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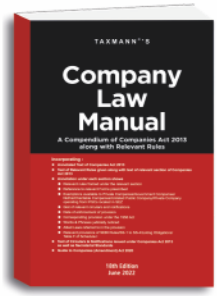

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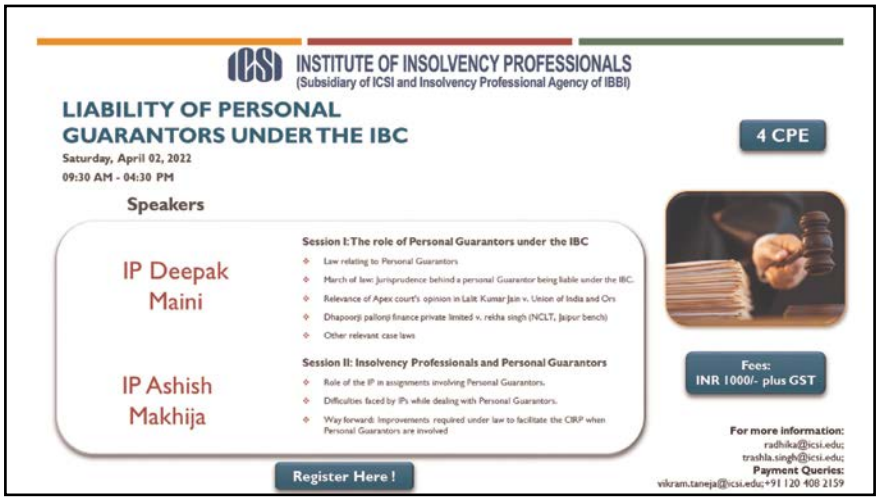
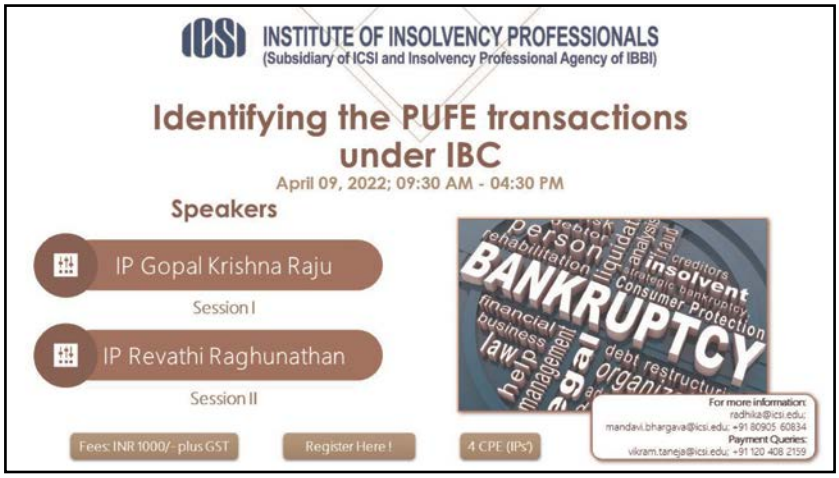
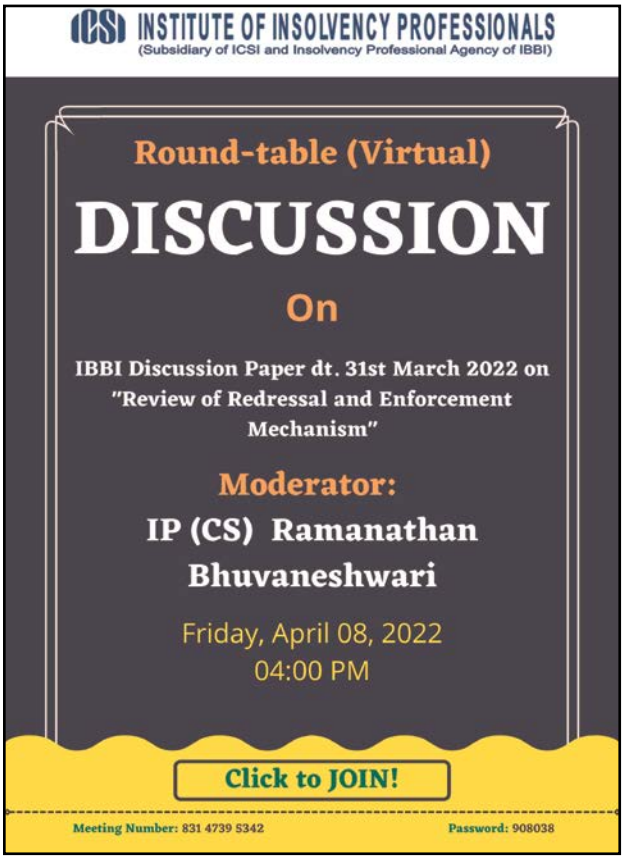
◆ Workshop on Liability of Personal Guarantors under the IBC on April 02, 2022



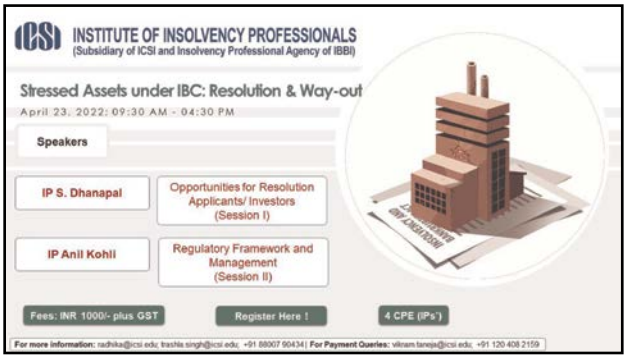
◆ Workshop on Identifying the PUFE transactions under IBC held on April 09, 2022



◆ Round-table (Virtual) Discussion on IBBI Discussion Paper dt. 31st March 2022 on "Review of Redressal and Enforcement Mechanism" held on April 08, 2022



◆ Workshop on Stressed Assets under IBC: Resolution & Way-out held on April 23, 2022



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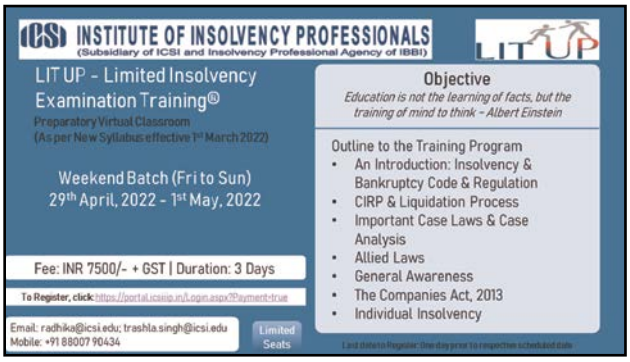

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At a Glance

No. 4 | Pg. 1-100 | April 2022

Section 238A of the Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Limitation period - Operational Creditor sold various fabrics to corporate debtor and raised invoices - Corporate debtor committed default in making payments - Operational creditor thus, filed an application under section 9 - Corporatedebtor raised a dispute that instant application was barred by limitation - It was a case of operational creditor that six cheques had been handed over to it by corporate debtor along with letter dated 28-9-2015 however, these cheques were dishonoured when presented for payment - NCLT, thus, held that there was an acknowledgement of liability on part of corporate debtor and therefore, application filed on 20-4-2018 was within period of limitation

- Consequently, NCLT ordered admission of application under

section 9 - NCLAT completelyoverlooked pleadings revolving around letter and six cheques and reversed order passedby NCLT - Whether failure of NCLAT as first appellate authority to look into a such vital aspect vitiated its order, especially when NCLT had recorded a specific finding of fact -Held, yes - Whether therefore, order of NCLAT was liable to be *set aside* and matter was to be remanded to NCLAT for fresh consideration - Held, yes (Para 10)

- **Sunil Kumar Jain *v.* Sundaresh Bhatt**
  (2022) 137 taxmann.com 303 (SC) • P-111

Section 5(13) of the , read with sections 53, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Insolvency resolution process cost - Whether section 20 mandates that IRP/RP is to manage operations of corporate debtor as a going concern and in case during CIRP corporate debtor was going concern, wages/salaries of such workmen/employees who actually worked, shall be included in CIRP cost and in case of liquidation of corporate debtor, dues towards wages and salaries of such workmen/employees who actually worked when corporate debtor was a going concernduring CIRP, being a part of CIRP cost are entitled to have first priority and they have to be paid in full first as per section 53(1)(a) - Held, yes - Whether any other dues towards wages and salaries of employees/workmen, shall be governed by section 53(1)(b) and (c) - Held, yes (Paras 9 and 10)

Section 36, read with section 53, of the Insolvency and Bankruptcy Code, 2016 - Corporate liquidation process - Liquidation estate - Whether section 36(4)(iii) specifically excludes all sums due to any workman or employee from provident fund, pension fund and gratuity fund, from ambit of liquidation estate assets and, therefore, section 53(1) shall not be applicable to such dues, which are to be treated outside liquidation estate process and liquidation assets under IBC - Held, yes - Whether thus, section 36(4) has given outright protection to workmen's dues under provident fund, gratuity fund and pension fund which are not to be treated as liquidation estate assets and the Liquidator shall have no claim oversuch dues and they are not to be used for recovery in the liquidation - Held, yes (Para 13)

- **Babu A. Dhammanagi *v.* Union of India**
  (2022) 138 taxmann.com 406
  (Karnataka) • P-112

Section 95, read with section 97 and 100, of the Insolvency and Bankruptcy Code, 2016 - Individual/firm's insolvency resolution process - Application by creditor - Whether insolvency proceedings initiated against personal guarantor under Code is a time bound process and aforesaid procedure contains filing of application under section 95 for appointment of Resolution Professional by Adjudicating Authority under section 99, submission of report by Resolution Professional under section 99, recording reasons for recommending request for acceptance or rejection of application and finally admission or rejection of application by Adjudicating Authority - Held, yes - Whether as per procedure prescribed under sections 95 to 100, role of Resolution Professional is limited to make appropriate recommendation to Adjudicating Authority and final decision of admission or rejection of application referred to under section 95 solely lies with Adjudicating Authority - Held, yes - Whether Adjudicating Authority is not bound by recommendation made by Resolution Professional - Held, yes - Whether procedure prescribed under provisions contained in sections 95 to 100 are fair, rational and reasonable and same cannot be termed to be violative of Article 14 - Held, yes (Para 4)

- **Synergy Technologies *v.* Parthiv Parikh, (Resolution Professional of Sanghvi Forging & Engineering Ltd.)**
  (2022) 138 taxmann.com 401 (NCLAT-New Delhi) • P113

Section 3(6), read with section 31, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Claim - Corporate debtor had taken loan from respondent bank - Respondent bank filed an application under section 7 and CIRP was initiated against

corporate debtor - Appellant filed its claim as unsecured financial creditor as advised by Interim Resolution Professional (IRP) - Resolution plan was approved without appellant's participation as financial creditor in Committee of Creditors - NCLT by impugned order approved said resolution plan when objection of appellant was pending before NCLT - Whether there was mistake by Resolution Professional by not considering claim of appellant-financial creditor being unsecured loan holder as per written statement of IRPand, therefore, financial creditor who received major chunk from resolution applicant should refund original claim minus any amount received by appellant-financial creditor in same percentage as those financial creditors had received from resolution applicant - Held, yes (Para 11)

- **Smt. Aditi Bezbaruah** *v.* **Kamalesh Kumar Singhania**
  (2022) 138 taxmann.com 402 (NCLAT-New Delhi) • P-115

Section 31 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - Appellants, owner of land in question, entered intoa development agreement with corporate debtor for purpose of construction of a multi storeyed commercial complex - Thereafter, corporate debtor underwent into CIRP - Thereafter, a resolution plan submitted by SRA was approved with 100 per cent votingrights by CoC - Approved resolution plan undertook to honour development agreement with appellants - Appellants objected inclusion of their land in resolution plan - Whether reversion of lands owned by appellants to them did not appear to be a viable alternative because development agreements were germane to development of commercial complex project and eventual insolvency resolution of erstwhile corporate debtor - Held, yes -Whether since plots of lands in ownership of appellants were quite organic and necessary for corporate debtor's project, inclusion of said lands of appellants was a sine qua non for success of resolution plan and, therefore, same could not be removed from integrated plot of land on which project was to eventually come up - Held, yes (Paras 45 and 46)

- **Rana Saria Poly Pack (P.) Ltd.** *v.* **Uniworld Sugars (P.) Ltd.**
  (2022) 138 taxmann.com 403 (NCLAT-New Delhi) • P116

Section 61, read with section 33, of the Insolvency and Bankruptcy Code, 2016 and regulation 35 of the IBBI (Corporate Insolvency Resolution Process of Corporate Persons) Regulation, 2016 - Corporate person's Adjudicating Authorities - Appeals and Appellate Authority - Whether third valuation under regulation 35 is required only if two estimates of liquidation value obtained earlier are significantly different - Held, yes - An order for initiation of CIRP was passed in case of corporate debtor - In course of said process, resolution applicant submitted its resolution plan along with valuation by two registered valuers, which estimated liquidation value of corporate debtor's assets as Rs. 126.30 crores and Rs. 121.01 crores, leading to average value of Rs. 123.66 crores - On CoC's request, third valuation was done without any legal justification, which estimated liquidation value as Rs. 52.69 crores, which was even less than half of liquidation value estimated earlier and, hence, significantly different from first two valuations - CoC approved resolution plan on basis of third valuation, which was subsequently approved by NCLT - Whether procedure of obtaining third valuation and then considering it as basis for deciding payment particularly of operational creditors under section 30(2)(b) was defective and not in accordance with stipulated norms and procedure under CIRP Regulations - Held, yes - Whether thus, third valuation report was to be discarded and average of first two liquidation value estimation, viz Rs. 123.66 crores was to be taken as liquidation value on which various payments in resolution plan would be based upon - Held, yes (Paras 44 and 46)

- **Manish Jain** *v.* **Rakesh Bhatia**
  (2022) 138 taxmann.com 404 (NCLAT-New Delhi) • P118

Section 33 of the Insolvency and Bankruptcy

Code, 2016, read with sections 230 and 232 of the Companies Act, 2013 - Corporate liquidation process - Initiation of - Liquidation order was passed by NCLT against corporate debtor - Appellant, ex-director of corporate debtor, entered into a OTS with financial creditor, however, could not pay up amount under OTS - Appellant filed an application before High Court for extension of time, but despite extension of time, corporate debtor could not pay up amount - Liquidation order attained finality and liquidator proceeded to auction sale of assets of corporate debtor - Whether since order of liquidation had attained finality and scheme under sections 230-232 of Companies Act was never formalized, action of liquidator in selling asset by public auction could not be termed as contempt or any breach of order of NCLT - Held, yes (Para 11)

- **Damodar Valley Corporation *v.* VSP Udyog (P.) Ltd.**
  (2022) 138 taxmann.com 405 (NCLAT-New Delhi) • P119

Section 31, read with section 14, of the Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Resolution plan - Approval of - Appellant supplier entered into a Power Supply agreement with corporate debtor - On failure of corporate debtor to make payments due for power supply, appellant terminated electricity connection given to corporate debtor - Meanwhile, company petition under section 9 filed by operational creditor was admitted and resolution plan submitted by successful resolution applicant was approved by NCLT - Appellant assailed approval of resolution plan on ground that it was based on disparity in treatment accorded to operational creditors and financial creditors without assigning any concrete reason and treatment so meted out was arbitrary and done to benefit financial creditors at cost of operational creditors - Further, resolution plan contained direction to appellant to give fresh power connection to successful resolution applicant and waiver of charges etc., for a fresh connection, which according to appellant was not legally valid and could only be given under WBERC Regulations formulated under Electricity Act - Whether since said resolution plan of corporate debtor had been affirmed by Supreme Court in *India Resurgence Arc (P.) Ltd.* v. *Amit Metaliks Ltd.* (2021) 127 taxmann.com 610/167 SCL 223, challenge to approval of resolution plan could not be sustained - Held, yes - Whether since successful resolution applicant was not interested in seeking a fresh electricity connection from appellant, provisions made in resolution plan regarding waiver of charges etc. became irrelevant - Held, yes - Whether thus, challenge to order of approval of resolution plan passed to by NCLT could not be sustained - Held, yes (Paras 14, 15 and 16)

P.K. MALHOTRA
ILS (Retd.) and Former Law Secretary (Ministry of Law & Justice, Govt. of India)

From Chairman's Desk

Incredible things can be done simply if we are committed to make them happen

Dear Professional Member(s),

It is a delight to welcome you all to the start of this new financial year. It is a time to start something new and trust the magic of new beginnings. Afterall, success is not about achieving perfection, but it is about the direction and path that one choses to take in life.

I also welcome back CS Alka Kapoor, who was earlier associated with and under whose leadership (as CEO designate), the Institute moved making huge strides in discharging its responsibilities and functioning as an Insolvency Professional Agency (IPA).

The IBC is now universally accepted as laying down a time-bound insolvency resolution process, wherein, in order to achieve maximization of value of assets and speedy acquisition of assets, the final word has been left to the wisdom of financial creditors of the Company. The interface between different provisions of Limitation Act, 1963 and the IBC is one area which is now gradually getting settled by virtue of Court judgments. In other words, once there is final word coming from Hon'ble Supreme Court, the room for anyone to project a contrary interpretation of the law gets squeezed. I often

see it as a case wherein in order to do away with the darkness, we get sunlight in its place. Darkness is a mere absence of light and once there is light, everything becomes clearly visible to us.

There was a long-standing issue concerning application of section 18, Limitation Act, 1963 to IBC proceedings, and the Supreme Court, while clarifying the legal position on this issue in the case of *Asset Reconstruction Co. (India) Ltd.* v. *Bishal Jaiswal*, (2021) 126 taxmann.com 200/166 SCL 82 SC, clearly answered the question in the affirmative. Further, in its judgment delivered in the matter of *Dena Bank* v. *C. Shivakumar Reddy (2021) 129 taxmann.com 60*, the Apex Court underlined the effect of acknowledgment of liability by CD in its Financial Statements. This ratio was followed by Hon'ble NCLAT in its judgment dt. 18th April 2022 while passed while disposing-off an appeal (*PEC Ltd.* v. *Tathagat Exports* (Company Appeal (AT)(Insolvenry) No. 341 of 2021).

Another important ruling that has flown from a judgment delivered by Hon'ble NCLAT in this month concerned the question as to whether two or more OCs can file a joint petition u/s 9, IBC on the basis of 2 different statutory notices u/s 8 having been issued separately by them. This issue turned on to the judgment rendered earlier by Hon'ble NCLAT in the matter of *Uttam Galva Steels Ltd.* v. *DF Deutsche Forfait AG* (2017) 84 taxmann.com 183/143 SCL 318, wherein it was held that under IBC scheme, unlike section 7 application, a notice u/s 8 and a petition u/s 9, IBC has to be issued by the OCs individually and not jointly. This has put the things beyond any pale of doubt that two Operational Creditors cannot file a joint application u/s 9 of IBC. In its judgment, Hon'ble NCLAT has drawn a distinction with the ratio of *JK Jute Mill Mazdoor Morcha* v. *Juggilal Kamlapat Jute Mill Co. Ltd.* (Company Appeal (AT)(Insolvency) No. 82 of 2017, dated 19-3-2022) wherein it was held that a registered Trade Union which represented all workmen could go ahead filing one common petition u/s 9 on behalf of all of them.

The other important ruling that came in the month of April which caught my attention pertained to the reading of language of section 17 of IBC. The provision provides for vesting of CD's management in the hands of IRP as also suspension of powers of CD's Board of Directors to be exercised by IRP. Hon'ble NCLAT however made it clear that the provision does not operate to do

away with the duties of CD's Management/promoters. In other words, the BoD of CD cannot claim exemption from its duties *vis-à-vis* the CD. Though it is not expressly provided by section 19 that the personnel of CD as well as its promoters and other person associated with its management are necessarily required to render all assistance and cooperation to IRP, what has been often observed (in many cases) is that such management claims to be not bound to sign the financial statements pertaining to CD's operations prior to CIRP initiation. Now, with the efflux of time and through consistent judgments being rendered on this subject by Hon'ble SC and Hon'ble NCLAT that such promoters realise that they can no longer take refuge or shrug-off their responsibilities under the IBC. Now, the only way out for them is to render full cooperation to the IRP/RP in discharge of his/her responsibilities. The case in question is of *Mukund Chaudhary* v. *Subhash Kumar Kundra* (Company Appeal (AT) Insolvency No. 452 of 2021, dated 18-4-2022.

The stakeholders are now very clear that IBC aims at achieving maximization of value of assets, and therefore, apart from setting up a legal framework for an early identification of financial stress in the CD as also a time-bound insolvency resolution mechanism, the final word on selection of a resolution plan has been left to the commercial wisdom of CoC. Hon'ble NCLAT, while delivering its judgment in the matter of *Steel Strips Wheels Ltd.* v. *Shri Avil Menezes, RP of AMW Autocomponent Ltd.* (Company Appeal (AT)(Insolvency) No. 89 of 2022, dated 18-4-2022), made it clear that while finding out the credible resolution plan with highest bid is in line with IBC's objectives, any bid submitted post CoC's decision approving (with requisite majority) a resolution plan would result in upsetting the apple cart. In other words, if bids are allowed to be submitted post approval of a resolution plan, then the timelines under the Code would become susceptible to breach.

A further reiteration and reaffirmation of the principle of supremacy of commercial wisdom under IBC was made by Hon'ble NCLAT in its judgment delivered in the matter of *Damodar Valley Corporation* v. *VSP Udyog (P) Ltd. (2022) 138 taxmann.com 405 (NCLAT - New Delhi)*. As regards scope of judicial review under IBC, the Appellate Tribunal made it clear that such scope is limited to the parameters laid down for a resolution plan u/s 30(2) only.

With these judicial developments, I now wish to share a few thoughts about the connection of ethics with Professionals. I believe that for the professionals to be successful in their career it is very important that they must never lack is their ethics. Ethics should form a part of their core values which should keep guiding their actions and decisions, and it should become a constant reminder of what and how they are required to operate. A culture with strong ethics would mean honesty, integrity and transparency in our actions and decision. We all share the responsibility to operate with ethics and for the same, we should not only embrace the letters of law but also the spirit behind it. Our Code of Conduct serves as a compass as to how we conduct ourselves every day. It also helps us to successfully navigate challenges that life throws at us. In conclusion, I would only say that it is upto us to make ethics a part of our conscious actions.

I wish all of you the best of health and I also look forward to meet you very soon.

CS ALKA KAPOOR
COO (Designate)

COO's Message

What Challenges us has the capability to change us too

Dear Professional Member(s),

I am glad to be reconnected with all our members. For me, it has always been a source of great satisfaction to keep a close connect and have an active interaction with our members. These conversations and discussions are the real life force behind the existence of institutions like ours. I plan to chart out our future course of action based on the suggestions that shall come forth from our members.Our actions and functions are meant to be not only complementary to those of our members, but are also intended to supplement them so that we not only succeed in performing to the best of our capabilities but also feel the cohesiveness, strength and support of our bond. I always believe that as an institution we have to strive so as to make our members feel that they are a part of one family wherein they not only learn from each other, but always feel motivated to achieve the objective of the Code.

As we are now gradually getting over challenges associated with the pandemic, I wish to see you all through your physical presence. Towards that end, I plan, in the coming days, to organise some physical meetings with our member which shall afford me with an opportunity to interact with our members

so that we are able to restore the momentum that got a little subsided due to constraints faced in the past couple of years. I always believe that interacting with our professional members is an opportunity to get to know a different perspective on all common and relevant issues and subjects. Besides this, such meetings are an opportunity to convey our thoughts and ideas to the stakeholders.

With a legacy of more than 5 odd years, the journey of IBC has witnessed many twists and turns on its way; some road-blocks (like the pandemic) also appeared, threatening to take away relevance of this legislation. But, on the strength of timely actions (including amendments brought into the legislation, as also concomitant regulatory and judicial developments that happened as complementary actions by the IBBI and Judiciary), as a nation, we have succeeded in overcoming these challenges as well. The statute has reestablished itself as an effective and efficient legislative tool for insolvency resolution and a medium to effectuate *freedom of exit*.

Amongst several legal developments taking place, the one that has caught the attention of legal experts and is now being increasingly debated amongst the stakeholders is the issue of liability of personal guarantor to corporate debtor (PG to CD). The relevant provisions enforcing liability of PG to CD (under Part II of IBC) were made effective from 1st December 2019, and soon thereafter, these provisions were tested for their constitutional validity before Hon'ble SC. The Court, *vide* its judgment dt. 21st May 2021, pronounced in the matter of *Lalit Kumar Jain* v. *Union of India* (2021) 127 taxmann.com 368 (SC), had upheld the validity of the provisions, making it clear that the creditor can proceed against PG to CD for recovery of its dues against CD. It was held that since such guarantees (given by the Personal Guarantor to Corporate Debtor) are intricately connected with the CD (principal borrower), therefore, such persons can be proceeded against. Another very interesting aspect of IBC which *Lalit Kumar Jain's* case (*supra*) laid down was that even if CD's responsibility gets discharged by way of a resolution plan, the liability of PG to CD does not *ipso facto* gets dissolved. It was made clear that the resolution plan does not *ipso facto* discharge the responsibility of personal guarantor(s) to corporate debtor. As we know that certain legal issues require further clarifications through Apex Court judgments, this legal

issue has again landed-up itself before Hon'ble SC. The case in point before SC now pertains to a legal challenge made to an NCLAT (Principal Bench) order dt. 27th January 2022 pronounced in the matter of *State Bank of India* v. *Mahendra Kumar Jajodia* (2022) 136 taxmann.com 371/171 SCL 232 (NCL-AT) wherein the Appellate Tribunal has held that there is no bar in filing an application to initiate insolvency proceedings against PG to CD even when no CIRP or Liquidation Process is pending against such CD. Thus, Hon'ble Apex Court is now seized of the issue as it has been called up to decide as to whether a creditor can invoke a personal guarantee even without proceeding against the corporate debtor under IBC; in other words, can a personal guarantor be proceeded against under IBC when no CIRP is pending against CD, and secondly, which is the appropriate forum (NCLT or DRT) for carrying out proceedings against PG to CD when a CIRP has not been initiated against such CD. We shall have an answer to these issues in the coming days.

