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INSOLVENCY AND BANKRUPTCY JOURNAL

Equality today: Sustainability tomorrow

ICSI Institute of Insolvency Professionals (ICSI IIP)

Reach us @ Below

Registered Office:

Third Floor, ICSI House
22, Institutional Area, Lodhi Road
New Delhi 110 003

Corporate Office:

ICSI House, C 36, Third Floor, Sector 62, Noida 201 309
Tel: +91 (120) 408 2142
Email: info@icsiiip.in
Website: https://icsiiip.in/

Working Hours:

Monday to Friday
09:00 AM - 05:30 PM

For any query, feel free to connect at below provided Number/ Email Id

Department	Email Id	Direct Number
Enrolment & Registration as an Individual Insolvency Professional (IP)	enrollment@icsiiip.in	+91 74289 22988
Enrollment & Registration as IPE	enrollment.ipe@icsi.edu	+91 120 408 2142
Monitoring & Inspection/ Authorization for Assignment/ Compliance (IBC)	reporting@icsiiip.in	+91 120 408 2153 +91 96250 53525
Program	programs.icsiiip@icsi.edu	+91 120 408 2142
CPE	programs.icsiiip@icsi.edu	+91 120 408 2196
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ICSI IIP Celebrated International Women's day

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From Chairman's Desk

"World would be happier place if women made equal partners in progress of humanity"

President Droupadi Murmu

March brings with it a unique celebration : The International Women's Day is celebrated on March, 8 every year to not only recognize the contribution of women to the society but to bring the world closer to gender equality. In more than 25 countries, the Day is an official holiday and observed unofficially in many more. A day born out of women's strike is now an international festival of women - revealing their social, economic, cultural, and political achievements.

It is said "Some leaders are born women", but I strongly believe that all women are born leaders. Women have inbuilt leadership, management and multitasking skills which enable them to manage multiple things together with grace and dignity. Taking a note of the years gone by, there has been a paradigm shift in leadership lending tremendous and powerful significant changes around the World. The Indian stands in a position no with women from varied backgrounds dominating with presence in the leadership roles and paving the way to success and inspiring millions globally. Be it the President of the nation, Smt. Droupadi Murmu, representing the tribal community and the youngest person to occupy the position, Smt. Nirmala Sitharaman, the Finance Minister of India, Smt. Falguni Nayar, Founder of Nyka, Smt. Indra Nooyi, Former CEO of PepsiCo, a consistent on the Forbes Influential list and Padma Bhushan Awardee, Smt. Madhabi Puri Buch, the first-ever woman Chairperson of SEBI, Smt. Kiran Mazumdar-Shaw, Chairperson of Biocon, and so on. The number of women entrepreneurs are increasing tremendously and so is that of professionals; all of them inspiring young girls all over the world.

Technology and innovation have also shaped our lives in ways unfathomable. It has changed our way to behave and the way we operate. Every single aspect of our life is dependent on technology. The age is one of virtual reality and artificial intelligence. However, to quote UN statistics, women make up only 22% of artificial intelligence workers globally, while 37% of women do not use the internet. 259 million fewer women have access to the Internet than men, even though they account for nearly half the world's population. Therefore, the theme adopted for this year's women's day seems apt wherein women should benefit from the opportunities offered by technological transformation.

Extending my best wishes of all the festivals of the month passed, I would say that "better the balance, better the world". Every small step towards change will bring us closer to balance. So change what you can, when you can.

With warm regards,

(P.K. Malhotra)
ILS (Retd.) & Ex-Law Secretary,
Ministry of Law & Justice, GoI, Chairman, ICSI IIP

INSTITUTE OF INSOLVENCY PROFESSIONALS
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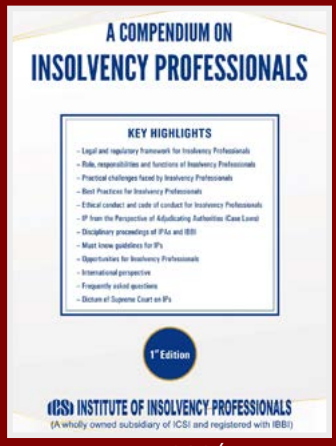
Azadi Ka Amrit Mahotsav

ICSI IIP's Publications

A Compendium on Insolvency Professionals

ICSI IIP has brought-out a comprehensive publication on Insolvency Professionals titled 'Compendium on Insolvency Profession', covering varied aspects like legal and regulatory framework for IPs, disciplinary proceedings against IPs (and their outcomes), ethical and code of conduct for IPs, opportunities for IPs and case laws related to IPs.



INR 1000/-
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INR 400/-
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100 Landmark Judgements of NCLAT (covering NCLAT judgements on IBC from the year 2019 to 2021)

This publication is about making the legal provisions in the Insolvency & Bankruptcy Code, 2016 and the interpretations thereof easily discernible for the readers. This is approached through the analysis of 100 crucial landmark judgments delivered by Hon'ble National Company Law Appellate Tribunal (NCLAT). The landmark judgments, as delivered by Hon'ble NCLAT, have been identified and their ratios culled out in this book.

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Azadi Ka Amrit Mahotsav

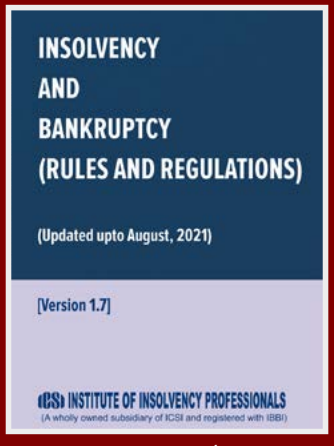
Insolvency and Bankruptcy Code, 2016 (Version 1.7)

This Publication (updated upto August, 2021) covers the provisions of Insolvency and Bankruptcy (Amendment) Act, 2021 which provides the specialised forum to oversee Insolvency and Liquidation proceedings.

INR 500/-
Postage Extra

Insolvency and Bankruptcy (Rules and Regulations) (Version 1.7)

This Publication (updated upto August, 2021) covers all the Rules, Regulations and Notifications along with all the Circulars and Guidelines issued by Insolvency and Bankruptcy Board of India (IBBI).



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Headquarter
ICSI House, C 36, Third Floor,
Noida, Sector 62, Uttar Pradesh 201309
Landline: +91 120 408 2142 (2264)
Email: info@icsiiip.in
Website: https://icsiiip.in/

COO's Message

EVERYTHING IS WITHIN YOUR POWER AND THE POWER IS WITHIN YOU.

- Janice Trachtman

The Insolvency and Bankruptcy Code, 2016 (IBC/ Code) introduced a timebound mechanism for resolution of insolvency and bankruptcy cases in India. It consolidated the fragmented laws relating to reorganization, insolvency resolution and liquidation of corporate persons and individuals. The Code envisaged a collective effort not only to keep a distressed entity alive but also to maximize the value of its assets for benefit of all stakeholders. The IBC is a relatively new legislation in India. Like any other new law, in order to remain relevant with the changing dynamics of the market, the Code has undergone several amendments and it still continues to be a 'work in progress'.

This law gave birth to a new set of professionals known as Insolvency Professionals. This came to be a new lifeline for a lot of professionals who were otherwise dabbling in their jobs and practices as Company Secretaries/Advocates/Chartered Accountants/ senior management professionals etc.

Currently, as per the latest data available, out of 4216 Insolvency Professionals, only 10% are women professionals. Women leaders are just as ambitious as men, but at many companies, they face headwinds that signal it will be harder to advance. They're more likely to experience belittling microaggressions, such as having their judgment questioned or being mistaken for someone more junior. Since an Insolvency Professional is a leadership and management role, a change in the mindset of general public is utmost important to their contribution in this profession.

Although due recognition is being given to women in the workforce, the numbers are still scanty at the upper management level. Only 4.7% of CEOs and 7.7% of board seats were held by women in 2021, a number that has increased just slightly from 3.2% in 2014. In a refreshing turn of events, women are being encouraged not just at an individual level but also at an institutional level to scale new heights. The Government of India has taken various steps to ensure empowerment of women through their social, educational, economic and political uplifting through various schematic interventions. In order to enhance the employability of female workers, the Government is providing training to them through a network of Women Industrial Training Institutes, National Vocational Training Institutes and Regional Vocational Training Institutes. Further, in order to encourage employment of women, a number of enabling provisions have been incorporated in the recently enacted Labour Codes viz. the Code on Wages, 2019, the Industrial Relations Code, 2020, the Occupational Safety, Health and Working Conditions Code, 2020 and the Code on Social Security, 2020 for creating congenial work environment for women workers.

These initiatives are baby steps towards a more equal and equitable workforce in the country. We, at ICSI IIP, would like to urge each and every professional to empower the women in their lives, around them and the women in their offices by providing an inclusive and safe work environment.

We hope by the next year, women not only break the glass ceiling but also publicly placed barriers and emerge powerful and empowered.

ICSI IIP is there at every step to encourage our existing women members to claim their space and for new women members to make their space in the insolvency ecosystem.

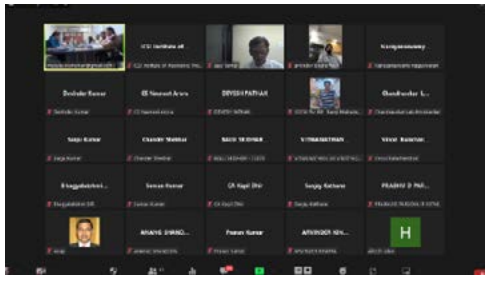
Looking forward to your support and guidance to the ICSI-IIP.

(Dr. Prasant Sarangi)

COO (Designate), ICSI IIP

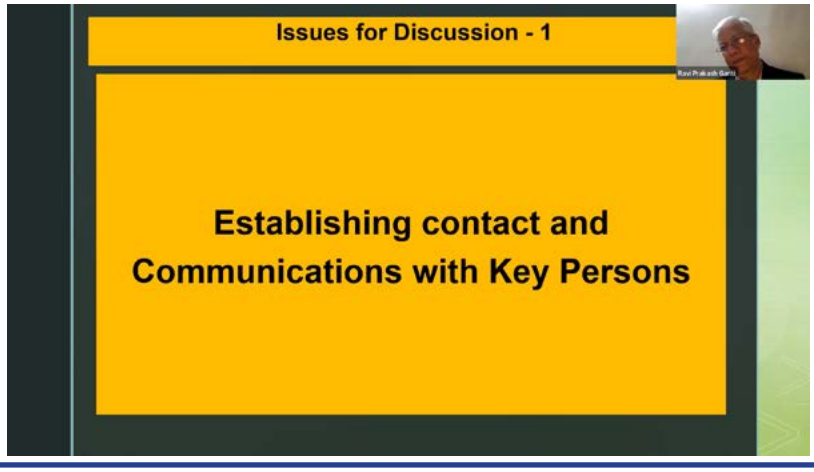
Events @ICSI IIP

(Workshops, Webinars, Round-table Discussions, Interactive Meets etc)



ICSI IIP organised a Workshop Series "PERSPECTIVES ON IBC Series IV -AN ARRAY" to celebrate Women's week from 1st March, 2023 to 7th March, 2023. The topics covered in the series were ranging from Drafting, pleadings and Arguments before NCLT and NCLAT to Mock - CoC Meeting, etc.

Let's Connect: A Platform for IPs on Managing the CD as Going Concern on 6th Feb 2023 moderated by IP Ravi Prakash Ganti

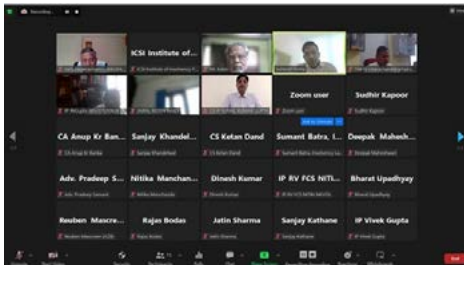


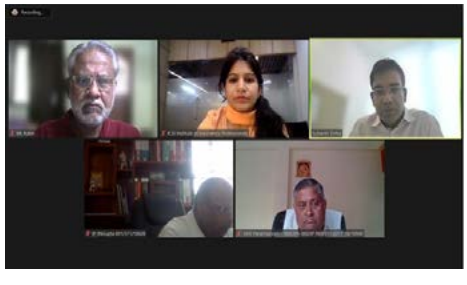
Insights of Power Sector & Manufacturing Sector under IBC by IP Navneet Kumar Gupta and IP Anish Nanavaty on Saturday, 18th February 2023

Alternative Career Options for IPs (Part 1) by IP (Adv.) Rocky Ravinder Gupta conducted on February 24, 2023

Alternative Career Options for IPs (Part 2) by Senior Advocate Amarjit Singh Chandhiok - President, Maadhyam, Council for Conflict Resolution) and IP (Adv.) Rocky Ravinder Gupta (INSOL Fellow) on February 28, 2023

Restructuring Process Involving Financial Service Providers (FSP) by Adv. Sumant Batra and Adv. Nilang Desai on 27th & 28th February 2023 respectively





Interviewee:
Ms. Subramaniam Aneetha

Insolvency Professional, Registered Valuer and Independent Director.

Founder: Aneetha & Co, Chartered Accountant Firm

INTERVIEW

1. What do you think have been the key achievements of Insolvency and Bankruptcy law since its commencement?

There is a paradigm shift of the business conduct from the "debtors in possession" to" Creditors in Control" played a pivotal role in the business of the Corporate, without compromising the going concern concept. It is important to note that the business conducted by Corporate altered after the implementation of the Insolvency and Bankruptcy Code, 2016. The prospective of borrowings by the Corporate are completely changed, further clear understanding is developed amongst all the stakeholders and slowly discipline is brought into the business. The focus is mainly to bring the company back to the momentum at the shortest possible time frame, concentrating on resolution process, failing which the recovery process is initiated. The main fulcrum is Resolution mechanism, not Recovery mechanism.

2. What made you pursue the field of IBC and become an Insolvency Professional considering it is relatively new and niche field?

IBC is the game changer, in conducting the business of the Corporate. As an IP, we can use our knowledge & experience extensively to bring back life to the Corporate provided it deserves the support services.

3. So far how was your experience as an Insolvency Professional?

Excellent, it is an eye-opener in all spheres of life. IBC is not a stand-alone act, we have to equip ourselves with all other acts intact. In other words, we have to update ourselves every day in this regard. People having passion to do the value creation for the society, this profession helps a lot.

4. Since you are also a Charted Accountant, how does it help you in handling the assignments and what practical challenges you face?

My approach to the entire profession has been completely changed. Being a Law post-graduate along with CS and CWA, enabled me to look into the entire gamut of profession in different perspectives. As a professional, it gives immense pressure and pleasure to do the assigned job. Bringing the CoC members in align with the Code, Rules and Regulations is the biggest challenge.

5. Since, you have handled number of assignments, how has your experience been with the Promoters of the Corporate Debtors?

All the promoters are not bad. They have an aptitude to start of the business, take ownership of the results and face all challenges. Due to various factors, the ongoing business face setbacks. Being a facilitator, it is part of the duty of the IPs to interact with the promoters understand the gravity of the situation, explain the promoters the due process, purpose of IBC , Roles and responsibilities of the promoter post admission of INSOLVENCY RESOLUTION PROCESS and it is important to revive the corporate in a time bound manner. To understand the gravity of the situation, we need the co-operation of the promoters. Focussed interaction with them and studying their past process patterns , the day to day decision making styles in particular and its outcomes etc ., to understand their real motive and vision. The powers of the board is only suspended not their duties. It is important to keep this in mind and work with them. Filing an application against them will not help us to complete the assigned task, rather it is also important to educate them on the legal grounds and also help them to get their company back to normalcy provided if they are MSME and does not have illicit mind to siphon the funds

6 How significantly do you think the regulators i.e., IBBI and IPAs serve the profession of Insolvency Professionals?

The relationship between the IP, IPA and IBBI have to be improved. IPA and IBBI are not only the regulators, but it is also a duty cast upon them to give a support service to all the IPs to improve the smooth functioning of the system. There is scope for improvement in all roles. The fulcrum of the entire system revolves around the IP's and conducting training program by the regulatory bodies, both IBBI and IPA across the country will also help the IP's to understand the system in better way and whenever or wherever required, the regulators should also participate in field level guidance and support services.

7. How being an Insolvency Professional shaped your professional career from the time you got yourself registered?

I would not be wrong if I say that being an Insolvency Professional is the best part of my career as I enjoy this role the most. With each amendment and case law the rules of the game keep changing and my learning component increases significantly. It certainly helps in legal, compliance and bookkeeping perspectives. It has also addressed to improve my patient quotient and listening capacity.

8. Any piece of advice you would like to share with the prospective aspirants or Fresh Insolvency Professionals who are seeing their career in Insolvency Law?

Fresh Insolvency Professionals should enter with an open mind and learn to look at the issues from the angle of fiduciary capacity and not with ownership mentality. Being an Insolvency Professional will give a different exposure and I would encourage more Professionals to get into this area. If there is a passion towards this profession, excellent scope is there to learn and also to earn goodwill in the long-run.

9. What are the key elements in your opinion that can be addressed to make IBC more effective?

As on date primary issue is vacancies in the NCLT benches and this must be filed quickly.

Further, in certain areas the burden on NCLT can be reduced by giving automatic approval on decision on basic legitimate applications viz extension, assignment and dissolution, by filing certain forms with IBBI in this connection. It is also important to implement, say, built in provision that the applicant creditor shall deposit a sum of Rs. 10,00,000/- (say) with in a three days of passing the order to meet out the basic expenses of the Insolvency professional. This amount can be treated as interim finance which may carry interest from the 3rd day till resolution being approved by the authority.

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

This law shall bring in prosperity to our Nation provided all the stake holders understand the real purpose of this law and its long term positive benefits to the society at large in right and proper sense . The real success of this law is lying on adhering to the timelines stipulated ,not only by the Insolvency professional but also by all the stake holders in each and every stage of the process which will surely deliver the best results to all the stake holders and the society at large and success of this law in the long run.

ICSI IIP – AT A GLANCE

1. During the month of February 2023

S. No.	Particulars	Details
1.	Members enrolled	4
2.	Members registered	8
3.	Inspections conducted	1
4.	IPs monitored	5
5.	AFA applications received	43
6.	AFA applications approved	37
7.	Complaints/Grievances received	3
8.	Complaints/Grievances disposed off	2
9.	SCN issued	NA
10.	Disciplinary action taken	NA

2. During the month of February 2023, following programs were organised by ICSI IIP,

Workshops

S. No	Date of Workshop	Topic
1.	18.02.2023	**Insights of Power Sector & Manufacturing Sector under IBC**
2.	24.02.2023	**Alternative Career Options for IPs (Part 1)** - Turn Around & Business Rescue - Preventing Company from getting into Insolvency
3.	27.02.2023 & 28.02.2023	**Restructuring Process Involving Financial Service Providers (FSP)**
4.	28.02.2023	**Alternative Career Options for IPs (Part 2)** - Mediation in Insolvency - Pre-default and Post-Insolvency

Interactive meets

S. No	Date of event	Topic
1.	06.02.2023	**Let's connect: A platform for the IPs** – Managing the CD as Going Concern

CA Vikram Kumar,
Insolvency professional

Fate of claims not filed/ not admitted by IRP/RP.

