Role & Responsibility of Insolvency Professionals Under The CODE-An Analysis

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INSOLVENCY PROFESSIONALS (IP)

There are a number of professions and the professionals who are adherants to these professions. What makes a person a professional? A person who identifies himself with a profession having expertise in a field of activity and considers issues placed before him in an objective and impartial manner subject nevertheless to a code of conduct. The professions of law, medicine and church were considered as noble professions in England. With the church taking a back seat, law and medicine continues to shine as noble. The practice of any profession creates an awareness in the public mind and as the practice goes unabated in providing service to society, it creates an instant confidence in the public and an abiding faith in the ability of a professional to provide flawless service. This creates an enduring bond which deserves to be cherished. The IP professional falls into this category.

The Insolvency and Bankruptcy Code is transformational piece of legislation as it seeks to establish an ecosystem for handling Insolvency & Bankruptcy issues. Most importantly it offers an exit plan to all categories of persons-Corporates, Stakeholders, Individuals and Partnership firms, apart from over hauling century old legal framework. Hence it is a game changer in which the Bankers, Courts, Investors and the initiators of insolvency proceedings will have to work in harmony for devising either a survival plan or liquidation of sick units and others facing debt default.

IP is appointed to conduct the insolvency resolution process for all categories of persons including the interim IP) in accordance with the procedure laid down in the Code. IP comes on the horizon when the concerned persons initiate insolvency proceedings. He is a professional endowed with specialised knowledge and training and recognised by the Agency and the Board for undertaking insolvency proceedings.

The insolvency process under the Code starts with a financial creditor, operational creditor or Corporate applicant as the case may be who makes an application to the Adjudicating Authority (AA) about the debt default by the Corporate together with the name of an IP who has consented to act as an Interim IP. On the acceptance of the application the AA appoints an interim IP in terms of section 16 of the Code and declares a moratorium in terms of section 14 (no institution of suits or legal proceedings against the debtor including the on-going legal actions etc). The appointment of IP is automatic in the case of financial creditor or the Corporate debtor, if no disciplinary proceedings are pending against the IP. However in the case of operational creditor, the AA makes a reference to the Board, if no proposal is made by the applicant, about the name of an IP and for the Boards' recommendation there for. The Board is required to recommend the name of an IP against whom no disciplinary proceeding is pending. This is dealt with in section 16 of the Code. The Code also makes a fine distinction between a financial creditor and an operational creditor and the former plays a dominant role in the liquidation proceedings. The financial creditor is a person to whom a financial debt is owed including any assignee thereof arising out of financial debt together with interest which is disbursed against consideration for the value of money borrowed etc. But in the case of an operational debtor, it refers to an operational debt in respect of provision of goods and services including employment, repayment of dues to the Govt. authorities or any local authority.

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DUTIES OF AN IP

The duties of an IP are quite onerous having regard to role and responsibility cast on the IP. On appointment as an interim IP in the case of a corporate debtor, the first and the foremost duty is to make a public announcement about the commencement of insolvency process which coincides with the admission of the application by the AA. The contents of public announcement should conform to section 15 of the Code read with Reg 6 of Insolvency & Bankruptcy Board of India(Insolvency Resolution Process For Corporate Persons)Regulations,2016.the advertisement should include details of the date of appointment of the IP, the name of the corporate debtor, address, ,the last date for submission of claims by the creditors, the period of Insolvency which is 180 days from the date of application by the applicant with one time extension of the period by 90 days. The ad in the prescribed form-schedule Form A to the Regulations should appear not later than three days from the date of appointment of the IP, one each in English language and the Regional language newspapers circulating at the location of corporate debtors' registered office and the principal office etc

Other duties of an IP are- (1) management of the affairs of the corporate debtor including the powers of the Corporate Board which stands suspended(Sec 17),(ii) collection of all information relating to the assets, finances and operations of the corporate debtor for determining the financial position in relation to business operations, financial and operational payments etc more fully described in Sec 18 of the Code.(iii) management of operations of the debtor as a going concern(Sec 20),(iv) collection of all claims received from the creditors for determining the financial position of the corporate debtor(Sec 21),(v) constitute a Committee of Creditors(COC) comprising of all financial creditor except related parties.

POSITION OF IP IN THE CASE OF INSOLVENCY PROCEDURE RELATING TO INDIVIDUALS & PARTNERSHIP FIRMS;

In the case insolvency applications falling under Part III of the Code-Insolvency Resolution For individuals & Partnership Firms-the procedure for appointment of an IP is on a different footing. There are two types of insolvency procedures, that is, by way of (1) Fresh Start Process under Sec 80 and (2) Insolvency Resolution Process under sec 94.

Fresh Start Process

Under Section 80 a debtor cannot make an application if his gross annual income exceeds Rs60,000 or the qualifying debts exceeds Rs 35,000 etc. Such restrictions are not there in section 94. A debtor who is unable to pay his debts and fulfilling the conditions provided is sec 80(2) may make an application either personally or through an IP .Where an application is made by the debtor through an IP, the Adjudicating Authority(AA) should direct The Insolvency & Bankruptcy Board of India (Board) ,within seven days of the receipt of application, to confirm that there are no disciplinary proceedings against the I.P. who has submitted the application. The Board may either confirm the appointment of an I.P or reject the same. In the later case, the Board should nominate another I.P. Such a person is appointed by AA as an I.P. However where an application is made by the debtor directly, then the AA should direct the Board, within seven days of receipt of application, to nominate an I.P. for the Fresh Start Process and such a person is appointed by AA. The application aforesaid should disclose a list of all debts owed by him with details of each debt, interest payable, security held etc duly supported by an Affidavit etc (sec 81(4).

The appointment of an I.P as aforesaid will give rise to the examination of the application made and submit a report to the AA, either recommending acceptance of the application or rejection thereof. The report should contain certain details like qualifying debts and liabilities eligible for discharge under sec 92 of the Code. Qualifying debt is defined in section 79(19) as the amount due which includes interest or any other claim due under any contract but does not include an excluded debt ,a debt which is a secured and a debt which has been incurred three months prior to the application. Excluded debt is defined in Section 79(15) of the Code. On the admission, the AA passes an order of moratorium under Section 85 and a creditor may file an objection by an application to the IP on the ground of inclusion of a debt as a qualifying debt and incorrectness of debts mentioned. The IP may consider all such objections and prepare a final list of qualifying debts and make an application to the AA for the purpose of issue of directions. There is a provision in sections 87 and 89 for removal and replacement of an IP on the grounds of not affording an opportunity of making a representation, collusion with other party etc. by an application made by the debtor or the creditor to AA.. The IP may also make an application under Sec 91 for revocation of the debtors' application made under sec 84 if there is a change in the financial position of the debtor or non compliance by the debtor of the restrictions imposed on him etc

Insolvency Resolution Process

Under section 94 a debtor who commits a default may file an application to AA, either personally or through an IP for initiating the insolvency resolution process. As defined in Sec 3(12) "default" means non-payment of debt when the whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor. This cannot include excluded debt as defined in Sec tion 79(15) of the Code. Where the debtor is the partner of a firm, he cannot apply to the AA in respect of the firm unless all or majority of the partners make a joint application. A debtor is also not eligible to make an application under sec 94 if an application in respect of the debtor has been admitted during 12 months preceding the date of application under sec 94.The following points are also important (i) an application may also be made by a creditor either himself or on behalf of other creditors jointly through an IP to the AA for initiating insolvency resolution process, Sec 95(ii) on acceptance of the application ,an interim moratorium will follow, sec 96 (iii)Where an application has been filed through an IP, the AA should direct the Board ,within seven days of the receipt of application, to confirm that there are no pending disciplinary proceedings against the IP. The Board within seven days should either confirm the appointment or reject the same. In the later case the Board should nominate another IP for the resolution process ,sec 97 (iv) there is a provision in sec 98 for replacement of an IP at the instance of the debtor or the creditor. Such a replacement is also possible if the Committee of Creditors have taken a decision for replacing an IP.(v) the IP is required to examine the application made under section 94 or Section 95 and submit a report to the AA recommending acceptance or rejection of the same etc.

DUTIES OF I.P. UNDER INSOLVENCY &BANKRUPTCY BOARD OF INDIA(MODEL BYE LAWS & GOVERNING BOARD ETC) REGULATIONS, 2016.

Regulation 13 provides that no person is allowed to render service as an I.P. except as a member of the Insolvency professional

Agency. Such a member is also required to register with the Board(Sec 206\207) of the Code. Regulation 6 of the said regulations imposes certain duties on the members in the performance of duties as an I.P. They are;(i) act in good faith in the discharge of his duties as an I.P.(ii)endeavour to maximise the value of assets of the debtor.(iii)discharge his functions with utmost integrity and objectivity,(iv) be independent and impartial,(v) discharge his functions with highest standard of professional competence & ethics,(vi) continues to upgrade his professional expertise(vii) perform duties as quickly and efficiently as reasonable subject to timelines under the code,(viii) comply with applicable laws in the performance of his duties,(ix) maintain confidentiality of information obtained in the course of his professional activities unless required to disclose such information by law.

REGISTRATION OF INSOLVENCY PROFESSIONALS

Regulation 3 of IBBI (Insolvency Professionals) Regulations,2016 provides that an individual is not eligible for registration unless(a) he has passed the National Insolvency Examination(b) has passed the Limited Insolvency Exam and has 15 years of experience in management, after receiving Bachelors' degree from a University established or recognised by law ,OR(III) has passed the Limited Insolvency Exam and has ten years of experience as(i) CA enrolled as a member of the ICAI(II) A Company Secretary enrolled as a member of the ICSI (iii) a Cost Accountant enrolled as a member of the ICAW(iv) an Advocate enrolled with a Bar Council. Apart from the above, an individual should be a fit and proper person. In deciding this, the Board may take into account any consideration as it deems fit, but not limited to (i) integrity, reputation and character (ii) absence of conviction and restraint orders and (iii) competence including financial solvency and net worth.

CODE OF CONDUCT-FIRST SCHEDULE TO THE REGULATIONS

The Insolvency professional is also required to abide by the Code of Conduct and bring to bear in the practice of the profession. The focal areas are(i) integrity & objectivity,(ii) independence & impartiality(iii)professional competence,(iv) representation of correct facts and correcting misrepresentation(v) observance of timelines,(vi)ability in respect of information magement (vi) observance of confidentiality(ix)occupation, employability & restrictions-not to accept too many engagements(x) Remuneration & costs-this should be in a transparent manner(x0) not to accept gifts and hospitality.

FUNCTIONS & OBLIGATIONS OF INSOLVENCY PROFESSIONALS

The Code also specifies certain functions and obligations to be observed by the Insolvency professionals in section 208.Where any insolvency resolution, fresh start, liquidation or bankruptcy process has been initiated, it shall be the function of an insolvency professional to take such actions as may be necessary in the following matters, namely(a) a fresh start process under chapter II (b) individual insolvency resolution process under chapter III (c) corporate insolvency resolution process under chapter II of part II (d)individual bankruptcy process under chapter IV of part III (e) liquidation of a corporate debtor firm under chapter III of part I.

The Insolvency professional is also required to abide by the following Code of Conduct.(i) to take reasonable care and diligence while performing his duties, (ii)to comply with all requirements and terms and conditions specified in the bye laws of the insolvency professional agency of which he is a member,(iii)to allow the insolvency professional agency to inspect his records, (iv)to submit a copy of the records of every proceeding before the AA to the Board as well as to the insolvency professional agency of which he is a member, and (v)to perform his functions in such manner and subject to such conditions as may be specified.

CHALLENGES & OPPORTUNITIES TO INSOLVENCY PROFESSIONALS

A perusal of what is stated above indicates that senior professionals with expertise and experience of 15/10 years are required for the profession and it is not for ordinary mortals. In addition high standards of integrity and probity is required of individuals desiring to join the profession. The I.P occupies a unique position and acts as an intermediary between the debtor/creditors on the one hand and the Adjudicating Authority on the other and functions under the watchful eyes of the Agency and the Board. This is a position of trust and confidence. In terms of work the insolvency professional has to carry heavy workload-secretarial, legal, finance, management of business of the debtor and the assessment of assets and liabilities of the debtor, valuation and sale of assets etc. fall under the care of insolvency professional. This calls for establishment of adequate and proper infrastructure facility by the insolvency professional. In addition adequate human resource and experts in the field of finance, valuation of assets, security enforcement, taxation etc. are required.

Recognising the complex nature of work to be handled by an I.P., the Regulations provide for training of his staff including subject knowledge by the Agency .The Agency is also entrusted with the task of developing the insolvency profession of its members by organising educative programmes. This will keep the members updated on national and international development on a continuous basis in the field of solvency and related issues. In this task the Agency is ably assisted by an Advisory Committee of professional members constituted by it and charged with the responsibility of advising the Agency on development of insolvency profession, setting high standards for professional and ethical conduct and observance of best practices in relation to insolvency resolution, liquidation and bankruptcy.

The members of the three professional bodies-ICSI, ICAI, ICWA - are given a special privilege for enrolling as insolvency professionals by passing the Limited Insolvency exam with ten years of experience. Others have to pass both the National & Limited Insolvency and they should have 15 years of experience at the threshold. The Code provides a new avenue of opportunity to the CS members to enrol as members of the insolvency profession. while this a new and emerging area of practice, CS members have to imbibe new shills and the ability to manage the tasks envisioned in the Code .A high degree of management skills ,apart from the subject knowledge is required. Another aspect of the matter is handling of finance of the debtor requiring high degree of integrity, reputation and absence of conviction and restraint orders. These qualities are kept in view by the Board while registering for the membership. There is also a need to observe the code of Conduct which has already been discussed.

CONCULSION

The insolvency profession offer a challenging opportunity to the CS members. The grant of certificate of registration to "ICSI Insolvency Professional Agency" augurs well for the CS members and provides an ease of opportunity to become insolvency professionals. CS

ARTICLE

Insolvency Professionals – An International Perspective

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Insolvency representative plays a central role in the effective and efficient implementation of an insolvency law, with certain powers over debtors and their assets and a duty to protect those assets and their value, as well as the interests of creditors and employees, and to ensure that the law is applied effectively and impartially.

-UNCITRAL Legislative Guide on Insolvency Law

The institutional framework is critical for the success of insolvency system. Insolvency Professional, who is a person responsible for administering the insolvency proceedings and the most importent pillar of this institutional framework is known by different titles in different countries viz. "administrator", "trustee", "liquidator", "supervisor", receiver" and so on.

Worldwide, the success of a Bankruptcy case majorly depends on the quality of professionals handling the case. This article attempts a comparative study of insolvency professionals in different countries with specific reference to licensing, role, monitoring and remuneration covering countries such as United States of America (USA), United Kingdom (UK), Canada, Singapore and India.

As mentioned by the European Bank for Reconstruction and Development (EBRD), an insolvency process cannot be imagined without the involvement of an IP who in many respects is the lynch pin of the process - the link between the court, creditors and the debtor[1].

The following principles developed by EBRD could provide a useful comparison platform for discussion on Insolvency Office Holders (i.e. Insolvency Professionals under Insolvency and Bankruptcy Code 2016):

- Licensing and registration - IPs should hold some form of official authorisation to act.
- Regulation, supervision and discipline - given the nature of their work and responsibilities, IP should be subject to a regulatory framework with supervisory, monitoring and disciplinary features.
- Qualification and training - IPs candidates should meet relevant qualification and practical training standards. Qualified IPs should keep their professional skills updated with regular continuing training.
- Appointment system - there should be a clear system for the appointment of IPs, which reflects debtor and creditor preferences and encourages the appointment of an appropriate IP candidate.
- Work standards and ethics - the work of IPs should be guided by a set of specific work standards and ethics for the profession.
- Legal powers and duties - IPs should have sufficient legal powers to carry out their duties, including powers aimed at recovery of assets belonging to the debtor's estate.
- IPs should be subject to a duty to keep all stakeholders regularly informed of the progress of the insolvency case.
- Remuneration - a statutory framework for IP remuneration should exist to regulate the payment of IP fees and protect stakeholders.

This Articles attempts to cover international comparison with respect to the following broad parameters:

i. Who regulates and who is regulated?
ii. Licensing of Insolvency Professionals

[1] Study on a new approach to business failure and insolvency by European Commission

iii. Role of Insolvency Professionals
iv. Monitoring Mechanism for insolvency professionals
v. Remuneration of Insolvency Professionals

The Countries that have been undertaken for the comparison study are listed below:

1. United States of America (USA)
2. United Kingdom (UK)
3. Canada
4. Singapore
5. India

World Bank Statistics on the above mentioned countries provide an outlook of insolvency framework in these countries as follows:

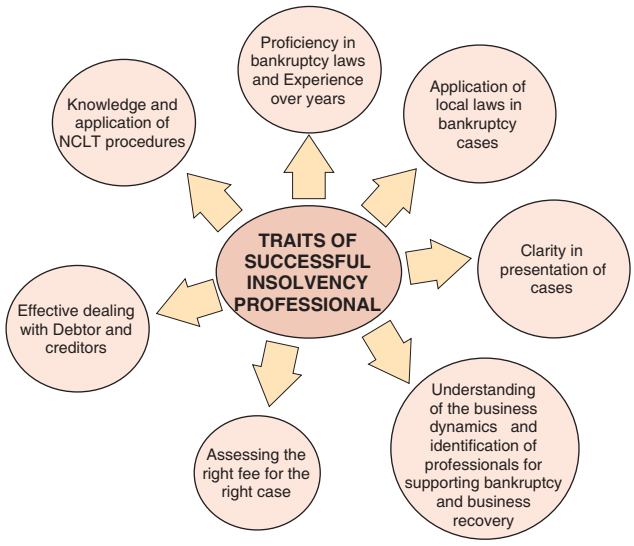
Country	Recovery rate (cents on the dollar)	Time taken (years)	Cost (% of estate)	Ranking
United States of America (USA)	78.6	1.5	10.0	5
United Kingdom (UK)	88.6	1.0	6.0	13
Canada	87.4	0.8	7.0	15
Singapore	88.7	0.8	4.0	29
India	26.0	4.3	9.0	136

In India, as per a recent report, there are 700 BIFR cases, 15000 cases in DRT related to corporates only and 5200 winding up and amalgamation cases pending before high courts which are being transferred to NCLT.

