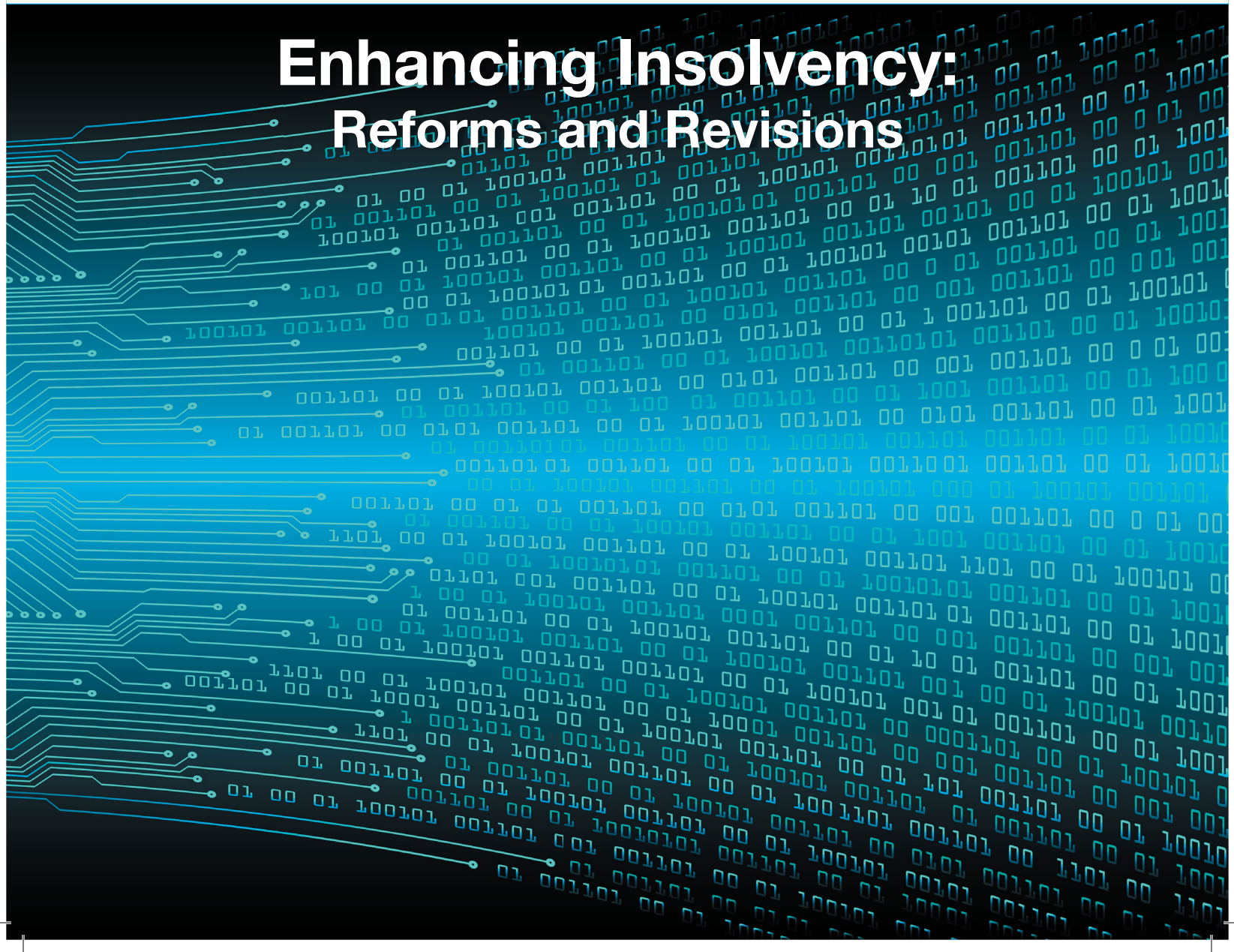
ICSI INSTITUTE OF INSOLVENCY PROFESSIONALS
(A wholly owned subsidiary of ICSI and registered with IBBI)
VOL VII | NO. : 7 | PG. 1-40 | 2023

INSOLVENCY AND BANKRUPTCY JOURNAL



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
Research Initiative	research.icsiiip@icsi.edu	+91 120 408 2142 (2264)
Education & Publication	research.icsiiip@icsi.edu	+91 120 408 2142 (2264)
Grievance/ Complaint	grievance@icsiiip.in	+91 120 408 2142
Administration & IT	chakshu.gambhir@icsi.edu	+91 74289 22988

Contents

VOL VII | NO. : 7 | PG. 1-40 | June 2023

CONTENTS

From Chairman's Desk

"If you really look closely, most overnight successes took a long time"

- Steve Jobs

A uniform and comprehensive insolvency legislation encompassing all Companies, partnerships and Individuals and majorly all industries is the Insolvency and Bankruptcy Code, 2016. Talking about the industries, statistically as on 31st March, 2023, a total of 6571 CIRPs have been initiated under the Code out of which the Manufacturing Industry covers 39% of the total admissions, followed by real estate (21%), construction (11%), wholesale & retail trade (10%), Hotels (2%), electricity (3%), transport (3%) and others (11%). Further, till 31st March, 2023, the creditors have realised 2.86 lakh Crore under the resolution plans which is approximately 168.47% of the liquidation value.

Aviation Industry is one industry which is currently in the news because of the recent initiation of voluntary Insolvency in *Go Airlines* which is one of the largest airline operators in India. Before it, *Jet Airways*, another aviation company, also underwent Insolvency resolution under the Code. India's Aviation Market is fast growing and has become the third largest market. The inabilities to pay off debts, aircrafts leasing, huge costs etc have led to the downfall of various airlines. After the insolvency initiation of *Go Airlines,* some issues have popped up like aircraft leasing during moratorium which needs to be addressed quickly. The domestic aviation industry is swiftly growing internationally, which can conquer the international market by removing small roadblocks.

Talking about Insolvency and Bankruptcy Code, IBBI is continuously working towards the effectiveness of the Code and its Regulations and eventually successful implementation of law for growth of the Indian Economy. IBBI, in its robust role as the Regulator, is always keen to take suggestions from the stakeholders to improvise the Regulations. Currently, they are organising series of roundtables with the members under the banner of "IP Conclave" to understand ground level issues and accordingly making required suggestions under the Law. ICSI IIP has also conducted a series of Roundtables to address the issues in various Regulations under the Code and the suggestions of the members are shared with IBBI.

With each and every stakeholder's support, the roadblocks under the legislative framework may be straightened. It will become more dynamic, robust, time effective and successful in the coming times.

P.K Malhotra

Chairman, ICSI IIP

INSTITUTE OF INSOLVENCY PROFESSIONALS
(Subsidiary of ICSI and Insolvency Professional Agency of IBBI)

ICSI IIP'S PUBLICATIONS

HELLO,

we are your expert in providing the right solutions

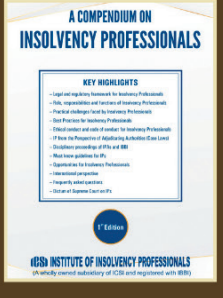
WE OFFER

BOOKS ARE UNIQUELY PORTABLE MAGIC

A Compendium on Insolvency Professionals

ICSI IIP has brought-out a comprehensive publication on Insolvency Professionals titled 'Compendium on Insolvency Profession', which the IBBI Chairperson Mr. Ravi Mital has himself released on 27th Oct 2022 at IBBI office.

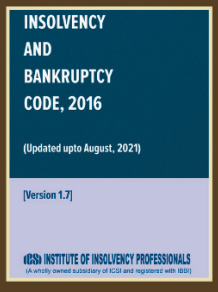
The publication is a comprehensive document covering varied aspects like legal and regulatory framework for IPs, disciplinary proceedings against IPs (and their outcomes), ethical and code of conduct for IPs, opportunities for IPs and case laws related to IPs.



INR 1000/- Postage Extra

https://icsiiip.in/

LET'S GROW WITH US



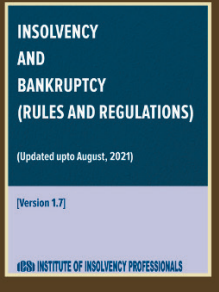
Insolvency and Bankruptcy Code, 2016 (Version 1.7)

This Publication (updated upto November, 2022) covers the provisions of Insolvency and Bankruptcy (Amendment) Act, 2021 which provides the specialised forum to oversee Insolvency and Liquidation proceedings.

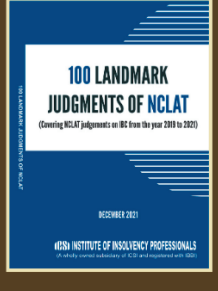
INR 500/- Postage Extra

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

This Publication (updated upto November, 2022) covers all the Rules, Regulations and Notifications along with all the Circulars and Guidelines issued by Insolvency and Bankruptcy Board of India (IBBI).



INR 600/- Postage Extra



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.

INR 400/- Postage Extra

Available At:
Hardbound: https://icsiiip.in/publications.php
E-Book: https://icsiiip.in/lms/

Connect with ICSI IIP: https://icsiiip.in/ |

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

MD's Message

"Any change, even a change for the better, is always accompanied by drawbacks and discomforts."

—Arnold Bennett

The Government implemented the IBC, 2016 to consolidate all laws related to insolvency and bankruptcy and to tackle Non-Performing Assets (NPA), a problem that has been pulling the Indian economy down for years. IBC is slated for another round of changes and amendments basis the need for constant amendment.

In its seventh year, the law is caught in a maze of litigation, new interpretations, amendments, challenges from stakeholders, and new precedents set by the Supreme Court. It is a resounding sentiment that the IBC is being used as a recovery tool, not just by operational creditors or suppliers, but also financial creditors.

The Code follows an evidence-based policy-making method for bringing amendments. This method is followed in most economic legislations, however, the IBBI has been the most successful after the Securities and Exchange Board of India and other such bodies in suggesting real-time difficulties faced by the bar and the bench in making the Code a success.

The government is reportedly planning to revamp the Insolvency and Bankruptcy Code in the upcoming Union Budget 2023, in order to address weaknesses in bankruptcy and to facilitate faster resolution of distressed assets.

These changes impact not just the market, but also the stakeholders under the Code. IBBI, through various Discussion Papers on proposed changes is seeking comments and suggestions of those most impacted. ICSI IIP is conducting and providing discussion forums to both IBBI and the stakeholders to express their views on proposed changes and is playing the role of liaison between the stakeholders and the Regulator.

Active participation of members in these discussions, instils a fresh hope and enthusiasm for the future of this law.

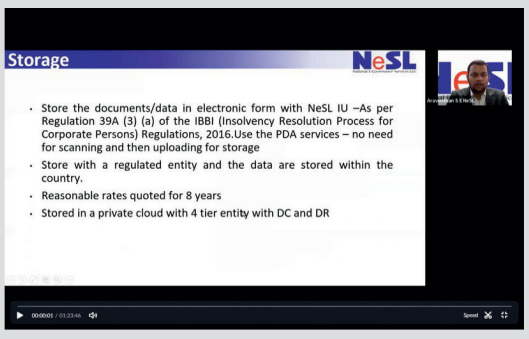
(Dr. Prasant Sarangi)

Managing Director (Designate), ICSI IIP

Events @ICSI IIP

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

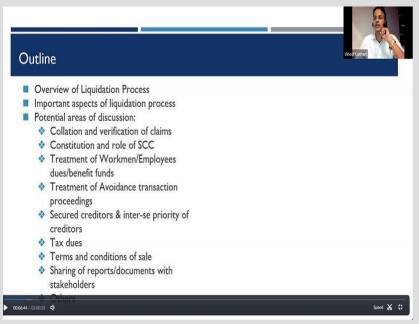
Webinar on Information Utility services for the IPs in association of NeSL on Friday, 9th June, 2023



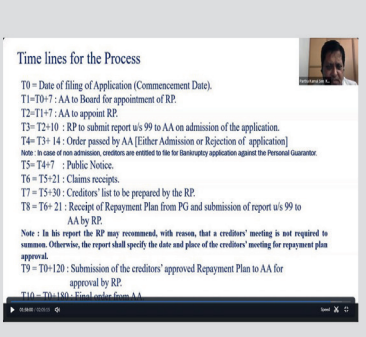
Workshop on Rising Haircuts under IBC by CS and IP Mahadev Tirunagari and CA and IP Anand Sonbhadra on Tuesday and Wednesday, 13th June, 2023 and 14th June, 2023

Round-table on IBBI Discussion Paper on Measures for increasing the possibility of resolution, value of resolution plan and enabling timely resolution by CA and IP Sanjeev Ahuja on Friday, 16th June, 2023

Webinar Series on Reviewing Regulations notified under Insolvency and Bankruptcy Code, 2016 by CS and IP Pankaj Khetan on Wednesdays.