OVERVIEW

Collation and admission of claims in CIRP/liquidation process is critical to safeguard the interest of all stakeholders and also to minimize needless litigation by claimants whose claims have not be considered /admitted by the IRP/RP.

In this article, the author has delved into the various issues around claims and its implications for successful completion of an insolvency resolution/ liquidation process.

CLAIM AND ITS INTERPLAY WITH DEBT AND DEFAULT

The definition of claim, debt and default is as stated below:

Section3(6) defines "Claim" as

"claim" means –

(a) **a right to payment**, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured, or unsecured;

(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to **a right to payment**, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured"

"Section 3(11) defines "Debt" as

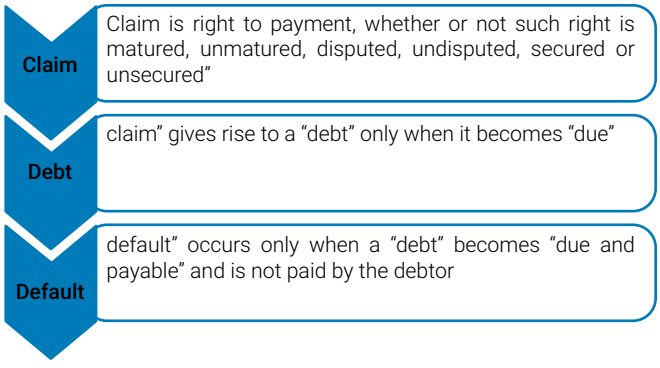
"debt" means a liability or obligation in respect of **a claim which is due** from any person and includes a financial debt and operational debt;"

Section 3(12) defines "Default" as

"default" means **non-payment of debt** when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be;"

Hence "claim" gives rise to a "debt" only when it becomes "due", a "default" occurs only when a "debt" becomes "due and payable" and is not paid by the debtor.

The close correlation between claim, debt and default is explained in the diagram below:



It is vital to note that as per Section 21 of the Code, the voting share is determined **on the basis of the financial debts** owed to the creditors of the corporate debtor not on the basis of claims filed by the creditors.

DUTIES OF IRP/RP WITH RESPECT TO CLAIMS

The various duties of the IRP/RP as stated in the Code and the CIRP Regulations with respect to claims is stated below for a quick recap:

Section 18- Duties of interim resolution professional –

*(b) receive and collate all the claims **submitted by creditors to him**, pursuant to the public announcement made under sections 13 and 15;*

It is important to note that that the IRP is required to collate only the said claims which are submitted to him by the creditors. The moot question is to determine the fate of claims not submitted before the IRP/RP. This issue will be examined in latter part of the article.

Section 21- Committee of creditors -

(1) The interim resolution professional shall after collation of all claims received against the corporate debtor and determination of the financial position of the corporate debtor, constitute a committee of creditors.

Section 25- Duties of resolution professional (2)(e) maintain an updated list of claims; Provisions of CIRP Regulations:

Regulation 6(2)(c)- Public announcement.

The public announcement shall provide the last date for submission of proofs of claim, which shall be fourteen days from the date of appointment of the interim resolution professional.

Regulation 12(2)- Submission of proof of claims (as amended w.e.f. 04.07.2018)

*A creditor, who fails to submit **claim with proof** within the time stipulated in the public announcement, may submit the claim with proof to the interim resolution professional or the resolution professional, as the case may be, on or before the ninetieth day of the insolvency commencement date.*

As per Regulation 6(2)(c) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (in short CIRP Regulations), the last date for submission of claims before the Interim Resolution Professional (IRP) is 14 days from the date of appointment of the IRP. However, in practice, a large number of claims are received by the IRP/RP after the 14 days of his appointment. Regulation 12(2) of the CIRP Regulations as amended w.e.f. 04.07.2018 provides for late submission of claims. The said Regulation 12(2) provides that, a creditor may submit the claims on or before 90th day of the insolvency commencement date. Hence upto the 90th day of the insolvency commencement, claims can be filed and the IRP/RP can admit the said claims upto the 90th day of the insolvency commencement date.

It is pertinent to note that the adjudicating authorities have held the said period of 90 days to be directory in nature and therefore the said timelines are not mandatory in nature. Hence claims filed after 90 days are also to be considered by the RPs.

Regulation 12(2) prior to amendment dated 03.07.2018

*A creditor, who failed to submit **proof of claim** within the time stipulated in the public announcement, may submit such proof to the interim resolution professional or the resolution professional, as the case may be, **till the approval of a resolution plan by the committee**.*

The intention & the purpose of the above amendment made vide Notification No. IBBI/2018-19/GN/REG031, dated 3rd July, 2018 is twofold namely:

(a) To ensure timely completion of CIRP process and to discourage the creditors to file the claim at the fag end of the process.

(b) The phrase "proof of claim" was replaced with "claim with proof" thereby to ensure that all claimants file their claim along with the supporting documents substantiating their claim. The phrase "proof of claim" could be interpreted as the claimants are not required to submit any claim but they shall be required to file proof of the claim only if so, asked for by the IRP/RP.

JUDGMENT DATED 6TH SEPTEMBER, 2022 OF THE HON'BLE SUPREME COURT OF INDIA IN THE MATTER OF STATE TAX OFFICER VS. RAINBOW PAPERS LIMITED. [CIVIL APPEAL NOS. 1661 OF 2020 AND 2568 OF 2020]

In this landmark judgment, which has been termed by many as disruptive in nature, the Hon'ble Supreme Court of India has made some very important observations with respect to filing of claims by the State Tax Officer in the CIRP of Rainbow Papers Limited. The key observations of the Hon'ble Apex court with respect to filing of claims by the State Tax Officer are summarized below:

Sl. No.	Observation / Ruling	Para / Page No.
1	Under the unamended provisions of regulation 12(1) of CIRP Regulations, the State Tax Officer (appellant) **was not required to file any claim**. Read with regulation 10, the appellant would only be required to substantiate the claim by production of such materials as might be called for.	24/18
2	**There was no obligation on the part of the State to lodge a claim in respect of dues which are statutory dues** for which recovery proceedings have also been initiated. They were never called upon to produce materials in connection with the claim raised towards statutory dues.	25/18
3	The Books of Accounts of the Corporate Debtor (CD) would have reflected the liability of the CD to the State in respect of its statutory dues. In abdication of its mandatory duty, the RP failed to examine the Books of Accounts of the CD, verify and include the same in the information memorandum and make provision for the same in the resolution plan. The resolution plan does not conform to the statutory requirements of the Code and is, therefore, not binding on the State.	26/19

It is pertinent to note that the Hon'ble Apex court made the above observations in light of the unamended provisions of Regulation 12 of the CIRP Regulation. Prior to the amendment effective from 04.07.2018, the Regulations used the phrase "Proof of claim". The phrase "proof of claim" was interpreted by the Hon'ble Apex court as- the claimants are not required to submit any claim but they shall be required to file proof of the claim only if so, asked for by the IRP/RP.

It is also explicit from the above judgment of the Hon'ble Apex court that liabilities reflected in the books of accounts of the corporate debtor has to be considered by the IRP/RP in the information

memorandum, irrespective of whether claims are filed or not. The moot question which arises out of this said judgement of the Hon'ble Apex court is – can the RP admit a claim merely because it is reflected in the books of accounts and is verification of claims by the IRP/RP a mere formality? We shall attempt to answer these questions in the latter part of this article.

CLASSIFICATION CLAIMS

Claims can be broadly classified under the below mentioned categories:

(a) Claims filed and admitted by the IRP/RP

(b) Claims filed late and not admitted by the IRP/RP

(c) Claims not filed but appearing in the books of accounts

(d) Claims not filed and not appearing in the books of accounts but the claimant has documents to substantiate that the claim exists.

The treatment of the various class of claims as stated above has been discussed below.

VARIOUS ISSUES AROUND CLAIMS AND ITS FILING BEFORE THE IRP/RP

The various issues pertaining to filing and admission of claims can be summarized as stated below:

(a) Is filing of claims optional or mandatory?

(b) Can claims filed late i.e., after the timelines stipulated in Regulation 12(2) of the CIRP Regulations be admitted by the RP?

(c) Can claims be filed post approval of the resolution plan by the CoC?

(d) If the claim has not been filed by the financial creditor, can the said FC be admitted to CoC?

(e) Has CoC any role to play in admission of claims?

(f) Can claim of a related party be converted to a claim of an unrelated party?

(g) If claims are not filed, but reflected in the books of accounts, can the IRP/RP admit the claims merely because it is reflected in the books of accounts?

(h) If claims are not reflected in the books of accounts, but the claimant has documents to substantiate that the claim, can the IRP/RP admit such claims?

(i) Is verification of claim a mere formality? or what is the IRP/RP supposed to verify during the process of claim verification?

We shall attempt to answer each of these questions with reference to various judicial pronouncements and the extant provisions of the Code and the CIRP Regulations.

VERIFICATION OF CLAIM BY THE IRP/RP

The Hon'ble Apex court in the matter of **Committee of Creditors of Essar Steel India Limited Vs. Satish Kumar Gupta & Ors. [Civil Appeal No. 8766-67/2019, judgement dated 15.11.2019]** has held that the role of the RP is not adjudicatory but administrative, it is important to note that, verification & admission of claim by the RP is not equivalent to adjudication. verification of claim is an integral part of the duties of RP. The RP is not mere post-office to merely take a claim and send it forward. Verification of claim is necessary for some of the reasons stated below:

(a) Claim is within limitation period

(b) Claim is genuine and not false/misleading, which can entail imposition of penalties. Form "A" – format for public announcement states that "Submission of false or misleading proofs of claim shall attract penalties". It is therefore the duty of the RP to examine if the claims are not false/ misleading.

(c) Verification of security interest held by the creditors.

(d) Claims are properly substantiated with proof of supporting documents; this becomes all the more critical where books of accounts are not maintained upto the date of commencement of CIRP.

(e) Rate of interest applied is as per the terms of sanction/agreement with the corporate debtor

Proper verification of claim by the RP can go a long way in generating confidence amongst all the stakeholders with respect to the conduct of the RP and eliminating needless litigation by claimants for

adjudication of their claim admission before the adjudicating authorities.

It can therefore be safely concluded that verification of claim is not a mere formality but critical for successful completion of the CIR Process.

We shall now delve into each of the issues/ concerns related to claims with their related judicial pronouncements/ extant provisions of the Code & CIRP regulations for clarity on the subject.

Concern No. 1

Is filing of claims optional or mandatory?

Regulation 12(1) of the CIRP Regulations states as follows:

Regulation 12. Submission of proof of claims.

*(1) Subject to sub-regulation (2), a creditor **shall submit** claim with proof on or before the last date mentioned in the public announcement.*

*(2) A creditor, who fails to submit claim with proof within the time stipulated in the public announcement, **may submit the claim** with proof to the interim resolution professional or the resolution professional, as the case may be, on or before the ninetieth day of the insolvency commencement date*

The phrase used in Regulation 12(1) of the CIRP Regulation is 'creditor shall submit claim with proof; hence the use of word shall denote that the filing of claim by all creditors are mandatory.

There are various provisions in the Code and the CIRP Regulations pertaining to submission of claims by various category of creditors.

The insolvency law committee in its report dated 26.03.2018 has also recommended that *"nuances regarding submission of claims, constitution of the CoC, verification of claims, etc. are captured in the CIRP Regulations, the Committee deemed it fit to explicitly provide in the Code that the IBBI has the power to specify the last date for submission of claims, to provide for further flexibility in streamlining the timelines within the CIRP in relation to submission of claims"*

Hence it can safely be concluded that the intent of the legislature has always been to make submission of claim mandatory, without submission of claims by the creditors, it would be extremely difficult for the resolution professionals to verify and admit the claims.

In this context, it is pertinent to refer to the judicial pronouncement in the matter of **Doha Bank Q.P.S.C Vs. Manish Dhirajlal Kaneria, Resolution Professional of Reliance Infratel Ltd. [IA No. 1960/MB/2019 in CP (IB) No. 1385/MB/2017 dated 02nd March, 2021]**

When financial creditors were admitted to the CoC by the RP merely on the basis of corporate guarantees perused by the RP but no claims were filed by the financial creditors (R2 to R7), the Hon'ble NCLT, Mumbai Bench observed as follows:

"-----The statutory Forms require that the Creditor must submit its claim with proof, this itself indicates that the proof so submitted would form part of the RP's records for collation of the claims and for verification of the Adjudicating Authority if the need so arose. As far as the claims of R2 to R7 are concerned such proofs never saw the light of the day nor was it submitted as required under the statute. It is trite that when a statute envisages a particular procedure for an act to be done, the act must necessarily be done in the manner so provided"

The Hon'ble NCLT, Mumbai Bench also referred to the judgement of the Apex court in the case of **Shiv Kumar Chadha Etc. vs Municipal Corporation of Delhi [1993 SCR (3) 522],** wherein the Apex court observed as regards the well-known principle in the following words.

"... if a statute requires a thing to be done in a particular manner, it should be done in that manner or not all. This Court has also expressed the same view in respect of procedural requirement of the Bombay Tenancy and Agricultura Lands Act in the case of Ramachandra Keshav Adke v. Govind Joti Chavare, AIR 1975 SC 915.

the Hon'ble NCLT, Mumbai Bench therefore concluded that *"----a statutory mandate requires strict compliance. In the instant case such compliance is squarely lacking. ---- The irresistible conclusion would be that Resolution Professional (R1) without proper submission of documents before him and without proper verification admitted R2 to R7 as Financial Creditors of the Corporate Debtor, therefore the admission of R2 to R7 into the CoC of the Corporate Debtor basing on the Corporate Guarantees dated*

03/03/2017 reportedly executed by the Corporate Debtor in their favour is not proper."

Hence it can be concluded from the above discussion that the filing of claims is mandatory and not optional.

Concern No. 2

Can claims filed late i.e., after the timelines stipulated in Regulation 12(2) of the CIRP Regulations be admitted by the RP?

There are umpteen judicial pronouncements where it has been held by the adjudicating authorities that delayed claims should not be rejected by the RP. Some of the said judicial pronouncements are stated below:

(a) Edelweiss ARC Vs. Adel Landmarks Ltd [NCLT, Principal Bench –

(IB) 1083/2018 dated 06.06.2019]

(b) State Bank of India Vs. Surya Pharmaceuticals Ltd. [NCLT, Principal Bench – (IB) 904(PB)/2018 dated 17.05.2019]

The Hon'ble NCLT, Principal Bench observed as stated below:

"We have repeatedly held that rejection of claim on the ground of delay is not sustainable because the provision has been held to be directory. In that regard reference may be made to the orders dated 01.05.2019 passed in CA-727(PB)/2019 in CP. No. (IB)-737(PB)/2018, Twenty First Century Wire Rods Ltd. & in the case of the corporate debtor itself on 30.04.2019 in CA- 729(PB)/2019 where the same counsel for Resolution Professional has appeared. ***We wish to make it clear that all the Resolution Professionals shall make a note of these repeated orders passed by NCLT clarifying that claim of an applicant, like the present one, could not be rejected on the ground of delay as the provision has been held to be directory"****. (Emphasis added)*

Hence it can be concluded from the above discussion that the claims even though filed beyond the timelines stipulated in Regulation 12(2) of the CIRP Regulations cannot be rejected by the RP.

Concern No. 3

Can claims be filed post approval of the resolution plan by the CoC?

The Hon'ble Apex Court in its landmark judgement in the matter of **Committee of Creditors of Essar Steel India Limited Vs. Satish Kumar Gupta & Ors. [Civil Appeal No. 8766-67/2019 and other petitions dated 15.11.2019]** observed as follows:

"…successful resolution applicant cannot suddenly be faced with "undecided" claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by the successful resolution applicant"

Hence with the judgement of the Hon'ble Apex Court, this issue has been put to rest and the adjudicating authorities post the above-mentioned judgement of the Hon'ble Apex Court, have in unison passed several orders wherein it has been held that- all claims must be submitted to and decided by the Resolution Professional so that a prospective Resolution Applicant knows exactly what amount has to be paid and to whom in order that it may then take over and run the business of the Corporate Debtor. Therefore, claims that are not submitted or are not accepted or dealt with by the Resolution Professional and such Resolution Plan submitted by the Resolution Professional is approved by the adjudicating authority, then those claims would stand extinguished.

Hence it can be concluded from the above discussion that claims cannot be filed post approval of the resolution plan by the CoC.

Concern No. 4

If the claim has not been filed by the financial creditor, can the said FC be admitted to CoC?

As discussed in Concern No. 1 above, in the matter of **Doha Bank Q.P.S.C Vs. Manish Dhirajlal Kaneria, Resolution Professional of Reliance Infratel Ltd. [IA No. 1960/MB/2019 in CP (IB) No. 1385/MB/2017 dated 02nd March, 2021],** the Hon'ble NCLT, Mumbai Bench has categorically held that without proper submission of documents before the RP, the financial creditor cannot be admitted to the CoC.

Hence it can be concluded from the above discussion that, if the claim has not been filed by the financial creditor, the said FC cannot be admitted to CoC.

Concern No. 5

Has CoC any role to play in admission of claims?

Section 18 of the Code defines the duties of the IRP.

Section 18(1)(b) states that the IRP shall receive and collate all the claims submitted by creditors to him, pursuant to the public announcement made under sections 13 and 15.

Section 18(1)(c) states that the IRP shall constitute a committee of creditors- which is only possible post verification and admission of the claims by the IRP.

Section 25 of the Code defines the duties of the RP.

Section 25(2)(e) states that the RP shall maintain an updated list of claims.

Verification of claims submitted by the creditors is one of the primary duties of the IRP/RP. If CoC which is an interested party/ largest stakeholder in the CIRP process starts exercising powers of claim admission, the independence of the RP and the CIR Process shall be severally jeopardized and the various stakeholders in the CIRP process shall have no trust in the process and its outcome.

The issue pertaining to role of CoC in claim admission process arose before the Hon'ble NCLAT in the matter of **Mr Rajnish Jain Vs. Anupam Tiwari, Resolution Professional for M/s Jain Mfg (India) Private Limited [Company Appeal (AT) (Insolvency) No. 519 of 2020 dated 18.12.2020]**

Facts of the Case:

The COC in its 4th meeting voted in majority in favour of BVN Traders as "financial creditor" and the Hon'ble NCLT held that Suspended Management as well as Resolution Professional has no locus to challenge the commercial wisdom and decision of Committee of Creditors with regard to determination of BVN Traders as financial Creditor. The Hon'ble NCLT held that, BVN Traders was financial Creditor in light of the decision of the CoC as a commercial wisdom and decision of Committee of Creditors.

