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THE RESOLUTION PROFESSIONAL

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

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

BUILDING A FUTURE READY PROFESSION

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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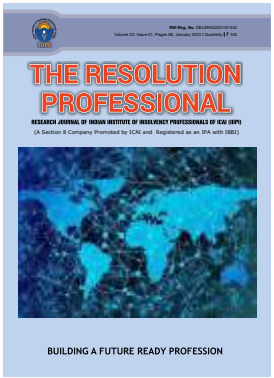

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Message from Chairman, Editorial Board

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

Dear Member,

I wish you all a very Happy New Year and hope that the Year 2023 brings lots of positivity and success in your life.

The importance of Insolvency and Bankruptcy Code (IBC) regime has been continuously recognised by the government, institutions, and stakeholders across the board. The IBC has, so far, successfully delivered distinct outcomes owing to the jurisprudence which is continuously evolving and is alive to the ground realities. Government and Regulator have been moving timely and with alacrity to address the challenges as and when noticed. Potential investors are feeling more confident, thanks to salutary ramifications of IBC acting as the deterrent.

During 2022, certain remarkable amendments were made in IBC 2016, which has the potential of changing the behaviour of lenders and borrowers significantly. Further, the amendments related to minimum fees for insolvency professionals and enrolment of the Insolvency Professionals Entities (IPEs) as the IPs, bespeaks the bright and promising prospects of the insolvency regime.

Right from the early recognition of distress to value maximizing insolvency resolution, every phase and step under the Code requires constant commitment and dedication of all the stakeholders. A total of 5893 Corporate Insolvency Resolution Processes (CIRPs) have commenced by the end of September, 2022 out of which 3946 have been closed including orders for liquidation in 1807 cases. The manufacturing sector has been the most impacted sector under the IBC regime in almost all the categories viz. Admission of CIRPs (39%); Commencement of Liquidation (43%); Appeal, Review, Settled & Withdrawn (37%); and Resolution Plans (50%). Further, till the end of September 2022, the creditors have realised ₹2.43 lakh crore under the resolution plans which is 177.55% of the liquidation value and 84% of the fair value.

Continuous efforts are needed to spread the awareness of IBC and in this backdrop, I appreciate the efforts of IIIPI for taking various initiatives including by publishing the (previous) special edition of this journal highlighting the effectiveness of IBC. Promoting excellence and development of its members and stakeholders, has been one of the main objectives of IIIPI. In pursuance of said objectives, IIIPI has been organising various webinars and seminars, bringing out various publications on contemporary topics etc.

Undoubtedly, the IBC has benefitted the economy in an unprecedented way, but we have a long way to go before its full potential could be realized. The goals of reducing liquidations, reducing adjudication delays, and establishing reasonable haircuts are yet to be achieved. I am confident that, if all the stakeholders are aware of their duties, take actions in a time bound manner and in letter and spirit of the Code, we can achieve the desired outcomes quickly and resoundingly.

I hope you will find this edition of the Journal informative and knowledge accretive.

Wishing you all the best.

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

Message from Chairman, Governing Board-IIIPI

Dr. Ashok Haldia
Chairman, Governing Board- IIIPI

Dear Member,

Happy New Year 2023!

On 25th November 2022, IIIPI completed six years since its incorporation. During the six years of operation, IIIPI has continuously remained the largest Insolvency Professional Agency (IPA) of the country both in terms of number of members and the number of assignments under IBC. Starting from a modest 33 professional members in December 2016, IIIPI's members have grown to 2,671 members now, constituting about 63% of total Insolvency Professionals (IPs) in the country. Furthermore, IIIPI's incremental share of membership during April to November 2022 improved to 71.8%. We can proudly say that our professional members have conducted over 70% of insolvency assignments under the IBC regime. After the recent regulatory amendments allowing registration of Insolvency Professional Entities (IPEs) as Juristic IP, IIIPI swung into action and became the first IPA to roll out the enrolment of such IPEs as IPs. The growing confidence of insolvency professionals in IIIPI, is a testimony of the qualitative services, it extends to its professional members.

Insolvency profession is a unique one which lays crucial and, at times, onerous responsibilities upon insolvency professionals. In his/her capacity as IRP, RP or Liquidator, an IP is required to strike a fine balance among various stakeholders such as financial creditors (secured or unsecured), operational creditors, dealers/customers, suppliers, employees, resolution applicant, etc., that approach him/her with expectations often conflicting in nature. At the same time, an IP is expected to run the financially stressed Corporate Debtor as a going concern and guide the efforts of resolution while preserving and maximizing the value of underlying business/assets, keeping a close watch on the timelines. In this context, all the endeavours of IIIPI are aimed at equipping our professional members appropriately to face these challenges successfully.

Evolving Jurisprudence

IPs and legal experts have expressed reservations on various platforms regarding two recent judgements of the Supreme Court – *Vidarbha Industries Power Limited Vs. Axis Bank Limited* (Civil Appeal No. 4633 of 2021) and *State Tax Officer Vs. Rainbow Papers Limited* (Civil Appeal No. 1661 and 2568 of 2020). Though, these judgements may be revisited or reviewed in times to come, it highlights the evolutionary nature of law and the need for nuanced applicability of the case laws in the context of the text.

IBBI through a circular on 13th September 2022 has taken a laudable initiative for seeking information from IRPs/RPs/Liquidators involved in litigations wherein any important issue relating to vires, interpretation, and applicability of the provisions of the IBC, Rules and Regulations made thereunder is being contested before the Hon'ble Court(s). This measure may be critical in order to ensure the representations by the Regulator in deserving cases and to avoid *ex parte* decisions on matters of legal interpretation.

The IPs and IPEs working on various assignments under the IBC, 2016 should be vigilant enough and inform proactively to the Regulator, if any provision of the IBC, 2016 or any Regulation made under it, is challenged in any court of law.

Capacity Building

Insolvency profession requires a multidisciplinary understanding and multidimensional approach to handle

CIRP assignments and rescue the corporate lives. At IIIPI, we have been taking several initiatives to provide varied exposure of national and international level to our professional members.

On its 06th Foundation Day, IIIPI organized a Webinar on "Challenges & Expectations of Insolvency Profession (Virtual Mode)" the 'Inaugural Session' of which was graced by Shri Ravi Mital, Chairperson-IBBI as Chief Guest. Smt. Anita Shah Akella, Joint Secretary, Ministry of Corporate Affairs (MCA), Government of India, and Shri. Jayant Kumar Dash, Executive Director, Reserve Bank of India (RBI) graced the occasion as Guests of Honour. The Inaugural Session was followed up with 'Special Addresses' and 'Panel Discussion' in which dignitaries shared their views. On this occasion, two publications of IIIPI – "Background Guidance on Valuation Process Under IBC" and "Best Practices on Individual Insolvency under IBC (with reference to Personal Guarantor to CD)" were also released.

IIIPI recently organized two open house sessions for IPs – *first*, with Hon'ble President, NCLT and *second*, with Chairperson, IBBI. In these open house sessions, the IPs shared their issues and challenges. These programs have helped in building trust and confidence to a great extent between the Judiciary, Regulator, and IPs.

During the interactive session with Chairperson, IBBI on Nov.22, 2022, it was suggested that a list of FAQs shall be designed around grey areas under IBC which would be answered by IBBI and shall serve the purpose of providing guidance to IPs upfront. We have initiated a survey across IP members, seeking suggestions on the questions (FAQs) to be covered as such. We request the members to contribute their questions for the purpose.

During the current FY so far, IIIPI has conducted 39 webinars, 14 Executive Development Programs (EDPs), 07 LIE Preparatory Virtual Classroom Programs, 07 PRECs, 05 Seminars, 02 Conferences and 03 Trainings/workshops. Besides, IIIPI has developed and launched innovative e-Services for IPs such as Mentorship Program, Peer Review Portal, and MSMEs Helpline. In each edition of the journal, case studies on CIRP assignments are covered to facilitate knowledge enhancement of our members.

So far, IIIPI has constituted 14 Study Groups out of which the reports of 10 Study Groups have been published while four are under process. Besides, more Study Groups will be constituted soon on contemporary subjects in near future as an ongoing effort.

We hope the year 2023 will bring new hopes and provide new dimensions to the insolvency regime in India in terms of much awaited Cross Border Insolvency Framework, Pre-Pack Framework for big corporates, and Group Insolvency Framework among others. With the active support and contribution of our professional members, we at IIIPI also aspire to create new frontiers in development of insolvency profession and build a stronger insolvency profession.

Wish you all the best.

Dr. Ashok Haldia
Chairman, Governing Board-IIIPI

From Editor's Desk

Dear Member,

Wishing you a very happy and prosperous New Year 2023!

The year gone by has yielded some of the landmark reforms in the insolvency regime in the country both in terms of resolving financially distressed companies and also in streamlining the insolvency profession. Some of them include provisions for inviting resolution plan a second time, partial sale of assets for value maximization, fixing minimum and maximum fee for IRPs and RPs, empowering CoC to reward performance-based incentives to RPs, and registration of IPEs as Juristic IP.

In line to these amendments, IIIPI has also updated its Bylaws and made required arrangements to facilitate our professional members. By the end of December 2022, we have enrolled 27 IPEs out of which 17 have been registered as Juristic IP with the IBBI as well.

This 10th edition of The Resolution Professional starts with the '*Key Takeaways from Addresses of Eminent Speakers on the 06th Foundation Day of IIIPI*' in which Shri Ravi Mital, Chairperson, Insolvency and Bankruptcy Board of India (IBBI) graced as Chief Guest. Smt. Anita Shah Akella, Joint Secretary, Ministry of Corporate Affairs (MCA), Government of India, and Shri. Jayant Kumar Dash, Executive Director, Reserve Bank of India (RBI) were Guests of Honour.

Moreover, this edition has six research articles and Case Study on 'Performance Analysis of Jhabua Power Ltd. (JPL)'.

In the opening article 'Handling Business Failure: A Dharmic way' the author goes beyond into the reasons of default and suggests ways to avoid financial stress. The author of the second article, 'Supreme Court Ruling in Vidarbha Power Industries Limited: An Appreciation and A Critique', after analyzing the pros and cons of the judgement, suggests an amendment in line with the UNCITRAL Legislative Guide on Insolvency Law, 2005.

In the third article 'Application of Global Ethical Principles related to Insolvency Professionals in Indian Context', the author presents a comparison of global ethical principles. The fourth article 'Withdrawal of Application Under Section 12A of IBC: Key Issues and Areas of Concern' analysis developing jurisprudence in relation to withdrawal of CIRP under Section 12 A of the IBC. In the fifth article 'Changing Landscape of Insolvency Professional (IP)', the author has focussed on recent amendments related to insolvency professionals. The last article 'Grey Issues Under IBC: Dissection of Quintuple Oddities' highlights some practical issues in implementation of the IBC and suggests appropriate amendments.

Besides, the journal also has its regular features, i.e., Legal Framework, IBC Case Laws, IBC News, Know Your Ethics (Background Guidance on Quality Control by Insolvency Professionals) IIIPI News, IIIPI's Publications, Media Coverage, Services, Help Us to Serve You Better, and Crossword.

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

Wish you a happy reading.

Editor

Key Takeaways from Addresses of Eminent Speakers on the 06th Foundation Day of IIIPI

IIIPI observed its 06th Foundation Day on 25th November 2022 by organizing a Webinar on "Challenges & Expectations of Insolvency Profession (Virtual Mode)". Shri Ravi Mital, Chairperson, Insolvency and Bankruptcy Board of India (IBBI) graced the Webinar as Chief Guest. Smt. Anita Shah Akella, Joint Secretary, Ministry of Corporate Affairs (MCA), Government of India, and Shri. Jayant Kumar Dash, Executive Director, Reserve Bank of India (RBI) were Guests of Honour. On this occasion, two publications of IIIPI – "Background Guidance on Valuation Process Under Insolvency and Bankruptcy Code 2016: Best Practices" and "Report on Best Practices on Individual Insolvency (with reference to Personal Guarantor to CD)" were also released.

This Inaugural Session was followed up with 'Special Addresses' and 'Panel Discussion' in which eminent personalities shared their perspectives. Hereinbelow, we present highlights from addresses of eminent speakers of this half-day event.

Welcome and Opening Address

Dr. Ashok Haldia

Chairman, Governing Board-IIIPI

1. Six years are possibly a good period for an institution to establish itself, contribute to its mission and objectives and to engage with the stakeholders. In this context the 6th annual day program has become very important, and we understand the enormous responsibility reposed upon us.
2. The success and effectiveness of IBC depends on how Insolvency Professionals (IPs) work at the grassroot level and are able to generate trust and responsibility. Such responsibility is measured by the number of sick projects being brought back to life, and the quantum of dues the financial creditors are able to realise as a result.
3. As a frontline regulator, IIIPI performs this role in more than one way. While maintaining discipline and ensuring ethical conduct are important objectives, professionals should be able to deliver with excellence, integrity, and efficiency. Excellence, integrity, and efficiency are the hallmarks of the functioning of IIIPI as well.
4. At IIIPI, we are cognizant of the enormous expectations from IPs and provide them continuous professional training, exposure, and orientation.
5. IPs play multi-disciplinary roles such as CEO, negotiator and interface between stakeholders and adjudicating authority, etc. IIIPI organizes Executive Development Program (EDP) across three to five days to ensure managerial aptitude and capability to run the Corporate Debtor as a Going Concern. In these programs the IPs are provided

exposure through senior officials of corporate debtors which were resolved through resolution plans and also through the CEOs of the corporates who have acquired such corporate debtors as successful bidders.

6. With a view to provide international level exposure to IPs, IIIPI has organized programs with various international organizations in which insolvency professionals, regulators, and judges of the UK, the USA, Australia, South Africa, Singapore etc. have participated.

7. IIIPI recently organized two open house sessions for IPs – *first*, with Hon'ble President, NCLT and *second*, with Chairperson, IBBI. In these open house sessions, the IPs shared their issues and challenges. These programs have helped in building trust and confidence to a great extent between the Regulator and IPs.

8. As the Government and Regulator are preparing for IBC 2.0, there are several challenges and new requirements for IPs in terms of Group Insolvency, Cross Border Insolvency and Pre-Pack. We have decided to constitute a study group to analyze as to why the Pre-Pack could not meet expectations and what should be done to make it a success. We have organized several programs for MSMEs and also prepared publicity materials to create awareness on Pre-Pack.

9. There are lot of expectations from IPs in terms of time take in CIRPs process and value maximization. We have also conducted a study on lower value realization under avoidance transactions, who is responsible for the same and how that can be addressed. The report of this study is being finalized.

10. The two publications of IIIPI being released, "Background Guidance on Valuation Process Under Insolvency and Bankruptcy Code 2016: Best Practices" and "Report on Best Practices on Individual Insolvency (with reference to PG to CD)" are based on the recommendations of respective 'Study Groups' after incorporating suggestions of insolvency professionals and experts.

Address

CA. Sripriya Kumar

Central Council Member,
ICAI & Director, IIIPI

1. IBC, 2016 has heralded a new world of debt resolution from 'debtor-in- possession' to 'creditor-in-control'.

2. The Code is primarily centred to achieve two things *firstly*, value maximization and *secondly*, to ensure resolution and recovery in that order as quickly as possible.

3. The success of any legislation depends on two things – what we inherit and what we deliver. IBC seeks to bring out a linear and unified mechanism to approach the Adjudicating Authority and put the Corporate Debtor back on track. The success of any regulatory framework depends on four things – time, people, process, and institution. In this, I would treat the 'time' as first.

4. In comparison to other legislations such as Companies Act, IBC is relatively very young so we cannot draw a final judgement on its success. However, as far as high liquidations are concerned this may be because most of such companies are admitted in insolvency when value of their assets already stand eroded.

5. As per the IBBI data, the PUFE transactions of corporate debtors stands about ₹ 2.28 Lac Crore. It is not just the job of IPs but there should be a larger consensus on this issue. The financial creditors need to support the IPs to bring this amount back into the productive economic system.

6. RP has to work like a businessman. He has to believe that it is his company which s/he is trying to resolve and run.

7. We need to take a big leap in technology in terms of how a resolution professional can be supported with access to more data bases related to avoidance transactions and information utility (IU) so that s/he can appraise his work in context. Besides, if CoC takes decisions quickly, and is supportive, the IP would be emboldened.

8. In several judgements the Courts have reiterated the supremacy of 'Commercial Wisdom of the CoC'. It would be better if this 'Commercial Wisdom' is passed on to other institutions including the Resolution Professional.

9. IBBI's linear process of compliance is very important for this Code. The recent amendment on IPs' fee will help ensure professionalism.

10. IIIPI carries out its functions proactively and in timely manner. We organize discussions on various issues/proposals related to IBC which are also apprised to the regulator. I am sure, together we can make a better world and a better institutional framework.

Guest of Honour
Shri. Jayant Kumar Dash
Executive Director
Reserve Bank of India (RBI)

1. The introduction of IBC, 2016 was a watershed event for RBI after various regulatory frameworks on resolution of stressed assets of banks were introduced at different points of time and tweaked from time to time.

2. In 2019, the RBI was tasked with initiation of CIRP for Financial Service Providers (FSPs) regulated by it under Section 227 of the IBC. This framework is now being used very actively.

3. The IPs are the key protagonists even when the supremacy of the CoC is recognized in the CIRP. It is collective responsibility of all the stakeholders to ensure that the outcomes under IBC, far exceed than that during all the previous experiments that RBI has tried.

4. IIIPI has rightly recognized the challenges of RPs such as adherence to timeline, increasing eventualities of liquidation, and ethical conduct aspect of stakeholders among others, which creates the basis of efforts in this direction.

5. The five major points related to timely resolution of a Corporate Debtor are as follows:

   (a) **Control of Assets of CD**: Control of assets can prevent any deterioration in its economic value. RP can directly ask the details from promoters and if they are unwilling, s/he can approach to Adjudicating Authority (AA). However, when to pursue with promoters and when to pursue with AA? It is an art which can be learnt only by practice. Having industry specific questionnaire will be a good way to reduce the time.

   (b) **Interim Finance**: If interim finance is available, only then the RP would be able to sustain value and maintain the Corporate Debtor a going concern and also manage the administrative expenses. However, raising interim finance has been difficult due to unwillingness of CoC as well as lenders. To convince the CoC for interim finance, the RP is required to understand the related industry, business model and have a good command on corporate finance. The lenders generally hesitate to extend interim finance despite its seniority status, flexibility, and benefits of classification as standard asset for one year, and eligibility to earn interest for one year in case of liquidation. This unwillingness is primarily due to delays in completion of the CIRP process.

   (c) **Managing Affairs of the Corporate Debtor**: Taking over the assets of the corporate debtor is only the beginning, whereas understanding business model, identifying key managerial process, key stakeholders, organization culture etc., are key to manage it successfully as a going concern. RPs should also be mindful of the financial constraints put up by CoC in hiring professionals for managing the affairs of the Corporate Debtor, which is also crucial to address any dispute.

   (d) **Convening CoC Meetings**: Sometimes successful resolution applicants withdraw after approval of the CoC and/ or Adjudicating Authority which leads to liquidation of the company. RPs should facilitate enough meetings of resolution applicants with CoC to ensure that only fit and proper resolution plans are shortlisted.

   (e) **Understanding limitations:** It is important for the IPs to be abreast of the latest developments in the courts especially those related to the interpretation of the IBC and Regulations. There is a greater onus on the RP to build trust and credibility of the process.

6. Some of the major challenges before the IBC include CoC members initiating independent recovery process against the Corporate Debtor, absence of the framework for Group Insolvency, de-linking of subsidiaries which are already into the insolvency process, litigations against the Corporate Debtor or its group companies and multiplicity of regulators. From the perspective of the RBI, preventing backdoor entry of erstwhile promoters, fast tracking of the audit of avoidance transactions, maintaining transparency are the primary challenges.

7. During resolution process IPs should maintain utmost transparency and host the information on the website of the company. S/he should also ensure that there is no leakage of sensitive information related to the resolution.

8. While the challenges of meeting the expectations of the IBC may appear hydra-headed, concerted efforts of stakeholders with an ethical approach to solve the problems supported by laws and regulations, the desired goals can be achieved. I hope the members of IIIPI will immensely benefit from deliberations in this Webinar.

Guest of Honour
Smt. Anita Shah Akella,
Joint Secretary
Ministry of Corporate Affairs (MCA)
Government of India

1. IIIPI, as a frontline regulator has been responsible for development and regulation of the insolvency profession. Besides, it has been building the knowledge blocks and capacity of the stakeholders.
2. Insolvency professional is a key pillar of the insolvency ecosystem upon whom rests a lot of responsibilities – effectiveness, timely functioning, and credibility of the entire edifice of the insolvency and bankruptcy resolution process rest on his shoulders. He plays various roles such as Interim Resolution Professional, Resolution Professional, Liquidator and Bankruptcy Trustee.
3. I take this opportunity to congratulate IIIPI for six wonderful years of successfully countering the challenges through proactive and dynamic regulatory measures including the challenges that were faced during Covid-19 pandemic. I am glad to note the remarkable contribution of IIIPI under the Code.
4. There has been a concern that a lot of the cases are being pulled into liquidation rather than being resolved. It is duty of all the stakeholders to ensure that the company runs as going concern and is resolved amicably within a timeframe. There is need to address the concerns related to delays and improving the realization.
5. There has been concern, expressed on various forums, regarding the conduct of insolvency professionals. This has led to disciplinary proceedings against IPs due to failure to comply with various provisions of the Code and orders of the courts, etc. Adherence to the Code of Ethics of the profession is very important for every professional.
6. We are trying to address the delays at the level of Adjudicating Authorities, but IPs should adhere to time limits prescribed in the Code and ensure that there is no delay from their part. There is a plethora of activities IPs need to perform so they should continuously update and upgrade themselves.
7. IPs should discharge their duties with utmost integrity, objectivity, independence, impartiality, and they should also make honest efforts to maximize the value of Corporate Debtor. IPs should also ensure that the process is run in a fair and objective manner and in the best interest of the stakeholders. While doing so, IPs should also guide their peers which is beneficial for entire ecosystem.
8. IPs should also be abreast of IT skills and new technology for faster resolution of the Corporate Debtor. It is important that we adopt technology and have a case management software in which all the necessary inputs including the 'the way case is flowing' is available on a single platform.
9. We need to make efficient, effective, and preferred legislation to deal with all issues. With the active support of IPEs, IPs, and other stakeholders, we will be able to make Indian insolvency system more robust and efficient.

Chief Guest
Shri Ravi Mital
Chairperson
Insolvency and Bankruptcy
Board of India (IBBI)

1. IIIPI is the most important organization that works with IBBI. IIIPI should become so effective and efficient that IBBI need not to do anything regarding regulation of IPs. IBBI has recently started delegating disciplinary proceedings to IIIPI. I wish IIIPI grows and become more efficient and transparent organization. In the times to come, we will be happy, if you (IIIPI) take over all our work related to IPs, so that we can concentrate our energies on other important matters.
2. Interim Resolution Professional (IRP) is named in the CIRP petition itself but has a little control on delays in its admission. Immediately after admission of the case, the Resolution Professional is expected to strictly follow the timeline prescribed in the Code.
3. Though RPs have little role in delaying the process, they are blamed the most. There is a need for other stakeholders to share the responsibilities of timelines during the insolvency and share the blame. The job of RP is quite difficult because he has maintained the unit as a going concern, here s/he is expected to be a master of all trades.
4. Loss of value and huge haircuts are two major concerns which needs to be addressed.
5. Under IBC, two kinds of valuation of the Corporate

Debtor are conducted – fair value and liquidation value. If you look at the fair value, you will find about 85% of the fair value is preserved during the IBC process. If value of the Corporate Debtor is lost before it is admitted in the CIRP, it will be very difficult to maximize the value. Besides, the value of the asset goes down as time goes by. The resolution is based on the value on the date of bid which cannot be equal to the value of company when it was running with a sound financial status.

6. RPs should be more efficient, as manager, accountants, and lawyers. That is why we have recently allowed Insolvency Professional Entities (IPEs) to become IPs at least for managing bigger CDs.

7. We will have to change the perception of people, who are out of the system, about the IBC. That can be done only when we are able to counter their doubts with facts. We should tell the system that we have been able to preserve the fair value, etc.

8. Of course, there are problems as we are taking more time than prescribed in the IBC. However, in the earlier regimes it used to take 4 to 5 years.

9. There is a genuine criticism that some RPs are not working in a transparent manner. There is a need to improve transparency in our working, reply to all criticism, be more polite, work with the CoC and resolution applicants in a more coordinated and efficient manner.

10. Behavioural changes are more important for IPs. There are law and regulations but how we change our behaviour, is important.

Special Address
Shri. Ashwini Kumar Tewari
Managing Director
(Risk, Compliance & SARG)
State Bank of India (SBI)

1. IIIPI is playing a very important role as a self-regulatory organization.

2. CoC is largely focussed on the value it can get from the Corporate Debtor. Thus, the IPs' job is not only to run the company as a going concern but also to preserve the value of the company so that it gets a viable resolution plan. There have been instances where promoters try to take out cash and assets of the company.

3. Though the appointment of professionals is cleared by the CoC, it is largely dependent on RPs for appointment of professionals during the CIRP. SBI is preparing broad guidelines on fees of professionals, qualifications etc. for appointment of professionals, which would facilitate the process.

4. Handling large number of creditors is again a challenge. There have been complaints from large operational creditors, which may be large groups including suppliers, government authorities and tax authorities. The operational creditors either do not get anything or they get very less. There is need to define the share of operational creditors including government agencies, in the proceeds obtained from the Resolution Plan.

5. Infrastructure requirement is another contentious issue as the IPs are required to manage multiple offices and sites of the company. This requires a multidisciplinary team of officials.

6. Confidentiality is another sticking issue as sometimes sensitive data come out in media. Besides, transparency, timelines, impartiality, constant vigilance are also very important.

7. Individual IPs can surely hire good professionals to run the show but there is always this challenge of having no fallback. In corporates, a team can handle the case and be made accountable. So far, we have not come across any such complain by banks but given the complexity of the job there may be possibility of missing some deadlines or having suboptimal output. We need some inputs/ suggestions on this issue on whether there should be any threshold to handover the cases to IPEs and below that the individual IPs should be engaged so that the individual IPs are not completely wiped out from the system.

8. SBI holds training for CoC members to explain them the need for constant dialogue with the RP, documentation, compliance, and timelines. Committee members should be empowered to take basic decisions if not the critical ones.

9. Personal insolvency is also not taking off because either cases are not being admitted or not moving forward. Therefore, such cases should be conducted alongside the CIRP. Presently, the companies are

sold but personal insolvency cases continue. The bankers find it very difficult because there is no information about the value of the assets, value of the personal guarantee as records are not updated for long time. We look forward for some suggestions and background papers on this issue as well, like one released today by IIIPI.

10. Pre-Packaged Insolvency Resolution Process (PPIRP) of MSMEs is also not taking off as there are just three cases as of now. Here too, some thoughtful discussion is required.

11. IBC is a living Code primarily due to proactive nature of IBBI. With the active support of various stakeholders, we will be able to face challenges.

12. The role played by IBBI and IIIPI in operationalizing the Code and ensuring thereby recoveries of the banks' debt, is a real national service for bringing the money back in in the economy.

Special Address

Mr. Adam Taylor

Head of Economic and Finance
(India) FCDO
The United Kingdom

1. Governments of India and UK are committed to an ambitious roadmap for enhancing our trade and investment relationship by 2030.

2. UK's bilateral trade with India is expected to be over £70 billion by 2023. UK is the sixth largest investor in India while India stands second largest investor in the UK directly supporting 95,000 jobs. UK's financial services exports to India rose from £170 Million in 2015 to £340 Million last year. Thus, when India succeeds, the UK also succeeds.

3. Implementation of IBC, 2016 is a boost to Indian economy. A strong insolvency regime is critical to strong and dynamic economy. This is why the work of IIIPI is so important as a frontline regulator, quasi-judicial body, and the largest Insolvency Professional Agency (IPA) in India. UK is working with India to support reforms and ensuring effective implementation of insolvency regime.

4. At the 09th UK- India Economic & Financial Dialogue (EFD) 2017, the UK Chancellor and Indian Finance Minister agreed to share knowledge, best practices, and capacity in insolvency. This collaboration had deepened in the 10th and 11th Economic & Financial Dialogues respectively in 2020 and 2021. Under this collaboration, the UK government launched a program in 2019 and working closely with Ministry of Corporate Affairs (MCA), IBBI and IIIPI for strengthening India's insolvency regime.

5. In the last three years, this program has now touched 5,000 professionals including IPs, creditors, and regulators. During August 2022 in a program on "Role of Mediation in Insolvency and Bankruptcy" 200 IPs had participated and another workshop in October 2022 was attended by 300 IPs. The fourth year of this program aims to support the MCA, IBBI in strengthening India's insolvency regime, in particular, sharing of best practices on regulatory aspects, building capacity of stakeholders, policy development and developing stressed asset market in India.