The Joint Study of ASSOCHAM and CRISIL on 'Insolvency and Bankruptcy Code 2016: A game changer,' reveals that effective implementation of the Insolvency and Bankruptcy Code, 2016 can potentially release about Rs. 25,000 crore capital currently locked up in non-performing assets (NPAs) over next 4-5 years thereby implying that there is ample scope for the insolvency professionals.

WHO CAN BE SUCCESSFUL INSOLVENCY PROFESSIONAL?

Bank of America identified certain traits of successful bankruptcy lawyers. Applying the traits in the Indian context, the following traits may be considered essential for a successful insolvency professional:



WHO REGULATES AND WHO IS REGULATED?

The nomenclature for IPs/regulators/regulations of some countries is discussed below:

UNITED STATES OF AMERICA (USA)
Regulator: United State Trustee
Regulations: Bankruptcy Code, Federal Rules of Bankruptcy Procedure
Nomenclature for the term "Insolvency Professionals": Private Trustees.

UNITED KINGDOM (UK)
Regulator: Secretary of State and Recognised Professional Bodies (RPBs).
Regulations: Insolvency Act 1986, Insolvency Rules 1986 and Enterprises Act 2002.
Nomenclature for the term "Insolvency Professionals": Insolvency Practitioners

CANADA
Regulator: Office of the Superintendent of Bankruptcy (OSB)
Regulations: Bankruptcy and Insolvency Act, 1985
Nomenclature for the term "Insolvency Professionals": Licensed Insolvency Trustee (LIT)

SINGAPORE
Regulator: Accounting & Corporate Regulatory Authority (ACRA) in case of Corporate Insolvency and Official Assignee (OA) in case of individual bankruptcy.
Regulations: Companies Act (Chapter 50) in case of corporate insolvency and Bankruptcy Act (Chapter 20) in case of individual bankruptcy.
Nomenclature for the term "Insolvency Professionals": Insolvency Practitioners.

INDIA
Regulator: Insolvency and Bankruptcy Board of India (IBBI) and Insolvency Professional Agencies (IPAs).
Regulations: Insolvency and Bankruptcy Code, 2016.
Nomenclature for the term "Insolvency Professionals": Insolvency Professionals.

LICENSING OF INSOLVENCY PROFESSIONALS

In all countries, the licensing of insolvency professionals is essential in order to monitor and regulate them. The licensing of insolvency professionals in different countries are mentioned here:

UNITED STATES OF AMERICA (USA)
The person who can be appointed as a trustee must be-

1. A member of bar of highest court of a state or of the district of Columbia; or
2. Certified public accountant; or
3. Holder of a bachelor's degree from an accredited college or university or a master's or doctoral degree; or
4. A senior law student or a candidate for master degree in business administration from relevant law school or business school, working under supervision of:
   a. A member of law school faculty; or
   b. A member of panel of private trustee; or
   c. A member of a program established by the local bar association to provide clinical experience to students.
5. Should be of sound mind.
6. Should possess integrity and good moral character.

UNITED KINGDOM (UK)
To practice as an Insolvency Practitioner, it is necessary to:

- Pass the Joint Insolvency Examination Board Exams
- Gain experience in insolvency work (typically 600 hours over 3 years)
- Obtain a licence from one of the RPBs (or the Insolvency Service)
- Be approved as a fit and proper person.

CANADA

The following are the prerequisite requirements for issuance of an individual licence to be a Licensed Insolvency Trustee under the Act:

(a) the applicant shall have successfully completed the following, which are administered by CAIRP in accordance with the MOU:
  (i) the CIRP Qualification Program (CQP) unless otherwise exempted;
  (ii) the CIRP National Insolvency Exam; and
  (iii) the Insolvency Counsellor's Qualification Course;
(b) the applicant shall pay the prescribed fee under Rule 134(1);
(c) the applicant shall be solvent;
(d) the applicant shall be of good character and reputation; and
(e) the applicant shall pass the Oral Board of Examination.

An applicant shall also satisfy the Superintendent that he or she has adequate knowledge, experience and skills to carry out the duties of a trustee.

SINGAPORE

Bankruptcy

In bankruptcy proceedings, the court may appoint a person other than the Official Assignee to be the trustee of the bankrupt's estate. The trustee in bankruptcy must be (a) registered as a public accountant under the Accountants Act, (b) an advocate and solicitor, or (c) such other person as the Minister may prescribe, and must not have been convicted of an offence involving fraud or dishonesty punishable on conviction by imprisonment for 3 months or more.

Insolvency

In winding up by the court and creditors' voluntary winding up, only individuals who are "approved liquidators" can act as liquidators. The Minister grants the requisite approval, and the applicable criteria are found in the Practice Directions issued by the Registrar of Public Accountants. Generally, if an applicant is a public accountant registered under the Accountants Act, he needs to satisfy the Registrar of Public Accountants that he has the necessary experience (in audit or liquidation work) and capacity (as evidenced by the reports of two referees, one of whom must be an approved liquidator) to undertake the work of an approved liquidator satisfactorily. If the applicant is not a public accountant, then he must have passed the final examination in accountancy in a prescribed list of tertiary education institutions or professional examinations, have at least 3 years' relevant experience in insolvency work, and be of good reputation and character.

INDIA

Subject to the other provisions of these Regulations, an individual shall be eligible for registration, if he -

a. has passed the National Insolvency Examination; or
b. has passed the Limited Insolvency Examination, and has fifteen years of experience in management, after he received a Bachelor's degree from a university established or recognized by law; or
c. has passed the Limited Insolvency Examination and has ten years of experience as -
  (i) a chartered accountant enrolled as a member of the Institute of Chartered Accountants of India.
  (ii) a company secretary enrolled as a member of the Institute of Company Secretaries of India.
  (iii) a cost accountant enrolled as a member of the Institute of Cost Accountants of India, or
  (iv) an advocate enrolled with a Bar Council.

No individual shall be eligible to be registered as an insolvency professional if he -

(a) is a minor.
(b) is not a person resident in India.
(c) does not have the qualification and experience specified in Regulation 5 or Regulation 9, as the case may be.
(d) has been convicted by any competent court for an offence punishable with imprisonment for a term exceeding six months or for an offence involving moral turpitude, and a period of five years has not elapsed from the date of expiry of the sentence. Provided that if a person has been convicted of any offence and sentenced in respect thereof to imprisonment for a period of seven years or more, he shall not be eligible to be registered.
(e) he is an undischarged insolvent, or has applied to be adjudicated as an insolvent.
(f) he has been declared to be of unsound mind.
(g) he is not a fit and proper person.

ROLE OF INSOLVENCY PROFESSIONALS

Insolvency Professionals play varied roles in the Insolvency and Bankruptcy regime. Their role in different countries as well as in different cases is as follows:

UNITED STATES OF AMERICA (USA)

The Bankruptcy Code in USA provides for six basic types of bankruptcy cases. The details of two main bankruptcy cases along with the role of the trustees in these cases are enumerated below:

1. **Chapter 7 (bankruptcy leading to liquidation):** Chapter 7 of the Bankruptcy Code deals with liquidation. In this type of bankruptcy, a court-appointed trustee or administrator takes possession of any non-exempt assets, liquidates these assets and then uses the proceeds to pay creditors.

He shall be accountable for all the property received and has the right to investigate the financial affairs of the debtor. He shall also file accounts of the administration of the estate with the United States Trustee and the Court.

The trustee under this Chapter is authorized to employ accountants, attorneys, appraisers, auctioneers and other professionals, whenever the need arises for their assistance, while carrying out his or her duties.

2. **Chapter 11 (Reorganization):** Reorganization is ordinarily used by commercial enterprises that desire to continue operating a business and repay creditors concurrently through a court-approved plan of reorganization. The appointment or election of a trustee occurs only in a small number of cases under this Chapter. Generally, the debtor, as "debtor in possession," operates the business and performs many of the functions that a trustee performs.
   The Court shall pass an order for appointment of a trustee under this Chapter only when the court is satisfied that the reorganisation may be subject to any fraud, dishonesty, incompetence, gross mismanagement or where such an appointment will be in the interest of creditors, any equity security holders, and other interests of the estate.
   The trustee, wherever appointed, is responsible for management of the property of the estate, operation of the debtor's business, and, if appropriate, the filing of a plan of reorganization. Section 1106 of the Bankruptcy Code requires the trustee to file a plan "as soon as practicable" or, alternatively, to file a report explaining why a plan will not be filed or to recommend that the case be converted to another chapter or dismissed.

UNITED KINGDOM (UK)

Role of Insolvency Practitioners in reviving the Company

There are four possibilities for a company in financial difficulty, other than liquidation, which are enumerated as follows along with the role of the Insolvency Practitioners in each of the cases:

1. **Administration:** 'Administration' offer companies a breathing space during which creditors are restrained from taking action against them.During this period, an Insolvency Practitioner (acting as an administrator) is appointed by a court to put forward proposals to deal with the company's financial difficulties.The entire procedure is managed by the licensed insolvency practitioner.

2. **Administrative Receivership:** 'Administrative Receivership' permits the appointment of a receiver (the insolvency practitioner) by certain creditors (normally the holders of a floating charge) with the objective of ensuring repayment of secured debts. The company must be in breach of the terms of its debenture for the charge-holder to trigger the appointment. In this case, administrative receiver will seek to realise the assets charged for the benefit of the debenture holder after meeting the costs and the claims of the preferential creditors.

3. **Company Voluntary Arrangement:** 'Company Voluntary Arrangement' (often abbreviated to 'CVA') is a formal arrangement between debtors and creditors. It provides a way in which a company in financial difficulty can come to a binding agreement with its creditors. The company remains under the control of the directors but an insolvency practitioner supervises the arrangement and pays the creditors in line with the accepted proposals.

4. **Informal Arrangement:** 'Informal Arrangement' is where the company writes to all its creditors to see if a mutually acceptable agreement can be reached. The agreement is not legally binding, therefore, neither party has to honour the agreement. The advantage of this option is that the agreement is likely to be less costly than formal proceedings. An insolvency practitioner is not necessary, although they would be able to offer advice on the option. Thus, the role of insolvency practitioner here is more advisory in character.

Role of Insolvency Practitioner in case of liquidation

Considering the options for a company in financial difficulty, one option is 'liquidation'. There are three types of liquidation that an insolvency practitioner may administer. For each of these options a registered insolvency practitioner is required, by law, to manage:

- 'members' voluntary liquidation' (or 'members' voluntary winding up')
- 'creditors' voluntary liquidation'.
- 'compulsory liquidation' (i.e. through Court order).

In compulsory liquidation, the insolvency practitioner takes full control of the affairs of the company from directors as well as investigates the conduct of directors in the time leading up to insolvency.

In the case of a Members' Voluntary Liquidation, the IP has a duty to ensure that company funds are correctly distributed among members. Additionally, an Insolvency Practitioner may arrange meetings of creditors and/or members who shall vote on whether to accept the proposal for liquidation.

CANADA

A Licensed Insolvency Trustee (LIT) is an individual or a corporation entrusted with the duty to distribute bankrupt's property among the creditors in accordance with the distribution scheme under the Bankruptcy and Insolvency Act (BIA). The bankrupt and all other persons holding bankrupt's property must transfer the property to

trustee. The trustee may also assist individual in preparing and submitting a consumer proposal to creditors. The trustee must arrange mandatory counselling of the bankrupt. The trustee must call creditors meetings and send the parties required, notices of proceedings and documents. The trustee is responsible for preparation of pre-discharge report and may oppose the bankrupt's discharge.

SINGAPORE

The Insolvency Practitioners in Singapore undertake functions in case of liquidation, judicial management and receivership. They assume the role of liquidator in case of liquidation proceedings, judicial manager in case of judicial management and the role of receiver or manager in case of receivership. The various roles of the insolvency practitioners are listed as follows:

Role of liquidator in case of liquidation:

- Liquidator in compulsory winding up:

The Official Receiver is a public officer who may be appointed by the High Court to act as the liquidator of companies undergoing compulsory winding up in Singapore. The Official Receiver's role as a liquidator is to expeditiously recover and realise the assets of the wound up company for the distribution of dividends to creditors and administer any outstanding matters involving the wound up company.

- A Liquidator for Unincorporated Entities:

Where the Official Receiver is appointed as a liquidator to act for an unincorporated entity (i.e. trade unions, societies, mutual benefit organisations or cooperative societies) whose registration is cancelled by the Registrar, its properties will vest in the Official Receiver. The Official Receiver will pursue the Statement of Assets from the office bearers and take the necessary steps to realise the assets of the unincorporated entity. Any proceeds derived are used to repay the unincorporated entity's debts and liabilities (if any) by way of a dividends declaration.

Role of judicial manger in case of judicial management:

Where a company is in financial difficulty but there is a reasonable prospect of rehabilitating the company or of preserving all or part of the business as a going concern or the interests of creditors would be better served than by resorting to a winding up, the company or its creditors may apply to court for an order that the company be placed under the judicial management of a person known as a judicial manager.

In this case, the business and property of the company will be managed by a judicial manager. As per Section 227G (1) of the Companies Act, the judicial manager shall take into his custody or control all the property to which the company is or appears to be entitled. Section 227G(2) goes on to state that, during the period for which the order is in force, all the powers and duties of the directors shall be exercised and performed by the judicial manager and not by the directors. He may do all such things as are necessary for the management of the affairs of the company and shall do all such things as the court may sanction.

Role of receivers or managers in case of receiverships:

Receivership is a type of corporate bankruptcy in which a receiver is appointed by bankruptcy courts or creditors to run the company. The ultimate aim of a receivership is to pay off creditors on whose behalf the receiver is appointed and the receiver or manager's function is accordingly to gather in the assets, realise the assets and pay off the creditors in question. The receivers are typically vested with wide ranging powers including the power to conduct the business of the company, which makes it possible for a receiver to carry on the business of the company with the purpose of rehabilitating the company and to the extent that the company is then able to pay off the creditors, a corporate rescue may be effected.

INDIA

Corporate Insolvency Resolution Process:

During the Resolution Period, the entire management of the debtor and custody of the assets of the debtor are placed in the hands of a resolution professional to ensure the protection of the assets of the debtor. The officers of the corporate debtor shall report to him. He is further vested with diverse powers ranging from executing contracts and documents in the name of the corporate debtor to appointing accountants, legal or other professionals for managing the operations of the corporate debtor.

The resolution professional also constitutes a committee of the creditors and conducts the meetings of the creditors committee wherein the all the resolution plans are laid down to bring the corporate debtor out of insolvency. This plan needs to be approved by 75% of the voting share of the financial creditors within the prescribed time, failing which, the corporate debtor must undergo liquidation.

Liquidation:

When corporate debtor initiates liquidation, the resolution professional assumes the role of the liquidator. He verifies all the claims of the creditors and takes over and evaluates the assets of the corporate debtor against which a report is prepared by him. He shall carry on the business of the corporate debtor for its beneficial liquidation. He can obtain professional assistance from any person or appoint any professional to help him in the discharge of his duties. Moreover, he can institute and defend any suit or legal proceedings in the name of the corporate debtor. He shall take all such actions, steps or sign, execute and verify any paper, deed, receipt document, petition, affidavit or any other instrument as may be necessary for liquidation, distribution of assets and in discharge of his duties.

Voluntary Liquidation:

An insolvency professional shall act and assume the role of a liquidator in case of voluntary liquidation. Where the affairs of the corporate person have been completely wound up and its assets liquidated, the liquidator shall make an application to the Adjudicating Authority for the dissolution of such corporate person.

Fast track Corporate Insolvency:

The insolvency professionals engaged in fast track corporate insolvency shall have the same duties, powers and role as in the case of corporate insolvency resolution process.

Individual bankruptcy:

- Fresh start process:

A resolution professional can make an application for a fresh start on behalf of the debtor provided that the eligibility provisions mentioned in the Code in this regard are fulfilled. The resolution professional shall examine the application and submit a report to the Adjudicating Authority, either recommending acceptance or rejection of the application. He shall also provide a copy of the report to the debtor.

The report shall contain details of qualifying debts and liabilities eligible for discharge. The resolution professional may call for additional information in connection with the application from the debtor.

- Insolvency Resolution process:

The resolution professional shall examine the application made

under this process within ten days of his appointment and submit a report to the Adjudicating Authority recommending acceptance or rejection of the application. The resolution professional shall examine the application and ascertain that the application satisfies the requirements set out in the Code and that the applicant has provided information and given explanations sought by the resolution professional.

Once the application is admitted, the resolution professional shall invite claims from the creditors in respect of which he shall prepare the list of creditors. He shall hold the meeting of the creditors and get the repayment plan approved by more than three-fourth in value of the creditors present in person or by proxy. He shall also submit the repayment plan along with his report on such plan to the Adjudicating Authority.

MONITORING OF INSOLVENCY PROFESSIONALS

Monitoring of Insolvency Professionals is very important to ensure that they adhere to the prescribed standards and code of ethics while performing their duties as well as to ensure their effectiveness in the insolvency regime. The monitoring mechanism of Insolvency Professionals in different countries is as follows:

UNITED STATES OF AMERICA (USA)

The United States Trustee monitors bankruptcy trustees through the following reports.

