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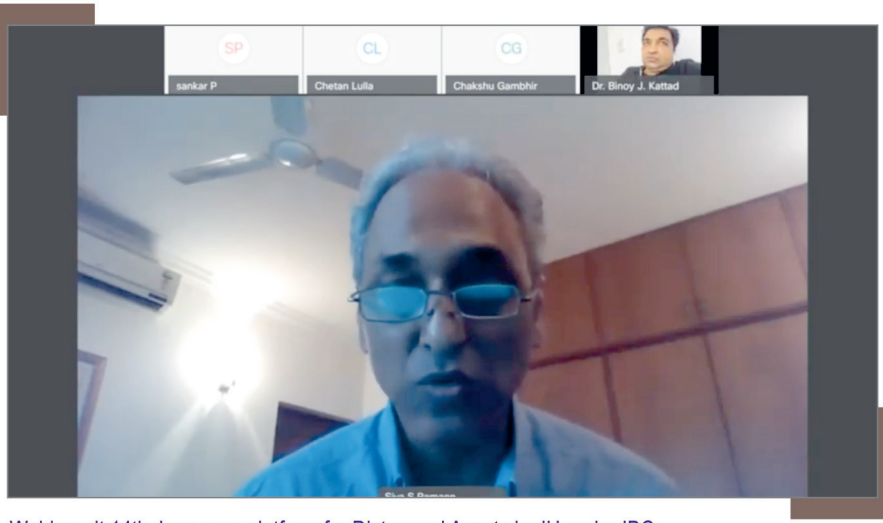
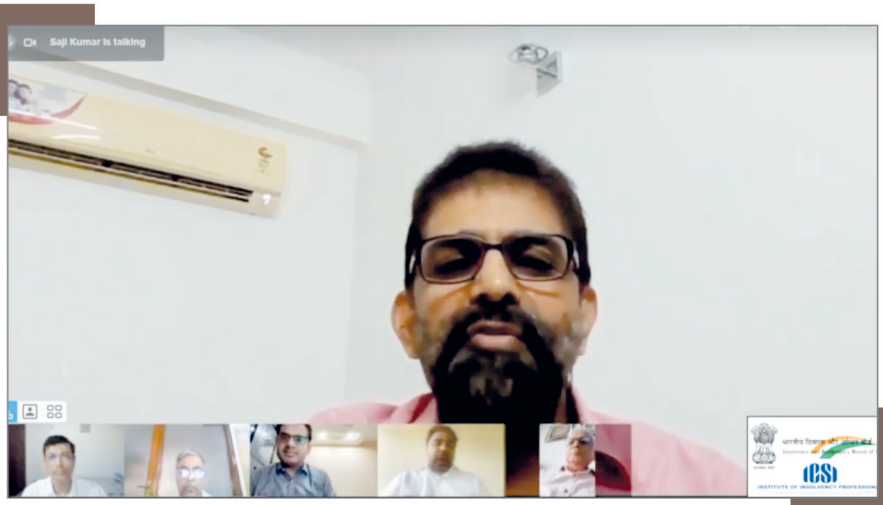
Some Webinar Events held during June Month



Webinar dt 14th June on e-platform for Distressed Assets by IU under IBC



Webinar dt. 7th June 2020 on IBC (Amendment) Ordinance, 2020

Webinar dt. 27th June 2020 on e-filing Procedure before NCLT

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At a Glance

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Section 25, read with section 208, of the Insolvency and Bankruptcy Code, 2016 and regulations 13 and 27 of the Insolvency and Bankruptcy Board of India (Insolvency Resolu-

tion Process for Corporate Persons) Regulations, 2016 - Corporate insolvency resolution process - Resolution professional - Duties of - Resolution professional appointed two unregistered entities as Registered Valuers - On discovering his mistake, he appointed a new valuer while allowed other to continue for another 6 months till they got registered as an entity - List of creditors presented before committee in two meetings did not contain complete details as per requirement of Regulation 13 of CIRP Regulations - A transaction paying a group company Rs. 1,00,000 which was initiated by Corporate Debtor before CIRP commencement date, was finalized after CIRP commenced; thus, money was not transferred to any creditor but to a group company - This unauthorised transaction was within knowledge of RP, but RP had not taken any action for 245 days for correcting it until Inspecting Authority pointed out issue - He held no discussions before CoC nor did he mentioned this unauthorised transaction in scope of Forensic and Transaction Audit Agreement - Further, RP had, in various communications with stakeholders, used letterheads indicating his profession as an Advocate but there was no indication of his registration as an Insolvency Professional or his capacity as IRP or RP - Whether since RP had contravened provisions of Code, different Regulations and circulars thereunder, his registration as an Insolvency Professional was to be suspended for three months; however, he would continue to conduct and complete assignments/processes in hand - Held, yes (Para 5)

- **Vijay Kumar Garg, In re.**

  (2020) 118 taxmann.com 145 (IBBI) • P-139

Section 20, read with section 5(13) and 5(14), of the Insolvency and Bankruptcy Code, 2016 and Regulation 7 of the IBBI (Insolvency Professionals) Regulations, 2016, read with Regulation 31, of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016 - Corporate insolvency resolution process - Corporate debtor - Management of operations as going concern - An Inspecting Authority (IA) was appointed to conduct an inspection of one VK an Insolvency Professional (IP), on having reasonable grounds to believe that IP had contravened provisions of Code, Regulations, and directions issued thereunder - Board had issued SCN to VK, based on findings of an inspection in respect of his role as an interim resolution professional (IRP) and/or resolution professional (RP) in corporate insolvency resolution process (CIRP) of corporate debtors, GGL, NWL and NBL - It was found that VK had appointed D&P to provide support services to it in CIRP of corporate debtors which was in contravention of IBC as D&P did not qualify as a professional, having authorization of a regulator of any profession to render any professional service and fee payable to D&P was also found to be unreasonable - Further, VK had created an additional burden on corporate debtor by unnecessarily extending benefits to D&P, by purchasing two insurance policies as part of CIRP with D&P as beneficiary - It was also found that VK had conducted two meetings of CoC for Corporate Debtors beyond CIRP period and transacted business beyond order of Adjudicating Authority and beyond provisions of Code - It was observed that CIRP rests on shoulders of IP and he/she is duty-bound to preserve and protect assets of corporate debtor as well as run corporate debtor as a going concern - However, instead of preserving and protecting value of corporate debtor, VK frittered away resources of ailing corporate debtor for unlawful purposes - Thus, engagement of D&P was only a façade to siphon off funds of ailing corporate debtors - Whether therefore, VK having converted noble insolvency profession to a business, converted professional client relationship to that of money lending and borrowing, manipulated market for insolvency professional services, attempted to siphon off crores of rupees from ailing corporate debtor to its partner in crime, acted under influence of one creditor, and contravened every provision of Code, Regulations and Code of Conduct for ulterior purposes he was to be ordered to pay a penalty equal to 25 per cent of fee payable to him - Held, yes (Paras 4 and 5)

Circulars and Notifications: IBBI Circular No. IBBI/IP/013/2018 dated 12-6-2018, Circular No. IP/002/2018 dated 3-1-2018

Knowledge Centre 29-32

- **Practical Questions** • P-29
  - Can a Holding Company be said to have availed a financial debt from its subsidiary company in case where the subsidiary company mortgaged its property as security for a loan taken by the holding company from a financial creditor?
  - Can the NCLT and the NCLAT inquire into the question of fraudulent initiation of CIRP and trading in a CIRP proceedings pending before it?
  - Is it mandatory under the IBC that in all cases the bid by resolution applicant must atleast match the liquidation value?
  - Can an appellant before the SC challenge an admission order w.r.t. a CIRP application on the plea of collusion when such a plea was neither raised by Adjudicating Authority nor the Appellate Authority?
  - Can a creditor bring an IBC action against the Corporate Guarantor for a financial claim in respect of which its CIRP application has already been admitted by AA against the Principal Borrower?
- **Learning Curves** • P-31
  - Provisions of the IBC override all other laws and hence, the resolution plan approved by the NCLT acquires primacy over all other legal provisions
  - Adjudicating authority *suo-motu* cannot direct the CoC to consider the new resolution plan and re-consider the already approved resolution plan
  - The liquidator is not required to file application before compounding authority for an offence committed by the Company by not depositing TDS. Company itself will file compounding application accepting that it has committed such offence.
  - Abatement of Original Suit before DRT will not affect the proceedings in NCLT under IBC as the dues still remain outstanding.
  - Civil suit filed after receipt of the demand notice will not be a dispute as defined in section 5(6) of I&B Code.

Policy Updates 91-100

- **INSOLVENCY PROFESSIONALS TO ACT AS INTERIM RESOLUTION PROFESSIONALS, LIQUIDATORS, RESOLUTION PROFESSIONALS AND BANKRUPTCY TRUSTEES (Recommendation) Guidelines, 2020** • P-91
- **THE INSOLVENCY AND BANKRUPTCY CODE (AMENDMENT) ORDINANCE, 2020** • P-99

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From Chairman's Desk

"We must accept finite disappointment, but we must never loose infinite hope.?

– Martin Luther King

Dear Professional Members,

We are living in a new world wherein reality of COVID-19 pandemic has truly sinked into our daily lives. The measures related to maintaining social-distance, wearing face mask, maintaining hygine, *etc.* are something that we all acknowledge to be very crucial in flattening the curve of spread of the pandamic.

In the words of Albert Einstein, *reality is an illusion, albeit a very persistent one*. Reality has multiple facets, and as time passes by, its temporal aspects become more prominent, resulting in a better vision of its true nature. One of the most prominent aspect of the present-day reality is that we have accelerated our pace of transition towards

a digitized working environment, and this confirms our belief that intelligent choices made during crisis situations can really shape our future.The change has helped individuals as well as institutions to transcend from one milestone to another. Your institute has taken initiative in organizing a series of webinars on a whole host of important subjects relating to insolvenct and bankruptcy law. The webinars have become a very important medium for not only holding virtual meetings, it is also being increasingly employed for knowledge dissemination.

In the Insolvency and Bankruptcy law space, the month of June, 2020 has seen a significant development in the form of promulgation of IBC (Amendment) Ordinance, 2020. Keeping in view the difficulties faced by corporates on account of COVID-19 pandemic, a very calibrated and pragmatic approach has been adopted by the Government of India. The Ordinance has *inter alia* introduced a new provision, namely section 10A in the code taking away the remedy to file an application for initiation of CIRP as envisaged u/ss. 7, 9 and 10, IBC for any default occurring from 25th March 2020 till the expiry of 6 months, or such further period as may be notified, but not exceeding 1 year. The proviso to s. 10A has further put to rest all speculation on the issue as to whether the remedy can be exercised after the exemption period is over by clarifying that there shall be a prohibition on filing of an application for the default occurring during the said period. It is however important to note, that, for the defaults that occurred prior to 25th March 2020, the remedy to initiate CIRP is still open.

The recital to the Ordinance clarifies that the step has been taken to deal with the unprecedented difficult situation created on account of the COVID-19 pandemic. While the Ordinance has attracted support from different stakeholders, some pertinent queries and concerns have also been raised which I am sure will settle down eventually as we get more and more closer to the reality. One of the concerns which is being raised is the issue that the ban imposed on exercise of CD's right under section 10, IBC is not aligned with the objective of the Ordinance. It is argued that a prohibition on voluntary insolvency proceedings of a CD in distress, may result in further deterioration of its assets, implying lesser chances of its revival. It is important to remember that the recital to the Ordinance recognizes the fact that *it may be difficult to find adequate number of resolution applicants*

to rescue the CD. Therefore, the prohibition imposed is a very pertinent step. The Chairman of IBBI, while elaborating on this aspect of the Ordinance, aptly remarked, "*when every firm that was viable till recently is reeling under stress on account of COVID-19, are there rescuers? For example, when every airline is under stress, which airline will rescue another? If all such firms are pushed into insolvency, many of them will end up with liquidation. Upon liquidation, there would be distress sale of assets, realizing abysmally little. Consequently, the firms would face a premature death, while creditors would realise next to nothing.*"

Another point being raised is that exempting the defaults may result in some intentional defaults as well, since the recourse to IBC for defaults during the exempted period has been permanently done away with. The concern raised may be genuine. But, it is important to remember that a legislation necessarily involves a balancing exercise. Therefore, while for the larger good, the Ordinance is needed, the chances of its misuse can certainly be taken care of adopting other legal means available. The situation may encourage the CD and FC/OCs to go for alternate mechanisms like debt restructuring, one-time settlement, change in ownership *etc*. After all, IBC is not intended to be an instrument for debt enforcement against the CD. It is a means to discover and act on early signs of financial distress in order to facilitate discovery of a feasible resolution plan in a time-bound manner.

I thank you all for your support to the Institute during these tough times. Take care, stay safe and healthy.

Dr. BINOY J. KATTADIYIL
Managing Director
ICSI Institute of Insolvency Professionals

Managing Director's Message

The pandemic has pushed Governments across the world adopt immediate safety precautions to minimum the loss to human life. The measures like social distancing has really helped in restricting the rising number of cases, but it also a direct impact on the economy activity. The situation is undoubtedly unprecedented, and there is no prior human experience in place which may act as a guide to our action or the way forward to deal with the challenge. At the same time, putting restrictions on working and travel conditions has contributed in restricting and containing rising number of cases. But, at the same time, the Economy is perhaps yet to come to terms with the present situation wherein human movement has been restricted in the interest of human life itself. The severity of the situation requires all sections of the economy to prevent 'deepening' of the crisis.

The Government of India through a string of decisions/actions taken by it to deal with the present critical situation, and try to mitigate losses suffered by the Indian Economy (on account of Covid-19 pandemic)

has not only displayed its farsightedness, but also its strength, flexibility, willingness and determination to win in the nation's fight against the pandemic by taking the challenges head-on. On the legislative side, on June 5, 2020 itself, the President of India by promulgating the Insolvency and Bankruptcy (Amendment) Ordinance, 2020 has taken the much needed step as required to safeguard the Indian businesses. The Ordinance was promulgated in furtherance of economic measures announced by the Ministry of Finance to support businesses which got impacted by the outbreak of the pandemic. The Ordinance has *inter alia* inserted Section 10A which takes away the right to file a CIRP application for the any default after March 25, 2020 till a period of 6 months. Thus, the period for which prohibition shall be operative is provided six months (as of now), which may be extended to 1 year (counted from March 25, 2020). The proviso to the section makes it clear that no application shall ever be filed for initiation of a CIRP in respect of for any default of payment by CD during the aforementioned period. The language of the provision does not leave any doubt that the legal remedy under IBC in respect of a default during the said period is not merely suspended, but that such an application cannot be filed subsequently as well. While some doubts have been raised as regards justification of imposing permanent prohibition on an IBC action for defaults committed during the said period, the rationale and the intent thereof is very clear. There has been a definite adverse impact due to the pandemic on the financial condition of businesses and also the cash flows issues. In fact, the preamble to the Ordinance clearly lays down that the Ordinance has been introduced in light of business disruptions caused on account of Covid-19, and also the consequent inability to find adequate number of resolution applicants to rescue corporate debtors. The Ordinance thus seeks to provide a breathing space to the businesses which have been hit very hard by the pandemic, and while there are some chances of debtors abusing the suspension provisions for reasons other than the pandemic, given the extent of damage caused to the economy, a risk is worth taking. Afterall, the act policy making necessarily involves balancing exercise to be carried out by the policy makers.

Further, the amendment ordinance has also introduced a non-obstante clause to section 66, IBC which provides protection to the CD's management. The provision lays down that no

application can be filed by an RP under sub-section 66(2) in respect of such defaults against which initiation of CIRP is suspended under section 10A.

While the legal framework for special insolvency resolution regime is being worked on for the micro, small and medium size enterprises (MSME), in the meantime, the MCA, *vide* its notification dt.1st June 2020 has modified the criteria for classification of businesses into Micro, Small and Medium enterprises respectively. Under the new criteria, the parameters laid down are: (a) for a micro enterprise, the investment in plant and machinery must not be more than Rs. 1 Crore, and turnover of Rs. 5 Crores; (b) for small enterprises, the investment in plant and machinery should not be more than Rs. 10 Crore, and turnover of Rs. 50 Crores; (c) for a medium enterprise, the investment in plant and machinery must not be more than Rs. 50 Crores, and turnover of Rs. 250 Crores.

I want to conclude this piece by reiterating that this is an unprecedented situation which has posed a very difficult challenge before the whole world. The amendment which has been brought about to minimise adverse impact of pandemic on Indian businesses is also an application of no fault liability principle which provides shield to the businesses. Furthermore, the Ordinance is also likely to induce the creditors and debtors to adopt alternate mechanisms such as restructuring schemes, one-time settlement *et al*.

Wishing you all good health. Keep safe!

The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020

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The Finance Minister Ms. Nirmala Sitharaman announced on 24th March 2020 that the threshold limit for initiating proceedings under Insolvency and Bankruptcy Code 2016 is being increased from Rs. 1 lakh to Rs100 lakhs. The ordinance was issued on 25th March 2020 to give effect to the announcement. At the said Press Conference, the Hon'ble Finance Minister also stated that in the event of the outbreak continuing beyond 30th April 2020 the Government would consider suspension of sections 7, 9 & 10 of the Insolvency & Bankruptcy Code, 2016 (IBC) in order to prevent Companies from being forced into insolvency proceedings. This set off a debate on the requirement of such an ordinance and whether it is wise to suspend IBC at this juncture as any revival of the economy is a function of time required to control the pandemic. The suspension would result in negative sentiments among Foreign Investors, rating agencies etc. The debate raged and the suspense increased as there was no traction post the announcement. Even there were reports that Chairman of IBBI Mr. Sahoo expressed reservation on blanket suspension of the provisions of IBC.

The reasons against the suspension of the code were as follows:

- The threshold limit was raised to 100 lakhs for initiating proceedings under IBC. Hence, the number of applications filed in NCLT are bound to reduce.
- RBI has announced a moratorium on term loans and working capital and as such there is no need to suspend IBC since new applications are unlikely to be filed.
- The Promoters of the Companies which are insolvent will use the opportunity for asset stripping.
- The Companies who are keen to move a section 10 application will be at a disadvantage
- None of the other jurisdiction have taken recourse to suspending fresh insolvency applications.

Select Summary of concessions given by a few Governments in different jurisdiction in the light of situation arising out of or foreseen due to Covid 19

Australia

Enacted on 23rd March 2020 Coronavirus Economic Response Package Omnibus Act No. 20 of 2020 (the Act) which provides for the following relief:

- Increased the minimum threshold from $ 5000 to $ 20000
- Time limit for debtors to respond to bankruptcy notice increased from 21 days to 6 months.
- The enforcement action by a creditor on serving the notice indicating intention to present a debtor's petition has been increased from 21 days to 6 months
- Directors have been given temporary relief under the Corporation Act from their duty to prevent insolvent trading.
- Provisions to complement the instant write off of Assets by Small and Medium business up to 30th June 2020 to entities with an aggregate turnover between $10 million to $ 500 million.
- Businesses with aggregate Turnover of less that $ 500 mn have been allowed accelerated Depreciation to enhance their future productive capacity.
- A cashflow boost bill was enacted to provide for payment to support employers to retain employees during this period.

United Kingdom

- Financial package of £ 330 billion to help business cope up with the current situation.
- A Corona Virus Business Interruption Loan Scheme to facilitate easier access to bank lending and overdrafts for small business up to £ 5 mn, interest free for the first 12 months and guaranteed by the Government up to 80% of the loan value.

- Businesses with less than 250 employees are eligible for refund up to 2 weeks of statutory sick pay per employee due to Covid -19
- There is a provision for grant funding with certain conditions with higher rate of relief for retail, hospitality and leisure business.
- A Covid -19 Corporate financing facility by way of Bank of England buying short term debt as measure of short-term liquidity support to the Companies.
- A corona Virus job retention scheme provides for grant up to 80% of the wages of employees initially for 3 months and the amount is capped at £ 2500 pm.
- VAT payment deferred till June 2020 for all businesses
- IT payment due dates extended.
- No temporary moratorium against creditor action announced except relief for protection to Commercial tenants from forfeiture if they cannot pay rent due to Covid -19.
- Many banks have voluntarily provided for moratorium on loan repayments
- Permanent changes in the insolvency regime is proposed.

Likewise, the other countries that have announced measures include Belgium, China, Czech Republic, Debmark, Finland, France, Germany, Hungary, Italy, Poland, Singapore, Spain, Slovak Republic, Sweden, The Netherlands, The UAE & USA

The initial announcement of the Hon'ble Finance Minister was followed by a series of announcement of economic package termed as Áatmanirbhar" covering various sectors of the economy which was a combination of fiscal, monetary and growth measures. Coupled with the monetary measures announced by RBI earlier, the total package was a massive 10% of the GDP amounting to Rs. 20 lakh Crores. However, even during the series of announcements spread over 5 days there was still speculation on the suspension of the core provisions of IBC in terms of filing fresh applications and the scope and extent of the coverage. Finally, on 17th May 2020 while presenting the 4th tranche of the economic package the Hon'ble Finance Minister announced that the default of debt related to covid19 period will not be covered for initiation of insolvency proceedings under IBC and that the Government is considering suspension of sections 7, 9 & 10 of the IBC by one year instead of 6 months. The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020 followed on 5th June 2020. The recital lists out the reasons for the enactment which is as follows:

- The reason for enacting the ordinance is the covid -19 pandemic which has impacted business,

financial markets and economy all over the world, including India, creating uncertainty and stress for business for reasons beyond the control of businesses.

- The nationwide lockdown from 25th March 2020 has added to disruption of normal business.
- In view of the above it was considered expedient to suspend sections 7, 9 & 10 of IBC to prevent corporate persons which are experiencing distress on account of the unprecedented situation, being pushed into insolvency proceeding under the code.
- Further, it was considered expedient to exclude the default arising out of the unprecedented situation for the purpose of insolvency proceedings under the code.

The salient features of the ordinance are as follows:

- A new section 10A is introduced with the heading "Suspension of initiation of Corporate Insolvency Resolution Process".
- The new section suspended filing of all applications under sections 7, 9 & 10 for any default arising on or after 25th March 2020 for a period of 6 months or such further period not exceeding one year from such date, as may be notified in this behalf.
- The proviso to the section explicitly provides that no application SHALL EVER BE FILED, for initiation of corporate insolvency resolution process(CIRP) of a corporate debtor for the said default occurring during the said period.
- By way of explanation it is clarified that the provision of the new section 10A shall not apply to any default before 25th March 2020.
- Section 66 of the Code was amended to introduce a new sub clause (3) which prohibits the filing of the application by a resolution professional under sub-section (2) in respect of default against which initiation of CIRP is suspended as per section 10A.

A short and precise ordinance required some clarifications. Let us examine and understand the scope and the impact of this ordinance on filing of fresh applications.

1. The ordinance is for a period of six months from 25th March 2020 to 24th September with an option to extend for a period of another six months with the maximum total period not exceeding one year. *i.e.* as per the ordinance the Government reserves the option to extend the suspension up to 24th March 2021.
2. The suspension is RESTRICTED TO all new applications under sections 7, 9 & 10 for any default arising on or after 25th March 2020 till the notified period. Thus, for defaults arising before or after the period there is NO RESTRICTION on filing the application.
3. It is important to note that the period of immunity is the notified period. Thus, it has nothing to do with the

reason for the default. It is not important that the default is due to the business being affected due to covid -19. There is an underlying presumption that during this period any default is due to covid -19. To avoid litigations and to reduce the burden on the Adjudicating Authority, it is not explicitly stated that the default due to covid -19 would only be covered. Further, the cascading effect of the unprecedented situation my result in a business failing after the expiry of suspension period and there could be unending litigations to determine the cause of default. The government has wisely ensured that there is no scope for such litigation.

4. The threshold for filing fresh applications was increased to Rs.100 lakhs wef 25th March 2020. Hence, any new application pertaining to a default prior to that date can be for default of Rs.1.00 lakh or more while it has to be Rs. 100 lakhs for applications pertaining to default on or after 25th March 2020.

5. The proviso that no application **shall ever be filed** for default occurring during the suspension period does not include any period before or after the suspension period. For e.g. if the default during the period is not made good after suspension, in case there is no moratorium given by the lender, then the default is a **continuing default,** though it has arisen during the suspension period, an application for initiating CIRP is permitted. The logic for such an interpretation is that the Government has decided on the suspension period based on the expectation of business returning to normalcy when the unprecedented situation does not exist anymore. The businesses are required to reengineer to make it viable during this period and ensure that there is no default post the suspension period. Thus, the businesses are expected to work out arrangement with the creditors in the form of restructuring, settlement or other alternate options to ensure that there is no continuing default after the said period. The suspension is a breather to business to reorganize themselves to be relevant in the NEW NORMAL that is expected post waning of the pandemic. It was also essential to ensure that viable companies are not dragged to insolvency by Financial Creditors who are not under the purview of Reserve Bank of India, as they are not obliged to offer any moratorium to the Corporate Debtor (CD).