While the IBC has been able to succeed in its objective of laying down a new normal/culture of responsible borrowing and lending, as also facilitating freedom of exit for genuine business failures, we are not very far from the day when the virtues of this new order shall start getting appreciations even from those quarters where there is still some resistance to this reform. As for the setting-up entities, I believe that if you are creating a company for perpetuity, you need to have three essential elements first. One is a culture that renews itself as the external conditions change. You create the culture where the internal decision-making about business and people continually adapts to external changes. Second is that you produce leaders who are capable of steering the organization. An organization cannot perpetuate for long without having a leader that steers it;and number three is, you need mechanisms inside the culture that will produce those leaders and that will even correct such leaders if they made a mistake.

Please do stay connected and feel involved in all our actions and activities. Ultimately, we are meant for serving and are strengthened on account of your efforts and support to us. Currently, we are holding Round-table discussions (as also workshops) regularly over the virtual platform and I wish to see you all actively participating. We have also been regularly sending a one-liner update on the judicial developments taking place

in IBC law space through our daily learning curves. I encourage our members to help us with their valuable thoughts, ideas and suggestions on our activities, especially as to what you would like us to expand our attention and focus into, in addition to the current ones.

As always, thank you for your trust in us and giving us an opportunity to serve you.

INTERVIEW

RAMANATHAN BHUVANESHWARI

IP REGISTRATION No. IBBI/IPA-002/IP-N00306/2017-18/10864

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1. What are your views on this law, Insolvency and Bankruptcy Code, 2016, which has gradually emerged over the years?

In my view, this law IBC is an excellent initiative, having objective to revive the entities and accordingly contribute to the Economy of the Country and clearly distinguishes with many other laws which are merely compliance oriented. This law is creditor focussed and there is a clear purpose of revival and if revival not possible, liquidation, ensuring that the creditors are able to recover full or part of the debt. The time bound process makes it meaningful, compared to other legal systems. This Code is well structured, to achieve its objectives.

2. How has this profession as an Insolvency Professional shaped your professional career from the time you got yourself registered?

This profession requires the expertise of a super human, requiring various skills, expertise and ability to act in a very organised manner. My entire corporate knowledge, experience, including technical, commercial and legal knowledge acquired during my corporate career, is being used in this profession, unlike

any other professional practice which may be focussed on specific areas. By the very nature of the profession in which we need to act as CEOs of varieties of Industries, there is new learning in each assignment and we try to improve upon it. There are several challenges at the ground level, which makes this career very interesting. I am quite happy to contribute to the economy, though in a very limited way.

We also have the support of IBBI and IPA who provide various support in developing ourselves in terms of practical knowledge. I am fortunate that I could get into one such practice to passionately involve and make a meaningful career.

3. Since you are also a Company Secretary by profession, how does being a Company Secretary help you in handling the assignments?

The practical experience acquired during my tenure with various corporates in the capacity of CFO and Company Secretary has given me a good base to get into this profession. This profession requires expertise in Finance, commercial, legal areas, in addition to the technical expertise relating to the type of industry we deal with.

Dealing with Committee of Creditors (CoC) is similar to dealing with the Board of Directors in a Company. Right from sending notice scheduling CoC meetings, careful preparation of Agenda items and related preliminary activities, conducting the meetings, preparation of Minutes, etc., are the skills I have developed as a Company Secretary. The entire process handled by an IP, including the minutes of CoC are submitted in NCLT, NCLAT, till Supreme court level. Hence the skills of a Company Secretary is definitely an advantage in dealing with our assignments. However, I must mention that in addition to legal expertise as a Company Secretary, one needs to have good Financial and Accounting knowledge and also needs to understand the business as a whole, in order to work towards revival of the business. Only then, the Company Secretary can become a successful Insolvency Professional.

4. What are the challenges faced by you as an IP while handling the assignments?

The challenges are several. Few of the challenges are below:

(*a*) For taking action on avoidable transactions, I have received threats calls on my family. Also one of the Four Pillars of IBC penalised me for nearly 3 years, in all possible ways for my unrelented effort on avoidable transactions.

(*b*) Almost all the Promoters of CD are non-cooperative. While getting orders from the court and in turn getting cooperation is a difficult task, we end up doing everything possible to collect information and complete our assignments, making the process very tiresome.

(*c*) Though as an IP, I am able to complete my job in a time bound manner, finally some of the assignment get stuck in legal battle on which I have no control.

However, I must admit, the challenges coupled with the ultimate objective of providing solution to the creditors on the NPAs is making this career more interesting and lively. Our innate qualities, like, being bold, straightforward, never-give-up attitude, management skills help us meet these challenges.

5. One of the major challenges faced by IPs in this profession is fees paid to Insolvency Professionals, so what is your take on this challenge?

In my personal view, fees is not at all a challenge. It all depends on how we deal with the assignment and the stakeholders from day one. Understanding the assignment and accordingly quoting appropriate fees, very transparent dialogue and agreement with the stakeholders on the fee shall ensure that fees is paid properly. I must say, our quality in handling the assignments decide our fees. Delay in adjudication process has resulted in Creditors losing faith in the process and in turn are discouraged to pay professional fees.

6. What is your take on the implementation of Pre-packaged Insolvency Resolution Framework for Corporate MSMEs?

We are yet to see the action on the Ground. I was of the view that PPIRF is a legalised form of OTS. I observe that the Financial creditors give preference to OTS than PPIRF.

7. According to you, how far the Insolvency and Bankruptcy Code, 2016 has benefitted the allottees of real estate projects?

In my view, the real estate allottees, though very hopeful on IBC are yet to see the benefit accrue to them. As I already pointed out, the projects get stuck in legal battles for several months, much beyond timelines provided under IBC, inspite of time bound action by the Professionals. The Government has to work on this area, in order to make Real estate allottees benefit from IBC.

8. Since Graduate Insolvency Program has been introduced for the students opening doors of new career opportunities for them, what advice would you like to give this young aspiring Insolvency Professionals?

I am always of the opinion that the minimum experience stipulated for enrolment as IPs was more meaningful, considering the various expertise demanded by this profession. Having said that, I feel, it is better if the young aspiring IPs work with the existing IPs so that they learn practically, before independently taking up the assignments.

9. How significantly do you think the regulators serve the profession of Insolvency Professionals and what suggestion you want to give for the improvement?

The Regulatory support is quite good and proactive. The speed with which the Code is amended and Regulations are amended was never seen in any other law. However, I feel, some of the proposals seem to be threatening, which may discourage the IPs. As such, the ground level challenges are huge for the IPs and hence IPs require more moral support.

10. Lastly, according to you what are your views on the future of this law?

IBC gives confidence to global investors to invest in India. This law as such is evolving. Once cross border insolvency and Group Insolvency are legalised, the results would be tremendous, giving more confidence to the stakeholders.

Insight!

Analysis of Disciplinary Cases under IBC - Article 3

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Background:

The Author in a series of Articles seeks to analyze the disciplinary cases that have been instituted against the Insolvency Professionals by IBBI/IPA along with the outcome of such cases. These proceedings are taken up by the Disciplinary Committee of Insolvency Professional Agency (IPA) and of Board (IBBI).

Up-till now, out of the total inspections made by the Inspection Authority, 87 orders are passed by the Disciplinary Committee of IBBI for various non compliances (source listing on IBBI website till January 31, 2022 - last case uploaded is of December 29, 2021.)

The first such article was based on the disciplinary proceedings in 26 cases where the subject matter was Authorization for Assignment.

In second article, the author attempted to analyze 27 cases of disciplinary proceedings which could be stated to be Generic in nature, as these are not specifically arising out of the subject matter of the specific CIRP case but are cases

which arose due to lapse on part of IP mainly on procedural matters and delay in adherence of timelines.

In this article, the author attempts to analyze 23 cases of disciplinary proceedings which can be stated as specific, as these are arising out of the subject matter of the specific CIRP case and actions taken by IP's in the process.

Resolution Process under Insolvency Code and Regulations:

The Insolvency and Bankruptcy Code, 2016 and regulations, describe the resolution process (CIRP, Voluntary Liquidation and Liquidation) of a corporate person as a time bound process, which include various time lines for completion of the process and various compliance an Insolvency Professional have to follow while going through a process. Each process has its defined procedure in which it has to start and end.

For this purpose, various sections defining the duties and responsibilities of the insolvency Professional are also laid down in the Code. These very sections have been used for trying the Insolvency Professionals of misconduct. Some of the relevant sections are given hereunder:

A. Relevant Section & Regulation for disciplinary proceedings:

IBBI/IPA referred to Sections 17, 18, 20, 23, 25 and 208 of the Code as the governing sections while proceeding against the IPs.

B. Types of defaults/issues arising out of the disciplinary proceedings:

All the 23 cases have been analyzed and main causes underlying such cases are given in a tabulated form for the convenience of the readers:

S. No.	*Type of Defaults/Issues*
1	Outsourcing his/her responsibility of certifying eligibility of RA(Resolution Applicant) to a CA.
2	Making payment to Financial Creditor during moratorium
3	Extension for CIRP by making false statement
4	Appointment of related party in CIRP cases.
5	Unnecessary expenses incurred in conduct of CoC Meetings
6	Non Compliance of moratorium during CIRP
7	Modification in the category of creditor in connivance with suspended director of CD
8	Preferential treatment of creditors
9	Initiation of various debit transactions without the authorization of CoC.

As can be seen from the above table that all of the matters contained herein are arising out of the fact that somewhere the IP did not diligently apply the Code and/or did not act in a manner as required under the circumstances.

C. IBBI Decision:

The decision by IBBI in above matters as decided in the 27 cases is tabulated below:

Particulars	Nos.	Authority	General Outcome of Order and Penalty
Guilty of professional misconduct	16	9 cases by IIIPI - ICAI 5 cases by - ICSI-IIP 2 cases by IPA-ICMAI	1. Cancel the Registration of IP 2. Suspended Registration of IP for a period. 3. Penalties imposed
Issued Warning	3	2 cases by IIIPI - ICAI 1 cases by - ICSI-IIP	Issues Warning to Insolvency Professionals.
Not Guilty of professional misconduct	4	2 cases by IIIPI - ICAI 1 cases by - ICSI-IIP 1 cases by IPA-ICMAI	NIL

D. Conclusion:

From the above summary and Board's decisions, it clear that for an Insolvency Professional is required to take full care, due diligence and to be alert in every step taken in the process, since the role of an Insolvency Professional is extremely crucial for all stakeholders and parties involved in the CIRP process.

TABLE - 1 -Specific Category

A. GUILTY OF PROFESSIONAL MISCONDUCT

S.No.	*Date*	*Subject*	*Issue*	*IBBI Decision*
1.	23 Aug, 2018	Mr. Mukesh Mohan, Insolvency Professional Ref. No IBBI/ DC/07/2018	1. NCLAT directed IP to take into consideration the claim of appellant, to request CoC to notice the same and to bring it to the notice of AA, However IP failed to comply with the direction. 2. IP failed to comply with the direction of board requiring him to issue a fresh invitation of EOI, after removing deficiencies observed by the board in Invitation of EOI. 3. IP attempted to mislead the Board and the AA that the invitation for EOI, requiring a verification certificate from a CA , was approved by only one creditor , PNB, in a special meeting with the forensic auditors and not in a meeting of the CoC. However not a single invitation enclosed by IP required a certificate from a CA certifying eligibilty of resolution application.	1. Conduct of Mr. Mohan is unbecoming of IP and in Contravention of Provision. 2. The submission that the CoC rejected the proposal to issue a fresh invitation is not correct. IP influenced the decision of the CoC by producing a legal opinion to the effect that the invitation issued was in conformity with the section 25(2)(h) of the code. Probably the CoC would have decided differently, if IP had presented correct position. 3. IP has been changing his stance for exlpaning his conduct, IP has been resorting to implausible explanantions. 4. IP outsourced verification of eligibility of a resolution

			4. IP outsourced his responsibility of certifying eligibility to a CA. He introduced the requirement of a certificate from a CA, which is not envisaged in the law, adding to cost in terms of time and money. 5. Instead of appointing one, IP used the services of a forensic auditor, who was earlier appointed by one of the financial creditors in the same account. Further, the forensic audit report had adverse findings with regard to irregular transactions - preferential transactions, undervalued transactions, extortionate transactions and fraudulent trading or wrongful trading. The CoC directed IP, in its meeting dated 5th January, 2018, to file an application in respect of irregular transactions before the AA. IP, however, failed to do so. 6. IP handed over custody of the assets of the CD to the members of suspended board of directors ignoring his statutory liablities. 7. IP resigned from some cases due to personal reason rather than professional, pre-occupation and health issue.	applicant to a CA who is not professionally qualified to undertake this responsibility. Further, he did not identify a CA for verification of eligibility on his behalf; he asked the interested party, namely, resolution applicant, to obtain a certificate from a CA. This compromised the integrity of the process, and thereby his ability to protect and preserve the value of the propety of the corporate debtor. 5. IP knowingly and deliberately did not file the application for avoidance of the irregular transactions as required by the Code before the AA in breach of his statutory duties. 6. Handing over the asset to suspended director of the CD is in contravention of the provision of code. 7. Ignoring the private understanding for a moment , it is clear that IP contravened the provision of code. Hereby the committee cancels the registration of IP.
2.	27 Apr, 2020	Mr. Ashwini Mehra, Insolvency Professional Ref. No. IBBI/ DC/23/2020	1. In 2nd Committee of Creditors (CoC) meeting dated 24th May, 2018, Shardul Amarchand Mangaldas (SAM) was appointed by CoC members as their legal counsel. Fee of SAM was also decided in the said CoC meeting by the CoC members. CIRP fees does not include such costs, which are incurred by the members of the CoC directly. However, it has been observed that fee of SAM was included in CIRP costs. IBBI Circular dated 12-6-2018 on "Fees and other Expenses incurred for Corporate Insolvency Resolution Process" that the CIRP cost would not include costs which are not incurred by the IRP/RP, it has been observed that post this circular also, IP still continued to accept the invoices of SAM. 2. IP is required to take an independent decision on whether there was a need to get forensic audit of the CD again rather than abdicating the authority in favour of CoC and allowing them to usurp RP's authority. Also, since it is the CoC and not RP who decided	1. The conduct of RP by making payment of the fee of lender's legal counsel from the IRPC is in violation of Sections 5(13), 208(2)(*a*) & (*e*) of the Code and Regulation 7(2)(*a*), 7(2)(*h*) & 7(2)(*l*) of the IP Regulations. 2. The RP has made the appointment of Kroll to conduct a forensic Audit of the Corporate Debtor on the basis of a decision of the CoC, he has contravened Provisions of Code and Regulations. 3. No evidence has been found corroborating the fact that either RP or CoC has interfered with valuation exercise or the liquidation values could be determined, the IP cannot be held liable for contravening the provisions of Regulation 35 of CIRP Regulations. Penalty: The registration of IP as an

			to conduct the forensic audit again, the cost of the second audit should not have been made a part of CIRP cost in accordance to IBBI Circular dated 12th June 2018. 3. It has been observed from the valuation report that both the valuers revised the fair value and liquidation value on the instructions of CoC. Regulation 35(2) of the CIRP regulations which states that valuers should provide valuation report(s) directly to the RP only and thereafter, the information in valuation report may be shared with the CoC members only after receiving an undertaking from all the members. IP's actions indicate misunderstanding of the law and an attempt to mislead the stakeholders on such a crucial aspect.	Insolvency Professional was suspended for six months. The DC hereby directs IP to secure reimbursement of an amount of Rs. 73,87,642/- (Rs. Seventy-Three Lakh Eighty-Seven Thousand Six Hundred Forty-Two only) which was paid to lender's legal counsel (SAM) and charged to IRPC. The DC also directs IP to secure reimbursement of an amount of Rs. 50,74,000/- (Rs. Fifty Lakh Seventy-Four Thousand only) which was paid to Kroll for conducting second forensic audit on the directions of the members of CoC and was charged to IRPC.
3.	30 May, 2020	Mr. Mohan Lal Jain, Insolvency Professional Ref. No. IBBI/ DC/24/2020	1. In the matter of Mack Soft Tech Private Limited, it has been observed from the minutes of the 3rd CoC meeting dated 16th March 2018 that the RP had sought approval from the CoC members to continue making payments through EMIs to HDFC Pvt. Ltd. ('HDFC'), one of the Financial Creditors of the CD. That after obtaining approval from CoC members, the RP continued to make payments to HDFC during CIRP which is in violation of Section 14(1)(*e*) of the Code which states that transfer and disposal of any of the assets of the CD is prohibited during the CIRP. 2. As per the minutes of 10th CoC meeting, the claim of HDFC Ltd. as per the revised list stood at Rs. 1,08,34,362/- and this decrease in value of the admitted claim of HDFC from Rs. 22,45,49,456/- to Rs. 1,08,34,362/- was because of the regular payment of EMIs from the assets of CD during CIRP which is in contravention of Section 14(1)(*e*) of the Code. 3. Moreover, it was decided in the 10th CoC meeting that HDFC may recover remaining EMIs from the Security deposit of Rs. 5,48,63,987/- available with HDFC.	In this matter, the DC observes that IP displayed a casual and negligent approach during the conduct of CIRP. When a CD is admitted into CIRP, the Code shifts the control of a CD to creditors represented by a CoC for resolving its insolvency. The CoC holds the key to the fate of the CD and its stakeholders. Thus, several actions under the Code require approval of the CoC. On the other hand, the IP must maintain absolute independence in discharge of his statutory duties under the Code. In the present matter, the RP compromised his independence and continued making payment of EMIs to the FC during CIRP from the assets of the CD. Thus, IP, has displayed utter misunderstanding of the provisions of the Code and Regulations made thereunder. He has, therefore, contravened provisions of the code. Penalty: The DC hereby imposes on Mr. Mohan Lal Jain a penalty equal to twenty five percent of the fee he has received in this process. This twenty-five percent works out as Rs. 34,22,500/-

4.	02 Jun, 2020	Mr. Kanwal Chaudhary, Insolvency Professional Ref.No. IBBI/ DC/25/2020	1. Wrongly captured the amount of two claims , which ultimately changed the voting shares of CoC. 2. Failed to provide the list of creditors containing the name of creditors, the amount claimed by them, the amount of there claim admitted and the security interest, if any , in the Information Memorandum. 3. Certain transaction initiated by the Corporate Debtor, purportedly with the homebuyers, before the CIRP commencement date were finalized after CIRP commenced in this matter. One such transaction was entered with Ireo Waterfront Private Limited for amount of Rs. 1,00,000/-. In this regard RP has submitted to the Inspecting Authority that this transaction was unauthorized in nature as money was not transferred to any creditor but to a group company of the Corporate Debtor and due to this Ireo Waterfront Private Limited will be required to make a refund. RP failed to take any steps to reverse the transaction. RP's action indicates his casualness towards CIRP. 4. Code requires every IP to disclose the fee payable to professional engaged by him to insolvency professional agency of which he is a professional member.IP failed to disclose cost. 5. it has been observed that IP communicated with various stakeholders during the course of CIRP while using the letterheads indicating his profession as a lawyer and not that of an insolvency professional.	1. IP took immediate action in the next CoC meeing and also passed an application to NCLT , on whose direction one more CoC was held, therefore no contravention coulde be made out. 2. The Information Memorandum Provided by IP to DC contained the list of creditors with full details therefore no contravention. 3. The IP had not taken any action for 245 days towards correcting the unauthorised transaction until the IA pointed out the issue and no discussions before CoC were held regarding the transfer to a group company or any action to be taken thereof. This is in voilation of code. 4. Provider of e-voting is not a professional, hence no contravention. 5. it was held that it was in voilation of povision of code. Penalty: The registration of IP as an Insolvency Professional was suspended for three months.
5.	13 Nov., 2018	Mr.Martin S.K. Golla, Insolvency Professional Ref.No. IBBI/ DC/12/2018	1. IP presented information memorandum (IM) at the 3rd meeting of the CoC, after about 8 months of the commencement of the CIRP. 2. IP issued the invitation of EoI on 4th April, 2018 without the approval of the CoC. 3. IP failed to publish brief particulars of the invitation in Form G of the Schedule to the CIRP Regulations, as required under regulation 36A(5) of the said Regulations. 4. IP did not carry on the process during the entire period of CIRP. As RP, he convened only one meeting, that too, with only one agenda, that is, to	The minutes of the 1st meeting and 3rd meeting of the CoC indicate that IP has submitted IM. The DC does not find any lapse on this count. The Code prohibits any payment to a creditor from the assets of the CD during moratorium. It does not prohibit payment to creditors through a resolution plan. Therefore, the DC does not find any merit in this allegation. In other cases IP action is in contravened the provisions of Code Penalty: DC cancels the registration of IP and debars him from

			seek approval for extension of time. 5. IP allowed BoB, the sole financial creditor to recover its loan during moratorium. 6. IP permitted a recovery plan to be considered as resolution plan. 7. IP sought an extension of time, *vide* application dated 19th February, 2018 to the AA, on the ground that he and the promoter were actively seeking out investors to formulate resolution plan and talks were in very advanced stage. However, there was no such talk except the effort by the RA to reach an OTS with BoB. Therefore, IP obtained approval for extension of time by making a false statement to the AA.	seeking fresh registration as an insolvency professional or providing any service under the Insolvency and Bankruptcy Code, 2016 for ten years.
6	14 Nov., 2019	Mr. Mahender Kumar Khandelwal, Insolvency Professional Ref. No. IBBI/ DC/15/2019-20	1. A duty is imposed on the RP to file an application for avoidance of transactions immediately with NCLT upon receipt of report to preserve and protect the assets of Corporate Debtor (CD). However, the RP abdicated his authority in favour of the Committee of Creditors (CoC) and allowed the CoC to usurp his authority. Even after direction of CoC to file application there was a delay of two months (in filing the application). 2. 'Insolvency Resolution Process Cost (IRPC)' which does not include fee paid to lender's legal counsel since they are incurred directly by members of CoC. However, RP included the fee payable to lender's legal counsel - Cyril Amarchand Mangaldas (CAM) while calculating IRPC. 3. PwC was appointed as a valuer to determine the liquidation value of CD on 31st July 2017. During the CIRP, the IP resigned from BDO India LLP and joined PwC as a partner. Thereafter, PwC was again appointed to perform due diligence in relation to Section 29A of the Code. Thus, the IP gave an assignment to PwC, then joined them as a partner and thereafter again engaged PwC to perform due diligence. Thus, IP used his position to derive some benefits to the firm in which he was a partner establishing a clear case of conflict of interest since his position as an IP is in conflict with his position as a partner of PwC.	1. Taking the matter before CoC for review at two instances (in 2nd and 11th Meeting) and filing the application after approximately two months of receipt of valuation report shows the casual approach of the RP towards compliance of law. 2. In view of admission by RP of having charged lender's legal counsel (CAM) fee of Rs. 12,09,90,185/- from IRPC and specifically for the services rendered prior to the Insolvency Commencement date (*i.e.* period from 17th June 2017 to 25th July 2017) of CD, RP has contravened Section. 3. It is observed that IP appointed PWC as a registered valuer on 31st July 2017 while joined a distinct entity, PPS with effect from 23rd April 2018 *i.e.* approximately after eight months. Thereafter, he appointed PPL for conducting due diligence. However, on the date of appointment of PPL to conduct due diligence, no partner of PPS was a common partner in PPL. Thus, the RP cannot be said to be directly related to PPL on relevant dates. The DC hereby imposes on IP a monetary penalty of

				Rs. 29,24,167/- (Twenty Nine Lakhs Twenty Four Thousand One Hundred and Sixty Seven only) (which is ten per cent of the RP Fee (Rs. 2,92,41,667 X 10 per cent) forming part of IRPC).
7.	13-Nov-20	Mr. Kamalesh Kumar Singhania, Insolvency Professional Ref.No. IBBI/DC/42/2020	1. RP is required to verify every claim as on the insolvency commencement date. The Form C in the schedule of CIRP regulations provides that the claim of the FC would be the total amount of claim including any interest as on the Insolvency commencement date. Thus, the revised claim admitted by Mr. Singhania after including interest amount from 20th September, 2017 to 10th April, 2018 (post CIRP commencement period) is in contravention of regulation 13(1) of the CIRP regulations. Due to this, a resolution plan was submitted by M/s Terai Tea Co. Ltd. (TTCL) and presented by Mr. Singhania before the CoC, wherein it was proposed to pay Rs. 10.38 Cr. to PNB as against its claim of Rs. 1,27,74,287/-. This indicate bias in favour of Mr. Singhania towards one stakeholder 2. As per minutes of 4th CoC meeting dated 9th February, 2018, it was proposed that advertisement for invitation of EoI will be published in the newspapers on 13th February, 2018 and the last date for submission of EoI to be kept at 28th February, 2018. During the meeting Mr. Mintri, promoter of the CD, requested Mr. Singhania to defer the date of publication of EOI as he had submitted a proposal to PNB to settle and pay the outstanding dues of the Bank. Thus, it was decided that, if the said proposal of settlement is not accepted by the Bank by 20th February, 2018, the advertisement shall be published on 23rd February, 2018 and the last date of submission of EOI would be 10th March, 2018. The Code envisages resolution of a CD in a time bound manner for maximisation of value of its assets. Thus, Mr. Singhania deferred the publication of EOI for the outcome of settlement proposal submitted by the promoter of the CD. The same promoter was accused by Mr. Singhania for non-cooperation.	1. The DC notes the submission of IP that for claim after the commencement of CIRP, he relied upon the proviso to section 29A of the Code and that under the Code applicable at that time, guarantors had the option to submit the resolution plan after making payment of overdues and interest thereon. However, DC is of the opinion that this submission of Mr. Singhania still does not explain the rationale behind accepting the interest post CIRP commencement period as revised claim. Claims can be accepted only as on insolvency commencement date. 2. DC further notes the submissions of IP that the decision to defer publication of EoI after 23rd February, 2018 was taken at the 4th meeting by CoC and not by Mr. Singhania and that too in the context of limited purpose of the outcome of settlement proposal submitted by the promoter of the CD. Therefore, regarding deferring of the publication of EoI in that context, the DC is of the opinion that lenient view may be taken. Penalty: Mr. Kamalesh Kumar Singhania shall undergo pre-registration educational course from the IPA of which he is a member.