Workshop on Refresher on IBC by CS and IP Anagha Anasingaraju and Advocate and IP Apoorv Sarvaria and CS and IP Partha Kamal Sen on Friday and Saturday, 7th July, 2023 and 8th July, 2023 respectively



TURNAROUND AND RESTRUCTURING SERIES

Rocky Ravinder Gupta

President of Turnaround Management Association India

He is a Lawyer and Managing Partner of UnitedJuris, INSOL Fellow, an Insolvency Professional and an Accredited Mediator.

BUSINESS TURNAROUND - AN INTRODUCTION

(Prevention Is Better Than Cure)

INTRODUCTION

In my experience as a restructuring lawyer, I have observed a common trait and a prevalent mindset among entrepreneurs, promoters, and business leaders when they face business challenges or demanding situations. They often hold the belief that injecting money into their enterprises and cutting costs by downsizing can resolve all their issues and overcome obstacles, ultimately getting their business back on track. It is a common misunderstanding among these individuals that financial infusion alone is the key to addressing any challenges they may encounter in their business endeavors.

Early on in my career, I came to understand that a struggling business can be equated with a bucket of water riddled with multiple holes. These holes symbolize the various issues and leakages that plague a business, such as declining sales, escalating costs, poor cash control, entrepreneurial stubbornness, emotional attachment with business, unpaid debts, and competition. No matter how much water (money) you pour into the bucket, it will inevitably flow out through the holes, leaving the bucket empty. In the same way the cash, which is needed

for the business's growth and stability, flows out of these holes (leakages) with or without the knowledge of the owner thereby depleting the cash needed for the business's growth and stability. Consequently, the business may become vulnerable to external threats and the business may be admitted to insolvency process. We call it the holes in the bucket theory.

Influx of money or cash into the system without addressing the underlying issues will result in wastage of valuable funds and leave the business in a more precarious position than before, as additional burden of servicing new debts will further strain the business. Moreover, if the owner or promoter has personally invested from their own resources, the loss of that money will place an additional financial burden on the promoter.

WHAT IS A TURNAROUND SITUATION?

There is no fixed definition of what constitutes a turnaround situation. Turnarounds can often be likened to an illness, wherein individuals or businesses may experience minor ailments requiring only minimal corrective measures and motivation. On other occasions, the underlying issues may be more severe, such as a decline or plummeting sales, necessitating robust corrective actions such as the implementation of a strong sales team and product innovation. Turnarounds become intriguing and intricate when multiple problems accumulate within a brief period, such as dwindling sales coinciding with cost overheads, factory closures due to worker strikes demanding higher wages, and government-mandated increases in minimum wage regulations.

When multiple factors begin to impact the profitability and sustainability of businesses, leading to operational and/or financial distress and unfavorable cash flow circumstances, the situation becomes significantly grave. In such instances, it becomes imperative to engage the expertise of a professional turnaround specialist who can effectively navigate and mitigate the challenging circumstances at hand. The turnaround professional identifies the issues affecting the business and administers the required corrective measures to get the business back on track. Time is of the essence and importantly a business in distress is short on both time and money and requires immediate assistance for a rapid recovery.

It is seen that the promoters or the owners of the businesses try and manage the severe business situation on their own. They may have valuable experience of running their business for decades, but the situation demands an expert turnaround professional to manage the situation, as does a patient with an illness or an infection needs a doctor. This over confidence of the owner promoter leads to the business getting in a worse state than before; firstly they keep adding water (money) in their bucket (business) in a hope that the situation will rectify, whereas the need of the hour is to identify the holes (issues) in the business and ways and means to close those holes so that the water (money) can be retained in the bucket. Secondly the expertise required to negotiate the contractual obligations with the financial institutions considering the fine print contained in those agreements and safely meander through the maze of rules and regulations of the regulators and legal compliances needs professional expertise.

Certainly, whenever there is a severe cash crisis there is a turnaround situation, however businesses can be in stress even without a cash crisis. A turnaround situation recognizes that businesses often show symptoms of failure long before any crisis begins. These are often stagnant businesses with under-utilized assets and ineffective management. Numerous firms have survived over the years despite poor management. These losses over the years have piled up and have started showing up in several sectors of the economy after Covid 19, when all economic activity across the globe was shut down, the cash cycle was broken and countless businesses now are on the verge of insolvency, if not yet insolvent.

In recent years, there has been a growing focus on early identification of stressed assets and timely intervention to facilitate turnaround efforts. Businesses often exhibit signs of distress, akin to symptoms indicating an underlying disease. These are called early warning signs. These early warning signals serve as crucial indicators for the economic revival of any company. The earlier these signs are identified, the easier it becomes to initiate a turnaround and restore stability and sustainable growth to the company. Early intervention increases the likelihood of a successful turnaround, offering a

favorable economic outlook and potentially sparing company owners from insurmountable debt, thereby providing them with an opportunity to safeguard their business and embark on new ventures. Turnaround professionals play a vital role in assisting viable companies before they default on their debt or are classified as non-performing assets by creditors. They can also offer support even after companies and their assets have been designated as non-performing assets, by streamlining finances, operations, and HR management, identifying gaps in various business processes, and rectifying any anomalies.

TURNAROUND MANAGEMENT IN INDIA

Turnaround management in India has undergone significant advancements and encountered various challenges throughout the years since independence. Prior to India's economic liberalization in 1991, the country had a tightly regulated and protected economy, resulting in inefficiencies and difficulties for struggling businesses. During this period, turnaround management primarily involved government intervention, such as nationalization, subsidies, and debt restructuring. However, the introduction of economic reforms in 1991 opened India's economy, leading to increased competition, globalization, and market-oriented policies. Consequently, turnaround management shifted towards market-driven approaches, including mergers and acquisitions, debt resolution mechanisms, and corporate restructuring.

The landscape of turnaround management in India was revolutionized in 2016 with the implementation of the Insolvency and Bankruptcy Code. This code provided a structured and time-bound framework for resolving distressed assets and companies. It streamlined the insolvency process, encouraged debt resolution and asset maximization, and attracted more investor interest in distressed assets. The introduction of the Insolvency and Bankruptcy Code 2016 (IBC) marked the dawn of a new era for companies and businesses, bringing about a significant shift in the way business was conducted in India. Prior to the implementation of the IBC, the process of recovering debts was protracted, spanning several years for both public and private enterprises. Moreover, the value of recovery amounts diminished over time. For financial institutions that had extended loans to businesses, the IBC presented itself as a fortuitous development. Entrepreneurs, fearing the loss of their companies and livelihoods, realigned their methods and practices in conducting transactions and business operations. Bounced cheques became a rarity, cash flows underwent rigorous scrutiny, and then... the onset of the Covid-19 pandemic struck in early 2020.

Governments in various jurisdictions globally raised the threshold for filing insolvency and bankruptcy cases. In India, the threshold limit was increased 100-fold, from INR 100,000 to INR 10 million. Consequently, there was a significant decline in insolvency filings. To combat the economic fallout caused by the Covid-19 crisis, the Indian Government swiftly implemented economic measures and relief packages. Although these measures have now been scaled back, the threshold limit of INR 10 million persists, posing a significant challenge for the MSME sector to initiate insolvency proceedings against their debtors.

The adage "time is of the essence" is a fundamental principle in any global insolvency regime. However, in the Indian insolvency landscape, this principle has lost its meaning. The period between the admission of insolvency and the approval of a resolution plan is excessively long, often far exceeding the timelines prescribed by statutory provisions. This not only erodes the value of the business due to the passage of time, resulting in larger haircuts for creditors, but also diminishes the value of investment for the resolution applicant. The delay between the filing and approval of the resolution plan, which can span several months, further depreciates the assets. Additionally, these delays impede the efficient utilization of the insolvent business's assets. IBC mandates that insolvent businesses either be sold as going concerns or, if not feasible, proceed with liquidation. However, the protracted timelines hinder the sale of businesses as going concerns, often forcing companies into the liquidation process.

WHY TURNAROUND?

The age-old maxim "Prevention is better than cure" holds significant relevance in situations that necessitate a business turnaround. The proactive approach of preventing potential distress yields better results than the curative or reactive approach of addressing it afterwards.

Public financial institutions serve as custodians of public funds, and the lenders who provide these funds have a fiduciary responsibility and duty to establish appropriate checks and balances to supervise the debtor's utilization of such funds. However, many a times the financial institutions fail in their responsibility to monitor the debtor and the use of funds by the debtors. Financial institutions often prioritize addressing existing issues in businesses rather than proactively taking preventive measures to ensure the well-being of their debtors. This approach allows businesses to continue operating even when they are insolvent, leading them to face financial distress with negative cash flows and insufficient working capital before resorting to legal measures of insolvency and bankruptcy.

It is a misconception that the downfall of a business into insolvency is an abrupt event. Companies do not plunge into insolvency overnight. The path to insolvency is typically a gradual one, with businesses displaying symptoms of stress, also known as early warning signals over a period. If timely corrective action is not taken, the company or business will eventually reach a state of insolvency, characterized by a cash deficit, and conclude in legal proceedings.

Turnaround Management presents a strategic approach aimed at revitalizing struggling companies, offering a glimmer of hope during times of distress. When organizations confront significant challenges such as financial instability, operational inefficiencies, or declining market share, Turnaround Professionals provides a structured framework to evaluate the situation, formulate a recovery plan, and implement necessary adjustments. The journey towards insolvency is fraught with negative consequences, and the likelihood of a successful revival diminishes over time throughout the insolvency process. It is advisable to make timely decisions, preferably during the initial stages of distress, to deploy turnaround professionals and revive or rescue the business or company. The advantages of this approach are manifold: confidentiality is maintained, avoids any insolvency associated stigma; ownership remains in the hands of the promoters; and the company retains its vendors, employees, and other stakeholders.

THE OPPORTUNITY

It is worth noting that India has over sixty-three million MSMEs (Micro, Small, and Medium Enterprises), with around three million being legal entities. However, the Insolvency and Bankruptcy Code currently only caters to legal entities, such as companies or LLPs. Proprietorships and partnerships are not covered by the code, although the necessary laws, rules, and regulations are in place, pending notification.

Consequently, over sixty million MSMEs comprising proprietorships and partnerships lack an exit route through the insolvency and bankruptcy framework. Therefore, their only solution to overcome financial or operational distress is to receive sound and actionable advice on business revival and turnaround from professional adept at turnaround and business rescue. There is a dearth of turnaround professionals in India, which creates an opportunity for professionals to become turnaround experts and offer specialized services to these businesses that currently lack access to professional advice on turnaround management and strategies.