Panel Discussion

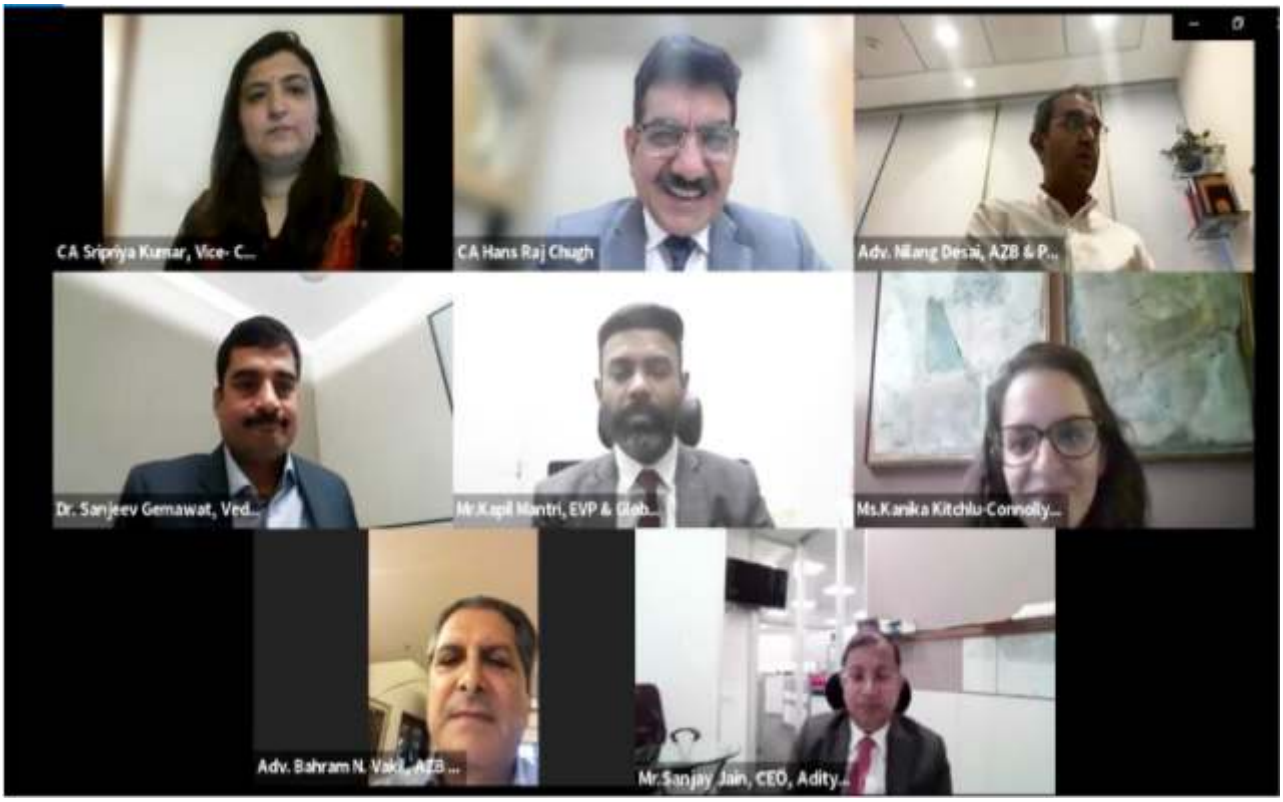
Moderator: CA. Hans Raj Chugh, CCM-ICAI and Director-IIIPI

Panellists:

- Adv. Bahram N. Vakil, Founding Partner, AZB & Partners
- Mr. Nilang Desai, Senior Partner, AZB & Partners
- Dr. Sanjeev Gemawat, Group General Counsel, Vedanta Group
- CA. Sripriya Kumar, CCM-ICAI and Director-IIIPI
- Ms. Kanika Kitchlu, Connolly, Partner-TLT, LLP, The UK
- Mr. Sanjay Jain, CEO, Aditya Birla ARC Ltd.
- Mr. Kapil Mantri, EVP & Global Head, Corporate Strategy, M&A, JSPL Group.

Key Takeaways of the Session

1. As per IBBI Newsletter, till September 2022, 23,417 applications for initiation of CIRPs, having underlying default of ₹7.31 lakh crore were resolved before their admission. This demonstrates the change in the Credit Culture brought in by IBC, 2016. Besides, of the 3,946 closed cases, corporate debtors have been rescued in more than half of these cases.



2. IBC has given rise to a new industry viz. distressed financing. Because of the protection provided to the debtors by the IBC, creditors are coming forward to provide funding to promoters of distressed corporate debtors who have good business prospects.

3. RP is expected to be a business manager during the CIRP process, in a fiduciary capacity. However, timely resolution and recoveries are influenced by an entire ecosystem. The success or failure of an RP depends on future relevance of the business, and CD's financial status at the time of commencement of the CIRP, among others.

4. The challenges in resolution of corporate debtors include lack of clear guidelines on Group Insolvency, Cross Border Insolvency, Interim Finance, Litigation Finance and delays due to protracted litigations. We have yet to evolve a clear code on lenders' liabilities. Almost 50% time of RP goes into compliance and documentation.

5. Due to the IBC, 2016 borrowers are very cautious of not committing the default. Gone are the days when we used to hear – right businessman is that who borrows money from banks and learns business from borrowed money.

6. In terms of attracting international investment and giving them confidence, the journey has started. More success stories, if well publicised will generate more interest and more excitement in the market.

7. Some RPs, particularly backed by reputed IPEs are very proactive in marketing the corporate debtors to attract investors by sharing the relevant information creatively. Without right information, it becomes difficult for any bidder to participate in bidding process. The problem is aggravated more if RP is replaced. Sometimes RPs are not able to explain the expectations of CoC to resolution applicants. Besides, last minute changes in clauses EOI,

changes in deadlines, insistence on physical submission of the Resolution Plans etc. also discourage the investors. CoC should proactively promote marketing of the corporate debtor to get the best value from Potential Resolution Applicants (PRAs).

8. ARCs have been in market for over two decades and are governed under SARFAESI Act and RBI Regulations issued from time to time. ARCs have been buying stressed assets and resolving it through various means such as enforcement of their rights, restructuring of dues and settlement with borrowers. SARFAESI Act does not allow ARCs to become Resolution Applicant, but RBI has recently allowed ARCs to submit resolution plans under the IBC, 2016 with some restrictions. Presently about four ARCs are eligible to submit the resolution plan out of which three have not submitted any resolution plan so far.

9. In the pre-Covid period, the recoveries were quite good, and cases were timely resolved. Now, the delays have become major issue in the IBC.

10. Group Insolvency and Cross Border Insolvency often go together across the some of major economies across the world.

11. RPs should appraise and discuss the issues of various stakeholders of the Corporate Debtor such as suppliers and employees etc., so that a comprehensive solution could be chalked out.

12. RPs should discuss with CoC about factors behind failure of the Corporate Debtors, whether it is business failure, financial failure, or malfeasance to enable the CoC to determine the way forward. Insolvency profession is a full-time job. RPs should have good team and use latest technology while running the process. Negotiation skills are crucial for the RP to earn support of various stakeholders of the CD.

13. Integrity, transparency, and confidence are very important for insolvency regime. The RP should ensure that the entire team particularly the juniors understand the legal framework and related compliance. S/he should have a proper 'Case Management System', build a network of professional, and engage with various stakeholders.

14. There is need to discontinue physical notarization and affidavits. If this process is made online, a lot of time could be saved. There should be an online platform for qualified resolution applicants. There should be some guidelines to ensure consistency in EMD amounts (Earnest Money Depots) as some corporate do not ask for it while some others demand up to ₹ 10 to ₹ 15 crore as EMD.

15. The biggest challenge ARC industry is facing is that banks sell their assets to ARC individually not as consortium. Thus, ARC is not able to figure out time frame for resolution and the resolution strategy. Consequently, they do not get the right value for acquiring their assets. This affects the international investors which are big participants in acquisition of financial assets through ARC.

16. In last couple of months and after the launch of Bad Bank, the banks have triggered Swiss Challenge in six cases involving total amount of ₹18,000 crore. Out of these, counterbids have been submitted in four cases. This is clear evidence that other ARCs have started participating in acquisition of assets. If assets are acquired by ARC, inter-creditor issued are solved faster resulting in early resolution of the CD.

Vote of Thanks

CA. Rahul Madan,
MD-IIIPI

1. The occasion of 06th Annual Day is the time to reflect upon what more can be achieved in future. There is no denying of the challenges looming large but as true professionals it is our job to tackle and overcome them with our best efforts and intentions.

2. Going by wisdom, I can quote "what we think, we become and what we imagine we create!!". For us to emerge victorious in our endeavours, it is imperative for all pillars under IBC to join forces and work together as we move ahead. In this particular context, the insightful thoughts and lessons expressed by our eminent guests today indeed go a long way in carving the direction for the future.

Handling Business Failure: A Dharmic Way

Under the IBC, 2016, existing default to payback the debt is considered a sign of business failure. However, if you go under the skin, you will realize that default is not the cause but a symptom of business failure. It is like a doctor in a small town immediately gives you some pills to cure your fever but those sitting in reputed medical institutions consider fever as symptom of any major infection. They administer fever control pills only if the fever is very high and damaging. Describing his personal experiences, the author argues that the lack of cash in hands of businessmen to continue their businesses brings them to a point of standstill, which ultimately leads to closure.

Read on to Know More…

M. Suresh Kumar
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1. Introduction

Day-in & Day-out, we come across many business successes and umpteen number of failures. In our business streets, some of the new shops, showrooms & small hotels opened in the last 1-2 years back are no longer there. In some cases, those shops continue to exist with a new set of owners, as the earlier owners were not able to run it viably.

Quite often, we hear about some of our acquaintances incurring losses in their business resulting in the loss of even their houses. On its extremity, we come across disturbing news of some family suicides in newspapers, due to business / personal debts. While coming across all such business failure news and incidents, many of us feel pity for their bad luck and often we generalize such failures to their inefficiency, poor planning, greediness and being over ambitious etc., etc.

Business failure is part and parcel of any business process. One may fail in one business for various reasons. But that is not the end of his life. He can explore the next available opportunity for success. After all, a child learns to walk after repeated falling. Learning the art of balancing on her legs happens through repeated trial and error process. All said and done on positive side, is the business failure so simple to handle? For a man of positivity, the answer is

certainly YES.

When this question is put to me, I have answered it as "YES, provided there is no repercussion".

The next question was what you mean by "Repercussion". I simply answered it as "One person's loss should not become another person's loss". Let me try to explain my understanding of Dharma in the context of handling a business closure [rather a business failure] by a sensible businessman.

2. Possible Causes of Business Failure

Before dealing with Dharma, let's analyze some of the business elements causing success and failures, business

Asset	Liability	Profit	Loss
Capital	Sales	Purchase	Taxes
Lenders	Workers	Customer	Suppliers

environments and the interested stakeholders.

I am not going to define each of these terms here. Just listing the key components of a business.

When a business flourishes, they attribute the success to hard work put in by the owner, her determination and managing skills. On the flipside, when it fails, the reasons for failure expand as usual, as the reason for failure is always "You" and not "Me".

Let's list some of general reasons of business failure we hear very often:

a. Sales didn't pick-up as expected [Market expectation gap]

b. Cost of manufacturing was very high [unable to cover-up fixed costs]

c. Lack of adequately trained manpower [high attrition]

d. Lack of adequate working capital fund flows

This list can grow much bigger, as we are experts in pinpointing reasons for failure. The question here is,

"Did the businesspeople know all these likely problems upfront2?"

[OR]

"Did they conveniently overlook these matters in their pursuit of being optimistic about their business and its management?"

3. Loss V/s Cash Flow Issue

The layman thinks the reason for business closure is continuous losses. However, in reality the businesses get impacted/closed on account of cashflow issues. In 2008, the financial meltdown started because the Lehman Brothers did not have money to pay their dues, although they were always profitable in papers until their last quarter results.

In my experience and knowledge, I have come across at least 1000+ cases of small business failures and/or bankruptcies in the garments sector, just because of bankruptcy of an overseas buyer!!

> **"There are many small-scale businessmen, who close their businesses, because their customer(s) fail to make the payments."**

This is not a unique phenomenon in the export segment alone. There are many small-scale businessmen, who close their businesses, because their customer(s) fail to make the payments. The lack of cash in their hands to continue the business brings them to a point of standstill, ultimately leading to closure.

4. Hopeless Hope & Consequences

Many entrepreneurs, with the hope of recovery in the near future, borrow funds from friends and relatives and invest in their business. After exhausting those sources, they next resort to high interest borrowing from private money lenders to continue their business. Besides such borrowings, they take more and more supplies on credit and use those funds also in their business. When their continued optimism & unrealistic recovery dream fails, it causes serious financial repercussions in society.

Individually, they lost in their business. But their "Hopeless Hope" leads to multiplier effect:

a. The friends and relatives, who have lent them on trust end up loosing their money

b. The suppliers who gave on credit lose their money, which in turn may push them towards insolvency.

c. The default on the loans taken from banks causes loss to the banks and their depositors.

One failure leads to another failure, due to irrational behavior of the hopeful entrepreneur. It's true that the

person had tried his best for a business success. He may be an honest man, but his business failure not only eroded his wealth, but the wealth of all those who trusted him. The biggest question here is, does anyone have the moral right to carry on business with other's money and lose it?

5. Leveraging Beyond Limits

There is a famous saying that "An Intelligent will earn Money with Others Money". So long as you are successful, there is no problem in trading with other's money. The trouble starts at the point of incurring loss. When a loss occurs, whose money is he losing?

Losing the money of those who trusted him not only upset the trust and faith of the individual, but the whole financial and economic activity. Such irrational behavior of the optimistic businessmen causes serious repercussions in the financial system and the on-going business / economic activity of the society:

a. Bankers charge high interest rate margins on lending, when the failure rate is high (e.g., credit cards are charged @ 3% p.m. as repayment failures are high)

b. Small savings of individuals are not reinvested into the business cycle, because of the fear of failure of businesspeople.

c. At times, to hide failure, few resort to unhealthy / illegal business activities thereby spoiling the total business credibility [e.g., adulteration, etc.,]

d. This vicious circle of debt and the promoter's attitude of holding on to the assets, becomes a national waste as many of the productive assets and resources remain unutilized.

e. Some business failure leads to yet another, wherein this chain of failures results in loss of many gainful employment in the society.

"This vicious circle of debt and the promoter's attitude of holding on to the assets, becomes a national waste as many of the productive assets and resources remain unutilized."

Additionally, the entrepreneur's family & their lifestyle gets toppled. On good days, the spouse and kids would have enjoyed a comfortable living and good schooling. Business failure leads to the loss of their homes. The financial stress disrupts the morality of the family altogether. Many family suicides we come across are mainly on account of financial stress and reputation loss in society.

6. Point of Insolvency

Morally, no one has the right to carry on a failing business, when his capital is eroded. Once his entire Net worth is lost, the entrepreneur starts playing with the money of lenders and suppliers. Any further loss in the venture is no longer his loss. It is the loss of his trusted stakeholders [Creditors].

Every entrepreneur presumes the recovery is certain if he somehow manages to stay in the business. In more than 99% of such cases, this tendency of "somehow continuing to stay" further widens the loss and leads to vicious circle of debt [i.e., new borrowing for servicing the old debt].

Increased debt, higher interest cost, higher procurement cost due to lack of capital, higher operating cost, low sales etc., ultimately lead to insolvency. Such chronic financial stress collapses the entire business, which otherwise may be viable at certain borrowing levels.

In an ongoing stressed business, which is the right point for deciding its continuity?

a. When your asset value equals the liability (without own capital). i.e., when your entire capital investment is eroded on account of cash losses. At this point, you have a fair chance of disposing of all the assets and settling the liabilities. No one will lose, although you have lost.

b. If you fail to take appropriate action at this point and continue to incur loss beyond this point, you become the source point for chain of losers in the forthcoming period.

This point of "Assets equals (or marginally exceeding) the debt value" is the point of insolvency for the business. Beyond this level, if business continues, the probability of "Vicious circle of debt" is high for any business and the chance of collapse magnifies.

7. Point of Insolvency as per IBC

The Insolvency and Bankruptcy Code 2016 hints the start point of insolvency as "Failure/Inability to honor any debt on its due date" [whether financial or operations].

The law makes the point simple. When an entrepreneur can't pay his bill on a date, it clearly depicts his inability to manage the cashflow and the increased chance of failure. The present law stipulates monetary threshold of ₹1 Crore for initiating insolvency process against companies [with some variations for MSME companies, partnership firms & individuals].

The intent of the law is to identify stress at the earliest possible instance and find a viable buyer to continue the business, so that the business and employment of many are continued without any disruption (may the owners change). Will the business owners understand this intention of law in its right perspective?

> **"Given the proprietary mindset of many Indian businessmen, and their way of perceiving the business failure as personal failure, almost all of them continue to hold the rotten apple tightly."**

Certainly, a "Big No". Given the proprietary mindset of many Indian businessmen, and their way of perceiving the business failure as personal failure, almost all of them continue to hold the rotten apple tightly causing serious financial and economical repercussion in the business world.

8. NPA Classification of Bank

This new version of insolvency law is still evolving. The law & procedures are being tested with the stalwarts. On the other hand, the stress identification in the form of NPA classification and SARFAESI auctions are more than two decades old in our banking circle.

IBC narrows the point of insolvency as failure to repay the debt which is due. Whereas the RBI norms narrow the point of insolvency as 90th day from the date of default. On the 91st day, they brand the loan as Non-Performing Asset (NPA). All the entrepreneurs cry and make a huge noise at this point that

> "My business is still doing Good. Due to temporary cashflow mismatch, there is delay in repayment. Just because I have delayed the installment for 3 months, it doesn't mean that I have to lose the business".
>
> "Bank has not supported me at the right time. If they had given the additional loan, I would have solved serviced the orders and repaid all the loans."

As these NPA classification & consequential actions are legal norms, no one is ready to hear their cries. Any number of DRT (Debt Recovery Tribunal) filing & writ petitions in this matter, just enriched the lawyers. *Leave aside these norms, let me ask a question here. Is the entrepreneurs' cry genuine?*

Sitting in the shoes of the entrepreneur, you may feel that they are right. At this point, let me ask you the next question - Is the bankers, real reason for business failure?

Before you conclude your answers, ensure to evaluate the following facts also, for the given business of any entrepreneur:

a. What shall be the right amount of own capital & borrowings in a given business [Debt: Equity]?

b. Is it appropriate to use the entire CC / OD limits to its brims, without keeping any reserve for tougher times in the business?

c. Is it appropriate to use the short-term funds for long term uses [i.e., buying land, plant & machinery with the OD/CC borrowings]?

From the lender's angle, when a party can't service their debt even after giving 90 days additional time, they presume a chronic financial issue in the business and hence they classify it as NPA for further course of initiating recovery actions (after all, they are answerable to the deposit holder's money).

9. Tough Business Decision

In the angle of insolvency law, when you fail to honour any bill or debt on its due date, the point of insolvency kicks in. Whereas bankers grant 90 days waiting time.

The point of insolvency may vary between statutes. The end result is the same. Whether the entrepreneur takes appropriate tough decision on its continuity at the crucial point, that is the key for holding on to the business dharma. Explaining directive principles for head/leader of the State (King), the great philosopher and polymath Archarya Chankya[1] has said, "All urgent calls he shall hear at once, but never put off; for when postponed, they will prove too hard or impossible to accomplish1." In the context of business leaders, one of the key takeaways from this verse is - tough decisions should be taken on time, when business needs it.

[1] Arthashastra. Part – I, Chapter 19, Shlok. 35.

At times, timely closure holds the path of Dharma, as the arrest of loss safeguards the wealth of many.

In business, there are times wherein owners are put in tricky situation demanding a tough decision. It includes the decision of whether to continue the business or not. A deeper understanding of the business situation and financial prudence should guide the businessmen in arriving an appropriate business decision.

Every business owner wants its business to be successful. Every businessman dream of becoming a billionaire. When everything goes well, it's happy doing & happy ending. However, in reality many go in the opposite direction and end up incurring losses.

When your business travels northwards, at what point of time you will take the tough decision of closure is crucial for an honest business closure and holding back the trust and faith of the kith & kin. At times, timely closure holds the path of Dharma, as the arrest of loss safeguards the wealth of many.

Supreme Court Ruling in Vidarbha Power Industries Limited: An Appreciation and A Critique

NCLTs act as an interface of the insolvency regime in India. They monitor processes under the IBC, 2016 (Code) and take crucial decisions. Whether NCLTs enjoy discretionary powers under the Code? If yes, to which extent? These issues have ignited debate after the Supreme Court judgement in the matter of M/s Vidharbha Industries Power Limited Vs. Axis Bank Limited (2022). Apprehensions are being raised on possible misinterpretation of the judgement by promoters of the CDs to delay the admission of CIRP, which may derail the main objective of the IBC,2016 i.e., resolution. After analyzing the pros and cons of the judgement, the author suggests an amendment in line with the UNCITRAL Legislative Guide on Insolvency Law, 2005. ***Read on to know more…***

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1. Introduction

Perhaps for the first time, the Supreme Court of India had the occasion to decide on the crucial aspect as to whether there was any elasticity permissible to the rigors of an admission to the Corporate Insolvency Resolution Process (CIRP) under Section 7 of the Insolvency and Bankruptcy Code 2016 (Code) despite there being occurrence of a default. This was observed by the Apex Court in its ruling rendered in July 2022 in the landmark case of *M/s Vidharbha Industries Power Limited (Corporate Debtor) Vs. Axis Bank Limited (Financial Creditor)*[1].

2. Facts of the Case

The Corporate Debtor (CD) was an electricity generating company, which had set up two units of coal-fired thermal power plant, each for 300 MW in Maharashtra. The tariff to be charged by such a company was determined by the State Electricity Regulatory Commission viz., the Maharashtra Electricity Regulatory Commission (MERC) in this case. So, in February 2013, the MERC had duly approved the Power Purchase Agreement including the tariff (which is based on cost-plus mark-up basis), permitting the CD to commercially sell the electricity it

[1] C.A. No. 4633 of 2021

generated. Later in January 2016, the CD sought to claim enhanced tariff inter-alia owing to what it claimed were increased fuel and operational costs. However, the MERC declined to approve the enhanced tariff. So, the Appellant went into appeal before the Appellate Tribunal for Electricity (APTEL), which approved the enhanced tariff calculations. It appears that the financial implications of this successful appeal would result in ₹1,730 crores due to the CD. But, pouring cold water on such gain, MERC carried the matter into appeal before the Apex Court, where the matter was pending at the time of judgement (the same was pending as of December 08, 2022).

Meanwhile, Axis Bank, being a Financial Creditor (FC), claimed that the CD had defaulted on dues amounting to ₹553 crores (₹499 crores being principal and the rest being interest). As the default had occurred, it filed a petition in January 2020, under the Code before National Company Law Tribunal (NCLT), Mumbai for initiation of CIRP against the CD. As a counter, the Appellant filed a Miscellaneous Application before the court seeking a stay of the proceedings under the Code, until its matter in the MERC appeal was decided by the Apex Court.

The NCLT, in January 2021, declined to stay the CIRP stating that under the Code, it had no discretion but to only see whether (a) there has been a debt and (b) the corporate borrower had defaulted in making the repayments. That's it, and no further. These two aspects, when satisfied, would trigger the CIRP. It also observed that "no extraneous matter" should come in the way of expeditiously deciding the petition under Section 7 of the Code. And that the inability of the CD in servicing the debts or the reason for committing a default "were alien to the scheme of the Code".

Even the National Company Law Appellate Tribunal (NCLAT) concurred with the NCLT's stand, citing that the "flow of legal process cannot be thwarted on considerations which are anterior to the mandate of Section 7(4) & (5) of the Code". Dissatisfied with these orders, the Appellant carried the matter to the Supreme Court.

3. Arguments and Counter Arguments before Supreme Court

The CD vehemently argued that (a) it was not able to pay the dues of the FC only because of the pending MERC appeal before the Supreme Court and (b) implementation of the orders of the APTEL would enable the CD to clear all its outstanding liabilities. Referring to Section 7(5)(a) of the Code, it contended that where the Adjudicating Authority (AA) i.e., NCLT was satisfied that a default has occurred, and the application under Sub-Section (2) was complete, and there was no disciplinary proceeding pending against the proposed Resolution Professional, AA may[2] by order, admit such application. Thus, it must be interpreted to say that it was not mandatory for the NCLT to admit an application in each and every case, where there was existence of a debt, thereby implying that it could reject the initiation of CIRP in fit conditions "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 short, it was argued that NCLT had the discretion to admit the CIRP and this was not a fit case to do so.

Per *contra*, the FC strongly contended that Section 7(5)(a) of the Code cast a mandatory obligation on the AA to admit an application of the FC, under Section 7(2), once it was found that a CD had committed default in repayment of its dues to the FC. Quoting from the celebrated ruling of the Apex Court in *Swiss Ribbons* [(2019) 4 SCC 17], it was stated that the trigger for a FC's application was non-payment of dues when they arose under loan agreements.

4. Ruling of the Supreme Court

Interestingly and pertinently, the Apex Court critically observed that the viability and overall financial health of the CD were not extraneous matters, particularly when there was a favourable order by the APTEL, which would have netted the CD ₹1,730 crores i.e., an amount which was far in excess of the dues (₹553 crores) to the FC. The Apex Court in this ruling has categorically held that whilst the existence of a default in servicing the financial debt only gave the FC a right to apply for initiation of the CIRP, yet, the NCLT, as the AA, was required to apply its mind to relevant factors including as in this case, the feasibility of initiation of CIRP against an electricity generating company operated under statutory control, the impact of MERC's appeal being *sub-judice*, favorable order of APTEL and the overall financial health and viability of the

[2] Emphasis supplied, the use of 'may' in contradistinction to 'shall' made the critical difference in this important matter

> **Apex Court critically observed that the viability and overall financial health of the CD were not extraneous matters, particularly when there was a favourable order fetching the CD more money than payable dues.**

CD under its existing management. The Court felt that these factors were germane enough for consideration by the subordinate courts in deciding the admissibility of the CIRP.

Concurring with the Appellant's contentions, the Apex Court ruled that a bare perusal of the aforesaid provision showed that the word used in Section 7(5)(a) of the Code is 'may' as opposed to 'shall', which must be interpreted to say that it was not mandatory for the NCLT to admit an application in each and every case, where there is existence of a debt. Effectively, the Supreme Court overturned the orders of the subordinate insolvency courts which refused to entertain a stay on the CIRP initiated by the FC owing to the occurrence of a default.

5. The Verdict: Author's Take

With due regards, the decision is a straightforward one in that the Supreme Court has upheld the first and foremost principle of interpretation of statute, which was the rule of 'literal interpretation'. The use of the word 'may' in Section 7(5)(a) in respect of an application for CIRP initiated by a FC against a CD in contradistinction to the expression 'shall' in the otherwise almost identical provision of Section 9(5) of the Code relating to the initiation of CIRP by an Operational Creditor (OC) clearly evidences the intent of the Legislature.

That the Legislature appreciates very well the value of the words they choose becomes evident from the following comparison also:

a) Section 7(1) of the Code reads that "A financial creditor either by itself or jointly with 2 [other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government] may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred."

b) Whereas Sub-Section (2) thereof reads that "The financial creditor shall make an application under sub-section (1) in such form and manner and accompanied with such fee as may be prescribed."

c) Similarly, Sub-Section (4) reads as "The Adjudicating Authority shall, within fourteen days of the receipt of the application under Sub-Section (2), ascertain the existence of a default from the records of an Information Utility (IU) or on the basis of other evidence furnished by the financial creditor under sub-section (3)".

This verdict also dovetails into the object of the Code which was to try and resuscitate the CD and not rush and pave the way for its eventual liquidation. So, where the solvency of the CD was not in question but appeared to be a temporary shortage of funds, then admitting the CIRP (which includes displacing the existing management) in such an instance would appear harsh and contrary to the avowed object of the Code.

Also, the reliance on *Swiss Ribbons* judgement *supra* as feeding into the mandatory admission to the CIRP ought to be displaced since in that case, the Apex Court was deciding questions relating to the constitutional validity of the Code and not the issue of 'may' versus 'shall' the present context. The obiter deployed (read pearls of wisdom) by the Court in the *Swiss Ribbons* judgement is an ultimate manifestation of one true and splendid majesty of the Court, erudition at its very best. Effectively, in this case, the Court espoused its stance that it must defer to legislative judgement in matters relating to social and economic policies and must not interfere, unless the exercise of legislative judgement appeared to be arbitrary. Be that as it may, the Court did not have the occasion to consider the technicalities of whether the use of the word 'may' in Section 7(5)(a) of the Code denoted mandatory admission by the NCLT. Thus, it becomes clear that there is no conflict of any sorts between these two judgements (both fundamental) of the Apex Court viz., *Vidharbha* Industries and *Swiss Ribbons* supra. What apparently causes the confusion is when certain obiter is quoted/read in isolation and taken out of perspective.

For instance, the use of language such as "the scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the

"There is no conflict of any sorts between these two judgements of the Apex Court viz., Vidharbha Industries (2022) and Swiss Ribbons (2019). What apparently causes the confusion is when certain obiter is quoted/read in isolation and taken out of perspective."

insolvency resolution process begins" or "the moment the AA is satisfied that a default has occurred, the application must be admitted unless it is incomplete". However, it is trite that a judgment is a precedent only for the question of law that is raised and decided. The language used in a judgment cannot be read like a statute. In any case, words and phrases in the judgment cannot be construed in a truncated manner out of context.

6. The Verdict: Author's Perspective

a) Until now, it was understood that the moment there was a default in financial credit repayment and no adverse proceedings pending against the Resolution Professional (RP), CIRP process was to be admitted by the AA. But now, with this judgement, the NCLT will have to exercise discretionary power and judgement considering the facts and circumstances of each case before admission to CIRP. Despite the verdict in this case being what it is, yet, with humble regards, there are some concerns emanating from plausible future misinterpretation of this simple and straight forward judgement in the Vidharbha Industries case, which could stifle the significant gains made owing to the implementation of the Code and pose hindrance to the unstinted positive development of CIRP in India and therefore, a need is felt to stimulate a healthy discussion amongst the stakeholders. Here are a few such concerns:

b) Is it not trite that under the Code, the Legislative intent has moved away from the concept of "inability to pay" to "determination of default"[3] ? And the Design of the Code was intended deliberately "to facilitate the assessment of viability of the enterprise at a very early stage"[4] . If that be the situation accepted as ripe for CIRP, then, a default in servicing the financial debt would be the right time to admit the CIRP as otherwise, the motto of maximization of value for the stakeholders would be vitiated as the CD could very well hurtle towards further defaults of succeeding instalments too.

c) Effectively, what the ruling in the Vidarbha Industries case exhorts NCLT as the AA to ascertain whether there was a business failure (which is a breakdown in the business model of the enterprise, and it is unable to generate sufficient revenues to meet payments) as well, besides the financial failure (a persistent mismatch between payments by the enterprise and receivables into the enterprise, even though the business model is generating revenues). If there was no business failure, then the CIRP petition need not be admitted. It is humbly submitted that the Courts must oversee the CIRP through scrupulous adherence to the due process of the Code but not be burdened to make business decisions. After all, this was an important design feature[5] adopted by the Bankruptcy Law Reforms Committee while designing the Code framework.

d) The framers of the Code have chosen to adopt the test of insolvency as the trigger for CIRP as juxtaposed to the Balance Sheet test[6] . Reliance on this test is designed to activate insolvency proceedings sufficiently early in the period of the CD's financial distress to minimize dissipation of assets and avoid a race by creditors to grab assets that would cause dismemberment of the CD to the collective disadvantage of all creditors. Even the flow of Section 7 corroborates this. So, Sub-Section (1) paves the way for the FC to apply for CIRP either singly or jointly, Sub-Section (2) deals with the manner of such application, Sub-Section (3) exhorts the FC to enclose the proof of default to show insolvency, Sub-Section (4) mandates the NCLT to ascertain the existence of default and Sub-

[3] Para 64, Swiss Ribbons judgement *supra*
[4] Para 3.4.2, Principles driving the Design under 'Features of the Code', The Report of the Bankruptcy Law Reforms Committee, November 2015
[5] Para 3.4.2 *ibid*
[6] Mentioned in Part Two, B. Commencement Standards, Page 45 of the UNCITRAL Legislative Guide on Insolvency Law, 2005

Section (5) culminates with an approval/ rejection of the petition to admit the CIRP. Thus, in case the FC triggers the CIRP, the AA verifies the default from the Information Utility (if the default has been filed with an Information Utility as incontrovertible evidence of the existence of a default) or otherwise confirms the existence of default through the additional evidence adduced by the FC. Further, there is a time-limit of 14 days granted by the Code for such determination of default by NCLT. So, in sequence, if after the NCLT examines the records to ascertain the default, expecting the NCLT to again spend considerable time and significant effort in ascertaining the reasons for default would (i) stretch things afar, (ii) would be contrary to planned design of the Code and, (c) delay the whole process quite significantly.