8.	1-Dec-20	Mr. Ajay Gupta, Insolvency Professional Ref.No. IBBI/DC/46/2020	It is provided in section 25(1) of the Code that it is the duty of the resolution professional to preserve and protect the assets of the corporate debtor. However, it has been observed that IP failed to do so and had handed over charge of the CD, back to the erstwhile directors after the stay order dated 29th March, 2019 was passed by the Hon'ble Supreme Court in Writ Petition (Civil) No. 354 of 2019. This led to preferential transactions conducted by the ex-management in the form of payment of interest dues to IIFL, one of the financial creditors of the CD. Therefore, the Board was of the *prima facie* view that IP has violated sections 25(1), 208(2)(*a*) & (*e*) of the Code, regulation 7(2)(*h*) of the IP Regulations and clause 14 of the Code of Conduct under Schedule 1 of the IP Regulations.	The issue of preferential transaction during the period when control was given back to the ex-management by IP, it has been submitted that Mr. Gupta has filed application under section 43 of the Code before the AA to counter said preferential transaction. However, the reason for the said transaction, in the first instance, is due to the transfer of control of CD to the ex-management by IP. Therefore, filing an application before the AA against transactions which have resulted due to the conduct of handing over of the management of the CD by IP to the ex-management does not exonerate him of his action committed in violation of the Code. The DC finds that the conduct of Mr. Gupta of handing over the management of the CD back to the ex-management is in contravention of sections 23(1), 25(1), 208(2)(*a*) & (e) of the Code, regulation 7(2)(*h*) of the IP Regulations and clause 14 of the Code of Conduct under Schedule 1 of the IP Regulations. Penalty: IP shall not seek or accept any process or assignment or render any services under the Code for a period of six months.
9.	5-Mar-21	Mr. Venkatesan, Insolvency Professional Ref.No. IBBI/DC/68/2021	1. IP has agreed and allowed use of his name by EY and other EY firms to perform the services and in correspondence including proposals, from EY or other EY firms. IP instead of complying with the circular dated 3-1-2018, assigned all the work to be done by an IP to EY including the preparation of IM which is the primary duty of the IP. 2. IP executed 8 POAs(Power of attorneys) with various other person during CIRP. IP executed all POAs without taking any prior approval of the CoC which is mandatory as per section 28(1)(*h*) of the Code. 3. IP appointed EY for restructuring service. It has been observed that neither the appointments of these	1. IP must maintain complete independence in his professional relationship and should not conduct IP with external influence. Therefore IP has contravened the provision of code. 2. Even though the minutes do not specifically mention the fee paid to EY, as its appointment has been approved by CoC, the terms of engagement letter including fee stand approved. Therefore, no contravention is made out as alleged. 3. IP by conducting CoC meetings by audio mode only on 6 occasions during the

			professionals nor their fees was ratified by the CoC. IP stated that the per month cost and budgeted costs for the next six months (180 days) in the process was placed before CoC for its approval in its first meeting. However, it has been observed from the voting results of 1st CoC meeting, that no such item was there for voting and hence, no approval was obtained. 4. Two resolutions were placed for approval of CoC for appointment of EY and appointment of CRO. His appointment was separate from appointment of EY (in the capacity of a firm) for providing restructuring/ IBC advisory services. In the 1st CoC meeting, two separate resolutions were placed for approval of CoC for appointment of EY and appointment of CRO. However it was observed that the invoices for the fees of CRO has been raised by EY which is voilative of the IBBI Circular No. IP/004/2018, dated 16-1-2018	CIRP and 7 occasions after the completion of CIRP out of total 15 meetings has not provided facility to CoC members for effective participation. Therefore, the DC finds that IP has contravened of code. 4. The DC notes that the Circular No. IP/004/2018, dated 16-1-2018 came much after the resolution process was undertaken for the CD in the present matter and therefore, the DC takes a lenient view with regard to the allegation in this regard. Penalty: IP shall not seek or accept any process or assignment or render any services under the Code for a period of three months.
10.	22-Jul-21	Mr. Manish Kumar Gupta, Insolvency Professional Ref. No. IBBI/ DC/74/2021	1. That the EOI received on last date of EOI but was taken in account after the last date, and one EOI recevied after last date was accepted. 2. That Singhal Ajay & Associates was appointed for looking after compliance of TDS and GST requirements for CD and the same Mr. Ajay Singhal is one of the PRAs as seen from the minutes of 4 th CoC meeting dated 8-1-2020. Despite this fact, IP did not terminate the services of Mr. Ajay Singhal. 3. Did not file Relationship Disclosure with respect to appointed professional, who were employees of the flagship company	1. No contravention if EOI received on the last date, IP to duly inform the stakeholder, however if IP consider EOI after due date it will be against the regulations of IBBI. 2. The DC notes that Mr. Ajay Singhal also submitted EOI which was fundamentally wrong on the part of Mr. Singhal and more so on the part of IP in including his name in the list of PRAs and placing before CoC. 3. IP did not take reasonable care and exercise diligence while making the disclosures and therefore guilty of misconduct. Penalty: 1. IP shall not seek or accept any process or assignment or render any services under the Code for a period of twelve months. 2. IP shall pay a penalty equal to the fee paid to Mr. Ajay Singhal during the CIRP.
11.	27-Aug-21	Mr. Pramod Kumar Sharma, Insolvency Professional Ref. No. IBBI/ DC/76/2021	1. CoC decided not to rent out the Oyster Water Park and IP even then proceeded to enter into the revenue sharing agreement for the water park, against the decision of the CoC. 2. IP took refuge of lockdown/ restrictions of movement imposed on the individuals in view of Covid-19	1. The DC notes that to maintain the going concern status, it was necessary to operate the water park as the CD was cash strapped and maintenance of water park and other expenses could not have been incurred unless

			pandemic and did not provide the data, when the fortnightly reports were available with him. 3. It is seen that the e-voting results for the agenda items of 2nd CoC meeting were declared by IP on the basis of total votes casted by Financial Creditors (FC), including Financial Creditors in Class as decided by Hon'ble NCLT in *Nikhil Mehta & Sons (HUF)* v. *M/s AMR Infrastructure Ltd.* It is noted that the entire CoC of CD consists of real estate allottees. However, the principle laid down in *Nikhil Mehta's* case (*supra*) was not applied by Mr. Pramod Kumar Sharma while determining the issue of replacement of RP in the 3rd CoC meeting and declared the resolution as defeated, even though the total votes in favour of the resolution was more than votes against the resolution. 4. IP initiated various debit transactions without the authorization of CoC. It is clearly stated that prior approval of the CoC is mandatory for actions mentioned in section 28 of the Code and therefore, unauthorized withdrawals made by IP cannot be justified on the premise that expenditures were made to keep the CD a going concern and it does not mitigate the nature of the contraventions committed. 5. IP had AR for one sub-set of financial creditors and while the other financial creditors were representing themselves in the individual capacity. This led to a situation wherein hundreds of FCs were attending the CoC meetings and sometime led to disruptions in the meetings. It is considered view of the IBBI that the all the real estate allottees form one class of creditors and thus, should be represented by one AR only.	revenue was generated. Therefore, the DC finds that Mr. Sharma did not contravene section 28(1)(*k*) of the Code. 2. IP contravened the provision of Code 3. IP contravened the provision of Code, by not following the direction of AA 4. DC took a linent view, since, CoC did not fix any limit for debit transaction by RP, hence, the issue of CoC's approval under section 28(1)(*e*) of the Code as to excess amount in absence of initial limit being fixed 5. IP did not share the names of the members of CoC who voted for or against the decision or abstained from voting in the e-voting results for the CoC meetings for maintaining safety and security of the members of CoC owing to the rivalry between different group of investors but the same were shared with the AA. The DC therefore, takes a lenient view. Penalty: IP shall not seek or accept any process or assignment or render any services under the Code for a period of six months.
12.	8-Jul-21	Mr. Anupam Tiwari, Insolvency Professional Ref. No. IBBI/DC/72/2021	1. Modification in the category of creditor in connivance with suspended director of CD, The Code does not permit the change of category of a creditor in a CoC once it is constituted. 2. Preferential treatment of creditors: It was observed from the records that during the 5th and 6th CoC meetings IP had *inter alia* informed CoC that certain members of CoC have withdrawn their claims due to	1. IP has acted in contravention of the provisions of the Code while modifying the category of creditor from FC to OC and even despite the order of the AA and clear guidance provided in the order of Hon'ble NCLAT as regards the provisions relating to his powers as to updation of claims.

			personal settlement of the claims by the suspended director of the CD and that the liabilities of CD had been reduced. Taking note of the same, IP had also reconstituted CoC and revised the voting share from time to time.	2. IP had no option but to reconstitute the CoC, hence DC takes a lenient view. Penalty: IP shall not seek or accept any process or assignment or render any services under the Code for a period of one year.
13.	29 Dec, 2021	Mr. Vimal Kumar Grover, Insolvency Professional Ref. No.	1. Non-Compliance of moratorium during CIRP: Suspended Board of CD had been receiving rent and paying Instalments to ICICI Bank, the financial creditor (FC), and who has not filed any claim against the CD. 2. Non-submission of certain documents: IP has not submitted documents for Self-declaration by him being independent of the CD and Disclosures to IPAs as per the IBBI Circular No. IP/005/2018 dated 16-1-18. 3. IP did not receive any claim from FCs. Even after the receipt of claim from the OC, he did not constitute the CoC with one OC as a member even after lapse of more than 150 days from the date of admission of CIRP.	DC took a lenient view in respect of Non-discolusre of Self-declaration by him being independent of the CD and Disclosures to IPAs as per the IBBI Circular No. IP/005/2018 dated, 16-1-18 as IP apologized for it. In all other matter IP contravened the provision of the Code and was held liable. Penalty: 1. Cancels the Registration of the IP debars him from seeking fresh registration as an insolvency professional or providing any service under the Code for a period of one year.
14.	15 Oct, 2018	Mr.Sandeep Kumar Gupta, Insolvency Professional Ref.No. IBBI/ DC/10/2018	1.IP, as IRP/RP conducted only one meeting of the CoC during the entire CIRP, particularly when many decisions are required to be taken with the approval of the CoC, including decision to approve a resolution plan or to liquidate the corporate debtor. 2. IP was appointed as IRP. His appointment as RP required approval of the CoC by 75% of voting share, while he received only 73.42% of voting share of the CoC before the closure of e-voting window. Therefore, he could not have been appointed as RP. 3. IP failed to either appoint the valuers within seven days of his appointment as IRP or follow up with them for valuations leading to non-submission of the information memorandum carrying the liquidation value to the members of the CoC within fourteen days of the first meeting of the CoC. 4. IP did not receive any resolution plan was not informed to the CoC. Instead of working for resolution of the corporate debtor, he worked for its liquidation.	As this CIRP was the very first assignment of the IP (*i*) Imposes on IP a monetary penalty equal to one hundred per cent of the total fee payable to him as IRP and as RP in the CIRP of Corporate Debtor; and (*ii*) directs IP to undergo the pre-registration educational course specified under regulation 5(*b*) of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 from his Insolvency Professional Agency to improve his understanding of the Code and the regulations made thereunder, before accepting any assignment under the Insolvency and Bankruptcy Code, 2016.

15.	8 Jun, 2020	Mr. Vijay Kumar Garg, Insolvency Professional Ref. No. IBBI/ DC/26/2020	1. IP appointed a private firm for assisting in 2 CIRP cases. D&Ps scope of work included preparation of Information Memorandum, receiving/ collating claims, monitoring & managing the operations of the Corporate Debtor, assisting the IP to take control & custody of any asset. This is in violation of Section 25(1) of the Code which provides that it is the duty of the resolution professional to preserve and protect the assets of the corporate debtor. 2. The RP provided unnecessary benefits to D&P even though it was stated in the engagement agreement between the RP and D&P that D&P would act independently of the RP. Costs incurred by RP in providing insurance to D&P was done in violation of section 5(13) of the Code, Regulation 31 of CIRP Regulations and IBBI Circular dated 12th June, 2019 which states that if any fee or other expense, is not directly related to the CIRP, it shall not be included in the IRPC. 3. Unnecessary expenses were incurred by the RP in conducting the said meetings after completion of the CIRP period in violation of section 5(13) of the Code.	1. D&P is not a professional, having authorisation of a regulator of any profession to render any professional service, and its conduct and performance is not subject to oversight of any regulator of any profession, therefore, appointment of D&P is in contravention of section 20(2) of the Code. Fee of Rs. 23,75,000/-(excluding taxes) per month to D&P in the matter of GGL which is 19 times of the fee payable to the RP cannot be said to be reasonable. Fee of Rs. 6,87,500/-(excluding taxes and out of pocket expenses) per month each in case of NBL and NWL to D&P also cannot be said to be reasonable. Thus there is contravention of Code 2. The RP created an additional burden on the ailing Corporate Debtor by unnecessarily extending benefits to a third party *i.e.* D&P. Therefore, the Board is of the *prima facie* view that RP has violated Sections 3. Conducting two meetings of the CoC beyond the CIRP period and discussing agendas other than as directed by AA *i.e.* ratification of IRPC, are beyond the provisions of the Code and the directions of the AA. Therefore, RP has contravened provisions of Sections. Penalty: IP shall pay a penalty equal to 25% of fee payable to him as 25 per agreed terms and conditions in CIRPs of GGL, NBL and NWL where he has acted as an IRP/RP.
16.	21 Apr., 2020	Mr. Bhupesh Gupta, Insolvency Professional Ref. No. IBBI/ DC/22/2020	1. There was no resolution that has been approved by CoC with regard to fee payable to liquidator, but the liquidator continued to draw the same remuneration as was paid to him in the capacity of RP rather than in accordance with the table provided in Regulation 4(3) of IBBI (Liquidation Process) Regulations, 2016.	1. By continuing to draw the same fee in the capacity of a liquidator as he was taking in the capacity of RP, he has acted in contravention. 2. DC ordered for further investigation. Penalty: Recovery of Rs. 31,09,000/- in the Liquidation Estate of CD

			2. On 1-9-2018, the Ld. Additional District Judge passed an award in an arbitration proceeding wherein Oriental Insurance Co. Ltd. handed over a Demand Draft of Rs. 8,30,77,161/- towards full and final settlement of claim to Mr. Kuldeep Singh, director of CD, who has accepted the DD towards the full and final settlement of claim. CIRP of CD was started on 29-9-2017 and all these activities took place during CIRP. As per section 17 of the Code, the management and control of CD during CIRP is vested with the RP and he is authorized to act and execute in the name and on behalf of CD in all such matters. Further, it is also the duty of the RP to represent and act on behalf of the CD with third parties, exercise rights on behalf of CD in judicial, quasi-judicial or arbitration proceedings as per section 25(2)(*b*) of the Code. Therefore, the Board is of the *prima facie* view that the RP has violated section.	which IP has drawn without any authorisation during the period 8th August 2018 to 31st October 2019 while acting as liquidator.

C. ISSUE D WARNING

S.No.	*Date*	*Subject*	*Issue*	*IBBI Decision*
1.	27 Feb, 2020	Mr. Dushyant C. Dave, Insolvency Professional Ref.No. IBBI/ DC/18/2020	1. In 1st CoC meeting, the RP apprised the CoC about illegal use of assets of CD by another company which is sister concern of CD. The RP should have deployed security at the time when he was appointed as IRP. Thus, the RP failed to protect and preserve the assets of CD which may have led to erosion in value of assets of CD. 2. It is observed from minutes of 3rd CoC meeting, that despite knowing that there was an urgent need to take steps to preserve the assets of company the RP failed to appoint security agency (for which CoC had given approval) due to the following reasons: *i.* Lack of adequate funds. *ii.* Security was already provided by the yard owners where truck owned by CD were parked. However, these facts were not brought to notice of CoC during 3rd CoC meeting. 4. CoC resolved to liquidate the CD. However, this decision was based upon an interim valuation report. It is the responsibility of an RP to advise CoC members against the liquidation since	1-2. In the present case, the RP has taken extra-ordinary time to file an application under section 66 of the Code after the forensic audit report was submitted to him. An IRP/RP has the highest professional responsibility during CIRP. However, in the absence of any statutory mandate prescribing definite timelines for filing application under section 66 of the Code, the RP cannot be held liable for filing the application belatedly. However, it cannot be disputed that he acted negligently and failed to acknowledge the importance of timelines during CIRP. As regards to appointment of security agency, submission made by RP seems to be reasonable because of the fact that all yards had their own security agency. Keeping the above

1.	27 Feb, 2020	Mr. Dushyant C. Dave, Insolvency Professional Ref.No. IBBI/ DC/18/2020	final valuation report was awaited. It is in the domain of the members of CoC to take commercial decisions but at the same time, it is the duty of RP to provide CoC all necessary documents/ information like valuation report to enable them to take an informed decision. However, IP failed to take any steps to invite prospective lenders, investors and any other person to put forward resolution plans in accordance with section 25(2)(*h*) of the Code. 5. RP may sell unencumbered assets of the CD, other than in the ordinary course of business, if he is of the opinion that such sale is necessary for a better realization of value under the facts and circumstance of the case. However, in 3rd CoC meeting, sale of encumbered assets was proposed and as per summary report of e-voting for 3rd CoC meeting concluded on 21-11-2017, CoC also allowed sale of encumbered assets not exceeding 10% of the total value.	in view, there seems to be no violation as mere taking approval for appointing security agency and then not appointing the same should not be a reason/ ground for violation. 4. In the present case, it was observed from the minutes of the 2nd CoC meeting that the RP made efforts to explain the legal position to CoC, however, CoC decided to go for liquidation. In such a peculiar circumstance, the RP cannot be strictly held liable even though he acceded to the request of CoC and filed an application for liquidation of the CD without inviting resolution plans. 5. No encumbered assets have actually been sold by the RP, a lenient view can be taken in this regard and he may not be held responsible even though he should have been more careful while performing his duties. Keeping in view the circumstances of the CIRP of Corporate Debtor, the RP is hereby warned to be extremely careful, diligent, strictly act as per law and similar action should not be repeated.
2.	26 Feb, 2020	Ms. Kavitha Surana, Insolvency Professional Ref. No. IBBI/ DC/17/2020	1. It is the duty of the IP to appoint registered valuers to determine the fair value and liquidation value of the Corporate Debtor. It has been observed from the appointment letter(s) of the valuers that the RP directed the valuers to conduct valuation of three properties of guarantors along with the properties of the Corporate Debtor. Further, not only were properties of guarantors valued but the cost for the same was also included in the Insolvency Resolution Process Costs (IRPC). 2. All expenses borne by the IP during the CIRP must be approved by the CoC. The RP appointed M/s. Kaliannan & Associates, Chartered Accountants, to conduct the audit of the Corporate Debtor. However,	1. This is a peculiar case where all the expenses relating to the IRPC has already been borne by the Bank of India itself which is sole CoC member and the proceeds of the liquidation will ultimately be deposited into the accounts of the sole CoC member. 2. RP did not get the fees of M/s. Kaliannan & Associates, Chartered Accountants fixed by the CoC (in the meeting of the CoC). Hence, keeping in mind the fact that Bank of India is the sole CoC member and it has approved the expenses *vide* email dated 18th December 2018, a

			RP failed to get their fee approved by the CoC.	lenient view may be taken as the Code is new and one learns by experience. The RP is warned to be extremely careful, diligent, strictly act as per law and similar action should not be repeated.
3	17-Sep-2021	Ms. Charu Sandeep Desai, Insolvency Professional Ref.No. IBBI/DC/77/2021	1. Fees paid to legal fees of Cyril Amarchand Mangaldas (CAM) for rendering advocacy and legal counsel advisor of Bank of Baroda, a part of fees charged was prior to insolvency commencement date. The agenda for ratifying the fees was disapproved once and then ratified in next meeting. IP being the Chairman of the CoC allowed the voting on this agenda for making payment to CAM not once but twice. Section 5(13) clearly defines IRPC and IP's conduct on allowing the voting on the agenda to ratify the legal fees of the counsels appointed by a member of the CoC and thereby making it a part of IRPC was in contravention. The said amount was only refunded back by Bank of Baroda once IA (Inspection Authority) pointed out the same. IP as being negligent while performing functions and duties envisaged under the Code. 2. Charging Success Fees Success fee shall be charged by the SBI Caps who was engaged as M&A Advisor. Professionals or advisors engaged by the IP should be paid on a reasonable basis and as per the nature and scope of the work and not on the outcome of the final result of CIRP. 3. It was observed that Mr. Priyavrat Mandhana who is a family member of the erstwhile promoters of the CD was involved in the functioning of the CD. The foreign trips taken by Mr. Priyavrat Mandhana were funded from the CD's fund and these trips were approved by IP.	1. The DC also notes that since, the insolvency regime in India was at its infancy and the common practice in the market was for the fees of the legal counsel engaged by the CoC to be charged to the borrower, due to which IBBI was obligated to issue Circular dated 12-6-2018. In these prevailing circumstances, the DC notes that when IP came to know of the contents of the Circular, she took immediate action by sending e-mail dated 9-7-2018 seeking refund of the amount from Bank of Baroda. IP was able to get the refund from the Bank of Baroda on 29-8-2020. In view it cannot be said that IP disregarded the Circular on being made aware of the same or that she had not taken any action prior to the observation made by IA. Therefore, the DC takes a lenient view in this regard as IP had acted in good faith. 2. DC notes that the charging of success fee linked to the milestones has not been barred in the Code, Regulations or the Circular issued thereunder. Since, the CoC approved the fees and the fee being charged is reasonable within the said Circular. The DC therefore, finds the submission made by Ms. Desai to be satisfactory. 3. DC notes that it is as per the scheme of the Code, the employees of the CD are to provide continued co-operation to the RP even during the CIRP and

				in this matter no separate remuneration was paid to Mr. Priyavrat Mandhana. Moreover, due to the various trips taken for business development of the CD a sales of Rs. 255 crore in Financial Year of 2018 and subsequent roll over business of Rs. 386 crore in Financial Year of 2019 was achieved, therefore, it is observed that the activities were undertaken to maximise the value of the CD. Hence, the DC is of the view that the justifications provided by IP are sufficient with regard to the allegation. Hence, there appears to be no contravention of the provisions of the Code or Regulations made thereunder.

B. NOT GUILTY OF PROFESSIONAL MISCONDUCT

S.No.	*Date*	*Subject*	*Issue*	*IBBI Decision*
1.	25-Nov-2021	Mr. Pawan Kumar Garg, Insolvency Professional Ref. No. IBBI/DC/78/2021	1. Home Buyers appoint a Chartered Accountant as continuous independent auditor for carrying out independent audit and reporting to CoC and charged the fees of the independent auditors appointed for reporting to CoC as CIRP cost. 2. Paying the valuation fee to a person other than the individual registered valuer and including the same in CIRP cost 3. To act as the Authorised Representative (AR) to represent the class of Home Buyers. However, the written consent to act as an AR in Form AB was not taken instead oral confirmation was take.	1. No contravention in appointment of continuous internal auditor for ensuring transparency in the process. fee payable to any professional appointed during the course of CIRP shall form part of CIRP Cost. 2. Corrective steps taken by IP regarding payment 3. IP should have announced the names of the AR only after receipt of the written consent of the IPs to act as an AR.
2.	5-Jan-2021	Mr. A. Arumugam, Insolvency Professional Ref.No. IBBI/DC/63/2021	1. IP failed to perform his duties and also failed to obtain the requisite documents for preparation of Information Memorandum. 2. RP Handed over documents to liquidator appointed and not preserving a physical as well as electronic copy. 3. IP did not provide any documents based on which the claims of OC were verified by him. 4. AA Ordered IP to reconstitute CoC and to conduct a meeting with the reconstituted CoC. It is observed that,	1. The DC has noted that despite the steps taken by IP, Information Memorandum could not be prepared due to non-co-operative attitude of the Ex-directors. 2-3. The DC notes the submission made by IP that Regulation 39A came into effect after the culmination of the instant CIRP of the CD, *i.e.*, after 26th September, 2018 and thus was not applicable in his case at the relevant

			IP had reconstituted CoC after including home buyers as members, however, he failed to conduct a CoC meeting till the order of liquidation was passed by AA. 5. IP has not provided any documentary evidence to prove that he has filed a petition with AA for the appointment of authorized representative for homebuyers nor he has provided any documents relating to a petition filed before AA for approval for appointment of Authorised Representative. 6. IP did not file relationship disclosure.	time. Mr. Arumugam acted as the RP till 4th April, 2019 and Regulation 39A of the CIRP Regulations, which came into force on 5th October, 2018 was applicable in the matter. The DC takes on record his submission that he was maintaining the records in physical as well as electronic mode, therefore, there appears to be no contravention. 4-5. In accordance with the submission of reply of IP, DC observed that there was no contravention in action of IP. 6. The DC has taken on record the CIRP-5 Form filed by IP wherein he has mentioned that such relationship disclosure does not apply. Penalty: The IP shall not take any new assignment under the Code for a period of two months.
3.	16-Apr-2021	Mr. Venkataramanarao Nagarajan, Insolvency Professional Ref. No. IBBI/DC/70/2021	Case 1 1. IRP/RP did not take CoC approval for incurring CIRP Cost towards his fees including legal charges in any meeting of CoC 2. IP prepared Information Memorandum (IM), one of the CoC Members has observed discrepancies, however he did not rectify the same and also shared the IM with resolution applicant. 3. IP failed to file application for avoidance of transaction in accordance with Chapter III and Part II 4. Mr. V. Nagarajan conducted the 3 rd and 5th CoC meeting with less than 24 hours' notice without sufficient reasons in clear violations of regulation 19(2) of the CIRP regulations. Case 2 1. Mr. V. Nagarajan conducted 2nd CoC meeting without adequate notice. No prior approval for shorter notice was taken from CoC and ratification was sort after the meeting was over. He also delayed sharing of 2nd CoC meeting minutes. It was observed from the copies of e-mails exchanged between him and CoC member that 2nd CoC meeting was held on 5-3-2018 while the draft minutes were circulated on 13-3-2018.	Case 1 1. DC notes that IP was advised by the FCs - State Bank of India and Central Bank of India that the same fee as charged by earlier IRP can be charged by him. Hence, alleged contravention in this regard is not made out. 2. IP in 8th CoC Meeting exentsively meantioned the concern on the IM and the same was suitably replied to him to the knowledge of the CoC Members., also the position was in order and was duly accepted by CoC. Hence, DC takes a linient view. 3. Forensic Audit was initiated by him as per CoC Instruction. Work of Forensic Audit was stopped due to non paying of interim bills, thereafter bank entered in direct arrangement with forensic auditor. The delay for filling of application for avoidance of transaction was dur to delay in forensic audit report. Therefore, no contravention.