6. There are apprehensions that the ordinance may be used by unscrupulous businesses to deliberately default. While, that remains a possibility, it should be understood that Government and parliament can make rules and laws based on trust and not based on mistrust of its citizens. The unscrupulous needs to be dealtwith separately. In the context of this ordinance it should be understood that applications under IBC are for commencement of CIPR and not for recovery. If the default is deliberate, the banks/FIs will recall the loans by classifying such borrowers as wilful defaulters and may initiate criminal

action against them. In such cases of deliberate default continuing post revocation of suspension then the Corporate Debtor will be admitted to the CIRP and he will not be eligible to be a resolution applicant as he will be declared a wilful defaulter under section 29A

7. The underlying message of the ordinance is that alternative medium of resolution or restructuring to be explored during the period of suspension so that the business survives which is the primary objective of the Code. This is one of the fundamental thought process behind the ordinance, where the Government had to decide on the balance of convenience between protecting viable units, which but for the pandemic would not be insolvent and businesses which are already insolvent and waiting at the gate of IBC. Such insolvent businesses anyway would have been admitted to the CIRP irrespective of the pandemic. Thus, if viable firms are allowed to be dragged into insolvency proceedings and are eventually liquidated it will be an irreversible process. Instead supporting such viable business by giving them breathing space and postponing the eventuality of the unviable firms would, in addition, also meet the ends of justice. The entire ease of doing business has been supported by RBI giving moratorium on loans and many other supporting relaxations for business to survive the pandemic period. Thus, the eco system to deal with the fallout of the pandemic on economy and businesses has been created.

8. It is also pertinent to note that the Government had the option of coming up with sectoral relief in rather than blanket relief by identifying sectors/ business segments in trouble. The Government, it appears decided against such an option as it would introduce an element of subjectivity, in the process of identification, when generally every section has been affected but with varying degree of severity. There are some segments like Pharma, IT which has benefitted due to the changed lifestyle and the benefits are likely to taper with the pandemic.

9. Finally, most of the countries have announced economic rescue packages which has a stimulus and legal reliefs. Many jurisdictions have suspended insolvency, while many have not. The following table will make for interesting reading:

Countries	Status of Suspension of Insolvency and Bankruptcy laws
USA	No
UK	Yes
Germany	Yes
France	Yes
Spain	Yes
Italy	Yes
Hungary	No
Belgium	Yes
Netherlands	No
Sweden	No
Denmark	No

Countries	Status of Suspension of Insolvency and Bankruptcy laws
Finland	No
Poland	Yes
Australia	Yes
UAE	No
Czech Republic	Yes
Slovak Republic	Yes
China	No Change. Guidelines for handling bankruptcy cases in response to Covid -19 issued.
Singapore	No
Japan	No special insolvency law exists but it is covered in various aspects of civil and commercial laws. Mitigating steps have been taken to ease economic hardship.
Russia	Yes

This also vindicates the Indian Government stand in this regard and the criticism that there was no need to suspend sections 7, 9 & 10 of the code is not justified.

10. It is pertinent to note that no exemption has been given to a personal guarantor (PG) to the CD and the financial creditor has the option to move against the PG despite the suspension in cases where the CIRP has commenced or fresh application is filed pertaining to the default before 25th March 2020. Otherwise, the FC has the option of moving the DRT in this regard.

11. The ordinance will have prospective application for all other purposes except that the date of suspension is from a date prior to the date of the ordinance. The e-filings done after 25th March 2020 pertaining to default prior to that date will be considered. However, applications pertain to default on or after 25th March 2020 till the revocation of suspension will not be considered.

12. It is evident from the foregoing that the apprehensions expressed, before the issue of the ordinance, is without merit.

Amendment to Section 66 of the Code

There was intense debate on the necessity of this amendment and the rationale for the said amendment. Section 66 deals with fraudulent trading or wrongful trading. Section 66(1) deals with a situation where the business of the Corporate Debtor has been carried on with an intent to defraud the creditors or for any fraudulent purpose. If this is established by the Resolution professional by means of an application, the Adjudicating Authority(AA) will direct the persons responsible for carrying on the business in such a manner to make contributions to the assets of the Corporate Debtor. On the contrary, section 66(2) deals with a situation where the Director or partner of the Corporate Debtor, as the case may be, knew or ought to have known that there was no reasonable prospect of avoiding commencement of CIRP and did not exercise due diligence in minimizing the potential loss to the creditors of the Corporate Debtor, then the AA may by order direct the director or the partner to make such contributions to the asset as deemed fit. While, the application under section 66(1) may be filed during CIRP or the Liquidation Process, the application under section 66(2) can be made only during CIRP.

It is evident from the foregoing, that both the sub-sections deal with different situations. The suspension will result in a situation where a director or partner may know or conclude that there is no reasonable chance to avoid insolvency and will not be able to move an application under section 10 of the Code. In such an event, denying exemption from section 66(2) may result in an unfair situation, which could lead to the AA directing the director/ partner to make contribution to the assets of the CD, on an application by the Resolution Professional.

It can thus be seen that the ordinance has addressed the primary requirement of the preamble of the code of balancing the interest of the stakeholders and maximizing value by protecting the assets of viable companies. Otherwise, the viable companies would have been dragged to liquidation with no Resolution Applicant coming forward during these unprecedented times.

The Impact on the IPs on the ordinance

There was a fear that the IPs will suddenly be unemployed with the suspension of the core provisions of the IBC. However, it is now clear that the fear was unfounded for the following reasons:

- The existing applications that have been filed before the suspension will proceed normally as and when NCLT/NCLAT resume hearing.
- As default is the key trigger any default which is prior to 25th March 2020 can still be proceeded against by filing an application.
- If the default is before 24th March 2020 then the application for default of Rs.1.00 lakhs and above can be filed even today. If the default is on 24th March 2020 then the threshold limit for filing an application is Rs.100 lakhs. In cases of default WEF 25th March 2020 no applicant is permitted to be filed till the suspension is revoked.
- The scope of business for an IP can be gauged from the fact that till date approximately 13000 applications have been disposed off and another 13000 applications are pending with the AA. There are approximately 3000 applications in various stages under CIRP. In addition, it is expected that a few hundred fresh applications will be filed every month with various NCLTs. Thus, there is ample scope for IPs to pursue their profession without any significant fall in the revenues.
- The new definition of MSMEs and the separate insolvency regime for MSMEs too is expected to generate additional business for the IPs.
- There will be challenges in existing assignments as the CoC may want to reduce CIRP cost and as such the RPs will have to do quite a few of the tasks currently outsourced to professionals such as filing routine applications in NCLT, trying to use his/ her knowledge and skill in ascertaining PUFE transactions without instituting transaction and forensic audit, dispensing with the

need of process advisors by inhouse capacity building etc.

- The revenues will also be affected by CoC not agreeing to fees which was hitherto considered normal and lower fees could be the order of the day. It is also likely that IBBI may announce some uniform fee structure which will reduce litigation in this regard.
- The IPs can also explore providing advisory services or work with fellow IPs, represent FCs in CoC meetings and market for advising/ hand holding Companies which are moving towards insolvency due to the pandemic.
- The IPs now will be forced to be tech savvy as CoC meetings henceforth may mostly be video conferencing with few physical meetings.
- The NCLTs may also move toward e-hearing and already the process is in place. Hence, the IPs will have to invest in technology, proper net connection with adequate bandwidth, common server for access to all members of the team, data security and storage, adequate lap-tops for the team to work from home with good connectivity etc.
- The IPs will have to reorient their soft skills to adapt to the digital world.

In conclusion, it may be stated that new opportunities will emerge, and the IPs have to focus on capacity building, innovative strategy and work towards being relevant in the changing environment.

•••

Summary and impact of the recent Ordinance amending the IBC

Prakash K. Pandya
IP, FCS and LLB

The Government of India issued an Ordinance on 05 June 2020 to amend the Insolvency and Bankruptcy Code, 2016[1] (the IBC).

Suspension ersatz prohibition - relief to distressed Corporate debtors

The Ordinance offers two major reliefs to financially distressed corporate debtors who have not defaulted prior to 25th March 2020. One, it 'prohibits' initiation of the proceedings under the IBC by financial creditors and operational creditors for default by Corporate debtor under section 7 or 9, respectively of the IBC[2] until the provisions are suspended from a date to be notified for a period of 6 months, which can be extended upto 12 months. It 'prohibits' creditors from taking action against defaulting Corporate debtor permanently *i.e.* even after the suspension is lifted[3], so long as the default occurring during the period of suspension. Implying that after lifting of the suspension, creditors need to wait for further default until the value of default reaches Rs.10 million (one crore) by the Corporate debtor before initiating action under the IBC.

Second, it shields directors against action for 'insolvent trading' or 'wrongful trading' during such suspension, if eventually *i.e.* after the suspension is lifted, and the creditors action under the IBC is admitted. Thus, an attempt is made to provide the

directors room for 'fearless mind' to do whatever they deem fit and proper to revive the business of the company.

The Ordinance provides that where after the suspension if action is initiated under the IBC by creditors against a corporate debtor, then resolution professional (who will be appointed) is prohibited from taking action under section 66(2) of the IBC against directors (partners in case of LLP) for 'insolvent trading' during the period of suspension of the IBC[4]. 'Insolvent trading' means where directors knew or ought to have known that there was no reasonable prospect of avoiding action by financial creditors or operational creditors under the IBC (u/s.7 or 9 respectively) and despite that director did not exercise due diligence in minimising the potential loss to the creditors of the corporate debtor[5]. It may be noted that there is no protection against fraudulent trading u/s. 66(1) or preferential transactions u/s. 43 or undervalued transactions u/s. 45 or extortionate credit transactions u/s. 50 of the IBC.

Pending and ongoing matters

There is no suspension or prohibition by the Ordinance on the matters already pending before the Adjudicating Authority (NCLT) or Appellate Authority (NCLAT). And hence the same can be continued. Also, corporate debtors undergoing corporate insolvency resolution process or liquidation process under the IBC is not meddled with by the Ordinance and hence it can continue.

Default prior to 25/3/2020

There is no relief to Corporate Debtors defaulted prior to 25th March 2020[6]. Financial creditors or operational creditors may initiate action against such defaulting corporate debtors (it may be noted that the amount of default is increased from Rs.100,000 to Rs. 10 million (one crore)[7] from 24th March 2020 and is not having retrospective effect[8].

However, it is feared that due to global lockdown to contain pandemic COVID-19, sufficient resolution applicants may not come forward (even preamble to the Ordinance recognises this) or will take full advantage of the situation and may come with very low funding proposals - thus financial creditors will have two choices - liquidate or accept more hair-cuts. It is hoped that Banks and financial creditors will assess each of their defaulting corporate debtors and decide if they are willing to accept liquidation value, which will get reduced by the time spent in its realisation and the cost involved. They may also weigh the option to realise assets under SARFAESI to the extent secured portion. As Hon'ble Delhi High Court[9] has held that the PMLA, the

Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDB), SARFAESI Act and Insolvency Code (or such other laws) must co-exist, each to be construed and enforced in harmony, without one being in derogation of the other. And, also the decision of Hon'ble NCLAT[10] that financial creditor can proceed simultaneously under RDB, SARFAESI and the IBC. Only because financial creditor has proceeded under SARFAESI, it does not attract sec. 65 of the IBC. And, the pendency of actions under the SARFAESI or under the RDB does not create obstruction for filling an Application under Section 7 of the IBC, specially in view of section 238 (overriding effect) of the IBC[11].

It is hoped that creditors will wait for measures for MSMEs that the Government may announce under the IBC[12].

Option for Corporate debtors in financial difficulty upon suspension of the IBC

While corporate debtors in financial difficulty (who have not defaulted prior to 25/3/2020) gets protection against action by creditors under the IBC, action under SARFAESI and RDB is not barred or suspended (ibid).

The Ordinance also bars Corporate Debtors in financial distress from voluntarily initiating the proceedings under the IBC under section 10 (where a corporate debtor is in the state of insolvency) and thereby doors are closed for resolving debt during the period of suspension of the IBC[13].

However, insolvent companies have the door open under Chapter XV of the Companies Act 2013 for a (voluntary) scheme of arrangement with creditors albeit without moratorium (similar to section 14 of the IBC) until approval of such scheme by NCLT or under section 271 of the Companies Act 2013 to seek winding-up.

Corporate Debtors with positive net-worth *i.e.* solvent corporate debtors may avail to liquidate voluntarily under section 59 of the IBC as hitherto as there is no suspension of the same.

What the Ordinance missed

In respect of pending and ongoing matters and possible action under the IBC in respect of default prior to 25/3/2020 (both discussed supra), the Government should have also suspended the same on the ground stated in the preamble of the Ordinance itself that "it is difficult to find adequate number of resolution applicants to rescue the corporate person ...". The same remains true not only for corporate person who *may* default in discharge of their debt obligation but also equally for corporate person *who have defaulted and* in respect of whom (i) resolution plans were not invited on or before 25/3/2020, or (ii) actions under the IBC were either not initiated by creditors or are pending before Adjudicating Authorities for admission.

Conclusion

In this unprecedented and extraordinary time due to COVID-19, extraordinary measures are required and that's what the Government has attempted. No one can be sure about how these measures

may turnout eventually. The attempt to support businesses now when economy is being reconfigured, is a welcome move and shows government is rooted to the ground realties.

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1. The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020 (9 of 2020).
2. Section 2 of the Ordinance has inserted a new Section 10A for the purpose.
3. Proviso to section 10A.
4. Section 3 of the Ordinance has inserted a new sub-section (3) to section 66 of the IBC.
5. Section 66(2) of the IBC.
6. Explanation to section 10A.
7. *Vide* Notification No. S.O. 1205(E) of 24th March 2020. It is done for the benefit of MSMEs struggling due to the lockdown.
8. NCLT, Kolkata bench vide order dt. 20th May 2020 in Fosco India Ltd. v. Om Boseco Rail Products Ltd. in CP (IB) No. 1735/KB/2019.
9. *Deputy Director Directorate of Enforcement* v. *Axis Bank* (2019) 104 taxmann.com 49 (Delhi).
10. *Punjab National Bank* v. *Vindhya Cereals Pvt Ltd.* (2020) 117 taxmann.com 254 (NCL-AT)
11. NCLAT's decision dated 20th Feb 2020 in *Rakesh Kumar Gupta Director* v. *Mahesh Bansal* (2020) 117 taxmann.com 300 (NCL-AT).
12. As per the press conference of the Hon'ble Finance Minister on 17th May 2020, for MSMEs a special insolvency framework will be notified under section 240A of the IBC.
13. Section 10A of the IBC.

The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020: An Analysis Impact of Covid-19 on Global Insolvency Regimes

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Background

Various reform initiatives to promote "Ease of Doing Business" and "Atmanirbhar Bharat" taken by Government recently and on 17th May 2020 the Finance Ministry of India announced as a piece of improvement bundle in the wake of flare-up of pandemic, announced an embargo on the fresh proceedings under the Code for next one year in respect of COVID-19 related default.

On 5th June, 2020, finally the hiatus comes to an end with the promulgation of the much awaited The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020 ("Ordinance").

Reasons for Promulgation of Ordinance:

1. COVID-19 Pandemic has created uncertainty and stress for business for reasons beyond their control.
2. A nationwide lockdown is in force since 25th March, 2020 due to which normal business has disrupt.
3. Difficult to find adequate number of resolution applicants to rescue to corporate person who may default in discharge of their debt obligation.
4. Considered expedient to suspend filings under sections 7, 9 and 10 of Insolvency and Bankruptcy Code, 2016 to prevent corporate person being pushed into insolvency

proceedings under the said code for sometime;

5. Considered necessary to exclude the defaults arising on account of unprecedented situation.

Amendment

Section10A and sub-section (3) to section 66 have been inserted by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020 dated 05.06.2020

Statute Wording of Section 10A

Section 10A: Suspension of initiation of corporate insolvency resolution process.

*"10A. Notwithstanding anything contained in Sections 7, 9 and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after **25th March, 2020** for a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf:*

Provided that no application shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period.

Explanation - For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply to any default committed under the said sections before 25th March, 2020."

Statute Wording of Section 66(3)

Further, in section 66 of the principal Act, after sub-section (2), the Ordinance has inserted sub-section (3) as under:

"(3) Notwithstanding anything contained in this section, no application shall be filed by a resolution professional under sub-section (2), in respect of such default against which initiation of corporate insolvency resolution process is suspended as per section 10A."

An analysis of ordinance

We analyse the ordinance in few points:

1. The Ordinance covers two major aspects *i.e.* 'default' and 'wrongful trading'. The aspect of 'wrongful trading' is consequential to abatement of insolvency filings.

2. As regards default, intention is to exclude default arising out of 'unprecedented situation'. S.10A inserted.

3. The suspension on filing application is umbrella suspension. It covers filings by financial creditor's, operational creditors, as well as voluntary filings by companies. Accordingly, there shall be no filings under sections 7, 9, & 10 for defaults taking place during the "COVID period".

4. What we call as the 'COVID Period' is a period of 6 months from 25th March, 2020. Therefore, it continues upto 24th September, 2020 and may be extended for upto 12 months. Central Government has retained

power to extend COVID Period up to one year *i.e.* upto 24th March, 2021.

5. There is no relaxation for MSMEs, either as creditors or as debtors. The distinctive insolvency regime for MSMEs that the Finance Minister talked about is not there in the Ordinance.

6. There are two major provisions in sec. 10A – abatement from filing of IBC applications for default during the COVID period, and "filings ever" for default during the COVID period. Does it mean "abatement from filing ever" means "never". The concept of "filing ever" is what will create interpretational issues. Hence, we clarify it with 4 different possiblesituations:

   Let us understand this with 4 possible scenarios:

   Scenario 1. Default occurs prior COVID period, and is cured during the COVID period or continues thereafter.

   In this scenario, there is no doubt that there will be no abatement of filings for initiation of corporate insolvency resolution process;

   Scenario 2. Default occurs during the COVID period, and is cured during the COVID period. In this case, very clearly, there will be an abatement of filings;

   Scenario 3. Default occurs during the COVID period, and continues beyond the COVID period.

   This is scenarios where there will be some doubts, because of the language of the proviso. However, in our view, there will be no abatement in this case as well. Default continues every day there is a failure to pay. If the default has continued beyond the COVID period, it has actually occurred after the COVID period as well. Intuitively, if the COVID period is admittedly over, there is no reason for the debtor to take aid behind the COVID. Hence, such a debtor will be liable to suffer insolvency filings.

   Scenario 4. Default occurs after the COVID period.

   In scenario 4, once again clearly, there will be no abatement of filings;

Some more important points arising out of Ordinance to analyse

(*a*) Analysis of Applicability of 6 Months' Time Period

Though the Ordinance clearly provides for the cut-off date for looking at the default but the question arises that when the suspension period of six months (as of now) to be calculated. Whether the suspension period is to be construed from 25th March, 2020 or from the date of Ordinance *i.e.* notification of Section 10A of the Code.

- From which date 6 months are to be counted?
  - From 5.6.2020 *i.e.* the date of issue of Ordinance?
  - From 25.3.2020 *i.e.* the date of beginning of lockdown and such date being stated in Section10A?

- From the date of existence of default during COVID period?

▶ Date of Ordinance is 5.6.2020 but it deals with the period commencing from a particular date *i.e.* 25.03.2020. Hence, COVID Period will start from 25.03.2020

▶ Question of prospective and retrospective does not arise as section 10A itself mentions the default period beginning from 25.3.2020.

(*b*) Bar on Filing of application "FOREVER"

From the Ordinance, it is clearly evident that there is no bar on filing of application under the provisions of the Code against the default taken place before or after the suspension period. Further, clarity is also there on the point that no insolvency proceedings can be initiated against the defaults occurring on or after 25th March, 2020 for the suspension period of six months or one year (as the case may be). What gives rise to obscurity is that whether the corporate debtors where defaults continues even after the suspension period will still enjoy the immunity under the provisions of Section 10A of the Code.

The expression "no application shall ever be filed' as used in first proviso to section 10A cannot be taken to mean that abatement is available even after the COVID Period and that means "never" be filed. If such an interpretation is taken, the provision becomes counter-intuitive. A blanket and 'forever' protection would rather actually incentivize a debtor to accelerate default so as to bring it during COVID Period and avail a permanent abatement. This cannot be the intent of the law. So, any default within the suspended period no application can be filed under IBC, however, if the default continues after the suspension period, a creditor can initiate insolvency proceeding.

Notably, pursuant to RBI moratorium on loans due to COVID-19 disruption, the Ordinance may not have much use in section 7 cases. Though the abatement might be useful in cases where the borrower has not availed the moratorium, however, the chances are quite rare that such borrowers will commit default. The abatement would be relevant with respect to section 9 cases as majority filings would be by operational creditors. In our view, the Ordinance will mostly go to the detriment of the operational creditors, as financial creditors in any case will have extended the 6 months' moratorium.

(*c*) Some aspects relating to MSME/ "SPECIAL INSOLVENCY FRAMEWORK" for MSMEs:

Survival of MSME's being one of the greatest concern in the rampant situation and government being repeatedly talking about ways and means to protect them, it was highly anticipated that the Ordinance will come out with the Special Insolvency Framework for MSMEs by way of the

amendment under Section 240A of the Code. However, at present Ordinance is completely silent with regard to the relaxations for MSMEs.

Few points which may be noted that:

- MSME creditors cannot file for defaults lower than Rs. 1 crore (due to recent amendments in section 4).
- Now, pursuant to this Ordinance, MSMEs will not be able to invoke section 9 cases even when the default by their debtors reaches the threshold. Therefore, MSMEs may be prone to wilful non-payments by their debtors which could give rise to abuse the amendment by debtors by keeping the outstanding below Rs. 1 crore.
- However, there is no relaxation of section 16 of the MSME Act which calls for payment of interest to MSMEs for delay in payments. Therefore, those who owe money to MSMEs would still need to pay interest under the said provisions of the MSME Act. This should act as adeterrent against non-payment to MSMEs

(*d*) Section 66(3):

The exiting provisions of the Section 66(3) of the Code seems to provides lifetime blanket protection to the management of the corporate debtor where default occurred during suspension period. It provides relaxation from wrongful trading provisions, which is understandable. Note, the sub-section should be read in the context of sub-section (2) and not sub-section (1), as the latter covers 'fraudulent trading'.

Directors will be temporarily relieved from obligation to prevent their companies from trading while insolvent if debts are incurred during the ordinary course of business. Although, they still will be held criminally liable if the debts are incurred fraudulently, under section 69 for defrauding creditors.

However, we need clarity on whether the suspended period be excluded for the purpose of determining "look back" period for PUFE transactions. Also, high risk is associated with such relaxation.

An Analysis on Impact of Covid-19 on Global Insolvency Regimes

United States

- On February 19, the Small Business Reorganization Act (SBRA) became effective, which added a 5 new sub-chapter to the United States Bankruptcy Code & eliminated some of the more costly elements of relief under traditional Chapter 11. It also seeks to provide a quicker & economical option for reorganization to businesses.
- The Act has also amended the definition of "income" in the Bankruptcy Code for the purpose of chapters 7 and 13, to exclude coronavirus-related payments from the ambit of definition of "income" for purposes of filing bankruptcy.

Germany

- Temporary suspension of obligation to file for insolvency and of creditor's right to request opening of insolvency proceedings.

  On 25 March, 2020 the German parliament passed a bill "*to mitigate the consequences of the COVID-19 pandemic in civil, bankruptcy and criminal procedure law*" (COVID-19 Bill) that aims at protecting companies that experience financial difficulties as a result of the COVID-19 pandemic.

  The COVID-19 Bill includes a temporary suspension of both, the debtor's statutory obligation to file for insolvency and the creditor's right to request the opening of insolvency proceedings for insolvency reasons that occurred after 1 March 2020.

- Suspension of debtor's obligation and creditors' right to file forinsolvency

  The COVID-19 Bill provides for a temporarily suspension of the filing obligation until 30 September, 2020; this deadline can be shifted by the Ministry until 31 March, 2021.

  For the suspension of the filing obligation two conditions must be fulfilled:

  The reason for insolvency must be based on the effects of the COVID-19 pandemic (and not on other reasons).

  There are prospects for restructuring of the company due to pending procedures for granting public aid to the company and/or pending negotiations with (potential) creditors of the company about additional financing or reorganization of debt.