In 7th CoC meeting, the same CoC again voted and passed a resolution stating that BVN Traders is not a 'Financial Creditor.

Issues before the Hon'ble NCLAT

(a) Whether the Committee of Creditors constituted under Section21 of the I&B Code, 2016, could determine that M/s BVN Traders' is a 'Financial' or 'Operational' Creditor.

(b) Whether the Order of the Adjudicating Authority in upholding that 'BVN Traders' is a Financial Creditor based on the majority decision of Committee of Creditors is valid

Decision of the Hon'ble NCLAT

(a) Committee of Creditors had no role in deciding the status of a creditor either as 'Financial' or 'Operational' Creditor and such a decision of 'Committee of Creditors' can never be treated as an exercise under its Commercial wisdom.

(b) It is a matter of applying the law of I&B Code, and if such factor is left to CoC, there would be a serious conflict.

(c) Whether a person or entity is "Financial Creditor" as defined in Section 5(7) or Operational Creditor as defined in Section 5(20) is a matter of applying the law to facts. It cannot be a matter of voting, and choice as discretion is not relevant.

(d) It is also necessary to mention that core duty of IRP is to receive, collate and verify claims which cannot be further delegated to 'Committee of Creditors', who in turn cannot be allowed to do the same in purported exercise of Commercial Wisdom.

Hence it can be safely concluded from the above discussion that, CoC has no role to play in admission of claims.

Concern No. 6

Can claim of a related party be converted to a claim of an unrelated party?

It is very critical for the resolution professional to determine whether the financial creditor is a related party of the corporate debtor or not. If a financial creditor is a related party of the corporate debtor, such financial creditor shall not have any right of representation, participation or voting in a meeting of the committee of creditors.

The issue pertaining to conversion of a financial creditor who was a related party to the corporate debtor to an unrelated financial creditor arose before the Hon'ble NCLT, Mumbai Bench in the matter of **Fortune Pharma Private Ltd [MA 560 in CP No.**

148/I&BC/NCLT/MB/MAH/2017 dated 13.11.2017]

Facts of the Case:

CIRP was initiated against the CD namely Fortune Pharma Private Ltd on 28.08.2017 under section 10 of the Code. From the date of filing of the application on 29.06.2017 and admission of the application on 28.08.2017, the CD assigned certain related party debts to unrelated parties, thereby reducing the voting power of SBI from 100% to 55%.

Issues before the Hon'ble NCLT

(a) Whether the deed of assignment dated 01.07.2017 is legal and bona fide.

(b) Whether the disqualification attached to the related parties is extinguished subsequent to the execution of assignment deeds.

(c) Whether the voting power of SBI is reduced from 100% to 55% by entry of new financial creditors.

Decision of the Hon'ble NCLT

(a) After assignment, the color of debt does not change, the rights of the assignee are no better than the rights of the assignor. If assignor is a related party, then the assignee is also a related party. The status of the assignee does not change after assignment.

(b) A related party cannot suddenly become a non-related party just because he washes off his hands and hands over the papers to other party who have no valid reason for taking up assignment of a debt which may not be recoverable.

(c) Hence NCLT restored SBI with 100% voting rights.

Hence it can be safely concluded from the above discussion that, claims of a related party cannot be converted to a claim of an unrelated party as the rights of the assignee are no better than the rights of the assignor.

Concern No. 7

If claims are not reflected in the books of accounts, but the claimant has documents to substantiate the claim, can the IRP/RP admit such claims?

The resolution professionals are often faced with the above-mentioned circumstances where books of accounts of the corporate debtor are not updated as on the insolvency commencement date or the books of accounts are not maintained for the last two or more years from the insolvency commencement date. Under these circumstances, the resolution professionals have to carry out their statutory duties of claim verification and admission. The Code and the CIRP Regulations are silent on the above subject. The extant and relevant provisions of the CIRP Regulations which can act as a guide for the insolvency professionals under the said circumstances are stated below:

Regulation 10- Substantiation of claims.

The interim resolution professional or the resolution professional, as the case may be, may call for such other evidence or clarification as he deems fit from a creditor for substantiating the whole or part of its claim.

Regulation 14- Determination of amount of claim.

(1) Where the amount claimed by a creditor is not precise due to any contingency or other reason, the interim resolution professional or the resolution professional, as the case may be, shall make the best estimate of the amount of the claim based on the information available with him.

(2) The interim resolution professional or the resolution professional, as the case may be, shall revise the amounts of claims admitted, including the estimates of claims made under sub-regulation (1),as soon as may be practicable, when he comes across additional information warranting such revision.

Hence as per the above provisions of the CIRP Regulations, the resolution professionals have to admit the claims based on the documents, evidence and clarifications as obtained by him from the claimants. Non-maintenance of the books of accounts by the corporate debtor cannot be a reason for the resolution professionals to not admit the claims received by him during the CIRP/liquidation process. Moreover, even if the books of accounts are maintained by the corporate debtor upto the insolvency commencement date, the said books of accounts may not be reliable

or reflect the true state of affairs of the corporate debtor, hence the resolution professionals have to rely on the documents & evidence substantiating the claim and not rely merely on the books of accounts of the corporate debtor.

Hence it can be concluded from the above discussion that, claims even if not reflected in the books of accounts, has to be admitted by the IRP/RP if the claimants can substantiate the claim.

Concern No. 8

If claims are not filed, but reflected in the books of accounts, can the IRP/RP admit the claims merely because it is reflected in the books of accounts?

Regulation 12(1) of the CIRP Regulations states as follows:

Regulation 12. Submission of proof of claims.

(1) *Subject to sub-regulation (2), a creditor **shall submit** claim with proof on or before the last date mentioned in the public announcement.*

(2) *A creditor, who fails to submit claim with proof within the time stipulated in the public announcement, **may submit the claim** with proof to the interim resolution professional or the resolution professional, as the case may be, on or before the ninetieth day of the insolvency commencement date*

The phrase used in Regulation 12(1) of the CIRP Regulation is 'creditor shall submit claim with proof; hence the use of word shall denote that the filing of claim by all creditors are mandatory, however the code is silent on the fate of claims not filed by the creditors but reflected in the books of accounts.

The following judicial pronouncements can assist the insolvency professionals in arriving at a correct conclusion with respect to this important issue which is often faced by all insolvency professionals.

(a) State Bank of India Vs. ARGL Limited [NCLT, Principal Bench, New Delhi in CA-1215(PB)/2018 in (IB)- -531(PB)/2019 dated 12.03.2019]

Facts of the Case:

CIR Process commenced on 16.03.2018 and resolution plan was approved by the CoC on 30.08.2018. The claim by the Central Board of Goods and Service Tax Department was filed on 01.11.2018.

Issues before the Hon'ble NCLAT

Can the claim of Central Board of Goods and Service Tax Department be admitted/ considered?

Decision of the Hon'ble NCLAT

*It is strange situation which is adopted by the RP because in the books of accounts, the governmental dues are always reflected. **It is nowhere stated as to the claims which are to be filed alone are to be collated in terms of Section 21 (emphasis added)**. First of all, as a matter of fact as the first step the IRP/RP has to prepare the list in accordance with the books of accounts and then invite the claims otherwise the dues reflected in the books of accounts would be rendered completely meaningless. It is only in case there is any discrepancy in the books of accounts that the claim needs to be modified or additions are required to be made. Therefore, we allow the application and direct the IRP /RP to collate the claim of the Central Board of Goods and Service Tax the needful shall be done within three days.*

Hence as per the above order, the Hon'ble NCLAT allowed the claim of a statutory authority even after approval of the resolution plan by the CoC on the premise that governmental dues are always reflected in the books of accounts and it is nowhere stated in the Code/ CIRP Regulations as to the claims which are filed alone are to be collated in terms of Section 21.

(b) Puneet Kaur Vs. K V Developers Private Limited & others. [NCLAT, Company Appeal (AT) (Insolvency) No. 390 of 2022, dated 01.06.2022]

Facts of the Case:

Appeals were filed by homebuyers of Corporate Debtor - K V Developers Private Limited aggrieved by order of the Adjudicating Authority refusing to entertain their belated claims as Financial Creditors of the Corporate Debtor.

Issues before the Hon'ble NCLAT

(1) Whether the Adjudicating Authority has rightly rejected the IAs filed by the Appellant(s) seeking

direction to include their claims, which was belatedly filed?

(2) Whether after approval of the Resolution Plan on 20.07.2021 by CoC, the claim of the Appellant(s) stood extinguished?

(3) Whether the Resolution Professional was obliged to include the details of Homebuyers as reflected in the records of the Corporate Debtor in the Information Memorandum, even though they have not filed their claim before the Resolution Professional within time?

(4) Whether Resolution Applicant ought to have also dealt with Resolution Plan regarding Homebuyers, whose names and claims are reflected in the record of the Corporate Debtor, although they have not filed any claim?

Decision of the Hon'ble NCLAT

(i) Non-submission of claim within the time prescribed is a common feature in almost all project of real estate and homebuyers cannot be included in the List of Creditors and that too after approval of Plan by CoC.

(ii) Once Resolution Plan is approved by the Adjudicating Authority, the claims as provided in the Resolution Plan shall stand frozen and all such claims, which are not part of Resolution Plan shall stand extinguished. Hence with the approval of the plan by the CoC, claims of the home buyers cannot be extinguished.

(iii) All the documents pertaining to Homebuyers are on the record of the Corporate Debtor and IRP/RP does take charge also of all the records of the Corporate Debtor. Even though, IRP/RP are not obliged to include the name of such Homebuyers, who have not filed the claim within the time in their List of Creditors, but there is no reason for not collating the claims of such Homebuyers whose claims are reflected from the records of the Corporate Debtor, including their payments and allotment. **The liability towards those Homebuyers, who have not filed their claim exists and required to be included in the Information Memorandum.** Further, under Regulation 36, sub- regulation 2(l), there is column for other information, which the Resolution Professional deems relevant to the Committee. The liabilities which have been undertaken by the Corporate Debtor, **huge money received by the Corporate Debtor from Homebuyers, whose claims, which could not be filed within time, could not be wished away by the Resolution Professional, on the convenient ground that claims have not been filed by such Homebuyers. The purpose of CIRP of Corporate Debtor is to find out all liabilities of the Corporate Debtor and take steps towards resolution. Unless all liabilities of the Corporate Debtor are not known or included in the Information Memorandum, the occasion to complete the CIRP shall not arise.**

(iv) Information Memorandum ought to have included the claim of those Homebuyers, who have not even filed their claims to correct liabilities of the Corporate Debtor for its appropriate resolution.

(v) Non-consideration of such claims, which are reflected from the record, leads to inequitable and unfair resolution

Hence as per the above orders it can be safely concluded that, the claim of the creditors who have not filed their claim but whose claims were reflected in the record of the Corporate Debtor must be included in the information memorandum & resolution applicant have to take note of the said liabilities and provide for the said liabilities in their resolution plan.

Concluding Remark:

It is critical to note that merely because the claims have not been filed, the claims cannot be made nugatory by the IRP/RP. All the liabilities as appearing in the books of accounts of the corporate debtor must be included in the information memorandum and all the liabilities as stated in the information memorandum must be considered for repayment in the resolution plan submitted by the resolution applicant. For a resolution plan to be legally compliant with IBC, it shall include a statement under Regulation 38(1A) of the CIRP Regulation as to, how the resolution plan has dealt with the interest of all the stakeholders, it is important to note that, a creditor who has not filed his claim is also a stakeholder.

Conclusion:

- The resolution plan should be worded in a manner that it freezes the future liabilities for a successful resolution applicant. No resolution applicant likes future surprises.
- All claims whether filed or not, but appearing in the books of accounts of the corporate debtor as on the insolvency commencement date must be considered by the prospective resolution applicants at the time of preparing a resolution plan, otherwise the successful resolution applicant will be unnecessarily dragged into protracted litigation.
- It is imperative that, the successful resolution applicant is legally protected from future surprises to generate confidence.
- Section 21 of the IBC may be suitably modified to provide for collation of all claims appearing in the books of accounts of the corporate debtor as on the insolvency commencement date instead of collation of claims received against the corporate debtor.
- Every resolution plan may provide for a certain sum of money to take care of claims arising post approval of the resolution plan by the Hon'ble NCLT. If the claims exceed the said amount provided for in a resolution plan, the said amount can be proportionately distributed.

This may assist in reducing protracted litigation post approval of the resolution plan by the Hon'ble NCLT.

Vikram Kumar | Insolvency Professional|

Registration No. IBBI/IPA-001/IP-P00082/2017-2018/10178 J 6A, Kailash Colony, New Delhi-110048

Tel: +91-11-29244247; Fax: +91-11-29242249;

Mob: +91-9818119504

Email: vikramau@gmail.com/vikram@vikramca.com

LEGAL MAXIM

Ubi jus ibi remedium.

Meaning: *There is no wrong without a remedy or where there is a legal right there is a remedy.*

Example: *"These principles were over a period of time recognised in the form of Bill of Rights and Constitutions of various countries which acknowledged the Roman maxim* ***'Ubi Jus Ibi Remedium'*** *i.e. every right when it is breached must be provided with a right to a remedy. Judicial pronouncements have delved and elaborated on the concept of access to justice to include among other aspects the State's obligation to make available to all its citizens the means for a just and peaceful settlement of disputes between them as to their respective legal rights."- Anita Kushwaha and Ors. vs. Pushap Sudan and Ors. (19.07.2016 - SC)*

IMPACT OF IBC ON NON-PERFORMING ASSETS (NPAS) OF BANKING INDUSTRY AND INDIAN ECONOMY

IP Ashok Kumar Jain,
Former General Manager &
Adviser, Union Bank of India

BACKGROUND:

Before enactment of **Insolvency & Bankruptcy code, 2016 (IBC 2016)**, Banks were internally using Reserve Bank of India (RBI) various schemes for revival/resolution of distressed assets i.e. assets under financial difficulty.

Business runs on so many assumptions and sometimes realizations do not match expectations. There may be cases of genuine difficulties faced by the borrowers resulting in failure to meet the commitments on time and as per projections. This will result in the account going down the order in quality and prompt pro-active measures will certainly help the borrowers to come out of the difficulties.

SYNOPSIS:

Because of Economic downturn genuine difficulties are faced by borrowers, resulting in not meeting the commitments as per contracted terms & conditions. To take care of such units and revive them, Banks have well defined frame work to undertake restructuring exercise. RBI gave various restructuring schemes over a period of time to help such borrowing units with an objective to bring back them on track. While

restructuring such units/accounts, the fundamental idea for such an exercise was to enable the borrowing unit to come out of financial difficulties based on the future cash flows.

Resolution Framework available to Banks prior to IBC 2016:

RBI has time to time issued prudential guidelines for restructuring of advances to retain the economic value of units/assets when the borrower/unit is in temporary financial difficulty for economic or legal reasons, but unit is otherwise viable. To name a few was 'Corporate Debt Restructuring (2001) CDR', 'Framework for Revitalizing Distressed Assets in the Economy (2014)', 'Flexible Structuring of Long Term Project Loans to Infrastructure and Core Industries (2014) also known as 5:25 Scheme', 'Strategic Debt Restructuring (SDR) (2015)' Change in ownership outside SDR and 'Scheme for Sustainable Structuring of Stressed Assets (2016) also known as S4A' etc., for timely resolution of stressed assets. Further, Reserve Bank of India (RBI), vide Circular DBR. No.BP.BC.101/21.04.048/2017-18 dated 12.02.2018,

issued fresh guidelines titled resolution of Stressed Assets- Revised Framework" and withdrawing all the above schemes with immediate effect.

Based on practical difficulties faced by Banks & corporates, RBI issued another circular no DBR. No.BP.BC.45/21.04.048/2018-19 dated 07.06.2019 as **"Prudential Framework for Resolution of Stressed Assets".**

Need for a legal framework :

While RBI schemes has helped a large number of units in their revival, however, these schemes were devoid of any legal consequences or penalties. Large number of restructured cases **failed as borrowers did not adhere to financial discipline as per the restructuring package and a few lenders did not act in prudence**.

The latest legislation with its central objective of revival of financial assets in difficulty, enacted in the name of Insolvency & Bankruptcy code, 2016 (IBC 2016) received the assent of President/ published in the official gazette on 28th May 2016. Banks/lenders can exercise this option of resolution through National Company Law Tribunal (NCLT) called Adjudicating authority (AA).

Action by Bankers/lenders can be initiated under this code u/s 7 of IBC 2016, with an idea for resolution or revival i,e, to keep the unit running wherever it is viable and not to close or liquidate the unit.

The new code promises a better and painless procedure for restructuring or reorganisation of firm's debt and also speed up the liquidation of a failing business and efficient recovery of creditor's investment. IBC introduced the much awaited and much-needed creditor driven procedure for resolving insolvency and bankruptcy.

While the introduction of new code is a historical reform in the country's economy, its effect will be seen in years to come and will depend on the infrastructure support and capacity of the implementing authorities and newly formed procedures.

We can say that in case of default by a corporate debtor/equity owner in meeting their debt obligations, control is transferred to the creditors and corporate debtor/equity owner take a back seat. So far, this excellent piece of legislation in the form of IBC, 2016, has been used for the purpose of resolution of big ticket borrowers/defaulters.

IBC is a ray of hope- Salient features:

1. One set of laws for insolvency and bankruptcy.
2. It is an overriding legislation on other laws in the area of insolvency/resolution/recovery.
3. In the situation of rising non-performing loans assets in India, it has been a simplification of collective mechanism for resolution of distressed assets in Indian economy. It ensures retaining a proper balance for all stakeholders to preserve the economic value of such assets in a time bound mode.
4. It's a new ecosphere of debt resolution from debtor-in-possession to

   creditor-in-control.
5. It's an Empowerment to creditors to make key decisions during the insolvency proceedings. Good number of judgements by NCLT/NCLAT/Supreme court has well established the Commercial wisdom of committee of creditors (COC) as supreme.
6. The code enacted with twin objective of value maximization and resolution/recovery in a specified time line.

7. Water fall mechanism (Section 53) is largely protecting the prime stake holders in order of priority like workmen dues, secured creditors, wages and unpaid dues of employees over other stake holders.
8. Though IBC is comparatively young so still in the evolving stage. However, best part is that based on experiences and practical issues faced; many amendments have been done to enhance efficacy and effectiveness which shows resilience of Insolvency and Bankruptcy Board of India (IBBI)/ Central government.
9. IBC resolution is a rescue mechanism to save a falling business as a going concern, through change in ownership, mergers and restructuring.

Based on experience of last more than 5 years, we can undoubtedly make out that this new legislation is proving superior law in effective industrial development and Indian economy. IBC is helping in removing the defaulting and fraudulent businessmen from the market. We have seen the cases where giant fishes have lost their ownership of big companies.