			Case 3 1. Delayed in conducting 1st CoC. 2. IP did not circulate the minutes of meeting with 48 hours of meeting. and he admitted his delay. 3. IP failed to provide the option of video conferencing or other audio and visual means for CoC Meeting.	4. IP request that the delay may be condoned as no prejudice was caused to any one and all the members attended the meetings is duly accepted by this DC, DC Took a lenient view. Case 2 1. Minutes of 2nd meeting was approved by all CoC members in 3rd CoC, therefore no cntravention. Case 3 1. On finding there was no delay on IRP side, therefore no contravention. 2. IP took due care and diligence , hence DC took lenient view. 3. VC could not be arranged by IP but he provided necessary facility of audio conference for ARCIL, therefore, DC took a lenient view.
4	1-Jan-21	Mr. Anil Goel, Insolvency Professional Ref.No. IBBI/ DC/62/2021	1. It is provided in section 5(13) of the Code that Insolvency Resolution Process Costs (IRPC) include the fees payable to any person acting as a resolution professional. However, it has been observed that IP authorized an Insolvency Professional Entity (IPE), AAA Insolvency Professional LLP (AAA) to raise invoices for his fee in the CIRPs 2. It has been observed that IP failed to take prior approval before availing services of AAA Capital Services (AAACS), a related party entity in the CIRPs, further relationship disclosure is not made. 3. It has been observed that in the CIRP of VISA, IP discussed the Liquidation and Fair value with the members of the CoC before taking the confidential undertaking.	(*a*) The invoices raised by AAA for the work conducted by IP were issued before the circular of IBBI clarifying separate invoices to be raised by the IP and the IPE. Since, IP was also partner in AAA, such invoices were raised in order to avoid double incidence of taxes. (*b*) The services were availed by IP from AAACS in the CIRPs of LML, Gujarat Oleo, Loha, Rasoya, Charbhuja, Amar Remedies and VISA with the approval of the respective CoCs under section 28(1)(*h*) of the Code and have been reimbursed by him with regard to expenses made by AAACS in assisting IP for physically taking over the custody and control of the assets of these Corporate Debtors and also assisting him in inspection of security personnel. (*c*) Regarding the disclosure of relationship of IP with AAACS, it does not fall within the purview of Para 3 of IBBI circular dated 16th January, 2018. (*d*) The

4				detailed report of the Fair and Liquidation Value in the CIRP of VISA has not been shared with the members of the CoC before obtaining confidentiality undertaking. However, he discussed in brief about the Fair and Liquidation Value as there was no time to publish another EOI and no chance of receiving resolution plans. Hence, lenient view may be taken in this regard.

The impact of IBC on credit markets and distressed asset market creation*

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1. Background and Objectives

Credit is the lifeline of an economy, and an effective insolvency resolution mechanism is the backbone of credit. Also, credit markets cannot be looked at in isolation without analysing distressed credit markets, because distressed credit is a normal by-product of the credit system.

India's insolvency law - the IBC[1] - has been a paradigm-changing law in many ways. It has given a very important tool in the hands of credit providers. Now that roughly four to five years have gone by since the Top 12 cases were referred under IBC, there is reasonable amount of data and trends which are available to analyse. It is important at this stage to assess and measure the impact of IBC on the credit and distressed credit ecosytems. This will enable policy-makers to plan necessary interventions and chart out the further evolution of the IBC. The ultimate objective of the paper is to provide tangible recommendations on this front, based on the impact assessment exercise.

2. Structure

The broad template of this paper will be based on trying to answer the following questions:

- Whether there has been an impact of the IBC on credit markets and distressed credit markets? If so, is it measurable?
- What factors have worked favourably?
- What are the impediments?
- What can be done additionally?
- How can progress and effectiveness be continuously monitored?

3. Credit Markets: Where we stand

The main parameters of the Indian credit system in terms of size, growth rate, NPL levels etc. are well-documented and well-discussed. To help set the context, it would be apt to start

* " This article has been written in the authors individual capacity and views presented are personal "

by putting forth the 4-5 parameters that distinguish the Indian credit system from others globally

- Relative insulation from external financial crises - as seen in the global financial crisis of 2008 and the Asian financial crisis of 1998
- Huge reliance on informal lending systems for small borrowers - alternative channels have emerged in the last couple of decades but with considerably higher cost of credit
- Relatively recent adoption of Insolvency law - India's insolvency law was introduced in 2016 and became operational on the ground from 2017. Developed countries have had the benefit of this framework for many years - but among the South Asian economies, India is ahead on this front
- Much higher share of large corporate sector in bank lending coupled with low penetration of bond market finance
- Failure of systemically large domestic financial entities including banks in the last five years. At least four to five large lending institutions/ groups have collapsed in India in the last few years. While several multi-national banks from other jurisdictions had faced the brunt during the global financial crisis, a similar situation has not been seen or repeated in recent times at least in the major economies of the world.
- In recent history, much higher NPL levels as compared to world average or even Asian average levels -NPLs had spiked to ~10% in 2018 but have been declining thereafter. It is widely mentioned that this stress was driven largely by the corporate portfolios of banks and lenders, rather than their retail portfolios.

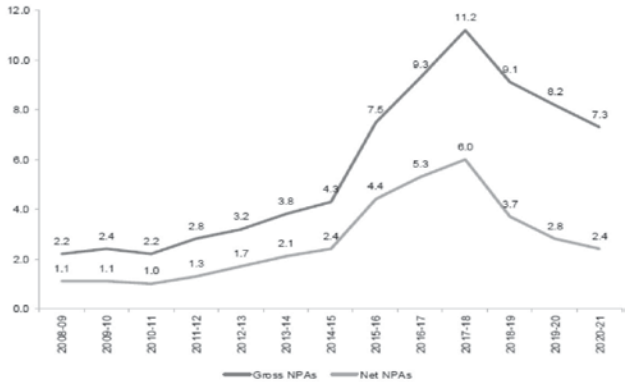
At the present moment, the global economies are recovering together from the Pandemic-induced crisis. The last 2 years of the crisis saw unprecedented, concerted action by central banks everywhere to help combat the crisis, which included regulatory forbearance on NPL decla-ration, standstill on interest or principal repayments, and credit enhancement from the government for emergency credit lines. As these interventions come to the end of their life, there is higher threat of re-emergence of high NPL levels, and a renewed focus on dealing with the same across economies.

4. IBC: Where we have reached

Since the IBC was launched, thousands of companies have been admitted and hundreds have achieved resolution plans. The companies that have reached the resolution plan stage (as well as those under admission) belong to diverse sectors of the economy.

GNPAs in the banking sector had peaked in 2017-18 The moderation in GNPA ratios of banks that began in 2018-19, continued during the period under review to reach 7.3 per cent by end-March 2021.

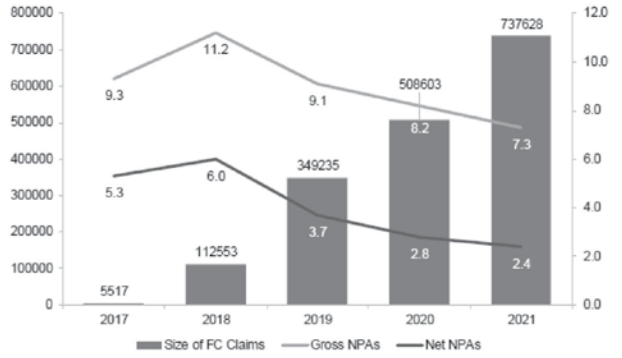
Gross and Net NPAs of Banks



Source: RBI Report on Trends and Progress of Banking in India, 2021; RBI banking sector statistics

This corresponds to the period that the IBC has been under implementation and it is widely accepted that the IBC has been a driving force behind this. This linkage is further brought out by mapping the progress of resolutions under IBC with the moderation in NPA levels, as shown below.

NPA Movement and Size of FC Claims for Companies achieving Resolution Plans under IBC



NPA levels considered as at March of the relevant year, FC claim data is for Jan-Dec of the relevant year.

Source: RBI Report on Trends and Progress of Banking in India, 2021; IBBI data release on CIRPs yielding resolution plans till 30th September 2021.

The above chart depicts that the cumulative level of Financial Creditor claims for companies achieving resolution plans under IBC steadily went up over 2017 to 2021 (based on data compiled till September 2021). This was concomitant with reduction in NPA levels of banks and demonstrates the strong inter-linkage between the outcomes achieved under IBC, and the robustness of the banking system.

One oft-repeated statement regarding IBC is that total number of cases resolved (~400 as at September 2021) versus cases admitted (~4000 as at September 2021), is a small percentage. However, it is also important to look at the size of financial creditor claims that has been addressed under IBC, *vis a vis* the total stack of Non-Performing debt in the banking system, to get an idea of the impact of this reform.

	Rs. Crores
Gross NPAs in 2018 (peak level of NPAs in last 5 years)	8,95,601
Cumulative level of Financial Creditor claims for companies achieving resolution plans under IBC till September 2021	7,37,628

Of course, it is important to mention here that while size of FC claims is corelated with non-performing debt, it is not exactly the same, since claims submitted by lenders for companies undergoing CIRP (Corporate Insolvency Resolution Process) under IBC include various penal and default rate components, which may not be reflected in the actual NPAs. (This issue and its implications are dealt with in greater detail in a separate section.) So, the purpose of above table is not to provide an exact measure but to give an indication of the extent of bad debt that has been addressed under IBC, *vis a vis* the total system stressed debt: as evident from the above table, this is significant.

5. The Bigger Picture: A robust credit market

Thus, it can be said that the IBC has been highly effective in reduction of NPAs. However, this is only one way of looking at the outcome - ultimately reduction in NPAs has a more far-reaching effect and enables credit growth, which is the major requirement for strong economic growth.

There are several dimensions on which a credit system can be evaluated as depicted below:

It is already clear that the IBC has provided a default redressal or distressed credit resolution mechanism, which has been quite effective in NPA reduction. It is important to also assess how these developments have influenced the other aspects.

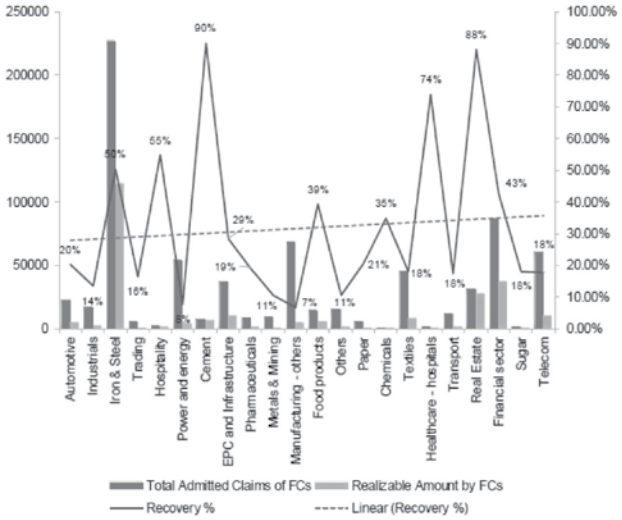
We will focus on two main parameters for this exercise:

- Credit coverage and access - in terms of credit growth rates to different sectors as well as large/small corporates.
- Cost efficiency - cost-effective credit ultimately drives cost-competitiveness of companies/borrowers and their ability to service the debt in a timely manner

But before going to that, let us look at the different data points for companies that have been resolved under the IBC framework, and try to draw some learnings from that. First, we will analyze the sectoral profile of companies that have achieved resolution plans under IBC. Then we will look at the composition of this set of companies in terms of large/medium/small borrowers.

6. Sectoral Profile of Completed CIRPs

SECTORAL PROFILE OF REALIZABLE AMOUNTS UNDER RESOLUTION PLANS



Source: IBBI data releases on CIRPs yielding resolution plans (as of 30th September 2021)

Sectors assigned to different companies by the author based on their CIN no and description of business.

Clearly, certain sectors have sent many more companies to IBC, and certain sectors have fared better in terms of resolution.

From the above, it emerges that:

The dominant sectors in terms of size (aggregate admitted FC claims > 20,000 cr. in the universe of companies that have achieved resolution plans) include

- Iron & Steel
- Automotive
- Power and energy
- EPC
- Textiles
- Real Estate
- Financial sector and Telecom were also large, but a point to be kept in mind is that there were only one or two large entities/corporate groups

admitted to insolvency from these two sectors.

The top-ranking sectors in terms of amounts realizable under resolution plans as a proportion of admitted FC claims include:

- Iron & Steel
- Cement
- Hospitality
- Real estate
- Financial sector
- Manufacturing - Food products
- Healthcare - hospitals

For these sectors, the amounts realizable under resolution plans as a proportion of admitted FC claims (on a gross basis for all companies within a sector), are more than the overall average of 35% across sectors.

The reason to bring this out is to underline the fact that realizations under the IBC should not be seen in a broad-brush manner as a single aggregate number. This is highly differentiated from sector to sector.

It is important that credit flow to various sectors takes place in an efficient manner, so that the overall economy can grow. Sectoral performance under the IBC can be used by lenders to calibrate their credit outlook and design their credit policy for different sectors. It can also serve as an input for policy-makers to assess the size and type of interventions or policy support that a sector requires.

Already, this seems to be taking place, as can be seen from the following examples

Sector	*Performance under CIRP*	*Take-away*	*Developments*
Steel	Relatively high (Better than average realizable amounts under resolution plans, good bidder interest, higher than average completion rates of CIRPs)	Good potential to grow the sector book as NPAs recede	As per various reports, domestic steel makers have recently announced capacity expansion projects and investment activity is picking up after a gap of 7 years As per informal views obtained, lenders are in-principle positive about financing these projects
Power	Relatively low (Lower than average realizable amounts under resolution plans, low bidder interest, fewer completed CIRPs)	Sector fundamentals need redressal	Various policy interventions announced in the power sector such fuel supply for stressed power assets under Shakti scheme, liquidity infusion under Atma Nirbhar Bharat scheme, discom reforms, regulatory clarity that key contracts such as PPAs, FSAs and transmission contracts would not be cancelled if the project is referred to NCLT or is acquired by another entity.

Thus, the influence of IBC is beyond the set of companies that are referred for CIRP. It acts as a catalyst in shaping the efficient allocation of financial resources, and bringing about policy interventions targeted to the requirements of different sectors.

CIRP outcomes are being used as a reference point by distressed debt investors, and wider dissemination of sectoral data under IBC can foster price discovery and distressed asset market creation.

To delve more into the performance variation between sectors in terms of resolution achieved under IBC, we look at the parameter of liquidation value (LV) in the next section.

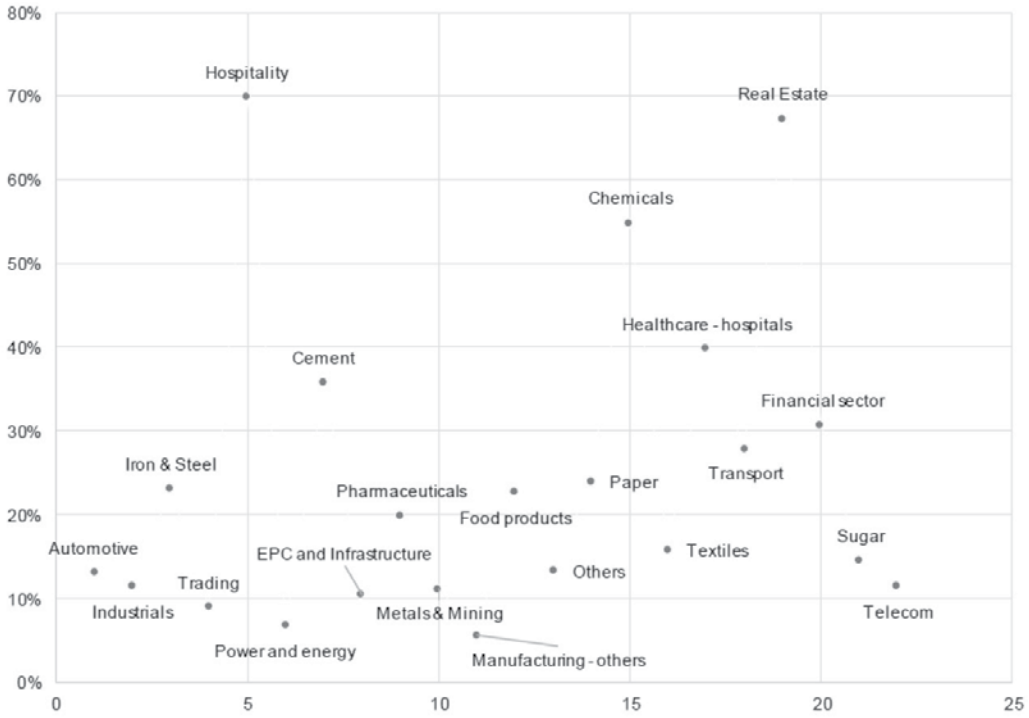
7. Liquidation Value

The LV parameter assumes significance in the context of the arguments that the resolution plans under IBC have yielded very low recovery to Financial Creditor in several cases. For certain companies, this has been as low as 5%. The counter argument to this has been that:

- IBC is not merely a recovery mechanism but a means to preserve the value of companies and their eco-system
- Most of the cases that were admitted to CIRP in the initial years are old cases transferred from other forums such as DRTs and related to non-operational companies
- The amounts realized under resolution plans as a percentage of LV is much higher (166% of LV on overall basis as per the data till September 2021) than the recovery percentage to FCs. Since LV is an indicator of how much a potential buyer may be willing to pay for acquiring the company's assets, it is more apt to look at this metric.

We suggest that in addition to the above, *LV as a percentage of FC claims* is also a meaningful metric that must be considered. If LV is low and the FC claims are extremely high, it essentially means that the lending was not guided by sufficiently prudent policies in the first place. The leverage undertaken was possibly much higher than what the value of the assets and the value of the business were in a position to support. In the next graph we look at how the LV as a percentage of FC claims varies across sectors.

LV as a % of claims



Source: IBBI data releases on CIRPs yielding resolution plans (as of 30th September 2021)

The sectors wherein the LV as a percentage of FC claims is on the *relatively* higher side (>20%) include:

- Iron & Steel
- Cement
- Pharma
- Paper
- Manufacturing - food products
- Transport
- Real estate
- Financial sector
- Hospitality
- Healthcare - hospitals

Most of the sectors above (the ones highlighted in blue) are also the ones that rank better in terms of recovery percentage (as depicted in the preceding section).

This underscores the fact that sectors wherein the debt is linked to higher realizable value of assets have also yielded better resolution plans in terms of recovery to FCs.

Another revealing aspect is that capex-intensive sectors such as power and telecom, that commanded a huge share of project finance/term debt in the 2000 - 2010 decade, have extremely low LVs (which also possibly explains their low recovery levels).

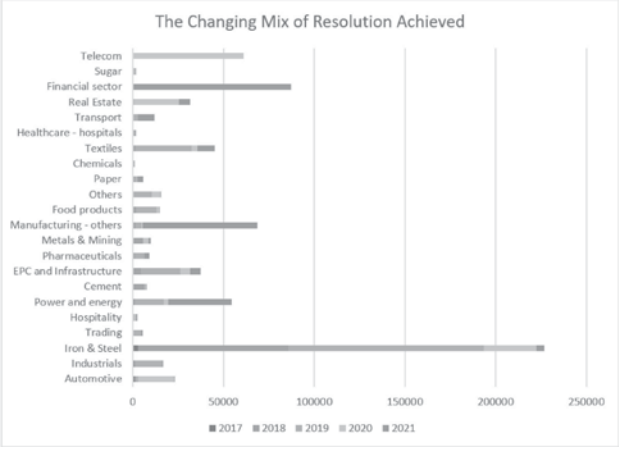
The main take-away from the above is that:

- The level of risk controls to be adopted by lenders, the leverage to be allowed, the valuation practices and project finance norms to be followed, need to be much tighter in the decades going forward than they have been in the past.
- Already, lenders are following more rigorous processes for new loan disbursements and incorporating measures such as 'specialized monitoring agency' as a part of their sanction conditions
- The valuation framework has been completely upgraded in line with international best practices and IBBI-registered valuers are being relied on, not just for stressed asset valuations but also for new project assessments

This points to the efficacy of the IBC in bringing the loopholes of earlier lending practices into sharp focus and promoting a behavioral change not just among borrowers but also among lenders - by making lenders more proactive and prudent - which will act as a preventive measure against creation of new stress.

8. The Changing Mix of Resolutions

Let us now also look at sectoral profile in terms of year-wise progress of resolution under the IBC framework, and what it signals for new credit appetite creation in the system. There has been a change over the years in the sectoral composition of cases getting resolved through the CIR process.



Source: IBBI data releases on CIRPs yielding resolution plans (as of 30th September 2021) The above is on calendar year basis

The above chart depicts for different sectors the year-wise break-up of resolutions achieved under IBC, in terms of the size of FC claims resolved.

- The Iron & Steel sector had the highest NPAs at sub-sector level in 2016/2017, and majority of the Top 12 cases were from the steel sector. For this sector, there was a high volume of resolutions achieved in the initial years 2018 and 2019.
- Sectors such as real estate, which were impacted by the NBFC crisis that came about in the second half of CY 2018, saw gradually increasing admissions after the initial year, and consequently saw more resolutions from 2020 onwards
- IBC did not have a chapter for dealing with financial entities in its original version. This was introduced in 2019 and DHFL[2] became the first financial sector entity to be referred for CIRP. The financial sector dominated the resolutions achieved in 2021, largely due to DHFL.
- In the power sector, several large projects were resolved outside IBC, and referrals to CIRP picked up pace at a slightly later stage. Accordingly, some resolutions in this sector were seen in 2019, and then again picked up in 2021.
- The auto sector stress was at worrisome levels from 2017 itself and this sector saw a high volume of admissions from the initial years. However, the resolution timeframe was prolonged, and more of the resolutions in this sector took place after the first two years.

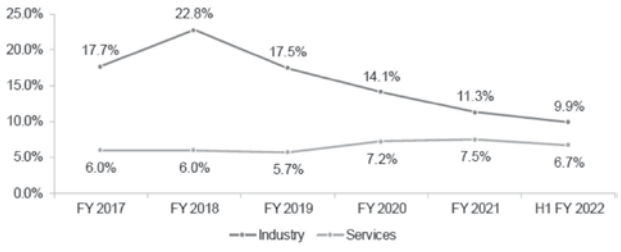
Thus, the referrals under CIRP and subsequent resolutions have followed a pattern in line with economic developments and formation of stress in the system.

It is sometimes said about the IBC that lenders referred very old cases to it - cases that had dragged on for several years in other forums such as DRT without closure. This may be true and such cases would have comprised a significant proportion of the total companies *referred and admitted*. However, if we consider only the set of corporates that *achieved closure under CIRP* (as depicted above), it is seen that the usage of the IBC mechanism has been in tandem with the build-up of stress. It can be said that with the availability of IBC, lenders have been quite active in invoking this mechanism to address the new stress getting recognized.

This is a pointer to the effectiveness of IBC in dealing with stress build-up in different sectors, in line with their emergence.

IBC has so far been used for resolving corporate stress (not retail or personal loans). To that extent, it would be more relevant to look at the stress movement for industry and services sectors. While headline GNPAs have reduced from peak of around 11.2% to around 7.3% in FY 2021, at sector level the impact is much more.

GNPA movement for Broad Sectors: Industry and Services

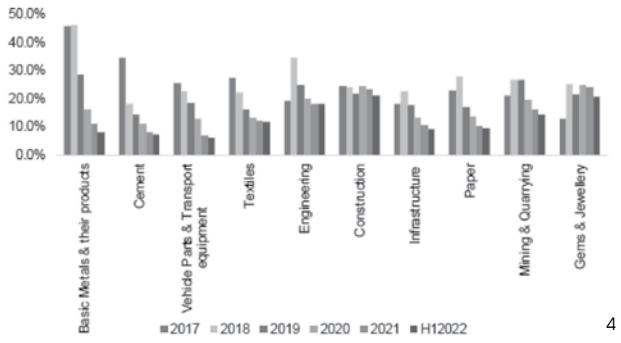


Source: Fiscal stability reports of RBI

- For Industry, the GNPAs have reduced from a peak level of 22.8% to 9.9% as of Sept. 2021, which is a substantial change.

- For Services (major components of which include commercial real estate, hotels and hospitality, NBFC financing, trading, etc.) - the trend has been different - NPAs peaked in FY 2020 and FY 2021 and have been arrested thereafter - this is in line with the pattern of resolutions under IBC seen in the previous analysis.
- Let us also take a look at the movement of sub-industry level stress[3] in the last five years, which further brings out the impact of IBC:

Stressed Assets/GNPA ratio -Industry Sub-sectors



Source: Fiscal stability reports of RBI

As we noted in an earlier section: the top industry segments that comprised a major chunk of the companies that achieved resolution under CIRP include: iron & steel, automotive, textiles, EPC and power sectors. Accordingly, the stress in these sub-sectors can be said to be the 'most sensitive' or most closely linked to IBC. The extent of NPA reduction in most of these industry sub-sectors has also been very sizeable:

- The steel sector has seen the highest volume of IBC resolutions. GNPAs in the basic metals sector were in the range of ~45%, and now down to 8.2% in 5 years' time.
- In the textile sector, the GNPAs were at a level of 27.5%, and this is 11.7% now as per the latest data
- In the automotive/vehicle parts sector, the NPAs were as high as 25.6%, and have come down to 6.1% as of Sept. 2022
- The infrastructure sub-sector had the highest share of total advances within industry (35%) and power was the largest within infrastructure. In the infrastructure sub-sector, the peak NPA level was 22.6%, which is now reduced to 9.2%.

All the above are clear indicators that the IBC has aided in substantial NPA reduction in the critical sectors of the economy, and thereby strengthened the credit system.