A. Initial Financial Report

The Initial Financial Report ("Initial Report") is due 14 days after the petition is filed. It is submitted only to the U.S. Trustee (due to the sensitive information contained in this report) with a copy provided to any committee appointed in the case.

The Initial Report consists inter-aliaof the following:

1) Latest fiscal year financial statements and tax returns.
2) Balance sheet as of the end of the month immediately prior to filing.
3) Profit and loss statement (statement of operations)
   a) for the month immediately prior to the month in which the order for relief was entered.
   b) and a year-to-date statement cover the period ending for that month.
4) Evidence of insurance and the Insurance & Environmental Risk Questionnaire.
5) Projections that covers the first 180 days of post-petition operations.
6) Information concerning debtor in possession account(s).

B. Monthly Operating Reports (Non-Small Business Cases)

A Monthly Operating Report must be submitted for each calendar month (or portion thereof) after the petition is filed until a plan is confirmed or the case is dismissed or converted. It is due 21 days after the end of the month covered by the report. The information must pertain to the period from the petition date through the end of the reporting period.

The Monthly Operating Report inter-alia consists of the following:

1) Cash Receipts and Disbursements Statements (Form 2-B).
2) Balance Sheet (Form 2-C).
3) Profit and Loss Statement (Form 2-D).
4) Supporting Schedules (Form 2-E) including aspects such as insurance, tax, certain payments including payments to attorneys etc.
5) Quarterly Fee Summary (Form 2-F).

UNITED KINGDOM (UK)

- Desk-top monitoring

Firms selected for desktop monitoring will be asked to complete a compliance questionnaire and to submit various documents and records to Practice Monitoring Directorate for inspection. After assessing this documentation, Practice Monitoring Directorate will consider whether a monitoring visit is necessary. In addition, a number of firms will be selected on a random basis for visits in order to confirm the accuracy of the information supplied on the compliance questionnaire. Firms that fail to supply the requested information will also be scheduled for a monitoring visit.

- All IPs are subject to monitoring visits (on-site visits) from their respective RPBs (at least once every six years, sometimes earlier if considered necessary)
- Monitoring seeks to establish whether IPs are adhering to legislation and accepted standards including:
  - Insolvency Code of Ethics
  - SIPs (Statement of insolvency practice)
  - Insolvency Guidance Practice

CANADA

The Office of the Superintendent of Bankruptcy (OSB) is responsible for protecting the integrity of Canada's insolvency system. They are engaged in functions of licensing, regulating and overseeing the conduct of the trustee profession and also in monitoring compliance of all parties with the Bankruptcy Insolvency Act (BIA).

The OSB ensures that Licensed Insolvency Trustees:

- have a solid base of knowledge and experience in the insolvency industry before they are eligible to apply for a licence.
- comply with the applicable legislation, regulations and directives, which protect the public.
- are subject to ongoing oversight via regular reviews, audits and inspections and adherence to standards of practice pursuant to the BIA and its General Rules, including the Code of Ethics for Trustees.
- when compliance concerns arise, are subject to investigation and appropriate discipline, including possible licence suspension, cancellation or other legal consequences.

SINGAPORE

Currently, the licensing of public accountants and "approved liquidators" is performed by the Registrar of Public Accountants through the Accounting & Corporate Regulatory Authority (ACRA). Where such persons are appointed as trustees in bankruptcy, their conduct is supervised by the Official Assignee. In so far as they are appointed as liquidators, they come under the joint supervision of the Registrar of Companies (the "Registrar") and the Official Receiver.

These are the main ways in which the conduct of office-holders in insolvency proceedings is regulated:

1. the civil liability regime for office-holders, under which they may be held liable for the breach of a statutory or common law duty imposed on the relevant office or under the terms of their appointment.
2. the criminal sanctions that may be imposed on the office-holder for failure to comply with his or her statutory duties. One such example would be Section 227K(3) of the Companies Act, which makes it an offence for a judicial manager to omit issuing the relevant notifications relating to the making of a judicial management order.
3. there is supervision and control by the court and/or by the

Official Assignee or Official Receiver.

INDIA

The Insolvency and Bankruptcy Board of India (IBBI) regulates and monitors the activities of the Insolvency Professionals (IPs) as well as the Insolvency Professional Agencies (IPAs) with whom the Insolvency Professionals enrol themselves.

The IBBI has laid down the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 that lay down the registration and eligibility procedures of the Insolvency Professionals, temporary surrender of certificate of membership, disciplinary proceedings and code of conduct relating to Insolvency Professionals.

Moreover, the Board has also provided powers to the Insolvency Professional Agencies (IPAs) to lay down bye-laws wherein the IPAs may provide for additional requirements to be fulfilled by the members for registration,duties of the members, monitoring mechanism of members, grievance redressal mechanism, disciplinary proceedings, surrender of professional membership etc.

REMUNERATION

Keeping in mind, the onerous task and duties taken up by Insolvency Professionals in the field of insolvency and bankruptcy, it is important that they are remunerated in line with the nature and complexity of the cases. The remuneration process in different countries is as follows:

UNITED STATES OF AMERICA (USA)

Limitation on compensation of trustee

a) In a case under chapter 7 or 11, the court may allow reasonable compensation under section 330 for the trustee's services as follows:

Money disbursed or turned over	Percentage of the amount allowed as reasonable compensation
On the first $5,000 or less	upto 25%
Excess of $5,000 but not in excess of $50,000	10%
Excess of $50,000 but not in excess of $1,000,000	5%
Excess of $1,000,000	3%

(b) If more than one person serves as trustee in the case, the aggregate compensation of such persons for such service may not exceed the maximum compensation prescribed for a single trustee by subsection (a) as mentioned above, as the case may be.

(c) The court may deny allowance of compensation for services or reimbursement of expenses of the trustee, if the trustee fails to make diligent inquiry into facts.

Administrative Fee

To review bankruptcy and oversee the meeting of creditors (also called the 341 hearing), the Chapter 7 trustee gets paid a flat $60 administrative fee. The trustee's administrative fee is paid out of your initial court filing fee.

If there is a no-asset Chapter 7 bankruptcy, the trustee's only compensation is the administrative fee. But if the creditors are entitled to a distribution, the trustee also receives a commission from the amounts disbursed.

UNITED KINGDOM (UK)

Administration

The basis for fixing the administrator's remuneration is set out in Rule 2.106 of the Insolvency Rules 1986, which states that it shall be fixed either:

- as a percentage of the value of the property which the administrator has to deal with, or
- by reference to the time properly given by the administrator and his staff in attending to matters arising in the administration.

Insolvent Liquidations and Bankruptcies

The basis for fixing the remuneration is broadly the same for both insolvent liquidations and bankruptcies. The rules state that the remuneration shall be fixed either:

- as a percentage of the value of the assets which are realised or distributed or both, or
- by reference to the time properly given by the office holder and his staff in attending to matters arising in the insolvency.

Members' Voluntary Liquidations

The basis is the same as for insolvent liquidations, except that it is to be determined by the members of the company in general meeting and not by the creditors. In determining the basis of the liquidator's remuneration, the members must have regard to the same factors as the creditors do in an insolvent liquidation.

If the remuneration is not fixed in this way, it will be in accordance with the relevant statutory scale. In cases where the company goes into liquidation on or after 1 April 2004, the scale will be that set out in Schedule 6 to the Rules. In other cases it will be the scale laid down for official receivers in Schedule 2 to 6 the Insolvency Regulations 1994, which is still deemed to be applied in such cases.

Voluntary Arrangements

The fees, costs, charges and expenses which may be incurred for any of the purposes of a voluntary arrangement are as follows:

- any disbursements made by the nominee prior to the arrangement coming into effect, and any remuneration for his services as such agreed between himself and the company (or the administrator or liquidator, as the case may be) or the debtor (or the official receiver or trustee, as the case may be);
- any fees, costs, charges or expenses which
  - are sanctioned by the terms of the arrangement, or
  - would be payable, or correspond to those which would be payable, in an administration, winding up or bankruptcy (as the case may be).

Receiverships

In the case of a receiver appointed over the property of a company, there is provision under section 36 of the Insolvency Act 1986 for the court to fix the remuneration of the receiver on application by the liquidator.

Other types of appointment

Other appointments which may be encountered include receivers, special managers and provisional liquidators appointed by the court. In these cases the remuneration of the office holder is fixed by the court.

CANADA

A Licensed Insolvency Trustee (LIT) is paid under the Bankruptcy and Insolvency Act (BIA) pursuant to the Bankruptcy and Insolvency General Rules. In some cases an individual may pay higher fees when working with other professionals who may not be regulated and are offering debt solution services outside of the BIA.

Section 39 of Bankruptcy and Insolvency Act covers the provisions of remuneration. The gist of the provisions is listed below:

(1) The remuneration of the trustee shall be voted by ordinary resolution at any meeting of creditors.

(2) Where the remuneration of the trustee has not been fixed under

subsection (1), the trustee may insert in his final statement and retain as his remuneration a sum not exceeding 7½% of the amount remaining out of the realization of the property of the debtor after the claims of the secured creditors have been paid or satisfied.

(3) Where the business of the debtor has been carried on by the trustee or under his supervision, he may be allowed special remuneration as the creditors authorize or in the case of a proposal, as agreed by the debtor, or in the absence of agreement with the debtor, the amount approved by the court.

(4) Where the case is undertaken by two or more trustees acting in succession, the amount shall be apportioned between them in accordance with the services rendered by them and in the absence of any agreement between the trustees, by the court.

(5) On application by the trustee, a creditor or the debtor, the court may make an order increasing or reducing the remuneration.

SINGAPORE

Sections 268(2) and 268(3) of the Act provide three alternate means to liquidators for settling their remuneration. The relevant sections are reproduced below:

Section 268 -

(2) A provisional liquidator, other than the Official Receiver, shall be entitled to receive such salary or remuneration by way of percentage or otherwise as is determined by the Court.

(3) A liquidator, other than the Official Receiver, shall be entitled to receive such salary or remuneration by way of percentage or otherwise as is determined –

(a) by agreement between the liquidator and the committee of inspection, if any;

(b) failing such agreement or where there is no committee of inspection by a resolution passed at a meeting of creditors by a majority of not less than 75% in value and 50% in number of the creditors present in person or by proxy and voting at the meeting and whose debts have been admitted for the purpose of voting, which meeting shall be convened by the liquidator by a notice to each creditor to which notice shall be attached a statement of all receipts and expenditure by the liquidator and the amount of remuneration sought by him; or

(c) failing a determination in a manner referred to in paragraph (a) or (b), by the Court.

INDIA

Fee in case of corporate insolvency resolution process:

In India, no fee has been prescribed for Insolvency Professionals in respect of corporate insolvency resolution process. The Insolvency Professional has to therefore, make an objective assessment on his own.

Fee in case of liquidation:

Regulation 4 of Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016provides for Liquidator's fee which is enumerated below:

(1) The fee payable to the liquidator shall form part of the liquidation cost.

(2) The liquidator shall be entitled to such fee and in such manner as has been decided by the committee of creditors before a liquidation order is passed under sections 33(1)(a) or 33(2).

(3) In all cases other than those covered under sub-regulation (2), the liquidator shall be entitled to a fee as a percentage of the amount realized net of other liquidation costs, and of the amount distributed, as under:

Amount of Realisation / Distribution (In rupees)	Percentage of fee on the amount realized / distributed			
	in the first six months	in the next six months	in the next one year	Thereafter
Amount of Realisation (exclusive of liquidation costs)				
On the first 1 crore	5.00	3.75	2.50	1.88
On the next 9 crore	3.75	2.80	1.88	1.41
On the next 40 crore	2.50	1.88	1.25	0.94
On the next 50 crore	1.25	0.94	0.68	0.51
On further sums realized	0.25	0.19	0.13	0.10
Amount Distributed to Stakeholders				
On the first 1 crore	2.50	1.88	1.25	0.94
On the next 9 crore	1.88	1.40	0.94	0.71
On the next 40 crore	1.25	0.94	0.63	0.47
On the next 50 crore	0.63	0.48	0.34	0.25
On further sums realized	0.13	0.10	0.06	0.05

(4) The liquidator shall be entitled to receive half of the fee payable on realization under sub-regulation (3) only after such realized amount is distributed.

CONCLUSION

The effective role of insolvency professionals calls for multiple skills in the field of finance, people management, court procedures, stakeholder management, business dynamics, strategic foresight, business valuation and so on. This requires a right team with combination of experts under the overall supervision of insolvency professional. More over the insolvency resolution process is tightly time bound and the herculean task of completing the same with the team of experts and with the co-operation of debtor and creditor is going to leave a very positive impact on the overall Economy in times to come.

The Regulators, adjudicating authorities and the insolvency professionals are still in the learning stage as the law is at infancy stage now, there are going to be challenges to all of them in making the regulations more effective and stakeholder friendly, in manner of dealing and disposal of cases and in acquiring the skill sets that is desired for successful insolvency resolution process. CS

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ARTICLE

Role of Insolvency Professionals in Corporate Insolvency Resolution Process

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ROLE OF IPS: HISTORICAL PERSPECTIVE

Laws pertaining to insolvency have, historically, in India as well as in the UK, been developed in the context of individuals, and later extended to companies. The US law, which developed largely out of the UK law, took a pro re-organisation stance, and therefore, are known more because of the so-called Chapter 11 (on the lines of which our own Sick Industrial Companies Act was drawn) rather than the liquidation provisions. Irrespective of the jurisdiction or the subject matter of the law, an insolvency resolution process has always needed an agency to execute the process, the primary difference being whether such agency was an officer of the court, or an appointee of the creditors :

This article examines the role of insolvency professionals (IPs) in the process of corporate insolvency resolution. While an insolvent company essentially comes under the creditors' discretion, the IP becomes the nodal agency that brings the creditors together, ensures the going-concern nature of the insolvent during the resolution process, preserves assets and, where needed, enhances the value of assets by challenging questionable transfers of assets or creation of obligations, and above all, plays an enabling role in the framing of the resolution plan. It may be intuitive to think of the IP as an agency imposed by some or other creditors, and therefore, have the upfront risk of being taken as anti-debtor, it is important to understand that the IP plays the significant role of cementing together the interests of the corporate debtor and the creditors.

1. The Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920 provided for appointment of official assignees/official receivers for the purpose of carrying out relevant procedures under the Acts – see section 17 of the PTIA, 1909 and section 57 of the PIA, 1920.
2. In case of companies, section 448 of the Companies Act, 1956 provided for appointment of official liquidators attached to High Court for carrying out liquidation of those companies which are ordered to be wound up by the High Court. The Companies (Second Amendment) Act, 2002 extended the eligibility [which never came into force] to be appointed as official liquidator, by permitting the appointment of a professional, from a panel of chartered accountants, advocates, company secretaries, costs and works accountants, or firms, or bodies corporate consisting of such professionals, as empanelled with the Central Government. The Companies Act, 2013, however, brought this change vide section 275. A "company liquidator", whether in case of winding up by NCLT or voluntary winding up, has to be appointed from a panel of professionals maintained by the Central Government. With the amendments made by the Insolvency and Bankruptcy Code (the Code or IBC), this section will now be relevant only in case of compulsory winding-up other than on grounds of inability to pay.
3. Under the provisions of the SICA, 1985, an "operating agency" would aid in the preparation of scheme for rehabilitation of the sick company. "Operating agency", as defined under section 2, meant any public financial institution, State level institution, scheduled bank or any other person as may be specified by general or special order as its agency by the BIFR. It may be relevant to mention, inasmuch as the Companies (Second Amendment) Act 2002 sought to merge revival provisions into the Companies Act, the said amending Act defined the term "operating agency" as any group of experts

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consisting of persons having special knowledge of business or industry in which the sick industrial company is engaged and included public financial institution, State level institution, scheduled bank or any other person as may be specified by the NCLT.

4. The Companies Act, 2013 contains provisions for revival and rehabilitation of sick companies under Chapter XIX. Section 259 provides for appointment of "administrators" by the NCLT from a databank maintained by the Central Government or any institute or agency authorised by the Central Government in a manner as may be prescribed consisting of the names of company secretaries, chartered accountants, cost accountants and such other professionals as may, by notification, be specified by the Central Government. These provisions now stand deleted by the IBC.

The above would make it evident that while a nodal agency has always been present in the resolution or liquidation process, there has been a gradual tendency to enhance professional involvement in the corporate insolvency procedures. However, the need of a specialized line of profession focused solely on the areas of insolvency law and practice was always felt, alongwith the necessity of revamping the old laws. The IBC, 2016 addresses this need by introducing IPs in the individual and corporate insolvency resolution processes, individual bankruptcy process and corporate liquidation process as well.

NEED FOR SPECIALIZED INSOLVENCY PROFESSIONALS

The need of specialized professionals to conduct the resolution and liquidation processes has been emphasized unequivocally. The **UNCITRAL Legislative Guide on Insolvency Law**[1] recognizes the role of an "insolvency representative" as follows:

> "However appointed, the insolvency representative plays a central role in the effective and efficient implementation of an insolvency law, with certain powers over debtors and their assets and a duty to protect those assets and their value, as well as the interests of creditors and employees, and to ensure that the law is applied effectively and impartially. Accordingly, it is essential that the insolvency representative be appropriately qualified and possess the knowledge, experience and personal qualities that will ensure not only the effective and efficient conduct of the proceedings and but also that there is confidence in the insolvency regime."