Impact on Non performing assets of Indian Banks:

To see the impact on movement of non performing assets of scheduled commercial Banks, reference of Reserve Bank of India report on **TREND AND PROGRESS OF BANKING IN INDIA for two years i.e. 2019-20 and 2021-22** is relevant here.

The data given is for almost 90 Scheduled Commercial Banks (SCBs) which includes 12 Public sector Banks(PSBs), 21 Private Sector Banks(PVBs),45 Foreign Banks(FBs) and 12 Small Finance Banks(SFBs).

It will be portrayed that it has helped some of the falling but viable businesses and helped in promoting entrepreneurship.

Movement in NPAs for 2018-19 to 2019-20 is shown in Table-1 below.

(Amount in ₹ crore)

Table-1 : Movements in Non-Performing Assets by SCBs

Item	PSBs*	PVBs	FBs	SFBs	All SCBs#
Gross NPAs					
Closing Balance for 2018-19	7,39,541	1,83,604	12,242	1,087	9,36,474
Opening Balance for 2019-20	7,17,850	1,83,604	12,242	1,660	9,15,355
Addition during the year 2019-20	2,38,464	1,31,249	6,751	1,764	3,78,228
Reduction during the year 2019-20	99,692	51,335	3,832	1,046	1,55,905
Written-off during the year 2019-20	1,78,305	53,949	4,953	669	2,37,876
Closing Balance for 2019-20	6,78,317	2,09,568	10,208	1,709	8,99,803
Gross NPAs(%) as per cent of Gross Advances**					
2018-19	**11.6**	**5.3**	**3.0**	**1.7**	**9.1**
2019-20	**10.3**	**5.5**	**2.3**	**1.9**	**8.2**
Net NPAs					
Closing Balance for 2018-19	2,85,122	67,309	2,051	586	3,55,068
Closing Balance for 2019-20	2,30,918	55,746	2,084	784	2,89,531
Net NPAs(%) as per cent of Net Advances**					
2018-19	4.8	2.0	0.5	1.0	3.7
2019-20	3.7	1.5	0.5	0.9	2.8

Notes: 1. #: Data includes scheduled SFBs.

2. *: Closing balance for 2018-19 and opening balance for 2019-20 do not match due to amalgamation of Dena Bank and Vijaya Bank into Bank of Baroda.

3. **: Calculated by taking gross NPAs from annual accounts of respective banks and gross advances from off-site returns (global operations).

After enactment of IBC (2016) on 28th May 2016, provisions relating to CIRP came into force on December 1, 2016. However, practically its real impact observed from the financial year 2018-19. There was overall reduction in Gross Non performing assets(GNPA) from 9.1 % to 8.2 % in 2019-20 over 2018-19. Likewise, Net non performing assets (NNPA) improved from 3.7% to 2.8 % in the same period. In terms of value for all SCBs put together, GNPA reduced to Rs 2,89,531 crore in 2019-20 from a level of Rs 3,55,068 crore in 2018-19. PSBs GNPA percentage also seen southward trend with total reduction of Rs 61,224 crore, but remains in double digit for both the years i.e.11.6 % to 10.3 %.

The positive side is that reduction was due to resolution/recovery in some big ticket advances filed under Insolvency & bankruptcy code 2016 (IBC) through NCLTs. When the recovery was sticky, IBC has brought a new ray of hopes for better recovery and recycling of funds. Though recovery against total claims was with a significant hair cut i.e.50-75%.

Table-2 shows Movement of NPAs for 2020-21 to 2021-22 below.

(₹ in Crores)

Table-2 Movement in Non performing Assets of Scheduled commercial Banks

Item	PSBs	PVBs	FBs	SFBs	All SCBs
Gross NPAs					
Closing Balance for 2020-21	6,16,616	1,97,508	15,044	5,971	8,35,138
Opening Balance for 2021-22	6,16,616	1,97,508	15,044	5,971	8,35,138
Addition during the year 2021-22	1,39,905	1,25,834	8,320	9,381	2,83,441
Reduction during the year 2021-22 (i+ii+iii)	2,14,347	1,42,559	9,578	8,441	3,74,926
i. Recovered	56,959	34,139	2,722	1,758	95,579
ii. Upgradations	37,675	55,333	3,390	3,785	1,00,184
iii. Written-off #	1,19,713	53,087	3,466	2,898	1,79,163
Closing Balance for 2021-22	5,42,174	1,80,782	13,786	6,911	7,43,653
Gross NPAs as per cent of Gross Advances*					
2020-21	9.1	4.8	3.6	5.4	7.3
2021-22	7.3	3.8	2.9	4.9	5.8
Net NPAs					
Closing Balance for 2020-21	1,96,451	55,377	3,241	2,981	2,58,050
Closing Balance for 2021-22	1,54,745	43,733	3,023	2,725	2,04,226
Net NPAs as per cent of Net Advances					
2020-21	3.1	1.4	0.8	2.7	2.4
2021-22	2.2	1.0	0.6	2.0	1.7

Notes: 1. #: Includes prudential as well as actual write-offs.

2.*: Calculated by taking gross NPAs from annual accounts of respective banks and gross advances from off-site returns (global operations).

Gross Non-performing assets (NPAs) reduced by scheduled commercial banks (SCBs) to 5.8 per cent in FY22 against 7.3 per cent in FY21, as per above table-2. GNPA Reduction in terms of amount was Rs 91,485 crore by SCBs during 2021-22.

PSBs share in total NPAs is highest amongst all SCBs. If we see the percentage share of GNPA of PSBs it was 73.83 % in 2020-21 reduced to 72.90

% in 2021-22, which is more than 100 basis points. Rather the gross NPA ratio of PSBs has shown a southward trend from 14.6% on March 31, 2018 to 7.3 % on March 31, 2022. Reduction in PSBs GNPA percentage to just half in March 2022 over March 2018 is a great achievement on any scale. Major share in recovery was also from PSBs among all SCBs.

Now, we will have a glance on the recoveries made by scheduled commercial Banks in year 2020-21and 2021-22 through various channels available. The same is presented in Table-3. In next page.

(₹ in Crores)

Table-3 NPA of Schedule Commercial Banks recovered through various channels including IBC-2016

Recovery Channel	2020-21				2021-22 (P)			
	No. of cases referred	Amount involved	Amount recovered*	Col. (4) as per cent of Col. (3)	No. of cases referred	Amount involved	Amount recovered*	Col. cent (8) as per of Col. (7)
1	2	3	4	5	6	7	8	9
Lok Adalats	19,49,249	28,084	1,119	4	85,06,648	1,19,005	2,777	2.3
DRTs	28,182	2,25,361	8,113	3.6	29,487	47,165	12,114	25.7
SARFAESI Act	57,331	67,510	27,686	41	2,49,475	1,21,642	27,349	22.5
IBC @ #	536	1,35,319	27,311	20.2	885	1,99,250	47,421	23.8
Total	**20,35,298**	**4,56,274**	**64,229**	**14**	**87,86,495**	**4,87,062**	**89,661**	**18.4**

Notes: 1. P: Provisional.

2. *: Refers to the amount recovered during the given year, which could be with reference to the cases referred. during the given year as well as during the earlier years.

3. DRTs: Debt Recovery Tribunals.

4. @: Data in column no. 2 and 6 are the cases admitted by National Company Law Tribunals (NCLTs) under IBC.

5. #: Data in column no. 3, 4 and 5 are with respect to 121 cases, and in column no. 7, 8 and 9 are with respect to 143 cases, where in resolution

plans were approved during 2020-21 and 2021-22, respectively.

Source: Off-site returns, RBI and Insolvency and Bankruptcy Board of India (IBBI).

Table-3 reveals that SCBs recovered Rs 89,661 crore via different channels in FY 2022 against Rs 64229 crore in FY 2021. The different channels are — Lok Adalats, Debt Recovery Tribunals (DRTs), Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, and Insolvency and Bankruptcy Code (IBC).

In FY22 Rs 4,87,062 crore involved against ₹ 4,56,274 crore involved in FY 2021.The amount recovered was 18.4% in FY 2022 against 14% in FY 2021 of the amount involved. **Highest recovery was recorded through IBC mechanism.**

A breakup of the overall ₹ 89,661 crore recoveries made in FY22 reveals that largest percentage of recovery by banks i.e.53 per cent was made via the IBC route. Whereas, 30.5 per cent via SARFAESI Act, 13.5 per cent via DRTs and 3 per cent via Lok Adalats.

As we know that Banks have multiple options for resolution of stressed assets. After the one- year suspension during COVID-19, fresh insolvency cases admitted under the IBC increased by 65 per cent during 2021-22. 885 cases admitted in 2021-22 against 536 cases in FY2020-21. The amount involved in the cases referred under IBC was 47.35 per cent higher at Rs. 1,99,250 crore against Rs 1,35,319 crore in 2020-21.

Table-3 also reveals that the number of cases referred under Lok Adalats and SARFAESI Act increased by 336 per cent and 335 per cent, respectively, but the IBC mechanism was the front-runner in terms of the amount involved/recovered, as per RBI report.

The pre-pack insolvency resolution process (PPIRP), introduced for MSMEs in April 2021, is yet to gain momentum and only 4 cases have been admitted under the channel up to December 2022.

IBC mechanism also adversely affected sales of stressed assets to asset reconstruction companies (ARCs) and have gradually decreased over the years. In 2021-22, only 3.2 per cent of the previous year's GNPAs were sold to ARCs, as per the RBI report.

Impact on Indian Economy:

The most important parameter to measure the state of economy of a nation is its Gross Domestic Product (GDP) in terms of value and percentage. Except during COVID-19 crucial period, Indian GDP has registered a reasonable growth in comparison to various developed and developing world economies.

Index of **Ease of Doing Business (EODB)** is another way to gauge the economic environment of a country. **In the environment of global recession and downturn in economy, The IBC has proved a crucial structural reform, producing reasonable gains for the corporate sector and the economy as a whole. It played an undeniable role** in **improving India's Ease of Doing Business (EODB) ranking from 130 in 2016 to 63 in 2020** in world Bank 'Doing Business' report.

Resolving Insolvency is one of the vital processes considered for ranking of countries. The aspects considered are time, cost, result and recovery rate for commercial insolvency.

We can understand it from the data given in table-4.

Table-4 India GDP Growth Rate-percentage and amount

Sr No	Year ended	GDP Growth rate	Annual Change	GDP (Billions of US $)	Per Capita (US $)
1	2022	6.8%	-1.88	3469	2320
2	2021	8.68%	15.28%	3176	2277
2	2020	-6.60%	-10.33% covid impact	2668	1910 (COVID impact)
4	2019	3.74%	-2.72%	2832	2047
5	2018	6.45%	-0.34%	2703	1974
6	2017	6.79%	2016 fig. not taken	2651	1958

It is observed from above table that:

- **India GDP growth rate for 2022 was 6.8%, -1.88 % decline from 2021.**
- India GDP growth rate for 2021 was 8.68%, a 15.28% increase from 2020.
- India GDP growth rate for 2020 was -6.60%, a 10.33% decline from 2019.
- India GDP growth rate for 2019 was 3.74%, a 2.72% decline from 2018.
- India GDP growth rate for 2018 was 6.45%, a 0.34% decline from 2017.

There is little slackness in GDP growth rate in 2022 over 2021, due to global impact, but still our growth rate was better than developed countries like USA, UK, China etc. as shown in Table-5 in next page. We surpassed the nominal GDP in 2022(3469 billion USD) over 2021(3176 billion USD).

For our country, 2022 was special. It manifests the 75th year of India's Independence. India became the world's fifth largest economy, measured in current dollars. The nominal GDP of India almost touched USD 3.5 trillion. India entered into **Amrit Kaal, the 25 year journey towards its centenary as a modern and independent nation. India also assumed the presidency of G20 nations in December 2022.**

If we compare GDP data for the top 10 countries of the world available on the website of Investopedia, we find that India's growth rate was highest. This may be attributed to better NPA recoveries boosted through IBC regime, better recycling of funds and better money supply in the market through Indian Banks. See table-5 below:

Table-5 Top 10 Countries by Nominal GDP at Current U.S. Dollar Exchange Rates-Year 2021

Country	Nominal GDP (in trillions)	Annual Growth (%)	GDP Per Capita
United States	$23.0	5.7%	$69,287
China	$17.7	8.1%	$12,556
Japan	$4.9	1.6%	$39,285
Germany	$4.2	2.9%	$50,801
United Kingdom	$3.2	7.4%	$47,334
India	$3.2	8.9%	$2,277
France	$2.9	7.0%	$43,518
Italy	$2.1	6.6%	$35,551
Canada	$2.0	4.6%	$52,051
South Korea	$1.8	4.0%	$34,757

Conclusion:

- IBC has played a catalytic role in NPA resolution of Banks and better recoveries since its inception and its gaining momentum.
- Its excellent piece of legislation and evolving very fast as per the need to make the process more effective and efficient. Settling of issues making a positive impact on our economy.
- IBC has given birth to new Industry i.e. distressed financing. Looking to the protection provided to the new resolution applicant/debtors by the IBC, creditors are not hesitating in providing funding to promoters of distressed corporate debtors where there are good business scenarios.
- It has reasonably boosted the economic environment and Bank recoveries which are wheels of economy in India.
- It's an emerging legislation and in the short period of its working, the consolidation of the statute is diligently harmonized with the development of the insolvency ecosystem.

In order to take full advantage of IBC, all stake holders must respect this special piece of legislation and have problem solving attitude so that full benefit of the statute can be harnessed. Dragging it like other cases in judicial courts will increase the pendency and timely resolution will not be achieved.

Way Forward:

1. **For harvesting the higher sums, time lines need to be adhered by all concern by minimizing litigations and adopting resolution attitude.**
2. **To promote Entrepreneurship and balance the interest of all stake holders, IBC should not be primarily looked at medium of:**
   - Auction of securities
   - Sale of assets
   - Liquidation process for recovery
3. In resolution of corporate debtor, resolution plan is a process of revival of unit as going concern so as to retain the economic value. In such cases approach towards resolution plan value must be based on enterprise value/ future cash flows rather than fair market value/liquidation value. This will go a long way to really attain the twin objective of preserving the business/unit as going concern as well as maximization of value.
4. To save the corporate Micro Small and Medium Enterprises/ businesses and organisations and to flourish the economy, the new Pre-packaged insolvency process (PPIRP) is an alternate and speedier resolution mechanism introduced by central government by way of amendment on 11 Aug 2021, giving a fair chance to debtor himself to continue the enterprise/business. To harp the full benefit, it is to be used more effectively with a pragmatic approach to save the MSME, which are backbone of Indian economy. So far much headway is not made in this new option and only 4 cases were admitted till Dec 2022 since its introduction from 04.04.2021.
5. There is need for clear guidelines on Group Insolvency, Cross Border Insolvency and Delays due to prolonged litigations.

INSOLVENCY RESOLUTION-AN OVERVIEW:

Now, in the end, just to have a feel about the cases admitted, closed and on going, numbers are shown in a table-6. The position as of Dec 2022 is taken from IBBI quarterly Journal of Sept-Dec 2022.

Table-6 Corporate Insolvency Resolution Process-Position Dec 2022

Sr No	Admitted Cases(No)	Of which CD rescued by closure/withdrawn/Res. Plan approved			Liquidation order	On going
1	6199	2298 (55% of admitted cases)			1901	2000
		Within which			45% of admitted cases	
		Closed on appeal/settled	Withdrawn	Resolution plan approved		
		894	793	611 (26.58% of rescued)		

The provisions relating to CIRP came into force on December 1, 2016. Total of 6199 CIRPs was admitted as at the end of December, 2022. Within which, 4199 cases closed. Of the CIRPs closed, the Corporate Debtor was rescued in 2298 cases, which comes to 54.72%. Out of total 2298 cases closed, 894 have been closed on account of appeal or review or settled. 793 cases withdrawn. Only in 611 cases resolution plans approved which is merely 14.55 % of cases closed and 26.58 % of cases rescued. In 1901 cases orders for liquidation passed by adjudication authority.

References:

1. ***RBI report on Trend and Progress of Banking in India for two years i.e. 2019-20 and 2021-22.***
2. ***Website of Macrotrends***
3. ***Website of Investopedia***
4. ***Quarterly News Letter of IBBI-Oct-Dec 22***

(Ashok Kumar Jain)

IP: IBBI/IPA-002/IP-N00549/2017-18/11696

Former General Manager & Adviser Union Bank of India

Jaipur 08.03.2023

LEGAL MAXIM

Volenti non fit injuria.

Meaning: *No injury can be done to a willing person.*

Example: *"...that the tractor driver victim invited the incident himself by towing the heavier vehicle based in essence on the maxim volenti non fit injuria deserve to fail in this case in law as well as on facts. It may be noted that such kind of defence could have been raised only if the injuries arose out of a risk in respect of which the non-applicants did not owe any duty to the claimants, or in respect of which they had fulfilled such duty as they owed. In such a situation, the action for compensation would have failed whether or not the tractor driver ran the risk voluntarily, since the truck driver had done him no wrong at all."- National Insurance Company Ltd. vs. Kur Singh and Ors. (26.03.2007 - RAJHC)*

Atul Kumar
Advocate-on-Record,
Supreme Court of India &
Insolvency Professional

RIGHTS OF SHAREHOLDERS/ INVESTORS OF A CORPORATE DEBTOR TO INTERVENE IN A CORPORATE INSOLVENCY RESOLUTION PROCESS UNDER I&B CODE, 2016

The National Company Law Appellate Tribunal (Chennai Bench) in a significant ruling in the matter of *Nirej Vadakkedathu Paul & Ors Vs Sunstar Hotels & Estate Private Limited and Mcdowell Holdings Ltd (Company Appeal (AT) (CH) (Ins) No. 142/2022)* dealt with the issue of objection by group of shareholders (which included some Foreign Portfolio Investors) of corporate debtor against which corporate insolvency resolution process (CIRP) has been initiated by the NCLT (Adjudicating Authority/AA) under section 7 of the I&B Code, 2016.

Appellant/Sharholders' contention

Main contention of the group of shareholders (which included some

Foreign Portfolio Investors) of corporate debtor was that their investment by way of shareholding in the corporate debtor was at stake since the corporate insolvency resolution process would have direct and adverse bearing on the valuation of the shares and it would jeopardise their investment. The shareholders also contended that petition under section 7 was a collusive and fraudulent attempt on the part of the corporate debtor and financial creditor to defraud the shareholders and the corporate insolvency resolution process would reduce the value of their shareholding to a bare minimum level. The appellants/shareholders relied on the judgment by NCLAT in *Reliance Commercial Finance Vs Darode Jog Builders Pvt Ltd* which laid down that if the corporate debtor is ready to pay the entire amount to the financial creditor, the financial creditor cannot refuse to accept the same and no purpose would be served to continue to proceed with the corporate insolvency resolution process. The shareholders/appellants also relied on the judgment passed in Periasamy *Palani Gounder Vs Radhakrishan Dharmarajan (2022 SCC Online NCLAT 86)* wherein the NCLAT has held that nothing prevents a shareholder from producing evidence to establish the illegality in the CIRP. The appellants/ shareholders contended that they must be treated as "aggrieved persons" in terms of section 61 (1) of the I & B Code, 2016.