9. Size-wise composition

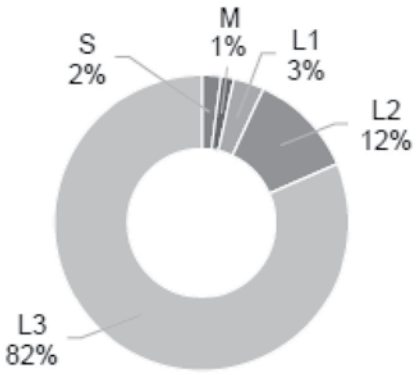
In India, a key feature of the NPL portfolio has been the dominance of large borrowers (exposure of more than 5 cr.) Various statistics reveal that large borrowers contributed >65% of the stressed portfolio in the overall banking system in March 2021 (as high as 75.4 per cent in March 2020 and declined to 66.2 per cent in March 2021).

However, exposure of > 5 cr. is a very broad way categorize "large borrowers", and exposure cap of 5 cr. is very narrow. For the purpose of our analysis of the companies that have achieved resolution plans under CIRP (~400 companies till Sept. 2021)[5], we categorize them as below

Label	*Description*	*Admitted FC claims INR crores*
S	Small	< 250
M	Medium	250 to 500
L1	Large - Category 1	500 to 1000
L2	Large - Category 2	1000 to 5000
L3	Large - Category 3 (Very Large)	> 5000

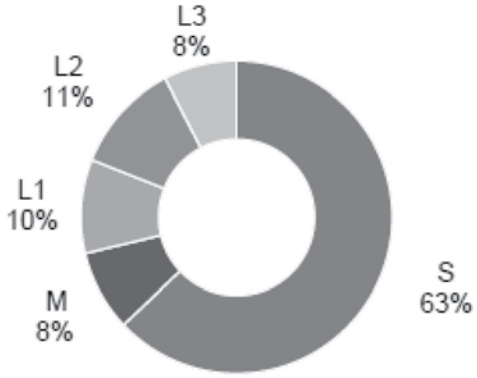
The L3 (very large) corporates constitute more than 80% in terms of admitted FC claims

FC claims admitted - Size-wise composition of corporates



However, an analysis of the size-wise composition of corporates resolved[2] in terms of number of companies throws up a different picture

SIZE-WISE DISTRIBUTION OF CORPORATES WITH APPROVED RESOLUTION PLANS

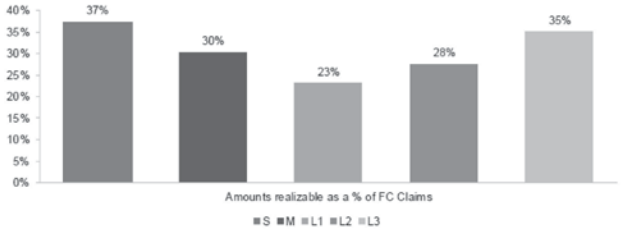


This implies that, in terms of number, the smaller companies make up a bigger chunk of the corporate debtors that have achieved resolution plans under CIRP.

It is important that the point which emerges from the above does not get lost in the common narrative that resolutions under IBC have been dominated only by a few large corporates. In terms of numbers, the story is quite the opposite.

If we look at the recovery metrics of the different categories of borrowers (in terms of size), they are as below

AMOUNTS REALIZABLE AS A % OF FC CLAIMS BY CORPORATE SIZE



The small borrowers have yielded the best recoveries as shown above. In the large category (L1, L2 and L3), the L3 (very large) category has performed well, but the other large borrowers have been below the overall average recovery level of 35%.

The key take-aways from the above are:

- IBC as a resolution tool for small corporates cannot be ignored
- In this context, innovations such as the prepack option that has been made available to MSMEs are timely interventions
- Expansion of the prepack option to slightly bigger companies (more than the current definition of MSMEs) should be taken up on priority, given the very large % of companies from this set getting resolved under CIRP. This will give these companies an alternate resolution route under the overall IBC framework, and may aid in improving recovery performance and reducing timelines for resolution of distressed companies.
- This may also be the need of the hour, given that additional stress is expected to hit bank as well as NBFC portfolios, with expiry of the ECLGS[6] tenure and withdrawal of other relief measures that were extended during COVID times. It

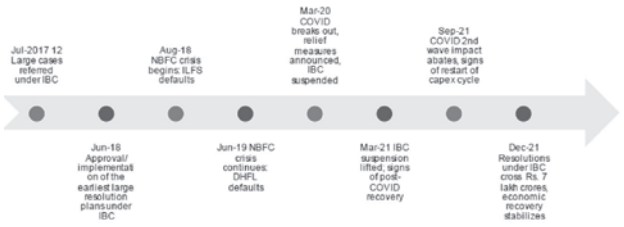
is to be noted that most of these measures were availed by mid-size companies.

10. Credit Growth: Has it been enabled

Credit deployment is driven by both supply side and demand side factors. Overhang of bad assets continuing for a long time without resolution creates risk aversion and financial constraints for lenders and impacts the appetite for fresh credit.

After studying the sectoral profile and size-wise composition of companies resolved under CIRP, let us assess how the credit growth has been impacted since the introduction of the IBC.

For that, it is useful to keep before us a timeline of key themes playing out in the economy since 2017 - the hall-mark year when the first 12 large cases were referred for resolution under IBC:

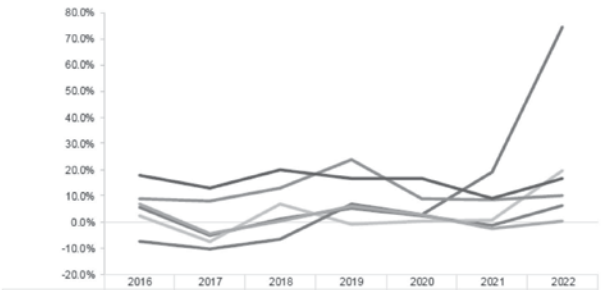


The major points to be noted from the above are as follows:

- As the IBC was picking up steam, the NBFC crisis broke out, which had a spiraling effect on certain sectors, particularly real estate, which comprised a large chunk of the NBFC wholesale lending portfolios.
- As the NBFC situation came under control (with IL&FS being taken up for resolution under a Government-appointed Board, and DHFL - the other large NBFC being referred for CIRP under IBC), the COVID crisis broke out which impacted almost all sectors initially, and sectors such as hospitality and real estate on a prolonged basis
- The IBC was suspended for a year from March 2020 as a part of the relief measures announced by the Government, and new admissions ceased, but existing resolutions continued, though at a slower pace
- The IBC suspension was lifted in March 2021, and there has been significant traction in admissions as well as closures since then.

Against the background of the above timeline, let us look at the credit growth: overall credit growth as well as credit growth by major segments: industry, services and retail

Credit Growth Rate to Different Segments



	2016	2017	2018	2019	2020	2021	2022
Total Industry	5.6%	-5.1%	1.1%	5.2%	2.5%	-1.3%	6.4%
Micro & Small	2.4%	-7.4%	6.9%	-0.7%	0.5%	0.9%	19.7%
Medium	-7.1%	-10.2%	-6.3%	7.0%	2.8%	19.1%	74.7%
Large	7.0%	-4.4%	0.5%	6.1%	2.8%	-2.5%	0.5%
Services	8.9%	8.1%	13.2%	23.9%	8.9%	8.4%	10.2%
Retail	18.1%	12.9%	20.0%	16.9%	16.9%	9.1%	16.7%

Growth rates above are tabulated as of January for each year Source: RBI data on sectoral deployment of bank credit

- As evident from the above, the credit growth rate was worrisome in 2017, with a contraction in credit to all segments of industry (Micro & Small, Medium and Large). For services and retail, the growth had slowed down. This can be correlated with the peaking NPA levels in the economy at that point of time (FY 2017, FY 2018), and the

resultant reduction in the financial capacity of lenders to extend fresh credit.

- There was a trend reversal in credit growth rate in 2018, which roughly coincides with the first 12 months of launch of the IBC
- From August 2018 onwards, the economy was beset with fresh crises in succession: first the financial sector crisis led by IL&FS default, and then the global pandemic in 2020
- These no doubt had their impact on credit growth, but the lows of 2017 were not repeated in any of the following years.
- There has been another 'turning point' seen in 2022, during which period the 'low base effect' due to the COVID-19 crisis in the previous year would also have had an impact. However, even after adjusting for that, credit growth appears to have been restored
- The Micro & Small and Medium Industry segments seem to have bounced back most strongly with credit growth rates of ~20% and ~75% respectively in January 2022.
- However, the credit growth rate in the Large Industry segment is still struggling - only 0.50% in 2022. This has also held down the Total Industry credit growth rate to 6.4% (which is very low, but it crossed the 6% mark for the first time in 7 years).
- For the services segment (a large chunk of which is real estate and was severely impacted by the NBFC crisis), credit growth rate has moved up to 10% plus levels for the first time in the last three years
- The loans sanctioned under the ECLGS scheme announced by the Government as part of the COVID-19 relief package, have also boosted the credit growth to the micro, small and medium enterprises across both industry and services. As per the data for September 2021, loans sanctioned have crossed Rs. 2.86 lakh crore under the scheme and out of total guarantees issued, about 95% of the guarantees issued are for loans sanctioned to Micro, Small and Medium Enterprises.
- Retail credit growth has picked up strongly to ~17%, after falling in the previous year to a 7-year low, impacted by the COVID-19 crisis. (Retail credit growth rate is presented here only for reference and not for impact analysis of IBC. IBC has so far been utilized primarily for resolving corporate stress, which was also the largest driver of stress in the financial system. Retail portfolio NPA levels have historically been much lower but are projected to grow. A chapter on personal bankruptcy has also now been introduced in the IBC; and as retail portfolios see more stress going forward, the role of IBC is expected to become wider. We will cover more on this in a separate section.)
- It is to be noted that in terms of number of companies resolved under IBC, the smaller companies fared better than larger ones, as reflected in the data presented earlier. Credit growth rate for micro, small and medium industry segments has been quite robust as seen from the latest data. While ECLGS lending has been a factor, the resolutions

taking place have also supported the growth.

- Large corporates contributed to the bulk of NPA portfolios of banks, as mentioned earlier. In the large industry segment, the credit growth rate is still far below targeted levels but expected to pick up as the capex cycle restarts.
- Thus, it can be said that on an overall basis there has been a gradual restoration of corporate credit growth in the system, and the outlook is positive. The availability of the IBC framework for resolving stressed loans has facilitated this growth and improvement in outlook (even though it would not have been the only influencing factor). As per a recent report dated February 2022, India Ratings and Research (Ind-Ra) has revised its outlook on the banking sector to 'improving' from 'stable' for 2022-23, helped by better credit demand and strong balance sheet of lenders.

A strong insolvency regime enables banks to resolve their stressed assets in a time-bound manner. This in turn enables them to calibrate their risk perception and credit policy outlook in a responsive manner, so that credit flows to deserving sectors are not blocked, and are also equitable *i.e.* aligned to their viability and growth prospects. The "transmission" of credit (not just in terms of interest rate but in terms of overall availability) gets catalyzed by a robust insolvency framework. It keeps the fuel of credit flowing, and the wheels of the economy turning.

11. The Recovery Conundrum

When the proponents of IBC emphasize its benefits (as are also validated by various data points shown above), there is always a counter argument that recovery rates under IBC have been steadily falling. However, recovery under the IBC context needs to be differentiated from recovery through other channels such as SARFAESI, DRT etc. The latter are security enforcement measures and the recovery therein is through asset sale, without any linkage to continued business operations. The recovery under CIRP corresponds to the amounts realized by FCs as part of a resolution plan, which includes roadmap for revival of the company, and reflects the value that a potential buyer is willing to pay for the overall business on going concern basis. While this point is oft quoted, the additional point being made here is that one should not be guided merely by the nomenclature of 'recovery'. Recoveries under IBC certainly need to be considered and tracked as a performance indicator, but they need to be looked at differentially. Apart from the amounts realized by FCs, attention also needs to be paid to other parameters such as

- Number of jobs preserved
- Ecosystem of vendors and suppliers protected
- Additional financing avenues that become available to capital providers/lenders under new managements or revived companies

The related aspect we want to focus on in this section is also the manner in which claim figures are arrived at, as per market practice, and how this can impact the recovery picture.

As an illustration, consider the below:

NPA date	1-4-2014	
CIRP date	1-04/2018	
Principal amount	100	

Original Interest rate	11.50%	p.a.
Default rate on account of deterioration in credit rating/non-adherence to financial covenants	2%	p.a.
Default rate on account of delay in project	1%	p.a.
Overdue interest rate	2%	p.a.
Submitted claim amount "A"	182	
Effective Interest rate	16%	p.a.

In most cases, lenders apply multiple default rates under different clauses of the loan agreement, due to multiple deviations such as deterioration in credit rating, delay in project implementation, etc. In addition, sometimes overdue rates on the entire overdue amount including principal and interest is also applied. The application of all these penal rates increases the effective rate to unserviceable levels (impact of 3-4% above original effective rate). This is of course purely theoretical as no business can service debt at such onerous rates, let alone a distressed company. This results in very high claim amounts, which can distort the recovery position.

Key take-away from the above:

- In addition to recovery on total claim amount, recovery as a % of principal amount needs to be measured separately
- Recovery should factor in the continued working capital limits/non-funded limits that are extended to the company post-resolution, since essentially the lenders deploy/redeploy this capital in a "resolved" company, and it is not a principal loss for them
- To get a better sense of recovery, one scenario should also be to compute the interest cost by applying a notional risk-free rate and reasonable premium over it from date of NPA to date closure
- There needs to be a sharp focus on timelines of completing the process. Currently, the loss of interest during CIRP and the burden it creates is not being counted. Service providers including RPs should be incentivized for time-bound recoveries and NCLTs must have back-to-back hearings to clear CoC-approved resolution plans.

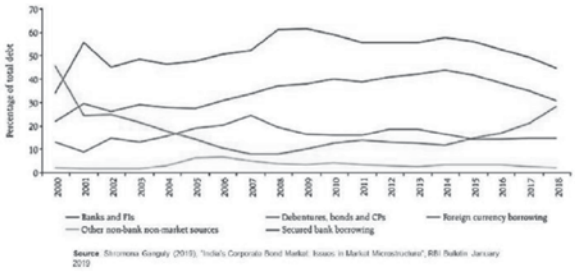
12. The Eternal Question: Deepening of bond markets

The question of sufficient access to bond markets has plagued India for several decades. Historically, bank loans have been the dominant form of financing business activity. Various policy makers and expert committees have dwelled on suggestions to diversify the financing mix and grow the bond markets, but this remains a challenge. It is important for corporate issuers to have a choice of financial instruments, including bonds, so that they utilize the ones best suited to their needs and also the most cost-efficient option. Not only is the share of bonds in the total corporate debt abysmally low, but also the access to bond financing is available only for the top-rated corporates.

In this section, we look at two perspectives:

- how the share of the bond market in corporate debt has moved since the inception of IBC, and whether there is any perceptible improvement
- whether there has been any sign of increase in the depth of bond markets i.e. increase in the issuance and trading of bods beyond the

AAA/AA brackets, and how this has been influenced by IBC



Source Shromona Ganguly (2019), "India's Corporate Bond Market: Issues in Market Microstructure", RBI Bulletin January 2019

The above graph indicates that there has been a noticeable increase in the share of bond market instruments (debentures, bonds and CPs) in the overall financing mix of corporate borrowers from 2015 onwards, with increased pace from 2016 onwards.

Today, AIFs, Mutual Funds, FPIs, etc. are actively providing funds to non-financial firms through subscription to debt securities, far more than previous years.

The availability of IBC as a resolution mechanism from 2016 onwards appears to have positively impacted the improved share of bond markets as a financial resource provider:

- There are various new investor classes that are now active in the corporate bond market. While progressive measures by different financial regulators such as SEBI, RBI, IRDA, have facilitated increased participation in the bond markets, the IBC has also played a part. The fact that a court-driven mechanism for distressed credit exists, would have influenced the overall decision-making and risk appetite of potential investors. It is to be noted that several large cases admitted under IBC had bond investors, both local and foreign, as a part of the Committee of Creditors. At the same time, it is to be noted that most of these investors are "unsecured". While unsecured debt is a financial claim, and these investors have recourse to the IBC in a default situation, in the distribution waterfall which applies in a liquidation scenario, they sit below the secured financial creditor category. Possibly, what these investors will expect in future with regard to resolutions under IBC, will be regulations that better protect their interests in relation to secured creditors on the distribution aspects. This could be one of the considerations for policy makers who take up future innovations under the IBC.
- In addition to new investors, there has been emergence of new instruments in the financial markets such as SRs (Security Receipts) issued by ARCs - investment in these instruments by non-bank buyers has been positively boosted post-IBC - we will see supporting data, for this in a following section
- Moreover. in successful resolution scenarios, the resolution applicants sometimes resort to the bond market to finance their resolution plan amount. In certain cases, the successful acquirer also issues NCDs as a part of the resolution plan at the corporate debtor level, which are subscribed by the existing creditors. However, these are unrated and unlisted instruments, the volume is very small, and figures are not separately available. They are issued to the same lender group (generally banks and NBFCs) and do not involve fresh investment. Still, this can be seen as a form of financing that did not exist pre-IBC and has at least made a beginning. Many of the resolution applicants and resolved companies, are mid-size

corporates, which also deepens the issuer profile for corporate bond instruments.

- Also, post the IBC, there have been transactions seen in the "high yield" bond space in India, which are directly connected to the resolution activity under IBC. Though these are only a handful, the key point is that such transactions were never seen before in the Indian context. Their occurrence marks an "unprecedented" development, and probably serves as a pointer that such markets do have the potential to develop locally. (Refer Case Illustration below)
- Another interesting phenomenon is that world over, distressed credit has developed as an alternate asset class over the last 5 - 7 years, and IBC has successfully brought many such special situations and hedge fund investors to the Indian market. Several global stressed asset investors have increased their India allocations and their presence in India post the introduction of IBC.

Case Illustration

A news report in December 2019 in a leading financial newspaper (The Economic Times) mentioned that "Demand for junk bonds is picking up, mostly from overseas banks such as Barclays and Deutsche Bank, reflecting a surge in the market for high-yield, high-risk paper. They have been snapping up bonds rated below investment grade from Dewan Housing Finance Corp. Ltd (DHFL), Altico Capital, Reliance Capital and others. All three companies are rated 'D', or default grade."

"Investors will bet on high-yield or junk bonds only when they believe in restoration of the company,"

"If the resolution process gets more robust under IBC, junk bond market should come up in a big way."

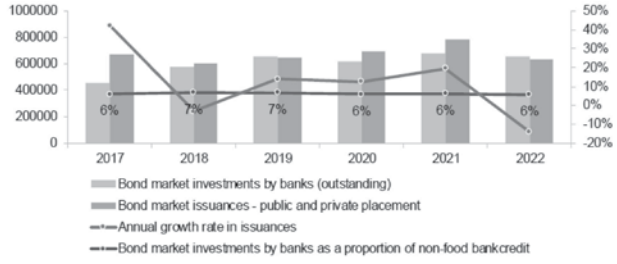
The article surmises that "This will help deepen and broaden India's debt market - otherwise dominated by sovereign paper - a long-held aim of the government and the central bank." Point to be noted on two of the companies mentioned - DHFL got resolved under IBC in 2021 and Reliance Capital us currently undergoing (CIRP).

Thus, in various ways, the IBC has been providing an impetus to corporate bond market activity. Still, corporate bond markets in India have a long way to go

To further support the above hypothesis, we look at some additional data points. Please find below an analysis of comparative movement of

- Growth rate in total bank investments in NCDs and CPs
- Growth rate in total public and private issuances in the corporate bond market

Bond Market -Select Parameters



LHS vertical axis amounts in Rs. Crores

The figures are approximately on financial year basis - for FY22, the 9-month data till Dec is normalized for 12 months

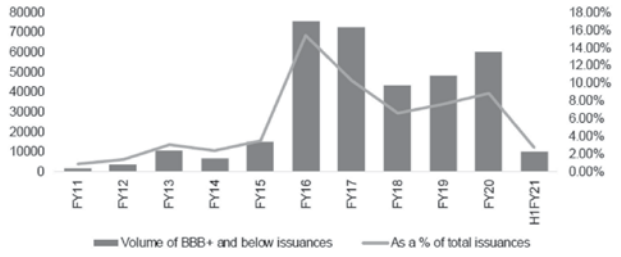
Source: RBI statistics, SEBI statistics

Public and private issuances in the corporate market have grown to some extent between FY 2017 and FY 2021, although there is no clear, decipherable trend.

The proportion of non-SLR debt market instruments invested in by banks (bonds, NCDs, CPs) as a percentage of non-food bank credit in terms of loans & advances has remained stagnant at around 6%. This implies that on an overall basis, there is no noticeable increase in bank financing by way of market instruments as compared to loans.

However, it is a well-known fact that corporate bond market issuances are dominated by top-rated borrowers and financial entities. This has been a historical challenge for the corporate bond market in India - the lack of market depth. The appetite for AAA/AA/A credit may not have been impacted much by IBC, as the default risk for these borrowers is relatively low. Therefore, it would be more relevant to look at whether issuance activity in the 'below A' rating corporates has grown, since these credit categories would be more sensitive to the availability of a strong default resolution mechanism.

Bond Market Issuance Volumes - Select Rating Categories



LHS vertical axis amounts in Rs. Crores

For FY22, the 6-month data till Sept. is normalized for 12 months

Source: CRISIL Yearbook on the Indian Debt Market 2021

If we look at the size of bond market issuances in the BBB+ and below category, the volumes are distinctly up in the post-IBC years from FY 2017 to FY 2020. Though these issuances are fairly low in terms of the overall market size, the growth cannot be ignored. We spoke earlier about the various ways in which the IBC has positively impacted the bond market, and the above numbers seem to bear this out.

In relation to bond markets, one oft quoted statistic is the FPI investment in this market, since that is an indicator of foreign investor confidence in the Indian debt markets. So, let us now talk in some more detail about the following additional data points:

a. Overall primary and secondary market FPI trades in the total corporate bond segment including G-Secs from CY 2017 to CY 2021

b. Select primary and secondary market FPI trades - in relation to instruments that have a linkage to 'stressed assets' - for the same period

For point (*b*) above we have considered FPI trades in bonds of the following types:

- Bonds of companies referred under IBC or considered as stressed cases e.g. DHFL[7], KSK Energy, GVK Power Goindwal Sahib, Kesoram Cements, Reliance Capital, Relance Home Finance etc.

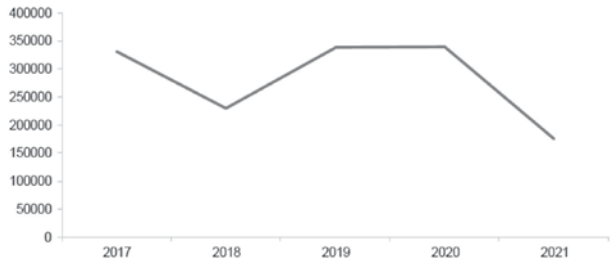
  The trades in relation to such companies may have been a result of any of the following transaction types (as an example):

  - yield-hungry investors carried out secondary trades in companies admitted under for CIRP on the expectation of a good resolution outcome *e.g.* DHFL (Refer Case Note mentioned earlier)
  - special situation investors subscribed to bonds issued by stressed companies to raise funds as a part of their debt resolution plan - *e.g.* Kesoram Cements

- SRs issued by ARCs (Edelweiss ARC, ASREC, Omkara ARC, ACRE, others) for acquiring stressed loans
- Bonds issued by ARCs for financing purposes

For the purpose of the above, data pertaining to more than 40,000 FPI trades between 2017 and 2021 was analysed. The trends are set out below:

FPI Trading Volumes -total

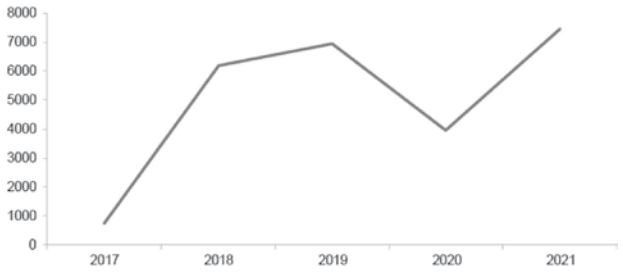


LHS vertical axis amounts in Rs. Crores

The data is on calendar year basis till July 2021– data for CY2021 is normalized for 12 months

Source: SEBI statistics

FPI Trading Volumes -stressed asset related



LHS vertical axis amounts in Rs. Crores

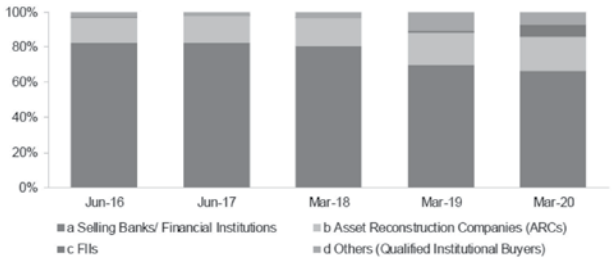
The data is on calendar year basis till July 2021 – data for CY2021 is normalized for 12 months

Source: SEBI statistics, analysis

Clearly, the stressed asset-related FPI volumes have moved up post 2017. While they declined in 2020 y-o-y, there has been an overall growth in the period of consideration from 2017 levels. This appears to suggest that the IBC has provided impetus to foreign investor participation in the distressed debt market in India. Though the volumes are still quite low, at least a beginning has been made.

Yet another data point to consider is the non-bank investor participation in the SRs issued by ARCs towards acquisition of stressed loans, and how this has changed since the introduction of IBC.

Proportion of SRs subscribed by different buyers



Source: RBI Report on Trend and Progress of Banking in India 2020 and 2019

The above data brings out that the percentage of total SRs subscribed by non-bank investors has steadily grown from FY17 till FY20, a period that coincided with the unfolding of the IBC.

ARCs have been able to diversify their investor base and attract global investor participation for Indian stressed assets post introduction of IBC.

This suggests that contrary to the popular notion, ARCs and IBC need not be seen as competing channels for NPL resolution by banks. Rather, ARCs have benefited from IBC as it provides them another tool for resolving the NPLs acquired by them.

