the RP can file an application for PUFE transactions and no one else can. Second, it is the end of the matter if the IP is satisfied that there was no reason to file an application."

In a landmark judgement in the matter of *Anuj Jain Vs. Axis Bank Ltd*., the Supreme Court has delineated the duties and responsibilities of an RP in respect of avoidance transactions. It held that the RP shall sift through all transactions relating to the property/interest of the CD backwards from the insolvency commencement date and up to the preceding two years. After carrying out the volumetric and gravimetric analysis of the transactions, the RP must apply to the AA for necessary orders. In this matter, the Apex Court upheld recovery of 758 acres of land valued at about ₹5300 crore, which was lost through avoidance transactions. Despite statutory provisions and jurisprudence, the PUFE transactions have not gained much traction, though failure to claw back the value lost through these transactions is often fatal.

There are several factors, including legal clarity, which come in the way of retrieval of value lost through PUFE transactions. The order in the matter of *Venus Recruiters Pvt Ltd. Vs. Union of India* has cast a shadow on the pending applications where resolution plans have been approved or where the CD has proceeded for liquidation. The Court held that avoidance applications do not survive beyond the conclusion of the CIRP. A review petition is reportedly pending before the High Court. Government has proposed to amend the Code to address this and several other concerns. IBBI has recently amended the CIRP Regulations that requires the resolution plan to provide for

how the applications in respect of PUFE transactions shall be pursued after the approval of the resolution plan and how the proceeds, if any, from such proceedings shall be distributed. It has made similar amendments to the Liquidation Process Regulations. As the remaining concerns are addressed, the IPs would continue to remain the centre of activity, interest and attention in respect of PUFE transactions.

Sole Objective of the Code

The Code requires retrieval of value lost through PUFE transactions in furtherance of its objective. What is its objective? It is not a panacea for every economic evil though some would believe or wish it to be. Some allege that the CIRP is frustrating the objectives of the Code, as several CIRPs are yielding less than 100% recovery for creditors. They ignore the fact that the Code does not provide for a recovery mechanism. In fact, it nowhere uses the word 'recovery' in its entire text, except where it provides for 'Debt Recovery Tribunal' as the AA for individual insolvency resolution.

The sole objective of the Code is reorganisation or insolvency resolution. Such reorganisation has several benefits, namely, promotes entrepreneurship, improves credit availability, maximises value of assets of the CD, balances the interests of the stakeholders, etc. One must not confuse objectives with benefits. The first Nobel Laureate in Economics, Jan Tinbergen stipulated a basic principle of public policy efficacy that a policy must not have more than one objective. There must be at least one policy for each target. One can have more than one policy to achieve one target but having one policy to achieve more than one target is troublesome. It is not easy to kill more than one bird with one stone, particularly when the birds are flying in different directions. There can be many tools for reorganisation. In fact, there are. One may reorganise using the framework available under the Companies Act, 2013 or the RBI Guidelines or even outside any formal framework.

The Code provides for a market mechanism for resolution of stress of a CD in two ways, namely, rescue the CD through a resolution plan or close it through liquidation, and leaves it to the market to choose either. The market usually chooses to rescue the CD if it is viable and to close it if it is unviable. The Code, however, prefers rescue of the CD to capture the going concern surplus which is lost if it is liquidated. Therefore, it does not envisage initiation of liquidation proceeding directly. Liquidation process commences only after the CIRP fails to rescue the CD through a resolution plan or a collective body, namely, committee of creditors (CoC) decides to liquidate it earlier. Therefore, one should consider if the Code has resolved insolvency, that is, rescued all viable CDs and closed all unviable ones, and what has been the quality, cost and time of such resolution. The tendency to evaluate the performance of the Code in terms of incidence of liquidations or extent of recovery must be eschewed to ensure that it remains firm on the track.

"The market usually chooses to rescue the CD if it is viable and to close it if it is unviable. The Code, however, prefers rescue of the CD to capture the going concern surplus which is lost if it is liquidated."

Reversal of PUFE Transactions

Reversing PUFE transactions promotes the objective of the Code in many ways. The Bankruptcy Law Reforms Committee, which conceptualised the Code, has identified avoidance transactions as a key source of additional value in corporate insolvency, over and above the existing assets of the CD. The Code accordingly enables the processes to undo these transactions and thereby claw back the value lost through them. If these transactions are undone and the lost value is clawed back to the CD, creditors would stand to realise higher value than they would otherwise. Higher the realisation, the higher is the likelihood of rescue of the CD through a resolution plan, which is the primary objective of the Code. If the market decides to liquidate the CD, the liquidation estate would include any assets or their value recovered through proceedings for avoidance of transactions. This improves realisation for creditors that promotes credit availability.

Second, the Code requires the beneficiaries of avoidance transactions to disgorge the value unlawfully appropriated by them through such transactions. This maximises the value of the assets of the CD. Such a transaction could be considered criminal in certain circumstances, particularly when it is fraudulent, inviting criminal proceedings. If the market knows that there is no way one can get away with PUFE transactions with impunity, it does not make any sense for anyone to indulge in such transactions. In such a case, the value continues to reside in the CD and consequently the possibility of the CD getting into stress is minimised. Thus, provisions relating to PUFE transactions not only help rescue the CD, but also prevents the need for rescue.

Thirdly, the Code provides a waterfall for distribution of liquidation proceeds among stakeholders. It requires resolution plan in a CIRP to consider the order of priority in the said waterfall. This prioritisation balances the interests of various stakeholders of the CD. If someone resorts to avoidance transactions to appropriate any value from the CD in the run up to the CIRP, the stakeholders standing in waterfall would lose. Further, if a junior stakeholder appropriates any value of the CD in the eve of CIRP, a senior stakeholder may not get its share of value, which disturbs the balance among the stakeholders enshrined in the Code.

"Section 66 (2) provides recourse against the director who carries on the business during twilight period and not against the beneficiary. A director is required to make good the loss even if he has not gained anything personally."

Fourth relates to the value lost through fraudulent trading. Section 66(1) provides that if the business of the CD has been carried on with intent to defraud creditors or for any fraudulent purpose, the AA may require the persons, who were knowingly parties to the carrying on of the business in such manner, to make such contributions to the assets of the CD as it may deem fit. Unlike avoidance transactions, the recourse here is against the persons who are knowingly parties to defraud the creditors. This provision has been contested most because it is a criminal proceeding in the cloak of a civil proceeding, where the liability arises on a finding based on preponderance of probabilities.

Section 66(2) of the Code makes the directors of the CD liable for the loss to the creditors that arise during the twilight period, which begins from the time when a director knew or ought to have known that there was no reasonable prospect of avoiding commencement of CIRP till the CD actually enters into CIRP. During this period, a director has an additional responsibility to exercise due diligence to minimise potential loss to creditors and he is liable for such loss. While improving corporate governance, this incentivises the CD as well as directors to seek resolution in the early days of stress when the possibility of the rescue is higher.

In case of avoidance transactions, the underlying property/value returns from the beneficiary to the CD. In case of fraudulent transactions, recourse is against the director or person responsible, who is required to make good the loss even if he has not gained anything personally. This provision has been used rarely. If used effectively, no CD would resist initiation of CIRP and consequently, the admission will be much faster, allowing commencement of CIRP in the early days of stress and making the possibility of rescue of the CD by resolution plan higher. It is incumbent upon IPs to scrupulously scrutinise the transactions made during the twilight period and file applications under Section 66 (2) to improve rescue rate.

Incidence of PUFE Transactions

Let us look at data to have an idea about the incidence of such transactions and its consequences. The IBBI Newsletter for the quarter ending December 2021 indicates that CDs undergoing CIRP have lost at least 10% of claims admitted against them through PUFE transactions during the look back period. The loss is likely to be a multiple of 10% if we consider loss prior to the look back period, the loss not detected by IPs, loss from business during twilight period, etc. This is disconcerting. In the quarter ending June 2022, the creditors realised only 10% of their claims through resolution plans, and these CDs had assets valued at only 7% of the admitted claims, when they entered into CIRP.

Till June, 2022, 786 applications have been filed to claw back ₹2,21,104 crore lost through PUFE transactions during the relevant period. If this value is clawed back, several CDs would be rescued. If this value was not lost, several of them would not have got into CIRP in the first place. This becomes more obvious seen in the prism of outcomes of CIRPs.

The CDs, which ended up with resolution plans through CIRP, had lost ₹41,667 crore through PUFE transactions, accounting for about 4.98% of the amounts claimed against them. In contrast, the CDs that ended up with liquidations had lost ₹1,21,121 crore through PUFE transactions, which accounts for 15.43% of the amounts claimed against them. Thus, CIRPs are likely to result in liquidations of CDs where relatively more value has been lost through PUFE transactions

Data also indicate that CDs getting rescued through CIRP are typically left with assets valued at 17% of the claims when they entered into CIRP. The CDs getting liquidated through CIRP had lost 15% of the claims through irregular transactions and were left with assets valued at 5% of the claims by the time they entered into CIRP. If there was no irregular transaction, these CDs would be left with assets valued at 20% of claims. In that case, all of them would be rescued through resolution plans.

Inadequate Performance

There are instances, however, where some IPs don't discharge their responsibilities effectively. In the matter of Surat Fabrics (Textiles) Mills Ltd., the RP filed an application for avoidance transactions on 389th day of the CIRP. He filed this application after filing the application for approval of the resolution plan. He did not make any determination; merely relied on the forensic auditor's report and did not give independent reasons for determination of preferential transactions. The AA observed: "The feeling is inescapable that the RP has filed the application under section 43 read with section 44 of the Code only to avoid adverse scrutiny on the part of the IBBI and not with any real intention to pursue the alleged preferential transactions to their logical end."

The law enables filing of applications both at CIRP and liquidation stages. If this exercise is done during the CIRP, the need for this exercise at the liquidation stage would not arise. It is, however, observed from the IBBI Newsletter of December 2021 that the underlying value of applications filed for PUFE transactions during liquidation stage constitutes about 20% of the total value of all applications. This means that the IPs are failing to file applications in respect of 20% of the value of PUFE transactions during the CIRP. There is some reluctance, which could be motivated in some cases, in attempting to retrieve value lost through PUFE transactions.

Another issue is the quality of scrutiny of transactions by and the applications filed by RPs. In the matter of *Mrs. Renuka Devi Rangaswamy, RP of M/s. Regen Infrastructure and Services Pvt. Ltd. Vs. M/s. Regen Powertech Pvt. Ltd,* while dismissing an application in respect of fraudulent trading, the AA held: "The Applicant in the present case has miserably failed to prove the dishonest intention of the Respondents to defraud the creditors…Only allegations have been made by the Applicants and no documentary proof has been filed in support of the same, to show that the business of the corporate Debtor was carried out by the Respondents with a dishonest intention and to defraud the creditors".

There is a tendency to consider a transaction to be simultaneously preferential, undervalued fraudulent and extortionate and file an application to avoid that transaction. The scope of inquiry, the ingredients, and the consequences are different for each of these transactions. For example, intent is not material for preferential transaction, while it is material for fraudulent trading. The beneficiary gives up the benefits in case of former while the persons responsible are liable. In the matter of *Anuj Jain Interim Resolution Professional for Jaypee Infratech Limited Vs Axis Bank Limited Etc*., the Supreme Court advised both the RP and the AA to deal with these transactions separately and distinctively.

> **"IPs must not hide under the non-cooperation from the CD, statutory auditors or CoC to hide his/her own inefficiency or hesitancy. An IP, who claws back the maximum value lost through PUFE transactions, should get a premium in the market."**

IBBI's Newsletter for the quarter June 2022 shows that the AA has so far disposed of 86 applications for PUFE transactions valued at ₹18,000 crore. This has ploughed back a total sum of ₹60 crore (excluding repossession of 758 acres of land in the CIRP of Jaypee Infra). This means that only 0.3% of value underlying the applications is being ploughed back. The cost of ploughing back seems higher than the amount being ploughed back, indicating quality of work of the RP which probably is not withstanding the judicial scrutiny. There are several factors that contribute to such poor outcomes. Of them, the IP and quality of his work is most significant. The role of IP is focussed in this article because it is a Journal of the leading IPA, which is the first level regulator of IPs.

Conclusion

PUFE transaction is a life and death matter for the CD. Clawing back the value lost through PUFE transactions solely rests on the shoulders of IPs. No one else can file such an application, and whatever the RP does, it is final, subject to the satisfaction of the AA. Therefore, it must not be half-hearted, and a tick-box approach. IPs must not take shelter under the non-cooperation from the CD, statutory auditors or CoC, or even inability of forensic auditor, to hide his/her own inefficiency or hesitancy. An IP, who claws back the maximum value lost through PUFE transactions, should get a premium in the market. Likewise, the market should penalise those, who neglect or do a poor job in respect of PUFE transactions, in addition to the penalty by IBBI and IPA. To enable the market to do so, it must have the information. The IPAs should disclose the performance of each IP in terms of detection, filing and success of PUFE transactions.

Meeting Timelines under the Insolvency and Bankruptcy Code, 2016

Timely completion of insolvency processes is at the core of the IBC, 2016. In this backdrop, the author has analysed reasons for delays at various stages and suggested use of automation techniques to plug the loopholes right from filing of cases to admission to resolution, which will reduce burden from Adjudicating Authorities (AAs). He has suggested that the timely information exchange among all the stakeholders of a Corporate Debtor (CD) is key to reduce delays during CIRP. To reduce information exchange delays, including sensitive information between the IRP/RP and CoC and RAs, a central portal can be designed that hosts all information about a CD undergoing CIRP.

Read on to know more…

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More than five years since its enactment, the landmark Insolvency and Bankruptcy Code, 2016 (IBC/Code) has come of age and borne fruits of economic transformation in the form of holistic outcomes in keeping with the enshrined objectives of the Code *viz*. "…reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders…".

One of primary objectives of the Insolvency and Bankruptcy Code, 2016 (Code/IBC) is time bound resolution of insolvency which distinguishes it from the erstwhile legislations pertaining to insolvency viz., winding up under the Companies Act, Presidency Towns Insolvency Act, 1909, Provincial Insolvency Act, 1920.

Initiation of corporate insolvency resolution process (CIRP) in a time bound manner is provided in the statute to facilitate fast resolution and thereby, prevent asset erosion, loss of business and enterprising value. Value erosion due

to such delays will harm all stakeholders. Further time consumed in admission leads to consequential delay in imposing moratorium and chances of promoters indulging in asset stripping during the twilight period increases significantly.

'*Time is of the essence*', a common term used in legal language, assumes great importance in the case of a distressed firm whose value of assets erodes as time passes. The liquidation value of a distressed firm tends to go down with time as many assets suffer from a high economic rate of depreciation. As noted by the Bankruptcy Law Reforms Committee in its report, delays cause value destruction and the longer the delay, the more likely it is that liquidation will be the only answer. Erosion of value due to delays also reduces the share of pie for distribution to creditors. Recovery rate is a function of time, cost and outcome as measured by the World Bank. The longer the time delay, the higher the value erosion and lower would be the recovery/ realisation by stakeholders. Value erosion also impacts evincing interest from prospective resolution applicants to rescue the distressed firm and offer competitive resolution plans.

"While the time taken in closure of processes is crossing the statutory limit of 330 days, this outcome is still better than the previous insolvency resolution regimes in India."

The Code was enacted as panacea for timely resolution of distressed entities against the backdrop of erstwhile legislations that suffered from excessive delays in resolution of stress. The regime for resolution of non-performing assets comprising of the Sick Industrial Companies Act, 1985, the Recovery of Debts and Bankruptcy Act, 1993 and the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 took nearly 4.3 years to resolve stress, as noted by the World Bank. Unlike the erstwhile frameworks, the Code provides for timeline for completion of CIRP. Section 12 of the Code provides for a specific timeline of 180 days for completion of a CIRP from the date of admission of application which can be extended further by maximum 90 days on filing of an application. It further provides that the CIRP shall be completed within a period of 330 days from the insolvency commencement date including any extension of the period granted under this Section and the time taken in legal proceedings in relation to such resolution process of the corporate debtor (CD). Since the enactment of the Code, the time taken to resolve insolvency in India, as of 2019, has come down to 1.6 years on an average as noted by the World Bank in its Doing Business Report 2019. However, this is still a far cry from 0.4 years (Ireland), which is the best regulatory performer in resolving insolvency category in the Doing Business Report 2019.

The value of distressed asset gradually declines with time if distress is not addressed. Data, as available with the IBBI, indicates that the prescribed timelines have been breached on an average till now. Take the case of the 517 CIRPs which have yielded resolution plans by end of June 2022 that took an average of 460 days (after excluding the time excluded by the Adjudicating Authority or AA) for conclusion of process. Likewise, the 1703 CIRPs which ended up with orders for liquidation took on an average 428 days for conclusion. Further, 374 liquidation process, which have closed by submission of final report took an average of 487 days for closure. Similarly, 727 voluntary liquidation processes, which have closed by submission of final report took an average 422 days for closure.

While the time taken in closure of processes is crossing the statutory limit of 330 days, this outcome is still better than the previous insolvency resolution regimes in India. However, the success of the Code going forward will hinge on meeting timelines as more and more stakeholders get on-board the IBC for resolution of stress. Timely resolution of stress will increase the legitimacy of the Code going forward and make it the first choice for stakeholders for resolving stress.

Several factors have contributed to exceeding timelines. On the face of it, one of the factors that has come to the fore is judicial delays. As per Section 9 of the Code, 14 days' timeline has been prescribed for admission of application.

As per the consultation paper dated 13th April 2022 issued by IBBI, on issues related to reducing delays in the CIRP, no application was admitted in 14 days. Further, time

taken for admission of Section 9 applications in the last two financial years is presented in the following table:

Year	Data available for applications admitted u/s 9	Average time taken for admission from date of filing (days)	No. of applications where admission took < 1 year	No. of applications where admission took 1-2 years	No. of application where admission took more than 2 years
2020-21	153	468	54	84	15
2021-22	207	650	39	86	82

Indian judiciary has, time and again, emphasized that proceedings under Section 7, 9 and 10 do not require a final hearing and the timeline prescribed in law for this purpose should be strictly adhered to, on best effort basis.

In *Innoventive Industries Ltd. Vs. ICICI Bank and Ors.*[1], the SC observed that "the moment the Adjudicating Authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 (seven) days of receipt of a notice from the Adjudicating Authority."

In *The South Indian Bank Ltd. Vs. Gold View Vyapaar Pvt. Ltd.,*[2] Hon'ble NCLAT observed that the application under Section 7 was filed in December 2019 and time has been granted to CD to file reply umpteen times since then. This approach cannot be supported as the AA is statutorily bound to pass an order of admission or rejection on being satisfied in respect of debt, default and completeness of the application within 14 days from the date of filing of such application. Pre-admission hearing with limited notice to the CD is only to derive satisfaction in regard to the existence of debt, occurrence of default and completeness of the application. No final hearing was postulated at pre-admission stage. AA will be well advised to be alive to the phraseology/ terminology to be employed at different stages of the CIRP proceedings and not give impression of a final hearing at the pre-admission stage.

In *Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited*,[3] the SC observed that -"The strict adherence of these timelines is of essence to both the triggering process and the insolvency resolution process. As we have seen, one of the principal reasons why the Code was enacted was because liquidation proceedings went on interminably, thereby damaging the interests of all stakeholders, except a recalcitrant management which would continue to hold on to the company without paying its debts. Both the Tribunal and the Appellate Tribunal will do well to keep in mind this principal objective sought to be achieved by the Code and will strictly adhere to the time frame within which they are to decide matters under the Code."

In the matter of *Ebix Singapore Private Limited Vs. Committee of Creditors of Educomp Solutions Limited & Anr.*,[4] the SC had observed that the NCLT and NCLAT should be sensitive to the effect of delays on the insolvency resolution process and be cognizant that adjournments hamper the efficacy of the judicial process. The NCLT and the NCLAT should endeavor, on a best effort basis, to strictly adhere to the timelines stipulated under the IBC and clear pending resolution plans forthwith. Judicial delay was one of the major reasons for the failure of the insolvency regime that was in effect prior to the IBC and the present insolvency regime cannot be allowed to meet the same fate.

"In the matter of *Ebix Singapore Private Limited Vs. CoC of Educomp Solutions Limited & Anr.*, the SC had observed that the NCLT and NCLAT should be sensitive to the effect of delays on the CIRP and be cognizant that adjournments hamper the efficacy of the judicial process."

In *V.R. Hemantraj Vs. Stanbic Bank Ghana Ltd* , [5] it was observed that the applications under the Code not being an adversarial litigation, the AA is only required to be satisfied that there is a 'debt' and default has occurred. For this reason, the Code provides for a 14-day time period.

[1] Civil Appeal No. 1661 of 2020 with Civil Appeal No. 2568 of 2020
[2] CA (AT) (Ins.) No. 611 of 2021 (Order dated 29.01.2021)
[3] Civil Appeal No. 9405-2017
[4] Civil Appeal No. 3224 of 2020 and other appeals
[5] Company Appeal (AT) (Insolvency) No.213/2018
[6] Civil Appeal No. 4633 of 2021

Recently, in *Vidarbha Industries Power Limited Vs. Axis Bank Limited*,[6] it was *inter-alia* observed by the SC that -

(i) The AA should examine the expedience of initiation of Corporate Insolvency Resolution Process (CIRP), considering all relevant facts and circumstances, including the overall financial health and viability of the Corporate Debtor (CD). The AA may in its discretion not admit the application of a FC. It is certainly not the object of the Code to penalize solvent companies, temporarily defaulting in repayment of its financial debts, by initiation of CIRP.

(ii) On the provisions of Section 7(5) that authorizes AA to admit or reject the insolvency resolution application; it held that legislature has, in its wisdom, chosen to use the expression "may" in Section 7(5)(a). If legislative intent behind Section 7(5)(a) of the Code were to be a mandatory provision, Legislature would have used the word '*shall*' and not the word '*may*'. While the provisions of Section 9(5)(a) are mandatory, Section 7(5)(a) of the Code is discretionary. The AA may in its discretion, if facts and circumstances so warrant, keep the admission in abeyance or even reject the application.

(iii) There is no fixed time limit within which an application under Section 7 of the Code has to be admitted.

In the *Vidarbha* judgment, there is a departure from the test of default to test of insolvency which is against the spirit of the Code. Axis Bank, Financial Creditor (FC) in this case had filed Review Petition which was dismissed by the Supreme Court holding the original judgment is facts specific.

Presently, the case handling capacity of the AA is full to the rim. There is a case to increase the number of benches and number of technical and judicial members across the board to clear the backlog of cases waiting at various stages of CIRP like admission of application, approval of resolution plan, passing of liquidation order etc. The AA needs administrative or back-end support to expedite processing of admission of applications. In fact, the entire process of admission can be automated as admission requires fulfilment of certain criteria (like a checklist) as required under the Code.

Harnessing technology in the form of e-filing of petitions imparts machine readability of information. Machine readability allows for automatic admissions where information is complete and correct and weeding out of applications that need more information or that do not merit admission. The precious time of the AA can then be saved to adjudicate upon contentious matters only or matters that need careful consideration by the AA.

> **"Machine readability allows for automatic admissions where information is complete and correct and weeding out of applications that need more information or that do not merit admission."**

Apart from admission of application, there are delays at various stages during CIRP. Specific activities like issue of public announcement, issue of provisional list of resolution applicants (RAs) and issue of Request for Resolution Plan (RFRP) get delayed. Timely information exchange among all the stakeholders of a CD is key to reduce delays during CIRP. The IBBI website presently hosts information on public announcement, claims, invitation of resolution plan, auction notices and orders of the courts and tribunals pertaining to all CDs admitted into CIRP. This can be accessed by all stakeholders. However, to reduce information exchange delays, including sensitive information between the IRP/RP and Committee of Creditors (CoC) and RAs a central portal can be designed that hosts all information about a CD undergoing CIRP. The exclusive access to manage the portal can be given to the IRP/RP appointed in a CD. The portal will allow an IRP/RP to share all information with the CoC members on real time basis such as meeting notice, minutes of CoC meeting, information memorandum, details of valuers appointed, call for expression of interest, evaluation of resolution plans etc. The portal will become the central gateway for all information exchange in a seamless and confidential manner between the IRP/RP and the CoC and RAs. The portal will provide unique logins to

each Insolvency Professional for all assignments handled by him. The portal can also be linked to information available with the Information Utility.

The portal described above can be mimicked for Liquidation process, Voluntary liquidation process, insolvency resolution of personal guarantor to Corporate Debtor and pre-packaged insolvency resolution process (PPIRP) under the Code.

Approval of resolution plan by the AA is also a source of delay in timely completion of the process. April 2022 to June 2022 data published by IBBI indicates that 23 processes covered during this period from Insolvency Commencement Date (ICD) to approval of Resolution Plan by the AA took 709 average days (excluding excluded time). The delay at this juncture of CIRP frustrates both the CoC and the successful RA, as value of the CD deteriorates with passing delay.

"A Code of Conduct for the CoC is the need of the hour to enable the RP to get key decisions of the CoC passed by the CoC in a timely manner."

Under the Code, the CIRP is conducted by the Resolution Professional (RP) under the supervision of the CoC. In case of liquidation process under the Code, the Liquidator takes decisions with the consultation of the Stakeholders' Consultation Committee. The IP appointed in both CIRP, and liquidation process ensures that the process is carried out as per the provisions of the Code and ensures the integrity of the process. The IP himself is under the regulatory supervision of the IPAs and the IBBI. In the case of winding up of companies under the Companies Act, 2013, the Official Liquidator appointed is under the general oversight of the Ministry of Corporate Affairs. As can be seen, the insolvency practitioner is at all times under the watchful eye of the stakeholders, thereby lending transparency and accountability to the process.

The case for timely completion of process is strong. One of the ways to expedite the process is to convert certain aspects of the process, which do not require exercise of discretion but are rather entail fulfilment of certain criteria or checklist, into administrative processes. For instance, admission of application of CIRP and appointment of IP from the IBBI panel can be converted into an administrative process. For this purpose, strengthening the document management systems of the CDs themselves and the courts will play a critical role.

Success of a process (specifically a process which have multifarious aspects), requires a close and day-to-day monitoring. Regulatory Authority can play a great role in close monitoring of the CIRP and Liquidation Process. To start with, Voluntary Liquidation Process can be monitored on day-to-day basis by inhouse personnel or if deemed fit, by taking services of retired officers of Ministry of Corporate Affairs (MCA) having practical and in-depth knowledge of the Companies Act and specifically of liquidation process in the office of Official Liquidators.

Delays caused on account of decisions taken by members of the CoC also needs to be addressed at the earliest. It has been generally observed that representatives of banks that participate in CoC meetings often defer key decisions to be taken for want of approval of competent authority or are not well versed with the matter at hand to take a timely decision. A Code of Conduct for the CoC is the need of the hour to enable the RP to get key decisions of the CoC passed by the CoC in a timely manner.

The need for centralised portal to expedite processes was also highlighted in the Economic Survey of 2020-21. While noting the outcomes under the IBC, the Survey advocated for simplification of the voluntary liquidation process given that timelines are being exceeded in this process. The report said that apart from simplifying issues in various steps in the processes, there is a need for the creation of a single window for the entire process through a portal that combines all the steps of the liquidation process altogether, starting from application by companies to processing by all departments of the Government such as GST, EPFO, CBDT etc.

The Code is at a critical juncture in its short journey of five years. The time is ripe to institute mechanisms that can streamline the processes under the Code to make them time efficient. This is essential to buttress the gains the Code has made so far.

Bank Guarantee: It's time to go Digital with e-Bank Guarantee (e-BG)

The need of original physical documents for bank guarantee (BG) has become days of passe'. In this age of digital technology coupled with information security systems the process of issuance, managing the contingent liability, ascertaining the authenticity, managing stock and invocation of bank guarantee on due date has been eased and made user friendly. NeSL's DDE platform has seen more than 8 lac transactions within a short span of two years. The author foresees a day when a customer can get a BG issued sitting in the comfort of his office or home at any time of the day and the beneficiary will be able to access the eBG in a secure manner almost instantaneously.

Read on to know more…

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1. Bank Guarantee (BG): The need for Change

(i) Invocation of a BG: The year was 2017 and I was heading the Industrial Finance Branch of SBI in Chennai. One day as I was entering the branch in the morning I saw a person, who I did not seem to have met earlier. He seemed to have been waiting for the branch to open and was apparently in visible stress. I was told that he was representative of a beneficiary, and he had come in person from Delhi to lodge the invocation of the BG along with the original BG document. A BG is issued on a stamp paper and for the beneficiary it is an important document as in the absence of the original, it would be difficult to invoke the BG. Moreover, it is also important to lodge the invocation along with the BG at an early date as in case of any delay there is always a possibility that the applicant can seek intervention of the Courts and obtain a stay on invocation of the BG. So, it was not uncommon for a beneficiary to go in person to invoke the same to avoid risk of delays or loss of the BG document in transit.

(ii) Procuring the stamps required for the BG: During my tenure at another branch in SBI, I got a call from a customer who wanted a BG urgently.

As it was a small branch, we did not have the stamp paper of the requisite denomination at the branch and when we approached the stamp vendors, they had closed for the day. The BG could only be issued the next day when the stamp vendors opened for business.

"The other challenge for the beneficiary was to manage the inventory of physical BGs so that invocation of BGs or the request for renewal of BGs was done well before the date."

(iii) Managing the Contingent Liability: The contingent liability in respect of bank guarantee was also a challenge for the bank as many times the original guarantees were not received at the branch even after the expiry of validity of the BG and in the absence of the original BG, there was a possibility that an invocation could come at a later date through post with the original bank guarantee. Later banks came out with instructions that the liability would be marked off after giving a notice and a timeline to the beneficiary. A contingent liability which extends beyond the validity of the BG is a cost to the bank as fee is recovered only for the period of validity of guarantee. It also causes inconvenience to the applicant as credit limits are blocked.

(iv) Ascertaining authenticity of a BG: The biggest risk for the beneficiary is that the BG submitted by the applicant may not be genuine. The beneficiary would often seek independent confirmation from the opening bank regarding issuance of the BGs. In respect of high value BGs the beneficiary would often send a representative in person to the branch which had issued the BG to mitigate the risk of a fraudster intercepting the letter and sending a communication on behalf of the bank. This risk was substantially mitigated when it was decided that the issuing a branch would send a confirmation by SFMS to the beneficiary's bank. However, in respect of every BG, the beneficiary would have to follow up with his bankers to obtain the confirmation, even though he might have the actual BG with him. This can lead delays and inconvenience to all concerned. The SFMS system was not always fool proof as it was only a message regarding issuance of the BG and may provide an alert about manipulation of the contents of the BG.