  The COVID-19 Bill provides for a legal presumption that these conditions are fulfilled if the company was not illiquid as of 31st December 2019.

Singapore

- The Bill temporarily raises the monetary thresholds (from $10,000 to $100,000 for companies/partnerships) and time limits for bankruptcy and insolvency, making it harder for individuals to be declared bankrupt and businesses to be declared insolvent.
- It also seeks to find a way for an organized moratorium so the underlying obligations are deferred or suspended, yet they remain payable at a later date. This move will provide the SMEs and the smaller retailers, the best possible chance of preserving cash flow, staying in business.
- A prohibition on taking court or insolvency proceeding, seeking enforcement of security over property used in business or trade; calling on a performance bond given pursuant to a construction contract, and termination of lease for non-residential premises.
- Directors will be temporarily relieved from obligation to prevent their companies from trading while

insolvent if debts are incurred during the ordinary course of business. Although, they still will be held criminally liable if the debts are incurred fraudulently.

United Kingdom

- The new restructuring tools would include :
  1. A moratorium for companies giving them breathing space from creditors enforcing their debts for a period of time whilst they seek a rescue or restructure;
  2. Protection of their supplies to enable them to continue trading during the moratorium and;
  3. A new restructuring plan (including cross class cram down), binding creditors (including dissenting creditors) to that plan;
  4. Safeguard measures for creditors and suppliers, to ensure timely payments till the time a solution is sought.
- Additionally, the government would temporarily suspend wrongful trading provisions for a period of three months having a retrospective application from 1st March onwards which will boost the confidence of directors to do trade.

Australia

- Firstly, creditor must have a statutory minimum debt of $5,000, to initiate bankruptcy proceedings against a debtor. This threshold has been increased to $20,000 Secondly, the time period for complying with the bankruptcy notice has been increased from 21 days to 6 months vide amendments to S. 5(1) of Bankruptcy Act, 1966 and Regulation 4.02AA of Bankruptcy Regulations, 1996.
- Temporary relief from personal liability of Directors for insolvent trading.

Conclusion

Desperate times requires desperate measures. There will be lot of businesses experiencing a liquidity crisis and trade disruptions, the goal is to keep them afloat.

The Indian government's predicament, while unenviable, is not entirely unique. Other countries, too, are facing such problems, and many have responded by making it harder to initiate insolvency proceedings (Australia and Singapore), providing statutory for a to negotiate moratoria with lenders, announcing new tools for insolvency resolution (the UK) and making insolvency resolution tools less costly (the US). Yet, India (and Germany) appears to be going far further than many other jurisdictions by completely stopping recourse to insolvency proceedings.

Experience thus far has suggested that purely out-of-court restructuring has not been very effective in resolving distress, with high possibilities of hold-outs. Even schemes of arrangement have not been used extensively for debt restructuring, unlike in other jurisdictions. This will undermine the government's goals entirely. If lenders

choose to not act at all, or choose less value-maximising methods to resolve distress, there is a further risk of financial sector distress, which India may not have adequate tools to resolve at present.

The government has already announced that it will notify a new insolvency resolution framework for micro, small and medium enterprises (MSMEs) in the coming days. This is expected to be a pre-packaged version of the resolution framework under the IBC, and may offer further insights on how the government is expecting non-MSME insolvency resolutions to work as well.

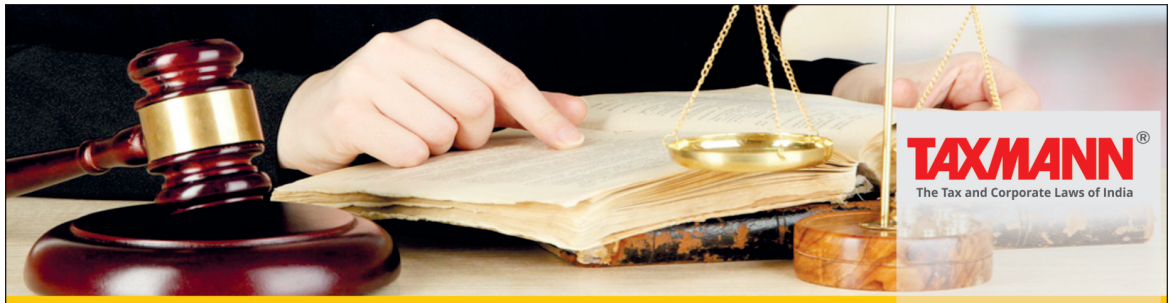
Directors will be temporarily relieved from their duty to prevent insolvent trading for any debts incurred in ordinary course of company's business. The amendment brought in through Ordinance is already been announced in some or the other way in various other countries. Singapore, Australia and United Kingdom among other have given temporary relief to directors which will support directors to focus more on the business. The provision has been relaxing to reassure the directors that the complex decision pertaining to future viability of the business must not be unduly be influenced by exceptional circumstances, like this, which are beyond their control.

Keeping the intent of balancing the interest of all stakeholders intact, it is expected that legislature and regulators will eventually come out with more clarity in the Indian insolvency space on the concerned issues. Though the calibrated suspension is bought very well keeping in mind the interest of borrowers, lenders, resolution applicants and other stakeholders at large. However, timely address of the present critical issues will provide greater clarity in the minds of the stakeholders to accordingly plan their action foreplay in present time situation.

It also remains to be seen if a modified version of the insolvency resolution process under the IBC will suffice in these vastly changed macro-economic conditions, or if the government will need to offer a new model for insolvency resolution.

Disclaimer

The opinions expressed in this article are that of the author, in her personal capacity and do not, in any way or manner, reflect the views of the organizations. Nothing herein shall be deemed or construed to constitute legal or investment advice.



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INSOLVENCY AND BANKRUPTCY BOARD OF INDIA

Kanwal Chaudhary, *In re*

DR. NAVRANG SAINI, MEMBER

NO. IBBI/DC/25/2020

JUNE 2, 2020

Section 25, read with section 208, of the Insolvency and Bankruptcy Code, 2016 and regulations 13 and 27 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 - Corporate insolvency resolution process - Resolution professional - Duties of - Resolution professional appointed two unregistered entities as Registered Valuers - On discovering his mistake, he appointed a new valuer while allowed other to continue for another 6 months till they got registered as an entity - List of creditors presented before committee in two meetings did not contain complete details as per requirement of Regulation 13 of CIRP Regulations - A transaction paying a group company Rs. 1,00,000 which was initiated by Corporate Debtor before CIRP commencement date, was finalized after CIRP commenced; thus, money was not transferred to any creditor but to a group company - This unauthorised transaction was within knowledge of RP, but RP had not taken any action for 245 days for correcting it until Inspecting Authority pointed out issue - He held no discussions before CoC nor did he mentioned this unauthorised transaction in scope of Forensic and Transaction Audit Agreement - Further, RP had, in various communications with

stakeholders, used letterheads indicating his profession as an Advocate but there was no indication of his registration as an Insolvency Professional or his capacity as IRP or RP - Whether since RP had contravened provisions of Code, different Regulations and circulars thereunder, his registration as an Insolvency Professional was to be suspended for three months; however, he would continue to conduct and complete assignments/processes in hand - Held, yes (Para 5)

ORDER

1. *Background*

1.1 This Order disposes of the Show Cause Notice (SCN) dated 5th December 2019 issued to Mr. Kanwal Chaudhary, EA-413, Maya Enclave, New Delhi-110064, who is a Professional Member of the ICSI Institute of Insolvency Professionals and an Insolvency Professional (IP) registered with the Insolvency and Bankruptcy Board of India (Board/IBBI) with Registration No. IBBI/IPA-002/IP-N00207/2017-18/10661.

1.2 In exercise of its power under section 218 of the Code read with the Insolvency and Bankruptcy Board of India (Inspection and Investigation) Regulations, 2017, the Board *vide* Order dated 4th July 2019 appointed an Inspecting Authority (IA) to conduct an inspection of Mr. Kanwal Chaudhary on having reasonable grounds to believe that the IP had contravened provisions of the Code, Regulations, and directions issued thereunder.

1.3 The Board on 5th December 2019 had issued the SCN to Mr. Kanwal Chaudhary based on findings of an inspection in respect of his role as interim resolution professional (IRP)/resolution professional (RP) in corporate insolvency resolution process (CIRP) of Ireo Fiveriver (P.) Ltd. (CD). The SCN alleged contraventions of several provisions of the Insolvency and Bankruptcy Code, 2016 (Code), the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 (IP Regulations) and the Code of Conduct under regulation 7(2) thereof, the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations), IBBI Circular dated 3-1-2018 on "Insolvency professional to use Registration Number and Registered Address in all his communications" and IBBI Circular dated 17-10-2018 on "Valuation under the Insolvency and Bankruptcy Code, 2016". Mr. Kanwal Chaudhary replied to the SCN *vide* letter dated 25th December 2019.

1.4 The Board referred the SCN, response of Mr. Kanwal Chaudhary to the SCN and other material available on record to the Disciplinary Committee (DC) for disposal of the SCN in accordance with the Code and Regulations made thereunder. Mr. Kanwal Chaudhary availed an opportunity of personal e-hearing before the DC on 26th May, 2020 when he reiterated the submissions made in his written reply and also made a few additional submissions. Thereafter, the IP submitted additional reply *vide* email dated 27th May 2020 in support of his submissions made during the course of personal e-hearing.

Consideration of SCN

2. The DC has considered the SCN, the reply to SCN, written and oral submissions

of Mr. Kanwal Chaudhary, other material available on record and proceeds to dispose of the SCN.

Alleged Contraventions, Submissions, Analysis and Findings

3. A summary of contraventions alleged in the SCN, Mr. Kanwal Chaudhary's written and oral submissions thereon and their analysis with findings of the DC are as under:

3.1 Contravention: Regulation 27 of the CIRP Regulations states that a resolution professional shall within seven days of his appointment but not later than forty-seventh day from the insolvency commencement date appoint two registered valuers to determine the fair and liquidation value of the corporate debtor. Further, in this regard IBBI Circular IBBI/RV/019/2018 (w.e.f. 1st February, 2019) specifies that only valuers registered with the Board under the Companies (Registered Valuers and Valuation) Rules, 2017 may be appointed by the IP during the CIRP. In the aforementioned matter, RP appointed M/s RBSA Valuation Advisors LLP and K.G. Somani & Co. as valuers on 23rd February 2019. However, it has been observed that the RP appointed valuers who were not registered with the Board in violation of this Circular. IP's actions indicate misunderstanding of the law.

Submission:

As regards appointment of unregistered valuers being RBSA Valuation Advisors LLP and K.G. Somani & Co., it is submitted by RP that it would though appear that RBSA Valuation Advisors LLP and K.G. Somani & Co. were themselves not registered with IBBI on the date of their appointment, however the undersigned was informed that they have registered valuers as their partners or on their panel who would be conducting and issuing valuation reports for each category of assets. Even in EOI for valuers, it was specifically mentioned by IP that valuation done by valuers of specific class of assets need to be disclosed alongwith names of all valuers who have been engaged for valuation in respect of different class of assets. The relevant portion of EOI issued to valuers is being reproduced as under:

> "The valuer shall include in his report the valuation done by valuers of specific class of assets and disclose the names of all valuers who have been engaged for valuation in respect of different class of assets in accordance with Companies Registered Valuers Rules, 2017."

RBSA Valuation Advisors LLP, informed the RP that it has 09 partners and all its partners are registered valuers. Further, RBSA has been registered as RVE for all three asset classes *viz.* Securities & Financial Assets; Land & Building and Plant and Machinery *vide* registered No. IBBI/RE-E/05/2019/110 dated 29th August, 2019. K.G. Somani & Co., through it also came to be appointed on misconception, however, no valuation reports were obtained from this firm. Rather valuation reports have been obtained from Ms. Gunjan Agarwal and Mr. Varun Sharma who both are registered valuers with IBBI. In fact upon careful examining IBBI's Circular dated 17th October, 2018 and 13th August, 2019 as also advisory received from IPA, it was realized that RBSA and K.G. Somani could not have been

appointed at the first place. Therefore, corrective measures were taken and Ms. Gunjan Agarwal and Mr. Varun Sharma were appointed in the place of M/s K.G Somani and reports have been submitted by them. RBSA Valuation Advisors LLP informed that they were in the process of getting itself registered as RVE and ultimately came to be registered on 29th August, 2019. The valuation report dated 11th September prepared by Mr. Rajeev R Shah for Securities & Financial Assets and Mr. Arpit M. Sharma for Land & Building came to be submitted on 17th October, 2019. Both aforesaid valuers as well as RBSA are the registered valuers with IBBI. Having explained the aforesaid factual matrix, RP does accept that initially appointment letters to non-registered valuers ought not to have been issued. There was an inadvertent error committed which subsequently was corrected.

In furtherance to submissions made during the personal e-hearing, the RP has also submitted in his reply *vide* email dated 27-5-2020 that, with respect to appointment of unregistered valuers at the first instance, RP reiterates that both the firms at that point of time represented that they have registered valuers as their partners. Considering that one engages a Law Firm or a CA Firm but ultimately it is the Lawyer enrolled with Bar Council who appears in Court or the CA enrolled with ICAI who signs the Audit Report, an impression was taken that such appointment letters could be issued. However, later when it was realized that this wasn't proper, remedial action was taken. Neither any report was obtained nor any monies paid to them. However, timelines did get breached in the process, for which the IP sincerely apologize.

Analysis:

A person is registered as a valuer only after passing the valuation examination conducted by the IBBI and on recommendation of RVO. A company or a firm is registered as RVE, if it fulfils the requisite criteria provided under the Companies (Registered Valuers and Valuation) Rules, 2017. The objective of the valuation exercise is to enable the Committee of Creditors (CoC) and the prospective resolution applicants to take an informed decision based on the fair and liquidation value of the CD. Also the solemn purpose of the Code is to the maximise the value of assets and a critical element in achieving the objective is by ensuring transparent and credible determination of value of the assets to facilitate comparison and informed decision making. Hence, it is essential that qualified, accountable and professional individuals are allowed to conduct valuation under the Code. The Hon'ble Delhi High Court in the matter of *Cushman and Wakefield v. Union of India* (2019) 102 taxmann.com 102/152 SCL 516, had held that, "The endeavour of the Rules is to introduce a class of professionals where the focus is on the professionals skills of the individuals rather than a business venture. Professionalism is introduced into the profession of valuation, which involves sophisticated skills and a high degree of integrity, impartiality and ethics for the purposes of the Companies Act and IBC, through Valuation Rules which can regulate this area and make valuers more accountable and professionally trained."

Regulation 27 of the CIRP Regulations provides that:

> "27. *Appointment of registered valuers.*—The resolution professional shall within seven days of his appointment, but not later than forty-seventh day from the insolvency commencement date, appoint two registered valuers to determine the fair value and the liquidation value of the corporate debtor in accordance with regulation 35:
>
> **Provided** that the following persons shall not be appointed as registered valuers, namely:
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> (*a*) a relative of the resolution professional;
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> (*b*) a related party of the corporate debtor;
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> (*c*) an auditor of the corporate debtor at any time during the five years preceding the insolvency commencement date; or
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> (*d*) a partner or director of the insolvency professional entity of which the resolution professional is a partner or director."

The IBBI Circular dated 17-10-2018 on "Valuation under the Insolvency and Bankruptcy Code, 2016" states that:

> "6. In view of the above, every valuation required under the Code or any of the regulations made thereunder is required to be conducted by a 'registered valuer', that is, a valuer registered with the IBBI under the Companies (Registered Valuers and Valuation) Rules, 2017. It is hereby directed that with effect from 1st February, 2019, no insolvency professional shall appoint a person other than a registered valuer to conduct any valuation under the Code or any of the regulations made thereunder."

It has been observed that in the 2nd CoC Meeting dated 13-2-2019 it was noted that, "To approve the appointment of registered valuers by Interim Resolution Professional

As desired by the CoC members viz financial institutions in last CoC meeting, the IRP floated EOI inviting two more bids. One of the valuer CBRE declined to bid and the other bidder RBSA gave a quote of Rs. 5,25,000/-. Both HDFC and Axis approved the bid made by RBSA. It was brought to notice of CoC members that there was a need to circulate fresh EOI in view of only one bid being received and since new valuation regulations are effective post 1st Feb-2019 requiring valuation by specific class of assets. IRP was requested to float a fresh EOI for appointment of one other valuer and further negotiate with RBSA."

Thereafter, in the 3rd CoC meeting dated 8-5-2019 the appointment of the two valuers was informed to the CoC members stating that,

> "In terms of Regulation 27 of CIRP Regulations, the RP has appointed two valuers to determine the valuations prescribed by the regulation 35. The RP had invited bids from several valuers and the two lowest bids were selected. The selected valuers were

issued appointment letters on 23rd of February 2019. Details of selected valuers are as under :-

Name of the Valuers	*Fees*
K G Somani & Co.	Rs. 5,10,000/-
RBSA Valuation Advisors LLP.	Rs. 5,25,000/-

The above remuneration is inclusive of all out of pocket expenses but exclusive of GST."

Thus, as per the minutes of 2nd CoC meeting the RP was well aware of the IBBI Circular dated 17-10-2018 which was to be effective from 1-2-2019 but he still appointed K.G Somani & Co. and RBSA Valuation Advisors LLP. RP has clearly accepted that K.G. Somani & Co. was not registered at the time of appointment and he had mistakenly appointed them even though no valuation report was obtained from K.G. Somani & Co. However, it is observed that on one hand the RP discontinued the services of K.G Somani & Co. on the grounds of non-registration with IBBI at the time of appointment and replaced (K.G Somani & Co.) with valuers Ms. Gunjan Agarwal and Mr. Varun Sharma. On the other hand, the RP despite the same ineligibility still allowed RBSA Valuation Advisors LLP to continue as the valuers for the CD for further 6 months until they got registered on 29th August 2019. This differential treatment given to the two valuers firms on the same issue is jarring.

The DC has been informed by the IPA Division of the Board that IPA of ICSI has dealt with this matter and *vide* their letter dated 05th December, 2019 has advised and directed Mr. Kanwal Chaudhary, RP to strictly comply with the IBBI Circular with regards to appointment of registered valuers in future. Nevertheless, the illegality committed by the IP cannot be ignored.

CIRP under the Code envisages estimation of fair value and liquidation value of the assets of the CD. These values serve as reference for evaluation of choices, including liquidation, and selection of the choice that decides the fate of the CD, and consequently of the stakeholders. A wrong valuation may put an otherwise viable company into liquidation, which may in turn affect the economy of the country.

Findings:

The RP had appointed two unregistered entities as Registered Valuers of the CD on 23rd February. On discovering his mistake, he appointed Ms. Gunjan Agarwal and Mr. Varun Sharma in place of K.G Somani & Co. but allowed RBSA Valuation Advisors LLP to continue for another 6 months till they got registered as an entity on 29 August, 2019.

Hence, there is violation of Section 208(2)(*a*) and (*e*) of the Code, Regulation 27 of the CIRP Regulations, Regulation 7(2)(*a*), 7(2)(*h*) and 7(2)(*i*) of the IP Regulations, read with clause(*s*) 1, 2, 10 and 14 of the Code of Conduct of the said IP Regulations and IBBI Circular IBBI/RV/019/2018 dated 17-10-2018.

3.2 *Contravention*: Section 22(2) of the Code states that the CoC may appoint an RP (either IRP as RP or new IP as RP) by a majority vote of not less than 66% of the voting share of the financial creditors. In the present matter, IP made an error

in capturing the claim amounts of two creditors (Mr. Pramod Kumar Agarwal and Mr. Krishna Saroop Singh) due to which the voting percentage of these creditors were calculated on admitted amounts which were higher than the actual amounts. Number of votes considered for Mr. Pramod Kumar Aggarwal was for the amount Rs. 40915856/- while it ought to have been for the amount claimed Rs. 4091586/-. Similarly, the number of votes calculated for Mr. Krishna Saroop Singh on the amount Rs. 180514713/- while the amount claimed was Rs. 1805147.13/-. As a result of these errors, IP's appointment as RP got confirmed with the resolution being passed with 66.39% of votes in favour of the resolution, whereas the correct percentage of votes in IP's favour comes to only 64.56% on the resolution. IP brought this error to the notice of the CoC members during the 4th CoC meeting when a financial creditor pointed out this fact. However, it has been observed that while placing the list of creditors before the CoC members during the 3rd CoC Meeting, the admitted amount w.r.t. those two creditors were taken on the correct claim amount. This indicates that the RP became aware of the errors in the 3rd CoC meeting but still he did not take any action in this regard for reason best known to him. Further, with regards to these errors, RP filed an application before the Hon'ble NCLT but it was observed that the RP misrepresented these errors at that stage. As seen above there are two different types of errors (decimal placed at the wrong place and addition of an extra digit) on RP's part in verification of claims, however, RP stated in the said application that decimal was placed at a wrong place for both the claim amounts. RP's actions indicate his attempt to mislead the stakeholders.

Submission: The RP submits that as regards committing an error in capturing the claim amounts of two of the claimants and it would have come to notice at the stage of 3rd CoC, there was failure on his part to correctly capture/verify the claim amounts of Mr. Pramod Kumar Agarwal and Kishan Saroop Singh. The error is apparently true and there cannot be any dispute about the same. Being fallible and making mistake is inherent to being a human. He reiterates that it could not be noticed at the stage of 3rd CoC. The accounting records were not forthcoming from CD even till the time of 2nd CoC. Thereafter, on persistent persuasion by RP, records in relation of Homebuyers were provided. RP's team then proceeded to re-ascertain the amounts to be admitted taking the accounting record submitted by CD. Most of the claims got revised on account of fresh information being made available. As per claim forms, Homebuyers had claimed interest ranging from 9% to 30% on principal amount paid, therefore, to maintain uniformity and considering the respective Builder-Buyer Agreements as well as court orders, Homebuyers were categorized in following manner:

i. Villa Buyers

ii. Plot Buyers

iii. Apartment Buyers

iv. Floor Buyers

v. Court orders

Accordingly, allottees of Villas and Plots were provided 7.5% interest per annum whereas allottees of Apartment and Floors were provided interest @10% per annum. Homebuyers who had court orders were provided rate of interest according to the interest awarded in respective Court orders. It would appear that error in capturing the claim amount of Mr. Pramod Kumar Agarwal came to be corrected in a routine revision as explained above which was being done as regards all the homebuyers. It should be appreciated that the above exercise resulted in revision of amounts for almost all the homebuyers claims and therefore, possibility for RP to discover the error with regard to claim of a single Homebuyer was remote, be it Mr. Pramod Kumar Aggarwal or anyone else. It will not be out of place to state here that there were fresh claims also which were considered post the 2nd CoC leading to 3rd CoC. It must be appreciated that it was the RP who immediately brought the error to the notice of CoC during 4th CoC when a financial creditor pointed out the same. RP neither ignored or suppressed the said fact and also approached the NCLT with all *bona fide*. Had there been any *mala fide*, RP wouldn't have disclosed the same to CoC. Further, as regards misrepresenting before Hon'ble NCLT, it is submitted that objective of application was to bring to the Notice of Hon'ble NCLT the errors that occurred in two figures. There was no *mala fide* in approaching Hon'ble NCLT or say intentional misrepresentation. In para 22 of the said application, RP categorically disclosed the errors with figures and annexed list of Creditors which were noticed by the Hon'ble NCLT, the errors that had crept in two figures which resulted in IP securing 66.395% votes. Here, in the event there would have been any such misrepresentation, Hon'ble NCLT could have taken note of the same. In the above facts and circumstances, RP denies that there have been alleged violations.

During the personal e-hearing, the IP reiterated the submissions made in the reply to the SCN.

Analysis:

As per the Code it is the duty of the CoC to confirm the IRP as the RP. Based on the performance of the IRP in conducting the affairs of the CD the satisfaction of the CoC is accorded. The creditors represented by a CoC holds the key to the fate of the CD and its stakeholders as it exercises its commercial wisdom in determining how the insolvency of the CD will be resolved.

Section 22(2) of the Code provides that:

> "22. (2) The committee of creditors, may, in the first meeting, by a majority vote of not less than sixty-six per cent of the voting share of the financial creditors, either resolve to appoint the interim resolution professional as a resolution professional or to replace the interim resolution professional by another resolution professional."

It has been alleged that the RP was aware of the errors in claim amount figures during the 3rd CoC meeting but still he did not take any action in this regard and that the RP misrepresented these errors in the application before the Hon'ble NCLT as decimal was placed at a wrong place for

the claim amounts but it was observed that the error in the claim amount was of decimal placed at the wrong place and addition of an extra digit.