If the Legislature wanted the NCLT to ascertain the business reasons for the default and consider extraneous factors, then, surely it would have provided for it more explicitly in Sub-Section 5(b) to Section 7.

e) There is yet another way to look at this issue. If the Legislature wanted the NCLT to ascertain the business reasons for the default and consider extraneous factors, then, surely it would have provided for it more explicitly in Sub-Section 5(b) to Section 7. Currently, Clause (b) provides for a situation where if the NCLT is satisfied that (i) default has not occurred or (ii) the CIRP petition/application was incomplete or (iii) any disciplinary action was pending against the proposed Resolution Professional (RP), then only in such circumstances, the NCLT could reject the application to CIRP. So, it could be contended that there are no other factors germane for consideration in the rejection of an application. In the same vein, the use of the word 'may' in both limbs (a) and (b) to Section 7(5) could be linked only to the occurrence of the situations described above viz., no default established, incomplete CIRP application or pending disciplinary proceedings against the proposed Resolution Professional (RP). The use of the word 'may' in that sense would brook of no further elasticity and therefore, may not accord any further discretion to the AA in the matter of admitting the CIRP in relation to default concerning FC.

f) The problem with expecting NCLT to apply their mind to consider various germane factors in case of each and every petition for CIRP before admission is that no two case shall be same and therefore, it is feared that the entire exercise shall be held ransom to (i) incomplete furnishing of facts, (ii) frivolous means to delay the proceedings and (iii) the need to adhere to timelines in the conduct of the process. CDs may then vehemently try to stall/delay the process by bringing various factors which they may contend would merit consideration, stretching the time and efforts of the already over-burdened NCLT. In the absence of full facts, the NCLT may practically not have the wherewithal to delve deeper into the circumstances behind each default. And so, any decision based on such incomplete facts could turn to be miscarriage of justice, which needs to be avoided at all costs.

g) In the Vidharbha case, the Apex Court considered the pendency of a matter in the highest Court and also its likely financial implications. With humble regards, it is feared that this would be sure shot recipe for (mis)interpretation in all hues by the various subordinate Courts. For instance, a fairly old CD would have many matters under various laws, so which all cases would be germane for decision-making by the NCLT. In this case, the CD had a successful verdict to show from the APTEL. So, are we to then take it as a template that if the CD has a favorable verdict in the penultimate Court, then a stay needs to be granted for the CIRP application until the final verdict has come. Also, what would happen if there were multiple grounds, and the CD has received partially favourable verdict. Who will do and how will the quantification of the stake be worked out?

h) An argument does exist for consideration that when an account turns non-performing asset as

per the accepted prudential banking norms, already sizeable time has elapsed on the insolvency. So, elongating the process any further would only deteriorate the value of the assets of the insolvent CD. Pertinently, if the CD has defaulted in servicing the financial debt, that could preponderate the intent of the CD (unless proven otherwise) and could also pinpoint towards non-viability or malfeasance and therefore, allowing any further delay to the FC to seek insolvency resolution through the CIRP would be unfair to the latter.

Whilst the Code has succeeded for sure in giving a fillip to the credit climate in India with its time-bound nature and inherent aim of resolving the insolvency situation (rather than liquidation), there does remain the need to continue the momentum and not drop the guard in the administration of the Code by the stakeholders (Courts, IBBI, and the Practitioners).

A practical solution to addressing the challenge of discretion in this case has been attempted by the UNCITRAL Legislative Guide on Insolvency Law, 2005, where at para 24, page 46, the Report exhorts the Insolvency Law/Code to provide guidance for the Courts in this regard and to prevent a premature finding of insolvency, the relevant excerpt reads as follows:

"There is a need to bring an amendment in the insolvency framework of the IBC, 2016 in line with the UNCITRAL Legislative Guide on Insolvency Law, 2005 (Para 24, p. 46) to put the issue of discretion to rest."

> "24. One issue associated with the general cessation of payments test that needs to be considered is that the inability of the debtor to pay its debts as they become due may point only to a temporary cash flow or liquidity problem in a business that is otherwise viable. In today's competitive markets, competition may compel market participants to accept ever-lower profits or even losses on a temporary basis in order to become competitive and maintain or gain market share. While it will be a question of fact in each case, it is desirable that an insolvency law provide guidance for the court to determine whether or not the commencement standard has been met in order to avoid a premature finding of insolvency."

In conclusion, it is humbly submitted that necessary amendment to the Law would be in order to put the issue of discretion in admission to the CIRP in case of financial defaults, once and for all, lest the continued positive growth trajectory of the successful Code be stinted for the reasons discussed above.

Application of Global Ethical Principles related to Insolvency Professionals in Indian Context

Ethics is an important aspect of any profession so is true for insolvency profession. Wherever the law is silent, or ambiguous, the ethical principles provide a way out. These principals play a crucial role during an evolving insolvency framework and also act as torch for insolvency professionals and other stakeholders. The ethical principles related to insolvency profession exist at national as well as international level. However, the international ethical principles of insolvency profession are not intended to supersede any local rule. Moreover, it has been provided that in case of any conflict with such local laws, the local laws would prevail. In the following article, such principles are consolidated and compared in-line with the global principles and checked for their application in Indian context. ***Read on to know more…***

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1. Introduction

आचार: फलते धर्ममाचार: फलते धनम्।
आचाराच्छियमाप्नोंति अचारो हन्त्यलक्षणम्।।

~Ethics helps in performing duties. Ethics makes you successful in earning wealth. On account of ethics a person attains prosperity. Ethics destroys evil quality.

Insolvency & Bankruptcy Code, 2016 (IBC or Code) was enacted with objective for maximisation of value of assets, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders connected thereto.

The Standing Committee of Parliament on Finance in its 32nd Report has analysed the implementation of the IBC[1]. It mentioned four pillars of the Code, which aid and abet each other and act collectively to hold the objectives of the Code to the position it has. The four pillars mentioned in the report are: Insolvency Professionals (IPs) and Insolvency Professional Agencies (IPAs), Information Utilities (IUs), Adjudicating Authorities (AAs) i.e., National Company Law Tribunals (NLCTs) and Insolvency and Bankruptcy Board of India (IBBI). Out

[1] STANDING COMMITTEE ON FINANCE, 32nd Report of the Committee on Implementation of Insolvency and Bankruptcy Code- Pitfalls and Solutions, Ministry of Corporate Affairs (August 2021)

these, IPs are recognized as key pillar of Indian insolvency ecosystem. As officers of the Court, IPs has been provided some authority but with equally high responsibilities which a professional should always be aware about and follow his duties diligently.

It is very interesting to note that, in India, only few professions, one of them being the profession of IPs has the concept of "Two-Tier Regulators"; one being the IBBI and other, the IPA to which an IP is registered with.

Moreover, the superior regulator, i.e., IBBI has underlined certain ethical principles which an IP must comply with. The IPAs have their respective Model Code of Conduct for the members to adhere to and the deviations are monitored to maintain the desired ethical standard. Following such ethical principles would result in higher efficiency and effectiveness in their respective assignments and would also protect the professional from strict disciplinary and penal action against him.

2. INSOL International Ethical Principles for IPs

a) Interaction with Legislation and Regulation

The principles of INSOL International provide guidance based on international standards of conduct. They are not a restatement of applicable legislation, regulations, and judicial pronouncements. Wherever the law is silent, or ambiguous, these principles provide a way to work through. They are not intended to supersede any local rules or laws. Moreover, it has been provided that in case of any conflict with such local laws, the local laws would only prevail. The principles were established to enhance and protect the integrity of the insolvency profession, and to create a fair, effective, practical and readily understood framework.

b) Principles-Based

The practice of insolvency or restructuring and turnaround services is often complex and varied. An IP has to perform his duties in a very dynamic environment. It has to operate in various difficult circumstances involving various parties to deal with, meet the timelines, understand the complex legal, financial and factual issues, or probably run a business which he never thought about. Hence, it is nearly impossible to conceptualise and codify every possible situation or scenario. Accordingly, the ethical principles are merely an attempt to establish broad standards of practice that can be applied to every situation in broad perspective rather than in specific situation in detail.

As statements of principle are unavoidably general, explanatory guidance is provided-but the principles themselves (and not only the specific guidance) are there to assist in guiding professional members' decisions and actions. In addition to assisting professional members, the guidance may also assist stakeholders in setting reasonable expectations by better understanding certain limitations of insolvency advisors and / or officeholders in carrying out their duties.[2] Professional Members should also be able to use their professional and commercial judgment; when in doubt, they should seek legal or other advice, or the assistance of the applicable court, before proceeding.

c) The Principles are not Mandatory

The principles do not impose any mandatory requirements on IPs; however, it is expected that they would find them useful to implement and be guided by the principles in their professional practice. Thus, they just act as a "torch in a dark road". The principles use a two-level hierarchy of wording to describe and explain their application:

i. recommended behaviours to achieve best practice (should / should not); and

ii. permissive statements where greater discretion is available (may).

d) Regulators and Courts

The regulation of the insolvency profession varies in different jurisdictions, and the conduct of insolvency practitioners may be subject to review by disciplinary tribunals and Courts in accordance with local requirements, such as in India it is regulated under First Schedule of Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 and subject to review by the Disciplinary Committee formed under Section 220 of IBC. It is intended that the principles may be used by regulators, tribunals, and courts to assist with the identification and enforcement of acceptable

[2] INSOL INTERNATIONAL, Ethical Principles for Insolvency Professionals (October 2018)

> **The principles are intended to be a resource and guide for such bodies, not a directive and always remain subject to applicable law and judicial or regulatory authorities.**

insolvency practices and professional standards. The principles are intended to be a resource and guide for such bodies, not a directive and always remain subject to applicable law and judicial or regulatory authorities.

e) Other Professional Standards

Many Members may also be members of other professional agencies/ associations, which may have guidelines or requirements that are similar to the principles, as in India, like IPAs. Moreover, in duties of such IPAs set out in Regulation 6 of Schedule to IBBI (Model Bye- Laws and Governing Board of IPAs) Regulations, 2016, it is clearly mentioned that "the Agency shall maintain high ethical and professional standards in the regulation of its professional members."

Where applicable, professional members should comply with applicable regulatory guidance promulgated by local regulators. To the extent that following the principles would impose a higher standard on professional members than applicable law, regulations, or rules published by other associations, professional members should still have regard to the principles. To the extent that applicable law, regulations, or association rules impose a higher standard on applicable professional members, that higher standard will apply and compliance with the principles does not supersede any local requirements.

3. What the IBC provides?

(a) Section 208[3] read along with Section 93, 120 and, 143 of the IBC, 2016

It provides that where any insolvency resolution, fresh start, liquidation or bankruptcy process has been initiated, it shall be the function of the appointed IP to take such actions as may be necessary, for resolution of various corporate persons under various processes.

The law also provides that every IP shall abide by the following code of conduct (which is apart from the Code of Conduct as in IP Regulations):

i. Take reasonable care and diligence while performing his duties under the Code;

ii. Comply with all requirements and terms and conditions specified in the bye-laws of the IPA of which he is a member (IIIPI, ISCI IIP, or IPA ICAI);

iii. Allow the IPA to inspect his records related to work performed by him;

iv. Submit copy of the records of every proceeding before the AA to the IBBI as well as to the IPA of which he is a member so as to make the regulators aware of the proceedings; and

v. Perform his functions in such manner and subject to such conditions as may be specified [Specified in IBBI (Insolvency Professionals) Regulations, 2016].

(b) Regulation 7(2)(h) of the IBBI (IPs) Regulations, 2016

The Regulation provides that the Certificate of Registration granted to an IP shall be subject to the conditions that such IP shall abide by the Code of Conduct specified in the First Schedule to the Regulations.

The First Schedule specifies a Code of Conduct for IPs which is derived from the Ethical Principles (Mandates for IPs) recommended in the report of the Bankruptcy Law Reforms Committee (BLRC)[4]. The Mandates for IPs recommended in BLRC Report are as under:

i. An IP will act independently, objectively, and with impartiality;

ii. An IP will carry outs his tasks diligently;

iii. An IP will treat the assets of the debtor with honesty, and transparency;

iv. An IP will avoid all possible conflicts of interest and if he comes to know of any such conflict, he will disclose the same immediately to the creditor committee;

v. An IP will maintain confidentiality of information acquired as a result of professional relationships;

[3] Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India)

[4] T K VISWANATHAN COMMITTEE, The Report of the Bankruptcy Law Reforms Committee (November 2015)

vi. An IP will act in a fiduciary capacity towards the debtor, and the creditors as a whole, when appointed in any capacity in an insolvency and bankruptcy resolution proceeding;

vii. An IP will not commit fraud or abuse, or exert undue influence on, or on behalf of his clients."[i]

All the mandates as recommended by BLRC were tried to be incorporated in the Code of Ethics so as to enable successful implementation of the IBC as the IPs had to play a major role in turning the fate of the law.

IBC assigns various duties to IPs. The possible reasons for that could be to establish a well-functioning system of the process of insolvency and bankruptcy driven by insolvency practitioners, enabling Courts/ Tribunals to delegate more and more to practitioners, thereby in a positive way, allowing better utilisation of judicial time and furthermore to achieve the overall objective of the Code, that is, "Time-Bound Resolution". It establishes an inverse relationship between performance of IPs and intervention of Courts/ Tribunals i.e., the worse the performance of IPs, the more the AA will intervene in supervising the process.

"IBC and Regulations made under it establishes an inverse relationship between performance of IPs and intervention of Courts/ Tribunals i.e., the worse the performance of IPs, the more the AA will intervene in supervising the process."

For that, they needed to ensure that IPs should be more inclined towards following ethical principles and practices rather than indulging in malpractices. Therefore, the ethical principles were made more rigid leaving no scope for making errors by the IPs. Some professionals may be of a view that the Code of Conduct should not be so much rigid; but, to answer them, it would defeat the sole objective of enabling Courts/ Tribunals to delegate more and more to practitioners.

(c) Key areas of common objectives between IBC and International Insolvency Association in terms of ethics

Although the IBC's Code of Conduct for IPs has incorporated all the guided ethical principles into the code of conduct; however, there are differences as compared to INSOL Ethical Principles and certain addition/ deletion/ alteration is done so as to match and make it more feasible in the Indian context. Moreover, Code of Conduct under IP Regulations are in more detail clarifying the said Ethical Principles maintaining the essence of their broad heading.

Thereby, the said Code of Conduct has 43 clauses (Numerically 29) under 10 broad heads describing the ethical practices that an IP has to follows:

Broad Headings			
	IP Regulations		**INSOL Ethical Principles**
1 2	Integrity and objectivity Independence and impartiality	1 2	Integrity Objectivity, Independence and Impartiality
3	Professional competence	3	Professional / Technical competence
4	Representation of correct facts and correcting misapprehensions	4	Professional Behaviour
5	Timeliness		
6	Information management		
7	Confidentiality		
8	Occupation, employability, and restrictions	6	Practice Management
9	Remuneration and costs	5	Remuneration
10	Gifts and hospitality		

4. Practice in in the United Kingdom

In the UK Insolvency law practice, there are five fundamental principles of ethics for insolvency practitioners[5] which are also an adopted version of INSOL International Ethical Principles. Moreover, on detailed study of the Code of Ethics, it was observed that all the respective ethical principles are completely in line with the IBC's Code of Ethics. This implies that the profession has developed so much that all of the functions are already inter-connected among various countries thereby paving a way for IPs becoming "Global Professionals" ready to deliver their services beyond the borders of their respective countries. The five fundamental principles as mentioned in ICAS Code of Ethics are as follows:

a) **Integrity**: it is expected from a practitioner to be straightforward and honest in all his professional and business relationships.

b) **Objectivity** – A practitioner shall not compromise professional or business judgments because of any bias, conflict of interest or undue influence of others.

[5] ICAS CODE OF ETHICS, Part 5 – Insolvency Practitioners (May 2020)

c) **Professional Competence and Due Care**:

I. To attain and maintain professional knowledge and skill at the level required to ensure that a client or employing organisation receives competent professional service, based on current technical and professional standards and relevant legislation; and

ii. To act diligently and in accordance with applicable technical and professional standards.

d) **Confidentiality** – to respect the confidentiality of information acquired as a result of professional and business relationships.

e) **Professional Behaviour** – to comply with relevant laws and regulations and avoid any conduct that the insolvency practitioner knows or should know might discredit the profession."[ii]

5. Conclusion: A way forward

It is thus observed that the broad objectives of the ethical standards or Code of Conduct for the IPs in India and the principles of ethics as enumerated by INSOL or as per the UK laws of insolvency are having the same objective in general. IPs in India and in other countries as well are expected to maintain a high standard of ethical practice with integrity, timeliness and with an objective to fulfil the stakeholders' interests.

Insolvency profession was created under IBC separate from all the existing professions acting as an add-on qualification for the professionals. In simple words, the entire regulatory mechanism has been clearly laid out in the law and related rules and regulations instead of getting it evolved gradually along with jurisprudence. This is understood that the ethical practices cannot be put for later date, the law might gradually evolve but the ethical standards have to be in place from the very inception of the law. This probably is a reason for which it is observed a rigidity in the manner the IPs are regulated today. The expectations are not just some sentences written under the Code but are the factors shaping the development of this profession in India and further helping us draw lessons for possible recommendations in the future.

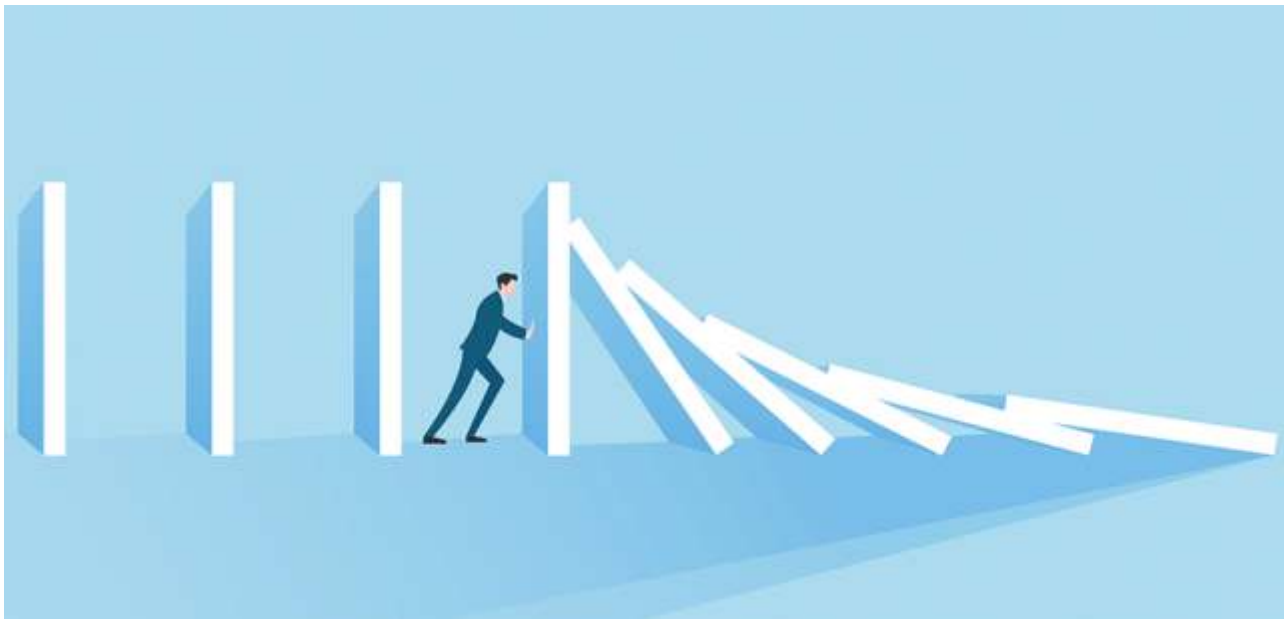
This is the result of the vision of BLRC to create a model of "regulated self-regulation" which they considered optimal for the IP profession. It may be summarised that the principles of ethics are the same as followed across the countries but the regulation and monitoring of the practice of the Code of Ethics have variations in comparison to different geographies. In current industry scenario, market forces are also likely to contribute significantly to the development of the profession, especially in understanding the expectations of the stakeholders. This constant interaction and feedback mechanism will play a critical role in shaping the profession.

> **The greater role of the IPAs in this field besides the enhanced role of IPEs as per the latest amendments will also facilitate a better monitoring of the ethical practices by IPs in India.**

As the profession develops further, IBBI may need to exercise greater oversight to the professionals and let the IPAs play a more important role in regulating the IPs. The regulatory control will definitely contribute to the raising of the bar in terms of IPs embracing the ethical standards set by the IBC. The amendments in the IBC and Regulations concerned will also be conducive to this development. The greater role of the IPAs in this field besides the enhanced role of IPEs as per the latest amendments will also facilitate a better monitoring of the ethical practices by IPs in India. The role of Insolvency agencies in UK can be taken as an instance of such practice of monitoring the IPs by them. Similarly in USA, one of the oldest insolvency and bankruptcy law is being practised with systematic rules and monitoring of the member IPs of the prescribed ethical parameters. This would also result in reducing the burden that IBBI's Disciplinary Committee has and shift the same to IPAs.

[i] Box 4.17: Mandates for IPs, T K VISWANATHAN COMMITTEE, The Report of the Bankruptcy Law Reforms Committee (November 2015)
[ii] 2100.1 A1, INSOLVENCY CODE OF ETHICS, The Institute of Chartered Accountants in England and Wales (ICAEW)

Withdrawal of Application Under Section 12A of IBC: Key Issues and Areas of Concern



Section 12A of the IBC, 2016 was inserted through an amendment in 2018. This amendment empowers the NCLT to allow withdrawal of an ongoing CIRP, if such an application is approved by CoC with 90% vote share. Subsequently, Regulation 30 A was added into IBBI (CIRP) Regulations, 2016. In fact, this provision provides a last chance to the promoters to regain control of the Company provided he/she either clears all the dues payable to creditors or makes partial payment but satisfies the CoC that remaining dues shall be paid as per mutually agreed terms and conditions. In this article, the author presents an account of practical challenges faced in implementation of this provision and related judicial decisions. ***Read on to know more…***

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1. Overview

Section 12A was inserted in the Insolvency and Bankruptcy Code, 2016 (IBC) with effect from (w.e.f.) June 06, 2018, to facilitate withdrawal of applications admitted for Corporate Insolvency Resolution Process (CIRP) under Section 7, 9 or 10 of the IBC. Regulation 30A was inserted in the IBBI (CIRP) Regulations w.e.f. July 03, 2018, and was later amended on July 25, 2019, to provide a detailed procedure with timelines to be followed for such withdrawal.

Withdrawal process under Section 12A facilitated several corporate debtors (CDs) to come out from the rigours of the CIRP process through settlement. As per the data released by IBBI, 740 CIRP cases were closed through withdrawal under Section 12A by September 30, 2022. Out of the said 740 cases, 72% of the cases were initiated by the Operational Creditors (OCs), 27% of the cases were initiated by the Financial Creditors (FCs) and 01% of the of the cases were initiated by the Corporate Debtor (CD) itself. Section 12A has acted as an important tool for resolution of CDs which are solvent and against which CIRP has erroneously been initiated.

2. Brief overview of the process of withdrawal under Section 12A read with Regulation 30A

For withdrawal from the rigours of the CIRP, the applicant is required to submit an application in Form FA to the Interim Resolution Professional (IRP)/ Resolution Professional (RP) either before or after the constitution of the Committee of Creditors (CoC). The said application is to be accompanied by a bank guarantee towards the amount of CIRP cost incurred in the process till the date of filing of the application.

Where the application is submitted before the constitution of the CoC, the IRP is mandated to submit the said application before the Adjudicating Authority (AA) within three days of its receipt and where the application is submitted after the constitution of the CoC, the CoC has to consider the said application within seven days of its receipt and if the application is approved by the COC with 90% or more vote share, the IRP/RP is mandated to submit the said application before the AA within three days of its approval by the CoC.

If the application is approved by the AA, the applicant is required to deposit within three days of such approval, the actual amount of CIRP expenses incurred till the date of the said approval by the AA in the bank account of the CD, failing which, the bank guarantee submitted by the applicant shall be invoked.

3. Issues/ Concerns Around Withdrawal under Section 12A of CIRP Applications Already Admitted

Section 12A is a beneficial legislation, however, there are certain areas of concern which needs to be resolved by way of an amendment to the CIRP Regulations / IBC as detailed below:

a) What is the status of CIRP after filing the application for withdrawal under Section 12A? Are the duties of the IRP/RP suspended during the period in which the application for withdrawal under Section 12A is pending before the AA?

b) Can a Section 12A application be filed during the Liquidation Process i.e., after an order for liquidation of the Corporate Debtor is passed by the AA?

c) Can an application for withdrawal under Section 12A be filed by a person other than the applicant who had filed petition for initiation of CIRP?

d) The application for withdrawal under Section 12A is to be filed by the IRP/RP or the applicant who initiated the CIRP?

e) Can an application admitted for CIRP under Section 10 of the IBC be allowed to be withdrawn?

Each of the issues as stated above has been discussed pointwise below with their related judicial pronouncements for better clarity on the subject.

Concern No. 1

What is the status of the CIRP process post filing of an application for withdrawal under Section 12A? Are the duties of the IRP/RP suspended during the period in which the application for withdrawal under Section 12A is pending before the AA?

The IBC and the Regulation are silent on this fundamental/ critical issue as to what are the duties of the IRP/RP during the interim period when the application for withdrawal under Section 12A is pending before the AA.

In this context, it is pertinent to refer to the judicial pronouncement in the matter of *Shri Alok Kaushik, Erstwhile RP of Cheema Spintex Ltd Vs. Cheema Spintex Ltd & Ors*[1].

Facts of the Case

An application filed under Section 9 of the IBC by *Kotak Commodity Services Pvt Ltd.* was admitted against the CD *M/s. Cheema Spintex Ltd*. Before constitution of the CoC, a settlement agreement was signed, and Form FA was submitted to the IRP on October 12, 2021. The IRP submitted the application for withdrawal under Section 12A on October 18, 2021. However, the IRP, post filing of the application under Section 12A, proceeded to constitute the CoC, filed an application under Section 19(2) towards non-cooperation, undertaken valuation of the assets, six CoC meetings were also held post filing of the application under Section 12A. The AA passed orders dated May 30, 2022, and allowed closure of the CIRP process, disallowed substantial part of expenses incurred by the IRP, the AA also passed some adverse remarks against the conduct of the IRP.

[1] Company Appeal (AT) (Insolvency) No.896 of 2022 dated September 05, 2022.

Issues before the NCLAT

I. Whether it was justified on the part of the IRP to continue with the CIRP proceedings?

ii. Whether the AA had erred in disallowing certain CIRP expenses claimed by the Appellant/IRP by treating them as "non-essential"?

iii. Whether the remarks disapproving the conduct of the IRP in the present matter by the AA stands to reason?

The IRP's continuance with the CIRP process without making adequate efforts to seek pointed clarification from the AA on whether to proceed with the CIRP or not, does not reflect well on his conduct.

Decision of the NCLAT

i. The IRP's continuance with the CIRP process without making adequate efforts to seek pointed clarification from the AA on whether to proceed with the CIRP or not, does not reflect well on his conduct.

ii. Instead of pursuing the withdrawal application with greater vigour, the IRP has rather chosen to mechanically proceed with CIRP by taking the plea of adherence to CIRP Regulations. We therefore agree with the AA that the conduct of the IRP though may be technically correct, the same cannot be countenanced given the attendant circumstances.

iii. The disallowance of expenses by the AA was justified.

iv. We concur with the impugned order (i.e., order passed by the NCLT) and are of the considered opinion that the IRP seems to have taken advantage of the fluid situation and unnecessarily added to the costs by carrying out activities which could have otherwise been put on hold and find the conduct of the IRP, deprecatory.

In light of the above judgement of the NCLAT, it can be concluded that the IRP/RP are required to take directions of the AA with respect to the continuation of the CIRP process post filing of the application under Section 12A.

Concern No. 2

Can a Section 12A Application be filed during the Liquidation Process i.e., after an order for Liquidation of the Corporate Debtor is passed by the AA?

The IBC and the Regulation are silent on this issue. However, the judicial pronouncements in the matter can assist us in drawing conclusions.

In this context, it is pertinent to refer to the judicial pronouncement in the following matters:

(a) S. Rajendran, Liquidator of M/s. Arohi Infrastructure Private Limited Vs. Tata Capital Financial Services Private Ltd & Ors[2].

(b) V. Navaneetha Krishnan Vs. Central Bank of India, Coimbatore & Anr[3].

The NCLAT in the above mentioned applications held that "even during the liquidation period if any person, not barred under Section 29A, satisfy the demand of 'CoC' then such person may move before the AA by giving offer which may be considered by the 'CoC', and if by 90% voting share of the 'CoC', accept the offer and decide for withdrawal of the application under Section 7 of the IBC, the observation as made above or the order of liquidation passed by the AA will not come in the way of AA to pass appropriate order". In light of this order, an application for withdrawal under Section 12A may be filed even during liquidation proceedings.

Concern No. 3

Can an application for withdrawal under Section 12A be filed by a person other than the applicant who initiated the CIRP process?

As per Section 12A, "The AA may allow the withdrawal of application admitted under Section 7 or Section 9 or Section 10, on an application made by the applicant (emphasis added**)** with the approval of ninety per cent voting share of the CoC, in such manner as may be specified".

Hence Section 12A requires the applicant to file an application for withdrawal of CIRP. However, the NCLAT in the matter of *Sukhbeer Singh Vs. Dinesh Chandra*

[2] IA(IBC)/514(CHE)/2022 in CP/672/IB/2017 dated June 20, 2022.
[3] Company Appeal (AT) (Insolvency) No.288 & 289 of 2018 dated August 09, 2018.

Agarwal, (Resolution Professional), Maple Realcon Pvt. Ltd. & Ors[4]. held that "promoters of the real estate company namely Maple Realcon Pvt. Ltd can settle the matter with all the 'Financial Creditors', 'Operational Creditors' including the Allottees and for that they may give their proposal and the 'Resolution Professional' is bound to place it before the 'CoC', which is supposed to consider such application in the light of Section 12A". Hence there is no bar on any person and a person other than the applicant can also propose withdrawal of CIRP under 12A.

Concern No. 4

The Application for Withdrawal under Section 12A is to be filed by the IRP/RP or the Applicant who initiated the CIRP process?

Section 12A requires the applicant to file an application for withdrawal of CIRP. However, Regulation 30A requires the application to be filed through the IRP/RP. The Regulations need to be in sync with the IBC and there should be no ambiguity on this count. This issue arose before the NCLAT in the matter of *Francis John Kattukaran Vs. The Federal Bank Ltd. & Anr*[5].