(v) Managing stock of BGs: The other challenge for the beneficiary was to manage the inventory of physical BGs so that invocation of BGs or the request for renewal of BGs was done well before the date by lodging it with the issuing bank. In case of amendment or extension of validity of BGs the same process especially regarding seeking confirmation of the instrument, was followed like in the case of the issuance of BGs.

2. Electronic Bank Guarantee (eBG): The Way forward

(i) Fully Digital process: In the eBG the issuance, amendment, invocation and the cancellation of the BG are done online in fully digital mode with a valid digital signature, through the DDE (Digital Document Execution) platform of NeSL (National E-Governance Services Limited). This is made possible through an integration of the banks accounting system with the NeSL DDE platform. NeSL has also integrated with various state governments for seamless and real time procurement of stamp duty and affixation with the BG document which can be subsequently signed through the Aadhaar e-sign or through a dongle based Digital Signature Certificate (DSC) on the NeSL portal. There is a facility for "server-based signing", where banks can fully automate the signing process. This is suitable for centralised process of issuance of BGs and there is no dependency on the presence of the authorised signatory. The duly stamped and executed BG is instantaneously available on the NeSL DDE platform. The beneficiary has to do a onetime registration and access the BG on the NeSL platform.

(ii) Convenience for the Beneficiary: The process of verification of the BG document becomes seamless, immediate and fool proof. A notification is sent regarding the issuance of the BG as also any change in status of BG like amendment, extension of validity date. The beneficiary can easily access outstanding BGs in its favour, there is also a search facility on the NeSL portal. The eBG platform can also be customised to generate reports as desired by the beneficiary like alerts for BGs becoming due for renewal.

(iii) Benefits for the Applicant: The applicant benefits from an eBG as the BG becomes effective

almost immediately, credit limits get released quickly on release of BGs, contract implementation happens without delays associated in physical verification of BGs and in general "ease of doing business" is facilitated.

(iv) **NeSL as a central repository:** NeSL, as an Information Utility (IU) can accept and store electronic submission of financial information in the manner provided in the Insolvency and Bankruptcy Code (IBC). Financial information includes debt and liabilities and also includes contingent liabilities like bank guarantee. Accordingly, NeSL can serve as a central reservoir of BGs. This can be accessed by authorised persons based on their need. For example, statutory auditors of the company can use this for external confirmation of contingent liabilities and other debt. On commencement of insolvency, the IP can access the same to arrive at the debt and liabilities including contingent liabilities of the corporate debtor.

3. NeSL: A regulated entity

(i) National E-Governance Services Limited (NeSL) is an Information Utility regulated by IBBI. As a regulated entity NeSL has some obligations under the law. The law provides that NeSL shall have a Compliance Officer appointed by the Board of Directors who reports independently to the Regulator. The eBG product is an extension of our DDE product. An eBG is executed on our platform as the provisions of the Information Technology Act, the principal law governing digital document execution. For example, mortgages are not permitted. Secondly, as stamp duty comes under the purview of the state governments, approval for issuance of bank guarantee should have been permitted by the State Government under the Stamp Act of the state. Most states have facilitated the execution of documents including eBG through the DDE platform.

(ii) **Security Features of DDE:** Users of the DDE have the comfort of dealing with an entity like NeSL which is regulated by IBBI and which also conducts an annual inspection of NeSL. The law also provides for an audit of the information technology framework, interface and data processing systems of NeSL every year by an external agency. NeSL also has a Technology Committee comprising of eminent persons to advise on technology related matters besides a Chief Technology Officer (CTO) and Chief Information Security Officer (CISO) who have overall responsibility for technology and information security respectively. The security framework of NeSL is compliant with ISO 27001:2013 requirements and also adheres to the RBI guidelines on Cyber security framework. Data Security & Privacy is ensured in all applications and processes. The data is stored in Tier 4 Datacentre with the Primary, and the Disaster Recovery Centres located in different seismic zones. Accordingly, issues relating to technology and information security are given prime importance.

"Almost 20% of DDE transactions happen on non-business hours and holidays, while our analysis shows that in every hour of the day or night some DDE transactions are being executed."

4. Conclusion

NeSL's DDE platform has seen more than 8 lac transactions within a short span of two years. It's product agnostic and can be used across all customer segments. While the most common usage in the individual segment is for personal loans, but it has also been used for vehicle loans, and education loans. In the business segment it has been used for working capital, term Loans, Emergency Credit Line Guarantee Scheme (ECLGS) and others. The amount of loans could vary from the smallest of loans under government schemes to large corporate loans of a few thousand crores. Almost 20% of DDE transactions happen on non-business hours and holidays, while our analysis shows that in every hour of the day or night some DDE transactions are being executed. The same success can be achieved for eBG. With the trade finance being increasingly automated by banks, I can foresee a day when a customer can get a BG issued sitting in the comfort of his office or home at any time of the day and the beneficiary being able to access the eBG in a secure manner almost instantaneously.

Sale as a Going Concern: Key Issues and Concerns

Though Section 35 empowers the liquidator, to carry on the business of the corporate debtor for its beneficial liquidation, IBC, 2016 does not empower the CoC to continue the business of the corporate debtor in liquidation. After analysing various provisions of the Code related to the liquidation process, the authors argue that if the continuity of business is not for the beneficial liquidation of the corporate debtor, the CoC cannot identify the group of assets and liabilities, which can be sold as a going concern. The authors have recommended a comprehensive legal framework for providing due recognition to the sale of corporate debtor as a going concern and adequately protect of the interests of the stakeholders. ***Read on to Know More…***

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Introduction

The provisions concerning liquidation process are set out in Chapter III of the Insolvency and Bankruptcy Code, 2016 (Code). Section 33 of the Code stipulates the circumstances under which the Adjudicating Authority can pass an order requiring the corporate debtor to be liquidated in the manner as laid down in this Chapter.[1]

The conditions triggering liquidation of a corporate debtor provide that if before the expiry of the insolvency resolution process period or the maximum period permitted for completion of the Corporate Insolvency Resolution Process (CIRP) under Section 12 or the Fast Track CIRP under Section 56, as the case may be, the Adjudicating Authority does not receive a resolution plan under Section 30(6) or rejects the resolution plan under Section 31 for the non-compliance of the requirements specified therein, then the Adjudicating Authority shall pass an order for liquidating the corporate debtor. Further, the Adjudicating Authority shall issue a public announcement and require such order to be sent to the Authority with which the corporate debtor is registered.

[1] Section 33(1)(b)(i), Insolvency and Bankruptcy Code, 2016

A resolution professional can at any time during the CIRP but before confirmation of the resolution plan intimate the Adjudicating Authority of the decision of the committee of creditors (CoC) approved by not less than 66% of the voting share to liquidate the corporate debtor, where the Adjudicating Authority shall pass the liquidation order in accordance with Clause (b)(i), (ii) and (iii) of Section 33(1).[2]

Provisions related to Liquidation

Section 33(5) also provides that once the liquidation order is passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor, provided that a suit or legal proceeding may be instituted by the liquidator on behalf of the corporate debtor, with the approval of the Adjudicating Authority. Section 33(6) further states that Section 33(5) shall not apply to legal proceedings in relation to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

The consequence of an order of liquidation is set out in Section 33(7), which states that the order will be deemed to be a notice of discharge to the officers, employees and workmen of the corporate debtor, except where the business of the corporate debtor is continued during the liquidation process by the liquidator.

Section 35 of the Code specifies the powers and duties of the liquidator. Such powers are set out in Section 35(1)(a) to (o) and are subject to the directions of the Adjudicating Authority. Section 35(1)(e) categorically states that the liquidator can carry on the business of a corporate debtor for its beneficial liquidation as he considers necessary. Section 35(1)(f) stipulates that subject to Section 52 of the Code, the liquidator has powers and duties to sell the immovable and movable property and actionable claims of the corporate debtor in liquidation by public auction or private contract, with power to transfer such property to any person or body corporate or to sell the same in parcels in such manner as may be specified. Proviso to section 35(1)(f) provides that the liquidator shall not sell the immovable and movable property or actionable claims of the corporate debtor in liquidation, to any person who is not eligible to be a resolution applicant. None of the powers or duties enumerated under section 35 of the Code empower the liquidator to sell the corporate debtor on a going concern basis.

> **None of the powers or duties enumerated under section 35 of the Code empower the liquidator to sell the corporate debtor on a going concern basis.**

After the initiation of liquidation under Section 33 of the Code, Section 36 provides for the formation of the liquidation estate. For the purposes of liquidation, the liquidator shall form an estate of assets mentioned in sub-section (3) of Section 36, which will be called the liquidation estate in relation to the corporate debtor. Section 36(2) provides that the liquidator holds the liquidation estate as a fiduciary for the benefit of all creditors.

Section 36(3) further specifies the elements of the liquidation estate. Again, it nowhere provides that the liquidation estate includes incorporeal assets like licenses, entitlements, mining leases and other statutory permissions to carry on business as part of the liquidation estate, except broadly in Section 36(3)(h), which provides that the liquidation estate shall include any other property belonging to or vested in the corporate debtor at the insolvency commencement date.

Subsequent thereto, Section 36(4) specifies what is not included in the liquidation estate assets. Assets which are not included in the liquidation estate inter alia include assets owned by a third party, which are in possession of the corporate debtor or such other assets as may be notified by the Central Government in consultation with the financial sector regulator, assets in security collateral held by financial services providers, subject to netting and set off in multilateral trading or clearing transactions. Furthermore, any other assets as may be specified by the Insolvency and Bankruptcy Board of India (IBBI) including assets which could be subject to set off on account of mutual dealings between the corporate debtor and any creditor are not to be included in the liquidation estate asset.

[2] Section 33(2), Insolvency and Bankruptcy Code, 2016

Chapter VI of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (Liquidation Process Regulations) provides for realisation of assets. Regulation 32 provides that the Liquidator may sell (a) assets on a standalone basis; (b) assets in a slump sale; (c) a set of assets collectively; (d) assets in parcel; (e) the corporate debtor as a going concern; or (f) the business of the corporate debtor as a going concern, provided that where an asset is subject to security interest, it shall not be sold under any of the provisions of (a) to (f), unless the security interest therein has been relinquished to the liquidation estate. The phrase "going concern" is undefined under the Code but it implies that the corporate debtor would continue to function as it did prior to the initiation of the CIRP, other than as restricted under the Code.[3] Contrast this with the relevant provisions in the Code

Section 35(1)(e) contemplates that the business of the corporate debtor can be carried on only for its beneficial liquidation as the liquidator may consider necessary. The liquidator has no authority to carry on the business if it is not for the beneficial liquidation of the corporate debtor.

"Liquidator's powers are circumscribed to selling immovable and movable property and actionable claims of the CD by public auction or private contract and does not include of sale of the CD or its business as a going concern."

Section 35(1)(f) is telling. The liquidator's powers and duties include to sell the immovable property, movable property and actionable claims of the corporate debtor in liquidation by public auction or private contract with power to transfer such property to any person or body corporate or to sell the same in parcels in such manner, as may be specified. Thus, the liquidator's powers are circumscribed to selling the immovable and movable property and actionable claims of the corporate debtor by public auction or private contract and does not include of sale of the corporate debtor or its business as a going concern.

Even Section 36(3)(a) provides that cash in bank or cash on hand where the corporate debtor has ownership rights including all rights and interests therein as evidenced in the balance sheet of the corporate debtor etc. are part of the liquidation estate. A running business cannot form a liquidation estate as liquidation means corporate death. This is clear from Section 33(7) of the Code.

Hence, unless and until the liquidator can support the proposition that continuing the business is in the interest of beneficial liquidation i.e., realising higher value, the business of the company has to cease for the creditors to realise maximum value, rather than frittering away the liquid assets of the corporate debtor in a mis-directed continuation of business.

The only exclusion, as we considered above, is set out in Section 35(1)(e) and it must be proved that the business is being engaged for the beneficial liquidation of the corporate debtor for continuing such business or part of such business.

Again, examining the provisions of Regulation 32A read with Regulations 32(e) and (f) of the Liquidation Process Regulations, conceptually an ultra vires principle has crept in. It is only the liquidator empowered under Section 35, who can carry on the business of the corporate debtor for its beneficial liquidation. The Code does not empower the CoC to continue the business of the corporate debtor in liquidation. The entirety of Regulation 32A is at cross purposes with the Code as, if the continuity of business is not for the beneficial liquidation of the corporate debtor, the CoC cannot identify the group of assets and liabilities, which can be sold as a going concern. Regulation 32 A (3) proceeds on the basis that upon the failure of the CoC, the liquidator is entitled to identify and group the assets and liabilities to be sold as a going concern in consultation with the Consultation Committee.

The provisions of Regulation 32A (4) create a condition precedent to attempting to sell the corporate debtor as a going concern and provide that if the liquidator is unable to

[3] Report of the Insolvency Law Committee, March 2018 available at https://ibbi.gov.in/ILRReport2603_03042018.pdf pg. 36.

sell the corporate debtor or its business as a going concern within ninety days from the liquidation commencement date, then he shall proceed to sell the assets of the corporate debtor by other manners of sale as specified under Regulation 32. The provisions of Regulation 32A (4) must be construed as mandatory as otherwise they conflict with the period available for the sale of assets. Regulation 33 also clearly indicates that the normal method of liquidation is by selling the assets and not the business or the corporate entity, as a going concern.

The consequence of a company being ordered for liquidation is for the Registrar of Companies to include the words "in liquidation" along with the corporate name of the corporate debtor to give public notice that the company is in insolvent circumstances.

Having demonstrated that the order of liquidation as made under Section 33 of the Code is civil death or corporate death of the company, the law does not provide for a Christ like action of reviving a dead person. It is only when the business of the corporate debtor is continued for the beneficial liquidation thereof that the order of liquidation does not constitute a notice of discharge. In every other case the order of liquidation under Section 33 strips the company of life as the living corporate being.

Just as a dead person cannot engage in business activity or enter into contracts, continue collections, etc., a company or a corporate debtor in liquidation is also barred from doing so. When an order under Section 33 is passed, it amounts to notification of the death of a corporate juristic person. The provisions of Section 35 and 36 demonstrate that after an order of liquidation, liquidator makes an estate known as the liquidation estate from the company, which would not have been possible if it were alive. A company in liquidation results in the liquidation estate being held by the liquidator as a fiduciary for the benefit of its creditors. Therefore, the entire edifice of sale as a going concern after initiation of liquidation of the corporate debtor is on extremely shaky grounds.

Concerns Regarding Sale as a Going Concern

As stated in Section 33 of the Code, the power of the Adjudicating Authority to pass an order of liquidation is provided in Chapter III and its liquidation order and process must be in the manner as laid down in Chapter III.

However, Chapter III has not provided the manner or process of a sale nor the concept of sale as a going concern. Hence, inclusion of the process of sale of a going concern in the Liquidation Process Regulations is well beyond the provisions of the Code. It is excessive delegation of legislative power as the substantive law has not made provisions for it. The authority to sell a company in liquidation as a going concern is a contradiction in terms as liquidation means cessation of the juristic person. A liquidation order can be equated to a certificate of death. The subsequent process in corporate liquidation is like a mix of succession and distribution of assets of the deceased. If lenders exist and are secured, then an unpaid secured creditor can realise in priority.

Therefore, the process of sale as a going concern is unknown to law of liquidation and is an impossibility after pronouncement of a liquidation order. Such a liquidation order means discontinuity. It is the date when the board of directors of the corporate debtor stands dissolved as only the liquidator can represent the company.[4] Post the liquidation order what remains is the liquidation estate as there is no live corporate juristic being and the liquidator represents the corporate debtor in liquidation. A company which has had its board of directors negated and ceases to exist is not a continuing legal personality as a corporate debtor entitled to be sold as a going concern.

Despite such fundamental legal issues, sale as a going concern has been gaining recognition and acceptance from various benches of the Adjudicating Authorities. The lack of a comprehensive legal framework governing such a sale gives rise to certain concerns:

(i) Sale as a going concern under Liquidation Process Regulation is ultra vires the Code

As discussed above, the Code stipulates a two-step process where the resolution of the corporate debtor is attempted through CIRP driven by the creditors failing which the corporate debtor is liquidated.[5] The provisions of the Code

[4] It is only when the business of the corporate debtor is continued for the beneficial liquidation thereof that the order of liquidation does not constitute a notice of discharge.

contemplate dissolution of the corporate debtor upon liquidation.[6] No provision of the Code allows resolution of a corporate debtor in liquidation or empowers a liquidator to sell the corporate debtor as a going concern once liquidation has commenced. In this regard, the observations of the NCLT in the case of *Invest Asset Securitisations & Reconstruction Private Limited V. M/s Mohan Gems & Jewels Private Limited*[7] succinctly discusses this primary concern.

"34. Insolvency and Bankruptcy Code is an embodiment of substantial rights laced with procedural mandates. When procedure itself is part of the enactment, the Regulating Authority cannot rewrite the procedure obliterating the provisions IBC. Yes, the Regulating Authority may bring in subordinate procedure for full implementation of the sections of the Code. What could be liquidated is the assets of the debtor company, this concept of liquidation of assets shall not be construed as inclusion of sale of the company."

(ii) Lack of creditor consent and approval of the Adjudicating Authority

The scheme of the Code ensures that a resolution plan approved for the revival of the corporate debtor undergoes extensive examination and scrutiny. Firstly, the Code requires a resolution plan to be approved by the CoC by a majority vote of sixty-six percent.[8] This collective business decision, reached upon after due deliberations and exercise of commercial acumen by the CoC ensures that the resolution plan proposed is one that is feasible and viable, and the corporate debtor is being transferred to an efficient management. The resolution plan is then approved by the Adjudicating Authority after ensuring necessary compliance with the provisions of the Code and the regulations thereunder.[9] In contrast, a sale as a going concern neither requires the majority approval of the CoC nor the consent of the Adjudicating Authority. Limited oversight by the CoC and Adjudicating Authority leaves scope for misuse of the process.

(iii) No requirement of mandatory contents or minimum safeguards for stakeholders

A resolution plan approved by the CoC is required to contain several mandatory provisions such as inter alia priority payments to operational creditors, demonstration of feasibility and viability, term of the plan and its implementation schedule, management, and control of the business of the corporate debtor during its term and adequate means for supervising its implementation.[10] However, adherence to no such minimum standards are required in a case of sale as a going concern.

(iv) Disincentivises submission of resolution plans

The scheme of the Code allows for submission of resolution plans at competitive prices to ensure value maximisation for all stakeholders of the corporate debtor. Permitting sale of the corporate debtor as a going concern after expiry of the CIRP leaves scope for foul play as interested resolution applicants may misuse lack of commercial interest generated in the market to quote lesser value for a corporate debtor after a failed resolution.

(v) Exclusion of non-relinquished assets

In liquidation proceedings, secured creditors have the right to realise their security under section 52 of the Code or alternatively relinquish their security and partake in the distribution of liquidation proceeds under section 53 of the Code. Proviso to regulation 32 of the Liquidation Process Regulations makes it amply clear that assets subject to

[5] Section 54, Insolvency and Bankruptcy Code, 2016
[6] Section 54, Insolvency and Bankruptcy Code, 2016
[7] I.A. No. 1490/2020 in CP. No. (IB) 590 (PB)/2018, order dated 16 September 2020.
[8] Section 30(4), Insolvency and Bankruptcy Code, 2016
[9] Section 31, Insolvency and Bankruptcy Code, 2016
[10] Regulations 38, CIRP Regulations, 2016

security interest can only be sold if the security interest therein has been relinquished. However, in cases where creditors have *pari-passu* charge over one asset, there is lack of clarity on how such an asset will form part of the liquidation estate in case all creditors do not relinquish their security interest held therein.

A comprehensive legal framework is required to give due recognition to this concept (sale as going concern during liquidation process) and adequately protect of the interests of the stakeholders.

(vi) Uncertainty with regard to timelines

The liquidator applies for the closure of the liquidation process once the sale certificate is issued to the successful bidder.[11] However, in cases of a deferred payment structure in a case of sale as a going concern, the liquidator or the corporate debtor may be faced with multiple obstacles such as challenges in distribution of subsequent payments in accordance with section 53 of the Code or lack of clarity as to when to apply for closure of the liquidation process.

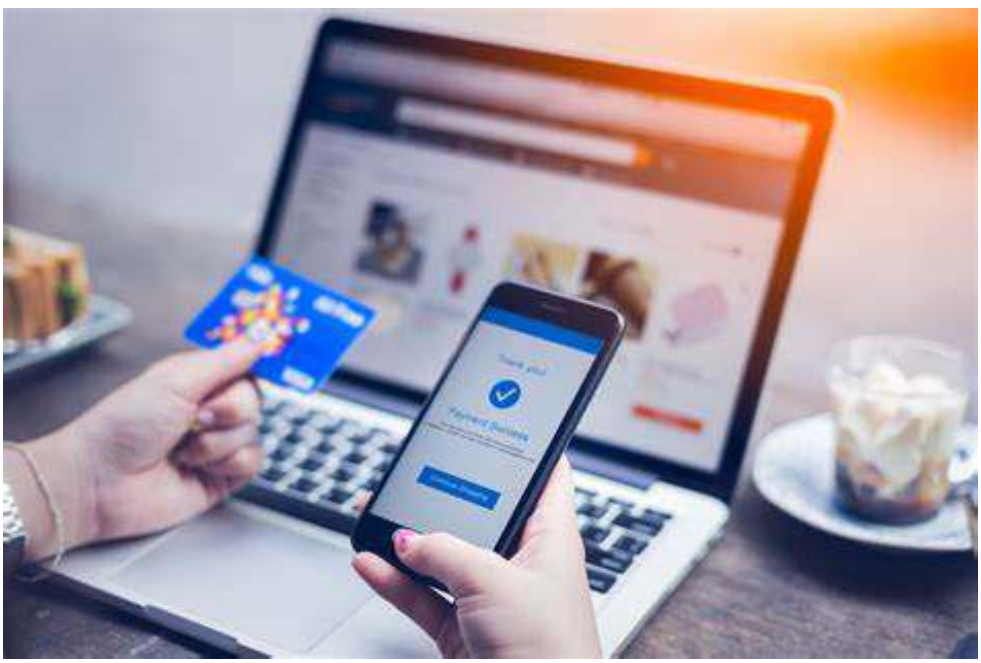
In case of an auction, if the payment is not received within 90 days, the sale is cancelled.[12] However, given the lack of statutory backing of sale as a going concern, successful bidders may be hesitant to make payments till the approval of the Adjudicating Authority and grant of appropriate reliefs and concessions. Moreover, mere grant of sale certificate may not be sufficient for the successful bidder to take control of the corporate debtor as an explicit approval from the Adjudicating Authority will be required for capital restructuring of the corporate debtor.[13]

Way Ahead

The constitutional validity of sale as a going concern is a pertinent question that remains unanswered. While courts have been allowing sale as a going concern and have adopted a lenient approach when granting reliefs to effectuate such a sale, a comprehensive legal framework is required to give due recognition to this concept and adequately protect of the interests of the stakeholders.

[11] Regulation 45(3)(a), Liquidation Process Regulations, 2016

[12] Schedule 1, Regulation 33, Liquidation Process Regulations, 2016
[13] Section 66, Companies Act, 2013.



Insolvencies Involving New Technologies: Challenges Ahead

Given the growing importance of India's digital economy and the potential for some enterprises in this sector to fail, it is important for practitioners to be aware of some possible features of such cases. This article highlights some of the new technologies that may be encountered and the issues that can be raised, drawing upon international examples to illustrate the problems that could arise and their possible solutions. There will also be challenges ahead for resolution professionals in cases which feature digital technologies, but the IBC, 2016 arguably provides a good framework to enable these cases to be suitably managed with the main ambiguities regarding entitlements to data and the potential for ongoing trading in the interests of customers during insolvency processes.

Read on to Know More…

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1. Introduction

India is known as a technology powerhouse and its performance in this sector is supported by good company laws and insolvency laws, as well as talented entrepreneurs, workers, startups and established businesses. The country is therefore in a strong position as digital economies gain increasing worldwide importance. India's consumer digital economy has been predicted to be of US$800 billion value by 2030[2] and this sector as a whole in India is predicted to reach a trillion-dollar value by 2025[3]. Whilst many businesses in this sector will thrive there is inevitable potential for insolvencies for example in the event of rising energy costs. There have already been examples of failures in this sector in India including Nxtgen Datacenter & Cloud Technologies Pvt. Ltd., Rubique Technologies India Pvt. Ltd and TMW Fintech Pvt. Ltd. Cases elsewhere highlight the potential scale of difficulties that these cases could present. In the USA, cloud computing service provider Nirvanix filed for US Chapter 11 bankruptcy protection in 2013 and gave customers two weeks' notice[4]. In the UK the data centre 2e2 collapsed in 2013 and the insolvency administrator demanded £1 million (~₹9.4 Crore) from customers to

[1] I would like to thank Dr Neeti Shikha, University of Bradford, for comments on an earlier draft.

[2] Ankur Pahwa, "India's Burgeoning Digital Economy is Driving Growth in Internet and E-Commerce" EY 4 April 2022, https://www.ey.com/en_in/e-commerce/india-s-consumer-digital-economy-a-us-800b-dollar-opportunity-by-2030

[3] The Hindi Bureau, "$1-Trillion Scope for Digital Economy: PM Modi" The Hindi 22 June 2022, https://www.thehindu.com/news/national/india-expecting-75-economic-growth-rate-this-year-pm-modi-at-brics-summit/article65553837.ece

[4] Discussed in W Kuan Hon and Christopher Millard, "Banking in the Cloud: Part 3 - Contractual Issues" (2018) 34 Computer Law & Security Review 595, 600.

keep the business going while their data was preserved.[5] There is therefore great potential for insolvencies in this sector to cause disruption and significant losses to business and individual customers and major cases could undermine confidence in digital economies. Given the ability of technologies to easily cross borders, damage to the reputation of a digital economy in one country could be to the advantage of rival economies.[6] Practitioners should therefore be prepared for cases in this sector, in which new types of services and properties may be featured. Happily, India's laws are in some respects already well-suited to technology insolvencies.

2. Problems of new and complex technologies

In the digital age an insolvency may feature aspects such as cloud computing, both with debtors as providers and users, or transactions evidenced on blockchains or may feature intangible assets such as cryptocurrencies. Each will present complexities in the event of an insolvency. In this short article examples can only be briefly highlighted but some sources will be referenced that discuss each further.

(i) Cloud computing is useful for business as it enables software, infrastructures and platforms to be accessed remotely, rather than on the customer's own hardware. The benefits of cloud computing include lower costs and scalability, which can enable big data to be processed, but this type of technology also presents risk in the event of insolvency.[7] Business data or information, photos and multimedia data uploaded by customers may be lost. There can also be impacts on other technologies which use cloud computing. For example, artificial intelligence, "AI", applications often rely on the cloud and insolvency could result in unique AI outputs being lost. A problem is that cloud computing can rely on layers of different services and can bring vulnerabilities if any one of these service providers becomes insolvent. There is a need for continuation of services to enable customers to make alternative arrangements, which will be considered further in part 3 below.

"Cloud Computing can rely on layers of different services and can bring vulnerabilities if any one of these service providers becomes insolvent."

(ii) Cryptoassets are digital representations of value or contractual rights using distributed ledger technology (DLT), which are transferred, stored or traded electronically. The most high-profile examples are cryptocurrencies, which have featured in a growing number of cases globally, as assets held by debtors, as well as insolvent exchanges and there have also been some cryptocurrencies which have failed. One issue which has been raised in cases to date is whether cryptoassets are regarded as property and, if so, where ownership of this property lies.[8] Whilst a growing number of cases internationally have recognised cryptoassets as "property"[9] the harder issues have concerned the rights of investors as against insolvent exchanges.[10] Exchanges are largely unregulated and those which have failed have often failed to maintain sufficient funds to satisfy customer claims and in other cases they have not maintained separate customer accounts. Customers have not always been able to establish proprietary claims as a result.

(iii) Blockchain technologies have been identified as useful for generating operational efficiencies through the elimination of intermediaries of a type who would normally be involved in financial transactions. A blockchain is a distributed online ledger which records and verifies transactions across a distributed network, rather than through a single central authority. In its original format,[11] verification of blocks of transactions is done through a process of

[5] "2e2 Datacentre Administrators Hold Customers' Data to £1m Ransom" ComputerWeekly.com (8 February 2013) < https://www.computerweekly.com/news/2240177744/2e2-datacentre-administrators-hold-customers-data-to-1m-ransom>.

[6] For example, Nigeria's digital economy has been impacted by uncertainties regarding the application of law and investors have preferred to use holding companies incorporated in jurisdictions such as Mauritius and the UK: Abubakar Idris, "Why Your Favourite African Startups are Incorporating Abroad" Techcabal 12 December 2019 https://techcabal.com/2019/12/12/why-your-favourite-african-startups-are-incorporating-abroad/

[7] See in relation to the UK position Rebecca Parry and Roger Bisson, 'Legal Approaches to Management of the Risk of Cloud Computing Insolvencies' (2020) 20 Journal of Corporate Law Studies 421.

[8] Lee Pascoe and Ilya Kokorin, "Digital Gold: Implications of Crypto Assets under an Insolvency Scenario" [2021, Summer] Eurofenix 12

[9] Ruscoe v Cryptopia Ltd (in Liquidation) [2020] NZHC 728
Lee Pascoe, "Cryptocurrency and Insolvency: 2018 the Year in Review" Norton

[10] Rose January 2019 https://www.nortonrosefulbright.com/en-gb/knowledge/publications/39f45394/cryptocurrency-and-insolvency-2018-the-year-in-review.

[11] More recently it has been recognised that "proof of work" format is environmentally costly and other models, particularly "proof of stake" are gaining popularity.

miners solving arbitrary mathematical puzzles. There are different types of blockchains and although some are private in nature, restricting usage to those with permission, others such as the Bitcoin blockchain are unpermissioned, so anyone can use them or act as a developer and do so anonymously. Interesting issues are raised around the liability of developers in cases where such blockchains go wrong, for example through hacking. In the UK case of Tulip Trading Ltd v Bitcoin Association [2022] EWHC 667 (Ch) a Seychelles company had suffered a hack and sought to pin liability on several Bitcoin developers on the basis of breaches of fiduciary and common law duties. This case illustrates the likely difficulties of holding developers liable in unpermissioned blockchain cases, as on the facts the relationship was not considered to be fiduciary in character nor was any breach of a duty of care in tort found. The case is due to be considered by the Court of Appeal.