It is noted that in Form CA submitted by Mr. Pramod Kumar Agarwal dated 29-12-2018 the total claim amount is mistakenly mentioned as Rs. 40,91,5856/- by the claimant and the Form CA submitted by Mr. Krishna Saroop Singh on 3-1-2019 correctly mentions the claim amount as Rs. 18,05,147.13/-. In the list of creditors for the 1st CoC meeting, RP has mentioned the claim amounts as Rs. 4,09,15,856/- for Mr. Pramod Kumar Agarwal and Rs. 18,05,147.13/- for Mr. Krishna Saroop Singh. Thereafter, the RP stated the claim amounts as Rs. 4,09,15,856/- for Mr. Pramod Kumar Agarwal and erroneously stated as Rs. 18,05,14,713/- for Mr. Krishna Saroop Singh while calculating their voting share (which were 0.98% and 4.32% respectively) for the 2nd CoC meeting. However, the accurate voting share should have been 0.10% and 0.04% respectively.

Thereafter, it is observed that according to the list of creditors presented by RP to the CoC in the 3rd Meeting held on 8th May, 2019 amount of claim admitted along with interest of Mr. Krishna Saroop Singh was calculated to be Rs. 17,04,609.96/- and of Mr. Pramod Kumar Agarwal was Rs. 29,66,479/- which could have only been arrived at if the calculation was made over the actual amount was taken as Rs. 18,05,147.13/- and Rs. 40,91,856/- respectively. Hence, it can be inferred that the RP had been aware of the mistake in his calculation of the claim amount during the 3rd CoC meeting.

Further, from the minutes of the 4th CoC meeting dated 13-6-2019 it is observed that only when the mistake was pointed out by one Mr. Desh Ram Dhankar, the RP was advised by the CoC to approach the Hon'ble NCLT for clarification. The relevant minutes are as given under:

> "Further, Email of Mr. Desh Ram Dhankar was placed before the members of COC pointing out that in the voting held during 16th-18th Feb, 2019 as regards appointment of RP, number of votes considered for Mr. Krishan Saroop Singh Guleria, were for the amount 180514713 while amount claimed was 1805147.13. Similarily, number of votes considered for Mr. Promoda Kumar Aggarwal was for amount 40915856 while it ought to have been for amount claimed 4091586. Therefore, RP secured 64.56% votes instead of 66.39%. The members took note of the same and advised RP to approach NCLT seeking appropriate orders in this respect."

Thereafter, the IP filed an application with the Hon'ble NCLT on 15-6-2019 stating that,

> "22. That while the CIRP was being conducted in the above manner, one of the homebuyers namely. Sh. Desh Ram Dhankar sent an email dated 22-5-2019, pointing out that in the voting held during 16th February - 18th February, 2019 as regards the appointment of RP, number of votes considered for a homebuyer Mr. Krishan Singh Swaroop Guleria were for the amount being Rs. 180514713 while the amount claimed was Rs. 1805147.13. Similarly number of votes considered for another homebuyer, Mr. Pramod

Kumar Aggarwal was for amount of Rs. 40915856 while it ought to have been for the amount claimed being Rs. 4091586. Therefore, RP secured 64.56% votes instead of 66.39% votes.

...there occurred an error as regards putting "decimal" in two of the figures of the amounts claimed by the homebuyers by virtue of which there has arisen a difference of 1.83% for the votes to have been secured for being appointed/confirmed as RP..."

Further, the Hon'ble NCLT in its Order dated 2-7-2019 observed that,

"CA No. 2019/2019 is filed under section 16(5) by the Resolution Professional seeking directions with respect to the confirmation of appointment of Resolution Professional since there was an discrepancy in calculating the voting share for approval by CoC. It is further stated that discrepancy in calculation of the voting share of the CoC Members has come to surface and the required 66 per cent is not met but after considering the actual voting share percentage for approving the appointment by COC comes to 64.56% which is less than by 1.44% required as under Code. Let one more COC meetings be held with this agenda put for voting. Application is deferred till the report of the next meeting by COC."

In pursuant to the Order of the Hon'ble NCLT, the 5th meeting of the CoC dated 5-8-2019 was held wherein the IP was not re-confirmed as RP. The relevant portion of the minutes of the 5th CoC meeting is as under:

"To confirm the appointment of Mr. Kanwal Chaudhary as RP as per direction of NCLT

In terms of NCLT Order dated 2nd July, 2019 the agenda for confirming the appointing Mr. Kanwal Chaudhary as RP was required to be placed again before the CoC in view of discrepancy noted in the voting share for appointment of RP. Hence, in compliance of the same, the present CoC meeting was convened for passing the following resolution. Here it required to be mentioned HDFC Limited, after the Notice & Agenda having been circulated sought amendment in the Agenda so as state `Confirmation' in place of `Ratify'. The same is accordingly amended. HDFC also proposed name of one Mr. Krishan Vrid Jain to act as RP. However, in view of the order dated 2-7-2019, it was explained that it was the agenda as stated in the order, which was placed in the meeting. The AR also placed email of one homebuyer proposing name of Mr. Taneja to act as RP, She stated that he has also obtained some consent/approval of an Association of homebuyers. However, in view of Association not being recognized under IBC and their being no resolution from majority of Homebuyers as also in view of order dated 2-7-2019, the same could not be considered at this stage. The following resolution is thus being proposed to be put to vote

"Resolved that appointment of Mr. Kanwal Chaudhary is confirmed as Resolution Professional in the CIRP of Ireo Fiveriver (P.) Ltd.. He shall

be entitled to remuneration of Rs. 6,00,000/- per month all inclusive apart from out of pocket expenses and such expenses shall form a part of CIRP cost."

Hence, it is observed that the RP was clearly aware of the error in calculating the claim amount of Mr. Krishna Saroop Singh and Mr. Pramod Kumar Agarwal, before the 3rd CoC meeting as he had rectified the same while evaluating the admitted claim amount (for the 3rd CoC meeting). Ideally, he should have informed the CoC in 3rd meeting itself. However, the RP reckoned to disclose the error before the CoC members in the 4th CoC meeting only when the discrepancy was pointed out by a member by an e mail, wherein he was advised to seek clarification from the Hon'ble NCLT. Though the RP submitted an application before the Hon'ble NCLT misstating the details of the error (which is decimal wrongly placed and addition of an extra digit instead of `putting "decimal" in two of the figures of the amounts') it is observed that he had already explained in details the error in the claim amounts of Mr. Pramod Kumar Agarwal and Kishan Saroop Singh and the deficiency in the voting percentage for confirming the RP in the paragraph 22 of the Application submitted. Further, the Hon'ble NCLT directed for one more COC meeting to be held with this agenda put for voting. Accordingly, the RP convened the 5th CoC meeting for confirmation of appointment, but his appointment was not reconfirmed. Though the RP had not voluntarily taken initiative to disclose the error in voting share and only on prompting of a financial creditor took to discussing the issue in the 4th CoC meeting, it is observed that the Hon'ble NCLT has already taken cognizance of the issue and in its wisdom has already sought to cure the irregularity by directing to reconfirm the appointment of the RP in the next CoC meeting.

Findings:

Though there seems to be some negligence on the part of RP in not putting the correct figures of claims received and admitted, however, since the issue was discussed in the 4th CoC meeting (on being pointing out by a creditor) and then an application was moved before the Hon'ble NCLT, on whose direction one more COC meetings was held with this agenda put for voting wherein the RP could not secure the requisite percentage of voting hence, strictly no contravention could be made out.

3.3 *Contravention*: As per regulation 13 of the CIRP regulation, an insolvency professional must maintain a list of creditors containing names of creditors along with the amount claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims, and update it. Further, regulation 16A(7) of the CIRP Regulations states that voting share of creditors in class shall be in proportion to the financial debt which includes an interest at the rate of 8% per annum unless a different rate has been agreed to between the parties. However, it has been observed that the list of creditors provided by the IP to the CoC were not prepared in accordance to regulation 13 of CIRP regulations. In some lists only claimed amount was specified (lists circulated before 1st & 2nd CoC

meeting) while in other lists only admitted amount was mentioned (list circulated before 3rd & 4th CoC meeting). Further RP also failed to specify the interest applied for computation of claims w.r.t. class of creditors in violation to regulation 16A(7) of the CIPR Regulations since financial creditors also consisted of homebuyers.

Submission: IP submits that as regards the list of creditors not prepared in accordance with Regulation 13 of CIRP Regulations is concerned, the same is denied as RP had prepared and provided the list of creditors in accordance with Regulation 13. To the Inspecting Authority, RP had by mistake forwarded the voting lists of creditors, however, later RP had provided the list of creditors along with his response to draft inspection report indicating therein amounts claimed; amounts admitted and interest provided. It appears that Annexure R-7 with RP's response has not been considered.

During the personal e-hearing, the RP reiterated the submissions made in reply to the SCN.

Analysis:

Any creditor, workmen, employees or any other stakeholder, who has a right to payment and right to remedy against the CD can submit claim to RP. Therefore, it is one of the primary functions of the RP to receive and collate all the claims and prepare a list of creditors. The list of creditors shall then be made available for inspection to the CoC members, claimant who submitted proof of claims and other stakeholders. List of creditors is a consolidated data that collates the details of debt due to each stakeholder and it is of utmost importance that the list of creditors should be prepared by the IRP/RP in accordance to the provisions of the CIRP Regulations.

Regulation 13 of the CIRP Regulations provides that:

> "13. *Verification of claims* - (1) The interim resolution professional or the resolution professional, as the case may be, shall verify every claim, as on the insolvency commencement date, within seven days from the last date of the receipt of the claims, and thereupon maintain a list of creditors containing names of creditors along with the amount claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims, and update it.
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> (2) The list of creditors shall be-
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> (*a*) available for inspection by the persons who submitted proofs of claim;
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> (*b*) available for inspection by members, partners, directors and guarantors of the corporate debtor;
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> (*c*) displayed on the website, if any, of the corporate debtor;
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> (*d*) filed with the Adjudicating Authority; and
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> (*e*) presented at the first meeting of the committee.."

Regulation 13(1) of the CIRP Regulations mandates an IRP or the RP, as the case may be to verify and thereupon maintain a list of creditors containing names of creditors along with the amount claimed by them,

the amount of their claims admitted and the security interest, if any, in respect of such claims, and update it.

Regulation 13(2) (*e*) of the CIRP Regulations provides that the list of creditors shall be presented at the first meeting of the committee.

Further, Regulation 16A(7) of CIRP Regulations, 2016 provides:

> "16A. (7)The voting share of a creditor in a class shall be in proportion to the financial debt which includes an interest at the rate of eight per cent per annum unless a different rate has been agreed to between the parties."

Submission of list of creditors, before the Inspecting Authority, containing the details as per the requirement of Regulation 13 of CIRP Regulation is not disputed. However, the allegation is that the list of creditors provided by the IP to the CoC were not prepared in accordance to regulation 13 of CIRP regulations. In the present matter the list of creditors submitted before the 1st and 2nd CoC meeting shows only the name of creditors and their claimed amount (the amount of claims admitted and the security interest, if any, missing) while the 3rd and 4th CoC meeting lists contains only name of creditors and admitted amount (the amount claimed and the security interest, if any, missing). There may not be any security interest but amount of claims admitted (in 1stand 2nd COC meeting) and the amount claimed (in 3rd and 4th COC meetings) were mandatorily required to be included in the list of creditors by IRP/RP as the case may be. The RP has submitted that there is no security interest registered by CD against the amounts of Homebuyers.

Findings:

Since the list of creditors presented before the committee (as required by clause (*e*)of Regulation 13 of CIRP Regulation) do not contain the complete details (containing names of creditors along with the amount claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims) there is contravention of Regulation 13 of the CIRP Regulations.

This is in violation of Section 208(2)(*a*) & (*e*) of the Code and Regulation 7(2)(*a*) and 7(2)(*h*) of the IP Regulations, read with clauses 10 and 14 of the Code of Conduct as given in the First Schedule of the IP Regulations and Regulation 13 of CIRP Regulations, 2016.

3.4 *Contravention*: Preparation of Information Memorandum (IM) is one of the crucial tasks of an Insolvency Professional. As per clause (*d*) of regulation 36(2) of the CIRP regulations, IM shall contain list of creditors containing the name of creditors, the amount claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims. In the present matter, it has been observed that the RP failed to maintain list(*s*) containing the said particulars.

Submission: The IP submits that, as regards IM not containing list of creditors along with amounts claimed or admitted, the same is not correct and is, therefore, denied. As per clause 3.1 of Information Memorandum, requisite information has been provided in tabulated form indicating

amount claimed by creditors and amount admitted. Notes to table under clause 3.1 clearly mentions that amount admitted includes interest calculated till date of commencement of CIRP, interest rates as per their respective agreements with Corporate Debtor. In addition, detailed Homebuyer wise listing has been provided as Annexure VI to the IM where amount claimed, and amount admitted have been disclosed. There is no security interest registered by CD against the amounts of Homebuyers. Details of security interest have been disclosed in clause 4 of IM.

During the personal e-hearing, the RP reiterated the submissions made in reply to the SCN.

Analysis:

The objective of the IM is to provide a complete picture of the financial position of the CD that is seeking resolution. The information provided in the IM is crucial to the CD as the prospective resolution applicants would rely on such information for a better understanding and evaluating the position of CD, thereby aiding them in decision to make a bid for the CD by submitting a resolution plan. Hence, to ensure that the CD gets a fair chance at reaching a resolution, the RP must ensure that all necessary information depicting a comprehensive position of the CD is provided.

Regulation 36(2) of the CIRP Regulations, 2016 provides that:

> "36. (2) The information memorandum shall contain the following details of the corporate debtor-
>
> (*a*) assets and liabilities with such description, as on the insolvency commencement date, as are generally necessary for ascertaining their values.
>
> *Explanation*: 'Description' includes the details such as date of acquisition, cost of acquisition, remaining useful life, identification number, depreciation charged, book value, and any other relevant details.)
>
> (*b*) the latest annual financial statements;
>
> (*c*) audited financial statements of the corporate debtor for the last two financial years and provisional financial statements for the current financial year made up to a date not earlier than fourteen days from the date of the application;
>
> (*d*) a list of creditors containing the names of creditors, the amounts claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims;
>
> (*e*) particulars of a debt due from or to the corporate debtor with respect to related parties;
>
> (*f*) details of guarantees that have been given in relation to the debts of the corporate debtor by other persons, specifying which of the guarantors is a related party;
>
> (*g*) the names and addresses of the members or partners holding at least one per cent stake in the corporate debtor along with the size of stake;
>
> (*h*) details of all material litigation and an ongoing investigation or proceeding initiated by Government and statutory

authorities;

(*i*) the number of workers and employees and liabilities of the corporate debtor towards them;

(*j*) & (*k*) ** ** **

(*l*) Other information, which the resolution professional deems relevant to the committee."

After the e-hearing, the RP has submitted a copy of the IM on 27th May 2020.

List of Creditors

A list of creditors is based on claims received and admitted by the RP up to l3-3-2019. Resolution Professional can admit claims received till 13/03/2019 (ninetieth day from the start of CIRP (as per regulation 12(2) of CIRP Regulation), The claim verification process is a continuous process, whereby any claim admitted may undergo change on submission/discovery of further information which supplements or is contrary to the information on record as on date of this document. In a few cases clarifications are being sought from the claimants for reconciliation/validation of claims submitted. The list of creditors is being reproduced below:

3.1 *Financial Creditors*

S. No	*Financial Creditor*	*Amount Claimed*	*Claim Admitted*	*Voting share (%) to be calculated at per admitted claim*

From the above table (appearing at page No. 8 of the IM) it is adequately clear that the particulars of the list of creditors containing the name of creditors (Column-2 Financial Creditor), the amount claimed (Column-3) by them and the amount of their claims admitted (Column-4) was clearly mentioned at in accordance with Regulation 36(2) of the CIRP Regulations (keeping in view the confidential nature of the IM, names and amounts have not been mentioned). As per submission made by IP there is no security interest registered by CD against the amounts of Homebuyers. However, the security interest relating to Banks has been shown separately at page Nos. 10 and 11 of the IM. Further, the list of creditors (for the homebuyers) is available at pages 173-179 of the IM contains the name of creditors, the amount claimed by them and the amount of their claims admitted including interest.

Findings:

Since the copy of IM submitted before the DC contains the name of creditors, the amount claimed by them, the amount of their claims admitted and the security interest, there is no contravention of Regulation 36(2) of the CIRP Regulations, 2016.

3.5 *Contravention*: Certain transaction which were initiated by the Corporate Debtor, purportedly with the homebuyers, before the CIRP commencement date were finalized after CIRP commenced in this matter. One such transaction was entered with Ireo Waterfront (P.) Ltd. for amount of Rs. 1,00,000/-. In this regard RP has submitted to the Inspecting Authority that this transaction was unauthorized in nature as money was not transferred to any creditor but to a group company of the Corporate Debtor and due to this with Ireo Waterfront (P.) Ltd. will be required to make a refund. Section 25

(1) of the Code states that it is the duty of the resolution professional to preserve and protect the assets of the corporate debtor. However, it has been observed that the RP failed to take any steps to reverse the transaction. RP's action indicates his casualness towards CIRP.

Submission:

It is submitted by the RP that, as regards Rs. 1,00,000/- transferred to Ireo Waterfront (P.) Ltd. maintaining its account no. 01732100000345 with Kotak Mahindra Bank, the same was Kotak to Kotak internal transfer. This amount was recoverable as Ireo Waterfront (P.) Ltd. is a group company of CD and not a creditor of CD. This transaction was unauthorized and required to be refunded by Ireo Waterfront (P.) Ltd. RP had notified Ireo Waterfront (P.) Ltd. in this regard by way of an email dated 16-8-2019. However, availing appropriate remedy, seeking its reversal in the event the same wasn't complied with. RP was awaiting the report from the Auditor which was appointed to conduct transactional audit so that any other such transfers, if any, brought to notice, could be included in one application instead of filing separate applications. Such transactions were first noticed by the RP only and were brought to the notice of CoC and formed basis of further advent of Transaction and Forensic Audit. The CoC approved the same in 3rd CoC. As Section 43 of IBC, 2016 requires RP to apply to Adjudicating Authority for avoidance of preferential transactions, it would be prudent to list all such transactions that are unearthed through transaction and forensic audit. Therefore, it cannot be alleged that RP's approach was casual.

During the personal e-hearing, the IP reiterated the submissions made as in reply to the SCN.

Analysis:

As per the Code it is the duty of the RP to file an avoidance application on finding transactions that may prejudice the interests of the CD and that of the other stakeholders. Thus, a duty is imposed on the RP to file such an application immediately with Adjudicating Authority upon receipt of report to preserve and protect the assets of Corporate Debtor.

Section 25(1) of the Code provides that:

> "25. *Duties of resolution professional* - (1) It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor. "It has been observed that the transaction between the CD and Ireo Waterfront (P.) Ltd. was made on 14-12-2018 post the commencement of CIRP (which was on 13-12-2018) for an amount of Rs. 1,00,000/-. Also, the transaction was referred to in the 2nd CoC meeting stating that,
>
> > "Further, it was brought to the Notice of CoC that post admission of the application, there was a withdrawal/ transfer of Rs. 26.00 lacs on 14th December 2018 in two of the bank accounts maintained by CD with Kotak Bank. Therefore, it was considered appropriate to call upon Kotak to provide the details of aforesaid transactions and to take action in

accordance with law."

Thereafter, in the 3rd CoC meeting it was observed that,

> "5. To take note of action taken by RP since the last CoC meeting
>
> The Resolution Professional placed before the COC, the action taken report since the last COC meeting. COC members enquired about the status of clarification sought from Kotak bank regarding transactions of withdrawal of Rs. 26.00 lacs appearing in the statement of Kotak bank account on 14th December 2018. RP clarified that those transactions pertained to refund cheques issued to homebuyers by Corporate Debtor prior to commencement of CIRP which hit the bank account one day after commencement of CIRP."

However, it has been observed that Rs. 25 lakhs was made to creditor Fimosys Infrastructure (P.) Ltd. but the remaining Rs. 1,00,000/- was made to Ireo Waterfront (P.) Ltd., a group company of the CD. Moreover, in the appointment letter dated 18-5-2019 to the Forensic Auditor and Transaction Auditor for Corporate Debtor, TR Chadha & Co LLP the scope of their engagement is as follows:

> "A. To carry out forensic audit for financial years 2013-14, 2014-15, 2015-16, 2016-17, 2017-18 and for the period 01st April, 2018 to 13th December 2018 *i.e.* Insolvency Commencement Date."

From the above scope of the Forensic Auditor and Transaction Auditor assessment, it is observed that this does not include the date of the transaction made to Ireo Waterfront (P.) Ltd. for the amount of Rs. 1,00,000/- *i.e.* 14-12-2018 and neither is there any mention of the aforesaid unauthorised transaction in the appointment letter. Further, it is observed that only after this issue was raised in the inspection conducted by the Board on 25-7-2019 and the draft inspection report was shared with the RP on 6-8-2019, the RP finally decide to notify Ireo Waterfront (P.) Ltd., *vide* email dated 16-8-2019 of the unauthorised transaction made in their favour and to remit the aforesaid amount back to CD.

Hence, it is observed that the unauthorised transaction made in favor of Ireo Waterfront (P.) Ltd. was within the knowledge of RP however, it was only after the issue was raised by the Board, he took action towards it. In view of this, the argument raised by RP that he was awaiting the report from the Auditor which was appointed to conduct transactional audit so that, other such transfers, if any, brought to notice, could be included in one application instead of filing separate applications does not hold good. As per Regulation 35A of the CIRP Regulation, 2016 the RP is required to form an opinion on preferential and other transactions within 75 days of the commencement (of CIRP) and to make a determination on the same within 115 days of commencement and to file application to AA for appropriate relied within 135 days of commencement. However, it has been seen that from 14-12-2018 till 16-8-2019, wherein 245 days had passed and no action was taken by RP and only on the issue being pointed out by the Board, the RP deigned to send an email to Ireo Waterfront (P.) Ltd. on 16-8-2019. Though such transactions were first noticed by the RP and were discussed before the

CoC, it was in regards to refund made to homebuyers and no mention of the transfer to a group company or any further action that is being contemplated to recover such amount has been stated. Moreover, nowhere in the scope of the Forensic and Transaction Audit Agreement this unauthorised transaction was covered. Therefore, the DC is of the view that the RP has not undertaken adequate measures to reverse the transaction and has shown a casual attitude in his conduct of CIRP.

Findings:

The IP had not taken any action for 245 days towards correcting the unauthorised transaction until the IA pointed out the issue and no discussions before CoC were held regarding the transfer to a group company or any action to be taken thereof. Further, the RP did not mention the unauthorised transaction in the scope of the Forensic and Transaction Audit Agreement either. Hence, the DC is of the view that the RP has shown a casual attitude towards his responsibilities and adequate measures were not taken to reverse the transaction.

This is in violation of Sections 25 (1), 208(2) (*a*) & (*e*) of the Code and Regulation 7(2) (*a*) and 7(2)(*h*) of the IP Regulations, read with clause 14 of the Code of Conduct as given in the First Schedule of the IP Regulations.

3.6 *Contravention*: As per clause 25A of the Code of Conduct (under the IP regulations) an insolvency professional is required to disclose, *inter alia*, the fee payable to professionals engaged by him to the insolvency professional agency of which he is a professional member. In the present matter, RP appointed M/s Linkstar Infosys (P.) Ltd. for providing e-voting services. However, it has been observed that while proving cost disclosures to his IPA, RP failed to disclose cost incurred by engaging M/s. Linkstar Infosys (P.) Ltd.

Submission:

RP has submitted that as regards not disclosing costs incurred by engaging Linkstar Infosys (P.) Ltd. he is of the understanding that it would not fall in the category of 'professionals' engaged to operate/manage affairs of the CD. Its service was taken as and when e-voting was to be conducted for considering resolutions of CoC. Therefore, by RP's understanding, no disclosures were required to be made.

During the personal e-hearing, the IP also submitted that as Linkstar Infosys (P.) Ltd. was not handling the assets of the CD, there is no requirement of Cost disclosure.

Analysis:

CIRP under the Code is a non-adversarial resolution process where the defaulting CD cedes control to an IP, who is responsible for managing the affairs of the company as a going concern and preserving its value. It is the objective of the Code to ensure that there is transparency in the functioning and performance of IPs and an arm's length relationship is maintained and reasonable fees are paid to the professionals engaged by the IP during the CIRP of the CD. Therefore, Cost disclosures are made to ensure that the CIRP is conducted with transparency and accountability, it is also accessible by all the stakeholders, who can ascertain that the CIRP of the CD

is not incurring any unreasonable costs.