PROCESS OF BUSINESS TURNAROUND

It is a commonly held view that the primary role of a turnaround professional is short-term cost reduction. This view is myopic and does not address the basic presumption of securing the holes in a bucket theory. The fundamental proposition is that turnaround management is holistic. Successful turnarounds are based on addressing both strategic and operational issues. The perspective of turnaround is both short and long term. This broader view can help in addressing the four key objectives of most turnaround situations. These are:

- **taking control and managing the immediate crisis**
- **rebuilding stakeholder support**
- **fixing the business**
- **resolving future funding**

To help achieve these objectives a turnaround professional shall first analyze the situation the business is in. Try and find the issues within the business that are responsible for the decline or distress in the business. Once these issues are identified, devise a workable action plan to fix the business, keeping in view the strategic focus, organizational change, and critical process improvements.

Importantly it is imperative that the early warning signals of business distress be identified as soon as possible for a better and effective resolution of the distress. Earlier a company or a business is detected with symptoms of distress, the probability of turnaround success is high. The faster a company can be turned back, the better it will be for the Indian economy and for the business as well, to avoid the pitfalls of insolvency regime in India.

WHY RETAIN TURNAROUND PROFESSIONALS

When a promoter becomes aware of critical issues plaguing their business, it is crucial for them to recognize the limitations of self-treatment and seek professional help to address the underlying stresses. Ignoring these issues or attempting to manage them alone can exacerbate the problems and lead to detrimental consequences. Turnaround Professionals can professionally assist in managing business stress by:

1. **Bringing expertise and experience to the table. Turnaround professionals specialize in identifying and resolving common stress faced by businesses. They possess industry knowledge, analytical skills, and proven strategies to tackle complex challenges. By leveraging their expertise, promoters can gain valuable insights, alternative perspectives, and effective solutions tailored to their specific situation.**
2. **Seeking professional help allows the promoter to focus on their core competencies. Entrepreneurs are often enthusiastic about their business ideas and possess specialized skills in certain areas. However, managing, and mitigating business stress may require expertise in diverse domains like finance, marketing, human resources, or operations. By delegating these responsibilities to professionals, promoters can concentrate on their strengths and core business activities, thereby improving overall efficiency and productivity.**
3. **Turnaround professionals provide an objective viewpoint. Promoters can become emotionally invested in their business, making it difficult to assess problems impartially. Turnaround professionals bring a fresh perspective and can objectively evaluate the situation without any preconceived notions. This impartiality allows for unbiased analysis, identification of root causes, and development of appropriate strategies for resolution.**
4. **Turnaround professionals often have a broad network of industry contacts, potential partners, and investors. By accessing extensive networks and resources they can facilitate introductions, provide valuable connections, and open doors to new opportunities for growth and collaboration. Additionally, Turnaround professionals may have access to research, databases, or best practices that can significantly benefit the promoter's business.**
5. **Seeking professional help demonstrates a commitment to addressing the challenges and improving the business's long-term prospects. It shows stakeholders, including employees, customers, investors, and partners, that the promoter is proactive and dedicated to finding sustainable solutions. This commitment can enhance trust, credibility, and reputation, leading to increased support and cooperation from various stakeholders.**
6. **Finally, Turnaround professional provides a structured approach to problem-solving. They often follow a systematic methodology to diagnose, analyze, and develop strategies for resolving business stress. This structured approach ensures comprehensive coverage of all relevant aspects and increases the likelihood of finding effective solutions. It also helps the promoter track progress, set realistic goals, and implement changes in a controlled manner.**

Considering India's large population and numerous businesses, there are few turnaround professionals. This presents a significant opportunity to become turnaround professionals and offer specialized services to the vast number of businesses that lack access to professional advice on turnaround strategies. Currently the role of turnaround professional is being undertaken by chartered accountants, lawyers, company secretaries, cost accountants and management consultants in India in their individual capacity. In most cases these

professionals provide services and advisories specific to their domain.

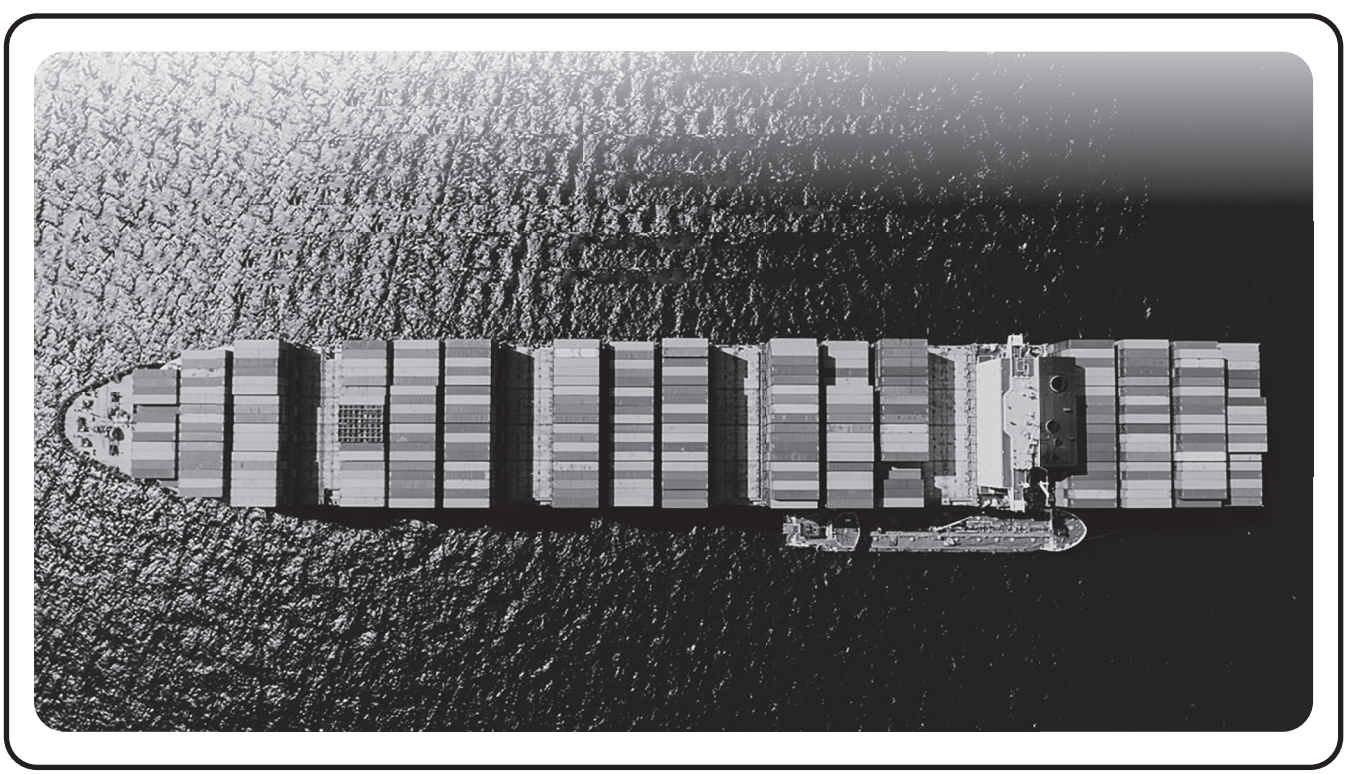
Turnaround management is a profession where the turnaround professional must be adept in law, management and accounting combined to help a stressed company to get back to its earlier avatar of a successful enterprise. Presently there is no certification or accreditation for a turnaround professional in India. TMAIndia is in the process of bringing global certification for turnaround management for Indian professional service providers in association with TMA Global.

We are now starting a series of articles on Business Turnaround to help understand the nuances of the turnaround industry. These articles will give you an insight on Turnaround as a profession and how it can help India grow, by helping and aiding companies and businesses in distress. The articles will explore about Turnaround Management, Early Warning Signals, Causes of Business Stress, Stages of business stress, Crisis Stabilization, Stakeholder Management, developing a turnaround plan, implementing a turnaround plan and financial and operational restructuring.

These articles may help the promoters to save their business or aid and assist in creating or developing a turnaround strategy and avoiding future crises by retaining turnaround professionals. Other professionals may also contemplate starting a career as a turnaround professional.

***Disclaimer**: The information provided in this article does not, and is not intended to constitute legal advice, instead, all information, content, and material available in this article are for general informational purposes only.*

***About the Author**: Rocky Ravinder Gupta is the President of Turnaround Management Association India. He is a Lawyer and Managing Partner of **UnitedJuris**, INSOL Fellow, an Insolvency Professional and an Accredited Mediator. Turnaround Management Association India (TMA India) is the Indian chapter of the Turnaround Management Association (TMA) Global. TMA India is a community of professionals in the corporate restructuring and reorganization field to promote the interdisciplinary field of turnaround management, bringing together professionals and experts from law, accounting, business, and investing community.*



ICSI IIP – AT A GLANCE

1. DURING THE MONTH OF JUNE 2023:

S. No.	Particulars	Details
1.	Members enrolled	3
2.	Members registered	10
3.	Inspections conducted	(old reports were finalised)
4.	IPs monitored	5
5.	AFA applications received	42
6.	AFA applications approved	36
7.	Complaints/Grievances received	5
8.	Complaints/Grievances disposed off	4
9.	SCN issued	NA
10.	Disciplinary action taken	3

2. DURING THE MONTH OF JUNE 2023, FOLLOWING PROGRAMS WERE ORGANISED BY ICSI IIP,

WORKSHOPS

S. No	Date of Workshop	Topic
1.	05.06.2023 to 09.06.2023	**Workshop | Perspectives on IBC - An Array (Series V) | June 05 - June 09, 2023 | 2pm - 5pm**
4.	13.06.2023 to 14.06.2023	**Workshop | Rising Haircuts under IBC | June 13th and 14th, 2023 | 2.00 PM - 5.00 PM**

WEBINARS

S. No	Date of Webinar	Topic
1.	09.06.2023	**Webinar | Information Utility services for the IPs | June 09, 2023 | 11 AM to 1 PM**
2.	21.06.2023 and 28.06.2023	**Webinar Series: Reviewing Regulations notified under Insolvency and Bankruptcy Code, 2016 (Every Wednesday) | 04.00 PM - 05:30 PM**

ROUNDTABLE

S. No	Date of Roundtable	Topic
1.	16.06.2023	**Round-table (Virtual) Discussion | IIBBI Dis. Ppr on "Measures for increasing the possibility of resolution, value of resolution plan and enabling timely resolution" | June 16, 2023 | 4pm to 5.30pm**

PREC

S. No	Date of PREC	Topic
1.	07.06.2023 to 13.06.2023	**61st Batch Pre-Registration Education Course (Online Course) (June 07 - June 13, 2023)**

Learner's Corner

Legal Maxims

"AD HOMINEM"

Meaning: At the person.

Legal Use: It is used to counter another argument. It is based on feelings of prejudice, rather than facts, reason, and logic. It is often a personal attack on someone's character or motive rather than an attempt to address the actual issue at hand.

Example: "*The power of the judicature, while the Constitution stood, could not be usurped or infringed by the executive or the legislature. Secondly, the Criminal Law (Special Provisions) Act, No. 1 of 1962, as well as, the Criminal Law Act, No. 31 of 1962 were aimed at individuals concerned in an abortive coup, and were not legislation effecting criminal law of general application. Although not every enactment ad hominem, and ex post facto, necessarily infringed the judicial power, yet there was such infringement in the present case, by the above two Acts***."-** Madras Bar Association vs. Union of India (UOI)

"OMNIA PRAESUMUNTUR RITE ET DOWEE PROBETUR IN CONTRARIUM SOLENNITER ESSE ACTA."

Meaning: All the acts are presumed to have been done rightly and regularly.

Legal Use: When acts are of official nature and went through the process of scrutiny by official persons it is presumed that all things have been rightly *and* duly performed until it is proved to the contrary.

Example: *"Section 114 of the Act 1872 gives rise to the presumption that every official act done by the police was regularly performed and such presumption requires rebuttal. The legal maxim* ***omnia praesumuntur rite et dowee probetur in contrarium solenniter esse acta i.e., all the acts are presumed to have been done rightly and regularly****, applies. When acts are of official nature and went through the process of scrutiny by official persons, a presumption arises that the said acts have regularly been performed."*- Gian Chand and Ors. vs. State of Haryana

"EX INJURIA JUS NON ORITUR."