"In some cases, if software accessed remotely through the cloud becomes unavailable due to an insolvency this will lead to data becoming unreadable and therefore useless."

3. Problems of continuity of service

Everyone who has worked using the internet will be familiar with the frustrations of a sudden loss of service from an online provider. Customers depend on continuation of supplies of different types of interconnected services in online transactions and there is significant infrastructure dependence on some, including top-level domain name registries,[12] domain name services,[13] internet exchange points ("IXPx")[14] and cloud computing providers. Disruption to any one of these can cause significant losses on a par with the problems created by the banking sector in 2008. There are many other types of service providers whose financial difficulties would present problems. In June 2021 there was widespread disruption caused by only a one-hour outage at the content delivery network[15] *Fastly*.[16] These problems would naturally be much worse in the event of an insolvency. Whilst the laws in many countries' present great risks of sudden shutdowns in the event of liquidation the more protective approach of India is, as discussed below, ideally suited to enabling customers to have continued supplies whilst they source alternatives. Of course, customers can also help by diligence in choosing service providers, structuring their usage of services in a way that avoids single points of failure, and making use of services such as software escrow and backups. Backups are only of limited use as, inevitably, where data is stored in the cloud a backup is only likely to be a snapshot of the data at a particular time. In some cases, if software accessed remotely through the cloud becomes unavailable due to an insolvency this will lead to data becoming unreadable and therefore useless. There are other examples of problems that the sudden failures of other essential digital service companies would present. The digital service sector is therefore one that demands a more gradual approach to business closure, to enable customers to recover their data and source alternative services.

In many countries liquidation proceedings can happen rapidly and lead to a shutdown of the debtor's business. Liquidation can be important for creditors as a debt collection mechanism and, for example, liquidation proceedings in the UK can be opened where a debtor has an unpaid invoice of £750 (approximately ₹68,945) or more, under Insolvency Act 1986, s 123 and United States law also allows involuntary Chapter 7 proceedings to be opened at the request of three or more creditor holding $10,000 of claims (or one such creditor in a case with fewer than 12 creditors).[17] Such cases, if involving digital service companies, would have the potential to cause significant problems for customers. A liquidator, or trustee in Chapter 7, may not realise the nature of the digital service firm's business and they may fail to take steps to

[12] These businesses handle the reservation of domain names as well as the assignment of IP addresses for those domain names. It can be regarded as a type of property register. For example .com names are controlled by Verisign.

[13] The website's IP (internet protocol) address, which would otherwise be an unmemorable string of numbers, is converted into a more recognisable and memorable name by the DNS. It can be regarded as a phone book. See e.g. Cloudflare, What is DNS https://www.cloudflare.com/en-gb/learning/dns/what-is-dns/, accessed 1 November 2021.

[14] IXPs are part of the internet infrastructure, acting as points to connect and exchange internet traffic in more efficient ways. See e.g. Internet Society, Explainer: What is an Internet Exchange Point (IXP)? 22 June 2020, https://www.internetsociety.org/resources/doc/2020/explainer-what-is-an-internet-exchange-point-ixp/, accessed 1 November 2021.

[15] The role of a CDN is to speed up internet transactions using proxy servers. CDNs are geographically dispersed and enable faster content delivery by bringing service provision closer to customers.

[16] Neil Miller, "Inside the Fastly Outage: a Firm Reminder on Internet Redundancy" Data Center Dynamics 22 June 2021, https://www.datacenterdynamics.com/en/opinions/inside-the-fastly-outage-a-firm-reminder-on-internet-redundancy/

[17] 11 U.S. Code § 303

ensure continuity of service, particularly since there may be limited funds for ongoing trading. Indeed, these procedures are not primarily vehicles for ongoing trading. In Chapter 7 continued trading is possible if in the "best interests of the estate and consistent with the orderly liquidation of the estate" under 11 USC §721. In the UK ongoing trading by a company in liquidation is possible "so far as may be necessary for its continued winding up", under Insolvency Act 1986, Sch. 4, para. 5. Although this section has been interpreted generously in some cases, permitting continued trading to mitigate environmental risks[18] the approach may not be the same in digital service insolvencies.

It is therefore advantageous that India's approach to insolvencies prioritises resolution rather than liquidation, as such an approach supports continued trading.[19] A resolution professional appointed in relation to a digital economy business, for example a cloud computing service provider, may find a complex business that is part of wider networks of interconnected services where a sudden shutdown could significantly harm not only direct customers of the firm but also those who use this wider network. Customers could lose access to software and data that they rely upon for their businesses, causing disruption as alternatives may not be readily available and in some instances may not be available at all. The moratorium[20] will assist in enabling continuity of service as it should protect the company against problems with the company's landlord or with lessors of equipment regarding continued access, utility providers regarding services and e.g. software licensors regarding continued use of the software and this will help continuity of service, either with a view to a successful exit from resolution through the approval of a resolution plan [21] or with a view to a managed closedown of the business prior to a liquidation.[22] The difficulty for an office holder may also be that technology firms tend to operate a lean staffing structure and cases are likely to lead to a high volume of calls from customers but the moratorium should assist in enabling demands for data recovery to be resisted. A resolution professional is likely to be reliant on know-how of existing staff regarding maintenance of cybersecurity and care should be taken in this regard. Data protection safeguards (if applicable) should be observed if, for example, using customer lists.

Care should also be taken by the resolution professional to respect ownership entitlements regarding data held by the business on behalf of customers. There could potentially be greater clarity in the IBC 2016 Act regarding the ownership of digital assets and disputes may arise in cases where such assets are held by service providers such as cloud computing firms. This is a matter that should hopefully have been the subject of agreement between the user and the service provider to avoid uncertainty and the potential costs of establishing implied ownership so that the user's property does not end up as part of the bankruptcy estate.[23] The IBC section 36(4) excludes from the insolvency estate assets owned by a third party that are in the possession of the debtor and it can be argued that this would exclude customer data from the scope of the estate. The position is not squarely covered, however, in the non-exhaustive list of assets in section 36(4)(a). Therefore, it is prudent for customers to specify in their contracts that they retain ownership of data but in any event, it is strongly arguable that such a term should be implied. A resolution professional would therefore be wise to treat data as subject to proprietary entitlements.

"There could potentially be greater clarity in the IBA 2016 Act regarding the ownership of digital assets and disputes may arise in cases where such assets are held by service providers such as cloud computing firms."

If the business is being closed down plans should be made to facilitate the recovery of data by customers, as meeting the requirements of all may be a long process. In the 2e2 case mentioned above, the administrator of this insolvent data centre estimated that it could take up to 16 weeks for commercial customer data to be returned and therefore the anticipated 180 days' timescale for resolution proceedings should suffice or, if not, an application for extension can be made[24] and experience indicates that extensions are likely to be granted by the Indian courts.

Where a company enters fast-track liquidation under section 56 of the Insolvency and Bankruptcy Code of

[18] Re Pantmaenog Timber Co Limited [2004] 1 AC 158 per Lord Millett at [63]-[64]; Re Baglan Operations Ltd [2022] EWHC 647 (Ch).

[19] IBA 2016, s 20.

[20] IBA 2016, s 14.

[21] IBA 2016, s 31.

[22] IBA 2016, s 33.

[23] Cesare Bartolini, Cristiana Santos and Carsten Ullrich, 'Property and the Cloud' (2018) 34 Computer Law & Security Review 358.

[24] IBA 2016, s 12.

India, the 90-day period would potentially be insufficient to enable the affairs of a digital service supplier to be brought to an end, bearing in mind the experience in the 2e2 case. However, again the section allows the adjudicating authority to extend the time period and, given the experience with Indian courts, there is strong likelihood of time allowances being made. Under section 35(e) of the said law, the liquidator can carry on the business of a company for its "beneficial liquidation as he considers necessary" and the question would be how a "beneficial liquidation" is to be regarded, whether this is only from the perspective of creditors or whether regard can be had to the impact on stakeholders, including customers. Since stakeholders are mentioned in the preamble to the Act it might be argued that a generous approach can be taken.

4. Conclusion

There is clear potential for new technologies to be transformative for India. Progress in the development of this sector can be enhanced through technical improvements, such as increased availability of broadband and internet exchange points, but also through legal improvements and effective approaches in insolvencies are part of this.[25] One aspect of where insolvency laws will be important is in the development of approaches that minimise the public impact of insolvencies in this sector, as otherwise there can be severe damage to the interests of businesses and consumers. Failure prevention is also important and there is a need for crisis prevention safeguards for key technologies. There will also be challenges ahead for resolution professionals in cases which feature digital technologies, but the legislation arguably provides a good framework to enable these cases to be suitably managed, with the main ambiguities regarding entitlements to data and also the potential for ongoing trading in the interests of customers during liquidation.

"Failure prevention is also important and there is a need for crisis prevention safeguards for key technologies."

[25] Rebecca Parry, "Building a Legal Framework to Facilitate the Transformative Potential of Digital Economies" (2022) 10 NIBLeJ (forthcoming).

Insolvency Professionals, Resolution Process, and the Courts: A Call for a Management Education

Insolvency profession is the fulcrum of the insolvency and bankruptcy process. The Insolvency and Bankruptcy Code 2016 (IBC 2016) provides legal and administrative process in which insolvency professionals are expected to function. Indian courts time and again gave enough judicial backing and support on the critical role played by the insolvency professionals. Be that as may, a continuing management education will help the insolvency profession to understand the nuances of running and sustaining a business and thus furthering the cause of IBC 2016.

Read on to know more…

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1. Insolvency Professionals under the IBC 2016

The Indian insolvency and bankruptcy regimes remained complex and inconsistent till 2016.[1] In response to decades of suggestions for an overhaul of the insolvency regime,[2] the Indian Insolvency and Bankruptcy Code, 2016 (IBC, 2016 or Code) was introduced before the Indian Parliament. The newly introduced umbrella legislation reformed the insolvency ecosystem and replaced a multitude of archaic legislations, some of which dated as far back as 1924.[3] The IBC introduced a number of reforms to the insolvency process, including a time-bound resolution process, a reduced scope of judicial intervention and a creditor in control regime.[4]

[1] INTERNATIONAL FINANCE CORPORATION & INSOLVENCY AND BANKRUPTCY BOARD OF INDIA, *Understanding the IBC: Key Jurisprudence and Practical Consideration,* 11–12 (2020).

[2] VIDHI CENTRE FOR LEGAL POLICY, *Understanding the Insolvency and Bankruptcy Code, 2016,* 11 (2019); Swiss Ribbons Pvt. Ltd. and Another v. Union of India And Others, (2019) 4 SCC 17.

[3] See Sreyan Chatterjee, Gausia Shaikh & Bhargavi Zaveri, An Empirical Analysis of the Early Days of Insolvency and Bankruptcy Code, 2016, 30 NAT'L LAW SCH. OF INDIA REV. 89 (2018); Abhishek Saxena & Akshay Sachthey, The Insolvency and Bankruptcy Code, 2016 - A Fresh Start for India's Insolvency Regime, 10 INSOLVENCY & RESTRUCTURING INT'L 22 (2016).

[4] VIDHI CENTRE FOR LEGAL POLICY, *supra* note 2, at 8.

The IBC created the profession of Insolvency Professionals (IPs) and adopted a two-tier model for their regulation.[5] IPs perform the accounting functions in insolvency proceedings and ensure compliance with insolvency's due process.[6] Within Corporate Insolvency Resolution Process (CIRP), an IP can be appointed as an Interim Resolution Professional (IRP) and a Resolution Professional (RP),[7] while they also discharge the functions of a liquidator during liquidation proceedings.[8] The provision of insolvency professionals allow the Courts to streamline the bankruptcy process by delegating responsibilities to the practitioners and ensuring better utilisation of judicial time.[9] Within IBC, 2016, the IPs perform the key role of ensuring symmetry of information between debtors and creditors, the correct collection and evaluation of bids, satisfying the National Company Law Tribunal (NCLT) of compliance with due process and acting as a liquidator amongst others.[10] The RP is one of the most important actors in a insolvency resolution process. While acting on the directions of the Committee of Creditors (CoC), RP acts as the face of the entire corporate debtor (CD).[11]

2. Administration and Regulation of Insolvency Professionals

The Bankruptcy Law Reforms Committee (BLRC), which is responsible for drafting the Code, acknowledged that insolvency professionals were an integral part of the insolvency resolution process.[12] Given that the insolvency processes within the Code are largely conducted through IPs, they have been referred to as the backbone and the fulcrum of the (insolvency) process.[13]

The BLRC argued in favour of a two-tier regulation of the IPs through the IBBI and Insolvency Professional Agencies (IPAs).[14] Under the present code an insolvency professional has to be a member of IPA and enrolled with IBBI.[15] The IPA develops code of ethics and professional standards according to the IBC and the regulations enacted thereunder. The IPAs also audit the functioning of its members, disciplines them and take action against them if and when necessary.[16]

In turn, the IBBI registers IPAs[17] and exercises oversight on their functioning as disciplinarians and regulate the conduct of the IPs.[18] At the same time, IBBI is also entitled to regulate the affairs of the IPs.[19] In the case of *IBBI Vs. Wig Associates*, the NCLAT noted that: "IBBI can monitor the performance of the Insolvency Professionals and in appropriate cases, may pass any direction as may be required for compliance of the provisions of the Code."[20]

Section 208 of the Code sets out the functions of an insolvency professional in reference to four sets of proceedings:

(i) A fresh start order process under Chapter II of Part III of the Code;

(ii) Individual insolvency resolution process under Chapter III of Part III;

(iii) Corporate Insolvency Resolution Process under Chapter II of Part II;

(iv) Individual Bankruptcy Process under Chapter IV of Part III and;

(v) Liquidation of a CD firm under Chapter II of Part II.

The Code[21] along with the Regulations[22] provided thereunder, provides a Code of Conduct that the IPs are required to follow.[23] Further regulations are enacted by the IPAs based on the IBBI (Model Bye- Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016.

2.1. The role and duties of resolution/insolvency professionals

IPs discharge their functions during CIRP as IRP or RP. The Code requires an IP to assume the office of an IRP

[5] Anirudh Burman & Rajeshwari Sengupta, *Regulating Insolvency Professionals under the IBC: Tracing Pathways To Regulation Based on A Study Of Professional Development,* NATIONAL INSTITUTE OF PUBLIC FINANCE AND POLICY (2019).
[6] *Id.*
[7] Section 5(47), Insolvency and Bankruptcy Code, 2016.
[8] Section 33, Insolvency and Bankruptcy Code, 2016.
[9] Burman and Sengupta, *supra* note 5.
[10] *Id.*
[11] AKAANT KUMAR MITTAL, INSOLVENCY AND BANKRUPTCY CODE: LAW AND PRACTICE 587 (first ed. 2021).
[12] BANKRUPTCY LAW REFORMS COMMITTEE, *The report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design,* 3.4.2 (2015).
[13] *Mukulita Vijaywargiya, Insolvency Professionals and the Code of Conduct, in* INSOLVENCY AND BANKRUPTCY CODE: A MISCELLANY OF PERSPECTIVES 141 (2019).
[14] BANKRUPTCY LAW REFORMS COMMITTEE, *supra* note 12 at 3.4.3 & 4.2.
[15] Section 3(19), Insolvency and Bankruptcy Code, 2016.
[16] INSOLVENCY AND BANKRUPTCY BOARD OF INDIA, HANDBOOK ON ETHICS FOR INSOLVENCY PROFESSIONALS, ETHICAL AND REGULATORY FRAMEWORK, https://ibbi.gov.in/uploads/whatsnew/0ab3ccba77975afcd9eb7ac679154de8.pdf.
[17] Section 199-201, Insolvency and Bankruptcy Code, 2016.
[18] See, Section 203-205, Insolvency and Bankruptcy Code, 2016.
[19] See: Section 220, Insolvency and Bankruptcy Code, 2016 r/w Regulation 11, Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016.
[20] Insolvency and Bankruptcy Board of India v. Wig Associates Pvt. Ltd., 2018 SCC OnLine NCLAT 386.
[21] Section 208(2), Insolvency and Bankruptcy Code, 2016.
[22] Regulations 7(2) r/w First Schedule of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016
[23] For more details see: Vijaywargiya, supra note 13.

within fourteen days of the commencement of insolvency proceedings.[24] If an IRP is proposed within the application for initiation of CIRP, the NCLT shall appoint the same.[25] If no such recommendation is provided, the NCLT shall approach to the IBBI for recommending the names of potential IRP.[26]

"On the day of the first meeting, the CoC is required to appoint an RP who conducts the entire CIRP process under close supervision from the CoC."

One of the primary duties performed by an IRP is the assumption of powers vested in a CD's Board of Directors[27] and manage the operations of the CD as a going concern.[28] The IRP is further required to collect all information about the assets, finances and operation of the CD for determining its financial position,[29] to collate such claims and constitute the CoC.[30] Within seven days of constitution of the CoC, they are required to conduct their first meeting.[31] On the day of the first meeting, the CoC is required to appoint an RP[32] who conducts the entire CIRP process under close supervision from the CoC.[33]

Along with protecting and preserving the assets of the CD and maintaining its continued business operations,[34] the duties performed by the RP can be categorised under four broad areas:[35]

(i) Convene and conduct the meetings of the CoC;[36]

(ii) Conduct an evaluation of claims against the CD, keep an updated list of claims[37] and determine the voting share to be assigned to each creditor in the manner specified by the Board;[38]

(iii) Prepare information memorandum and provide access to the relevant documents and information to every corporate applicant,[39] and invite resolution plans for the CD;[40]

(iv) Report any avoidable transactions to the NCLT.[41]

2.2 Other important duties of the IRP and RP are as follows:

(i) Invite expression of interests (EoIs) from resolution applicants (RAs) for submitting resolution plans in accordance with the requirements set forth in the Code;[42]

(ii) Appointing various professionals to conduct the CIRP;[43]

(iii) Issue the public announcement inviting claims within 3 days of appointment[44]

(iv) Where required, enter into, amend or modify contracts[45]

3. Insolvency Professionals, Resolution Process, and the Courts

3.1. Decisions of Supreme Court

In the case of Essar *Steel Vs. Satish Kumar Gupta*,[46] the Supreme Court elaborated the role of a RP in a CIRP proceeding:

[24] Section 16(1), Insolvency and Bankruptcy Code, 2016.
[25] Section 16(2), 16(3)(b), Insolvency and Bankruptcy Code, 2016; See: Sharvan Kumar Vishnoi v. Crown Alba Withing Instrument (P) Ltd., 2018 SCC OnLine NCLAT 621.
[26] Section 16(3)(a), Insolvency and Bankruptcy Code, 2016, See: Insolvency and Bankruptcy Board of India, Insolvency Professionals to act as Interim Resolution Professionals, Liquidators, Resolution Professionals and Bankruptcy Trustees (Recommendation) (Second) Guidelines, 2020, (issued on November 23, 2020).
[27] Section 17, Insolvency and Bankruptcy Code, 2016.
[28] Section 20, Insolvency and Bankruptcy Code, 2016.
[29] Section 18, Insolvency and Bankruptcy Code, 2016.
[30] Section 21, Insolvency and Bankruptcy Code, 2016.
[31] Section 22(1), Insolvency and Bankruptcy Code, 2016.
[32] Section 22(2), Insolvency and Bankruptcy Code, 2016; Regulation 3 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, provides the eligibility requirements of a Resolution Professional, Also see: Section 29A, Insolvency and Bankruptcy Code, 2016 for a list of people ineligible to be a resolution applicant.
[33] Section 23(1), Insolvency and Bankruptcy Code, 2016.
[34] Section 25(1), Insolvency and Bankruptcy Code, 2016; In Gujarat Urja Vikas Ltd. v. Amit Gupta, 2019 SCC OnLine NCLAT 1157 the NCLT restrained the termination of an agreement which would have terminated the continued nature of the corporate debtor as a going concern; See: Bank of New York v. Zenith Infotech Ltd., (2017) 5 SCC 1.
[35] See: Dhananjay Kumar et al., Liability of Insolvency Professionals: Roles, Duties, and Liabilities, in INSOLVENCY NOW & BEYOND: A THOUGHT LEADERSHIP DOCUMENT ON INSOLVENCY REGIME , 120–121, https://ibbi.gov.in/uploads/publication/e9dd73743324522f79d302ca72029094.pdf.
[36] The IRP is required to conduct the first meeting of the CoC where the RP is appointed; Regulation 17, Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016; Thereafter, the RP is required to conduct the meetings of the CoC: Section 24(2) & (3), Insolvency and Bankruptcy Code, 2016, Regulation 18-24, Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016; In Vijay Kumar Jain v. Standard Chartered Bank, (2019) 20 SCC 455 the Supreme Court noted that every participant is entitled to a notice of every meeting of the Committee of Creditors and such notice of meeting must contain an agenda of the meeting, together with the copies of all documents relevant for matters to be discussed at such meetings.
[37] Section 25(2), Insolvency and Bankruptcy Code, 2016.
[38] Section 24(7), Insolvency and Bankruptcy Code, 2016.
[39] Section 29, Insolvency and Bankruptcy Code, 2016.
[40] Section 30, Insolvency and Bankruptcy Code, 2016; As per Section 30(2) & 30(6), the RP is also required to assess the resolution plan in terms of the regulations of the Code, and submit the plan to the NCLT.
[41] Section 43-51, Insolvency and Bankruptcy Code, 2016.
[42] Section 25(2)(i), Insolvency and Bankruptcy Code, 2016.
[43] Regulation 27, Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016; The RP is required to appoint two registered valuers to determine the fair value and the liquidation value of the corporate debtor.
[44] Regulation 6, Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
[45] Section 20 r/w 23(2), Insolvency and Bankruptcy Code, 2016.
[46] ESSAR STEEL INDIA LTD. COMMITTEE OF CREDITORS V. SATISH KUMAR GUPTA, (2020) 8 SCC 531.

"The detailed provisions that have been stated hereinabove make it clear that the resolution professional is a person who is not only to manage the affairs of the corporate debtor as a going concern from the stage of admission of an application under Sections 7, 9 or 10 of the Code till a resolution plan is approved by the Adjudicating Authority, but is also a key person who is to appoint and convene meetings of the Committee of Creditors, so that they may decide upon resolution plans that are submitted in accordance with the detailed information given to resolution applicants by the resolution professional. Another very important function of the resolution professional is to collect, collate and finally admit claims of all creditors, which must then be examined for payment, in full or in part or not at all, by the resolution applicant and be finally negotiated and decide by the Committee of Creditors."

The Supreme Court in the case of Arcelor Mittal clarified that given the powers and duties of the RP in relation to CoC, the role is only administrative in nature. The Court noted:

"A conspectus of all these provisions would show that the Resolution Professional is required to examine that the resolution plan submitted by various applicants is complete in all respects, before submitting it to the Committee of Creditors. The Resolution Professional is not required to take any decision, but merely to ensure that the resolution plans submitted are complete in all respects before they are placed before the Committee of Creditors, who may or may not approve it. The fact that the Resolution Professional is also to confirm that a resolution plan does not contravene any of the provisions of law for the time being in force, including Section 29-A of the Code, only means that his prima facie opinion is to be given to the Committee of Creditors that a law has or has not been contravened. Section 30(2)(e) does not empower the Resolution Professional to "decide" whether the resolution….

Thus, the importance of the Resolution Professional is to ensure that a resolution plan is complete in all respects, and to conduct a due diligence in order to report to the Committee of Creditors whether or not it is in order. Even though it is not necessary for the Resolution Professional to give reasons while submitting a resolution plan to the Committee of Creditors, it would be in the fitness of things if he appends the due diligence report carried out by him with respect to each of the resolution plans under consideration, and to state briefly as to why it does or does not conform to the law." [47]

The administrative role of the RP as held in the case of Arcelor Mittal was upheld in the case of Swiss Ribbons, where the Supreme Court clarified:

"It is clear from a reading of the Code as well as the Regulations that the resolution professional has no adjudicatory powers… Under the CIRP Regulations, the resolution professional has to vet and verify claims made, and ultimately, determine the amount of each claim… It is clear from a reading of these Regulations that the resolution professional is given administrative as opposed to quasi-judicial power.

The resolution professional cannot act in a number of matters without the approval of the committee of creditors under Section 28 of the Code, which can, by a two-thirds majority, replace one resolution professional with another, in case they are unhappy with his performance. Thus, the resolution professional is really a facilitator of the resolution process, whose administrative functions are overseen by the committee of creditors and by the Adjudicating Authority." [48]

"RP is not required to take any decision, but merely to ensure that the resolution plans submitted are complete in all respects before they are placed before the CoC, who may or may not approve it, held Supreme Court in the case of Arcelor Mittal."

Once an RP assumes control of the CD, the erstwhile directors are ousted from management of the CD. The Code states that their powers stand suspended and be exercised by the resolution professional.[49] The management and the directors cannot maintain any petitions or appeals on behalf of the CD.[50] The Supreme Court confirmed this position in Innoventive Industries:

"According to us, once an insolvency professional is appointed to manage the company, the erstwhile directors who are no longer in management, obviously cannot maintain an appeal on behalf of the company."

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[47] ArcelorMittal (India) (P) Ltd. v. Satish Kumar Gupta, (2019) 2 SCC 1.
[48] SWISS RIBBONS PVT. LTD. AND ANOTHER V. UNION OF INDIA AND OTHERS, supra note 2.
[49] Section 17(1)(b) r/w 23(2), Insolvency and Bankruptcy Code, 2016; National Plywood Industries Ltd. Resolution Professional v. JSVM Plywood Industries Ltd., (2021) 9 SCC 401.
[50] Burn Standard Co. Ltd. v. United Bank of India, 2017 SCC OnLine Cal 9863.

Further, the personnel and management of the CD is required to extend assistance and cooperation to the RP, failing which the RP can approach the NCLT for issuing the requisite direction to the CD personnel.[51]

3.2. NCLT & NCLAT decisions on RP

The RP acts as an officer of the court[52] and the management of the CD is required to extend support to him/her.[53] The NCLAT explained this important principle in further detail in the case of Mamta Banani:[54]

"A Resolution Professional has a duty among other things to invite the prospective Resolution Applicant who satisfies the requirements as prescribed by him with the approval of the 'Committee of Creditors' keeping in mind the complexity and scale of operation of the business of the 'Corporate Debtor' and other conditions as may be prescribed by the IBBI to place forward the Resolution Plans, project such plan to the 'Committee of Creditors' etc. He is an Officer of the Court and he is to exercise reasonable and responsible care for the company whose property and affairs are entrusted with him. He has an absolute duty to secure the best prize in the given circumstances and he is not made liable because his perception is wrong, of course, with the rider that unless it is not a reasonable one."

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The NCLT in the case of Asset Reconstruction Company held that since a RP acts as an officer of the court, any hindrance to his working would amount to contempt of court.[55] Further dealing with the scope of a RP's duty, the NCLAT in Encore Asset Reconstruction Company noted that as long as the title of an asset is retained by the CD, it is the duty of the IRP to take control of the underlying assets. The IRP is expected to fulfil this mandate even when the possession of the asset is not retained by the CD[56]. With the appointment of the RP by the CoC, the IRP is required to hand over the custody of the assets as well as other records that have been taken into custody.[56]

3.3. Legal and judicial protections given to RPs

An IP is protected from any coercive action for any decisions and actions conducted during CIRP, provided that he was acting in good faith.[57] In Basavaraj Koujalagi, NCLT Kolkata argued that if an IP is not protected against coercive action, it would impede his ability to make independent decisions:

"To hold otherwise will set a wrong precedent, and insolvency professionals shall not be able to take independent decisions, leading to a failure of the system. Such an approach should, therefore, be shunned. Actions taken in good faith by a public servant always enjoy protection under the law, and the IBC is no different, providing for the same under Section 233 of the Code." [58]

The Guwahati High Court in *Amit Pareek Vs. State of Assam*, further elaborated on the scope of Section 233 and the contours of acting in good faith:

"However, the provision of Section 233 of the IBC, which provides immunity from any suit, prosecution or other legal proceeding for anything done under the IBC or the rules or regulations made thereunder cannot be said to be restricted only to the offence committed under the Code.

If the act is done in good faith than the petitioner or any other official envisaged by the provisions of Section 238 of the IBC shall be immune from criminal or civil proceeding for any act done under the Code. There is no doubt that "good faith" or "bad faith" is certainly a question of fact and is subject to proof. When a person is immune from prosecution in respect of any act done in good faith, and such immunity is sought to be taken away by way of filing a proceeding or suit, the person bringing the proceeding needs to allege the relevant facts in the FIR or complaint, which can be attributed to motive or absence of good faith of any person, inasmuch, as the immunity under the statute provided in order to protect the certain class of person from prosecution in respect of their official act done under the IBC cannot be taken away in a light manner."[59]

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[51] Section 19 r/w Section 23(2), Insolvency and Bankruptcy Code, 2016; See: Navin Srichand kanjwani v. Prashant Verma, 2020 SCC OnLine NCLT 8105.
[52] Numetal Ltd. v. Satish Kumar Gupta & Anr., I.A. Nos. 98 & other IAs in CP (IB) No. 40 of 2017 order dated 19.04.2018.
[53] Section 19, Insolvency and Bankruptcy Code, 2016.
[54] Canara Bank v. Mamta Binani, RP of Aristo Texcon and Ors., MANU/NL/0001/2022.
[55] Asset Reconstruction Co. Pvt. Ltd. v. Shivam Water Treaters Pvt. Ltd., MANU/ND/0902/2019.
[56] Rajendra K. Bhutia vs. Maharashtra Housing and Area Development Authority, MANU/NC/5463/2018.
[57] Section 233, Insolvency and Bankruptcy Code, 2016; See: Bank of Baroda v. Varia Engineering Works Ltd., IA/4679 (AHM) 2021 in CP(IB)/149 (AHM) 2017, Order dated 19.07.2021; Basavaraj Koujalagi and Ors. v. Sumit Binani, Liquidator of Gujarat NRE Coke Ltd., MANU/NC/1084/2021.
[58] Section 233, 238 Insolvency and Bankruptcy Code, 2016. BASAVARAJ KOUJALAGI AND ORS. V. SUMIT BINANI, LIQUIDATOR OF GUJARAT NRE COKE LTD., supra note 58.
[59] Amit Pareek v. State of Assam, MANU/GH/0319/2021.