Clause 25A of the Code of Conduct as given in the First Schedule of the IP Regulations provides that:

> "25A. An insolvency professional shall disclose the fee payable to him, the fee payable to the insolvency professional entity, and the fee payable to professionals engaged by him to the insolvency professional agency of which he is a professional member and the agency shall publish such disclosure on its website."

The above mentioned clause of the code of conduct clearly states that the RP is required to disclose costs incurred to the Insolvency Professional Agency of which he is a member, of all the fees that are payable to any professional that have been engaged by him. However, the IP has submitted that provider of services for e-voting is not a 'professional'. The definition of the term 'professional' has not been provided under the Code nor has any Circular been issued to the effect to clarify as to who may be covered as a professional.

The term 'Profession' as defined by the Black's Law Dictionary, 4th Edition is as under:

> "Profession- A vocation, calling, occupation or employment involving labor, skill, education, special knowledge and compensation or profit, but the labour and skill involved is predominantly mental or intellectual, rather than physical or manual."

Professionals in India are generally members of professional body, which adheres to a model set of Code of Conduct and has acquired expertise in a specialised field such as legal, valuation, accounting etc. Hence, in the absence of any provision under the Code or Regulations or Circular and the understanding as per the common usage of the term professional, it cannot be held that provider of e-voting services would be covered as a professional as per clause 25A of the Code of Conduct. It is some sort of support service.

Findings:

DC is of the view that provider of e-voting services is not a professional, hence there is no contravention.

3.7 *Contravention*: IBBI Circular dated 3rd January, 2018 provides that an insolvency professional in all his communications as an IP must provide: (*i*) his name, address and email, as registered with IBBI; (*ii*) his Registration Numbers as an IP, and (*iii*) the capacity in which he is communicating. However, it has been observed that IP communicated with various stakeholders during the course of CIRP while using the letterheads indicating his profession as a lawyer and not that of an insolvency professional.

Submission: IP submits that as regards using the letter heads reflecting the profession as lawyer is absolutely correct. This aspect was never realized till Inspecting Authority advised in this regard and accordingly RP sent the notice/agenda and Minutes of 5th CoC meeting on letterhead reflecting Kanwal Chaudhary as IP. The advise was well taken and RP has since then using letter heads mentioning profession as 'Insolvency Professional'.

Analysis:

The letterheads carry the identification of a person be it natural or juristic for the benefit of all his contemporaries. Therefore, it is essential that the IP must identify himself in respect of his capacity either as IRP/RP or Liquidator that he is holding in the CD. RP's registration number helps in identifying his status on registration with IBBI.

The Circular dated 3-1-2018 issued by IBBI on `Insolvency professional to use Registration Number and Registered Address in all his communications.' provides that,

> "It is hereby directed that in all his communications, whether by way of public announcement or otherwise to a stakeholder or to an authority, an insolvency professional shall prominently state: (*i*) his name, address and email, as registered with the IBBI, (*ii*) his Registration Number as an insolvency professional granted by the IBBI, and (*iii*) the capacity in which he is communicating (Example: As Interim Resolution Professional of XYZ Limited, As Resolution Professional of ABC Limited, etc.)."

It has been observed from the various documents submitted by the IP in the CIRP of Ireo Fiveriver Limited (such as the CoC Minutes of the 2nd, 3rd, 4th, expression of interest for inviting Forensic Audit, appointment letter for conducting Forensic Audit etc.) that the RP has indicated his profession as lawyer which is in clear contravention of the IBBI Circular dated 3-1-2018, which categorically states that an insolvency professional shall prominently state: (*i*) his name, address and email, as registered with the IBBI, (*ii*) his Registration Number as an insolvency professional granted by the IBBI, and (*iii*) the capacity in which he is communicating with the stakeholders. Further, it is also noted that the IP has also not provided his registration number or any other information identifying himself as a registered insolvency professional. The situation becomes graver when the mistake is done by a lawyer. The RP has admitted that he has wrongly been addressing his profession as Advocate in the letterheads and had not realized his mistake until the IA pointed it.

Findings:

The RP in his reply to the SCN has admitted that in various communications with the stakeholders he has used letterheads indicating his profession as an Advocate until the IA pointed it out.

Hence this is in violation of Section 208(2)(*a*) & (*e*) of the Code and Regulation 7(2)(*a*), 7(2)(*h*) and, 7(2)(*i*) of the IP Regulations, read with clause(*s*) 2, 10, 12 and 14 of the Code of Conduct as given in the First Schedule of the IP Regulations and IBBI Circular dated 03rd January, 2018.

4. *Conclusion*

4.1 The RP holds a central position in conducting the CIRP. He acts as a bridge between the debtor and the creditor. He is appointed by the Adjudicating Authority as an officer of the Court to oversees the resolution process and he also has to maintain transparency in the process ensuring that all the stakeholders are appropriately informed. The duty placed

on the IP is burdensome however, he also possesses immense powers which if unchecked would severely affect the ailing CD and prejudice the interests of various stakeholder. The RP has to perform a balancing act of overseeing the resolution of the CD as well as take care of the interests of all the stakeholders. Hence, it is crucial that the RP abides by the Code, rules, regulations and guidelines at all times.

4.2 The BLRC also noted that: "The Committee recommends that an industry of regulated professionals be enabled under the Code (Burman and Roy, 2015). These Insolvency Professionals will be delegated the task of monitoring and managing matters of business by the Adjudicator, so that both creditors and the debtor can take comfort that economic value is not eroded by actions taken by the other. The role of the professional is also critical to ensure a robust separation of the Adjudicator's role in to ensuring adherence to the process of the law rather than on matters of business, while strengthening the efficiency of the process.

The Committee recognizes that it is not possible, at present, to fully design every last procedural detail about the working of the bankruptcy process. Further, the changing institutional environment in India will imply that many procedural details will need to rapidly evolve in the future."

4.3 In this matter, the DC observes that Mr. Kanwal Chaudhary displayed a negligent approach during the conduct of CIRP which can be elaborated as below:

i. The RP had appointed two unregistered entities as Registered Valuers of the CD on 23rd February 2019 in contravention of Regulation 27 of the CIRP Regulations and IBBI Circular IBBI/RV/019/2018 dated 17-10-2018. On discovering his mistake, he appointed Ms. Gunjan Agarwal and Mr. Varun Sharma in place of K.G Somani & Co. but allowed RBSA Valuation Advisors LLP to continue for another 6 months till they got registered as an entity on 29 August 2019.

ii. The list of creditors presented by IRP/RP before the committee in its 1st to 4th meeting do not contain the complete details as per requirement of Regulation 13 of CIRP Regulations.

iii. The unauthorised transaction made in favour of Ireo Waterfront (P.) Ltd. was within the knowledge of RP. However, the RP had not taken any action for 245 days towards correcting the unauthorised transaction until the IA pointed out the issue, no discussions before CoC were held regarding the transfer to a group company or any action to be taken thereof and neither did the RP mention the unauthorised transaction in the scope of the Forensic and Transaction Audit Agreement.

iv. The RP has, in the various communications with the stakeholders, used letterheads indicating his profession as an Advocate but there is no indication of his registration as an Insolvency Professional or his capacity as IRP or RP in the CIRP of CD.

4.4 Thus, Mr. Kanwal Chaudhary has displayed utter misunderstanding of the provisions of the Code and Regulations

made thereunder. He has, therefore, contravened provisions of:

i. Sections 25(1), 208(2)(*a*) and (*e*) of the Code,

ii. Regulations 13 and 27 of the CIRP Regulations.

iii. Regulations 7(2)(*a*), 7(2)(*h*) and 7(2)(*i*) of the IP Regulations, 2016 read with clauses 1, 2, 10, 12 and 14 of the Code of Conduct under the said Regulations.

iv. IBBI Circular dated 17-10-2018 on "Valuation under the Insolvency and Bankruptcy Code, 2016"; and

v. IBBI Circular dated 3-1-2018 on "Insolvency professional to use Registration Number and Registered Address in all his communications".

5. *Order*

5.1 During the personal e-hearing, Mr. Kanwal Chaudhary submitted that the errors committed by him during CIRP were *bona fide* mistakes and not intentional. In view of the above, the DC, in exercise of the powers conferred under section 220 of the Code read with sub-regulations (7) and (8) of Regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016 and Regulation 13 of IBBI (Inspection and Investigation) Regulations, 2017, disposes of the SCN with the following directions:

5.1.1 The registration of Mr. Kanwal Chaudhary as an Insolvency Professional, having Registration No. IBBI/IPA-002/IP-N00207/2017-18/10661, shall be suspended for three months; and

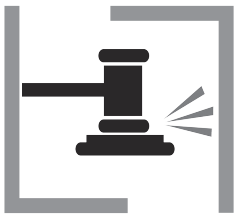
5.1.2 Mr. Kanwal Chaudhary shall not seek or accept any process or assignment or render any services under the Code during the period of suspension. He shall, however, continue to conduct and complete the assignments/processes he has in hand as on date of this order.

5.2 This Order shall come into force on expiry of 30 days from the date of its issue.

5.3 A copy of this order shall be forwarded to the ICSI Institute of Insolvency Professionals where Mr. Kanwal Chaudhary is enrolled as a member.

5.4 A copy of this Order shall also be forwarded to the Registrar of the Principal Bench of the National Company Law Tribunal, New Delhi, for information.

5.5 Accordingly, the show cause notice is disposed of.



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INSOLVENCY AND BANKRUPTCY BOARD OF INDIA

Vijay Kumar Garg, *In re*

DR. NAVRANG SAINI, MEMBER

NO. IBBI/DC/26/2020

JUNE 8, 2020

Section 20, read with section 5(13) and 5(14), of the Insolvency and Bankruptcy Code, 2016 and Regulation 7 of the IBBI (Insolvency Professionals) Regulations, 2016, read with Regulation 31, of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016 - Corporate insolvency resolution process - Corporate debtor - Management of operations as going concern - An Inspecting Authority (IA) was appointed to conduct an inspection of one VK an Insolvency Professional (IP), on having reasonable grounds to believe that IP had contravened provisions of Code, Regulations, and directions issued thereunder - Board had issued SCN to VK, based on findings of an inspection in respect of his role as an interim resolution professional (IRP) and/or resolution professional (RP) in corporate insolvency resolution process (CIRP) of corporate debtors, GGL, NWL and NBL - It was found that VK had appointed D&P to provide support services to it in CIRP of corporate debtors which was in contravention of IBC as D&P did not qualify as a professional, having authorization of a regulator of any profession to render any professional service and fee payable to D&P was also found to be unreasonable - Further, VK had created an additional burden on corporate debtor by unnecessarily extending benefits to D&P, by purchasing two insurance policies as part of CIRP with D&P as beneficiary - It was also found that VK had conducted two meetings of CoC for Corporate Debtors beyond CIRP period and transacted business beyond order of Adjudicating Authority and beyond provisions of Code - It was observed that CIRP rests on shoulders of IP and he/she is duty-bound to preserve and protect assets of corporate debtor as well as run corporate debtor as a going concern - However, instead of preserving and protecting value of corporate debtor, VK frittered away resources of ailing corporate debtor for unlawful purposes - Thus, engagement of D&P was only a façade to siphon off funds of ailing corporate debtors - Whether therefore, VK having converted noble insolvency profession to a business, converted professional client relationship to that of money lending and borrowing, manipulated market for insolvency professional services, attempted to siphon off crores of rupees from ailing corporate debtor to its partner in crime, acted under influence of one creditor, and contravened every provision of Code, Regulations and Code of Conduct for

ulterior purposes he was to be ordered to pay a penalty equal to 25 per cent of fee payable to him - Held, yes (Paras 4 and 5)

Circulars and Notifications: IBBI Circular No. IBBI/IP/013/2018 dated 12-6-2018, Circular No. IP/002/2018 dated 3-1-2018

ORDER

1. *Background*

1.1 This Order disposes of the Show Cause Notice (SCN) dated 11th December 2019 issued to Mr. Vijay Kumar Garg, Flat No. 1402, Tower A, GPL Eden Heights, Sector 70, Darbaripur Road, Gurugram (Haryana)-122101, who is a Professional Member of the ICSI Institute of Insolvency Professionals and an Insolvency Professional (IP) registered with the Insolvency and Bankruptcy Board of India (Board) with Registration No. IBBI/IPA-002/IP-N00359/2017-18/11060.

1.2 In exercise of its power under section 218 of the Code read with the IBBI (Inspection and Investigation) Regulations, 2017, the Board *vide* Order dated 5th September 2019 appointed an Inspecting Authority (IA) to conduct an inspection of Mr. Vijay Kumar Garg, on having reasonable grounds to believe that the IP had contravened provisions of the Code, Regulations, and directions issued thereunder.

1.3 The Board on 11th December 2019 had issued the SCN to Mr. Vijay Kumar Garg, based on findings of an inspection in respect of his role as an interim resolution professional (IRP) and/or resolution professional (RP) in corporate insolvency resolution process (CIRP) of M/s Gitanjali Gems Ltd. (GGL), Nakshatra World Ltd. (NWL) and Nakshatra Brands Ltd. (NBL). The SCN alleged contraventions of several provisions of the Insolvency and Bankruptcy Code, 2016 (Code), the IBBI (Insolvency Professionals) Regulations, 2016 (IP Regulations) and the Code of Conduct under regulation 7(2) thereof, the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016 (CIRP Regulations) and IBBI Circular No. IBBI/IP/013/2018 dated 12th June 2018. Mr. Vijay Kumar Garg replied to the SCN *vide* letter dated 6th January 2020.

1.4 The Board referred the SCN, response of Mr. Vijay Kumar Garg to the SCN and other material available on record to the Disciplinary Committee (DC) for disposal of the SCN in accordance with the Code and Regulations made thereunder. Mr. Vijay Kumar Garg availed an opportunity of e-hearing before the DC on 26th May 2020 when he reiterated the submissions made in his written reply and made a few additional submissions. Thereafter, the IP submitted some additional documents *vide* email dated 31st May 2020 in support of his submissions made during the course of e-hearing.

Consideration of SCN

2. The DC has considered the SCN, the reply to SCN, written and oral submissions of Mr. Vijay Kumar Garg, additional documents, other material available on record and proceeds to dispose of the SCN.

Alleged Contraventions, Submissions, Analysis and Findings

3. A summary of contraventions alleged in the SCN, Mr. Vijay Kumar Garg's written and oral submissions thereon and their analysis with findings of the DC are as under:

3.1 *Contravention*: RP appointed Duff & Phelps India (P.) Ltd. (D&P) to provide support services during the CIRP of GGL, NWL and NBL. Section 20(2)(*a*) of the Code states that the interim resolution professional shall have the authority to appoint accountants, legal or other professionals as may be necessary. However, appointment of D&P by the RP was finalized in violation of the provisions since D&P cannot be considered a professional. Further, as per IBBI Circular dated 12th June 2019, IP has been directed to ensure that expenses incurred by him during CIRP are reasonable and are directly related to and necessary for the CIRP. However, it is noted that with respect to the CIRPs of GGL, NWL and NBL, D&Ps scope of work included preparation of Information Memorandum, receiving/collating claims, monitoring & managing the operations of the Corporate Debtor, assisting the IP to take control & custody of any asset. It was a fact that prior to the commencement of CIRPs, the assets of each of the Corporate Debtors (GGL, NWL and NBL) were already attached by various investigation agencies and control of the assets could not be taken by the RP. Despite this, the RP did not renegotiate the terms (including fees) of agreement with D&P and continued to pay full fees to D&P in all the three matters despite the fact that D&P could only provide limited support services to RP in violation of Section 25(1) of the Code which provides that it is the duty of the resolution professional to preserve and protect the assets of the corporate debtor. Therefore, the Board is of the *prima facie* view that RP has violated Sections 20(2)(*a*), 25(1), 208(2)(*a*) and (*e*) of the Code, Regulation 7(2)(*a*), 7(2)(*h*) and 7(2)(*i*) of the IP Regulations read with clause 27 of the Code of Conduct of the said IP Regulations and IBBI Circular dated 12th June, 2019.

Submission: RP submits that there is no rationale to assume that the intent of the lawmakers was to ensure that only individual accountants, valuers, asset advisors, restructuring advisors, transaction auditors etc. can be appointed to aid the RP while excluding the group/firms/company of accountants, valuers, asset advisors, restructuring advisors, transaction auditors etc. since in such a situation the RP will have to appoint multiple individual professionals without any integration of services within them, thereby increasing the financial burden on the Corporate Debtors/financial creditors. Since the Code provides for appointment of IPE which can only be a company, partnership firm or LLP, it clearly provides support to the approach adopted by the RP in the present matter.

Further, at the time of filing the application under section 7 of the Code, ICICI Bank (one of the financial creditors) conducted a combined bidding process for appointment of RP. There were rounds of negotiations between ICICI Bank, RP and D&P and accordingly RP was appointed to conduct CIRP. As submitted, the appointment of the RP and D&P was also envisaged collectively and was duly approved by the CoC(*s*) of all the Gitanjali Group Companies on the collective strength and credentials of the RP and D&P.

The RP further submits that given the peculiarities, complexities, and the work to be undertaken for meeting the objectives of the CIRP of the Corporate Debtor,

the professional fee charged by D&P was commensurate and reasonable. The RP submits that no amounts have been withdrawn from the corpus created by the Committee of Creditors (CoC) and no payments have been made to any service providers till date. Since no cash flows of GGL were available, in order to support the continuation of the process, D&P made payment of CIRP costs and expenses amounting to Rs. 85.18 lakhs for GGL, Rs. 4.4 lakhs for NBL and Rs. 4.10 lakhs for NWL from out of its own pocket. The RP has also stated that D&P has extended its services for a period of more than 15 months in case of GGL and 11 months in cases of NWL & NBL, whereas fee claimed by them is only for 6 months (for GGL) and 4 months (for NWL & NBL each), despite the fact that D&P continues to provide full support and assistance to RP till date.

During the e-hearing on 26th May 2020, it was reiterated by the RP that there being no cash flows in the account of GGL, NBL, NWL, all members of the CoC agreed to bear the CIRP expenses in proportion to their voting share. D&P extended full support to the RP both in managing GGL, NBL, NWL as a going concern and in performance of other duties.

The RP submitted that since a fraud of a huge proportion had been perpetrated by the Corporate Debtor and its Group Companies by diverting bank funds to its foreign subsidiaries/associates etc., and no business was presently going on, management of the affairs of the Corporate Debtor meant making an effort to trace and recover the fraudulent money, to explore whether the investments made in these subsidiaries could be monetized, to try and recover from importer clients as well as from domestic debtors the amount they owed to the Corporate Debtor. As the domestic assets of the group were already in control of the agencies, RP and D&P also focused on the international assets. With the offices/records sealed and no access having been provided to the RP, the required information/data had to be searched, collected, and compiled from all available sources which involved a humungous effort.

Analysis:

CIRP under the Code is a non-adversarial resolution process where the defaulting corporate debtor cedes control to an IP, who is responsible for managing the affairs of the company as a going concern and preserving its value. One of the duties of the RP under the Code is to act with objectivity in his professional dealings by ensuring that his decisions are made without the presence of any bias and also to ensure that all costs incurred during CIRP are reasonable.

The allegation in para 3(*i*) of SCN against the IP involves examination of two issues which shall be dealt with separately. The first issue to be examined is whether D&P is a professional or not while the second issue is whether the fee paid to D&P was reasonable or not.

The DC proceeds to examine the first issue as under:

Section 20 of the Code provides as under:

> "20. *Management of operations of corporate debtor as going concern.*—(1) The interim resolution professional

shall make every endeavour to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern.

(2) For the purposes of sub-section (1), the interim resolution professional shall have the authority-

(*a*) to appoint accountants, legal or other professionals as may be necessary;"

The *Explanation* to Regulation 33 of the CIRP Regulations provides as under:

"... *Explanation*.—For the purposes of this regulation, "expenses" include the fee to be paid to the interim resolution professional, fee to be paid to insolvency professional entity, if any, and fee to be paid to professionals, if any, and other expenses to be incurred by the interim resolution professional."

Further, *Explanation* to Regulation 34 of the CIRP Regulations provides as under:

"... *Explanation*.—For the purposes of this regulation, "expenses" include the fee to be paid to the resolution professional, fee to be paid to insolvency professional entity, if any, and fee to be paid to professionals, if any, and other expenses to be incurred by the resolution professional."

The RP has submitted that there is no rationale to assume that the intent of the lawmakers was to ensure that only individuals can be appointed to aid the RP while excluding the group/firms/companies, however, the intention of the law makers is neither known to the RP nor anyone else. The language used in Section 20(2) of the Code in itself is clear and unambiguous and there is no possibility of more than one interpretation. The rationale being that only a qualified and regulated individual renders services for which he can be held accountable professionally, for example, for display of professional misconduct, his license to practice may be cancelled. This ensures that professionals continue to render services in a responsible manner. Further, it is true that the firms and companies are also not excluded if they are registered with the regulator of the profession, for example, only a company or LLP registered as a registered valuer or a firm of Company Secretaries registered with the regulator can provide professional services and not any company or firm engaged in production of any goods and services.

As regards the RP's contention with respect to integration of services between multiple individual professionals, the DC observes that primarily, it is the RP who has the responsibility to integrate all the professional services required by him during CIRP and he is not permitted to outsource the job of integration to a third party.

The Code bestows upon an IP the authority to appoint accountants, legal or other professionals as may be necessary and provides that the expenses incurred for engaging such professionals by the IP shall be included in the Insolvency Resolution Process Costs (IRPC) in accordance with the *Explanation* to Regulations 33 and 34 as abovementioned. However, the term

'professional' has not been defined under the Code.

The term 'Profession' as defined by the Black's Law Dictionary, 4th Edition is as under: "Profession - A vocation, calling, occupation or employment involving labour, skill, education, special knowledge and compensation or profit, but the labour and skill involved is predominantly mental or intellectual, rather than physical or manual."

The term 'professional' as defined by Merriam-Webster Dictionary is "of, relating to, or characteristic of a profession".

Professionals, in India, are generally members of professional body, which adheres to a model set of Code of Conduct and has acquired expertise in a specialized field such as legal, valuation, accounting etc. In the present case, the RP has submitted that the Code provides for appointment of Insolvency Professional Entity (IPE) which can only be a company, partnership firm or LLP, which clearly provides support to the approach adopted by the RP in appointment of D&P. This contention of RP cannot be accepted as comparison of any company/LLP with an IPE is not correct. A company/LLP generally pursues its activities as per the objects contained in its charter and can apply for registration for all legal objects. As such, no restrictions are imposed on incorporation of a company/ LLP in terms of net worth, holding of shares, majority capital contribution by its members, composition of Board/Partnership etc. which exists in case of IPEs. An IPE is recognised by the Board in accordance with Regulation 12(1) of the IP Regulations if its sole objective is to provide support services to IPs, who are its partners or directors, as the case may be. Thus, there was nothing to prevent Mr. Garg to join an IPE and consequently avail their services. Moreover, as per explanation to Regulations 33 & 34 of the CIRP Regulations, the term "expenses" expressly includes the fee to be paid to IPE.

With regard to the submission made by RP, that the appointment of RP and D&P was envisaged collectively and was duly approved by the CoC(*s*) of all Gitanjali Group Companies on the collective strength and credentials of RP and D&P is untenable. The Code provides for appointment of an IP based upon his own capabilities and strength to handle CIRPs. If the RP does not possess requisite strength to manage the CIRP and needs additional support to perform his primary functions, it is advisable that the RP shall build up his own capacity before taking up any assignments under the Code. Permitting an arrangement in the nature of tie-in arrangement may prove to be anticompetitive.

The contention of the IP cannot be accepted also because he was not appointed collectively with D&P but was appointed by Adjudicating Authority (National Company Law Tribunal, Mumbai Bench) ("AA ") in his individual professional capacity. If the services of D&P were required by ICICI Bank or other creditors, they were at liberty to engage D&P independently, thereby incurring their expenditure separately.

The RP has also submitted that D&P continues to provide him assistance, however, it has been observed that D&P has provided services without payment of any fee to it. RP has claimed that D&P has paid the cost for conduct of the CIRPs of GGL,

NWL and NBL. This manifests some sort of understanding between the RP and D&P to pay D&P exorbitant fee in lieu of the costs borne by it even though it is not a professional.