Meaning: Law (or right) does not arise from injustice.

Legal Use: A legal right or entitlement cannot arise from an unlawful act or omission. When a fact arises from an illegal or unlawful acts or omissions, it cannot form the basis of law or legal rights, even if it is public or prominent.

Example: *"More so, if the initial action is not in consonance with law, the subsequent conduct of a party cannot sanctify the same. "Subla Fundamento cedit opus" - a foundation being removed, the superstructure falls. A person having done wrong cannot take advantage of his own wrong and plead bar of any law to frustrate the lawful trial by a competent Court. In such a case the legal maxim Nullus Commodum Capere Potest De Injuria Sua Propria applies. The persons violating the law cannot be permitted to urge that their offence cannot be subjected to inquiry, trial or investigation. Nor can a person claim any right arising out of his own wrong doing(Juri Ex Injuria Non Oritur)."* - Devendra Kumar vs. State of Uttaranchal and Ors.

Need for Code of Conduct for Committee of Creditors

Anil Kumar Bansal
Assistant General Manager-Law (Retd.)
Central Bank of India, Mumbai

CIRP can be initiated by a CD, a financial creditor, an operational creditor under the Insolvency and Bankruptcy Code, 2016. Section 21 of the Code provides that after collation of all claims received against the CD and determination of financial position of CD, the IRP shall constitute CoC. Section 28 of the Code says that certain acts cannot be performed by RP without the approval of CoC e.g. creation of security interest over assets of corporate debtor, change in capital structure of corporate debtor, undertake any related party transaction etc. It is important to note that every act of the RP in conducting CIRP has to be with the approval of CoC. Hence the CoC is in a commanding position under the Code so far as resolution process is concerned.

'Commercial Wisdom' of CoC: The term 'commercial wisdom' has neither been defined under the Code, nor under the Regulations made thereunder. However, the concept has evolved by way of judicial decisions/precedents. The term 'commercial wisdom' essentially involves prudence and justifiable reasons for arriving at a particular commercial decision so far as insolvency process is concerned.

As per Section 30(2) of the Code, the RP shall examine each resolution plan received by him and after ensuring that it conforms to the criteria laid down in Section 30(2), present it to CoC. The CoC has been vested with responsibility to examine various aspects relating to the resolution process and take appropriate decision in accordance with the provisions and objectives of the Code. While the RP conduct the whole resolution process and supervise and control all the actions/functions of the CoC, the CoC is the supreme decision-making body in a CIRP as decides the

fate of corporate debtor. The decision taken by CoC regarding resolution plan has come to be known as 'commercial wisdom' of CoC.

Scope of 'commercial wisdom': The term 'commercial wisdom' got prominence after certain decisions taken by the CoC while dealing with the insolvency resolution plans. One of the issues is whether the 'commercial wisdom' of CoC is amenable to judicial review. It may be noted that the legislature envisages certain objectives to be achieved when a particular legislation is enacted. However, several issues still remain untouched which may not be possible to be visualized by the legislature while enacting a law. It is for the Higher Courts to interpret the law in a meaningful manner and supplement the law so that the objectives behind the enactment of a particular law may be achieved. In an important matter of **K. Shashidhar Vs Indian Overseas Bank and others, 2019 SCC Online SC 257,** Hon'ble Supreme Court held that while the Adjudicating Authority cannot interfere with the commercial decision of CoC, a limited judicial review is available to see whether CoC has considered the facts that the CD needs to be kept as a going concern during CIRP, need to maximize value of assets and that interests of all stakeholders have been taken care of. Hence, The Hon'ble Court held that the power of Judicial Review to interfere with the 'commercial wisdom' or decisions taken by CoC is very limited.

In the matter of **Committee of Creditors of Essar Steel Ltd Vs. Satish Kumar Gupta decided on 15/11/2019,** Hon'ble Supreme Court observed that it is the 'commercial wisdom' of the CoC which decide whether to rehabilitate a corporate debtor by accepting the resolution plan. It was further observed by that the judicial review by the Adjudicating Authority or the Appellate Authority must be in accordance with the provisions of Sections 30 or 32 read with Section 61 (3) of the Code. They can only review the fairness of the resolution plan by considering whether the resolution plan provides for maximization of the value of assets of the corporate debtors and the interests of all the stakeholders.

It would be seen that the financial creditors are presumed to be fully aware about the state of affairs of the CD and they are fully competent to decide the feasibility of the resolution plan. Based on this assumption, the CoC has been endowed with huge powers purposely in deciding the fate of the CD. The 'commercial wisdom' of CoC can be challenged before Courts of Law but the scope of judicial review is limited. The decisions of CoC can be reviewed by the within the scope of provisions of Sections 30(2), and 61(3) of the Code which specifically provide the grounds for challenging the decision taken by the CoC. In the matter of **M.P. Agarwal Vs Shri Lakshmi Cotsyn Ltd. And another [CA (AT) (Ins) No 620 of 2020],** it was held by NCLAT that it is settled law that CoC enjoys primacy in the matter of approval or rejection of resolution plan/settlement proposal and the AA as well as appellate tribunal would be exceeding its jurisdiction in approving or rejecting such proposal/plan which is essentially based on commercial wisdom of the CoC.

Huge Haircuts : One of the concerns which has propped up is the approvals given by CoC to the resolution plans by allowing huge haircuts. It is questioned whether such huge haircuts are in consonance with the objectives of the Code. It is about five years that the Code was brought into force with certain objectives *inter alia* insolvency resolution in a time bound manner, maximization of value of assets to promote entrepreneurship. A section of the stakeholders feel that the Code has been able to achieve its objectives. However, some sections are of the opinion that the zeal with which the new legislation was implemented, has failed to deliver the goods. Of course it cannot be denied that for a legislation on complicated issues like insolvency, the sailing may not be very smooth as envisaged. In this connection it is important to note the observations of Mr. M.S. Sahoo, Ex-Chairman, IBBI stated in an interview with the Economic Times "IBC is not a panacea for all ills and requires systematic and holistic assessment. If claims and realizations are adjusted to their real level, haircuts figure will be lower. He stated further that the question to ask is why does IBC process yield zero haircut in one case and 100% in another for creditors? It depends upon the nature of business, health of the economy, marketing efforts etc. It critically depends upon at what stage of stress of the company enters IBC process, as much as at what stage a patient arrives at the hospital. If the company has been sick for years, and the assets have depleted significantly, the IBC process may yield huge haircut or even liquidation. The IBC maximizes the value of existing assets, not of the assets which do not exist".

It cannot be denied that the concern of certain section of stakeholders seems to be genuine but on the other

hand, it has also to be taken into consideration that the quantum of haircuts largely depends upon the value of assets available. If we look at the objectives of the Code, we will find that the primary objective of the Code is not recovery of amount but is maximization of value of assets of the CD, promote entrepreneurship, availability of credit and balance the interests of all stakeholders. CoC takes commercial decision in respect of the CD after taking into consideration various aspects like circumstances leading to default by CD, value of assets, chances of revival of the CD. As the CoC has to work out the revival of the business of CD, it is imperative that the CoC is vested with commensurate powers so as to take an independent decision after taking into account various factors.

Need for Code of Conduct for CoC : In view of the huge powers vested in the CoC, the question is being raised in certain quarters whether there ought to be a Code of Conduct for the CoC similar to the Code of Conduct in respect of other agencies i.e. IPs/IPAs/IUs. There cannot be a difference of opinion that the decisions taken by CoC impact all the stakeholders. Hence, each decision of CoC ought to be fair, transparent and based on sound reasons.

It would be seen that sub-sections (2) and (3) of Section 30 of the Code provides that the RP (IP) shall examine each resolution plan received by him and after confirming that the plan meets the requirements laid down under sub-section (2), submit it to the CoC for approval. Hence, it is not only the CoC who takes decision regarding resolution plan but the RP (IP) also who plays a major role to decide whether the plan meets all the requirements to meet the objectives laid down under the Code. The CoC further examines each plan and arrive at a conclusion during its meetings. If the plan is found to be feasible and viable by the CoC, it is submitted to the AA for approval. As discussed earlier, the AA finally review the plan and render its decision about the plan.

Hence, the plan passes various tests before being given finality. First of all the RP on being satisfied that it meets the requirements laid down under the Code, forward it to CoC. There is already a Code of Conduct for the IPs (IPs are the RPs) which has to be kept in mind by the RP while dealing with the resolution plan. Thereafter the CoC decides the fate of proposal, after examining its viability and feasibility, in a meeting of FCs through voting of not less than sixty six percent. The AA shall approve the plan after being satisfied that the plan meets the requirements of Section 30(2). The plan shall be binding on CD, its employees, members, creditors, which includes Central and State Government, Local Authority and such authorities to whom statutory dues are owed, guarantors and other stakeholders. As the plan impacts so many stakeholders, the CoC has to take a conscious decision by applying its judicial mind while approving the plan.

It would be appreciated that the CoC has to be given some sort of discretion while arriving at the decision which of course is subject to judicial review. The author is of the view that as the powers and functions of CoC partakes the character of quasi-judicial functions while deciding the plan, there may not be any requirement of separate Code of Conduct for the CoC. That apart, the decisions of CoC are subject to judicial review. Moreover, the Code and the Regulations made thereunder contains adequate provisions to monitor the conduct of other agencies like; IPs/IPAs/IUs which play their respective roles in furtherance of achievement of objectives of the Code. Hence, creation of a separate forum in the form of Code of Conduct does not seem to be need of the hour.

Conclusion: Based on the judicial decisions, it is now well established proposition of law that the CoC is supreme while exercising its 'commercial wisdom' in taking decisions regarding insolvency resolution process. Some experts have stated that the IBBI should regulate the conduct of CoC. The author feels that as the functions of CoC partake the character of quasi judicial functions (so far as its commercial wisdom is concerned), it seems to be inappropriate if the IBBI is vested with the powers of regulating CoC, IBBI being an administrative and regulatory body. However, t*he IBC being at a nascent stage, the judiciary is expected to play its role by giving meaningful interpretation to certain issues like 'Commercial Wisdom', 'Haircuts', 'Code of Conduct' etc.*

REFERENCES

- *Insolvency and Bankruptcy Code, 2016*
- *IBBI (Insolvency Professionals) Regulations, 2016*

EVOLVING JURISPRUDENCE UNDER IBC

CA Chandrasekaran Ramadurai, Chartered Accountant, Insolvency professional Registered Valuer

The Insolvency and Bankruptcy Code (IBC) is a dynamic and progressive economic legislation, and the jurisprudence around it is constantly evolving. The judiciary has interpreted the Code with deference to legislative intent in economic matters, and judicial pronouncements under the Code are very important resources to understand the various provisions of this ever-evolving law.

Here are some of the key areas where jurisprudence has evolved under the IBC:

- The definition of "financial debt". The IBC defines "financial debt" as "any debt arising out of the lending of money by a financial creditor to a corporate debtor". However, the courts have held that this definition is not exhaustive, and that other types of debt, such as those arising from the sale of goods or services, may also be considered financial debts for the purposes of the IBC.
- The role of the Resolution Professional. The Resolution Professional (RP) is a key player in the insolvency resolution process. The RP is responsible for taking all necessary steps to maximize the value of the corporate debtor's assets and to find a resolution plan that is acceptable to all stakeholders. The courts have held that the RP has a wide range of powers, including the power to sell assets, to enter into contracts, and to dismiss employees.
- The rights of operational creditors. Operational creditors are those who have provided goods or services to a corporate debtor on a regular basis. The IBC gives operational creditors a number of rights, including the right to vote in the insolvency resolution process and

the right to receive payment in full in the event of a successful resolution. The courts have held that operational creditors should be given priority over other creditors, and that their rights should be protected.