In **"Orderly and Effective Insolvency Procedures"**[2] by International Monetary Fund, the role of a liquidator or an administrator has been appropriately described, however, with a suitable caution –

> "The liquidator and the administrator play a central role in the effective implementation of the law. Although their respective roles differ substantially, they are similar in one important respect. As court-appointed officials, they have an obligation to ensure that the law is applied effectively and impartially. Moreover, since they normally have the most information regarding the circumstances of the debtor, they are in the best position to make informed decisions. That does not mean, however, that they are a substitute for the court: due process requires that a dispute between the liquidator and an interested party be adjudicated by a court of competent jurisdiction. Even in countries where there are serious problems with the capacity of the judiciary, there is a limit to the amount of authority that the law can confer upon these officers."

[1] http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf

[2] http://www.imf.org/external/pubs/ft/orderly/#institu

The **Bankruptcy Law Reforms Committee,** the recommendations of which has led to the enactment of the Code, in its Final Report[3], emphasises the role of an insolvency professional as follows –

> "In an insolvency and bankruptcy resolution process driven by the law there are judicial decisions being taken by the adjudicator. But there are also checks and accounting as well as conduct of due process that are carried out by the IPs. Insolvency professionals form a crucial pillar upon which rests the effective, timely functioning as well as credibility of the entire edifice of the insolvency and bankruptcy resolution process.
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> . . .
>
> In administering the resolution outcomes, the role of the IP encompasses a wide range of functions, which include adhering to procedure of the law, as well as accounting and finance related functions. The latter include the identification of the assets and liabilities of the defaulting debtor, its management during the insolvency proceedings if it is an enterprise, preparation of the resolution proposal, implementation of the solution for individual resolution, the construction, negotiation and mediation of deals as well as distribution of the realisation proceeds under bankruptcy resolution. In performing these tasks, an IP acts as an agent of the adjudicator. In a way the adjudicator depends on the specialized skills and expertise of the IPs to carry out these tasks in an efficient and professional manner.
>
> The role of the IPs is thus vital to the efficient operation of the insolvency and bankruptcy resolution process. A well functioning system of resolution driven by IPs enables the adjudicator to delegate more and more powers and duties to the professionals. This creates the positive externality of better utilisation of judicial time. The worse the performance of IPs, the more the adjudicator may need to personally supervise the process, which in turn my cause inordinate delays. Consumers in a well functioning market for IPs are likely to have greater trust in the overall insolvency resolution system. On the other hand, poor quality services, and recurring instances of malpractice and fraud, erode consumer trust."

In tune with the recommendation of the Bankruptcy Law Reforms Committee, the Code requires an insolvency professional to play a catalytic role in corporate insolvency process (as Resolution Professional), corporate liquidation process (as Liquidator), individual insolvency resolution (as Resolution Professional) and individual bankruptcy process (as Bankruptcy Trustee). This article focuses solely on the role of an insolvency professional as "resolution professional" in the corporate insolvency resolution process. However, before getting into the provisions of the Code, 2016, it would be interesting to have a look at the provisions of US and UK laws regarding the roles expected from an insolvency representative; notably, the two laws are different in their approach – the US law follows "debtor-in-possession" approach, while the UK law has creditor-in-possession theme.

ROLE OF AN INSOLVENCY PROFESSIONAL: DIFFERENCE UNDER UK AND US INSOLVENCY LAWS

The Insolvency Act, 1986 – UK

In UK, the concept of the licensed insolvency practitioner was first introduced in the mid 1980s and formalised in statutory provisions which now form Part XIII of the UK Insolvency Act, 1986[4]. The

[3] http://finmin.nic.in/reports/BLRCReportVol1_04112015.pdf

[4] Technical Manual of Insolvency Service -- https://www.insolvencydirect.bis.gov.uk/technicalmanual/Ch49-60/Chapter%2055/Chapter55.htm

administration (equivalent of insolvency resolution under Indian law) under the UK Insolvency Act, 1986 is conducted by an administrator. The administrator, as Schedule B1 to the Act states, is an officer of the Court, whether or not appointed by the Court. Schedule B1 specifies that the administrator of a company must perform his functions with the objective of "rescuing the company as a going concern", unless he thinks that it is not reasonably practicable to achieve that objective or that achieving a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration) would be preferable. Where the administrator thinks that it is not reasonably practicable to achieve either of the objectives, he may proceed to realise property in order to make a distribution to one or more secured or preferential creditors, provided that it does not unnecessarily harm the interests of the creditors of the company as a whole.

Paragraph 49 of Schedule B1 requires that the administrator shall make a statement setting out proposals for achieving the purpose of administration; and the proposal may include a voluntary arrangement (popularly called CVA) under the Act, or a proposal for a compromise or arrangement to be sanctioned under the Companies Act, 2006. The administrator has been vested with the power to do anything necessary or expedient for the management of the affairs, business and property of the company. The administrator of a company may call a meeting of members or creditors of the company. The administrator of a company shall on his appointment take custody or control of all the property to which he thinks the company is entitled.

US Code: Title 11 – Bankruptcy

Chapter 11 of the US Bankruptcy Code deals with reorganization (equivalent to insolvency resolution in India and administration in UK law). The reorganisation framework envisaged under the US Bankruptcy Code follows "debtor-in-possession" approach; hence the nature of duties which a Court-appointed trustee has to perform is different in this case. Section 1106 specifies the duties of a trustee appointed by the Court. He is required to perform the duties of a trustee in a liquidation case specified in section 704 (2), (4), (6), (7), (8), and (9). These include – to be accountable for all property received, to investigate the financial affairs of the debtor, to furnish such information concerning the estate and the estate's administration as is requested by a party in interest (unless the Court orders otherwise), and to file with the Court periodic reports and summaries of the operation of the business of the debtor. The section also casts certain investigative duties on the trustee – to investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business, and the desirability of the continuance of the business, and any other matter relevant to the case or to the formulation of a plan. Section 1107 places a debtor-in-possession in the shoes of a trustee in every way. The debtor is given the rights and powers of a Chapter 11 trustee. He is required to perform the functions and duties of a Chapter 11 trustee, except the investigative duties.

ROLE OF INSOLVENCY PROFESSIONAL IN CORPORATE INSOLVENCY RESOLUTION PROCESS UNDER THE CODE, 2016

The corporate insolvency resolution process envisaged under the Code, 2016 is prominently a creditor-driven process, whereby the decision to let the debtor survive or to liquidate the same rests on a collective body of the creditors, i.e. the committee of creditors. Since the resolution professional (RP) is an appointee of the creditors, and the IP takes over the management and supervision of the company in insolvency, the business of the company may be said to be in creditors' possession during the resolution process. Unlike during the liquidation process, there is no vesting of assets and property in the RP, but the RP takes over the management of the business. Hence, the approach is similar to that under the UK Insolvency Act, 1986. The assets of the corporate debtor are taken into custody by the RP chosen by the committee of creditors and the management of the affairs of the corporate debtor too, vests in the RP. Note that prior to appointment of a RP, an interim resolution professional (IRP) is appointed to perform the aforesaid functions till the committee of creditors is constituted and the RP is appointed. The role played by the RP (including an interim resolution professional) has been explained in the following paragraphs.

Management of the affairs of the corporate debtor

Section 17 of the Code, 2016 provides for vesting of the management of the affairs of the corporate debtor in the hands of interim resolution professional, which is natural consequence of a creditor-in-possession regime. The concept of 'debtor-possession' implies that the debtor continues to remain in possession of the management of the entity during the resolution process. This was the approach under SICA, as SICA was evidently drawn on the basis of the US Bankruptcy Code. The N L Mitra Committee advocated a deviation from the approach as follows:

> "The most critical provision in the SICA is that the promoter/ management bringing the entity to the BIFR remains in possession and creates incentives for stripping off assets. Therefore, creditors are against most restructuring proposals. It is therefore recommended that if the owner/promoter/ existing management files the petition for the bankruptcy of a company, the possession of the company with its entire assets and liabilities must be vested with the Trustee immediately without any loss of time. That ensures the first principle of maximisation of asset value. If a creditor files the petition the possession of the company's assets and liabilities shall vest on the Trustee as soon as the petition is allowed."

The Code adopted the theme of "creditor-in-possession", and therefore, vests the RP with the management of the affairs of the corporate debtor, starting from the date of appointment itself. Further, the powers of the board of the directors of the corporate debtor shall stand suspended, and the same shall be exercised by the interim resolution professional. However, it is important to note that the powers of the interim resolution professional in such capacity is not unfettered – the powers of the interim resolution professional/resolution professional is subject to the authority of the committee of creditors, as discussed in later paragraphs.

The authors, in their *"Law Relating to Insolvency and Bankruptcy Code 2016"*[5], discuss that the corporate boards in India are more often supervisory boards while the day-to-day functioning of the entity is the responsibility of the executive management. Section 17 though provides for suspension of the powers of the board of directors, yet clearly says that all officers and employees will report to the interim resolution professional. Hence, the suspension of the powers of the board of directors must have no bearing on the executive machinery. Note that the executive machinery may typically be headed by the managing director. Therefore, the managing director, who works under the supervision of the board of directors, will now work under the supervision of the IRP. Likewise,

[5] Vinod Kothari & Sikha Bansal, Taxmann, 2016

executive directors will cease to have the powers of "directors" but will continue their respective functional roles, under the supervision of the interim resolution professional.

That it is not the administrator who starts managing the company, but the existing management starts working under the supervision of the administrator, is clear from reading of Item 64 of Schedule B1 to the UK Insolvency Code, reading as follows:

> 64. (1) A company in administration or an officer of a company in administration may notexercise a management power without the consent of the administrator.
> (2) For the purpose of sub-paragraph (1)—
> (a) "management power" means a power which could be exercised so as tointerfere with the exercise of the administrator's powers,
> (b) it is immaterial whether the power is conferred by an enactment or aninstrument, and
> (c) consent may be general or specific.

It will be impractical for the RP or the administrator to start managing the day-to-day operations of the entity. Neither does the RP have the technical expertise to do so, nor is the replacement of existing management at all conducive to the idea of preserving or maximising the going concern value of the entity. Of course, the RP has wide powers, but the issue is that the power must be exercised in the interest of the entity, and not as a matter of power play. In rulings like RAB Capital plc v. Lehman Brothers (International) Europe (2008) EWHC 2335 (Ch), courts have taken very liberal view on the powers of the administrator; however, it is a consistent position in the UK that the administrator does not dismiss the existing management[6].

Sections 18, 20 and 25 of the Code talk about duties and functions of the RP. These may seem to suggest that the actual day-to-day operations of the entity will be carried out by the RP. However, the RP has to preserve the existing management. The RP has powers to appoint agencies to carry out his management function. The idea behind the law is to put the RP effectively in the steering position, so that the going concern is in the creditors' control.

In order to facilitate the interim resolution professional/resolution professional in fulfilling his responsibility of managing the affairs of the corporate debtor, sections 20 and 25 provide authority to interim resolution professional/resolution professional to do necessary acts, including the following –

(i) to enter into contracts on behalf of the corporate debtor or to amend or modify the contracts or transactions which were entered into before the commencement of corporate insolvency resolution process;
(ii) to raise interim finance, subject to certain conditions;
(iii) to issue instructions to personnel of the corporate debtor as may be necessary for keeping the corporate debtor as a "going concern" (see discussion under the next heading);
(iv) to appoint accountants, legal or other professionals as may be necessary; etc.

"It will be impractical for the RP or the administrator to start managing the day-to-day operations of the entity. Neither does the RP have the technical expertise to do so, nor is the replacement of existing management at all conducive to the idea of preserving or maximising the going concern value of the entity. Of course, the RP has wide powers, but the issue is that the power must be exercised in the interest of the entity, and not as a matter of power play."

However, section 28 acts as a limit to the authority of the interim resolution professional/resolution professional – it lists out certain acts which shall not be undertaken without the prior approval of the committee of creditors. The acts include – raising interim finance in excess of limits approved by the committee of creditors, creating security interest on the assets of the corporate debtor, changing the capital structure of the corporate debtor, undertaking related party transactions, amending constitutional documents of the corporate debtor, amongst others.

Management of the entity as "going concern"

The Code emphasises that the interim resolution professional shall manage the operations of the corporate debtor as a "going concern" (Section 20). "Going concern" refers to an enterprise continuing in operation for the foreseeable future. It is assumed that the enterprise has neither the intention nor the necessity of liquidation or of curtailing materially the scale of the operations[7]. The provision sets out the guiding principle for the interim resolution professional or the resolution professional managing the corporate debtor during the resolution process. The interim resolution professional/resolution professional, therefore, shall administer the company "as is", without making any material alterations in the scale of operations of the company or selling off material value of its assets which may endanger any possibility of the revival of the corporate debtor.

Custody of the assets of the corporate debtor

Section 18 requires the interim resolution professional to take control and custody of any asset over which the corporate debtor has ownership rights and section 20 obliges the interim resolution professional to make every endeavour to protect and preserve

[6] Note the following comment from a Jones Day publication: "Opinion diverges over who is best placed to run the company (presuming there is not mismanagement or dishonesty). It is arguable that many insolvency cases are caused by some weakness in management. Moreover, the historical link between the insolvency to the displacement of management is very strong. …. Ironically, the UK has not really had experience with substantive stand alone reorganizations and perhaps the new legislation will highlight whether an insolvency practitioner can manage a business back to health and reorganization. However, the alternative is to identify the management weakness and intervene with expert advisors or help which in many ways mirror the skills of the insolvency practitioner." [http://www.jonesday.com/files/Publication/b0c886bd-6721-4c66-9213-db7f01ddb55f/Presentation/PublicationAttachment/96b1ebf1-2203-4577-bff4-8baf89f4e0d1/Comparison%20of%20Chapter%2011.pdf]

[7] See Para 10 of the Accounting Standard (AS) 1 (Disclosure of Accounting Policies), issued by the Institute of Chartered Accountants of India.

> Resolution professional prepares the information memorandum which serves as an input for the formulation of the resolution plan. The task of the resolution professional in respect of the resolution plan does not end here – section 30 of the Code, 2016 read with regulation 38 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 mandates that a resolution plan must confirm to certain minimum requirements.

the value of the property of the corporate debtor. Again, section 25 states that 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. The Code has also amended section 429 (1) of the Companies Act, 2013 empowering the NCLT to pass instructions to executory authorities for taking control and custody of assets, in case the RP is facing difficulties in doing so.

Here, the words "take control and custody" shall not be misinterpreted to mean taking control and custody of the assets for the purpose of disposal thereof – the objective of the provision is to move the custody and control of the assets from the directors to the interim resolution professional for the purpose of adequate monitoring and not as a pre-disposal measure. The view transpires from the very fact that the corporate debtor is presently at the stage of "resolution" and not "liquidation" – this also brings out the distinction between the roles played by an administrator and a liquidator.

Bringing the creditors together

The interim resolution professional shall constitute the committee of creditors after collation of all claims received against the corporate debtor and determination of the financial position of the corporate debtor (Section 21). The committee of creditors is the collective body of financial creditors of the corporate debtor which, by way of majority vote, decides on the ultimate fate of the corporate debtor, i.e. whether to resolve the insolvency or to liquidate the entity. The committee of creditors appoints resolution professional in its first meeting. The resolution professional is then entrusted with the task of convening and conducting the meetings of the committee of creditors during the resolution process. (Section 24).

Conducting the Corporate Insolvency Resolution Process

Section 23 states that 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. During the corporate insolvency resolution process period, the interim resolution professional/ resolution professional has to undertake the following activities –

(i) making public announcement of the insolvency resolution process in respect of the corporate debtor;
(ii) collection of all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor, including information relating to business operations, financial and operational payments, list of assets and liabilities;
(iii) receipt and collation of claims of creditors submitted pursuant to the public announcement;
(iv) constitution of the committee of creditors;
(v) convening and conducting the meetings of the committee of creditors;
(vi) filing necessary information with information utility;
(vii) preparation of information memorandum for facilitating the formulation of a resolution plan;
(viii) inviting prospective resolution applicants to put forward their resolution plans;
(ix) examining each resolution plan received so as to see whether the resolution plan meets the criteris enlisted under section 30 (2) and presenting the eligible resolution plans at the meetings of the committee of creditors;
(x) submission of the resolution plan approved by the committee of creditors to the adjudicating authority for approval of the latter;
(xi) making applications for avoidance of preference, undervalued, fraudulent transactions; etc.

Preparation of Information Memorandum

Section 29 requires that the resolution professional shall prepare an information memorandum in such form and manner containing such relevant information as may be specified by the Board for formulating a resolution plan. The IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, however, require that certain minimum information shall be provided to each member of the committee of creditors and any potential resolution application before the first meeting of the committee of creditors. This calls for preliminary preparation of information memorandum by the interim resolution professional. The information memorandum shall contain details on the basis of which a resolution plan may be

formulated. Regulation 36 (2) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 lists out the contents of the information memorandum.

Facilitating Resolution Plan

As mentioned in the preceding paragraph, the resolution professional prepares the information memorandum which serves as an input for the formulation of the resolution plan. The task of the resolution professional in respect of the resolution plan does not end here – section 30 of the Code, 2016 read with regulation 38 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 mandates that a resolution plan must confirm to certain minimum requirements. The resolution professional must examine each resolution plan received by him to confirm that each resolution plan –

(i) provides for the payment of insolvency resolution process costs in priority to the repayment of other debts of the corporate debtor and identifies specific sources of funds to pay the same;
(ii) provides for the repayment of the debts of operational creditors which shall not be less than the liquidation value due to operational creditors in priority to any financial creditor and before the expiry of thirty days after the approval of a resolution plan by the adjudicating authority;
(iii) provides for the repayment of the liquidation value due to dissenting financial creditors before any recoveries are made by the financial creditors who voted in favour of the resolution plan.
(iv) provides for the management and control of the affairs of the corporate debtor after approval of the resolution plan;
(v) the implementation and supervision of the resolution plan;
(vi) does not contravene any of the provisions of the law for the time being in force.