Initially *vide* an order dated November 13, 2018, the NCLAT held that "30A cannot over-ride the substantive provisions of Section 12A according to which the 'applicant' can only move application for withdrawal of the application before the AA and not by the RP. However, the NCLAT *vide* its order dated December 11, 2018, changed its stand and allowed the application filed by the RP.

Hence it can be concluded that the application for withdrawal as per Section 12A is to be filed by IRP/RP.

Concern No. 5

Can an Application Admitted for CIRP under Section 10 of the IBC be allowed to be withdrawn?

The heading of Section 12A categorically states as "Withdrawal of application admitted under section 7, 9 or 10". (Emphasis added)

Hence there is no ambiguity as to whether an application admitted for CIRP under Section 10 of the IBC can be allowed to be withdrawn or not. However, this legal issue

was raised before the NCLT, Mumbai Bench in the matter of *Satyanarayan Malu Vs. SBM Paper Mills Ltd*[6].

The NCLT observed that "whether such an attempt of a CD be encouraged to first allow an Application/ Petition u/s 10 for its insolvency and later on after consuming precious time of few months of the Court, as also RP along with the

> **Withdrawal of an application admitted under Section 10 needs to be discouraged if the said application for withdrawal is filed by the CD itself.**

members of the CoC, be allowed to withdraw Section 10 Petition? Because the jurisprudence is developing everyday concerning various provisions of this IBC, hence in the absence of any precedent my conscientious view is that if deem fit such an attempt is required to be discouraged. The IBC shall not be made a tool for deferment of payment of liabilities which ought to happen due to declaration of moratorium".

NCLT also imposed a cost of ₹5 lacs on the CD for wasting the precious time of the court. Hence it could be concluded that, withdrawal of an application admitted under Section 10 needs to be discouraged if the said application for withdrawal is filed by the CD itself.

4. Concluding Remarks

IBC, 2016 is an evolving law and there are grey areas which shall gradually be resolved with passage of time as the law matures with experience. It is suggested that the duties of the IRP/RP during the period where an application for withdrawal under Section 12A is pending before the AA may clearly be spelled out in Regulations to avoid any confusion in the minds of the practicing IPs. Explanatory notes may be inserted to Regulation 30A for removing the various ambiguities as discussed above.

[4] Company Appeal (AT) (Insolvency) No. 259 of 2019, August 07, 2019.
[5] Company Appeal (AT) (Insolvency) No. 242 of 2018, November 13, 2018, and December 11, 2018.
[6] M. A. 1396/2018, 827/2018, 1142/2018, & 828/2018 in C.P. (IB)-1362(MB)/2017 dated 20.12.2018.

Changing Landscape of Insolvency Professional (IP)

Insolvency and Bankruptcy Board of India (IBBI) with a view to institutionalize the insolvency profession has allowed Insolvency Professional Entities (IPEs) to act as 'Juristic Insolvency Professional (Juristic IP)' through IBBI (IPs) (Fourth Amendment) Regulations 2022 dated September 28, 2022. As per the Regulation, an IPE which is registered as an IP shall allow only its partner or director who is an IP and holds a valid Authorization for Assignment (AFA), to sign and act on behalf of it. The IBBI also amended relevant Regulations and fixed minimum fee for IP. Besides, it has empowered CoC to provide performance-based incentives for resolution professionals. The article presents a detailed analysis of these landmark reforms. ***Read on to know more…***

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1. Introduction

Before the commencement of Insolvency and Bankruptcy Code, 2016 (IBC) in May 2016, corporate insolvency resolution was a remote possibility and virtually non-existent due to multiple legislations governing the same. IBC is an omnibus legislation for the development of insolvency laws in India with an underlying assurance of time-bound and efficient mechanism for distressed entities either to revive or liquidate.

IBC is the supreme law for corporate insolvency in India and overarches every other law in such matters. This puts a halt on all the legal or otherwise proceedings of any manner against Corporate Entity/Debtor pending with any authority and/or forum. The proceeding is termed a Corporate Insolvency Resolution Process (CIRP), which requires primarily the financial creditors' approval and is hence a creditor-controlled model but to be managed solely by the Insolvency Professional (IP) in his capacity as Interim Resolution Professional (IRP) or Resolution Professional (RP) with the aim to protect the interests of all stakeholders as per the given circumstances within the timelines as prescribed in the IBC.

IP thus plays a pivotal role in the CIRP, to manage, protect, preserve, and maximise the value of assets of the

Corporate Debtor (CD) and keep it as a "Going Concern" as per Section 20 of IBC. Meanwhile, he is concomitant as an IRP and RP being a fiduciary for the stakeholders of the CD. From the Panel of IPs provided by the Insolvency and Bankruptcy Board of India (IBBI), National Company Law Tribunal (NCLT) appoints an IP as IRP for the CD at the time of commencement of CIRP which is either confirmed as an RP by Committee of Creditors (CoC) or replaced with another IP on a mutually agreed professional fee.

The IRP/RP typically steps into the shoes of the erstwhile management of the CD undergoing CIRP. As follows in the process, the management ceases to be in power and IRP/RP shoulders every responsibility to ensure the continued normal business operations of the CD in direction of the CoC. As per the IBC, IP means an eligible person:

i. Enrolled with an Insolvency Professional Agency (IPA) as its member, and

ii. Registered with Insolvency and Bankruptcy Board of India (IBBI) as an IP.

Once the CIRP is initiated, the existing board of directors of the CD, is suspended and replaced with an individual IP who performs multifarious responsibilities provided under Section 25 of the IBC, such as:

i. Critical assessment of affairs, analysing records and business

ii. Ascertaining the realisable value in order to derive the appropriation

iii. Finding an appropriate but realistic resolution plan

iv. Coordination with creditors, resolution applicants, management, employees and agencies dealing with valuation, accounting, compliances, legal etc

v. Augmenting funds to keep the essential activities in up and running condition besides meeting the CIRP expenses

vi. Completion of CIRP as per IBC

As an "officer of the court" and performing all the tasks mentioned above, the IP is not without encumbrances to his stipulated undertakings.

2. Complexities and Challenges

It's quite evident from above that an individual IP functions under extreme challenging environment not just of generic ones such as strict timeline management, non-accountability of support team and conflict with suspended promoter's etc., but of external ones, which are far more dangerous than procedural lapses and were not envisaged at all. Here are a few of those:

(a) Interpretation difficulties of the IBC

As per IBC, IPs are required to maintain independence and impartiality when functioning as an IRP/RP vis-à-vis the corporate debtors but silent on their relationship with the financial or operational creditors. As legal precedence to this point, National Company Law Appellate Tribunal (NCLAT) had passed a judgement on an appeal filed by the Financial Creditor (FC) in the CIRP of *Metenere Limited* whereby the Appellate Authority directed for the substitution of the IRP proposed in the application based on the fact that he happened to be an ex-employee of the State Bank of India, one of the financial creditors. Here is the peculiar situation created by the IBC:

i. CoC takes decisions on appointment of IRP/RP who satisfies qualifying criteria, hence proposed to appoint a RP having worked in the Financial Creditor (FC) for 39 years.

ii. IRP proposed, being ex-employee of FC, was apprehended by the CD as "Interested Person" in the CIRP.

iii. AA has judicial authority to approve the appointment of IRP, directed the FC for substitution.

iv. On which SBI appealed to the NCLAT which also upheld the order passed by Adjudicating Authority (AA) rejecting the proposed IRP to be appointed even though was of the view that proposed IRP is not (a) "disqualified or ineligible" to be appointed as an IRP and (b) "interested person" since he is drawing pension and not salary.

While in another case of *SBI Vs. Ramdev International*, the NCLAT held that empanelment of RP as an advocate or Company Secretary or Chartered Accountant with a FC "cannot be a ground to reject the proposal of his

appointment unless there is any disciplinary proceeding pending against him or it is shown that the person is an interested person being an employee or on the payroll of the FC". It leads to a situation of very wide interpretation of legal reasoning and code of conduct.

(b) Mental Trauma

As per Section 217 of the IBC, any person aggrieved by the functioning of IP may file a complaint to IBBI and the Disciplinary Committee (DC) will deal with such complaints and issues orders basis facts and merit of complaints. Yet there have been instances where the IP has been made to go through the horrible unwarranted experience while functioning as IRP/RP. No one would have ever visualised facing arrest and that complaints would be lodged to the Central Bureau of Investigation (CBI) and not with IBBI.

This in fact, has been a reality in a couple of cases (*CIRP of FR Tech Innovations Pvt. Ltd.* and *Adi Ispat India Pvt. Ltd.*) where CBI has arrested IP even though he is not a public servant. It could naturally cause to have discomfort to the creditors on rejecting the claims due to insufficient documentary proof or the clash with suspended promoters of corporate debtors in terms of non-cooperation while functioning as IRP/RP.

In these circumstances, it is hard to fathom how the individual IP would defend himself to fight unforeseen legal battles against arrest by CBI and prove his innocence in the court of law, followed by the IBBI forum. Besides the mental trauma to himself and his family, the IP may end up indenting his professional reputation and shelling out substantial money towards the legal cost which does not form part of CIRP cost.

(c) Responsibility *Vs.* Remuneration

The IBC regulations define what constitutes CIRP cost which includes the IRP/RP fee basis on "reasonable reflection of his function" and how to deal with it. But the challenge for the IP is that in the absence of any guidelines in the IBC for determining his remuneration makes it openly subjected to the applicant or CoC in commensurate with the time and efforts he has to put in for discharging his functional responsibility as IRP/RP. Here now the classic conflict prevails with the applicant or CoC in that, firstly they are already grappling with distress situation to recover their own stuck amount in the CD, so ideally would not like to burn further their pocket. On the other hand, the IP expects that the remuneration ought to be reasonable enough to cover the cost of his time and effort.

In one case of CIRP of *Ariisto Developers Pvt Ltd*, wherein NCLAT upheld the order of AA not approving the success fee of ₹3 cr. though approved by CoC, on the ground that this success fee was in the nature of a contingency and speculative, hence did not form part of the provisions of IBC and its regulations.

3. Changing Framework by IBBI to Mitigate Complexities

Necessarily the expectations from IP so appointed by the AA acting in the capacity of an officer of the court, are enormous, and these can be met with the support of IBBI. It is clearly evident that for any form of differences or disputes, the AA is approached as being the authority to resolve them, beside interpretation issues. This leads to delay in the CIRP timelines and eventually becomes detrimental to the very objective of having a time bound CIRP. The IBBI has been making serious efforts to ensure streamlining of overall processes and making it more transparent and robust. In this attempt, there have been various amendments to make the IBC more efficient and effective and are relevant for the professionals engaged in rendering IP services.

> **"The IBBI has been making serious efforts to ensure streamlining of overall processes and making it more transparent and robust."**

Further, two recent amendments are aimed to strengthen the IPs and will have far reaching impact on the insolvency process in terms of the manner, format and remuneration going forward. IBBI came up with new policies as a step to address most of above issues (if not all) such as ensuring impartiality of IP acting as IRP/RP, individual relationship with the creditors and fee matters etc. Hence, these amendments are of utmost importance in shaping the insolvency professionals and their services aligning with the global formats while achieving the objectives of IBC in a better way. The details of these two amendments are:

a) Corporatisation of Insolvency Profession

Before the amendment as per IBC, an IP meant an eligible person who possessed professional qualifications of either a Chartered Accountant (CA), Company Secretary (CS),

Cost Accountant (ICWA) or an advocate or MBA with minimum 10 to 15 years of experience in their professional field, having passed the Limited Insolvency Examination (LIE), apply for enrolment with an IPA within a year and subsequently registered with the IBBI as an IP. Besides, he is required to complete certain CPE hours to receive assignments. It is an individual who is able to function as IRP/RP in his individual capacity, but this leads to a complexity for him to cope with the responsibilities within the timelines as per the IBC. Therefore, the IP, in general, resorts to his own or other professional(s) or firm(s) for the required support.

In the context of above, it was the long pending pressing need to reckon Insolvency Professional Entity (IPE) to provide resolution professional services. This is in line with other professional services mentioned in qualifying criteria such as CAs, CSs, and Advocate etc., which are being rendered under the entity's name, where a group of professionals with similar qualification (being individual) come together as either partner or director to act on behalf of the entity.

Finally, this has been addressed and effective from September 28, 2022 – the definition of Professional Member under Section 2(1)(g) of IBBI (IPs) Regulations, 2016 has been amended to "an individual or an IPE recognised by the IBBI under Regulation 13" and has been enrolled as a member of an IPA. With this, an IPE can provide resolution professional services once registered itself as an IP under Regulation 4(2) by making an application to the IBBI in Form AA of Second Schedule along with the requisite fee. Individual IPs can come together to pool their experience and expertise within their respective field to form an IPE. This is a welcome paradigm shift as it will provide a unique platform to pool the IPs which eventually will bring lots of benefits such as:

i. Hassle free empanelment requirement at the entity level;

ii. Pooling technical and managerial skills under one roof;

iii. Efficient mechanism to address the need of capital investment;

iv. Enabling platform to create desired infrastructure to support the process;

v. Streamlining compliance and tax structure;

vi. Added comfort to the CoC and the applicant on the capabilities of IP;

vii. Continuous up-gradation of professional expertise handling multiple CIRP;

viii. Creating a strong brand with global tie-ups or overseas presence.

Furthermore, the IPE, and not an individual, to be held accountable and responsible for CIRP and may thus avoid the hardship of being arrested and other legal battles in his individual capacity. It would always be prudent for an IPE to take Directors & Officers Liability insurance for the unexpected liabilities that emerge from managing CIRP and an insurance premium may be part of remuneration or CIRP cost.

(b) Remuneration of IPs

Though there have been many provisions such as Section 5(13) of the IBC, 2016, Regulations 33 and 34 of IBBI (CIRP) Regulations, 2016 and clauses 16, 25, 26 and 27 of the first schedule of IBBI (IPs) Regulations, 2016 covering constitution of CIRP cost including free for IPs. All these provisions define the CIRP cost and how to deal with it but do not specify the benchmark to serve as a guideline for determination of IRP/RP fee, which is entirely left open between the IP and Applicant/CoC and upon their failure to be decided by the AA.

It is difficult to accept the responsibility of IRP/RP without a commensurate fee structure in place and to negotiate for a minimum fee to make up for time and efforts. Therefore, there have been quite a few cases of disputes between RP and CoC on fee and sometimes blames of exorbitant fee as per the latter. The IBBI has also been receiving directions from the AA several times to frame necessary regulations and guidelines with regards to fixation of the fee as per the discussion paper of IBBI which listed many such cases.

Finally, IBBI vide IBBI (CIRP) Regulations, 2016 effective from September 13, 2022, has inserted a new clause i.e., 34B to provide guidance over the remuneration structure comprising of:

i. Minimum Remuneration
ii. Performance Linked Incentive
iii. Period of Remuneration

This amendment provides a regulatory framework of professional fee payable to IPs comprising fixed and

variable fee with a minimum and maximum basis. This not only deals with sustainable basis for protecting interests of all the stakeholders but also will result in reduction of the IP fee disputes, enhance time efficiency including possible reduction of time involved in the CIRP and at the same time, keep the IP motivated by linking his incentive to the maximisation of CD value in whatever expedited timeline basis. Here is the synopsis of the remuneration framework as applicable going forward:

(I) Minimum Fixed Fee to be paid to IRP and RP

The applicant or the CoC will continue and free to decide the remuneration, but the fee of IRP or RP appointed on or after October 01, 2022, cannot be lesser than the slab wise fee specified as below:

Quantum of claims admitted	Minimum Fee PM
<= ₹ 50 Cr	₹ 1 Lakh
> ₹ 50 Cr but <= ₹ 500 Cr	₹ 2 Lakh
> ₹ 500 Cr but <= ₹ 2,500 Cr	₹ 3 Lakh
> ₹ 2,500 Cr <= ₹ 10,000 Cr	₹ 4 Lakh
> ₹ 10,000 Cr	₹5 Lakh

(ii) Performance-linked incentive fee

In addition to above fixed remuneration, CoC may decide in its discretion to pay performance-linked incentive fee for (a) the expedited completion of CIRP before 330 days and (b) for the maximisation of realisable value over the liquidation value, but in aggregate not exceeding ₹ 5 Cr for the resolution plan approved by the committee on or after October 01, 2022, as per below slab:

(a) For timely resolution

Time period from commencement date	Fee as % of Realisable Value
<=165 days	1.00%
> 165 days but <=270 days	0.75%
> 270 days but <=330 days	0.50%

(b) For value maximisation

The RP may also be paid the performance-linked incentive fee for valuation maximisation at the flat rate of 1% of difference between realisable and liquidation value, after the approval of the resolution plan. In this case, the realisable value means the sum payable to creditors in the resolution plan approved by the CoC.

> **With the performance linked incentive, RP will be induced to work to maximise his remuneration by making a sincere attempt to complete the CIRP at the earliest.**

Illustration:

If IP submits resolution plan to the AA on the 205th day from the commencement date where realisable and liquidation value is 140 Cr and ₹40 Cr respectively then IP can be paid the performance-linked incentive fee under both categories with an individual cap as under:

For timely resolution (@0.75% of ₹140 Cr)	₹ 1.05 Cr
For value maximisation (@1% of ₹100 Cr (140 Cr - 40Cr)	₹ 1.00 Cr
Total	₹ 2.05 Cr

4. Conclusion

The remuneration guideline offers a win-win situation for all stakeholders and works at par like in other situations such as a CEO, over and above fixed remuneration, and is also eligible for reward in case of better performance. It is always a welcoming step when offered with a balanced environment between efficiency, quality, and effort with least room for ambiguity. The minimum fee criteria will avert the need for hard negotiation and thus in a way will be instrumental in completing CIRP with greater time and cost efficiencies.

Further, we have witnessed so far that CIRP is progressing with a slow pace and in many cases exceedingly even the 330 days period (not necessarily due to IRP/RP inefficiency). With the performance linked incentive, RP will be induced to work to maximise his remuneration by making a sincere attempt to complete the CIRP at the earliest. Since, there is no incentive fee for CIRP, completing post 330 days will trigger an expedited completion subject to other conditions.

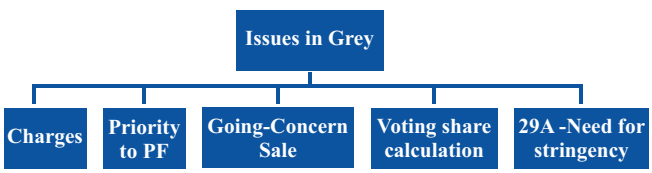
The above amendments will pave the way for long-term sustainable growth of the IPs by bringing the improved structural and appropriate format besides being advantageous for corporate debtors undergoing CIRP, the applicant and the AA. As the IBC is maturing, a simultaneous shift in corporate structure, remuneration pattern and better governance will also be in due course.

Grey Issues Under IBC: Dissection of Quintuple Oddities

In the past six years, IBC, 2016 has witnessed six amendments by the Parliament of India. Besides, IBBI has made over 84 amendments to its 18 Regulations made under the IBC. However, there still exists some grey areas in the IBC, which poses problems in its implementation on the ground. This article aims to examine in detail five distinct issues faced in the CIRP/Liquidation Process i.e., Charges to Secured Creditors, priority to Provident Fund, Going Concern Sale, Voting Share Calculation, and Section 29 A. For better understanding of these relevant provisions of IBC analyzed in the light of related jurisprudence. The author has also recommended 'feasible solutions' to address these issues through legislative amendments. ***Read on to know more…***

Introduction

It has been a 5-year journey since the launch of the Insolvency and Bankruptcy Cody, 2016 (IBC) - "A unified code" for revival of different forms of entities, which has been and is being witnessing a lot of amendments and fine-tuning to its best version. A recapitulation of the path travelled by IBC would reveal that almost all issues of simple/intricate nature have been addressed appropriately by the amendments/notifications/clarifications issued by Insolvency and Bankruptcy Board of India (IBBI) from time to time.



On the other hand, there are a few issues faced during Corporate Insolvency Resolution Process (CIRP)/ Liquidation of corporate debtors which remains grey and perplexing. It is difficult to attain a conclusion with respect to such issues and whenever it is felt that the issue has been settled, there crops another perspective to the issue and thus the conclusion keeps changing its substance. Let us probe into 5 such issues to understand the intricate nature of the issues which makes it puzzled.

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Issue No. 1 - "Charges" and "Secured Creditors"

Section 3(30) of IBC defines a Secured Creditor as a creditor in favour of whom a Security Interest is created, and Section 3(31) defines Security Interest as that which includes mortgage, charge, hypothecation, assignment, encumbrance, agreement/ arrangement. For discussion purposes, let us narrow the definition and restrict the focus on "Charges". The term "Charge" is defined under Section 3(4) of IBC 2016 and Section 2(16) of Companies Act 2013, and both these definitions are precisely the same under both the Acts. Prior to initiation of CIRP, the CD being a "Company" would have been governed by the provisions of Companies Act 2013, thereby adhering to the compliances mandated therein.

In connection to the above, as per Section 77(1) of Companies Act 2013, every company shall mandatorily register the charge created on its property with the Registrar of Companies within thirty days of its creation and as per Section 77(3), no unregistered charges shall be taken into consideration even by the Liquidator appointed under the IBC 2016. Thus, charge registration with Registrar is mandatory for a valid charge creation. Analysis of few related judgements are as follows:

a) However, based on the recent Judgement of the Apex Court in *State Tax Officer Vs. Rainbow Papers Limited* (Civil Appeal No. 1661 of 2020 dt. 06.09.2022), the State was considered as a Secured Creditor, since as per Section 48 of the Gujarat VAT Act, 2002, "Tax shall have a first charge on Property" of a Person who is liable to pay the dues and thus the order provided that "Security Interest" can be created by "Operation of Law" and hence the State is a Secured Creditor under the Gujarat VAT Act.

b) However, another interesting judgement passed by the High Court of Bombay in the matter of *Jalgaon Janta Sahakari Bank Ltd. & Anr Vs. Joint Commissioner of Sales Tax Nodal 9* dt. 30.08.2022, held that a "Crown debt enjoys no priority over secured debts and that the dues of a Secured Creditor (subject of course to CERSAI registration) and subject to proceedings under the IBC would rank superior to the dues of the relevant department of the state government".

Table 1: Summarized Viewpoints

Companies Act 2013	Judgements	
	Supreme Court	High Court of Bombay
Charge registration is mandatory for valid charge creation.	Security interest can also be created by operation of law and thus the State is a Secured Creditor.	Dues of Secured Creditor who has registered the security interest would rank superior to the dues of the relevant department of the state government.

Though IBC 2016 and SARFAESI Act 2002 are two Independent Acts, they share a common theme of "auctioning the properties and recovering amounts" *(Liquidation phase of IBC)*. Under these circumstances, there exists a dilemma as to how the same set of creditors (Banks and/or Financial Institutions and State Department Dues) are being given two different treatments under the same theme of "recovery process". Further, when statutory departments are to be treated under the secured Operational Creditor (OC), then the following queries may arise.

a) Since security interest is created by operation of law, no charges would have got registered with Registrar of Companies (ROC). In that case, how would the statutory departments identify the assets on which a security interest has been created?

b) Section 52(3) of IBC 2016 permits the Secured Creditor to realize "Only such security interest", the existence of which may be proved either by records available with Information Utility (IU) or such other means as may be specified by IBBI". So how will the statutory creditors prove their security interests?

c) Should the statutory departments always consent to "Relinquishment of Security Interest", since in case of opting for "Non- Relinquishment of Security Interest" they will not be in a position to identify the asset which they are going to realize on their own outside the Liquidation Estate.

d) In case the secured financial creditors (Secured FCs) having exclusive security interest opt to not relinquish their security interests, then how will the statutory creditors be entitled to the distribution of proceeds? Is it still possible for the FC to retain its security interest and recover the

dues outside liquidation estate or should both creditors be treated at par thereby resulting in mandatory relinquishment of security interest by the FC?

e) Incase if statutory dues are to be considered as secured creditors, then would the entire statutory claim or only the dues of the period of two years preceding the liquidation commencement date (as per Section 53(1)(e)(i)) be ranked under Section 53(1)(b)(i).

Issue No. 2: An all-time conundrum - "Priority Payment to PF"

Section 36 of IBC 2016 excludes a few assets from the Liquidation Estate and such assets shall not be used for recovery in Liquidation.

One such asset which is excluded from Liquidation Estate is "all sums due to any workman or employee from the provident fund, the pension fund and the gratuity fund".

This exclusion clearly applies only when a separate PF Fund/Gratuity Fund is maintained by the company. In the absence of such a fund, there is no question of exclusion of the same from the Liquidation Estate since the entire logic behind the exclusion is that the hard-earned money of the workmen/employees in the form of PF should not be appropriated for settlement of other creditors.

This fact is clearly established by the NCLAT Judgment in the matter of *Mr. Savan Godiwala, The Liquidator of Lanco Infratech Limited Vs. Mr. Apalla Siva Kumar*, wherein it was held that the Liquidator need not make provision for payment of Gratuity without there being a separate fund in this regard. The same concept applicable to Gratuity Fund also applies in case of PF dues. Few judgements related to PF dues are as follows:

Against PF	Judgements
NCLAT, Chennai in the matter of *B. Parameshwara Udpa Vs. Assistant PF Commissioner, EPFO* dt. September 23, 2022, mentioned that only when the CD maintains an established fund in terms of Section 16-A of the EPF Act 1952, the exclusion from Liquidation Estate Assets as well as from recovery in Liquidation, as stipulated in Section 36(4)(a)(iii) of IBC 2016 shall apply.	NCLAT, New Delhi in the matter of *Sikander Singh Jamuwal Vs. Vinay Talwar Resolution Professional* dt. March 11, 2022, directed the Successful Resolution Applicant (SRA) to release full provident fund dues in accordance with EPF Act 1952.

However, there are a plethora of cases where there are orders favouring and against PF dues, creating a dilemma in reaching a conclusion on full and priority payment to EPF even in the absence of separate funds. In case of full and priority payment to PF dues, the following query arises.

> **In case the Secured FCs having exclusive security interest opt to not relinquish their security interests, then how will the statutory creditors be entitled to the distribution of proceeds?**

a) As per Section 53 of the IBC 2016, the wages and unpaid dues of employees shall be paid only after payment to secured creditors and workmen dues. However, in the event of full and final priority payment of PF dues (in the absence of separate PF funds) belonging to employees, does it not tantamount to violation of the priority stipulated in Section 53 since employees are paid prior to secured creditors resulting in a change in order of priority?

Issue No. 3: Concerns over "Going-concern Sale"

A Corporate Debtor (CD) is pushed to Liquidation in the absence of a Successful Resolution Plan. Though it is generally felt that Liquidation results in death of the CD, IBC still implants hope for revival of the CD in the form of "Going-Concern Sale (GCS)" during Liquidation.

In general terms, GCS means selling the entire company along with its status as legal entity, so that the company can function under the same name, with a change only in its management post acquisition. However, neither any definition for GCS is explicitly provided in the IBC nor in IBBI Regulations. Following two judgements with respect to GCS are note-worthy:

Liabilities transferred in GCS	Liabilities not transferred in GCS
NCLAT, New Delhi in the matter of *M/S. Visisth Services Limited Vs. S.V. Ramani & Another*, dt. January 11, 2022, decided that Sale as a 'Going Concern' means sale of assets as well as liabilities and not assets sans liabilities and all assets and liabilities, which constitute an integral business of the CD would be transferred together and the consideration paid must be for the business of the CD.	NCLAT, New Delhi in the matter of *Shiv Shakthi Inter Globe Exports Pvt Ltd Vs. KTC Foods Private Limited* dt. February 25, 2022, held that in sale under Regulation 32(e), the CD need not be burdened by any past or remaining unpaid outstanding liabilities prior to the sale of the Company as a 'Going Concern' and after payment of the sale proceeds distributed in accordance with Section 53 of the Code.

Generally, GCS is conducted via e-Auction. As per Liquidation Regulations, the reserve price of the asset is based on the valuation done by registered valuers. Therefore, the price at which the buyer acquires the CD as a Going Concern is nothing, but the Liquidation Value of the assets acquired by the buyer. Thus, it may not be fair to impose the burden of past liabilities in the nature of arrears like electricity dues, maintenance charges and other liabilities on the new buyer.

Even if it is considered that valuation in case of GCS should reflect the consideration to be paid for acquiring the entire business of CD, then for major quantum of companies in liquidation, the valuation would be zero or remote, since as per Net-Asset Method, the value of liabilities would absorb the value of all assets and only a negative figure would remain as the value of company and "Fair Value" of the company based on share prices will also remain meagre in case of liquidation.

Further, GCS during Liquidation is similar to a Resolution Plan during CIRP, then how can there exist a differential treatment between the Resolution Applicant who gets a clean-slate company whereas the auction buyer is loaded with past liabilities. Assuming, if a GCS should be coupled with transfer of assets and liabilities, the following questions would arise:

a) Predominantly in GCS, the statutory liabilities in the form of arrears of electricity, water and maintenance charges pose a major threat to auction buyers. The FCs move out of the picture after receipt of distribution in accordance with Section 53. Whereas only on clearance of the full and final dues of statutory charges, the new buyer is granted re-connection facilities. In this scenario, does this settlement not tantamount to violation of the priority stipulated in Section 53 since the operational creditors are paid more than the secured creditors resulting in a change in order of priority.

b) Section 240A of the IBC 2016, exempts MSMEs from application of clauses (c) and (h) of Section 29A and therefore allowed the promoters of MSME's to bid for their own company. Thus, they are also eligible to participate in an auction sale during Liquidation.

c) Assume that an MSME company is acquired by the promoters (same management) as a Going Concern during liquidation. Under these circumstances what would be the logic behind transferring the same old liabilities of the CD back to the CD, when in fact the CD was actually Ordered for CIRP only on account of default of these liabilities.

Issue No. 4: Computation of Voting Share

Though an un-frequent issue, it still remains grey as to "Whether a creditor who abstains from voting on a Resolution Plan be counted for the purpose of voting?" Analysis of certain case laws and relevant provisions and Regulations of IBC will shed some light on the nature of this issue.

In the matter of *K. Sashidhar Vs. Indian Overseas Bank & Ors. (Civil Appeal No. 10673 of 2019),* the Supreme Court observed that, "For that, the 'percent of voting share of the financial creditors' approving vis à vis dissenting is required to be reckoned. It is not on the basis of members present and voting as such. At any rate, the approving votes must fulfill the threshold percent of voting share of the financial creditors". In view of the SC judgment, inference may be drawn that the SC judgment overrules the "Liberty House Order" and suggests that the percent of voting sharing is "not on the basis of members present and voting".