- The role of the National Company Law Tribunal (NCLT). The NCLT is the principal adjudicating authority under the IBC. The NCLT has the power to hear and decide applications filed under the IBC, and to pass orders on such applications. The courts have held that the NCLT should be given a wide latitude in interpreting the IBC, and that its decisions should be given great weight.

The jurisprudence around the IBC is still evolving, and it is likely to continue to evolve as the Code is applied in different cases. The courts have played a key role in shaping the jurisprudence, and their decisions have provided clarity on a number of important issues. The evolving jurisprudence is helping to ensure that the IBC is a fair and effective tool for resolving insolvency cases.

The Insolvency and Bankruptcy Code, 2016 (IBC) is a landmark legislation that has brought about a significant change in the way corporate insolvency and bankruptcy is handled in India. The Code has been in force for over five years now, and during this time, there has been a significant amount of jurisprudence that has evolved around it.

Some of the key areas where jurisprudence has evolved include:

- The definition of "default": The Code defines "default" as a situation where a corporate debtor fails to repay a debt within the stipulated time period. The courts have interpreted this definition broadly, and have held that even a single instance of default can constitute a default under the Code.
- The role of the Resolution Professional: The Resolution Professional (RP) is an independent professional who is appointed by the NCLT to oversee the insolvency resolution process. The courts have held that the RP has a wide range of powers, including the power to take possession of the corporate debtor's assets, to manage the corporate debtor's business, and to enter into agreements with creditors.
- The right of creditors to vote: The Code gives creditors the right to vote on a resolution plan that is submitted by a prospective resolution applicant. The courts have held that this right is a fundamental right, and that creditors cannot be deprived of this right without due process of law.
- The time period for completion of the insolvency resolution process: The Code provides that the insolvency resolution process must be completed within 180 days. However, the courts have held that this time period is not mandatory, and that the NCLT can extend the time period if it is satisfied that there are good reasons for doing so.

The jurisprudence that has evolved around the IBC has helped to clarify and define the law, and has made it more effective in resolving corporate insolvencies. This has had a positive impact on the Indian economy, and has helped to improve the credit environment.

Here are some of the key cases that have shaped the jurisprudence of the IBC:

- In the matter of Essar Steel Ltd.: This case was decided by the Supreme Court in 2019, and it held that the RP has the power to sell the corporate debtor's assets even if there is a pending challenge to the initiation of the insolvency resolution process.
- In the matter of Synergies Dooray Automotive Ltd.: This case was decided by the NCLAT in 2019, and it held that the RP cannot approve a resolution plan that does not provide for full payment of the dues of secured creditors.
- In the matter of ABG Shipyard Ltd.: This case is currently pending before the Supreme Court, and it raises the issue of whether the corporate debtor can be held liable for the acts of its promoters.

The jurisprudence of the IBC is still evolving, and it is likely that there will be further developments in the coming years. This is a positive development, as it shows that the law is being interpreted in a way that is fair to all stakeholders.

The Insolvency and Bankruptcy Code, 2016 (IBC) has been hailed as a landmark legislation that has the potential to transform the Indian economy by providing a time-bound and efficient mechanism for resolving insolvency. The Code has been in force for over five

years now, and during this time, there has been a significant amount of jurisprudential development around its provisions.

Some of the key areas where jurisprudence has evolved under the IBC include:

- The definition of "financial debt" and "operational debt"
- The scope of the moratorium on enforcement of security interests
- The rights of operational creditors during the insolvency resolution process
- The role of the Resolution Professional
- The approval of resolution plans
- The challenge of resolution plans

The jurisprudence around the IBC is still evolving, and it is likely that this will continue in the coming years. This is to be expected, given the complexity of the Code and the fact that it is a relatively new piece of legislation. However, the development of jurisprudence is a positive development, as it helps to ensure that the IBC is interpreted and applied in a consistent and predictable manner.

Here are some specific examples of how jurisprudence has evolved under the IBC:

- In the case of Innoventive Industries Ltd. v. Edelweiss Asset Reconstruction Co. Ltd., the Supreme Court held that homebuyers are financial creditors for the purposes of the IBC. This was a significant development, as it expanded the pool of creditors who could initiate insolvency proceedings against a defaulting corporate debtor.
- In the case of ArcelorMittal Nippon Steel India Ltd. v. Satish Kumar Gupta, the Supreme Court held that the moratorium on enforcement of security interests does not apply to secured creditors who have obtained a decree of sale from a court of law. This was a significant development, as it clarified the scope of the moratorium and protected the rights of secured creditors.
- In the case of Essar Steel Ltd. v. Committee of Creditors, the Supreme Court held that operational creditors have the right to vote in the insolvency resolution process, even if their debts are not secured. This was a significant development, as it gave operational creditors a greater say in the process of resolving insolvencies.

These are just a few examples of how jurisprudence has evolved under the IBC. The development of jurisprudence is a positive development, as it helps to ensure that the IBC is interpreted and applied in a consistent and predictable manner. This is important for promoting certainty and predictability in the insolvency resolution process, which is essential for attracting investment and stimulating economic growth.

Knowledge Centre

JOURNEY OF A COMPANY: From Insolvency to Resolution

GALADA POWER AND TELECOMMUNICATION LIMITED

In accordance with the applicable provisions of the Insolvency and Bankruptcy Code 2016 ("IBC/Code"), the Corporate Insolvency Resolution Process ("CIRP Process") of Galada Power and Telecommunication Limited ("Company") was initiated by one of the Financial Creditors of the Company i.e. Stressed Assets Stabilisation Fund.

The company was incorporated in the year 1972 with a manufacturing unit in Hyderabad, India for rolling EC grade aluminium rod by continuous casting process. It has developed and popularized several technologies of energy saving like Concast Aluminium Alloy Electric Grade Wire – Rods, all Aluminium Alloy Conductors, Aluminium Alloy Strategic Castings for Defence and Spacecrafts etc. Galada is a pioneer in Power Sector, developing innovative Transmission & Distribution lines for reducing Technical Losses in Power Systems. The company is a listed company having registered office at Hyderabad with authorised capital of 11,00,00,000/- and paid-up share capital of 7,48,98,800/-

The company's insolvency process was initiated on 14th August, 2019 by NCLT Hyderabad Bench through Stressed Assets Stabilisation Fund under Section 7 of the Code.

Mr. Nitin Vishwanath Panchal (IBBI/IPA-001/IP-P00777/2017-2018/11350) was appointed as the Interim Resolution Professional and later on he was confirmed as Resolution Professional.

The following financial creditors formed the Committee of Creditors:

Stressed Asset Stabilisation Fund	41.63%
Edelweiss ARC	10.90%
Syndicate Bank	28.63%
UTI Mutual Fund	18.84%

Following were the series of events which took place during process:

S. No.	Particulars	Details
1.	Initiation of CIRP	14th August, 2019
2.	First CoC meeting	20th September, 2019
3.	Issuance of expression of interest (Form G)	6th November, 2019
4.	No of CoC meetings conducted	25
5.	Issuance of Final list of resolution applicant	12th July, 2021
6.	No. of prospective resolution applicants	9
7.	Date of approval of resolution plan by CoC	7th September, 2021
8.	Name of final resolution applicant	Amrutha Constructions Private Limited (CoC with 100% voting share voted in favour of the plan)
9.	Date of approval of resolution plan by AA	25th May, 2023
10.	No. of days taken to complete the resolution	3 years, 9 months (Approx)

Successful Resolution applicant, ***Amrutha Constructions Private Limited***, is a Company incorporated in the year 2006-2007 with a paid-up share capital of Rs. 1,35,000/- led by the Promoter Mr. P. Venkateshwar Rao, who has experience in the Aluminium Conductor market and boasts itself to be financially strong robust company. The Company's net worth is Rs. 265.37 crores as on March 2021.

The resolution applicant acquired the corporate debtor as a going concern including all fixed assets of the Company. The term of the resolution plan is 45 days of approval by the Adjudicating Authority.

Details of payment by the resolution apwplicant: *(In lakhs)*

Category of stakeholder	Amount admitted	Amount provided under the plan	Amount Provide d to the Amount Claimed (%)
Secured Financial Creditors (all voted in favour of resolution plan)	210,727.96	2,932.00	1.39%
Unsecured Financial Creditors	NIL	NIL	NA
Operational Creditors			
Related Party of Corporate Debtor	32.43	-	0.00%
Government	345.01	8.62	2.50%
Workmen	18.26	17.83	97.65%
Employees	71.16	31.19	43.83%
Other OCs	124.30	3.11	2.50%
Total	**211,319.13**	**2992.75**	**1.42%**

CIRP costs	Upfront Rs. 3.50 crores payable within 45 days of approval of NCLT.
Financial Creditors	Upfront Rs. 29.32 crores payable within 45 days of approval of NCLT
Employees and Workmen	Upfront Rs. 0.49 crores payable within 45 days of approval of NCLT.
Operational Creditors & Statutory dues	Upfront Rs. 0.12 crores payable within 45 days of the approval of NCLT
Total	**Rs. 33.43 crores.**

The implementation of the plan until the final payment of Resolution plan is being supervised by the Monitoring Committee. The Monitoring Committee is comprised of (i) a representative of the COC (ii) One representative of the resolution applicant (iii) Resolution Professional. On and from the Effective Date, the Reconstituted Board is responsible for daily affairs and operations of the Company.

The Adjudicating Authority on 14.03.2022 has observed that the valuations undertaken by both the valuers were incorrect and appointed Mr. N. Malikarjuna Setti and Mr. Madasa kumar as commissioners to independently get the valuation done. The average liquidation value submitted by the Commissioners is Rs. 39.73 crores and the valuation already approved by the COC was Rs. 38.50 crores. However, CoC proceeded with the resolution plan already approved in 25th CoC meeting held on 07.09.2021

Way forward

The resolution plan is under implementation stage. The corporate debtor has been resolved as a going concern and the financial creditors took heavy haircut in resolving the bad debts. Let's hope that the Company will grow in the near future with new aspirations.

BRIEF OF JUDGMENTS

Supreme Court

Case Title: Paschimanchal Vidyut Vitran Nigam Ltd. Versus Raman Ispat Private Limited & Ors.

Case no.: Civil Appeal nos. 7976 of 2019

Decision Date: July 17, 2023

Court/Tribunal: Supreme Court of India

FACTS:

- Paschimanchal Vidyut Vitran Nigam Limited (PVVNL) and Raman Ispat Pvt. Ltd. (corporate debtor) had entered into an agreement for supply of electricity. Clause 5 of the agreement provides that "The outstanding dues will be a charge on the assets of the company.
- Since the dues remained unpaid, PVVNL attached the corporate debtor's properties by an Order of District Collector and Tehsildar, Muzaffarnagar and has restrained, transfer of property by sale, donation or any other mode, and create charge due to outstanding dues.
- The corporate debtor went under liquidation. Therefore, Liquidator is duty bound to form liquidation estate, consolidate claims of creditors and distribute the proceeds of liquidation among the creditors in order of priority prescribed under Section 53 of the IBC.
- Liquidator contended that unless the attachment orders of the District Collector, Muzaffarnagar and Tehsildar, Muzaffarnagar were set aside by the NCLT, no buyer would purchase the property of the corporate debtor due to uncertainty about the authority of the liquidator to sell the property.
- It is further stated that PVVNL's claim would be classified in order of priority prescribed under Section 53 of the IBC, and PVVNL would be entitled to pro rata distribution of proceeds along with the other secured creditors from sale of liquidation assets.
- Learned counsel for PVVNL submitted that the Electricity Act, 2003 being a special law, had primacy over all other laws, including the IBC, which was a 'general' law dealing with corporate insolvency. Therefore, rights of PVVNL, were not subordinate and subject to the 'priority of claims' mechanism under the IBC.
- The liquidator's position ultimately led the NCLAT to direct the District Magistrate and Tehsildar, Muzaffarnagar to immediately release the attached property in its favour so as to enable sale of the property, and after realisation of the property's value, to ensure its distribution in accordance with the relevant provisions of the IBC.
- The NCLAT also endorsed NCLT's reasoning that PVVNL fell within the definition of 'secured operational creditor', which could realize its dues in the liquidation process in accordance with the law as it is settled that 'IBC' being a subsequent Act of parliament, will have overriding effect on the 'Electricity Act, 2003.