The 1st meeting of the CoC of GGL was convened by the RP on 1st November 2018. The minutes of the said meeting provide as follows:

> "AGENDA ITEM Nos. 7 AND 10 -
>
> (A) RATIFICATION OF APPOINTMENT OF DUFF & PHELPS AND REMUNERATION
>
> The scope of work of Duff and Phelps was discussed in detail with the CoC members. Duff and Phelps is being appointed for providing infrastructure, personnel and back office support to assist in the IRP/RP statutory functions relating to IBC.
>
> The CoC members examined the fee proposal of Duff & Phelps India (P.) Ltd. and expressed a desire to re-negotiate the fees.
>
> ** ** **
>
> "RESOLVED THAT, pursuant to the applicable provisions of the Insolvency and Bankruptcy Code, 2016 and in accordance with rules and regulation made thereunder, approval of the Committee of Creditors be and is hereby accorded for the appointment of Duff & Phelps as the entity providing infrastructure, personnel and back office support to assist in the IRP statutory functions relating to IBC on the fee Rs. 23,75,000/-per month (exclusive of taxes and out of pocket expenses)."
>
> ** ** **
>
> AGENDA ITEM No. 15 - ANY OTHER MATTER AS MAY BE DEEMED NECESSARY FOR THE SMOOTH FUNCTIONING OF THE CIRP OF THE COMPANY
>
> … The CoC members agreed to remit upfront 50% of the said amount, as per their voting share, in a CIRP account which will be opened with ICICI Bank Ltd., in the name of the Company, and will be operated by the IRP/RP. Accordingly, an initial corpus of Rs. 10,00,00,000 (Rupees Ten Crore) is proposed to be built up in the CIRP account.
>
> Accordingly, the following resolution was agreed to be put to vote for the consideration of the CoC:
>
> RESOLUTION:
>
> "RESOLVED THAT, pursuant to the applicable provisions of the Insolvency and Bankruptcy Code, 2016 and in accordance with rules and regulation made thereunder, approval of the Committee of Creditors be and is hereby accorded for creation of an initial corpus of Rs. 10,00,00,000/- (Rupees Ten Crores only) to be contributed by the members of the Committee of Creditors in proportion to their voting share towards incurring CIRP costs."

The 1st meeting of the CoC of NWL was convened by the RP on 6th March 2019. The minutes of the said meeting provides that:

> "The scope of work of Duff and Phelps was discussed in detail with the CoC members. Duff and Phelps is being appointed for providing infrastructure, personnel and back office support to

assist in the IRP/RP statutory functions relating to IBC.

They are providing support in the CIRP process of Group's main company *viz.* Gitanjali Gems Ltd. (GGL). Since NWL is a subsidiary of GGL, in order to have a consistent approach across the group, it would be prudent to have the same company for providing the back office support.

The CoC decided that the voting will be conducted through e-voting, and accordingly it was agreed that the following resolution shall be put to vote:

RESOLUTION:

"RESOLVED THAT, pursuant to the applicable provisions of the Insolvency and Bankruptcy Code, 2016 and in accordance with rules and regulation made thereunder, approval of the Committee of Creditors be and is hereby accorded for the appointment of Duff & Phelps as the entity providing infrastructure, personnel and back office support to assist the IRP in performing the statutory functions relating to IBC.

RESOLVED FURTHER THAT the aforesaid fees and expenses shall form part of the Corporate Insolvency Resolution Process (CIRP) cost.

"RESOLVED THAT, pursuant to the applicable provisions of the Insolvency and Bankruptcy Code, 2016 and in accordance with rules and regulation made thereunder, approval of the Committee of Creditors be and is hereby accorded for Duff and Phelps's fee of Rs. 6,87,500 per month exclusive of taxes and out of pocket expenses."

RESOLVED FURTHER THAT the aforesaid fees and expenses shall form part of the Corporate Insolvency Resolution Process (CIRP) cost.

RESOLVED FURTHER THAT the IRP/RP of Corporate Debtor be and is hereby authorized to take such steps as may be necessary in relation to the above, if required and to settle all matters arising out of and incidental thereto and sign and execute all documents and writings that may be required and generally to do all acts, deeds, make payments and things that may be necessary, proper, expedient or incidental for the purpose of giving effect to the aforesaid resolution.""

The 1st meeting of the CoC of NBL was convened by the RP on 6th March 2019. The minutes of the said meeting provide that:

"The scope of work of Duff and Phelps was discussed in detail with the CoC members. Duff and Phelps is being appointed for providing infrastructure, personnel and back office support to assist in the IRP/RP statutory functions relating to IBC.

They are providing support in the CIRP process of Group's main company *viz.* Gitanjali Gems Ltd. (GGL). Since NBL is a subsidiary of NWL, in order to have a consistent approach across the group, it would be prudent to have the same company for providing the back office support.

The CoC decided that the voting will be conducted through e-voting, and accordingly it was agreed that

the following resolution shall be put to vote.

RESOLUTION:

"RESOLVED THAT, pursuant to the applicable provisions of the Insolvency and Bankruptcy Code, 2016 and in accordance with rules and regulation made thereunder, approval of the Committee of Creditors be and is hereby accorded for the appointment of Duff & Phelps as the entity providing infrastructure, personnel and back office support to assist the IRP in performing the statutory functions relating to IBC

RESOLVED FURTHER THAT the aforesaid fees and expenses shall form part of the Corporate Insolvency Resolution Process (CIRP) cost.

** ** **

"RESOLVED THAT, pursuant to the applicable provisions of the Insolvency and Bankruptcy Code, 2016 and in accordance with rules and regulation made thereunder, approval of the Committee of Creditors be and is hereby accorded for Duff and Phelps's fee of Rs. 6,87,500 per month exclusive of taxes and out of pocket expenses.

RESOLVED FURTHER THAT the aforesaid fees and expenses shall form part of the Corporate Insolvency Resolution Process (CIRP) cost.

RESOLVED FURTHER THAT the IRP/RP of Corporate Debtor be and is hereby authorized to take such steps as may be necessary in relation to the above, if required and to settle all matters arising out of and incidental thereto and sign and execute all documents and writings that may be required and generally to do all acts, deeds, make payments and things that may be necessary, proper, expedient or incidental for the purpose of giving effect to the aforesaid resolution.""

Therefore, the fact of the matter is that D&P was engaged in all three CIRPs (GGL, NWL, NBL) for providing infrastructure, personnel, and back office support at a fee of Rs. 23,75,000/- per month for GGL and Rs. 6,87,500/- per month each for its two subsidiaries *i.e*, NWL and NBL. Their scope of work as defined in the letters of engagement dated 8th October 2018 (for GGL) and 5th February 2019 (for NWL and NBL) includes assisting the RP in carrying out his obligations under the Code (*i.e*. receiving claims, collating claims, constituting the CoC, conducting CoC meetings, monitor/ manage assets of the Corporate Debtor, preparing Information Memorandum, reviewing accounts/operations of the Corporate Debtor, assist RP in preparation of progress reports and attending all other back office requirements of the Corporate Debtor).

As is evident from the scope of work envisaged in the minutes of the CoC meetings as well as the engagement letters, D&P was only engaged to provide infrastructure, personnel and back office support services which cannot be classified as `professional services' involving skill or even a `profession' falling within the definition given in Black's Law Dictionary (as abovementioned). Further, D&P cannot be regarded as an IPE since it has not been recognized by the Board under Regulation 12 of the IP Regulations. Thus,

D&P does not fall within the definition of the term `professional'.

Having examined the first issue, the DC now proceeds to examine the second issue regarding reasonableness of the expenses incurred by the IP with respect to payment of fees to D&P.

Section 5(13) of the Code defines the IRPC in the following words:

> "insolvency resolution process costs" means—
>
> (*a*) the amount of any interim finance and the costs incurred in raising such finance;
>
> (*b*) the fees payable to any person acting as a resolution professional;
>
> (*c*) any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern;
>
> (*d*) any costs incurred at the expense of the Government to facilitate the insolvency resolution process; and
>
> (*e*) any other costs as may be specified by the Board."

Regulation 31 of the CIRP Regulations provides as under:

> "Insolvency Resolution Process Costs" under section 5(13)(*e*) shall mean -
>
> (*a*) amounts due to suppliers of essential goods and services under Regulation 32; (aa) fee payable to authorised representative under (sub-regulation (8)) of regulation 16A;
>
> (*ab*) Out of pocket expenses of authorised representative for discharge of his functions under (Section 25A);
>
> (*b*) amounts due to a person whose rights are prejudicially affected on account of the moratorium imposed under section 14(1)(*d*);
>
> (*c*) expenses incurred on or by the interim resolution professional to the extent ratified under Regulation 33;
>
> (*d*) expenses incurred on or by the interim resolution professional fixed under Regulation 34; and
>
> (*e*) other costs directly relating to the corporate insolvency resolution process and approved by the committee."

IBBI Circular No. IBBI/IP/013/2018 dated 12th June 2018 (erroneously stated as 12th June 2019 in the SCN) provides that:

> "6. Keeping the above in view, the IP is directed to ensure that:-
>
> (*a*) the fee payable to him, fee payable to an Insolvency Professional Entity, and fee payable to Registered Valuers and other Professionals, and other expenses incurred by him during the CIRP are reasonable;
>
> (*b*) the fee or other expenses incurred by him are directly related to and necessary for the CIRP;
>
> (*c*) the fee or other expenses are determined by him on an arms' length basis, in consonance with the requirements of integrity and independence;
>
> (*d*) written contemporaneous records for incurring or agreeing to incur any fee or other expense are maintained;
>
> (*e*) supporting records of fee and other expenses incurred are maintained at least for three years from the completion of the CIRP;

(*f*) approval of the Committee of Creditors (CoC) for the fee or other expense is obtained, wherever approval is required; and

(*g*) all CIRP related fee and other expenses are paid through banking channel"

It has been observed from the minutes of 1st CoC meeting (in the matter of GGL, NWL and NBL) that D&P was engaged for providing infrastructure, personnel and back office support at a fee of Rs. 23,75,000/- per month (excluding taxes and out of pocket expenses) for GGL and Rs. 6,87,500/- per month (excluding taxes and out of pocket expenses) each for NWL and NBL. The total fee payable to RP was Rs. 1,25,000/- per month in the CIRP of GGL. It is observed that the payment agreed to be paid to D&P in GGL is 19 times of the fee payable to RP. It is inconceivable that the cost of providing infrastructure, personnel and back office support services in GGL is 19 times of the fee payable to the RP.

In this regard, the RP has submitted that given the peculiarities, complexities, and the work to be undertaken for meeting the objectives of the CIRP in the present case, the professional fee charged by D&P was commensurate and reasonable. Further, the RP has submitted that the mere fact that custody and control of the assets of the Corporate Debtor could not be obtained from the government authorities does not automatically imply that the quantum of services provided by D&P was limited, instead the nature and composition of services provided shall be examined.

As per the scope of work (as indicated in the joint proposal dated 06 September, 2018 submitted by Mr. Vijay Kumar Garg, an IP assisted by D&P to ICICI Bank), its mandate was: (*i*) initial analysis and strategy, (*ii*) taking control of business, (*iii*) monitoring business and cash, (*iv*) assisting in development of business resolution plan, (*v*) finalising the resolution plan, and (*vi*) approval of resolution plan.

The services provided by D&P have been detailed by the RP in paragraphs 17 to 36 of the Affidavit in Rejoinder dated 12th September 2019 filed by the RP before the AA in MA No. 1520 of 2019 & MA No. 254 of 2018. A summary of the work carried out by D&P is represented below:

a. Liasioning with senior officials of the Enforcement Directorate, Mumbai (ED), Central Bureau of Investigation (CBI) and Serious Fraud Investigation Office (SFIO);

b. Filing of Intervention Applications, written synopsis, appeals before the National Company Law Appellate Tribunal (NCLAT), Prevention of Money Laundering Authority (PMLA);

c. Emails/Correspondences and meetings with erstwhile employees of the Corporate Debtor/Company Secretary/ Chartered Accountants;

d. Back office, technology and infra-structural support;

e. Preparation and execution of action plans in respect of subsidiaries;

f. Liasioning for protection and preserv-ation of International Assets;

g. Recovery efforts to recover dues from Domestic Debtors;

h. Claim verification, conduct of CoC meetings and initiation/follow-up of legal action.

Some of the services, as stated above, should have been provided by other professionals and some of the services like liasioning are those which should have been undertaken by the RP himself or his employees as a part of his professional services.

The AA *vide* its order dated 14th May, 2019, in the matter of *ICICI Bank Ltd.* v. *Gitanjali Gems Ltd.* (MA 1520/2019 in MA 254/2019 in C.P. (IB) 3585(MB)/2018) referred the matter relating to fixation of CIRP cost to the Board. Pursuant to the directions of AA, the Board constituted an Expert Committee to examine and submit a report on the reasonableness of the IRPC involved in the CIRP of GGL and a report was submitted by the Committee to the Board in August 2019. The Report of the Committee provides as under:

> "The Committee notes that D&P was engaged by the RP for providing back office support services to RP (as per engagement agreement dated 8-10-2018). The scope of the back-office support work is indicated in items 1 to 7 at page 2 of the agreement. In the present case, except collection and verification of claims around 37 in number, no other item of work was undertaken. The RP has admitted that he was unable to take custody and control of the assets of the CD.
>
> The Committee notes that evaluation of efforts of D&P and amounts payable as fee to D&P was initially estimated to support the entire range of services to be rendered by RP during CIRP (as stated in the role of D & P *vis-à-vis* time line under IBC, mentioned at paragraph 7 above). However, it is a fact that it was actually confined to supporting the services which the RP was able to render. Therefore, the Committee notes that fee for D & P quoted for supporting those services of RP during CIRP which were not undertaken, did not accrue.
>
> Accordingly, assessment of fee for services rendered by D&P in CIRP is confined to and restricted to the extent of services which in the opinion of the Committee would have supported the services rendered by RP.
>
> Further, the time sheets of D & P furnished by RP are very generic. It indicates activities of verification of claims in October, 2018 (during IRP period) and verification of few claims/ revised claims in November-December 2018. Other than the above, most of the other activities mentioned in the time sheets are of the nature of discussions, meetings, follow up, etc. The need for any role of D & P in these activities is beyond the reasoning of the Committee, as lawyers are separately engaged (for which separate bills have been raised by the lawyers) and RP is expected to directly discuss the matters with them.
>
> Also, several activities mentioned therein are those which RP is expected to perform as part of his duties. For instance, meeting investigating authorities, discussions with lenders, lawyers, ex-employees, gaining understanding of PMLA cases and documentation, drafting and reviewing petitions with lawyers, negotiations for transaction audit etc.

As per the model times for CIRP specified under Regulation 40A of the CIRP Regulations, various actions including appointment of valuers, determination of irregular transactions, invitation and submission of EoI should have been completed within 90 from Insolvency commencement date (ICD) (*i.e.,* by 8th January, 2019). None of these activities have been undertaken in the present case.

Considering the fact that CD was not going concern and all assets and books of accounts of the CD were seized by different investigation agencies, there do not seem to be any valid reason for the RP to have continued the services of D&P and such continuance at the originally agreed rates may not be in the best interest of the CD.

In the above circumstance, the Committee is of the view that fees of D&P claimed as part of IRPC is neither reasonable nor can be regarded as necessary for the CIRP."

While making the above observations, the amount recommended to be paid to D&P by the Committee is as below (extracts of the table on pages 10-13 of the report):

S. No.	*Description*	*Amount Claimed*	*Recommendation of the Committee*	*Amount Recommended*
2.	D&P fees	Rs. 23.75 lakhs per month excluding taxes & OPE as IRP/RP support fees (Oct-Mar) Total = 1,59,74,250/-(Including GST)	(*i*) Fee for month of Oct, 2018= for 21 days 100% of the amount claimed. (considering that quantum of work is more in IRP period) (*ii*) Fee for month of November, 2018 = for remaining IRP period of 9 days = 100% of the amount claimed.	Rs. 48,34,312/- (including GST)
			Balance 21 days of the month = 25% of the amount claimed (considering the activities related to claims/ revised claims during this period) Fee for month of December, 2018 = 25% of the amount claimed (considering the activities related to claims/ revised claims during this period) (*iii*) Fee for month of January - March, 2019 = 10% of the amount claimed (as a reasonable fee toward the commitment for providing support services)	

Within the first few months of the CIRP, the RP had become aware of the fact that there were no cash flows of the Corporate Debtor and all the assets of the Corporate Debtor were attached under various investigative authorities. It was the duty of the RP, at this stage, to discontinue the services as not required and to appoint professionals according to need. Making payment of CIRP cost and expenses does not entitle them to continue at an exorbitant fee.

The RP engaged D&P in the 1st CoC meeting of GGL held on 1st November 2018 to provide infrastructure, personnel and back office support services while the appointment of D&P for NBL and NWL (subsidiaries of GGL) was made on 6th March 2019 in their 1st CoC meeting. There was a time gap of approx. 4 months between the two appointments, during which the RP became well aware of the fact that the assets of the Corporate Debtor were already attached by various investigation authorities and could not be taken over. This shows that the engagement of D&P for NBL and NWL (subsidiaries of GGL) at an exorbitant rate of Rs. 6,87,500 per month each (plus taxes and out of pocket expenses) was nothing but a way of siphoning off the money of the Corporate Debtor.

Findings:

D&P is not a professional, having authorisation of a regulator of any profession to render any professional service, and its conduct and performance is not subject to oversight of any regulator of any profession, therefore, appointment of D&P is in contravention of section 20(2) of the Code. Fee of Rs. 23, 75,000/-(excluding taxes) per month to D&P in the matter of GGL which is 19 times of the fee payable to the RP cannot be said to be reasonable. Fee of Rs. 6,87,500/-(excluding taxes and out of pocket expenses) per month each in case of NBL and NWL to D&P also cannot be said to be reasonable. Thus there is contravention of Sections 20(2) (*a*), 25(2(*d*), 208(2)(*a*) & (*e*) of the Code, Regulation 7(2)(*a*), (*h*) & (*i*) of the IP Regulations read with clause 27 of the Code of Conduct as given in the First Schedule of the IP Regulations and IBBI Circular dated 12th June 2018.

3.2 *Contravention:* In the matter of GGL, RP received approval from the CoC members to get insurance for himself during the course of CIRP. However, the RP purchased two insurance policies from ICICI Lombard General Insurance Company Limited and made D&P a beneficiary in the same. The RP provided unnecessary benefits to D&P even though it was stated in the engagement agreement between the RP and D&P that D&P would act independently of the RP. Costs incurred by RP in providing insurance to D&P was done in violation of section 5(13) of the Code, Regulation 31 of CIRP Regulations and IBBI Circular dated 12th June, 2019 which states that if any fee or other expense, is not directly related to the CIRP, it shall not be included in the IRPC. Therefore, the Board is of the *prima facie* view that RP has violated Sections 5(13), 208(2)(*a*) and (*e*) of the Code, Regulation(*s*) 7(2)(*a*), 7(2) (*h*) and 7(2)(*i*) of the IP Regulations read with clause(*s*) 1 and 2 of the Code of Conduct of the said IP Regulations, Regulation 31 of the CIRP Regulations and IBBI Circular dated 12th June, 2019.

Submission: The RP has submitted that upon research it was found that no insurance policies were exclusively available for individuals and had to be taken only in the name of entities. The cost of insurance was also found to be lower if the policy is issued in the name of an entity/company. Thus, the RP was constrained to buy a policy with the name of D&P. The insurance company clarified that the policy has been issued in the name of D&P, but the RP is also an insured party under the policy. Further, the coverage amount is Rs. 70 Crore, but coverage of D&P is limited to Rs. 10 Crore only. The RP further submitted that he had entered into an understanding with D&P that they would bear the insurance cost on pro-rata basis to the extent of the insurance cover provided to D&P under the policy and only the cost incurred regarding the RP would be charged as IRPC.

During the e-hearing on 26th May 2020, it was reiterated by the RP that the premium amount ratified by the CoC regarding the purchase of insurance for the RP was not utilized to cover the insurance of D&P and that D&P is bearing the *prorata* premium incurred in relation to insurance cover provided to D&P under the insurance policies.

Analysis: The 3rd meeting of the CoC was convened by the RP on 31st January 2019. The minutes of the said meeting provide as under:

> "RESOLVED THAT, pursuant to the applicable provisions of the Insolvency and Bankruptcy Code, 2016 and in accordance with rules and regulation made thereunder, approval of the Committee of Creditors be and is hereby accorded for an expenditure upto Rs. 29 lakhs (Rupees twenty nine lakhs only) plus taxes to be incurred for the purchase of insurance policy for the IRP/RP and that the same be reimbursed to Duff & Phelps India Pvt Ltd. if payment is made by them prior to creation of the Corpus Fund approved for the CIRP of GGL.
>
> RESOLVED FURTHER THAT the said expenditure towards insurance policy for the IRP/RP shall form part of the Insolvency Resolution Process cost.
>
> RESOLVED FURTHER THAT the Resolution Professional be and is hereby authorised to take such steps as may be necessary, in relation to the above if required and to settle all matters arising out of and incidental thereto and sign and execute all applications, documents and writings that may be required and generally to do all acts, deeds and things that may be necessary, proper, expedient or incidental for the purpose of giving effect to the aforesaid Resolution."

Thus, it is clear that the CoC approved an expenditure of Rs. 29 Lakhs (plus taxes) for purchase of insurance policy for the IRP/RP. Even though the approval by the CoC was with regards to an insurance policy for the RP, he purchased two insurance policies *i.e.* Directors & Officers Liability Insurance (D&O) for the period of 8th February 2019 till 5th November 2019 and Professional Liability Insurance (PL) for the period 8th February 2019 till 5th November 2019. Both the policies were issued in the name of Duff & Phelps India Private Limited with a total insurance cover of Rs. 70 Crores (with D&P having total coverage

of Rs. 10 Crores) and gross insurance premium of Rs. 16,52,000/- each. Total insurance premium (inclusive of taxes) on both policies being Rs. 33,04,000, the amount of premium accruable to D&P being Rs. 4,72,000 (inclusive of taxes *i.e.* 18% GST).

The RP has submitted that upon approval of insurance from the CoC, he conducted a search of policies available in the market and since no policies were available exclusively for the RP, he was constrained to buy a policy in the name of D&P. This information is factually incorrect since such policies were available in the market as on 8th February 2019. Another insolvency professional (name withheld due to confidential reasons) purchased "Errors and Omissions Liability Insurance" policy from SBI General Insurance for the period of 4th December 2018 till 3rd December 2019. This policy was in the nature of "Professional Indemnity for IP during the CIRPs". Further, the RP has contradicted his own submission by stating as under:

> "2.4… Upon speaking with representative of various insurance companies, the RP was given to understand that the cost of the IP insurance policy would decrease/be lesser, if D&P's name was on the policy since the risk of an insurance company would be higher if an individual only is covered rather than an individual backed by a Multinational Corporation. Hence, it is submitted that the cost of the insurance policy was lower than it would have been had the name of D&P not been there on the policy."

Further, he has submitted that he sought clarification on the same from the insurance company, ICICI Lombard General Insurance Company Limited. The company has clarified *vide* email dated 27th August 2019 that:

> "The policies issued by us are based on products approved by IRDA, the regulator. In accordance with the filing, the said products can be issued to entities, *i.e.* not individuals. However, the policies are structured to cover the individual, as is explained below.
>
> The D&O policy has been issued to Duff & Phelps, but the insured under the policy is Mr. Vijay Garg (see ENDORSEMENT NO. 8). There is no cover for Duff & Phelps under this policy. Besides, the D&O policy has reference to the work done by Mr. Vijay Garg for Gitanjali Gems under ENDORSEMENT NO. 8).
>
> The PI Policy has Duff & Phelps as the name insured in the schedule, but the endorsement No. 5, amends it to include Mr. Vijay Garg also. ENDORSEMENT 4 restricts the cover to Duff & Phelps to INR 10cr only. Besides, the PI policy also has reference to the work done for Gitanjali Gems under Item 3- PROFESSIONAL SERVICES."

A letter dated 20th December 2019 has also been issued by D&P recording the understanding between the RP and D&P. The letter provides as under:

> "Please refer to the Insurance Policy taken by the RP for the Gitanjali Gems Ltd CIRP assignment from ICICI Lombard Ltd. in which Duff and Phelps is also one of the co-insured. The policy is for Rs. 70 Crores out of which D&P's coverage has been limited to only

Rs. 10 Crores. The premium was Rs. 28 lakhs plus GST.

It may be recalled that D&P has agreed to lend its name, solely to enable the RP to obtain an insurance policy, since the Insurance Company had advised that as per IRDAI guidelines the concerned policies could only be issued in the name of an entity and individual could become a co-insured by way of an endorsement. The policy finally issued was structured accordingly and D&P's coverage was restricted to a small amount to meet compliance requirements, subject to the understanding that pro-rata cost would be met by the respective beneficiaries *i.e.* the RP and D&P.

