RNI Reg. No. DELENG/2021/81442
Volume 04, Issue 02, Pages 92, April 2024 I Quarterly | ₹100

# 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)

## PREPARING FOR NEW AGE IBC

# 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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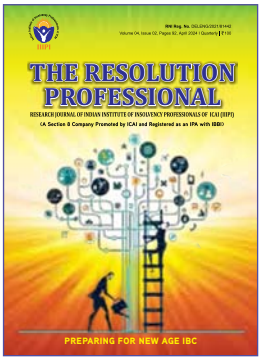
**Imprint Line:** Printed and published by Rahul Madan on behalf of Indian Institute of Insolvency Professionals of ICAI (IIIPI) and printed at VIBA Press Pvt. Ltd., C-66/3, Okhla Industrial Area, Phase-II, New Delhi - 110020 and published at ICAI Bhawan, P.O. Box No. 7100, Indraprastha Marg, New Delhi – 110002., **Editor: Rahul Madan**

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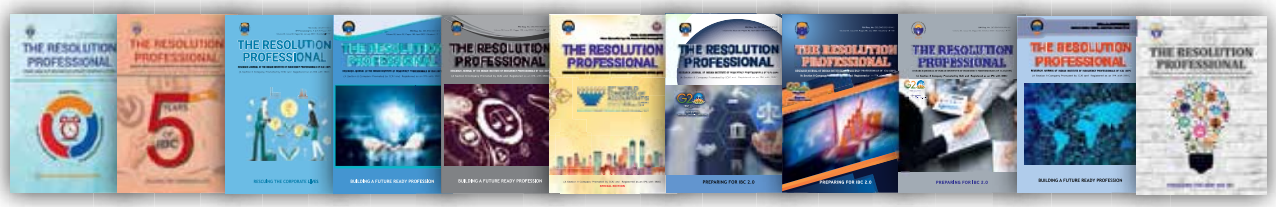


## President & Vice President of ICAI for the Year 2024-25

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# Message from Chairman, Editorial Board

**CA. Ranjeet Kumar Agarwal**
President, ICAI
Chairman, Editorial Board-IIIPI

*Dear Professional Colleagues!*

The International Monetary Fund (IMF) in its World Economic Outlook, April 2024 has projected India to grow with a strong growth rate of 6.8% in 2024 owing to the robustness reflecting continuous strength in domestic demand and a rising working age population. Furthermore, India's share in the aggregate GDP of the world in the year 2023, has been 7.6%, which depicts the significant role of our country on the global map.

The implementation of the IBC in 2016 signifies a landmark shift in restructuring institutional frameworks, enabling dignified exit for insolvent firms and fostering a resilient economic environment conducive to India's growth and development. Renowned economist and Nobel Laureate Joseph Stiglitz emphasizes that bankruptcy is an essential part of capitalism. Ensuring a graceful exit for businesses during challenges is an important factor to ensure economic prosperity.

IIIP of ICAI has been playing a proactive role in strengthening the insolvency ecosystem in the country through capacity building, policy advocacy, research, and innovations; and created several firsts which includes Peer Review Mechanism, Mentorship Program, IIIPI Research Project Scheme etc. Besides enhancing the insolvency regime in India to the global standards, IIIPI's initiatives helped in winning over the confidence of Insolvency Professionals (IPs) and retaining the position of the largest Insolvency Professional Agency (IPA), since its inception by the ICAI in 2016. Presently, about 62% of IPs having Authorization for Assignment (AFA) are affiliated to IIIPI which includes 1163 CA, 20 CS, 15 CMA and 198 other Professionals.

As per the IBBI data, 891 resolution plans were approved till 31st December 2023, through which creditors realized ₹3.21 lakh crore as against the total claims of the creditors worth ₹10.07 lakh crore, that is ~169% of their liquidation value. The IBC processes have also catalyzed better financial management by corporate debtors, proactive decisions to avoid financial crisis, which has positively impacted the entrepreneurship in India. However, a lot needs to be done in the IBC ecosystem to minimize haircuts and ensure better realization to creditors. In this endeavor, the words of the former President of India, Dr. A. P. J. Abdul Kalam - excellence is a continuous process and not an accident- will continue to motivate us for further excellence.

Resolving a business from financial distress requires active involvement of various stakeholders right from management to professionals working on the ground to entrepreneurs to creditors to policy makers and all. IIIPI journal 'The Resolution Professional' has been a vibrant platform for knowledge dissemination. As we navigate through these transformative times, let us continue to leverage the power of informed discourse and collaborative action to shape a brighter future for our nation.

*Wish you all the best.*

**CA. Ranjeet Kumar Agarwal**
President, ICAI
Chairman, Editorial Board-IIIPI

# Message from Chairman, Governing Board-IIIPI

**Dr. Ashok Haldia**
Chairman, Governing Board- IIIPI

*Dear Member !*

IBC has progressed over last six years with immense success and is slated for directional change to address emerging challenges and experience gained so far. The theme of the current edition of the Journal 'Preparing for new age IBC' focuses on the emerging trends of IBC version 2 and challenges and opportunities for IPs arising from them. Needless to say, IIIPI is preparing itself to assume greater responsibility as a largest IPA and to equip IPs to be ready in responding to changing dimensions of IBC.

**Emerging IBC Version 2**

Government and IBBI are learnt to have prepared draft frameworks for Cross-Border Insolvency and Group Insolvency, which are expected to be rolled out in future. By codifying the rights and responsibilities of Indian stakeholders in foreign territories and vice versa, these frameworks are expected to provide a further boost to the Indian economy and IBC ecosystem. Besides, full-fledged individual insolvency and Pre-Pack insolvency for big corporates may follow which will be helpful in value maximization and rescue of financial stressed individuals and corporates.

Further an Expert Committee constituted by the IBBI has recommended for the introduction of mediation as a complementary mechanism for resolution of disputes. International experiences also suggest significant role the mediation plays in the insolvency processes. Speaking at the International Conference on "Cross-Border and Group Insolvency in India: Challenges and Opportunities" on April 13, Shri Sudhaker Shukla, WTM-IBBI said, "We are trying to see India becoming the hub of arbitration in Asia for which you all need to contribute proactively". I also see a huge opportunity for insolvency professionals for arbitration at the pre-admission, conducting the process and also in the post-insolvency phase.

Amendments in the IBBI Regulations to incorporate Project-Wise CIRP and clarifying permissibility of an RP to be part of the monitoring committee responsible for implementation of the Resolution Plan, will further expand the role of IPs. RPs are now also allowed to resign subject to certain conditions.

**IIIPI's Preparedness to Respond as IPA and Equip its Members**

IIIPI has been actively engaged in policy advocacy with RERA, IBBI, MCA and other stakeholders and in raising concerns of IPs in compliance of IBC and efficient discharge of their responsibilities. Series of interactive sessions have been held in last few months with the top brass of IBBI.

**Initiatives by IIIPI**

In the wake of expected futuristic dispensations, IIIPI has been playing its role proactively in terms of capacity building, research, and policy advocacy. It has scheduled new Executive Development Programs (EDP) and capacity building programs on themes like i.e., Cross-Border & Group Insolvency, Mediation, Individual Insolvency (PG to CD) and Real Estate Resolutions. These initiatives, we hope, will be helpful for our professional members in preparing themselves in advance for future challenges and provide them an edge when these frameworks are rolled out.

**Building Brand of IP and IPEs**

IIIPI has decided to promote peer-review mechanism

for IPEs as juristic IPs including support services such as managing end-to-end process comprising support in claim verification, managing operation of corporate debtor, evaluation of resolution plan, etc., provided by them to IPs. We have also decided to showcase the names of IPs and IPEs who have successfully completed peer-review on IIIPI website and journal.

IIIPI has developed an "Insolvency Process Maturity Model" (IPMM) to enable IPs to carry out self-assessment of their preparedness, capability, and competence in handling engagements under the IBC. The IPMM has been structured on a quantitative scoring system and enables IPs to score themselves on well-defined parameters, initiate relevant actions and track quality over time. Surely, this will help in branding of IPs and IPEs and in increasing confidence of the stakeholders in them.

**Policy Advocacy and Simplifying CIRP**

IIIPI is also working with IBBI for simplification of various compliances under the IBC and bring more efficient and efficacy into the CIRP system. These include revamping of CIRP forms, creditors' claim forms and removing duplicity in Disclosure forms, etc.

Study groups have been constituted recently, wherein outcomes shall be shared with IPs and stakeholders soon:

1) Improving real estate resolutions and coordination with RERA. Several recommendations for amendment in IBC and RERA, and till then, on administrative measures for expeditious resolution and address concerns of home buyers. The report has been highly appreciated by All India Forum of RERA Chairmen during a presentation to RERA authorities of various States. Highlights of the report are included in this edition (refer page no.76).

2) A template facilitating AAs in forming opinion on avoidance transactions. The same was presented to chairman, members and other officers of IBBI. The said template shall be shared with members for adopting as best practice, soon. Highlights of the template are contained inside this edition. (refer page no. 77).

3) Removal of Duplicity and Redundancy of compliances by IPs. The exercise is being carried out to identify the areas of duplicity prevalent in various compliances like CIRP/Liquidation/ Disclosure forms being submitted by IPs to IBBI and IPAs and propose suggestions to remove such duplicity or redundancy without compromising the quality.

**Reduction in Fee for IPs**

In order to mitigate the hardship being faced by IPs not having AFA, IIIPI has rationalised and reduced membership fee w.e.f. 01st April 2024 for both – Insolvency Professionals (IPs) and Insolvency Professional Entities (IPEs) by 50%, while introducing AFA fee to the same extent.

**Contribute articles to the Journal**

IIIPI journal – The Resolution Professional, is increasingly becoming popular among stakeholders. I express my sincere gratitude to Shri Sudhaker Shukla, Whole Time Member (WTM)-IBBI, for carving out time to provide his futuristic views on the IBC, which is being published in the form of an interview in this edition of the journal. I also express my sincere gratitude to authors who have contributed articles and case study for this edition.

**Let us Continue to Perform Better and Better**

IIIPI of ICAI and its member IPs have over the years proved their capacity and competence to deliver best despite the challenges and continuously evolving IBC. This puts even a greater responsibility on us to continue to do better and better.

Warm Regards

**Dr. Ashok Haldia**
Chairman, Governing Board-IIIPI

# From Editor's Desk

*Dear Member,*

The IBC ecosystem in the next phase of evolution, may witness rollouts of Cross-Border Insolvency and Group Insolvency frameworks, considered critical to resolve complex corporate structures spanning across different territories and jurisdictions. To deliberate on such futuristic dispensations, IIIPI jointly with Foreign, Commonwealth & Development Office- United Kingdom (UKFCDO), IBBI and ICAI organized a day-long International Conference on "Cross-Border and Group Insolvency in India: Challenges and Opportunities" on April 13, 2024 in New Delhi which was graced by Shri S. J. Mukhopadhaya, Former Judge, the Supreme Court of India & Former Chairperson-NCLAT, as the Chief Guest. In the present edition, we are publishing 'key takeaways' from the addresses of dignitaries of the international conference for greater benefits of IPs and other stakeholders.

IBBI, the regulator of the IBC regime in India has been endeavouring and innovating to find solutions to various challenges and implementing them in the greater interest of stakeholders. In this edition, we are carrying an exclusive interview of Shri Sudhaker Shukla, Whole Time Member (WTM) - IBBI. In this interview he has provided insights on various contemporary issues and shared his futuristic vision to further strengthen the insolvency ecosystem in the country.

Besides, this edition has various Research Articles on contemporary topics and a Case Study on 'Successful Insolvency Resolution of Emerald Lands (India) Private Limited.'

In the opening article 'Revolutionizing Corporate Insolvency Resolution in Real Estate: The Emergence of Reverse CIRP in India', the author provides an insightful overview of Reverse CIRP including its jurisprudence, advantages, and shortcomings in implementation. The second article 'Maximize Gains in Real Estate Resolutions with Project-Wise CIRP' presents a detailed analysis of Project-Wise CIRP in the light of developing jurisprudence and initiatives of the IBBI. It also presents pross and cons of this judicial innovation and the need for amendments in the insolvency framework. In the third article 'Employees and Workmen Benefits under the IBC', the author, through hypothetical scenarios, has elaborated various approaches to deal with employees' dues in the light of relevant judgements passed by the Hon'ble Supreme Court, NCLAT and NCLTs. Besides various suggestions for effectively dealing with dues of employees, the author has also made recommendations for amendments in the pertinent laws to incorporate jurisprudence developing around the issue for better clarity to stakeholders. The concluding article, 'Extinguishing Guarantees: Dilemma of Dissenting Financial Creditors' discusses the dilemma and possible way outs for dissenting creditors, if the CoC, in exercise of its commercial wisdom, approves the Resolution Plan extinguishing Personal Guarantor(s) to the Corporate Debtor from all its liabilities.

Under 'Help Us to Serve You Better' we have provided extensive information to Insolvency Professional (IP) members regarding GRC and DC proceedings.

Besides, the journal also contains its regular features, i.e., Legal Framework, IBC Case Laws, IBC News, Know Your Ethics (Avoidance Transactions), IIIPI News, IIIPI's Publications, Media Coverage, Services, and Crossword.

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

Wish you a happy reading.

**Editor**

# As we move forward, stakeholders can expect a thoughtful and consultative approach to the development of the guidelines defining the Code of Conduct for CoC: Shri Sudhaker Shukla, WTM, IBBI

*The intention is not to impose stringent rules that might constrain the commercial judgements of the CoC but to provide a set of principles that guide its actions, ensuring that decisions are made in a manner that is fair, transparent, and in the best interest of all parties involved.*

**Shri Sudhaker Shukla**
Whole Time Member (WTM)
Insolvency and Bankruptcy Board of India (IBBI)

*Shri Sudhaker Shukla joined the Insolvency and Bankruptcy Board of India (IBBI) as a Whole Time Member (WTM) on 14th November 2019. He is currently looking after Research and Regulation Wing comprising Corporate Insolvency, Corporate Liquidation (including Voluntary Liquidation), Individual Insolvency and Individual Bankruptcy, Research & Publication, Data Management & Dissemination and Advocacy. In addition, he is also handling Human Resources, National Insolvency & Graduate Insolvency Programmes, Continuing Professional Education and Knowledge Management & Partnership divisions in the IBBI.*

*Shri Shukla served as a member of the Indian Economic Service (IES) for over 34 years in various capacities across Ministries and Departments of the Government of India. His last assignment was as Chief Economic Adviser in the Ministry of Rural Development. Earlier, he served as Adviser in African Development Bank. He has wide experience in dealing with various regulations.*

*In an Exclusive Interview with IIIPI for The Resolution Professional, Shri Shukla shared his views on various aspects of the IBC particularly resolution of real estate sector companies, Committee of Creditors, etc.* ***Read on to know more....***

**IIIPI: In the past over seven years, the IBC (Insolvency and Bankruptcy Code, 2016) regime in India has witnessed several highs and lows and achieved many accolades. How would you like to summarize the journey so far?**

**Shri Shukla:** The journey of the Insolvency and Bankruptcy Code (IBC/ Code), 2016, over the past seven-plus years has been both challenging and rewarding, marking a significant shift in India's approach towards 'freedom to exit' which is a necessary pre-condition for fostering risk taking society. In addition, the IBC is envisioned as a transformative tool designed to streamline and expedite the insolvency process, thereby inculcating a culture of financial discipline in the country. It is reported in large number cases, corporate debtors are preferring to settle before a credible threat of IBC being invoked and over 27000 cases involving amount of about ₹ 10 Lakh crores have been withdrawn before admission; this is a conclusive pointer towards behavioural change among the debtors as "debtors' paradise" is well and truly lost.

It is being duly acknowledged that the IBC has fundamentally altered the creditor-debtor relationship, bringing about a paradigm shift where the control shifts from the debtor to the creditor, thereby instilling a greater sense of accountability and discipline in financial dealings. The accomplishments have not only bolstered investor confidence but have also contributed to the stabilization of the banking sector by reducing non-performing assets. With net NPA falling below 1%, it can be safely concluded that 'twin balance sheet problem' is non-existent now.

With focus on reorganization and resolution, IBC showcases significant departure from earlier insolvency regimes where focus was primary on recovery. In this context, 2023 has been the watershed year as 268 resolutions were approved in the calendar year 2023, which depicts significant upswing in comparison to earlier years. With over ₹ 72,000 crore as realizable

amount in 2023, percentage of realization to the claims works out to be about 36%. Results for the financial year 2023-24 depicts similar buoyancy as till February 2024, 250 cases have already yielded resolution: with 4 weeks to go, in all likelihood, resolutions will be setting a significant landmark. Furthermore, during April 2023 to February 2024, 539 corporate insolvency resolution process (CIRPs) have been closed as going concern and liquidation orders were passed in 405 cases. Thus, going concern to liquidation, ratio works out to be 133 %. This literarily debunks the hypothesis that IBC is pushing more and more corporate debtors towards liquidation.

> **"During April 2023 to February 2024, 539 have been closed as going concern and liquidation orders were passed in 405 cases. Thus, going concern to liquidation, ratio works out to be 133%."**

On the accolades front, the global recognition of our efforts in improving the insolvency framework is a testament to the robustness and effectiveness of the IBC. International forums and financial institutions have lauded India for its rapid strides in reforming the bankruptcy landscape, which has been reflected in our improved rankings in ease of doing business indices.

However, the journey has not been without challenges. The implementation of the IBC has faced several teething issues, including legal challenges, procedural delays, infrastructural constraints, and the need for constant amendments to address unforeseen complexities. The process has been a learning curve, requiring continuous adaptation and fine-tuning of the framework to align with the evolving economic landscape and stakeholders' expectations.

In summary, the journey of the IBC regime in India so far has been a blend of significant achievements and valuable learnings. As we move forward, our focus remains on enhancing the efficiency of the insolvency resolution process and making the ecosystem more inclusive and accessible.

**IIIPI: The demand is growing for industry specific resolution frameworks rather than following "one size does not fit all" approach, particularly in 'real estate sector'. Moreover, some provisions of Real Estate Regulatory Authority (RERA) seem to be overlapping with the IBC. How, in your view, these wrinkles can be smoothened on the way to alleviate concerns of homebuyers who invest their hard-earned money in housing projects?**

**Shri Shukla:** At, the Insolvency and Bankruptcy Board of India (IBBI), we recognise the unique sector specific challenges, and several steps are on anvil to address them. To foster a sense of sector specific specialization, IBBI website displays information regarding insolvency professionals (IPs), category-wise, in terms of assignments handled. Further, in the calendar year 2023-24, 12 amendments to the regulations and model bye laws were carried out thereby, effectuating 86 changes in the regulatory framework. These interventions, in general, reflect sand-box approach under which apart from targeting process efficiency, several sector specific steps have been taken.

Real estate sector peculiarities create unique challenges in insolvency cases. In this segment, on one hand allottees (homebuyers) often prioritize property possession over financial settlements and on the other, divergent interests between allottees and financial creditors like banks complicate resolutions. The valuable insights gathered from the Amitabh Kant Committee's recommendations, and the Colloquium on the Functioning and Strengthening of the IBC Ecosystem held during November 2022 highlight key areas for reform and improvement, focusing on ensuring the efficacy of insolvency processes for real estate projects. Further, a Study Group was constituted by Indian Institute of Insolvency Professionals of ICAI (IIIPI) which has submitted its report, titled, 'Improving Real Estate Resolutions under IBC and Coordination with RERA'. The report provides a well-researched framework and will serve better in tackling the issues for resolution of real estate companies.

The initiatives like implementation of project wise project-wise CIRPs and reverse CIRPs by the Adjudicating Authority (AA) are pivotal steps towards a more effective resolution mechanism tailored to the real estate sector's complexities. The recent regulatory reforms, like the clarification regarding invitation of separate resolution plan for each project and separate bank accounts for each project enhance the legal framework in this regard.

Moreover, the exclusion of property in possession of homebuyers from the liquidation estate and the emphasis on allowing homebuyers to play a more significant role in the resolution process are critical for safeguarding their interests. These measures not only address the immediate concerns of homebuyers who invest their life savings in properties but also contribute to the overall stability and trust in the real estate market.

The above-mentioned regulatory amendments and clarifications aim to bridge the gaps between RERA and IBC, ensuring a harmonious and effective regulatory framework that adequately addresses the unique challenges of the real estate sector. As we move forward, it is imperative to continue engaging with stakeholders, including homebuyers, developers, financial institutions, and regulatory bodies, to refine these proposals further and ensure they effectively address the sector's needs.

**IIIPI: The discussion on 'Mediation process' is gaining momentum as a complementary mechanism for resolution of disputes around the processes under IBC. Recently a committee constituted by IBBI has released its recommendations on the subject. What, in your view, does the future hold for adopting 'Mediation process' actively within the scope of IBC?**

**Shri Shukla:** A famous quote of Abraham Lincoln "Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time" sums up the benefits of out of court restructuring. Echoing similar sentiments, Harvard Professor Frank Sander introduced the "multi-door courthouse" and encouraged looking for "alternative doors" which would lead to the same result in terms of efficiency gains, albeit with lessor cost and time. The Code has no explicit mention of out of court work-outs or mediation, however, implicitly spirit is visible in large number of cases being withdrawn before admission, Section 12 A of the Code and cases settled through inherent power of the AA, too, have semblance of negotiations. To ward off eminent disastrous effects of COVID particularly on MSMEs, PPIRP (prepack) was notified with inherent scope of purposeful negotiation between debtors and creditors prior to admission. Furthermore, to remove the requirement of admission altogether and enhance the scope of the out of court work-outs, the Creditor Led Resolution Approach (CLRA) is under discussion.

**"Furthermore, to remove the requirement of admission altogether and enhance the scope of the out of court work-outs, the Creditor Led Resolution Approach (CLRA) is under discussion."**

In Modern times to keep pace with the global preference for out of court work-outs, the Government of India has taken several Legislative measures to promote Mediation in the Country. For instance, Section 442 of the Companies Act, 2013, provides for referral of company disputes to Mediation by the National Company Law Tribunal (NCLT) and Appellate Tribunal read with the Companies (Mediation and Conciliation) Rules, 2016 (notified on September 9, 2016). Further Section 18 of the Micro, Small and Medium Enterprises (MSME) Development Act, 2006 mandates conciliation when disputes arise on payments to MSMEs. More recently overarching Mediation Act has been notified which does not exclude IBC from the mediation framework.

As already mentioned, the Code does not contain any provision relating to mediation. However, the NCLT has been exercising inherent powers from time to time in cases where the creditors and suspended board members want to settle the matter after initiation. The NCLAT in the matter of Intec Capital Ltd. & Anr., December 6, 2019, allowed mediation plea by the Corporate Debtor and appointed Hon'ble Justice (Retd) A. K. Sikri as a mediator. Further, NCLT Bengaluru bench in the matter of Chemizol Additives Pvt Limited held that even the NCLT can invoke the power under Section 442 of the Companies Act, 2013 and refer the matter for mediation. However, consistent approach towards mediation is lacking across the jurisdictions of the AA.

The future of adopting a 'Mediation process' actively within the scope of the IBC looks promising and dynamic, based on the recent recommendations by the Expert Committee constituted by IBBI. The Committee's report underscores a forward-thinking approach by proposing the integration of mediation as a complementary mechanism for dispute resolution within the IBC framework. The mediation framework as recommended by the Expert Committee is designed to operate within the existing structure of the IBC, ensuring that the core objectives of time-bound reorganization and maximization of value are not compromised. The introduction of a voluntary mediation process, aligned

with the Mediation Act, 2023, represents a strategic move to enhance the efficiency and effectiveness of insolvency resolutions by providing parties with an autonomous 'out-of-court' option for dispute settlement. The phased implementation of voluntary mediation as envisaged by the Committee suggests a careful and balanced approach to integrating this mechanism into the IBC. This strategy allows for the preservation of the IBC's timelines while introducing a flexible and independent framework that can adapt based on implementational feedback.

> **"The Expert Committee constituted by IBBI provides a strategy to incorporate mediation process within the IBC that allows for preservation of the IBC's timelines while introducing a flexible and independent framework that can adapt based on implementational feedback."**

In essence, the future of mediation within the IBC context is set to offer a more nuanced, flexible, and efficient pathway for dispute resolution. This innovation not only aims to preserve the integrity and objectives of the IBC but also enhances the overall effectiveness of the insolvency resolution process, making it a highly anticipated development in the realm of insolvency law in India.

**IIIPI: The claw-backs under PUFE or Avoidance transactions so far, have been sub-optimal. Given the value maximizing potential of such proceedings, what more, in your opinion, could be done by the stakeholders to improve the outcomes?**

**Shri Shukla:** The effectiveness of clawbacks under Preferential, Undervalued, Fraudulent and Extortionate (PUFE) transactions within the framework of the IBC has indeed been a focal point for enhancing the value maximization potential of insolvency proceedings.

The effort to tackle avoidance transactions within the IBC has seen a significant level of activity, as evidenced by the applications filled and disposed of until December 2023. A total of 1,106 applications across various categories—Preferential, Undervalued, Fraudulent, Extortionate, and Combination transactions—were filed, involving a staggering amount of approximately ₹ 339,149.40 crore. Out of these, 255 applications have been disposed of, dealing with an amount of ₹ 47,345.66 crore and successfully clawing back ₹ 6,319.27 crore.

However, the path to identify and adjudicate these transactions is fraught with challenges, including the difficulty in obtaining reliable information and quality data from the corporate debtor or third parties. This is further compounded by physical access issues to underlying assets and a general time crunch that puts pressure on both IPs and Transaction Auditors, potentially compromising the thoroughness of their analysis. Additionally, the classification of transactions into multiple categories sometimes overlaps, leading to confusion and complicating the adjudication process. These hurdles underscore the complexities involved in navigating avoidance transactions and highlight the critical need for continued attention and refinement of processes to enhance the efficacy of the IBC's mechanisms in this area.

The ruling in Venus Recruiters Private Limited Vs. Union of India & Ors., posited that the approval of a resolution plan by the AA effectively ends the CIRP, thus precluding the Resolution Professional (RP) from pursuing avoidance applications. This interpretation suggested that once the CIRP concluded with the approval of a resolution plan, the RP lost the authority to act further, including moving forward with avoidance applications. However, the Division Bench's decision in Tata Steel Vs. Venus Recruiters overturned this understanding by explicitly allowing for the pursuit of avoidance Applications even after the conclusion of the CIRP.

Recognizing this, the IBBI, in collaboration with the IIIPI and other IPAs, has been proactively working towards improving the outcomes of such proceedings. One significant initiative in pipeline is the development and dissemination of standardized templates for the documentation and filing of cases pertaining to avoidance transactions. This endeavour aims to streamline and simplify the process for stakeholders, thereby facilitating more informed and efficient decision-making. The creation of such templates will be a step towards addressing the challenges faced in the effective implementation of claw-back provisions under the IBC. By standardizing the documentation and filing process, the IBBI and IIIPI are making strides in reducing the complexities and ambiguities that may hinder the optimal realization of assets from avoidance transactions.

> **By standardizing the documentation and filing process, the IBBI and IIIPI are making strides in reducing the complexities and ambiguities that may hinder the optimal realization of assets from avoidance transactions.**

In sum, a multi-pronged approach involving enhanced education, regulatory support, and the adoption of international best practices could significantly contribute to improving the outcomes of clawbacks under PUFE or avoidance transactions, ultimately benefiting the insolvency resolution process and the stakeholders involved.

**IIIPI: An 'Integrated Software Solution' for the IBC ecosystem on the lines of MCA 21, for managing the processes, interfaces, and compliances, could go a long way in assuaging concerns of various stakeholders. How do you visualize the said solution upending the current way of working, while indicating the expected timeline for the same?**

**Shri Shukla:** The efficiency and efficacy of case management systems both at process level and judicial pronouncements in addressing the issues of delays is well known. The envisioned Integrated Software Solution for the IBC ecosystem, akin to MCA 21, symbolizes a transformative shift towards a more streamlined, efficient, and user-friendly process management system. The development of the iPIE (Integrated Technology Platform for IBC Ecosystem) project heralds this shift, aiming to significantly enhance digital process adoption and facilitate seamless information sharing among the critical pillars of the IBC ecosystem, including NCLT, NCLAT, MCA, IBBI, IU, and IPs.

The approach taken in the design and development of iPIE prioritizes user-centricity, modular architecture, and scalability, promising a robust and agile platform that adapts to the evolving needs of stakeholders. By addressing current challenges like manual data sharing and limited analytical insights, iPIE aims to provide operational excellence, enhanced security, and better decision-making capabilities. This integrated platform is expected to revolutionize the way stakeholders interact with the IBC ecosystem, offering a single source of truth, reducing redundancy, and improving the user experience across different interfaces.

While the timeline for full implementation of iPIE is subject to the completion of developmental stages and stakeholder adoption, the progress made so far suggests a promising future for the IBC ecosystem. The successful implementation of iPIE will surely result in a paradigm shift in how insolvency and bankruptcy processes are managed in India, setting a benchmark for digitalization and efficiency in legal and financial ecosystems across the jurisdictions world over.

**IIIPI: Cross-border and Group insolvency are futuristic frameworks and may require significant amendments in law and regulatory regime. Request you to reflect upon the criticality and readiness of the ecosystem for introducing such frameworks.**

**Shri Shukla:** The contemplation of integrating Cross-Border and Group Insolvency frameworks into the existing IBC through jurisprudence, signifies an important step towards aligning India's insolvency regime with global practices. At policy level, to integrate the concepts and framework essential for addressing the complexities of modern business structures that often operate across national boundaries and within conglomerate setups, the Ministry of Corporate Affairs (MCA) had floated a discussion paper dated January 18, 2023, which underscores government's proactive approach in considering significant amendments to the IBC.

The criticality of introducing such frameworks cannot be overstated. They hold the potential to significantly improve the efficiency and effectiveness of the insolvency resolution process for entities with cross-border operations and group companies. This not only aligns with the principle of maximizing the value of assets but also ensures a holistic resolution approach that takes into account the interconnectedness of group entities and the intricacies of international insolvency.

The introduction of Cross-Border and Group Insolvency provisions will necessitate not only legislative amendments but also a bolstering of the regulatory regime, judicial infrastructure, and professional capacity. It involves harmonizing laws with international standards, such as the UNCITRAL Model Law on Cross-Border Insolvency and creating mechanisms for cooperation between Indian courts and foreign jurisdictions. While large number of jurisdictions across globe adopted cross border regime, however, on public policy exception issue there is large variation in approach. Further, there is no research work worth the name which can highlight potential benefits associated with the adoption of model laws in any jurisdiction. This necessitates a cautious

approach on the issue. Furthermore, the wisdom as emanating from the colloquium held in November 2022, highlights the importance of introducing Group Insolvency into the Code, prior to opening the Code to address Cross Border Regime.

Reflecting upon these considerations, it is clear that while the introduction of Cross-Border and Group Insolvency frameworks is a forward-looking initiative, it requires a phased, cautious and well-coordinated approach.

**IIIPI: The Delhi High Court, in a recent judgement has advised the Regulator, inter alia, to formulate a Code of Conduct for CoC. In the context of balancing interests of stakeholders, how important is the said development and what more can be expected on this front?**

**Shri Shukla:** The recent order of the Hon'ble Delhi High Court for the formulation of a Code of Conduct for the Committee of Creditors (CoC) is a significant development in the evolution of insolvency resolution processes under the IBC which otherwise, relies heavily on the 'commercial wisdom' of the CoC. This guidance from the judiciary underscores the importance of establishing clear ethical and procedural standards for the CoC, which plays a pivotal role in the decision-making processes affecting the resolution of insolvency cases.

While the specifics of the Code of Conduct are currently under study, it is anticipated that the guidelines will strike a delicate balance. The intention is not to impose stringent rules that might constrain the commercial judgements of the CoC but to provide a set of principles that guide its actions, ensuring that decisions are made in a manner that is fair, transparent, and in the best interest of all parties involved. This approach acknowledges the complexity of insolvency resolutions and the need for the CoC to navigate these challenges with a degree of flexibility, while also adhering to a standard that promotes confidence in the IBC process.

As we move forward, stakeholders can expect a thoughtful and consultative approach to the development of the guidelines defining the code of conduct.

**IIIPI: Insolvency Professionals are an important pillar of the IBC regime. What words of wisdom and guidance would you like to offer to IPs so that they could contribute their best in strengthening the IBC ecosystem?**

**Shri Shukla:** The IPs indeed form a cornerstone of the IBC regime, playing a pivotal role in navigating complex insolvency processes. Their expertise, integrity, and professionalism significantly contribute to the effectiveness and credibility of the IBC ecosystem.

In guiding IPs towards further strengthening the IBC ecosystem, it's crucial to emphasize the importance of continuous learning, upgradation of skill set and adaptation. The insolvency landscape is dynamic, with frequent legal updates, emerging market trends, and evolving best practices. IPs should commit to ongoing education and training to stay abreast of these changes, ensuring their approach remains both effective and compliant with current standards.

Ethical conduct and transparency must underpin every action taken by IPs. The responsibilities entrusted to them require a steadfast adherence to the highest standards of integrity and fairness. Upholding these principles not only enhances the trust stakeholders' place in the IBC process but also contributes to the overall reputation and reliability of the insolvency framework.

Collaboration and stakeholder engagement are also key areas where IPs can make a significant impact. By fostering open lines of communication and working cooperatively with all parties involved, IPs can navigate complex negotiations and resolutions more effectively. Understanding the perspectives and concerns of each stakeholder allows for more informed decision-making and can lead to outcomes that are more equitable and sustainable.

Lastly, IPs should embrace innovation and technology, which are increasingly becoming integral to the insolvency process. Leveraging digital tools and platforms can enhance efficiency, accuracy, and accessibility, streamlining processes and improving outcomes for all parties involved.