DECISION:

- The counsel for the liquidator had submitted that dues owed to PVVNL were technically owed to the "government", and thus occupied a lower position in the order of priority of clearance.

- Amounts payable to corporations created by statutes which have distinct juristic entity but whose dues do not constitute government dues payable or those payable into the respective Consolidated Funds stand on a different footing.
- Such corporations may be operational creditors or financial creditors or secured creditors depending on the nature of the transactions entered into by them with the corporate debtor.
- It is held that Section 238 of the IBC overrides the provisions of the Electricity Act, 2003 despite the latter containing two specific provisions (Section 173 and 174) which open with non-obstante clauses.
- Lastly, the liquidator had urged that without registration of charge, the same was unenforceable under liquidation proceedings.
- In this court's opinion, the liquidator cannot urge this aspect at this stage, because of the concurrent findings of the NCLT and the NCLAT that PVVNL is a secured creditor.
- The appeal was dismissed and the Liquidator directed to decide the claim exercised by PVVNL in the manner required by law. It shall complete the process within 10 weeks from the date of pronouncement of this decision, after providing such opportunity to the appellant, as is necessary under law.

CASE REFERRED:

- K. Shashidhar v. Indian Overseas Bank, 2019 (3) SCR 845
- Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta & Ors., 2019 (16) SCR 275;
- Moser Baer Karamchari Union thr. President Mahesh Chand Sharma v. Union of India & Ors., 2023 SCC OnLine SC 547;
- K.C. Ninan v. Kerala State Electricity Board, 2023 SCC Online SC 603;
- Shrikant v. Vasantrao & Ors ., 2006 (1) SCR 496;
- Municipal Commissioner of Dum Dum Municipality & Ors. v. Indian Tourism Development Corporation & Ors., 1995 (5) SCC 251;
- Member, Board of Revenue v. Anthony Paul Benthall (1955) 2 SCR 842;
- Brihan Mumbai Mahanagarpalika & Anr. v. Willington Sports Club & Ors., (2013) (16) SCR 216;
- Sundaresh Bhatt, Liquidator of ABG Shipyard v. Central Board of Indirect Taxes and Customs, 2022 SCC Online SC 1101;
- Duncans Industries Ltd. v. AJ Agrochem, (2019) 9 SCC 725;
- Innoventive Industries (supra), CIT v. Monnet Ispat & Energy Ltd. (2018) 18 SCC 786;
- Ghanashyam Mishra & Sons (P) Ltd. v. Edelweiss Asset Reconstruction Co. Ltd. [2021] 13 SCR 737;
- Jagmohan Bajaj v. Shivam Fragrances Private Limited 2018 SCC OnLine NCLAT 413.

NATIONAL COMPANY LAW APPELLATE TRIBUNAL (NCLAT)

Case Title: Akashganga Processors Pvt. Ltd. V. Shri Ravindra Kumar Goyal & Ors.

Case no.: Company Appeal (AT) (Insolvency) No.1148 of 2022

Decision Date: July 13, 2023

FACTS:

- In this case, the Resolution Professional received claims from two Operational Creditors i.e. State Tax, Government of Gujrat and Central Excise, Government of India. There were also statutory dues of Gujarat Industrial Development Corporation and Surat Municipal Corporation.
- Under the Resolution Plan, payments were made to Gujarat Industrial Development Corporation and Surat Municipal Corporation to keep the Corporate Debtor as a going concern. In fact, the Financial Creditor from its own entitlement agreed to give amount to two entities (statutory authorities) so that the Corporate Debtor may run.
- In addition, the admitted claims of Financial Creditor were Rs.111.29 Crores whereas the Financial Creditor could be allocated amount of only Rs.7.52 Crores.

- The Resolution Plan was approved by the Committee of Creditors on 06.08.2021 with 99.84% vote share, however, none of the Operational Creditors i.e. State Tax, Government of Gujrat and Central Excise, Government of India have come up in appeal.
- The Resolution Professional filed an application praying for approval of the Resolution Plan before the Adjudicating Authority.
- The Adjudicating Authority in the impugned order has rejected the application and refused to approve the Resolution Plan on the ground that it is in violation of Section 30(2)(e) and (f) of the Insolvency and Bankruptcy Code, 2016.
- Further, it is submitted that the Dissenting Financial Creditor was not given any notice of 7th CoC meeting is also a reason given by the Adjudicating Authority for rejecting the plan.

DECISION:

- It was open for the Resolution Applicant not to allocate any amount to any of the Operational Creditor since under Section 53 no entitlement was there in accordance with the total amount available for distribution. However, when the Successful Resolution Applicant was making payment to other two Operation Creditors, there cannot be any discrimination between payment of one class of Creditors.
- Ends of justice be served in disposing of this appeal in directing that the amount of Rs.32,78,102/- be distributed to all the four Operational Creditors so as to save the plan from being invalidated.
- The Adjudicating Authority having found that there is discrimination in payment of Operational Creditors could have directed for compliance of provision of the Code by distribution of Rs.32,78,102/- without affecting the other terms and conditions of the plan.
- Further, the Minutes of 7th CoC Meeting indicated the presence of Dissenting Financial Creditor through video conferencing, hence, on that ground no fault can be found in the proceeding.
- The order of the Adjudicating Authority was modified by approving Resolution Plan, the application filed by the Resolution Professional was allowed subject to modification that amount of Rs.32,78,102/- shall be distributed on pro rata basis between all Operational Creditors.

CASE REFERRED: Committee of Creditors of Essar Steel India Limited Through Authorized Signatory vs. Satish Kumar Gupta & Ors., (2020) 8 SCC 531.

Case Title: Ravindra Kumar Goyal Vs. Committee of Creditors of Yashasvi Yarns Limited

Case no.: Company Appeal (AT) (Insolvency) No. 809 of 2023

Decision Date: July 14, 2023

Court/Tribunal: NCLAT, New Delhi

FACTS:

- In this case, the Adjudicating Authority vide Order dated 26th April, 2022 admitted application filed under Section 7 of Insolvency and Bankruptcy Code, 2016 against the Corporate Debtor Yashasvi Yarns Limited.
- The Appellant was appointed as Interim Resolution Professional and thereafter confirmed as the Resolution Professional.
- An I.A. was filed by the Resolution Professional seeking extension of CIRP period by 90 days from 24.10.2022. The Adjudicating Authority on 21/11/2022 allowed extension of 90 days.
- On 01.12.2022, Resolution Plan was approved by the Committee of Creditors.
- Appellant has also claimed incentive fee for successfully completing CIRP and approval of resolution plan by Committee of Creditors in 247 days and for achieving value maximization as per Clause 4 of Schedule II under Regulation 34B of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 which came to be considered by the Committee of Creditors on 01.12.2022.
- The Resolution which was placed before the Committee of Creditors for payment of performance linked payment incentive fee was not approved by 91.55 % vote.

- I.A. questioning the said decision of Committee of Creditors and seeking a direction to make the payment of performance linked incentive fee filed by Resolution Professional which was rejected by the Adjudicating Authority.
- Thereafter, the appeal has been filed by the Resolution Professional of Yashasvi Yarns Limited challenging the impugned order rejecting IA filed by Appellant for grant of Incentive Fee.

DECISION:

- Sub-Regulation 4 of Regulation 34B provides for "THAT THE COMMITTEE MAY DECIDE, IN ITS DISCRETION, TO PAY PERFORMANCE LINKED INCENTIVE FEE". The use of two expressions "MAY" and "IN ITS DISCRETION" makes it clear that the provision is enabling provision which vests discretion in the Committee of Creditors to pay performance linked incentive fee.
- The decision of the Committee of Creditors dated 01.12.2022, approving the Resolution Plan which also contains consideration of resolution regarding performance linked incentive fee is a commercial decision of the Committee of Creditors. The law is well settled that the commercial decision of the Committee of Creditors has to be given due credence and the Adjudicating Authority or the Appellate Authority is not to interfere in the commercial decision of the Committee of Creditors unless it does not fulfill the requirement of Section 30 of the Code.
- Resolution Professional at best was entitled for consideration of his claim under statutory scheme. When claim is considered and not approved, Resolution Professional has no right to claim that he was mandatorily entitled for payment of performance linked incentive fee.
- Appellant had no right to claim performance linked incentive fee and his claim having been considered and rejected by the Committee of Creditors with 91.55% vote share in accordance with the discretionary power vested with it under Regulation 34B, cannot be faulted nor it can be interfered with by the Adjudicating Authority or Appellate Authority in exercise of its jurisdiction. Therefore, Hon'ble NCLAT, New Delhi dismissed this appeal**.**

CASE REFERRED:

- State of Kerala & Ors. Vs. Kandath Distilleries, (2013) 6 SCC 573;
- CoC of Essar Steel India Ltd. Vs. Satish Kumar Gupta & Ors, (2020) 8 SCC 531

NATIONAL COMPANY LAW TRIBUNAL

Case Title: Mr. Haridas Krishna Kumar & Anr. Vs. Mr. G.Kalpana

Case no.: IA No.805/2023 in CP(IB) No. 10/7/HDB/2023

Decision Date: July 17, 2023

Court/Tribunal: National Company Law Tribunal, Hyderabad Bench - II

FACTS:

- Application was filed by Canara Bank under Section 7 of Insolvency and Bankruptcy Code, 2016 against Fenoplast Limited. The application was admitted by the Adjudicating Authority and the respondent was appointed as Interim Resolution Professional.
- Respondent on her appointment published a newspaper advertisement seeking claims from the prospective applicants and constitute Committee of Creditors.
- CoC has defined the eligibility criteria for prospective resolution applicants to participate in the expression of interest.
- The applicants (two erstwhile directors of corporate debtor), in response to the paper advertisement submitted the Expression of Interest with the respondent, within the timelines, as specified in the Expression of Interest.
- Respondent, after going through the detailed expression of interest submitted by these applicants found them ineligible as they do not satisfy the minimum eligibility criteria approved by the CoC.
- The Applicants placed the relevant case laws mentioning that the minimum eligibility criteria for

filing an expression of interest is not applicable to the promoters of an MSME corporate debtor who want to file the expression of interest.

- Respondent has sought a legal opinion in the matter as there is no such provision in the IBC that CoC must admit an expression of interest even if it does not satisfy the minimum eligibility criteria. As per legal opinion, it was opined that the EoI received from the promoters needs to be entertained irrespective of whether they satisfy the eligibility criteria or not.
- Respondent is of the opinion that the Judgments submitted by the Applicants and the Legal Opinion sought by her is not binding on her to approve expression of interest submitted by the applicants. Hence applicants were advised to approach the tribunal for proper directions.

DECISION:

- In the order passed by the Hon'ble NCLAT, Chennai in C.P.(AT)(CH)(INS) No. 207/2021, it was held that, if the Corporate Debtor is an MSME, it is not necessary for the promoters to compete with other resolution applicants to regain control of the Corporate Debtor. In the said case also, the resolution applicant did not submit the net-worth certificate, which was worth Rs. 2 crores.
- The object of the Code, which is maximization of the Value of the Assets of Corporate Debtor, is also taken into consideration by the NCLAT.
- The NCLT, Kochi Bench in IA(IBC) No. 64/KOB/2021 in IBA No. 52/KOB/2019, order dated 20 th April, 2021 also dealt with a similar case, wherein, the Net Worth mentioned was Rs. 10 Crores.
- The ratio laid down in the above judgments, would explain the rationale behind permitting MSMEs to submit resolution plan irrespective of they not submitting the Net Worth Certificate.
- In the result, the application is allowed and the respondent directed to accept the Expression of Interest of the Applicant; to relax the eligibility criteria requirement of the minimum tangible net worth of Rs. 75 Crores for the applicant; to issue RFRP and IM to applicant, and the Resolution Plan submitted by him shall be accepted and dealt with in accordance with law.