The RBI Report of the Committee to Review the Working of Asset Reconstruction Companies on ARCs dt. Sept. 2021 mentions that assets bought by ARCs after FY14 are increasingly being resolved through IBC.

- ARCs are acquiring loans, and acting as aggregators, even post admission of companies into CIRP. They are also invoking IBC as the

lead lender in many cases. Some examples:

- Essar Steel - largest steel company resolved under CIRP - Edelweiss ARC was the 2nd largest CoC member with 19% vote share
- KSK Mahanadi - largest energy sector company currently undergoing CIRP - Aditya Birla ARC is among the top 5 CoC members with 16% vote share
- Sathavahana Ispat - mid-size steel company currently in CIRP - J C Flowers ARC is the sole CoC member with 100% vote share.

- ARCs have submitted resolution plans in the capacity of resolution applicants in certain CIRP cases, either on a sole basis or in consortium with strategic investors. Examples include companies such as Alok Industries (part of the 12 Large cases initially referred under IBC) and DHFL (one of the largest cases in recent times)
- The National Asset Reconstruction Company Ltd. (NARCL), which was announced by the Government in last year's budget, to buy out 2 lakh crores of NPAs from the banking system, is also expected to work in close harmonization with the IBC framework. Among the assets having debt of ~50000 cr. identified by NARCL for acquisition in the first phase, assets corresponding to 36000 cr. debt are already in CIRP.
- At the same time, there has been a legal challenge around ARCs acquiring equity in stressed companies under IBC, and certain resolution plans submitted by ARCs have become stuck or delayed on legal grounds even after approval by CoC. However, the RBI Committee on ARCs has taken cognizance of this and recommended permitting ARCs to acquire equity in corporate debtor companies in the capacity of a Resolution Applicant in CIR processes. This is expected to enable better value realization and enhance the effectiveness of ARCs in recovery.

The committee has made various other recommendations to improve the working of ARCs, such as allowing them to buy loans from different lenders categories including AIFs, and issue SRs to various investor classes including HNIs. ARCs are a major player in the stressed asset ecosystem, and the speedy implementation of such recommendations will further enable them to leverage the IBC mechanism for NPL resolution. This in turn will encourage global investors to partner with ARCs and increase their participation in the Indian stressed asset market.

13. The Emergence of Alternative Credit Providers

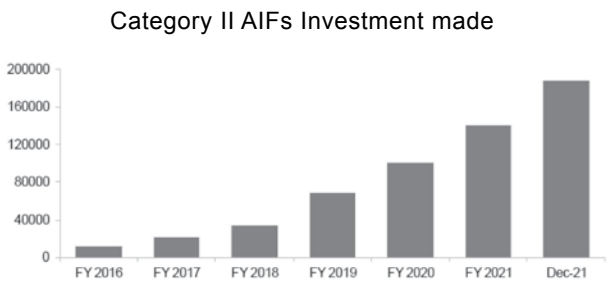
Let us look at yet another measure of the vibrancy of credit markets in a country - which is the availability of alternate lending channels apart from banks and NBFCs, that may have

- better ability to provide long-term capital
- differentiated investment approach and higher risk appetite

A look at the data pertaining to AIFs registered with SEBI reflects the below

- For Category II AIFs or funds that invest primarily in debt securities, the investments made have increased from Rs. 11,500 cr. to Rs. 1.9 lakh cr.

over the last 5.75 years from March 2016 to December 2021



Source: SEBI statistics Amounts in Rs. crores

Clearly, there has been an exponential increase in the number of such alternate credit providers in the last five years. While this may not be directly and only attributable to IBC, the presence of the IBC framework certainly seems to have helped.

14. The Ultimate Credit Market: Distressed Credit

A robust distressed credit market requires a sophisticated investment approach and is integral to an efficient credit market. As seen from various indicators, the IBC has laid the foundation for a distressed credit market in India, and the journey needs to continue.

The Indian distressed assets sector has seen sustained interest from investors due to several legal developments over the past few years.

In India, the market for NPAs was marginal and relatively unknown to private investors till some years ago. The IBC has acted as a game-changer in making India a business-friendly destination as well as an attractive market for stressed assets. Various global investors have not only invested in Indian NPLs for the first time since 2016 but have also set up physical presence and offices in India, since they now attach much higher importance to this market.

Recently, new reforms have been announced, which further expand the stressed asset eco-system by permitting new buyer categories:

- In September 2021, the RBI released its Master Directions on Transfer of Loan Exposures ('Directions') which expand the list of permitted transferees of stressed loan exposures beyond banks, NBFCs and ARCs
- SEBI has recently approved the introduction of 'Special Situation Funds' (SSFs) as a sub-category under Category - I Alternate Investment Funds (AIFs). The proposed SSFs can invest in (a) stressed loans available for acquisition in terms of the Directions or available for acquisition as part of a resolution plan approved under the IBC; (b) security receipts issued by ARCs; and (c) securities of companies in distress.

The availability of a strong resolution mechanism, which can be resorted to by all types of financial creditors (loan providers, bond holders, loan transferees, specialized funds), is vital to an active NPL market. Global distressed debt investors look for a few key things while deciding their investment allocation for any market:

- Supply of NPLs
- Strong legal and regulatory framework governing NPLs:
- Track record of recovery and returns

While the domestic lending system provided a large supply of NPLs, the legal and regulatory framework was strengthened by IBC. The 5-year track record of the IBC and the well-developed jurisprudence provide added comfort from investor perspective.

15. The Advent of New Modes of Distressed Debt Investing

Post-IBC, there have been several new modes of distressed investing seen in the domestic market, that were not present earlier such as:

- Litigation or arbitration claim financing: specialized investors provide liquidity to cash-strapped companies against their receivables from legal awards. A few companies in the EPC sector have approached the market for funding against their arbitration awards. Though this is at a very nascent stage, at least such structures are now being attempted.
- Interim financing: this is priority financing to distressed companies undergoing the resolution process, to enable their operations to continue and preserve value. Relevant amendments that were made to the IBC to provide super-ranking for interim financing, have paved the way for financiers to explore this form of distressed funding.

  However, while interim financing has made a beginning, it is yet to fully take off. Some examples of successful interim financing transactions include:

  - interim financing availed by two of the Top 12 cases (in steel and textiles sectors)
  - interim financing raised by some real estate projects undergoing CIRP from sources such as SWAMIH Fund[8]

  Some measures that can support further development of interim finance:

  - time-bound closures of resolution processes
  - timely referral of companies to the resolution process, wherein operations are still ongoing and interim finance can serve a purpose
  - clarity on payment of financing costs beyond the CIRP time frame, in case the process leads to liquidation

Once a market sees the entry of distressed debt investors, specialized investors that focus on nice areas within distressed investing also come to the fore.

16. IBC and the Foreign Currency Debt Market

Indian corporates access foreign currency debt through the ECB (External Commercial Borrowing) route which is governed by RBI guidelines. Historically, companies have not been permitted to access ECBs to finance acquisition of other companies. However, a relaxation in this regard was allowed, specially in the context of the IBC, when the RBI permitted companies to raise ECB resources to finance resolution plans for corporate debtors undergoing CIRPs. However, this channel has not been used much till now, and it remains to be seen if it will pick up in future. One of the reasons for this could be that overseas branches of Indian Banks were not permitted to extend ECBs under this option, which restricted the potential sources. The other reason may have been the ECB pricing caps, which generally constrain ECB financing to top-rated borrowers.

However, the indirect impact of the IBC on foreign lenders' appetite for Indian credit has been positive on account of:

- availability of an effective resolution mechanism which can also

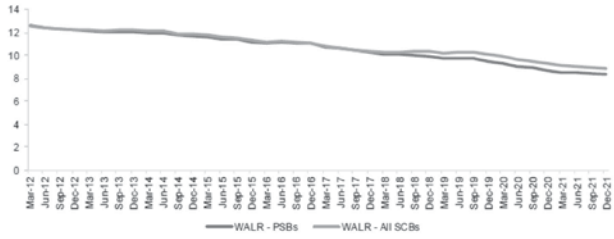
be triggered by ECB lenders - the previous mechanisms such as SARFAESI were not available for foreign lenders (certain large CIRPs have been initiated by foreign lenders)

- good track record of IBC in yielding resolutions in a time-bound manner with better realizations as compared to the previously prevailing enforcement mechanisms

17. The Cost of Credit

To assess the impact of IBC on cost of credit, we look at how the WALR (Weighted Average Lending Rate) for the banking sector has moved, from March 2012 to December 2021, based on the data available. Together with that, we also look at the 'spread' *i.e.* the difference between the 'return on funds' and 'cost of funds' - which indicates the profitability of financing operations.

WALR

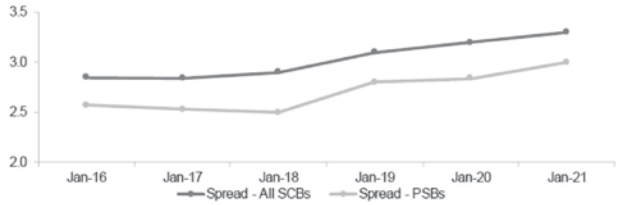


Source: RBI statistics

The above shows that the WALR has progressively reduced for the banking sector as a whole, as well as for Public Sector Banks as a group from 2012 onwards. However, the rate of decline has been greater between 2016 and 2020 (post IBC) than in the previous period between 2012 and 2016 (pre-IBC). This difference was more accentuated for public sector banks (PSBs) than for all Scheduled Commercial Banks (SCBs). The compounded annual reduction rate was 3% p.a. in the post IBC period and 2.8% p.a. in the pre-IBC period for all SCBs. The compounded annual reduction rate was 4.3% p.a. in the post IBC period and 3.2% p.a. in the pre-IBC period for PSBs.

Further, in absolute terms, there has been a compression of more than 2% from March 2016 to December 2021 for both categories. It is well-established that PSBs were more impacted than other bank groups by the NPA crisis and also referred the most cases to IBC and were its biggest beneficiaries.

Spread

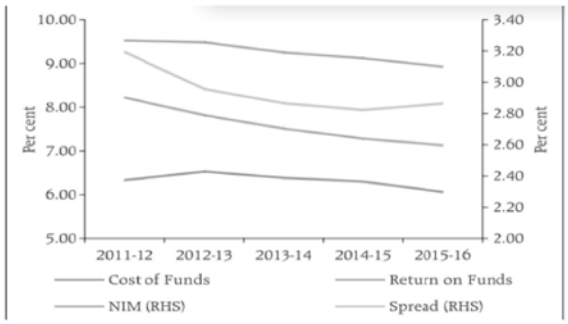


Source: RBI Reports on Trend and Progress of Banking in India for 2021, 2019 and 2017

Spread = difference between return and cost of funds. Return on funds = (interest earned on advances + interest earned on investments)/(average of current and previous year's advances + investments). Cost of funds= (interest paid on deposits + interest paid on borrowings)/(average of current and previous year's deposits + borrowings).

Simultaneously, if we look at the "spread" earned by banks in the post-IBC phase, it has steadily improved between FY2016 and FY2021. Thus, even though the lending rates were on a decline, banks were managing to improve their profitability, as a result of reduced burden of bad loans.

SCBs' Return on Funds pre-IBC



Net interest margin = net interest income/ average total assets

Spread, Return and Cost of Funds as defined earlier

Source: RBI Reports on Trend and Progress of Banking in India

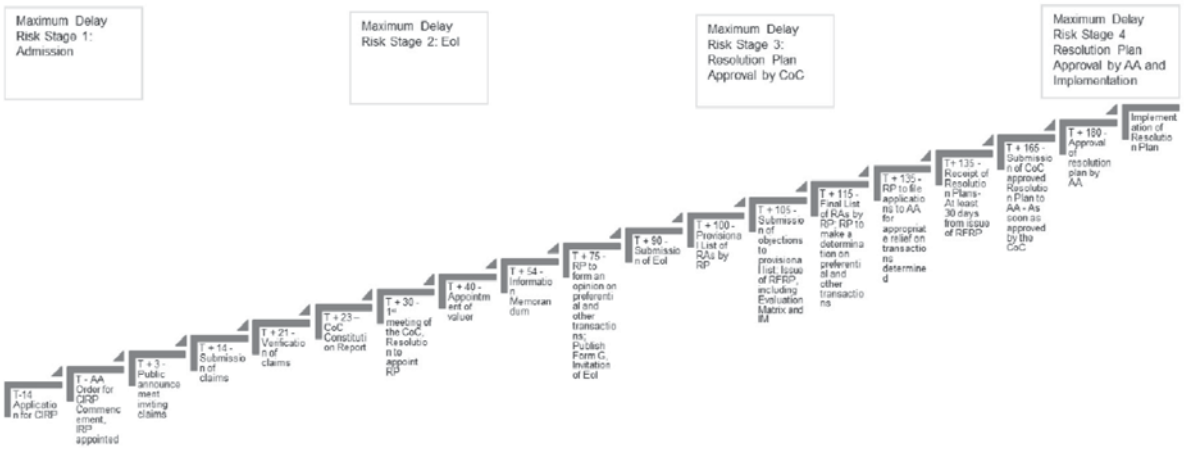
The contrast between pre-IBC and post IBC periods is further brought out if we also look at the movement in "spread" in the years from 2012 to 2016 - before the commencement of IBC. As can be seen from above, the "spread" earned by banks was on a declining trend in this period, which differs from the improving trend observed in the earlier graph in the post-IBC period.

To sum up, the while lending rates have been on a reducing trend since 2012, this accelerated after commencement of IBC. Further, even though the lending rates declined, the profitability of banks as measure by the "spread" earned by them, reflected an improvement, indicating greater efficiency of operations. Consequently, it can be stated that the IBC has aided in reduction of lending rates in the economy, and more efficient credit delivery.

18. The Question of Time

Let us now look at another very important parameter that is the measure of the efficacy of IBC, which is 'time'. Apart from the improvement in amounts realized by FCs and the revival rate of companies, the other area where the IBC heralded significant improvements was in the time taken for resolution. However, this has increased in recent years as a result of various factors, including legal challenges and lack of sufficient buyer interest. It is being said that the main promise of the IBC, which was a "time-bound" resolution process, is no longer being fulfilled.

Let us take a look at the different stages and typical timeline of a CIR process, which is supposed to be completed in 180 days (though rarely done). Along with that, based on what has been seen in practice in multiple cases, an attempt is made to identify the stages that are prone to the maximum risk of delay.



IRP - Interim Resolution Professional. RP - Resolution Professional, AA - Adjudicating Authoprity, EoI - Expression of Interest, RFRP =- Request for Resolution Plan, RA - Resolution Applicant.

This is also borne out by the relevant data.

As per the Research Paper titled 'Assessment of Corporate Insolvency and Resolution Timeline' dated February 2021 by Neeti Shikha and Urvashi Shahi:

- the average number of days taken for admission of applications under CIRP was 133 days for the cases surveyed under the paper9; 74% of the respondent RPs (Resolution Professionals) surveyed said that it took more than 90 days to get the application admitted under CIRP
- 80% of the total delay was at 4 stages - 1. Date of Issue of list of RAs 2. Date of issue of RFRP 3. Date of EOI 4. Approval of resolution plan
- 64% of the total delay was caused in taking approvals of the resolution plan from CoC and Adjudicating Authority.

At the two stages that caused the most delay, the admission stage and the Resolution Plan approval stage, it is the judicial interface that needs to be addressed on priority.

The time taken for admission of cases, is extending up to 12 to 18 months in certain cases. Since the definition of default and the ground-rules for invocation by different classes of creditors are very clearly laid down under the IBC, there should be a more standardized approach to determination of admissibility, which can save time at this stage. This can be also be aided by ramping up the capacity of the judicial infrastructure, and perhaps having dedicated benches focusing only on this aspect.

It needs to me mentioned here that the risk of value leakage is also the highest at this stage. Once inefficient managements get alerted to the threat of their company going under CIRP, if they are not placed under the supervision of an independent Resolution Professional (RP) at the earliest, they can work in counter-productive ways and create a dent on the company's operations and assets. The IBC's main purpose is to maximize the value of businesses, and unless the initial stage bottleneck is addressed, there will be so much value erosion even before the CIRP starts, that subsequent resolution prospects will be extremely dim.

Another crucial stage which requires judicial intervention is that of final Resolution Plan Approval by the Adjudicating Authority (AA). In certain cases, this has taken 12 months or higher, which is more than the entire timeline available to complete the CIRP as per the IBC. It is to be noted that the IBC has already laid down the primacy of the Committee of Creditors (CoC) as far as commercial matters are concerned, and the compliance matters of a Resolution Plan are certified by the Resolution Professional (RP) before being put up to the AA for approval. Therefore, it is submitted that this stage (final approval of Resolution Plan by the AA) needs to be expedited much more.

Further, even after approval by the AA, it takes several more steps before the corporate debtor is finally transferred to the successful Resolution Applicant, and the amounts as laid out in the approved Resolution Plan, are distributed to the different categories of creditors. In certain cases, this stage itself has taken 8 to 12 months or more. It is recommended that a CIRP should be treated as complete only once the implementation of the Resolution Plan is achieved, and this time period also needs to be monitored and tracked on an overall basis. The IBC should include sections to provide for the time-frame for Resolution Plan implementation, as well as the monitoring mechanism to be followed therein. Key principles such as moratorium should continue to apply during this period.

The different participants in the resolution ecosystem such as the RPs, advisors, legal counsels, lenders, and bidders, need to be incentivized for adhering to a time-bound

process. Currently, the focus appears to be more on managing the process rather that bringing it to fruition within the specified timelines. Many suggestions have been made earlier in different forums, such as having electronic platforms for bidding and investor reach-out, and templatized assessment and approval procedure for Resolution Plans, which need to be put in practice.

As we have seen, the first phase of IBC evolution or the first 5 years have had a positive impact on the banking system and the credit markets on various fronts. It is imperative that the time-related impediments are addressed on priority so that resolution period under the IBC does not elongate further and converges as much as possible to the prescribed timelines.

The Insolvency Law Committee (ILC) constituted by the Central Government to propose certain changes to the corporate insolvency resolution and liquidation framework, has taken cognizance of the above. The key changes suggested by the ILC include:

- Enabling a swift admission process
- Having a fixed time period for approval or rejection of resolution plan by the AA

These reforms will improve the pace of resolution, which will enable the positive impact of the IBC to be sustained in future.

19. Emerging Trends

As per various banking sector reports, there are two noticeable trends that are emerging:

- increase in retail and MSME portfolio stress
- increase in share of digital channels in retail and SME lending

As per a report by India Ratings & Research dated Sept. 2021:

- Retail loans, which have been considered as a safe bastion for lenders, are showing cracks as the pandemic drives higher delinquencies due to salary cuts and job losses. Overall stressed assets in the segment are expected to increase to 5.8% by end-FY22 from 2.9% earlier (approximately double).
- MSME NPAs projected to rise to 13.1% by FY22 from 9.9% in FY21. Credit to the MSME segment has grown very strongly in the last two years on the back of post-pandemic relief measures such as the ECLGS. As these measures are withdrawn, NPLs in this segment are also expected to increase.

Another key trend in the banking landscape is the emergence of digital lending. As per an RBI Report on Digital Lending dated Nov. 2021, the overall volume of disbursement through digital mode exhibited a growth of more than *twelvefold* between 2017 and 2020 (from ₹11,671 crore to ₹1,41,821 crore (for the sampled entities covered by the Report). The major products disbursed digitally by banks are personal loans followed by SME loans. The ultra-rapid growth of digital lending is bound to result in sizeable amount of NPLs in future.

The conclusion from the above is that the next phase of the IBC will need to have a sharp focus on personal insolvency resolution and pre-packaged insolvency resolution targeted at MSMEs. Recommendations in these areas are made in the last section of this paper.

On the same note it needs to be mentioned that as far as corporate insolvency is concerned, IBC is at par with the most advanced international 'creditor in control' insolvency resolution regimes in terms of critical clauses such as: moratorium, in-

terim financing, ranking of claims, running of process by court-appointed Resolution Professional, time-bound process, etc. However, many countries with successful corporate insolvency regimes have not necessarily replicated the same success in personal insolvency resolution. In the post-COVID era, personal insolvencies are expected to challenge most economies in the coming years. Distressed debt investors are looking at stressed retail portfolios as the next avenue of growth. They also see that it complements their corporate portfolio, in terms of risk attributes and cash-flow profile. Having a strong personal insolvency regime will be key to sustaining the growth of the distressed debt market.

20. The Way Forward

We conclude by summing up some key recommendations - these are grouped into two categories: one set of recommendations is based on the learnings from the last 5 years of experience with the IBC framework - with the objective to further improve its efficacy. The 2nd set of recommendations relates to broader changes that are required to be made keeping in view the emerging trends in the banking and lending industry. It is to be noted that this is not a comprehensive list- it is just a listing of priority items that directly flows from the preceding sections of this paper.

Recommendations for measures to enhance the efficacy of the IBC mechanism
Time for completion of the corporate insolvency resolution process to be reduced from current levels and should adhere to the prescribed timelines under the code. The suggestions made by the ILC for enabling a swift admission process and fixing the time-frame for approval of Resolution Plan by the AA should be operationalized.
Various stakeholders to be incentivized for time-bound resolution
Resolution Plan implementation timeline to be also considered and monitored - CIRP should be considered as complete once the Plan is implemented and transfer of the corporate debtor to the new management is completed along with distribution of amounts realizable under the approved Resolution Plan
Sectoral performance in terms of parameters such as amounts realized under resolution plans, level of bidding interest and resolution time, should be measured and tracked on regular basis and the data should be widely disseminated - credit policy and regulatory policy design should factor in the performance of different sectors under IBC to address any loopholes
Recovery percentages should be appropriately measured and a consistent methodology for computing interest costs and time value of money should be applied, to provide an accurate picture of recovery levels
Comprehensive digital platform for showcasing stressed assets to potential investors should be built and maintained centrally - this should integrate various types of data such as: ◆ assets undergoing CIRP/pre-pack/ liquidation along with status of the process ◆ SRs or instruments issued against different types of NPL assets along with recovery rating and NAV ◆ information dashboard showing sectoral and asset-level performance under IBC ◆ NPL auctions announced by banks/ NBFCs/other financing institutions
As financial markets diversify, the supply of non-performing assets in future would come from both loan-givers (banks, NBFCs, FIs) as well as bond investors. Bond investors are both institutional and retail. There should be a well-defined mechanism for adequate representation of retail bondholders in an insolvency process, and suitable clarity around their position in the distribution waterfall. There needs to be closer co-ordination between the market, banking and insolvency regulators (SEBI, RBI and IBBI), on the voting and decision-making process where debt securities investors are part of the debt structure of a company undergoing resolution through the IBC mechanism.

The stressed asset market has been opened for new categories of investors *e.g.* AIFs, who are now permitted to invest in stressed assets under various routes including through the CIR process. However, some of these investors may not have all the operational and turnaround capabilities in-house that are required to revive stressed companies. Industry- level capacity and skillsets in these areas should be built up, including "turnaround professionals" who can assist such investors to realize their investment goals.
Recommendations for innovations in the stressed asset framework, in tandem with the future
So far, the IBC has primarily been utilized for resolving corporate stress. Individual insolvency proceedings for personal guarantors to corporate debtors under the IBC have commenced, however individual insolvency of partnership and proprietorship firms as well as or other individuals is yet to take off.
Going forward, policy-makers need to dwell on how the IBC mechanism can be put to use to tackle the upcoming retail portfolio stress through the personal insolvency process.
Detailed regulations for operationalizing personal insolvency resolution process need to be framed, keeping in view the scale and spread of retail portfolios
Faster development of system-level capacity will be required to apply IBC for personal insolvency resolutions in the coming years
Given the granularity of retail portfolios, a differentiated approach will be needed. Resolution professionals focusing on this area will need to work with both sellers and buyers, as well as debt servicers.
Suitable framework needs to be put in place for the development of pooled securities backed by retail NPL portfolio cash-flows, with different risk-return tranches, for greater tradeability and liquidity
Digital and 'express lending channels' have shown rapid growth in recent times. Currently, the reported stress levels in these new-age portfolios are quite low. However, the sharp expansion is bound to cause increase in NPA levels in future. EWS (Early Warning systems) for these new lending products need to be designed appropriately, so that stress is detected in a timely manner and can be offloaded to interested investors before the value declines irretrievably.
Various suggestions have been made by the Committee to review the working of ARCs, which need to be put into practice.
ARCs have been allowed to acquire stressed loans availed by domestic borrowers from regulated overseas entities - various procedural matters in this regard need to be clarified.
Listing of SRs should be encouraged to increase tradeability. Longer redemption period for SRs and other instruments issued for NPL acquisition can be permitted based on the cash-flow profile of the underlying assets acquired - for example, NPLs in infrastructure sectors such as roads and ports will typically have long concession periods and will also require longer time horizons for reconstruction/revival. Such SRs/instruments can be specifically targeted to specialized long-term investors
As seen earlier, the lending to MSMEs has picked up sharply in the last two years, on the back of the ECLGS extended by the Government as a COVID relief measure. As these extraordinary support systems are withdrawn, the stress in MSME borrowers is expected to go up.
The pre-packaged resolution process under the IBC, which is specifically targeted at this segment, is presently at a nascent stage
Faster roll-out of the pre-pack process can be facilitated by measures such as: ◆ greater outreach by banks and borrower awareness ◆ development of system capacity in terms of RPs focusing on this segment ◆ crystallization of guidelines by industry bodies such as IBA, f or banks to facilitate wider adoption of the pre-pack process

21. Abbreviations

AA Adjudicating Authority
AIF Alternative Investment Fund
CoC Committee of Creditors
DRT Debt Recovery Tribunal
ECB External Commercial Borrowing
ECLGS Emergency Credit Line Guarantee Scheme
FPI Foreign Portfolio Investor
IBBI Insolvency & Bankruptcy Board of India
IBC Insolvency & Bankruptcy Code, 2016
IRP Interim Resolution Professional
NCLAT National Companies Law Appellate Tribunal
NCLT National Companies Law Tribunal
NPA Non-Performing Asset
NPL Non-Performing Loan

RBI Reserve Bank of India
RP Resolution Professional
SEBI Securities and Exchange Board of India
WALR Weighted Average Lending Rate

22. Sources

- IBBI Newsletters
- IBBI data releases on CIRPs yielding resolution plans (as of Sept. 2021)
- RBI Report on Trend and Progress of Banking in India (December 2017, 2019, 2020, 2021)
- Data on FPI trading volumes dated July 2021 from SEBI website
- RBI Report on ARCs
- CRISIL Yearbook on the Indian Debt Market 2021
- RBI statistics and data releases
- https://economictimes.indiatimes.com/markets/bonds/overseas-banks-show-appetite-for-junk-bonds/articleshow/72177362.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst
- Research Paper 'RP-01/2021' titled 'Assessment of Corporate Insolvency and Resolution Timeline' dated February 2021 by Neeti Shikha and Urvashi Shahi (Indian Institute of Corporate Affairs) under IBBI RESEARCH INITIATIVE
- Report of the RBI Working Group on Digital Lending dt. November 2021
- Report of the IBBI Working Group on Tracking Outcomes under the IBC, 2016, dated November 2021
- Ebook released by IBBI on completion of five years of the IBC
- RBI's Financial Stability Reports from FY2017 onwards

1 Insolvency and Bankruptcy Code, 2016

2 Dewan Housing Finance Corporation Ltd.

3 Sectoral classification methodology used for categorization of CIRP cases does not correspond exactly with industry sub-sector classification used in RBI reports - but for the purpose of assessing broad trends this is considered acceptable.