In conclusion, the role of IPs is critical to the success of the IBC regime. By focusing on continuous improvement, ethical practice, stakeholder collaboration, and technological adaptation, IPs can significantly contribute to the strength and effectiveness of the IBC ecosystem. Their dedication and expertise are essential in navigating the challenges of insolvency proceedings, ultimately fostering a more robust and resilient financial and corporate environment.

# Key Takeaways from Addresses of Dignitaries in the International Conference (Physical) on "Cross-Border and Group Insolvency in India: Challenges and Opportunities" organized in New Delhi on April 13, 2024

Indian Institute of Insolvency Professionals of ICAI (IIIPI) jointly with the Foreign, Commonwealth & Development Office- United Kingdom (UKFCDO), the Insolvency and Bankruptcy Board of India (IBBI), The Institute of Chartered Accounts of India (ICAI) and EY (Technical Partner) organized a conference (physical) on "Cross-Border and Group Insolvency in India: Challenges and Opportunities" in New Delhi on April 13, 2024.

Justice Shri S. J. Mukhopadhaya, Former Judge, Hon'ble Supreme Court of India & Former Chairperson, NCLAT graced the occasion as the Chief Guest and enlightened stakeholders with his vision on robust frameworks for Cross-Border and Group Insolvency.


As Guests of Honour, Shri Ashok Kumar Bhardwaj, Hon'ble Member (Judicial), NCLT; Shri Sudhaker Shukla, Whole Time Member-IBBI; CA. G. C. Misra, Chairman, Insolvency & Valuation Standards Board (I&VSB), ICAI and Dr. Ashok Haldia, Chairman, IIIPI also addressed the participants. In addition, insolvency experts, besides India, from the United Kingdom and Singapore also shared their views in the conference which was attended by IPs from across the country. For wider dissemination of this intellectual discourse, the key takeaways of the conference are presented as below:

**Welcome and Opening Address**
**Dr. Ashok Haldia**
Chairman, Governing Board-IIIPI

1. IIIPI's members, about 2,700 IPs, contribute in handling about 75% CIRP cases under the Insolvency and Bankruptcy Code, 2016 (IBC).
2. IIIPI has been proactively engaged in capacity building and policy advocacy on various aspects of the insolvency profession at all levels.
3. We work to bridge the gap among the law makers, stakeholders and IPs who work on the ground to implement the IBC.
4. Research & knowledge dissemination has been a top priority for us. So far, we have constituted about 20 study groups on various themes related to the insolvency ecosystem in India.
5. We have already conducted studies and made critical suggestions on Group Insolvency and Cross-Border Insolvency. Based on analysis of various international insolvency laws, these

studies suggested that India needs to contextualize UNCITRAL Model Law.

6. Under IIIPI Research Project Scheme we are working on 5 - 6 researh projects with the leading law institutions in the country and also sponsoring a PhD seat at NLU, Delhi.

7. In addition to the timeliness and realization by creditors, confidence of stakeholders in the system is of primary importance. We have developed a Code of Ethics for IPs which will help them to discharge their duties in the most rational way and avoid allegations.

8. We appreicate the tremendous contribution of Hon'ble NCLT and NCLAT in administration and interpretation of the law for various stakeholders. We are working to improve interface between adjudicating authorities and IPs. IIIPI, through a study, has also developed a template for reporting avoidance transaction.

9. IIIPI is also working on simplification of various processes under the IBC and bring more efficiency and efficacy into the system.

10. A study group constituted by the IIIPI has conducted significant interactions with homebyers and other stakeholders. We are working closely with the NCLT and RERA to enhance the efficiency and efficacy of the insolvency process in the real estate sector.

**Guest of Honour**
**CA. G. C. Misra**
Chairman
Insolvency & Valuation Standards Board
(I&VSB)-ICAI

1. Insolvency law is still evolving in the country. A lot has been done but a lot is yet to come.

2. Timeliness has been one of the major concerns under the IBC due to which several cases are pending and the spirit of the IBC, for which it was formed, has not been met in toto.

3. Avoidance Transaction is another area which requires focus. We hope this will be taken care of in the upcoming IBC 2.0.

4. IPs are a key stakeholder in the entire process of insolvency. There is a need for enhancement in capacity building for IPs because only regulations will not yield desired results.

5. IIIPI has taken up the task of automation of various processes under the IBC which is highly commendable.

6. Running a non-performing business as a Going Concern (GC) is a tremendous responsibility bestowed by the IBC on IPs. We need to continuously instrospect to match these expectations. I am sure, together, we will be able to serve our purpose to the best of our knowledge, ethics and endeavours.

**Guest of Honour**
**Shri Sudhaker Shukla**
Whole Time Member (WTM)
Insolvency and Bankruptcy Board of India
(IBBI)

1. UNCITRAL model law on Group Insolvency is still a work in progress but the same has been nearly drafted in case of Cross-Border Insolvency framework.

2. We acknowledge contributions of Justice (Retd) S. J. Mukhopadhaya in the form of his forward looking directions to the IBC and IBBI, which has shaped the regulatory framework we have today.

3. How equity principles are honoured in respect of each of the stakeholders, is a crucial message from the Essar Steel judgement by Shri Mukhopadhaya. He is also credited with floating the idea of 'Reverse CIRP'.

4. In the recent past, we have tried a few ideas such as financial autonomy of IBBI, promoting professionalism among the IPs and allowing Insolvncy Professional Entirities (IPEs) to act as Juristic IPs. The idea of sectoral approach under the IBC is also being germinated in our 'sandbox'.

5. In the FY 2023-24, 270 Resolution Plans have been approved which is the highest so far under the IBC regime and up from 189 Resolution Plans in FY 2022-23. Furthermore, NCLT has disposed of highest number of cases in this year and minimized pendency.

6. In the 90th anniversary of the Reserve Bank of India, the Hon'ble Prime Minister mentioned three achievements of the IBC – highest recovery rate that has yielded ₹3.5 lakh crore to creditors, behavioural change reflected in withdrawal of about 27,000 insolvency applications before admission and elimination of the twin balance sheet problems.

7. The recent judgement of the Supreme Court clarifying simultaneously insolvency process against Personal Gurantor to Corporate Debtor (PG to CD) will give fillip to the pending cases and enhance recovery.

8. The two crucial reforms – efficiency in the process and out of court settlement – made Singpore a global arbitration hub. We are trying to see India becoming the hub of arbitration in Asia for which you all need to contribute proactively.

9. We are developing a technological platform iPIE (Integrated Technology Platform for IBC Ecosystem) which will significantly enhance digital process adoption and facilitate seamless information sharing among the critical pillars of the IBC ecosystem, including MCA, NCLT, NCLAT, IBBI, IUs, and IPs.

10. There exists wide variations on interpretation and implementation of UNCITRAL Model of law. We have studied versions of 57 juridictions. The law in Japan and South Korea are entirely different from those in the UK and the USA.

11. The reciprocity requirement, public policy exception and COMI (Center of Main Interests) are our focussed areas in Cross-Border Insolvency. However, we are trying to develop a framework on Cross-Border Insolvency with a cautious approach and also simultaneously working on Group Insolvency framework.

12. After several rounds of discussions and consultations, we are in process of recommending procedural coordination to pierce the corporate veil. The voluntary integration of all the concerned companies is an important aspect under Cross-Border Insolvency in Indian context.

**Guest of Honour**
**Shri Ashok Kumar Bhardwaj**
Hon'ble Member (Judicial)
National Company Law Tribunal (NCLT)

1. When we talk of Cross-Border Insolvency, the depecage of law, jurisdictions and enforcement are crucial. As various countries have different rules, the first problem that arises is inter-se coordination thereof.

2. There are different schools of thought regarding coordination among various jurisdictions – firstly, Universal thought which suggests that there may a common regime and office of insolvency should be in the country where the CD has its head office while other regimes should coordinate for implementation.

3. Secondly, Territorial thought, which states that the law of different territories may be followed and there should be coordination for compliance of the CIRP commenced in a particular territory. Thirdly, the Hybrid Thought, which suggests a multilateral convention and harmony.

4. The idea of Cross-Border Insolvency dates back to 1889, when seven conventions were signed between different countries in Uruguay out of which one was related to Cross-Border Insolvency of hybrid nature. Further in 1930, there was another convention of Eastern European countries on Cross-Border Insolvency of hybrid type. In 1980, International Bar Association passed a model International Insolvency Act but that was never adopted.

5. Presently, two laws on Cross-Border Insolvency are in vogue- UNCITRAL Model Law - 2000 and European Commission (EC) Regulation-2000. The main features of UNCITRAL Model Law are COMI (Center of Main Interest) and CONMI (Center of non-Main Interest).

6. The only difference between the two is - UNCITRAL Model Law emphasizes on resolution while EC Regulations mandates to divest the CD of its assets either fully or partially that encourages liquidation. The former is applicable in 46 countries while the latter is prevalent in only two jurisdictions.

7. IBC also takes care of Cross-Border litigations. There is a provision that the orders passed by a foreign court, provided there is reciprocity, will be implemented in India as an order passed by the Indian Court. Thus, provision related to Cross-Border Insolvency lies in the IBC as sporadic law.

8. The IBC provides that an IRP or RP will not take control of the assets of a subsidiary company. This provision intends to separate the holding and subsidiary companies. However, the need for Group Insolvency in the case of Videocon and Jaypee Greens arose because when the subsidiary company took loan, the holding company stood as guarantor.

9. In the matter of Laxmi Pat Surana, the Supreme Court has upheld that the CIRP can be ordered against both CD and the Guarantor. In such situations, the CIRPs may be clubbed and takes the shape of Group Insolvency.

10. In the case of Vodafone, the Supreme Court upheld that the shareholder has only the right of dividend but no right on the assets of the company. However, if the shareholder is a holding company then in terms of the provision of the Sales of Goods Act, shares held by the holding company in the subsidiary company are treated as its assets. Therefore, if the holding company goes into CIRP, the RP can take control of the assets of the subsidiary company leading to Group Insolvency.

**Chief Guest**
**Justice Shri S. J. Mukhopadhaya**
Former Judge, the Supreme Court of India
Former Chairperson, NCLAT

1. Section 1(2) of the IBC proclaims, it will be applicable only in India. After about seven and half years of implementation, the time has come for Cross-Border Insolvency.

2. The first opportunity came in the matter of Jet Airways against which the insolvency process started simultaneously in Indian Court (NCLT) and Dutch Court. The NCLT held that Dutch Court does not have jurisdiction in India. Finally, the matter was resolved through an agreement between the IP in India and Administrator in Dutch.

3. Financial Creditor, Operational Creditor and Prospective Resolution Applicant (PRA) under the IBC can be a foreigner or a foreign company and they can not be discriminated against. It needs to be decided what comes and what will not come under the Cross Border Insolvency?

4. As per the provisions of Indian law, if a resolution applicant fails to comply, the earnest money is forfeited. How this law will be applicable in case of foreign resolution applicants? How the validity of account will be verified? This may not be a part of UNCITRAL model law but is an important aspect of it.

5. The insolveny law is evolving everyday based on the decisions taken by insolvency professionals, Committee of Creditors (CoC), NCLT, NCLAT, and the Supreme Court.

6. Despite the absence of legal frameworks for Cross-Border and Group Insolvency under IBC, except brief provisions under sections 234 and 235, several cases of Cross-Border and Group Insolvency have been successfully resolved through judicial interventions.

7. We will have to respect the law of other countries, but it does not mean supersedence of our law. The dominance should be of our law in our jurisdiction.

8. RPs who are first level of decision makers, play a great role in deciding how the law is actually laid down. My suggestion to RPs is, 'try to make experiments when you find foreign parties at any level irrespective of the previous judgements.

9. First of all, a definition is required for Group Insolvency. In real estate sector, land owner is a company while builder is a separate company which come together to form a joint venture, a third company, which allots flats to homebuyers. Here the banks lend to developer against the land which is to paid by the homebuyers. Homebuyers get loan against a building/ flat to be constructed in future. Thus, in the case of *Mamta Vs. AMV Infra Build Pvt. Ltd. (2018)*, both developer and land owning company were grouped together for insolvency.

10. In the case of Edelweiss Asset (2019), some companies came before NCLT asking for tagging them with the Edelweiss Asset for CIRP under Section 7 of the IBC, which was rejected by the Adjudicating Authority (AA). Before the NCLAT, it was revealed that the matter was related to a township in Haryana where different companies were allotted different chunks of land but the builder was one single company. This case was sent for Group Insolvency.

11. Can there be Group Insolvency with regard to a subsidiary company when holding company is the defaulter? In such a case of CIRP of an energy company, there were two subsidiary companies –

one suppying coal and another water. If they don't tie up, how a Resoution Plan can succeed? These are situations to be discussed by IPs among themselves and also in the CoC because they exercise the right to annul an agreement.

12. The suspension of the Board of Directors is the essence of the IBC. Directors are not suspended, board is suspended and directors continue. The Board(s) of subsidiary companies are different and are not suspended.

13. Consider a situation, a foreign company or person owns a piece of land in India. This CD or Guarantor has given a gurantee. Can we treat this as Personal Guarantee under the IBC? This is a grey area. In such cases, the IP will have to take a decision with futuristic approach without going into the judicial precedents and present it before the NCLT as his view or CoC's view. This will lead to development of the law.

14. Before Essar Steel judgement by the Supremre Court the operational creditors were getting on average 46.6 % of their dues, though smaller in absolute value, while financial creditors were getting 46%. After the Supreme Court judgement, the Parliament amended Section 30 (4) of the IBC. Presently, the operational creditors are getting almost zero from the Resolution Plan. Whether we can offer the same treatment to foreign operational creditors?

15. However, in "Reverse Insolvency", homebuyers who are operational creditors are provided preference over financial creditors i.e., banks. Will foreign stakeholders not use this provision? The problem regarding collation of claims will arise if foreign stakeholders are involved in MSMEs and Start-up companies.

16. IPs should apply both - diligence and intelligence, to collate the claims of foreign stakeholders and assess the feasibility and viability of the company and also the resolution applicants.

## Panel Discusison – I
## (Group Insolvency)

**Chairman & Moderator :** Adv. Virender Ganda, President - Bar Association of NCLAT and NCLT

**Panellists:**

- Mr. Benjamin Barker, Senior Policy Advisor, The Insolvency Service, the UK
- CA. Hans Raj Chugh, Central Council Member, the ICAI
- Mr. Sidharth Sethi, Partner, JSA
- Mr. Ashok Kumar, Partner, Black Oak LLC, Singapore
- Mr. Abhilash Lal, Insolvency Professional

1. The primary objective of the Group Insolvency is to sustain companies as going concern and value maximization. Their corporate structure can be highly complex, featuring an umbrella holding company with multiple subsidiaries having common directors, lenders, shared assets, employees etc. In many cases, loans are extended to holding companies against the assets of subsidiary companies.

2. The IBC lacks a statutory framework for Group Insolvency except reference to sections 18(1)(g) and 234. There are some success stories such as Videocon and Lavasa but cases like Uttam Galva, and Uttam Steel exemplify the challenges posed due to the absence of Group Insolvency Framework.

3. Earlier, Mr. U. K. Sinha Committee and Dr. K. P. Krishnan Committee have advocated for procedural coordination in Group Insolvency and appointment of a common RP.

4. The United Kingdom's flexible common law jurisdiction, which is continuolsy developoing since 1896, allows courts and insolvency practitioners, considerable leeway to tailor insolvency proceedings for maximum benefit, fostering cooperation both domestically and internationally.

5. The UK has adopted the UNCITRAL Model Law on Cross-Border Insolvency, which focuses on finding mutual comity in one jurisdiction while recognizing each group member as a distinct entity. Yet, there is a gap in the framework regarding group proceedings. However, the UK government has recently decided to implement the Model Law on Group Insolvency.

6. In managing group insolvencies, practitioners must navigate complex legal frameworks and potential conflicts of interest. The role of a group representative coordinating insolvency proceedings adds another layer of complexity, requiring careful consideration of potential conflicts with individual insolvency office holders.

7. Effective communication and transparency are essential to maintain stakeholders' trust throughout the insolvency process. Clear reporting and updates on proceedings can help mitigate concerns and ensure fair treatment for all parties involved.

8. A collaborative approach involving practitioners, courts, regulators, and stakeholders is essential to navigate the challenges of group insolvencies successfully. By upholding ethical standards, promoting transparency, and fostering cooperation, the insolvency process can achieve fair outcomes for creditors and other affected parties.

9. Formation of a coordinating Committee of Creditors (CoC) ensures alignment between individual and collective interests, acknowledging each company's status as a distinct entity within the group. By adhering to shared parameters, efficiency, effectiveness, and cost-effectiveness can be significantly improved in managing cases of Group Insolvency.

10. Institutions like IIIPI are committed to enhancing the competency of IPs but effective training becomes paramount once new laws and regulations are in place. The training of staff within institutions like the NCLT needs to meet high standards to handle cases that could impact the entire economy, particularly in the context of large group insolvencies.

11. IPs face hurdles while consolidating claims, given the diverse lenders involved and varying loan profiles and security interests. Furthermore, dealing with foreign representatives and gaining control of assets in other jurisdictions can be arduous, especially without mechanisms for cross-border insolvency.

12. It is essential to refine the definition of a corporate group and ensure that solvent entities are only included in insolvency processes under specific conditions, such as volunteering or the likelihood of future insolvency. Coordination and consolidation efforts should be encouraged for interlinked entities, as they facilitate information sharing and reduce administrative costs, ultimately serving the broader objectives of Group Insolvency.

13. Singapore has diverse legal systems, including civil law in Indonesia and common law in Malaysia. However, it has implemented various tools to facilitate international cooperation, such as memorandum of understandings (MoUs) with neighbouring countries and the establishment of an international commercial law bench. It is also considering the adoption of Group Insolvency.

14. Leveraging information utilities (IUs) to ensure up-to-date information and regulatory compliance from promoters can enhance creditors' understanding of

the underlying risks. Further, exploring innovative approaches like the Pre-Pack can facilitate early-stage solutions even before commencement of formal insolvency proceedings.

15. While there is no one-size-fits-all solution due to the diversity of group structures, creditors must exercise commercial acumen and invest time in evaluating the most viable resolution strategies. This approach not only alleviates the burden on adjudicating authorities but also fosters comprehensive management of Group Insolvency.

## Panel Discusison – II
## (Cross-Border Insolvency)

**Moderator :** CA Shailendra Ajmera, Insolvency Professional

**Panellists:**

- Mr. Simon Whiting, Assistant Director, Strategy, Policy and Analysis-Policy, The Insolvency Service, the UK
- Ms. Kanika Kitchlu-Connolly, Partner, TLT LLP, the UK
- Adv. Aparna Ravi, Partner, M/s Samvad Partners
- Mr. Surendra Raj Gang, Insolvency Professional


1. While domestic insolvency processes are well-defined under the IBC, addressing foreign creditors presents unique challenges. For instance, in the case of GoAir, which is undergoing CIRP, numerous service providers and lessors are involved, some of whom have opted to pursue legal action in foreign jurisdictions.

2. Section 426 of the UK insolvency law facilitates assistance between UK insolvency courts and their counterparts in designated jurisdictions. UK adopted UNCITRAL Model Law in 2006 thereby significantly expanding the framework for international cooperation.

3. After the UK's exit from the European Union (EU), challenges have emerged regarding the recognition of insolvency proceedings, as EU Regulations no longer automatically apply. So far, only four EU member states have adopted the UNCITRAL Model Law, posing limitations for the UK office holders.

4. Aligning various jurisdictional tests poses significant challenges, despite recent calls for government intervention in the UK. Additionally, the choice of law remains a topical subject, with discussions focusing on a potential third model law, under the rule 'Lex Fori Concursus'.

5. Policymakers must engage with various government departments to ensure alignment with existing public policy scenarios. For instance, the UK's consultation on adopting UNCITRAL Model Law on recognition and enforcement of insolvency

judgements reflects this cautious approach.

6. Networking and knowledge-sharing among IPs are invaluable for industry growth. The conferences, seminars, and webinars offer opportunities to learn from peers, share experiences, and build trust within the community.

7. In the UK, litigation funding market has seen a significant evolution, with a diverse range of funders available for taking assignment of the claim, providing upfront payments based on claim valuation and potential recovery, funding legal expenses, insurance for funders, etc.

8. Without clarity on outcomes, investors may hesitate to engage in distressed assets market. Establishing predictability and cost efficiencies, such as appointing the same IP across group companies, can enhance recovery prospects. This along with Cross-Border framework will further strengthen the process and ensure value maximization.

9. The issues pertaining to Cross-Border Insolvency in India have been deliberatbed by Insolvency Law Committee and Cross-Border Insolvency Law Committee such as reciprocity, access of foreign representatives in Indian courts, coordination between RPs across jurisdictions, and safeguarding interests of domestic stakeholders.

10. Having a structured framework on Cross-Border Insolvency for cooperation and coordination, especially for tracking and accessing overseas assets, would greatly facilitate insolvency process. Furthermore, integration of provisions related to personal guarantors with the Cross-Border Insolvency will help value maximization and resolution of CDs.

11. Challenges arose in controlling assets and liabilities of an EPC (engineering, procurement and construction) company with branches across Middle East and Asia. In this case a former employee of the company was arrested during a personal trip due to unresolved claims of creditors.

12. Despite some success stories, the unresolved issues underscore the need for continued efforts to enhance Cross-Border Insolvency regulations and practices.

13. While accepting a new insolvency assignment, it is crucial to be mindful of the nature of the business and the jurisdictions where the company operates. These situations are inherently complex, requiring thorough planning and consultation with experts and legal advisors who have relevant experience.

14. There's rarely a straightforward solution, so careful consideration is essential. Secondly, establishing trust is paramount, particularly when collaborating with the RPs or administrators from other countries. Building rapport and trust is vital for navigating the resolution process effectively and finding a way forward.

## Vote of Thanks

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

1. The Inaugural Session aptly set the context for ensuing panel discussions.

2. In the first seven years of the IBC, the foundation for the insolvency law and the profession has been cemented. Evolving jurisprudence, regulations proactiveness and newer frameworks of Cross-Border and Group Insolvency which are on the anvil have heightened the prospects of insolvency profession in India to become truly a global profession.

3. Regarding Group Insolvency, in September 2019, there was a working group by IBBI which was followed by a Cross Border Insolvency Regulations Committee (CBIRC) constituted by the Ministry of Corporate Affairs (MCA) which released a report namely CBIRC – 2.

4. The CBIRC for the first time in June 2020, came out with 'Draft Z' which was based on UNCITRAL Model Law with certain exceptions. Many complex cases require both these proposed frameworks to work in unision.

5. In panel discussions, the deliberations are centred around four broad themes - key challenges, international learnings, timing and order of implementing these two frameworks and capacity building for IPs and other stakeholders.

6. We are thankful to all dignitaries and look forward for their blessings, guidance and support in strengthening the IBC ecosystem.

# Revolutionizing Corporate Insolvency Resolution in Real Estate: The Emergence of Reverse CIRP in India

*Through an amendment in 2018, homebuyers were provided the status of financial creditors under the IBC, thereby enabling them to file insolvency petitions against the CD and participate in the meetings of the CoC. This triggered a spurt in CIRP petitions against real estate companies causing another amendment in the IBC in 2020 wherein the law introduced a minimum threshold limit for homebuyers to file CIRP petition. Furthering the interest of homebuyers, the NCLAT in the matter of Flat Buyers Association Winter Hills vs. Umang Real tech (2020) recognized the concept of 'Reverse CIRP'.*

*The article provides an insightful overview of Reverse CIRP including its jurisprudence, advantages, and shortcomings in implementation. Further, the author also suggests a legal framework to address these issues, emphasizing the need for a balance between protecting the interests of homebuyers and ensuring a fair and transparent resolution process.* ***Read on to know more…***

**Hiten Ratilal Abhani**
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## 1. Introduction

The Reverse CIRP (Corporate Insolvency Resolution Process) in real estate refers to a mechanism by which distressed real estate projects or companies undergoing insolvency proceedings are revived or resolved. Unlike the original CIRP, which involves the resolution of insolvent companies through restructuring or liquidation, the reverse CIRP focuses specifically on real estate projects.

The uniqueness of homebuyers' positions and concerns led to the introduction of Reverse CIRP, which allows them to prioritize possession of their units over other financial creditors' who are interested in repayment of their debts.

However, the concerns about the potential drawbacks of Reverse CIRP are particularly related to the porous nature of project funds. It highlights the requirement under Section 4(2)(l)(D) of the Real Estate (Regulations and Development) Act (RERA), mandating that 70% of the funds for a real estate project be kept in a separate account for project costs. Though there have been violations to this provision by real estate companies.

The Reverse CIRP is to be run under the able monitoring of the Interim Resolution Professional (IRP)/Resolution Professional (RP) to protect the interest of all the stakeholders. If under the Reverse CIRP the promoters

fail to bring funds, then normal CIRP is conducted. This shift is seen as crucial for effective Reverse CIRP, overcoming potential self-serving tendencies of promoters, and introducing predictability to the process.

The driving force behind the adoption of Reverse CIRP lies in addressing a key concern- the inability of allottees (considered financial creditors) to accept a reduced settlement, commonly known as a "haircut," which is a standard practice under CIRP). Courts, through various judgments and orders, have endorsed the Reverse CIRP route, deeming it a more efficient and suitable option for all parties involved in real estate insolvency cases.

## 2. Shortcomings in the Current Regime

The proposed Amendment to the Insolvency and Bankruptcy Code (IBC), introducing a 'project-wise resolution' for real estate, offers relief to both developers and allottees. However, concerns arise due to the undefined nature of the process, particularly in terms of monitoring mechanisms. In the matter of *Anand Murti vs. Soni Infratech Pvt. Ltd*[1]. (2022), the Supreme Court upheld the followings:

i. Furnishing of affidavit by promoter explaining the timelines for completion of project, funds to be infused, that the cost of the flats will not be escalated, and BBA signed by previous management will be honored. (Para No. 19)

ii. IRP shall submit quarterly reports to the NCLAT with respect to the progress of the housing project. [Para No. 24(E)]

**"The Supreme Court in the matter of *Anand Murti vs. Soni Infratech Pvt. Ltd.* (2022) endorsed the Reverse CIRP, without mandating compliance with the 70% fund requirement under the RERA."**

Thus, the aforementioned case has endorsed the Reverse CIRP, without mandating compliance with the 70% fund requirement under the RERA. Furthermore, the NCLAT in the matter of *Flat Buyers Association vs. Umang Realtech*[2] (2020) provided extensive monitoring guidelines on Reverse CIRP":

(a) Agreement between promoter and allottees to let the promoter act as a financial lender of the project. (Para No. 13 of the order).

(b) Promoter to remain outside CIRP but to ensure that allottees get possession during CIRP without intervention of any "third party". (Para No. 13)

(c) Promoter to give time frame for project completion and for providing common area. (Para No. 15)

(d) The promoter also provides details of amounts due from allottees and defaults committed by them. (Para No. 15)

(e) The amount paid by promoter and the amount generated from dues of allottees during CIRP are to be deposited in the account of the Corporate Debtor (CD) to keep it going concern (Para No. 26).

(f) The above amounts to be utilized only through issuance of cheque signed by authorized person of CD and counter signed by the IRP. (Para No. 26)

(g) Amount deposited in a bank account should be utilized only for a specific project. (Para No. 26)

(h) Banks will allow cheques for encashment only with counter signature of IRP.

(i) Financial institutions/banks to be paid simultaneously. (Para No. 27)

(j) Allottees to pay their dues by given date (Para No. 27).

(k) Allottees allowed to form RWA to empower them to claim common areas (Para No. 28).

(l) Resolution cost including the IRP fee to be borne by the promoter. (Para no. 29)

(m) Unsold flats/apartments to be transferred to promoter only after getting the certificate of completion from IRP and Adjudicating Authority (AA). (Para No. 29).

(n) Option with IRP to sell unsold inventory even during CIRP, via tripartite agreement between purchaser, IRP/RP, and promoter (Para No. 30).

[1] *Anand Murti vs Soni Infratech Pvt. Ltd., Civil Appeal Nos. 7534 of 2021,* Supreme Court judgement. dated April 27, 2022.

[2] *Flat Buyers Association Winter Hills – 77, Gurgaon vs Umang Realtech, Company* Appeal (AT) (Insolvency) No. 926 of 2019, NCLAT judgment dated February 04, 2020.

### 2.1. Amendment to the Insolvency and Bankruptcy Code, 2016 (IBC) in 2018 and Subsequent Developments

The IBC underwent significant amendments in 2018, addressing the inclusion of homebuyers in the category of 'Creditors in a Class'. This amendment, based on the recommendations of the Insolvency Law Committee, aimed to recognize amounts raised from allottees under real estate projects as 'financial debt'. However, the legal landscape surrounding this amendment saw subsequent challenges and refinements.

**(a)** ***Pioneer Urban Land and Infrastructure Limited vs. Union of India*** **(2019)**

The real estate companies challenged the provisions of 2018 amendment in the case of *Pioneer Urban Land and Infrastructure Limited vs. Union of India.* The Supreme Court upheld the amendment, emphasizing that amounts raised from homebuyers contribute significantly to the development of flats/ apartments. However, the court clarified that speculative investors not genuinely interested in purchasing a flat/apartment could be excluded from the definition of financial creditors.

> **"The Supreme Court in the case of *Pioneer Urban Land and Infrastructure Limited vs. Union* of India., clarified that speculative investors who are not genuine homebuyers could be excluded from the definition of financial creditors."**

The court's decision led to an increase in CIRP applications, affecting development projects. In response to these practical challenges, the IBC (Second Amendment) Act, 2020, introduced a minimum threshold limit for homebuyers to initiate CIRP. This threshold required either 10% of the total number of creditors in the same class or 100 such creditors in the same class. The constitutional validity of this threshold limit was challenged in the case of Manish Kumar vs. Union of India, but the Supreme Court upheld it, acknowledging the practical considerations and the need for a threshold requirement.

**(b)** ***Bikram Chatterji vs. Union of India (Amrapali Case)***

In the case of Bikram Chatterji vs. Union of India, a writ petition was filed by homebuyers against the CIRP decision of the National Company Law Tribunal (NCLT). The case involved a major realty developer defaulting on a payment to the Union Bank of India for a construction project. Homebuyers expressed dissatisfaction as they were making payments without receiving possession of their flats and were forced to pay loans.

The Supreme Court, in this case, held that the claims of homebuyers take precedence over claims of other financial creditors and government authorities. This decision ensured that authorities and "secured financial creditors" would not proceed to sell the flats of homebuyers who were eagerly waiting for possession.

The amendments and judicial decisions highlighted the evolving nature of the IBC concerning real estate projects and homebuyers. While recognizing the financial contributions of homebuyers, the legal framework also sought to balance the rights and interests of various stakeholders, including developers and creditors. The threshold limit was introduced to streamline the CIRP process, considering the practical challenges faced in its implementation. The judicial decisions reinforced the importance of protecting the rights of homebuyers in insolvency proceedings.

### 3. The introduction of RERA provision in CIRP

The introduction of provisions from the RERA into the CIRP has been a topic of debate, with varying perspectives on its necessity and implications.

**(a) RERA and Project Troubles:** It is argued that the failure of projects under RERA oversight should primarily be addressed within the framework of RERA itself. RERA was enacted to regulate the real estate sector, protect the interests of homebuyers, and ensure timely completion of projects. If a project faces difficulties or defaults under RERA, critics argue that it should be resolved within the purview of RERA regulations and mechanisms, rather than integrating it into the CIRP.

**(b) IBC Overriding Provisions:** The IBC has overriding provisions on other laws, including RERA, to facilitate the resolution process for insolvent companies. This override is based on the principle that the objective of the IBC, i.e., the resolution of insolvency and maximization of value for creditors, supersedes conflicting provisions of other laws. However, this override has been subject to legal scrutiny and debate, with some arguing that it may undermine the specific objectives and protections provided under RERA.

> **"The overriding provision of the IBC is based on the principle that the objectives of the IBC, i.e., the resolution of insolvency and maximization of value for creditors, supersedes conflicting provisions of other laws."**

Thus, integration of RERA provisions into the CIRP and the override of RERA by the IBC are contentious issues that involve balancing the objectives of both laws and addressing the complexities of resolving distressed real estate projects. While some argue that RERA failures should be addressed exclusively within the RERA framework, others contend that the IBC's overarching objective of insolvency resolution justifies its overriding provisions. Ultimately, the effectiveness and fairness of these provisions depend on their application and interpretation in specific cases, as well as broader policy considerations regarding the regulation of the real estate sector and the resolution of insolvency.

### 4. Key Features of Reverse CIRP

(a) **Promoter as Lender:** Under Reverse CIRP, promoters take on the role of lenders rather than promoters. This shift is designed to prioritize the completion of the real estate project, addressing the concerns of homebuyers.

(b) **Project-Specific Approach:** The NCLAT, in subsequent judgments, emphasized that Reverse CIRP should be implemented project-wise. This project-specific approach acknowledges the unique nature of each real estate project and tailors the resolution process accordingly.

(c) **Legislative Amendments:** The proposed amendments to the IBC are aligned to the concept of Reverse CIRP. As the IBC currently focuses on the resolution of an entire company, default in one project triggers the CIRP for the entire company. To overcome this limitation, the MCA has proposed amendments introducing 'project-wise resolution.'

(d) **Addressing Difficulties:** The proposed amendments to the IBC aim to address challenges arising from the current IBC framework, ensuring a more nuanced and targeted approach to insolvency resolution in the real estate sector. 'Project-wise resolution' provides a mechanism to deal with defaults specific to individual projects without affecting the entire corporate entity.

In conclusion, Reverse CIRP emerges as a tailored solution to the unique challenges faced by homebuyers in the real estate sector. The project-specific nature of this approach, coupled with proposed legislative amendments, reflects a responsive effort to enhance the effectiveness of CIRP in the context of real estate projects, striking a balance between the interests of various stakeholders.