CASE REFERRED:

- Saravana Global Holdings Ltd and Anr. Vs. Bafna Pharmaceuticals Ltd. and Ors. In CP CA(AT) (INS) No. 203 of 2019, dated 04/07/2019, NCLAT, Principal Bench;
- Swiss Ribbons Pvt. Ltd. and Another Vs. Union of India and Others, 2019 SCC Online SC 73;

Case Title: M/s INP Computer Technology Pvt. Ltd. Vs. Chawla Digital Systems Pvt. Limited

Case no.: CP (IB) No. 222/Chd/Chd/2020

Decision Date: July 19, 2023

Court/Tribunal: National Company Law Tribunal Chandigarh Bench, Chandigarh

FACTS:

- A petition was filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 by M/s INP Computer Technology Pvt. Ltd. to initiate Corporate Insolvency Resolution Process (CIRP) in case of Chawla Digital Systems Pvt. Limited.
- The Corporate Debtor, namely, Chawla Digital Systems Pvt. Limited, is a Company engaged in retailer a qualitative range of industrial products, computer servers, mini laptop, and barcode printers.
- The operational creditor, namely, M/s INP Computer Technology Pvt. Ltd. is a world-class manufacturer in supply of the inclined, computer parts, processor and related server-based computer technology.
- The operational creditor started the supply of material at location specified by corporate debtor and raised invoices on the corporate debtor. Despite several reminders the corporate debtor failed to pay the payment.
- The corporate debtor intimated operational creditor to supply 42 devices in replacement of the delivered goods stating that they are inappropriate as per High Court tender requirement and promised to return back the earlier delivered machines.
- The operational creditor delivered the required machines and reminded the corporate debtor to deliver the earlier goods to which corporate debtor

replied that the goods are in the custody of High Court once these are leased from the custody will be returned.

- The corporate debtor failed to clear the outstanding invoices and default occurred on 26.04.2019 i.e. the date on which part payment was made by the corporate debtor.
- A demand notice dated 01.11.2019 issued and delivered to the corporate debtor. The corporate debtor did not reply to the demand notice till date.
- The notice of this petition has been issued to the corporate debtor to show cause as to why this petition be not admitted.
- The corporate debtor has filed a reply vide diary No.02227/2 dated 28.09.2021, wherein it is stated that the dispute between the parties was existing before issuance of demand notice by the operational creditor.

DECISION:

- Learned counsel for the operational creditor submitted that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt. However, vide emails it is evident that parties were in dispute regarding the non-performance of the services and quality of goods supplied by the operational creditor.
- If there is any pre-existing dispute then the petition under Section 9 of Insolvency and Bankruptcy Code, 2016 cannot be admitted to recover any amount due towards petitioner.
- It is a settled proposition that the National Company Law Tribunal is not a recovery forum. If at all, there is any dispute between the parties regarding the said claim then the parties are at liberty to approach the appropriate Forum.
- The petition was dismissed, since there is a pre-existing dispute between the parties regarding the amount claimed by the petitioner.

CASE REFERRED:

Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited (2018) 1 SCC 353

Policy and Regulatory Updates

Insolvency News around the world

❖ SUPREME COURT LAYS DOWN THE LAW ON PREFERENTIAL TRANSACTIONS

A host of concerns surrounding preferential transactions under the Insolvency and Bankruptcy Code were recently addressed by the National Company Law Appellate Tribunal. The tribunal's findings have now been affirmed by the Supreme Court of India in the case of electronics manufacturing company NTL Electronics India Pvt. Ltd.

Read More at: https://www.bqprime.com/law-and-policy/insolvency-law-supreme-court-lays-down-the-law-on-preferential-transactions

❖ TATA STEEL MOVES SUPREME COURT IN BHUSHAN STEEL CASE FOR DEBT RECOVERY

The high court had held that the amount that is recovered after hearing the avoidance application can be distributed among the creditors of the erstwhile company and not the successful resolution applicant, which is Tata Steel in this case. The court had also remarked that the amount available after the avoidance application is decided upon can be made available to the secured creditors, who are primarily financial institutions and have taken a haircut in agreeing to accept a lesser amount than what was due and payable to them.

Read More at: https://www.bqprime.com/law-and-policy/tata-steel-moves-supreme-court-in-bhushan-steel-case-for-debt-recovery

❖ NEW LUXEMBOURG LAW TO PRESERVE BUSINESSES AND MODERNIZE INSOLVENCY LAW

On 19 July 2023, the Luxembourg parliament finally passed a new law to modernize insolvency law and preserve businesses, after more than a decade since the first draft bill (n° 6539) was presented.

The most recent law relating to insolvency matters (namely on controlled management) dated back to 1935 and the EU Commission had pressed Luxembourg to comply with the Directive (EU) 2019/1023 of the European Parliament and of the Council, of 20 June 2019, on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt.

Read More at: https://www.dentons.com/en/insights/articles/2023/july/20/new-luxembourg-law-to-preserve-businesses-and-modernize-insolvency-law

❖ INDIAN COFFEEHOUSE CHAIN CAFÉ COFFEE DAY FACES BANKRUPTCY

The operator of Cafe Coffee Day chain, Coffee Day Global, was admitted for corporate insolvency last week. The coffee chain is facing bankruptcy case after IndusInd Bank filed a petition to the National Company Law Tribunal (NCLT). In January 2023, the company was slapped with a penalty of ₹26 crore by the capital markets regulator SEBI. The fine was imposed for diversion of funds from subsidiaries to a company related to promoters.

Read More at: https://www.livemint.com/companies/news/coffee-day-global-under-bankruptcy-process-report-cafe-coffee-day-indusind-bankNCLT-11690171073328.html

❖ INDIA'S ONLINE GAME TAX

The Indian government's decision to impose a 28% tax on online gaming poses an "existential threat" to the booming industry and could spell its death knell. Shares of Indian online gaming platforms and casinos have crashed following the GST (Goods and Services Tax) Council's decision.

The country's 900+ gaming start-ups had been paying a small tax on the fee they charged for offering games. But the imposition of a 28% GST on the full face value of a gaming transaction will mean the entire amount collected from players will now come under the ambit of taxation.

Read More at: https://www.bbc.com/news/world-asia-india-66161596

❖ MEDIATION BILL, 2021 PASSED IN RAJYA SABHA

The Bill was introduced on December 20, 2021 before being referred to a Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice headed by Sushil Kumar Modi. The committee submitted its report to the Rajya Sabha chairperson on July 13, 2022. The Bill requires individuals to try and resolve civil or commercial disputes through mediation before resorting to any court or tribunal. After two mediation sessions, a party will be allowed to withdraw from the process. The mediation process itself should be completed within 180 days, with the possibility of extending it by another 180 days if the parties agree.

Read More at: https://www.barandbench.com/news/mediation-bill-2021-passed-in-rajya-sabha

Global Arena

Guernsey's Insolvency Regime: Key Changes

GUERNSEY'S INSOLVENCY REGIME

Guernsey's insolvency regime comprises of the insolvency procedures to ensure an orderly realisation and distribution of the assets of a Guernsey company which cannot or will not pay its debts. The available procedures can broadly be divided into those provided for under customary law – *désastre* and *saisie* – and the more modern corporate procedures provided for under Guernsey's corporate legislation.

The traditional insolvency procedures are rarely used in the corporate context and not governed by any legislation. The process involves realisation and distribution of the debtor's property by obtaining order from the Court. ***Désastre*** applies to a debtor's personal, moveable property and ***saisie*** applies to a debtor's real estate.

Unlike the traditional insolvency procedures Guernsey's modern corporate insolvency regimes are not limited to any particular type or class of assets. The Companies (Guernsey) Law, 2008 (the "Companies Law") set out the modern corporate insolvency procedures comprises of primarily administration, voluntary liquidation and compulsory winding up of Guernsey's Companies.

Administration is the primary form of corporate insolvency procedure where the intention is to save the company or part of its business as a going concern. Sections 374 to 390 of Part XXI of the Companies Law deals with administration whereby an order for administration made by the court if it is satisfied that the order may either make the company to survive as a going concern or may make the reaslisation of Company's assets more advantageous than on winding up. The court will make the order if company is unable to qualify the *solvency test*, or is likely to become unable to satisfy, the solvency test. This is the test as to whether the company:

- **is able to pay its debts as and when they become due (cash flow test); and**
- **has more assets than liabilities (balance sheet test); and**
- **if it is regulated Company, complies with all its regulatory financial adequacy requirements.**

An administrator having all the powers and rights over the debtor is appointed by the Court to run the business and doing necessary actions on behalf of the debtor. Therefore, a moratorium is imposed so that no other proceedings commenced or continued against the debtor. The administrator is required to call an initial meeting of creditors unless the court otherwise directs or where there are no assets available for distribution to creditors. If the administration becomes successful, the order is discharged and debtor may resume and in the event debtor remains insolvent, the court may by order dissolves the company.

Further, there is no set process and time limit for administration. It is therefore open to the administrator, court and creditors to work flexibly towards the most beneficial realisation of the debtor's assets and liabilities and, ultimately, its survival as a going concern.

Voluntary liquidation is an out-of-court process that can be used for both solvent and insolvent entities. If it is solvent the Board may make declaration of solvency that the company is satisfy the solvency test. If it is not a resolution for winding up may be passed by the members. Thereafter a liquidator has been appointed to realise the debtor's assets and discharge its liabilities. From the commencement of a voluntary winding-up, the company ceases to carry on business unless beneficial for winding up the company. The company's corporate state and powers continue until dissolution. On the appointment of a liquidator, all powers of the directors cease, except to the extent that the company (by ordinary resolution) or the liquidator approves their continuance. Once the assets are realized and the liabilities are discharged the liquidator will call a general meeting to present the accounts prepared by the liquidator. The company will dissolved after giving notice to registrar of companies.

