

KNOWLEDGE REPONERE- 79

(1st June-20th June, 2020)

*“There is only one thing that makes a dream impossible to achieve: the fear of failure”
-Paulo Coelho*

Dear Professional Colleagues,

Trust this mail finds you well and safe.

The ICSI IIP has taken an initiative to keep its professional members abreast with the latest amendments, notification and case laws filed under the Code as well as other issues encompassing the law of insolvency in India and Abroad. We are pleased to share with you our 79th issue of the Knowledge Bulletin on the recent updates under Insolvency and Bankruptcy Code, 2016 (“Code”) along with recent initiatives of ICSI IIP.

IBC UPDATES

1. Insolvency Professionals to act as Interim Resolution Professionals, Liquidators, Resolution Professionals and Bankruptcy Trustees (Recommendation) Guidelines, 2020

On 02.06.2020, IBBI issued Insolvency Professionals to act as Interim Resolution Professionals, Liquidators, Resolution Professionals and Bankruptcy Trustees (Recommendation) Guidelines, 2020. These Guidelines shall come into effect for appointments as IRP, Liquidator, RP and BT with effect from 1st July, 2020 and 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 28th November, 2019.

Link: <https://ibbi.gov.in/uploads/legalframework/71d50e11656190259af4e3fe5427d943.pdf>

2. Insolvency and Bankruptcy Amendment (Ordinance) Act, 2020

On 05.06.2020, President of India has promulgated the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020, in order to suspend Sec. 7, 9 and 10 of the Code, to prevent corporate persons which are experiencing distress on account of the unprecedented situation caused by the COVID-19 pandemic, from being pushed into insolvency process;

To this effect, new Sec. 10A has been introduced to provide that no application for initiation of insolvency process of a corporate debtor shall be filed, for any default arising on or after March 25, 2020 for 6 months or till such further period not exceeding 1 year from such date;

Further states 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.", thereby excluding defaults arising on account of these unprecedented circumstances, from the gamut of IBC;

Also bars Resolution Professionals from filing any application u/s 66 of IBC (for reporting fraudulent or wrongful trading by Corporate Debtor), in respect of such default against which initiation of insolvency proceedings is suspended as per Sec.10A.

Link: <https://ibbi.gov.in/uploads/legalframework/741059f0d8777f311ec76332ced1e9cf.pdf>

IBBI ORDERS

1. IBBI reconstitutes Advisory Committee on Corporate Insolvency and Liquidation

On 12th June, 2020, the insolvency regulator IBBI vide its order has reconstituted the Advisory Committee on Corporate Insolvency Resolution and Liquidation process. This panel, which would be chaired by Uday Kotak, Executive Vice Chairman and Managing Director, Mr. Kotak Mahindra Bank, comprises of 13 members besides the Chairman.

This Advisory Committee will advise and provide professional support— on a request from the IBBI or on its own volition—on any matter relating to the Corporate Insolvency resolution and liquidation dealt with by the Board under the Insolvency and Bankruptcy Code 2016, official sources said.

Link: <https://ibbi.gov.in/uploads/whatsnew/c08f41974a0a17f105c2d5e6b89af0fd.pdf>

2. IBBI suspends RP for appointing unregistered entities as Corporate Debtor's Valuers

IBI vide its order dated 08.06.2020 in the matter of Mr. Vijay Kumar Garg, Insolvency Professional, suspends RP's registration for 3 months on finding that he displayed a negligent approach during the conduct of Corporate Debtor's CIRP by inter alia appointing 2 unregistered entities as Registered Valuers of the Corporate Debtor in contravention of the CIRP Regulations and IBBI Circular issued in this regard

IBBI ordered Insolvency Professional to pay a penalty equal to 25% of fee payable to him as per agreed terms and conditions in the three CIRPs where he acted as an IRP/RP and 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. The Insolvency Professional had paid an amount for support services that were huge and unreasonable.