4 Based on data availability, the ratios for FYs 2017 and 2018 are 'stressed advances' ratio while the ratios for subsequent years are GNPA ratios. However, as per the commentary in RBI's December 2018 Financial Stability Report, stressed advances as a share of all loans and gross non-performing assets (GNPAs) in the system are on a converging path, as a result of the February 12 (2018) circular issued by RBI, which accelerated stress recognition and NPA classification. Hence for the purpose of broad trend analysis this approach is considered acceptable.

5 Companies that achieved resolution plan approval stage under CIRP and are listed in the IBBI data release titled.

6 Emergency Credit Line Guarantee - announced by the Government to provide additional liquidity to companies in the post-pandemic situation.

7 DHFL - Dewan Housing Finance Ltd - the first and largest financial sector entity to have undergone resolution under IBC.

8 Sector-focused Government-promoted fund to provide last mile financing to enable completion of stressed real estate projects.

9 Data pertaining to 1189 companies (resolved companies = 224 and liquidated companies = 965 as of March 2020) was analyzed by the paper.

(2022) 136 taxmann.com 374 (SC)

SUPREME COURT OF INDIA

SVG Fashions (P.) Ltd. *v.* Ritu Murli Manohar Goyal

HEMANT GUPTA AND V. RAMASUBRAMANIAN, JJ. CIVIL APPEAL NO. 4228 OF 2020†

MARCH 29, 2022

Section 238A of the Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Limitation period - Operational Creditor sold various fabrics to corporate debtor and raised invoices - Corporate debtor committed default in making payments - Operational creditor thus, filed an application under section 9 - Corporate debtor raised a dispute that instant application was barred by limitation - It was a case of operational creditor that six cheques had been handed over to it by corporate debtor along with letter dated 28-9-2015 however, these cheques were dishonoured when presented for payment - NCLT, thus, held that there was an acknowledgement of liability on part of corporate debtor and therefore, application filed on 20-4-2018 was within period of limitation - Consequently, NCLT ordered admission of application under section 9 - NCLAT completely overlooked pleadings revolving around letter and six cheques and reversed order passed by NCLT - Whether failure of NCLAT as first appellate authority to look into a such vital aspect vitiated its order, especially when NCLT had recorded a specific finding of fact -Held, yes - Whether therefore, order of NCLAT was liable to be set aside and matter was to be remanded to NCLAT for fresh consideration - Held, yes (Para 10)

CASE REVIEW

Ritu Murli Manohar Goyal v. *SVG Fashions Ltd.* (2020) 116 taxmann.com 888/(2021) 163 SCL 357 (NCLAT - New Delhi) (para 10) *reversed.*

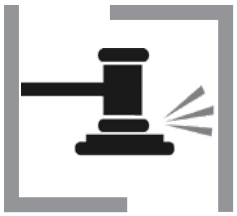
CASES REFERRED TO

Jignesh Shah v. *Union of India* (2019) 109 taxmann.com 486/156 SCL 542 (SC) (para 9), *Babu LalVardharji Gurjar* v. *Veer Gurjar Aluminium Industries (P.) Ltd.* (2020) 15 SCC 1 (para 9), *B.K. Educational Services (P.) Ltd.* v. *Parag Gupta & Associates* (2018) 98 taxmann.com 213/150 SCL 293 (SC) (para 9), *Laxmi Pat Surana* v. *Union Bank of India* (2021) 125 taxmann.com 394/166 SCL 318 (SC) (para 9) and *Asset Reconstruetion Co. (India) Ltd.* v. *Bishal Jaiswal* (2021) 126 taxmann.com 200/166 SCL 82 (SC) (para 9).

Saurabh Mishra, AOR *for the Appellant.* **Keith Varghese**, Adv., **Ms. Rashi Bansal**, **Ms. Meera Mathur**, AOR's, **Sumit Kansal** and **Bhupesh Kumar Pathak**, Advs. *for the Respondent.*

† Arising out of order of NCLAT in *Ritu Murli Manohar Goyal* v. *SVG Fashions Ltd.* (2020) 116 taxmann.com 888/(2021) 163 SCL 357.

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 136 taxmann.com 374 (SC)



(2022) 137 taxmann.com 303 (SC)

SUPREME COURT OF INDIA

Sunil Kumar Jain *v.* Sundaresh Bhatt

M.R. SHAH AND ANIRUDDHA BOSE, JJ.

CIVIL APPEAL NO. 5910 OF 2019†

APRIL 19, 2022

Section 5(13) of the , read with sections 53, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Insolvency resolution process cost - Whether section 20 mandates that IRP/RP is to manage operations of corporate debtor as a going concern and in case during CIRP corporate debtor was going concern, wages/salaries of such workmen/employees who actually worked, shall be included in CIRP cost and in case of liquidation of corporate debtor, dues towards wages and salaries of such workmen/employees who actually worked when corporate debtor was a going concern during CIRP, being a part of CIRP cost are entitled to have first priority and they have to be paid in full first as per section 53(1)(a) - Held, yes - Whether any other dues towards wages and salaries of employees/workmen, shall be governed by section 53(1)(b) and (c) - Held, yes (Paras 9 and 10)

Section 36, read with section 53, of the Insolvency and Bankruptcy Code, 2016 - Corporate liquidation process - Liquidation estate - Whether section 36(4)(iii) specifically excludes all sums due to any workman or employee from provident fund, pension fund and gratuity fund, from ambit of liquidation estate assets and, therefore, section 53(1) shall not be applicable to such dues, which are to be treated outside liquidation estate process and liquidation assets under IBC - Held, yes - Whether thus, section 36(4) has given outright protection to workmen's dues under provident fund, gratuity fund and pension fund which are not to be treated as liquidation estate assets and the Liquidator shall have no claim oversuch dues and they are not to be used for recovery in the liquidation - Held, yes (Para 13)

CASES REFERRED TO

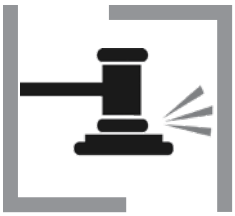
Swiss Ribbons (P.) Ltd. v. *Union of India* (2019) 101 taxmann.com 389/152 SCL 365 (SC) (para 6.5) and

Gujarat Urja Vikas Nigam Ltd. v. *Amit Gupta* (2021) 125 taxmann.com 150/167 SCL 241 (SC) (para 6.6).

Ms. Shobha Ramamoorthy, AOR, **Shilp Vinod**, **Nawaz Sherif**, **M.A. Karthik**, **Vincy George**, **Gokulakrisnan** and **Ms. Ritika Rao**, Advs. *for the Appellant*. **Alok Tripathi**, AOR, **Parminder Singh Bhullar**, AOR, **Rajeev Kumar Gupta**, **Dinesh Tripathi**, **Sanjay Kumar**, Advs. and **Sanjay Kumar Tyagi**, AOR *for the Respondent*.

† Arising out of *Sunil Kumar* v. *Sundaresh Bhatt* (2019) 107 taxmann.com 184 (NCL-AT).

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 137 taxmann.com 303 (SC)



(2022) 138 taxmann.com 406 (Karnataka)

HIGH COURT OF KARNATAKA

Babu A. Dhammanagi *v.* Union of India

ALOK ARADHE AND S. VISHWAJITH SHETTY, JJ.

W.P. NO. 21626 OF 2021 (GM-RES)

APRIL 5, 2022

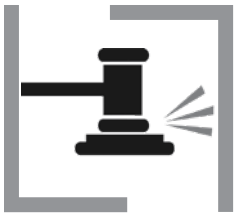
Section 95, read with sections 97 and 100, of the Insolvency and Bankruptcy Code, 2016 - Individual/firm's insolvency resolution process - Application by creditor - Whether insolvency proceedings initiated against personal guarantor under Code is a time bound process and aforesaid procedure contains filing of application under section 95 for appointment of Resolution Professional by Adjudicating Authority under section 99, submission of report by Resolution Professional under section 99, recording reasons for recommending request for acceptance or rejection of application and finally admission or rejection of application by Adjudicating Authority - Held, yes - Whether as per procedure prescribed under sections 95 to 100, role of Resolution Professional is limited to make appropriate recommendation to Adjudicating Authority and final decision of admission or rejection of application referred to under section 95 solely lies with Adjudicating Authority - Held, yes - Whether Adjudicating Authority is not bound by recommendation made by Resolution Professional - Held, yes - Whether procedure prescribed under provisions contained in sections 95 to 100 are fair, rational and reasonable and same cannot be termed to be violative of Article 14 - Held, yes (Para 4)

CASES REFERRED TO

Uma Nath Pandey v. *State of U.P.* AIR 2009 SC 2375 (para 3), *Justice P.D. Dinakaran* v. *Judges Inquiry Committee* AIR 2011 SC 3711 (para 3) and *Gujarat Urja Vikas Nigam Ltd.* v. *Amit Gupta* (2021) 125 taxmann.com 150/167 SCL 241 (SC) (para 4).

Shashank Kumar, Adv. *for the Petitioner.* **M.N. Kumar**, CGC, **Angad Verma**, **George Joseph**, **Ms./Mrs. Malarika Prasad** and **A.S. Vishwajith**, Advs. *for the Respondent.*

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 138 taxmann.com 406 (Karnataka)



(2022) 138 taxmann.com 401 (NCLAT - New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Synergy Technologies *v.* Parthiv Parikh, (Resolution Professional of Sanghvi Forging & Engineering Ltd.)

M. VENUGOPAL, JUDICIAL MEMBER

AND DR. ASHOK KUMAR MISHRA, TECHNICAL MEMBER

COMPANY APPEAL (AT)(INSOLVENCY) NOS. 352 & 424 OF 2021‡

APRIL 18, 2022

Section 3(6), read with section 31, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Claim - Corporate debtor had taken loan from respondent bank - Respondent bank filed an application under section 7 and CIRP was initiated against corporate debtor - Appellant filed its claim as unsecured financial creditor as advised by Interim Resolution Professional (IRP) - Resolution plan was approved without appellant's participation as financial creditor in Committee of Creditors - NCLT by impugned order approved said resolution plan when objection of appellant was pending before NCLT - Whether there was mistake by Resolution Professional by not considering claim of appellant-financial creditor being unsecured loan holder as per written statement of IRPand, therefore, financial creditor who received major chunk from resolution applicant should refund original claim minus any amount received by appellant-financial creditor in same percentage as those financial creditors had received from resolution applicant - Held, yes (Para 11)

CASE REVIEW

Vikram Sanghvi v. *Bank of Baroda* (2021) 130 taxmann.com 120 (NCLT - Ahd.) (para 11) *partly reversed*.

CASES REFERRED TO

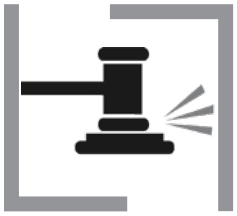
Ronak Kundanlal Bhagat v. *Parthiv Parikh* (Co. Appeal (AT) (Ins.) No. 364 of 2021, dated 21-5-2021) (para 4), *Karad Urban Co-operative Bank* v. *Swwapnil Bhingardevay* (2020) 119 taxmann.com 46/116 Taxman 457 (SC) (para 6), *Rai Bahadur Shree Ram & Co. (P.) Ltd.* v. *Bhuvan Madan* (2020) 118 taxmann.com 489/162 SCL 413 (NCL-AT) (para 6), *K. Sashidhar* v. *Indian Overseas Bank* (2019) 102 taxmann.com 139/152 SCL 312 (SC) (para 6), *Pratap Technocrats (P.) Ltd.* v. *Monitoring of Reliance Infratel Ltd.* (2021) 129 taxmann.com 132/167 SCL 508 (SC) (para 7), *Gujarat Urja Vikas Nigam Ltd.* v. *Amit Gupta* (2021) 125 taxmann.com 150/167 SCL 241 (SC) (para 7), *E S Krishnamurthy* v. *Bharath Hi Tech Builders (P.) Ltd.* (2021) 133 taxmann.com 159/(2022) 169 SCL 644 (SC) (para 7), *Maharashtra Seamless Ltd.* v. *Padmanabhan Venkatesh* (2020) 113 taxmann.com 421/158 SCL 567

(SC) (para 7), *Jaypee Kensington Boulevard Apartments Welfare Association* v. *NBCC (India) Ltd.* (2021) 125 taxmann.com 360/166 SCL 678(SC) (para 7), *Kalpraj Dharamshi* v. *Kotak Investment Advisories Ltd.* (2021) 125 taxmann.com 194/166 SCL 583 (SC) (para 7), *Committee of Creditors of Dewan Housing Finance Corpn. Ltd.* v. *Kapil Wadhwan* (Co. Appeal (AT) (Ins.) No. 370 of 2021) (para 7), *Navalkha & Sons* v. *Ramanya Das* AIR 1970 SC 2037 (para 7), *Vedica Procon (P.) Ltd.* v. *Balleshwar Greens (P.) Ltd.* (2015) 62 taxmann.com 254/132 SCL 492 (SC) (para 7), *Innoventive Industries Ltd.* v. *ICICI Bank* (2017) 84 taxmann.com 320/143 SCL 625 (SC) (para 7) and *Ebix Singapore (P.) Ltd.* v. *Committee of Creditors of Educomp Solutions Ltd.* (2021) 130 taxmann.com 208 (SC) (para 7).

Gaurav Mitra, **Jain**, **Ms. Aditi Singh**, **Rajendra Beniwal** Advs., **Navin Pahwa**, Sr. Adv. and **Jaimain R. Dave** *for the Appellant.* **Karan Valecha**, **Hera Dave**, **Dheeraj Garg**, **Bishwajit Dubey**, **Ms. Neha Shivhare**, **Ms. Srideepa Bhattacharyya**, **Vishnu Shriram**, **Tarak Damani**, **V.K. Pandey**, **Akhil Chadha**, **Parish Mishra** and **Karan Malhotra**, Advs. *for the Respondent.*

† Arising from *Vikram Sanghvi* v. *Bank of Baroda* (2021) 130 taxmann.com 120 (NCLT - Ahd.).

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 138 taxmann.com 401 (NCLAT - New Delhi)



(2022) 138 taxmann.com 402 (NCLAT - New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Smt. Aditi Bezbaruah *v.* Kamalesh Kumar Singhania

JUSTICE ASHOK BHUSHAN, CHAIRPERSON

DR. ALOK SRIVASTAVA AND MS. SHREESHA MERLA, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INSOLVENCY) NO. 1468 OF 2019‡

APRIL 5, 2022

Section 31 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - Appellants, owner of land in question, entered into a development agreement with corporate debtor for purpose of construction of a multi storeyed commercial complex - Thereafter, corporate debtor underwent into CIRP - Thereafter, a resolution plan submitted by SRA was approved with 100 per cent votingrights by CoC - Approved resolution plan undertook to honour development agreement with appellants - Appellants objected inclusion of their land in resolution plan - Whether reversion of lands owned by appellants to them did not appear to be a viable alternative because development agreements were germane to development of commercial complex project and eventual insolvency resolution of erstwhile corporate debtor - Held, yes -Whether since plots of lands in ownership of appellants were quite organic and necessary for corporate debtor's project, inclusion of said lands of appellants was a sine qua non for success of resolution plan and, therefore, same could not be removed from integrated plot of land on which project was to eventually come up - Held, yes (Paras 45 and 46)

CASE REVIEW

CP (IB)/04/GB/2018, dated 25-10-2019 (NCLT - New Delhi) (para 49) *affirmed*.

Gujarat Urja Vikas Nigam Ltd. v. *Amit Gupta* (2021) 125 taxmann.com 150/167 SCL 241 (SC) (para 42) *followed*.

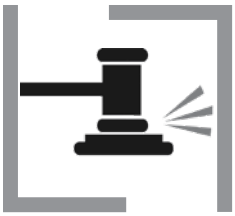
CASES REFERRED TO

Embassy Property Developments (P.) Ltd. v. *State of Karnataka* (2019) 112 taxmann.com 56/(2020) 157 SCL445 (SC) (para 15), *Encore Asset Reconstruction Co. (P.) Ltd.* v. *Ms. Charu Sandeep Desai* (2019) 107 taxmann.com 100/154 SCL 382 (NCL-AT) (para 15), *Rajendra K Bhutta* v. *Maharashtra Housing and Area Development Authority* (2020) 114 taxmann.com 655/160 SCL 95 (SC) (para 18), *Gujarat Urja Vikas Nigam Ltd.* v. *Amit Gupta* (2021) 125 taxmann.com 150/167 SCL 241 (SC) (para 18) and *Tata Consultancy Services Ltd.* v. *Vishal Ghisulal Jain, Resolution Professional of SK Wheels (P.) Ltd.* (2021) 132 taxmann.com 232/(2022) 170 SCL 153 (SC) (para 24).

N.P.S. Chawla, **Surekh Kant Buxy** and **Satvik Issar**, Advs. *for the Appellant.* **Abhijeet Sinha**, **Pranay Agarwal**, **Ms. Ankita Baid**, **Jitendra Kumar**, **Prashant Mishra** and **P.K. Sachdeva**, Advs. *for the Respondent.*

† Arising out from order of NCLT in CP (IB)/04/GB/2018, dated 25-10-2019 (NCLT - New Delhi).

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 138 taxmann.com 402 (NCLAT - New Delhi)



(2022) 138 taxmann.com 403 (NCLAT - New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Rana Saria Poly Pack (P.) Ltd. *v.* Uniworld Sugars (P.) Ltd.

JUSTICE ASHOK BHUSHAN, CHAIRPERSON

AND DR. ALOK SRIVASTAVA, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INS.) NOS. 422 & 741 OF 2021‡

APRIL 12, 2022

Section 61, read with section 33, of the Insolvency and Bankruptcy Code, 2016 and regulation 35 of the IBBI (Corporate Insolvency Resolution Process of Corporate Persons) Regulation, 2016 - Corporate person's Adjudicating Authorities - Appeals and Appellate Authority - Whether third valuation under regulation 35 is required only if two estimates of liquidation value obtained earlier are significantly different - Held, yes - An order for initiation of CIRP was passed in case of corporate debtor - In course of said process, resolution applicant submitted its resolution plan along with valuation by two registered valuers, which estimated liquidation value of corporate debtor's assets as Rs. 126.30 crores and Rs. 121.01 crores, leading to average value of Rs. 123.66 crores - On CoC's request, third valuation was done without any legal justification, which estimated liquidation value as Rs. 52.69 crores, which was even less than half of liquidation value estimated earlier and, hence, significantly different from first two valuations - CoC approved resolution plan on basis of third valuation, which was subsequently approved by NCLT - Whether procedure of obtaining third valuation and then considering it as basis for deciding payment particularly of operational creditors under section 30(2)(b) was defective and not in accordance with stipulated norms and procedure under CIRP Regulations - Held, yes - Whether thus, third valuation report was to be discarded and average of first two liquidation value estimation, viz Rs. 123.66 crores was to be taken as liquidation value on which various payments in resolution plan would be based upon - Held, yes (Paras 44 and 46)

CASE REVIEW

Sri Venkateswara Syndicate v. *Oriental Insurance Co. Ltd.* (2009) 8 SCC 507 (para 30) *distinguished*.

CASES REFERRED TO

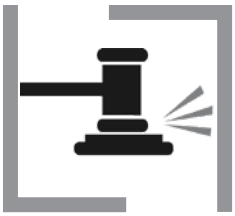
Maharashtra Seamless Ltd. v. *Padmanabhan Venkatesh* (2020) 113 taxmann.com 421/158 SCL 567 (SC) (para 12), *Committee of Creditors of Essar Steel India Ltd.* v. *Satish Kumar Gupta* (2019) 111 taxmann.com 234 (SC) (para 13), *K. Sashidhar* v. *Indian Overseas Bank* (2019) 102 taxmann.com 139/152 SCL 312 (SC) (para 13), *Pratap Technocrats (P.) Ltd.* v. *Monitoring Committee of Reliance Infratel Ltd.* (2021) 129 taxmann.com 132/167 SCL 508 (SC) (para 14), *India Resurgence ARC (P.) Ltd.*

v. *Amit Metaliks Ltd.* (2021) 127 taxmann.com 610/167 SCL 223 (SC) (para 14), *Swiss Ribbons Pvt. Ltd.* v. *Union of India* (2019) 101 taxmann.com 389/152 SCL 365 (SC) (para 15), *Kridhan Infrastructure (P.) Ltd.* v. *Venkatesan Sankaranarayan* (2021) 125 taxmann.com 138/165 SCL 355 (SC) (para 15), *Binani Industries Ltd.* v. *Bank of Boarda* (2018) 99 taxmann.com 164/150 SCL 703 (NCL-AT) (para 18) and *Sri Venkateswara Syndicate* v. *Oriental Insurance Co. Ltd.* (2009) 8 SCC 507 (para 29)

Saurav Agrawal, **Sahil Tagotra**, **Varad Nath**, **Ms. Archi Agarwal** and **Pradeep G. Tulsian**, Advs. *for the Appellant.* **Gopal Jain**, Sr. Adv., **Abhishek Anand** and **Nazim Khan**, Advs. *for the Respondent.*

† Arising out of CP/IBI/ALD/No. 120 of 2017, dated 17-3-2021.

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 138 taxmann.com 403 (NCLAT - New Delhi)



(2022) 138 taxmann.com 404 (NCLAT - New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Manish Jain *v.* Rakesh Bhatia

JUSTICE ASHOK BHUSHAN, CHAIRPERSON

DR. ALOK SRIVASTAVA AND MS. SHREESHA MERLA, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INSOLVENCY) NO. 49 OF 2022‡

APRIL 19, 2022

Section 33 of the Insolvency and Bankruptcy Code, 2016, read with sections 230 and 232 of the Companies Act, 2013 - Corporate liquidation process - Initiation of - Liquidation order was passed by NCLT against corporate debtor - Appellant, ex-director of corporate debtor, entered into a OTS with financial creditor, however, could not pay up amount under OTS - Appellant filed an application before High Court for extension of time, but despite extensionof time, corporate debtor could not pay up amount - Liquidation order attained finality and liquidator proceeded to auction sale of assets of corporate debtor - Whether since order of liquidation had attained finality and scheme under sections 230-232 of Companies Act was never formalized, action of liquidator in selling asset by public auction could not be termed as contempt or any breach of order of NCLT - Held, yes (Para 11)

CASE REVIEW

Order passed by NCLT, New Delhi, Special Bench, in C.P.(IB) No. 417(ND)/2017, I.A. No. 5278 of 2021 dated 16-11-2021 (para 11) *affirmed*.

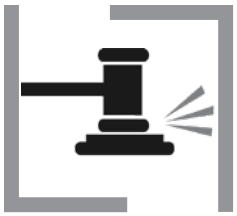
CASES REFERRED TO

Y. Shivram Prasad v. *S. Dhanapal* (2019) 104 taxmann.com 377/153 SCL 294 (NCL-AT) (para 3) and *Ramesh Kumar Chaudhary* v. *Anju Agarwal, Liquidator of Shree Bhawani Paper Mills Ltd.* (2022) 137 taxmann.com 242 (NCLAT - New Delhi) (para 7).

Manan Batra and **Dr. Amit George**, Advs. *for the Appellant*. **Sumant Khatri**, Adv. *for the Respondent*.

† Arising out of order passed by NCLT, New Delhi, Special Bench, in C.P. (IB) No. 417/(ND)/2017, I.A. No. 5278 of 2021, dated 16-11-2021.

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 138 taxmann.com 404 (NCLAT - New Delhi)



(2022) 138 taxmann.com 405 (NCLAT - New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Damodar Valley Corporation *v.* VSP Udyog (P.) Ltd.

JUSTICE ASHOK BHUSHAN, CHAIRPERSON

DR. ALOK SRIVASTAVA AND MS. SHREESHA MERLA, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INSOLVENCY) NO. 78 OF 2021‡

APRIL 12, 2022

Section 31, read with section 14, of the Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Resolution plan - Approval of - Appellant supplier entered into a Power Supply agreement with corporate debtor - On failure of corporate debtor to make payments due for power supply, appellant terminated electricity connection given to corporate debtor - Meanwhile, company petition under section 9 filed by operational creditor was admitted and resolution plan submitted by successful resolution applicant was approved by NCLT - Appellant assailed approval of resolution plan on ground that it was based on disparity in treatment accorded to operational creditors and financial creditors without assigning any concrete reason and treatment so meted out was arbitrary and done to benefit financial creditors at cost of operational creditors - Further, resolution plan contained direction to appellant to give fresh power connection to successful resolution applicant and waiver of charges etc., for a fresh connection, which according to appellant was not legally valid and could only be given under WBERC Regulations formulated under Electricity Act - Whether since said resolution plan of corporate debtor had been affirmed by Supreme Court in *India Resurgence Arc (P.) Ltd.* v. *Amit Metaliks Ltd.* (2021) 127 taxmann.com 610/167 SCL 223, challenge to approval of resolution plan could not be sustained - Held, yes - Whether since successful resolution applicant was not interested in seeking a fresh electricity connection from appellant, provisions made in resolution plan regarding waiver of charges etc. became irrelevant - Held, yes - Whether thus, challenge to order of approval of resolution plan passed to by NCLT could not be sustained - Held, yes (Paras 14, 15 and 16)

CASE REVIEW

Damodar Valley Corpn. v. *Karthik Alloys Ltd.* (2022) 137 taxmann.com 234 (NCL-AT) (para 16) *reversed*.