Since there were no cash flows and the agreed Corpus is still not created by the COC, D&P has paid the entire amount of Rs. 28 lakhs plus GST which is yet to be reimbursed. We hereby reiterate and confirm the understanding that D&P will bear the *prorata* cost, in the same percentage as the coverage given to it under the policy, which works out to Rs. 4 lakhs plus GST. We may therefore be reimbursed only Rs. 24 lakhs plus GST instead of Rs. 28 lakhs plus GST which we have paid to the Insurance Company."

Clause 1 of the Code of Conduct as given in the First Schedule of the IP Regulations provides as under:

> "1. An insolvency professional must maintain integrity by being honest, straightforward, and forthright in all professional relationships."

IPs play a vital role in the resolution process and forms a crucial pillar upon which rests the effective, timely functioning as well as credibility of the entire edifice of the resolution process. An IP must ensure that no unnecessary benefits are provided to a third party at the expense of the CIRP. In the present matter, the insurance was approved by the CoC, solely for the RP. However, the RP purchased insurance policies in the name of a third party, *i.e.* D&P. The RP was, therefore, not straightforward and forthright in his professional relationships.

Section 5(13) of the Code defines the IRPC as under:

> "insolvency resolution process costs" means-
>
> (*a*) the amount of any interim finance and the costs incurred in raising such finance;
>
> (*b*) the fees payable to any person acting as a resolution professional;
>
> (*c*) any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern;
>
> (*d*) any costs incurred at the expense of the Government to facilitate the insolvency resolution process; and
>
> (*e*) any other costs as may be specified by the Board."

Regulation 31 of the CIRP Regulations provides:

> "Insolvency Resolution Process Costs" under section 5(13)(*e*) shall mean -

(*a*) amounts due to suppliers of essential goods and services under Regulation 32;

(*aa*) fee payable to authorised representative under (sub-regulation (8)) of regulation 16A;

(*ab*) Out of pocket expenses of authorised representative for discharge of his functions under (Section 25A);

(*b*) amounts due to a person whose rights are prejudicially affected on account of the moratorium imposed under section 14(1)(*d*);

(*c*) expenses incurred on or by the interim resolution professional to the extent ratified under Regulation 33;

(*d*) expenses incurred on or by the interim resolution professional fixed under Regulation 34; and

(*e*) other costs directly relating to the corporate insolvency resolution process and approved by the committee."

The IBBI Circular dated 12th June 2018 provides as under:

"7. The Code read with regulations made thereunder specify what is included in the insolvency resolution process cost (IRPC). The IP is directed to ensure that:-

(*a*) no fee or expense other than what is permitted under the Code read with regulations made thereunder is included in the IRPC;

(*b*) no fee or expense other than the IRPC incurred by the IP is borne by the corporate debtor; and

(*c*) only the IRPC, to the extent not paid during the CIRP from the internal sources of the Corporate Debtor, shall be met in the manner provided in section 30 or section 53, as the case may be.

8. It is clarified that the IRPC shall not include:

(*a*) any fee or other expense not directly related to CIRP;

(*b*) any fee or other expense beyond the amount approved by CoC, where such approval is required;

(*c*) any fee or other expense incurred before the commencement of CIRP or to be incurred after the completion of the CIRP;

(*d*) any expense incurred by a creditor, claimant, resolution applicant, promoter or member of the Board of Directors of the corporate debtor in relation to the CIRP;

(*e*) any penalty imposed on the corporate debtor for non-compliance with applicable laws during the CIRP; (Reference: Section 17(2)(*e*) of the Code read with circular No. IP/002/2018 dated 3rd January, 2018.)

(*f*) any expense incurred by a member of CoC or a professional engaged by the CoC;

(*g*) any expense incurred on travel and stay of a member of CoC; and

(*h*) any expense incurred by the CoC directly; (*Explanation*: Legal opinion is required on a matter. If that matter is relevant for the CIRP, the IP shall obtain it. If the CoC requires a legal opinion in addition to or in lieu of the opinion obtained or being obtained by the IP, the expense of such opinion shall not be included in IRPC.)

(*i*) any expense beyond the amount approved by the CoC, wherever such approval is required; and

(*j*) any expense not related to CIRP."

It has been observed that the D&O policy has been purchased in the name of D&P and the insured under the same is the RP as per Endorsement No. 8 on page 25 of the policy document where the RP has been made the beneficiary of the policy in the place of D&P. This has been done by replacing the definition of 'You' (which is the insured person as per page 1 of the policy document) as mentioned in clause 3.15 of the policy document as under:

"ENDORSEMENT NO. 8

SPECIFIC MATTER ENDORSEMENT

It is hereby understood and agreed that Definition 3.15- You, is deleted and replaced as below.

(*a*) Mr. Vijay Kumar Garg, Resolution Professional, Gitanjali Gems Ltd.

(*b*) the legal representatives, heirs, assigns or estate of a person defined above in (*a*) in the event of the Insolvency/Lunacy/ Incapacity/Death of the person mention in (*a*)

(*c*) The lawful spouse or domestic partner of person mentioned in (*a*) In the event where recovery is sought solely because joint property is held or owned by or on behalf of the spouse or domestic partner (the spouse or domestic partner, however, is not insured under this Certificate in his or her own right).

All other coverage, terms, conditions and exclusions shall remain unchanged."

Further, Endorsement No. 5 on page 21 of the PL policy document purchased in the name of D&P provides that the insured under the policy is D&P as well as the RP. This has been done by replacing the definition of 'Insured' as mentioned in clause V Definition G of the policy document as under:

"ENDORSEMENT 5

SPECIFIC MATTER ENDORSEMENT- Amended Insured definition

Notwithstanding anything contained to the contrary in the Policy, it is hereby understood and agreed that clause V Definition G Insured, is deleted in its entirety and replaced with the following

Insured & Named Insured means

(*a*) The Insured Organization as Insolvency resolution entity for Gitanjali Gems Ltd.

(*b*) Mr. Vijay Kumar Garg as Insolvency Resolution Professional for Gitanjali Gems Ltd.

(*c*) The estate, heirs, executors, administrators, assigns and legal representatives of any persons mentioned in (*a*) or (*b*) above in the event of such person's death, incapacity, insolvency or bankruptcy, but only to the extent that such person would otherwise be provided coverage under this Policy

However, the Underwriter's liability for cover for Insured Organization as insolvency resolution entity for Geetanjali Gems Ltd. shall be sub-limited to INR 100,000,000 (which limit forms a part of and is not in excess of the Limit of Liability)

All other terms and conditions remain unchanged."

Additionally, Endorsement No. 4 on page 20 of the PL policy document states that the combined limit for both the policies issued to D&P (including the RP) shall not be more than Rs. 70 Crores with sub-limit for D&P to be Rs. 10 Crores. The RP has submitted that the *prorata* cost of insurance accruable to D&P is being borne by D&P, and therefore, the same will not be included in the IRPC. However, this is an after-thought as the total cost (Rs. 3,57,47,494/-) submitted before the AA in MA 254/2019 in C.P. (IB) 3585(MB)/2018 includes the amount of premium paid in full *i.e.* Rs. 33,04,000/-(including GST).

Findings:

Initially the RP charged the premium paid in full towards the insurance policies to the IRPC, however, subsequently (*i.e.* after being pointed out by the IA) made an attempt to rectify this irregularity by obtaining a copy of the letter dated 20th December, 2019 from D&P clarifying the understanding between RP and D&P regarding bearing the *prorata* cost. Thus, the RP created an additional burden on the ailing Corporate Debtor by unnecessarily extending benefits to a third party *i.e.* D&P. Therefore, the RP failed to act in a forthright manner which is in contravention of Sections 5(13), 208(2)(*a*) & (*e*) of the Code and Regulation 7(2)(*a*), (*h*) & (*i*) of the IP Regulations read with clause(*s*) 1 & 2 of the Code of Conduct as given in the First Schedule of the IP Regulations, Regulation 31 of the CIRP Regulations and IBBI Circular dated 12th June 2018.

3.3 *Contravention*: In the matter of GGL the CIRP period was over and an application for liquidation was filed by the RP on 17th April 2019. After filing this application, the RP has conducted two meetings of the CoC (7th & 8th meeting on 31st May 2019 and 01st August 2019, respectively) in violation of Sections 5(14) and 12 of the Code. Considering CIRP period was over and liquidation application had already been filed, the said meetings cannot be said to have been related to the CIRP. Hence, unnecessary expenses were incurred by the RP in conducting the said meetings after completion of the CIRP period in violation of Section 5(13) of the Code, Regulation 31 of CIRP Regulations and IBBI Circular dated 12th June, 2019. Therefore, the Board is of the *prima facie* view that RP has violated Sections 5(13), 5(14), 12, 208 (2)(*a*) and (*e*) of the Code, Regulation(*s*) 7(2)(*a*), 7(2) (*h*) and 7 (2) (*i*) of the IP Regulations read with clause(*s*)

14 and 27 of the Code of Conduct of the said IP Regulations and Regulation 31 of the CIRP Regulations.

Submission: The RP has submitted that with a view to avoid any adverse impact on the CIRP, it was considered important for RP to continue till the liquidation order was passed. A prayer in the liquidation application has also been made to the same effect. RP further submitted that the 7th & 8th meeting of the CoC were convened to ensure continuity in the process and the RP is duty bound to pursue various matters before a number of legal fora for which expenses were required to be approved by the CoC. Further, the RP stated that he would be remiss in his duty and not be acting in the spirit of the Code if he abruptly stops discharging his duties after the expiration of CIRP and before the appointment of liquidator, thereby causing grave prejudice to the stakeholders and GGL. In this regard, reference has to be made to the Insolvency and Bankruptcy (Amendment) Ordinance, 2019 (now the Insolvency and Bankruptcy Code (Amendment) Act, 2020), wherein amendment has been made to Section 23 of the Code to allow IPs to continue managing operations of a CIRP till the resolution plan is approved by the adjudicating authority or a liquidator is appointed by the adjudicating authority.

Analysis:

Under the Code, an IP plays a crucial role in resolution, liquidation and bankruptcy processes. He takes important business and financial decisions that may have substantial bearing on the interests of all stakeholders. In such a scenario, it becomes imperative for an IP to perform his duties with utmost care and diligence and act in accordance with the provisions of the Code.

Section 5(14) of the Code provides as under:

> "(14) –insolvency resolution process period – means the period of one hundred and eighty days beginning from the insolvency commencement date and ending on one hundred and eightieth day;"

Section 12(1) of the Code provides as under:

> "12. Time-limit for completion of insolvency resolution process. - (1) Subject to sub-section (2), the corporate insolvency resolution process shall be completed within a period of one hundred and eighty days from the date of admission of the application to initiate such process."

Section 25(2)(*f*) of the Code provides as under:

> "(2) For the purposes of sub-section (1), the resolution professional shall undertake the following actions, namely: -
>
> ** ** **
>
> (*f*) convene and attend all meetings of the committee of creditors;"

Regulation 18 of the CIRP Regulations provides as under:

> "18. Meetings of the committee. A resolution professional may convene a meeting of the committee as and when he considers necessary, and shall convene a meeting if a request to that effect is made by members

of the committee representing thirty three per cent of the voting rights."

The CoC functions only during the period of CIRP. In the matter of GGL, CoC in its 6th meeting, recommended liquidation of GGL. There is no provision under the Code to convene meetings of the CoC after the completion of the CIRP period.

Section 23(1) of the Code (prior to the Insolvency and Bankruptcy Code (Amendment) Act, 2020 ("2020 Amendment")) provides:

> "23. *Resolution professional to conduct corporate insolvency resolution process*- (1) Subject to section 27, the resolution professional shall conduct the entire corporate insolvency resolution process and manage the operations of the corporate debtor during the corporate insolvency resolution process period:
>
> **Provided** that the resolution professional shall, if the resolution plan under sub-section (6) of section 30 has been submitted, continue to manage the operations of the corporate debtor after the expiry of the corporate insolvency resolution process period until an order is passed by the Adjudicating Authority under section 31."

The above proviso is specifically applicable when a resolution plan under sub-section (6) of section 30 has been submitted by the RP and not when an application has been filed for liquidation upon approval of CoC. There was no provision for continuation of RP if resolution plan has not been submitted under sub-section (6) of section 30 of the Code.

Section 23(1) of the Code (post the 2020 Amendment) provides:

> "23. *Resolution professional to conduct corporate insolvency resolution process*- (1) Subject to section 27, the resolution professional shall conduct the entire corporate insolvency resolution process and manage the operations of the corporate debtor during the corporate insolvency resolution process period:
>
> **Provided** that the resolution professional shall continue to manage the operations of the corporate debtor after the expiry of the corporate insolvency resolution process period, until an order approving the resolution plan under sub-section (1) of section 31 or appointing a liquidator under section 34 is passed by the Adjudicating Authority."

The amended Section 23(1) of the Code provides that a resolution professional may continue to manage the operations of the corporate debtor until an order approving the resolution plan under section 31 of the Code or appointing a liquidator under section 34 of the Code is passed by the adjudicating authority. However, in the present case, it has been observed that in the CIRP of GGL, a liquidation application has been filed by the RP before the AA on 17th April 2019 *i.e.* before the commencement of the 2020 Amendment and thus, the same shall not be applicable to the facts of the present case.

Further, it has also been observed that the liquidation application filed by the RP has prayed for the following:

"(*a*) to pass order to liquidate the Corporate Debtor;

(*b*) to grant leave to Applicant to submit written consent to act as liquidator for the purposes of liquidation of the Corporate Debtor, subject to finalization of terms and conditions of the appointment between the Applicant and the CoC;

(*c*) pending hearing and final disposal of this application to pass order for continuation of the Applicant as the Resolution Professional of the Corporate Debtor and continuation of the CIRP process in terms of the IBC;

(*d*) to pass any other order in the interest of justice which this Hon'ble Tribunal deems fit;"

The RP in prayer clause (*c*) has prayed for continuing as the RP and also for continuation of the CIRP process in terms of the provisions of the Code till a liquidator is appointed by the AA. However, this application is still pending before the AA.

It is observed that the 7th and 8th meetings of the CoC were convened by the RP on 31st May 2019 and 1st August 2019, respectively. The RP submits that the meetings of the CoC were convened to avoid any adverse impact on the CIRP and to ensure continuity of the process as well as ratification of some expenses incurred during CIRP.

The 5th meeting of the CoC was convened by the RP on 28th March 2019 and as per the minutes of the said meeting, it is observed that the RP made an application, MA 254/2019 to the AA to allow the RP to operate a separate bank account for the expenses incurred during the CIRP. This was allowed by the AA and the relevant portion of the order of the AA was discussed by the RP in the 5th meeting of the CoC which is as under:

"Resolution Professional is directed to open an Account for CIRP purpose of Geetanjali Gems Limited, if deem fit under – No Lien Account not subject to control of any authority or bank. This bank account shall be operated as an 'Escrow Account' under the control and supervision of NCLT, Mumbai Bench along with the Members of the Committee of Creditors. Needless to mention the withdrawals are therefore to be ratified and also to be verified by the Members of the Committee of Creditors. Thereafter the decision in this regard of CoC to be placed before the Adjudicating Authority to seek permission of withdrawal. With these directions this Application is allowed."

Therefore, the AA gave directions to the RP to get all expenses under the CIRP to be ratified as well as verified by the members of the CoC and thereafter, seek permission of the AA for withdrawal of the ratified and verified amount.

The key agendas of the 7th meeting of the CoC can be found in the detailed agenda circulated by the RP before the meeting. These are provided as under:

> "Agenda Item No. 4: Discussion on the way forward of the Liquidation Process
>
> ** ** **
>
> Agenda Item No. 5: Status of contribution to the Corpus for the CIRP process
>
> ** ** **

Agenda Item No. 6: Creation of Corpus for Liquidation Proceedings

** ** **

Agenda Item No. 7: Appointment of Insurance consultant

** ** **

Agenda Item No. 8: CIRP Expenses incurred upto May-2019."

The key point of discussion of the 8th meeting of the CoC can be found in the minutes of the meeting. These are provided as under:

"While NCLT has allowed opening of the bank account, it has stipulated that the expenses to be ratified by the CoC and RP to approach Hon'ble NCLT for permission to withdraw the funds from the account. RP informed that CoC has already verified and ratified the expenses of Rs. 3.57 cr. incurred till March 2019 and that he has filed an application with the Hon'ble Tribunal for permission to withdraw the same from the Corpus.

Accordingly, RP requested the CoC to ratify the expenses incurred & taken on record from April 2019 onwards, as given in para 10A above, to enable the RP to seek permission of the Hon'ble NCLT for withdrawal of the amount.

(*a*) While expenses/monthly payments/out of pocket expenses (at actual) and other operational costs as mentioned in Sr. Nos. 1, 2, 3, 5(*a*), 5(*b*), 5(*d*), 10(*a*), 16 and 18 (Rs. 65,88,934) were approved by the CoC in its previous meetings, approval of other expenses mentioned therein is now being sought.

(*b*) RP requested the CoC for its approval for the remaining expenses of Rs. 13,45,159 mentioned at Sr. Nos 5(*c*), 10(*b*), 17,19,20,21."

It is observed that the RP convened the meetings of the CoC post the completion of the CIRP period not only in order to ratify the expenses incurred by the RP after the completion of the CIRP period but also for other items beyond the ratification of expenses. The expenses were to be ratified by the CoC to enable the RP to withdraw the amount from the corpus of funds maintained under the directions of the AA. Conducting two CoC meetings after filing the application for liquidation of the Corporate Debtor before AA and discussing agendas other than as directed by AA *i.e.* ratification of IRPC, are beyond the provisions of the Code and the directions of the AA. Therefore, the intention of the RP in convening the 7th and 8th CoC meetings was not only limited to ratify expenses in order to withdraw the amount from the corpus of funds but also for discussion on agenda items beyond the same which do not explicitly fall under the ambit of "managing the operations of the corporate debtor" as provided in Section 23(1) of the Code.

Findings:

Conducting two meetings of the CoC beyond the CIRP period and discussing agendas other than as directed by AA *i.e.* ratification of IRPC, are beyond the provisions of the Code and the directions of the AA. Therefore, RP has contravened provisions of Sections 5(13), 5(14), 12, 208(2)(*a*) & (*e*) of the Code and Regulation 7(2)(*a*), (*h*) & (*i*) of IP Regulations read with clause(*s*) 14 & 27 of the Code of

Conduct as given in the First Schedule of the IP Regulations and Regulation 31 of the CIRP Regulations.

4. *Conclusion*

4.1 A corporate insolvency resolution process rests on the shoulders of an IP. He is duty bound to preserve and protect the assets of the corporate debtor as well as run the CD as a going concern. The list of duties and responsibilities of an IP in a CIRP have been detailed in the Code and Regulations made thereunder. As compared to the role envisaged in the Code for an IP in CIRP, the conduct of the RP in this matter is disturbing. The DC finds as under:

(*a*) Appointment of a professional is based on the need. Only when professional expertise is not available inside the CD, the IRP may appoint a professional from outside. It is an independent responsibility of the IRP based on his professional assessment. He must make such appointment on merits, not under the influence of a creditor or any other person. In this case, the IRP appointed D&P under section 20(2) of the Code, as per pre-agreed plan prior to his appointment as IRP, under the influence of a creditor, who has no locus either in running the business of the CD or conduct of the CIRP.

(*b*) The fee payable to Mr. Vijay Kumar Garg is a handsome amount. He is expected to serve as IRP/RP and use his employees, if required, to assist him. The law enables him to use the services of an IPE of which he is a partner or director. It is not permissible for an IP to tie-up with a third party and bid for a work jointly, whereby the IP and the third party are collectively appointed on their collective strength. This amounts to converting a noble profession to a business and manipulating the market for insolvency professional services through anti-competitive, tie-in arrangement. An IP, who wishes to compete on his own merit and does not indulge in nefarious tie-in arrangements, would never get any assignment.

(*c*) Mr. Garg has claimed that he engaged D&P as a professional under section 20(2) read with section 25(2) of the Code. However, as per the scope of work (as indicated in the joint proposal dated 06 September, 2018 submitted by Mr. Vijay Kumar Garg, an IP assisted by D&P to ICICI Bank), its mandate was: (*i*) initial analysis and strategy, (*ii*) taking control of business, (*iii*) monitoring business and cash, (*iv*) assisting in development of busines resolution plan, (*v*) finalising the resolution plan, and (*vi*) approval of resolution plan. None of these services is a service of a professional. The first three are responsibilities of the RP himself and for this, he may need support services, for which he has option either to use his employees or take assistance of an IPE, if he is a member of that IPE. Services at (*iv*) and (*v*) are the responsibilities of a resolution applicant. The service at (*vi*) is the responsibility of CoC and the RP. None of these services fall within the ambit of services of a

professional. Procurement of services, other than services of a professional, is not permissible under section 20(2).

(*d*) Mr. Garg claims that he appointed D&P for professional services. Since D&P is not a professional, having authorisation of a regulator of any profession to render any professional service, and its conduct and performance is not subject to oversight of any regulator of any profession, appointment of D&P is in contravention of section 20(2) of the Code. Further, by not appointing a professional and by appointing a person who is not professional, Mr. Garg deprived the CD of professional services.

(*e*) Section 20(1) of the Code provides that the interim resolution professional shall make every endeavour to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern. Section 23(2) reasserts this responsibility. Instead of preserving and protecting the value of the CD, Mr. Garg frittered away the resources of the ailing CD for unlawful purposes.

(*f*) As claimed by Mr. Garg, the appointment of the IRP (Mr. Garg) and D&P was always envisaged collectively, and they were appointed on their collective strength and credentials of the RP and D&P. It makes it clear that he has been appointed not on his own strength or merit, but on the strength of D&P. This makes him beholden to D&P and explains his undue favour to D&P. This makes clear that Mr. Garg alone is not capable of discharging the responsibilities as an IP.

(*g*) The law envisages appointment of an IRP by the Adjudicating Authority, which appointed Mr. Garg as IRP. It does not envisage a collective appointment, either by the Adjudicating Authority or the CoC; it empowers the IP to appoint a professional. If a particular creditor wanted the services of D&P, that creditor may engage him and bear the fee of D&P. That cannot be a part of the insolvency resolution process cost. In order to get the assignment, Mr. Garg mortgaged the interests of the CD to the creditor, by committing to engage D&P and transfer crore of rupees to D&P in the guides of fee.

(*h*) Policy in the nature of Professional Indemnity for IP during the CIRPs' was available from SBI General Insurance on the date of purchase of policy (*i.e.* 8th February 2019). Mr. Garg had no business to buy policy in the name of D&P and unnecessarily extending benefits to a third party *i.e.* D&P. This establishes the meeting of mind of RP and D&P.

(*i*) Mr. Garg conducted two meetings of the CoC even after filing the application for liquidation of the CD before AA and transacted business beyond the order of AA and beyond the provisions of the Code.

(*j*) Mr. Garg and D&P never had a professional-client relationship. The relationship between them is mysterious. It is observed that D&P has funded about Rs. 1.62 crore

to meet the various expenses of Mr. Garg/CD. No professional-client relationship enables money lending, that too, of this order, to a client. The RP buys an insurance policy to cover himself and employees of D&P. The terms of appointment of D&P in GGL indicate that it would be paid Rs. 23.75 lakh per month. The fee of Rs. 1.6 crore for the CIRP period was *prima facie* considered exorbitant by the AA and the Expert Committee constituted by the IBBI. Engagement of D&P is only a façade to siphon off funds of the ailing CD. Findings at (*a*) to (*g*) relates to all three CIRPS *i.e.* GGL, NWL and NBL and (*h*) and (*i*) relates to CIRP of GGL only.

4.2 Thus, Mr. Vijay Kumar Garg has contravened provisions of:

i. Sections 5(13), 5(14), 12, 20(2)(*a*), 25, 208(2)(*a*) and (*e*) of the Code,

ii Regulation 31 of the CIRP Regulations,

iii. Regulations 7(2)(*a*), 7(2)(*h*) and 7(2)(*i*) of the IP Regulations, 2016 read with clauses 1, 2, 14 and 27 of the Code of Conduct under the said Regulations, and

iv. IBBI Circular No. IBBI/IP/013/2018 dated 12th June 2018 on "Fee and other expenses incurred for Corporate Insolvency Resolution Process".

5. *Order*

5.1 Mr. Vijay Kumar Garg converted the noble insolvency profession to a business, converted professional client relationship to that of money lending and borrowing, manipulated the market for insolvency professional services, attempted to siphon off crores of rupees from the ailing CD to its partner in crime, acted under the influence of one creditor, and contravened every provision of the Code, Regulations and the Code of Conduct for ulterior purposes. Such conduct does not call for any leniency. However, in view of the directions of the AA and the recommendations of the IBBI Expert Committee about reasonableness of fee, the DC is inclined to allow payment of fee, as determined by the Expert Committee to D&P in the matter of GGL, even though the engagement of D&P is illegal.