### 5. Key Judgments in Simplified Language

#### 5.1. *Flat Buyers Association Winter Hills vs. Umang Real tech* (2020), NCLAT

(a) The NCLAT Delhi first recognized the concept of Reverse CIRP in this case.

(b) The court permitted Reverse CIRP, where a promoter agrees to act as a financial creditor and infuse funds into the project to ensure its completion within the stipulated time frame set by the NCLAT.

(c) The court directed that non-compliance or lack of cooperation by the promoter with the IRP/RP would lead to the completion of the CIRP by the NCLT.

**5.2. *Anand Murti vs. Soni Infratech Pvt. Ltd.* (2022), Supreme Court**

(a) The Supreme Court upheld the principle of Reverse CIRP in this case.

(b) The NCLAT initially rejected a settlement modification application by the promoter, leading to the continuation of CIRP.

(c) The Supreme Court, however, allowed Reverse CIRP, emphasizing its benefits to allottees and timely project completion.

(d) The promoter assured, via affidavit, that flat costs would not increase, commitments made by the previous management would be honored, and funds were arranged promptly to commence the project without delay.

(e) The Supreme Court noted that permitting CIRP might result in higher costs for homebuyers compared to the promoter's offer.

> **"Upholding the idea of 'Reverse CIRP' in the case of *Anand Murti vs. Soni Infratech Pvt. Ltd.* (2022), the Supreme Court noted that permitting CIRP might result in higher costs for homebuyers compared to the promoter's offer."**

**5.3. *Rajesh Goyal vs. Babita Gupta & Ors.* (2020), NCLAT**

(a) Promoter Rajesh Goyal was allowed to act as a leader after a voting process among allottees, overseen by the IRP.

(b) The promoter committed to infusing funds totaling ₹69.27 crores to sustain the Corporate Debtor as a going concern.

(c) A time frame was established for allottees seeking refunds after surrendering their flats.

(d) The procedure for Reverse CIRP mirrored that of Flat Buyers Association, Winter Hills.

(e) The IRP had the authority to sell unsold flats/apartments through a tripartite agreement, utilizing the proceeds to repay banks, operational creditors, and interest to allottees awaiting refunds.

(f) Non-compliance or lack of cooperation by the promoter with the court's directions or the IRP would result in NCLT completing the CIRP.

These judgments illustrate the application and acceptance of Reverse CIRP in various scenarios, emphasizing its efficiency and benefits, in the real estate sector. The courts' decisions prioritize timely project completion and protect the interests of homebuyers and other stakeholders.

### 5.4. Comparison between CIRP Vs Reverse CIRP

| Sr. No. | | CIRP | Reverse CIRP |
|---|---|---|---|
| 1 | **Bidding Restrictions** | Promoters are generally not allowed to bid, except in the case of Micro, Small, and Medium Enterprises (MSMEs). Third-party Resolution Applicants (RAs) are permitted to bid. | Promoter only submits the proposal, and no third-party bidding is invited. |
| 2 | **Bidding Process** | Involves third-party bidding, and the resolution process can face litigation related to the bidding process by the RAs. | No third-party bidding is involved, making the process less time-consuming. |
| 3 | **Resolution Cost** | The resolution cost, including fees for the IRP/ RP, is borne by the Corporate Debtor or the Committee of Creditors (CoC). | The resolution cost, including fees of IRP/RP, is borne by the promoter. |
| 4 | **Time Consumption** | CIRP is time-consuming due to the involvement of third-party bidding and potential litigation. This can result in delays in completing the project. | Reverse CIRP is less time-consuming, allowing for timely completion of the project by the promoter as committed before the court. |
| 5 | **Familiarity with Real Estate** | Third parties or Resolution Applicants (RAs) may not be familiar with the intricacies of the real estate sector. They need to acquaint themselves with the project, its status, and coordinate with sub-contractors and authorities. | The promoter has hands-on details of the project, making it easier for them to work and coordinate with sub-contractors and authorities. |
| 6 | **Unsold Inventory** | Unsold inventory remains with the Corporate Debtor. | Unsold inventory goes to the promoter after receiving a completion certificate from the IRP and approval of the NCLT. |
| 7 | **Price Escalation** | There is a possibility of price escalation of the flats, impacting the final cost for homebuyers. | The promoter may undertake that there would be no price escalation, providing more certainty to homebuyers. |

## 6. Key advantages of Reverse CIRP

(a) Timely Completion: One of the significant advantages of Reverse CIRP is its ability to ensure the timely completion of real estate projects. This is crucial for both homebuyers and promoters.

(b) Mitigation of Litigation Risks: By avoiding the complexities and potential litigation associated with regular CIRP, Reverse CIRP provides a more streamlined resolution process.

(c) Protection of Homebuyers: Homebuyers benefit from Reverse CIRP as they receive possession

of their flats without facing haircuts or price escalations, safeguarding their interests.

> **Homebuyers benefit from Reverse CIRP as they receive possession of their flats without facing haircuts or price escalations, safeguarding their interests. Besides, promoters are incentivized and empowered to complete unfinished projects.**

(d) Empowering Promoters: Promoters are incentivized and empowered to complete unfinished projects through Reverse CIRP, contributing to the resolution of distressed real estate.

(e) Lack of Legislation: The absence of specific legislation for Reverse CIRP highlights its emergent nature within the legal framework, signifying the need for further development and clarity.

(f) Preventing Misuse: While Reverse CIRP brings advantages, precautions are necessary to prevent defaulting promoters from exploiting it. Strict compliance with timelines, infusion of funds, and collaboration with the IRP are essential components.

(g) Unclogging Incomplete Projects: Reverse CIRP is positioned as a valuable tool for unclogging incomplete projects entangled in extensive litigation, addressing a critical issue in the real estate sector.

(h) Balancing Interests: It is emphasized that the implementation of Reverse CIRP should carefully balance the interests of all stakeholders, particularly prioritizing the rights and concerns of homebuyers.

## 7. Concluding Remarks

In the experimentation of Reverse CIRP, the NCLAT has demonstrated pragmatism in protecting the rights of homebuyers and addressing the unique challenges of real estate projects. However, the lack of specific guidelines and defined contours for the process poses potential risks.

The NCLAT's focus on prioritizing the needs of allottees is commendable, but the absence of clear guidelines may lead to unintended consequences. The risk of fund siphoning jeopardizing the core tenet of the IBC, particularly Section 29A, which aims to keep erstwhile promoters at bay, is a concern.

To address these issues, policymakers are urged to consider the formulation of mandatory requirements, such as a RERA account, for promoters involved in Reverse CIRP. While proposed amendments acknowledge the need for 'project-wise resolution,' they lack specifics on how Reverse CIRP should be carried out. Merely mandating project-wise CIRP does not fully address the underlying problem of promoters benefiting at the expense of other stakeholders.

> **As Reverse CIRP continues to play a crucial role, it is essential to ensure its implementation in a manner that protects the interests of homebuyers and prevents misuse by default promoters.**

The success and legitimacy of Reverse CIRP hinge on addressing these fundamental issues. Policymakers and regulators need to provide clear and detailed guidelines, ensuring independence between projects and safeguarding the interests of all stakeholders. The proposed amendments should be refined to offer a robust framework that prevents misuse, maintains transparency, and upholds the principles of the IBC. In doing so, Reverse CIRP can evolve into an effective mechanism for resolving distressed real estate projects, striking a balance between the interests of promoters, homebuyers, and other financial creditors.

The concept of Reverse CIRP in India is currently evolving, lacking specific legislation within the IBC. Despite this absence, it has been proven to be a beneficial mechanism for resolving distressed real estate projects. Unlike the original CIRP, Reverse CIRP facilitates timely project completion, minimizing delays and the litigation risks associated with standard procedures.

In conclusion, while Reverse CIRP lacks specific legislative backing, its positive impact on resolving incomplete real estate projects is evident. It represents an evolving mechanism that addresses the challenges posed by extensive litigation and delays associated with traditional insolvency resolution processes. As it continues to play a crucial role, it is essential to ensure its implementation in a manner that protects the interests of homebuyers and prevents misuse by default promoters.

# Maximize Gains in Real Estate Resolutions with Project-Wise CIRP

*Under the IBC processes, the challenges of corporate persons are unique to their concerned sectors that require specific solutions. Hence, one size fits all may not be sufficient to address a variety of issues being faced on the ground in resolving corporate debtors of different sectors. In this context, the Real Estate Sector, which is of great public concern, is under constant review for evolving better framework including judicial innovation of Project-Wise CIRP. In this article the author has presented a detailed analysis of Project-Wise CIRP in the light of developing jurisprudence and initiatives of the IBBI. He has also presented pros and cons of Project-Wise CIRP and the need for amendments in the insolvency framework.* ***Read on to know more…***

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## 1. Background

The term 'Project Wise CIRP' originated to address specific challenges faced by companies of the Real Estate Sector undergoing Corporate Insolvency Resolution Process (CIRP) under the Insolvency and Bankruptcy Code, 2016 (IBC). The primary reason for stress in real estate projects is the lack of financial viability of the projects undertaken by the real estate companies. Initially real estate companies were brought into CIRP by the financial or operational creditors but later on in the case of Jaypee Infratech Ltd and also *Pioneer urban Land and Infrastructure Limited vs. Union of India*[1], the home buyers (allotees) in a real estate project of the companies were brought into the purview of definition of financial creditor under Section 5(8) of the IBC.

As per the Quarterly Newsletter[2] for July-September, 2023 of Insolvency and Bankruptcy Board of India (IBBI), the Real Estate Sector contributes to about 21% of the cases of CIRP admission, which is the second highest after the manufacturing sector that contributes

[1] Pioneer Urban Land and Infrastructure Ltd. v. Union of India, (2019) 8 SCC 416.

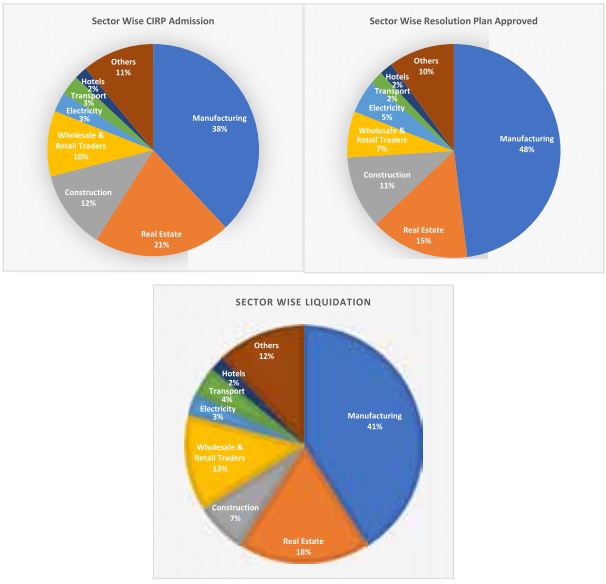
[2] IBBI Quarterly Newsletter for July – September 2023. https://ibbi.gov.in/uploads/publication/b4ce3516920836e9ff9b1e816137bf97.pdf

38%. However, only 15% of the Real Estate Sector companies are resolved through resolution plans while 18% resulted in liquidation, and 26% cases were settled through withdrawal, which is also very high. These statistics suggest that companies in the Real Estate Sector, once admitted into insolvency, are more likely to opt for liquidation or withdrawal rather than a successful resolution, as resolving them is not as easy as resolving other companies that have fallen under insolvency or requires some other approaches.

**"Recently the Indian Banks' Association (IBA) conducted an analysis indicating that 4.12 lakh distressed dwelling units, valued at ₹4.08 lakh crore, are impacted in these stalled real estate projects."**

Recently the Indian Banks' Association (IBA) conducted an analysis indicating that 4.12 lakh distressed dwelling units, valued at ₹4.08 lakh crore, are impacted in these stalled real estate projects. Among these, 2.40 lakh distressed dwelling units are located in the National Capital Region (NCR). If 75% of these distressed units are successfully resolved, it could result in an additional three lakh units for the housing sector. This resolution would assist the middle and lower middle class in obtaining housing for which they have already made a significant payment. Moreover, it would provide a significant boost to economic activity and growth.[3]

In CIRP, promoter's interference is nearly eliminated, and Interim Resolution Professional (IRP)/ Resolution Professional (RP) steps into the shoes of the promoter/ directors of the company. S/he is assigned the responsibility to take care of the operations of the company and the conduct of CIRP simultaneously, which would be otherwise a burdensome affair. Under this process, the design of the IBC favors banks and financial institutions rather than the homebuyers who have invested their lifetime savings into the real estate project. Hence, CIRP has not seen much success in achieving a satisfactory resolution in the real estate sector. This gap has resulted in unresolved issues for homebuyers. Addressing these issues would benefit not only the homebuyers but also other stakeholders and could help in completing stalled projects.




In a rare case, the Appellate Authority (NCLAT) felt that it may not be possible to resolve a real estate company under insolvency by following the CIRP as laid down in the IBC. This is because the IBC benefits only institutional secured lenders as much compared to other types of financial creditors, whereas in real estate companies, homebuyers are not considered as 'secured creditor' because the projects are funded by some financial institutions/ service providers that come under the category of 'secured creditor'. Hence it has come up with a novel concept called "Reverse CIRP" through judgement in *Flat Buyers Association Winter Hills-77 vs. Umang Realtech Pvt. Ltd. through IRP and Others*[4].

Reverse CIRP is a form as similar to that of the normal CIRP, wherein the company's promoter/s is allowed to fund projects as an external lender (with protection as available to interim finance provider under the IBC) and helps the RP in completing the project while remaining outside of the process. It is a more controversial one to let the promoter again to involve in managing and finishing the project of the company, but considering the objective and beneficial interest of the homebuyers this collaboration and implementation is considered to be an amicable solution under resolving the company under IBC, even though it is apparently in the teeth of provision u/s 29A.

A further variant that has emerged is Project-Wise resolution and henceforth it shall be construed as Project-Wise CIRP. In the NCLAT judgment in *Flat Buyers*

[3] Amitabh Kant's Committee Report on Real-Estate projects

[4] *Flat Byers Association Winter Hills-77 v. Umang Realtech Pvt. Ltd.* through IRP and Others, - [2020] ibclaw.in 166 NCLAT

*Association Winter Hills-77 vs. Umang Realtech Pvt. Ltd. through IRP and Others*, the competent authority has first time adopted the concept of "Project Wise CIRP". This concept was introduced because each allottee of the project may have different concerns and may vary from project to project, hence bringing all the projects carried over by the company into an umbrella CIRP would not be feasible and viable, and this may affect the purpose of the IBC altogether.

Project Wise CIRP both have advantages and disadvantages. In recent judgments, including *Union Bank of India and Indiabulls Asset Reconstruction Company Ltd vs Ram Kishore Arora & Ors*[5], the Supreme Court upheld NCLAT's decision to convert CIRP against Supertech Ltd (CD) into Project Wise CIRP.

It is worth noting that the Reverse CIRP is a rarely used process that only a few judges in the NCLT recognize. Even now, policy makers have not given it much consideration, as evidenced by the recent discussion papers from the IBBI, that are focused on Project-Wise CIRP rather than the Reverse CIRP.

It is important to keep in mind that the reverse CIRP is an exceptional measure that can only be utilized in rare cases where the project is solvent, but the IBC has been invoked due to various other reasons. However, if insolvency has arisen due to the subject project itself, the possibility of implementing a reverse CIRP is highly unlikely.

In most cases, the cost to completion will exceed the balance amount realizable from home buyers. As a result, no one will come forward to fund the gap, as it is non-recoverable. Hence Reverse CIRP is not possible in such cases.

For a decision to be made on whether to consider Project Wise CIRP, the default should be specific to a particular project and other projects should be financially stable enough to be maintained as ongoing projects. To better understand this, let's examine the case of *Ram Kishor Arora Suspended Director of M/s. Supertech Ltd. vs. Union Bank of India & Anr.*[6], where the Union Bank of India filed a Section 7 application against Supertech Limited (Corporate Debtor) and it was admitted by the Adjudicating Authority. The Corporate Debtor is in the

**"For a decision to be made on whether to consider Project Wise CIRP, the default should be specific to a particular project and other projects should be financially stable enough to be maintained as ongoing projects."**

real estate business and has several projects in NCR. The Union Bank of India filed for insolvency because of a default by the Corporate Debtor with regard to the "ECO Village II Project". The promoters of the Corporate Debtor filed an appeal against the initiation of CIRP with the Appellate Authority which found that the Corporate Debtor was involved in 20 projects, all of which were going well and had sold a substantial number of units. However, there was a default with regard to the "ECO Village II Project" alone. A large number of homebuyers who filed an Intervention Application (IA) requested that the CIRP be confined to the "ECO Village II Project" only. With regard to the other projects, construction may be allowed to continue so that homebuyers can receive their flats. After hearing the IA and Appeal Application, the NLCAT decided that conducting CIRP on the Corporate Debtor as a whole may affect other feasible and solvent projects where the majority of units are sold and could also potentially affect homebuyers. Instead, they suggested starting a Project-Wise Resolution as a test to see its success. All other ongoing projects can continue construction under the overall supervision of the RP with the assistance of the ex-management and its employees and workmen. However, the "ECO Village II Project" has been directed to undergo "Project Wise Resolution". This means that CIRP will only pertain to this particular project, and a Committee of Creditors (CoC) will be formed under Section 21 of the IBC with all Financial Creditors, including Financial Creditors/Banks/Home Buyers of the "ECO Village II Project" only.

The case mentioned above highlights the importance of implementing Project Wise CIRP. However, in another case involving *N. Kumar RP of M/s. Sheltrex Developers Pvt. Ltd. vs. M/s. Tata Capital Housing Finance Ltd*[7] ", the Chennai Bench of the NCLT ruled against previous judgments. It stated that the concept of Project Wise CIRP cannot be applied universally, and its application is dependent on the specific facts and circumstances of each case. Furthermore, the NCLT added that Project Wise CIRP is not covered by the IBC. But the Report[8] of

5. Indiabulls Asset Reconstruction Company Ltd. Vs. Ram Kishore Arora & Ors. – (2023) ibclaw.in 68 SC

6. Ram Kishor Arora Suspended Director of M/s. Supertech Ltd. Vs. Union Bank of India & Anr. - (2022) ibclaw.in 455 NCLAT

7. Mr. N. Kumar RP of M/s. Sheltrex Developers Pvt. Ltd. Vs. M/s. Tata Capital Housing Finance Ltd. - (2022) ibclaw.in 329 NCLT

8. Amitabh Kant's Committee Report on Real-Estate projects

Amitabh Kant Committee on real estate projects suggests that it is feasible to move forward with Project-Wise CIRP because all projects are mandatorily pre-registered with the Real Estate Regulatory Authority (RERA). As RERA registration is carried out on a project-wise basis, this approach can also be adopted under the IBC.

> **"Amitabh Kant Committee on real estate projects has suggested that it is feasible to move forward with Project-Wise CIRP because all projects are mandatorily pre-registered with the Real Estate Regulatory Authority (RERA)."**

In the case of *Whispering Tower Flat Owner Welfare Association vs. Abhay Narayan Manudhane, RP of Corporate Debtor- Housing Development and Infrastructure Limited and Ors*[9], the NCLAT allowed for project-wise insolvency, even though the NCLT had previously rejected the idea. The CoC had divided the assets of the Corporate Debtor into eight projects for exploring project-wise resolution, and the NCLAT deemed this acceptable. The NCLT had previously rejected this resolution, believing that the CoC had only approved it due to pressure from homebuyers. The NCLAT gave the CoC a 90-day extension from the date of order to explore the project-wise resolution and decide.

The recent decisions made by the Supreme Court and the NCLAT have given priority to the interests of home buyers in the CIRP of real estate companies which is a significant development under the IBC and a step in the right direction as the objective of the IBC is resolution, not liquidation.

## 2. Whether Amendment in the IBC is required or not?

After reviewing the situation, we need to consider whether an amendment is necessary in the IBC framework for Project Wise CIRP? This is a complex question that is difficult to answer. The Ministry of Corporate Affairs (MCA) released a Discussion Paper on the proposed changes to the IBC on January 18, 2023. The paper, which was kept open for public comments and suggestions, contained a dedicated section for improving outcomes in real estate cases, as well as a discussion on proposals pertaining to Project Wise CIRP. The discussion paper had proposed several amendments in the CIRP Regulations so as to allow the CoC and RP to move ahead with Project-Wise CIRP. The Amendments proposed were; Registration of Real Estate under Real Estate (Regulation and Development) Act 2016 [ RERA] , Handing over possession which are complete or on an 'as is where is ',invite separate plans for each project'.

Based on the outcomes of judgements in the matters of *Supertech Limited* and *Housing Development and Infrastructure Limited*, wherein NCLAT has directed for Project-Wise CIRP, we can expect an amendment in law and framing of relevant regulations to address various situations that may arise, and the inherent problems associated with project wise CIRP. This would improve the CIRP and the enhance recovery. The Committee Report on Real Estate Projects, led by Amitabh Kant, and the Discussion Paper on Real Estate Sector dated November 6, 2023, have highlighted the fact that the current framework of CIRP is not conducive to address the issues specific to the real estate sector. A large number of real estate cases have remained unresolved for long periods of time. Therefore, the report suggests that a resolution mechanism tailored to address the needs of the real estate sector be specified with necessary variations from the CIRP. The new mechanism may include project-wise admission and resolution, delivery of completed houses to homebuyers during CIRP, and allowing homebuyers to become Resolution Applicants, among other things.

In cases related to real estate, corporate debtors (CDs) have multiple projects at different stages of construction. prospective resolution applicants (PRAs) are more likely to take over projects closer to completion, rather than those in early stages of construction. Sometimes, a default occurs in one specific project, while the other projects are on track, but the initiation of CIRP puts all the projects under duress. To address these issues, courts have attempted several experiments, including "Reverse CIRP" and "Project-Wise resolution". Therefore, there is a pressing need to have a separate resolution mechanism for the real estate sector, which is proposed to be "Project-Wise CIRP". Although the expert committee recommended this "Project-Wise CIRP", the IBBI, while releasing its discussion paper on November 06, 2023, did not consider this recommendation. Instead, they focused only on the registration of the real estate project, making it more transparent, accountable, and efficient. Projects registered under RERA enhance transparency and

[9] Whispering Tower Flat Owner Welfare Association Vs. Abhay Narayan Manudhane, RP of Corporate Debtor and Ors. - (2022) ibclaw.in 05 NCLAT

accountability as per the norms of the RERA, which is a sector-specific legislation and can significantly improve the prospects of a successful resolution.

> **"Project-Wise CIRP is a promising solution for resolving defaulted projects separately, which can lead to faster resolution and address the concerns of multiple stakeholders, including homebuyers."**

In accordance with the recommendations of the expert committee and the pressing need to address ongoing insolvency cases in the real estate sector, it is imperative that an amendment be made to the IBC code, specifically the "Project-Wise CIRP". This would serve to facilitate a more effective resolution of such cases, ensuring that the interests of all stakeholders are safeguarded. Before considering the amendment in the law regarding Project-Wise CIRP, it is necessary to examine the advantages and disadvantages of this proposal. The implementation of Project-Wise CIRP involves creating separate accounts for defaulted and non-defaulted projects and maintaining receivables accordingly. The RP supervises these accounts, and no account of the Corporate Debtor is allowed to be operated without the counter signature of the RP, which reduces the risk of siphoning of funds.

The Project-Wise CIRP is a promising solution for resolving defaulted projects separately, which can lead to faster resolution and address the concerns of multiple stakeholders, including homebuyers. However, various inherent issues are associated with this proposal.

Firstly, Project-Wise CIRP does not guarantee a successful resolution, especially if ongoing projects remain incomplete, or if the promoter fails to comply with the guidelines of Project-Wise CIRP. In such cases, the IRP would resort to regular CIRP, which is typically a longer process.

Secondly, Project-Wise CIRP permits promoters to infuse funds as interim finance for ongoing projects, thereby violating Section 29A of the IBC. This provision allows secured financial creditors to participate in the resolution process but is often discriminatory against homebuyers.

Lastly, homebuyers are typically ill-informed and do not have the expertise necessary to determine the financial viability of the plans and proposals. This can lead to further discrimination against "secured financial creditors".

On February 15, 2024, IBBI made amendments to several CIRP regulations vide IBBI (Insolvency Resolution Process for Corporate Persons) (Amendment) Regulations, 2024[10]. These amendments are made as per the recommendations of the Expert Committee Report and Discussion Paper on Real Estate Sector regarding operating separate bank accounts for each real estate project under Regulation 4D. Besides, clarification has been inserted into regulation 36A (1), stating that the RP may invite a Resolution Plan for each real estate project or group of projects of the Corporate Debtor after CoC's approval. These changes were made for smoother functioning of Real Estate CIRPs and to resolve them effectively. *It may be noted that inviting a Resolution Plan for each project is quite different from 'Project-Wise CIRP'*. Importantly, the Amendment in the CIRP Regulations on February 15,2024 has dropped the amendments proposed in the Discussion Paper relating to Registration under RERA and handing over possession where the flats are complete or on an 'as in were is' basis. This clearly points out that IBBI has not considered the bigger picture which is recommended by the Amitabh Kant Expert Committee on Real Estate Projects when it comes to Real Estate CIRP.

If a Real Estate Corporate Debtor is facing financial stress, it may be due to one or two projects only, while the other projects may be functioning well. If such diversification is clear regarding Real Estate corporate debtors, it is better to go with Project Wise CIRP, i.e., the projects that lead to financial distress should be brought into the purview of the IBC and resolved individually, rather than pulling the entire real estate entity into insolvency, even though they are not facing distress.

Thus, to overcome the difficulties of bringing the entire real estate entity into the purview of IBC, it is necessary to introduce "Project Wise CIRP" into the IBC which is deliberated by the expert committee in their report. The amendment has the potential to facilitate easier resolution and benefit all stakeholders under the IBC, making it a promising solution for insolvency cases pertaining to the Real Estate Sector. Hence, we anticipate the formal amendment in the IBC to be accompanied by the necessary regulations that will ensure successful resolution and revival of real estate sector insolvencies.

[10] https://ibbi.gov.in/uploads/legalframwork/88458173f47fbda03d775370a420f307.pdf

# Employees and Workmen Benefits under the IBC


*The Insolvency and Bankruptcy Code, 2016 (IBC) focuses on resolving financially stressed corporate debtors in a time-bound, market-led, and incentive-compliant manner thereby promoting entrepreneurship, credit availability, and balancing interests of various stakeholders. During the IBC processes – CIRP and Liquidation- employees and workmen play crucial role but face significant challenges related to their dues such as salary, gratuity, provident fund, and pension fund etc. In the present article, the author, through hypothetical scenarios, has elaborated various approaches to deal with employees' dues in the light of relevant judgements passed by the Supreme Court, NCLAT and NCLTs. Besides various suggestions for effectively dealing with dues of employees, the author has also made recommendations for amendments in the pertinent laws to incorporate jurisprudence developing around the issue for better clarity to stakeholders.* ***Read on to know more…***

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The Insolvency and Bankruptcy Code, 2016 (IBC) is the comprehensive legislation governing insolvency resolution in India for both corporate and individual entities. Enacted on December 01, 2016, for corporate insolvency and later covered personal guarantors to corporate debtors on December 1, 2019, the IBC replaced outdated laws and aimed to establish a coherent framework. It emphasizes the freedom to start, operate, and exit businesses. The IBC focuses on resolving financially stressed corporate debtors in a time-bound, market-led, and incentive-compliant manner thereby promoting entrepreneurship, credit availability, and balancing interests of various stakeholders. This legal reform has shifted power from debtors to creditors, enhancing fiscal and credit discipline.

As per data in Newsletter- September 2023 of the Insolvency and Bankruptcy Board of India (IBBI), out of 7,058 admitted Corporate Insolvency Resolution Process (CIRP) cases, 808 resulted in approval of resolution plans, 2,249 ended in liquidation orders, and 2,001 are ongoing, while the rest were closed via section 12A appeals or withdrawals.

As of September 2023, creditors have recovered ₹3.16 lakh crore through approved resolution plans.

Additionally, over 26,000 applications with a total default of ₹9.33 lakh crore were withdrawn before entering the resolution process.[1]

The IBC doesn't define the word "Employee" but defines the "Workman" as the one who draws wages not exceeding ₹10,000 and works in Non-Managerial Capacities.[2]

> **As per the IBC, a workman is one who draws wages not exceeding ₹10,000 and works in Non-Managerial Capacities.**

Following benefits are applicable to the employees and to workman while in service or after termination subject to applicable laws and the contract.

a) Basic Salary
b) Dearness Allowance
c) Allowances (Transport, Medical etc.)
d) Leave Encashment
e) Bonus
f) Retrenchment Compensation
g) Gratuity
h) Provident Fund
i) Pension Fund

In the insolvency process, employees and workmen face significant challenges during two distinct stages: CIRP and Liquidation. These stages involve various scenarios, which are contingent upon the specific circumstances of each case.

To elucidate, we can examine hypothetical examples that exemplify the different situations that can arise within each scenario.

## A. CIRP Stage

**Scenario – 1:** Employees are continuing after the Insolvency Commencement Date (ICD) and supporting Interim Resolution Professional (IRP) /Resolution Professional (RP) to run the Corporate Debtor (CD) as a going concern.

All employees who are working and supporting IRP/RP to run the CD as a going concern are entitled to get their benefits and the nature of the cost is detailed below.

**(a) Monthly Salary** (Break up depends on the contract)

i. **Dues prior to CIRP** – To be submitted to IRP/RP in the form of a claim.

ii. **During CIRP** – It is a CIRP cost and should be paid by IRP/RP as and when funds are available subject to approval of the CoC.

If dues are not paid to employees owing to insufficient funds, the same will be treated as unpaid CIRP cost and will be paid on priority (in cases of approved Resolution Plan or in Liquidation) subject to approval of the Committee of Creditors (CoC).

**(b) Gratuity**

Irrespective of the status of employees' continuity in the organization, all the employees who are eligible to receive gratuity as per the Gratuity Act 1972 are entitled to receive the gratuity as per the timelines provided in the Gratuity Act 1972.

This scenario comes into the picture when an employee was working during CIRP and was terminated due to death/ Superannuation/ Retirement/Resignation/ or disablement due to accident or disease subject to the continuous service.

In the matter of *Savan Godiwala, the Liquidator of Lanco Infratech Limited vs. Apalla Siva Kumar,* the Supreme Court on February 07, 2023, has upheld the NCLT judgement that "even if no fund is kept, the liquidator must make adequate provisions for paying gratuities to the applicants in accordance with their eligibility. The Liquidator cannot avoid the obligation to pay gratuities to the employees on the grounds that the CD did not maintain separate funds". Thus, it is not an asset of the CD and therefore IRP/RP has to release the dues as and when it is due and payable irrespective of the fact that whether CD has been maintaining a separate Fund or not.

1. https://ibbi.gov.in/uploads/whatsnew/b4ce3516920836e9ff9b1e816137bf97.pdf
2. https://lddashboard.legislative.gov.in/sites/default/files/A1947-14_0.pdf Please refer to Section 2(s) of the Act for the detailed definition

If gratuity is not paid due to insufficient funds with CD or Insurer, then the same will be paid on priority (in cases of approved Resolution Plan or Liquidation). The NCLAT in the matter of *Sikander Singh Jamuwal vs. Vinay Talwar & Ors,* ordered the Successful Resolution Applicant to release full provident fund dues in terms of the provisions of the Employees Provident Funds and Miscellaneous Provident Fund Act, 1952 immediately by releasing the balance amount. The same was upheld by the Supreme Court on September 23, 2022, while dismissing the appeal against this order of the NCLAT. Subsequently, the Resolution Plan was modified to incorporate the same.

> **The Supreme Court, in the case of *IDBI Bank limited vs. Lanco Infratech Ltd.* (2023) upheld the judgement of NCLT Hyderabad that the Liquidator to pay gratuity with interest for the delayed payment.**

The Supreme Court in its verdict dated February 07, 2023, upheld the judgement of NCLT Hyderabad in the case of *IDBI Bank limited vs. Lanco Infratech Ltd.* wherein the tribunal has ordered the Liquidator to pay gratuity with interest for the delayed payment. Thus, the interest as per the Gratuity Act 1972 is required to be paid on delayed payments.

**(c) Provident & Pension Fund**

i. **Dues prior CIRP –** To be submitted to IRP/RP in the form of a claim.

ii. **During CIRP –** CD has to deposit the PF contribution mandatorily.

If the contributions were not deposited due to any reason, then the total dues including interest and damages as per the Employees' Provident Fund Organization (EPFO) Act shall be paid in full and on priority (in cases of approved Resolution Plan or in Liquidation). Further, in the matter of *Tourism Finance Corporation of India Ltd. vs. Rainbow Papers Ltd. & Ors,* National Company law Appellate Tribunal (NCLAT) has ruled, "However, as no provisions of the 'Employees Provident Funds and Miscellaneous Provision Act, 1952' is in conflict with any of the provisions of the IBC, 2016 and, on the other hand, in terms of Section 36 (4) (iii), the 'Provident Fund' and the 'Gratuity Fund' are not the assets of the 'Corporate Debtor', there being specific provisions, the application of Section 238 of the 'IBC' does not arise". The same was upheld by the Supreme Court on May 22, 2020.

In instances where the NCLAT aligns with and is subsequently upheld by the Supreme Court, emphasizing the absence of conflict between the IBC and the EPFO Act, a crucial resolution surface. The prescribed approach entails the prioritized settlement of all dues, meticulously calculated in accordance with the EPFO Act, excluding interest and damages. This prioritization ensures the exclusion of said amounts from the Liquidation Estate.

However, a notable challenge emerges in the form of conflicting judicial opinions on the matter of interest and damages. To address and alleviate the prevailing uncertainties, a proposed solution takes the form of a legislative amendment to the pertinent laws. This strategic amendment aims to provide clarity and coherence, ultimately streamlining the resolution process and harmonizing the treatment of interest and damages in the context of EPFO-related obligations within the framework of insolvency proceedings.