Respondent/Financial Creditor's Contention

The Respondent (FC) defended the AA decision and challenged the locus of the shareholders/ appellants and contended that the appellants are mere shareholders and they cannot be treated as aggrieved party under section 61 (1) of I &B Code,2016. They contended that it is settled law that with regard to debt and default, the contesting parties can only be the Financial Creditor and the Corporate Debtor and there is no place for a third party to intervene as per the scheme of the I&B Code,2016. The Respondent further contended that the debts due and non-payment of the same are undisputed facts and liability has been accepted and cited Supreme Court judgments that there is limited scope for judicial intervention once debt and default is established *(Innovative Industries Limited Vs ICICI Bank & Ors (2018) 1 SCC 407)*. The Respondent further cited NCLAT judgment in Axis Bank Vs Lotus Three Developments & Ors (2018) SCC Online NCLAT 914) wherein it was held that the role of Adjudicating Authority is only to satisfy that the default has occurred and no other person has a right to be heard at the stage of application under section 7 including "shareholders" or "personal guarantor". The Respondents also contended that there is no provision under the I &B Code,2016 or the Companies Act,2013 which allows shareholders to directly deposit the money on behalf of the Corporate Debtor. It further contended that the intent of the I &B Code,2016 is to allow genuine resolution of the corporate debtor in order to put it back on rails and intent of the IBC is not to protect only the "shareholders".

The Respondent/Financial Creditor further contended that the Committee of Creditor has already approved the Resolution Plan and once an IRP/RP has been appointed, he assumes full authority to represent the corporate debtor and therefore no derivative actions can be initiated by the shareholders being non maintainable. The Respondent further contended that such action can be resorted to only in exceptional condition where company has failed to take action as mandated by law. The Respondent further contended that since the present appeal has been filed under section 61 of the I &B Code,2016 where the Appellants claiming to be "aggrieved person", they need to show how the Appellants are aggrieved in respect of the specific circumstances of the case to maintain a derivative action.

NCLAT Findings

The NCLAT after going through the factual matrix of the case primarily decided the following two issues :-

(a) Whether the shareholder of the 'Corporate Debtor' has any locus in Section 7 application filed by the 'Financial Creditor?

(b) Whether the shareholders can make payment to satisfy financial debt of financial creditor in order to take away the 'Corporate Debtor' from the clutches of the 'Corporate Insolvency Resolution Process ?

The NCLAT having regard to the provision under I&B Code,2016 and judicial pronouncements held that the shareholders have no '*locus*' once an application under Section 7 of the I &B Code,2016

filed by a Financial Creditor is accepted and CIRP is initiated by the Adjudicating Authority. Once debt and default is established before the Adjudicating Authority, there is no law which allows a shareholder of a corporate debtor to challenge the initiation of corporate insolvency resolution process of the corporate debtor.

The NCLAT further held that shareholders cannot be aggrieved merely by the admission of the corporate debtor into the corporate insolvency resolution process since such objection may render the object of I &B Code,2016 redundant since any shareholder of a corporate debtor against which insolvency proceedings have been initiated can seek to maintain a derivative action and question and sabotage a valid CIRP initiated by the Adjudicating Authority. A shareholder is technically an investor who owns limited investment in the company to the extent of share capital subscribed by him. The NCLAT relied on its judgment in the case of *Anant Kajare Vs Eknath Aher & Anr CA (AT) (Insolvency) No.296 of 2017* wherein it has been held that since appellant is an investor therefore it cannot claim to be an aggrieved person for preferring an appeal against the order passed by the Adjudicating Authority. However, the NCLAT held that an investor is entitled to file its claim before the Insolvency Resolution Professional.

The NCLAT further held that in an appeal filed under section 61 of the I &B Code, no direction can be given to any party to the settlement (particularly to a third party) to perform certain duties to ensure settlement between other parties.

Similarly, on the issue of settling of claims of the Financial Creditor by a third party, the NCLAT held that there is no law which allows a third party to settle claims of the Financial Creditor on behalf of the Corporate debtor more so without the consent of the Corporate debtor and in the teeth of opposition by the Financial Creditor.

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Contact details:

B-17, 3rd Floor, Jangpura Extension, New Delhi-110054 E-mail : atuladv@gmail.com

Mobile : 9810431518

LEGAL MAXIM

Noscitur a sociis.

Meaning: *The meaning of a word can be determined by the context of the sentence.*

Example: *"...Associated words take their meaning from one another under the doctrine of nosciture a sociis, the philosophy of which is that the meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it..."- Rohit Pulp and Paper Mills Ltd. vs. Collector of Central Excise, Baroda (26.04.1990 - SC)*

Prima facie.

Celebrating Our Women: Success Stories

Smt. Ramanathan Bhuvaneshwari

is an Insolvency Professional with IBBI Registration no. IBBI/IPA-002/IP-N00306/2017-18/10864. She is a science graduate and qualified Cost Accountant and Company Secretary, residing in Bengaluru for more than three decades.

IP Ramanathan Bhuvaneshwari has rich corporate experience of 27 years, served in various corporates, including in the positions of CFO, Company Secretary and COO. She has worked in various industries, which includes Manufacturing, News Print and Micro Finance Sectors.

As an Insolvency Professional, practicing from 2017 onwards, she has handled more than 10 Companies in various sectors as Interim Resolution Professional, Resolution Professional, Liquidator and also as Liquidator for Voluntary Liquidation.

In her experience as Insolvency Professional, she finds each assignment being different, unique with its own challenges and learnings. Also, the assignments of MSME sector brings additional challenges peculiar to that sector.

Right from her very first assignment, she has handled very tough assignments, wherein avoidance transactions existed in each assignment and very few / no assets were available. In spite of all odds, the first assignment, with no asset base and ordered for SFIO, resulted with 100% recovery to all the operational creditors including statutory authorities, due to her relentless efforts. Many of her avoidance applications were ordered for SFIO / MCA Investigations, some of which are still in progress. She has also successfully submitted few CoC approved Resolution Plans. Also, she has conducted Liquidation of assets successfully, with realisation of 4 times of Liquidation value in one of the assignments.

Ms.Bhuvaneshwari feels that her educational qualification combined with her corporate experience is helping her making a mark in the assignments and she enjoys the challenge each assignment poses. As a woman, she never felt any discrimination in the corporate life as well as in her practice as IP. Her upbringing and rural background have imbibed various qualities, which are the requirements of an IP. With her understanding of IBC and various other allied laws and with her innate qualities, she has been a preferred IP, especially by the creditors who have seen her in the earlier assignments.

Ms.Bhuvaneshwari is very proud to be a women professional. Being a successful IP, she encourages many women to enter this challenging career.

***

CS Anagha Anasingaraju

holds the position of Partner, KANJ & Co LLP, Pune and Insolvency Professional has professional experience of more than 23 years

Dear Professional Colleagues,

At the outset, I thank ICSI IIP for this initiative and for considering me to provide my views on this occasion of Women's Day. Wishing you all a very happy Women's Day!

Equal opportunity is a true essence of equality and a level playing field in any profession makes the difference. The profession of Insolvency Practitioners is no exception to this rule. People excel when there are equal opportunities and there is absence of sense of entitlement. I agree that even in 2023, in many jobs, equal opportunity is still wanting. I do not wish to belittle that reality and make idealistic statements that this does not exist. It is very much present and existent in many spheres of personal and professional life. When equal opportunity is made available, women will excel in any field in which they wish to enter. Taking away opportunities from women, or anyone for that matter, only because of their gender is grossly unfair. It makes them victim of circumstances which are beyond their control and does not give them a level playing field. The occasion of Women's day should not be merely a tokenism but should make some meaningful impact in providing equal opportunities to women to showcase their talent.

In the profession of Insolvency Practitioners, prima facie, there is equal opportunity. When the notice is issued by IBBI for empanelment, there are no gender specific reservations or requirements. Everyone is treated equally. When the banks are empanelling IPs, they do not give gender specific requirements. Anyone who meets their guidelines are eligible to be empanelled with them.

At the same time, some creditors may have apprehension about appointment of certain IPs in some assignments due to the nature of the assignment. Nature of assignment typically means the complications, worker issues, location of the assets of the CD, fraud involved etc. Some FCs may be of the view that women may not have the appetite to deal with these issues. It may not be a question of competency.

As we are aware, in the field of Insolvency Professionals, the assignments do not see the gender, background, hardships or other personal biases or

situations of the professional involved. Once someone is appointed as an IRP / RP, the job to be done does not differentiate based on the gender of the incumbent. We are required to issue public announcement, invite and verify claims, constitute COC, take custody of the assets and so on. All actions are the same. Here, the concerned IP should have the wherewithal, gumption and appetite to deal with these complications irrespective of the gender.

From my own experience, I can definitely vouch for the above statements. When the IP profession was introduced in the year 2016, I was very sceptical of handling these matters. I was settled in my practice as a company secretary, handling litigation matters and other diverse topics. I entered the IBC litigation arena and got interested in the subject matter. I was reluctant to act as IP but when I realised that to handle voluntary liquidation matters (which I was already handling under Companies Act) I need to be an IP, I decided to appear for the exam and get enrolled. Studying for the exam after long gap was the first challenge. Second challenge was to write an exam where you need to choose the right answer from amongst multiple choices. I was used to writing long descriptive answers and this was a new format. I cleared the exam in July 2017 and got enrolled as an IP. My primary objective was to be eligible to handle voluntary liquidation matters. But with an adventurous streak, I applied for the IBBI empanelment and got my first appointment in March 2018 through Mumbai NCLT. I did not know anything about the CD at the time of appointment. It turned out to be a massive case with 12 COC members, debt of more than Rs. 300 crores, hundreds of operational creditors including workers and more than 8 locations of the CD along with many litigations and scores of worker issues. Since the law was very new then and very few people were aware about the workings of the Code, my job started with educating people about the Code, the moratorium and all. I did not have an exclusive IBC team then – one CS from my team (who was handling secretarial matters but also had an adventurous steak like me) and couple of articled assistants. The mandatory training after clearing the exam was also not available then. We all studied the Code and Regulations together and handled that assignment. Studying for the exam was one thing, but putting that into practice was a different ball game. I did not know anyone from any of the COC members or the CD. It was in true sense, complete independence. I started with basic online search on MCA Portal and studying the provisions of the Code. We made basic checklists for all actions to be taken in the process, held extensive discussions with the CD officers and gathered as much information as possible about the CD. I can definitely say that my 17 years of work experience and experience of NCLT litigation helped me. Having that experience was gold in the sense that I was able to understand the thought process of the parties, was able to gauge the conflicting interest of each party involved and keep focus on the ultimate goal of resolution of the CD without getting personally involved in the happenings around me. At the first COC meeting, I was meeting most of the COC members for the first time and was not empanelled with any of them. I was hopeful, but not at all sure, that my appointment would be continued. But I am very glad that the COC decided to continue my appointment and I was even happier when I got feedback that my conduct of the CIRP, various reports which I placed before the COC and overall conduct was in a thoroughly professional manner without any bias towards any party. That, I felt, was my reward.

Handling that assignment was a life changing event for me. From then on, I realised how interested I was in these matters and how much I enjoyed handling this. I also understood that you may not be known to many people but your work, your work ethics, professionalism, integrity will definitely take you places. This again brings us to the equal opportunity – someone saw me worthy of this opportunity and then on, it was my responsibility to live up to that through my actions.

Since 2018, I have handled lot of interesting assignments, dealt with diverse industries, handled going concerns, conducted transaction audits myself and have grown as a professional as well as a person. These assignments helped me gain rich experience in dealing with people with clashing interests, managing corporates in distress, ensuring that I protect my interests and actions and overall deliver better in each subsequent assignment after learning new things in previous assignment.

In my view, what mattered was professionalism,

integrity, work ethics, exposure, open mind and attention to detail. Along with these attributes, what was also necessary was courage of conviction, having single minded focus on what is expected out of the role, being neutral in your dealings, understanding that different people will have different priorities and that people will not hesitate to make you a scapegoat to further / protect their own interests. That reminded me of something I had learnt in my first job 23 years ago – we are not here to make friends, we are here to do our job right. It also taught me to take everything with a pinch of salt, not to trust any third party but only yourself and your team. Everyone will assure you their co-operation on your face, and I need not say further……

When I was doing all this, the fact that I am a woman IP did not matter much. No one gave me concessions or expected any less of me because I was a woman who was doing what was expected out of the job. I did not expect any concessions or preferential treatment because of my gender. If the COC reposes trust in you that you are the person for the given job, we do what any professional would do irrespective of whether you are a woman or a man. Although I would say that being a woman helped me to multi task different assignments (its an inborn skill in women to juggle different tasks simultaneously), to withstand pressures (we as women are wired to handle pressure better, in my view), to pay attention to detail. These are generally said to be attributes of women although that is not at all to say that men lack these attributes. It is person specific.

To summarise, on this occasion of Woman's Day, I would urge all my women friends, not only in this profession but anywhere, to consider some principles which I follow:

a. **Firstly, believe in yourself and your capacities. If you don't, no one else will.**

b. **Keep studying and improving yourself and your skills on a daily basis.**

c. **Learn from others, irrespective of who they are. Your maid, who may be illiterate, may teach you the attribute of tenacity.**

d. **Be consistent. Perseverance is the word I live by.**

e. **Do not expect any special treatment – do your job in a very professional manner which will speak for itself. Opportunities then open up themselves.**

f. **Develop a good team of capable trustworthy people who will get the job done – at home and in office.**

g. **Have a close circle of people (outside of your office and family) who will always have your back and motivate you to do better and go further in your profession and who inspire you. As it is said, you are a sum of the 5 people closest to you.**

h. **Ask for help wherever required – you cannot do everything on your own - do not try to be a superwoman.**

i. **Have a vision – where do you see yourself five years down the line - and move towards it. Without a goal or target, you are simply going through the motions.**

j. **Keep looking out for opportunities actively. Don't be shy to network.**

k. **Help others grow, especially women working with you so that you create that a healthy working environment. Don't waste time in jealousy and gossip.**

l. **Have empathy for others and learn to let go. Forgive people and also learn to accept your mistakes. Decide which battles are worth the fight.**

m. **Remember that each one of us has only 24 hours in a day – what matters is how you utilise them.**

n. **And most importantly, make time for your family. You need someone to share your success with. Other close relationships may change over time, but family will always stand by you, no matter what. As they say, don't lose the diamonds in search of gold!**

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Pratibha Khandelwal

is a qualified CS, Certified CSR Professional and an Insolvency Professional.

MERI KAHANI, MERI ZUBAANI

This is my story. Whether it's a success story for others or not, I don't know. Success is a relative and a subjective term. For some, it may mean prosperity, while others may measure it in terms of recognition, name and fame. But to me, it is an achievement of my planned goals, the goals which seemed unattainable around 30 years back.

A CAREFREE BEING

Born and brought up in a liberal environment, I was fortunate enough to get convent education and subsequently, do post-graduation in Foods and Nutrition. As a budding Nutritionist, I was fondly referred to by my friends and family as an **"ANGRY YOUNG WOMAN"**; always ready to fight for a cause, especially for women related matters.

THE DARK CLOUDS

Suddenly life took a turn. Everything was topsy turvy. I got married into a typical shekhawati Marwari family. I wasn't allowed to read newspapers or watch the news. The only thing expected from me was to cook, clean and manage the house. From being a free bird, I was suddenly caged. The constant fights due to difference of mind set was taking a toll on my life. The only breather was my husband, a Chartered Accountant by profession. Soon I realized, at that juncture of my life, the only way to shift focus from all this stuff was to study further. So, I planned on pursuing my dream, a Ph.D. in Nutrition. But I soon realized that this would require daily visits to the University which would create more stir within the family. So, Plan A (my dream) failed.

A SILVER LINING

Now, here comes PLAN B. My Chartered Accountant husband suggested that I pursue CS (Company Secretary). The plus point of doing CS at that time was that I could sit and study in my room (as it was a distance education program), without stepping out of my room and I had my tutor at home - My husband. With a heavy heart I made

a compromise and from a Science background, I switched to Commerce.

THE JOURNEY (AND SOME GREY CLOUDS)

So, the journey of becoming a CS started in 1993. The expected and unconditional support and encouragement came from my mummy, papa, sisters and my husband. Everyone else discouraged and wrote me off even before I wrote my exams. Not to blame others, I also had apprehensions. I knew there was a long way ahead. I didn't even know **DEBIT CREDIT** at that time. I am also a believer of this phrase **"where there is a STRONG will, there is a way"**. I studied hard along with fulfilling my other responsibilities towards family.

To my surprise (and to the shock of others) I cleared the first group in my first attempt. My little success aggravated all sorts of negative tactics by my family that could stop me from appearing in further exams that included hiding my Admit Card. (Thanks to my husband, who put in all efforts to issue a duplicate admit card, which was not that easy in those days).

I was determined to clear CS before the birth of my child. But this time too my plan failed. Both the exams and the delivery date were scheduled in the last week of December. I took a chance and studied throughout my pregnancy (the time when moms-to-be read Ramayana, I read Company Law and other Laws). I even say this to my son jokingly, who is 27 years old now and a CA himself, that Company Law is in your blood. My son was born in the 2nd week of December, so I could not appear for the exams. Now, I had additional responsibility for my son. I took a break of two years and enjoyed Motherhood.

THE SKY'S THE LIMIT

And then finally, climbing between a rock and a hard place, I achieved my goal. I completed CS. It has granted me social status, confidence, independence, name and fame.

Continuing with my motto of always sharpening the saw, I cleared Insolvency Professional Examination in March 2017 and have the honor of being the first woman Insolvency Professional of Rajasthan. Along with CS Practice, since March 2017, I am handling cases as Insolvency Professional in different capacities as Interim Resolution Professional, Resolution Professional, Liquidator, Authorised Representative and contributing a drop to the profession by successful resolution of Insolvency matters.

To achieve success in the Insolvency profession, which is 24*7 job, one needs to step out of the comfort zone and take challenges thrown by all the stakeholders and Regulators. Besides expertise in Management skills, being a compassionate listener to all aggrieved parties be it a COC members, Operational creditors, Promoters, Government authority, employees etc is indeed, a tremendous advantage and 'asset'.

Inch by inch I am moving further and the journey of learning continues. Each day comes with a new set of goals, new targets, new dreams. Some are fulfilled while some are carried forward. This is life.