The resolution professional shall present to the committee of creditors for its approval such resolution plans which confirm the conditions as referred hereinabove. The resolution plan which is approved by the committee of creditors shall then be submitted by the resolution professional to the adjudicating authority. Where the resolution plan is approved by the adjudicating authority, the resolution professional shall forward all records relating to the conduct of the corporate insolvency resolution process and the resolution plan to the Insolvency and Bankruptcy Board of India to be recorded on its database.

The assessment of the fair values of assets, and a preparation of the liquidation value assessment is one of the key tasks at this stage. Resolution is the preferred alternative; liquidation is the ultimate. Therefore, a resolution plan has to offer to the stakeholders something better than what they would get in liquidation. There is a well-known "vertical test" used by UK Courts [for example, see T & N Limited, (2005) 2 BCLC 488] that in a resolution, a stakeholder cannot be put to prejudice apropos what he would get in liquidation. So, a creditor either votes on the resolution plan, and therefore, hopes to get a better deal out of a healthier borrower, or votes against (which includes not voting) the resolution plan, in which case, he gets an exit based on what would have been liquidation value of his claim, going by the priority order of distribution and the estimated fair value of the assets.

While the RP acts as the catalyst of the entire process, he is not the one who actually prepares the resolution plan. The plan is prepared by a "resolution applicant", who may either one of the lenders themselves, or an external consultant. A resolution plan is a rescue strategy. Turnaround strategy is always a bespoke solution to the case; it involves close scrutiny of assets, liabilities,

incomes and expenses. In terms of assets, the plan may provide for sale of non-core assets, or replacing owned assets by leased assets. In respect of liabilities, the plan may provide for conversion of the unsustainable debt into equity, or sacrifice of interest. The plan may involve curtailing expenditure, redirecting operations, etc. Very often, a restructuring plan may also involve alteration of product mix, product markets, etc.

Preparation of rescue plan may include rescue financing as well. Note that the Code gives uppermost priority in the liquidation waterfall to interest and principal on rescue financing. However, it is hoped that resolution applicants do not go ambitiously in restructuring plans for further capital infusion. This strategy has not worked in past SICA revivals or CDR cases. Instead, resolution applicants may provide for interim financing largely for paying off dissenting creditors, and therefore, reducing the burden of liability on the entity.

CONCLUSION

The following statement[8] sums up the importance of the role with insolvency professionals play in reorganisation or resolution of an entity:

> "It is conceivable for an insolvency system to function with minimal interventions by courts or government agencies. It is not conceivable for such a system to function effectively without specialists, especially for reorganization. "The probability of effective reorganization increases when agents of reorganization have the capacity to (a) decide whether rescuing business is feasible and to advise on alternative courses of action (liquidation, reorganization, creative combinations of these); and (b) to reorganize the company itself . . . ." Such capacities depend on a sufficient supply of expert labor. Public policy must therefore (a) find means to bring the best and brightest into the debt restructuring area, (b) regulate competition to constrain costs and reduce conflicts of interest, (c) remove financial and reputational barriers to insolvency professions, and (d) develop a regulatory system that delivers competency and integrity." CS

[8] Institutional Lessons from Insolvency Reforms in East Asia, Terence C. Halliday and Bruce G. Carruthers, available here: http://siteresources.worldbank.org/GILD/Resources/Halliday4.pdf; pg. last visited on 11th February, 2017.

ARTICLE

The Insolvency and Bankruptcy Code, 2016 - An analysis and Opportunities for Professionals under the Code

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BRIEF INTRODUCTION

The Insolvency and Bankruptcy Code, 2016 (in short 'Code') is a landmark legislation consolidating erstwhile SICA, 1985 and some provisions of the Companies Act. It is viewed as a 'Game Changer' and would have a long term impact on all stakeholders be it Banks, FIs, PSUs, Borrowers, Foreign Investors etc. The passing of the Code is an important milestone and paves the way for economic and banking reforms in the country. The Code has been fully implemented on and from 1st December, 2016 as most of the Regulations governing Corporate Insolvency Processes, Insolvency Professionals (IPs), Insolvency Professional Agencies (IPAs) and the Liquidation Process have come into force. The Code offers a lot of challenges and opportunities to the professionals be it CAs, CSs, lawyers and others.

The process of winding up of companies including sick companies has been a complex and time consuming one and often frustrating. For a long time a need has been felt for the enactment of an efficacious and comprehensive legislation to deal with corporate insolvency. The enactment of the Insolvency and Bankruptcy Code, 2016 coupled with setting up of the Insolvency and Bankruptcy Board of India and development of a specialized cadre of corporate insolvency professionals, will usher in a new era of corporate insolvency in India.

HISTORICAL BACKGROUND

The Code received Presidential Assent on 28th May, 2016 when the landmark Bill introduced in the Lok Sabha in November 2015 finally became an Act. The Code was enacted in the midst of soaring NPAs, falling GDP, bad credit perspective in the country and last but not the least the Mallya Saga. After issuance of the draft legislation various changes were made incorporating recommendations by the Joint Parliamentary Committee (in short 'JPC') in April 2016 after which the Code was passed in Lok Sabha on 9th May, 2016 and by the Rajya Sabha on 11th May, 2016. The approach towards passage of Bill together with efforts of JPC are praiseworthy and reflects the intent of Government to streamline the locked credits of Banks and resolve the NPA issue in our country. Most praiseworthy is the work by the Bankruptcy Reforms Law Committee who made the draft law with utmost precision which not only has clarity but also has a forward vision.

WHY THIS LAW AND OTHER LEGISLATIVE CHANGES

Corporate insolvency related issues have assumed greater significance in the light of the 'Mallya Saga'. The events clearly exposed the legal framework which could not arrest the misdemeanour. India is opening up internationally and concepts like 'Make in India', 'Ease of doing business' and others have been implemented to achieve popularity and for a favoured investment destination. Further, to meet international standards radical changes were made in October, 2015 in Indian Arbitration Law. Bankruptcy Code was also brought in December, 2015 in line with international laws. Further, key legislations like SARFAESI and RDDBFI Acts have been amended in June, 2016 to be more lender specific.

> Part III of the Code sets out the legal regime dealing with the insolvency mechanism for individuals and partnership firms and includes within its ambit, three processes, namely, the 'fresh start process', 'the insolvency resolution process' and 'bankruptcy'.

EXISTING LEGAL FRAMEWORK AND CHALLENGES

Existing laws governing Revival, Rehabilitation, Restructuring are covered under Sick Industrial Companies Act (SICA) and Companies Act (Winding Up). The Code consolidates and amend laws relating to revival, restructuring and winding up of the sick or debt oriented industries and companies as well as time bound resolution of corporate and individual bankruptcy. In short it is mother of all laws.

Before the implementation of Code, the legal system and remedies were available under SICA, SARFAESI, Companies Act and other laws i.e. provisions relating to Winding Up, Suits, Arbitration and JLF/CDR. These often turned out to be inadequate, not fully effective, non-implementable, costly and causing undue delays in recovery and resolution process. The parties involved took shelter under either of these laws as a result of which remedy pursued becomes unachievable. Four different forums i.e. High Courts, CLB (now NCLT, effective from 1.6.2016), BIFR and the DRTs, with overlapping jurisdiction gave rise to the systemic delays and complexities in the process of recovery.

HOW THE CODE OVERCOMES THE EXISTING CHALLENGES?

- The Code seeks to overcome the existing challenges by restricting the choice of forum to National Company Law Tribunal (NCLT);
- Once a case is filed under the Code, all avenues under other legislations in force are closed during moratorium period.
- The Code brings all the stakeholders to one platform to complete a resolution process within a definite time frame, failing which liquidation process initiates.
- NCLT / NCLAT as a focussed forum would deal with cases under the Bankruptcy Code as well as the Companies Act, 2013.
- With the enforcement of the Code the SICA Act has been repealed w.e.f 1-12-2016 and as a result both forums BIFR and AAIFR stand dissolved.

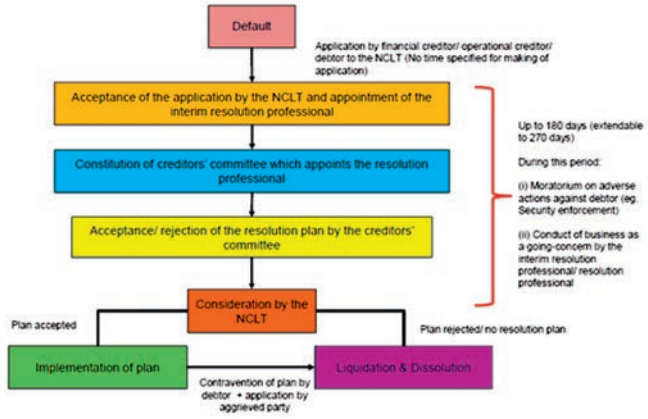
WHAT THE CODE SEEKS TO ACHIEVE

- The Code refurbishes prevailing bankruptcy laws and it is expected to:
  - improve ease of doing business in India;
  - change the negative perception of recovery and litigation in India;
  - facilitate better and faster debt recovery process for maximizing asset value;
  - facilitate stress-free and time-bound closure of businesses;
  - improve foreign investment and credit perspective;
  - facilitate investment leading to higher economic growth and development.
- Average time to resolve insolvency process in India is more than 4 years - Code seeks to cut down the time to less than a year

SOME KEY FEATURES IN THE CODE

- **Applicability:** The provisions of the Code are applicable to companies, limited liability entities, firms and individuals (i.e. all entities other than financial service providers). Corporate Insolvency includes two processes within its ambit, (i) Insolvency Resolution and (ii) Liquidation.
- **Who can initiate a corporate insolvency case under the Code:** The corporate insolvency resolution process ("CIRP") can be initiated by the corporate debtor itself, the financial creditors or operational creditors. For the purpose of the Code, financial creditors and operational creditors include persons resident outside India. A case can be filed if there is a default of Rs. 1 Lakh (minimum value prescribed can be increased to Rs. 1 crore by notification) for any debt.

Corporate Insolvency Resolution Process



During this process, an IP in his capacity as a resolution professional is required to manage the affairs of the corporate debtor and to drive the resolution process, while the powers of the board of directors of a company and/or managers of a LLP remain suspended.

- **Committee of Creditors (CC):** The Committee shall include the financial creditors and their voting rights shall be proportionate to the debts owed to them. All decisions of the Committee shall be taken by a vote of not less than 75% of voting share of Financial creditors. Operational creditors will have no decision making authority but have a right to be present in the Committee meetings.CC will have a dominant position for all actions under the Code including passing or rejecting a resolution plan. They can resolve to liquidate the corporate debtor during the insolvency resolution process [Section. 33(2)].
- **Timelines:** Section 12 of the Code provides that Corporate insolvency applications are to be decided within 180 days from date of admission or the insolvency commencement date. This can be extendable only once by additional 90

days and possible only when the committee of creditors pass a resolution by a vote of 75% of voting shares and when NCLT is satisfied with reasons for such extension. Strict timelines have been provided with a view to provide certainty to the process. [refer sec. 12 read with sec. 5(14) read with sec. 5(12)]. To maintain timelines it is imperative that NCLT/NCLAT are sufficiently equipped with sufficient number of Members, administrative support and infrastructure.

- **Moratorium and its effect:** Section 14 of the Code provides that from date of admission or the insolvency commencement date, NCLT shall grant moratorium during which any creditor action will be stayed. Hence:

(i) all civil proceedings i.e. Arbitration, Suits, Execution, SARFAESI, DRT action will stand dissolved including the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

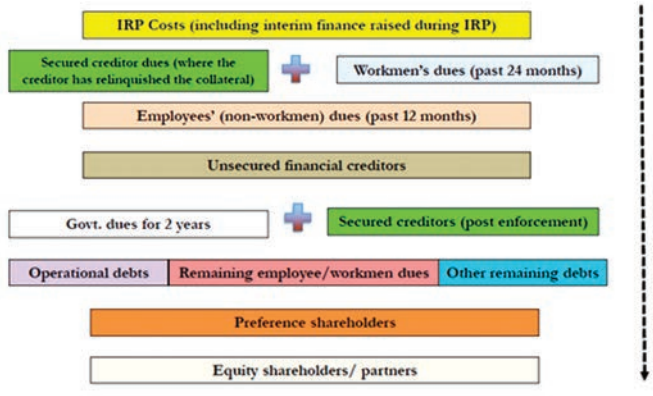
(ii) the debtor is prevented for transferring / alienating assets/ properties.

(iii) SARFAESI action had priority over winding up and other insolvency action; but with the moratorium , Banks and FIs will loose the SARFAESI advantage.

A creditor can realise its security interest under section 52(1)(b) after initiation of liquidation process i.e. after completion of resolution process (may be 180 days or max 270 days), however, for such time assets will be idle.

- **Corporate Liquidation kick starts**
  a) when no resolution plan is received by NCLT [section 33(1)(a)];
  b) when the resolution plan is rejected by NCLT [section 33(1)(b)];
  c) when there is a contravention of the resolution plan [section 33(3)]; and
  d) Based on vote of majority of the creditors [section 33(2)].

  For the purpose of the liquidation process, a Liquidation estate will be formed after liquidation order u/s 33 of the Code which shall include assets of the debtor.
- **Liquidation Estate and Scheme of Distribution:** Assets of Debtor will form part of the liquidation estate and distribution will take place as per Scheme of Distribution as follows:



In liquidation, the secured creditor can relinquish its security under section 52 of the Code.

- **NCLT / NCLAT:** National Company Law Tribunal (NCLT) shall be the Adjudicating Authority for companies, LLPs. Appeals shall lie to National Company Law Appellate Tribunal (NCLAT). NCLAT would also deal with orders passed by the Regulator with respect to IRPs/ RPs. Ministry of Corporate Affairs vide notification dated 1st June, 2016 has constituted the NCLT / NCLAT as a result of which Company Law Board (CLB) stands dissolved [sec. 466 of CA 2013]. NCLT has been constituted with eleven Benches, two at New Delhi and one each at Ahmedabad, Allahabad, Bengaluru, Chandigarh, Chennai, Guwahati, Hyderabad, Kolkata and Mumbai. Timely and speedy justice with a focussed approach is expected in times to come.
- **DRT / DRAT:** The Debt Recovery Tribunal (DRT) shall be the adjudicating authority with jurisdiction over individuals and partnership firms other than LLPs. Appeals therefrom would lie before Debt Recovery Appellate Tribunal (DRAT).
- **Insolvency and Bankruptcy Board of India:** The Board has been set up as the Regulator to regulate the Insolvency professionals and insolvency professional agencies.
- **Insolvency Professionals:** Insolvency professionals and insolvency professional agencies shall play leading role in the implementing the Code.
- **Insolvency Information Utilities** would collect, collate, authenticate and disseminate financial information from listed companies, financial and operational creditors of companies. Individual insolvency database will also be set up to prevent serial defaulters from misusing the system through information utilities.
- **Cross border insolvency:** Considering various corporate transactions including foreign investments and collaborations as well protecting country's interest , the Code attempts to address this by including provisions for cross border insolvency.
  - ✓ **Definition of 'property'** under the Code includes 'money, goods, actionable claims, land and every description of property situated in or outside India'.
  - ✓ Central Government can enter into agreements with any country outside India for enforcing Code.
  - ✓ Assets of the debtor located outside India (in countries with whom India has reciprocal arrangements) may also be included in the Insolvency Resolution Process and/ or liquidation.
- **Some important concepts / definitions**
  - ❖ "Default" means non-payment of debt in whole or part / instalment of the amount of debt which has become due and payable and is not repaid [Section 2(12)]
  - ❖ "Debt" means a liability or obligation in respect of a claim and includes a financial debt and operational debt [Section 2(11)]
  - ❖ "Claim" means a right to payment or a right to remedy for breach of contract, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured [Section 2(6)];
  - ❖ 'Dispute' includes a suit or arbitration proceedings [Section 5(6)]
  - ❖ Personal Guarantor means an individual who is surety in a contract of guarantee to a corporate debtor [Section. 5(22)]
  - ❖ 'Related party' means and includes director, partner, their relatives, key managerial persons (KMP), covers parallels and all levels to a corporate structure be it holding, subsidiary, associate company or a subsidiary of holding company, control through conduct, voting

rights, 20% control over voting rights in or by a CD, amongst others. [Section 5(24)]

- "Financial Creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to [Section 5(7)]
- "Financial Debt" [Section 5(8)] means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes-
  - (a) money borrowed against the payment of interest; .....
  - (d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease;
  - (h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit etc. issued by a bank or FI;
  - (i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;

CODE EXPECTED TO IMPROVE FOREIGN INVESTMENTS

The Code with the avowed objectives of time bound corporate insolvency process and recovery, will attract foreign investments and international investors to park their funds in India. While enactment of the Code will be a window opener for foreign investments, on ground and proven results of effective functioning of processes envisaged under the Code coupled with active and speedy functioning of NCLT/NCLAT will be a key factor to attract and sustain foreign investments in India.

INDIVIDUAL BANKRUPTCY

Part III of the Code sets out the legal regime dealing with the insolvency mechanism for individuals and partnership firms and includes within its ambit, three processes, namely, the 'fresh start process', 'the insolvency resolution process' and 'bankruptcy'. A case can be filed if there is a default of Rs. 1,000 (minimum value prescribed can be increased to Rs. 1 Lakh) for any debt (other than secured debt and 'excluded debt').