**Scenario – 2:** Employees are continuing after the ICD and have not supported IRP/RP to run the CD as a going concern due to various reasons.

**(a) Monthly Salary** (Break up depends on the contract)

i. **Dues prior CIRP –** To be submitted to IRP/RP in the form of a claim.

ii. **During CIRP –** Since employees have not supported IRP/RP to run the CD as a going concern these dues cannot be treated as CIRP cost and will not be considered in Resolution Plan. Claims of employees before CIRP shall be considered.[3]

iii. Wages during CIRP can be treated under Section 53 (1) (b) & 53(1) (c) in case of Liquidation[4] subject to conditions.

[3] *Sunil Kumar Jain & Ors. vs. Sundaresh Bhatt & Ors.* – (2022) SCC OnLine SC 467

[4] https://nclt.gov.in/gen_pdf.php?filepath=/Efile_Document/nclt doc/casedoc/3607130003472019/04/Order-Challenge/04_order-Chal lange_004_167202861418035411863a921c605cd4.pdf

> **If employees have not supported IRP/RP to run the CD as a going concern monthly salary cannot be treated as CIRP cost and will not be considered in the Resolution Plan.**

(b) Gratuity, Provident & Pension Fund– Same as Scenario 1.

**Scenario – 3:** Employees resigned before the ICD.

(a) **Monthly Salary** (Break up depends on the contract)

i. **Dues –** To be submitted to IRP/RP in the form of a claim.

**(b) Gratuity, Provident & Pension Fund**

i. All of the above dues are to be submitted as part of the claim to IRP/RP.

ii. These funds do not belong to the CD. Hence, IRP/RP should pay at the earliest.

iii. If these funds were not paid due to insufficient funds, the same shall be paid (Including interest/ damages as applicable) in full by the Successful Resolution Applicant or Liquidator as the case may be.

### B. Liquidation Stage

As per Section 33(7) – Liquidation Order is deemed to be 'Notice of Discharge' to officials and employees/ workmen of the CD.

**Scenario – 1:** Employees were continuing after the Liquidation Commencement Date (LCD) and supported the Liquidator to run the CD's business.

**(a) Monthly Salary** (Break up depends on the contract)

i. **Dues prior CIRP** – Can be submitted to the Liquidator in the form of a claim[5].

ii. **During CIRP** – It is a CIRP cost and should be paid by IRP/RP in full as and when funds are available.

iii. **During Liquidation** – Dues after discharge order by Liquidator will be considered. It is a liquidation cost and will be paid in full depending on the availability of funds with the CD.

If any amounts due during CIRP or Liquidation and are not paid by IRP/RP/Liquidator in full, the same shall be


treated as CIRP/Liquidation cost and will be paid in full and as a priority during the distribution of assets by the Liquidator.

**(b) Gratuity, Provident and Pension Funds**

Due to their exclusion from the liquidation estate under Section 36(4)(b)(iii), the workers and employees are entitled to the full amount of the provident fund and gratuity[6].

Hence, CD has to release the dues accordingly.

**Scenario – 2:** Employees were not continuing after the LCD due to the deemed notice of discharge.

This can be dealt with as explained in CIRP stage.

> **Thus, from the above analysis we can conclude that in any case scenario -- Gratuity, Provident and Pension Fund are to be paid in full be it in the CIRP or Liquidation stage.**

Thus, from the above analysis we can conclude that in any case scenario – Gratuity, Provident and Pension Fund (Including Interest[7] /Damages etc. as applicable) are to be paid in full be it in the CIRP or Liquidation stage (Irrespective of the fact that a separate Fund was maintained or not by the CD).

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5. Liquidator has to consider the claim submitted by employees during CIRP, if any. Employees don't need to submit the claim again unless there is a change in the claim amount.

6. Jet Aircraft Maintenance Engineers Welfare Association Vs. Ashish Chhawchharia RP of Jet Airways (India) Ltd. & Ors. – NCLAT New Delhi

7. https://nclt.gov.in/gen_pdf.php?filepath=/Efile_Document/ncltdoc/casedoc/3607130000012017/04/Order-Challenge/04_order-Challange_004_1689155516160091155064ae77bc848d4.pdf

## CASE LAWS (Related to Employee Benefits):

| Sl No | *Name* | Date of Judgement | Forum | Summary |
|---|---|---|---|---|
| 1 | *Jet Aircraft Maintenance Engineers Welfare Association Vs. Ashish Chhawchharia & Ors.* | October 21, 2022 | NCLAT, New Delhi | i. Till ICD, Employees and Workmen are entitled to receive payment of the entire provident fund and gratuity.<br>ii. In accordance with the provisions of Section 53(1)(b) and at least the minimum liquidation value specified under Section 32(2)(b) read with Section 53(1), the Workmen are entitled to receive their dues from the CD for a period of 24 months. |
| | | January 30, 2023 | Supreme Court | i. The Supreme Court upheld the order of NCLAT dated December 02, 2022, and dismissed the appeal against it. |
| 2 | *State Bank of India Vs. Moser Baer Karamchari Union & Anr* | August 19, 2019 | NCLAT, New Delhi<br><br>3 Member Bench | NCLAT did not find a reason to interfere with the contested order dated March 19, 2019, as NCLT has determined that the funds—the provident fund, the pension fund, and the gratuity fund—do not fall under the definition of "liquidation estate" for asset distribution under Section 53. |
| | | February 07, 2023 | Supreme Court | The Hon'ble Supreme Court dismissed the appeal as no cogent reason was found by the court to entertain the appeal. |
| 3 | *Tourism Finance Corporation of India Ltd. vs. Rainbow Papers Ltd. & Ors* | December 19, 2019 | NCLAT, New Delhi<br><br>3 Member Bench | As it did not include as an asset of the "Corporate Debtor," NCLAT orders the "Successful Resolution Applicant" to release the full provident fund & interest thereof in accordance with the provisions of the EPF Act, 1952 immediately. |
| | | May 22, 2020 | Supreme Court | Hon'ble Supreme Court dismissed the appeal against NCLAT order as no merit was found in the appeal |
| 4 | *Mr Savan Godiwala, the liquidator of Lanco Infratech Limited vs. Apalla Siva Kumar* | August 20, 2019 | NCLT Hyderabad | Even if no fund is kept, the liquidator must make adequate provisions for paying gratuities to the applicants in accordance with their eligibility. The liquidator cannot avoid the obligation to pay gratuities to the employees on the grounds that the "Corporate Debtor" did not maintain separate funds |
| | | February 14, 2020 | NCLAT New Delhi | Due to the liquidator's lack of authority to handle the corporate debtor's assets, which are not included in the liquidation estate, the liquidator cannot be ordered to provide gratuities to the employees. |
| | | February 07, 2023 | Supreme Court | Hon'ble Supreme Court quashed and set aside the order passed by the learned NCLAT and the order passed by the National Company Law Tribunal was restored" - Civil Appeal No. 2520 of 2020. |
| 5 | *Sikander Singh Jamuwal vs. Vinay Talwar & Ors* | March 11, 2022 | NCLAT New Delhi | NCLAT has ordered the Successful Resolution Applicant to release full provident fund dues in terms of the provisions of the Employees Provident Funds and Miscellaneous Provident Fund Act, 1952 immediately by releasing the balance amount.<br><br>The impugned order dated 02nd April, 2019 approving the 'Resolution Plan' by the NCLT stands modified to the extent above |
| | | September 23, 2022 | Supreme Court | Hon'ble Supreme Court did not find merit in the appeal after hearing from the appellant's learned counsel. As a result, the Civil Appeal is dismissed. Nonetheless, liberty is given to the appellant that he may seek that the difference in the provident fund be deposited at a later date in front of the appropriate forum. |

| | | | | |
|---|---|---|---|---|
| 6 | *Nitin Gupta Vs. Applied Electro Magnetics Pvt. Ltd* | March 17, 2022 | NCLAT New Delhi | NCLAT is of the view that with a small adjustment to the sums suggested to be paid to the Workman and Employees in respect to their dues, including provident fund, the approved resolution plan conforms with the rules of the IBC. The amounts are:<br>• The additional payment of ₹0.8834 crores to be distributed among the workers according to their proportionate shares<br>• The provident fund payment should be paid in compliance with the NCLAT's judgment in the matter of Sikander Singh Jamuwal Vs. Vinay Talwar & Ors |
| 7 | *Sunil Kumar Jain vs Sundaresh Bhatt,* | April 19, 2022 | Supreme Court | Section 36(4) of the IB code states that when provident funds, gratuity funds, and pension funds are kept separate from the assets of the liquidation estate, the share of labor dues must be kept out of the liquidation process. The relevant workmen and employees must be paid the appropriate amount from any available provident funds, gratuity funds, and pension funds; the liquidator will not be entitled to any of these funds.<br><br>Also NCLAT New Delhi clarified on the words "If any, available" in Jet Aircraft Maintenance Engineers Welfare Association Vs. Ashish Chhawchharia RP of Jet Airways (India) Ltd. & Or as – The aforementioned language cannot be interpreted to imply that workers and employees are not eligible for pension, gratuity, or provident funds if the funds are not available with the liquidator." |
| 8 | *C.G. Vijyalakshmi Vs. Shri Kumar Rajan, RP Hindustan Newsprint Ltd* | February 14, 2023 | NCLAT Chennai | The court said that - As per the principles outlined in the Jet Aircraft Maintenance Engineers Welfare Association (Supra), the successful resolution applicant will be directed to pay any unpaid provident fund and gratuity fund as well as any outstanding debts to workers or employees until the date of CIRP, after deducting the amount already paid toward provident fund in the resolution plan. |

The following instances touch upon various aspects of the IBC in India, specifically highlighting the importance of employees' dues in the resolution process.

i. **Precision Fasteners Ltd vs. EPFO:** The Adjudicating Authority (AA) recognizes that creditors have a property right over the assets of the CD. However, it also noted that workmen's dues are closely connected with the right to life and should be prioritized over the rights of creditors. This observation underscores the significance of employees' dues and their priority in the insolvency resolution process.

ii. **IIM-A Report:** It indicates that the average employee costs increased significantly in the three years following the resolution of firms under the IBC. This suggests a higher employment intensity in resolved firms during the post-resolution phase, along with an overall increase in employment across all companies. This data reflects the positive impact of IBC resolutions on employees. (reference required)

iii. **EPFO Annual Report 2023-24:** It highlights that a substantial amount of ₹1,773.61 crores in 2546 cases falls under the "Not Immediate Realizable (NIR) Category" due to establishments being in liquidation[8]. (reference required)

iv. **ESI Dues:** A sum of ₹284 crores and ₹156 crores was categorized under immediate not recoverable, due to establishments under Liquidation and cases in respect of Factories/Estts. Registered with BIFR/NCLT but rehabilitation scheme yet to be sanctioned[9].

It is essential to emphasize that, as per established jurisprudence, all outstanding payments owed to the

8. https://www.epfindia.gov.in/site_docs/Annual_Report/Annual_Report_ 2022-23.pdf

9. https://labour.gov.in/sites/default/files/ar_2022_23_english.pdf

three categories - Gratuity, Provident, and Pension Fund - must be promptly disbursed by the IRP/RP or Liquidator. Regrettably, due to a lack of clarity among the stakeholders, the owed amounts have yet to reach the intended beneficiaries.

> **IBBI may consider revising relevant regulations to address the evolving jurisprudence and eliminate any confusion among practitioners by providing necessary clarifications and amendments.**

The new labour codes when implemented are expected to bring much-needed clarity in the distinction between employees and workmen, reducing confusion in the labour landscape. Furthermore, it is essential to note that these labour codes will also play a significant role in the context of the IBC. They will provide a structured framework for addressing labour-related matters during insolvency proceedings, ensuring that the interests of employees and workmen are safeguarded while also facilitating the resolution of financial distress for businesses. This interplay between the labour codes and the IBC signifies a balanced approach that aims to protect the rights of both labour and capital, contributing to a more stable and equitable business environment in India.

## Conclusion

a) Gratuity, Provident and Pension Fund including interest and damages as applicable to be paid by the CD irrespective of the fact that a separate fund was maintained or not. For these funds, relevant authorities can submit a claim form as "Other Creditor" and can revise based on the outcome of subsequent enquiry proceedings as only recovery proceedings are prohibited under the moratorium.

b) Information about the application for CIRP can be shared with Provident Fund, Gratuity Fund and Pension Fund authorities to capture the dues/ status of the fund(s) in the admission order. Once the claims are verified by IRP/RP, the shortfall, if any shall be contributed by CoC as soon as it is constituted.

c) IBBI may consider revising relevant regulations to address the evolving jurisprudence and eliminate any confusion among practitioners by providing necessary clarifications and amendments.

# Extinguishing Guarantees: Dilemma of Dissenting Financial Creditors under the IBC, 2016


*The IBC nowhere puts an embargo on the creditors to recover their dues (apart from what has been received under the Resolution Plan) from the guarantors of the Corporate Debtor (CD). Further, the Supreme Court in the case of SBI vs. V. Ramakrishnan and Ors. has observed that simultaneous proceedings can be initiated against both - the principal borrower and the guarantors. However, what will be the way-out for dissenting creditors, if the CoC, in exercise to its commercial wisdom under the IBC, approves the Resolution Plan extinguishing Personal Guarantor (s) to the Corporate Debtor from all its liabilities? As hair cut is order of the day in insolvency processes, is it justified to bar dissenting creditors from initiating insolvency proceedings against the Personal Guarantors? In light of various judgments of NCLAT and the Supreme Court, the authors have deliberated upon this crucial issue, highlighted practical difficulties and suggested remedies.* ***Read on to know more…***

**Varun Akar and Rapaka Sravya**
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Insolvency and Bankruptcy Code, 2016 (IBC) was enacted with the objectives of resolving the insolvency of a corporate person in a time-bound manner by maximizing the value of assets of such persons, promoting entrepreneurship, availability of credit, and balancing the interest of all the stakeholders. The proceeding under the IBC aims to resolve the insolvency of the company and not to recover the dues of the creditors.[1] This is further supplemented by the fact that the creditors in the resolution process usually take haircuts in realization of their dues. The IBC nowhere puts an embargo on the creditors to recover their dues (apart from what has been received under the Resolution Plan) from the guarantors of the Corporate Debtor (CD). In fact, the Supreme Court in the case of *SBI vs. V. Ramakrishnan and Ors.*[2] has observed that simultaneous proceedings can be initiated against both - the principal borrower and the guarantors, under the IBC realizing the coextensive nature of the contract of guarantee under the Indian Contract Act, 1872.

This has been further reiterated by the Supreme Court in the case of *Lalit Kumar Jain vs. Union of India*[3] which

1. Ravi Iron Ltd. v. Jia Lal Kishori & Ors. (Civil Appeal No. 3068 of 2022) & S.S. Engineers & Ors. v. Hindustan Petroleum Corporation Ltd. (Civil Appeal No, 4583 of 2022).
2. 2018 (17) SCC 394; Civil Appeal No. 4553 of 2018.
3. Transfer Case (Civil) No. 245/2020 at 111.

provides that the approval of the Resolution Plan does not ipso facto release the Personal Guarantor to Corporate Debtor (PG to CD) from their liability under the contract of guarantee thereby implying that the right to recover the balance dues of the creditors remains and does not get extinguished once the plan is approved. Furthermore, it is to be noted that a sanctioned Resolution Plan cannot be construed as a variation in terms of the contract between the principal borrower and creditor, thereby discharging surety from the liability as per Section 134 of the Indian Contracts Act.[4]

In this regard, there have been instances wherein under the resolution plan, the right of recovery against the personal guarantors arising out of the guarantee contract was curbed at the instance of the assenting financial creditors (AFCs).[5] The moot question that arises here is "whether an approved Resolution Plan can contain a clause for extinguishment of security interest owned against corporate guarantor/personal guarantor/third party for recoveries and if yes, what is the fate of rights of the dissenting financial creditors (DFCs) who have not approved such extinguishment?" The issue has been deliberated and discussed at length at multiple forums including the Supreme Court and NCLAT.

**"In the case of *SVA Family Welfare Trust & Anr. vs. Ujaas Energy Ltd. & Ors.*, the NCLAT has observed that the security interest of the DFC by virtue of the personal guarantee of the ex-director can be dealt with in the Resolution Plan."**

In the case of *SVA Family Welfare Trust & Anr. vs. Ujaas Energy Ltd. & Ors.*[6] , the NCLAT has observed that the security interest of the DFC by virtue of the personal guarantee of the ex-director can be dealt with in the Resolution Plan. The appeal in the instant case was filed by the Successful Resolution Applicant (SRA) whose Resolution Plan was rejected by the Adjudicating Authority (AA) on the ground that the Committee of Creditors (CoC) under the garb of the Resolution Plan cannot release the personal guarantee by receiving a consideration in lieu of such relinquishment and thus, the Resolution Plan was stated to be in violation of Section 30(2)(e) of the IBC. Further, the Appellate Tribunal (NCLAT) also observed that the use of expressions 'per se' and 'ipso facto' in the judgement of *Lalit Kumar Jain vs. Union of India*[7] indicates that the approval of a Resolution Plan does not extinguish the liability of the Personal Guarantors from their obligations to the creditors. It was further observed that the use of such expressions also indicates that there might be certain situations where some relevant clauses in the Resolution Plan can be inserted to discharge the liability of the personal guarantors. Lastly, reversing the order of the NCLT and basis Regulation 37(d) of CIRP Regulations (which provides for satisfaction or modification of any security interest under a Resolution Plan)[8] , it held that the decision of the CoC to accept the value for relinquishment shall be considered as commercial wisdom which cannot be challenged. This reasoning of the Appellate Tribunal was upheld by the Supreme Court in the case of *Bank of Baroda vs. Ujaas Energy Limited & Ors.*[9]

Thereafter, the above issue was deliberated again by the NCLAT in the matter of *Puro Naturals JV vs. Warana Sahakari Bank and Ors.*[10] In the instant case, the Resolution Plan provided for the extinguishment of securities and personal guarantees for consideration to the secured creditors without the consent of DFC. The NCLAT observed that the plan envisaged that after payment of a certain amount, the debt of Secured Financial Creditors would stand assigned to SRA and that the securities and guarantees would get extinguished. It was further observed by the Appellate Tribunal that the plan was well deliberated by the CoC before approval and that it had consciously dealt with securities and personal guarantees given to Financial Creditors (FCs) including that of DFCs. The NCLAT referred *SVA Family Welfare Trust & Anr. v. Ujaas Energy Ltd. & Ors*[11] and held that the extinguishment of securities and personal guarantee in the resolution plan is in compliance with Section 30(2)(e) of the IBC.

Although, the above judgements have answered the moot problem raised by the authors, the plight of DFCs

4. Gouri Shankar Jain Vs. Punjab National Bank & Anr, W.P. No. 10147 (W) of 2019 at ¶35.

5. Naveen Kumar Sood RP of Ujaas Energy Ltd, IA/190(MP)2021 & IA/165(MP)2022 in CP(IB) 9 of 2020.

6. Company Appeal (AT) (Insolvency) No. 266 of 2023.

7. Supra Note 3.

8. The Insolvency and Bankruptcy (Corporate Insolvency Resolution Process) Regulations, 2016, Regulation 37(b)

9. Civil Appeal No. 6602 of 2023.

10. Company Appeal (AT) (Insolvency) Nos. 651, 661-663 and 1005 of 2023.

11. Supra Note 6.

continues to exist, whose fate to recover their dues remains at the mercy of AFCs, which are as follows:

**"In light of judgements on the issue of Extinguishing Guarantees, Dissenting Financial Creditors (DFCs) are likely to be in an adverse situation wherein they receive less/zero amounts from the guarantors."**

1. As a potential impact of the above judgments, the DFCs are likely to be in an adverse situation wherein they receive less/zero amounts from the guarantors. This is because they will not have any recourse to invoke guarantees (be it corporate guarantee or personal guarantee) on account of commercial wisdom exercised by the AFCs. The authors opine that AFCs cannot be allowed to infringe upon the payment rights of the DFCs, which undermines the interest of DFCs, thereby derailing from one of the objectives of the IBC which is to balance the interest of all stakeholders. Furthermore, as evident from both the cases referred to above, the plan value is much lower in comparison to debts of the Secured Financial Creditors (SFC). In the event of distribution, the SFCs will not get their full dues realized as the payments such as CIRP cost, and payment to Operational Creditors (including workmen dues, as in the event of liquidation) shall take priority. Thus, curbing the right to recover its balance dues from the guarantors seems unjustified on the part of AFCs.

2. The legal right to pursue against either of the parties (principal borrower and guarantor) cannot be allowed to be waived/extinguished merely through the purported commercial wisdom of CoC. The extinguishment of the guarantee deprives a creditor (DFC in particular) of their *right to payment* without their consent which has been conferred under Section 128[12] of the Indian Contract Act which provides that the liability of the guarantor and the borrower is co-extensive. In this regard, the Supreme Court in the case of *Maharashtra State Electricity Board, Bombay vs. Official Liquidator, High Court, Ernakulam*[13] has held that even if the principal borrower of the loans has gone into liquidation, the same shall not affect the liability of the guarantor. Thus, a resolution plan absolving the guarantors of their liability is prejudicial to the interest of creditors who, on the security provided by the guarantor, had extended the loan, especially when dissenting to approve such a plan.

3. Ideally, the commercial wisdom of the CoC should be confined to matters exclusively pertaining to the CD and such authority cannot be exercised to overstep such boundaries to extinguish the liability arising out of the contract of guarantee. NCLAT in the case of *UV Asset Reconstruction Company Limited vs. Electrosteel Castings Limited*[14] while dealing with the issue raised by the Appellant that *"whether debt of personal guarantor or third party which arises out of different contract shall also automatically extinguished after approval of the resolution plan"* has stated that extinguishment of debt post approval of the plan has to be qua the CD only and cannot be stretched to include extinguishment of debts guaranteed by third party.

**"Assignment of debts of the financial creditors under the Resolution Plan to the SRA with/without any consideration, would also hinder the right of DFCs to recover their balance dues separately."**

4. Further, the authors are of the opinion that the assignment of debts of the financial creditors under the resolution plan to the SRA with/without any consideration, would also hinder the right of DFCs to recover their balance dues separately. Also, as a matter of fact, the assignment of loans is a form of contract that has to satisfy the principles of the Indian Contract Act, 1872. The plan providing for the assignment of all the debts of the FCs including that of DFCs will lack consensus ad idem and violates the basic principle of the Contract Act, i.e., mutual consent, which affects the plan compliance with Section 30(2)(e) of the IBC. Moreover, NCLAT in *Vikas Agarwal vs. Asian Colours Coated Ispat Limited*[15] has upheld the plan which provided for the assignment of debt to the SRA excluding the right to

[12] The Indian Contract Act, 1872, § 128, No. 9, Acts of Imperial Legislative Council (1872) (Ind.).

[13] AIR 1982 SC 1497.

[14] Company Appeal (AT) (Insolvency) No. 975 of 2022.

[15] Company Appeal (AT) (INS.) No. 1104 of 2020.

go against the guarantors separately by the Financial Creditors and has observed that retaining such right shall not be in violation of Section 30(e) of the IBC or Section 6(e) of the Transfer of Property Act, 1882.

5. Also, according to Section 134 of the Indian Contract Act, the liability of the guarantor gets discharged if the creditor himself discharges the principal borrower from the liability. The key ingredient of Section 134 is the discharge of the debtor/ principal borrower through a voluntary act of the creditor and not due to the operation of law.[16] Thus, any scheme or resolution plan becomes a statutory scheme once it gets approval from the NCLT and is therefore considered an act of operation of law.

6. Furthermore, the authors are of the opinion that the effect of Regulation 37(d) of the CIRP Regulations should be confined only to the security interest that is given by the CD for the benefit of the third parties and not for the securities given for CD. If the same is not restricted, the right to proceed against the guarantors under the IBC or any other recovery legislations may become impracticable, contradicting the judgement of the Supreme Court in the case of *SBI vs. V. Ramakrishnan.*[17]

7. Furthermore, if it is deemed that the interests of the DFCs can be curtailed for a larger economic benefit, one must consider the other objective of the IBC, which emphasizes balancing the interests of all stakeholders. The doors for creditors who did not assent to such extinguishment/assignment are completely shut from recovering the amount from the guarantors which does not balance the interest of the DFCs with that of AFCs. Thus, it should be impermissible for AFCs to interfere with the payment rights of DFCs which could compromise the interests of the latter.

8. Moreover, curtailing the right to recover dues from guarantors will impair another objective of the IBC, i.e., to improvise the availability of credit. In India, lenders predominately provide loans after obtaining a guarantee from the promoters. Furthermore, NCLAT in the case of *Vikas Agarwal vs. Asian Colours Coated Ispat Limited*[18] has also observed that "the IBC is not for resolution of PG, and it may not be out of context to note that the financial creditors sanction huge credit facilities to the CD based on several protections including personal guarantees of the promoters". The Appellate Tribunal also observed that "resolution of debts is only to the extent of obligations against the Company, and this will not take away the rights of the financial creditors to proceed against the PGs"[19]. Therefore, if something under the resolution plan prohibits/ bars a lender from recovering the loan (option of recovering from guarantors in case of default), they may be hesitant to provide the loans in future, which may adversely impact on overall credit ecosystem thereby defeating the objective of the IBC.

**"NCLAT in the case of *Vikas Agarwal vs. Asian Colours Coated Ispat Limited* observed that resolution of debts is only to the extent of obligations against the Company, and this will not take away the rights of the financial creditors to proceed against the PGs."**

9. Also, it is to be considered that Section 29A (h) of the IBC debars a person to be a resolution applicant if he/ it has extended a guarantee to the CD against which an insolvency application has been admitted and such guarantee is invoked and remained as unpaid either in full or in part. This indirectly implies that the IBC originally envisaged payment of full amounts by the guarantors. An artificial extinguishment and free exit to contracting parties without fulfilling their contractual liabilities[20] by Resolution Plan goes against the spirit of the IBC. Thus, such a right cannot get extinguished under the resolution plan for a nil amount or for some consideration over and above the plan value which has been agreed by the AFCs.

10. One of the possible outcomes of extinguishing the liability under the Resolution Plan is that it might negate the effect of Section 32A of the IBC, which does not bar any action to be taken against the person apart from the CD or the SRA, as the cause (i.e., liability under the guaranteed agreement) will not

16. Prashant Shashi Ruia vs. State Bank of India, R/Special Civil Application No. 11199 of 2019.

17. Supra Note 2.

18. Supra Note 15 at 88.

19. Ibid at 50.

20. Ibid at 49.

subsist post extinguishment. Additionally, Section 14 of the IBC which provides for moratorium to the CD does not protect the guarantors during such period. By virtue of extinguishment of liability under the plan, the judgement provides protection to the guarantors, what otherwise they would not have had such clause for extinguishment was not provided under the plan.

11. Further, the authors understand that the judgement does not cover the situation wherein the majority members in the CoC are unsecured or are private parties (corporates) who might vote for such extinguishment/assignment with/without receiving any consideration against such extinguishment/ assignment which can leave the DFC remediless.

12. Conclusively, the extinguishment or effacement of third-party security held by the creditors under the Resolution Plan raises serious concerns about the fairness of the process. It is difficult to fathom why a Successful Resolution Applicant will take such a step and what benefit accrues to him by impinging on someone else's right.

Further, the authors are also aware of the judgements of the Supreme Court in the case of *Laxmi Pat Surana vs. Union Bank of India & Anr.*[21] as well as *Ebix Singapore Private Limited v. CoC of Educomp Solutions Limited & Anr*[22]. In the former, the court had emphasized that IBC is a self-contained law, and in the latter, the court had mentioned about the coercive mechanism of IBC wherein seeking recourse to the Contract Act would be antithetical to IBC. Summarizing, the court had said that the contractual principles and common law remedies, which do not find a tether in the wording or intent of IBC cannot be imported and remedies that are specific to the Contract Act cannot be applied de-hors the over-riding principle of IBC.

However, the coercive element in the aforesaid judgements is for participants inside the process for matters pertaining solely to the CD. Coercion cannot be applied to existing rights outside of the IBC.

> **"It is recommended that if the plan is providing either for extinguishment of liability of guarantors or for assignment of debts backed by a guarantee, without 100% approval of the CoC, such plan should be deemed as non-compliant under the IBC."**

Considering the above arguments, it is to be understood that the Resolution Plan cannot extinguish the debt secured by a personal or corporate guarantee without obtaining 100 percent approval from the CoC. Therefore, it is recommended that if at all the plan is providing either for extinguishment of liability of guarantors or for assignment of debts backed by a guarantee, without the hundred percent voting of the CoC, such plan should be deemed as non-compliant under the IBC.


[21] Civil Appeal No. 2734 of 2020.

[22] Civil Appeal No. 3224 of 2020.

# Successful Insolvency Resolution of Emerald Lands (India) Private Limited

*Emerald Lands (India) Pvt. Ltd., the Corporate Debtor, was created as a joint venture company by Silver Glades, Brack Capital Real Estate, and IL&FS Investment Manager Ltd. (IIML), to develop a golf based mega township namely "The Imperial Golf Estate" in Ludhiana, the State of Punjab. However, due to management disputes, PUFE transactions, lack of sale of real estate units lead to increase in losses and the company landed into a financial crisis.*

*IIML in its capacity of Financial Creditor filed an application under Section 7 of the IBC, 2016 to initiate CIRP of the Emerald Lands (India) Pvt. Ltd., which was admitted by the NCLT through an order on January 02, 2020. During the CIRP, the RP faced several challenges in arranging funds to pay salaries of staff, protecting the assets of the CD, maintenance of golf course, that were further aggregated by the Covid-19 pandemic. Seven investors expressed interest in the third EOI and the CoC approved the Resolution Plan submitted by the UK based M/s. Malhotra Group PLC, that proposed 39.44% payment to the claims of secured financial creditors. The payments were made within 60 days from the date of approval of the Resolution Plan by the NCLT.*

*In the present case study, Mr. Navneet Kumar Gupta, the RP of Emerald Lands (India) Pvt. Ltd has highlighted the challenges faced during the CIRP and measures adopted to address them to ensure a successful resolution.* ***Read on to know more…***

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## 1. Introduction: About the Corporate Debtor

The Imperial Golf Estate is around 280-acre golf-centric lifestyle project, being developed by Silver Glades, Brack Capital Real Estate, and IL&FS Investment Manager Ltd. (IIML) through their Joint Venture (JV) company - "Emerald Lands (India) Private Limited". The Corporate Debtor (CD) was incorporated in the year 2006. One of the few mega-townships in Ludhiana, it has been conceptualized as a low-density, high-end residential township developed around an 18-hole championship golf course designed by Jack Nicklaus.

The township, which has been master-planned by Arcop Associates, offers a variety of plots, villas and suites ranging from 250 sqyd to 2,000 sqyd, a Golf Academy and a host of amenities.

Emerald Lands (India) Private Limited entered in a development agreement with land owning company to develop a golf based mega township with 18-hole championship golf course. Through wholly owned subsidiaries it acquired around 280 Acres of land for the project i.e., The Imperial Golf Estate.

## 2. Reasons that lead to Corporate Insolvency Resolution Process (CIRP)

There were many reasons for losses in the company. Few of the reasons that primarily impacted the company which led it to the CIRP are mentioned below.

**a) Management Disputes:** There were major disputes between the management that lead to poor decisions by higher authorities. It was strange thing that before insolvency, all the directors from the company resigned.

**b) Real Estate Cycle:** The company got caught in trouble due to lack of sale leading to increase in losses over the period.

**c) Preferential, Undervalued, Fraudulent, and Extortionist (PUFE) Transactions:** It was believed that PUFE transactions occurred on higher levels that lead to major paucity of funds in the company.

## 3. Challenges during the CIRP

Here are some of the challenges that made the insolvency process a difficult one:

**a) Paucity of Funds:** The lack of funds was one of the biggest hurdles that came in between the project and its completion. Salaries of all the employees, security staff and compliances were to be given and plenty of funds were required for the maintenance of ground, golf courses and preserving of assets so as to realize the maximum value at the time of realisation of assets in future.

**b) Coronavirus Disease 2019 (COVID-19):** Covid-19 came as an unexpected surprise and directly affected the insolvency process. Due to lockdown in the country, the maintenance of golf courses and preserving of assets was getting difficult as site examination was not possible. Also, since all the processes of insolvency were delayed, the risk of overall delay of the insolvency process kept on increasing.

**c) Running and maintenance cost of golf course and technicalities involved:** The maintenance of golf course was the most difficult task and that too during the Covid pandemic. The golf course required special grass that was too costly, and lack of funds made it more difficult to arrange the tasks. Also, the golf course was in a very awful and unacceptable state when handed over to the Resolution Professional (RP). So, huge funds were required for first bringing the golf course in a running condition.

> **"The maintenance of golf course was the most difficult task and that too during the Covid-19 pandemic. Besides, long pending salary dues of staff worsened the situation as the CD was suffering from acute paucity of funds."**

**d) Over-Due Salaries:** All the people engaged in the insolvency process were stuck in the covid-19 lockdown. They were demanding their salaries from the RP. The security staff hired for maintenance and preserving of assets and golf course also had their salaries pending.

**e) To settle the of claims made by all the Creditors and Homebuyers:** The Covid-19 delaying the process of insolvency made the creditors and homebuyers reluctant for their dues to be settled fast. It was very important for the RP to build the trust of the parties involved in the insolvency process that the insolvency process was on its way of being successfully completed.

**f) PUFE Transactions:** The PUFE transactions were to be identified in the books of accounts as per the IBC because it could make a major impact on the process.

**g) Reconciliation of Land:** The total area of land owned by the company was said to be approximately 300 acres (approximately the area that will be covered by around 200 football stadiums). The full area of land was reconciled and assured that no false claims were made regarding the total area.