A reference may also be made to Regulation 25(4) of the CIRP Regulations, which states that *"*at the conclusion of a vote at the meeting, the resolution professional shall announce the decision taken on items along with the names of the members of the committee who voted for or against the decision or abstained from voting*"*. Further, as per Regulation 26(4) *of the CIRP Regulations, "*at the conclusion of a vote held under this Regulation, the resolution professional shall announce and make a written record of the summary of the decision taken on a relevant agenda item along with the names of the members of the committee who voted for or against the decision or abstained from voting". Thus, as per the Regulations, a member may vote for or against a resolution or a member may abstain from voting. However, this opens several questions,

a) *Firstly,* regarding the inclusion or exclusion of

the votes of those who abstained from the numerator and the denominator for the purpose of calculation of votes when the members who abstained were present at the CoC.

b) *Secondly,* regarding the inclusion or exclusion of the abstained votes from the numerator and the denominator for the purpose of calculation of votes when the members who abstained were absent from the CoC.

As regarding the voting by authorized representatives, Section 25A (3) of the IBC, stipulates that, "the authorised representative shall not act against the interest of the Financial Creditor (FC) he represents and shall always act in accordance with their prior instructions [...] Provided further that if any FC does not give prior instructions through physical or electronic means, the authorized representative shall abstain from voting on behalf of such creditor."

In view of this the IBC seems to have envisaged this as the only situation in which there could be abstention from voting, namely, in cases wherein the authorized representative has not received instructions from the FC, elsewhere in the IBC and the Regulations, although the term abstained has been used, however, no circumstances for abstention from voting have been provided for. Therefore, *thirdly*, whether the "abstained from voting" is to be limited to cases in terms of Section 25A (3) of the IBC. The significance of this issue can be demonstrated with the following illustration:

At a meeting comprising total creditors of ₹1000/-, the following votes were obtained: -

a) Creditors for ₹600/ - Voted in favour

b) Creditors for ₹300/ - Voted against

c) Creditors for ₹100/ - Abstained/Did not vote.

Abstaining-Creditors are included in Denominator	Abstaining-Creditors are excluded in Denominator
Computation of Votes in favour of Resolution Plan	
Voted in Favour / Total share of FCs = 600 / 600+300+100 = 60%	Voted in Favour / Total voted = 600 / 600+300 = 66.67%
Result: Since Resolution Plan did not secure 66% voting, the Plan stands rejected.	**Result:** Since Resolution Plan secured the requisite 66% voting, the Plan stands approved by CoC.

Based on the above computation, it appears that even a creditor with smallest voting share of 10% can change the entire fate of revival of the CD. Thus, it may be unfair to include such abstaining creditors for counting the decision of the majority who have explicitly expressed their views.

Thus, a person who has decided not to vote on a Resolution Plan or is unable to decide on the voting cannot be considered as assenting/dissenting. Hence abstaining financial creditors are neutral in nature and therefore, by implication, it is understood that they have decided to follow the decision of the majority. Such abstaining members need not be counted for voting at all – neither in the numerator nor in the denominator. Court orders with different perspective on the above issue is as follows:

Abstaining Creditors are Counted in Denominator	Abstaining Creditors are Excluded in Denominator
NCLT, Chennai in the matter of *Rahul Jain Vs. J. Karthiga, RP of M/s. Capricorn Foods Product India Limited* dt. July 22, 2022, held that by removing 'Abstained' vote from the total number of votes from the denominator, the voting share of the other financial creditors have been increased indirectly. By removing the 'Abstained' vote from the total number of voting share, the vote of abstained creditor has been indirectly construed as they have voted in favour of the 'Resolution Plan'. Accordingly, the NCLAT directed to convene a fresh voting on approval of the Resolution Plan.	NCLAT, New Delhi in the matter of *IDBI Bank Vs Mr. Anuj Jain, IRP, Jaypee Infratech* dt. June 10, 2019, held that if any of the FC remains absent from voting, their voting percentage should not be counted for the purpose of counting the voting shares.

Issue No. 5: 29A – Is there a need for further stringency?

The core-theme of IBC is to revive the falling CD. During the infancy of the Code, there were no restrictions on the

eligibility of a person to submit a Resolution Plan. This was considered as an advantage by the defaulting promoters, who either directly or indirectly through their connected parties tried to regain control over their company by submitting a Resolution Plan at a substantially lower value.

To be precise, the acquisition of the company by its own promoters through a Resolution Plan was similar to waiver/reduction of the existing debts and obtaining a clean-slate company. Therefore, Section 29A – "one of the remarkable amendments to IBC" was inserted at the appropriate time through an amendment to defy the intentions of defaulters. Section 29A emphasizes on the eligibility of Resolution Applicants along with their connected parties in the following phases:

a) **Initial Restriction:** As per Section 29A there is an entry blockage for ineligible applicants to submit a Resolution Plan.

b) **Restriction during the Resolution Plan Implementation Phase:** If the Resolution Applicant has an ineligible, connected person proposed to be the promoter or in management or control of the business of the CD, during the implementation of the Resolution Plan, in such case the entry or further access to proceed with the Resolution Plan will be restricted to the Resolution Applicant.

However, the Code is silent about the re-entry of the defaulting promoter/s into the management of the CD post the conclusion of the Resolution Plan implementation Process, since there is neither any lock-in period restrictions nor any other restriction barring the re-entry of the promoters into the management of the revamped CD.

Illustration: The Resolution Plan of "XYZ Limited" provides for settlement to stakeholders and restart of business operation within six months from NCLT approval date. Under such circumstances, the Resolution Plan implementation will be completed within six months from NCLT date and after the completion of the implementation phase, the erstwhile promoter of the CD joins the company.

In this case, the re-entry of the erstwhile promoter into the management of the CD will indirectly outwit the intention of Section 29A. Thus, the defaulters will get back their company ultimately and it was only a matter of waiting time for the defaulters to get it back.

Conclusion

The above-mentioned are the handful of issues which remain grey and open-ended in the conduct of CIRP/Liquidation. The article is not intended to provide any solutions to the above issues, but only intends to address the perplexing nature of the issues which may serve as a decisional impediment in the CIRP/Liquidation Process.

One of the distinguishing salient features of IBC is the timely resolution process. With respect to CIRP/Liquidation Process, the timeline of one year for completion of the entire process signifies the efficient resolutions in a time bound manner. However, the above discussed oddities with contradictory perspectives may pose hurdles and hinder the smooth conduct of CIRP/Liquidation. The lack of clarity on the above issues may derail the CIRP/Liquidation Process and consume substantial time and efforts in litigations.

The major pillar of success of IBC 2016 lies in the role played by judicial authorities. Due to the increase in number of IBC cases, there was news that there appears a shortage in the number of judicial members. However, the number of CDs resolved, and the landmark judgement in IBC is a clear witness to the tremendous contributions of the NCLT, NCLAT and other judicial forums towards the remarkable growth of Indian insolvency law. Thus, it may not be viable to utilize the valuable-irreplaceable time of the tribunal in issues of repetitive nature, when there are other important matters which can be resolved only with the wisdom of the judiciaries, towards which the time of the tribunals may be utilized.

The feasible solution to address the above matters may be by way of incorporating the final conclusions on the above issues in the form of legislative amendments to the Act, so that the amended law will serve as a "Guide & Precedence" to the issues of similar nature arising in future and will also be binding on all stakeholders. If conclusions are embedded in Acts, then it will lead to uniform decisions and will eliminate unnecessary arbitrary views on the issues and will curtail the time and money spent on litigations of repetitive nature.

Case Study: Performance Analysis of Jhabua Power Ltd. (JPL)

Jhabua Power Limited (JPL), a company originally promoted by Avantha Group, is a power generation company based at Seoni district in the State of Madhya Pradesh. In pursuance of insolvency application filed by an operational creditor, the Kolkata Bench of the National Company Law Tribunal (NCLT) admitted JPL into Corporate Insolvency Resolution Process (CIRP) vide an order on March 27, 2019.

The Committee of Creditors (CoC) in its first meeting appointed Mr. Abhilash Lal as the Resolution Professional (RP) of JPL. He and his support team successfully completed the CIRP of the company. The team, with the support of stakeholders, continued and improved operations of the power plant, reinforcing the going concern status of the Corporate Debtor (CD). This enabled the team to market the company, generate interest and obtain compliant resolution plans before handing it over to NTPC Ltd., the successful resolution applicant (SRA).

The present case study, sponsored by IIIPI, was developed by Mr. Abhilash Lal with his colleagues. In this study, the research team has provided a first-hand step by step guide to resurrect a corporate life.

Read on to know more...

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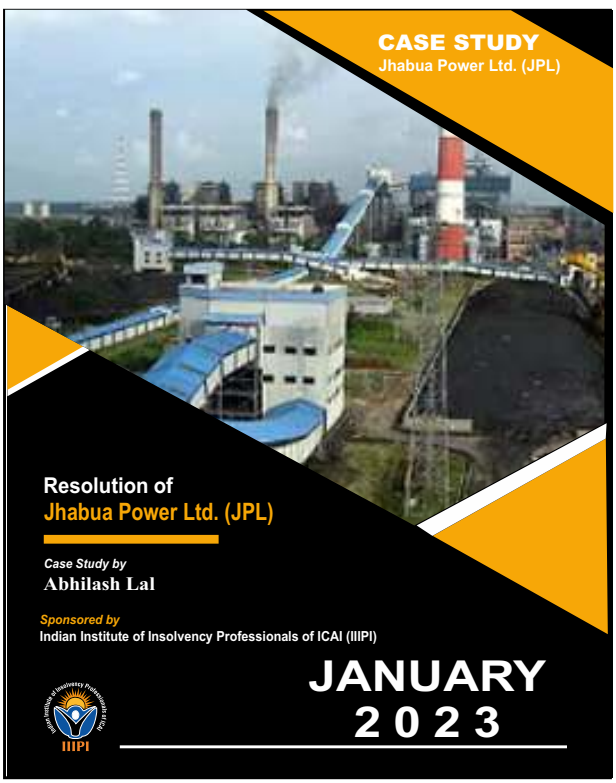
1. Introduction

Jhabua Power Limited (JPL), a company originally promoted by Avantha Power & Infrastructure Limited (APIL), is a power generation company based in the Seoni district in the State of Madhya Pradesh. The site is located near village Barela - Gorakhpur, Tehsil Ghansore of Seoni District (near Jabalpur). JPL currently has 600MW thermal capacity which is fully operational with potential for a second unit of 600MW at the same site.

During the CIRP, the Resolution Professional (RP) along with his support team not only managed to maintain the company as a Going Concern as per the provisions of the Code, but also successfully transformed business operations leading to superior performance and achieving lifetime high operational and financial milestones.

The RP submitted the resolution plan of the successful resolution applicants (SRA) for consideration of the Adjudicating Authority (AA) i.e., NCLT, Kolkata Bench. The plan had been unanimously approved by all the members of the CoC. Upon approval of the resolution plan application by the AA, the CIRP of the CD was concluded



and the CD was successfully transferred to the SRA. During the transition period, a Monitoring Committee comprising representatives from the lenders and the SRA and headed by the RP, monitored the operations and the transition process as per the approved resolution plan.

This case study discusses the challenges and steps taken for sustained and improved operations thereby facilitating a successful resolution as envisaged under the IBC.

2. Company Profile

(a) JPL is an Independent Power Producer (IPP) having 600 MW Coal-fired power plant with turnover of ~₹11 billion. It entered into CIRP before even crossing 50% utilization of power generation capacity.

(b) The plant was commissioned in 2016 with a delay of three years with several critical CAPEX work like Railway siding, Wagon Tippler, Plant Roads, Drains, etc. still incomplete and inadequate essential and mandatory spare parts in its store.

"As in the FY2018-19, about 335 Cr of term loan was dues from Banks and NBFCs. Besides, 90 Cr of Compulsory Convertible Debentures (CCD) were issued in 2013-14."

(c) At the time of admission into CIRP, JPL had 85% of its power capacity tied up through Long- & Medium-Term Power Purchase Agreements (PPAs) with governments of Madhya Pradesh (MP), Kerala & West Bengal (WB).

(d) The debt profile and security structure of the CD are provided in Annexure 2.

(e) JPL was accredited with Quality Management Systems (ISO 9001:2015), Environmental Management Systems (ISO 14001:2015), Occupational Health and Safety Management Systems (ISO 45001:2018) and Energy Management System (ISO 50001:2018).

(f) The nearest railway siding station is Binaiki, located in the Jabalpur Gondia section of Indian Railways and the nearest airport is at Jabalpur.

(g) About ₹335 Cr of term loan from Banks and NBFCs as of FY19 and ₹90 Cr of Compulsory Convertible Debentures (CCD) were issued in 2013-14.

3. Pre-CIRP Performance

(a) JPL regularly faced the issue of coal availability and hence couldn't ensure full Declared Capacity to the PPA. beneficiaries, thus getting a hit on fixed cost tariff invoicing;.

(b) The company faced several arbitrations claims even before entering CIRP, the major one with the key BTG (Boiler Turbine Generator) vendor – BHEL. This led to serious issues with plant maintenance, running and safety.

(c) JPL struggled in inventory management for mandatory spares due to insufficient cash balance, with inadequate spares for extremely critical machinery e.g., turbine blades which affected plant availability.

(d) Due to improper budgeting and liquidity crunch, JPL was unable to meet requirements for non O&M and employee engagement expenses.

(e) With several important capital items left unfinished (roads, rail siding, wagon tippler, drains etc), JPL faced regular issues in normal operations that pushed up the cost of repairs and operations. Coals supply too was erratic and slow due to constraints at the plant end

4. Key Reasons for Financial Stress

(f) Significant delays in start of Commercial Operation of the plant.

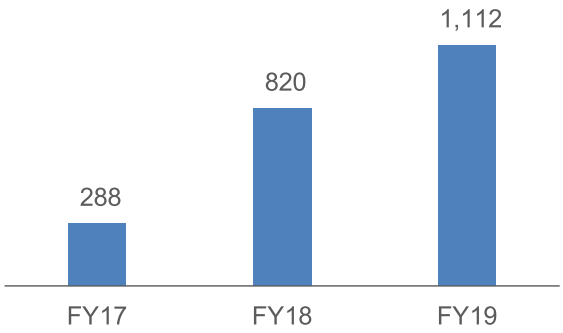
(g) Cost overrun led to a substantial increase in the debt. The debt could not be serviced through the cash inflows and the lenders started charging penal interest which further added to the debt service cost.

(h) High financing cost of long-term debt (at ~14%) was unsustainable for JPL given its cash flows.

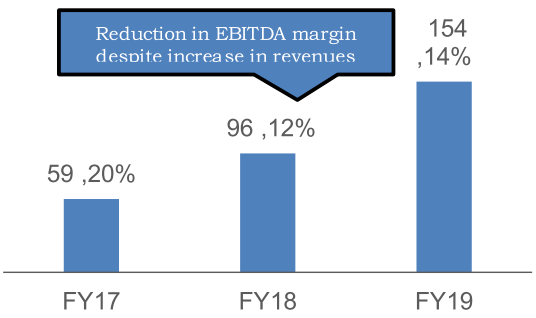
(i) Low plant availability due to absence of critical spares and incomplete works.

(j) Working capital constraints to purchase coal & meet operational expenses – addressed through prudent cash management, detailed budgeting and monitoring.

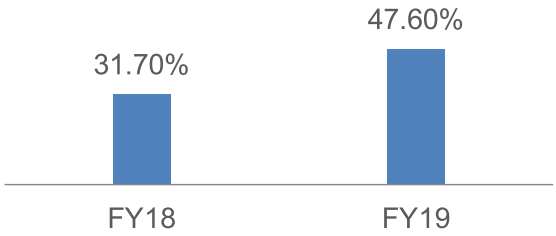
Pre ICD Revenue (₹Cr)



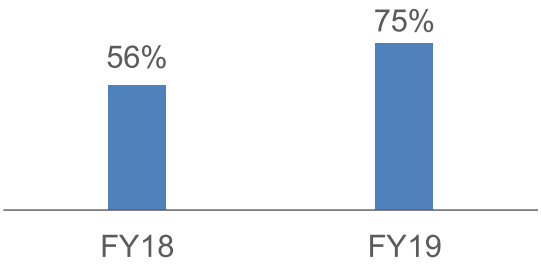
Pre ICD EBITDA (₹Cr,%)



Pre ICD Plant Load Factor (PLF) - in %



Pre ICD Plant Availability - in %



5. Corporate Insolvency Resolution Process (CIRP)

5.1. Appointment of IRP/RP

Pursuant to a Section 9 application filed by M/s FL Smidth Private Limited (Applicant), NCLT Kolkata Bench admitted Jhabua Power Ltd. (JPL) to CIRP in terms of the provisions of the Insolvency and Bankruptcy Code, 2016 (IBC). The CoC of JPL in its first meeting appointed Mr. Abhilash Lal as the Resolution Professional (RP) to replace the erstwhile Interim Resolution Professional (IRP). The entire CIRP was completed with the active support of financial creditors and other stakeholders. The summary of the CIRP timeline is provided in Annexure 1.

5.2. Initial Assessment

(a) Low Plant Availability due to which company was not able to bill full fixed cost as per the terms of power purchase agreements.

(b) Interruptions in business operations on account of coal stock-out situations.

(c) Performance test of Boiler, Turbine and Generator unit was not carried out.

(d) No support from OEM for obtaining spares & services support for plant maintenance / overhauling due to ongoing arbitration.

(e) Private railway siding at JPL was under construction due to which coal was being transported inside the plant by trucks.

(f) Lack of space in ash dyke for disposal of ash.

(g) Critical major equipment/facilities like permanent ash silo, condensate polishing unit, standby CW pump, wagon tipplers etc., were not ready/ commissioned affecting sustained operation of plant at higher load.

(h) High landed cost of coal due to procurement from market traders due to low allocation of linkage coal.

(i) Permanent roads and drains were not constructed during plant construction phase causing significant problems in bringing coal & evacuating ash through trucks/dumpers/bulkers thereby affecting scheduled generation of power, especially during monsoon season.

(j) Huge outstanding receivables from PPA beneficiaries affect the working capital position of the company. To improve the cash position,

alternative revenues sources by supply of power on market/exchanges was explored on near term and short-term basis along with watertight controls on non-critical spends and regular follow-ups with PPA beneficiaries resulted in faster realization of part of the outstanding receivables.

5.3. Role of RP Team

(a) Resolution Process

(i) Managed operations whilst preparing the company for a competitive bidding process within IBC framework.

(ii) Managed the resolution process as per requirements of Section 25 of the IBC 2016 viz, Expression of Interest and RFRP document.

(iii) Set up and maintained a VDR to store data effectively for prospective resolution applicants.

(iv) Developed the information memorandum as per requirements of Section 29 of the IBC and supplemented the same with a more detailed i-banking document.

(v) Managed claims database, payment control mechanism and preparation of related MIS for lenders.

(vi) Ensured that all requirements under the IBC and Regulations were carried out within the stipulated time frame without any conflicts.

(b) Business Operations

(i) Monitored business activities, plant operations and performance

(ii) Reviewed the Mega Insurance Risk Policy of Plant for Business Interruption (BI) during MLOP/FLOP and made critical interventions to include BI coverage during Insolvency. Mega Insurance Risk Policy covers any plant against Physical damage to Plant Asset & Equipment and also revenue loss during stoppage of plant due to fire or shutdown of machinery due to any fault.

(iii) Reviewed existing contracts and finalized strategy for long running contracts

Equipment/facilities like Railway Siding, Wagon Tipplers, Condensate polishing unit, Ash water recovery, Coal Bunker dust suppression system, Plant roads & drains, etc. were not ready/ commissioned affecting sustained operation of the plant at higher load.

(iv) Completed and ensured operational readiness of critical unfinished project capex works during CIRP (funded by internal company cash flows) by effective capex budgeting, representation to CoC for their approval and tracking project progress and performance.

(v) Made recommendations for optimal inventory management on mandatory spares.

(c) Commercial, Legal & MIS

(i) Preparation of progress reports for NCLT.

(ii) Tracking of all statutory compliances of company as going concern

(iii) Monitoring hearings and legal consultations pertaining to the various ongoing / outstanding petitions / arbitration matters and providing regular updates to COC with advice as to future actions.

(iv) Maintained trackers of Bank Guarantees issued by JPL to various agencies and also BGs received from vendors under various ongoing WO/PO.

(v) Detailed monthly MIS to CoC including plant performance parameters, entity-wise landed coal cost & stock, cash flow, monthly billing & payment status under various PPAs, debtors aging, etc.

(d) Cash Flow Management

(i) Review of monthly cash budget for all operational expenses and ensuring that the budget was adhered to.

(ii) Actuals tracking to monitor transactions, review collections and manage receivables.

(iii) Maintained water-tight controls during Work Order / Purchase Order approvals to ensure transparency and follow Nip-in-the-bud procedure at PO/WO stage itself (segregating Opex & Capex).

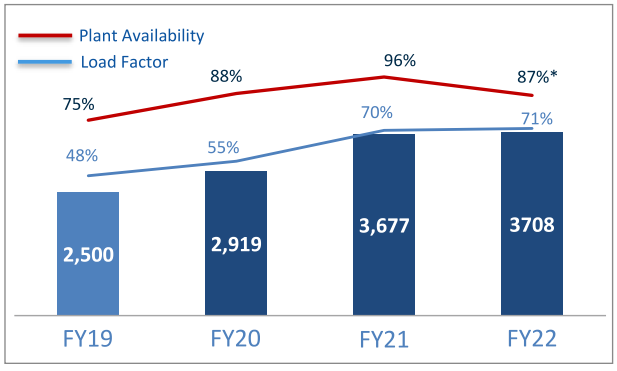
(iv) Budget and track non-O&M expenses (CSR, employee engagement, Admin etc.)

(v) Verify that the funds utilized for business operations and report anomalies.

6. Key Results

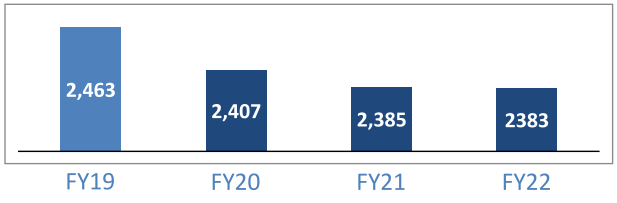
6.1. Improvement in Key Operational Parameters

Higher Power Generation, Improved Plant Availability and Load Factor



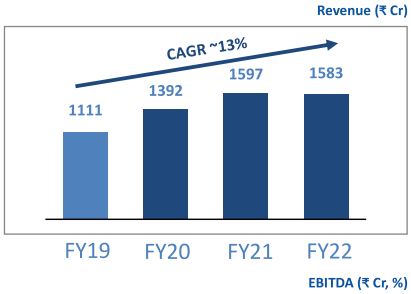
*Plant Availability reduced for FY22 due to planned annual overhaul at plant

Improved Station Heat Rate (KCal/KWH)

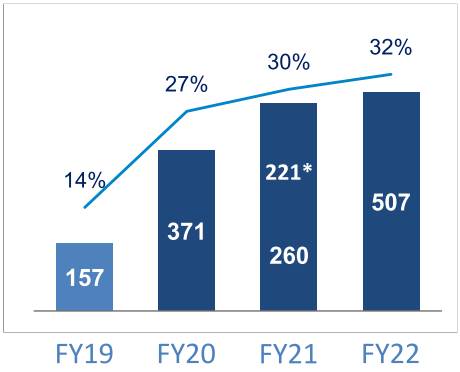


Station Heat Rate: Amount of heat energy required by a thermal power plant to produce 1 unit of electricity. Lesser its value more efficient the power plant

6.2. Improvement in Key Financial Parameters



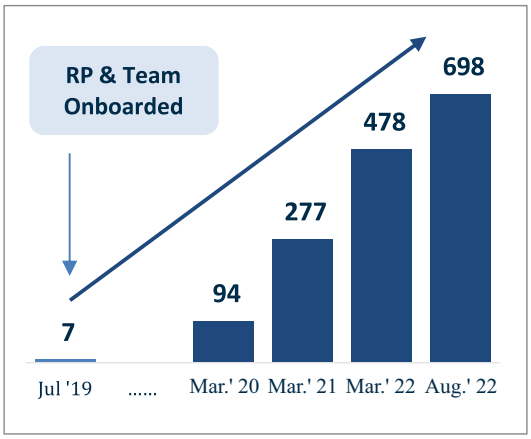
- ~13% YoY CAGR growth (FY19-22) in revenue by optimizing power sale at PPAs and IEX.
- Improvement in fixed tariff recovery from 80% to 96% by ensuring near 100% declared capacity consistently thereby earning full fixed charges under the PPAs.



Company made provision of ~INR 221 Cr in FY21 for doubtful debts

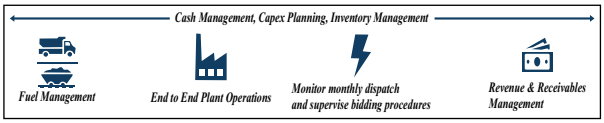
- ~3X growth in EBITDA was noticed at the back of higher revenues and controlled expenses.
- Reduction in landed cost of coal (constitutes 70-75% of total expenses) to ensure higher margins leading to EBITDA improvement.

Cash Balance (₹ Cr)



- Moratorium on interest payments during CIRP period.
- Established strict controls in cash budget.
- Controls at PO approval stage.
- Monitored payments against budgets with daily payment management process.
- Ensured timely payment of all statutory dues & ongoing O&M. expenses during CIRP

7. Key Impact Areas by RP and Team



(a) Systems Establishment

(a) Set up a process where requests from JPL for every PO/WO (value above ₹1 lakh each) came to RP team for review and clearance.

(b) Set up robust PO/WO review and MIS with O&M (regular plant and admin) and CAPEX expenses to control spend – *Nip In The Bud* at PO/WO stage itself.

(c) Established process for PO approval which ensured tightening of spends - getting quotations from at least 3 vendors, detailed and signed Note for Approval (NFA) and Comparable Statement Quotes (CSQ) which contains all important T&C of contract (Landed Cost, Payment terms, Delivery time, warranty, BG etc.), restricting contracts to shorter time frame (3-6 months), unconditional exit clauses, and stores confirmation on current stock level for consumables.

(b) Inventory Management

(a) JPL used to struggle in inventory management for mandatory spares due to insufficient cash balance, with insufficient spares for extremely critical processes which affected plant availability.

(b) Identified critical and key inventory requirements and stocking levels, negotiated and purchased critical spares from alternate vendors, set up reorder levels and procedure.

(c) Post RP team coming on board, the plant had zero delay due to unavailability of spares and consumables without exceeding budget managed with the existing cash balance.

(c) Expense Monitoring

(a) Tracked and controlled non-essential purchases to reduce overall expenses and to keep it within CERC tariff guidelines for thermal power plants.

(b) Introduced budgeting across functions with clear ownership (Statutory, O&M, Coal & Freight, CAPEX).

(c) Monitored and controlled spends across facilities management, security agencies, payroll and IT hardware and services.

(d) Cash management & Cashflow forecasting ecasting

(a) Team established cash budget and monthly review with cross functional teams to exercise tight control on payments and inflows.

(b) Monitored payments against budgets with daily payment management process and actuals tracking.

(c) Ensured timely payment of all statutory dues & ongoing O&M expenses during CIRP period.

(d) Provided consistent monthly updates of cashflow and forecast to CoC.

(e) Coal Planning

(a) Prior to CIRP, JPL regularly faced the issue of coal availability and hence couldn't ensure full declared capacity to the PPA beneficiaries, thus getting a hit on fixed cost tariff invoicing. There was not a single instance of stock-out after the RP team onboarded due to effective cash management and efficient coal planning to account for logistical and operational delays.

(b) RP team improvised coal planning and tracking system – maintained a coal stock of three to four weeks at site, coordination with coal planning and F&A team, created a visibility for six months, reduced sourcing of poor-quality high-cost MCL coal, managed shifting of coal supply to mine with better quality coal (higher GCV, lower dust), participated in e-auction on landed coal cost basis and nullified the dependence on buying coal from traders, thereby reducing the overall landed cost.

(c) Third party quality testing for e-auction coal at mines end (as loaded coal).

(d) RP team assisted fuel management team to set

RP team assisted fuel management team to set up Short Term Open Access (STOA) contracts to set up sales channel via IEX portal, resulting in consistent increase in cash flow.

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(f) Cost Saving

(a) Coordinated with JPL coal team to ensure maximum loading through direct rail mode and reduction in dependence on road mode – instituted penalties to coal handling agent (CHA) if quality and quantity less than guaranteed.

(b) Reviewed various contracts for liaison with CIL, coal reconciliation, improving inflow of FSA coal above trigger (above 80% of allotted annual contracted quantity).

(c) Created contract structure for CHA to incentivise them for loading higher quantity of allotted coal (above 80% of allotted quantity) through rail mode.

(d) Rationalization of FSA from poor-quality costly coal (MCL) to better-quality cheaper coal (NCL).

(e) Monitored average landed cost of coal (INR/GCV) regularly to drive higher margins and EBITDA improvement.

(g) Financial & Operational Planning

(a) Facilitated research and feasibility study for Flue Gas Desulfurization (FGD) & Ash Management.

(b) Identification and utilization of ash dumping site to ensure compliance with MOE guidelines.

(c) Developed Annual Business Plan and benchmarks during CIRP process to ensure continuous improvement in performance.

(d) Carried out two financial audit cycles and oversaw preparation of annual accounts in line with accounting conventions. Subsequently ensured necessary board approvals and conducted AGMs.

(h) CAPEX

(a) Detailed 6-month, 1-Year and Long-Term capex plans developed for better visibility and prioritizing capex activities – ensured all capex was approved by CoC.

(b) Finished critical project works - railway siding and electrification, wagon tippler, CPU, Coal Bunker dust extraction system, ventilation system, fire-fighting lines, high mast lighting, railway track fencing, internal and external roads, drains, retaining walls among others - that were unfinished from project phase. All funding met through internal accruals without any additional financing and phasing out capex to match cash flows.

(c) Commissioning of railway siding and wagon tippler helped in reducing overall landed coal cost, reduced transit losses due to multiple handling of coal and increased supply efficiency.

(d) Completion of external plant roads helped in better ash evacuation and compliance with regulatory norms.

(i) Employee Engagement

(a) Carried out replacement hiring and employee reduction to maintain and maximize efficiency in operations

(b) Carried out two cycles of annual appraisals and duly awarded promotions and increments during CIRP process.

(c) Conducted regular site/office visits to ensure high morale and maintain connection with on-ground team.

(d) During the outbreak of Covid-19, ensured availability of medical and accommodation support for all plant personnel.

(e) Ensured the setting up of canteen and rest rooms for railway siding staff in accordance to Factories and Labor Act.

(f) During CIRP period, multiple awards and recognitions awarded to JPL employees for outstanding performance.

(j) Corporate Social Responsibility (CSR)

(a) Established contracts for CSR funding via Institute for Development of Youth, Women and Child & BAIF Development Research Foundation while company was under CIRP.