The NCLAT in *S. Rajendran Vs. Jonathan Mouralidarane* dealt with the powers of the RP in reference to collation of claims and held that:

"We are of the opinion that the 'Resolution Professional' had no jurisdiction to "determine" the claim as pleaded in the Appeal. He could have only "collated" the claim, based on evidence and the record of the 'Corporate Debtor' or as filed by Jonathan Mouralidarane ('Financial Creditor'). If an aggrieved person thereof moves before the Adjudicating Authority and the Adjudicating Authority after going through all the records, comes to a definite conclusion that certain claimed amount is payable, the 'Resolution Professional' should not have moved in appeal, as in any manner, he will not be affected."[60]

In the case of the *B.R Traders Vs. Venkataramanarao Nagarajan & Ors,* NCLAT noted that once the CoC has been constituted, the RP cannot entertain more applications for including a financial creditor in the CoC.[61]

The Court in *Puneet Kaur Vs. KV Developers*, noted that the RP is required to collate and prepare claims including the ones which have not been submitted by the creditors. The records of the CD reflecting the claims of creditors should be included in the information memorandum:

However, we are of the view that the claim of those homebuyers, who could not file their claims, but whose claims were reflected in the record of the Corporate Debtor, ought to have been included in the Information Memorandum and Resolution Applicant, ought to have been taken note of the said liabilities and should have appropriately dealt with them in the Resolution Plan. Non-consideration of such claims, which are reflected from the record, leads to inequitable and unfair resolution as is seen in the present case. To mitigate the hardship of the Appellant, we thus, are of the view that ends of justice would be met, if direction is issued to Resolution Professional to submit the details of homebuyers, whose details are reflected in the records of the Corporate Debtor including their claims, to the Resolution Applicant, on the basis of which Resolution Applicant shall prepare an addendum to the Resolution Plan, which may be placed before the CoC for consideration.[62]

[60] Mr. S. Rajendran, Resolution Professional of PRC International Hotels Private Limited v. Jonathan Mouralidarane, CA(AT)(Ins) No. 1018/2019; INSOLVENCY AND BANKRUPTCY BOARD OF INDIA, IBC: A Code for Corporate Governance, 10 (2019).

[61] Asset Reconstruction Company (I) Limited and Ors. vs. Koteswara Rao Karuchola and Ors., MANU/NL/0533/2019.

[62] Puneet Kaur and Ors. v. KV Developers Private Limited and Ors., MANU/NL/0363/2022.

4. Professional standards and misconduct of RPs

An insolvency professional functions within the dual regulatory authority of the IBBI and the IPA. The IBBI (Insolvency Professionals) Regulations, 2016, provide a Code of Conduct which is required to be followed by IPs and is adoptable by the IPA to ensure proper regulation of the IPs. Following are the broad categories in reference to which IBBI regulates the conduct of the IPs:[63]

(i) Integrity and objectivity
(ii) Independence and impartiality
(iii) Professional competence
(iv) Representation of correct facts and correcting misapprehensions
(v) Timelines
(vi) Information Management
(vii) Confidentiality
(viii) Occupation, employability and restrictions
(ix) Remuneration and costs
(x) Gifts and hospitality

The Code of Conduct has been interpreted to aid in the construction of the provisions and mandate of the Code. In the case of Vijay Kumar Jain, the Supreme Court held that the RP has an obligation to maintain confidentiality while conducting CIRP, and he can take an undertaking to this effect from the members of the CIRP process.[64]

The Code empowers IBBI to entertain complaints against the functioning of any IPA or IP.[65] On receipt of such complaint, the Board upon inspection would issue a show cause notice to the insolvency professional.[66] The Board shall constitute a Disciplinary Committee (DC) which shall decide upon the complaint.[67] The Code gives wide ranging powers to the DC which can suspend or cancel the registration of the insolvency professional,[68] and impose heavy fines to repatriate the amount of loss.[69] There are numerous examples where RPs are given punishment for negligence and misconduct, some examples are discussed below.[70]

[63] First Schedule, Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulation 2016; See: Vijaykumar Iyer & Abhishek Sood, Insolvency Professionals and the Code of Conduct, in INSOLVENCY AND BANKRUPTCY CODE: A MISCELLANY OF PERSPECTIVES 151 (2019).

[64] VIJAY KUMAR JAIN V. STANDARD CHARTERED BANK, supra note 36.

[65] Section 217, Insolvency and Bankruptcy Code, 2016 r/w Insolvency and Bankruptcy Board of India (Inspection and Investigation) Regulations, 2017.

[66] Section 219, Insolvency and Bankruptcy Code, 2016.

[67] Section 220, Insolvency and Bankruptcy Code, 2016.

[68] Section 220(2), Insolvency and Bankruptcy Code, 2016.

[69] Section 220(3)-(5), Insolvency and Bankruptcy Code, 2016.

[70] For IBBI orders, please see: https://ibbi.gov.in/en/orders/ibbi

For example, in March 2022, the IBBI's DC adjudicated a complaint where the RP had withdrawn the insolvency costs and fees without the approval of the CoC. Citing Regulation 34 of the CIRP Regulations, the DC held that the fees and costs towards CIRP cannot be paid without the approval of the CoC. Found to have operated in contravention of the Code and the regulations framed thereunder, the DC suspended the concerned IP from taking any new assignments for the period of one year.[71]

In another complaint, it was alleged that the RP engaged to different firms for conducting the same task in the CIRP. The DC ordered that the RP shall have to arrange to refund ₹14,57,193 and also suspended him for one year.[72] In another case, the complaint accused that he had outsourced his primary duty of verifying claims. The DC ordered the payment of a penalty equivalent to the fees paid to the outsourced agency.[73] In 2018, for a gross violation of his duties and misleading the NCLT, the DC cancelled the registration the IP and debarred him from seeking registration for 10 years.[74]

Since almost all the IPs are drawn from consultancy and advisory, the capability and instinct required towards running enterprises require a comprehensive continuing management education at multiple levels.

5. A Call for Management Education

A review of the IBC 2016 and the judicial decisions brings three critical factors. One, IP's role in the resolution process is legally and judicially well established and understood. Two, IPs role is ever expanding and covers several areas of expertise such as finance, business, law government engagement, accounting etc. Third, being the fulcrum of the resolution process, the multi-tasking nature of IP's work profile require a concerted effort to learn and understand running of a business enterprise. Since almost all the IPs are drawn from consultancy and advisory, the capability and instinct required towards running

enterprises require a comprehensive continuing management education at multiple levels. I propose the following:

First level: Once an IP is IPAs, the person must enrol and go through a non-evaluated basic management course which also includes ethics and professional standards.

Second level: After 5 years of experience as an IP, and as part of continuing education, the IP must enrol for a mid-level experience sharing evaluated management course which includes engaging in research with academia.

Third level: After 10 years of experience as an IP, and as part of continuing education, the IP must go through a senior management program covering experience sharing and the lessons learnt for furthering the code based and professional reforms to bring process efficiency in the resolution process.

India has many management institutes. This will be a good collaborative engagement between academia and insolvency professionals.

[71] Ibid, Insolvency and Bankruptcy Board of India, IBBI/DC/83/2022, order dated March 14, 2022.
[72] Ibid, Insolvency and Bankruptcy Board of India, IBBI/DC/85/2022, order dated March 31, 2022, Also see: Insolvency and Bankruptcy Board of India, IBBI/DC/107/2022, order dated June 31, 2022.
[73] Ibid, Insolvency and Bankruptcy Board of India, IBBI/DC/80/2021, order dated December 9, 2021.
[74] Ibid, Insolvency and Bankruptcy Board of India, IBBI/DC/07/2018, order dated December 23, 2018.

Analysing Impact of Rainbow Judgment: One Step Forward, Two Steps Backward?

The recent judgment of Supreme Court, namely, Sales Tax Officer Vs. Rainbow Papers Limited (Rainbow) has been termed as a disruptive judgment, upsetting the settled legal understanding. In the present article the author analysis the impact of this judgement on various process under the Insolvency and Bankruptcy Code, 2016 (Code) from commencement of the CIRP to approval of the Resolution Plan. He also recommends the necessity to amend Section 53 of the Code to clarify the position that secured financial creditors have priority over government dues, whether secured or unsecured. Till such time the amendments are brought in, Insolvency Professionals and their legal teams would do good to distinguish Rainbow judgment on the lines suggested in this Article.

Read on to know more…

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A New Normal called IBC

Evolution of law is a welcome sign but what about disruptions on constant basis? Starting from zero base, any new law develops through jurisprudence guiding the law users in its application and interpretation. Judgments of highest courts, attaining the status of law of the land, are expected to provide clarity and remove any confusion rather than confounding it. Insolvency and Bankruptcy Code, 2016 (Code), hailed as landmark legislation in recent times, disrupted unscrupulous promoters taking advantage of laws protecting them for an extended period mostly at the cost of creditors. A new normal was underway.

Interpretational Judgments of Apex Courts under IBC

The true sources of interpretating Code are Bankruptcy Law Reforms Committee Report (BLRC Report) Vol I, Parliamentary Committee reports and discussion leading to passing of Insolvency Bill into law, preamble of the Code and Supreme Court judgments. The Code has evolved over its journey of almost 6 years with amendments every year since 2016. The role of Apex Court has been extremely significant in clearing the air guiding the Adjudicating and Appellate Authorities, Regulators and service providers primary being the

Insolvency Professionals. Through interpretational judgments, the role of Committee of Creditors (CoC) was also explained, defined, and circumscribed. The judgments dealt with principles of natural justice to be followed by Adjudicating Authorities (AA) while admitting applications initiating corporate insolvency resolution process (CIRP), the relevant factors to be considered in such applications, expounding eligibility criteria of Resolution Applicants, authoritatively cautioning the Authorities below about the judicial interference in the matters of approval of Resolution Plans limiting their role by giving prominence to commercial wisdom of the CoC on money matters, establishing grounds and circumstances of withdrawal of admitted cases, clearing the air on applicability of limitation laws to the Code, defining roles of financial and operational creditors, edifying the status of home buyers under the Code and upholding the constitutional validity of the Code in the face of strong opposition on several occasions. The list is long. The journey has been eventful, and the judgments of Apex Courts were in the nature of confirming the legislative intent and upholding the concepts driving the Code.

Rainbow Judgment – Beginning or end of a disruptive trend?

Of late, few judgments of the Supreme Court have brought in a new twist in the tale. With no change in law, the established jurisprudence is seeing rainbow shades. In law schools, it is taught that law is not black and white but has many shades of grey. The untold truth, however, remains is that the interpretational judgments can have colorful shades of rainbow. The recent judgment of Supreme Court, namely, *Sales Tax Officer Vs. Rainbow Papers Limited (Rainbow)*[1] has been termed as a disruptive judgment, upsetting the settled legal understanding. Here is the analysis of Rainbow with possible impact on the pending resolution plans vis-à-vis the statutory dues.

What *Rainbow* is All About?

The ratio of *Rainbow* does not only question the supremacy of the commercial wisdom of the CoC in a CIRP but also shatters it to pieces. It has disturbed the established norm of finality of resolution plans and its element of binding nature on all the stakeholders including government authorities. The Rainbow lays down the following broad legal propositions:

a. Timelines in IBC are directory;

b. Sales tax department wasn't required to file any claim before the Interim Resolution Professional or the Resolution Professional (IRP/RP);

c. Resolution Professional failed to include the claim of sales tax department in the Information Memorandum as per books of account;

d. Sales tax department is a secured creditor;

e. Section 53 of the Code does not override Section 48 of the Gujarat Value Added Tax Act, 2003 (GVAT Act);

f. Security Interest could be created by operation of law;

g. Plan not meeting the requirements of S. 30(2) is invalid and cannot be binding on the Central Government (CG), State Government (SG), any statutory or other authority, any financial creditor or other creditor to whom the debt is owed under any law;

h. If the Resolution Plan ignores the statutory demands payable to any State Government or a legal authority, altogether, the AA is bound to reject the Plan;

i. Resolution Plan must contemplate dissipation of those debts in a phased manner, uniform proportional reduction or else the company would necessarily have to be liquidated and its assets sold and distributed; and

j. The CoC, which consists of financial creditors cannot secure their own dues at the cost of statutory dues owed to any Government or Govt Authority or for that matter, any other dues.

Understanding Facts of Rainbow

In Rainbow case, the Supreme Court was considering the appeal against the judgment of National Company Law Appellate Tribunal (NCLAT) holding that the government cannot claim first charge over the property of the corporate debtor as Section 48 of GVAT Act cannot prevail over Section 53 of the Code. The case has its unique facts whereby sales tax department had initiated recovery proceedings against the corporate debtor for its outstanding dues by attaching properties prior to commencement of CIRP. The sales tax department filed its claim for outstanding dues belatedly before the Resolution Professional. It wasn't considered and perhaps no amount was proposed as payable to sales tax department under the Resolution Plan approved by CoC and later by the NCLT.

[1] Civil Appeal No. 1661 of 2020 decided on 6th September, 2022

Questions Before the Supreme Court and its Impact

The Apex Court had to primarily answer a short question as to whether the provisions of the Code and, in particular, Section 53 thereof, overrides Section 48 of the GVAT Act, 2003? While answering that question, the Apex Court went adrift and made sweeping observations as mentioned above. Was it required? There is no easy answer, but Rainbow case is to be seen in the context of given facts. It is a well settled proposition that judgments and observations in judgments are not to be read as provisions of statute. Judicial utterances and/or pronouncements are in the setting of the facts of a particular case. Typically, text must match the context. But the far reaching, all-encompassing and across the board observations made by the Supreme Court in Rainbow have all the ingredients to cause misperception about the status of statutory dues and whether Resolution Plans, failing to adhere to proposition laid down in Rainbow, would face the same fate as it met in Rainbow.

> **Infact, the process of quoting Rainbow has started, and the Authorities have now been asking the RPs to file an affidavit explaining how Rainbow does not apply to their case where the Resolution Plans are pending for their approval.**

Infact, the process of quoting Rainbow has started, and the Authorities below have now been asking the Resolution Professionals to file an affidavit explaining how Rainbow does not apply to their case where the Resolution Plans are pending for their approval. This has serious repercussions on the success, fate, and future of the Code. The existence of the Code itself has come in question. If CoC decision does not bind the government authorities, and statutory dues have to be paid at par with secured financial creditors in the Resolution Plans, then why would the secured financial creditors be interested in initiating the CIRP of a corporate debtor or in its resolution. The secured financial creditors would be better off if they recover their dues through alternative remedies such as using the provisions of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002 (SARFAESI Act, 2002) where their rights have been held to be superior to the dues of the relevant department of the State Government provided such securitization, reconstruction and creation of security interest is registered with the Central registry (CERSAI)[2].

The threat of using the observations in Rainbow by statutory authorities is real and days to follow will see more litigation at several levels at the behest of statutory authorities.

Distinguishing Rainbow

The task of the Resolution Professionals, successful Resolution Applicants and CoC members is to defend their actions and plans as against the onslaught by the statutory authorities on the basis of Rainbow. They must successfully demonstrate that the facts in their case differ from Rainbow. The sweeping statements made in Rainbow have the capacity to cause some damage with some intensity, but a tabular presentation of distinguishing features would make the task of convincing Adjudicating and Appellate Authorities much easier. Here is the guidance to do so:

Serial Number	Ratio/Observation in *Rainbow*	Basis of Ratio/Observation	Possible Distinguishing Factors
1.	Timelines in IBC are directory.	The *Rainbow* judgment turns on its facts. The issue before Apex Court was whether the timelines specified in the CIRP Regulations in respect of filing of claims are mandatory or directory.	The Apex Court, while dealing with specific facts of the case, made the observation that timelines in IBC are directory. Looking at the issue at hand in *Rainbow* and in view of the settled legal proposition that *text* and *context* must match, it can be concluded that the Apex Court made this observation in the context of Regulations prescribing timelines for filing of claims in CIRP. All timelines in the Code were not held as directory by the Supreme Court as this issue was never before it.

[2] Jalgaon Janta Sahakari Bank Ltd. & Anr. Vs. Joint Commissioner of Sales, Tax Nodal 9, Mumbai, & Anr., Writ Petition No. 2935 of 2018, Bombay High Court dated 30th August, 2022

Serial Number	Ratio/Observation in *Rainbow*	Basis of Ratio/Observation	Possible Distinguishing Factors
2.	Sales tax department was not required to file any claim before the Interim Resolution Professional or the Resolution Professional.	The Supreme Court made this observation in the light of unamended provisions of Regulations 12 of CIRP Regulations. Prior to amendment effective from 4th July 2018, the Regulations used the phrase "Proof of Claim" amendment, no claims were supposed to be filed by tax authorities and the IRP/RP should have considered the claims on the basis of books of account or statutory notices/demand or pending litigation. After having examined the claims, it was incumbent upon him to ask for submission of 'proof of claim' from the tax authorities.	The ratio can be distinguished on following grounds: - a. *Rainbow* judgment deals with claims filed prior to 4th July 2018. After the amendment, the position has changed, and it cannot now be argued by statutory authorities that they were not required to file any claim and it was obligatory on the part of IRP/RP to ask for 'proof of claim' in case of doubt. b. Mere disclosure by Resolution Applicant in Information Memorandum is not equivalent to a lodging of proof of claims by the creditor. The submission seems to imply that if a Resolution Professional can be shown to have been aware of a claim by creditor, then the creditor has no obligation to file its proof of claims with the IRP or RP. Such a submission is not correct as it would play havoc with the entire structure of the CIRP process. c. Mere knowledge of existence of claim in books of account does not mean that the claims stand verified and proved on their own by the mere filing. The IRP/ RP is no mere post-office to merely take a claim and send it forward. The IRP is required to verify the claim. There may be questions of limitation. Some claims may require adjudication. There may be several other reasons why such claims may not be accepted at all or in the full form in which they are submitted to the IRP. d. The provisions of Section 13 and 15 of the Code and Regulations 7, 8, 8A, 9, 9A, 10, 12A and 13 were probably not brought to the attention of Apex Court. Conjunct reading of these provisions makes it amply clear that filing of claim was mandatory regardless of the amendments carried out on 4th July 2018 in the Regulations.

3.	Resolution Professional failed to include the claim of sales tax department in the Information Memorandum as per books of account.	It was incumbent upon the Resolution Professional to include the dues of sales tax department as per books of account in the Information Memorandum.	Typically, Information Memorandum is a base document which helps the prospective resolution applicants to make up their mind and finalize the Resolution Plans. It helps them in conducting due diligence. The Resolution Professionals should make every endeavor to disclose whatever information is available with them, including the details of claims not filed with him. The observation of Supreme Court is correct in this regard.
4.	Sales tax department is a secured creditor and Security Interest could be created by operation of law.	Supreme Court considered the specific provisions as contained in Section 48 of GVAT Act which provides that *"Notwithstanding anything to the contrary contained in any law for the time being in force, any amount payable by a dealer or any other person on account of tax, interest or penalty for which he is liable to pay to the Government shall be a first charge on the property of such dealer, or as the case maybe, such person."*. The Supreme Court read this provision in conjunction with Section 3(30) and 3(31) of the IBC to arrive at this conclusion.	The observation of the Supreme Court cannot be faulted with. The specific provisions contained in GVAT Act 2003 provide for statutory first charge. The RP's would be advised to check specific provisions in respective laws in case statutory authorities file their claim to ascertain their status as secured creditor or not.
5.	Section 53 of the Code does not override Section 48 of the Gujarat Value Added Tax Act, 2003 (GVAT Act)	Section 48 provides that dues payable to sales tac authorities are considered as first charge. Section 53 deals with priority of payment of dues. Both the provisions operate in different sphere and there being no clash between the two, the question of Section 53 overriding in the context of 'secured creditor' status of the sales tax department does not arise.	To this extent, the Supreme Court has rightly held that Section 53 of the Code and Section 48 of GVAT Act operate in different spheres. The question of superseding comes when there is inconsistency between the two provisions dealing with same subject. This position may be used to lay emphasis on the point that Section 48 of GVAT does not deal with priority in payment, which is specifically dealt by Section 53 of the Code. Hence Section 48 cannot be construed as giving priority in payment to the dues of sales tax.
6.	Plan not meeting the requirements of S. 30(2) is invalid and cannot be binding on the CG, SG, any statutory or other authority, any financial creditor or other creditor to whom the debt is owed under any law	The Supreme Court held this due to provisions that exist in Section 30(2)(b) that ensures minimum payment to operational creditors under the Resolution Plan. One of the minimum payment criteria is the payment of liquidation value to the operational creditor if distributed in accordance with Section 53. After holding that sales tax authorities are secured creditors, the Supreme Court	Entitlement of operational creditors to a minimum amount as per the limits laid down in Section 30(2)(b) is not in dispute. However, the conclusion drawn by Supreme Court can be distinguished on following grounds: - a. The preamble of IBC states that one of the purpose of enactment of IBC is the alteration in order of payment of government dues leading to balancing the interest of stakeholders.

		held that if Liquidation value is distributed in accordance with priority laid down in Section 53, the sales tax authorities are entitled to pro-rata payment equivalent to other secured creditors. Since the Resolution Plans fails to do that, hence the plan was held to be invalid.	b. As per S. 53, the payment of government dues are to be aid at fifth level and not at par with other secured creditors. The word 'government dues' is sufficient to cover secured or unsecured dues. c. The intention of legislature in lowering the priority of government dues cannot be ignored. d. State law cannot override a Central law. e. The judgment ignores the established proposition laid down *in Ghanashyam Mishra & Sons Pvt Ltd v Edelweiss Assets Reconstruction Company* that once the Resolution Plan is approved by the Adjudicating Authority, the legislative intent is to freeze all claims "so that the Resolution Applicants starts on the clean slate and is not flung with any surprise claims".
7.	If the Resolution Plan ignores the statutory demands payable to any State Government or a legal authority, altogether, the AA is bound to reject the Plan.	The basis of this proposition has not been explained in the judgment. However, it seems the Court was swayed by the reasoning that Resolution Plan is not in accordance with provisions of Section 30(2)	The grounds of distinction as stated in Point 6 apply here also.
8.	Resolution Plan must contemplate dissipation of those debts in a phased manner, uniform proportional reduction or else the company would necessarily have to be liquidated and its assets sold and distributed.	The basis of this observation is unexplained in the judgment. Probably the status of sales tax authorities as Secured Creditor weighed on their mind.	This proposition runs contrary to the scheme of IBC. Government dues have lower priority as per section 53 and hence dissipation of their dues in uniform proportional reduction is not called for.
9.	The CoC, which consists of financial creditors cannot secure their own dues at the cost of statutory dues owed to any Government or Govt Authority or for that matter, any other dues.	The basis of this proposition is also not explained in the judgment. It seems that secured creditors status was at forefront of this conclusion.	This seems to be a sweeping statement, which may be used by statutory authorities to claim rejection of Resolution Plan.

Conclusion

The *Rainbow* judgment brings forth the significance of drafting of any statute. The Review Petition in *Rainbow* matter seems to have been filed. Regardless of the fate of such a Review Petition, it would be necessary to amend Section 53 of the Code to clarify the position that secured financial creditors have priority over government dues, whether secured or unsecured. The following amendments are suggested.

a. In section 53(1)(b(ii), replace the words "secured creditor" with "secured financial creditor";

b. In section 53(1)(e)(i), add the words "whether secured or unsecured" at the end.

It must be borne in mind that operational creditors, other than government dues, can also be secured creditors. Rationally, they must be entitlement for payment in priority to unsecured financial creditors and other operational creditors including government dues. Their priority may also be clarified by way of suitable amendment in Section 53.

Till such time the amendments are brought in, Insolvency Professionals and their legal teams would do good to distinguish *Rainbow* judgment on the lines suggested in this Article.

Pre-Pack Framework: A Step in the Right Direction

With the introduction of Pre-Pack Insolvency Resolution Process for Micro Small and Medium Enterprises (PPIRP for MSMEs) through an Ordinance on April 09, 2021, India formally entered the Pre-pack regime. Subsequently, the Ordinance was replaced with an Act of the Parliament on June 30, 2022. The Pre-pack framework is aimed at easing the financial stress of MSMEs caused primarily by the Covid-19 pandemic. The author describes various advantages of the PPIRP for MSMEs and reviews Pre-pack framework in various developed countries from the Indian context. ***Read on to know more…***

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1. Ease of Doing Business and Insolvency resolution

The ease of doing business index was an index created jointly by Simeon Djankov, Michael Klein, and Caralee McLiesh, three leading economists at the World Bank Group. As per the Ministry of Corporate Affairs (MCA) various parameters pertaining to starting a business, running a business, and exiting a business are calculated to measure how conducive is the environment for businesses.[1] The insolvency resolution regime of a country plays a key role in providing businesses with the opportunity to exit from the market, and the effectiveness of an insolvency resolution regime can be measured in terms of time, cost, and outcome of the insolvency proceedings. According to studies, effective creditor rights reforms lead to lower credit costs, greater credit availability, a higher recovery rate for creditors, and strengthened job preservation.[2] The creditors expect a better recovery out of an insolvency proceeding and if the insolvency regime gives priority to the creditors' claims, then it builds the trust of lenders in the system which

[1] https://www.makeinindia.com/eodb
[2] Neira, Julian. 2017. "Bankruptcy and Cross-Country Differences in Productivity." Journal of Economic Behavior and Organization (2017). http://dx.doi.org/10.1016/j.jebo.2017.07.011

encourages them to continue responsible lending despite the risks involved.

2. Need for Pre-packaged Insolvency Resolution Process

2.1. Corporate Insolvency Resolution Process and its challenges:

In India, a threshold amount of default entitles a stakeholder to trigger the Corporate Insolvency Resolution Process (CIRP) of a Corporate Debtor (CD) under the Insolvency and Bankruptcy Code, 2016 (IBC or Code), pursuant to which the management of the CD changes from "debtor-in-possession" to "creditor-in-control", and the CD is managed by an IP as a going concern.[3]

The process under IBC focuses on revival of viable businesses by providing various in-built protections such as moratorium, and other regulatory benefits. However, as most MSMEs are promoter driven and lack the financial strength and management of larger companies, the insolvency system is perceived to lack the depth or the flexibility to support small businesses like MSMEs which are far more sensitive to market conditions and that could quite quickly and suddenly tip into financial distress.

Although, the outcome of CIRP has encouraging results, CIRP is a completely formal process and has its own limitations. Some of the problems CIRP has encountered are:

a. Litigations: During CIRP and post-approval of resolution plans by the committee of creditors.[4]

b. Business disruptions: Due to sudden shift of entire business of the CD to the IRP/RP it might suffer from business disruptions.

c. As the existing promoter and management is precluded from process by virtue of Section 29A they are not incentivized to initiate CIRP.[5]

d. Lack of Infrastructure and NCLT benches has affected efficient and speedy conclusion of CIRP.[6]

e. Non-cooperation with the RP by management of Corporate Debtor

2.2. Alternate options to CIRP under present Laws:

a. **Schemes under the Companies Act, 2013:** Section 230 of the Companies Act, 2013 offers a Scheme of Arrangement (SoA), which enables a company to restructure its liabilities and/or capital structure to turnaround the business, with the approval of NCLT. They experience disadvantages such as lack of moratorium and no fixed timeline for completion of process.

b. **RBI's Prudential Framework:** The RBI provides a prudential framework for early recognition, reporting and time-bound resolution of stressed assets. It has certain limitations such as it is only available in respect of stress of a CD which has RBI-regulated creditors, it does not provide for a moratorium. The plan binds only those FCs that are signatories to the ICA. It does not also bind OCs. This limits the scope of the plan to only financial restructuring, which may not be adequate to resolve stress in the CD.

c. **Informal /out-of-court negotiations:** The debtors and creditors may address the stress outside any formal framework, whether there is a default or not. The creditors also prefer to resolve stress through negotiations without resorting to a formal framework. In total 14,510 applications filed with NCLT for initiation of CIRP were withdrawn at pre-admission stage, indicating settlement arrived at by the relevant parties. However, such informal settlements do not enjoy the sanctity and benefits of a resolution arrived under a formal framework, etc.[7]

2.3.

The implementation of IBC has re-balanced the relationship between creditor and debtor. As creditor protection along with enforcement quality and judicial experience improve, a more debtor friendly bankruptcy was needed to be

[3] https://ibclaw.in/wp-content/uploads/2021/01/Pre-Pack-Comments.pdf
[4] https://www.lexology.com/commentary/insolvency-restructuring/india/shardul-amarchand-mangaldas-co/challenges-of-implementing-resolution-plans-in-india#Systemic%20challenges
[5] IBBI (2020), Insolvency and Bankruptcy News, April-June 2020
[6] https://www.juscorpus.com/contemporary-issues-with-insolvency-and-bankruptcy-code/
[7] https://ibbi.gov.in/uploads/whatsnew/34f5c5b6fb00a97dc4ab752a798d9ce3.pdf

explored by allowing the erstwhile management to remain in control of their firms, preventing inefficient liquidations that would otherwise occur.[8] However, the Code does not formally recognize the outcome of private arrangements, which makes them susceptible to future challenges by a dissenting creditor or the debtor itself.

Pre-package insolvency resolution process (PPIRP) was introduced in 2021 as an option for debtor-in-possession model for MSMEs. It is a hybrid debtor-friendly, semi-formal insolvency resolution process providing statutory recognition and protection to arrangements that are agreed between parties, and which also incentivizes the promoter and the management to initiate the insolvency resolution process as they are most suitably situated to identify stress in the CD at an early stage.

3. PPIRP: Attributes and Advantages

3.1. PPIRP is a mixed framework for resolving stress on an ongoing basis. Pre-pack has been structured to be a cutting-edge corporate rescue technique that combines the benefits of both formal (judicial) and informal (out-of-court) bankruptcy proceedings. It gives stakeholders the ability to handle the stress of a CD as a going concern with the least amount of government intervention. It is intended to be quick, inexpensive, and efficient in relieving stress well before value depreciates, with fewer interruptions to the company, and without drawing the stigma associated with a formal insolvency procedure. The three basic principles guiding the design of PPIRP as per Insolvency Law Committee are: (i) the basic structure of the Code should be retained; (ii) there should be no compromise on rights of any party; and (iii) the framework should have adequate checks and balances to prevent any abuse.