## 4. Solutions for the challenges faced.

Here are the solutions for the challenges faced that are mentioned above:

**a) Paucity of funds:** Even in case of paucity of

funds, many times salaries of the security staff and employees and electricity bills of the project site were arranged when creditors expressed inability to infuse money. Also, the RP had infused funds from time to time required for maintaining the golf course and preserving the assets. The golf course being in a substandard condition was first brought up to the standard and then made operational. Also, the money was bought via operating the golf course as the people who came to play golf were charged a fee for their play though the maintenance of such a large golf course was very expensive, and the RP and his team devised innovative and cost-effective ways to cut down on costs, strictly.

b) **Delays due to Covid-19:** The RP ensured that all the work that could be done online during the nationwide lockdown was completed so that the day lockdown is removed, no time is wasted in starting the offline process.

> **"The RP ensured that all the work that could be done online during the nationwide lockdown was completed so that the day lockdown is removed, no time is wasted in starting the offline process."**

c) **To settle the Claims Made by all the Creditors and Homebuyers:** The creditors and homebuyers were given a belief that the best possible result will be brought in the insolvency process. Also, the queries of all the homebuyers were resolved timely to their satisfaction by the RP.

d) **PUFE Transactions:** PUFE transactions of substantial amount were determined in the company. An avoidance application was filed for the PUFE transactions found.

e) **Prevention of Land Encroachment:** Even though, the golf course being a property that has limited boundaries or walls, it was made sure that not even a single inch of land was encroached.

There were some of legal challenges faced during the CIRP including the land authority GLADA; all these were duly addressed including the challenge to Resolution Plan by few employees and operational creditors. After detailed hearings, honourable NCLT rejected these challenges.

### 5. Teamwork

No project can be completed without a competent team and teamwork. This insolvency process adds an example to how important teamwork is. The RP with his team/ site employees worked on the project at times without electricity/water and security in area of around 300 acres posing severe risk to his team at times.

A qualified team of chartered accountants, company secretaries and lawyers were allocated to the project who together learned the levers, intricacies, nuts, and bolts of real estate accentuated with 18-hole golf course which was one of the best in class. Each person was allocated the task in his respective are of specialisation along with general management. The team managed to solve each and every problem that could hinder and come as an obstacle between the insolvency project and its resolution. The team's proper communication, coordination and commitment made every situation pleasant and converted adversity into opportunity. The legal team made sure that all the tasks were being done under the rules and regulations of law. The RP's team made sure that a team member was at the project site 24x7 to ensure protection and preservation of the assets. Even in Covid-19 when there was a nationwide lockdown, a team member stayed at the site for proper examination, maintenance, and preservation of the assets.

### 6. Synopsis of the project

The CIRP of the CD was initiated by Hon'ble NCLT vide its order dated January 02, 2020, in C.P.(IB) No. 1466/2019, on a petition under Section-7 of the IBC,2016 filed by M/s. IL&FS Financial Services Limited (Financial Creditor). The court appointed Mr. Navneet Kumar Gupta as Interim Resolution Professional (IRP) who was later appointed the RP.

Though the insolvency project is to be completed in 330 days from the date of application of insolvency, this CIRP took almost 2.5 years to be finished. The reasons for delay were Covid and consequent lack of the Expression of Interest (EOI). Expression of interest was not shown by any buyer in the first two attempts due to heavy impact of Covid-19 and nationwide lockdown which led to filling of Form-G three times.

Finally, perseverance paid, and we received seven EOIs out of which one Resolution Plan was finally approved

by the Committee of Creditors (CoC), after long drawn negotiations with 100% voting in favour of the Plan. The Successful Resolution Applicant (SRA) was a foreign investor.

However, this decision was challenged by the employees and creditors in the NCLT, that disposed of the matter in favour of the Plan. Later, the appeal was also rejected. The SRA settled claims of the Financial Creditor by making an upfront payment on the effective date and all the claims of the home buyers pertaining were also promised to be settled within 6 to 12 months. The RP assured that the company is handed over to the SRA within 60 days from the date of order by NCLT that is May 24, 2023.

**7. Claims filed vs Admitted Amount and the Resolution Plan:** The claims filed by financial creditors, Creditors in a Class (Regulation 8 A), Operational Creditors and Employees & Workmen along with the amount of Admitted Claims in the respective categories are provided in Table-1.

**Table-1: Claims Filed and Claims Admitted**

| Creditors | Claim Filed (₹) | Claims Admitted (₹) |
|---|---|---|
| Financial Creditors | 2,14,86,91,339 | 2,14,65,20,830 |
| Claims by creditors in a class (as per Regulation 8A) | 2,05,05,05,354 | 1,29,90,40,024 |
| Operational Creditors (including government dues) | 33,54,90,349 | 6,70,75,185 |
| Employees and workmen dues | 4,93,66,491 | 2,45,53,365 |
| **Total** | 4,58,40,53,533 | 3,53,71,89,404 |

## 8. The Resolution Plan

The salient features of the Resolution Plan approved by the CoC with an affirmative voting of 100%, there to as submitted by M/s. Malhotra Group PLC are mentioned below:

The SRA has been a Public Limited Company incorporated in England. One of the key reasons for selection of this Plan over others was the credibility of the SRA, its scheme for revival of the site as well as upfront payment. The SRA injected money through its sources, which was distributed in accordance with law per commercial negotiations amongst creditors. The Prospective Resolution Applicants (PRA) got attracted towards the asset primarily due to the way site was managed, the large piece of continuous land, the trust he posed in the process , local developments in the area which were duly highlighted to the PRA from time to time, especially during the period when the PRA expressed interest over phone call and till the time of formal submission of EOI.

> **"Secured financial creditors were paid 39.44% of the claim filed by them. The payment was made with 60 days from the date of approval of the Resolution Plan."**

So far as winning the Plan is concerned, there were multiple rounds of negotiations with homebuyers and financial creditors, and every time, the creditors and home buyers were duly assured to maintain positivity, which was duly supported by the way process was run and slowly/steadily, all stakeholders were in common boat of hope. They also came on board regarding resolution with duly redressal of claims/concerns through convincing communications which were helpful and effective in reducing the anxiety all across the ecosystem. Secured financial creditors were paid 39.44% of the claim filed by them. The payment was made with 60 days from the date of approval of the Resolution Plan.

**Table-2: Emerald Lands (India) Private Limited - Distribution parties**

| S.No. | Creditors/CIRP cost/MC cost |
|---|---|
| 1 | IL & FS Financial Services Limited |
| 2 | Homeowners |
| 3 | Employees & Workmen |
| 4 | Operational Creditors |
| 5 | CIRP cost |
| 6 | Monitoring cost |

## 9. Implementation Schedule

The Resolution Plan was approved by the NCLT through its order on May 24, 2023. Within a record period of 60 days from the date mentioned above, the company was handed by the resolution professional to the SRA. The transition was smooth, without any gaps/hindrances as all

steps were well practiced and thought through in advance culminating into new board/management. Following activities were performed in these 60 days:

**a)** **May 26, 2023:** Before May 26, 2023, the constitution of Monitoring Committee was completed. As the name suggests, the committee is set up for monitoring the insolvency process. The RP was also a part of the committee.

**b)** **June 03, 2023:** Before June 03, 2023, i.e. within 10 days of NCLT order dated, the access of all the documents and records and books of the CD as well as the subsidiaries, which were in possession of the RP; were provided to the advisors of the SRA so that they could review all the requisite documents required for the purpose of taking control of the CD and its subsidiaries.

**c)** **July 23, 2023:** Before the date mentioned above i.e., within 60 days of the NCLT order date, the monitoring committee communicated to all the homeowners immediately upon its constitution and received all cash settlement request from the home buyers.

**d)** All the payments towards the settlement of the CIRP cost, workmen & employees settlement account, operational creditors settlement amount and homeowners were cleared.

> **"The RP ensured that the Resolution Plan acts as a guide to the Monitoring Committee in disposing dues of various stakeholders. Furthermore, all original documents including all finance, accounting, legal property etc. were handed to the SRA and its advisors."**

**e)** The RP ensured that Resolution Plan acts as a reference book for disposal of the dues for all stakeholders and kept guiding the Monitoring Committee. Furthermore, all original documents including all finance, accounting, legal, property etc. were handed to the SRA and its advisors. Letters were written to all government authorities, customers etc., by the RP regarding the proposed change of management and control as per the Resolution Plan by the Adjudicating Authority.

## 10. Conclusion

Despite several challenges including severe cash shortage, disbanded board of directors, no office bearer/ worker in office, creditors hesitant to infuse money for processes/company, bulky real estate case far away from any metro city, we could find unique, front-loaded successful resolution. This event inculcates the faith in the process of the IBC, as well as proves that there is light at the end of tunnel provided the RP stays focused, has perseverance, clarity, and vision to move forward and keep the team and him/herself motivated till the fag end of the process.

# Legal Framework

## REGULATIONS

### IBBI amends Regulations for Project-Wise Resolution in Real Estate Sector

With an objective to streamline the CIRP for Real Estate Sector, IBBI has made crucial amendments in the IBBI (IRPCP) Regulations 2016 w.e.f. February 15, 2024.

As per the notification, a new Regulation 4 D has been inserted to provide for 'operating separate bank account for each real estate project'. "Where the corporate debtor has any real estate project, the interim resolution professional or the resolution professional, as the case may be, shall operate a separate bank account for each real estate project," reads Regulation 4 D.

Besides, Regulation 31B has been added regarding "approval of committee for insolvency resolution process costs". Under the amended dispensation, the RP is mandated to convene a CoC meeting at least once in every thirty days, with a provision to extend the interval between meetings to a maximum of one meeting per quarter, if CoC so decides. In addition to that amendments have been made in Regulations 18 (1); 25 (5) (b); 35; 35 (2); 36; 36 (a); 38 (3) and 40 (2).

**Source:** *IBBI Notification No. IBBI/2023-24/GN/REG113, dated February 15, 2024.*

### IBBI amends the IBBI (Liquidation Process) Regulations, 2016

To strengthen the regulatory framework of the liquidation process, the Insolvency and Bankruptcy Board of India (IBBI) through a notification dated February 12, 2024, has made certain key amendments to the IBBI (Liquidation Process) Regulations, 2016. These changes are aimed at facilitating a smoother process for liquidation, ensuring accountability, and bolstering the confidence of stakeholders in the liquidation process.

These amendments are primarily related to sub-regulation (1) of Regulation 2 B, Regulation 14, Regulation 31A, Regulation 32A, sub-regulation (2) of Regulation 33, Regulation 35, Regulation 46 (Regulation 46 A has been inserted), etc. The newly inserted Regulation 35


(7) allows a Liquidator to reduce the reserve price by up to 25% for assets with existing valuation of the CIRP on one occasion with the approval of the Stakeholders' Consultation Committee (SCC) at any time during the process.

**Source:** *IBBI Notification No. IBBI/2023-24/GN/REG112, dated February 12, 2024.*

### IBBI amends Regulations pertaining to 'Insolvency Resolution Process for PG to CD' and 'Bankruptcy Process for PG to CD'

The Insolvency and Bankruptcy Board of India (IBBI) has notified the IBBI (Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) (Amendment) Regulations, 2024 and IBBI (Bankruptcy Process for Personal Guarantors to Corporate Debtors) (Amendment) Regulations, 2024 dated January 31, 2024. The amended regulations are effective from January 31, 2023, and are available at the IBBI website.

The amendments remove the restrictions on an insolvency professional (IP) to be appointed as resolution professional (RP) or bankruptcy trustee (BT) in the insolvency resolution process or bankruptcy process of personal guarantors (PGs) to corporate debtors (CDs) respectively, if s/he has acted or is acting as Interim Resolution Professional (IRP), RP or Liquidator during the Corporate Insolvency Resolution Process (CIRP) or Liquidation Process of the CD. Removal of this restriction will allow the appointment of same IP in both the corporate processes as well as the insolvency and bankruptcy proceeding of the PGs to the CDs for better harmonization and effective coordination of both the processes.

To address complexities and unique challenges inherent in the PG cases, the amendment aims to make the convening of meeting of creditors mandatory to decide on the Resolution Plan submitted by the PG. This mandatory involvement of creditors brings a comprehensive and collaborative approach to the resolution process, enhancing the efficacy and fairness of the system. The amendment intends to foster active participation and cooperation among all stakeholders, thereby reinforcing a robust and equitable framework for addressing financial distress in PG cases.

**Source:** *IBBI Notification No. IBBI/2023-24/GN/REG107 dated January 31, 2024, and Notification No. No. IBBI/ 2023-24/GN/ REG108 dated January 31, 2024.*

### IBBI amends Regulations for IPs

As per the IBBI (Insolvency Professionals) (Amendment) Regulations, 2024 dated January 31, 2024, Clause 22 A has been added after Clause 22 and explanations are inserted in Clause 23B and 23C of the First Schedule of the IBBI (Insolvency Professionals) Regulations, 2016. These amendments are effective from Jan. 31, 2024.

The new Clause 22 A says, "An IP may resign from the assignment, subject to the recommendation of the CoC in a CIRP, consultation committee in liquidation process, the debtor or the creditor in the insolvency resolution process of personal guarantor to the CD, as the case may be, and the approval of the Adjudicating Authority". Furthermore, as per the explanation the IP shall continue to discharge his duties, functions, and responsibilities till the approval of resignation by the Adjudicating Authority.

**Source:** *IBBI Notification No. IBBI/2023-24/GN/REG 110 dated January 31, 2024.*

### IBBI notifies the IBBI (Voluntary Liquidation Process) (Amendment) Regulations, 2024

Though the IBBI (Voluntary Liquidation Process) (Amendment) Regulations, 2024 dated January 31, 2024, the Insolvency and Bankruptcy Board of India (IBBI) has amended the IBBI (Voluntary Liquidation Process) Regulations, 2017 w.e.f. the date of notification. The amendments are related to the sub-regulation (1) of Regulation 3; clause (b) of sub-regulation (1) of Regulation 8; Regulation 37; and Regulation 39. In the Regulation 3 (1) (c), a new sub-clause (iii) has been inserted which reads "the corporate person has made sufficient provision to meet the obligations arising on account of pending matters mentioned in subclause (iii) of clause (b)".

**Source:** *IBBI Notification No. IBBI/2023-24/GN/REG109 dated January 31, 2024.*

## CIRCULARS

### IBBI withdrew Paras on Liquidation Regulation set aside by Bombay HC

The IBBI had on Sept. 28, 2023, issued a Circular titled 'Clarification w.r.t. Liquidators' fee under clause (b) of subregulation (2) of Regulation 4 of IBBI (Liquidation Process) Regulations, 2016'. The Bombay High vide order dated April 04, 2024, in the matter of Amit Gupta vs. IBBI & Union of India while confirming the validity of the remaining part of the Circular stuck down two paragraphs of this Regulation i.e., Paragraph 2.1 ('Amount Realized') and Paragraph 2.5 ('Period for calculation of fee'). Accordingly, these two paragraphs have been withdrawn through this circular dated April 18, 2024.

**Source:** *IBBI Circular No. IBBI/LIQ/70/2024 dated April 18, 2024.*

### IBBI issued directions and Form to apply for withdrawal of amount from Corporate Liquidation Account

IBBI through a Circular dated February 22, 2024, has provided a direction and Form regarding request by liquidator for withdrawal from Corporate Liquidation Account for onward distribution to the stakeholder under regulation 46 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016. "To facilitate the request received from a stakeholder, under sub-regulation (7) of regulation 46, who claims to be entitled to any amount deposited into the Corporate Liquidation Account for withdrawal before the dissolution of the corporate debtor, the liquidator, after due verification, shall apply to the Board in the form as per Annexure, for the release of the amount for onward distribution to such stakeholder," reads the Circular.

**Source:** *IBBI Circular No. IBBI/LIQ/69/2024, dated February 22, 2024.*

### IBBI directs Liquidators to share progress report with stakeholders

IBBI through a Circular dated February 22, 2024, regarding 'Enhancing Transparency and Stakeholder Engagement in Liquidation Process' has directed the Liquidator to share the progress reports with the members of the Stakeholders' Consultation Committee (SCC) after receiving a confidential undertaking. Further, the Liquidator shall submit the progress reports under Regulation 15 till the filing of the final report under Regulation 45. Besides, it has also directed the Liquidator to seek suggestions / observations of the members of the SCC while preparing the Preliminary Report under Regulation 13.

**Source:** *IBBI Circular No. IBBI/LIQ/70/2024, dated February 22, 2024.*

### FSPs must obtain prior permission of the appropriate financial regulator for Voluntary Liquidation Process: IBBI

Through a Circular dated February 13, 2024, the IBBI has directed that the Liquidator shall ensure that if the corporate person falls under the category of Financial Service Provider (FSP), it shall declare that: (i) the category of Financial Service Providers (FSPs) has been notified by the Central Government under section 227 of the IBC, and (ii) the corporate person has obtained prior permission from the appropriate regulator. It is hereby directed that the Liquidator shall submit a copy of Form H and the final report filed before the AA as per Regulation 38 and email the order for dissolution to the IBBI, said the Circular.

**Source:** *IBBI Circular No. IBBI/LIQ/67/2024, dated February 13, 2024.*

### IBBI provides Form for withdrawal of amount under Regulation 39 of the IBBI (VLP) Regulations, 2017

Through a Circular dated February 13, 2024, the IBBI has provided a proforma to liquidators to submit requests for withdrawal of amounts from the Corporate Voluntary Liquidation Account (CVLA) for onward distribution to stakeholders under Regulation 39 of the IBBI (Voluntary Liquidation Process) Regulations, 2017. As per the regulation, liquidators are mandated to deposit unclaimed/undistributed amounts into the CVLA and inform the IBBI in Form-G containing details regarding the stakeholders entitled to such deposited amounts. "To facilitate the request received from a stakeholder, under regulation 39(7), who claims to be entitled to any amount deposited into the CVLA for withdrawal before the dissolution of the corporate person, the liquidator shall apply to the IBBI in the Form as per Annexure, for the release of the amount for onward distribution to stakeholders," reads the Circular.

**Source:** *IBBI Circular No. IBBI/LIQ/68/2024, dated February 13, 2024.*

### IBBI makes it mandatory for the RP to share the Report u/s 99 of the IBC to both debtor & creditor'

IBBI through a Circular dated February 12, 2024, has directed the RPs to share the report prepared in pursuance to the applications filed u/s 94 or 95 of the IBC to both debtor and creditor. "Sub-section (10) of section 99 mandates the RP to share a copy of this report to the debtor or the creditor, as the case may be," said the IBBI. However, there has been a lack of compliance in certain cases. "Therefore, it is hereby advised that the RP shall provide a copy of the report to both debtor and creditor in all cases," added IBBI.

**Source:** *IBBI Circular No. IBBI/II/66/2024, dated February 12, 2024.*

### IBBI's Regulations regarding 'Limit on Number of Assignments' and 'Fee Structure' are not applicable on Juristic IPEs: IBBI Circular

Through a Circular dated February 01, 2024, the IBBI has clarified that in case the assignment is undertaken by the IP, which is an IPE, the show cause notice under Regulation 11 of the IBBI (Inspection and Investigation) Regulations, 2017 shall be issued to (a) its partner or director, as the case may be, who is an IP and was authorized to sign and act on behalf of it for the respective assignment; and/or (b) the IPE if in the opinion of the IBBI, there are either repeated instances of contravention against one or more partners or directors of the IPE or instance of systemic failure on the part of such IPE. However, clause 22 of Code of Conduct (Limit on Number of Assignments) and Regulation 34B of CIRP Regulations (Fee Structure) does not apply to a Juristic IPE.

**Source:** *IBBI Circular No. IBBI/IPE/64/2024 dated February 01, 2024.*

### IBBI's issued clarifications on the 'Code of Conduct for IPs' to facilitate smooth and efficient conduct of the IBC processes

Based on the feedback received from various stakeholders and experiences encountered during implementation, the IBBI has provided clarity on few areas to facilitate smooth and efficient conduct of the processes. These clarifications are in relation to rendering professional service by an IP in implementation of the Resolution Plan approved by the Adjudicating Authority; and Clarification on compliance regarding billing / invoicing for services availed by IP from professionals.

As per the first clarification "In order to facilitate smooth implementation of the resolution plan, it is hereby clarified that an IP may render professional service in relation to implementation of resolution plan approved by the AA, provided details of such service are mentioned in the resolution plan approved by the AA". The second clarification is regarding clause 25C of Code of Conduct. Section 208 of the Code read with the IBBI (Insolvency Professionals) Regulations, 2016 (IP Regulations) mandates an IP to abide by the Code of Conduct.

**Source:** *IBBI Circular No. IBBI/IPE/64/2024 dated February 01, 2024.*

## NOTICE

### MCA invites comments on various rules under the IBC

The Ministry of Corporate Affairs (MCA) has invited online comments on the review of rules prescribed under the Insolvency and Bankruptcy Code, 2016 (IBC) under – "general comments" and "specific comments".

The "general comments" may be pertaining to inconsistency, difficulty in implementation of any of the provisions in any rule, any provision that should have been provided in any rule but has not been provided, and any provision that has been provided in any rule but should not have been provided. However, specific comments can be provided on the specific rule or subrule. These comments should be submitted online to the MCA within 30 days from the date of upload. This initiative has been taken in pursuance to the para-B.1 of MCA's policy for pre-legislative consultation and comprehensive review of existing rules and regulations prescribed under various legislations administered by it, which are in line to the announcement made in para 99 & 100 of Budget Speech (2023-24).

**Source:** *https://ibbi.gov.in/uploads/whatsnew/45711692a135cb163faf4300515d7338.pdf.*

## PRESS RELEASE

### IBBI Expert Committee Recommends Voluntary Mediation for IBC: A Balanced Approach to Enhance Efficiency

The Expert Committee constituted by the Insolvency and Bankruptcy Board of India (IBBI) to examine the scope of using mediation in respect of processes under the Insolvency and Bankruptcy Code, 2016 (IBC) has suggested the introduction of voluntary mediation as a dispute resolution mechanism under the IBC. The Committee recently submitted its report to the IBBI.

The panel has recommended a phased introduction of voluntary mediation as a dispute resolution mechanism under the IBC while maintaining the sanctity of the timelines for various existing insolvency resolution processes," said the IBBI. It further added, "the core essence of the framework is its independence and flexibility to provide room for quick incorporation of implementation learning". The panel has reportedly proposed the establishment of a dedicated and specialized NCLT-annexed insolvency mediation cell with an independent secretariat to administer, oversee, and manage the conduct of insolvency mediations. According to the IBBI, the panel has taken a cautious approach and endeavoured to balance the fundamental objectives of the IBC with the autonomy for parties to voluntarily opt for the 'out-of-court' mediation process to enhance the efficiency of the insolvency resolution process. The proposed mediation framework would best operate as a self-contained blueprint within the IBC, with independent infrastructure to ensure that the objectives of the IBC are met without compromising or diluting the basic structure in terms of timelines, public rights, etc.

**Source:** *IBBI Press Release No. IBBI/PR/2024/08, dated February 14, 2024.*

# IBC Case Laws

## Supreme Court of India

***Greater Noida Industrial Development Authority Vs. Prabhjit Singh Soni & Anr, Civil Appeal Nos.7590-7591 of 2023, Date of Supreme Court Judgement: February 12, 2024.***

**Facts of the Case**

The appeals under Section 62 are filed by the Greater Noida Industrial Development Authority (Appellant) against the order of the NCLAT whereby its appeal, against the order of the AA, has been dismissed. The Appellant being a statutory authority acquired land for setting up an urban and industrial township and one of the plots was allotted to M/s. JNC Construction Pvt Ltd (CD) for a residential project, by charging premium, payable in instalments.

The CD committed default in payment of instalments and was served with demand cum pre-cancellation notice. Later, CIRP against the CD was admitted and claims were admitted. The Appellant in the capacity of Financial Creditor, submitted a claim of ₹43,40,31,951/- being unpaid instalments payable towards premium. However, the RP requested the appellant to submit its claim as an Operational Creditor. The appellant did not submit its claim afresh and the AA vide its order dated August 04, 2020, approved the Resolution Plan. Subsequently, the Appellant filed I.A. No.344 of 2021 questioning, inter alia, the resolution plan, the decision of the RP to treat the appellant as an operational creditor. Another I.A. No.1380/2021 was filed on March 15, 2021, seeking, inter alia, to recall of the AA' order dated 04.08.2020.

The Respondent relying on ***New Okhla Development Authority vs. Anand Sonbhadra*** submitted that the dues payable to an Industrial Area Development Authority, like the appellant, would not be a financial debt.

The main issue before the Apex Court are: (i) Whether in exercise of powers under sub-section (5) of Section 60, the AA can recall an order of approval passed under sub-section (1) of Section 31 of the IBC?. (ii) Whether the application for recall of the order was barred by time? (iii) Whether the resolution plan put forth by the resolution applicant did not meet the requirements of sub-section (2) of Section 30 of the IBC read with Regulations 37 and 38 of the CIRP Regulations, 2016? (iv) As to what relief, if any, the appellant is entitled to?

**Supreme Court's Observations**

Citing the judgements of the Supreme Court/other

Courts/Tribunal in various cases, the Supreme Court held that a Court or a Tribunal, in absence of any provision to the contrary, has inherent power to recall an order to secure the ends of justice and/or to prevent abuse of the process of the Court. Further the Supreme Court held that Section 60(5)(c) of the IBC, which opens with a non-obstante clause, empowers the AA to entertain or dispose of any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution of the corporate debtor or corporate person under the IBC.

Further the Supreme Court observed that the Rule 11 of the NCLT Rules, 2016 preserves the inherent power of the Tribunal and therefore, in the absence of any specific provision, the Tribunal has power to recall its order. The Supreme Court held that the grounds taken by the Appellant qualify as valid grounds and therefore the recall application is maintainable, notwithstanding that an appeal lay before the NCLAT against the order dated August 04, 2020. Further, it was held that both the appeals were not barred by time.

The Supreme Court allowed both the appeals of the Appellant and held that neither AA nor NCLAT took note of the fact that,- (a) the appellant had not been served notice of the meeting of the CoC; (b) the entire proceedings up to the stage of approval of the resolution plan were ex parte to the appellant; (c) the appellant had submitted its claim, and was a secured creditor by operation of law, yet the resolution plan projected the appellant as one who did not submit its claim; and (d) the resolution plan did not meet all the parameters laid down in sub-section (2) of Section 30 of the IBC read with Regulations 37 and 38 of the CIRP Regulations, 2016.

**Order:** The order dated August 04, 2020, passed by the AA, approving the Resolution Plan, was set aside. The Resolution Plan has been sent back to the CoC for re-submission after satisfying the parameters set out by the IBC.

**Case Review:** *Appeals Allowed.*

***State Bank of India and Ors. Vs. The Consortium of Murari lal Jalan and Florian Fritsch and Anr. Civil Appeal Nos 3736-3737 of 2023 with Civil Appeal Nos. 4131-4134 of 2023, Civil Appeal Nos 6427-6428 of 2023, Date of Supreme Court Judgement: January 18, 2024***.

**Facts of the Case**

This Batch of appeals arises from three orders of the NCLAT. A resolution plan was submitted by the consortium of Murari Lal Jalan and Florian Fristch in respect of the CD (Jet Airways Ltd.) The Plan received the imprimatur of the AA. As per the Resolution plan, the Successful Resolution Applicant (SRA) was obligated to recommence operations as an aviation company subject to the fulfilment of five precedent conditions. The date of completion of the Conditions precedent was defined as the 'Effective date'. The SRA was then required to infuse funds and fulfil specified payments to stakeholders, including disbursements to Employees, Workmen, and other Operational Creditors, within 180 days from the Effective date. Due to contrary belief between the SRA and the consortium of lenders (represented by the SBI) regarding the completion of the precedent conditions, an IA was filed before the AA.

The AA held that SRA was compliant with the conditions precedent and permitted the SRA to take control and management of the CD. The period of six months for implementation would commence from November 16, 2022. SBI challenged the appeal before the NCLAT and on March 03, 2023, the NCLAT declined to stay the AA's order, which has given rise to the first in the three sets of appeals being Civil Appeal Nos 3736-3737 of 2023. By a subsequent order dated May 26, 2023, the NCLAT allowed an extension commencing from March 03, 2023, until August 31, 2023. This order has given rise to the second in the batch of appeals being Civil appeal Nos 4131-4134 of 2023. In an effort to resolve the imbroglio, an affidavit was filled by SBI that if SRA satisfies particular criteria, including infusing ₹350 crores by October 31, 2023, adhering to the Resolution plan terms, and meeting employee payment obligation in accordance with the NCLAT order dated October 21, 2022, the lenders will abstain from challenging exclusion/ extension of time issues. Following the affidavit, which was filled by SBI, an application was moved by the SRA on August 18, 2023 seeking liberty to pay the amount of ₹350 crores as envisaged in the affidavit of SBI in the following manner (i) The first tranche of ₹100 crores by August 31, 2023, (ii) The second tranche of ₹100 crores by September 30, 2023 and (iii) The balance of ₹ 150 crores by the adjustment of the Performance Bank Guarantee issued by SRA in favour of the lenders.

The same was permitted by NCLAT. Clause 3.13.9 of the Resolution Plan specifies that the performance security shall not be set off against or used as part of the consideration which the SRA proposes to offer in relation to the company: The Resolution plan also specifically contemplates that the performance guarantee provided by the Resolution Applicant can be invoked in terms of RFRP. NCLAT has permitted the SRA to adjust the last tranche of ₹ 150 Crores by adjusting the PBG of ₹150 Crores. This forms the subject matter of the appeal before the Court.

**Supreme Court's Observations**

The Apex Court observed that the impugned order of the NCLAT allowed the plea of the SRA for adjustment and consequential release of the PBG at the interlocutory stage. This prima facie would not be in accordance with the tenor of the affidavit which was filed by SBI in which it stated that the lenders would not contest the issues in the pending appeal conditional on compliance with three conditions which were set out in the affidavit. Infusion of ₹350 crores, as envisaged in the affidavit, could not have been submitted with a direction for adjustment of the PBG, at that stage Infusion meant that the third tranche has to be paid in the same manner. Adjustment of the PBG was not permissible.

The Apex Court held that NCLAT was not justified in holding, in its order dated August 28, 2023, that the last tranche of ₹ 150 Crores which was to be paid would be adjusted against the PBG. The SRA having deposited the first two tranches each of ₹ 100 crores must comply with the remaining obligation of depositing ₹150 crores to make a total payment of ₹350 cores.

The Apex Court directed the SRA to (i) The SRA shall peremptorily on or before January 31, 2024, deposit an amount of ₹150 crores into the designated account of SBI, failing which the consequences under the Resolution Plan shall follow: (ii) The PBG of ₹150 crores shall continue to remain in operation and effect, pending the final disposal of the appeal before NCLAT: and shall abide by the final outcome of the appeal and the directions that may be issued by the NCLAT and (iii) Whether or not the SRA has been compliant with all the conditions of the Resolution Plan as well as of the conditions set out in paragraph 8 of the affidavit dated August 16, 2023 shall be decided by the NCLAT in pending appeal.

**Order:** The order dated August 28, 2023 of the NCLAT is modified in part in terms of the above directions and hence, the permission which was granted to the SRA to adjust the last tranche of ₹150 crores against the PBG shall stand substituted by the above directions. The

NCLAT is requested to endeavor an expeditious disposal of the appeal by the end of March 2024.

Case Review: The appeals are accordingly disposed of and Pending applications, if any, stand disposed of.

## High Court

***Shiv Charan & Ors. Vs. Adjudicating Authority under PMLA, 2022 & Anr. and Directorate of Enforcement Vs. Shiv Charan & Ors. W.P (L) NO.9943 OF 2023 and W.P. (L) NO.29111 OF 2023, High Court Judgement dated March 01, 2024.***

**Fact of the Case**

The present cross writ petitions involve WP (L) No. 9943 of 2023 filed by Shiv Charan & others, (hereinafter refereed as Petitioner 1,2,3) respectively against the Adjudicating Authority under the Prevention of Money Laundering Act, 2002, Department of Revenue, Ministry of Finance (AA) and the Deputy Director, Directorate of Enforcement ED, (Respondents), seeking to invalidate the Enforcement Case Information Report (ECIR) and orders attaching properties while WP (L) No. 29111 was filed by the ED, (Petitioner 2) challenging the NCLT's authority to pass the order invoking Section 32A of the IBC, 2016.

The case concerns the resolution of DSK Southern Projects Private Limited/CD under the IBC. The CD underwent a CIRP initiated by a financial creditor on December 09, 2021. Eventually, a Resolution Plan put forth by petitioners and approved by NCLT on February 17, 2023, under Section 31 of the IBC, 2016. Prior to the commencement of the CIRP, on October 20, 2017, various FIR's alleging offenses including cheating and criminal breach of trust were filed against the CD and its former promoters. These offenses fell under the "scheduled offenses" as per PMLA, 2002. Consequently, an ECIR was filed by ED on March 08, 2018. The ECIR estimated the "proceeds of crime" to be approximately ₹ 8,522.27 crores. As a result of the ECIR, the ED filed an "original complaint," leading to attachment proceedings against the assets of the CD. This included four bank accounts of the CD totalling ₹3,55,298/-, and 14 flats constructed by the CD valued at ₹32,47,55,298/- (aggregating to ₹32,51,10,596/-), referred to as the "Attached Properties". The attachment was initially provisional under Section 5 of the PMLA, 2002, on February 14, 2019, and later confirmed by an order dated August 05, 2019, passed by the AA.