The process of resolving insolvency is similar for firms and for individuals as it is for Corporate Insolvency. In the case of individuals, however, the final resolution plan must have the consent of the debtor. As a new concept, an application for a fresh start process, can be made for any debt (other than secured debt, debt which has been incurred 3 months prior to the date of application for fresh start process and any 'excluded debt'). This is for small debtors whose gross annual income is less than Rs. 60,000/- and aggregate value of assets does not exceed Rs. 20,000/-.

Post declaration as Bankrupt, an individual shall not become director of any company, or take part in any affairs of the company, shall not create any charge on any asset and shall not be allowed to travel overseas [refer sec. 141 of the Code]; Restriction on overseas travel of bankrupt person, may require consequential provision in the Passport Act.

INVOCATION OF GUARANTEES

Whether Personal Guarantee or Corporate Guarantee can be invoked under the Code in case where application is filed against the Corporate Debtor is an important question. As per section 60 read with sections 5(8) and 79(14), in case of default by a Corporate Debtor (Borrower), both Corporate Guarantee and Personal Guarantee can be invoked as there is no restriction or prohibition for such invocation. Under section 5(8)(h) and 5(8)(i) the definition of the term "Financial Debt" includes the amount of any liability in respect of any of the guarantee or indemnity for any items under section 5(8) . Hence, Corporate Guarantee can be invoked and is covered in case of CIRP.

Under section 79(14) excluded debt includes (a) Liability to pay damages for negligence or breach of statutory or contractual legal obligation and (b) Liability as a Surety in a contract of guarantee to a CD. Excluded debts are not included in the qualifying debts. Hence, Personal Guarantee can be invoked and covered under CIRP. It is also relevant to note that Discharge order in relation to a Bankrupt does not discharge the Bankrupt from the excluded debts i.e. where such debtor is a Surety or a Guarantor. [Refer Proviso (c) to sec. 139(1)(b) and sec. 94(3)]

OPPORTUNITY FOR PROFESSIONALS

Advocates / lawyers, Chartered Accountants (CA), Company Secretaries (CS), Cost Accountants or Valuers, shall have lot of opportunities under the Code. Professionals dealing with winding up, restructuring, rehabilitation and revival of companies, can gear up to become Insolvency Professionals (IPs) and practice under the Code as IPs i.e. to manage the affairs of the company / LLP. The IPs can also do ancillary work arising out of the Code which include:

(i) Working out voting share or voting rights of the lenders / creditors;
(ii) Valuation of securities held by the lenders / creditors. This is required at the time of making application under the Code;
(iii) Valuation of assets including properties, stock, securities at the time of making of resolution plan, liquidation etc [Section 247 of Companies Act, 2013];
(iv) Drawing the information memorandum and resolution plan [Sections 29 and 30];
(v) Advisory, Due Diligence and others to IPs or Creditors reg whether any transaction is a Preferential transaction under sections 43 and 44 of the Code. Corporate Debtor / Borrower shall be deemed to have given a preference, if (a) there is a transfer of property or an interest thereof of the borrower for the benefit of a creditor or a surety or a guarantor to square up its debt; and (b) such transfer puts the such creditor or a surety or a guarantor in a beneficial position than it would have been in case of distribution of assets made under section 53.
(vi) Advisory, Due Diligence and others to IPs or Creditors reg whether any transaction is an undervalued transactions by way of gift [Sections 45 to 48].
(vii) Advisory, Due Diligence and others to IPs or Creditors reg whether any transaction is a Fraudulent and Extortionate transaction [Section 49 and 50]
(viii) Professionals are likely to have an opportunity to run as Information Utility centres, just like TIN-NSDL facilities, in order to facilitate uploading of data relating to contracts, invoices / Bills, agreements and others.

REGISTRATION AS IPA/ IP AND REGULATIONS GOVERNING THEM

To act and practice as an IP, professionals shall have to register themselves with the Insolvency Professional Agencies (IPAs) and get themselves registered with the Insolvency and Bankruptcy Board of India (Board). IPs and IPAs shall be

governed by the notified Regulations issued with respect to IPAs and IPs. An IP has key responsibilities in various processes such as corporate insolvency resolution process, individual insolvency resolution process, liquidation of a corporate debtor, individual bankruptcy process under the Code. The IPs or professionals desirous of becoming IPs should go through the Code and the following Regulations:

Regulation	Notification Date	Effective Date
IBBI (Insolvency Professional Agencies) Regulations, 2016	21.11.2016	21.11.2016
IBBI (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016	21.11.2016	21.11.2016
IBBI (Insolvency Professionals) Regulations, 2016	23.11.2016	29.11.2016
IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016	30.11.2016	1.12.2016
Insolvency and Bankruptcy (Applica¬tion to Adjudicating Authority) Rules, 2016	30.11.2016	1.12.2016
IBBI (Liquidation Process) Regulations, 2016	15.12.2016	16.12.2016

The two regulations i.e. IPAs and its Model Bye Laws inter alia provide for the eligibility norms to be a Professional Member of an Insolvency Professional Agency and also for eligibility norms to be registered with the IBBI as an Insolvency Professional Agency.

A company registered under section 8 of the Companies Act, 2013 with a minimum net worth of Rs. 10 crore shall be eligible to be an IPA. More than half of the directors of its Board shall be independent directors and not more than one fourth of the directors shall be insolvency professionals. It shall have Membership Committee(s), Monitoring Committee, Grievance Redressal Committee(s), and Disciplinary Committee(s) for regulation and oversight of professional members.

ELIGIBILITY OF PROFESSIONALS TO BECOME IPS

The following categories of individuals are eligible for registration as insolvency professionals:

(a) Advocates, Chartered Accountants, Company Secretaries and Cost Accountants with 10 years' of post-membership experience (practice or employment) or a Graduate with 15 years' of post-qualification managerial experience, on passing the Limited Insolvency Examination.

(b) Any other individual on passing the National Insolvency Examination.

However, Advocates, CAs, CSs and Cost Accountants with more than 15 years' of practice experience could have sought registration for the limited time period of 6 months, without any examination, by making applications before 31.12.2016.

There shall be a 'National Insolvency Examination' the details of which will be specified through regulations. There shall also be 'Limited Insolvency Examination'. The syllabus, format and frequency of the 'Limited Insolvency Examination', including qualifying marks, shall be published on the website of the Board at least one month before the examination.

A limited liability partnership, a registered partnership firm and a company may be recognised as an insolvency professional entity if a majority of the partners of the limited liability partnership or registered partnership firm or a majority of the whole-time directors of the company are registered as insolvency professionals under the Code. An insolvency professional may use the organisational resources of a recognised insolvency professional entity subject to the condition that the entity as well as the insolvency professional shall be jointly and severally liable for all acts of omission or commission of its partners or directors as insolvency professionals.

Further, the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 prohibit an insolvency professional from acting as a resolution professional for CIRP of a corporate debtor if he is not independent of the corporate debtor. These prohibit partners or directors of an insolvency professional entity of which the insolvency professional is a partner or director from representing other stakeholders in the same CIRP. These oblige the IP to make disclosures - initial and continuing - if he has any pecuniary or personal relationship with any of the stakeholders entitled to distribution of assets.

CONCLUSION

While rest of the world already have unified insolvency laws, a good insolvency regime was missing in India. Pari materia to SICA, the Code prevents premature liquidation of sustainable businesses. A firm suffering from bad management choices or a temporary economic downturn may still be turned around, and hence this Code and the provision relating to moratorium. The legislation is a path breaking step and viewed as a 'Game Changer', however, it will be able to change the negative perception of NPAs, recovery and litigation associated with India only when truly implemented in letter and spirit. At present, we see that even after judgment or orders or Arbitration awards, execution and implementation is a challenge and actual recovery cannot still be achieved. SARFAESI to a certain extent provides a scope to realise value of the securitised assets; however, there are issues relating to possession of immovable property under section 14 of SARFAESI. Professionals, be it lawyers, CAs, CSs, cost accountants or valuers, shall have to play a major role in making the turn around possible. The Code is the right step towards the much awaited economic and banking reforms in the country. CS

A Review of the Corporate Insolvency Resolution Process

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Sections 4 to 77 of Part II of the Insolvency and Bankruptcy Code, 2016 [IBC] contain provisions for Corporate Insolvency Resolution (CIRP) and liquidation of Corporate Persons. Sections 78 to 178 of Part III of IBC contain provisions for insolvency resolution process and bankruptcy of individuals and partnership firms. Most important provisions as regards initiation of CIRP and sanction of a resolution plan are contained in Sections 4 to 54. However a close look at IBC is impossible without referring to the words and expressions defined under Section 3 and 5, with respect to CIRP, and the definitions of words and expressions contained in Section 3 and 79, with respect to insolvency resolution process for individuals and partnership firms. One must be able to move atleast up and down through the sea of IBC like the successful Indian sub-marine in the film Ghazi so as to use the torpedoes effectively. The National Company Law Tribunal [NCLT] is the Adjudicating Authority for CIRP and Debt Recovery Tribunal is the Adjudicating Authority for insolvency resolution and bankruptcy for individuals and partnership firms.

The Insolvency and Bankruptcy Code, 2016 is a double edged sword. One has to tread very carefully. The predominant objective of IBC is to see whether there are reasonable prospects for revival of the fortunes of the business and if it is not, put the business in liquidation mode and liquidate the assets in a time bound manner. The corporate insolvency resolution process under the Code is briefly reviewed here.

APPROPRIATE BENCH

Section 60 states that the NCLT which has territorial jurisdiction over the place where the registered office of the corporate person is located will be the appropriate bench of NCLT for initiating the CIPR. As per Section 3(7), “corporate person”, refers to a company or limited liability partnership. It is only when an operational creditor being a corporate person, wanted our firm to initiate the CIRP, I pointed out that if one were to go by the definition of the expression “corporate person” as given in Section 3, the bench of NCLT having territorial jurisdiction over the operational creditor would also be an appropriate bench to initiate CIRP against a corporate debtor irrespective of the place of registered office of the corporate debtor, who has committed a default. On the basis of this understanding when I said that the operational creditor could file an application initiating CIRP before a bench under the jurisdiction of which its registered office is situate, the client was visibly happy as it helps them to commence the proceedings under IBC in their State.

However our Firm’s senior in house counsel was quick to point out that if this had really been the case, the purpose of the legislature would be lost as petitions against the same corporate debtor could be filed at different benches. She pointed out that the preamble of IBC clearly states, inter alia, that it is an Act to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons. Hence the expression “corporate persons” appearing in this preamble cannot be understood as referring to creditors at all. Moreover IBC provides for a statutory mandatory moratorium against suits and proceedings against the corporate debtor. Therefore the objective of the legislature is to give a peaceful and reasonable time during which it is possible (for the corporate debtor) to draft a resolution plan that would meet the interests of all classes of creditors substantially so that the commencement of a liquidation process could be avoided. If any other view is taken, it would be akin to saying that IBC introduces a moratorium against commencing proceedings under IBC itself as several operational or

other creditors could initiate CIRP before several NCLT benches on different dates.

WHAT IS BEST COURSE OF ACTION FOR AN OPERATIONAL CREDITOR?

Creditors cannot file a petition straightaway for the winding up of the corporate debtor in view of the amendment to Section 271 of the Companies Act, 2013 brought about by IBC. In one sweep, a statutory right which was available under the Companies Act, 1956 and which had short lived (without oxygen) under the Companies Act, 2013 had been given a go by. That does not means a defaulting corporate debtor can distribute laddus, by the way. First the CIRP must be given a try and if it does not work, an order of the NCLT under Section 33 would put the vehicle in the liquidation mode. In fact, even before such a stage comes, if the resolution professional communicates to NCLT the decision of the committee of creditors to liquidate the corporate debtor, it is incumbent upon the NCLT to pass a liquidation order.

CAN OPERATIONAL CREDITORS PREPARE A RESOLUTION PLAN?

Section 30 states that a resolution applicant may submit a resolution plan on the basis of the information memorandum prepared by the resolution professional under Section 29. As per definition, the expression "resolution applicant" means any person who submits a resolution plan to the resolution professional. Thus it is clear that every person who submits a resolution plan as stated Section 30 will be a resolution applicant. Therefore even an operational creditor can also prepare and submit a resolution plan to the resolution professional, though it is not mandatory. From the scheme of IBC, it is further clear that the resolution professional will be only receiving a resolution plan prepared on the basis the information memorandum. The resolution professional may receive more than one resolution plan too. He would be placing it before the committee of creditors for approval of the resolution plan. Irrespective of the creditor who had initiated the CIRP, the resolution plan must take care of the interests of all the stakeholders. A resolution plan will be treated as approved only if it secures vote of not less than 75% of voting share of the financial creditors. If no resolution plan is received by a resolution professional, he or the operational creditor may apply to NCLT and seek its intervention. However the committee of creditors might even recommend a liquidation of the corporate debtor if in the opinion of the committee of creditors, it is desirable to liquidate the corporate debtor.

DO OPERATIONAL CREDITORS HAVE VOTING RIGHTS?

My client being an operational creditor wanted to know whether he will have a significant say in formulating the resolution plan, if he initiates the CIRP. Subject to ensuring that the amount of default is more than the minimum amount of Rs.1 Lakh prescribed in Section 4, every operational creditor is entitled to initiate the CIRP. Section 28 declares that at a meeting of creditors, operational creditors do not have any voting rights. In fact, this aspect was thoroughly deliberated before the Joint Parliamentary Committee too. Only those operational creditors who have a sizeable stake will receive notices of meetings of creditors from the insolvency professional. Only if the amount of debt due to the operational creditor concerned is not less than 10% of the debt, the operational creditor is entitled to the notice of each meeting of the committee of creditors. Further even such high value operational creditors are entitled only to attend meetings of committee of creditors and they have no voting right. If resolution plan approved by the committee of creditors contains any compromise proposal, the operational creditor might suffer a hair-cut too. Thus operational creditors will not have much say in the resolution plan. Only saving grace is that the operational creditor will not be in any position which is worse than what he would have been without the CIRP.

> IBC provides an opportunity for cost effective resolution plan, actually. When a debt is about to be time barred, it is not going to be lost during the CIRP days which as per IBC could at the best be 270 days if no appeal is preferred by anyone at any stage. Even for appeals before the National Company Law Appellate Tribunal, Section 422 of the Companies Act, 2013 provides a time limit. Only for the appeals before the Supreme Court, no time limit has been prescribed.

RECOVERY SUITS

My client, an operational creditor, asked me whether there is any ban in filing a recovery suit against the corporate debtor instead of initiating the CIRP. I had to tell him that IBC does not bar instituting a recovery suit against the corporate debtor as the moratorium granted under Section 14 would apply only on the insolvency commencement date. Insolvency commencement date is nothing but the date on which the NCLT admits the application of a debtor for initiating CIRP.

WILL LIMITATION STOP RUNNING DURING CIRP?

The next question from the intelligent businessman was, if the debt is going to be hit by the law of limitation, would it be prudent to file a civil suit and pursue a safe course of action. IBC provides an opportunity for cost effective resolution plan, actually. When a debt is about to be time barred, it is not going to be lost during the CIRP days which as per IBC could at the best be 270 days if no appeal is preferred by anyone at any stage. Even for appeals before the National Company Law Appellate Tribunal, Section 422 of the Companies Act, 2013 provides a time limit. Only for the appeals before the Supreme Court, no time limit has been prescribed. Therefore it would be indeed necessary to initiate the CIRP instead of approaching an ordinary civil court with a recovery suit paying hefty court fee. Limitation will not expire during CIRP period, whether before NCLT or in any appeal. When jurisdiction of civil courts has

been expressly barred as stated in Section 63, (though not for recovery suits), and when Section 14 introduces moratorium and bars not only filing of fresh suits but even continuation of suits and proceedings already instituted, it goes without saying that no useful purpose is going to be achieved by filing recovery suits unless the situation of the corporate debtor is not grave or when the amount in claim is in dispute. Even if the operational creditor does not bother about IBC and moves a civil court, the corporate debtor (who will be the defendant in the civil court) might initiate a CIRP. In such a case, the suit is liable to be hit by the moratorium. But the operational creditor would have already spent money on court fee and counsel fees. If the CIRP does not succeed, by default, IBC provides for a liquidation order. As such claims could be filed before the liquidator in accordance with IBC itself. Hence filing a simple recovery suit is not at all needed, except in exceptional cases or where there are issues.

The company secretary of my client was very shrewd and he asked if the extension of the period of limitation would apply even to an operational creditor who does not initiate the CIRP. It depends on facts. If before initiating the CIRP, limitation would expire, nothing could save a debt which has become dead much prior to the Insolvency Commencement Date. If there is an initiation of CIRP any creditor, it operates for all the creditors from the Insolvency Commencement Date throughout the CIRP period until an order is passed by NCLT under Section 31 or 33.

In fact, in the time between the date of issue of a demand notice under Section 8 and the date of moving the NCLT for initiating a CIRP, some other creditor might have already moved the NCLT against the same corporate debtor. Though there is nothing wrong in NCLT being flooded with petitions from different creditors and generating revenue to Government also, such an exercise is absolutely unnecessary. Therefore if in relation to a corporate debtor, if Insolvency Commencement Date has already occurred, it is not necessary for any other creditor to initiate a fresh CIRP.

Our senior in house counsel could not stop saying that there are two types of creditors – those who are silent and those who take action. An active creditor brings in benefit not only to himself but also to the silent ones. As fresh suits and proceedings are barred from the Insolvency Commencement Date, any other creditor too cannot file suits or proceedings against the corporate debtor in view of commencement of operation of Section 14. Consequently the period of limitation would stop running during the CIRP period for all the creditors including the one who had initiated the CIRP.