(b) As a part of CSR program, provided funding toward the following initiatives

(c) Provided revolving funds to self-help groups (in convergence with govt. scheme) for their income generation activities.

(d) Organized school level competitions for students & provided electronic panels for smart classes.

(e) Provided health infrastructure support to Govt. Institutions like Nutritional Re-Habilitation Centers etc.

8. Learnings from CIRP of power companies and what are critical aspects to be focused while handling CIRP of Power Companies

(a) Developing understanding of the company's PPA and other short term power supply obligations

(b) Assessment of PAF to avail full fixed cost per the terms of the PPA.

(c) Assessment of alternate sources of coal and to undertake coal rationalization, if possible

(d) Planning of major and minor overhauls for compliance with critical licenses

(e) Close monitoring of the ash disposal activities followed by the Company in line with environmental norms

(f) Tracking of landed coal cost and contracted GCV to ensure timely receipt of compensation for grade slippages, if any

(g) Analysis of stock levels of mandatory spare parts as recommended by the OEMs.

Annexure 1: CIRP / Timeline of Key Operational Milestones

Event	Date
JPL was admitted to CIRP under IBC by an Operational Creditor u/s 9	March 27, 2019
Abhilash Lal appointed as RP by NCLT	July 25, 2019
Alvarez and Marsal team onboarded as RP Team	July 29, 2019
Submission of resolution plan by NTPC & Adani	December 30, 2019
Negotiation process ~16 months; Multiple revisions in plans; 29A verification, PPA & Liquidation Valuation issues	Jan 2020 – May 2021
Submission of resolution plan to NCLT (with 100% CoC approval)	June 30, 2021
Approval of resolution plan by NCLT and setting up of Monitoring Committee	July 06, 2022
Completion of Transfer to SRA	September 5, 2022

Annexure 2: Claims – Financial Creditors

Claims Filed			Claims Payout			
#	Creditor Name	Amount Claimed	Upfront Amount	NCD	Equity	Recovery %
1	AVANTHA POWER & INFRASTRUCTURE LIMITED*	1,482,295,897	-	-	-	NA
2	AXIS BANK LIMITED	4,735,830,922	805,048,717	533,811,599	289,147,950	34%
3	BANK OF INDIA	3,365,289,725	625,358,574	414,662,683	224,608,953	38%
4	LIFE INSURANCE CORPORATION	2,305,201,480	428,366,539	284,041,229	153,855,666	38%
5	POWER FINANCE CORPORATION	10,345,000,000	1,922,370,726	1,274,685,332	690,454,555	38%
6	PUNJAB NATIONAL BANK	6,187,893,008	1,149,857,443	762,447,325	412,992,301	38%
7	RURAL ELECTRIFICATION CORPORATION	4,178,008,558	776,382,924	514,803,889	278,852,106	38%
8	STATE BANK OF INDIA	7,320,319,511	1,360,306,228	901,991,678	488,578,826	38%
9	UCO BANK	3,411,861,259	614,501,042	407,463,271	220,709,272	36%
10	UNION BANK OF INDIA	7,353,604,683	1,366,491,481	906,092,995	490,800,372	38%
	Total	**49,203,009,147**	**9,048,683,674**	**6,000,000,000**	**3,250,000,000**	

* Avantha Power – related party – unsecured creditor. All other creditors had pari passu charge on fixed and current assets.

Annexure 3: Claims – Other Creditors

Claims Filed			Claims Payout	Recovery %
Category	# of claims	Amount of Claim Admitted	Amount Paid	
Workmen	1	1,316,326	1,316,326	100%
Operational Creditors	57	1,071,043,234	200,000,000	19%

Legal Framework

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

CIRCULARS

Proforma for reporting liquidator's decision(s) different from the advice of Stakeholders' Consultation Committee (SCC)

Pursuant to the sub-regulation 10 of Regulation 31A of the IBBI (Liquidation Process) Regulations, 2016 that provides the Liquidator to record the reason for taking a decision different from the advice given by the consultation committee, the IBBI vide Circular dated December 21, 2022, has made available an electronic platform at www.ibbi.gov.in, for reporting the liquidator's decisions different from the advice given by the SCC. The proforma for such reporting is also specified in the Circular.

Source: *https://ibbi.gov.in/uploads/legalframwork/2d5613091cded4721f7f0297f4416a8e.pdf*

IBBI Circular regarding payment of revised fee by IPs, and IPEs

Though a Circular dated November 24, 2022, the IBBI has directed the IPs and IPEs to pay the revised fee in the bank account of the Board as the online payment module is not yet implemented. As per the Circular, the 'one-time application fee' for IPs has been revised from ₹10,000 to ₹20,000 w.e.f. October 01, 2022. The 'one-time application fee' for IPEs has been revised from ₹50,000 to ₹2,00,000. Similarly, the 'five years fee for IPs' have been increased from ₹10,000 to ₹20,000 and the 'Annual Fee' is revised from 0.25% to 1.00% of professional fee earned for the services rendered as an IP in the preceding financial year.

The IPEs IPE applying for registration as an IP will be required to pay ₹2,00,000 as 'Application Fee' and IPE registered as an IP will be charged ₹2,00,000 in the form of '5 yearly fee'. The 'Annual Fee' for IPEs has been revised to 1% of turnover (excluding professional fee) in the preceding financial year.

The Board has also introduced two new categories of fee – (i) Related to resolution plans and (ii) Related to hiring any professional or other services. Under first category (I), the IP will be required to pay 0.25% of the realisable value to creditors under the resolution plan approved under section 31, shall be payable to the Board, where such realisable value is more than the liquidation value. Under the

category (ii) 1.00% of the cost being booked in insolvency resolution process costs in respect of hiring any professional or other services by IRP or RP.

Source: *https://ibbi.gov.in//uploads/legalframwork/ae2fd93db7a96c6c8eb65aa02dc03217.pdf*

IBBI rescinded 11 Circulars which were no longer required

According to a Circular issued by IBBI on November 09, 2022, an exercise was conducted for review of regulations, circulars based on experience gained. It was observed that certain circulars are no longer required on account of being already provided in the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 [IP Regulation] or the Insolvency and Bankruptcy Board of India (Model Byelaws and Governing Board of Insolvency Professional Agencies) Regulations, 2016 [Model Bye Laws Regulations] or the IBBI (Information Utilities) Regulations, 2017 [IU Regulations], as the case may be. Subsequently, 11 regulations were repealed. which were issued from 2018 to 2019.

Source: *Circular No. No. IBBI/IP/55/2022 dated November 09, 2022.*

FACILITATIONS

In case of assignment of debt during Section 7 application pending before the AA, there is no prohibition in the IBC, 2016 from continuing the proceeding by an Assignee

NCLAT, in the matter of Siti Networks Ltd. Vs. Assets Care and Reconstruction Enterprises Ltd. & Anr. [Company Appeal (AT) (Ins.) No. 1449 of 2022], has observed that section 5(4) of the SARFAESI Act does contemplate continuation of all proceedings after acquisition of financial assets by an assignee. There is no dispute that ACREL was assigned the debt by original FC

during pendency of section 7 proceedings. Further, Order XXII Rule 10 of Civil Procedure Code, 1908 contemplates continuance of proceeding on the basis of devolution of rights with the leave of the Court, which is applied generally in civil proceedings and suit. It held that there is no prohibition in the Code or the Regulations from continuing the proceeding by an assignee. 'Financial Creditor' as defined under section 5(7) also includes a person to whom such debt has been legally assigned or transferred to. By virtue of the assignment, ACREL become the Financial Creditor and having stepped in the shoes of "Housing Development Finance Corporation Limited", it has every right to continue the proceeding which was initiated by the FC.

Source: *IBBI-Analysis, dated December 16, 2022 (https://ibbi.gov.in//uploads/legalframwork/6a7e19c0e2491d15aecc2c17d68e2c28.pdf).*

NCLAT made it clear that the only question to be looked into while adjudicating upon section 9 application by the AA is whether the objection raised by the CD opposing claim of the OC is not a moonshine defense

NCLAT, in the matter of Krishna Hi-Tech Infrastructure Pvt. Ltd. Vs. Bengal Shelter Housing Development Pvt. Ltd. [Company Appeal (AT) (Ins) No. 1375 of 2022& I.A. No. 4297, 4296 of 2022] dated December 06, 2022, has held that NCLAT held that the Contract Act provides for dispute resolution mechanism for contractual disputes arising between the parties during the contract period. The dispute between the parties is not supposed to be decided, examined, and adjudicated in the IBC proceeding. The only question to be looked in section 9 petition of the Code is whether the objection raised by the CD opposing claim of the OC is not a moonshine defense. The Court further held that the issues raised in the emails sent by CD to the OC were not moonshine defence in the instant matter. The issues regarding quality of work were raised by the CD much prior to the issuance of section 8 notice. The AA has to examine the defence of the CD to find out if there is pre-existing dispute. If AA is satisfied on those emails of CD, it is not necessary to refer to explanation given by the OC.

Source: *IBBI-Analysis, dated December 15, 2022. (https://ibbi.gov.in//uploads/legalframwork/9db0a8d779f0410b33804eb89e3d745a.pdf) .*

GUIDELINE

IBBI released final Panel of IPs for January to June 2023

IBBI on January 03, 2023, released the final 'Final Panel of IPs' prepared in accordance with 'Insolvency Professionals to act as Interim Resolution Professionals, Liquidators, Resolution Professionals and Bankruptcy Trustees (Recommendation) (Second) Guidelines, 2022' for the period January 01, 2023, to June 30, 2023. The Panel of IPs will be used for appointment of IPs as Interim Resolution Professional (IRP), Resolution Professional (RP), Liquidator, and Bankruptcy Trustee (BT) by NCLTs and DRTs in accordance with Guidelines. The Panel has Zone wise list of IPs based on the registered office (address as registered with the Board) of the IP. This process will be repeated during May-June 2023 for the next Panel.

Source: *https://ibbi.gov.in//uploads/legalframwork/15fd41484696472007c3bf90e8f76e45.pdf*

IBC Case Laws

National Company Law Appellate Tribunal (NCLAT)

M/s Shah Paper Mills Limited Vs. M/s Shree Rama Newsprint & Paper Limited Company Appeal (AT) (Ins.) No. 1088 of 2022, Date of NCLAT's Judgement: December 21, 2022.

Facts of the Case

The appeal is filed under Section 61 of the IBC by *M/s Shah Paper Mills Limited* (Appellant) against the order dated July 20, 2022, passed by the AA. The AA through the impugned order has dismissed the Section 9 application filed against *M/s Shree Rama Newsprint & Paper Limited* (Respondent) for initiation of CIRP. The Appellant stated that the last invoice seeking payment of ₹70,76,730 was sent to the respondent on July 29, 2016, in reply of which the Respondent clearly admitted the liability to pay only ₹37,33,552. The Appellant further pointed out that on December 27, 2017, the Respondent was informed that the net receivable amount of ₹55,23,253/- was due from them. The Appellant also submitted that no disputes had been raised by the Respondent with regard to deficiency in supply of goods. The Appellant issued a demand notice on November 28, 2018, reply of which was submitted by the Respondent on December 11, 2018, i.e., beyond the timeline prescribed under the IBC. The Respondent submitted that there was change in the management of the company as per Share Purchase Agreement dated May 21, 2015, and all invoices pertaining to the period post-change of the management have been paid in full and that there were no outstanding dues. The Respondent contended that the present matter is not maintainable since the Appellant at no stage has crystalized the actual amount that had become due and that different outstanding amounts was claimed at different points of time. Further, it was contended that amount of ₹37,33,552 was the balance amount in respect of the invoices raised before July 25, 2015, being the date on which the first invoice was raised by the Appellant post change of management of the Respondent company. The question raised before the NCLAT is that whether the AA in the impugned order has correctly noted that as there was a serious dispute with regard to amount payable between the parties and the parties need to approach the proper forum in this regard.

NCLAT's Observations

The Appellate Tribunal referring to the *Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited* stated the while admitting or rejecting an application, AA must follow the mandate of Section 9 and in particular the mandate of Section 9(5) of the IBC. The Tribunal further stated that the AA is not to enter into final adjudication with regard to existence of disputes between the parties regarding the operational debt but what has to be looked into is whether the defence raised by the Respondent is moonshine defence or not. There is no prior dispute regarding quality of goods or material supplied. The only dispute is the difference of views on the actual amount payable. The Tribunal held that the AA has glossed over the fact that the Respondent has not controverted the outstanding liability of ₹37,33,552. Furthermore, the statement by the Respondent that no amount is due and payable to the Appellant, was made with the caveat that only invoices, post change in management, have been paid in full. It was further held that the Respondent's reply to demand Notice, that they are not liable for the claims prior to change in management, is not a tenable argument as change in management is an internal matter in which the Appellant had no role to play. The Respondent has tried to take advantage of their own wrong of being lackadaisical in reconciling the accounts in spite of nearly 30 requests made by the Appellant to do so.

Order: The Impugned Order dated July 20, 2022, is set aside and the AA is directed to pass an order of admission of Section 9 Application.

Case Review: *Appeal dismissed.*

M.K.Resely and Ors. Vs. & Union Bank of India and Ors. IA No 990/2022 in Company Appeal No.337/2022, Date of Judgement: November 24, 2022.

Facts of the Case

M.K. Resely and Ors. (Petitioners), feeling aggrieved by AA's order dated January 21, 2022, to add the 'personal properties' of the petitioners in the liquidation estate of the CD filed the Writ Petition with the High Court on January 26, 2022. The Writ Petition was dismissed on April 22, 2022, following which the Petitioner filed the Writ Appeal on April 25, 2022(against the dismissal of Writ Petition) Later, The High Court *vide* its judgment dated June 22, 2022, dismissed the Writ Appeal and permitted the petitioner to prefer an appeal within two weeks from the date of judgement. Accordingly, the Petitioner preferred this very appeal before the Appellate Tribunal seeking to exclude the period from January 25, 2022 till June 22, 2022 in computing the "Period of Limitation'.

The Petitioner, citing the judgement of Supreme Court in *Kalparaj Dharamshi and ors Vs. Kotak Investment Advisors Limited and Ors*, and in *State Bank of India Vs. Visa Steel Ltd.* submitted that Provision of Section 14 of the Limitation Act 1963 will apply to the proceedings and the period from January 25, 2022, till June 22, 2022, is liable to be excluded. The petitioner contended that the said appeal is presented well within the specified period under Section 61 of the IBC.

The Union Bank of India and Ors (Respondent) submitted that the as per the order of the High Court, the last date for filing the appeal was July 05, 2022, whereas the appeal was filed on July 06, 2022. Further the Respondent submitted that the Appeal was lodged by the Petitioner without attaching the Certified Copy of the AA's Order which is violation of Rule 22(2) of NCLAT Rules 2016. The Respondent cited the case of *V. Nagaranjan Vs Sks Ispat and Power Limited*, wherein the High Court was of view that appellant having failed to apply for a certified copy, rendered the appeal filed before the NCLAT as clearly barred by limitation.

The question raised before the NCLAT is that whether the appeal filed by the Petitioner is barred by limitation or not

NCLAT's Observations

The Appellate Tribunal stated that Section 14 of the Limitation Act was enacted to exempt a particular period covered by a "Bonafide Litigious Activity' and 'Good faith' is required to be established to press Section 14 into service. The Tribunal pointed that the period of limitation for filing a suit/appeal is fixed by a Statute and it cannot be deemed to be excluded or extended as a matter of routine.

The Tribunal was of view that, even though the Petitioner have indulged in Bonafide Litigious Activity in Good faith and by applying the ingredients of Section 14 of the Limitation Act the period from January 25, 2022 till June 22, 2022 is liable to be excluded, it cannot be forgotten that the Hon'ble High Court had permitted the Petitioner to prefer the appeal within two weeks from the date of judgement on June 22, 2022.

Going by the tenor and spirit of the Judgement of the High Court, the last date for filing the appeal was July 05, 2022, and there is a delay of 'One day' in preferring the appeal.

Order: The filing of the Appeal is beyond the prescribed time limit granted by the Hon'ble High Court

Case Review: *Appeal Dismissed.*

Sunit Suri Vs. Ahsan Ahmed (RP) & CoC of SDU Travels Pvt. Ltd. Company Appeal (AT) (Insolvency) No. 774 & 781 of 2022, respectively, Date of Judgement: November 21, 2022.

Facts of the Case

Appeal has been filed by Mr. Sunit Suri, (Appellant) against the orders dated July 20, 2022 passed by the AA. The appellant, being the suspended director of CD- "SDU Travel Pvt Ltd.", filed application under section 22(3) of the IBC to replace the IRP stating that the IRP is not acting independently and is working under the influence of the other Suspended Directors. The appellant supporting his claim stated that the IIRP had allocated share in the CoC to the entities related to the CD.

AA dismissed the application of the appellant stating that it has no merit and moreover the application for replacement of IRP was not filed by the CoC, as required under the IBC.

The Appellant, relying on the judgment of the Tribunal on *Kanakabha Ray Vs. Narayan Chandra Saha & Ors* and on the case of *State Bank of India Vs. M/s Metenere Ltd*, filed appeal in the Appellate Tribunal and contended that the application filed by him is maintainable before the AA and accordingly the order shall be set aside.

The question raised before the Appellate Tribunal is that whether the application submitted before the AA shall be allowed even when the provision of IBC confers power to CoC to replace the IRP.

NCLAT's Observations

The Appellate Tribunal highlighted the submission of the appellant that except seeking the aid of Rule 11 of the National Company Law Appellate Tribunal Rules 2016, no other provision of IBC empowers the appellant to prefer an appeal in the given case.

The Tribunal held that, as per the Principle of Interpretation, the language employed in the relevant Section towards a Provision /Act /Statute should be read in a simple, plain, and harmonious manner without causing any volatile harm to the language used therein. Further, Section 22(3) of the IBC clearly confers power to the CoC to replace the IRP by preferring appeal before AA.

The Appellate Tribunal held that when the Section 22(3) (b) of the IBC explicitly spells for the appointment of the proposed RP then the invocation of Rule 11 of the National Company Law Appellate Tribunal Rules 2016 cannot be pressed into service, showering power only to CoC to replace the IRP. Referring to the judgements on which the appellant relied, the Tribunal stated that based on the available facts and materials on record. the same is inapplicable to the present case.

Order: Appeal lacks merit and should be dismissed.

Case Review: *Appeal Dismissed.*

Rahul Arunprasad Patel Vs. State Bank of India (774) Amit Dineshchandra Patel Vs. State Bank of India (781) Company Appeal (AT) (Insolvency) No. 774 & 781 of 2022, respectively, Date of Judgement: November 21, 2022.

Facts of the Case

Appeal has been filed by the Personal Guarantors (Appellant) against the orders dated July 19, 2021, and August 17, 2021, wherein the application under Section 95 of the IBC filed by State Bank of India (Respondent), was admitted by the AA and consequently RP was appointed.

Appellant challenging the Impugned Orders passed in these two Appeals submits that Application which has been filed in Form-C does not have signature of the RP in Part-IV of the said form. Hence, it proves that the application has been filed by the Respondent and not by the RP. The appellant further submits that although consent form under Form-A has also been filed but the same is contemplated only when the Application is not filed by the RP.

Further, Appellant submitted that as per Section 97(3), the RP is to be nominated by the Board whereas AA has appointed the RP on the basis of the application filed and therefore the Impugned Order is violative of Section 97(3) of the Code. The appellant relying on "*Perkins Eastman Architects DPC Vs. HSCC (India) Ltd.*" and "*Voestalpine Schienen GMBH Vs. DMRCL*" requested the removal of the appointed RP and stated that when an Application is filed by/through RP, it is difficult to presume that he would recommend the rejection of the Application as the RP becomes interested person in his own Application and become judge in his own case which is not permissible in law.

Respondent refuting the claims of the Appellant submitted that Appeal has been filed with delay and latches. The Respondent submitted that the appellant didn't raise any objection at the time when order was passed, and the said appeal is abuse of process and an attempt to delay the Resolution Process. The Respondent admitted that the defect of RP not signing the application is curable and the fact that the RP has submitted its consent form before the AA has cured the defect.

The question raised before the Appellate Tribunal is that whether the application submitted before the AA shall be treated to be filed by the creditor or by the RP on the fact that the same is not signed by the RP.

NCLAT's Observations

The Appellate Tribunal held that the difference to find out whether the Application filed by the RP or Creditor himself is the difference with regard to the filing of Part-IV. When Part-IV is not filled up in an Application, Application is clearly by Creditor himself but when Part-IV is filled up, Application is not by the Creditor himself but through RP. Part-IV of the Application being filled up, the conclusion is irresistible that Application was filed through RP. Part-IV not containing the signature of the RP and containing the written communication is a minor irregularity/defect which cannot have any adverse effect

since the written communication given by the RP was a part of the Application in Form C.

The Appellate Tribunal, referring to its judgment in "*Pologix Infrastructure Pvt Ltd Vs. ICICI Bank Ltd.*" held that if there is any defect in the name and address and position of the authorized representative the Application cannot be rejected, and the Applicant is to be granted time to remove the defection. In the present case only, defect pointed out by Appellant is that there is no signature of RP but it is clear that instead of signature there was a written consent of the RP, thus defect if any stood removed.

On the judgements referred by the appellant in the appeal, the Tribunal held that the mere fact that details of RP are provided by the Applicant himself, no bias can be read into the said procedure. An RP plays a pivotal role in Insolvency Resolution Process and is expected to perform his function and duties as per the IBC and the Rules. Hence, both the appeals lack merit and should be disposed of.

Order: Both the Appeals are dismissed. No costs.

Case Review: *Appeal Dismissed.*

CFM Asset Reconstruction Pvt. Ltd. Vs. SABIC Asia Pacific Pte. Ltd. & JBF Industries Ltd Company Appeal (AT) (Insolvency) No. 1231 and 1232 of 2022, Date of Judgement: November 14, 2022.

Facts of the Case

CFM Asset Reconstruction Pvt. Ltd. (Appellant) filed appeal after being aggrieved by the orders dated September 06, 2022, passed by the AA that prohibited the appellant to intervene in the insolvency proceedings under Section 9 initiated by SABIC Asia Pacific Pte. Ltd. (Operational Creditor) against the JBF Industries Ltd. (Corporate Debtor).

All the Financial Creditors of the Corporate Debtor assigned their rights and interest to the Appellant. There being default on part of the Corporate Debtor, the Appellant initiated proceedings under SARFAESI Act, 2002. After knowing about the initiation of insolvency proceedings under Section 9 initiated by an Operational Creditor, the Appellant prayed before the AA to intervene in the Petition as claim of the Operational Creditor is in excess of ₹100 Crores whereas the amount outstanding to the Appellant is in excess of ₹3,600 Crores and any order of admission will impact the Appellant.

The Operational Creditor relying on *Beacon Trusteeship Ltd. Vs. Earthcon Infracon Pvt. Ltd.* and *L&T Infrastructure Finance Company Ltd. Vs. Gwalior Bypass Project Ltd.* case (7) submitted that the Appellant cannot be allowed to intervene in the present proceeding as even if Appellant holds debt of 99.1% of the Corporate Debtor, the Appellant should file its claim before the RP and NCLT cannot exercise its residuary inherent powers in the case. Permitting intervention by the Financial Creditor in Section 9 application will be contrary to the IBC which does not contemplate intervention by Financial Creditor prior to admission of application.

The Appellant apprehended that the Operational Creditor has not disclosed about the insurance taken with respect to the goods supplied and the fact that the insurance claim has been fully received by the Operational Creditor is also not disclosed. The Operational Creditor submitted that even if the amount of insurance claim has been received by the Operational Creditor, application under Section 9 can be proceeded with.

The question raised before the Appellate Tribunal is that whether Financial Creditor is entitled to intervene in proceedings initiated by Operational Creditor under Section 9 or not?

NCLAT's Observations

The Appellate Tribunal held the present case is different from the referred L&T Infrastructure Finance Company Ltd case on two facts, Firstly Intervention Application was filed by the L&T after order was reserved on the application filed under Section 7 and Secondly, L&T had challenged both order rejecting his Intervention Application and order admitting the Section 7 application but in present case, application under Section 9 is yet to be heard and admitted. Further, referring to the judgment of the Supreme Court in *Beacon Trusteeship Ltd. Vs. Earthcon Infracon Pvt. Ltd. & Anr*, case wherein a Financial Creditor was permitted to intervene in Section 9 Application, the Tribunal held that ordinarily a Financial Creditor cannot be allowed to intervene in the Section 9 proceedings, however, if there are reasons and allegations which require consideration by the AA intervention can be allowed.

The Tribunal further referring to a document titled as "Form of Acceptance Claim Discharge & Subrogation Form", which indicates that the Operational Creditor has received the insurance claim from the Insurance Company, was of view that when the Operational Creditor has received the claim amount and has fully discharged the Insurance Company of the liability the said document is relevant material to be examined by the AA as to whether on the basis of the claim raised by the Operational Creditor, insolvency proceeding be initiated against the Corporate Debtor or not.

The Appellate Tribunal held that on account of exceptional facts and circumstances, Appellant be permitted to intervene in the proceedings initiated under Section 9 by the Operational Creditor. Hence, order on September 06, 2022, passed by AA prohibiting the appellant to intervene in the insolvency proceedings is hereby set aside.

Order: The appellant is permitted to intervene in the application filed by the Operational Creditor under Section 9.

Case Review: *Appeal Allowed.*

Chipsan Aviation Private Limited Vs. Punj Llyod Aviation Limited Pvt. Ltd Company Appeal (AT) (Insolvency) No.261 of 2022, Date of Judgement: November 10, 2022.

Facts of the Case

Chipsan Aviation Private Limited (Appellant) filed appeal after being aggrieved by the order dated January 06, 2022, passed by the AA that rejected the Section 9 application holding that advance payment made by Operational Creditor to the Corporate Debtor does not fall within the four corners of the Operational Debt. The Appellant on March 28, 2016 advanced an amount of ₹60 lakhs to the Punj Llyod Aviation Ltd. (Respondent) for aviation related services, which were neither provided nor the advance paid was refunded. After payment, there has been several emails correspondence between the Appellant and the Respondent. Further, the amount of ₹60 lakhs was continuously shown as advance received from the customers during 2015-16, 2016-17 and 2017-18 in the financial statement of the Respondent. On September 19, 2019, the Appellant issued a demand notice under Section 8 which was delivered on Respondent on September 21, 2019. The Appellant filed a Section 9 application demanding an amount of ₹97,40,055/- (₹60 lakhs as principal amount and rest interest).

Respondent while refuting the claims of the Appellant pleaded that there was no privity of contract between him and the Appellant and there is no operational debt in existence under Section 5(21) of IBC. It was further pleaded that Application under Section 9 is barred by limitation as the advance payment was made on March 28, 2016, and the Application has been filed after expiry of the three years. The Appellant contended that advance payment was made for the purposes of providing aviation services and the Draft Agreement was forwarded to the Respondent but was never signed by him. The advance amount was towards obtaining goods and services; hence it falls within the Operational Debt. Relying upon *Construction Consortium Ltd. Vs. Hitro Energy Solutions Pvt. Ltd*. case, the appellant submitted that the order of the AA is knocked out and the Application under Section 9 was liable to be admitted.

The question raised before the Appellate Tribunal is that whether the advance payment made by Operational Creditor to the Corporate Debtor fall within the four corners of the Operational Debt or not?

NCLAT's Observations

The Appellate Tribunal while adjudicating the appeal held that although there is no contract between the Appellant and the Respondent for providing an aviation service, the payment of ₹60 lakhs to the Respondent, which is reflected by Bank transaction cannot be denied. The definition of Operational Debt as contained in Section 5(21) defines Operational Debt as a claim in respect of the provision of goods and services. Repeated correspondence between Appellant and Respondent indicates that the communication was in regard to goods and services. Thus, the correspondence as encapsulated shows that an amount of ₹60 lakhs was advanced for providing goods and services. However, neither goods and services could be provided, nor any Agreement could be entered between the Appellant and the Respondent. Referring the view of Hon'ble Supreme Court in Construction Consortium Limited case the Appellate Tribunal held that the advance payment of ₹60 lakhs was clearly an Operational Debt and the AA committed error in rejecting Section 9 Application.

The Appellate Tribunal further stated that although submission regarding objecting Section 9 Application on the ground of limitation have been noticed by the AA but has not been dealt with. Hence, order dated January 06, 2022 rejecting Section 9 Application on the ground that advance payment paid is not an Operational Debt is hereby set aside.

Order: The Section 9 Application before the AA to be heard and decided afresh after hearing both the parties.

Case Review: *Appeal Allowed.*

SLB Welfare Association Vs. M/s PSA IMPEX Pvt Ltd, M/s Rudra Buildwell Constructions Pvt. LtdCompany Appeal (AT) (Insolvency) No.642 of 2022, Date of Judgement: November 4, 2022.

Facts of the Case

SLB Welfare Association (Appellant) filed appeal against the orders dated April 18, 2022, and July 25, 2022, passed by the AA. *M/s PSA IMPEX Pvt Ltd*, the "CD", launched a House Building Project in the year 2012 to be completed within 36 months. Being delayed, the homebuyers approached the RERA, and the latter conducted an inspection of the Project site on February 18, 2019, and found that only 10% of the work has been started and from March 2016 work was abandoned. CD, on August 04, 2019, sent a mail to the buyers that the Project has been handover to *M/s. Rudra Buildwell Constructions Pvt. Ltd.* The RERA passed an order on September 30, 2019, cancelling the registration of the Project. A letter dated June 26, 2020, was issued by the Secretary of RERA to the CD for handing over the site to the Appellant.

M/s. Rudra Buildwell Constructions Pvt. Ltd. claiming to be an Operational Creditor filed an Application under Section 9 which was later withdrawn on the submission that Application is hit by Section 10A of the Code. Within a week from the withdrawal, a notice under Section 8 of the Code was issued by the Operational Creditor dated December 06, 2021, to the CD demanding payment of ₹ 5,39,60,674/- including interest. The date of default mentioned in the Application was March 31, 2020. The AA being prima facie of the view that the Application is hit by Section 10A, permitted the Operational Creditor to file an additional affidavit. The AA vide order dated April 18, 2022, admitted Section 9 Application, and appointed an IRP. Pursuant to the application filed by IRP, AA vide its order dated July 25, 2022, directed the Appellant to handover possession of the project in question to the IRP within two weeks.

Aggrieved by the order, the Appellant filed appeal in NCLAT submitting that insolvency proceedings were fraudulently initiated by the Operational Creditor in collusion with the CD. The invoices filed in support of Section 9 Application were only proforma invoices and does not have any invoices number and GST number and are self-prepared documents. The Appellant contended that rights of the Project vests in the Appellant by virtue of order passed by RERA and by virtue of Section 14(1) Explanation, there is no conflict with the order passed by the RERA and those of proceedings under IBC.