The attachment persisted even after the initiation of the CIRP and continued after the approval of the Resolution Plan, which forms the crux of the current writ petition. The core issue which arises before the Hon'ble High court is: Whether the NCLT has the jurisdiction to direct the ED to release the attached properties once the Resolution Plan in respect of said CD is approved by invoking Section 32A of the IBC, 2016

**High Court Observations**

The Hon'ble High Court affirmed, NCLT's jurisdiction in declaring that a CD would be discharged from offenses upon approval of the Resolution Plan under Section 31 of the IBC, 2016. Hon'ble High Court further stated that protections to the CD under Section 32A apply upon approval of a qualifying Resolution Plan, ensuring a clean break with a change in ownership. The Hon'ble High Court further observed that since Section 32A confers immunity from prosecution, continued attachment under the PMLA, 2002 would be illogical. It also clarified that the jurisdiction under Section 14 of the IBC, 2016 ceased upon the commencement of Section 32A, making conflicts irrelevant. The court emphasized that the Approval Order for Resolution Plan by the NCLT dated February 17, 2023, was not challenged by the ED, required the release of attached properties under Section 32A. The High Court further concluded that the NCLT's interpretation and application of Section 32A did not undermine the PMLA, 2002. The High Court further stated that quasi-judicial authorities, when exercising powers akin to civil courts within state agencies like the ED, play a distinct role separate from executive functions. They serve as a statutory check on the executive, bound by Supreme Court rulings as per Article 141 of the Constitution. It's imperative that such quasi-judicial bodies adhere to Supreme Court decisions to prevent unnecessary legal disputes, ensuring compliance with the rule of law.

Order: The High Court ruled that the attachment by the ED over the Attached Properties, including four bank accounts and 14 flats of the CD, ceased on February 17, 2023, pursuant to Section 32A of the IBC, 2016. It mandated that the Respondents in WP 9943 and the Petitioner in WP 29111 must promptly communicate this release to the CD, with a copy sent to the Petitioner in WP 9943, within six weeks of the judgment. This communication is vital for using the Attached Properties as bankable assets to revive the CD in line with the objectives of resolution.

**Case Review:** *Petitions Disposed of.*

***Kunwer Sachdev Vs. IDBI Bank & Ors. W.P.(C) 10599/2021 and CM Appls. 32697/2021, 25107/2023, 61523/2023 and 62100/2023 High Court judgement dated February 12, 2024.***

**Facts of the Case**

The present writ petition was filed by Kunwer Sachdev (Petitioner) in the capacity of ex-Director of Su-Kam Power Systems Ltd./CD, seeking issuance of direction for developing framework/guidelines to ensure effective monitoring and functioning of the CoC. This writ petition was filed after the application for liquidation of the CD was approved by AA vide an order dated March 27, 2019, and the same was upheld by the NCLAT as well as the Apex court. The entire fulcrum of the dispute emanates from the insolvency process of the company called Su-kam which was initiated by the AA vide its order dated April 05, 2018. Thereafter, an advertisement inviting EOI was published by the RP (Respondent No. 12) on June 04, 2018. Further, the RP also issued the request for resolution plans on July 19, 2018, pursuant to which resolution plans were invited in respect of the CD. Thereafter, various disputes arose in the CIRP of the CD like the trademark dispute of brand name "SUKAM", ineligibility of the petitioner's resolution plan as per Section 29A(h) of the IBC etc.

As no eligible resolution plan could be evolved, the CoC in its meeting held on January 23, 2019, decided to make another attempt to obtain a resolution plan for the CD, with February 28, 2019, being the last date for the submission of the plans. On March 19, 2019, at a meeting of the CoC, the RP, apprised the CoC of the financial position of the CD. At this meeting, the CoC was also informed by the RP that since no compliant Resolution Plan had been received, the RP would be filing an application seeking liquidation of CD before the AA on or at the expiry of the CD's CIRP. Accordingly, in view of the absence of any compliant resolution plan, the RP filed an application seeking for the liquidation of the CD under Section 33(1)(a) of the IBC before the AA on March 27, 2019, and the AA approved the liquidation of the CD. The petitioner submitted that despite the company's initial valuation of ₹300 crores, the Committee of Creditors (CoC) significantly diminished its worth, leading to a mere ₹10 crores for Respondents 1-11 from the sale.

They argue that the company's assets were valued at over ₹274 crores according to its balance sheet. Allegations of misconduct against the RP and liquidator (Respondent No: 13) prompted action by the IBBI. The petitioner asserts that this case exemplifies a misuse or neglect of power by the CoC, causing immense prejudice to the petitioner.

**High Court's Observations**

The High court underscores the repeated calls for a comprehensive code of conduct for the CoC, highlighted in the recommendations of the insolvency law committee's reports in 2020 and 2022. Recognizing its significant impact on CD's and stakeholders, the court emphasizes the need for fairness, transparency, and adherence to due process, including the Wednesbury principles of reasonableness. By placing its reliance on the judgment delivered by the Apex court in Sashidhar vs. Indian Overseas Bank, the court asserted the importance of upholding CoC decisions within the confines of the law and the principles of natural justice. Prioritizing integrity, professionalism, and confidentiality, the Hon'ble high court stressed that adherence to these principles enhances the credibility and fairness of CoC decisions, ensuring trust in the outcomes of the CIRP under the IBC. The High Court underscores the paramount role of the CoC in the CIRP, likening its commercial wisdom to a guiding GPS for entire voyage CD's CIRP. It further observed, given the CoC's crucial role and the legislative protection of its commercial wisdom, there's a pressing need for a Code of Conduct to ensure the fulfilment of the IBC's objectives.

**Order:** The High Court has partly allowed the petition and instructed the IBBI to establish a Code of Conduct/guidelines, aligning with the case's stance, principles mentioned earlier, and relevant factors. This should be done within three months from this judgment, ensuring the CoC's effective operation while preserving its commercial wisdom and the legislative intent of the IBC.

**Case Review:** *Petition is Disposed of, along with Pending Applications.*

## National Company Law Appellate Tribunal (NCLAT)

***Regional Provident Fund Commissioner, EPFO Regional Office, Jamshedpur Vs. Ms. Mamta Binani, RP & Ors. Company Appeal (AT) (Insolvency) No. 245 of 2022, NCLAT Judgement dated March 13, 2024***

**Facts of the Case**

The present appeal is filed by M/s Regional Provident Fund Commissioner, EPFO Regional Office, Jamshedpur (Appellant) against the Resolution Professional (RP) & Ors. (Respondents) after being aggrieved by the order dated May 11, 2021, passed by Adjudicating Authority/NCLT. The case is related to the CIRP initiated against "R.D. Rubber Reclaim Limited" on October 25, 2019, following a public announcement made on November

02, 2019. The Appellant submitted claims amounting ₹1,02,84,785 under Section 7A, ₹75,62,576 under Section 7Q, and ₹1,05,63,927 under Section 14B of the Employees' Provident Funds & Miscellaneous Provisions Act 1952 (Act of 1952) on August 28, 2020. These claims were entirely admitted by the Respondent 1 as communicated on the same day. Subsequently, a Resolution Plan presented by the Resolution Applicant (Respondent No. 3) was approved by the CoC with a unanimous vote share on November 06, 2020. Respondent No 1 then sought approval of NCLT on the Resolution Plan, which was granted on May 11, 2021. However, the approved Resolution Plan proposed payment of the amount claimed only under Section 7A, totalling ₹1,02,84,785. Discontent with the approved Resolution Plan due to omission of proposed payments for the amounts claimed under sections 7Q and 14B, this appeal was filed.

The Appellant submitted that while relying on the judgment delivered by Appellate Tribunal in Jet Aircraft Maintenance Engineers Welfare Association vs. Ashish Chhawchharia (2021) said that the dues under Section 7Q and Section 14B of 1952 Act are also PF dues and are entitled to be paid. It was further submitted that the claim was entitled to be paid first and there can be no denial of the amount. The Respondent No: 3 submitted that the Resolution Plan has already been implemented and all employees and workmen were retained. It was also submitted that the Appeal came nine months after the order, when the Resolution Plan was executed. Furthermore, it was submitted that demanding full payment at this stage may lead to closure of the company. The Successful Resolution Applicant (SRA) submitted that all dues under Section 7A of the Provident Fund were settled and it should be granted exemption from paying damages under Section 14B.

**NCLATs Observations**

The Appellate Tribunal observes that the Appellant's entire claim necessitates consideration and payment in the Resolution Plan. It also cites the judgment delivered in Maharashtra State Cooperative Bank Limited vs. Assistant Provident Fund Commissioner and Ors. (2022), noting that all amounts claimed under sections 7A, 7Q, and 14B of the 1952 Act were part of the Provident Fund. Furthermore, the Appellate Tribunal relies on the judgments in Jet Aircraft Maintenance Engineers Welfare Association vs. Ashish Chhawchharia (2021) and C.G. Vijyalakshmi vs. Shri Kumar Ranjan, Resolution Professional and Ors. The Appellate Tribunal directs Respondent No.3 to make a payment of ₹75,62,576/- within two months to the Appellant for the admitted claim under Section 7Q of the 1952 Act. Concerning the admitted amount of ₹1,05,63,927/- under Section 14B, NCLAT granted liberty to Respondent No.3 to apply to the Central Board for a waiver of 100% damages. Respondent No.3 is instructed to file this application within 30 days, and the Central Board is urged to expedite its decision on the waiver within three months of receiving the application.

**Order:** The Appellate Tribunal has affirmed the impugned order dated 11.05.2021 passed by the AA subject to the issued directions. Parties shall bear their own costs.

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

***Mayank Goyal. Vs. G. Madhusudhan Rao & Ors. With Suresh More Vs. G. Madhusudhan Rao & Ors. Company Appeal (AT) (Insolvency) No. 147 & 148 of 2024 with No. 182 of 2024, NCLAT Judgement dated February 23, 2024.***

**Facts of the Case**

The present set of two appeals filed by Mayank Goyal in the capacity of prospective resolution applicant and Suresh More, (Appellants) after being aggrieved by the order dated December 04, 2023, passed by the Adjudicating Authority. The Bil Energy Systems Ltd./ CD, was admitted into CIRP on December 09, 2022, based on a Section 7 application filed by the State Bank of India (Respondent No. 2). Initially, the IRP constituted CoC, with Respondent No. 2 as its sole member. Subsequently, the IRP was replaced by the present RP (Respondent No. 1), following unanimous voting in the 3rd CoC meeting. In response to the 'Form G' published on 23.03.23, three Potential Resolution Applicants (PRAs) submitted Expressions of Interest (EOIs), including one from Mayank Goyal. However, in its 5th meeting, the CoC concluded that PRAs would not be able to submit any effective resolution plan and on June 03, 2023, resolved to initiate the liquidation process of the CD.

The AA approved IA No. 2947 of 2023, filed by the Respondent No. 1 seeking liquidation of the CD, and dismissed IA No. 2825 of 2023, filed by the appellant seeking to set aside the resolution pertaining to initiating liquidation of the CD. Aggrieved with the impugned orders Appellants preferred two separate appeals before the NCLAT. The Appellants submitted that the failure on the part of Respondent No. 1 to perform his duty of taking charge of assets of the CD and tracing other assets cannot be a valid ground for recommending liquidation. Further, it was asserted that there was material irregularity in conduct of CIRP by Respondent No. 1, which was ignored by the AA.

The main issues before the Appellate Tribunal were:

(i) Whether the IBC allows CoC to consider liquidation before inviting resolution plans?

(ii) Whether there were valid reasons for the CoC to initiate liquidation in this case?

(iii) Whether there were sufficient grounds for the AA to reject the CoC's recommendation for liquidation of the CD?

**NCLAT's Observations**

The Appellate Tribunal observed that the AA's findings regarding the IBC permitting the CoC to approve liquidation before taking up any resolution plan for consideration cannot be debunked by the Appellants as being dehors the statutory provisions. However, the decision's conformity with IBC provisions is subject to review by both the AA and this Appellate Tribunal, depending on the specifics of each case. It was further observed that despite numerous attempts by the IRP to engage the suspended management for the handover of assets, no cooperation was received. Consequently, the CoC, under its authority granted by Section 33(2) of the IBC, was justified in opting for liquidation of the CD. The Appellate Tribunal further asserted that the Appellant's objection to the CoC's decision for liquidation lacks merit, given the CD's three-year inactivity prior to initiation of CIRP. Furthermore, the lack of essential information hindered creation of a proper Information Memorandum (IM). The CoC rightfully noted that the absence of necessary documents for making the prospect of a viable resolution plan unlikely. In the 5th meeting, the CoC unanimously decided on liquidation, aligning with Section 33(2) of the IBC. The AA acknowledged and endorsed the CoC's deliberations, adhering to statutory provisions. Since no grounds for judicial review were established under Section 61(4) of the IBC, the Appellant's objections hold no merit.

**Order:** The Appellate Tribunal did not find any infirmity in the impugned order dated December 04, 2023, passed by the AA. There is no ground to interfere with the impugned order.

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

***Jushya Realty Pvt. Ltd. Vs. Ninety Properties Pvt. Ltd. Company Appeal (AT) (Ins.) No. 543 of 2023, Date of NCLAT Judgement: February 02, 2024***

**Facts of the Case**

The Present appeal is filed by M/s Jushya Realty Pvt. Ltd. (Appellant) u/s 61 of IBC against the Ninety Properties Pvt. Ltd. (Respondent) after being aggrieved by the impugned order dated March 03, 2023, passed by the Adjudicating Authority. In December 2014, Shri Shabir Nirban, director shareholder, and promoter of the Respondent offered to sell 100% of its shares along with all assets and liabilities to the Appellant. The Appellant agreed to acquire all assets and liabilities of the Respondent as per its audited balance sheet dated March 31, 2013, after carrying out valuation of the shares of the Respondent, for a lump sum consideration of ₹4.50 Crore. An advance payment of ₹1.25 Crore was made by the Appellant, subject to execution of a share purchase agreement after conducting due diligence.

Despite receiving the payment, the Respondent failed to provide necessary documents for due diligence or execute the agreement, despite reminders from the Appellant. The Appellant asked the Respondent to refund the amount paid by him along with interest @ 18% p.a., but when this was not forthcoming, the Appellant filed a petition under section 7 of the IBC. The AA dismissed the petition without providing any reasoning, stating that the amount in default was not a financial debt. The Appellant submitted that Section 7 application well filled within limitation accordance with section 18 of limitation act, The Appellant further submitted that the rejection of the Section 7 application under the IBC lacks valid grounds.

The Appellant assert that section 5(8) of IBC covers payments related to Share Purchase Agreements and should be considered. The Respondent contends that the transaction with the Appellant isn't a financial debt, and there's been no default in repayment. The respondent further submitted that the ₹1.25 Crore was an advance for acquiring tenancy rights under a redevelopment scheme, where tenants could gain additional area in the new building. However, the true value of the premises exceeds ₹4.50 Crore.

The main issue before the Appellate Tribunal is whether the ₹1.25 Crore paid by the Appellant to the Respondent company constitutes a financial debt under the IBC, and if the Section 7 application regarding this debt should be admitted or not?

**NCLAT's Observations**

The Appellate Tribunal said that the Appellant failed to provide any documentation regarding the promised Share Purchase Agreement, instead relying solely on the transaction of ₹1.25 crores recorded in balance sheets over several years as evidence of financial debt. The Appellant's only argument in favor of the Share Purchase Agreement is a reminder sent in January 2018, four

years after the alleged promise in 2014, which does not conclusively prove any oral agreement made in 2013 or 2014.

Additionally, no Section 7 petition or supporting documents were submitted to demonstrate the existence of a Share Purchase Agreement or any borrowing evidence. Consequently, it is challenging to accept the claim that the ₹1.25 crores transaction constituted repayment of a financial debt, especially considering the lack of a default date. The transaction of ₹1.25 crores was purportedly for the purchase of a property situated at Teen Batti, Walkeshwar Road in Mumbai with redevelopment potential, valued at over ₹15 crores, consequently the Appellant's claim of a total consideration of ₹4.5 crores appears untenable, as this amount would not be adequate for acquiring such a valuable property. Moreover, if the transaction indeed occurred in December 2014 as stated, the Appellant should have asserted its rights within the stipulated three-year period for specific contract purchases, rather than pursuing recourse through the Insolvency and Bankruptcy Code (IBC) does not appear to be correct legal course of action.

**Order:** The Appellate tribunal held that AA didn't commit any error in dismissing the Section 7 application under IBC.

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

***Gloster Cables Ltd. Vs. Fort Gloster Industries Ltd. and Ors. Comp. App (AT) (Ins) No. 1343 of 2019 & I.A. No. 3823, 3824, 3825 & 3826 of 2019 & 470 of 2020 & 3655 of 2023 Date of NLACT'S Judgement Date: January 25, 2024.***

**Facts of the Case**

The present appeal is filled by the M/s Gloster Cables Ltd. (Appellant) against M/s Fort Gloster Industries Ltd (Respondent-1) and Gloster Limited (hereinafter referred as Respondent-2) and IRP (Respondent-3), after being aggrieved by the AA's order dated 27.09.19. The Appellant was incorporated as Crest Cables Private Ltd in 1995 to take over the assets of the sick company 'Sputnik Cables Pvt. Ltd.'. In 2004, S. K. Bangur Group was included as an investor with equity participation and the name of the entity was changed from Crest Cables to Gloster Cables Ltd.

The Respondent-1 was incorporated in 1890 and owns the Trademark 'GLOSTER' duly registered in Class 9. A former employee of the Respondent-1 filed an application u/s 9 of the IBC and the appointed RP (Respondent-3), filed a Resolution Plan as shared by Respondent-2, which was duly approved by 73.21% of the members of the CoC. While the plan was pending approval, the Appellant, filed an application before the AA for seeking intervention to exclude the Trademark "GLOSTER" from the list of assets of the Respondent-1 as the same was duly assigned to the Appellant. However, the AA dismissed the application and held that the transaction relied upon by the Appellant is an undervalued transaction, being hit by Section 45(2)(b) of IBC. Further, it held that the registration was done post the imposition of moratorium therefore all deeds executed between the Respondent-1 and the Appellant were void. Aggrieved by the said order, the Appellant has filed the appeal before NCLAT. The Appellant asserted that he initially had a Technical Collaboration Agreement (TCA) with the Respondent-1 allowing the use of the trademark 'GLOSTER'. Further, a loan agreement in 10.11.2006 hypothecated the trademark to the Appellant. Later, due to a BIFR order, a Supplementary Trademark Agreement on July 15, 2008, assigned the trademark to the appellant.

The Appellant submitted that after the repeal of SICA in 2016, the trademark fully belonged to him. The appellant thereafter executed a Deed of Hypothecation on September 20, 2017, for record of the Trademark assignment. Upon the initiation of CIRP in 2018, the trademark had already been firmly transferred to the appellant, with the registration process completed within the same year. The Appellant further asserted that AA has committed an error in declaring that the trademark as a property of the Respondent-1 because that jurisdiction lies with District court.

**NCLAT's Observations:**

The Appellate Tribunal relying on the Supreme Court's judgment in Gujarat Urja Vikas Nigam Ltd. vs Amit Gupta & Ors. stated that under Section 60(5)(c), the AA has jurisdiction over questions of law or fact related to insolvency resolution, including the ownership of the CD's property during CIRP. Further, the Tribunal cited the Supreme Court's decision in Thomson Press (India) Limited Vs. Nanak Builders & Investors Pvt. Ltd. & Ors. highlighting that the deed of July 15, 2008, stipulated the assignment's effectiveness upon the BIFR order's vacation. With SICA's repeal in 2016, this condition ceased to apply, making Appellant the trademark assignee as of the agreement's date. Thus, the AA's determination that the agreement was void due to the BIFR stay was deemed legally incorrect. Moreover, affirming that the Appellant obtained title to the trademark upon executing the supplemental trademark agreement dated July 15, 2008, the Tribunal emphasized that trademark ownership isn't contingent on registration. The Appellate Tribunal also stated that during its 5th meeting, the CoC was

informed that the forensic audit report revealed no evidence of preferential, undervalued, fraudulent, or wrongful trading transactions. Additionally, no related party preferential or fraudulent transactions were found. Hence, the mere difference in amounts between the trademark's hypothecation and assignment cannot be a basis for deeming it undervalued.

**Order:** The Appellate Tribunal set aside the impugned order dated September 27, 2019, passed by AA.

**Case Review:** *Appeal Allowed.*

***Vishram Narayan Panchpor (RP of Blue Frog Media Pvt Ltd.) Vs. Committee of Creditors (Blue Frog Media Pvt Ltd.) & Anr. Company Appeal (AT) (Insolvency) No 1489 of 2023 & IA No 5342 of 2023, Date of NCLAT Judgement: January 11, 2024.***

**Facts of the Case**

The present application was filed by the RP (Appellant) of the Blue Frog Media Pvt. Ltd. (CD) after being aggrieved by the AA's order of rejecting the resolution plan of Mahesh Mathai, Ex-Director of the CD (Respondent-2) on the ground that the Respondent-2 is not eligible to submit a Resolution Plan under Section 29A of the IBC. The CD filed an application under Section 10 which was admitted on May 19, 2021, by the AA. The CoC by 91.86% vote share approved the resolution plan submitted by the Respondent-2. Accordingly, the Appellant filed an application IA No. 2828 of 2021 under Section 30(6) of the Code seeking approval of the resolution plan. The AA by impugned order rejected IA No. 2828 of 2021 holding that the Respondent No.2- is not eligible under Section 29A as he was one of the ex-promoter/directors of the CD. The AA took the view that Section 29A restricts those persons from submitting a Resolution Plan who could have an adverse effect on the entire CIRP. The Appellant citing the judgement of the Supreme Court in Hari Babu Thota vs. Shree Aashraya Infra-Con Ltd. cited that the Respondent-2 is not covered by any of the clauses under which ineligibility is attached to promoter/ ex-management. Section 29A does not make ineligible ipso facto all promoters and directors. Ineligibility is attached if they are ineligible under any of the clauses under Section 29A. The issue raised before the Appellate Authority is that whether ex-promoter/directors are not eligible to submit a resolution plan under Section 29A if no disqualification is attached in any of the clauses under Section 29A.

**NCLAT's Observations**

The Appellate Authority observed that a plain reading of Section 29A indicates that a person shall not be eligible to submit a plan if such person, or any other person acting jointly or in concert with such person is covered by any of the clauses mentioned from (a) to (g).

The Appellate Authority held that the current case is not a case where it is pleaded or alleged that any of the clauses (a) to (g) are attracted with respect to Respondent No.2. Citing the judgement of the Hon'ble Supreme Court in the Hari Babu Thota (supra), the Appellate Authority held that in the present case none of the clauses of Section 29A are being pressed for ineligibility of Respondent-2/ Successful Resolution Applicant. Ineligibility is being held only on the ground that Respondent2/Successful Resolution Applicant was promoter of the Corporate Debtor till 2018 when he resigned. The Appellate Authority held the view taken by the AA is not as per the true and correct interpretation of Section 29A as the mentioned section does not make per se Promoters and Directors ineligible to submit a plan unless they are ineligible under clauses (a) to (g).

**Order:** The Appellate Authority held that AA has committed error in holding that the Respondent No.2/ Successful Resolution Applicant is ineligible to submit a Resolution Plan and therefore the rejection of IA No.2828 of 2021 is unsustainable. The Appellate Authority set aside the AA's order dated 18.08.2023 and revived IA No.2828 before the AA to be heard and decided afresh in accordance with the law.

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

## National Company Law Tribunal (NCLT)

***M/s Neptunus Power Plant Services Pvt. Ltd. Vs. M./s jagson International Limited IB – 827/ND/2020, Date of NCLT Judgement: January 09, 2024.***

**Facts of the Case**

The present application was filed by M/s. Neptunus Power Plant Services Pvt. Ltd. (hereinafter referred as 'Applicant') before the Adjudicating Authority, under Section 9 of the IBC for initiating the CIRP against M/s. Jagson International Ltd. (Respondent). The Applicant claimed that the Respondent defaulted to clear the outstanding amount of ₹1,32,99,727.58/- along with interest @ 18% p.a. and the date of default being March 18, 2020. The entire claim was based on invoices issued by the Applicant to the Respondent for the services rendered by him. The Respondent acknowledged the liability by way of acknowledgement letter dated August 29, 2018. The Applicant sent the demand notice to the Respondent on January 03, 2020, and January 24, 2020, for the debts outstanding since 2015. The Respondent

denied the contentions of the Applicant on the grounds that (i) Application is below the statutory limit of Rs 1 crore, (ii) There was a pre-existing dispute even before the issuance of Demand Notice, and (iii) The Application is time barred. The Respondent asserted that the debt mentioned in the first demand notice stood at ₹87.67 Lacs (54.12 Principal +33.54 Interest @18%) and without any prior notice the amount was increased to ₹1.32 Crs in the application. Further, the Respondent alleged that the Applicant has wrongly added interest amount as no such interest amount has ever been agreed in any invoices nor any agreement exists for the same.

**NCLT's Observations**

The Adjudicating Authority observed that the Applicant has not shown any clause in the invoice which specifies that interest is leviable in case of any default. Therefore, in such absence the Applicant cannot claim any interest.

The AA also observed that the Applicant has failed to satisfy the minimum pecuniary threshold for default being Rs 1 Crore as mandated in the amendment to Section 4 of IBC. Further, taking note of the averments made by the Respondent and the substantiating documents provide by him, the AA stated that the Respondent was not negligent in its obligations and that the dispute existed prior to the issue of Demand Notice.

**Order:** The Adjudicating Authority held that the filed application fails to fulfil the criteria laid under Section 9 of the Code. Accordingly, the application for initiating CIRP against the Respondent was dismissed.

**Case Review:** *Application Dismissed.*

***Central Bank of India Vs. Superfine Profile and Extrusions Private Limited CP (IB) 692/MB/2023, Date of NCLT Judgement: January 03, 2024.***

**Facts of the Case**

The present CIRP application is filled by the M/s Central Bank of India in the capacity of financial creditor (Applicant) against M/s Super profile and Extrusions Pvt. Ltd. (Respondent) before the Adjudicating Authority. The Applicant filed a CIRP application against the Respondent under Section 7 of IBC on July 29, 2023, for claiming a sum for a Secured Loan of ₹66,21,05,008/- vide a Corporate Guarantee Agreement dated August 22, 2015, and November 18, 2016, for the aggregate debt of ₹73,61,00,000/- including the outstanding principal and interest. The Corporate Guarantee Deed was executed between the Applicant and the Respondent for securing the credit facilities granted to the principal borrower i.e. M/s Superfine Metals Pvt. Ltd. The Applicant submitted that as per the guarantee deed, on the occurrence of default, the Respondent is liable to pay on demand. Accordingly, a demand notice was addressed to the Respondent to pay the outstanding debt claimed. The date of default was March 06, 2023, The Respondent submitted that the Petition, based on default and invoking guarantees dated August 08, 2015, and November 18, 2016, is barred by section 10A as the default date is 29.11.2020. Additionally, he further contends that Cash Credit, Ad Hoc and Funded Interest Term Loan facilities were sanctioned in December 2019 and September 2020 and were not covered in the mentioned guarantees. The Respondent highlighted missing documents and incomplete information, labelling the Petition as inadequate.

**NCLT's Observations**

The AA held that the present petition is not barred by Section 10A as it is a case of corporate guarantee which is payable on demand and the default occurs when a demand is made by the Financial Creditor. The AA, based on documents presented by the Applicant, held that the credit facilities were renewed from time to time hence the submission of the Respondent that guarantee deed dated August 22, 2015 and November 18, 2016 were not relevant for transaction of 2019, was not sustainable. Citing the judgement of the Hon'ble Supreme Court on Swiss Ribbons Pvt. Ltd. & Ors. Vs. Union of India & Ors, the AA held that the unlike Section 9, there is no scope of raising a 'dispute' as far as Section 7 petition is concerned. And as soon as a 'debt' and 'default' is proved, the adjudicating authority is bound to admit the petition.

**Order:** The AA held that the application made by the Applicant is complete in all respects and it clearly shows that the Respondent is in default of a debt due and payable. Further, the default is in excess of minimum amount stipulated under section 4(1) of the IBC. Therefore, the debt and default stands established and there is no reason to deny the admission of the Petition. Accordingly, the AA admitted the CIRP application against the Respondent and directed the IRP to initiate the process.

**Case Review:** *Application Dismissed.*

# IBC News

## Interveners do not have the Right to Seek Relief for themselves before the Adjudicating Authority: NCLAT

The Appellate Tribunal observed that the individuals who submit their claims to the Resolution Professional and whose claims are documented have the complete right to approach the Successful Resolution Applicant (SRA) or the Monitoring and Implementation Committee. "They are entitled to pursue their entitlements according to the provisions outlined in the Resolution Plan," said NCLAT while dismissing petitions filed by Jaiprakash Associates Limited (JAL) and Manoj Gaur (Appellants), erstwhile MD and personal guarantor of Corporate Debtor's loan. The appeal was filed against NCLT's order approving the Resolution Plan in the CIRP of the Corporate Debtor. NCLAT observed that interveners are expected to either support the challenged order or the appellant.

**Source:** *Livelaw.in, April 01, 2024*

*https://www.livelaw.in/ibc-cases/nclat-delhi-interveners-relief-adjudicating-authority-253948*

## IBBI Governing Board gets Two Part-Time Members

The Ministry of Corporate Affairs (MCA) has appointed M. P. Ram Mohan, a Professor at the Indian Institute of Management (IIM) Ahmedabad, and Dinabandhu Mohapatra, a Non-Executive Independent Director at Indiabulls Housing Ltd., as part time members in the Governing Board of the Insolvency and Bankruptcy Board of India (IBBI). With these appointments, IBBI Governing Board is now in full strength as per the IBC requirement.

These appointments are effective from February 19 for a period of five years or until they attain the age of sixty-five or until further orders, whichever is earlier. Mohapatra, who has over three and half decades of experience in the banking and insurance sector, was former Managing Director & CEO at Bank of India. Presently, the IBBI Governing Board has 10 members including the Chairperson of IBBI.

**Source:** *The Hindu Businessline, April 02, 2024.*

*https://www.thehindubusinessline.com/economy/policy/mca-appoints-two-part-time-members-to-ibbi-governing-board/article68018676.ece*

## Successful Resolution Applicant is bound by the approved Resolution Plan, rules the Supreme Court

The Supreme Court has rejected the appeal of Deccan Value Investors, the Successful Resolution Applicant (SRA) to withdraw its Resolution Plan amounting ₹1,500


crore for resolution of Metalyst Forgings under the IBC. In its appeal, the SRA alleged that the Resolution Professional had failed to provide information which were critical to decision making regarding the Resolution Plan.

"Inadequacies and paltriness of data are accounted for and chronicled for valuations and the risk involved. It is strange to argue that the super-specialists and financial experts were gullible and misunderstood the details, figures, or data. The assumption is that the resolution applicant would submit the revival/ resolution plan specifying the monetary amount and other obligations after an in-depth analysis of the fiscal and commercial viability of the corporate debtor," said the Supreme Court. It further added, "Pointing out the ambiguities or lack of specific details or data, post acceptance of the resolution plan by the CoC, should be rejected, except in an egregious case where data and facts are fudged or concealed. Absence or ambiguity of details and particulars should put the parties to caution, and it's for them to ascertain details and exercise discretion to submit or not submit a resolution plan." Rejecting appeal of the SRA, the Supreme Court said, "This is not a case where misinformation or wrong information was given to the resolution applicants."

**Source:** *The Economic Times, March 26, 2024.*

*https://economictimes.indiatimes.com/news/india/resolution-winner-is-bound-by-plan-sc-rules-in-metalyst-forgings-case/articleshow/108771720.cms?from=mdr*

## NCLT approved Repayment Plan by Personal Guarantors

As per the Repayment Plan approved by NCLT for Pradip Overseas, the creditors are required to release the personal guarantees provided by all the personal guarantors. Besides, creditors shall withdraw all the legal proceedings before various fora against the debtor within one month of the fulfilment of repayment obligations.

In this repayment plan, five personal guarantors, albeit from the same family, have come together for resolution of the Corporate Debtor. The personal guarantors had

proposed to pay ₹11.51 crore against the total admitted liabilities of ₹ 3,017 crore.

**Source:** *The Economic Times, March 26, 2024.*

*https://www.msn.com/en-in/money/news/pradip-overseas-plan-receives-nclt-approval/ar-BB1kwCxQ*

### IL&FS seeks NCLAT's approval to sell its insolvent companies with haircuts

IL&FS Group has sought NCLAT's nod to sell its stake with a "haircut" and without shareholders' approval in its companies, which are insolvent with unsustainable debts and placed under the Category II list of the resolution framework.

In the application, IL&FS has alleged that the shareholders of Category II are either blocking such resolution by voting in the CoC or filing an application before the NCLT. It further claimed that permitting for writing down the entire share capital of such Category II companies upon payment of the bid value/proceeds without the requirement of obtaining any further approvals from the shareholders, will result in the final resolution of these entities.

NCLAT approved resolution framework for IL&FS Group, which has a debt burden of ₹94,000 crore, divides its companies under two categories based on their potential bidding amount.

**Source:** *Business Standard, March 24, 2024.*

*https://www.business-standard.com/companies/news/il-fs-seeks-nod-to-sell-insolvent-companies-without-shareholders-approval-124032400221_1.html*

### Whether Input Tax has been taken in excess by Corporate Debtor or not, cannot be decided in proceedings under Section 9 of IBC: NCLAT

NCLAT, New Delhi Bench has upheld that the issue whether the Corporate Debtor (CD) has claimed input tax in excess on a GST invoice raised by the Operational Creditor cannot be decided in proceedings under Section 9 of the IBC.

"As per the submission of the Appellant that CD has taken input on the tax invoice sent by the Appellant. It is on record that advance payments were made by the CD and issues whether input tax taken is in excess is the issue which could not be gone into in proceeding under Section 9 of the IBC. However, we observe that it shall be open for the Appellant to take such remedy as available under the contract if there are any dues," said the Court in the case of Zaara Enterprises Venture Pvt. Ltd. (Appellant) vs. Dhanraaj Agencies Pvt. Ltd. (Respondent/CD).