Link: <https://ibbi.gov.in/uploads/order/2edd5a8a324c763b8e5ba42b354278aa.pdf>

RECENT ORDERS/ JUDGEMENTS

1. Hon'ble NCLAT held that Abatement of Original Suit before DRT will not affect the proceeding in NCLT under IBC as the dues still remain outstanding; **in the matter of *Babasaheb Sawalaram Chaware Vs. Punjab National Bank Company Appeal (AT) (Ins) 839 of 2019* dated 02.06.2020.**
2. NCLT, Amrawati Bench at Hyderabad rejected a Section 9 application on the ground that the claim of the Appellant falls within the ambit of disputed claim since the Respondent had filed a civil suit in the matter. However, the Hon'ble NCLAT held that, the Adjudicating Authority wrongly rejected the claim on the ground that the claim raised by the Appellant falls within the ambit of disputed claim. Merely disputing a claim cannot be a ground, as held by the Hon'ble Supreme Court in *Innovative Industries Ltd Vs ICICI Bank and Anr.* wherein it is observed that "claim means a right to payment even it is disputed. The Code gets triggered the moment the default of Rs.1 Lakh or more"; in the matter of ***G. T. Polymers v/s. Keshava Medi Devices Pvt. Ltd Company Appeal (AT) (Ins) No. 1266 of 2019* dated 03.06.2020**
3. Hon'ble NCLAT relying on the judgments of *K. Sashidhar vs. Indian Overseas Bank and Committee of Creditors of Essar Steel India Limited Vs. Satish Kumar Gupta and Others*, held that the evaluation matrix applied by the CoC falls within the commercial wisdom of the CoC and it is settled position of law that approval or rejection of Resolution Plan depends upon the commercial wisdom of the CoC, in the matter of ***IMR Metallurgical Resources AG Vs. Ferro Alloys Corporation Limited Company Appeal (AT) (Insolvency) No. 272 of 2020* dated 08.06.2020.**
4. The question for consideration is whether the AA was correct in directing the appellants to cause individual newspaper publications to receive the claim amount when the appellants were already impleaded in the case as legal heirs of Late Mukunchand Bothra. Hon'ble NCLAT held that Adjudicating Authority cannot direct the legal heirs of a Financial Creditor to cause individual newspaper publications to receive the claim amount when they were already impleaded in the case as legal heirs of Financial Creditors, in the matter of ***S. Rajendran, Resolution Professional v. S. Mukanchand Bothra (Deceased) and Ors. Company Appeal (AT) (Insolvency) No. 844 of 2019* dated 15.06.2020**
5. NCLT, Chennai Bench considered the text of the Notification along with the provisions pursuant to which it was issued and stated that the law and notification did not expressly confer any power to issue the March 24 Notification retrospectively. The Central Government's decision to increase the minimum threshold for the initiation of insolvency proceedings is prospective in nature; in the matter of ***Arrowline Organics Pvt. Ltd v. Rockwell Industries Pvt. Ltd I.A. 341/2020* dated 02.06.2020.**

6. Hon'ble NCLAT sets aside NCLT order initiating CIRP against Corporate Debtor, directs NCLT to provide another opportunity to the parties for considering renewal of One Time Settlement (OTS), considering the present/prevailing economic scenario of the country and downfall/slump in every business activity to provide one more opportunity to the parties for considering the OTS (One Time Proposal) in a fair, just, objective and dispassionate manner; in the matter of *Sandeep Kumar Bhagat v. Punjab National Bank* dated **18.06.2020**.
7. Hon'ble NCLAT held that If a secured creditor does not have a requisite 60% value in Secured Interest, they do not have the right to realize its security interest, because it would be detrimental to the Liquidation process and the interest of the remaining Secured Creditors; in the matter of *Mr Srikanth Dwarakanath v. Bharat Heavy Electricals Limited* dated **18.06.2020**.
8. Hon'ble NCLAT held that successful Resolution Applicant cannot be burdened with the past liabilities. Such an act will make it impossible for the successful resolution applicant to run the business of the corporate debtor. It will ultimately defeat the entire purpose and mechanism set out under the I&B Code; in the matter of *State of Haryana Through Excise & Taxation v. Uttam Strips Ltd.* dated **23.06.2020**

NEWS HEADLINES

1. Insolvency process of Vasan Healthcare getting delayed

The insolvency process of Vasan Healthcare Pvt. Ltd. has been hit by a slew of parties making claims and delay in deciding the voting pattern of committee of lenders. In 2017, the National Company Law Tribunal (NCLT), Chennai, had ordered commencement of insolvency proceedings against Vasan Healthcare, in a petition filed by Alcon Laboratories (India) Pvt. Ltd., one of its suppliers. Later the proceedings were stayed by a single judge of Madras High Court. Nearly two years later, in October 2019, the Division Bench had vacated the stay and the case was back at NCLT.