3.2. **Prior approvals are already secured before initiating process:** In case of CIRP, no prior steps are taken before filing petition for initiating the process. However, the PPIRP commences only after:

Pre-pack has been structured to be a cutting-edge corporate rescue technique that combines the benefits of both formal (judicial) and informal (out-of-court) bankruptcy proceedings.

a. Approval by financial creditors by a vote of at least 66% of value of the financial debt to initiate the PPIRP.
b. Special resolution is passed by the company to initiate PPIRP
c. Preparation of base resolution plan by the CD
d. Proposal and approval of resolution professional by the financial creditors and the CD

3.3. **Preliminary negotiation between parties before application to Adjudicating Authority (AA):** The flexibility to come up with an informal plan through discussions prior to making the application reduces chances of dissenting creditors further in the process.

3.4. **Minimizing involvement of NCLT:** Since the process is initiated only after an informal agreement has been achieved, it minimizes the chances of various litigations during admission. This in turn saves time as well as costs.

3.5. **Minimal disruption to the business:** As compared to the CIRP, there is no transfer of executive power from promoter to a RP which results in relatively minimal disruption of the business, as the existing management is more familiar with the business in comparison to an RP/ IRP.

3.6. **Statutory Sanction:** As opposed to other modes of out-of-court restructuring, the PPIRP operates as per the statutory scheme provided under the Code. Hence the resolution plan approved under this process has an additional statutory recognition and backing of the AA. This improves the chances of enforcement in PPRIP cases as compared to other modes of out of court restructuring.

3.7. **Base Resolution Plan:** As management of the CD is better acquainted with its business, it is suitably situated to prepare a resolution plan for

[8] Matching Bankruptcy Laws to Legal Environments

restructuring of the business of the CD, which can serve as a good starting point for other resolution applicants as well.

3.8. Swiss challenge method: The Swiss Challenge Method under the PPIRP gets initiated after the submission of the base resolution plan by the CD. Subsequently the CoC can decide to approve the base plan or invite plans from other interested parties. Other prospective resolution applicants need to submit a plan that is better than the base plan or the previous submitted plan by other resolution applicants. The process of improvement continues until one of the submitters fails to exercise the option within the time frame stated in the call for resolution plans. Adoption of Swiss challenge method helps the CoC to unearth the fair market value of the business.

4. Journey of Pre-packaged Insolvency in India

Since the introduction of the PPIRP for corporate MSMEs in August 2021, and as per the information published by the Board, two applications have been admitted as on 30 June 2022. The details are in the following table.[9]

Table: List of cases admitted for PPIRP as on June 30, 2022

Sl.	Name of the corporate debtor	Date of admission	Name of the NCLT Bench
1.	GCCL Infrastructure & Projects Ltd.	14-09-2021	Ahmedabad
2.	Loon Land Developers Pvt. Ltd.	29-11-2021	Principal Bench, New Delhi

Evidently, it is still early days to assess the acceptance and effectiveness of this process in the insolvency resolution ecosystem in India.

5. Distressed M&A opportunities under PPIRP

Distressed mergers and acquisitions often serve as a fresh start or rescue package for the target, but they also present a unique opportunity for the purchaser.[10] Distressed acquisitions offer two key attractions for the acquirer including value for money and speed of transaction. However, it also brings a major challenge of assessing the value of businesses with risky strategies, dwindling liquidity, limited resources, and uncertain prospects.

For a successful merger or acquisition, the buyer has to undertake various steps from identifying the candidate to its valuation and due diligence to the execution of the deal to post-merger compliance. A distressed M&A faces further challenges due compressed timetable, the limited information available to a buyer and invariably more limited contractual protection for buyers.

Under such circumstances, having a guiding framework such as PPIRP helps the acquirer in navigating and undertaking the process with its following features:

a. Time bound process and moratorium: Once the process is initiated it is directed in a time bound manner with fixed time allocated for each major milestone in the process. With the initiation of PPIRP, the CD also enjoys a moratorium that would allow the promoters to revive the operations of the company without any interference from the creditors and other stakeholders.

> **"CD also enjoys a moratorium that would allow the promoters to revive the operations of the company without any interference from the creditors and other stakeholders."**

b. Mitigation of information asymmetry and due diligence: The appointed Resolution Professional has access to the books of the CD along with the power to appoint other professionals for preparing various reports on CD. This can help mitigate information asymmetry to certain extent and aid the prospective acquirers in performing better due diligence on CD.

c. Execution / closure of deal: Since the PPIRP is initiated only after receipt of essential approvals from creditors as well as other stakeholder of the company, the execution of the final transaction should encounter less hinderance.

d. Post-merger compliances: Just as in case of CIRP, PPIRP also enjoys certain regulatory waivers when the acquisition is done under this route facilitating the completion of post-merger compliances.

6. Pre-packs across different jurisdictions

Pre-pack' has no statutory definition. It is known by different names in different countries, such as Pre-packaged insolvency resolution, pre-arranged insolvency resolution, and pre-plan sale in the United States, Pre-pack

[9] The quarterly report of the Insolvency and Bankruptcy Board of India, vol.23
[10] https://www.grantthornton.co.uk/insights/the-opportunity-in-accelerated-mergers-and-acquisitions/

sale in the United Kingdom, scheme of arrangement in Singapore etc.

6.1. Pre-pack in the UK: The Graham review of 2014 stressed the necessity of Pre-pack insolvency while also raising issues with the lack of transparency surrounding Pre-pack sales for unsecured creditors. The assessment also listed many voluntary measures to address these issues.[11]

"In Indian regime, only the CD can initiate Pre-pack insolvency resolution process while in US pre-plan option both CD and financial creditors may initiate the process."

6.2. Pre-pack in the USA: There are three basic types of Pre-packaged insolvency deals allowed by the USA Bankruptcy Code. First is the single-track Pre-pack wherein the debtor solicits the votes of creditors on Pre-pack without any simultaneous exchange offer. Second is the dual track Pre-pack where the company simultaneously prepares for an exchange offer where the debt instrument issuer makes an offer for the exchange of the existing security with new security, and files for a Pre-pack[12] under Chapter 11. The last one is a hybrid model known as partial Pre-pack wherein the debtor solicits the votes of certain types of creditors for the reorganization proposal before filing under Chapter 11 and the votes of other creditors are solicited after the petition under Chapter 11 is filed.

The elements of the USA and the UK PPIRP regulations have been combined in the Indian framework. The pre-plan arrangement described in Section[13] 363 of the Bankruptcy Code is quite comparable to the IBC (Amendment) Ordinance, 2021 and the UK model. The debtor-in-possession methodology is the first of these noticeable characteristics, and it has two effects; it ensures that business stays a going concern and limits asset value depreciation. However, it makes the process opaquer and allows 'phoenixing' wherein a corporate entity keeps on transferring only its business and not its debts to a series of new companies[14]. However, the Indian and US insolvency regimes differ on who can initiate process. In Indian regime only the CD can initiate while in US pre-plan option both CD and financial creditors may initiate the process.

6.3. Australia's Simplified Debt Restructuring: The Australian Government in 2020 identified the challenges in their insolvency regime one of which was that it was a 'one-size-fits-all' system wherein it imposed same duties and obligations, regardless of the size and complexity of the administration. Consequently, the Australian government introduced an insolvency law reform known as simplified debt restructuring in January 2021, aimed to accommodate the small businesses with effective and efficient restructuring tools, and to also provide them with an option to exit the market through liquidation. It enables the small financially distressed businesses to have access to a single, streamlined debt restructuring process while retaining the ownership of the company. It is a debtor-in-possession model allowing the directors of the debt-ridden companies to have control of the CD while devising a plan with the restructuring professional and with the approval of creditor to reorganize the debts of the CD. Such reform by Australia is similar to the PPIR process under IBC which aims to have a debtor-in-possession model for small businesses.

From the above, it maybe summarised that probably because Pre-pack has evolved over time, differently in different jurisdictions, and with every jurisdiction having a unique variant (s) of Pre-pack, that it has allowed stakeholders to modify and refine the nuances to suit needs of their respective eco-systems. This should only embolden us in India to be as bold and flexible and continue to improve and improvise on the Pre-pack process to suit the needs of the stakeholders for the larger benefit of all in the eco-system.

[11] Graham Review into Pre-pack Administration, Report to the Rt. Hon. Vince Cable MP, June 2014. Available at https://www.gov.uk/government/publications/graham-review-into-pre-pack-administration

[12] United States Bankruptcy Code

[13] Bankruptcy Code, 11 U.S.C. §363 (1978)

[14] Report of the Sub-committee of the Insolvency Law Committee on Pre-packaged Insolvency Resolution Process.

7. Challenges in adoption of PPIRP

a. Lack of transparency: Although secured creditors are usually consulted in the process, unsecured creditors are at the risk of not being notified of a PPIRP until it is completed. As a result, unsecured creditors could feel disenfranchised and suspicious of the process. Enhancing communication and collaboration amongst all the stakeholders should enable the process to achieve a healthier consensus amongst impacted stakeholders.

b. Insufficient marketing: Creditors may be concerned that maximization of value for the business and assets has not been achieved. This may be due to the nature and time lines of PPIRP which restricts marketing opportunities.. The IP may be unable to adequately 'tout' the business/assets for sale in the open market. On-boarding the right support team to the RP with the skills, ability, and network to actively 'sell' the asset should be a deliberate choice and decision by the CoC.

c. Conflict of interest: The IP can be perceived as having a conflict of interest. The directors would be unwilling to appoint IP who disagrees with them. Before accepting an appointment, the IP requires to be satisfied that they can comply with his statutory duties, and that a PPIRP sale is the most appropriate course of action in the circumstances.[15]

d. Voluntary Haircuts: Bankers may also be unwilling to accept haircuts in pre-packaged insolvency as their judgments may subsequently be questioned, thus they do not feel comfortable.[16]

8. Next Steps: The Way Forward

As per the Global Innovation Index[17] 2021, India's rank has improved from 111 in 2017 to 47 in 2021 in regard to 'Ease of Resolving Insolvency'. Hence, IBC has augmented the 'ease of doing business in India' and has turned out to be an effective reform in the financial system of the nation.

Adoption of PPIRP should take it a few steps further. After the paradigm shift in the Indian insolvency system brought through the IBC by changing the debtor in possession model to creditor in control model, the Insolvency Law committee[18] envisions to slowly give some control back to debtors with expectations that it will help in survival of genuine promoters undergoing insolvency due to unavoidable circumstances.

"Extending the PPIRP to the wider corporate sector, should only aid in further adoption of this process and in improving the ease of exit aspect of the ease of doing business in India."

The PPIRP which is currently only applicable to MSMEs gives a struggling CD a chance to either exit or merge with someone to save his failing business in a simpler, low cost, timely process. The Code has re-balanced the relationship between creditors and debtors, and in current circumstances, the Indian insolvency regime may be considered as being adequately mature to cede certain control back to the CD through the PPIRP while the creditors continue to exercise the final say and control of the insolvency resolution process and outcome[19]. Extending the PPIRP to the wider corporate sector, should only aid in further adoption of this process and in improving the ease of exit aspect of the ease of doing business in India.

[15] Report of the Sub-committee of the Insolvency Law Committee on Pre-packaged Insolvency Resolution Process

[16] https://economictimes.indiatimes.com/industry/banking/finance/banking/bankers-uncomfortable-taking-haircuts-in-pre-packaged-insolvency-resolution-process/articleshow/94160962.cms

[17] .https://www.wipo.int/edocs/pubdocs/en/wipo_pub_gii_2021.pdf

[18] Report of the Sub-Committee of the Insolvency Law Committee on Pre-packaged Insolvency Resolution Process

[19] Matching Bankruptcy Laws to Legal Environments.

Cross Border Insolvency: The Utility of Alternate Dispute Resolution (ADR) Mechanism

Insolvency and Bankruptcy Code 2016 (IBC) provides a creditor-in-control mechanism for resolving financially stressed companies. However, the experts across economies are unanimous that the creditors should use insolvency processes as a last measure when all the previous mechanisms of Alternative Dispute Redressal (ADR) such as restructuring, settlement, arbitration, mediation etc., are exhausted. Besides, various tools of ADR are also quite useful to sort of issues at the level of resolution professional and Committee of Creditors (CoC) thereby avoiding maximum possible litigations and interlocutory applications (IAs) which further delay the insolvency processes. As cross-border insolvencies involve more than one and sometimes several jurisdictions, ADR can play a crucial role in resolving such companies before and during the IBC processes. ***Read on to know more…***

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Productive enterprises are the backbone of a country's prosperity and its comprehensive national power. The Insolvency and Bankruptcy Code 2016 (Code/IBC) emphasizes the need for the timely resolution of financial stress to prevent value loss resulting from the failure of an economic entity or value destruction arising out of its unplanned closure.

The National Company Law Appellate Tribunal (NCLAT) in the matter of *Binani Industries Ltd. Vs. Bank of Baroda and ors*., clarified the goals of the Code in these words, "The first order objective is resolution. The second order objective is maximization of the 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." Thus, the main objective of the Code is 'to save the company ', regardless of its area of operations – domestic or overseas.

Role of ADR in Cross Border Insolvency proceedings

Given the above backdrop, the need for an efficient and flexible mode of corporate rescue in respect of Cross Border Insolvencies, assumes importance. As a support to

the UNCITRAL Model Law, recourse to the Alternate Dispute Resolution (ADR) Mechanism is available in some jurisdictions for use at various stages of Cross Border Insolvency. It regroups all processes and techniques of conflict resolution that occur outside of any governmental authority. The most commonly used ADR methods are: arbitration, mediation, negotiation, conciliation and transaction, of which the first three are the most in vogue.

Arbitration v/s Mediation

Although arbitration and mediation appear to have similar features as resolution modes, they are fundamentally different.

Arbitration is a determination of legal rights and leads to a binding determination, whereas

Mediation is a form of facilitated negotiation which looks beyond rights and allows the parties to focus on their underlying interests. It results in a binding determination only if the parties agree to settle their dispute on mutually satisfactory terms.

In the last 30 years, ADR has become an almost intrinsic part of dispute resolution clauses in international commercial contracts.

ADR Enforceability

The difference between enforceability of a court judgment and that of an arbitral award also favors use of arbitration in International Commercial Disputes Resolution.[2]

While the UNCITRAL Model Law (1997) on Cross-Border Insolvency has been accepted in 44 countries, including the USA and the UK, it is not a multilateral convention with a uniformly enforceable framework. In fact, Article 6 of Model Law expressly states that," nothing in this law prevents the court from refusing to take an action governed by this law if the action would be manifestly contrary to the public policy". Thus, many countries, including the USA, UK and Singapore, have incorporated public policy exemptions, as necessary, in their adopted version. Even the draft legislation proposed to be enacted in India has sought to build in caveats relating to domestic public policy. As such, the Model Law provides only a format, to be adapted locally, for proceeding with Cross Border Insolvency in the limited group of the 44 signatory countries and is not a globally applicable rule bound procedure.

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention -1958") provides a more wide-reaching option than the currently evolving UNCITRAL Model Law – particularly with reference to Indian Cross Border Insolvencies. The New York Convention has been described as "the single most important pillar on which the edifice of international arbitration rests." It may not be out of place to mention that in India, the Companies Act of 2013 and the MSME Act of 2006 provide for ADR. As such a comprehensive body of jurisprudence has evolved to give effective form to Mediation and Arbitration, etc., as acceptable dispute resolution processes, which may be extended to Cross Border Insolvencies as applicable. In the Indian context it may also be necessary to grant recognition to ADR for CIRP/Cross Border Insolvency by incorporating suitable changes to IBC.

Since there are currently 142 countries out of the 192 United Nations Member States that have adopted the New York Convention, the vast majority of international arbitration agreements are within its ambit. Under the New York Convention, if an arbitration award is issued in any country that is a party to the Convention, every other party to the Convention is legally obligated to enforce the award

ADR –Effectiveness for Cross Border Insolvency

ADR can be a useful tool in the pre-Insolvency resolution on the lines of the Pre-pack option for MSMEs or in the post CIRP stage before Liquidation. It can provide the following advantages:

(i) Settlement without public disclosure of dispute

This may facilitate a resolution without registering the recognition of default and dispute through a formal Insolvency initiation. The process may precede the invocation of CIRP and its attendant restraints on the CD. This would be useful in case of multiple locations of CD's operations, each of which may lose enterprise value due to actions in a separate jurisdiction

[1] Corporate Council Business Journal – RJ Aliment, Williams Kastner.

(ii) Cost Effective Mechanism

Formal insolvency processes under the Code/ Cross Border Insolvency requirements, can be time-consuming and involve significant direct and indirect costs. On the other hand ADR may provide a flexible and economical option for resolving claims and disputes. In case of Cross Border Insolvencies, the provisions of Arbitration Decree may be easier to execute assisted by the enabling Convention applicable to the member countries.[2]

(iii) Company as Going concern – Saving Value

Since the CD continues to function in a "Debtor-in-Possession" mode, there is little disruption in operations and a continuity in functioning which prevents sharp decline in enterprise valuations. This is relevant in respect of an Indian MNC which may experience a sharp loss of value as its overseas operations grapple with the initiation of domestic CIRP or Bankruptcy action in other countries.

ADR for Insolvency Resolution

(i) United States: The US has been a pioneer in using ADR/Mediation at various stages of Bankruptcy proceedings. The process received a fillip following the enactment of the Alternate Disputes Resolution Act (1998). ADR/Mediation was effectively used in the case of Lehman Brothers Holding to repay the creditors. The criteria to determine whether specific disputes relating to an insolvency were arbitrable or non-arbitrable depends on whether it is categorized as a core or non-core feature under Section 157 of Title 28, United States Code.

(ii) Switzerland: Article 177(1) of the Swiss Private International Law Act (PILA) states that any dispute involving economic interest is arbitrable. However, there is one exception i.e. "core issues" related to insolvency and bankruptcy shall not be arbitrable. This includes "initiation of insolvency proceedings, appointment of trustees etc." All other bankruptcy matters can be the subject of arbitration.

(iii) England: The general provision is that "insolvency matters disputes do not affect the ability of a party to proceed with arbitration". However, the arbitrability of insolvency matters depends upon whether the dispute engages third party rights or is there public interest involved. This includes payment made to third party creditors.

(iv) Chile: Though Specialized Insolvency courts have been set up in Chile, to shorten the long process of reorganization of the distressed companies, Insolvency Arbitration has now been included within the framework of Chilean insolvency law. Thus, parties (Debtor and Creditor) have the liberty to choose arbitration while their reorganization proceedings are underway. However, debtor consent is not required for Liquidation of companies. The reason for adoption of Insolvency Arbitration is to reduce the burden on the Bankruptcy court.

(v) Australia: The leading case of ACD Tridon Inc v. Tridon Australia Pty Ltd. allows that "while most matters under the Corporations Act could be referred to arbitration (if the clause was worded appropriately and that matters concern the parties' rights stemming from contract rather than statute), the parties could not refer to arbitration matters relating to the winding up of a corporation, as this is a matter stemming from statute and involves interest of third parties."

Legal Impediments to ADR under IBC

Insolvency proceedings in India are not the subject matter of arbitration. The moratorium gets triggered when an application under Section 7, 9 or 10 of the IBC is admitted by the tribunal. However, proceedings under the Arbitration Act can continue till the admission of the application under the IBC.[3]

In the matter of the *Indus Biotech Private Limited Vs Kotak India Venture and Ors.,* Supreme Court has held that in any proceeding which is pending before the Adjudicating Authority under Section 7 of IBC, if such petition is admitted upon the Adjudicating Authority

[2] Parul, Jagannath University Research Journal (JURJ) Volume No.-II, Issue No.–II, November, 2021, ISSN: 2582-6263

[3] Source Alternative Dispute Resolution (ADR) and IBC Resolution Professional July 2021- Manish Paliwal

recording the satisfaction with regard to the default and the debt being due from the corporate debtor, any application under Section 8 of the Act, 1996 made thereafter will not be maintainable.

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

Section 14 of the IBC provides that the adjudicating authority while admitting the application for insolvency shall by order declare moratorium for prohibiting the institution of any proceedings against the CD. This creates an additional hurdle in arbitrating the disputes arising during the pendency of the CIRP. In the matter of the SSMP Industries v Perkan (2019) DRJ 473, it was held by the High Court of Delhi that until and unless the proceeding has the effect of endangering, diminishing, dissipating, or adversely impacting the assets of the corporate debtor, it would not be prohibited under Section 14(1)(a) of the IBC. However, if continuing the ADR proceeding is not against the interests of the CD, such proceedings can continue even after the moratorium.

"Consent is the key element of the ADR proceedings. Parties are bound by the outcome of the ADR proceedings if they have consented to the same."

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

Contribution of ADR to facilitating Cross Border Insolvency

India's growing global engagement requires the setting up of an effective Cross Border Insolvency Resolution Mechanism for timely revival of a faltering enterprise or improving its realizable salvage value. Where ADR can be applied to the various jurisdictions that a CD operates within, it may facilitate the process in the following manner:

a. Some disputes will be resolved through ADR and it will reduce the number of applications filed before the Foreign/Domestic Adjudicating Authority (AA).

b. Since one attempt would have been made under ADR, the compete documents and pleadings regarding the application can be made available to AA without delay.

c. AA may refer to the ADR filings/records to expedite and facilitate decision making.

d. RPs may use various tools of ODR/ADR which could make the process more efficient and improve value salvaging.

e. Use of ADR or expert determination to resolve the valuation disparities and disputed transactions may reduce the time taken and the work of the AA.

Conclusion

The need for having a robust framework addressing all issues pertaining to cross-border insolvency has been long felt. Although various committees constituted by the Government have highlighted the importance of effective resolution of Cross Border Insolvencies, the present framework comprising of Section 234 and 235 IBC are inadequate to cover all aspects of insolvency. The need for a comprehensive framework is highlighted by the growing engagement of Indian Corporates with foreign counterparties and their increasing multinational footprints.

While the Model Law is a constructive step taken towards building such a mechanism, it is also not independent of various shortcomings. As discussed in the preceding paragraphs, the Model Law may need to be supported with the options available under ADR which do not conflict with the "Core" features of IBC, for improving its effectiveness.

Money has a time value. More than enhancing recovery, the value is best saved, if not enhanced, by timely action and restoration of viability. Where time is of essence and dispute resolution is necessary for value retention, the utility of an ADR for various stages of Cross Border

Sales Tax Now a Priority 'Secured' Creditor: Reversing Waterfall!

Section 53 of the IBC, 2016 provides a preferential order for distribution of the proceeds obtained from the sale of Corporate Debtor (CD) through a resolution plan or liquidation of its assets. This provision, commonly referred to as the waterfall mechanism, gives high priority to the dues of secured creditors. Since operationalization of the IBC, there have been several attempts, directly and indirectly, by various unsecured and operational creditors etc. to enter in the space of secured creditors, which were timely detected and refuted. However, while approving the tax dues of Gujarat GST Department, the Supreme Court in the matter of State Tax Officer Vs. Rainbow Papers Ltd. has granted operational creditors the status of a secured creditor. Besides the waterfall mechanism, this judgement has adversely affected the applicability of several provisions of the IBC.

Read on to know more…

Nipun Singhvi and Mayur Jugtawat

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Introduction

The Supreme Court of India in a recent verdict in the matter of *State Tax Officer (1) Vs. Rainbow Papers Limited*[1] has declared State Sales Tax (Gujarat VAT department) as secured creditor within the ambit of IBC recognising under Section 3(30) of the Insolvency and Bankruptcy Code, 2016 (IBC or Code). While discussing the various provisions Hon'ble Court has categorically held that definition of secured creditor in the IBC does not exclude any Government or Governmental Authority.

Another important issue discussed by apex court is with respect to claims filed by the Statutory authorities. It is stated that such claims should be considered in plan as per books of account of Corporate Debtor irrespective of the fact that claim form is filed by such authority or not. This article attempts to analyse the judgment keeping in mind objectives of the Code.

No timeline for claim

While discussing the claims to be filed by sales tax department, Court held that the timelines in the Code are directory and not mandatory. This is in contradiction to what has been held till now by the Courts. Till date the

[1] Civil Appeal No. 1661 of 2020 with Civil Appeal No. 2568 of 2020

legislature as well as Courts have taken the view that the Corporate Insolvency Resolution Process (CIRP) is time bound process and in specified case the timeline may be increased from 180 to outer limit of 330 days. However, the judgement held that the timelines are directory and not mandatory for the process under Code.

It is important to mention that the insolvency process which is a court monitored process lays much emphasis on time is essence of the process. Further, the claims filed are to be done in 90 days from the date of insolvency commencement, however court have been liberal to allow even till approval of resolution plan by Committee of Creditors (COC). However, declaring complete timelines shall lead to delays which needs to be reconsidered.

No charge registration!

Bankers lend to the companies based on the documents and data available in public domain. Therefore, the registration of charge has been made mandatory in Companies Act, 2013 and also was required in earlier company laws. There is always a charge registered by the bankers on the company whether it is mortgage, pledge, hypothecation, or any other form. This leads to a caution and the insolvency professionals are also guided by the charge registration and register so that the rights can be crystalised and proper distribution of recovery can take place.

This judgement holds that the charge in case of Sales Tax is created by operational law and grants supremacy to the fictional charge created as per respective law (Gujarat VAT law in this case). The view is contradictory to larger bench judgement of Apex Court in the matter of *Ghanshyam Mishra Vs. Edelweiss ARC* wherein the Court held that the purchaser (resolution applicant) cannot be allowed to be burdened with surprise claims. The concept of Clean Slate Theory was accepted right from Essar Steel case till date. Hon'ble Supreme Court has clarified the position by stating that the mischief which was noticed prior to amendment of Section 31 of the I&B Code was that though the legislative intent was to extinguish all such debts owed to the Central Government, any State Government or any local authority, including the tax authorities once an approval was granted to the resolution plan by NCLT; on account of there being some ambiguity, the State/Central Government authorities continued with the proceedings in respect of the debts owed to them. In order to remedy the said mischief, the legislature thought it appropriate to clarify the position that once such a resolution plan was approved by the adjudicating authority, all such claims/dues owed to the State/Central Government or any local authority including tax authorities, which were not part of the resolution plan shall stand extinguished

Relinquishment of Rights

Another analysis to this judgment is implications on rights of secured creditors under Section 52 of the IBC, 2016. A mortgaged security created in favour of financial institutions and security created by charge by the state tax department will create collusion while determining relinquishment rights. Though through catena of apex court judgments, the law is well settled that enactment which has come in later point in time shall have overriding effect over the earlier law, the effect of this judgment shall have a bearing effect on ascertaining true nature of security under Section 52 of the Code. The impact of judgment will reduce the approval of plans by CoC due to involvement of state tax department which will claim parity in distribution mechanism leading Corporate Debtor to go under Liquidation which is the last resort under IBC.

> **"The impact of judgment will reduce the approval of plans by CoC due to involvement of state tax department which will claim parity in distribution mechanism leading CD to liquidation."**

A *pari passu* charge over any property for the assets having formed part of the liquidation estate, an option to realise them outside liquidation is not merely an exercise in self-interest of the secured creditor, it impacts all other stakeholders as well. Hon'ble Supreme Court has further observed that CoC which might consist of financial institutions and other financial creditors cannot secure their own dues at the cost of statutory dues owed to any government or governmental authority or for that matter any dues. If the judgement stands as it is every statutory authority like Income tax, State tax (VAT/GST), ESI, PF, etc will come to ask for their pie in the distressed asset wherein the financial creditor is otherwise the sole stakeholder.

The Apex court held that any plan which ignores the statutory dues i.e government dues or governmental authority dues shall not be binding on the State. Further, it held that no plan can be passed at the cost of statutory dues. This is absolutely against the spirit of the Code wherein the preamble itself states that the alteration in priority of the

government dues shall happen. Further, the big plans approved till date shall be never approved if the bankers are to sacrifice to statutory authority. It is for this reason that even Securitization law was amended in 2016 to clarify that the bank dues shall be in priority to government dues.

Popping of Hydra

The precedent laid down by Apex court will now create difficulties for RP, COC and other stakeholders whose resolution plan is either approved or pending before Hon'ble Adjudicating Authorities because the requirement of this judgment will now become compliance for any resolution plan. The precedent is set to invite huge amounts of tax dues against a debt laden company which will defeat the objectives of the Code and Section 238 (non obstante clause), which in true sense intentionally keeps government dues at third layer in waterfall mechanism as per Section 53 of the Code.

"Earlier, the Supreme Court has held that a successful resolution applicant cannot suddenly be faced with "undecided" claims after the resolution plan submitted by him has been accepted."

Hon'ble Supreme Court in *Committee of Creditors of Essar Steel India Limited Through Authorised Signatory Vs. Satish Kumar Gupta & Ors*[2]. and *Ghanshyam Mishra and Sons Private Limited Vs. Edelweiss Asset Reconstruction Company Limited*[3] has already observed that a successful resolution applicant cannot suddenly be faced with "undecided" claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution applicant who successfully take over the business of the corporate debtor. As settled in the case of Ghanshyam Mishra, the past claims/debts in respect of the payments of dues arising under any law for the time being in force including the ones owed to the central government, any state government or any local authority shall stand extinguished. Therefore, such interpretation of law which is per incuriam will create an extra compliance/scrutiny for RP, COC and RA while reviving the Corporate Debtor.

If the dues of tax authorities are termed as a secured creditor, the same will render Section 53(1)(e) redundant because Government Authorities would come up in the ladder with the other secured creditors. If a secured creditor enforces his security interest in accordance with Section 52 of the Code, such secured creditor ranks lower in priority to a secured creditor and pari passu with government dues rather than a secured creditor who relinquishes his security interest. The Preamble to the Code lays down the objects of the Code to include "the insolvency resolution" in a time bound manner for maximisation of value of assets in order to balance the interests of all the stakeholders. Concerns have been raised that in some cases extensive litigation is causing undue delays, which may hamper the value maximisation. There is a need to ensure that all creditors are treated fairly, without unduly burdening the Adjudicating Authority whose role is to ensure that the resolution plan complies with the provisions of the Code. Various stakeholders have suggested that if the creditors were treated on an equal footing, when they have different pre insolvency entitlements, it would adversely impact the cost and availability of credit. Further, views have also been obtained so as to bring clarity on the voting pattern of financial creditors represented by the authorised representative.

Overriding Effect

As such provisdions of the Code shall prevail over provisions of other legislations being special law. the overriding effect of IBC over the Income Tax Act has been examined by the Hon'ble Supreme Court in the case of *Pr. Commissioner of Income Tax Vs. Monnet Ispat and Energy Ltd*[4]., wherein the court has ruled that Sec. 238 of IBC will override anything inconsistent contained in any other enactment, including the Income Tax Act. This has significant impact on regular tax matters as can be inferred from judicial development over the period. Section 238 of the Code provides for an overriding effect and Section 53 of the Code will prevail, wherein debt owed to secured creditors is given priority over government dues as reflected in Section 53(1) of the Code.