IS IBC DEBTOR FRIENDLY?

Out of curiosity and academic interest, when I asked my in house counsel, whether IBC actually favours corporate debtors though it appears to be a "creditor friendly legislation", she answered that IBC certainly helps corporate debtors who are genuine. In fact, she said that in one occasion, the managing director of a company which is facing severe liquidity issue was lamenting that any amount of blaming "demonetization" did not convince the creditors to give him and his company a deep breathing time.

Due to IBC, he was afraid of the fact that the directorships of him and his colleagues would remain in suspended animation during the CIRP period. He was not very afraid of his bankers who are financial creditors as his company could somehow ensure that the account does not become NPA. His concern was about the raw material suppliers to whom a huge amount is due and the default is accumulating day-by-day. His query was instead of allowing an operational creditor to initiate the CIRP, would it not be prudent to initiate the Section 10 process immediately by him. Irrespective of who initiates the CIRP, when the ball is set in motion, time would start ticking. Therefore it would really not be prudent to initiate any action which might turn out to be a suicidal action.

He asked me if he could create some proceedings to dispute the claims of the creditors of his company. Of course, if there are genuine disputes, suits and proceedings should be commenced by the corporate debtor as soon as may be possible without waiting for the demand notice to come from the operational creditor. In fact, Section 8 says that when a demand notice is received, within 10 days of receipt of the demand notice, the corporate debtor must inform the operational creditor of the existence of any dispute and bring it to the notice of the operational creditor record of the pendency of the suit or arbitration proceedings filed before the receipt of the demand notice. Thus ordinarily disputes should not have been created after the receipt of the demand.

WILL THE MORATORIUM UNDER IBC STALL PROCEEDINGS UNDER SARFAESI ACT?

Taking advantage of the opportunity, the managing director of the corporate debtor asked what would be the action to be taken if the banker of his company announces an auction of his properties as well as the properties of his company invoking Section 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 [SARFAESI Act]. I said there is a reference to SARFAESI Act in Section 14 and the absence of a provision similar to the second and third proviso under Section 15 of the Sick Industrial Companies (Special Provisions) Act, 1985 in IBC makes it clear that any proceedings

> It may not be necessary for the financial creditors to invoke their rights under the Recovery of Debts and Bankruptcy Act at all as they can evaluate the weight of their securities and in a proceeding under IBC, when an order for the liquidation of the corporate debtor is passed, it is possible for the financial creditors to choose to stand outside liquidation as stated in Section 52 or throw their assets in the common hotchpotch and enjoy distribution as envisaged under Section 53(1)(b) of IBC.

commenced already under SARFAESI Act would also come under the "standstill clause" contained in Section 14.

Immediately he asked if that be the case, are there any bright chances of reviving the running of the industry with a resolution plan. Of course, was my answer and I am sure financial creditors who have the special right under SARFAESI Act and the voting right under IBC to approve or reject a resolution plan would not vote in favour of a resolution plan unless it is more attractive than liquidation. In other words, the present value of all future revenues to the creditor must be more than the value of proceeds the creditor would be realizing through enforcement of his securities and standing in queue for any amount that might still be outstanding. There should see a scientific reason to push a resolution plan taking into account long term benefits instead of enforcing the securities and realizing their dues, in full or part and putting an end to a business relationship abruptly.

In fact, if revival is not going to work, the committee of creditors might even decide in advance to liquidate the company as stated in Section 33. With IBC, enforcement of security interest invoking the SARFAESI Act after opting to stay out of liquidation process under IBC gives the financial creditors the much needed edge. At the same time, IBC gives the corporate debtor the much needed breathing time in the form of a specified moratorium period. If the corporate debtor has good plans to work out a attractive resolution plan, there are fair chances of the CIRP under IBC resulting in a sanctioned resolution plan.

CLAIMS FROM SUNDRY CREDITORS

At the end of the day, even if the corporate debtor were to initiate a CIRP, there is no problem for the corporate debtor as it is not going to be in position worse than what it would have been if the CIRP had not been so initiated. My senior in house counsel tells me and the managing director that by initiating CIRP the corporate debtor is, in fact, saved from multiple proceedings that their sundry creditors might file. She points out that in the event of a liquidation the claims of sundry creditors would get settled as per the distribution sequence stipulated under Section 53 putting an end to their claims once and for all. Hence she says unlike a plain and simple SARFAESI Act alone situation, IBC situation removes the need to face multiple suits and proceedings as liquidation happens by default. Hence it is corporate debtor friendly in that way. I could not but appreciate the point in her theory.

WOULD IT BE PRUDENT FOR A FINANCIAL CREDITOR TO GIVE CIRP A TRY?

Though financial creditors may have a tendency to initiate an action under SARFAESI Act, they would want to give a try to the CIRP under IBC because any action from their side might get fused atleast temporarily due to initiation of CIRP any other creditor, whether set up by the corporate debtor itself as a device or by the corporate debtor itself. In fact, it may not be necessary for the financial creditors to invoke their rights under the Recovery of Debts and Bankruptcy Act at all as they can evaluate the weight of their securities and in a proceeding under IBC, when an order for the liquidation of the corporate debtor is passed, it is possible for the financial creditors to choose to stand outside liquidation as stated in Section 52 or throw their assets in the common hotchpotch and enjoy distribution as envisaged under Section 53(1)(b) of IBC.

STATUS OF GUARANTORS

When a person is in distress, he would not be in a position to listen to matters which do not concern him. The managing director of the corporate debtor was very eager to know whether the moratorium granted by section 14 would extend to the personal guarantees given by him to the loans of the corporate debtor too. Section 60 states that the Adjudicating Authority in relation to CIRP and Liquidation for corporate persons including personal guarantors shall be NCLT. Section 31 declares that a resolution plan approved by the NCLT is binding on guarantors too. But Section 14 does not speak about proceedings against personal guarantors. Even though there were several decisions on this aspect under the repealed Sick Industrial Companies (Special Provisions) Act, 1985, IBC has failed to provide expressly that the moratorium granted by Section 14 applies against suits and proceedings against guarantors too. Mostly promoters and directors would be the guarantors too. Therefore if such persons have to face suits and proceedings against their properties, the benefit granted under Section 14 would be completely lost as they will be naturally having the tendency to save their skins instead of looking at preparing a robust resolution plan.

CONCLUSION

IBC is a double edged sword. One has to tread very carefully. The predominant objective of IBC is to see whether there are reasonable prospects for revival of the fortunes of the business and if it is not, put the business in liquidation mode and liquidate the assets in a time bound manner. Kingfisher brand did not fetch any great value when the same was put on the mat as there was a huge delay between the time the airline had grounded its fleet of aircraft and the time when auction was announced. Ironically bankers were vying with each other to ground as many credit proposals as possible, once upon a time! CS

Insolvency Professionals and Corporate Insolvency Resolution Process

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While there has been no dearth of enactments on recovery and insolvency resolution of corporate persons in India, their practical enforcement has been sub-optimal, leading to complete failure of these mechanisms and a mounting pile of non-performing assets. There were a variety of factors which led to this state of affairs, prominent amongst them being the Indian legal system's propensity for delay, coupled with a debtor-in-possession resolution models requiring very little "skin in the game" for existing management. It is against this background that the Insolvency and Bankruptcy Code **("Code")** has been enacted by Parliament. Amongst the standout features of the Code is that it seeks to balance the rights of all stakeholders by adopting a "professional-in-possession" model, meaning that the driving force of the insolvency resolution mechanism (including interim management of the debtor) is an independent, regulated but private insolvency professional **("IP")**, working under the overall supervision of a committee of creditors. This approach seeks to reduce delays by removing the onus of supervision of the resolution process from a court/tribunal to one in favour of the IP and reducing incentive for the promoters to adopt dilatory tactics by making the IP in charge of interim management of the debtor.

> The Insolvency and Bankruptcy Code is a bold and imaginative step forward for insolvency resolution in India, and has great potential to succeed. The Code is in its infancy currently, and its success will depend substantially on how well the IPs perform their functions under the Code. This is especially important in the first few years of implementation of the Code which are precedent forming with respect to any statutory enactment.

SICA AND FAILURE OF DEBTOR-IN-POSSESSION MODEL IN INDIA

To better evaluate how the Code envisages the role of the IP and the chances of success of this model, an analysis of the experience under the Sick Industrial Companies (Special Provisions) Act, 1985 **("SICA")** would be illuminative. Before enactment of the Code, the legal mechanism for insolvency resolution in India was through SICA, which was a debtor-in-possession model, triggered upon balance sheet insolvency (liabilities more than assets), and conducted under the aegis of the Board for Industrial and Financial Reconstruction, a separate statutory body, and within the umbrella of a moratorium that was co-terminus with the resolution period, which was not capped. The BIFR was required to be staffed with members having experience in a variety of areas and had discretionary powers to take measures relating to a sick industrial company, including referring the debtor to respective High Court for winding up. Further, judicial oversight over the proceedings before the BIFR was limited by giving appellate jurisdiction to the Appellate Authority for Industrial and Financial Reconstruction.

In reality however, BIFR became a refuge for unscrupulous promoters seeking protection against creditor action and resolution and revival was the exception instead of the norm. While intended originally to reduce judicial interference in the resolution process, the very opposite happened, and BIFR proceedings were often challenged in multiple forums (particularly in the High Courts under writ jurisdiction) leading to inordinate delays. In addition, judicial thought in India has traditionally favoured an approach where liquidation or winding up was the last resort. Various committee reports and studies which have examined the operation of SICA provisions have almost unanimously condemned SICA as failing in its mandate to provide a timely rescue mechanism for sick industrial companies and called for its repeal. The BIFR process, contemplated originally to be completed in six months, was often taking seven to eight years and still resulting in failure.

The common trend in all these reports was the identification of debtor-in-possession model, uncapped moratorium, abuse of legal process by promoters coupled with the logistical / infrastructural constraints of Indian courts, and the pro-debtor/ anti-creditor nature of BIFR proceedings as reasons for failure of the SICA model.

It is against this background that the Bankruptcy Law Reform Committee **("BLRC")** evaluated the laws relating to corporate insolvency and revival and recommended an approach in which an independent private professional, originally nominated by the resolution applicant and thereafter approved/replaced by a committee of creditors, under the overall, but limited, supervision of an adjudicating body[2], is the driving force of the resolution and liquidation processes. In the event the corporate insolvency resolution process **("CIRP")** is not successful, the Code provides for automatic liquidation, which would also be overseen by IPs as against the official liquidator under the erstwhile Companies Act 1956. As articulated in the Final Report of the BLRC, the role of the IP encompasses a wide range of functions, which include the identification of the assets and liabilities of the defaulting debtor, its management during the insolvency proceedings, preparation of the resolution proposal, the construction, negotiation and mediation of deals as well as distribution of the realisation proceeds under bankruptcy resolution.

The BLRC's core proposition was that the IP would act as the agent of the NCLT, allowing the specialized skills and expertise of the IPs to be leveraged, thereby reducing judicial interference and consequential delays. The idea itself is novel, and deserves credit for leveraging private capital and enterprise to contribute to a process that was previously the state's domain.

NORMATIVE EXPECTATIONS FROM THE IP IN CIRP

1. Crucial Duties under the Code

The Code confers several duties on the IP, however, following are few crucial duties which the IP should perform for efficiently conducting the insolvency resolution process.

i. Once an application is admitted by NCLT, IP is required to give public announcement in two newspapers for declaring that insolvency resolution process has been initiated and also on IBBI's website and debtor's website;

ii. One of the duties of the IP is to receive and collate all claims submitted by the creditors as a result of the public announcement. In order to perform the said duty, IP should allocate adequate resources for managing the claims which shall include receiving the claims, comparing the claims with books of accounts of the debtor, reconciliation and updation of list of claims submitted;

iii. Upon receiving the claims submitted by the creditors, IP should form the committee of creditors of all financial creditors and plan for the first meeting of committee of creditors within 30 days of his appointment. IP should convey the date, venue, agenda, notice for formation of committee of creditors and then convene the first meeting of committee of creditors;

iv. The agenda for the first meeting of committee of creditors should cover, at least, following two proposals- firstly, the proposal to ratify the expenses incurred by the applicant in filing the insolvency application and secondly, the proposal to resolve appointment of IP as resolution professional or to replace IP by another IP. Further, IP should give presentation to committee of creditors on existing business situation, total liabilities, liquidation value, high level turnaround and revival options.

v. Simultaneously, IP should also carry out physical verification of assets of the debtor and IP may take assistance from valuers and security personnels in carrying out the said duty.

> 'Certain jurisdictions like Australia and Ireland have made professional indemnity insurance a mandatory requirement for registration of insolvency practitioners. It is suggested that IPs that are proposed to be appointed as resolution professionals or liquidators of certain companies involving substantial public interest should have a corresponding level of professional indemnity insurance.'

IP is required to conduct the entire corporate insolvency resolution process and simultaneously manage the operations of the debtor during the corporate insolvency resolution period, as a going concern.

2. Appointment of Consultants and Professionals

In performing its duties under the Code, IP would need assistance from several consultants/ professionals in order to conduct the entire corporate insolvency resolution process and manage the operations of the debtor as a going concern. Following are the consultants whom the IP may have to appoint immediately on commencement of corporate insolvency resolution process to optimize outcomes for all stakeholders:

i. Two reputed valuation firms should be appointed, in order to get valuation of assets of the debtor for arriving at estimated liquidation value;

ii. Security consultants to cover integrity of physical assets, company records and personnel of IP to work at the debtor's premises including immediate deployment of manpower, as required;

iii. Appointment of key managerial person(s) with suitable industry experience to take care of production and plant related technical matters and who can assist the IP in supervising the activities in the debtor company, as the powers of the Board of Directors are suspended;

[1] Goswami Committee Report, Eradi Committee report, Irani Committee Report and two reports of the Bankruptcy Law Reform Committee are especially scathing in their critique of the SICA model.

[2] Which is the National Company Law Tribunal ("NCLT") for corporate debtors

iv. Appointment of a legal professional, auditor or any technical consultant for assisting IP in all related matters;
v. Ensure all stock exchange formalities are complied with in case of a listed company. (At this stage it is not clear if this obligation is suspended or the IP has to discharge the same in the absence of the Board of Directors).

3. **Key Contracts and pending legal disputes**
   i. IP should obtain list of all pending litigation filed by or against the debtor and serve the NCLT order of moratorium on the relevant court/ tribunal/ authority;
   ii. IP should communicate and hold meetings with all government authorities including SEBI, Tax authorities etc as may be required;
   iii. IP should study all related party transactions and transactions where the debtor has given guarantee/ undertaking/ contractual comforts for loans taken by any other person and check whether these are on arms-length basis;
   iv. IP should ensure that adequate insurance policies are in place for protecting the assets of the debtor and original insurance policies should be taken into IP's custody;
   v. IP should identify the contracts under which receivables are accruing and hold meetings with such counter-parties for continued operations of the debtor.
4. **Managing business as going concern and maintaining stability**
   The Code requires the IP to manage the operations of the debtor as a going concern during the period of the CIRP and in order to achieve the same, IP is required to ensure that business stability is maintained and the faith of employees, customers and suppliers of the debtor is not shaken by the fact of initiation of insolvency resolution process. In addition to the duties mentioned above IP should necessarily perform, inter alia, following activities in order to manage the business of the debtor as a going concern:
   i. IP should collect all information relating to the assets, finances and operations of the debtor for determining the financial position of the debtor and should obtain organization chart, identify key managerial personnels (KMPs) and obtain existing authorization matrix;
   ii. IP should stop all post-dated cheques, change authorizations in relation to bank accounts and other committed payments. IP should change online passwords for all transactions. IP should issue instructions to the banks to mark freeze on existing bank accounts and open a new bank account for routing the cash flows of the debtor;
   iii. IP should immediately implement a new approval matrix and appoint new signatories with appropriate communication for carrying out banking transactions and other high value transactions;
   iv. IP should convene meetings with employees, contractors, customers, suppliers and any other third party dealing with the debtor and convey that the IP's duties are to revive the debtor for the betterment of all stakeholders.
   v. IP should obtain and review all related party contracts and transactions and decide, from commercial perspective, whether to continue with such contracts or not.
   vi. IP should identify all possible avenues in getting interim finances if required to manage the operations of the debtor as a going concern.
   vii. IP should monitor the cash flows of the debtor and deploy the same in efficient manner in the business of the debtor for managing the operations of the debtor.
   viii. IP should bring in sufficient infrastructure and expertise in performing its duties in time bound manner.
   ix. IP may also reach out to potential investors/ competitors who can take over the business of debtor on a going concern basis, if, in the permitted time period of 180 / 270 days of the admission of the application, resolution/ revival is not possible.