Link: <https://www.thehindu.com/news/national/tamil-nadu/insolvency-process-of-vasan-healthcare-getting-delayed/article31900562.ece>

2. Operating without a code: Suspension of IBC okay, but there's scope for further fine-tuning

In anticipation of the suspension of the Insolvency Code, the stakeholders had already voiced their opinion against taking away the ability of a company to initiate insolvency proceedings. The SC, in its judgments, has categorically stated that the ability to start and end business is a constitutional right, and, therefore, it cannot be taken away. Still, the Ordinance takes away the right of a company to initiate insolvency proceedings against itself, while allowing the same company to initiate voluntary liquidation proceedings under the Insolvency Code which can also be a consequence of pandemic-related stress.

Link: <https://www.financialexpress.com/opinion/operating-without-a-code-suspension-of-ibc-okay-but-theres-scope-for-further-fine-tuning/2000276/>

3. After 70 per cent jump in FY20, liquidation cases under IBC set to surge amid Covid crisis

While recent amendment bans insolvency on Covid defaults, 3774 cases already admitted under IBC face a dim future.

Link: <https://www.thehindubusinessline.com/portfolio/news-analysis/after-70-per-cent-jump-in-fy20-liquidation-cases-under-ibc-set-to-surge-amid-covid-crisis/article31882003.ece>

4. Liquidator has overriding right on company's assets over tax department: NCLT

The revenue department cannot attach the assets of a company in liquidation if liquidator has already taken in account its tax dues. The principal bench of NCLT, New Delhi ruled that the liquidator has overriding powers under the Insolvency and Bankruptcy Code to take both movable and immovable assets of a corporate debtor.

Link: <https://economictimes.indiatimes.com/news/economy/policy/liquidator-has-overriding-right-on-companys-assets-over-tax-department-nclt/articleshow/76449076.cms>

5. NPAs in corporate loans now under control, says SBI's Rajnish Kumar

Non-performing assets (NPAs) in small-ticket loans remain on the higher side, even as corporate bad loans are largely under control, according to Rajnish Kumar, chairman of SBI. Speaking on the issue of moratorium on loans, Kumar said that not many borrowers were keen to take advantage of the scheme due to its cost implications.

Link: https://www.business-standard.com/article/finance/npas-in-corporate-loans-now-under-control-says-sbi-s-rajnish-kumar-120061801454_1.html

6. No bar on invoking insolvency against personal guarantors: IBBI chairman

While a latest ordinance has suspended insolvency proceedings for up to one year against fresh default from March 25 to give breather to thousands of firms battered by Covid-19, it doesn't stop creditors from initiating bankruptcy process against a personal guarantor to a corporate debtor even now.

Link: <https://www.financialexpress.com/industry/no-bar-on-invoking-insolvency-against-personal-guarantors-ibbi-chairman/1992440/>

7. IBC ordinance aims to prevent unnatural death of viable firms: IBBI chief Sahoo | INTERVIEW

Dr. M S Sahoo, the chairman of the insolvency regulator IBBI, says rescuing a viable company that employs people is far more important than failing to liquidate an unviable one during the current crisis when the market does not have many suitors to turn around stressed assets.

Link: <https://www.financialexpress.com/industry/ibc-ordinance-aims-to-prevent-unnatural-death-of-viable-firms-ibbi-chief-sahoo-interview/1992893/>

8. IBC a game changer for financial institutions: Gopal Subramaniam

The Insolvency and Bankruptcy Code (IBC) has proved to be a “game changer” for financial institutions in the country, providing a much needed shot in the arm. Due to IBC, banks are able to advance loans with more ease. This will lead to a healthy business environment.