The overriding effect are always enacted to protect and achieve objectives of any legislations. However, in the present case, the impact of Section 238 has been made limited wherein government dues are given liberty to encroach the jurisdiction of IBC as secured creditor which is against the objectives of the Code.

2. Civil Appeal No. 8766-67 of 2019
3. Civil Appeal No.8129 of 2019
4. Special Leave to Appeal (C) No(s). 6483/2018

Conclusion

It is urged that the Government takes stake of the matter immediately and a review be filed in Hon'ble Supreme Court as once the judgement makes observation it becomes law of the land.

In authors' view the presumption if interpreted in light of the object of the Code shall mean that the charges created by law shall be subservient to the charge of the financial creditors. The lending by the bankers happens due to security interest they create, and tax department earns tax on the sales/income they effect. If the presumption of law is taken to be overriding the charge of banks or even pari passu to them the banking industry shall stop lending immediately. It is seen from the past that a financially distressed company shall always have huge tax liability since if the debt is not getting served, it is logical that the taxes which are normally paid on periodically basis would have been defaulted.

There is an urgent need of an ordinance to realign the intention of the legislature else majority of the pending matters will either be liquidated or withdrawn. Similar ordinance had been brought from time to time like blocking defaulting promoters from buying the company, inclusion of homebuyers as financial creditors, removal of attachment by enforcement agencies etc.

"There is an urgent need of an ordinance to realign the intention of the legislature else majority of the pending matters will either be liquidated or withdrawn."

As an interim measure, a stay be brought against the operation of said order and same may be declared *per incuriam* in the interest of banking industry. Even Apex court has time and again upheld the scheme of the code and held that Code is an improvement for benefits of financial creditors especially bankers. Such commercial economic laws should not be left in lurch and immediately process to reconsider the matter be done.

Legal Framework

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

REGULATIONS

IBBI amended Model Bye-Laws and Governing Board of IPAs in line with recement amendments in various Regulations

'IBBI' through a notification on October 3, 2022, has amended the IBBI (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations 2016. The amendment has been brought in line with the recent amendment done in the IBBI (IP) Regulations 2016 wherein the "Professional Member" definition included the Insolvency Professional Entity also. The major amendments have been done in clause(s) 9, 10, 12, 12A etc. along with the substitution of the words *"he"*, "*his"*, *and "him" with "the professional member*", "*its"*, and *"him"* respectively in the Schedule of the Model Byelaws.

Source: *Gazette Notification No. IBBI/2022-23/GN/REG100 dated October 03, 2022.*

IBBI introduced 'Regulatory Fee' and hiked existing fees to achieve self-sufficiency

Insolvency and Bankruptcy Board of India (IBBI) has levied a 'Regulatory Fee' at the rate of 0.25% of the realizable value to creditors under the Resolution Plan approved as per Section 31 of the IBC, where such realizable value is more than the liquidation value. This fee will be applicable where Resolution Plan is approved on or after October 01, 2022. The provision of 'Regulatory Fee' has been made under Section 31 (A) (1) which was inserted through the IBBI (CIRP) (Fifth Amendment) Regulations 2022 notified on September 20.

Further, as per the Section 31 (A) (2) 'a regulatory fee calculated at the rate of one per cent of the cost being booked in CIRP costs in respect of hiring any professional or other services by the IRP or RP, as the case may be, for assistance in a CIRP, shall be payable to the Board, in the manner as specified in Clause (cb) of Regulation (7) (2) of IBBI (IPs) Regulations, 2016'. Besides, the IPs will be required to pay one percent of his/her earning from professional services in the preceding financial years, which was earlier 0.25%. This provision has been inserted through an amendment in Clause (ca) of Regulation 7 (2) of IBBI (Insolvency Professionals) (Third Amendment)

Regulations 2022. This amendment also mandates the IPs and IP Entities to pay ₹20,000 and ₹2 lakhs 'on every five years after the year in which the certificate is granted and such fee shall be paid on or before the 30th of April of the year it falls due'. These fee hikes are reportedly to become self-sufficient and reduce reliance on government funds.

Source: *IBBI (CIRP) (Fifth Amendment) Regulations 2022, Gazette Notification F. No. IBBI/2022-23/GN/REG096 dated September 20, 2022.* and IBBI (IPs) (Third Amendment) Regulations, 2022, Gazette Notification No. IBBI/2022-23/GN/REG097 dated September 20, 2022.

IBBI amended Regulations related to "Voluntary Liquidation Process" and "Liquidation Process"

IBBI through two separate Gazette Notifications on September 16, 2022, notified IBBI (Voluntary Liquidation Process) (Second Amendment) Regulations, 2022 and IBBI (Liquidation Process) (Second Amendment) Regulations, 2022. The amendments will modify the liquidation process to enable better participation of stakeholders and streamline the liquidation process to reduce delays and realise better value. Besides, these amendments further lay down the manner and period of retention of records relating to liquidation and voluntary liquidation of a corporate debtor or corporate person, respectively. The major modifications are as follows:

(a) The Committee of Creditors (CoC) constituted during Corporate Insolvency Resolution Process (CIRP) shall function as Stakeholders Consultation Committee (SCC) in the first 60 days. After adjudication of claims and within 60 days of initiation of process, the SCC shall be reconstituted based upon admitted claims.

(b) The liquidator has been mandated to conduct the meetings of SCC in a structured and time bound manner with better participation of stakeholders.

(c) The scope of mandatory consultation by liquidator, with SCC has been enlarged. Now, SCC may even propose replacement of liquidator to the Adjudicating Authority (AA) and fix the fees of liquidator, if the CoC did not fix the same during CIRP.

(d) Before filing of an application for dissolution or closure of the process, SCC shall advice the liquidator, the manner in which proceedings in respect of avoidance transactions or fraudulent or wrongful trading, shall be pursued after closure of liquidation proceedings.

Source: *Gazette Notification No. IBBI/2022-23/GN/REG095 and Gazette Notification No. IBBI/2022-23/GN/REG094 dated September 16, 2022.*

IBBI amended CIRP Regulations to allow inviting Resolution Plan a second time and partial sale of assets etc. for value maximization

As per the 04th Amendment in IBBI (CIRP) Regulations 2016, the Resolution Professional (RP) and the Committee of creditors (CoC) can issue request for Resolution Plan a second time for sale of one or more of assets of the Corporate Debtor (CD) in cases where no Resolution Plan has been received for the CD. Besides, it enables for a Resolution Plan to include sale of one or more assets of CD to one or more successful resolution applicants submitting resolution plans for such assets and providing for appropriate treatment of the remaining assets.

For further value maximization, the amendment enables marketing of assets of the CD. It provides for formulating a strategy for marketing of assets of CD in consultation with the CoC to disseminate information about the asset to a wider and targeted audience of potential resolution applicants. The amendment also enables a longer time for the asset in the market as the invitation for expression of interest in Form G has been advanced to 60th day from Insolvency Commencement Date (ICD). Changes have also been made to Form G to provide more relevant information to persons for expressing interest. In addition to that the amendment (i) Changes timeline for filing application for preferential and other transactions on or before 130th day of ICD, (ii) Changes the timeline for submission of information memorandum to on or before 95th day from the ICD from 54th day. The amendment also provides measures to make the resolution process more transparent and robust. All the provisions of the amendment will be effective from September 16, 2022.

Source: *IBBI (CIRP) (Fourth Amendment) Regulations 2022, Gazette Notification No. IBBI/2022-23/GN/REG093.dated September 16, 2022.*

IBBI amended Regulations to fix Minimum Fee for Insolvency Professionals

Through a notification dated September 13, 2022, the IBBI has notified amendments in IBBI (CIRP) (Third Amendment) Regulations, 2022 and IBBI (IPs) (Second Amendment) Regulations, 2022 w.e.f. October 01, 2022. As per these amendments, "an IP shall be paid minimum fixed fee in the range of one lakh rupee to five lakh rupees, per month, depending on the quantum of claims admitted". However, the applicant or Committee of Creditors (CoC) may decide to fix higher amount of fees than the said minimum fixed fee, after taking into consideration market factors such as size and scale of business operations of corporate debtor, business sector in which corporate debtor operates, level of operating economic activity of corporate debtor and complexity related to process. The CoC may also decide to pay performance-based incentives for value maximization.

Source: *Gazette Notification No. IBBI/2022-23/GN/REG091 dated September 13, 2022.*

IBBI inserted new clause in Section 26 of the IBBI (IPs) Regulations 2016

IBBI through a notification on September 13, 2022, has amended the IBBI (IPs) Regulations 2016. The amendment has inserted new clause 26A which prohibits an insolvency professional to accept /share any fees or charges from any professional and/or support service provider who are appointed under the processes. "An insolvency professional shall not accept /share any fees or charges from any professional and/or support service provider who are appointed under the processes" reads newly inserted, Section 26 (a).

Source: *Gazette Notification No. IBBI/2022-23/GN/REG092 dated September 13, 2022.*

IBBI allows IPE to be registered as Juristic IP

Insolvency and Bankruptcy Board of India with a view to institutionalize the profession of IP have notified the IBBI (Insolvency Professionals) (Fourth Amendment) Regulations, 2022 on September 28, 2022, which allows

Insolvency Professional Entity (LLP/Company) to be enrolled / registered as juristic IP with IBBI/IPA. Such existing IPEs may now become 'Juristic IP (IPE)', after getting themselves enrolled with an Insolvency Professional Agency (IPA). An IPE, recognized by the IBBI, can seek registration as an IP with it, by making an application in the specified form along with a non-refundable application fee of two lakh rupees. Further, an IPE which is registered as an IP shall allow only its partner or director, as the case may be, who is an IP and holds a valid Authorization for Assignment (AFA), to sign and act on behalf of it

Source: *Notification No. IBBI/2022-23/GN/REG099 dated September 28, 2022*

CIRCULARS

IBBI asks IPs to inform about cases pending in Supreme Courts and HCs wherein 'scheme of IBC is in question'

Insolvency Professionals have been advised to inform IBBI without any delay about any important issues relating to vires, interpretation, and applicability of the provisions of the IBC, Rules and Regulations made thereunder are being contested before the High Courts and the Supreme Court of India, in respect of any assignment handled by them as on date. Further, the information as above shall be submitted by IPs as and when any such case is filed before Supreme Court and High Courts. For pending cases, the case papers with issues involved in brief shall be forwarded to IBBI by September 2022.

Source: *Circular No. IBBI/PROS/53/2022 dated September 13, 2022*

IBBI Revised fees for LIE and Valuation Exams

IBBI has revised the fees for Limited Insolvency Examination (LIE) and Valuation Examinations to ₹ 5000 plus applicable GST. A fee of ₹ 1770 (including GST) per enrolment is currently being charged for each of these examinations. The revised charges of ₹5,900 inclusive of GST for each enrolment will be applicable w.e.f. October 01, 2022. IBBI conducts LIE and Valuation Examinations in exercise of the powers conferred under Section 196(1)(a) of the IBC, 2016 and under Rule 5 of Companies (Registered Valuers and Valuation) Rules, 2017.

Source: *Circular No. IBBI/EXAM/52/2022 dated August 31, 2022.*

NOTIFICATIONS

Ms. Reetu Jain appointed Ex-officio Member in IBBI.

In accordance with the provisions under clause (b) of sub-section (1) of Section 189 of the Insolvency and Bankruptcy Board, 2016, the Central Government, has through a notification dated October 06, 2022, has appointed Ms. Reetu Jain, Economic Adviser, Department of Economic Affairs, Ministry of Finance, nominee of Ministry of Finance as the ex-officio member of the IBBI. She has been appointed in the place of Dr. Shashank Saksena who superannuated on June 30, 2022. She will hold this post until further orders.

Source: *Order No. 30/03/2016- Insolvency (196986), Ministry of Corporate Affairs, Government of India dated October 06, 2022.*

IBBI notified amendments in Fast Track Insolvency

The Ministry of Corporates Affairs (MCA), Government of India has notified amendments in Part II, Section 3, Sub-section (ii) of the IBC, 2016. In the said notification, for clause (b), the following clause shall be substituted, namely - "(b) a Startup (other than the partnership firm) as defined in the notification of the Government of India in the Ministry of Commerce and Industry number G.S.R. 127(E), dated the 19th February, 2019, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), dated the 19th February, 2019 and as amended from time to time; or". This notification was issued by the Minister in exercise of the powers conferred by sub-section (2) of section 55 of the Insolvency and Bankruptcy Code, 2016.

Source: *S.O. 4142(E), [F. No. 30/4/2017-Insolvency] dated August 30, 2022.*

GUIDELINES

IBBI extends validity of online programs

IBBI through a notification dated September 30, 2022, has extended the deadline of IBBI (Online Delivery of Educational Course and Continuing Professional Education by Insolvency Professional Agencies and Registered Valuers Organisations) (Amendment) Guidelines, 2022 till further orders. Besides, in Clause 9, in sub-clause (d), for the digit '100', the digit '200' shall be substituted.

Source:http:ibbi.gov.in/uploads/legalframwork/171423e671b649f715ea7e6d01f921ce.pdf

IBC Case Laws

Supreme Court of India

Balkrishna Rama Tarle (dead) through LRS & Anr. Vs. Phoenix ARC Private Limited & Ors, Special Leave Petition No. 16013 OF 2022, Date Judgement: September 26, 2022.

Facts of the Case

The Religare Finvest Ltd. sanctioned a loan of ₹6 crores (secured by Registered Mortgage) in favor of the borrowers. By a Deed of Assignment dated September 29, 2018, Religare Finvest Ltd assigned all its right, title, interest, and benefit under the said loan agreement to Phoenix ARC Private Limited hereinafter referred as (Respondent). The respondent issued a notice dated May 21, 2019, under Section 13(2) of the SARFAESI Act to borrowers calling upon borrowers to make payment of a sum of ₹5,83,22,866. The respondent filed an application under Section 14 of the SARFAESI Act seeking assistance of District Magistrate, Nashik, for taking physical possession of the secured assets.

Late Balkrishna Rama Tarle thr. LRS & Anr. hereinafter referred as (Petitioner) claiming to be a tenant on a part of the secured assets sought to intervene in the said proceedings. The DM passed the order dated August 27, 2021 and declined to assist the respondent in taking possession of the secured assets and kept the said application pending by observing that after termination of the tenancy rights of the petitioner further orders regarding possession of the mortgage property will be decided. It is required to be noted that neither the borrower(s) nor the petitioner(s) instituted any proceedings before the Debt Recovery Tribunal (DRT) under Section 17 of the SARFAESI Act.

The respondent preferred writ petition before the High Court, who set aside order of the DM by observing that such an order is beyond the scope and ambit of the powers to be exercised under Section 14 of the SARFAESI Act and directed the DM to hear and dispose of the application under Section 14 of the SARFAESI Act in accordance with the provisions of Section 14 of the SARFAESI Act.

Feeling aggrieved by the order passed by the High Court and relying on the decisions of Supreme Court in the cases

of *Harshad Govardhan Sondagar Vs. International Assets Reconstruction Company Limited and Ors.*; (2014) and *Vishal N. Kalsaria Vs. Bank of India and Ors*., the petitioner have preferred the Special Leave Petition before Supreme Court asking the court that whether while exercising the powers under Section 14 of the SARFAESI Act, the DM could have passed such an order or not?

Supreme Court's Observations

The Apex Court, after considering the scope, ambit, and jurisdiction of the DM/ Chief Metropolitan Magistrate (CMM) under Section 14 of the SARFAESI Act, observed that immediately after receipt of a written application under Section 14(1) of the SARFAESI Act from the secured creditor for taking over the possession of the property/ies, the CMM/DM is expected to pass an order after verification of compliance of all formalities by the secured creditor. Relying on the previous Supreme Court decision in the matter of *NKGSB Cooperative Bank Limited Vs. Subir Chakravarty & Ors*, the Court said time is of the essence, and this is the spirit of the special enactment. Further, citing the *Apex Court judgment in the case of M/s R.D. Jain and Co. Vs. Capital First Ltd. & Ors*, the Court observed that it is the duty cast upon the CMM/DM to assist the secured creditor in obtaining the possession. "Thus, the powers exercisable by CMM/DM under Section 14 of the SARFAESI Act are ministerial step and Section 14 does not involve any adjudicatory process qua points raised by the borrowers against the secured creditor taking possession of the secured assets," said the Court. It further added, "the secured creditor with respect to the secured assets and the aggrieved party to be

relegated to raise objections in the proceedings under Section 17 of the SARFAESI Act, before Debts Recovery Tribunal,".

Order: The High Court has not committed any error in passing the judgment and order and directing the DM to dispose of the application under Section 14 of the SARFAESI Act.

Case Review: *Special Leave Petition dismissed.*

K. Paramasivam Vs. The Karur Vysya Bank Ltd. & Anr., Civil Appeal No. 9286 of 2019, Date of Judgement: September 6, 2022.

Financial Creditor is free to proceed against the guarantor without first suing the Principal Borrower.

Facts of the Case

Karur Vysya Bank Ltd., the Financial Creditor, had advanced credit facilities to three entities, namely (i) Sri Maharaja Refineries, a Partnership Firm; (ii) Sri Maharaja Industries, a proprietary concern of K. Paramasivam; and (iii) Sri Maharaja Enterprises, a proprietary concern of P. Sathiyamoorthy. The Appellant, Maharaja Theme Parks and Resorts provided corporate guarantees for all these three credit facilities. On default by borrowers, the Financial Creditor filed an application before Adjudicating Authority (AA) to initiate insolvency proceedings against the Corporate Guarantor under Section 7 of the IBC. However, the Appellant relied on Section 3 (8) of the IBC which states that 'a corporate person is one who owes a debt to any person' and argued that it did not owe any financial debt to the Financial Creditor. Furthermore, the Appellant also contended that it was not covered within the definition of 'Corporate Guarantor' as per Section 5 (5A) of the IBC which reads 'Corporate Guarantor means a corporate person who is the surety in a contract of guarantee to a corporate debtor'.

The AA considered the Appellant as 'Corporate Guarantor' and ordered initiation its insolvency process via an order on April 08, 2019. The appeal of Maharaja Theme Parks and Resorts against this order of AA was dismissed by the NCLAT. The appellant filed the appeals in Supreme Court under Section 62 of the IBC and raised the question that whether CIRP can be initiated against a corporate person for corporate guarantee given on behalf of non-corporate person.

Supreme Court's Observations

The Court relied on a previous judgement of the Supreme Court in the matter of *Laxmi Pat Surana Vs. Union Bank of India and Another* in which these issues were settled. The Court observed that as per this judgement "under Section 7 of the IBC, CIRP can be initiated against a corporate entity who has given a guarantee to secure the dues of anon-corporate entity as a financial debt accrues to the corporate person, in respect of the guarantee given by it once the borrower commits default. The guarantor is then, the Corporate Debtor". On the question of whether CIRP can be initiated against the Corporate Guarantor without proceeding against the principal borrower, relying on the Laxmi Pat Surana (supra), the Court observed that the financial creditor is well within his rights to proceed against the principal borrower, as well guarantor in equal measure in case they commit default in repayment of the amount of debt acting jointly and severally. Besides, corporate debtor can also be a corporate person assuming the status of corporate debtor having offered guarantee. In conclusion, the Court observed that the liability of the guarantor is co-extensive with that of the Principal Borrower. Furthermore, the Financial Creditor is free to proceed against the guarantor without first suing the Principal Borrower.

Order: The Court did not find ground to interfere with the concurrent findings of the Adjudicating Authority (NCLT) and the Appellate Authority (NCLAT).

Case Review: Appeal Dismissed.

State Tax Officer (1) Vs. Rainbow Papers Limited, Civil Appeal No. 1661 of 2020 with Civil Appeal No. 2568 of 2020, Date of Judgement: September 06, 2022.

Financial Creditors cannot secure their own dues at the cost of statutory dues while approving a Resolution Plan.

Facts of the Case

This Appeal was filed against an order of National Company Law Appellate Tribunal (NCLAT) dated February 27, 2019, in which the NCLAT upheld the view of the Adjudicating Authority (AA) that the Government cannot claim first charge over the property of the Corporate Debtor (CD) under Section 48 of the Gujarat Value Added Tax (GVAT Act) 2003.

The Corporate Insolvency Resolution Process (CIRP) of the Respondent (Rainbow Papers Ltd., the CD) was initiated on September 12, 2017, by the NCLT, Ahmedabad (AA) on a Section 9 petition filed by an Operational Creditor. Subsequently, the Appellant had filed a claim of approx. ₹47.36 Crores before the Resolution Professional (RP) claiming dues payable by the CD to the State Government, towards its dues under the (GVAT Act). However, the RP informed the Appellant that his entire claim "had been was waived off". Aggrieved with this decision, the Appellant challenged the Resolution Plan by making an application before the NCLT contending that Government dues could not be waived off. The appellant prayed for payment of total dues towards VAT/CST on the ground that the Sales Tax Officer was a secured creditor. The AA rejected the application made by the appellant as not maintainable. The appellant agitated this issue before NCLAT through an Appeal. The NCLAT held that the Government cannot claim first charge over the property of the Corporate Debtor, as Section 48 of the GVAT which provides for first charge on the property of a dealer in respect of any amount payable by the dealer on account of tax, interest, penalty etc. under the said GVAT Act, cannot prevail over Section 53 of the IBC.

The appellant filed the appeals in Supreme Court under Section 62 of the IBC and raised the question that whether the provisions of the IBC, in particular Section 53, overrides Section 48 of the GVAT Act.

Supreme Court's Observations

The Apex Court, referring to the definition of the term "Secured Creditor" as defined under the IBC, observed that it is comprehensive and wide enough to cover all types of security interests namely, the right, title, interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction, which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person. The claim of the Tax Department of the State Government squarely falls within the definition of "Security Interest" under section 3(31) of the IBC and the State becomes a Secured Creditor under Section 3(30) of the IBC. The court also remarked "If the Resolution Plan ignores the statutory demands payable to any State Government or a legal authority, altogether, the Adjudicating Authority is bound to reject the Resolution Plan. In other words, if a company is unable to pay its debts, which should include its statutory dues to the Government and/or other authorities and there is no plan which contemplates dissipation of those debts in a phased manner, uniform proportional reduction, the company would necessarily have to be liquidated and its assets sold and distributed in the manner stipulated in Section 53 of the IBC. In our considered view, the Committee of Creditors, which might include financial institutions and other financial creditors, cannot secure their own dues at the cost of statutory dues owed to any Government or Governmental Authority or for that matter, any other dues."

Further, the Court said that Section 48 of the GVAT Act is not contrary to or inconsistent with Section 53 or any other provisions of the IBC. Under Section 53(1)(b)(ii), the debts owed to a secured creditor, which would include the State under the GVAT Act, are to rank equally with other specified debts including debts on account of workman's dues for a period of 24 months preceding the liquidation commencement date.

Order: The appeals are allowed. The impugned orders are set aside. The Resolution Plan approved by the CoC is also set aside. The RP may consider a fresh Resolution Plan in the light of the observations made above.

Case Review: *Appeals Allowed.*

Sundaresh Bhatt, Liquidator of ABG Shipyard Vs. Central Board of Indirect Taxes and Customs Civil Appeal No. 7667 of 2021, Date of Judgment: August 26, 2022.

IBC, 2016 to prevail over Customs Act, 1962 once moratorium is executed.

Facts of the Case

In April 2019, a liquidation order was passed against the Corporate Debtor (CD), that was in the business of shipbuilding, by the National Company Law Tribunal, Ahmedabad (NCLT) whereby the NCLT had directed the release of certain goods belonging to the CD, lying in the Customs Bonded Warehouses without payment of custom

duty and other levies. An appeal was filed against this order by the Central Board of Indirect Taxes and Customs (CBIC/ Respondent). The National Company Law Appellate Tribunal (NCLAT) observed that the goods lying in the customs bonded warehouse were not the assets of CD as they were neither claimed by the CD after their import, nor were the bills of entry cleared for some of the said goods. Further, the NCLAT held that the CD had lost his title to the imported goods under Section 48 and 72 of the Customs Act, 1962 and set aside the order of NCLT. Aggrieved by this, the Liquidator of the CD preferred the present appeal before the Supreme Court challenging the order of the NCLAT, wherein it was held that the goods lying in the customs bonded warehouses are not the assets of the CD.

The question under consideration was whether the provisions of IBC will prevail over the provisions of the Customs Act and whether the Customs Authority is entitled to confiscate the goods of the CD, which is currently under liquidation in terms of the IBC.

Supreme Court's Observations:

The Supreme Court observed that the Customs Act and the IBC act in their own spheres. In case of any conflict, the IBC, 2016 overrides the Customs Act. Section 238 of the IBC, being the non-obstante clause, clearly overrides any provision of law which is inconsistent with the Code.

It was observed that the demand notices issued by the CBIC under Section 72 of the Customs Act seeking enforcement of Customs dues during the moratorium period violated the provisions of Section 14 or 33(5) of the IBC, as the case may be. This is because demand notices are an initiation of legal proceedings against the CD.

The Court noted that Customs Authority could only initiate assessment or re-assessment of the duties and other levies. They cannot transgress such boundaries and proceed to initiate recovery in violation of Sections 14 or 33(5) of the IBC, 2016. The IBC would prevail over the Customs Act, to the extent that once moratorium is imposed in terms of Sections 14 or 33(5) of the IBC as the case may be, the Customs Authority would only have a limited jurisdiction to assess/determine the quantum of Customs Duty and other levies. The customs authority would not have the power to initiate recovery of dues by means of sale/confiscation, as provided under the Customs Act. After such assessment, the Customs Authority would submit its claims (concerning Customs Dues/Operational Debt in terms of the procedure laid down, in strict compliance of the time periods prescribed under the IBC, before the NCLT. It was further held that the title to the goods would not pass on to the Customs Authority and that the Authority would not confiscate the goods which are the assets of the CD for the purpose of recovering Customs Duties. The Court held that the IRP/RP/Liquidator has the right to take control of the assets belonging to the CD in terms of the IBC.

Order: The order of NCLAT was set aside.

Case Review: *Appeal Allowed.*

Asset Reconstruction Company (India) Limited Vs. Tulip Star Hotels Limited & Ors., Civil Appeal Nos. 84-85 of 2020, Date of judgement: August 01, 2022.

Entries in Financial Statement/s are acknowledgment of Debt liability of the Corporate Debtor.

Facts of the Case

The account of V. Hotels Ltd., the Corporate Debtor (CD) in which Tulip Star Hotels Ltd (Respondent No. 1) and Tulip Hotels Pvt. Ltd. (Respondent No. 2) has 50% share each, was declared a Non- Performing Asset (NPA) on December 1, 2008. Through a letter dated February 7, 2011, written within three years to the Appellant i.e., Asset Reconstruction Company (India) Ltd., the CD acknowledged the debt and proposed a settlement. This was followed by several requests of extension of time to make payment and revised settlements. On April 6, 2013, the CD again sought extension of time to pay the amount. Subsequently, on April 19, 2013, the CD made part repayment of the aggregate assigned debt. Thereafter, on May 29, 2013, another request was made by the CD for extension of time which was granted by the Appellant. On June 17, 2013, the Appellant revoked the settlement and in terms of the default obligations under the Settlement Agreement and the rate of interest under the Deed of Variation was revised to 22%. Furthermore, by its letter dated July 01, 2013, the CD acknowledged its obligation to repay the debt along with interest. Thus, the CD apparently acknowledged its liabilities towards the

Appellant in its Financial Statements from 2008-09 to 2016-17.

On April 03, 2018, the Appellant, in his capacity as a Financial Creditor (FC), filed an application under Section 7(2) of the IBC, 2016 before the Adjudicating Authority (AA)/ NCLT, Mumbai for initiation of the CIRP against the CD. The same was admitted by the AA. Aggrieved by the order of the AA, an appeal was preferred before the Appellate Tribunal (NCLAT). NCLAT held that CIRP initiated against the CD was barred by limitation as the FC failed to bring on record any acknowledgment of debt in writing by the CD. The Books of Account cannot be treated as an acknowledgement of liability in respect of debt payable to the FC. This order of the NCLAT was challenged in the present appeal before the Supreme Court.

Supreme Court's Observations

The Supreme Court noted that the IBC is a beneficial legislation for equal treatment of all creditors and also the protection of livelihood of its employees. Citing the case of *Sesh Nath Singh & Anr. Vs. Baidyabati Sheoraphuli Cooperative Bank Ltd*, the Apex Court stated that, "Legislature has in its wisdom chosen not to make the provisions of the Limitation Act verbatim applicable to proceedings in NCLT/NCLAT, but consciously used the words 'as far as may be'... The Courts would not give an interpretation to those words which would frustrate the purposes of making the Limitation Act applicable to proceedings in the NCLT/NCLAT 'as far as may be'". It is, therefore, imperative that the provisions of the IBC be construed liberally, in a purposive manner to further the objects of enactment of the statute.

Further, it was observed, as per Section 18 of Limitation Act, an acknowledgement of present subsisting liability, made in writing in respect of any right claimed by the opposite party and signed by the party against whom the right is claimed, has the effect of commencing a fresh period of limitation from the date on which the acknowledgement is signed. Such acknowledgement need not be accompanied by a promise to pay expressly or even by implication. However, the acknowledgement must be made before the relevant period of limitation has expired. Referring to *Bengal Silk Mills Co. Vs. Ismail Golam Hossain Ariff*, the Court opined that "The balance-sheet contains admissions of liability; the agent of the company who makes and signs it intends to make those admissions. The admissions do not cease to be acknowledgements of liability merely on the ground that they were made in discharge of a statutory duty."

In light of the above, the Apex Court, taking into account the object of IBC and the judgments referred, held that Entries in Books of Account/Balance sheet of a company can be treated as acknowledgement of liability in respect of debt payable to a FC. Accordingly, it was held that the CD acknowledged its liabilities in its Financial Statements from 2008-09 to 2016-17. Thus, the CIRP application was well within extended period of limitation.

Order: The impugned judgement and order of the NCLAT was set aside.

Case Review: *Appeals Allowed.*

M/S. S.S. Engineers Vs. Hindustan Petroleum Corporation Ltd. & Ors., Civil Appeal Number 4583 of 2022, Date of Judgment: July 15, 2022.