ADVICE TO GENERATION NEXT

Know your subject well, know the ins and outs about it. The more a person knows, the better armed she is. To be ahead of the curve, always stay updated and organized.Rome wasn't built in a day hence be patient and the end result will be beautiful.

BIGGEST TAKEAWAY

"Success is not the matter of handling the best and winning the race. Rather, it is the matter of handling the worst and finishing the race."

JOURNEY > DESTINATION

This article is not meant to defame my in-laws or to gain sympathy. My story is just a message for upcoming women members to stay focused and determined. No matter what comes your way, use your logic, decisiveness and strength.

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Judicial Pronouncements

DELHI HIGH COURT

Case title: Bharat Heavy Electricals Limited v M/s. Zillion Infra-projects Private. Limited.

Case no.: CM APPL. 33889/2020

Decision Date: 21st February, 2023

Facts:

- In the pertinent case, Appellant invited Tender for erection, testing, commissioning and trail operation of boilers, including ESP, rotating machines. The contract was awarded to the respondent for an amount of Rs. 380,000,000/- vide Letter of Intent dated 09.07.2010.
- Certain disputes arose between the parties under the contract and the respondent/claimant company invoked arbitration in terms of Clause 33 of the General Instructions to Tenders and Contract dated 09.07.2010 and an Arbitrator was appointed.
- After the arbitration proceeding commenced, CIRP proceedings were initiated and the respondent filed its Statement of Claim for a sum of Rs. 22,24,10,826/- before the learned Arbitrator on 27.09.2019.
- An Application under Section 14 of the IBC, 2016 was moved by Appellant on the ground that no pending proceedings can be continued once the petition against the Creditor Debtor/respondent was admitted by NCLT and requested that the arbitral proceedings to be adjourned till the continuation of Resolution Process by the AA.
- Learned Sole Arbitrator on 12.02.2019 adjourned the proceedings observing that the appellant herein being an Operational Creditor, may not be in a position to file its Counter-Claim before the Interim Resolution Professional (IRP) appointed by the Arbitral Tribunal, but there is no bar to the Corporate Debtor/respondent herein to continue with the proceedings before the Arbitrator.

- In the meanwhile, the appellant/Operational Creditor appeared before the Interim Resolution Professional and submitted its claims in Form B under Section 7 of the code.
- A total sum of Rs. 69,03,671.85/- was liable to be adjusted as set off, from the total amount of Rs. 2,64,19,997.33/- payable to appellant by the respondent.
- The respondent filed an Application under Section 31(6) read with Section 17 of the Act, 1996 dated 06.07.2020 for allowing an interim award in terms of the admitted amount stated as set-off in Form B before the IRP.
- The appellant herein denied having admitted any liability and asserted that the pleadings were a defense given to it by the statute itself and unless and until the set-off is adjudicated, it does not become binding upon the parties.
- Meanwhile, the Sole Arbitrator vide Order dated 13.08.2020 allowed the application of the respondent/Claimant and granted an interim award for a sum of Rs. 69,03,671.85/.
- The Interim Award has been challenged by the appellant under Section 34 of the Act, 1996.
- The respondent refuted the challenge to the interim Award by asserting that the appellant has already filed its claims in Form B for determination before the IRP and any challenge to the impugned order based on set-off, is an afterthought and without any valid reason.

Held:

- The Hon'ble High Court define the scope of interference under Section 34 and Section 37 of the Arbitration and Conciliation Act, 1996 by referring to ***Delhi State Industrial & Infrastructure Development Corporation Ltd. vs. M/s. H.R. Builders FAO (OS) (COMM) 77/2022*** which states that "the scope of interference under Sections 34 and 37 of the Act, 1996 is extremely limited to when „an award is in conflict with the public policy of India, which includes cases of fraud, breach of fundamental policy of Indian law and breach of public morality or is "patently illegal" as held by the Apex Court in its decision in McDermott International Inc."
- The Court through various judicial pronouncement interoperated what a set off is. "Set-off" is defined in Black's Law Dictionary inter alia as a debtor's right to reduce the amount of a debt by any sum the creditor owes the debtor; the counterbalancing sum owned by the creditor.
- Judgement ***Amit Kumar Chopra vs. Narain Cold Storage & Allied Industries Pvt. Ltd. & Ors. 2014 (208) DLT 509,*** was referred *"from the aforesaid enunciation of law it is quite clear that equitable set-off is different than the legal set-off; that it is independent of the provisions of the Code of Civil Procedure; that the mutual debts and credits or cross-demands must have arisen out of the same transaction or to be connected in the nature of circumstances; that such a plea is raised not as a matter of right; and that it is the discretion of the court to entertain and allow such a plea or not. The concept of equitable set-off is founded on the fundamental principles of equity, justice and good conscience."*
- With respect to the argument made that the admissions have not been made in these proceedings and cannot form basis of interim Award The law on admissions as contained in Order XII Rule 6 CPC, 1908 is couched in widest terms to permit considering the admissions made in the pleadings or "otherwise". It was submitted that the appellant's admission of set-off amount in Form B is not couched with any clarification, explanation or any denial. Therefore, admissions are unequivocal and have rightly formed the basis of the interim award.
- Furthermore, since the Counter-Claim was filed after the interim award has been made and it is a liability admittedly payable by the appellant to the respondent and thus the interim award for the admitted amount, cannot be faulted.
- It was observed that the learned Arbitrator has judiciously exercised its jurisdiction under Section 31(6) of the Act, 1996 to give an interim award on

the basis of admission made by the appellant in Form B by way of set-off. Accordingly, the appeal was dismissed.

CASES REFERRED:

Numero Uno International Ltd. vs. Prasar Bharti (MANU/DE/0199/2008); Gammon India Ltd. vs. Sankaranarayana Construction (Banglore) Pvt. Ltd. (MANU/TN/3737/2009); Jharkhand Bijili Vitran Nigam Ltd. vs. IVRCL Ltd. ; SSMP Industries Ltd. vs. Perkan Food Processors Pvt. Ltd. (MANU/DE/2362/2019); K.S. Oil Ltd. vs. State Trade Corporation of India Ltd. & Anr 2017; McDermott International Inc. vs. Burn Standard Co. Ltd. (2006); National Highway Authority of India vs. M. Hakeem (2021) 9 SCC 1

National Company Law Appellate Tribunal, Principal Bench,Delhi

Case title: Kanti Mohan Rustagi v. Redbrick Consulting Pvt. Ltd.

Case no.: Company Appeal (AT) (Ins.) No. 1176 & 1177 of 2022

Decision Date: 6th February, 2023

Facts:

- In the corporate insolvency resolution process (in short "CIRP") initiated against the corporate debtor, UTM Engineering Pvt. Ltd., an order for liquidation of the corporate debtor was passed by the Adjudicating authority on 15.10.2020 and the Appellant was appointed as the liquidator.
- An Invitation for Expression of Interest (in short 'EOI') with regard to the corporate debtor was published on 22.1.2021 and thereafter e-Auction Process Information Document was issued on 25.1.2021, whereupon only Redbrick Consulting Pvt. Ltd. submitted an EOI. The e-auction of the corporate debtor as a 'going concern' was conducted, only one bid was placed by Redbrick Consulting Pvt. Ltd., which was accepted in accordance with the e-Auction Process Document.
- Mr. Gnyandeep Kantipudi is a suspended director of the corporate debtor and is also a director of Redbrick Consulting Pvt. Ltd (successful e-auction bidder)
- The issues raised in the application were:
  (i) the successful e-auction bidder debtor is an MSME, and therefore eligible to receive benefit under section 240-A of the IBC.
  (ii) the successful e-auction bidder is not covered by any ineligibility under section 29-A to submit a resolution plan.
- The Learned Senior Counsel for Appellant argued that the successful bidder Redbrick Consulting Pvt. Ltd. is an MSME since its investment in plant and machinery and annual turnover places it in the category of a "small enterprise" as stipulated in notification no. S.O. 2119 E dated 26.6.2020 and no separate registration is required.
- The Learned Senior Counsel for Respondent-2 argued that it was obligatory for the successful bidder to have registered itself by filing a memorandum for registration, which is referred as "Udyam Registration", which quite clearly Redbrick Consulting Pvt. Ltd. did not do. He has argued that the successful e auction purchaser Redbrick Consulting Pvt. Ltd. has not produced any document or evidence with regard to its

completion of "Udyam Registration" or the "Udyam Registration Certificate" in order to bolster its claim of being an MSME, and is therefore not entitled to benefit under section 240-A of the IBC.

Held:

- NCLAT noted the judgement of Hon'ble Supreme Court in the matter of Silpi Industries v. Kerala State Road Transport Corporation and Anr. (supra), which relates to the requirement of registration as an MSME.
- NCLAT also noted its judgement in the matter of Nikhil Tandon v. Sanjeev Bindal which clearly holds that filing of entrepreneur memorandum and its acknowledgement is necessary for an enterprise to be treated as a registered MSME.
- NCLAT held that we are of the clear view that the successful auction purchaser Redbrick Consulting Pvt. Ltd. should have obtained the Udyam Registration Certificate to get the benefit of MSME under section 240-A of the IBC. The successful auction purchaser Redbrick Consulting Pvt. Ltd. did not produce any Udyam Registration Certificate when the e-auction of the corporate debtor as a 'going concern' took place on 16.6.2021. The notification dated 26.6.2020 of the Ministry of Micro, Small and Medium Enterprise was in existence on the date of e-auction, and therefore, it was incumbent upon the successful auction purchaser Redbrick Consulting Pvt. Ltd. to have obtained and submitted such a certificate to the liquidator to claim benefit under section 240-A. It was necessary for the liquidator to have examined the eligibility of R-1 in the light of the fact required e-certificate had not been produced by the successful auction purchaser.
- NCLAT therefore held that the successful auction purchaser Redbrick Consulting Pvt. Ltd. cannot claim the benefit of an MSME under section 240-A of the IBC.
- NCLAT noted that Hon'ble Supreme Court, in the matter of Arun Kumar Jagatramka v. Jindal Steel & Power Limited (supra) has held that while doing a 'purposive interpretation' with regard to section 29-A of the IBC while examining the eligibility of prospective resolution applicant, applies equally to the liquidation process.
- The underlying purpose of introducing Section 29-A was adverted to in a judgment of NCLAT in Chitra Sharma v. Union of India, wherein it was noted that "Parliament has introduced Section 29-A into IBC with a specific purpose. The provisions of Section 29-A are intended to ensure that among others, persons responsible for insolvency of the corporate debtor do not participate in the resolution process."
- In view of the aforesaid, NCLAT held that:

"we are of the clear view that Gnyandeep Kantipudi, who by virtue of being a director of Redbrick Consulting Pvt. Ltd., controls and manages its affairs, cannot be allowed to take over control of the corporate debtor of which he is a suspended director. Relying on the principle of "purposive interpretation" of section 29-A of IBC, we are of the clear view that Redbrick Consulting Pvt. Ltd. was not eligible to bid for the corporate debtor in liquidation as a 'going concern'.

In view of the findings that the successful auction purchaser Redbrick Consulting Pvt. Ltd. is not entitled to receive benefit under section 240-A as an MSME, and that the liquidator was not correct in giving such a benefit to the Redbrick Consulting Pvt. Ltd., and also that the successful auction purchaser was not eligible to bid for the corporate debtor in liquidation as a going concern….."

Cases Referred:

Ashish Mohan Gupta v. Liquidator of Hind Motors [2021 SCC Online NCLAT 352]; Nikhil Tandon v. Sanjeev Bindal [Company Appeal AT(INS) 13 of 2022]; Arun Kumar Jagatramka v. Jindal Steel & Power Limited; Silpi Industries v. Kerala State Road Transportation Corporation & Anr., [2021 SCC Online SC 439]; Bank of Baroda v. MBL Infrastructures Ltd. [2022 5 SCC 661]; Arcelor Mittal v. Satish Kumar Gupta [2019 2 SCC 1]

Case title: Shri Guru Containers v Jitendra Palande

Case no.: Company Appeal (AT) (Insolvency) No.106 of 2023

Decision Date: February 22, 2023

Facts:

- The appeal arised out of impugned order passed by the NCLT wherein the Appellant was directed to reimburse the Interim Resolution Professional the total costs of Rs.5,62,000/- which was incurred by the IRP in the discharge of his duties.
- Section 9 petition was admitted against the Corporate Debtor by the Adjudicating Authority on 24.02.2020. Since the Operational Creditor/ Appellant while filing the Section 9 application did not propose the name of the IRP, hence the Adjudicating Authority appointed Jitendra Palande as IRP on 09.03.2020.
- Following his appointment, the IRP issued a public announcement on 11.03.2020. No claims were filed by the Operational Creditor or any other creditor. Therefore, the CoC could not be constituted.
- Appellant submitted that he continued to follow up with the IRP for update on CIRP but did not get any information.
- On 16.10.2020, the IP filed Section 19 application before the Adjudicating Authority for issue of directions to the suspended directors of the Corporate Debtor and the Appellant to furnish requisite information for proceeding with the CIRP of the Corporate Debtor and reimbursement of the CIRP costs.
- Subsequently on 21.03.2022, the IRP filed an application under Section 60 of the IBC before the Adjudicating Authority, inter-alia, seeking the termination of the CIRP initiated against the Corporate Debtor; seeking his discharge from duties as IRP and reimbursement of costs amounting Rs.5,62,000/- for duties performed. NCLT directed the appellant to reimburse the cost.
- The appellant contended about dereliction of duty on the part of IRP and stated that the Appellant was, therefore, not obligated to reimburse the IRP for his fees/expenses. Appellant further submitted that the IRP had failed to disclose the detailed item wise break-up of the fees and expenses claimed by him which is required in terms of the Code of Conduct in terms of the IBBI (Insolvency Professionals) Regulations, 2016 and Regulation 34-A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016. Insolvency Professional claimed disproportionately high fees as compared to the limited work undertaken by him having only issued the public announcement.
- The Insolvency Professional submitted that in terms of CIRP Regulation 33(3), the person filing the application under Section 7, 9 or 10, as the case may be, is required to bear the expenses incurred by the IRP which shall then be reimbursed by the CoC to the extent such expenses are ratified. In the present case since the CoC was not formed, the expenses has to be borne by the Operational Creditor/Appellant who moved the Section 9 application.

Held:

- The Adjudicating Authority went into factual matrix to find out whether the IRP had discharged his duties as IRP with due diligence in furthering the CIRP and therefore entitled to CIRP fees/expenses or not. Adjudicating Authority noted that *"it is clear that on receipt of email dated 09.03.2020 from the Operational Creditor regarding his appointment as IRP, on the same date he sought the contact details of the Operational Creditor and also sent a communication to suspended management requesting other related particulars, documents and books of accounts of the Corporate Debtor so as to effectively conduct the CIRP and manage the affairs of the Corporate Debtor. Neither the Operational Creditor nor the suspended management had provided access to the books of accounts, financial statement, bank account details or any other related information to the IRP. It is also noticed that the Operational Creditor was not in contact directly with the IRP. Instead, an advocate Mr. Saurabh Pandya was seeking status of CIRP from IRP without any authorisation from*

the Operational Creditor. The IRP had clarified that he was not bound to respond to mails to Mr. Pandya in absence of receipt of any authority letter from the Operational Creditor.

- Shifting the entire blame on the IRP on grounds of non-performance of duty and making him the scapegoat does not appear to be justified. It is equally important for the creditors to play a catalytic role in the insolvency resolution process given the present regime of creditor-driven IBC. The rigours of similar standards of discipline should also apply on the creditors.
- The conduct of the Operational Creditor in the present case is deprecatory in that once the CIRP process had commenced, the Operational Creditor went into a sleeping mode. The Operational Creditor did not seem interested in resolution of the Corporate Debtor is evident from the fact that till date no claim has been filed with the IRP.
- CIRP Regulation 33 clearly provides that the applicant shall bear the expenses to be incurred by or on the IRP. In the present case, when the Operational Creditor had initiated the CIRP proceedings which had led to the appointment of the IRP, it is incumbent upon the Operational Creditor to pay for the CIRP expenses.
- CIRP Regulation 33 also provides that the reimbursement would be to the extent it is ratified by the CoC. Ratification of fees by CoC does not arise in the present case because no CoC could be formed for reasons already noted earlier. Given these peculiar circumstances, NCLAT held that in terms of the statutory construct of IBC, it is the Operational Creditor who is liable to bear the expense/fees of IRP in the present case.
- Attention was also adverted to circular of IBBI dated 21.06.2018 on fee and other expenses incurred for Corporate Insolvency Resolution Process.
- The provisions as appearing in IBC and Regulations framed thereunder read with the Code of Conduct indicate that although quantum of fees has not been fixed, the quantum of fees payable is context specific. Thus, what fee is reasonable is context specific but what is context specific is not amenable to a precise definition. However, the fee should be a reasonable reflection of the work necessarily and properly undertaken by IRP.
- Further, the fees should not be inconsistent with the applicable regulations and should be charged in a transparent manner.
- In view of the aforesaid, NCLAT rationalised the fees. The basis of this rationalisation is that not much work complexity was involved in the case. NCLAT therefore held that payment of a consolidated amount of Rs.2,87,000/- plus GST to the IRP would suffice towards payment of fees/ expenses.
- NCLAT held that *"we concur in the directions of the Adjudicating Authority to the Operational Creditor to reimburse costs to the IP for discharge of his duties as IRP, we modify the quantum of fees/ expenses payable to a consolidated amount of Rs.2,87,000/- plus GST instead of Rs.5,62,000/-."*

Case title: Venus India Asset-Finance Pvt. Ltd. V. Suresh Kumar Jain

Case no.: Company Appeal (AT) (Ins.) No. 1395 of 2022 & I.A. No.4539 of 2022

Decision Date: February 09, 2023

Facts:

- The appeal arised out of the NCLT order dated 14.10.2022 wherein the application for replacement of Resolution Professional with one Mr. Sapan Mohan Garg was rejected though approved by the Committee of Creditors by a voting share of 76.69%.
- Following are the brief facts:
  - M.K. Overseas Private Limited –Corporate Debtor was admitted into CIRP on 19.09.2019 following admission of Section 7 application. Mr. Suresh Kumar Jain was appointed as Interim Resolution Professional on 19.09.2019 and later confirmed as Resolution Professional by the CoC.

- ❖ The CoC approved the Resolution Plan on 02.12.2020 and the application under Section 30(6) for approval of the Resolution Plan is pending before the Adjudicating Authority from 09.12.2020.
- ❖ Later, the CoC in its 21st meeting voted and approved the replacement of the Resolution Professional/Respondent with a voting share of 76.69% on 01.08.2022.
- ❖ The resolution for appointment of the new Resolution Professional, Mr. Sapan Mohan Garg in place of the existing Resolution Professional, Mr. Suresh Kumar Jain, was forwarded by the Appellant/VIAF for confirmation to the Adjudicating Authority in terms of Section 27 of the IBC. This application was rejected by the Adjudicating Authority. Aggrieved by this order, VIAF being one of the main Financial Creditors having majority voting share on the CoC has preferred this appeal.