The CD had engaged the Appellant for some interior work in one of its showrooms for which some advance payments were made. In an email dated July 11, 2022, to the Appellant, the CD sought refund of the excess amount alleging the work done by Appellant was not satisfactory and incomplete. Thereafter, the Appellant served a "demand notice" to the CD and after payments were not received, it filed an insolvency petition under Section 9 of the IBC. In the court, Appellant submitted that it completed the work as per the contract and email was just a moonshine defense by the CD. Further, the CD had also claimed Input Tax Credit on the GST invoice raised by the Appellant.

**Source:** *Livelaw.in, March 17, 2024.*

*https://www.livelaw.in/ibc-cases/issue-of-whether-input-tax-has-been-taken-in-excess-cant-be-dealt-with-in-section-9-proceedings-under-ibc-nclat-delhi-252570*

### NCLT has power to order release of property attached by ED after approval of Resolution Plan: Bombay High Court

The Bombay High Court has ruled that once a Resolution Plan is approved by the NCLT, it has the power to order the release of properties of the Corporate Debtor attached by the Enforcement Directorate (ED). The Court further clarified that protection afforded by Section 32A would become available only when the Resolution Plan is so approved, and such a Resolution Plan meets the other necessary ingredients to qualify for the immunity, namely, that there is a clean break with a change in ownership of, and control over, the Corporate Debtor.

The judgement was pronounced on a petition filed by resolution applicants in the case of DSK Southern Projects Pvt. Ltd., which was undergoing insolvency process. In this matter, ED had filed a case against Corporate Debtor for cheating, which was part of the scheduled offence in the ED's case under the Money Laundering Act.

Subsequently, the agency attached the company's properties. These properties, worth ₹32 crores, continued to be attached even after the commencement of CIRP. In the petition before the High Court, the resolution applicants contended that despite the NCLT order, the ED did not release the properties. Bombay High Court, while allowing the petition, stated that Section 32A of the IBC 2016 states that no action can be taken against the properties of a corporate entity concerning the offence committed before the initiation of CIRP.

**Source:** *Lawbeat.in, March 05, 2024.*

*https://lawbeat.in/news-updates/nclt-can-order-release-property-attached-ed-after-resolution-plan-approved-bombay-high-court*

### Greater Noida builder revived under 'Reverse Insolvency Order' from NCLT

RG Luxury Homes, in Greater Noida West, was launched in 2010 with a deadline to complete the project in 2014. However, the construction work was stalled due to a fund crisis and a group of homebuyers filed CIRP petition in NCLAT in 2019. In February 2020, NCLT issued a "reverse insolvency order" regarding 1,900 units of the Phase-1 which was affected due to the insolvency proceedings and directed the promoters to complete the construction under the supervision of the Resolution Professional. The builder has not secured occupancy certificates (OCs) from the Greater Noida Industrial Development Authority (GNIDA) for 854 flats in four towers and has rolled out possession to homebuyers.

**Source:** *The Economic Times, March 10, 2024.*

*https://economictimes.indiatimes.com/industry/services/property-/-cstruction/noida-housing-project-pulled-back-from-insolvency-now-offers-possession-to-buyers/articleshow/108369448.cms?from=mdr*

### Rene Benko, an Austrian property tycoon and one of the country's richest men, filed for insolvency

Austrian investor Rene Benko, founder of the Signa property and retail group and one of Austria's richest men, has reportedly filed for insolvency. According to media reports, the insolvency petition has been filed for his inability to pay fees linked to the insolvency of Signa Group's holding company. However, this is not a private insolvency but rather insolvency as a business owner. As per a media report, Benko is personally liable with his own private wealth, estimated in 2023 to be around $6 billion.

**Source:** *Dw.com, March 07, 2024*

*https://www.dw.com/en/austrian-property-tycoon-rene-benko-files-for-insolvency/a-68464903*

### Formulate a Code of Conduct for CoC: Delhi High Court to IBBI

The Delhi High Court has directed the Insolvency Bankruptcy Board of India (IBBI) to formulate a Code of Conduct for taking recourse against the Committee of Creditors (CoC) by other stakeholders during the Corporate Insolvency Resolution Process (CIRP) in instances of negligence by the CoC. However, the Code of Conduct should not dilute the sanctity of the "commercial wisdom" of the CoC and the legislative intent of the IBC, asserted the Court.

"IBBI is directed to frame/finalize a Code of Conduct/ guidelines in accordance with its stand set out in the instant case, principles mentioned hereinabove and as per other relevant considerations, within a reasonable period of time, preferably, within three months from the date of the passing of this judgment, for the effective functioning of the CoC, without diluting the sanctity of the commercial wisdom of the CoC and the legislative intent of the IBC," said the Court. This judgement has come in a case wherein the CoC, without giving any reason, rejected the proposal of Resolution Professional to raise interim finance and maintain the Corporate Debtor (CD) as a going concern. In the petition the Director of the CD alleged that it was due to this decision of the CoC, the CD which was valued about ₹300 crore at the starting of CIRP was disposed in just ₹10 crores. Besides, the petitioner was not allowed to bring in investors to settle the outstanding dues. The high court emphasized that once a decision is made by the CoC, aggrieved parties are deprived of legal remedies.

**Source:** *Lawbeat.in, March 01, 2024.*

*https://lawbeat.in/news-updates/delhi-high-court-directs-ibbi-form-code-conduct-coc-enabling-legal-recourse-stakeholders-cases-negligence-coc*

### Spicejet Airline strikes settlement on ₹250 crore insolvency Dispute

SpiceJet and Celestial Aviation have successfully resolved $29.9 million (₹250 crore) insolvency dispute through out of court mutual agreement.

"This settlement marks a significant step forward for both parties and underscores our commitment to finding amicable solutions to complex challenges" said Ajay Singh, CMD, SpiceJet. After this settlement, SpiceJet is reportedly expecting to save ₹235 crore.

Celestial Aviation, in August 2022, had filed a plea under Section 9 of the IBC, 2016 to initiate the insolvency process against SpiceJet due to non-payment of dues amounting $29.9 million for nine aircrafts.

**Source:** *Cnbctv18.com, February 28, 2024.*

*https://www.cnbctv18.com/aviation/spicejet-settles-29-million-dollar-insolvency-dispute-with-celestial-aviation-19157771.htm*

### NCLT approves Resolution Plan for Reliance Capital

The NCLT, Mumbai Bench has approved IndusInd International Holdings' Resolution Plan for the acquisition of Reliance Capital under the IBC.

As per the Resolution Plan, IndusInd International will provide upfront cash payment of ₹9,650 crore, accounting for 37.03 per cent of the initial amount

claimed. The company has also proposed an amount net of ₹50 crore for the benefit of the CoC, which will be part of the upfront cash and an additional ₹11 crore over and above the proposed amount.

"The Resolution Plan provides for the implementation of the terms thereof within a period of 90 days from the approval of the Resolution Plan," said NCLT, adding that the 90-day timeline may be extended if required. According to media reports, the RBI and SEBI approvals are expected to come by next week or so, but the IRDAI application is in the process of being filed and might take some time.

**Source:** *The Hindu Businessline.com, February 27, 2024.*

*https://www.thehindubusinessline.com/money-and-banking/nclt-approves-hinduja-groups-resolution-plan-for-reliance-capital-takeover/article67892431.ece*

## CIRP cases increase 18% in Oct-Dec Quarter: IBBI Newsletter

As per the data of the Newsletter, cases admitted under the corporate insolvency resolution process (CIRP) rose to 7,325 in the October-December quarter (Q3) of the Financial Year (FY) 2023-24 from 6,199 in the corresponding Q3 of FY 2022-23, which is 18 percent higher on a year-on-year basis. Since the commencement of IBC, 2016, resolution plans of 891 CIRP cases have been approved till December 2023 and 2,376 cases went for liquidation, whereas 1,899 cases are pending in various courts. The number of cases closed under the process jumped to 5,426 in Q3 of FY2023-24 from 4,199 of Q3 in FY 2022-23. The manufacturing sector topped with 38 percent of the total cases followed by Real estate's 21 percent and construction's 12 percent. Till December 2023, creditors have realised ₹3.21 lakh crore.

**Source:** *Moneycontrol.com, February 26, 2024.*

*https://www.moneycontrol.com/news/business/insolvency-cases-rise-18-in-oct-dec-shows-ibbi-data-12349201.html*

## Canada's budget airline Lynx Air filed for bankruptcy protection

According to media reports, Lynx Air is facing financial crisis due to rising operating costs, high fuel prices and increasing airport charges. The company is reportedly planning to shut operations from February 26, 2024. In a media statement, the company has reportedly informed that despite substantial growth in the business, cost reductions and efforts to explore a sale or merger, the challenges facing the business have become 'too significant to overcome'. Lynx will reportedly seek protection under the Companies' Creditors Arrangement Act, a Canadian Federal Act that allows large corporations to restructure their finances and avoid bankruptcy, while allowing creditors to receive some form of payment for amounts owed to them.

**Source:** *Reuters.com, February 21, 2024.*

*https://www.reuters.com/business/aerospace-defense/canadas-lynx-air-files-bankruptcy-protection-cease-operations-feb-26-2024-02-23/*

## Credible threat of the IBC that a Company may change hands has changed the behaviour of debtors: IBBI

"Thousands of debtors are resolving distress in early stages of distress. They are resolving when default is imminent...making best efforts to avoid consequences of the resolution process," said IBBI in its Quarterly Newsletter for Oct.-Dec. 2023. As per the data in the IBBI Newsletter, over one-third of the CIRP cases that were withdrawn after admission resulted in full settlement with the creditor who filed the insolvency application. Furthermore, a total of 1,035 applications have been withdrawn under the Insolvency and Bankruptcy Code (IBC) process after admission till December 2023. The data also reveal that more than three-fourths of the CIRP cases withdrawn after admission had claims of less than ₹10 crore.

**Source:** *Business Standard, February 20, 2024.*

*https://www.business-standard.com/companies/news/ibc-threat-has-changed-creditor-behaviour-says-ibbi-124022000817_1.html*

## NCLT Mumbai ordered CIRP of Vadraj Cement, a subsidiary of ABG Shipyard

The CIRP against Vadraj Cement, a group company of the bankrupt ABG Shipyard, has been admitted at NCLT Mumbai after it defaulted on dues of more than ₹87 crore to the Punjab National Bank (PNB). However, company's total debt reportedly stands around ₹7,000 crore and the lenders include, PNB, Union Bank of India, Central Bank of India, Indian Overseas Bank, Bank of India, Bank of Baroda etc. According to the PNB, despite repeated requests, the company failed to repay its dues. Following the default, the bank filed an insolvency application in September 2018, almost a year after its loan to the company was classified as a nonperforming asset (NPA) in December 2017.

**Source:** *LiveMint.com, February 04, 2024.*

*https://www.livemint.com/news/india/nclt-orders-insolvency-proceedings-against-vadraj-cement-1707040904781.html*

# From Around the World

## Canadian Business Insolvencies rising to Levels Not Seen Since Great Recession

Business insolvencies in Canada are hitting their highest point since the Great Recession, new data show, the Globe and Mail reported. According to the federal Office of the Superintendent of Bankruptcy, 2,003 business insolvencies were filed from Jan. 1 to March 31 of this year. Of those, 1,599 were bankruptcies and 404 were proposals, which is a legal option to negotiate lower debt repayment with creditors.

The number of insolvencies was up 32 per cent from the previous quarter, and 87 per cent from the same quarter last year. This continues a steady climb in filings over the past two years. Insolvencies had hit a low point early in the COVID-19 pandemic because of government-support programs and rock-bottom interest rates – both of which are now gone. Historical data show the first quarter of 2024 is the highest number of insolvencies in a quarter since the beginning of 2008, early in the global financial crisis. The vast majority of insolvencies were in Quebec (1,125) and Ontario (634). André Bolduc, a licensed insolvency trustee at BDO Canada and chair of the Canadian Association of Insolvency and Restructuring Professionals, said the number of insolvency filings in Quebec tend to be higher than other provinces because companies there face stricter penalties for not filing. Outside of Quebec, he said, owners are more likely to just walk away from failing businesses. The sector with the highest number of insolvencies was accommodation and food services, with 357, or about 18 percent of the total.

**For More Details, Please Visit:** *https://globalinsolvency.com/headlines/canadian-business-insolvencies-rising-levels-not-seen-great-recession*

## U.K. Insolvencies Fall Back After Hitting Three-Decade High

The number of English and Welsh companies going bust stabilized in the first quarter after hitting a three-decade high in 2023 following a hit to balance sheets from soaring energy bills and interest rates, Bloomberg News reported.

Company insolvencies in England and Wales fell 2% from a year ago to 5,759 in the first three months of the year, according to the government's Insolvency Service. It was down 12% on the previous quarter. The figures add to hopes that a rapid exit from the last year's recession may strengthen companies that are now on the brink

and prevent a repeat of last year's jump to the highest level of insolvencies since 1993. Falling inflation, the economy's recovery and the prospect of cooling interest rates may begin to ease the pressure on UK companies in 2024. However, it still leaves bankruptcies well above pre-pandemic levels with experts warning of more pain ahead for firms as many are forced to refinance their borrowings at high borrowing costs.

**For More Details, Please Visit:** *https://globalinsolvency.com/headlines/uk-insolvencies-fall-back-after-hitting-three-decade-high.*

## UK Banks Ordered to Start Stress Testing Private Equity Exposure

The Bank of England found a number of UK banks were unable to measure their exposure to private equity giants and their portfolio companies and ordered them to begin stress testing those relationships, Bloomberg News reported.

The central bank's Prudential Regulatory Authority reminded lenders' chief risk officers in a letter Tuesday that it expects them to "comprehensively identify, measure, combine, and record risks" tied to buyout funds and the companies they back. The letter comes after the central bank discovered many banks haven't been stress testing their loan portfolios to better understand how cracks in the private equity industry could spill over into their own business, Rebecca Jackson, the PRA's executive director for authorizations, regulatory technology, and international supervision, said in a speech on Tuesday. "On stress testing, unfortunately I do not have a huge amount to say," Jackson said at an event hosted by UK Finance. "Not because we found that firms

are excellent at it, or because we think it's unimportant, but because we found that hardly any banks do it well in this context. Very few firms carry out routine, bespoke and comprehensive stress testing for aggregate sponsor related exposures."

**For More Details, Please Visit:** *https://globalinsolvency.com/headlines/uk-banks-ordered-start-stress-testing-private-equity-exposure*

### Shadow Banking Stress in South Korea Sends Warning to Global Investors

South Korea is emerging as a closely watched weak link in the $63 trillion world of shadow banking, Bloomberg News reported. Real estate exposure has been showing cracks at home and abroad after interest rates rose, prompting financial firms including T. Rowe Price Group Inc. and Nomura Holdings Inc. to express concern about stress in shadow loans to the sector.

Delinquency rates at one key group of Korean lenders nearly doubled to 6.55% last year, while economists at Citigroup Inc. estimate 111 trillion won ($80 billion) of project-finance debt is "troubled." Korean shadow-bank financing to the real estate sector rose to a record 926 trillion won last year, over four times the level a decade ago, data from the Korea Capital Market Institute show. Policymakers have stemmed contagion risks by expanding certain loan guarantees, but a shock restructuring announcement late last year by builder Taeyoung Engineering & Construction Co. underscored the threat of flareups. The firm will need a debt-to-equity swap of about 1 trillion won to erase capital impairments, its largest creditor said last week. Such restructurings stand to worsen strains among shadow banks—as non-bank lenders are often called. The part of that sector with activities that may pose stability risks is large compared with other advanced economies and is second only to the US in relative size, according to data from the Financial Stability Board.

**For More Details, Please Visit:** *https://globalinsolvency.com/headlines/shadow-banking-stress-south-korea-sends-warning-global-investors*

### EU Leaders Agree to Align Company Insolvency Laws

European Union leaders on Thursday agreed to align "relevant aspects" of their countries' insolvency laws for companies, as part of broader efforts to integrate capital markets and make the bloc more competitive, DPA International reported.

EU leaders agreed to a declaration that commits to "harmonizing relevant aspects of national corporate insolvency frameworks," among other measures to further integrate capital markets. The EU is struggling to compete with the United States and China and commissioned former Italian prime minister Enrico Letta to come up with a plan. Letta's 146-page report formed the basis of Thursday's discussions, which paid particular attention to ways of integrating EU capital markets. Leaders also discussed the possibility of more EU-level supervision of capital markets, though several member states are anxious to retain the role of their national financial authorities. "The economic case for a Capital Markets Union is crystal clear," European Commission President Ursula von der Leyen told reporters on Thursday. "Every year, €300 billion [$319 billion] of European savings are diverted abroad, mainly to the United States." "That is money missing for the development of our companies in the European Union. This is due to the fragmentation of our capital markets and finance system," she said.

**For More Details, Please Visit:** *https://www.msn.com/en-gb/money/other/eu-leaders-agree-to-align-company-insolvency-laws/ar-AA1ng2Ue?ocid=finance-verthp-feeds#:~:text=European%20Union%20leaders%20on,make%20the%20bloc%20more%20competitive.*

### IMF Board Changes Lending Rules to Speed Up Debt Restructuring

The International Monetary Fund (IMF) has changed its process for supporting countries struggling with debt restructurings, a move aimed at avoiding recent delays widely blamed on China, Bloomberg News reported. The IMF executive board on April 9 approved reforms in policy areas "which should ensure a smoother and speedier process in the future," the fund said on Tuesday.

Fund officials estimate that the changes will reduce the time between staff agreement and board signoff on an IMF program to as little as two months. That compares with the nine months it took for Zambia, six months for Sri Lanka and five months for Ghana. Achieving that speed would also meet a publicly stated goal of Managing Director Kristalina Georgieva. Specifically, the change effectively changes requirements for so-called financing assurances from creditors, which are necessary to approve an IMF program. Such assurances have been slow to emerge from China, where major debt restructurings need approval from the country's State Council, one of the government's highest decision-making bodies. Under the new rules, the IMF would accept what it calls a "credible official creditor process" toward such assurances, rather than a finalized agreement, to avoid waiting for China's process to play out.

**For More Details, Please Visit:** *https://globalinsolvency.com/headlines/imf-board-changes-lending-rules-speed-debt-restructuring.*

# Study Group Report: Avoidance Transactions under IBC 2016 – Improving Outcomes

## 1. BACKGROUND

1.1. The legal framework under IBC requires the IPs to establish/ demonstrate fair and transparent conduct of insolvency resolution process, casting upon an IP many responsibilities which are onerous at times. Such responsibilities, inter alia, include forming opinions, determining the amounts involved and filing application to Adjudicating Authority in respect of preferential, undervalued, extortionate and fraudulent transactions or PUFE/ Avoidance transactions.

1.2. Such exercise is intended to extract or disgorge the value from the erstwhile management or other wrongful beneficiaries in the direction of achieving value maximization for CD's business/assets. An IP can get transaction audit (contemporarily called as "forensic audit") of CD's books of accounts and other records from expert or can himself do the same, to establish and manage the requisite process.

1.3. The IBC 2016 is evolving and in the last few years many issues has got settled through rulings from various judicial authorities including from Hon'ble Supreme Court. However, in respect of Avoidance Transactions, though there has been a landmark ruling from Hon'ble Supreme Court, it seems that the litigations in this regard may be settled by various judicial authorities in near future.

1.4. It is however, also observed that in last over 5 years' period despite institution of around 700 PUFE applications filed in NCLT involving over Rs.2 lac crores worth of claims very few (about 100) have been adjudicated upon. The challenges include delays in admission, adjudication, and recovery proceedings. It is therefore imperative to analyze the contributing factors of such delays and accordingly ideate for improvement in dispensation/outcome.

1.5. With above backdrop, IIIPI constituted a study group to understand and analyze the underlying reasons contributing to delays or sub-optimal outcomes and to recommend ways to tackle such challenges. The scope of such study encompasses:

- Identifying the sample size to gather data of avoidance transaction filings.
- Gathering data/ suggestions from:
  (i) IBBI/IIIPI (to the extent available)
  (ii) IPs through google page survey
- The above exercise is aimed at analyzing the extent and nature of underlying delays (pre-admission and post-admission), amounts involved. Post admission delays to be analyzed into reasons like lack of sufficient evidence, counter-litigation, others, etc.
- Finalizing report on outcomes and recommendations/ suggestions basis such outcomes.

1.6. A Study Group was also constituted to work on the above, with necessary support from IIIPI with the following members:

- CA Sarath Kumar
- CA Kamal Garg, IP
- CA & Adv. Nipun Singhvi, IP

1.7. In pursuance thereof and in concurrence with the Study Group, a survey was carried out in the form of a questionnaire being circulated to the IPs and amongst other things, the following two questions were specifically asked to be responded by the IPs taking part in the survey:

- Challenges and Solutions (for improvement) in preparing (including collecting information) avoidance applications;

- Challenges and Solutions (for improvement) in concluding (including cooperation from stakeholders), post-filing of avoidance applications.

1.8. Comprehensive data points related to avoidance applications so far, were sought from various sources for analysis and drawing references for the purpose of the Study.

## 2. Outcome of Survey

2.1. The qualitative comments on challenges/ suggestions on the subject matter as collected from respondents in the survey have been summarized below:

### 2.1.1. Challenges Highlighted:

- Limited funds for appointing good auditors;
- Lack of available information. Challenges in getting quality data from CD/ third parties including physical access to underlying assets;
- Time constraint exert pressure on both IPs and Transactions Auditors, compromising effective analysis. Inadequate time allowed available, coupled with hostile environment;
- Challenges in getting COC approval/ ratification for appointing Forensic Auditors;
- Delays at NCLT to decide upon the fate, due to frequent adjournments and counter litigation;
- The legal provisions stipulate that in order to file an application, RP needs to have a clear ground to believe about existence of such transactions, which takes time;
- The manner of continuing the applications after the plan is approved – Committee of Creditors (COC), Ex-RP and Resolution applicant (RA).

### 2.1.2. Solutions Suggested:

- A capacity may be strengthened by providing more Benches/ Members and Staffs;
- The Lenders (FCs) should be advised to share details/ information available with them including Certificate of Compliance in terms of RBI Circular No. RBI/2015-16/100 DBR.No.CID. BC.22/20.16.003/2015-16 dated 1st July 2015, para-No. 4.1. (i). reg. “Monitoring of End Use of Funds”;
- Law may provide for RPs to form prima-facie opinion on avoidance transactions rather than establishing it clearly
- Funding needs to be provided both for forensic auditor’s fees and competent counsel’s fees;
- Separate funds to be earmarked in the plan as well as liquidation estate for continuing the PUFE applications.
- Section 19(2) applications need to be disposed of quickly
- Assigning / Estimating value to PUFE transactions identified during CIRP in case of plan approval (as suggested by Hon’ble NCLAT in DHFL case).
- Appropriate direction to Central Government in case of fraudulent transactions (Section 213 of Companies Act, 2013 as directed in few cases by NCLAT) be amended in the law so that the RP and transaction auditors are not part of

trial in case same is to be filed with Special Courts;

- PUFE application should be proceeded ex-parte in case of nonappearance after 3 notices from AA so that the matters can be disposed in time bound manner;
- Proper documentary proofs and evidence need to be worked on by the IRP/ RP/ Liquidator (s), COC and auditors, to avoid delay and uncertainty;]
- Auditors to join in proceeding before AA for effective outcome.

## 3. STUDY GROUP'S RECOMMENDATIONS

3.1. Statistical Analysis: The data on avoidance transactions (till March 2022) has been received from various sources, which has been analysed and was discussed amongst the Study Group Members. The moot points are:

- Overall, since inception of IBC, 787 applications for avoidance transactions have been filed with the AA till March 31, 2022, involving dues of ₹2.21 lacs crores. Average amount per application works out to ₹280 crores.
- Of these applications, 73 applications involving dues of ₹0.15 lac crore only have been disposed with average amount per application at ₹207 crore. The balance (714) applications were ongoing as on March 31, 2022. Against this, recovery stands at ₹4,549 crore across 12 applications. However, the recovery is mainly attributed to only one application (viz. Jaypee Infratech Limited) showing recovery by way of recouping land parcels, valued at ₹4,500 crores.
- Average time taken in disposing application is 323 days, whereas ongoing applications have taken 793 days as on the cut-off date.
- Range (size-wise) of such applications as above have been analysed as well. It transpires that 71% of lower (size)-end applications (nos.) have an average application size (amount) of ₹21 crore, whereas remaining 29% of applications have an average size of ₹ 925 crore.
- Besides, division of such applications into various stages of CIRP and into nature (P/U/E/F/combination thereof) has also been made. It is evident that majority (~70%) of applications (nos.) involve a combination of P/U/ E/F elements rather than singular element.
- Then analysis of above data basis the originating NCLT bench, has been made. As per the data, NCLT benches at New Delhi and Mumbai together have received 53% of total applications so far, having value of 63% of total claims under avoidance transactions. Other locations in the order of such parameter, are Kolkata (10% nos.) and Chandigarh (8%). Chennai (7%) comes next.

3.2. Quality of Forensic Reports: Besides what is deliberated in Para 2 earlier and Para 3.1 above, the study group members highlighted another major concern about the quality of the forensic audit reports.

3.2.1. The study group members were of the view that in many cases the forensic audit reports were rejected by the AA and accordingly the recovery as contemplated from the underlying PUFE transactions could not be materialized.

3.2.2. The RP/Liquidator should apply his mind and exercise his discretion while considering such audit report for forming opinion and determining the PUFE transactions, based on reasons to be recorded in writing while filing the application u/s 25(2)(j). For instance:

3.2.2.1. In *Jayesh Shanghrajka v. Divine Investments* M.A. No. 1893 of 2019 Hon'ble NCLT - Mumbai observed that:

"Further, even the auditor in its report has not categorized any transaction as fraudulent under section 66 of the Code. Not only this, but also the applicant has not even furnished the Forensic Audit Report for the perusal of this Bench which he should have done during filing of this application itself. He has blatantly mentioned that the forensic audit report gave him a reasonably strong hint of Vulnerable Transactions or other transactions that may be either regarded as breach of applicable law, or deleterious of the interests of creditors or stakeholders, or otherwise, transactions not designed to be in good faith. This Bench, basing merely on hints cannot declare the said transactions to be fraudulent ones."

3.2.2.2. In Punjab National Bank v. Carnation Auto India (P.) Ltd. IB NO. 302 (ND) of 2017 NCLT - New Delhi held that where liquidator filed application under section 66 on basis of a forensic audit report, application filed by liquidator was to be dismissed, as forensic audit report was weak and improperly conducted.

***(to be continued….)***

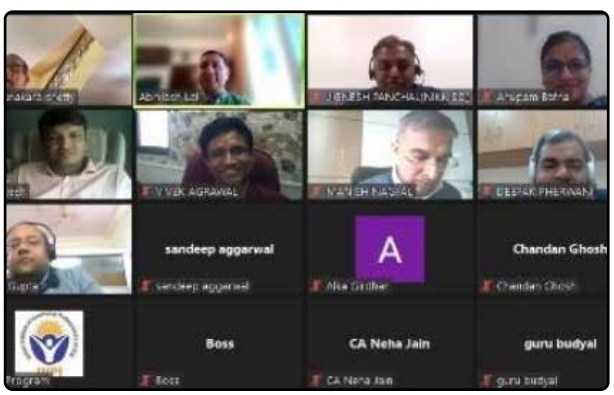
# IIIPI News


Inaugural Session of the Conference on "Balancing Rights of Stakeholders Under IBC" jointly organized by IIIPI, IBBI and PHD Chamber of Commerce & Industry (PHDCCI) in New Delhi on February 23, 2024.

Webinar on "International Insolvency- Best Practices" organized by South Asian Federation of Accountants (SAFA) and Insolvency & Valuation Standards Board of ICAI jointly with IIIPI on March 20, 2024.

Shri Santosh Kumar Shukla, Executive Director-IBBI, addressing the Webinar on "Role of Forensic Auditors under IBC" organized by IIIPI on February 09, 2024.


Webinar on 'Pre-Pack Insolvency Resolutions for MSMEs' jointly organized by IIIPI with WASMEs on January 12, 2024.



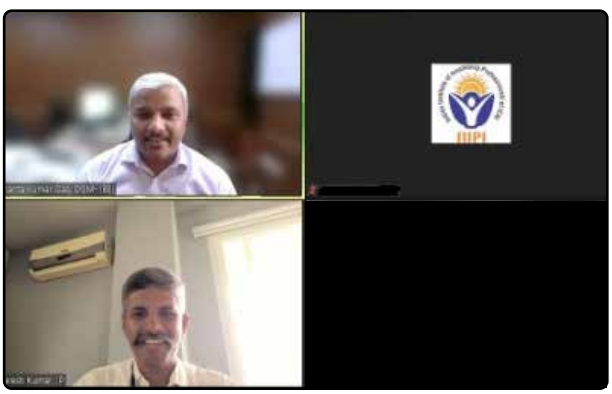

Limited Insolvency Examination (LIE) Preparatory Classroom (Virtual) Program of IIIPI conducted from 20th to 24th February 2024.


The 9th Batch of EDP (For IPs) Mastering "Avoidance/PUFE Forensics" Under IBC (Online) organized by IIIPI from 5th to 7th March 2024.

# IIIPI News

Shri Patibandla Satyanarayana Prasad, Hon'ble Member NCLT Chandigarh Bench, addressing seminar on "Stress Resolution-Role of Professionals" organized by IIIPI in Chandigarh on January 06, 2024.

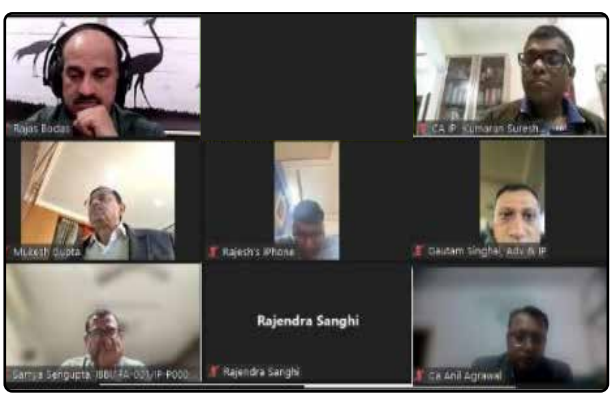
Webinar on "Case Study – CIRP & Liquidation" organized by IIIPI on April 19, 2024.



Webinar on "Individual Insolvency (PG to CD) process" organized by IIIPI on March 15, 2024.

Webinar on "Case Studies on Successful CIRP and Liquidation Process" organized by IIIPI on February 02, 2024.

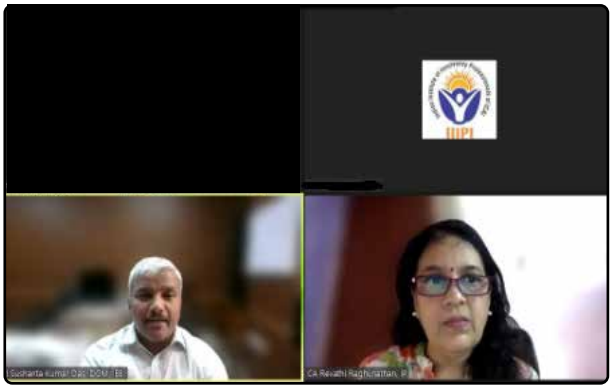

IIIPI conducted 18th Batch of Limited Insolvency Examination (LIE) Preparatory Classroom (Virtual) Program from 16th to 20th January 2024.




The 18th Batch of 'Executive Development Program on Managing Corporate Debtor as Going Concern Under CIRP' organized by IIIPI from 06th to 10th February 2024.

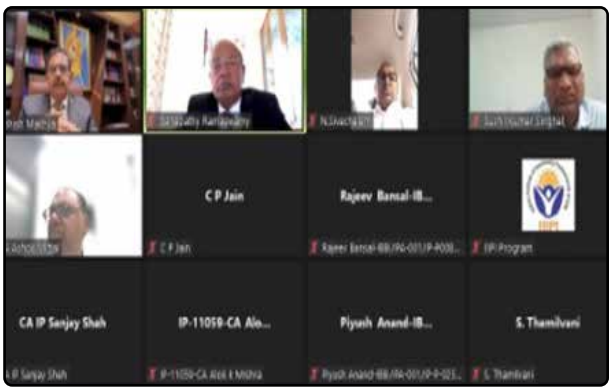
# IIIPI News


Webinar on "Improving Interface with CoC" organized by IIIPI on February 16, 2024.




Webinar on "Best practices - Liquidation & Voluntary Liquidation" organized by IIIPI on April 05, 2024.


Webinar on "Emerging Jurisprudence -- Recent Case Laws" organized by IIIPI on March 08, 2024.




The 10th Batch of "EDP on Mastering Legal Skills, Pleading and Court Processes Under the IBC" conducted by IIIPI from 20th to 23rd March 2024.

# IIIPI News

## Highlights: Study Group Report on Improving Real Estate Resolutions and Coordination with RERA

Insolvency resolution of CDs in real estate sector has posed a major challenge due to the peculiarities involved. Though the status of the allottees in a real estate project as financial creditors has been made effective, their divergent interests do not align with that of other FCs such as lenders. Unlike such other FCs, allottees look for possession of the apartment or building rather than repayment of their dues with or without haircuts. Hence liquidation as an outcome becomes unsuitable for such cases. Insolvency and Bankruptcy Code and the Real Estate (Regulation and Development) Act are two key legislations, though with some overlaps, with regard to settling the interest of the bankers and homebuyers.

In view of aforesaid, Indian Institute of Insolvency Professionals of ICAI (IIIPI) constituted a study group on 'Improving Real Estate Resolutions under IBC and Coordination with RERA' under the chairmanship of Dr. Ashok Haldia, Chairman IIIPI, for recommending legislative changes in IBC/RERA Act and Regulations for improving outcomes of Real-Estate resolutions. Further, pending such legislative changes, to recommend administrative and other measures for better outcomes under IBC and RERA, given the existing legal dispensation.