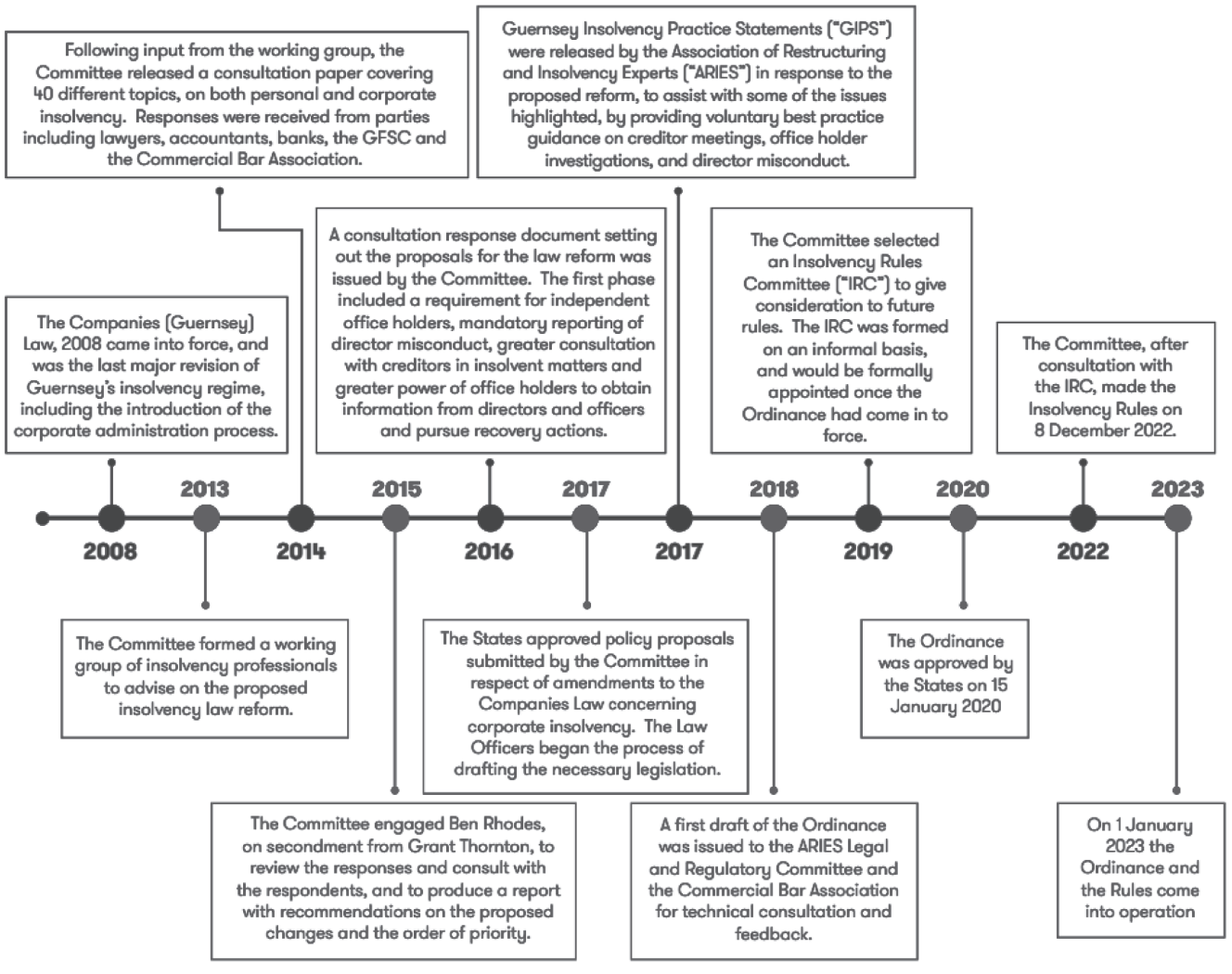
Compulsory winding up of a company can be initiated on several grounds, including an application may be made by the debtor, director, creditor or any interested party where the company is unable to pay its debts or if the court is of the opinion that it is just and equitable to wind the company up in public interest. On the making of a compulsory winding-up order, the court will appoint a liquidator. The company must cease to carry on business except as far as is necessary for the beneficial winding-up of the company, however, its corporate state and powers continue until its dissolution. Compulsory liquidation is only available through bringing a court application and not available as out-of-court process. Liquidator may ask the creditors to submit their claims in the form of 'proofs of debt', but liquidators do not have the role of adjudicating such claims. Once the liquidator wind up the affairs of the company and distribute surplus, if any among the shareholders, application can be made to the court for an order of dissolution.

Background

On July 01, 2008, Guernsey's new companies law, the Companies (Guernsey) Law 2008, came into force. The Law is a major revision and conglomeration of all companies laws, amendments and ordinances created since 1994. The Law consolidated all those ordinances which previously dealt with amalgamation, migration, purchase of own shares, financial assistance, protected cells and incorporated cells. Parts XXI to XXIV of the Companies (Guernsey) Law 2008, as amended, contain the main statutory provisions relating to corporate insolvencies and reorganisations of Guernsey companies. These Parts of the Companies Law were updated by 'the Companies (Guernsey) Law, 2008 (Insolvency) (Amendment) Ordinance, 2020' as supplemented by 'the Company Insolvency (Guernsey) Rules, 2022'.

All formal insolvencies involving Guernsey companies are governed by the Companies (Guernsey) Law, 2008 before 'the Companies (Guernsey) Law, 2008 (Insolvency) (Amendment) Ordinance, 2020 and the Companies (Guernsey) (Insolvency Rules) Regulations, 2022' came into operation. These Regulations may be cited as **the Companies (Guernsey) Law, 2008 (Insolvency) (Amendment) Ordinance, 2020 (Commencement and Application) Regulations, 2022**. The need for change arises due to increase in insolvencies as a result of the ongoing impact of the covid-19 pandemic, the war in Ukraine and resultant cost of living crises in many global economies.

HISTORY OF THE GUERNSEY'S INSOLVENCY LAW REFORM



REVISIONS IN THE GUERNSEY'S INSOLVENCY REGIME

Guernsey's new insolvency law and rules were enacted on 8 December 2022 and comes into force on January 01, 2023. The new law had significantly modernised the Guernsey's insolvency process and brings a significant set of reforms to Guernsey's insolvency legislation, which historically had limited operational provisions, bringing it in line with the law in comparable jurisdictions such as the law of England and Wales. Following are the changes incorporated in the Guernsey Insolvency Regime:

- Administration: Administration proceedings are being conducted with the objective to either enable the companies or its part to survive as going concern or making more advantageous realization of the company's assets than in the event of winding up.

Under the current law, Administrators are not able to make distributions to non-secured creditors. Further, to dissolve a company following Administration, it must first be converted into Compulsory Liquidation and a Commissioner's Hearing must be held to enable a distribution to creditors, following which the Liquidator can apply for dissolution which leads to delay and increased costs.

Now, Administrator can apply the court to distribute assets to unsecured creditors in certain circumstances; Further, Administrator can also apply to the court to dissolve the company following discharge of the Administration Order if

there are no further assets to realise or distribute, without having to convert the Administration to a Liquidation. Furthermore, Administrators will have increased powers to obtain information and pursue recovery action, in line with the powers that they would have as Liquidator.

- Voluntary Liquidation: Voluntary liquidation is a shareholder driven process as it commenced when the shareholders has passed resolution for winding up the affairs of the company.

  Liquidation proceedings are same for both type of companies either solvent or insolvent which makes it problematic to distinguish between the solvent and insolvent companies liquidation proceedings. Further, there is minimal involvement of creditors in the process and the views of creditors are less considered even the company is insolvent, regardless the creditors having primary interest in the outcomes of the company liquidation.

  New law brings out the distinction between the liquidation proceedings of solvent and insolvent companies by introducing the concept of filing Declaration of Solvency by the Board of Directors of the Company. Declaration of solvency refers to a solvency test which is to be satisfied by the company. It must be filed with the registrar of companies within 30 days. If declaration of solvency is prepared and submitted to the registrar, liquidation proceedings will continue under the already existing regime. In the event the declaration of solvency is not submitted by the board, liquidation proceedings may differ.

- Independent Liquidator: In the existing regime debtor's shareholder, director or any connected or related person can be appointed as a liquidator. In this scenario, liquidation is concluded without proper investigation of the cause of insolvency, without taking actions against defaulting directors and without proper consultation with the creditors. The creditor seeking recourse might have to apply to court for restoration of company and appointment of liquidator to investigate the doings of the directors at his own cost.

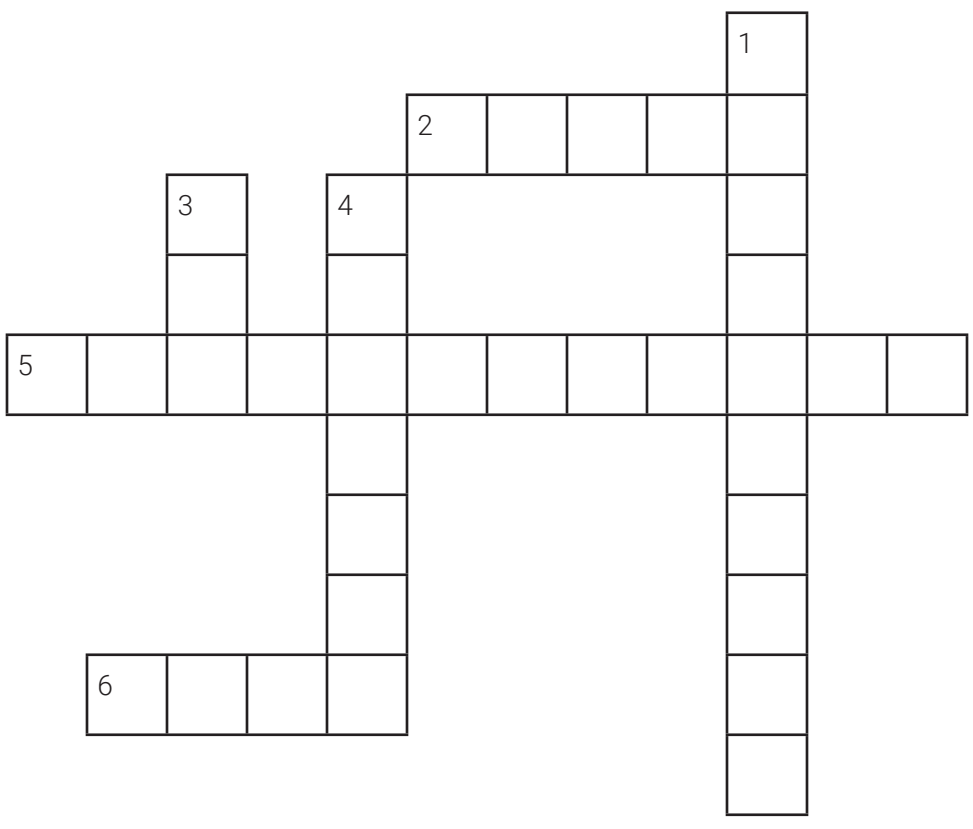
In insolvent companies the cause of insolvency and conduct of directors needs to be identified. If the Declaration of solvency is not filed by the directors, an independent liquidator must be appointed unless the court approves otherwise. The Independent liquidator shall:

a. conduct the meeting of creditors;
b. prepare and present a report on winding up to the creditors;
c. consider the conduct of director/existing director;
d. report adverse finding to the registrar or regulator; and
e. ensure realization of assets and discharge of liabilities of the debtor in the best interest of stakeholders.

- Creditors: Creditors are the primary interest holders in the outcomes of administration or liquidation proceedings of insolvent companies accordingly the views of creditor should be obtained and taken into account.

  Earlier the liquidators and administrators communicate with the creditors as a matter of best practice. However, it was not been a legal requirement. On inception of new regime, communication with the creditors becomes necessity. The liquidator will be required to hold at least one meeting of creditors to take place within one month of the Liquidator's appointment, on at least seven days' notice. For administrations, the administrator will be required to provide creditors an explanation as to the purpose and process of administration within 28 days of the administration order. The administrator will also convene a meeting of creditors within 10 weeks of the Administration Order, on at least 14 days' notice.

- Reporting: New regime imposes a duty on liquidators to report to the Registry and GFSC in prescribed format if any matters have come to their attention regarding preference payments, misappropriation of monies, misfeasance, fraudulent or wrongful trading, or any matters that would be ground for disqualification of director. Liquidator may also require - the directors to provide statement of affairs, production of documents and information, private examination of a person by applying for the same to the court. Liquidator and administrator may also pursue recourse in relation to undervalued transactions, extortionate credit transactions or any other inappropriate transactions.



ACROSS

2. _____ is the latest airline company to go into insolvency.
5. _____ committee is formed to oversee the implementation of the Resolution Plan.
6. A _____ resolution plan is made under Pre-Packaged Insovency Process.

DOWN

1. IBC follows the _____-in-control model.
3. To initiate a pre packaged insolvency, default of _____ lakhs is needed.
4. A bankruptcy _____ is appointed in a bankruptcy process.

Answers:

1. Creditor
2. GoAir
3. Ten
4. Trustee
5. Consultation
6. Base

ICSI INSTITUTE OF INSOLVENCY PROFESSIONALS

(A wholly owned subsidiary of ICSI and registered with IBBI)