Link: <https://economictimes.indiatimes.com/industry/banking/finance/banking/ibc-a-game-changer-for-financial-institutions-gopal-subramaniam/articleshow/76346235.cms>

9. India Credit Market Has Been Stung by Bankruptcy Suspension

Since India announced last month that it would temporarily suspend filings under its insolvency law amid the pandemic, credit investors have grown concerned that some weaker borrowers may use the development as an excuse to delay or avoid debt payments.

Link: <https://www.bloombergquint.com/global-economics/india-s-credit-market-has-been-stung-by-bankruptcy-suspension>

10. Analysis: How Indian insolvency law responded to the COVID-19 pandemic

The Ordinance seeks to provide an efficient breathing space to Indian businesses hit by the pandemic. While there is a small chance of debtors abusing the suspension for defaults during the specified period for reasons other than the pandemic, given the extent of damage otherwise to the economy, such a chance is miniscule.

Link: <https://www.cnbctv18.com/economy/analysis-insolvency-bankruptcy-code-ordinance-2020-ibc-6110031.htm>

11. What The Government's Got Wrong In Addressing Insolvency

The Ordinance may not prove as helpful for the Indian borrower corporates that it seeks to assist, and certainly doesn't appear to be favourable for the financial institutions and operational creditors to whom monies are owed.

Link: <https://www.ndtv.com/opinion/what-the-governments-got-wrong-in-addressing-insolvency-2243127>

12. IBC suspension will fuel innovative options outside the Code: IBBI's Sahoo

Even with corporate insolvency having been suspended for six months, the Insolvency and Bankruptcy Board of India has its hands full with existing cases, designing a special framework for MSMEs and implementing individual insolvency process. Dr. M S Sahoo, chairman of IBBI, in an interview said that best use of the Insolvency and Bankruptcy Code (IBC) is not using it at all and that the suspension will give momentum to innovative options for lenders outside the Code.

Link: https://www.business-standard.com/article/economy-policy/ibc-suspension-will-fuel-innovative-options-outside-the-code-ibbi-s-sahoo-120060800908_1.html

NEWS FROM INSTITUTE

1. Workshop on "Way forward for Insolvency Professionals in COVID - 19 Crisis" on June 05, 2020

A two day Interactive Workshop was conducted by ICSI IIP with eminent speakers like Mr. P.K. Malhotra, Mr. Vinod Kothari and Ms. Rekha Shah among others. The Workshop had important discussions on the topics of changes in Insolvency Law because of the COVID-19 pandemic and its impact and response by all the stakeholders of the insolvency process

2. Webinar titled "e-Platform for Distressed Assets by IU- Under IBC" organised on June 14, 2020 from 11:00 AM to 01:00 PM

A webinar was conducted wherein the importance of Information Utilities as well as its functions and its growing use in the coming times was discussed by eminent speakers came from the only registered Information Utility, NeSI.

3. Round-table discussion on 'Special Insolvency Resolution Framework for Micro, Small and Medium Enterprises (MSMEs) on June 18, 2020

A roundtable discussion was held with IBBI officials to discuss the upcoming amendments in the Insolvency Law in India with regard to MSMEs. The participants gave valuable inputs on the proposed framework, which was well appreciated by IBBI..

4. Training Program (LIT UP): Preparation of Limited Insolvency Examination on 26-28 June, 2020

ICSI IIP is organizing a preparatory crash course for all eligible candidates who would wish to take the Limited Insolvency Examination in future. The course would cover the entire syllabus and would be taught by experienced Professionals.

In order to address the concerns/challenges and the obligations of Insolvency Professionals, ICSI IIP organizes webinars/seminars on a regular basis. The program schedule for the same is being notified on the website of ICSI IIP. The members may register for such webinars/seminars in order to equip themselves to face the rapidly changing environment and understand and prepare for the issues of the future vis-a-vis the new Code.

We hope you will find this issue of our Bulletin useful and informative.

Please stay safe, be healthy and follow the advice and precautions issued by the Government from time to time for fighting against COVID-19.

Best Wishes!!

Team ICSI IIP

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