The Respondent submitted that proforma invoices are issued at the time of work being carried out and thereafter while raising final invoices, GST payments are made. The provisions of IBC shall override the provisions of RERA and order passed by RERA cannot come in the way of initiation of CIRP.

The question raised before the NCLAT is that whether the order of AA directing the Appellant to handover the Project to IRP is justified or not.

NCLAT's Observations

The Appellate Tribunal after considering the submission of both the parties held that the facts of the case make it amply clear that object of filing Section 9 Application by the Operational Creditor was not for resolution of insolvency of CD but was an attempt to stop the implementation of RERA order. The invoices are not claimed to have been issued within one month from the date of supply of goods, material or services and also does not mention the GST number or amount of tax, which proves the contention of the Appellant that they have been prepared for the purposes of the case.

Further, the ledgers of Corporate Debtor maintained by *M/s. Rudra Buildwell Constructions Pvt. Ltd.* indicate that ledgers are not prepared in an ordinary course of business. It is further relevant to notice that RERA has made inspection of the site in February 2019 and at that time of inspection, no work was found to be going on and the work has stopped for last two years. The Project was handed over to the Appellant on June 29, 2019 and the Operational

Creditor has claimed the amount from August 2019 to May 2021.

The Appellate Tribunal held that the entire case of the Operational Creditor to supply materials, goods and services appears to be false and concocted only for the purpose of filing Section 9 Application and thus penalty is liable to be imposed on the Operational Creditor under Section 65 of the Code. The initiation of CIRP itself being vitiated in law, all subsequent orders passed in the proceedings have to be automatically set aside.

Order: The orders are set aside, and the company petition is dismissed as having been filed malifide for purposes other than resolution of insolvency of the CD. A penalty of ₹ 25,00,000/- (Rupees twenty-five lakhs) is imposed on *M/s. Rudra Buildwell Constructions Pvt. Ltd.* through its owner Shri. Raj Kumar.

Case Review: *Appeals Allowed.*

Punjab National Bank Vs. Mr. Ashish Chhauwchharia, RP JetAirways & Ors. Company Appeal (AT) (Insolvency) No. 584 of 2021, Date of Judgement: October 21, 2022.

Facts of the Case

The Appellant - Punjab National Bank (PNB) had extended various loans credit to Jet Airways (India) Limited (Corporate Debtor) in 2016-17. After the Company committed default in repayment of the loan, the Promoter of the Corporate Debtor executed a Share Pledge Agreement in favour of the Appellant to secure their outstanding dues and 2,95,46,679 equity Shares were Pledged in favour of the Appellant. Meanwhile, the Corporate Debtor was admitted to Corporate Insolvency Resolution Process (CIRP) on an application filed by another creditor – State Bank of India (SBI). During CIRP, the Appellant filed a claim of ₹956.21 crore, which was admitted by the Resolution Professional.

On September 19, 2020, the RP issued an email to the Appellant stating that its claim would be reduced by the Fair Market Value of the Pledged Shares. Accordingly, the claim of PNB was reduced by approx. ₹202 crores. The Appellant also raised this issue during the e-voting on Resolution Plan through its representative in the CoC who 'requested the RP to minutise its dissent as PNB's claim of approx. ₹202 crores was rejected and they would suffer twice if such distribution methodology was allowed'. However, the Appellant voted in favour of the Resolution Plan. The Adjudicating Authority (AA) also rejected Interlocutory Application (IA) and approved the Plan. Subsequently, PNB preferred this appeal before the NCLAT.

The two questions before the NCLAT were (a) whether reduction of the claim of financial creditor by resolution professional was valid? and (b) whether a member of the CoC that has voted in favour of the Resolution Plan can question the Resolution Plan for his claims?

NCLAT's Observations

The Court observed that there was no dispute between the parties regarding facts and sequence of the events. The RP in its reply affidavit filed in this Appeal has categorically stated that reduction of the claim of the Appellant was on the basis of the judgment of NCLAT in the cases of *India Power Corporation Ltd. Vs. Meenakshi Energy Ltd.* and PTC India Financial Services Ltd. However, the NCLAT observed that the Supreme Court has set aside NCLAT's decision in the matter of PTC India Financial Services Ltd and upheld that 'registration of the pawn, that is the dematerialised shares, in favour of PIFSL as the 'beneficial owner' does not have the effect of sale of shares by the pawnee. The pledge has not been discharged or satisfied either in full or in part. PIFSL is not required to account for any sale proceeds which are to be applied to the debt on the actual sale'. Therefore, NCLAT concluded that in view of the law laid down by Supreme Court in PTC India Financial Services Ltd., the reason for reduction of the claim of the Appellant by RP is knocked out.

Regarding second question, the Court observed that the Appellant never acquiesced to the reduction of their claim and agitated it before the CoC and AA. Besides, apart from reduction of claim, no other part of Resolution Plan has been objected by the Appellant. The Appellant is not praying for setting aside the impugned order on any other ground and their prayer in essence is only to accept the entire admitted claim and direct for distribution of assets under the Plan accordingly. Accordingly, the Court concluded that the 'Appellant is entitled to the relief as prayed and it is not necessary to issue any direction for modifying the Resolution Plan'.

Order: - Reduction of the claim of Financial Creditor by

Resolution Professional is set aside. The liability of payment of additional amount to the Appellant shall be borne by Resolution Applicant from amount reserved under the Resolution Plan.

Case Review: *Appeal Disposed of.*

National Agriculture Cooperative Marketing Federation Limited (NAFED) Vs Synergy Petro Products Private Limited, Company Appeal (AT) (Insolvency) No. 862 of 2021, Date of Judgement: October 11, 2022.

Facts of the Case

This appeal under Section 61(1) of IBC was filed by NAFED (Appellant), who is a Creditor of Corporate Debtor (Synergy Petro Products Private Limited), against the order passed by the Adjudicating Authority (New Delhi). The appellant had filed an Application u/s 7 of IBC 2016, before the AA as a Financial Creditor and claimed its License Fee (in terms of Arbitral Award) and to get back the possession of their premises from the Respondents.

The Appellant is a multi-state Co-operative Society formed and registered under the provisions of the Multi State Cooperative Societies Act, 2002 and has given building to the Respondent for the use of in its business. The Respondents is unable to the pay the rent in terms of the Agreement despite reminders as well as Legal Notices, in furtherance of same the Appellant move for Arbitration. As per Arbitral Award the Respondent is liable to pay to the Appellant a license fee along with the Interest on it. In pursuance of order of Ld. District Collector, Alwar, the Appellant got back the possession of the said premise on July 15, 2015. Despite the award being passed on July 10, 2019, and the same becoming enforceable on expiry of a period of 90 days thereafter, the Corporate Debtor failed to make the payment in terms of the award and fails to vacate the premises. Therefore, Appellant filed an Application in terms of Section 7 of the IBC. However, the Adjudicating Authority dismissed the said Application filed by the Appellant under Section 7 of the IBC.

NCLAT's Observations

The court observed that the transactions which transpired between the parties does not partake the character of a 'financial debt' and the Appellant does not qualify to be a Financial Creditor in relation to the Corporate Debtor.

Order: - The court affirmed the order passed by the Adjudicating Authority wherein the rental lease agreement can be 'operational debt' but not 'financial debt'.

Case Review: *Appeal dismissed.*

High Court

Insolvency And Bankruptcy Board of India Vs. & State Bank of India & Ors. W.P.(C) 10189/2018 & CM APPL. 39715/2018, Date of Judgement: November 28, 2022.

Facts of the Case

Writ Petition has been filed by Insolvency and Bankruptcy Board of India, (Petitioner) against the order dated September 05, 2018, passed by the AA in *State Bank of India Vs. Su Kam Power Systems Ltd.* case. The AA held that Regulation 36A of the IBBI (CIRP) Regulations, 2016 *ultra vires* Section 240(1) of the IBC. The splitting of the CIRP into inviting expression of interest and then seeking resolution plans under Regulation 36A became the subject as it was contrary to the speedy disposal of the Resolution Process.

The Petitioner challenged the order on the ground that AA does not have jurisdiction to decide upon the validity and legality of the Regulations. Vide order dated September 26, 2018, the court directed that the AA's order shall not come in the way of the matters where 'Expression of Interest' has already been issued. The Petitioner preferred an appeal against the said order and vide order date October 05, 2018, the operation of AA's order was stayed. Thereafter, the appeal was disposed of on May 04, 2022, on the term that pending the disposal of the writ petition, interim order dated October 05, 2018 and Regulation 36A continues to operate.

On the final hearing, the Petitioner, citing the *M/s Mohan Gems & Jewels Pvt. Ltd. Vs. Vijay Verma & Anr* and *BSNL Vs. Telecom Regulatory Authority of India & Ors.* case, submitted that as per IBC the AA does not have any power to rule on the vires of any Regulations. The Petitioner's power to issue Regulations are recognized in Section 240 of the IBC and lastly, Section 196(1)(u) of the IBC is a broad provision which stipulates that the petitioner can perform such other functions as may be prescribed.

The question raised before the High Court is that whether

AA is vested with power to itself declare a Regulation as being ultra vires.

High Court's Observations

The High Court highlighted that on perusal of the powers of AA as per Section 60 of the IBC, the AA is vested with the power of deciding on questions of law, but the questions of law or facts ought to be in respect of those proceedings which are pending before the AA and they ought to arise out of or in relation to the resolution or liquidation proceedings.

Referring to the judgement on the cases cited by the Petitioner, the High Court upheld that the need for judicial intervention or innovation from the AA & NCLAT should be kept at its bare minimum and should not disturb the foundational principles of the IBC. The jurisdiction to deal with the validity and legality of the Regulations framed under the IBC is not conferred upon the AA. The AA being a creature of the IBC, cannot assume to itself the power of declaring any provisions of the IBC or the Regulations as illegal or ultra vires. The court held that Regulation 36A has been amended and passed in accordance with law, the AA did not have the power to declare the same as being ultra vires merely on the ground that the two-stage process provided in it i.e., of inviting an expression of interest first and then the financial bids, would be contrary to the speedier resolution of the Insolvency Resolution Process.

Order: Order to the extent it holds Regulation 36A as ultra vires is accordingly set aside.

Case Review: Writ petition is disposed of.

National Company Law Tribunal (NCLT)

Kotak Mahindra Bank Limited Vs. Jotindra Steel and Tubes. CP (IB) No.12/Chd/HRY/2021 Date of Judgement: October 21, 2022.

Facts of the Case

Kotak Mahindra Bank Limited (Applicant) filed petition under Section 7 of the IBC for initiating CIRP against *M/s Jotindra Steel and Tubes Limited* (Respondent). The applicant had advanced credit facilities to *M/s Mauria Udyog Limited* (associate company of the respondent, hereinafter referred as "Borrower") for an amount of ₹17,50,00,000. The respondent stood as Corporate Guarantor for the said loan and furnished an unconditional corporate guarantee to the applicant expressly stating and undertaking that it would make do payment on behalf of the borrower. Cause of continuous payment defaults made by the borrower in, the applicant classified the borrower as NPA. Thereafter, the applicant invoked the guarantee furnished by the respondent to pay the financial debt on behalf of the borrower to the tune of ₹14,48,48,132.15.

The Respondent contended that it never stood as Corporate Guarantor and no contract of guarantee was ever executed. Further it was stated that the letter of comfort in issue is a document signed by an individual, is undated and is not supported by an authentication of the Board of Directors and no resolution was ever passed by the Board of Directors in support of the said letter, or to provide any guarantee. The respondent stated that the letter of comfort was not stamped and as per Section 35 of the Indian Stamp Act it cannot be tendered as evidence. Further, the respondent quoted Section 185 of the Companies Act 2013 which strictly bars the company from granting loan/guarantee to any other person in whom director of the company are interested.

The question raised before the AA is that whether letter of comfort allegedly issued by the respondent/ amounts to contract of guarantee or not.

NCLT's Observations

The AA held that bare reading of the Section 126 of the Contract Act reveals that in a contract of guarantee, there are three different entities i.e., (i) 'surety', (ii) 'principal debtor' and (iii) 'creditor'. And the said letter of comfort cannot be termed as letter of contract of guarantee because it is neither signed by the creditor nor by the borrower. More so, there is no evidence placed on record to show that the said letter of comfort was signed in pursuance of any resolution passed by the Board of Directors of the respondent. Thus, the said letter of comfort is not in conformity with the provisions of Section 179 and Section 185 of the Companies Act, 2013.

The AA citing Laxmi Pat Surana case was of the view that there is no dispute that petition under Section 7 is maintainable against the corporate guarantors, but findings given in Lucent Technologies are not binding on the facts and circumstances of the case in hand because no

inference can be drawn from the said letter that there was intention to create the liability of guarantee in favour of the petitioner by the respondent.

Further, AA cited that Coordinate Bench of the Tribunal, recently in its order dated August 05, 2022, passed in the matter of IB-197/ND/2022*; M/s Shapoorji Pallonji and Company Private Limited versus M/s ASF Insignia SEZ Pvt. Ltd.*, held that letter of comfort cannot be treated as letter of guarantee.

Order: The respondent cannot be termed as a corporate guarantor based on alleged letter of comfort. Therefore, the present petition is not maintainable against the respondent/corporate debtor and the same is dismissed on the ground of maintainability.

Case Review: *Appeals Dismissed.*

IBC News

CD is not entitled for restoration of high-tension electricity connection without making payment of security deposit: NCLAT

After approval of the Resolution Plan by NCLT, the Chairman of the Monitoring Committee of *Kalptaru Steel Rolling Mills Ltd.* filed a petition seeking directions to electricity supplier - *Southern Power Distribution Company of A.P. Ltd.* to immediately restore electricity connection of the Corporate Debtor (CD). Besides, it was also urged to order the power supplier that the restoration be made without insisting for payment of any past dues or any fresh security deposit from the Resolution Applicant, as the supply of electricity is an essential and integral part of the resolution of the CD. The NCLT rejected the demand of applicant for restoration of electricity connection without making payment for security deposit, which was challenged for the NCLAT.

Upholding the decision of NCLT, the Appellate Tribunal said that security deposit is a pre-condition for sanction of High-Tension Power Connection to industries. The reliance was placed on a previous judgement of NCLAT in the matter of *Damodar Valley Corporation Vs. Cosmic Ferro Alloys Limited & Anr., (2020)* in which the Court has ruled that any dues relating to electricity supplied after the moratorium has ceased will have to be paid by the CD. "The Applicant being a heavy industry huge power supply is required. The security deposit is only to adjust the shortfalls which come in payment of bills," said the Court.

Source: *Live Law.In, December 16, 2022*

https://www.livelaw.in/news-updates/high-tension-electricity-connection-of-cd-cannot-be-restored-unless-security-deposit-is-paid-nclat-delhi-216885

Adjudicating Authority (AA) has no power to modify Resolution Plan: NCLAT

The New Delhi Bench of NCLAT has observed that if a Resolution Plan is in compliance with Section 30 and Section 31(1) of IBC, then such Resolution Plan has to be approved by the Adjudicating Authority (AA).

In Section 31 of IBC the word "shall" has been incorporated with proviso that the AA must be satisfied that the Resolution Plan has provisions for its effective

implementation. Furthermore, Section 31(2) of IBC empowers the AA to reject the Resolution Plan, if he is satisfied that Resolution Plan is not in conformity with Section 31(1) of IBC. However, there is no provision in the IBC which empowers AA for making alteration or modifications in the Resolution Plan.

This judgement came in the matter of *Mathuraprasad C Pandey & Ors. v Partiv Parikh & Anr*. wherein the AA had modified the Resolution Plan to the extent that "if any member of Resolution applicants has entered into or stand as guarantor in the individual capacity, in that event, he shall not be covered with any immunity given under the Resolution Plan".

Source: *Live Law.in, December 19, 2022*

https://www.livelaw.in/news-updates/aa-shall-either-approve-or-reject-the-resolution-plan-no-power-to-modify-it-nclat-delhi-217065

Canada based Great Panther undergoes bankruptcy

Great Panther Mining Ltd., a precious metals producer in Canada, has made a voluntary assignment into bankruptcy under the Bankruptcy and Insolvency Act (Canada). This development came following an order of the Supreme Court of British Columbia granting terminating of its proceedings under Companies' Creditors Arrangement Act (Canada). As per the media reports the bankruptcy of Great Panther does not affect Great Panther's subsidiaries, and the Trustee will now exercise the rights of Great Panther as shareholder. Alan Hair, Joseph Gallucci, Trudy Curran, and John Jennings have already resigned from the Company's board of directors.

Source: *CISION PR Newswire, December 16, 2022*

https://www.prnewswire.com/news-releases/great-panther-makes-voluntary-assignment-into-bankruptcy-under-the-bankruptcy-and-insolvency-act-canada-301705554.html

Government has approved 286 deals under SWAMIH, to benefits over 1.7 lakh homebuyers

Central Government has informed the Lok Sabha that over 1.72 lakh homebuyers stuck in stalled housing projects will benefit from the 286 deals amounting ₹28,393 crore approved under the SWAMIH scheme as of November 30, 2022.

The Special Window for Completion of Affordable and Mid-Income Housing (SWAMIH investment fund) has been created for funding of stalled projects that are net-worth positive and registered under RERA. This includes those projects that have been declared as Non-Performing Assets (NPAs) or are pending proceedings before the NCLT under the IBC, 2016. "'Land' and 'Colonization' are State subjects. The data of real estate projects are not maintained centrally by Ministry of Housing and Urban Affairs (MOHUA). In order to protect the interest of homebuyers and to ensure the transparency and accountability in the Real Estate Sector, the Ministry has enacted The Real Estate (Regulation and Development) Act, 2016 (RERA)," said the Shri Kaushal Kishore, Minister of State in the Ministry of MOHUA. Kishore was replying to a query on the steps taken by the Government to provide relief to people who have booked their flats but are stuck in stalled projects.

Source: *Financial Express, December 10, 2022*

https://www.financialexpress.com/money/swamih-deals-approved-1-72-lakh-homebuyers-stuck-in-stalled-housing-projects-to-benefit-says-modi-govt/2908334/

NCLAT sets aside Liquidation of Delhi based hospital on alleged Connivance of RP with Creditors

The Liquidation order of Febris Multispeciality Hospital was challenged by ex-director of the Corporate Debtor. The Appellate Tribunal observed that meetings of Committee of Creditors (CoC) were held "in the premises of the Financial Creditor and also joint filing of the reply by RP and Financial Creditor...Reflects that something was going on in between the parties". Furthermore, the RP had not taken any reasonable step to invite prospective resolution applicants for the hospital and run it as a "going concern which is mandated as per Section 25(2)(h)" of the Insolvency and Bankruptcy Code and as "such there is no reason to allow the impugned order to further continue". The court put on record its observations on several infirmities and illegalities it has noticed during hearing of the case and ordered the Insolvency and Bankruptcy Board of India (IBBI) for a thorough investigation into the matter.

Source: *The Economic Times, December 12, 2022*

https://economictimes.indiatimes.com/news/company/corporate-trends/nclat-sets-aside-liquidation-of-febris-multispeciality-hospital-orders-probe-into-rps-conduct/articleshow/96174331.cms

NCLT approved Resolution Plan of Café Coffee Day's subsidiary Sical Logistics Ltd.

NCLT Chennai has approved Resolution Plan of Pristine Malwa to acquire Sical Logistics Ltd. under IBC, 2016. The ₹521 crore Resolution Plan includes payment to lenders, employees, and cash in the company. The offer which equates to 30% recovery for verified creditors was approved with 77.5% votes by the CoC. According to the Plan the Successful Resolution Applicant (SRA) will provide ₹470 crore staggered payment to secured lenders, which includes ₹94 crore as upfront payment and remaining to be paid in two years. They have allocated ₹6.75 crore for employees.

Source: *The Economic Times, December 13, 2022*

https://economictimes.indiatimes.com/industry/banking/finance/pristine-malwa-gets-court-nod-for-resolution-plan-of-ccd-arm/articleshow/96180841.cms

NCLAT Approved CoC's Decision to Provide 100% Payment to Sugarcane Farmers

Operational Creditors (OCs) had challenged the approval of Resolution Plan of the Corporate Debtor (New Phaltan Sugar Works Ltd.) by NCLT on the ground that the Plan was discriminatory as sugarcane farmers (OCs) were given 100% of the dues whereas the Appellant (s) received only 1% of the dues which violates Section 30(2) of the IBC. It was contended that IBC does now allow discrimination among OCs. NCLAT observed that the Resolution Plan was approved by 100% Voting Share of the CoC under which the OCs were paid their dues as per Section 30 (2) (b) of the Code which read together with Regulation 38 of the CIRP Regulations, the 'OCs' are entitled to receive only such money that are payable to them as per Section 53 of the Code. The court recognized

the 'final discretion' of the 'Collective Commercial Wisdom' of CoC in relation to the amount to be paid and the quantum of money to be paid to a certain category or the incidental category of Creditors, balancing the interests of the 'Stakeholders' and the 'Operational Creditors', as the case may be. The appeal was dismissed.

Source: *Live Law.in, December 04, 2022.*

https://www.livelaw.in/news-updates/nclat-approves-sugar-farmers-as-separate-creditors-group-in-the-sugar-industry-resolution-plan-215762

Major Crypto Companies went into Bankruptcy in 2022

The year 2022, has been a rough year for the crypto industry. The price of bitcoin has dropped 65% since the start of the year, the cryptocurrency Luna suffered a total collapse in value, and crypto exchange FTX went from buying Super Bowl ads to crash landing into bankruptcy. John Ray, the new CEO brought in to oversee FTX's bankruptcy, said he had never seen "such a complete failure of corporate controls". He was tasked with cleaning up Enron's debts in the wake of its early-2000s accounting fraud scandal.

Source: Reuters.com, *December 02, 2022.*

https://www.reuters.com/technology/crypto-companies-crash-into-bankruptcy-2022-12-01/

Moratorium under IBC does not take away ED's power to order Attachment of Property under PMLA

Delhi High Court while adjudicating "Rajiv Chakraborty, Resolution Professional of EIEL Vs. Directorate of Enforcement" case stated that the provisions of the money laundering Act are not subservient to the moratorium provision comprised in Section 14 of IBC. The Court was of the view that acceptance of contention that Section 14 would take away ED's power to order attachment of property would not only run contrary to the legislative policy but also undermine the efforts of the legislature to combat the offense of money laundering.

The court further said PMLA proceedings are not akin or similar to steps that may be taken by a creditor pursuing an ordinary monetary claim. The Court was of the view that the act of attachment does not result in the effacement of rights in property, it would clearly stand and survive outside the scope of a moratorium or an action relating to an action in respect of a debt due or payable. The Resolution Professional was open to approach the competent authorities under the PMLA for such reliefs in respect of tainted properties as may be legally permissible. It was also held that the rights of ED over the properties would stand restricted to the extent of the observations made in the ruling as well as in the judgement made in the matter of *Deputy Director of Enforcement, Delhi Vs. Axis Bank & Ors.*

Source: *Live Law.in, November 11, 2022.*

https://www.livelaw.in/news-updates/ed-power-attach-under-pmla-not-fall-ambit-ibc-delhi-high-court-213901

CoC of HDIL Group approves the resolution plans for six realty projects

The resolution plans submitted by the RP on November 11, 2022 has been approved by the CoC of HDIL Group. The CoC voted for Adani Properties Pvt Ltd for Project BKC, while a consortium of Khyati Realtors and Dosti Realty for Majectic Towers in Nahur, Whispering Towers in Mulund and Premier Residences in Kurla. The committee also approved the resolution plan by Adani Properties for HDIL's Shahad Maharal Lands, while voted for Dev Land and Housing Pvt Ltd's plan for HDIL Towers. During the resolution process, it was decided to invite resolution plans for 10 verticals. Application is being filed with Hon'ble NCLT for the initiation of liquidation of remaining four verticals for which no compliant resolution plan is received.

Source: *Hindustan Times, November 16, 2022.*

https://www.hindustantimes.com/cities/mumbai-news/adani-group-gets-project-bkc-3-others-get-4-projects-in-hdil-insolvency-resolution-101668540327768.html

SEBI proposes to allow Minority Shareholders to Participate in CIRP on the Same Pricing Terms as Available to the Resolution Applicant

Capital market regulator, SEBI, came out with a proposal to protect the interest of public equity shareholders in cases of listed companies undergoing Corporate Insolvency Resolution Process (CIRP).

The proposed framework would provide an opportunity to minority shareholders to participate in the CIRP on the

same pricing terms as available to the Resolution Applicant (RA). The existing public equity shareholders of the Corporate Debtor should be provided an opportunity to acquire equity of the fully diluted capital structure of new entity to the extent of up to the minimum public shareholding percentage. The pricing terms should be the same as agreed upon by the RA. The new entity should endeavour to achieve at least 5% public shareholding through such mode of offer made to the non-promoter public shareholders. The mechanism should be an integral part of the resolution plan submitted by the RA for all listed entities undergoing CIRP. To ensure adequate float and liquidity in the new entity post its restructuring through the resolution plan, it should be specified that the entity should be permitted to continue as a listed entity only if 5% of the fully diluted capital structure of new entity is with the public shareholders. The SEBI has sought comments on the proposals from the public till November 24. Listing out the merits of the proposal, SEBI said the company will be able to retain its status as listed company with minimum public float post restructuring.

Source: *BQPrime.com, November 10, 2022.*

https://www.bqprime.com/business/sebi-proposes-framework-to-protect-public-shareholders-interest-in-companies-undergoing-insolvency-resolution

Govt appointed 15 Members at NCLT

The government has appointed 9 judicial and 6 technical members at NCLT to deal with the shortage of members and to expedite adjudication matters. The members are appointed for a period of five years from the date of taking charge or till they attain the age of 65 years, whichever is earlier. Among the new members two are retired judges of High Courts. Besides, judges of district courts, senior lawyers and bureaucrats are also in the list. NCLT has a total of 28 benches, with a sanctioned strength of 63 members. This includes 31 each from the judicial and administrative sides along with the President, NCLT.

Source: *The Economic Times, November 08, 2022.*

https://economictimes.indiatimes.com/news/economy/policy/govt-appoints-15-judicial-technical-members-at-nclt/articleshow/95384933.cms

Supreme Court approved Resolution Plan of Arcelor Mittal for Odisha Slurry Pipeline Infrastructure (OSPL)

The Resolution Plan was challenged by SREI Infra which questioned whether the revised Resolution Plan deserved to be sanctioned on account of its failure to maximize the value of the assets of the corporate debtor. It also alleged that the NCLAT had "adopted a blinkered approach of not looking at the issues raised in their true perspective, simply relying on the fact that the RP of AMI was approved by 100% vote of the CoC of OSPIL and the commercial wisdom of the CoC is beyond the purview of judicial review". However, the Supreme Court relied on the arguments of Corporate Debtor that the process was followed as per the provisions of the IBC, 2016 and related Regulations and dismissed the appeal of SREI Infra.

Source: *The Financial Express, November 11, 2022.*

https://www.financialexpress.com/industry/odisha-slurry-supreme-court-approves-arcelor-plan/2805341/

Interim Moratorium under Section 96 of IBC is limited to particular Guarantor and will not protect the other personal Co-Guarantors of same debt: Delhi High Court

The Delhi High Court while dealing with two summary suits filed by creditors of Bhushan Steel Limited against the ex-promoters for recovery of money has held that the interim moratorium under section 96 of the IBC 2016 is specific to all debts of a particular debtor and will not be applicable to other personal co-guarantors.

The defendant contended that insolvency proceedings have also been filed against him before NCLT, Delhi after the judgement was reserved therefore, by virtue of interim moratorium, suit cannot proceed against any of the Defendant. It was further contended that interim moratorium would only apply against all debts of a particular co debtor and not any other person or co-guarantor. Plaintiffs opposed the same on the ground that by virtue of Section 78 & 79 of Code, the adjudicating authority for personal guarantors is DRT and therefore, an application under Section 95 of IBC cannot be filed before NCLT. The Bench referring to the judgment of NCLAT in *State Bank of India Vs. Mahendra Kumar Jajodia* held that

in relation to insolvency resolution for corporate persons, including corporate debtors and personal guarantors, the Adjudicating Authority shall be the NCLT. The Court also held that interim moratorium against one of the Co-guarantors will not protect the other co-guarantor even though the liability of both the co-guarantors arises from the same debt.

Source: *Live Law.in, November 07, 2022.*

https://www.livelaw.in/news-updates/delhi-high-court-section-96-of-insolvency-bankruptcy-code-personal-guarantor-interim-moratorium-213421

When Corporate Debtor does not create a Gratuity Fund, No Gratuity is payable: NCLT Chandigarh

The NCLT while adjudicating an application filed in SIDBI v International Mega Food Park Ltd., has held that if the CD had not created a Gratuity Fund, then the RP cannot be directed to pay Gratuity to the employee(s). Further, the salary and leave encashment of employees accrued during CIRP period fall within the definition of insolvency resolution process cost under Section 5(13)(c) of IBC. Reliance was placed on the Supreme Court judgment in Sunil Kumar Jain and others v Sundaresh Bhatt and others. The Bench further directed the RP to make provisions for payment of salary and leave encashment to the Applicant after taking necessary information.

Source: *Live Law.in, November 07, 2022.*

https://www.livelaw.in/news-updates/nclt-chandigarh-small-industries-development-bank-of-india-sidbi-corporate-debtor-gratuity-213420

Aluminium extrusions Titan China Zhongwang enters Bankruptcy Proceedings

The biggest aluminium extrusions producer in the People's Republic of China and the second biggest in the world is now in bankruptcy proceedings. As per estimate the firm has about US$64 billion in liabilities, but less than half that amount in assets at present. In mid-October the company announced that its subsidiaries have endured significant losses and were thus unable to address the situation appropriately.

Source: *Aluminium Insider*

https://aluminiuminsider.com/aluminium-extrusions-titan-china-zhongwang-enters-bankruptcy-proceedings/

Adjudicating Authority Can Invoke Inherent Powers to Replace Liquidator: NCLAT

The NCLAT while adjudicating an appeal filed in Subrata Maity v Mr. Amit C. Poddar & Ors., has held that the Adjudicating Authority can invoke its inherent powers to replace the Liquidator and to do substantial justice. The NCLAT held that the Liquidator does not have any personal right to continue in the Liquidation Process. The Adjudicating Authority did not err in replacing the Appellant especially when the days were lost due the Appellant's incapability to act as a Liquidator.

Source: *Live Law.in, October 21, 2022*

https://www.livelaw.in/news-updates/nclat-adjudicating-authority-can-invoke-inherent-powers-to-replace-the-liquidator-212209

UK Supreme Court Confirms Existence of Directors' Duties to Creditors

The UK's Supreme Court in *BTI 2014 LLC Vs. Sequana SA and others* [2022] UKSC 25 case has considered for the first time the circumstances in which directors are required to act in the interests of creditors when a company faces insolvency but is not yet in an insolvency process. The Court stated that Directors must consider the interests of creditors when i) the company is insolvent on a balance sheet basis or is unable to pay debts as and when they fall due and therefore insolvent on a cashflow basis. ii) the company is bordering on insolvency iii) insolvent liquidation or administration is probable, or, iv) the particular transaction would create one of the above situations.