**The key highlights of the report, concluded recently, are as under:**

1. Appropriate amendments or clarification may be required for making allottees, landowners and statutory authorities as financial creditors and for their induction in Committee of Creditors specifically for real estate projects.

2. The claim amount of the landowners to be admitted by the RP, calculated on the outstanding amount as on ICD alongwith simple interest of 8% p.a. and in case claim includes constructed space, then admission amount based on valuation on circular rate as on ICD.

3. Amendments in IBC and Regulations may be made to relax conditions for participating in the CIRP of the CD by a registered Association of Allottees.

4. Where land or projects are held by multiple closely associated companies/entities, there should be enabling provisions for compulsory procedural and substantive consolidation of insolvency proceedings.

5. Amendments need to be made in RERA permitting fresh registration or modification of existing registration of projects based on new facts collected by RP during CIRP.

6. After approval of Resolution Plan by AA all pending litigations before RERA and Consumer Forums/Court should with dispensed.

7. Home buyers should be allowed to file fresh grievances for non-implementation of Resolution Plan, delayed possession, variations within terms of Resolution Plan.

8. In respect of stalled projects where the Resolution plans are not forthcoming under IBC, considering the public interest, special concessions should be made available to the projects like FAR/FSI by Govt/Authorities allowing house associations to complete the projects.

9. In case multiple resolutions are proposed, and individual assets/verticals may be demerged from the CD, Resolution Plan provide manner in which the said vertical gets amalgamated into another entity and that such demerger and amalgamation should not be treated as sale and not to be subjected to GST liability.

10. RERA may make mandatory provisions to avail Insurance by Developer to cover unforeseen delays/ cost escalations/financial risks.

11. Like Financial Service providers, RERA should also be empowered to appoint administrators for overseeing the completion of the Projects in the interest of the stakeholders.

12. Further, RERA should also be empowered to remove the bottlenecks in the execution and completion of the projects even when project is under CIRP.

## Highlights: Template for forming an opinion /filing of an application under Avoidance Transactions

IIIPI had constituted a Study Group on 'Developing a Templates under Avoidance Transactions' under the chairman ship of CA Subodh Aggarwal, past president, ICAI, develop templates, keeping in mind requirement of law/regulations, best practices and expectations of stakeholders including Hon'ble NCLT. The Study Group recently concluded its recommendations on the Template and incidental matters related thereto.

**Major highlights of the Template are as follows:**

1. The Template provides for recording of relevant facts of the transaction under different categories viz. Preferential, Undervalued, Fraudulent and Extortionate Credit transactions, along with the basis of arriving at the opinion, etc.

2. The findings should be referenced to the relevant evidence and information gathered, which should be annexed to the Template.

3. Template provides for the opinion of RP with regard to the category of PUFE transaction on the basis of facts and circumstances of the Transaction.

4. The Template provides guidance for filling the form including indicative sources of Information for forming opinion, reference to Look-back period.

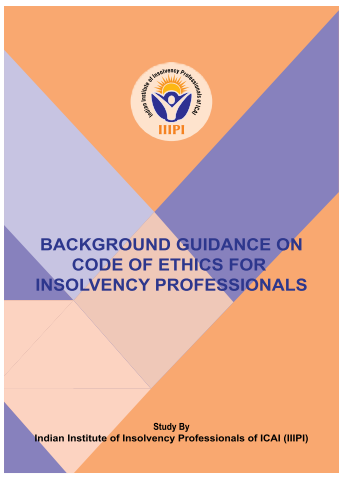
5. Such guidance also covers the indicative behavioural criteria and red flag indicators for the transactions that may be applied by the resolution professional.

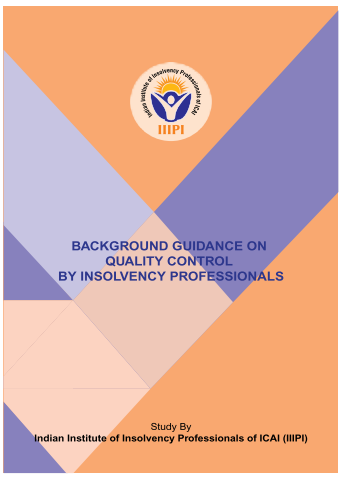
6. While preparing the Template Guidance may be taken from Forensic Accounting and Investigation Standard or FAIS 510.

7. Where RP is not be in a position to make the determination for 'avoidance transactions' for any reasons, then in such circumstances RP would need to record the reasons for non-completion of the engagement and clearly report such limitations in the Template.

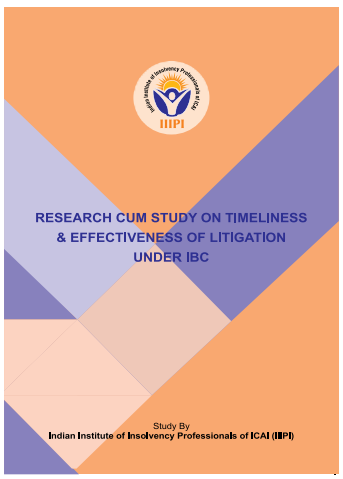
# IIIPI's PUBLICATIONS

IIIPI has published several 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/).

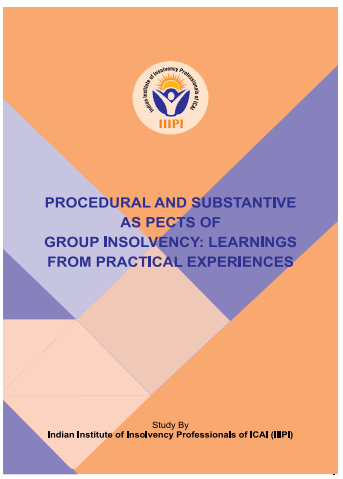


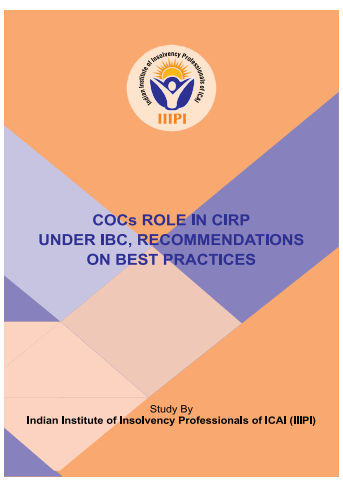



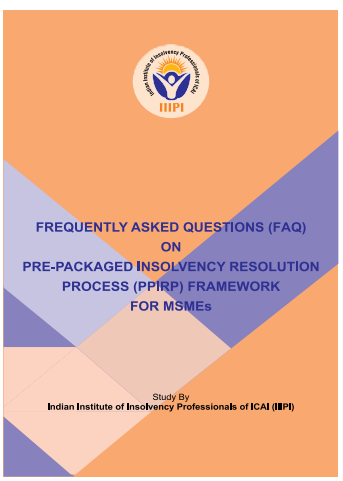


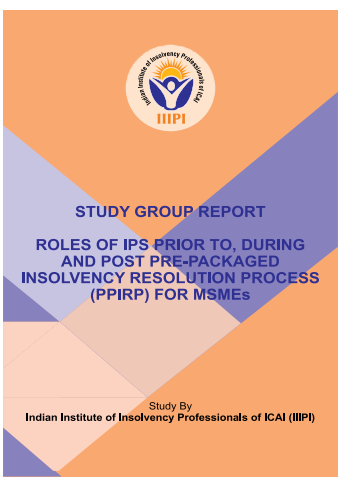


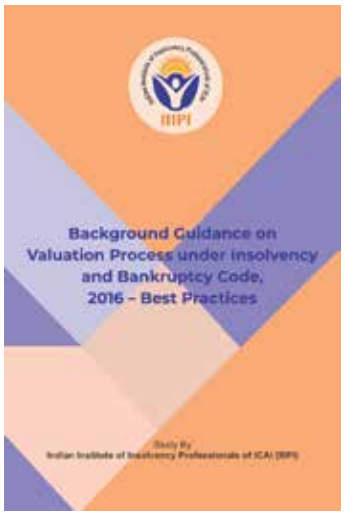




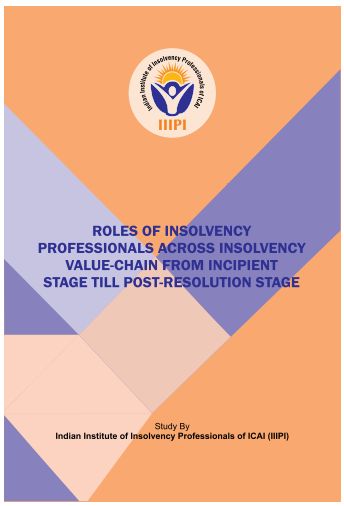



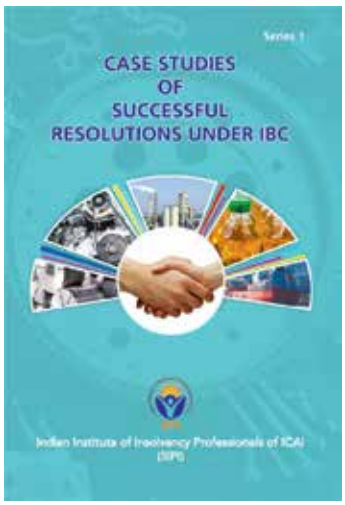









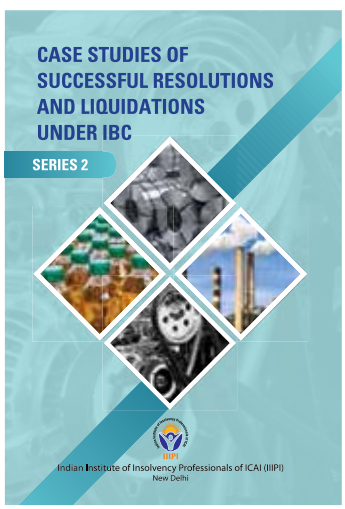



## Weekly Publications

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.

**IBC Case Laws Capsules**


**IIIPI Newsletter**

## Media Coverage

FINANCIAL EXPRESS
Read to Lead

NEW NORMS LIKELY AFTER ELECTIONS: IBBI MEMBER

# Discussion paper soon on cross-border insolvency

**'Following cautious approach', group insolvency regime too on the cards**

PRIYANSH VERMA
New Delhi, April 13

**THE GOVERNMENT IS** trying to develop a framework on cross-border insolvency with a "cautious approach", and is simultaneously working on the group-insolvency framework as well, said Sudhaker Shukla, member, Insolvency and Bankruptcy Board of India (IBBI) on Saturday.

Shukla mentioned that the ministry of corporate affairs shall issue discussion papers on the two frameworks soon, and the new norms would likely come into effect post elections.

He was speaking at an event organised by Indian Institute of Insolvency Professionals of ICAI.

Shukla also mentioned that record-high resolutions under the Insolvency and Bankruptcy Code (IBC), totalling 269 in FY24, as against 189 in FY23, was possible due to speedy disposal of cases done by the National Company Law Tribunal (NCLT).

On March 8, FE had reported that the government has drawn up a plan to introduce cross-border and group insolvency norms simultaneously through amendments to the Insolvency and Bankruptcy Code (IBC), shortly after polls.

"The ministry of corporate affairs has made representations in this regard to the Cabinet. With its approval, the IBC Bill is likely to be tabled in Parliament by the new government shortly after it assumes office," an official had told FE last month.

The government is focussing on out-of-the court settlements and providing latest technological platforms to insolvency professionals (IPs) for better management of cases, thereby enhancing effectiveness of the insolvency processes, including cross-border and group insolvency, said Shukla.

Group insolvency refers to clubbing the assets and liabilities of all companies in a corporate group and undertaking resolution proceedings, before dealing with each firm.

**The new cross-border insolvency norms will be based on UNCITRAL Model Law on Cross-Border Insolvency (MLCBI)**

Cross-border insolvency, on the other hand, helps in dealing with a situation when the insolvent debtor has assets and creditors in multiple countries.

At the same event, former chairperson of NCLAT Justice Mukhopadhaya underscored the importance of a robust cross-border insolvency framework in India and highlighted the need to make a feasible balance between the Indian and foreign jurisdictions.

"We will have to respect the law of other countries, but it does not mean superseding our law.

"The dominance should be of our law in our jurisdiction," said Mukhopadhaya.

Currently, the IBC has no instrument to restructure firms involving cross-border jurisdictions, and in the absence of a legislative framework, the cases involving resolution of groups and any cross-border elements are decided by the National Company Law Tribunal on an ad-hoc basis.

According to sources, the new cross-border insolvency norms will be based on UNCITRAL Model Law on Cross-Border Insolvency (MLCBI).

Mukhopadhaya also highlighted the plight of operational creditors under the current resolution mechanism of the IBC, and emphasised that the new cross-border insolvency framework needs to address this contentious issue.

"Currently, the operational creditors are getting pittance from the resolution plan. Whether we can offer the same treatment to foreign operational creditors, that could be big overseas industries?," he said.

According to the latest IBBI newsletter, the amount distributed to OCs under liquidation stands at a mere 0.8% of the total amount recovered.

The share is not very different in cases of corporate insolvency resolution process (cases that haven't slipped into liquidation), but the data are not publicly available.

**ON THE TABLE**

- Currently, IBC has no instrument to restructure firms involving cross-border jurisdictions
- The government has drawn up a plan to introduce cross-border and group insolvency norms simultaneously
- Focus on out-of-the court settlements and providing latest technological platforms to insolvency professionals (IPs)

**SUDHAKER SHUKLA,** MEMBER, INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (IBBI)

"CORPORATE AFFAIRS MINISTRY SHALL ISSUE DISCUSSION PAPERS ON THE TWO FRAMEWORKS (GROUP INSOLVENCY AND CROSS-BORDER INSOLVENCY) SOON, AND THE NEW NORMS WOULD LIKELY COME INTO EFFECT POST POLLS"

# Media Coverage

businessline.

## Cross border insolvency framework must respect global laws without overriding Indian jurisdiction, says former NCLAT Chief Mukhopadhaya

Updated - April 13, 2024 at 09:29 PM.

**In addition to India, insolvency experts from the United Kingdom and Singapore shared their views in the conference which was attended by IPs from across the country**

BY KR SRIVATS

India must go in for a robust Cross-Border Insolvency framework that strikes a feasible balance between the domestic and foreign jurisdictions, former NCLAT Chairperson and former Supreme Court judge S J Mukhopadhaya has said.

"We will have to respect the law of other countries, but it does not mean superseding our law. The dominance should be of our law in our jurisdiction,"Mukhopadhaya said at an event on Cross Border Insolvency in the capital on Saturday.

His remarks are significant as India is in the process of finalising a framework for Cross Border Insolvency and is widely expected to get an IBC amendment Act passed in Parliament when the new government assumes office at the Centre post the general elections.

The event was organised by the Indian Institute of Insolvency Professionals of ICAI (IIIPI) jointly with the Foreign, Commonwealth & Development Office- United Kingdom (UKFCDO), the Insolvency and Bankruptcy Board of India (IBBI) and the Institute of Chartered Accounts of India (ICAI).

In addition to India, insolvency experts from the United Kingdom and Singapore shared their views in the conference which was attended by IPs from across the country.

Mukhopadhaya also emphasised the need to deliberate on how to deal with foreign partner companies which are holding or subsidiary or partner companies in a joint venture project in India.

Ashok Kumar Bhardwaj, Member (Judicial), NCLT, said "There is increasing emphasis on hybrid model of Cross-Border insolvency framework wherein different jurisdictions have their laws and also have space for common interest."

Sudhaker Shukla, Whole Time Member-IBBI, said, "There exist wide variations on interpretation and implementation of UNCITRAL Model of law. The UNCITRAL law in Japan and South Korea are entirely different from those in the UK and the USA". However, IBBI is trying to develop a framework on Cross-Border Insolvency with a cautious approach and also simultaneously working on Group Insolvency framework, he said.

Ashok Haldia, Chairman-IIIPI said that IIIPI has been proactively engaged in capacity building and policy advocacy on various aspects of the insolvency profession at all levels including as to how the law should be interpreted and implemented.

"We are working closely with the NCLT and RERA to enhance the efficiency and efficacy of the insolvency process", he said.

The Sunday Statesman

## IIIP-ICAI organises Int'l conference

Indian Institute of Insolvency Professionals of ICAI (IIIPI) organised an International conference on "Cross-Border and Group Insolvency in India: Challenges and Opportunities" jointly with the Foreign, Commonwealth & Development Office- United Kingdom (UKFCDO), the Insolvency and Bankruptcy Board of India (IBBI) and the Institute of Chartered Accounts of India (ICAI) on 13 April in New Delhi.

Justice S J Mukhopadhaya, Former Judge, the Supreme Court of India & Former Chairperson NCLAT graced the occasion as the Chief Guest.

A K Bhardwaj, Member (Judicial)-NCLT; Sudhaker Shukla, WTM-IBBI; Anand Kumar, Chairman-Delhi RERA; Simon Whiting, The Insolvency Service, UK were also present as the dignitaries.

Business Standard

## Efforts on to develop cross-border insolvency framework, say experts

*Former NCLAT (National Company Law Appellate Tribunal) Chairperson S J Mukhopadhaya emphasised the importance of having a robust cross-border insolvency framework in the country*

Press Trust of India New Delhi

2 min read Last Updated : Apr 14 2024 | 7:15 AM IST

Efforts are going on to develop a cross-border insolvency framework with a cautious approach and such a framework should respect the laws of other countries without superseding Indian law, according to experts.

Former NCLAT (National Company Law Appellate Tribunal) Chairperson S J Mukhopadhaya emphasised the importance of having a robust cross-border insolvency framework in the country.

"We will have to respect the law of other countries, but it does not mean superseding our law. The dominance should be of our law in our jurisdiction," he was quoted as saying in a release.

He was speaking at the conference on 'Cross-Border and Group Insolvency in India: Challenges and Opportunities' in the national capital on Saturday.

The conference was organised by the Indian Institute of Insolvency Professionals of ICAI (IIIPI) jointly with the Foreign, Commonwealth & Development Office-United Kingdom (UKFCDO), the Insolvency and Bankruptcy Board of India (IBBI) and the Institute of Chartered Accountants of India (ICAI).

IBBI Whole-Time Member Sudhaker Shukla said efforts are on to develop a cross-border insolvency framework with a cautious approach as well as working on the group insolvency framework.

According to the release, National Company Law Tribunal (NCLT) Member (Judicial) Ashok Kumar Bhardwaj said there is an increasing emphasis on a hybrid model of cross border insolvency framework wherein different jurisdictions have their laws and also have space for common interest.

IIIPI Chairman Ashok Haldia said IIIPI has been proactively engaged in capacity building and policy advocacy on various aspects of the insolvency profession.

(Only the headline and picture of this report may have been reworked by the Business Standard staff; the rest of the content is auto-generated from a syndicated feed.)

# Help Us to Serve You Better

## Demystifying GRC and DC Proceedings: A Guide for Insolvency Professionals

The Legal Department of IIIPI, while dealing with grievances/complaints received from different stakeholders across the country, has noticed various unaddressed issues on the part of Insolvency Professionals (IPs) while handling assignments which turn up into grievances against them. These grievances sometimes also result into issuance of SCNs (Show Cause Notices) against them. Here, we are trying to capture few such issues, so that the IPs could be more careful while handling with stakeholders on such issues during handling assignments.

### Background

Under the framework of IBC, an Insolvency Professional Agency (IPA) is a frontline regulator, who apart from enrolling and regulating its members, shoulders the responsibility of guiding IPs with the aim to ensure that members are updated and carry their assignments smoothly. IPAs are self-regulated bodies that work under the aegis of Insolvency and Bankruptcy Board of India (IBBI) and carry out various functions in furtherance to their powers as envisaged under the IBC.

IBBI (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016 casts duty on IPAs to employ fair, reasonable, just and non-discriminatory practices for the enrolment and regulation of its professional members and to promote their continuous professional development. It thereby directs the IPAs to constitute various committees for executing their duties. Two such committees which work towards regulating the conduct of IPs are - Grievance Redressal Committee and Disciplinary Committee.

### Grievance Redressal Mechanism

The Governing Board of Indian Institute of Insolvency Professionals of ICAI (IIIPI) has thereby approved a Grievance Redressal Policy (Policy) providing the procedure for receiving, processing, redressing, and disclosing grievances against the Agency or/and any professional member of the Agency. This 'Policy' states *'A Grievance/Complaint is any communication that expresses dissatisfaction about an action or lack of action, about the standard of service/deficiency of service and the complainant asks for remedial* action'.

### Common issues in grievances/complaints

1. **Verification of Claims and Acknowledgement of Rejection or Acceptance of Claims**

   Invitation, verification, and communication with respect to claims are the first step towards CIRP. On multiple occasions we hear from the complainant that either his claims were not duly verified /admitted or reason for rejection/downsizing of their claims were not communicated by the Insolvency Professional (IP).

2. **Handing over the Documents**

   Complaints by IPs against their fellow professionals (other IPs) for issues with respect to not handing over of complete set of documents at the time of replacement or demission of their offices.

3. **Complaint related to Homebuyers**

   Homebuyers generally raise their concerns with respect to timelines for the possession or delivery of their units. Homebuyers holding decretal orders of refund from various forums are also seen rising in number, which are more concerned with status of their refund or their treatment in the Resolution Plan.

4. **Collusion with Financial Creditor/Board of Directors**

   Sometimes various stakeholders such as home buyers, operational creditors, suspended directors make complaint raising issues regarding collusion of the IRP/RP with the Committee of Creditors (CoC) / Resolution Applicants/suspended management of the Corporate Debtor.

5. **Non-payment or holding of salary or other expenses during CIRP period.**

   This issue is recurring in nature and is a point of major concern. It is circumstantial in nature where the

IRP/RP has to face different challenges in different condition, which the IRP/RP can avoid by taking reasonable and prudent steps timely.

6. **Enquiring about the status of their claim**

   Stakeholders after getting their claim admitted raise their concern in the form of complaint enquiring about the status of their claim as sometimes it happens that Corporate Debtor (CD) goes into Liquidation, or its Resolution Plan is in the process of implementation, but claimants were not updated about the same.

7. **Non-Sharing of Notice or Agenda of the Meeting**

   Sometimes suspended management or the operational creditor raise their grievance issue concerning non receipt of notice or agenda of the CoC meetings.

   **Suggestion:** The said gap between stakeholders and IP can be bridged by keeping stakeholders posted (updated) with developments, especially creditors with respect to admitted amount particularly in cases where there are any reductions made in the claimed amount. Also, these stakeholders must be kept duly informed if there is a major shift in the process i.e. if CD goes into Liquidation or if the Resolution Plan of the CD gets approved by NCLT etc.

## Disciplinary actions

As per the IBBI (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016, an IPA is required to have a Disciplinary Policy in terms of which it may initiate disciplinary proceedings by issuing a show-cause notice against its members –

(a) based on a reference made by the Grievances Redressal Committee;

(b) based on monitoring of professional members;

(c) following the directions given by the IBBI or another competent body or any Court of Law or any other agency authorized by law to file a cognizable report;

(d) Suo-moto, based on any information received by it.

## Common issues of DC

1. **Non-Communication of Reasons for Rejection of Claims**

   Non-communication of reasons for the rejection or downsizing of claims can lead to dissatisfaction among creditors and other stakeholders. Providing clear and detailed reasons for rejecting/ downsizing claims is essential for maintaining trust and confidence in the insolvency resolution process.

2. **Non-submission of Half Yearly Return (HYR)**

   As all IPs are required to submit information regarding their ongoing and concluded engagements/ assignments at least twice a year by 15th April and 15th October i.e. within 15 days from the end of the respective half year. However, it is noticed that IPs fail to adhere the requirement which disciplinary actions were instituted against them.

3. **Failure to appoint Registered Valuers, prepare Information Memorandum, publish Expression of Interest etc.**

   The IBC provides set timeline for the above-mentioned activities and professionals are under statutory duty and to carry out the activities within specified timelines. In some cases, IPs failed to undertake the said activities as per timelines as prescribed in the IBC which attracts contravention of the provision of the IBC and of the CIRP Regulations.

4. **Taking up new assignments without holding a valid AFA from the IPA**

   There has been rise in the complaints concerning IPs taking assignments without valid Authorisation for Assignment (AFA).

   Regulation 7A of the IP Regulations, requires every IP to have AFA before undertaking any assignment after 31st December 2019. Regulation 7A was inserted in the IP Regulations vide notification dated 23rd July 2019.

   AFA is a prerequisite to undertake an assignment, needs to be mentioned while filing 'Expression of Interest' to the IBBI for empanelment.

5. **Failure to preserve and protect the assets of the CD**

   Preserving and safeguarding the assets of the CD is a fundamental responsibility of the IP, aimed at maximizing the value of assets for the benefit of creditors and stakeholders during the Corporate Insolvency Resolution Process (CIRP).

6. **Failure with respect to procedural aspects in conducting CoC meetings**

   It can hinder the effectiveness and transparency of the CIRP. The procedural failures may include lack of notice, incomplete agenda, insufficient documentation with respect to recording of the proceedings or preparation of minutes.

## 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 on holidays**

### Contact Details

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| 7 | Grievance/Complaint | ipgrievance@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


# Book your Advertisements in IIIPI's journal The Resolution Professional

*Dear Member,*

The Resolution Professional, quarterly research journal of IIIPI, is the first-ever peer-review 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). It carries Articles, Case Studies, Key Takeaways from Important Events, Code of Ethics, Legal Framework, IBC Case Laws, IBC News, Know Your Ethics, IIIPI News, IIIPI's Publications, Media Coverage, Services and Crossword, etc.

The soft copies of the journal are emailed to all the IPs, several ministries, NCLATs, NCLTs, IBBI, ICAI's Indian and offshore offices, State Governments, Universities, Management Institutions, PSUs, industry bodies, lawyers, media, foreign professional bodies and much more. Besides, about 1,000 physical copies are also circulated among dignitaries and subscribers.

The soft copies of the journal are also available free of cost on IIIPI website in three different formats (a) Flip Book (b) HTML Highlights, (c) IIIPI e-Journal PDF Downloads and, (d) Full PDF.

We trust, this audience base will be helpful for you to increase your reach for various purposes while discharging your responsibilities as an IRP, RP, Liquidator or Bankruptcy Trustee under the IBC, 2016. Accordingly, you can book your Classified Advertisements under the following categories:

- Advertisement for recruiting staff in the IP's own office.
- Advertisement inserted on behalf of the Corporate Debtor (CD) requiring staff/ professionals or wishing to acquire or dispose of business or property.
- Advertisement for the sale of a business or property by an IP acting in a professional capacity as Interim Resolution Professional (IRP), Resolution Professional (RP), Bankruptcy Trustee, Liquidator, or Administrator or any other capacity/ ies notified by IBBI.
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The content of display advertisements should be broadly related to stakeholders of the insolvency profession.

Please send us your request with content (text and creatives etc.) at iiipi.journal@icai.in at the earliest. The advertisements will be published after approval of the Competent Authority.

# IIIPI Internship Program For 2024-25

Indian Institute of Insolvency Professionals of ICAI (IIIPI) formed as a Section 8 company by The Institute of Chartered Accountants of India (ICAI), New Delhi, is the largest Insolvency Professional Agency (IPA) in India. It is a front-line regulator to enrol and regulate insolvency professionals (IPs) as its members in accordance with the Insolvency and Bankruptcy Code 2016 (IBC) read with regulations and works under the aegis of Insolvency and Bankruptcy Board of India (IBBI) as the apex Regulator.

IIIPI extends internship opportunity for the final year students of law within the organisation in various departments; related to insolvency law. The interns will be placed at our Administrative Office, ICAI Bhawan, Sector 62, Noida.

As a frontline regulator, IIIPI has been bestowed with quasi-legislative, executive, and quasi-judicial responsibilities and is regulated by the IBBI as per the provisions of the IBC. IIIPI performs the following functions:

### 1. Enrolment and Registration:

Facilitating the enrolment and registration process for individuals aspiring to become insolvency professionals (IPs).

### 2. Capacity Building Programs, Publications, and Research:

Organizing and promoting capacity building programs, publications, and research initiatives to enhance the skills and knowledge of IPs.

### 3. Monitoring, Inspection, and Investigation:

Conducting monitoring, inspection, and investigation activities to ensure the adherence of members to ethical

standards and prevent frivolous behavior and misconduct by IPs.

### 4. Addressing Grievances and Complaints:

Providing a platform for addressing grievances of aggrieved parties, hearing complaints against members, and taking suitable disciplinary and corrective actions as necessary.

### 5. Compliance Requirements:

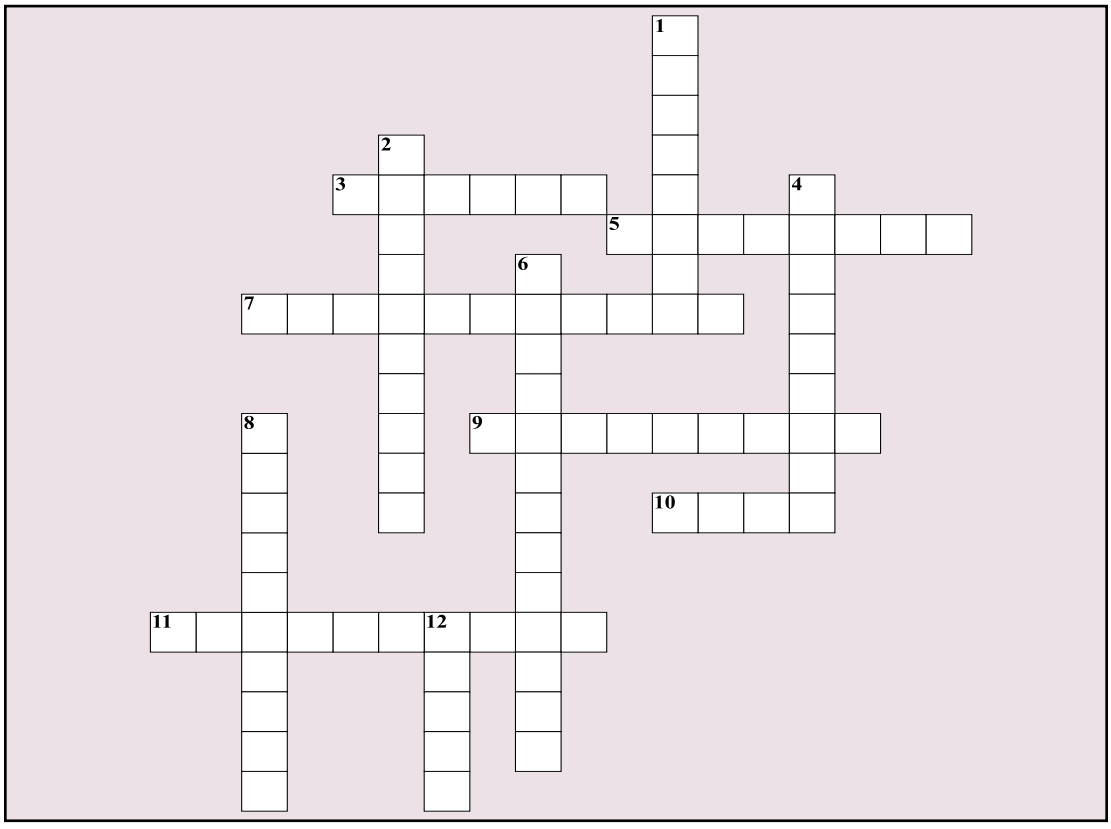
Ensuring compliance with the regulatory requirements outlined in the IBC and the Companies Act, thereby upholding the standards set by the Insolvency Professional Agency (IPA).

Hence, during the internship, candidates will gain exposure to any of the aforementioned areas based on the organization's needs.

Interested candidates can apply online by sending their resume to: **iiipi.hr@icai.in**

Regards
HR Department
IIIPICAI

# IBC Crossword



## Across

3: The period of limitation for suits relating to possession of immovable property is ____ years.

5: IBBI removed restriction preventing the same IP to be appointed as RP for CIRP of the Corporate Debtor and for its _____Guarantor via Notification dated February 03, 2024.

7: An Operational Creditor shall pay a fee of ……. along with an application for initiation of CIRP against the Corporate Debtor.

9: As per doctrine of _____ the property cannot be transferred during the pendency of any suit or proceedings in any court.

10: The Extension of fast track CIRP shall not be granted more than_____ .

11: As per the IBBI circular dated February 13, 2024, the liquidator can reduce the reserve price by up to ____% for assets with existing valuation during CIRP.

## Down

1: In Vishal Chelani & Ors. vs. Debashish Nanda, the Apex Court ruled that making distinctions between different classes of financial creditors when formulating a resolution plan violates Article _____.

2: The distribution of liquidation assets covers the settlement of workmen's dues for the preceding _____ months before the liquidation commencement date.

4: The List of stakeholder needs to be filled within _____days from the last date for receipt of claims.

6: Delhi High court ruled that RP under IBC, 2016 is not a _____ under the prevention of Corruption Act 1988

8: The RP shall circulate the minutes of the meeting to all participants by electronic means within _____hours of the said meeting.

12: A person claiming to be a workman or an employee of the corporate person shall submit proof of claim to the liquidator in person, by post or by electronic means in ____ of Schedule I.

---

**Answer Key: IBC Cross word, January 2024**

1: Form B
2: Majority
3: Guitar Centre
4: Coustodian
5: One
6: Seven
7: Form A
8: Form CA
9: Seven
10: WTM
11: Aircraft
12: CAG

# 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:

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- The article should be original, i.e., not published/broadcast/hosted elsewhere including on any website.
- The article should:
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  - 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.
  - Plagiarism (including references) should be below 10%.
  - The authors must provide the list of references at the end of article.
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