5.2 In view of the above, the DC, in exercise of the powers conferred under Regulation 13(1) of the IBBI (Inspection and Investigation) Regulations, 2017 and Section 220(2) of the Code read with sub-regulations (7) and (8) of Regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016, after considering the prohibition on taking new assignments since issue of the SCN till this date, disposes of the SCN with the following directions:

(*i*) Mr. Vijay Kumar Garg shall pay a penalty equal to 25% of fee payable to him as per agreed terms and conditions in CIRPs of GGL, NBL and NWL where he has acted as an IRP/RP. The penalty amount shall be deposited by a crossed demand draft payable in favour of the "Insolvency and Bankruptcy Board of India" within 45 days of this order. The Board in turn shall deposit the penalty amount in the Consolidated Fund of India.

(*ii*) Mr. Vijay Kumar Garg shall ensure that no amount beyond the reasonable fee, as determined by the Expert Committee, is paid to D&P. If any

amount beyond this has been paid, Mr. Vijay Kumar Garg shall make it good to the CD within 45 days of this order and confirm the same to the Board.

(*iii*) Mr. Vijay Kumar Garg shall undergo pre-registration educational course from the IPA of which he is a member and pass the Limited Insolvency Examination again to build his capacity to take up assignments on his own.

(*iv*) Mr. Vijay Kumar Garg may take any new assignment/process under the Code, only after compliance with the three ((*i*), (*ii*) and (*iii*) above) directions.

(*v*) Mr. Vijay Kumar Garg shall, however, continue to conduct and complete the assignments/processes he has in hand as on the date of this order.

5.3 This Order shall come into force on expiry of 30 days from the date of its issue.

5.4 A copy of this order shall be forwarded to the ICSI Institute of Insolvency Professionals where Mr. Vijay Kumar Garg is enrolled as a member.

5.5 A copy of this Order shall also be forwarded to the Registrar of the Principal Bench of the National Company Law Tribunal, for information.

5.6 Accordingly, the show cause notice is disposed of.

Practical Questions

Q.1. Can a Holding Company be said to have availed a financial debt from its subsidiary company in case where the subsidiary company mortgaged its property as security for a loan taken by the holding company from a financial creditor?

Ans No.

(SC judgment dt. 26th February 2020 passed in *Anuj Jain Interim Resolution Professional v. Axis Bank* (2020) 114 taxmann.com 656)

Q.2 Can the NCLT and the NCLAT inquire into the question of fraudulent initiation of CIRP and trading in a CIRP proceedings pending before it?

Ans Yes.

(SC judgment dt. 3rd December 2019 passed in *Embassy Property Developments (P.) Ltd. v. State of Karnataka* (2019) 112 taxmann.com 56)

Q.3. Is it mandatory under the IBC that in all cases the bid by resolution applicant must atleast match the liquidation value?

Ans No, the object behind valuation process is to assist CoC to arrive at a decision on the resolution plans.

(SC judgment dt. 22nd January 2020 passed in *Maharashtra Seamless Ltd. v. Padmanabhan Venkatesh* (2020) 113 taxmann.com 421)

Q.4. Can an appellant before the SC challenge an admission order w.r.t. a CIRP application on the plea of *collusion* when such a plea was neither raised by Adjudicating Authority nor the Appellate Authority?

Ans No.

(SC judgment dt. 18th February 2020 passed in *Beacon Trusteeship Limited v. Earthcon Infracon (P.) Ltd.* (2020) 115 taxmann.com 311)

Q.5. Can a creditor bring an IBC action against the Corporate Guarantor for a financial claim in respect of which its CIRP application has already been admitted by AA against the Principal Borrower?

Ans No.

(NCLAT judgment dt. 23rd January 2020 passed in the matter of *Bijay Kumar Agarwal, v. State Bank of India* (2020) 118 taxmann.com 48)

Learning Curves

- **Provisions of the IBC override all other laws and hence, the resolution plan approved by the NCLT acquires primacy over all other legal provisions**

(SC order dt. 15th November 2019 passed in the matter of *Municipal Corporation of Greater Mumbai (MCGM) v. Abhilash Lal* (2019) 111 taxmann.com 405)

- **Adjudicating authority suo-motu cannot direct the CoC to consider the new resolution plan and re-consider the already approved resolution plan**

(NCLAT order dt. 29th May 2020 passed in the matter of *Chhatisgarh Distilleries Ltd. v. Dushyant Dave* (2020) 117 taxmann.com 385)

- **The liquidator is not required to file application before compounding authority for an offence committed by the Company by not depositing TDS. Company itself will file compounding application accepting that it has committed such offence.**

(NCLAT order dt. 29th May 2020 passed in the matter of *Savan Godiawala v. G. Venkatesh Babu* (2020) 117 taxmann.com 477)

- **Abatement of Original Suit before DRT will not affect the proceedings in NCLT under IBC as the dues still remain outstanding.**

(NCLAT order dt. 2nd June 2020 passed in *Babasaheb Sawalaram Chaware v. Punjab National Bank* (2020) 118 taxmann.com 148)

- **Civil suit filed after receipt of the demand notice will not be a dispute as defined in section 5(6) of I&B Code**

(NCLAT order dt. 3rd June 2020 passed in the matter of G.T. Polymers v. Keshava Medi Devices (P.) Ltd . (2020) 118 taxmann.com 74)

INSOLVENCY PROFESSIONALS TO ACT AS INTERIM RESOLUTION PROFESSIONALS, LIQUIDATORS, RESOLUTION PROFESSIONALS AND BANKRUPTCY TRUSTEES (RECOMMENDATION) GUIDELINES, 2020

CIRCULAR, DATED 2-6-2020

Corporate Insolvency

The Insolvency and Bankruptcy Board of India (Board) is required under the Insolvency and Bankruptcy Code, 2016 (Code) to recommend name of an Insolvency Professional (IP) for appointment as Interim Resolution Professional (IRP) or Liquidator as under:

(*a*) Section 16(3)(*a*) of the Code requires the Adjudicating Authority (AA) to make a reference to the Board for recommendation of an IP, who may act as an IRP where an operational creditor has made an application for corporate insolvency resolution process (CIRP) and has not proposed an IRP. The Board is required under section 16(4) of the Code to recommend the name of an IP against whom no disciplinary proceedings are pending, within ten days of the receipt of the reference from the AA.

(*b*) Section 34(4) of the Code requires the AA to replace the resolution professional, if (*a*) the resolution plan submitted by the resolution professional under section 30 was

rejected for failure to meet the requirements mentioned in section 30(2); or (*b*) the Board recommends the replacement of a resolution professional to the AA for reasons to be recorded in writing; or (*c*) the resolution professional fails to submit written consent under section 34(1). For the purposes of clause (*a*) and clause (*c*) of section 34(4), the AA may direct the Board under section 34(5) of the Code to propose the name of another IP to be appointed as a liquidator. The Board is required under section 34(6) to propose the name of another IP along with written consent from him, within ten days of the direction issued by the AA under section 34(5).

2. The Board has been making available Panels of IPs to the AA for appointment as IRP or Liquidator, as the case may be. It made available the last such Panel for the period January, 2020 to June, 2020 in accordance with the Insolvency Professionals to act as Interim Resolution Professionals, Liquidators, Resolution Professionals and Bankruptcy Trustee (Recommendation) Guidelines, 2019. Making available Panel in advance by the Board has been found useful as indicated below:

(*a*) The AA, in its order dated 8th January 2018 in Innovsource Private Limited Vs. Getit Grocery Private Ltd., observed: *"The Insolvency and Bankruptcy Board of India vide its letter dated 01.01.2018 has recommended a Panel of Insolvency Professionals for appointment of Insolvency Resolution Professional in compliance with Section 16 (3)(a) of the Code in order to cut delay. The list of recommended Insolvency Professionals provides instant solution to the Adjudicating Authority to pick up the name and make appointment. It helps in meeting the time line given in the Code and the unnecessary time wasted firstly in asking the Insolvency and Bankruptcy Board of India to recommend the name and then to appoint such Interim Resolution Professional by the Adjudicating Authority ".*

(*b*) The NCLAT, in its order dated 28th February, 2019 in Sandeep Kumar Gupta, Resolution Professional Vs. Stewarts & Lloyds of India Ltd. & Anr., Observed: " .. *Further, the list of 'Resolution Professionals' being made available by the 'Board' to the Adjudicating Authorities, any person is appointed out of the said list submitted by the 'Board', it should be treated to be an appointment of 'Resolution Professional '/'Liquidator ' on the recommendation of the 'Board'."*

Individual Insolvency

3. The Board is also required under the Code to recommend the name of an IP for appointment as resolution professional (RP) or bankruptcy trustee (BT) as under:

(*a*) Section 97(3) of the Code requires the AA to direct the Board to nominate a resolution professional (RP) for an insolvency resolution process, where an application under section 94 or 95 is filed by the debtor or the creditor, as the case may be, and not through a RP. The Board is required under section 97(4) to nominate a RP within

ten days of the receiving the direction from the AA under Section 97(3).

(*b*) Section 98(2) of the Code requires the AA to make a reference to the Board for replacement of a RP in an insolvency resolution process, where in pursuance of Section 98(1), the debtor or the creditor is of the opinion that the RP appointed under section 97 is required to be replaced. The Board is required under section 98(3) to recommend the name of an RP, against whom no disciplinary proceedings are pending, within ten days of the receipt of the reference from the AA under Section 98(2).

(*c*) Section 125(3) of the Code requires the AA to direct the Board to nominate a bankruptcy trustee (BT) for the bankruptcy process, where a BT is not proposed by the debtor or creditor under section 122 or 123. The Board is required under section 125(4) to nominate a BT, within ten days of receiving the direction of the AA under Section 125(3).

(*d*) Section 146(2) of the Code requires the AA to direct the Board for replacement of the BT on his resignation in a bankruptcy process. The Board is required under section 146(3) to recommend another BT as a replacement, within ten days of the direction of the AA under Section 146(2).

(*e*) Section 147(2) of the Code requires the AA to direct the Board for replacement of a BT in a bankruptcy process in the event of occurrence of a vacancy in the office of the BT for any reason other than his/her replacement or resignation. The Board is required under section 147(3) to recommend a BT as a replacement, within ten days of the direction of the AA under section 147(2).

4. The relevant Rules provide as under:

(*a*) Rule 8 (2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 enables the Board to share a Panel of IPs, who may be appointed as resolution professionals, with the Adjudicating Authority for the purposes of section 97(4) and section 98(3).

(*b*) Rule 8(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Bankruptcy Process for Personal Guarantors to Corporate Debtors) Rules, 2019 enables the Board to share a Panel of IPs, who may be appointed as bankruptcy trustee, with the Adjudicating Authority for the purposes of section 125(4) and section 146(3) and section 147(3) of the Code.

Guidelines

5. At the time of reference/directions received from the AA, the Board does not have information about the volume, nature and complexity of an insolvency or bankruptcy process and the resources available at the disposal of an IP. In such a situation, the Board is unlikely to add much value by recommending an IP for the process. Further, it takes some time for a reference or a direction from the

AA to reach the Board. The Board may take up to ten days to identify an IP for the purpose. It also takes some time for the recommendation of the Board to reach the AA, after which the AA could appoint the recommended IP. The process of appointment may entail 2-3 weeks, which could be saved if the AA has a ready Panel of IPs recommended by the Board and it can pick up any name from the Panel for appointment while issuing the Order itself.

6. Given that every IP is equally qualified to be appointed as the IRP, Liquidator, RP or BT of any corporate or individual insolvency resolution, liquidation or bankruptcy process, as the case may be, if otherwise not disqualified, and in the interest of avoiding administrative delays, the Board considers necessary to have these guidelines to prepare a Panel of IPs for the purpose of sections 16(4), 34(6), 97(4), 98(3), 125(4), 146(3) and 147(3).

Panel of IPs

7.1 The Board will prepare a common Panel of IPs for appointment as IRP, Liquidator, RP and BT and share the same with the AA (Hon'ble NCLT and Hon'ble DRT) in accordance with these Guidelines.

7.2 The Panel will have Zone wise list of IPs based on the registered office (address as registered with the Board) of the IP.

7.3 Keeping in view, the issuance of large number of AFAs by the IPAs in last week of November and December 2019, to facilitate maximum possible coverage, instead of two six monthly panels, now for 2020-21, the first Panel under this guidelines will have a validity of **4 months and 25 days** and upon its expiry, a new Panel having validity of **7 months and 5 days** will replace it . For example, the first Panel under the Guidelines will be valid for consideration for appointment during 1st July, 2020 - 25th November, 2020, and the next Panel will be valid for being considered for appointment during 26th November, 2020 - 30th June, 2021.

7.4 The NCLT may pick up any name from the Panel for appointment of IRP, Liquidator, RP or BT, for a CIRP, Liquidation Process, Insolvency Resolution or Bankruptcy Process relating to a corporate debtors and personal guarantors to corporate debtors, as the case may be.

7.5 The DRT may pick up any name from the Panel for appointment as RP or BT, for an Insolvency Resolution or Bankruptcy Process for personal guarantors to corporate debtors, as the case may be.

Inclusion of IPs in the Panel

8. An IP will be eligible to be in the Panel of IPs, if -

(*a*) there is no disciplinary proceeding, whether initiated by the Board or the IPA of which he is a member, pending against him;

(*b*) he has not been convicted at any time in the last three years by a court of competent jurisdiction;

(*c*) he expresses his interest to be included in the Panel for the relevant period;

(*d*) he undertakes to discharge the responsibility as IRP, Liquidator, RP or BT, as he may be appointed by the AA;

(*e*) he holds an Authorisation for Assignment (AFA), which is valid on the date of expression of interest and remains valid till the validity of Panel. For example, the IP included in the Panel for appointments during 1st July, 2020 - 25th November, 2020 should have AFA valid up to 25th November, 2020

9. An IP will be included in the Panel against the Zone where his registered office (his address as reaistered with the Board) is located. For example, an IP located in the city of Surat (Gujarat) will be included in Ahmedabad Zone, which covers the State of Gujarat. He shall be eligible for appointment by any bench of NCLT or DRT located in the State of Gujarat, Union Territory of Dadra and Nagar Haveli, and Union Territory of Daman and Diu. The areas covered in different Zones are as under:

Zone	*Areas Covered*	
	(The IPs having registered office in these areas shall be eligible for appointment by benches of NCLT and DRT located in these areas)	
New Delhi	1	Union territory of Delhi
	1	State of Gujarat
Ahmedabad	2	Union Territory of Dadra and Nagar Haveli
	3	Union Territory of Daman and Diu
	1	State of Uttar Pradesh
Allahabad	2	State of Uttarakhand
Amravati	1	State of Andhra Pradesh
Bengaluru	1	State of Karnataka
Chandigarh	1	State of Himachal Pradesh
	2	State of Punjab
	3	State of Haryana
	4	Union Territory of Chandigarh
	5	Union Territory of Jammu and Kashmir
	6	Union Territory of Ladakh
Cuttack	1	State of Chhattisgarh.
	2	State of Odisha
Chennai	1	State of Tamil Nadu
	2	Union Territory of Puducherry
	1	State of Arunachal Pradesh
	2	State of Assam
	3	State of Manipur
Guwahati	4	State of Mizoram
	5	State of Meghalaya
	6	State of Nagaland
	7	State of Sikkim
	8	State of Tripura
Hyderabad	1	State of Telangana

Zone	*Areas Covered*	
Indore	1	State of Madhya Pradesh
Jaipur	1	State of Rajasthan
Kochi	1	State of Kerala
	2	Union Territory of Lakshadweep
	1	State of Bihar
Kolkata	2	State of Jharkhand
	3	State of West Bengal
	4	Union Territory of Andaman and Nicobar Islands
Mumbai	1	State of Goa
	2	State of Maharashtra

Expression of Interest

10. The Board shall invite expression of interest from IPs in Form A by sending an e-mail to them at their email addresses registered with the Board. The expression of interest must be received by the Board in Form A by the specified date. For example, the Board shall invite expression of interest by 10th June, 2020 from IPs for inclusion in the Panel for 1st July 2020 - 25th November, 2020. The IPs shall express their interest by 20th June, 2020. The Board will send the Panel to the AA by 27th June, 2020. This process will be repeated during November, 2020 for the next Panel.

Ongoing Assignments

11. The eligible IPs will be included in the Panel in the order of the volume of ongoing processes they have in hand. The IP who has the lowest volume of ongoing processes will get a score of 100 and will be at the top of the Panel. The IP who has the highest volume of ongoing processes will get a score of 0. The difference between the highest volume and the lowest volume will be equated to 100 and other IPs will get scores between 0 and 100 depending on volume of their ongoing assignments.

Illustration:

IP	*Volume of ongoing assignments*	*Difference between the highest volume and the volume of ongoing assignments of the IP*	*Formula*	*Score*
1	20	100	100 /100 *100	100
2	40	80	80/100 * 100	80
3	60	60	60/100 * 100	60
4	80	40	40/100 * 100	40
5	100	20	20/100 * 100	20
6	120	00	00/100 * 100	00

12. An ongoing assignments shall be valued as under:

Ongoing Assignments	*Volume*
IRP of a Corporate Insolvency Resolution Process	05
RP of a Corporate Insolvency Resolution Process	10
IRP of a Fast Track Process	03
RP of a Fast Track Process	06
Liquidation/Voluntary Liquidation	05
Individual Insolvency	01
Bankruptcy Trustee	01

13. Where two or more IPs get the same score, they will be placed in the Panel in the order of date of their registration with the Board. The IP registered earlier will be placed above the IP registered later.

14. The process for preparation of Panel of IPs will be undertaken by a team of officers of the Board, as may be identified by a Whole-Time Member.

Obligations of IPs in the Panel

15. It must be explicitly understood that an IP, who is included in the Panel based on his expression of interest, shall not:

(*a*) withdraw his interest to act as IRP, Liquidator, RP or BT, as the case may be;

(*b*) decline to act as IRPs, Liquidator, RP or BT, as the case may be, if appointed by the AA; or

(*c*) surrender his registration to the Board or membership or AFA to his IPA during the validity of the Panel.

16. It must be explicitly understood that:

(*a*) the AA may require the Board to recommend an IP from or outside the Panel and in such cases, the Board shall accordingly recommend an IP;

(*b*) an IP in the Panel can be appointed as IRP, Liquidator, RP or BT, at the sole discretion of the AA;

(*c*) the submission of expression of interest is an unconditional consent by the IP to act as an IRP, Liquidator, RP or BT of any process relating to a corporate or individual debtor, as the case may be;

(*d*) an IP who declines to act as IRP, Liquidator, RP or BT, as the case may be, on being appointed by the AA, shall not be included in the Panel for the next five years, without prejudice to any other action that may be taken by the Board.

Application

17. These Guidelines shall come into effect for appointments as IRP, Liquidator, RP and BT with effect from 1 July, 2020.

18. These Guidelines have been issued in supersession of the earlier Guidelines (Insolvency Professionals to act as Interim Resolution Professionals, Liquidators, Resolution Professionals and Bankruptcy Trustee (Recommendation) Guidelines, 2019) issued on 28 November, 2019.

Form A

EXPRESSION OF INTEREST TO ACT AS AN IRP, LIQUIDATOR, RP AND BT IN ANY PROCESS RELATING TO ANY CORPORATE OR INDIVIDUAL DEBTOR

1	Name of Insolvency Professional		
2	Registration Number		
3	No. And Date of Issue/Renewal of AFA Date of Expiry of AFA Name of IPA which has issued the AFA		
4	Address and contact details, as registered with the Board: a. E-mail b. Mobile c. Address		
5	**Number of Processes as on date:**	**Ongoing**	**Completed**
	a. As IRP of CIR Process		
	b. As RP of CIR Process		
	c. As IRP of Fast Track Process		
	d. As RP of Fast Track Process		
	e. As Liquidator of Liquidation/Voluntary Liquidation Process		
	f. As RP of Individual Insolvency Resolution Process		
	g. As Bankruptcy Trustee		
6	Whether IP has been convicted at any time in the last three years by a court of competent jurisidiction? (Give details)		
7	Whether IP is serving a suspension or debarment from serving as an IP: (Give details)		
8	Whether any disciplinary proceeding, whether initiated by the Board or the IPA, is pending against the IP? (Give details)		

Declaration

I hereby:-

a. Confirm and declare that the information given herein above is true and correct to the best of my knowledge and belief, and express my interest to act as IRP, Liquidator, RP and BT, as the case may be, if appointed by the Adjudicating Authority.

b. Undertake that if my name is included in the Panel, I shall abide by the Insolvency Professionals to act as Interim Resolution Professionals, Liquidators, Resolution Professionals and Bankruptcy Trustees (Recommendation) Guidelines, 2020.

c. Undertake that submission of this form is my unconditional consent to act as an IRP, Liquidator, RP and BT, at the sole discretion of the Adjudicating Authority during the validity period of the Panel under the Guidelines (1st July, 2020 - 25th November, 2020).

d. Undertake that I shall not decline to as as IRP, Liquidator, RP or BT, as the case may be, on being appointed by the Adjudicating Authority.

Signature of Insolvency Professional

Place: **Date:**

THE INSOLVENCY AND BANKRUPTCY CODE (AMENDMENT) ORDINANCE, 2020

No. 9 of 2020

Promulgated by the President in the Seventy-first Year of the Republic of India.

An ordinance further to amend the Insolvency and Bankruptcy Code, 2016.

WHEREAS the entire ecosystem for implementation of the Insolvency and Bankruptcy Code, 2016 is in place;

AND WHEREAS the provisions relating to corporate insolvency resolution process and liquidation process for corporate persons under the Code are in operation;

AND WHEREAS COVID-19 pandemic has impacted business, financial markets and economy all over the world, including India, and created uncertainty and stress for business for reasons beyond their control;

AND WHEREAS a nationwide lockdown is in force since 25th March, 2020 to combat the spread of COVID-19 which had added to disruption of normal business operations;

AND WHEREAS it is difficult to find adequate number of resolution applicants to rescue the corporate person who may default in discharge of their debt obligation;

AND WHEREAS it is considered expedient to suspend under sections 7, 9 and 10 of the Insolvency and Bankruptcy Code, 2016 to prevent corporate persons which are experiencing distress on account of unprecedented situation, being pushed into insolvency proceedings under the said Code for some time;

AND WHEREAS it is considered expedient to exclude the defaults arising on account of unprecedented situation for the purposes of insolvency proceeding under this code;

AND WHEREAS Parliament is not in session and the President is satisfied that circumstances exist which render it necessary for him to take immediate action;

NOW, THEREFORE, in exercise of the powers conferred by clause (1) of article 123 of the Constitution, the President is pleased to promulgate the following Ordinance:-

1. *Short title and commencement* -

   (1) This Ordinance may be called the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020.

   (2) It shall come into force at once.

2. Insertion of new section 10A. - After section 10 of the principal Act, the following section shall be inserted, namely:-

   "10A.Suspension of initiation of corporate insolvency resolution process - Notwithstanding anything contained in sections 7, 9 and 10, no

application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March, 2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf:

Provided that no application shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period.

Explanation - For the removal of doubts, it is hereby clarified the provisions of this section shall not apply to any default committed under the said sections before 25th March, 2020."

3. Amendment of section 66 - In section 66 of the principal Act, after sub-section (2), the following sub-section shall be inserted, namely:-

"(3) Notwithstanding anything contained in this section, no application shall be filed by a resolution professional under sub-section (2), in respect of such default against which initiation of corporate insolvency resolution process is suspended as per section 10A."

•••

ORDER FORM

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Name of the Bank	**Kotak Mahindra Bank**
Address	**D-10, No. 1 and 2, Local Shopping Centre Vasant Vihar, D Block, New Delhi-110057**
IFSC Code:	**KKBK0000182**
MICR Code:	**110485013**
SWIFT Code:	**KKBKINBB**
GSTIN of Taxmann Publications Pvt. Ltd.	**07AAACT2774P1ZT**

Contact Details

Name ..... Designation .....

Name of the Firm/Organization .....

GSTIN .....

Flat/Door No. ..... Street/Road No. .....

City: ..... State: ..... Pin code: ☐☐☐☐☐☐

Email: ..... Phone/Mobile No. ☐☐☐ ☐☐☐☐☐☐☐☐☐☐

PLEASE FILL ALL THE FIELDS TO ACTIVATE YOUR SUBSCRIPTION

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