CIRP should not be initiated to penalize solvent companies for non-payment of disputed dues.

Facts of the Case

HPCL Biofuels Limited (HBL), a wholly owned subsidiary of Hindustan Petroleum Corporation Limited, had floated tenders in order to enhance the capacity of its Boiling Houses. The Appellant M/s. S.S. Engineers, which is also the Operational Creditor (OC), submitted its offer in pursuance of the tenders. Subsequently, purchase orders were issued by HBL in favour of the Appellant in November 2012. Later, it transpired that there were a few shortcomings in performance of contract by the Appellant. HBL wrote various letters and emails to the Appellant stating that the Appellant had acted in violation of the General Terms and Conditions of the contract, by raising improper invoices for materials not supplied, not renewing bank guarantees, failing to effect supplies and complete work within the stipulated period. It alleged that the services rendered, and materials supplied by the Appellant were of poor quality as a result of which HBL had to suffer losses and procure materials from other vendors. HBL also contended that there was no payment outstanding from HBL to the Appellant in view of the same. Subsequently,

the Appellant issued two demand notices under Section 8 of the IBC, in 2017 and 2018, respectively, to HBL although HBL replied to the demand notices disputing the claim. Thereafter, the Appellant filed an application for initiation of CIRP against HBL, under Section 9 of the IBC.

The NCLT admitted the application for initiation of CIRP filed by the Appellant, rejecting the contention raised by HBL that there were pre-existing disputes between the parties in respect of the claim of the Appellant. Following this, an appeal was preferred to the National Company Law Appellate Tribunal (NCLAT) which was allowed, and the order passed by the NCLT was set aside. Subsequently, the Appellant filed an appeal in the Supreme Court challenging the order passed by the NCLAT.

The question to be adjudicated upon was whether the application of the OC under Section 9 of the IBC, should have been admitted by the NCLT.

Supreme Court's Observations

The Supreme Court referred to the case of *Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited* to deal with the issue of existence of dispute. The Court observed that when examining an application under Section 9 of the IBC, the Adjudicating Authority (AA) would have to examine (i) whether there was an Operational Debt exceeding ₹1,00,000 (ii) whether the evidence furnished with the application showed that debt was due and payable and had not till then been paid; and (ii) whether there was existence of any dispute between the parties or the record of pendency of a suit or arbitration proceedings filed before the receipt of demand notice in relation to such dispute. If any one of the aforesaid conditions was not fulfilled, the application of the OC would have to be rejected. In the present case, the correspondence between the parties showed that HBL was disputing the claims of the Appellant on the contention that the Appellant was backing out from its commitments and not adhering to the timeframes as per the contract, thereby causing losses to HBL. Due to this, HBL was constrained to procure materials from other vendors and had to incur losses. Hence, HBL declined to release money claimed by the Appellant on the ground of poor quality of work and breaches of the terms and conditions of the Purchase Order. The Court observed that the correspondences between the parties evince the existence of real dispute. Going by the test of existence of a dispute, it was clear that HBL had raised a plausible defence. There was no amount outstanding from HBL to the Appellant; rather there was a recovery due from the Appellant. The Apex Court found that there was a pre-existing dispute with regard to the alleged claim of the Appellant against HPCL or its subsidiary HBL. "It was not for the AA (NCLT) to make a detailed examination of the respective contentions and adjudicate the merits of the dispute at this stage," said the Court.

The Court also remarked that the NCLT while exercising powers under Section 7 or Section 9 of IBC, is not a debt collection forum and it is not the object of the IBC that CIRP should be initiated to penalize solvent companies for non-payment of disputed dues claimed by an OC. It was patently clear that an OC can only trigger the CIRP process, when there is an undisputed debt and a default in payment thereof. However, if the debt is disputed, the application of the OC for initiation of CIRP must be dismissed. The NCLT committed a grave error of law by admitting the application of the OC, despite a pre-existing dispute. The NCLAT rightly allowed the appeal filed on behalf of HBL.

Order: The Supreme Court found no ground to interfere with the judgment of the NCLAT impugned in this appeal.

Case Review: *Appeal Dismissed.*

Vidarbha Industries Power Ltd. Vs. Axis Bank Ltd., Civil Appeal Number 4633 of 2021, Date of Judgment: July 12, 2022.

Power of NCLT to initiate CIRP under Section 7(5)(a) is not mandatory but discretionary.

Facts of the Case

In this case, the Appellant Corporate Debtor (CD) i.e., Vidarbha Industries Power Ltd (VIPL) had defaulted on loan from Axis Bank Limited (Financial Creditor). CD pleaded that the default was on account of dispute relating to the price of the electricity which was to be settled by Maharashtra Electricity Regulatory Commission (MERC) and upon which CD was expecting to receive a substantial amount of ₹1,730 crore which would enable it to pay off the debt. The CD also submitted that it had won a case in

the Appellate Tribunal for Electricity (APTEL) challenging the disallowance of the actual fuel cost for the financial years 2014-15 and 2015-16. The appeal against the APTEL order is still pending in the Apex Court. The CD was, for the time being, short of funds but, it was submitted that implementation of the orders of the APTEL would enable CD to clear all its outstanding liabilities. However, the NCLT had admitted the CIRP application filed by Axis Bank Limited i.e., the FC against which appeal was rejected by the NCLAT.

This appeal in front of the Apex Court under Section 62 of the IBC was preferred by the CD against the order of NCLAT whereby the Tribunal refused to stay the proceedings initiated by Axis Bank Limited against the Appellant for initiation of the CIRP under Section 7 of the IBC. Both NCLAT and NCLT proceeded on the premise that an application must necessarily be entertained under Section 7(5)(a) of the Code if a debt existed and the CD was in default of payment of debt. They found Section 7(5)(a) of the Code to be mandatory for the Adjudicating Authority (AA).

The main question to be determined in front of the Apex Court was whether Section 7(5)(a) of the IBC is a mandatory or a discretionary provision.

Supreme Court's Observations

The Bench relied on the Supreme Court's observations in *Swiss Ribbons Private Limited and Anr. Vs. Union of India* which said that timely resolution of a Corporate Debtor, who is in the red, by an effective legal framework and process, would go a long way to support the development of the credit market. "There can be no doubt that a CD who is in the red should be resolved expeditiously, following the timelines in the Code and no extraneous matter should come in the way. However, the court remarked, the viability and overall financial health of the CD are not extraneous matters," said the Court.

On the judgement of NCLAT, the Apex Court said, it erred in holding that the NCLT was only required to see whether there had been a debt and the CD had defaulted in making repayment of the debt, and that these two aspects, if satisfied, would trigger the CIRP. The existence of a financial debt and default in payment thereof only gave the FC the right to apply for initiation of CIRP. Legislature has, in its wisdom, chosen to use the expression "may" in Section 7(5)(a) of the Code. Ordinarily the word "may" be directory. The expression 'may admit' confers discretion to admit. The use of the word "shall" postulate a mandatory requirement. Had it been the legislative intent that Section 7(5)(a) of the Code should be a mandatory provision, Legislature would have used the word 'shall' as it has used in Section 9(5) which is an almost identical Section with respect to an Operational Creditor and not the word 'may'. There is no ambiguity in Section 7(5)(a). It is certainly not the object of the IBC to penalize solvent companies, temporarily defaulting in repayment of its financial debts, by initiation of CIRP. "Even though Section 7(5)(a) may confer discretionary power on the NCLT, such discretionary power cannot be exercised arbitrarily or capriciously," emphasized the Court.

Order

The impugned order dated January 29, 2021, passed by NCLT and the impugned order dated March 02, 2021, passed by the NCLAT dismissing the appeal of the Appellant were set aside. NCLT was directed to reconsider the application of the Appellant for stay of further proceedings on merits in accordance with law.

Case Review: *Appeal Allowed.*

National Company Law Appellate Tribunal (NCLAT)

K.V. Jayaprakash Vs. State Bank of India & Anr., Company Appeal (AT) (Insolvency) No. 362 of 2022, Date of Judgement: September 30, 2022.

Facts of the Case

This appeal under Section 61(1) of IBC was filed by K.V.Jayaprakash, hereinafter referred as "Appellant", who is a personal guarantor of Corporate Debtor (Coastal Projects Limited), against the order passed by the Adjudicating. The appellant had filed an Interlocutory Application (IA) before the AA with a request to direct State Bank of India, (Respondent-1), which is Financial Creditor, to abstain the public auction of his properties in view of the liquidation order dated December 06, 2018, passed by the NCLT admitting the Corporate Debtor into liquidation.

During pendency of the liquidation process, the Financial Creditor filed an application before Chief Metropolitical Magistrate, Bangalore under Section 14 of SARFAESI Act against the Corporate Debtor and its guarantors, including the appellant herein, for taking possession of the Property. In this application, the Financial Creditor had not revealed the ongoing liquidation process and the moratorium in force under Section 33(5) of the IBC. Accordingly, the application was admitted, and Financial Creditor was allowed to take possession of the property. However, the appellant challenged this order in Debt Recovery Tribunal which was finally dismissed. Meanwhile, the Financial Creditor started the process of possession and sale of the said property. The order was challenged before NCLT Cuttack through an IA which was dismissed by the AA.

NCLAT's Observations

After listening the arguments of both the sides, the Appellate Tribunal formulated five legal questions for adjudication – (1.) Whether Section 60 (5) of the IBC permits 3rd party (Personal Guarantor to Corporate Debtor) to file an application and redress the grievances in the present appeal? (2.) Whether moratorium declared under IBC provides protection to the Personal Guarantor (3.) Whether Liquidator should include the Personal Guarantor as Secured Creditor (4.) The way out in case of conflict between IBC provisions and Section 140 of the Contract Act.

Relying on the Supreme Court judgements in the cases of *Gujarat Urja Vikas Nigam Limited Vs. Amit Gupta* and *Arcelor Mittal (India) (P) Ltd. Vs. Satish Kumar Gupta*, the NCLAT held that the proceedings under SARFAESI Act are independent and purely for recovery of the loan amount. "The Personal Guarantor though related to debt, but not related to the insolvency of the Corporate Debtor when no insolvency process is initiated. Therefore, the petition filed by the petitioner claiming various reliefs is unrelated to the insolvency of corporate debtor," said the Court and due to 'no jurisdiction' denied entertaining the application. Further in light of the Supreme Court Judgement in the case of *State Bank of India Vs. V. Ramakrishnan* (2018) and Delhi High Court Order in case of *Kiran Gupta Vs. State Bank of India* (2020) and some other cases, the Appellate Tribunal concluded that there is no bar to proceed against Personal Guarantor during moratorium.

Furthermore, the Court held that the Appellant is entitled to claim as Creditor of Corporate Debtor in view of Section 140 of Indian Contract Act, but not as Secured Creditor as no security interest is created in his favour, subject to limitation provided in Chapter III of IBC. The court also upheld the superseding powers of the IBC, 2016 on Indian Contract Act.

Order: The Appeal fails as it is devoid of any merit.

Case Review: *Appeal dismissed.*

VR Ashok Rao Vs. TDT Copper Ltd, Stressed Assets Stabilization Fund Vs. Delta International Ltd, and a bunch of other petitions. Date of Judgment: August 30, 2022.

Refiling after removal of defects will not be considered a fresh filing.

Facts of the Case

These appeals were filed against the respective orders passed by different the Adjudicating Authorities. The question involved in all these Appeals is the "Refiling Delay". In all the cases, after scrutiny of the memo of appeals, defects were intimated to the appellants and the respective appellants subsequently refiled the appeals after a delay of expiry of seven days. Later, the cases matters were placed before the National Company Law Appellate Tribunal (NCLAT) under the heading 'For Admission (fresh Case). The NCLAT observed significant delay in refiling of the appeals and expressed doubt on two earlier judgments delivered by the Tribunal in the matter of *Mr. Jitendra Virmani Vs. MRO-TEK Realty Ltd. & Ors*., and *Arul Muthu Kumaara Samy Vs. Register of Companies*, which resulted into reference to larger bench of five judges on the two questions:

(1) Whether the law laid down by NCLAT in Jitendra Virmani's case and in Arul Muthu's case that when the defect in appeal is cured and the Appeal is refiled before the Appellate Tribunal beyond seven days, the date of re-presentation of the Appeal shall be treated as a fresh Appeal, lays down correct law?

(2) Whether the limitation prescribed for filing an Appeal before this Appellate Tribunal under Section 61 of Insolvency and Bankruptcy Code, 2016 (IBC, 2016) or Section 421 of the Companies Act, 2013 shall also govern the period under which a defect in the Appeal is to be cured and this Appellate Tribunal shall have no jurisdiction to condone the delay in refiling/re-presentation if it is beyond the limitation prescribed in Section 61 of the IBC or Section 421 of the Companies Act, 2013.

NCLAT's Observations

With respect to the first question, Rule 26 (2) of the NCLAT Rule, 2016 contemplates that if a document is found defective, the same shall be notified to the party which shall cure the same within a period of seven days and on a failure to do so, orders maybe passed by the Registrar.When specific power is there under Sub-rule (3) of Rule 26 to extend the time for compliance, the period of seven days cannot be said to be mandatory period. The five-judge bench remarked that the law laid down by NCLAT in Jitendra Virmani's case and in Arul Muthu's case that when the defects in appeal are cured after seven days and the same is refiled, it shall be treated as a fresh Appeal, does not lay down a correct law. The re-presentation of appeal after expiry of a period of seven days or after extended period shall not be a fresh filing and shall only be refiling/representation. Also, as per Rule 26 of NCLAT Rules, 2016, as noticed above, there is no indication of concept of fresh filing, if defects are not cured in seven days as has been expressly provided in Delhi High Court Rules.

Regarding the second question, the court observed that Section 61 (2) of IBC, 2016 and Section 421 of the Companies Act, 2013 talk about time period for filing the appeal and not for refiling/re-presentation of the appeal after curing defects. The NCLAT held that the limitation prescribed in filing an appeal under Section 61 of the IBC, 2016 or Section 421 of the Companies Act, 2013 shall not govern the period taken in an appeal for removal of the defects in refiling/re-presentation. Even if, there is a delay in refiling/re-presentation which is more than the period of limitation prescribed for filing an appeal under Section 61 the Code and Section 421 of Companies Act, 2013, the same can be condoned on sufficient justification. Accordingly, the NCLAT held that the time period of seven days for removal of defects is directory and the refiling after removal of defects will not amount to a fresh filing.

Order: The Appeals for consideration of condonation of delay in refiling/re-presentation were ordered to be listed in accordance with law.

Case Review: *Appeals Disposed.*

IBC News

First Flight Couriers admitted in to CIRP

The petition for commencement of Corporate Insolvency Resolution Process (CIRP) of the First Flight Couriers, one of the major courier service companies in India was filed by an Operational Creditor Srinidhi Comprint Pvt. Ltd. which provided printing services to the company. According to the petition, there was a default of about ₹1.44 crore. During the hearing in the NCLT Mumbai, the counsel of the corporate debtor admitted the liability as well as default and submits that they are not in a position to repay its dues. She further stated that the employees of the company have also went on strike because of nonpayment of salaries etc. Admitting the petition, the Court also ordered the applicant to deposit a sum of Rs.5 lakh with the IRP to meet the expenses of the insolvency process. For More Details,

Source: *https://ibbi.gov.in//uploads/order/42744704f4aa0d05f568d7113b715a8e.pdf*

Industry body urged FM to amend IBC in the interest of survival of MSMEs

In a letter to Union Finance Minister Ms. Nirmala Sitharaman, Mangaluru (Karnataka) based Kanara Chamber of Commerce and Industry (KCCI) has urged the Central Government to include MSMEs under Section 53 (1) (b) along with workmen's dues.

"When MSMEs do business with some Limited Liability Companies that are later referred to NCLT, they stand no chance of recovering their dues. This is because MSMEs do not have the resources or the expertise to analyse their customers' creditworthiness," said M. Ganesh Kamath, President of KCCI. He contended that unless this is done the very survival of MSMEs is challenging,". The Section 53 provides waterfall mechanism for distribution of proceeds obtained from resolution or liquidation of the corporate debtor. The Section 53 of the IBC, 2016 provides waterfall mechanism for distribution of proceeds of the CD.

Source: *The Hindu, October 06, 2022*

https://www.thehindu.com/news/cities/Mangalore/kcci-urges-centre-to-amend-insolvency-and-bankuptcy-code-in-the-interest-of-msmes/article65971748.ece? homepage=true

About 50% posts of NCLT Members are vacant

Presently, the NCLT has a total of 28 benches across the country with a sanctioned strength of 63 members, which includes 31 members each from judiciary and technical sides headed by its President in New Delhi. Besides, the NCLTs are also facing shortage of infrastructure and supporting staff including court officers. Speaking to media, NCLT Bar Association Secretary Mr. Saurabh Kalia said that only half of the benches are working with full strength. "The other half works sometime in the morning and sometimes in the afternoon. Sometimes it also works in wee hours," said Mr. Kalia.

Source: *The Pioneer, October* 10, 2022

https://www.dailypioneer.com/2022/business/clouds-of-resolution-period-delay--nclt-manpower-crunch-over-ibc----sheen-.html

Australia starts a comprehensive review of its insolvency framework

The review is aimed at assessing effectiveness of Australia's corporate insolvency laws in protecting and maximizing value for the benefit of all interested parties and the economy. This review has been undertaken by the Federal Government's Parliamentary Joint Committee on Corporations and Financial Services on recommendations of various stakeholders including industries and is expected submit the report by November 30, 2022. The Committee will investigate seven broad areas of the insolvency laws including impact of Covid-19, operation of personal securities, potential areas of reform, supporting businesses in managing financial distress, role of IPs, role of government agencies, and any other related issues.

Source: *Lexology, October 04, 2022*

https://www.lexology.com/library/detail.aspx?g=e9ae6328-3247-4184-a55d-ca49e60c504a

Finance Minister urges RPs and IBBI to step up to fresh challenges from global turmoil

Finance Minister Smt. Nirmala Sitharaman while addressing the sixth annual day of the Insolvency and Bankruptcy Board of India (IBBI) has called for greater efforts from Resolution Professionals (RPs) to avoid fingers being pointed at deals wherein banks should take a hefty haircut on loans sanctioned.

The Minister also sought steps from the IBBI for early identification of rising stress in some companies due to the global disruptions underway and asked for an assessment on why Pre-Packaged Insolvency Resolution Process (PPIRP) for MSMEs was yet to find traction. "I cannot afford to say sorry, 95% haircut for the bank is the best resolution I can give you," said the Minister. She also called for more attention on systemically important companies which are very critical to the economy. Though some cases may be 'so pathetic' that only 'junk value' can be derived, this could not be a feature of the IBC or RPs' abilities, she opined. She also highlighted the need for early resolution and early highlighting of the distress. She urged the IBBI to keep their 'ears to the ground' as many companies were linked to their global peers or group companies and even small enterprises were dependent on foreign players for some technology or some equity.

The Minister concluded with the remark that the IBBI should be 'on its toes' so that they were conscious about the necessary interventions as the Indian Economy can't afford to ignore the liquidation suffer or early stress warnings which are coming up.

Source: *The Hindu, October 01, 2022*

https://www.thehindu.com/business/impossible-to-accept-95-haircuts-for-banks-under-ibc-sitharaman/article65959934.ece

NCLT disposed of insolvency cases amounting ₹10.5 lakh crore

NCLT President Chief Justice (Retd) Ramalingam Sudhakar while delivering the sixth annual day lecture of IBBI stated that for the period between November 01, 2017 to August 01, 2022, NCLT has disposed 25,225 cases under Sections 7, 9 and 10 of IBC, involving ₹ 10,49,264 crores. Out of the total, 23,608 cases involving an amount of ₹7,21,282 crore have been settled before admission. Resolution plans have been approved in 565 cases, involving an amount of ₹3,03,381 crore, he added.

Source: *The Economic Times, October 01, 2022*

https://economictimes.indiatimes.com/news/economy/policy/nclt-disposed-of-insolvency-cases-involving-nearly-rs-10-5-lakh-crore-justice-ramalingam-sudhakar/articleshow/94588810.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

Ex-promoters can't hold stake in insolvent firm, says Supreme Court

While hearing the Bhushan Steel case, where the promoters were holding onto a 2.35 % stake even after Tata Steel acquired a 72.65 % stake in the company, the Supreme court ruled that ex-promoters cannot hold a stake in the insolvent firm. The two-judge bench observed that there is no ground for review order passed by the National Company Law Appellate Tribunal (NCLAT) which dismissed the appeal. The Court stated that calling the resolution plan shall not be workable at all. It further added that the appellants are the erstwhile promoters and therefore they cannot be continued to be in the company in any capacity may be as shareholders. The resolution plan is a key document that determines the future liability as well as rights of the outgoing promoters on their shareholding in the company.

Source: Business Standard, October 03, 2022

https://www.business-standard.com/article/current-affairs/ex-promoters-can-t-hold-stake-in-insolvent-firm-says-supreme-court-122100300091_1.html

SBI approaches NCLT to initiate CIRP of Jaiprakash Associates Ltd. (JAL)

In its CIRP petition, the State Bank of India (SBI) has claimed "persistent defaults" by JAL which remained "irregular, despite the restructuring" throughout in making the payments. As per the petition, the total default on the JAL is about ₹6,893.15 crore. Several Jaypee Group companies namely Jaypee Infratech and Andhra Cement are already facing insolvency proceedings. JAL was part of the RBI's list of 26 big loan defaulters to commercial banks for initiating bankruptcy proceedings in August 2017. Earlier, ICICI Bank had also filed the insolvency petition in September 2018 which is pending before the NCLT.

Source: *Zee News, September 30, 2022*

Celsius CEO allegedly withdrew $10 million just weeks before it froze customer funds & filed for bankruptcy protection

Celsius Network had filed for Chapter 11 Bankruptcy in USA in July on the grounds of extreme market conditions and about $1.19 billion deficit. During the process, it has been revealed that Alex Mashinsky, the founder and former CEO of the company, allegedly withdrew $10 million from the crypto lending platform just weeks before it froze withdrawals and transfers for its 1.7 million customers. After this expose, he has decided to step down.

Source: *Financial Express, October 03, 2022*

https://www.financialexpress.com/blockchain/celsius-founder-withdrew-10m-before-bankruptcy-filing-ft/2698892/

NCLT orders CIRP of Asian Hotels on petition of an asset reconstruction co.

Asian Hotels Ltd. (West) owns Mumbai's Hotel Hyatt Regence and JW Marriott Hotel, New Delhi Aerocity (through its subsidiary). This order came on a petition filed by JM Financial Asset Reconstruction Co. Ltd. on a default over ₹264 crores. Yes Bank Ltd. had provided credit facilities to Asian Hotels Ltd. As it failed to pay the dues, the Bank declared this account as NPA and filed an application under Section 7 of the IBC to initiate CIRP. Meanwhile, the Yes Bank Ltd. assigned the debt to JM Financial Asset Reconstruction Co. Ltd., which pursued the matter.

Source: *Live Law, September 25, 2022*

https://www.livelaw.in/news-updates/nclt-delhi-asian-hotels-hyatt-regency-corporate-insolvency-resolution-process-cirp-210210

NCLT ordered CIRP of Ajnara Builders on petition of homebuyers

The petition for initiation of insolvency proceedings of the company was filed by 128 homebuyers on a reportedly delayed project in Noida. In their petition, the homebuyers have alleged that the respondent (developer) taking advance payments raised a total financial debt of ₹50 crore only from the applicants but failed to fulfil its commitments and defaulted in construction of the project. The NCLT has also directed Ajnara Ltd. to deposit ₹2 lakh to meet immediate expenses. As per the agreement, the buyers were promised possession within three years from the date of agreement most of which were executed between 2012 to 2014. The project was being built at a land area of approximately 1,42,967 sq in Sector 118, Noida.

Source: *Zee News, September 21, 2022.*

https://zeenews.india.com/real-estate/nclt-admits-homebuyers-insolvency-petition-against-ajnara-builder -to-appeal-in-nclat-2512562.html

Welspun Corp wins bid to acquire ABG shipyard through liquidation

The Liquidator of ABG shipyard has announced that Welspun Corp has won the bid to acquire ABG shipyard in ₹659 crore plus taxes. According to media reports, the partially built obsolete ships and scrap acquired under Welspun Corp is estimated to be over ~ 150,000 MT. Welspun Corp jointly with its subsidiary Nauyaan Shipyard would acquire the ABG asset at Dahej, in Gujarat. The asset is spread over 165 acres of leasehold land with 1,000 meter of water frontage. ABG Shipyard is among 'Twelve Large Accounts' the RBI had initially identified for insolvency proceedings under the IBC.

Source: *The Economic Times, September 23, 2022*

https://economictimes.indiatimes.com/industry/transportation/shipping-/-transport/welspun-corp-wins-bid-for-abgs-shipyards/articleshow/94383619.cms

Russia-Ukraine War: Insolvency cases rise by 26% in Germany

As per the reports, the increased cost of fuel supply has forced several energy intensive companies, which were otherwise successful, to bankruptcy. A study by IWH Economic Institute said some 718 German entities became insolvent in August, a 26% jump over the previous year. It expects that figure to stay at around 25% in September and climb to 33% in October. The annual energy price increase in Germany in August on average was 139%, reported local media quoting latest weekly 'producer price data'. In a BDI survey of 593 businesses, more than a third said their existence was threatened by higher energy prices, up from 23% in February.

Source: *Euro News, September 21, 2022.*

Lenders recovered more than 100% of principal amount from resolution of UP's power company

Termed as India's largest stressed asset in the transmission sector, Southeast UP Power Transmission Company has been acquired by Power Finance Corporation (PFC), a public sector utility of the Central Government through a Resolution Plan. The project comprised of about 1,500 km of 765 KV and 400 KV transmission lines and five sub-stations in Uttar Pradesh (UP). The transaction involves a one-time upfront settlement amount of ₹3,251 crore along with a pay-out plan.

Source: *The Hindu Business line, September 18, 2022*

https://www.thehindubusinessline.com/companies/pfc-successfully-resolves-cirp-of-indias-largest-stressed-transmission-asset/article65903445.ece

Supreme Court imposed ₹10 lakhs fine on two entities for seeking 'revision' of order under the grab of seeking 'modifications and clarification' on Resolution Plan

This cost was imposed in the matter of *Ghanashyam Mishra and Sons Pvt Ltd Vs. Edelweiss Asset Reconstruction Company (EARC) Limited & Ors.*, after the Supreme Court observed that they were seeking revision of its order under the grab of 'modifications and clarifications' in the Resolution Plan. "We find that there is a growing tendency of indirectly seeking review of the orders of this Court by filing applications either seeking modification or clarification of the orders passed by this Court. In our view, such applications are a total abuse of process of law," said the Bench of the Supreme Court constituting Justice B. R. Gavai and P. S. Narasimha. The EARC had moved a Miscellaneous Application for clarification towards the aspect of security of pledge of shares with EARC having allegedly been 'arbitrarily and illegally wiped out' in the Resolution Plan.

Source: *Bar & Bench, September 19, 2022*

https://www.barandbench.com/news/litigation/growing-tendency-indirectly-seek-review-under-garb-clarification-supreme-court-20-lakh-costs

Facing financial crisis due to seizer, Google's Russian subsidiary files for bankruptcy

Googl. o, the Russian subsidiary of USA's tech giant Google, plans to file for bankruptcy after authorities seized its bank account, making it impossible to pay staff and vendors, but free services including search and YouTube will keep operating. It has been under pressure in Russia for months for failing to delete content Moscow deems illegal and for restricting access to some Russian media on YouTube, but the Kremlin has so far stopped short of blocking access to the company's services.

Source: *Reuters, September 19, 2022.*

https://www.reuters.com/markets/europe/googles-russian-subsidiary-files-bankruptcy-document-2022-05-18/

Supreme Court allowed implementation of Resolution Plans for Reliance Commercial Finance Ltd. (RCFL)

Though the Supreme Court upheld that the norms of Securities and Exchange Board of India (SEBI) took precedence over the guidelines of the Reserve Bank of India (RBI), it gave a go-ahead to the Resolution Plan of the Corporate Debtor to avoid further delays "if voting is called afresh". The Reliance Commercial Finance Ltd. (RCFL) was controlled by industrialist Anil Ambani.

SEBI had filed an appeal seeking stay on voting by creditors because it wanted all bond holders to participate in such votes, contrary to the debenture trust deed (DTD) and RBI guidelines that expect only 75% of the bondholders to vote. The order came more than a year after lenders had approved it. "The different voting mechanism proposed under the SEBI circular will further delay the resolution process and potentially disrupt the efforts undertaken by the stakeholders, including the retail debenture holders. Such unscrambling of the resolution process will not only prove time-consuming but may also adversely affect the agreed realized gains to the retail debenture holders, who have already consented to the negotiated settlement before the High Court," said a three-judge bench of the Apex Court headed by justice DY Chandrachud.

Source: *India Daily Main, September 03, 2022.*

https://indiadailymail.com/industry/anil-ambanis-rcfl-resolution-plan-to-go-ahead-after-sc-nod/

NCLAT set aside Yes Bank's CIRP petition against Mack Star as the term loan was found to be "Collusive in Nature"

The tribunal in its order observed that the term-loan provided by Yes Bank to Mack Star was an 'eye-wash' and

'collusive in nature'. As per the records, more than 99 percent of the sanctioned amount of ₹147.6 crore by Yes Bank in Mack Star's name was returned to the bank on the same day or within a short period of time. "The chequered history of the loan transactions and collusive arrangements indulged by Yes Bank demonstrates that the Term Loans disbursed in the name of Mack Star is an 'eyewash' and Yes Bank has disbursed these loans with an ulterior motive," said the NCLAT.

Source: *Zee News, September 10, 2022.*

https://zeenews.india.com/companies/yes-bank-faces-big-action-over-unfair-loan-transactions-nclat-sets-aside-insolvency-proceedings-against-mack-star-2507863.html

Limitation period should not be counted from the date of delivery of the Certified Copy but from the date of its preparation: NCLAT

While dismissing an appeal for being time barred, NCLAT, Principal Bench, New Delhi, in the case of *Wadhwa Rubber Vs. Bandex Packaging Pvt Ltd* has observed that the limitation period is to be counted from the date of preparation of the certified copy and not from the date of when it was delivered to the applicant. The Bench opined that, "the certified copy being prepared on February 17, 2021. If the limitation is to be counted from February 17, 2021, the same had expired much earlier than the date of filing the appeal on August 04, 2021." Hence, the appeal was said to be barred by limitation.