- ➢ Appellant questioned the rationale adopted by the Adjudicating Authority in rejecting the application. Elaborating further, it was submitted that the Adjudicating Authority, disallowed the application for replacement of Resolution Professional on the ground that the IBC does not envisage any decision-making role for the CoC once it has approved the Resolution Plan and the Resolution Plan is pending adjudication of the Adjudicating Authority.
- ➢ Respondent submitted that in the instant case the Resolution Professional having placed the CoC approved plan before the Adjudicating Authority and CIRP period of 330 days being over, the CoC had become functus officio and hence could not have convened any meeting thereafter.
- ➢ The two points that needed to be answered were:
  - (i) Whether the CoC in passing a resolution to replace the Resolution Professional in the facts of the present case has committed any breach of the IBC and regulations framed thereunder; and
  - (ii) Whether the decision of the CoC to replace the Resolution Professional being the outcome of the wisdom of the CoC, is not subject to judicial review.

Held:

- ➢ When the CoC contemplates change of Resolution Professional, the Adjudicating Authority in terms of the statutory construct has to merely look into two basic check boxes which is whether the CoC has resolved to that effect with 66% vote share and whether the proposed Resolution Professional has given his written consent and not look at anything beyond. Both these conditionalities stand met in the present case.
- ➢ CoC is vested with the power to replace the Resolution Professional "at any time during the Corporate Insolvency Resolution Process". Regulation 2(e) defines CIRP. As per this definition, CIRP means the Insolvency Resolution Process for Corporate Persons as laid down under Chapter II of Part II of the IBC and that Chapter II of Part II of the IBC ends only with the approval of the Resolution Plan by the Adjudicating Authority. Attention was adverted to Explanation to Regulation 18 to state that it clearly empowers the CoC to hold meetings till the resolution plan is approved under sub-section (1) of section 31 or order for liquidation is passed under section 33.
- ➢ Section 27 does not prescribe the need to assess the performance of the Resolution Professional while seeking his replacement.
- ➢ NCLAT in the matter of State Bank of India vs. Ram Dev International Ltd. in Company Appeal (AT) (Ins.) No. 302 of 2018 held that it is not desirable for the CoC to record its opinion or comments about the Resolution Professional while seeking his replacement so that no harm is caused to his present and future appointment as Resolution Professional.
- ➢ It is well settled that the IBC does not postulate jurisdiction for the Adjudicating Authority to undertake scrutiny of the justness of the majority opinion expressed by financial creditors by way of voting. The insolvency regime introduced under the IBC has placed fetters on the power of interference by the Adjudicating Authority.
- ➢ In view of the aforesaid, NCLAT held that "we are of the view that the Adjudicating Authority being a creature of IBC Code and the statutory provisions

therein not having invested jurisdiction and authority upon it to review the decision exercised by the CoC to replace the Resolution Professional, the rejection of the application for the replacement of the Resolution Professional is a transgression of jurisdiction and therefore deserves to be set aside." NCLAT set aside the impugned order dated 14.10.2022.

Cases referred:

Sumant Kumar Gupta vs Committee of Creditors in Company (AT) Ins No. 1037 of 2020; Bank of India vs Nithin Nutritions Private Limited in Company (AT) Ins No. 497 of 2020; State Bank of India vs. Ram Dev International Ltd. in Company Appeal (AT) (Ins.) No. 302 of 2018

Case title: Hero Fincorp Limited Vs. M/s Hema Automotive Private Limited

Case no.: Company Appeal (AT) (Insolvency) No.1540 of 2022

Decision Date: January 03, 2023

Facts:

- The appeal arised out of the NCLT order dated 23.11.2022 wherein the application seeking liquidation of the Corporate Debtor was dismissed.
- Brief facts of the case are reproduced below:
  - An order dated 08.07.2022 was passed by Adjudicating Authority commencing the Corporate Insolvency Resolution Process ("CIRP") against the Corporate Debtor.
  - The Appellant filed its claim which was provisionally accepted. The Committee of Creditors ("CoC") was constituted with Appellant as the sole Member of the CoC. On 07.10.2022, in accordance with the approval of the CoC, the Resolution Professional ("RP") published Form-G, wherein the last date for receipt of Expression of Interest ("EOI") was 24.10.2022. However, prior to the said date the sole Member of the CoC resolved and directed the RP to move an application for liquidation of the Corporate Debtor.
  - The RP filed an application praying for an order of the liquidation.
  - The Adjudicating Authority directed the CoC to reconsider the Application. The Adjudicating Authority held that:

"Such approach is not in the spirit of IB Code as Insolvency Resolution is the focus of the act. Only in the event of failure of insolvency resolution the steps for liquidation have to be taken. The sole Member of CoC has not adopted a judicious approach of exploring the possibility of resolution. Since he has recommended the liquidation even before the time period for seeking EOI had elapsed which is 24.10.2022. Therefore, CoC is directed to reconsider the present application….."

- Appellant contended that it was mandatory for Adjudicating Authority to pass an order of liquidation in view of the provision of Section 33, sub-section (2) and Adjudicating Authority committed error in not allowing Application filed by the RP. Further, the decision taken by the CoC for liquidation was in the commercial wisdom of the CoC, which ought not to have been interfered by the Adjudicating Authority.

Held:

- Section 33, sub-sections (1) and (2), which are relevant in the present case are as follows:

***"**33. **Initiation of liquidation.** - (1) Where the Adjudicating Authority, -*

(a) before the expiry of the insolvency resolution process period or the maximum period permitted for completion of the corporate insolvency resolution process under section 12 or the fast track corporate insolvency resolution process under section 56, as the case may be, does not receive a resolution plan under sub-section (6) of section 30; or

(b) rejects the resolution plan under section 31 for the non-compliance of the requirements specified therein, it shall-

(i) pass an order requiring the corporate debtor to be liquidated in the manner as laid down in this Chapter;

(ii) issue a public announcement stating that the corporate debtor is in liquidation; and

(iii) require such order to be sent to the authority with which the corporate debtor is registered.

(2) Where the resolution professional, at any time during the corporate insolvency resolution process but before confirmation of resolution plan, intimates the Adjudicating Authority of the decision of the committee of creditors approved by not less than sixty-six per cent. of the voting share] to liquidate the corporate debtor, the Adjudicating Authority shall pass a liquidation order as referred to in sub clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

Explanation. – For the purpose of this sub-section, it is hereby declared that the committee of creditors may take the decision to liquidate the corporate debtor, any time after its constitution under sub-section (1) of section 21 and before the confirmation of the resolution plan, including at any time before the preparation of the information memorandum."

- The Explanation to Section 33, sub-section (2) contains a legislative declaration empowering the CoC to take a decision to liquidate the Corporate Debtor any time after its constitution as per sub-section (1) of Section 31 and before the confirmation of the Resolution Plan, including at any time before the preparation of the Information Memorandum.
- In Sreedhar Tripathy vs. Gujarat State Financial Corporation and Ors., NCLAT clarified that decision taken by the CoC is subject to judicial review in the facts of the particular case and the Tribunal can very well look into as to whether the decision is in accordance with the Code or not.
- There is no doubt that in Section 33, sub-sections (1) and (2) legislature has used the expression "shall". However, the obligation of the Adjudicating Authority to direct for liquidation shall rise only when decision of the CoC is in accordance with the Code. Judicial review of the decision of the CoC in a particular case is not precluded.
- In view of the aforesaid, NCLAT held that

"Form-G having been issued after preparation of the Information Memorandum and the last date fixed by the CoC being 24.10.2022 for receiving Expression of Interest, we are satisfied that Adjudicating Authority did not commit any error in rejecting for liquidation and asking the CoC to reconsider its decision. The order of Adjudicating Authority clearly empowers the CoC to reconsider its decision and take an appropriate decision taking into consideration further facts and events. We, thus, are satisfied that there is no ground to interfere with the impugned order."

Cases referred:

Company Appeal (AT) (Insolvency) No.1062 of 2022 – Sreedhar Tripathy vs. Gujarat State Financial Corporation and Ors.; Vidarbha Industries Power Limited vs. Axis Bank Ltd. – (2022) 8 SCC 352.

Code & Conduct

CASE NO	IBBI/DC/150/2023
DATE OF ORDER	14th February, 2023

Background

IBBI, in exercise of its powers under section 218 of the Code read with regulation 3(2) and 3(3) of the IBBI (Inspection and Investigation) Regulations, 2017 (Inspection Regulations) appointed an Inspecting Authority (IA) to conduct the inspection of Insolvency Professional. In compliance with regulation 6(1) of Inspection Regulations, IA shared the Draft Inspection Report (DIR) with Insolvency Professional. Thereafter, IA submitted the Inspection Report in accordance with regulation 6(4) of the Inspection Regulations.

Contravention – I

- Irregularity in appointment as Resolution Professional (RP)

The Disciplinary Committee of IBBI observed that Insolvency Professional recorded the minutes of 1st CoC meeting by intentionally misrepresenting the facts with a mala fide intention. Insolvency Professional further continued with this misrepresentation by filing a memo before the AA intimating it about his appointment as a RP even though no such resolution was passed and even when Financial Creditor holding 84.6% voting share did not agreed to it.

Provisions Referred

Section 22(2) of the Code read with clauses 1, 2, 3, 5, 13 and 14 of the Code of Conduct as specified in the First Schedule of IBBI (Insolvency Professionals) Regulations, 2016 (Code of Conduct).

Submission of Insolvency Professional

Insolvency Professional pleaded that the specific allegation pertaining to this is presently under appeal with Hon'ble National Company Law Appellate Tribunal (NCLAT), Chennai Bench, and are therefore sub judice.

Finding

The Disciplinary Committee (DC) of IBBI was of the view that the matter involving the appointment of RP is under challenge before Hon'ble NCLAT, Chennai Bench in appeal by Insolvency Professional, hence the DC refrains from intervening in the matter, at this stage.

Contravention – II

- Failure to convene CoC meetings as per Regulation 18 of extant CIRP Regulations

The Disciplinary Committee of IBBI observed that Resolution Professional may convene a meeting, if he

considers it necessary, and shall convene a meeting if a request to that effect is made by members of the committee representing thirty-three per cent of the voting rights.

Provisions Referred

Regulation 18 of CIRP Regulations, clauses 1, 2, 13 and 14 of the Code of Conduct.

Submission of Insolvency Professional

RP submitted that no request for a 2nd CoC meeting was made by the Financial Creditor either under regulation 18 or otherwise. He further submitted that for an allegation to be made by the Board of any violation on his part in not acting upon a request made by a CoC member to convene a CoC meeting under regulation 18, such a letter has to be produced in evidence. RP stated that there is therefore no violation of regulation 18(2) of the CIRP Regulations read with clause 13 of the Code of Conduct as alleged.

Finding

The Disciplinary Committee (DC) of IBBI found that an IRP shall perform functions of RP till appointment of RP. RP has not adhered to the request of the Financial Creditor to conduct meeting, RP has violated regulation 18 of CIRP Regulations, clauses 1, 2, 13 and 14 of the Code of Conduct.

Contravention – III

- **Violation of the AA's order**

The Disciplinary Committee of IBBI observed that RP was directed to hold a CoC meeting by next week from the date of order and submit a Resolution immediately but despite being directed by the AA to hold CoC meeting, RP conducted the 2nd CoC meeting with a substantial delay.

Provisions Referred

Section 17(2)(e) of the Code read with clause 12 and 14 of the Code of Conduct.

Submission of Insolvency Professional

RP submitted that he is unable to understand how a delay of 8 days has morphed to a larger delay. He further submitted that there has been no delay.

Finding

The Disciplinary Committee (DC) of IBBI found that RP was present before the AA while order for conducting CoC meeting was passed. It is the duty of Insolvency Professional to abide by the orders passed by the AA in its letter and spirit, and his conduct of convening CoC meeting with a delay even when the order of the AA was explicit in its directions is prima facie in violation of section 17(2)(e) of the Code read with clause 12 and 14 of the Code of Conduct.

DECISION OF IBBI

In view of the above, IBBI was of the view that Insolvency Professional was in violation of regulation 18 of CIRP Regulations, clauses 1, 2, 13 and 14 of the Code of Conduct for failing to convene CoC meeting on the request of Financial Creditor and suspended the registration of Insolvency Professional for a period of one year.

Knowledge Centre

FAQs on Grievance Redressal Mechanism of ICSI Institute of Insolvency professionals (ICSI IIP)

1. What is the meaning of term "Grievance"?

Pursuant to Regulation 2(1)(h) of the Insolvency and Bankruptcy Board of India (Grievance and Complaint Handling Procedure) Regulations, 2017, "grievance" means a written expression by a stakeholder of his suffering on account of conduct of a service provider or its associated persons. The term "service provider" includes Insolvency Professional and Insolvency Professional Agency.

2. Who can file a grievance?

Pursuant to Bye Law 21(1) of the ICSI IIP Bye Laws read with Grievance Redressal Policy of ICSI IIP, grievance may be filed by:

a. any professional member of the Agency;

b. any person who has engaged the services of the concerned professional members of the Agency; or

c. any other person or class of persons as may be provided by the Governing Board.

3. Against whom grievance can be filed?

Grievance can be filed against any professional of ICSI IIP or against ICSI IIP.

4. What is the procedure of filing the grievance?

- A stakeholder, who wishes to file a grievance, shall file it with the ICSI IIP in Annexure I or II of the Grievance Redressal Policy of ICSI IIP. The Grievance Redressal Policy of ICSI IIP is uploaded on its website https://www.icsiiip.in/panel/assets/images/policies_iip/16618355356312GRC%20Policy.pdf

- The grievance must be accompanied by demand draft for two thousand nine hundred and fifty rupees (Rs. 2,500/- fees plus Rs. 450/- GST) drawn in favour of the "ICSI Institute of Insolvency Professionals" payable at New Delhi or an online acknowledgement of two thousand nine hundred and fifty rupees (Rs. 2,500/- fees plus Rs. 450/- GST) paid to the credit of the ICSI IIP through its website, www.icsiiip.in

- The grievance and its enclosures should be filed in triplicate, duly signed by the Aggrieved and should be in English language. Any document/s in Hindi or in any Regional Language should be sent along with English translation thereof, duly verified as 'true copy'.

5. What is the mode of filing grievance to ICSI IIP?

The Grievance should be submitted through following modes:

- By sending an email, with the word "Complaint/ Grievance" recorded in the subject head, to anu.sharma@icsi.edu and md.iip@icsi.edu
- By letter to:

  Grievance Redressal Officer,

  ICSI Institute of Insolvency Professionals,

  ICSI House, C-36, Third Floor, Sector-62, Noida-201 309

6. Whether a Grievance Redressal Officer has been designated in ICSI IIP?

Yes, ICSI IIP has designated the following officer as the Grievance Redressal Officer:-

CS Anu Sharma

Executive (Legal & Compliance)

ICSI Institute of Insolvency Professionals,

Email Id: anu.sharma@icsi.edu

7. What are the possible outcomes of any grievances being addressed?

The Committee(s), after examining the grievance, the observations of the Grievance Redressal Officer and the facts associated with it shall take a decision recording the reasons thereof and may:

- Dismiss the grievance if it comes to conclusion that the grievance is devoid of merit by recording its reasons briefly, or
- Close the grievance with an advisory to the Insolvency Professional, or
- Refer the Secretariat of the agency, which shall authorize an officer (not below the post of Deputy Director) for issuance of show cause notice, in such format as may be prescribed, at the last known address of the professional member updated in the records of ICSI IIP requiring the professional member, to, inter alia, submit a reply in his defence within 2 weeks of receipt of the show cause notice, along with supporting documents, if any, failing which, the Disciplinary Committee shall proceed on the basis of material available on record., or
- Refer the matter to the Disciplinary Committee, if deemed appropriate, or
- Direct the parties to seek mediation as a means of redressal of grievance.

8. Whether on request of the Complainant, the identity of complainant can be kept confidential?

Yes, clause 5(7) of the grievance redressal policy provides that a stakeholder filing grievance may request the Committee(s) to keep the identity of the complainant confidential and in that case the Committee(s) shall keep it confidential unless its disclosure is necessary for processing the grievance or under any law.

9. What is the maximum timeline for disposal of grievance by the ICSI IIP

The maximum timeline for disposal of grievance by ICSI IIP is thirty days.

10. How long will it take to address to grievance?

An acknowledgement shall be sent by Grievance Redressal Offficer to the aggrieved within five (5) working days of the receipt of the grievance which shall contain:

- Date of receipt of grievance;
- Unique Redressal Grievance Number;
- Name, Designation and Contact details of Grievance Redressal Officer.

11. What is the procedure followed by ICSI IIP for redressal of grievance?

i. On receipt of grievance, an acknowledgement shall be sent by Grievance Redressal Offficer to the aggrieved within five (5) working days of the receipt of the grievance which shall contain:

- Date of receipt of grievance;
- Unique Redressal Grievance Number;
- Name, Designation and Contact details of Grievance Redressal Officer.

ii. The application will be scrutinized for completeness by Grievance Redressal Officer who may request for additional information or clarification(s) in this regard.

iii. The aggrieved and Professional Member or the ICSI IIP, as the case may be, shall submit the information and records sought by the

Grievance Redressal Officer.

iv. Once the grievance application is deemed to be complete, it will be submitted to the Grievance Redressal Committee by Grievance Redressal Officer with the recommendations for consideration and further necessary action. The actions that may be taken by the Grievance Redressal Committee are mentioned in question 7 in detail.

12. Can the grievance be closed by the Grievance Redressal Officer?

Yes, the Grievance Redressal Officer may close the grievance. Following are the grounds of closure of grievance by the Grievance Redressal Officer:

- if the aggrieved/ complainant has not responded or failed to provide the full information / documents sought;
- if the Grievance Redressal Officer is of the opinion that no prima facie case exists against the Professional Member or his/ her associated person
- where the aggrieved/ complainant has withdrawn his/her complaint / grievance;
- Where the subject matter of complaint / grievance is pending before a court, tribunal, Board etc.
- Where the complaint / grievance has been resolved court, tribunal, Board etc.

It is pertinent to mention that the details of complaints/ grievances closed by the Grievance Redressal Officer shall be placed before the Grievance Redressal Committee(s) for approval. If the Committee(s) is of the view that any complaint/ grievance closed by the Grievance Redressal officer requires to be reconsidered then the Committee(s) shall reopen such complaints/ grievances.

13. Will the Grievance Redressal Committee redress the grievance which is pending before court, tribunal etc.?

No, the Committee shall not redress the grievance which is pending before the court, tribunal etc. The same shall be closed by the Grievance Redressal Officer or the Grievance Redressal Committee.