CASES REFERRED TO

Committee of Creditors of Essar Steel India Ltd. v. *Satish Kumar Gupta* (2019) 111 taxmann.com 234 (SC) (para 9), *Embassy Property Developments (P.) Ltd.* v. *State of Karnataka* (2019) 112 taxmann.com 56/(2020) 157 SCL 445 (SC) (para 9), *India Resurgence ARC (P.) Ltd.* v. *Amit Metaliks Ltd.* (2021) 127 taxmann.com 610/167 SCL

223 (SC) (para 12) and *Damodar Valley Corpn.* v. *Kharkia Steels (P.) Ltd.* (CA (AT) (Ins.) No. 119 of 2022, dated 15-3-2022) (para 12).

Ms. Maninder Acharya, Sr. Adv., **Ms. Madhumita Bhattacharjee**, **Viplav Acharya** and **Anant**, Advs. *for the Appellant.* **Ratnanko Banerji**, Sr. Adv., **Kumarjit Banerjee**, **Gaurav Gupta**, **Samyak Gangwal** and **Raj Singhania**, Advs. *for the Respondent.*

‡ Arising out of *Damodar Valley Corpn.* v. *Karthik Alloys Ltd.* (2022) 137 taxmann.com 234 (NCL-AT).

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 138 taxmann.com 405 (NCLAT - New Delhi)

Common issues observed by the Insolvency Professional Agency during Monitoring/Disciplining the Insolvency Professionals

The Insolvency Professional Agencies (IPAs) are entrusted with the functions *inter alia* to monitor the performance of its members, lay down standards of professional conduct for its members, safeguard the rights, privileges and interests of its members and discipline its members.

The monitoring of Insolvency Professionals (IPs) by the IPAs is governed by Section 204(*c*) of the Insolvency & Bankruptcy Code, 2016, Part VIII of the IBBI Model Bye Laws and Monitoring Policies adopted by the IPAs. In terms of the Bye- Law 15 of the IBBI Model Bye-Laws, it is necessary to formulate a Monitoring Policy and constitute a Monitoring Committee to monitor the professional activities and conduct of Professional Member(*s*) for their adherence to the provisions of the Code, rules, regulations and guidelines issued thereunder, the Bye-Laws, the Code of Conduct and directions

given by the Governing Board. In view of the same, the Governing Board of the IPAs constituted Monitoring Committee. The members of the Monitoring Committee, through its Monitoring Policy, monitors the professional activities and conduct of professional members enrolled with it.

The objective of monitoring is to enable IPAs to gather relevant information pertaining to the conduct and performance of its Professional Member(*s*) for their adherence to the provisions of the Code, rules, regulations, circulars and guidelines issued thereunder, the bye-laws, the code of conduct and directions given by the Governing Board. The monitoring policy aims to help IPAs to collect adequate information and develop a mechanism to review, monitor and evaluate its professional members in terms of aspects including time based and event based compliances, code of conduct, directions by Adjudicating Authority, Board etc.

The IPAs carry out monitoring of IPs in the following two ways:

(*a*) Desktop Monitoring

(*b*) Inspection

The Disciplinary Mechanism of IPAs is governed by Part X of the IBBI Model Bye Laws and Disciplinary Policy adopted by the IPAs. The IPAs may initiate disciplinary proceedings by issuing a show-cause notice against professional members based on a reference made by the Grievances Redressal Committee; based on monitoring of professional members; following the directions given by the IBBI or any court of law; or *suo motu*, based on any information received by it. The Governing Board of the IPAs constituted Disciplinary Committee. The members of the Disciplinary Committee, through its Disciplinary Policy, disciplines conduct of professional members enrolled with it. The Disciplinary Committee by passing an order may expel the professional member; suspend the professional member for a certain period of time; cancel authorisation for assignment (AFA); admonish the professional member; impose monetary penalty; refer the matter to the IBBI or pass directions related to cost.

Following are the common issues observed by the Insolvency Professional Agency during Monitoring/Disciplining the Insolvency Professionals

- **Acceptance of assignment without getting renewal of Authorisation For Assignment (AFA)**

  Regulation 7A of IBBI (Insolvency Professionals) Regulations, 2016 requires for any IP to have AFA before undertaking any assignment after 31st December 2019. Regulation 7A reads as follows:

  > "7A. An insolvency professional shall not accept or undertake an assignment after 31st December, 2019 unless he holds a valid authorisation for assignment on the date of such acceptance or commencement of such assignment, as the case may be:
  >
  > **Provided** that provisions of this regulation shall not apply to an assignment

which an insolvency professional is undertaking as on-

(a) 31st December, 2019; or

(b) the date of expiry of his authorisation for assignment."

The requirement of having a valid AFA applies to all assignments under IBC. 'Assignment' is defined under regulation 2(*a*) of the IP Regulations as "any assignment of an insolvency professional as interim resolution professional, resolution professional, liquidator, bankruptcy trustee, authorised representative or in any other role under the Code".

While monitoring of IPs it is observed that few IPs took assignment without holding valid AFA.

- **Delay in statutory timelines**

Speed is the essence of the IBC, the longer the corporate insolvency resolution process, the more will be chances of liquidation. Also, liquidation value reduces with time.

It has been observed that the timeline of 330 days has been breached by IPs in various assignments. It cannot be generalised that delay is due to inadequate capacity of NCLT and Non-Cooperation by the Corporate Debtor. An IP must ensure that he plans all the actions well in advance, communicate to stakeholders and all the steps involved in corporate insolvency resolution process are completed in time bound manner to better preserve economic value. Merely compliance with the provisions after the timelines prescribed cannot be treated as compliance of law.

- Misrepresentation of facts in the minutes of meetings of committee of creditors

Clauses 12 and 16 of the code of conduct for Insolvency Professionals provides that:

"12. An insolvency professional must not conceal any material information or knowingly make a misleading statement to the Board, the Adjudicating Authority or any stakeholder, as applicable.

16. An insolvency professional must ensure that he maintains written contemporaneous records for any decision taken, the reasons for taking the decision, and the information and evidence in support of such decision. This shall be maintained so as to sufficiently enable a reasonable person to take a view on the appropriateness of his decisions and actions."

Following are the common errors observed while inspection of minutes of meeting prepared by the IPs:

(*i*) Minutes of CoC meetings do not specify the mode of participation of CoC members;

(*ii*) Incomplete recording in minutes with regard to the engagement of professionals;

(*iii*) The resolutions were simply written as passed or failed. The names of members who voted for or against the decision or abstained from voting were not mentioned.

(*iv*) Misrepresentation of facts in minutes of CoC meeting.

- **Improver e-voting procedure**

  Regulation 26(1) of the IBBI (CIRP) Regulations, 2016 provides that "The resolution professional shall provide each member of the committee the means to exercise its vote by either electronic means or through electronic voting system in accordance with the provisions of this Regulation.

  Explanation to the said regulation provides that "the expressions ''voting by electronic means'' or ''electronic voting system'' means a "secured system" based process of display of electronic ballots, recording of votes of the members of the committee and the number of votes polled in favour or against, such that the voting exercised by way of electronic means gets registered and counted in an electronic registry in a centralized server with adequate cyber security.

  In few assignments it is observed that IPs take approval of financial creditors on e-mails and does not follow the e-voting procedure. Process of e-voting is an important aspect. It is the duty of the IP to make the CoC aware of and understand the e-voting process.

- Non-filing of proper forms/disclosures to IPA.

  The IPs are required to file relationship disclosure, cost disclosure and CIRP forms with the IPAs. Following are the common issues observed while inspection of forms filed by the IPs:

  In case of relationship disclosures

  (*i*) Delay in submission of disclosure.

  (*ii*) Non-submission of details of all professionals in case of relationship disclosure.

  (*iii*) Appointment of professionals without engagement letters containing detailed scope of work.

  (*iv*) Appointment of relatives or related parties during assignment.

  In case of cost disclosures

  (*i*) Delay in submission of disclosure.

  (*ii*) The information provided in the cost disclosure does not match with the information provided in the relationship disclosure. (*vice versa*)

For example: details of professionals mentioned in cost disclosure, however relationship disclosure has not been submitted. (vice versa)

(*iii*) IPs submitted expenses on running business, however in CIRP forms it has been mentioned that company is not a going concern. (vice versa)

(*iv*) Invoices not maintained by the IPs.

(*v*) The fees paid to professionals, has no approval of CoC.

In case of CIRP forms

(*i*) Delay in submission of disclosure.

(*ii*) Incomplete forms filed

(*iii*) Incorrect details mentioned

(*iv*) Details not in consonance to disclosures already submitted

(*v*) Incomplete attachments

(*vi*) Forms not filed even though were applicable

- Issues in appointment of registered valuers

  In few cases IP appointed registered valuers duly registered with IBBI however provided them engagement letters in the name of their firms/companies which are not IBBI Registered Valuer Entity.

- Non-obtaining of declaration of confidentiality from CoC members while sharing Information Memorandum

  Regulation 36 of the IBBI (CIRP) Regulations, 2016 provides that "The resolution professional shall share the information memorandum after receiving an undertaking from a member of the committee to the effect that such member or resolution applicant shall maintain confidentiality of the information and shall not use such information to cause an undue gain or undue loss to itself or any other person and comply with the requirements under sub-section (2) of section 29."

  In few cases the IPs did not to obtain declaration of confidentiality from CoC members while sharing Information Memorandum.

- Non-submission of records to IPAs

  Section 208(2)(*d*) of the Insolvency and Bankruptcy Code provides that every insolvency professional shall abide by the code of conduct to submit a copy of the records of every proceeding before the Adjudicating Authority to the Board as well as to the insolvency professional agency of which he is a member.

  Clauses 18 and 19 of the Code of Conduct for Insolvency Professionals provides that

"18. An insolvency professional must appear, co-operate and be available for inspections and investigations carried out by the Board, any person authorised by the Board or the insolvency professional agency with which he is enrolled.

19. An insolvency professional must provide all information and records as may be required by the Board or the insolvency professional agency with which he is enrolled."

In few cases it is observed that the IPs did not maintain records or provide the records to the IPAs.

FAQs on Personal Guarantors to the Corporate Debtor

1. What is "Contract of Guarantee"?

Ans: The term "Guarantee holds its origin from the Indian Contract Act, 1872."

Section 126 of the Act introduces three protagonists to the picture of "Contracts of Guarantee" namely Principal Debtor, Creditor or Guarantor or surety respectively.

The Section says that—a "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default.

The person who gives the guarantee is called the "surety";

The person in respect of whose default the guarantee is given is called the "principal debtor", and

The person to whom the guarantee is given is called the "creditor".

2. What is the structure of Liability insofar as Principal Borrower is concerned?

Ans: Under Section 128 of the Indian Contract Act, 1872

— The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.

In other words, Surety and Principal Borrower are ranked *Pari Passu* insofar as liability is concerned.

The term "Co-Extensive" implies either of the two meanings,

(*i*) The creditor has the liberty to sue either Principal Borrower or Personal Guarantor, or

(*ii*) The Guarantor is liable to the full extent as the Principal Debtor.

In *Ram Kishan* v. *State of Uttar Pradesh & Ors.* (2012) 11 SCC 511

Court Held That "the liability of the guarantor/ surety is co-extensive with that of debtor. Therefore, the creditor has the right to obtain decree against the surety & the principal debtor. The surety has no right to restrain execution of the decree against him until the creditor has exhausted his remedy against the principal debtor for the reason that it is the business of the surety to see whether the principal debtor has paid or not. The surety does not have the right to dictate terms to the creditors as to how he should make the recovery and pursue his remedy against the principal debtor at his instance"

3. Can the Personal Guarantors enjoy the benefit of Moratorium which has been imposed on Corporate Debtor?

Ans: In *SBI* v. *Ramakrishnan,* 2018 17 SCC 394

> "The benefit of Moratorium shall not exceed to Personal Guarantors."

4. Can two applications u/s 7 of the Code be simultaneously filed against the Principal Borrower as well as Corporate Guarantor(s) or against both the guarantors?

Ans: The law relating to such provision is ambiguous as there are different opinions from the different benches.

In *Dr. Vishnu Kumar Agarwal* v. *Piramal Enterprise* (2019) 101 taxmann.com 464/151 SCL 535, NCLAT held that

> "There is no bar in the 'I&B Code' for filing simultaneously two applications under section 7 against the 'Principal Borrower' as well as the 'Corporate Guarantor(s)' or against both the 'Guarantors'.
>
> However, once for same set of claim application under section 7 filed by the 'Financial Creditor' is admitted against one of the 'Corporate Debtor' ('Principal Borrower' or 'Corporate Guarantor(s)'), second application by the same 'Financial Creditor' for same set of claim and default cannot be admitted against the other 'Corporate Debtor' (the 'Corporate Guarantor(s)' or the 'Principal Borrower'). "

However, In *SBI* v. *Athena Energy*, 2020 SCC Online, NCLAT Held that-

> "It is clear that in the matter of guarantee, CIRP can proceed against Principal Borrower as well as Guarantor. The law as laid down by the Hon'ble High Courts for the respective jurisdictions, and law as laid down by the Hon'ble Supreme Court for the whole country is binding. In the matter of Piramal, the Bench of this Appellate Tribunal "interpreted" the law. Ordinarily, we would respect and adopt the interpretation but for the reasons discussed above, we are unable to interpret the law in the manner it was interpreted in the matter of Piramal. For such reasons, we are unable to uphold the Judgment as passed by the Adjudicating Authority"

5. Does the personal guarantor gets discharged after the resolution plan is approved?

Ans: Personal Guarantor does not stand discharged,

It is a settled rule of insolvency law in India (even prior to IBC) that the *discharge which* a principal debtor may secure by operation of law in bankruptcy or in liquidation proceedings in the case of a company does not absolve the surety of his liability (*Maharashtra State Electricity Board, Bombay* v. *Official Liquidator* AIR 1982 SC 1497)

In the IBC context,

Hon'ble Calcutta High Court in *Gouri Shankar Jain* v. *Punjab National Bank* (2019) SCC Online Cal 7288 has relied on *Maharashtra State Electricity Board* (*supra*) and *SBI* v. *Ramakrishnan* (*supra*) to hold that a creditor availing a statutory remedy u/s 7 of IBC would not discharge the surety/guarantor, as the same is not a voluntary variance/compromise with the principal debtor.

A personal guarantor therefore presents a second bite at the apple for a creditor who took a haircut in the resolution plan.

6. Can the personal guarantor purchase assets which are being sold in the liquidation?

Ans. Under section 29A(*h*), unless the personal guarantor repays his liability in full when called upon, he cannot be a resolution applicant.

Under section 35(1)(*h*), this also stops the personal guarantor from bidding for the property or actionable claims of the corporate debtor that are in liquidation.

7. Whether the assets of the personal guarantor are part of liquidation estate?

Ans. As per section 36(4)(*c*) of IBC expressly excludes personal assets of any shareholder or partner of a corporate debtor from the liquidation estate of the corporate debtor.

However, the Hon'ble NCLT Mumbai, in *Punjab National Bank* v. *Vindhya Vasini Industries Ltd.* (C.P. (IB) No. 1170 (MB)/ 2017) held that the assets of the personal guarantors can be considered part of the liquidation estate of the corporate debtor by virtue of *inter alia* section 60(2) of IBC, 2016.

•••

Regulatory updates

The IBBI *vide* its notification dated 5th April, 2022 notified amendments in its Voluntary Liquidation Process Regulations by virtue of Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) (Amendment) Regulations, 2022. The amendment is intended to address issues related to delay in completion of voluntary liquidation process of solvent corporate persons. The modified timelines for stipulated activities undertaken during Voluntary liquidation process shall be as follows:

- Preparation of list of stakeholders.- The liquidator shall have to prepare a list of stakeholders within 15 (fifteen) days (against the earlier stipulated forty-five days) from the last date for receipt of claims, where no claim from creditors has been received till the last date for receipt of claims;
- The liquidator shall distribute the proceeds from realization within thirty days (against the previously stipulated six months) from the receipt of the amount to the stakeholders.
- The liquidator shall endeavour to complete the liquidation process of the corporate person within 270 days (two hundred and seventy days) from the liquidation commencement date, where the creditors have approved the resolution under section 59(3)(*c*) or regulations 3(1)(*c*), and 90 (ninety) days from the liquidation commencement date in all other cases (against the previously stipulated 12 months in all situations).

Further, a compliance certificate provision has been incorporated which shall facilitate the AA to adjudicate dissolution applications expeditiously.

(**The notification can be accessed at https://ibbi.gov.in/uploads/legalframwork/08722b75c35b6fbbd5a38299a2284e6a.pdf**)

Framework for Group Insolvency: Canada

The Legislation dealing with the subject of "Bankruptcy" in Canada is:

1. Bankruptcy and Insolvency Act (BIA)

The Regulations framed under this legislation are:

(*a*) Bankruptcy and Insolvency General Rules (C.R.C., c. 368);

(*b*) Eligible Financial Contract General Rules (Bankruptcy and Insolvency Act) (SOR/2007-256) and;

(*c*) Orderly Payment of Debts Regulations.

2. The Companies' Creditors Arrangement Act (CCAA)

There are different approaches to the insolvency proceedings for a Corporate Group in Canada. A Company or a Group of companies may file a petition in a foreign jurisdiction and then seek recognition of those foreign proceedings in Canada. Alternatively, a Company or a Group of companies may file in the jurisdiction that is the group's COMI, with each debtor company filing in only one jurisdiction and then coordinating each separate filing either through recognition proceedings or some other mechanism. Finally, each member in a

Corporate Group may make separate complete filings in Canada and the foreign jurisdiction(*s*).

Coordinated filings are often implemented in circumstances in which there is a Corporate Group consisting of entities that are related but not centrally managed or highly integrated.

Concurrent main filings involve full insolvency proceedings under the CCAA or BIA, as well as a full filing in the foreign jurisdiction(*s*) by the same entity. This approach is administratively complex and has rarely been used since the UNCITRAL Model Law on Cross-Border Insolvency was adopted by Canada in 2009.

Courts and office holders (professionals administering the debtor company's insolvency) involved in multi-jurisdictional insolvency proceedings typically enter into communication or cooperation protocols to ensure that cross-border insolvency proceedings are managed in a harmonious and efficient manner.

2.1 *Factors Supporting Consolidation*

The *CCAA* framework is based on six decisions under the Canadian Act. The decision of the British Columbia Supreme Court in *Northland Properties* was the first Canadian case to engage with the issue of "Substantive Consolidation". In this case, the companies sought, *inter alia*, an order merging and consolidating their reorganizations.

Since there aren't a lot of Canadian cases that deal with this subject, Justice Trainor relied on United States jurisprudence which included a variety of approaches to determine the factors that support Substantive Consolidation in the domestic context. Justice Trainor accepted the analysis in *Snider Brothers Inc. Re;* where by the Court held that it must be clearly shown that not only are the "elements of consolidation" present, but that the Court's action is both necessary to prevent harm or prejudice and to effect a benefit generally. The approach taken was confirmed by the British Columbia Court of Appeal as the correct test for substantive consolidation. However, the four cases that followed on from *Northland Properties* failed to result in the development of significant additional jurisprudence, creating a lacuna in the judicial reasoning as to the principles to be applied.

Nevertheless, in a subsequent case of Atlantic Yarns it was suggested that there is a broad set of principles that should be used to determine the circumstances in which consolidation should be granted by the Court. In the case of Atlantic Yarns, the debtors filed a consolidated plan of compromise and arrangement with the Court under the CCAA. The plan designed by the Court encompassed two classes of creditors for the purposes of voting on the proposed plan, *i.e.,* a secured class and an unsecured class. However, the secured creditors set out the motion that there should be no consolidation of creditors for voting purposes set out in the proposed plan. The issue before the Court was whether a consolidated plan of compromise or arrangement, *i.e.,* substantive consolidation, would be applicable in these circumstances.

As per the CCAA, the court will allow a consolidated plan of compromise and arrangement to be filed for two or

more related companies in appropriate circumstances. In the example of PSINet Ltd. the court allowed consolidation of proceedings (Procedural Consolidation) for four companies that were intertwined and essentially operated as one business. The filing of a Consolidated Plan (combined plan) would avoid complex issues regarding the allocation of the proceeds realized from the sale of the assets, and although consolidation by its nature would benefit some creditors and prejudice others, the prejudice had to be improved and compensated for by concessions made by the parent corporation, which was also one of the major creditors.

Generally, the courts will determine whether to consolidate proceedings by assessing whether the benefits will outweigh the prejudice to particular creditors if the proceedings are consolidated. In particular, the court will examine whether the assets and liabilities are so intertwined that it is difficult to separate them for purposes of dealing with different entities. The court will also consider whether consolidation is fair and reasonable in the circumstances of the case.

Guided by this analysis, Justice Glennie reviewed the "two-step" test taken by the court in Northland Properties. Under the two step process, firstly, there must be a balancing of interests, wherein, it should be ensured that the creditors should not suffer greater prejudice in the absence of consolidation than the debtors would from its imposition. Secondly, the elements of consideration for the application of consolidation must be present. Reliance was placed on the judgment of *PSINet* whereby Justice Farley noted whilst consolidation by its very nature will benefit some creditors and prejudice others, it is appropriate to look at the overall general effect and benefit.

Hence, the approach of adopted in the case of *Atlantic Yarns* can be formulated in three principles. Firstly, consolidation must be appropriate in the circumstances. The court must determine whether the elements of consolidation are present, such as the significant intertwining of assets and liabilities. Secondly, there must be a balancing of interests, ensuring the benefits will outweigh the prejudice to particular creditors if the debtor estates are consolidated. Thirdly, it is appropriate to look at the overall effect of consolidation. The court will consider whether consolidation is fair and reasonable in the circumstances of the case.

The direction given by Justice Glennie in Atlantic Yarns is the most significant decision on the factors supporting substantive consolidation since the case of Northland Properties. Prior to this judgment the application of substantive consolidation was always based on specific facts of each case. However, Atlantic Yarns has confirmed that the questions to be asked in determining whether to grant consolidation are still the same as they were twenty years ago at the time of Justice Trainor's judgment in Northland Properties, only supplemented with the need to ensure the overall effect of consolidation is fair and reasonable. The approach that has been followed subsequently is both flexible and broad; since it ensures the factors supporting consolidation can be applied in a variety of CCAA cases.

Re Northland Properties

The British Columbia Supreme Court's decision in Re Northland Properties was the first Canadian case to address substantive consolidation and it remains a leading authority on the principle. As neither the CCAA nor the Bankruptcy and Insolvency Act (BIA) contained any provisions relating to substantive consolidation, the Court relied on its equitable principles jurisdiction under principles of natural justice to build up the principle of substantive consolidation. Northland involved a group of financially distressed real estate corporations that sought protection under the CCAA. Since the corporate group was managed "as a single entity" and its finances were described as "inextricably intertwined", an application for substantive consolidation was brought up.

Although the principle had been regularly applied in the past, the approach of the courts had been case specific instead of elucidating the factors that necessitated consolidation. The Court in this matter explicitly added an additional precondition to substantive consolidation, *i.e.,* its overall effect must be "fair and reasonable in the circumstances."

FACTORS DETERMINING WHETHER SUBSTANTIVE CONSOLIDATION SHOULD BE DONE:

First, consolidation requires that the corporate group's financial affairs, business operations, and control functions be significantly intertwined.

Second, the court will assess the amount, degree, and type of prejudice suffered by creditors. Finally, consolidation must be fair and reasonable.

NORTEL CASE EXAMPLE**:** NNC, together with its 130 subsidiary corporations, formed the "Nortel Group", which operated in sixty sovereign jurisdictions. In order to maximize efficiency, the Nortel Group did not restrict its operations by jurisdiction. Rather, the Group "operated along business lines as a highly integrated multinational enterprise with a matrix structure that transcended geographic boundaries and legal entities organized around the world." After a series of economic difficulties, most entities within the Nortel Group filed for bankruptcy protection in January 2009. By June 2009, it was evident that the Nortel Group would not emerge as a going concern and liquidation proceedings were commenced.

The Court's conception of *pro rata* allocation involved four main features:

(*a*) First, each entity in the Nortel Group was entitled to a pro rata share of the asset realization based on the percentage of claims against that entity relative to the total claims against the Nortel Group. Once the funds were allocated, each entity independently administered its own claims process.

(*b*) Second, all intercorporate claims remained outstanding.

(*c*) Third, each corporate entity retained any cash on hand and applied it towards the entity's creditors.

(*d*) Finally, creditors with guarantees were entitled to make a claim for the full value of the guarantee.

The outcome for all creditors was a 71 per cent return on their claims against the Nortel Group.

The concept of *Pro rata* allocation is analogous to Substantive Consolidation. In particular, it involves distributing assets without regard for their source. Perhaps a better perspective on Substantive Consolidation is that it exists in a number of forms; *pro rata* allocation being merely one variation. Although Nortel did not apply Substantive Consolidation, this decision is significant for a number of reasons. Foremost it confirmed that substantive consolidation remains entrenched in Canadian insolvency law. By employing a solution that included features of substantive consolidation, Nortel reopened the debate on using the principle more generally. Lastly the case highlighted judicial antipathy towards "value-erosive adversarial and territorial litigation."

One school of thought was that the pro-rata allocation being argued for amounted to 'substantive consolidation', *i.e.*, treating the assets and liabilities of the different Nortel companies as, in effect, the assets and liabilities of one estate. Since the proceedings were ongoing in both the US and Canadian Courts, the opinions of two courts were sought for on the same issue. The US court stated that it would not be open to it to make such an order on the facts of this case whereas the Canadian court said that case laws could allow it, but that in this case it would decline to adopt that approach. In the US and Canada there must be evidence of a very significant disregard for legal entities in a group prior to insolvency before an approach of substantive consolidation post-insolvency will be adopted.

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