Source: *Live Law, September 05, 2022.*

https://www.livelaw.in/news-updates/nclat-delhi-section-9-of-the-insolvency-and-bankruptcy-code-corporate-insolvency-resolution-process-cirp-limitation-208461

NCLATs "hybrid" order ensured delivery of flats to homebuyers

A group of homebuyers had filed insolvency petition against a housing project of RG Group in Greater Noida in September 2019. The case went to NCLAT, which in February 2020 ordered the project developer to work with the Resolution Professional (RP), instead of bringing in another company. The project developer took all the stakeholders into confidence and restarted the construction. On September 09, 2022, it delivered keys to 17 homebuyers for fit outs with the promise that 800 buyers will get their flats in the next three months. The Company also promised to deliver all the remaining flats by March 2023. "The judiciary's support through this order gave a wonderful result. A hybrid kind of order not only rescued the project but also restored the faith of homebuyers and other stakeholders," said the Resolution Professional.

Source: DNA, September 09, 2022

https://www.dnaindia.com/business/report-greater-noida-good-news-for-1700-homebuyers-as-new-order-paves-way-for-delivery-of-rg-luxury-homes-2983938

Overall recovery rate till Q1 of FY 2022-23 was 30.6 per cent, better than the earlier rate of around 26 per cent: Analysis

Realisable value of financial creditors (FCs) rose from ₹2,25,293.8 crore to ₹2,35,093.6 crore which is 32.9 per cent and 30.6 per cent respectively, according to an analysis by Care Ratings. The total admitted claims of financial creditors rose from ₹6,84,901.3 crore in March 2022 to ₹7,67,384.9 crore in June 2022, while the liquidation value of these cases remained more or less the same at ₹1,31,447.9 crore and ₹1,31,468.6 crore respectively. However, according to the report, the cumulative recovery rate has been on a downtrend, decreasing from 43 per cent in Q1FY20 and 32.9 per cent in Q4FY22 because larger resolutions have already been executed and a significant number of liquidated cases were either BIFR cases and/or defunct.

Source: *Zee business, September 03, 2022.*

htt*ps://www.zeebiz.com/india/news-nclt-recoveries-improve-to-306-in-q1fy23-from-26-in-q1fy22-197151*

NCLT rejects Resolution Plan for violating Waterfall Mechanism and selectively favouring certain creditors

The National Company Law Tribunal, Ahmedabad, in the case of M/s. Sansar Texturisers Pvt. Ltd. v. M/s Polycoat India Pvt. Ltd. has rejected the Resolution Plan of a Successful Resolution Applicant that breached the waterfall mechanism of payments and favoured only certain creditors without providing any reason for the same.

Source: *Live Law, September 08, 2022.*

https://www.livelaw.in/amp/news-updates/nclt-ahmedabad-successful-resolution-applicant-resolution-plan-section-7-of-the-insolvency-and-bankruptcy-code-207837

Section 10A provides protection to Corporate Debtor from Covid-19 induced effect not to Personal Guarantor: NCLAT

NCLAT, New Delhi has held that the Section 10A has only one interpretation which is the suspension of CIRP only for the Corporate Debtor (CD). If the Legislature intended to prohibit filing of application under Section 95 (1) by a creditor against the Personal Guarantor, the Chapter III, Part III of the IBC would have been amended accordingly, observed the Court.

This judgment came on an appeal filed by the Personal Guarantor in the case of *Amit Jain Vs. Siemens Financial Services Private Limited* wherein it was observed that Section 10A which provides protection to the CD from the COVID-19 induced effect by prohibiting initiation of CIRP against the CD for any default arising on or after March 25, 2020, would not provide a similar protection to the Personal Guarantors of the CD. The main contention in this case was whether the benefit of Section10A could also be claimed by a Personal Guarantor and an application under Section 95 be barred for a default which has arisen after March 25, 2020, till March 24, 2021.

Source: *Live Law, August 26, 2022.*

https://www.livelaw.in/news-updates/nclat-new-delhi-insolvency-bankruptcy-code-personal-guarantors-resolution-professional-corporate-debtor-207619

About 80% of CIRPs with an underlying default of less than ₹1 crore were initiated by OCs

As per the latest IBBI data, ~80% of all insolvency resolution processes with an underlying default of less than ₹1 crore were initiated by Operational Creditors (OCs), while ~ 80% of those with a default of over ₹10 crore were initiated by lenders. The data further revealed that small vendors and suppliers initiated 51% of all IBC cases, while Financial Creditors (FCs) make upfor the rest. This trend, according to media reports, is being explained by some experts as misuse of the IBC by suppliers of CDs for recovery of their pending dues.

Source: *Business Standard, September 07, 2022.*

https://www.businesstoday.in/latest/corporate/story/47-closed-cases-under-ibc-in-liquidation-till-june-ibbi-306068-2021-09-07

Liquidation proceedings will take precedence over recoveries of indirect taxes: Supreme Court

The Supreme Court, in the case of *Sundaresh Bhatt, Liquidator of ABG Shipyard Vs. Central Board of Indirect Taxes and Customs*, has held that Insolvency and Bankruptcy Code, 2016 will have an overriding effect on the Customs Act, 1962. "While Customs authorities have the powers to assess the quantum of dues, it does not have the powers to initiate recovery of dues under the Customs Act," a three-judge Bench headed by the Chief Justice held. The Bench observed that the Customs dues had to be settled in accordance with the IBC and the liquidator was the owner of the goods after the initiation of IBC proceedings.

Source: *Business Standard, August 27, 2022.*

https://www.business-standard.com/article/economy-policy/ibc-will-have-overriding-effect-over-indirect-tax-recoveries-rules-sc-122082601213_1.html

Lenders should provide interim finance to companies under insolvency: IBBI Chairperson

Shri. Ravi Mital, Chairperson of the Insolvency and Bankruptcy Board of India (IBBI) has asked lenders to provide interim finance to companies that are undergoing insolvency processes. "It is in the interest of the existing lenders to provide interim finance since improved valuation would result in better resolution plans and lenders would benefit since, they are placed high in the waterfall mechanism," opined Mital in the latest quarterly Newsletter of IBBI. Interim finance is a part of CIRP cost which is given priority in payment over other debts- both in resolution plan and during liquidation.

Source: *The Economic Times, August 26, 2022.*

https://economictimes.indiatimes.com/industry/banking/finance/ibbi-chairman-nudges-lenders-to-provide-interim-finance-to-a-company-facing-insolvency-proceedings/articleshow/93776749.cms

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

IIIPI has been awarded with the registration certificate as the first Insolvency Professional Agency (IPA) of India by Hon'ble Union Finance Minister Late Shri Arun Jaitley on 28th November 2016. IIIPI is the largest IPA in India with nearly two third IPs of the country as its members.

IIIPI'S Role As IPA

REGULATORY	EXECUTIVE	CAPACITY BUILDING	QUASI-JUDICIAL
• Preparing detailed standards and codes of conduct through Byelaws • Making such documents public and binding on all members enrolled with IPA	• Monitoring, inspecting, and investigating members • Objective of preventing frivolous behavior and misconduct by IPs	• Building knowhow and capacity of members and other stakeholders	• Addressing grievances of aggrieved parties, hearing complaints against members • Taking suitable disciplinary and corrective actions

IIIPI Governing Board

Independent Directors

Dr. Ashok Haldia, Chairman, Governing Board- IIIPI

Ms. Rashmi Verma, IAS (Retd.)

Shri Ajay Mittal, IAS (Retd.)

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

Directors

CA. (Dr.) Debashis Mitra, President, ICAI

CA. Aniket Sunil Talati, Vice President, ICAI

CA. Hans Raj Chugh, Central Council Member, ICAI

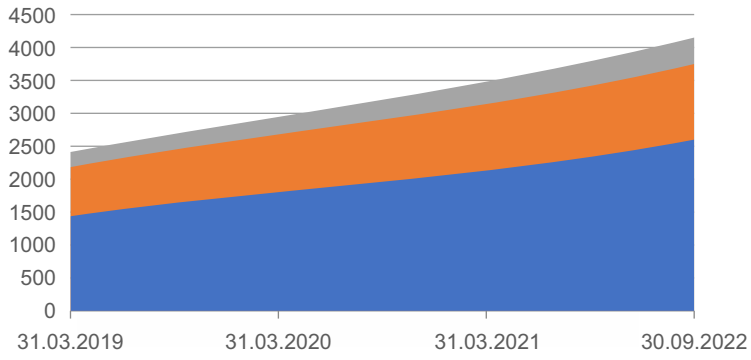
CA. Sripriya Kumar, Central Council Member, ICAI

CA. Rahul Madan, Managing Director, IIIPI

Professional Membership of IIIPI

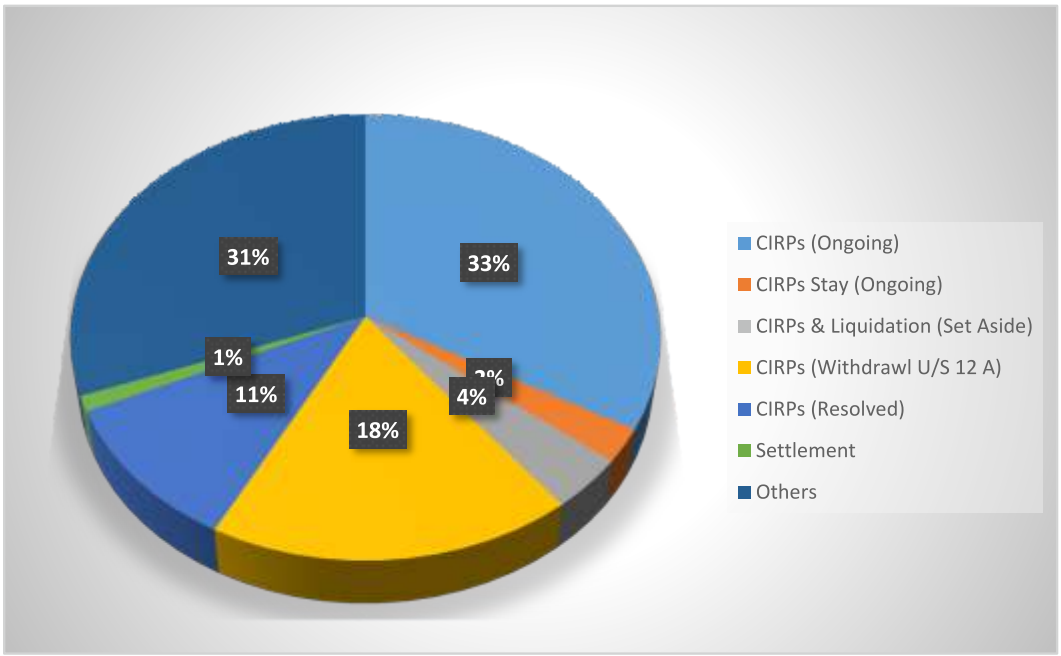
Starting from a modest 33 professional members in FY 2016-17, IIIPI family has increased to 4,205 professional members by 30th September 2022.

Professional Membership of IIIPI



IPAs	Mar-19	%	Mar-20	%	Mar-21	%	Sep-22	%
IIIP of ICAI	1520	61.89	1857	61.71	2177	62.13	2649	63.00
IPA of ICSI	733	29.85	901	29.94	1020	29.11	1164	27.68
IPA of ICMAI	203	8.27	251	8.34	307	8.76	392	9.32
Total IPs	**2456**	**100.00**	**3009**	**100.00**	**3504**	**100.00**	**4205**	**100.00**

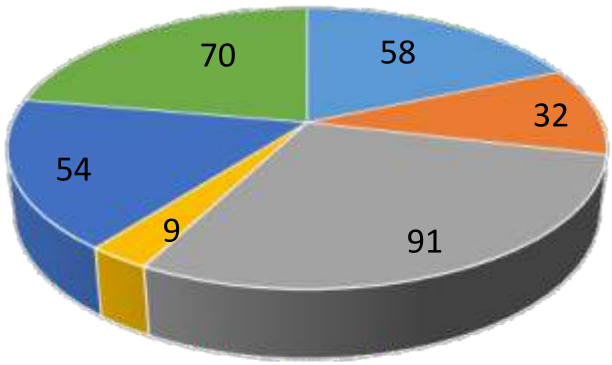
Details of Ongoing, Resolved, and Closed Cases as on 30th September 2022



IIIPI's Initiatives for Capacity Building

Till 30th September 2022, 314 events have been conducted for capacity building. Some of which were solely organized by IIIPI while others were jointly organized in partnership with IBBI, NCLT, ICAI, NLU-Delhi, NeSL, CII, UK-FCDO, CIBC-ICAI, IBA, CRISIL, ET-CFO and other industrial, institutional, governmental and corporate organizations.

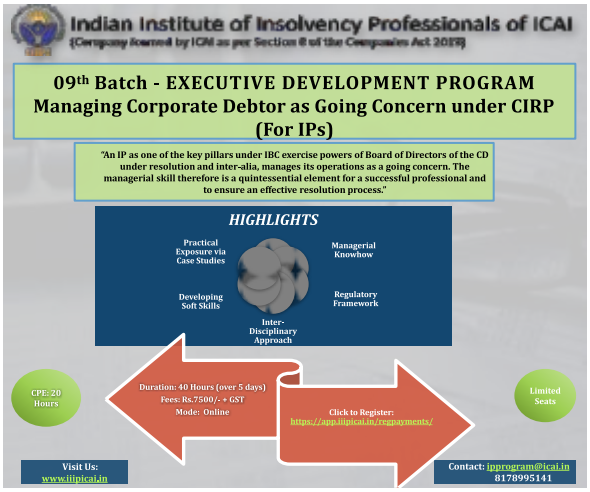
IIIPI's Programs

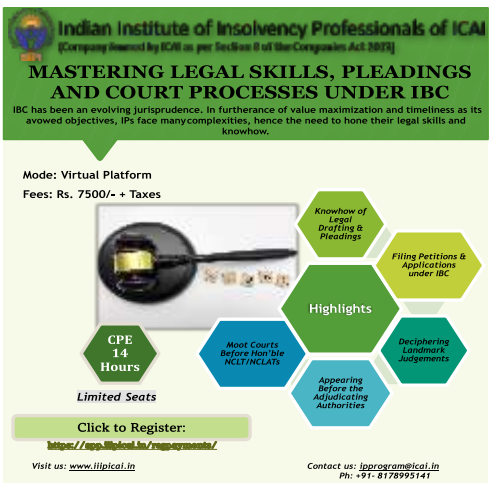


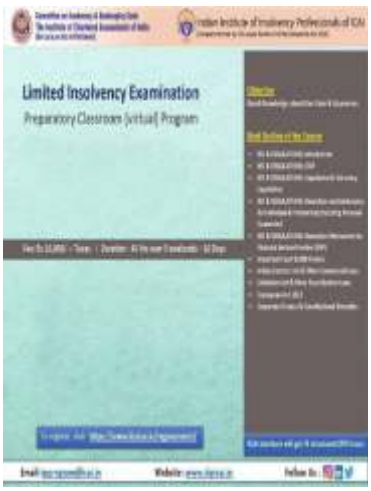
- Pre-Registration Course
- Round Tables & Study Groups
- Seminar & Webinars
- International, National Conferences
- Workshop & Training Programs
- Awareness & Other Programs

IIIPI Journal

Special Initiatives of IIIPI







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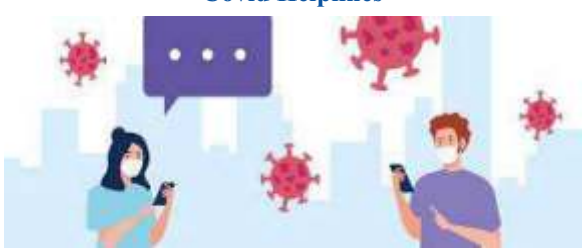
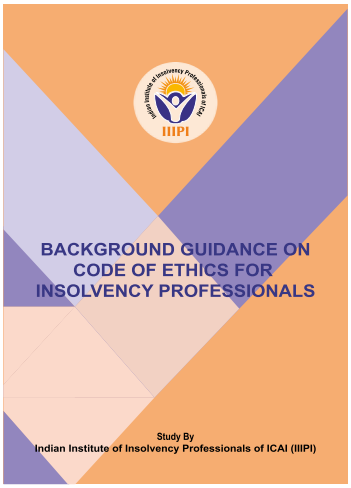
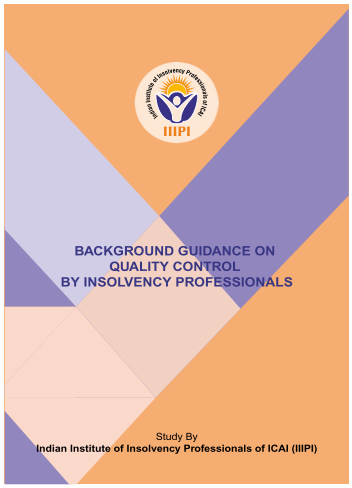
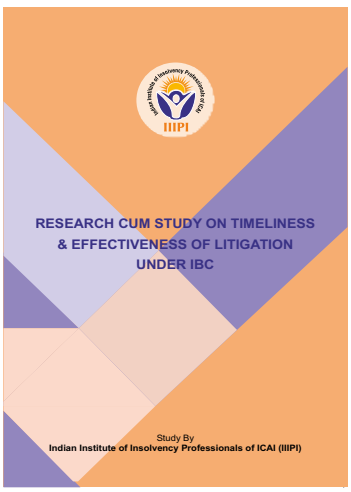


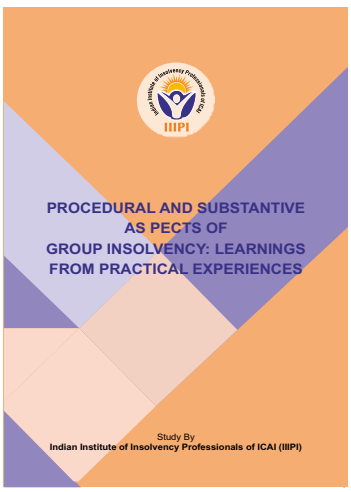
IIIPI's PUBLICATIONS

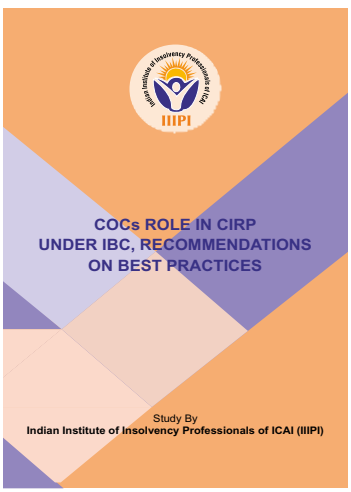
IIIPI has published nine research publications based on the Reports submitted by various Study Groups. The Study Reports of some other Study Groups are under process. The soft copies (downloadable PDF) of all these publications are available on IIIPI website (https://www.iiipicai.in/publications/).

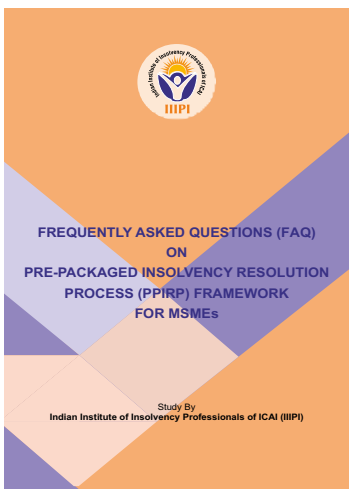


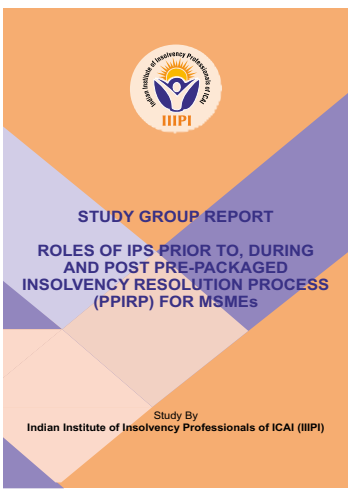












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Weekly Publications

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

IIIPI Newsletter

IBC Case Laws Capsules

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

First Schedule

[Under Regulation 7(2)(h)]

Code of Conduct for Insolvency Professionals

(*…Continue from previous edition*)

23A. Where an insolvency professional has conducted a corporate insolvency resolution process, he and his relatives shall not accept any employment, other than an employment secured through open competitive recruitment, with, or render professional services, other than services under the Code, to a creditor having more than ten percent voting power, the successful resolution applicant, the corporate debtor or any of their related parties, until a period of one year has elapsed from the date of his cessation from such process.

23B. An insolvency professional shall not engage or appoint any of his relatives or related parties, for or in connection with any work relating to any of his assignment.

23C. An insolvency professional shall not provide any service for or in connection with the assignment which is being undertaken by any of his relatives or related parties.

Explanation.- For the purpose of clauses 23A to 23C, "related party" shall have the same meaning as assigned to it in clause (24A) of section 5, but does not include an insolvency professional entity of which the insolvency professional is a partner or director.]

24. An insolvency professional must not conduct business which in the opinion of the Board is inconsistent with the reputation of the profession.

Remuneration and costs

25. An insolvency professional must provide services for remuneration which is charged in a transparent manner, is a reasonable reflection of the work necessarily and properly undertaken and is not inconsistent with the applicable regulations.

[48][25A. An insolvency professional shall disclose the fee payable to him, the fee payable to the insolvency professional entity, and the fee payable to professionals engaged by him to the insolvency professional agency of which he is a professional member and the agency shall publish such disclosure on its website.] 49[25B. An insolvency professional shall raise bills or invoices in his name towards his fees, and such fees shall be paid to him through banking channel.

[49][25B. An insolvency professional shall raise bills or invoices in his name towards his fees, and such fees shall be paid to him through banking channel.

25C. An insolvency professional shall ensure that the insolvency professional entity or the professional engaged by him raises bills or invoices in their own name towards their fees, and such fees shall be paid to them through banking channel.]

26. An insolvency professional shall not accept any fees or charges other than those which are disclosed to and approved by the persons fixing his remuneration.

[50][26A. An insolvency professional shall not accept /share any fees or charges from any professional and/or support service provider who are appointed under the processes.]

27. An insolvency professional shall disclose all costs towards the insolvency resolution process costs, liquidation costs, or costs of the bankruptcy process, as applicable, to all relevant stakeholders, and must endeavour to ensure that such costs are not unreasonable.

[51][27A. An insolvency professional shall, while undertaking assignment or conducting processes, exercise reasonable care and diligence and take all necessary steps to ensure that the corporate person complies with the applicable laws.

27B. An insolvency professional shall not include any amount towards any loss, including penalty, if any, in the insolvency resolution process cost or liquidation cost, incurred on account of non-compliance of any provision of the laws applicable on the corporate person while conducting the insolvency resolution process, fast track insolvency resolution process, liquidation process or voluntary liquidation process, under the Code.]

Gifts and hospitality.

28. An insolvency professional, or his relative must not accept gifts or hospitality which undermines or affects his independence as an insolvency professional.

29. An insolvency professional shall not offer gifts or hospitality or a financial or any other advantage to a public servant or any other person, intending to obtain or retain work for himself, or to obtain or retain an advantage in the conduct of profession for himself.

(The End).

[48] *Inserted by Notification No. IBBI/2017-18/GN/REG027, dated 27th March 2018 (w.e.f. 01.04.2018).*

[49] *Inserted by Notification No. IBBI/2022-23/GN/REG088, dated 4th July 2022 (w.e.f. 04.07.2022).*

[50] *Inserted by Notification No. IBBI/2022-23/GN/REG092, dated 13th September, 2022 (w.e.f. 13.09.2022).*

[51] *Inserted by Notification No. IBBI/2022-23/GN/REG088, dated 4th July, 2022 (w.e.f. 04.07.2022).*

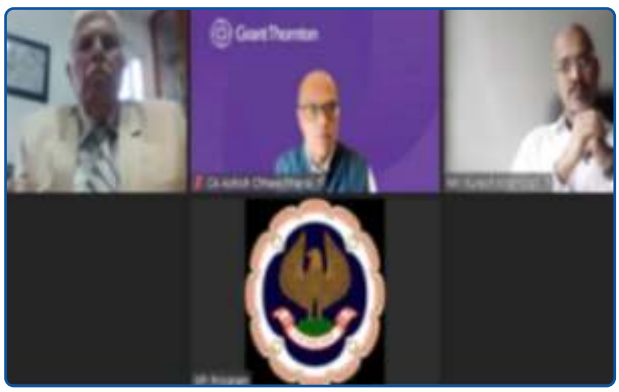
Shri Ravi Mital, Chairperson, IBBI, addressing the International Webinar on "Cross Border Insolvency and Global Lessons for India" organized by IIIPI jointly with III, USA on June 17, 2022.

CA. Aniket Sunil Talati, Vice President, ICAI, addressing Webinar on "Guidance on Quality Control for IPs & Peer Review Policy" organised by IIIPI on July 07, 2022.

Session on "Role of Mediation in Insolvency and Bankruptcy Processes" organized by IIIPI in association with British High Commission on August 06, 2022.

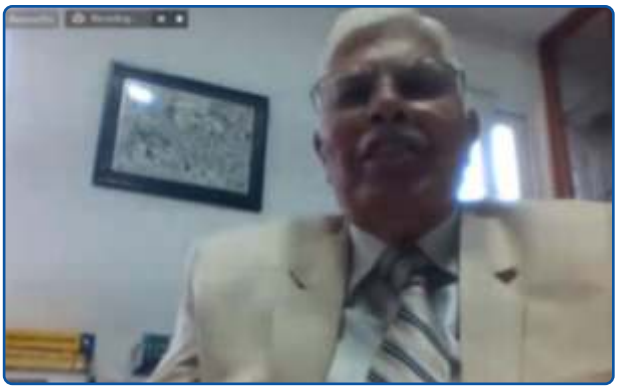
Dr. M. S. Sahoo, Former Chairperson-IBBI addressing the Inaugural Session of 04th Executive Development Program (for IPs) "Mastering 'Avoidance/ PUEF Forensics' Under IBC" organized by IIIPI from 05th to -07th Sept. 2022.

Webinar on "Evolving Jurisprudence Under IBC (Important Case Laws)" organized by IIIPI on September 30, 2022.



Webinar on "IM and Resolution Plan- Evolution and Learnings" organized by IIIPI on July 22,2022.

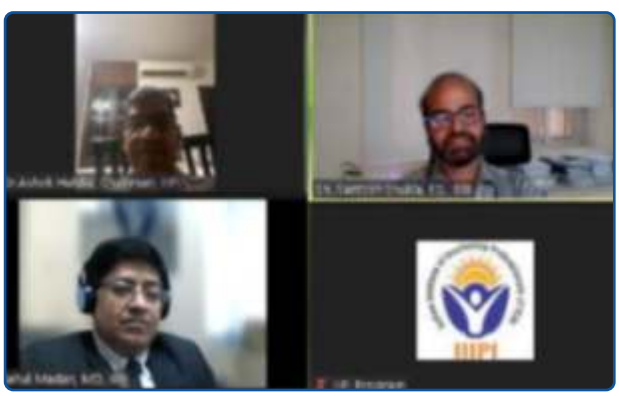
Webinar on "Recent Regulatory Amendments UNDER IBC" organized by IIIPI on October 07, 2022.



CA. K.G Somani, Past-President, ICAI, addressing the Webinar on "IM and Resolution Plan - Evolution & Learnings" organized by IIIPI on July 22, 2022

Shri Ritesh Kavdia, Executive Director (ED), IBBI, addressing Webinar on "Common Issues on Monitoring/Disciplinary and Launch of Mentorship Portal of IIIPI" on July 15, 2022.

CA. Subodh Kumar Agrawal, Past President, ICAI, addressing Webinar on "Guidance on Quality Control for IPs & Peer Review Policy" organised by IIIPI on July 07, 2022.



Webinar on "Common Issues & Peer Review Framework" organized by IIIPI on September 16, 2022

Webinar on "Case Study on Liquidation Process: Moser Baer India Ltd." organized by IIIPI on September 09, 2022.

Media Coverage

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FEEDBACK

Dear Reader,

The Resolution Professional is aimed at providing a platform for dissemination of information and knowledge on evolving ecosystem of insolvency and bankruptcy profession and developing a global world view among practicing and aspiring insolvency professionals in India.

We firmly believe in innovations in communication approaches and strategies to present complicated information of insolvency ecosystem in a highly simplified and interesting manner to our readers.

We welcome your feedback on the current issue and the suggestions for further improvement. Please write to us at iiipi.journal@icai.in

Editor

The Resolution Professional

GUIDELINES FOR ARTICLE SUBMISSION

THE RESOLUTION PROFESSIONAL, quarterly peer-reviewed refereed research journal of Indian Institute of Insolvency Professionals of ICAI (IIIPI), with RNI Registration Number DELENG/2021/81442/ 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 their convenience at iiipi.journal@icai.in. The same will be considered for publication in the upcoming edition of the journal, subject to approval by the Editorial Board. The articles sent for publication in the journal should conform to the following parameters:

- The article should be 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.
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  - The article can be sent by e-mail at **iiipi.journal@icai.in**
  - In case the article is found suitable for publication, the same shall be communicated to the author/s at the earliest.

NOTE: IIIPI has the sole discretion to accept, reject, modify, amend and edit the article before publication in the Journal. The copyright for the article(s) published in the Journal will vest with IIIPI.

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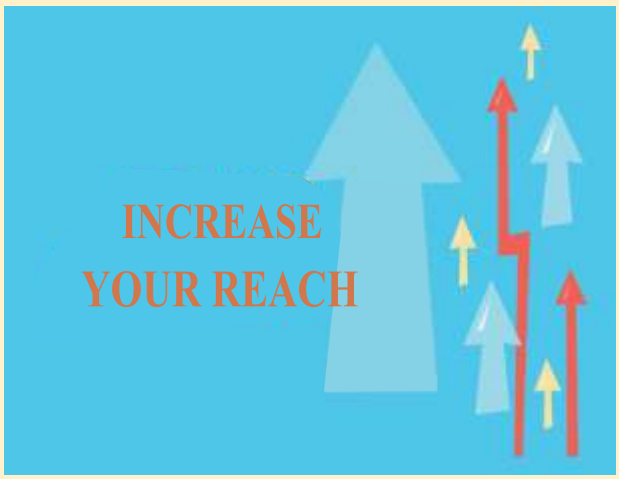

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