14. Is there any time limit for filing of grievance with ICSI IIP?

Yes, As per clause 5(A)(3) of the Grievance Redressal Policy of ICSI IIP, A grievance or a complaint, as the case may be, shall be filed with the Grievance Redressal Officer of ICSI IIP as designated by the Committee(s) within forty five (45) of the occurrence of cause of action for the complaint/ grievance.

Provided that a complaint/ grievance may be filed after the aforesaid period, if there are sufficient reasons justifying the delay, but such period shall not exceed forty five (45) days.

15. What actions are taken against false/malicious grievances?

In case the Committee(s), on investigation of the grievance, finds that a false grievance/ complaint has been made or that a grievance/complaint has been made with a malicious intent, the Committee(s) shall take such reasonable steps as they deem necessary to curb the initiation of such false and/or malicious complaints in the future.

However, a mere inability to provide adequate proof to substantiate the grievance/complaint shall not be construed as false and malicious grievance/complaint.

16. How ICSI IIP will keep record of grievances addressed?

There shall be a register of grievances stating details of grievances made and the resolutions/ settlements arrived at with regard to those grievances. In case, grievance has not been resolved and the matter has been referred to Disciplinary Committee, register of grievances shall provide for status of the same and be updated regularly. The register of grievances may be maintained either in physical or electronic mode.

17. Whether a stakeholder whose grievance was not sufficiently addressed by the Insolvency Professional can approach ICSI IIP with the grievance?

Yes, in such a case ICSI IIP shall consider the grievance.

Policy/Regulatory Updates

GOVERNMENT EXEMPTS CERTAIN INCOMES OF IBBI FROM INCOME TAX FOR FIVE YEARS

MINISTRY OF FINANCE

(Department of Revenue)

(CENTRAL BOARD OF DIRECT TAXES)

NOTIFICATION

New Delhi, the 1st March, 2023

S.O. 947(E).—In exercise of the powers conferred by clause (46) of section 10 of the Income-tax Act, 1961 (43 of 1961), the Central Government hereby notifies for the purposes of the said clause, 'Insolvency and Bankruptcy Board of India', New Delhi (PAN AAAGI0193K), a Board established by the Central Government, in respect of the following specified income arising to that Board, namely:

(a) Grants-in-aid received from Central Government;

(b) Fees received under the Insolvency and Bankruptcy Code, 2016 (31 of 2016);

(c) Fines collected under the Insolvency and Bankruptcy Code, 2016 (31 of 2016); and

(d) Interest income accrued on (a), (b) and (c) above.

2. This notification shall be effective subject to the conditions that Insolvency and Bankruptcy Board of India, New Delhi:-

(a) shall not engage in any commercial activity;

(b) activities and the nature of the specified income shall remain unchanged throughout the financial years; and

(c) shall file return of income in accordance with the provision of clause (g) of sub-section (4C) of section 139 of the Income-tax Act, 1961.

3. This notification shall be applicable with respect to the financial years 2022-2023, 2023-2024, 2024-2025, 2025-2026 and 2026-2027.

[Notification No. 09/2023/F.No.300196/39/2021-ITA-I]

SOURABH JAIN, Under Secy.

IBBI OBLIGATES APPLICANTS TO SUBMIT CIRP APPLICATION TO THE BOARD BEFORE FILING WITH THE ADJUDICATING AUTHORITY

Dear Madam / Sir,

Subject: Serving of copy of applications to the Board, as mandated under Rules 4, 6 and 7 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, as amended *vide* notification No. G.S.R. 583(E) dated 24th September, 2020 published in the Gazette of India, Part II, Section 3, Sub-section (i), No. 474 dated 24th September, 2020 obligates an applicant to provide a copy of the application for initiating corporate insolvency resolution process (CIRP) against a corporate debtor, *inter alia*, to the Board, before filing the same with the Adjudicating Authority.

2. Accordingly, for convenience of applicants, the Board has made available a facility on its website at https://ibbi.gov.in/en/intimation-applications/apply-iaa for serving a copy of the application online to the Board *vide* Circular No. IBBI/IU/35/2020 dated 29th October 2020.

3. Recently, IBBI has, *vide* Circular No. IBBI/IU/51/2022 dated 15th June 2022 decided to forward all the applications received for initiating insolvency to the Information Utility (IU) and, the IU is required to (a) inform other creditors of the CD by sharing the application; (b) issue notice to the applicant, requiring it to file 'information of default' as per IU Regulations; and (c) process the 'information of default' for the purpose of issuing ROD as per the IU.

4. Accordingly, to ensure filing of authentic information with the Board and further enable Board to share information relating to the application for initiation of CIRP with the IU efficiently, the format has been revised. The revised format is at **Annexure A**. A step-by-step guide for submission of the application is at **Annexure B**. On submission of the application online, the applicant shall get an acknowledgment. The applicants are encouraged to avail of this facility.

5. The provisions of this circular shall supersede IBBI's Circular No. IBBI/IU/35/2020 dated 29th October 2020. This is issued in exercise of the powers under clause (k) of sub-section (1) of section 196 of the Insolvency and Bankruptcy Code, 2016.

Global Arena

RUNDOWN ON CHINESE INSOLVENCY LAW: FEATURES AND GROUP INSOLVENCY FRAMEWORK

The main insolvency procedure in China is liquidation, which is set out in a special chapter of the Enterprise Bankruptcy Law. The objective is to properly value and distribute the residual value of the debtor's assets to its creditors and shareholders. Where there are no assets for the debtor to distribute, the bankruptcy administrator will request that the court terminates the liquidation proceedings.

A bankruptcy administrator must, when the insolvent's assets have been distributed, deliver to the court a report on the distribution of the assets in a timely manner and request that the court terminates the proceedings.

Although China has made various efforts to move towards a more adversarial system so as to build an impartial judicial organ, it is still facing many difficulties with the prevalent inquisitorial system. The active roles of court and government agencies reflect the view that the dispute resolution system in China is a matter of collective concern rather than a private matter, which is why there is more discretion and power, both in the courts and government agencies. The Enterprise Bankruptcy Law (EBL) of the People's Republic of China (Effective from 1st June, 2006).

Chapter 8 of the Bankruptcy Law talks about 'Reorganisation' of Corporate Enterprises. The Supreme People's Court judicial interpretations, Authoritative Guidelines for Bankruptcy Judicial Practice in China as issued on March 4, 2018 by Supreme People's Court of the People's Republic of China in National Court Work Conference on Bankruptcy trails.

Chinese Enterprise Bankruptcy Law has three remedies for companies undergoing Insolvency: Liquidation, Reconciliation and Reorganization.

SALIENT FEATURES OF EBL, 2016[1]

- Debtors under EBL will include any legal person in China regardless of whether the entity is stated-owned (i.e., state-owned enterprise or "SOE"), private, or foreign-invested. For the first time in China's history, the bankruptcy of all legal persons in China is governed by one uniform bankruptcy law. EBL, however, continues to exclude partnerships, sole proprietors, and individuals. More importantly, the inclusion of financial institutions, e.g., commercial banks, insurance companies, and securities companies, could bring transparency and other long-term benefits to creditors who invest in this sector.
- An enterprise may file a voluntary petition for bankruptcy only if two insolvency tests are met: first, the debtor is unable to pay its debts when due (the "cash flow test"); and second, the debtor lacks sufficient assets to pay the debts (the "balance sheet test"). On the other hand, an involuntary petition under the new law may be filed by a creditor when only the cash flow test is triggered.
- EBL 2016 imposes an automatic stay in limited circumstances. For example, the new law provides that during the pendency of the bankruptcy case any civil lawsuit involving the debtor can only be commenced in the same people's court that accepts the bankruptcy petition.
- The law also specifies that after a court accepts the bankruptcy petition, the debtor cannot pay any pre-bankruptcy debts, and any such payments are void ab initio. Again, it is unclear whether the payments made during the 15-day window period should also be void ab initio.
- A provision in law addresses executory contracts. It provides that the bankruptcy administrator is authorized to terminate or continue to perform pre-bankruptcy contracts if there are obligations to be performed by each contracting party. The law requires the bankruptcy administrator to decide whether to terminate or perform within two months of the court's acceptance of the petition or 30 days after the non-debtor contracting party requests a decision; otherwise the contract is deemed terminated.
- Prior to the enactment of the new law, workers' compensation claims were often paid ahead of secured claims. The new law reverses the current practice and provides that in liquidation, secured claims receive distributions to the extent of the value of the collateral, and any deficiency claim is treated as a general unsecured claim.
- The unsecured creditors should receive their distribution in the following order:
- First, post-bankruptcy administrative costs and expenses are entitled to first priority in distribution;
    - Second, post-bankruptcy liabilities for "common benefits" are entitled to second priority in distribution;
    - Third, workers' compensation claims are entitled to third priority in distribution;
    - Fourth, social insurance expenses not included in third priority distribution and tax claims are entitled to fourth priority in payment; and
    - Fifth, general unsecured claims are the last to be paid from the debtor's estate.
- This law devotes an entire chapter to reorganization. Either a debtor or a creditor may apply to the court for reorganization. Similar to U.S. Bankruptcy, a debtor in possession may manage its assets and operate its business under the supervision of an administrator, or the administrator may operate the business and administer assets by engaging existing management. In cases where there is both a debtor in possession and an administrator, the law does not clarify what the relative power and control will be between the two. It gives the debtor in possession or the administrator the exclusive right to propose a plan of reorganization for six months after the reorganization application is accepted by the court; this exclusivity period might be extended for another 3 months.
- *All creditors are allowed to vote on a reorganization plan and the creditors are divided into four classes for plan voting purposes: secured creditors, workers' compensation claimants, tax claimants, and other general unsecured creditors. In addition, the court may allow the holders of de minimis claims to vote on the plan as a separate class.*

[1]https://www.kirkland.com/siteFiles/kirkexp/publications/2272/Document1/Chinas_New_Enterprise_Bankruptcy_Law.pdf

- A creditors' meeting must be held to vote on the reorganization plan. The plan must be approved by an affirmative vote of two-thirds of the total amount of the claims in each class and a majority of the creditors in such class that are present at the creditors' meeting. The plan can be approved only if all four voting classes vote in favor of the plan, although the court may "cram down" a dissenting class if certain conditions are satisfied, similar to the cram down process in the U.S. and UK.
- Similar to the Indian Insolvency Code, Insolvency Law in China also introduces the concept of avoidance actions, i.e., fraudulent conveyances and preferences. For instance, the new law authorizes the court to avoid, upon request of the administrator, certain fraudulent conveyances of the debtor's property within one year prior to the date the court accepts the bankruptcy petition, and any payment made for the benefit of a creditor within the six month period prior to the date the court accepts the bankruptcy petition if the debtor was insolvent at the time.
- The court is to designate a bankruptcy administrator to manage the affairs of the debtor and therefore reverse the practice of designating a government-appointed liquidation group. The law gives the creditors power to later ask the court to remove the administrator if the administrator fails to perform its duties. The administrator reports to the court but is supervised by a creditors' committee. The law also authorizes the People's Supreme Court to issue an opinion on the details of the designation and compensation of the administrator, but does provide that the administrator's compensation is subject to review and objection by creditors. This situation is similar to the powers that are provided under the Indian Insolvency Law to the Committee of Creditors. The power to apply for replacement of the Insolvency Professional as well as power to fix and approve the fee of the Insolvency Professional, rest with the Committee of Creditors.
- As mentioned in point 11 above, the creditors' committee has extensive involvement in the bankruptcy case. For instance, the administrator must report to the creditors' committee for any significant asset disposition activities affecting the interests of the creditors. The creditors' committee also supervises the management, disposition and distribution of the bankruptcy estate. In particular, creditors may ask the court to remove the administrator and review the administrator's compensation, supervise the administrator, determine whether the debtor should remain as a going concern, or adopt the reorganization plan, settlement agreement, or other asset disposition plan.
- Through EBL, for the first time in China, the law purports to extend to assets of a debtor located outside the territory of China. In addition, it allows the court to recognize and enforce foreign court orders and judgments to the extent such orders or judgments may be enforced or recognized by a Chinese court pursuant to existing treaties, international conventions, or the principle of comity.

GROUP INSOLVENCY IN CHINA

There are no circumstances in which a parent or affiliated corporation assumes the responsibility for the liabilities of subsidiaries or affiliates. In practice, the parent corporation should bear the responsibility for its subsidiary if that subsidiary is not an independent entity, or it has conducted an abnormal transaction.

The combination of bankruptcy procedures of the parent company and its subsidiaries is permitted in general practice. Under such circumstances, the assets and liabilities belonging to the companies may be pooled for the purpose of distribution.

On December 25, 2017, the Supreme People's Court of the People's Republic of China ("PRC") convened the National Court Work Conference on Bankruptcy Trials. Representatives from higher people's courts of all provinces, autonomous regions and municipalities attended the conference and reached a consensus on major issues concerning bankruptcy trials. Minutes of the conference were issued by the Supreme People's Court on March 4, 2018, which have become authoritative guidelines for bankruptcy judicial practice in China.

In that conference, issue of substantive consolidation of related parties was issued and analysis of several

key provisions detailed within the minutes of the conference is provided below:

Substantive consolidation among affiliated debtor entities is a double-edged sword – on the one hand, it is helpful to prevent the debtor's fraudulent conducts and asset manipulations that jeopardise the creditors' interest, and on the other hand, the abuse or overuse of substantive consolidation may unfairly reduce the recovery rate of some creditors.

When examining the bankruptcy cases of enterprises, the people's courts should respect the independence of the corporate personality, and make the individual judgment of the reasons for the bankruptcy of the affiliated members and apply the **individual bankruptcy procedures as the basic principle.** When there is a high degree of legal personality confusion among the members of the affiliated enterprises, and the cost of distinguishing the property of each affiliated enterprise is too high, and the creditor's fair settlement interest is seriously damage the related entity's ***substantive merger and bankruptcy may be applied for trial.***

After receiving the substantive merger application:

- **the people's court will notify the relevant interested parties and organize the hearing.**
- **In the process of reviewing the application for substantive merger, the people's court may comprehensively consider the mixing procedures of assets between related enterprises and their duration, the interests of each enterprise, the overall liquidation of creditors, and the possibility of increasing the reorganization of enterprises.**
- **A ruling on whether to proceed in a substantive merger within 30 days from the date of receipt of the application.**
- **The people's court will decide rights relief of interested parties and if the related parties are dissatisfied with the substantive merger judgement, it may apply to the people's court at the next higher court for reconsideration within 15 days from the date of service of the ruling.**

In the case of reorganization by means of substantive consolidation, a unified credit classification, creditor adjustment and claims compensation scheme shall be formulated in the draft reorganization plan.

JURISDICTION OF THE SUBSTANTIVE CONSOLIDATION PROCESS:

If a case involving related enterprises is tried through the substantive consolidation process, the people's court in the place where the essential controlling enterprise is located shall have the jurisdiction. The reason for this is that, with the main assets and the management located, the people's court should be able to carry out the bankruptcy procedure more effectively and thus reduce costs incurred in the judicial process. Moreover, if the essential controlling enterprise is difficult to be identified, the people's court in the place where the major property of the related enterprises is located shall have the jurisdiction. If several courts are in dispute over which has jurisdiction, their common superior people's court shall be requested to designate the jurisdiction.

OUTCOME:

In case of substantive merger, the creditor's rights and debts between the members of each affiliated enterprise shall be extinguished, and the property of each member shall be the unified bankruptcy property after the merger, and the creditors of each member shall be fair in the same procedure in accordance with the statutory order.

If the substantive merger rules are applied for bankruptcy liquidation, all affiliated enterprises shall be cancelled after the termination of the bankruptcy proceedings. If the substantive merger rules are applied for settlement or reorganization, the affiliated enterprises shall be merged into one enterprise in principle. According to the settlement agreement or the reorganization plan, if it is necessary to maintain the independence of individual enterprises, it shall be handled separately according to the relevant rules of enterprise separation.

IMPORTANT LEARNINGS FROM LEARNING CURVES BY ICSI IIP*

Ratio of Judgment	Cause Title
The dues of the Income Tax dues are Government dues and Income Tax Authorities are a secured creditor.	Principal Commissioner of Income Tax and Other Vs. Assam Company India Limited (NCLAT, New Delhi Bench) dated 7th February, 2023
The Liquidator has no jurisdiction to reject or modify already admitted claims, if he receives any additional information.	Vijay Kumar Gupta Vs. Canara Bank (NCLAT, New Delhi Bench) dated 12th January, 2023
An application under Section 9 of Insolvency and Bankruptcy Code is not a suit and hence, the bar under Section 69(2) of Indian Partnership Act, 1932 is not applicable to a Section 9 application.	Rourkela Steel Syndicate (Through Its Partner Manish Patodia) Vs. Metistech Fabricators Private Limited (NCLAT, New Delhi Bench) dated 6th February, 2023
Creditors must not shift the entire blame on the IRP on grounds of non-performance of duty and make him the scapegoat; the rigours of similar standards of discipline should also apply on the creditors.	Shri Guru Containers Vs. Jitendra Palande (NCLAT, New Delhi Bench) dated 22nd February, 2023
Shareholders of CD have no locus to challenge the initiation of CIRP against the CD.	Nirej Vadakkedathu Paul Vs. Sunstar Hotels and Estates Private Limited (NCLAT, Chennai Bench) dated 27th February, 2023

* Detailed Learning Curves are available at our website (https://icsiiip.in/learning-curves.php)

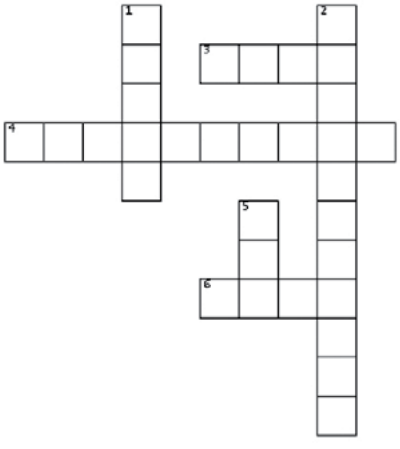
Complete the sentence

1. _____ are the only ones that can conduct valuation under IBC.
2. The terms _____ and _____ are not defined under Companies Act, 2013.
3. A successful Resolution Applicant submits a _____ which has to be approved by the COC.
4. CIRP Forms are to be filed on the _____ portal.
5. CIRP may be initiated on a minimum default of INR _____.

Answers:

1. Registered Valuers
2. Oppression and mismanagement
3. Resolution plan
4. IBBI
5. 1 crore

Insolvency Crossword Quiz



ACROSS
3. Regulatory Body
4. Section 14 IBC
6. Applications are made to

DOWN
1. Appeals are made to
2. If CIRP does not work
5. Code enacted in 2016

Use the clues to fill in the words above.

Words can go across or down.
Letters are shared when the words intersect.

Answer Key:

1. NCLAT
2. Liquidation
3. IBBI
4. Moratorium
5. IBC
6. NCLT

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