Creditors' duty is a modification of the statutory duty to act in good faith and promote the success of the company under section 172 of the Companies Act 2006. It exists at common law and is distinct from directors' liabilities in relation to wrongful trading and unlawful preferences under the Insolvency Act 1986.

Source: *Mondaq.com, October 26, 2022*

https://www.mondaq.com/uk/insolvencybankruptcy/1243524/uk-supreme-court-delivers-landmark-judgment-on-directors39-duties-when-a-company-faces-insolvency

Background Guidance on Quality Control by Insolvency Professionals

BACKGROUND

The objective of the Insolvency and Bankruptcy Code 2016 (IBC/Code), as economic beneficial legislation, is to provide effective legal framework for resolution of distressed businesses by reorganising such businesses. IBC's first order objective is rescuing a company in distress and liquidation can be viewed only as the last resort. The second order objective is maximizing value of assets of the company and the third order objective is promoting entrepreneurship, availability of credit and balancing the interests of all stakeholders. IBC provides for bifurcating the interests of the company from that of its promoters to ensure revival and continuation of the company by protecting it from its own management and from liquidation.

Insolvency professional (IP), in the capacity of Resolution Professional (RP) or Liquidator is one of the key pillars as envisaged under IBC, for achieving the said objectives. The legal framework under IBC requires an IP to establish fair and transparent conduct of insolvency resolution process, casting upon an IP, inter alia, following responsibilities reflective of qualitative aspects in such processes (in a non-exhaustive manner):

Provisions under IBC, 2016

(a) Section 17 and Section 18 require that the IRP/RP is vested with the powers of the board of directors of the Corporate Debtor (CD). The officers and managers of the CD shall report to the IRP, providing him access to documents and records of the CD. The IRP/RP shall act and execute in the name and on behalf of the CD, all deeds, receipts, and other documents and take such actions, in the manner and subject to such restrictions, as may be specified by the Insolvency and Bankruptcy Board of India (IBBI).

(b) Section 20 requires that the IRP/RP shall make every endeavour to protect and preserve the value of the property of the CD and manage its operations as a going concern. IRP/RP shall have the authority to appoint professionals, to enter contracts on behalf of the CD or to amend or modify the contracts or transactions, to raise interim finance, to issue instructions to personnel of the CD as may be necessary for keeping the CD as a going concern and to take all such actions as are necessary to keep the CD as a going concern.

(c) Section 23 requires RP to conduct the entire Corporate Insolvency Resolution Process (CIRP) and manage the operations of the CD during such processes. Further RP is required to continue to manage the operations of CD after the expiry of such process, until an order approving the resolution plan under subsection (1) of section 31 or appointing a liquidator under section 34 is passed by the Adjudicating Authority (AA). Further, in case there is a change in IRP to RP or from RP to RP/Liquidator, the incumbent IP shall provide all the information, documents and records pertaining to the CD in his possession and knowledge to the successor IP.

(d) Section 28 requires IRP/RP, during the CIRP, to take prior approval of the Committee of Creditors (CoC) for certain actions.

(e) Sec 29 requires that IRP/RP shall provide to the resolution applicant, an access to all relevant information in the form of Information Memorandum in physical and electronic form to formulate a resolution plan.

(f) Sec 30 requires that the IRP/RP shall examine each resolution plan received by him and shall present the same to the committee of creditors for approval.

(g) As per Section 208(2), an IP is obliged to take reasonable care and diligence while performing his duties, to comply with all requirements and terms and conditions specified in the byelaws of the insolvency professional agency of which he is a member; to allow the insolvency professional agency to inspect his records; to submit a copy of the records of every proceeding before the Adjudicating Authority to the Board as well as to the insolvency professional agency of which he is a member; and to perform his functions in such manner and subject to such conditions as may be specified.

Provisions as per Code of Conduct under Schedule-I of IBBI (IP) Regulations

(h) Clause 5 provides that an IP must maintain complete independence in his professional relationships and should conduct the insolvency resolution, liquidation or bankruptcy process, as the case may be, independent of external influences.

(i) Clause 12 provides that an IP must not conceal any material information or knowingly make a misleading statement to the IBBI, the AA or any other stakeholder, as applicable.

(j) Clause 13 provides that an IP must adhere to the time limits prescribed in the Code/IBC and the rules, regulations and guidelines thereunder for insolvency resolution, liquidation or bankruptcy process, as the case may be, and must carefully plan his actions, and promptly communicate with all stakeholders involved for the timely discharge of his duties.

(k) Clause 15 provides that an IP must make efforts to ensure that all communication to the stakeholders, whether in the form of notices, reports, updates, directions, or clarifications, is made well in advance and in a manner which is simple, clear, and easily understood by the recipients.

(l) Clause 16 provides that an IP must maintain written contemporaneous records for any decision taken, the reasons for taking the decision, and the information and evidence in support of such decision. This shall be maintained to sufficiently enable a reasonable person to take a view on the appropriateness of his decisions and actions.

Monitoring by Insolvency Professional Agency (IPA)

(m) The Code under Section 204(c) mandates monitoring by IPA of the performance of IPs with respect to legal compliance and empowers IPAs to call for information and records.

(n) Clause 8 of IBBI (Model byelaws and Governing Board of IPAs) Regulations 2016, provide for constitution of Monitoring Committee by an IPA. Further, clause 15 of such regulations provide for formulation of Monitoring Policy by an IPA for the purpose.

(o) The objective of monitoring of IPs is to ascertain whether the conduct of IPs is in overall interest of the stakeholders, CD as going concern and to ensure that the position of trust held by IPs is not abused by them and in cases where it is, to ensure appropriate action is taken.

Inspections of IPs by IBBI and IPA

(p) Section 196(1) of the Code/IBC empowers IBBI to carry out inspections and investigations, monitor the performance and call for any information or records, inter alia, from IPs.

(q) As per Section 208(2)(c) of the Code/IBC, IPAs are authorized to conduct the inspection of IPs enrolled with it.

(r) Further as per Clause 18 of the Code of Conduct an IP must appear, co-operate and be available for inspections and investigations carried out by the IBBI, any person authorised by the IBBI or the IPA with which he is enrolled.

In view of many duties and responsibilities cast upon IPs, it is of paramount importance for an IP, whether part of an IPE or not, to observe and maintain high standards of quality in connection with any professional assignment. Such an approach shall enthuse confidence in other stakeholders about IP's services on the one hand and support IP to face any regulatory or legal challenge, on the other.

INTRODUCTION

1. The purpose of this Background Guidance on Quality Control is to help IPs in maintaining and enhancing quality of their services while discharging responsibilities in relation to the professional assignments under IBC and related activities thereto. IPs may apply the guidance provided in this document as they deem appropriate depending upon circumstances of each case.

2. This document is to be read in conjunction with the requirements of the IBC, 2016, any regulations and circulars/notifications issued thereunder. In case of any variation, the provisions of such law, regulations, notifications shall prevail over the requirements as per this document. Further, the document is based upon recommendations of study group constituted by IIIPI and does not carry the authority and views of IIIPI.

3. This document, in the following paras, provides uses two types of statements viz.:

   i. Requirement, which is mentioned as text in bold font, and is desirable for IP to comply with the specific provision.

   ii. Reference matter, which is mentioned as normal text explaining the context relevant for proper understanding of the said 'Requirement' as referred in Clause 3 (i).

4. The IP should establish a system of quality control designed to provide it with reasonable assurance that the IP and its personnel comply with professional standards, best practices, regulatory and legal requirements, and that action taken are appropriate in the circumstances.

5. A system of quality control consists of policies designed to achieve the objectives set out in paragraph 4 above and the procedures necessary to implement and monitor compliance with those policies.

6. The nature of the policies and procedures developed by an individual IP to comply with this document will depend on various factors such as the size and operating characteristics of the CD, and whether he is part of an IPE.

DEFINITIONS

7. In this document, the following terms have the meanings attributed below:

   (a) Board: Insolvency and Bankruptcy Board of India (IBBI)

   (b) Code/IBC: Insolvency add Bankruptcy Code, 2016

   (c) Engagement documentation: The record of work performed, results obtained, and conclusions the IP reached (terms such as "working papers" or "workpapers" are also sometimes used). The documentation for a specific engagement is assembled in an engagement file;

   (d) Insolvency Professional (IRP/RP/ Liquidator/Administrator, Bankruptcy Trustee, Authorized Representative, etc.): The person who is registered with IBBI as IP and is in full time practice and who has been appointed as such.

   (e) Engagement team: All personnel performing an engagement, including any experts or professionals including accountants, legal counsels or other professionals, as envisaged under the Code, contracted or hired by the IP in connection with that engagement.

   (f) Inspection: In relation to completed engagements, procedures designed to provide evidence of compliance by engagement teams with the IP's quality control policies and procedures.

   (g) Monitoring: A process comprising an ongoing consideration and evaluation of the IPs system of quality control, including a periodic inspection of a selection of completed engagements, designed to enable the IP to obtain reasonable assurance that its system of quality control operates effectively.

   (h) For definition of other terms used in the document but not defined under this clause, the Code and/or Regulations made thereunder should be referred to.

ELEMENTS OF A SYSTEM OF QUALITY CONTROL

8. The IP's system of quality control should include policies and procedures addressing each of the following elements:

   a. Leadership responsibilities for quality.

   b. Ethical requirements.

c. Human and technological resources.

d. Engagement performance.

e. Monitoring.

9. The quality control policies and procedures should be documented and communicated to the IP's personnel. Such communication describes the quality control policies and procedures and the objectives they are designed to achieve and include the message that each individual has a personal responsibility for quality and is expected to comply with these policies and procedures. In addition, the IP recognizes the importance of obtaining feedback on its quality control system from its personnel. Therefore, the IP should encourage its personnel to communicate their views or concerns on quality control matters.

10. The IP should establish policies and procedures designed to promote an internal culture based on the recognition that quality is essential in performing engagements. Such policies and procedures should require the IP to assume ultimate responsibility for the system of quality control.

11. The IP's leadership and the examples he sets significantly influence the internal culture. The promotion of a quality-oriented internal culture depends on clear, consistent, and frequent actions and messages across all levels of the management emphasizing the quality-control policies and procedures, and the requirement to:

a. Perform work that complies with professional standards, best-practices, and regulatory and legal requirements; and

b. Ensure that actions taken are appropriate in the circumstances. Such actions and messages encourage a culture that recognizes and rewards high quality work. They may be communicated by training seminars, meetings, formal or informal dialogue, mission statements, newsletters, or briefing memoranda. They are incorporated in the internal documentation and training materials, and in staff appraisal procedures such that they will support and reinforce the IP's view on the importance of quality and how, practically, it is to be achieved.

12. Of particular importance is the need for the IP's leadership to recognize that the IP's business strategy is subject to the overriding requirement to achieve quality in all the engagements that the IP performs. Accordingly:

a. The IP assigns its management responsibilities so that commercial considerations do not override the quality of work performed;

b. The IP's policies and procedures addressing performance evaluation, compensation, and promotion (including incentive systems) with regard to its personnel, are designed to demonstrate the IP's overriding commitment to quality; and

c. The IP devotes sufficient resources for the development, documentation and support of its quality control policies and procedures.

13. Any person or persons assigned operational responsibility for the quality control system by the IP, should have sufficient and appropriate experience and ability, and the necessary authority, to assume that responsibility.

14. Sufficient and appropriate experience and ability enables the responsible person or persons to identify and understand quality control issues and to develop appropriate policies and procedures. Necessary authority enables the person or persons to implement those policies and procedures.

ETHICAL REQUIREMENTS

15. The IP should establish policies and procedures designed to provide it with reasonable assurance that the IP and IP's personnel comply with relevant ethical requirements as has been notified by IBBI/ IPA and others as applicable.

16. Some of the ethical requirements for IPs have been prescribed under Code of Conduct as per First Schedule of IBBI (Insolvency Professionals) Regulations, 2016. Such requirements have been categorised into areas of:

a. Integrity and Objectivity;

b. Independence and impartiality;

c. Professional competence;

d. Representation of correct facts and correcting misapprehensions;

e. Timeliness;

f. Information management;

g. Confidentiality;

h. Occupation, employability, and restrictions;

I. Remuneration and costs; and

j. Gifts and hospitality;

17. Besides, there may be additional or complementary ethical code that may be prescribed by IBBI/IPA including by way of non-mandatory guidance, which can act as reference for ensuring ethical conduct of IP and IP's personnel.

18. The policies and procedures on ethics should emphasize the fundamental principles, which are reinforced in particular by (a) the leadership, (b) education and training, (c) monitoring, and (d) a process for dealing with non-compliance. Given the criticality of 'Independence' during insolvency engagements, it is addressed separately hereinafter. These paragraphs need to be read in conjunction with the Code of Conduct.

Independence

19. The IP should establish policies and procedures designed to provide it with reasonable assurance that the IP, its personnel and, where applicable, others subject to independence requirements (including experts, employed by the IP), maintain independence wherever required. Such policies and procedures should enable the IP to:

a. Communicate its independence requirements to personnel and, where applicable, to others (including experts, employed by the IP) subject to them; and

b. Identify and evaluate circumstances and relationships that create threats to independence, and to take appropriate action to eliminate those threats or reduce them to an acceptable level by applying safeguards, or, if considered appropriate, to withdraw from the engagement in accordance with law as applicable.

20. Such policies and procedures should require:

a. Personnel to provide the IP with relevant information about client engagements, including the scope of services, to enable the IP to evaluate the overall impact, if any, on independence requirements;

b. Personnel to promptly notify the IP of circumstances and relationships that create a threat to independence so that appropriate action can be taken; and

c. The accumulation and communication of relevant information to appropriate personnel so that:

i. The IP and its personnel can readily determine whether they satisfy independence requirements;

ii. The IP can maintain and update its records relating to independence; and

iii. The IP can take appropriate action regarding identified threats to independence.

21. The IP should establish policies and procedures designed to provide it with reasonable assurance that it is notified of breaches of independence requirements, and to enable it to take appropriate actions to resolve such situations. The policies and procedures should include requirements for:

a. All who are subject to independence requirements to promptly notify the IP of independence breaches of which they become aware;

b. The IP to promptly communicate identified breaches of these policies and procedures to:

i. The personnel of IP who, needs to address the breach; and

ii. Other relevant personnel and those subject to the independence requirements who need to take appropriate action;

c. Prompt communication to the IP, if necessary, by such personnel of the actions taken to resolve the matter, so that the IP can determine whether it should take further action.

22. An IP receiving notice of a breach of independence policies and procedures promptly communicates relevant information to personnel, as appropriate and, where applicable, experts contracted by the IP and its personnel (if any), for appropriate action. Appropriate action by the IP and personnel includes applying appropriate safeguards to eliminate the threats to independence or to reduce them to an acceptable level or withdrawing from the engagement in accordance with law as applicable. In addition, the IP provides independence education to personnel who are required to be independent.

23. At the beginning of professional engagement assignment, the IP should obtain written confirmation of compliance with its policies and procedures on independence from all personnel required to be independent with a declaration that if the independence is ever breached during the engagement the same shall be communicated to IP immediately.

24. Written confirmation may be in paper or electronic form. By obtaining confirmation and taking appropriate action on information indicating non-compliance, the IP demonstrates the importance that it attaches to independence and makes the issue current for, and visible to, its personnel.

HUMAN AND TECHNOLOGICAL RESOURCES

25. The IP should establish policies and procedures designed to provide it with reasonable assurance that it has sufficient personnel with the capabilities, competence, and commitment to ethical principles necessary to perform its engagements in accordance with professional standards, best-practices, regulatory and legal requirements, and to enable the IP to complete the assignment that are appropriate in the circumstances.

26. The IP should establish policies and procedures designed to provide it with reasonable assurance that it has sufficient adoption of technological solutions necessary to perform its engagements in accordance with professional standards, best-practices, regulatory and legal requirements, and to enable the IP to complete the assignment that are appropriate in the circumstances.

27. Such policies and procedures address the following personnel issues:

(a) Recruitment;

(b) Performance Evaluation;

(c) Capabilities;

(d) Competence;

(e) Career development;

(f) Promotion;

(g) Compensation; and

(h) Estimation of personnel needs.

28. Addressing these issues enables the IP to ascertain the number and characteristics of the individuals required for the engagements. The IP's recruitment processes include procedures that help the IP select individuals with integrity as well as capacity and to develop the capability or competence necessary to perform the IP's work.

29. Capabilities and competence are developed through a variety of methods, including the followings:

a. Professional education.

b. Continuing professional development, including training.

c. Work experience.

d. Coaching by more experienced staff, for example, other members of the engagement team.

…to be continued.

IIIPI News

IIIPI jointly with British High Commission organized a Workshop (online) on “Cross Border Insolvency” on October 21, 2022.

Caption: Webinar on "Evolving Jurisprudence Under IBC (Important Case Laws)", December 30, 2022.

Webinar on "Guidance On Ethics And Quality Control In Insolvency Profession" on December 16, 2022.

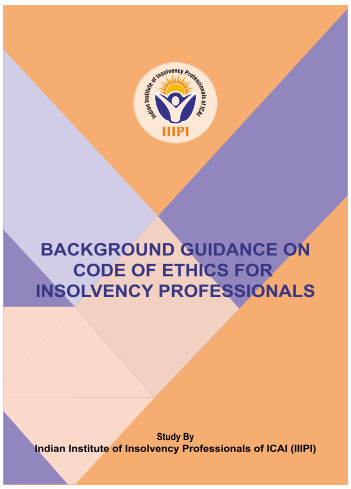
Webinar on “Value Maximization Strategies Under IBC” organized by IIIPI on November 04, 2022.

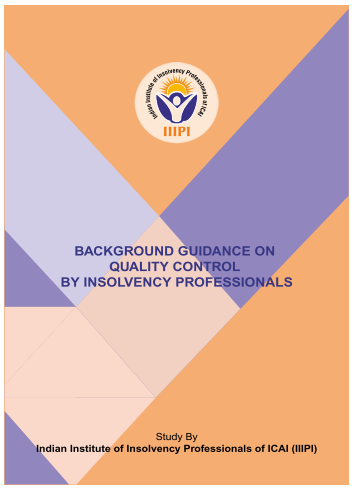
IIIPI in association with NeSL organized a Webinar on 'Office Infrastructure and Usage of Technology by IPs' on December 09, 2022.

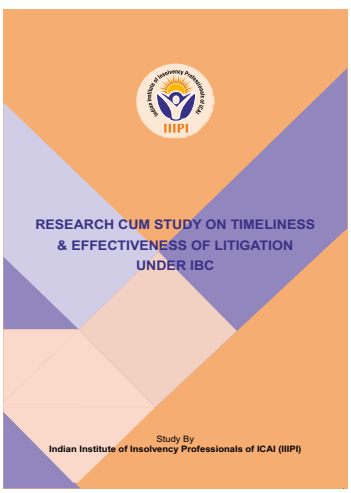
Industry Sector Training (Power and Iron & Steel) organized by IIIPI in association with ICRA on November 12, 2022.

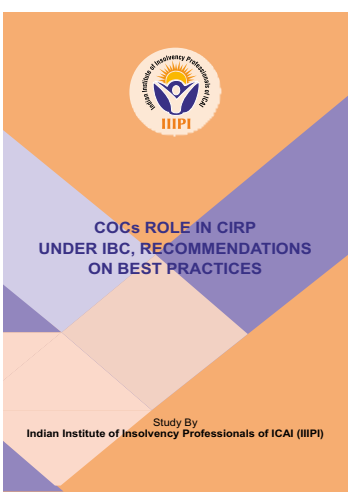
IIIPI's PUBLICATIONS

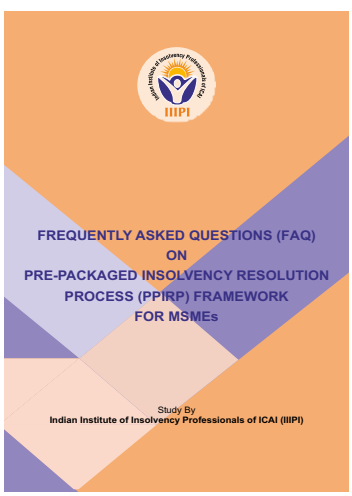
IIIPI has published nine research publications based on the Reports submitted by various Study Groups. The Study Reports of some other Study Groups are under process. The soft copies (downloadable PDF) of all these publications are available on IIIPI website (https://www.iiipicai.in/publications/).

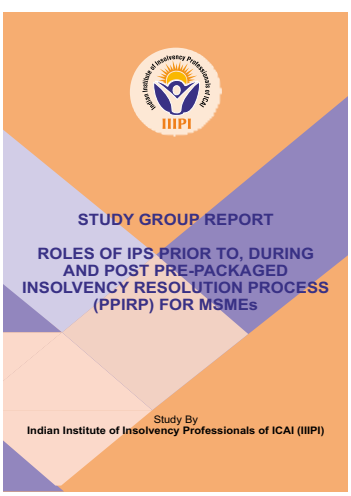


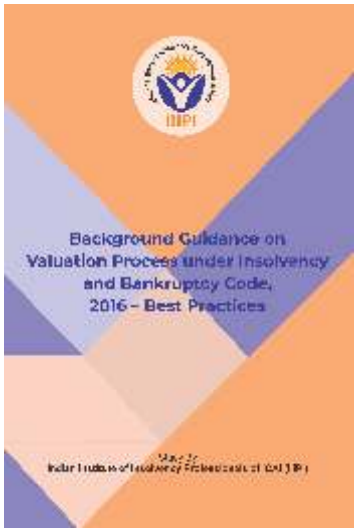


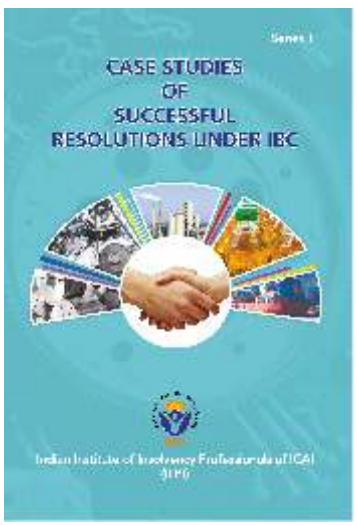












Weekly Publications

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

Media Coverage

Services

Indian Institute of Insolvency Professionals of ICAI (IIIPI)

ICAI Bhawan, 8th Floor, Hostel Block, A-29, Sector-62,
NOIDA, UP – 201309

Office Hours: 09:30 AM to 06:00 PM (Monday to Friday), except closed holiday.
(Presently the office is following staggered timing due to COVID19, which are;
I. 9:00 am to 5:30 pm, ii. 9:30 am to 6:00 pm, iii. 10:00 am to 6:30 pm)

Contact Details

☎ **0120-2975680/81/82/83**

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5	Monitoring	ip_monitoring@icai.in iiipi_monitoring@icai.in
6	Publication	iiipi.pub@icai.in
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8	CPE	iiipi.cpe@icai.in
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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

Help Us to Serve You Better

Get Your Articles/ Case Studies Published in The Resolution Professional

The Resolution Professional, quarterly research journal of IIIPI, is the first-ever peer-reviewed refereed research journal of its kind with a focus on the insolvency ecosystem in India. The journal is aimed at providing a platform for dissemination of information and knowledge-sharing on the IBC ecosystem and developing a global world view among Insolvency Professionals (IPs) and other stakeholders. IPs will get 8 CPE hours for each published article or case study in journal. Besides, as a token of appreciation, IIIPI pays ₹10,000 to the author for each article or case study published. The guidelines for submitting the articles are available on IIIPI website (https://www.iiipicai.in/ invitation-to-write-articles/). You can read published articles/ case studies of previous editions of *The Resolution Professional* on IIIPI website under Resources (e-Journal) (https://www.iiipicai.in/journal-of-iiipi/).

For further details, please write to us at: *iiipi.journal @icai.in*

Peer Review Mechanism

IIIPI has recently launched the Peer Review Framework and online-portal for the usage by IIIPI's members. Peer Review refers to an examination of a professional's performance or practices in a particular area by other experienced professionals in the same area. The Peer Review Process attempts to provide a comprehensive framework to benchmark the professional services under review to help improving performance, decision making, adoption of best practices and standards including ethics, compliance with relevant laws, established standards and principles. This Peer Review Mechanism is a proactive, and pre-emptive measure by IPs to enthuse confidence in stakeholders and regulator. The Peer Review Portal can be accessed on IIIPI website under e-Services (iiipicai.in).

For further details, please write to us at: *iiipi.peerreview @icai.in*

Discussion Forum

As a capacity building measure for our professional members, IIIPI has introducing a web-based 'Discussion Forum' (or query platform) for exclusive usage by IIIPI's members to raise and respond to the queries of professional nature under the broad headings of – (1) CIRP, (2) Liquidation, (3) Voluntary Liquidation, (4) Personal Guarantor to Corporate Debtor, and (5) Pre-Pack. You can access the Discussion Forum on IIIPI under e-Services at *https://forum.iiipicai.in/member*

Frequently Asked Questions (FAQs) on Grey Matters under IBC, 2016

IPs form a crucial pillar upon whom rests the effective, timely functioning as well as credibility of the entire edifice of the insolvency and bankruptcy resolution process. An IP must therefore be conversant with the processes and procedures that must be followed under the IBC.

For developing the FAQs in consultation with the IBBI in respect of grey areas under the IBC, IIIPI has invited form IPs their issues/ queries under the broad headings – (1) CIRP, (2) Liquidation, (3) Interface with Adjudicating Authority, (4) Interface with IBBI, (5) Voluntary Liquidation, (6) Individual Insolvency, and (7) Pre-Packaged Insolvency Resolution Process.

Your responses through the Google Form (which has been circulated over email) will help us in strengthening the insolvency ecosystem.

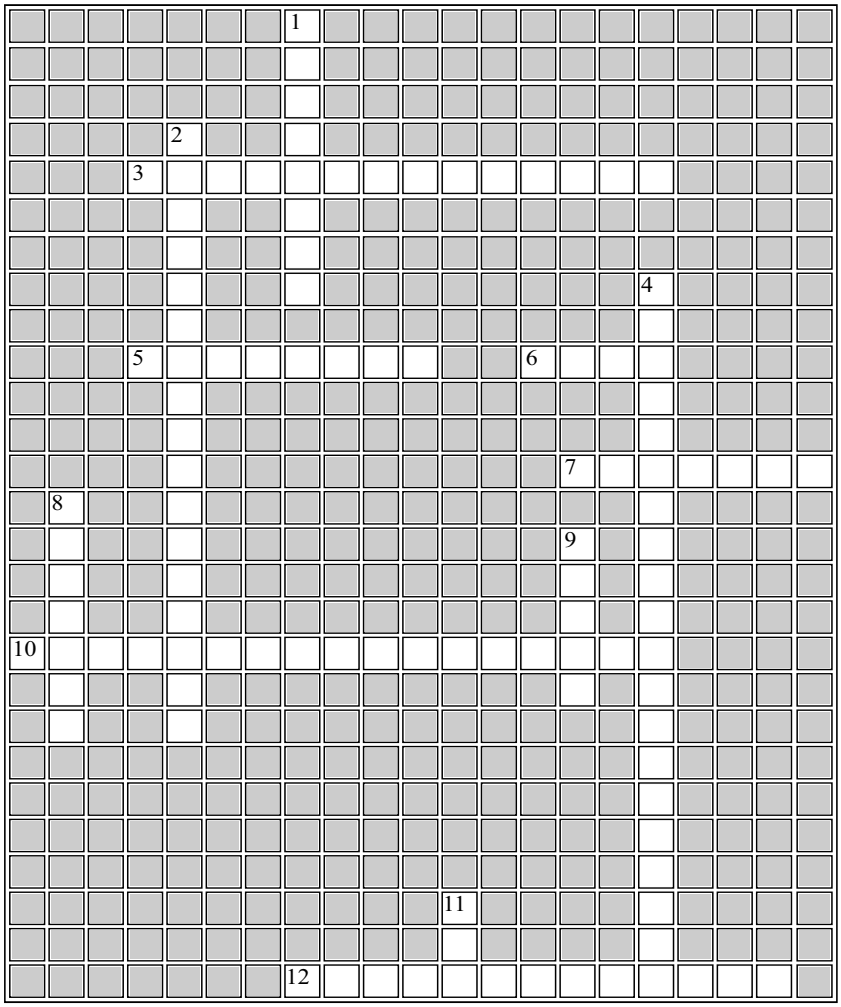
https://forms.gle/cfDpwJg9H4sRSxW89

Suggestions for Improving Functioning of IIIPI

Please write to us at *iiipi.helpdesk@icai.in* on any issue or suggestion for improving the functioning of IIIPI across different aspects.

Looking forward to working together for further strengthening the IBC ecosystem.

IBC Crossword



Across

3. Liquidator shall submit _____within fifteen days after the end of every quarter during which he acts as liquidator.
5. A creditor may withdraw or vary his claim under Section 38 within _____ days of its submission.
6. If a Corporate Debtor has no financial creditors, then the Code provides that the _____ will specify the manner of constitution of the committee.
7. Application for recognition as an IPE to IBBI is filed along with an application fee of____ rupees.
10. What a Resolution Professional is to a Corporate Insolvency Resolution Process (CIRP), so is a _____ to a bankruptcy process.
12. The voting rights of a person who is a financial and operational creditor shall be decided on the basis of_____.

Down

1. Fine for transactions defrauding creditors shall not be less than one lakh rupees, but may extend to _____rupees.
2. The Insolvency and Bankruptcy Code, 2016 has adopted _____ model for Corporate Insolvency Resolution Process (CIRP).
4. Financial creditors cannot secure their own dues at the cost of statutory ones owed to a government authority. This ruling of the SC is related to_____(2022).
8. A creditor can initiate Pre-Packaged Insolvency Resolution Process (PPIRP) when the debtor company has defaulted at least ₹_____.
9. The liquidator shall constitute a consultation committee within _____ days from the liquidation commencement date.
11. Operational creditors are entitled to receive notice of meetings of CoC if their aggregate dues are not less than_____% of the total debts of the corporate debtor.

Answer Key: IBC Crossword, July 2022

1. Seven	2. Voluntary Liquidation	3. Three	4. 12 YEARS	5. 180
6. Hyderabad	7. Chapter 15	8. 90	9. Wave Megacity	10. Ayan Mallick
11. Jet Airways	12. Bhupender Yadav	13. Section 20	14. 196 (1)	

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.
  - A brief profile of the author, e-mail ID, postal address and contact number along with his passport size photograph and declaration confirming the originality of the article as mentioned above should be enclosed along with the article.
  - The article can be sent by e-mail at **iiipi.journal@icai.in**
  - 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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