PRACTICAL CONCERNS AND CHALLENGES

On commencement of CIRP, the powers of board of directors are suspended and IP is empowered to exercise the powers of the board of directors. Following are few practical concerns regarding the role of the IP:

1. **Non-Cooperation from promoters, KMPs and employees**
   Especially in a promoter driven company the IP is unlikely to get enough cooperation from the promoters. This would impair the possibility of effective resolution of the debtor in terms of the Code. Further, KMPs and employees may also not cooperate, by not providing data, documents and information required by IP during resolution period. However, as per Section 19 of the Code, the IP can obtain necessary directions from NCLT requiring the promoters, employees and KMPs to cooperate with IP in collection of information and management of the debtor. However, obtaining necessary directions from NCLT may take some time, and provides yet another opportunity to the promoter to adduce lengthy arguments in interim applications at the NCLT which would thus result into time lag in the resolution process and additionally, the loss to debtor's business can be immense on account of the delay.
2. **Consensus among creditors**
   CIRP is driven by financial creditors who constitute the committee of creditors. The Code requires approval of creditors with not less than 75% of voting share of the financial creditors. For effective resolution in terms of the Code, approval of committee of creditors is required, inter alia, on ratification of the expenses incurred by the IP, confirmation on appointment of interim resolution professional as resolution professional, replacement of IP during corporate insolvency resolution process, on actions to be carried out in terms of Section 28 of the Code and also on the resolution plan submitted by the resolution applicant under Section 30 of the Code. IP may face challenges in getting approval from the majority of creditors and failure to get the consensus may result into either delay in the resolution process, which is intended to be completed in a time bound manner, or else it may result into liquidation of the debtor on account of failure in formulating a resolution plan. IP should take proactive steps to involve all creditors in the resolution process and drive the consensus amongst the creditors.
3. **Requirement of obtaining internal approvals by the creditors**
   As mentioned above, approval of committee of creditors is required on several crucial aspects during CIRP. IP may face challenges in getting the approval of the creditors, as

most of the creditors would want to take internal approvals before giving consent on any such aspects under the Code. For instance, if the proposal for consideration before the committee of creditors, in the first meeting, is – whether to confirm the appointment of interim resolution professional as IP for the remaining corporate insolvency resolution period and the committee of creditors does not vote, either for or against, for want of internal approvals, then the corporate debtor during resolution process will not be managed by any person, as interim resolution professional's tenure cannot exceed 30 days from the date of his appointment and the Board of Directors has been suspended as per the provisions of the Code. As a mitigant, the IRP/ any creditor can file an application with NCLT for appointment of IRP as RP thereby ensuring that the operations of the debtor are not brought to a standstill. Further, to avoid such challenges, every creditor should designate few senior officials to vote in the committee of creditors and any decision taken by such senior official shall be considered to be the decision of the said creditor. This will ensure that no time is spent on taking internal approvals and thus it will avoid causing delay in the insolvency resolution process.

4. **Dues to suppliers of essential goods and services**
   Section 14(2) of the Code stipulates that the supply of essential goods and services to the debtor should not be terminated or suspended or interrupted during the moratorium period. However, one cannot rule out the fact that, in case the debtor has defaulted in paying dues to the suppliers of essential goods or services like electricity, water, telecommunication services and information technology services, despite having the legislative safeguard, the said suppliers may terminate/ suspend the services. Such actions of the suppliers will adversely affect the operations of the debtor and result into shut-down of plants and factories. In order to address such concerns, IP will then have to file an application with NCLT under Section 60 of the Code and obtain an order directing the said suppliers to not terminate or suspend or interrupt the supply of essential goods and services to the debtor. However, the said process may take time and the loss to debtor's business can be immense.
5. **Hidden/ undisclosed contingencies**
   Once an IP takes charge of the debtor, IP may come across several undisclosed contingencies. For instance, environmental law violation, transactions with related parties, undisclosed investments etc. IP may face challenges in identifying and understanding the said contingencies in such a short time span and resolving the same before inviting/ floating a resolution plan.
6. **Oversight over IPs and Value Protection**
   When a private entity is delegated functions of the adjudicator, there is always scope for collusion between parties or poor performance of functions. The Code provides for various checks and balances to ensure that the IPs perform their functions in a diligent, careful, fair and transparent manner that the spirit of the Code and wider public interest require them to. In addition to eligibility norms and dual regulatory oversight, the Code also provides that an IP cannot act as a Resolution Professional or Liquidator for a debtor that is a related party. While these safeguards are certainly mitigants, there still are significant concerns, particularly during the tenure of the interim resolution professional, and prior to the formation of the committee of creditors. The experience on self-regulation of professionals in India has been mixed at best, and post-facto disciplinary proceedings do not fully compensate for value lost by wrongful or corrupt conduct.
   Approximately a thousand IPs have been granted registration for a limited period to practice as IPs in the course of three odd months, and this includes a fair number of apparently independent practitioners of uncertain provenance or means. Considering the substantial public interest involved in the case of certain corporate debtors involving (eg., listed company, or a company with debt or share capital beyond prescribed levels, or with a high exposure to the banking system), there certainly needs to be identifiable financial recourse for value lost due to professional misconduct in such cases. Certain jurisdictions like Australia and Ireland have made professional indemnity insurance a mandatory requirement for registration of insolvency practitioners. It is suggested that IPs that are proposed to be appointed as resolution professionals or liquidators of certain companies involving substantial public interest should have a corresponding level of professional indemnity insurance.
   Another question that is left unanswered is whether the IP is solely responsible for his acts or do the Committee of creditors as the appointer also share this burden. What happens if the assets are mismanaged by the IP, do the creditors also become responsible for the consequent loss to the debtor. Alternatively is the IP responsible if all acts are pre-approved by the Committee of creditors and IP has exercised diligence in executing the same. Stories have been heard of IP's absconding after mismanaging the assets in other jurisdictions. Who then becomes accountable. As the role indicates, the IP apart from being technically qualified is expected to be a good manager with ability to communicate and network effectively. While the IP may have some of the skill sets, success will lie in the ability to command other required resources in double quick time. So creditors will need to pick and choose depending on the skill sets required to manage the debtors business. This is no place for one shirt fits all.

CONCLUSION

Even a cursory analysis of the SICA experience suggests that the Code is a bold and imaginative step forward for insolvency resolution in India, and has great potential to succeed. The Code is in its infancy currently, and its success will depend substantially on how well the IPs perform their functions under the Code. This is especially important in the first few years of implementation of the Code which are precedent forming with respect to any statutory enactment. Further, during this nascent stage, the NCLT benches would also be struggling with a large caseload and inadequate infrastructure and manpower. At this stage the IPs have to chip in with their expertise and resources to ensure appropriate use of judicial time and ensure that the NCLTs are not saddled with an unmanageable caseload ab initio. As set out above, while there are certain practical issues that may require ironing out, these will get resolved as the CIRP mechanism attains a certain maturity and critical mass. Important as the role of the IP may be, there is a larger responsibility with all stakeholders to ensure that the IP is given the support and cooperation that is required for the Code to make a positive and lasting difference in the field of insolvency resolution in India. CS

Role of Interim Resolution Professional - A Critical Review

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The Bankruptcy Law Reforms Committee in its report dated 4th Nov., 2015, envisaged that the Insolvency professionals shall play a vital role in the insolvency and bankruptcy resolution process in two phases for corporates entities (Companies and LLPs), individuals and partnership firms.

The first phase of the insolvency and bankruptcy process is the period of insolvency resolution during which insolvency is assessed and a solution is reached within a stipulated time period of 180 days and in case a solution is not reached within the specified time, one time extension may be provided by the Adjudicating Authority for up to 90 days. The second phase of the process begins wherein the entity is declared bankrupt. At this point, registered entity enters the liquidation mode whereas an individual enters into bankruptcy resolution.

Part III of the Insolvency and Bankruptcy Code 2016 (IBC) covering sections 78 to 187 relate to Insolvency Resolution & Bankruptcy for Individuals and Partnership firms and other relevant regulations that are yet to be notified. The Adjudicating Authorities will consider the application under the Code and make appointment of the Interim Resolution Professional. The present article is covering the aspects relating to role of the Interim Insolvency Professionals for Corporate Insolvency and the relevant sections that have already been notified and became effective from 30th Nov., 2016.

> The entry norms for the Insolvency professionals are strict, requiring professional standing for not less than 10 years for the CA, CS, CWA and Advocates subject to passing of the examination. Therefore, to work as the RP is a new and challenging opportunity which needs thorough experience of the legal, financial and accounting frame work as well as commercial mind to run the business of the debtor as the going concern.

The enforcement of the Code is in the very initial stage and the Interim/Insolvency Professionals (IPs) do not have proper exposure and no guidance notes have been issued by the Insolvency Professional Agencies (IP Agencies). Further only a very few number of cases have been referred under the Code before the Adjudicating Authority i.e. National Company Law Tribunal (NCLT), against corporate entities. Therefore, there is no proper background and source of information available with the IPs to proceed for Insolvency Resolution Process (IRP).

ROLE OF THE IPS IN THE INSOLVENCY RESOLUTION PROCESS

The entire insolvency and bankruptcy process under the Code is managed by regulated and licensed professionals, namely the Insolvency Professional (IP), duly appointed by the adjudicator. IPR driven by the law are having adequate checks, accounting as well as due processes that are carried out by the IPs. Therefore, the IPs form a crucial pillar upon which rests the effective, timely functioning as well as credibility of the entire edifice of the IPR.

In administering the resolution outcomes, the role of the IP encompasses a wide range of functions, which includes adhering to the procedures of law as well as accounting and finance related functions. The latter includes the identification of assets and liabilities of the defaulting debtor, management during the insolvency proceedings, preparation of the resolution proposal, the construction, negotiation and mediation of deals as well as distribution of the realisation proceeds under bankruptcy resolution. In performing these tasks, an IP acts as an agent of the adjudicator. In a way the adjudicator depends on the specialized skills and expertise of the IP to carry out these tasks in an efficient and professional manner.

The role of the IPs is thus vital to the efficient operation of the IPR. A well-functioning system

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of resolution driven by IPs enable the adjudicator to delegate more and more powers and duties to the professionals. This creates a positive externality of better utilisation of judicial time.

The worse the performance of IPs, the more the adjudicator may need to personally supervise the process, which in turn may cause inordinate delays. Consumers in a well-functioning market for IPs are likely to have greater trust in the overall insolvency resolution system. On the other hand, poor quality services, and recurring instances of malpractice and fraud, erodes consumer trust.

ENTRY REQUIREMENTS FOR IPS

In the initial period, the Registration of the IP was made available only for the CA, CS, CMA and Advocates having experience of more than 15 years and application for registration was admitted for a limited period of 6 months, if received by the Board till 31st December, 2016. Therefore, now all such professionals need to pass the Limited Insolvency Examination within the validity period of their registration and need to apply for formal registration in the Prescribed Form to the Board through their respective IPA.

The CA, CS, CMA and Advocates having standing in the profession of not less than 10 years may be enrolled by the concerning IPA after passing the Limited Insolvency Examination. However, to carry out the IP activities he must be having valid certificate of practice.

No one is allowed to perform the activities as an IP, without being registered with the Board. Only "fit and proper" individuals who clear the Insolvency/Limited Insolvency examination and satisfy an IP agency's entry requirements will be issued membership certificates.

TRIGGER FOR IRP

The IRP can be triggered by either the corporate debtor or creditor by submitting documents specified in the Code to the Adjudicating Authority (NCLT). For the creditors to trigger the IRP, he must be able to submit all the documents that are defined in the Code, for default exceeding Rs.1.00 Lakhs or such higher amount as may be specified but not exceeding Rs. 1.00 Crores. The Code differentiates two categories of creditors:

(a) Financial creditors: Where the liability to the debtor arises from a solely financial transaction.

(b) Operational creditors: Where the liability to the debtor arises in the form of future payments in exchange for goods or services already delivered.

The Code requires different documents for debtor, financial creditor, and operational creditor to trigger the IRP.

PROCESS FLOW OF THE IRP

The Code defines a default maximum time allowed as the duration of the calm period of 180 days. The period is calculated from the start of IRP, excluding date of admission by the Adjudicator. In the event where 75% of the committee of creditors vote that a debtor's information is especially opaque or the resolution is complex, IP may apply to the Adjudicating Authority for a single extension of another 90 days.

INSOLVENCY RESOLUTION THROUGH MANAGED, TIME-BOUND NEGOTIATIONS

The first phase of the insolvency and bankruptcy process is the period of the Insolvency Resolution Process or IRP. The assessment of insolvency is through documentary proof, triggered either by the debtor or by creditor. The Interim IP is appointed by the NCLT, on the recommendation either by creditor or by debtor or by the Board as the case may be. When the negotiations conclude on a solution to keep the entity as a going concern, the NCLT will close the case of insolvency. If there is no agreement on a solution, or if there is a solution that contravenes any applicable law or does not meet the criteria prescribed in the Code, the NCLT orders that the entity is bankrupt, and orders the start of bankruptcy resolution, which is period of Liquidation.

APPOINTMENT AND TENURE OF INTERIM RP

Section 16 of the Code provides that the Adjudicating Authority shall appoint an interim RP within fourteen days from the insolvency commencement date as may be proposed u/s 7 or 10 by the applicant. If no disciplinary proceedings are pending against him and where no proposal for an interim RP is made, the Adjudicating Authority shall make a reference to the Board for the recommendation of an insolvency professional who may act as an interim RP. The term of the interim RP shall not exceed thirty days from the date of his appointment.

CHECK THE ELIGIBILITY CRITERIA BEFORE ACCEPTING APPOINTMENT OF THE INTERIM RP

The Interim RP before accepting the appointment needs to ensure that he has submitted his consent in Form 2 to the Creditors for submitting to the Adjudicating Authority and he is having valid registration with the Board to act as the RP/IP. He further needs to ensure that;

(a) his appointment is properly approved by the applicant;

(b) his remuneration has been approved by the applicant and confirming that he will pay the same from his own funds;

(c) he has made disclosures at the time of his appointment and thereafter in accordance with the Code of Conduct.

(d) he is eligible for appointment as the Resolution Professional under Regulation 3 of a corporate debtor, if he and all partners and directors of the IP entity of which he is a partner or director, are independent of the corporate debtor.

Explanation– A person shall be considered independent of the corporate debtor, if he:

(a) is eligible to be appointed as an independent director on the board of the corporate debtor under section 149 of the Companies Act, 2013, where the corporate debtor is a company;

(b) is not a related party of the corporate debtor; or

(c) is not an employee or proprietor or a partner:

(i) of a firm of auditors or company secretaries in practice or cost auditors of the corporate debtor; or

(ii) of a legal or a consulting firm, that has or had any transaction with the corporate debtor amounting to ten per cent or more of the gross turnover of such firm, in the last three financial years.

A Resolution Professional who is a director or a partner of an IP entity, shall not continue as RP in a CIRP if the IP entity or any other partner or director of such IP entity represents any of the other stakeholders in the same corporate insolvency resolution process.

FEE OF THE INTERIM RP- COST OF THE INTERIM RESOLUTION PROFESSIONAL

Regulation 33 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides as under:

(1) The applicant shall fix the expenses to be incurred on or by the interim RP.

(2) The Adjudicating Authority shall fix expenses where the applicant has not fixed expenses by the applicant.

(3) The applicant shall bear the expenses which shall be reimbursed by the committee to the extent it ratifies.

(4) The amount of expenses ratified by the committee shall be treated as insolvency resolution process costs.

Explanation- For the purposes of this Regulation, "expenses" mean the fee to be paid to the interim RP and other expenses, including the cost of engaging professional advisors, to be incurred by the interim RP.

There is no decided structure for the Interim RP professional fee and it is a matter of negotiation between the applicant and the Interim RP. Therefore, it would be appropriate for the Interim RP to get clear mandate regarding his fees and other expenses to be incurred by the Interim RP and get consent to reimburse the same by the applicant from time to time.

MORATORIUM ON DEBT RECOVERY ACTION

The motivation behind the moratorium is that it is value maximising for the entity to continue operations even when viability is being assessed during the IRP. There should be no additional stress on the business after the public announcement of the IRP. The order for the moratorium during the IRP imposes a stay not just on debt recovery actions, but also on any claims or expected claims from old lawsuits or on new lawsuits, for any manner of recovery from the entity. The moratorium will be active for the period in which the IRP is active.

PUBLIC ANNOUNCEMENT OF IRP AND COLLECTION OF CLAIMS

The NCLT issues an order for the public announcement of the IRP. The announcement will include a location where all creditors can file claims of liability against the entity, as specified in regulations. The manner of filing must afford the opportunity to all creditors to submit their claim to be considered while resolving insolvency, and be counted in the priority of claims during liquidation if the negotiations fails.

The information will be collected and maintained by the interim RP.

MANAGEMENT OF THE CORPORATE ENTITY VIS-A-VIS POWERS OF THE INTERIM RP

Section 17 of the Code provides the following powers to the Interim RP:

(a) the management of the affairs of the corporate debtor;

(b) the powers of the board of directors or the partners of the corporate debtor, as the case may be, shall stand suspended and be exercised by the interim RP.

(c) the officers and managers of the corporate debtor shall report to the interim RP and provide access to such documents and records of the corporate debtor as may be required by the interim RP;

(d) the financial institutions maintaining accounts of the corporate debtor shall act on the instructions of the interim RP in relation to such accounts and furnish all information relating to the corporate debtor available with them to the interim RP.

The interim RP vested with the management of the corporate debtor shall—

(a) act and execute in the name and on behalf of the corporate debtor in all deeds, receipts, and other documents, if any;

(b) take such actions, in the manner and subject to such restrictions, as may be specified by the Board;

(c) have the authority to access the electronic records of corporate debtor from information utility having financial information of the corporate debtor;

(d) have the authority to access the books of account, records and other relevant documents of corporate debtor available with government authorities, statutory auditors, accountants and such other persons as specified in the

> 'The Code has provided only 30 days' time to the Interim RP, and during that period he is eligible to act as per powers given under section 20 of the Code. But practically within the 30 days' time it is not possible to understand the existing status, make up mind for further action even if he appoints accountants, legal or other professionals for his assistance, they will take certain time to start and complete the work. Therefore, he may not be practically able to take effective and proper action as are necessary to keep the entity as a going concern.'

Regulation 4 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 namely -

(a) depositories of securities;

(b) professional advisors of the corporate debtor;

(c) information utilities;

(d) other registries that records the ownership of assets;

(e) members, promoters, partners, board of directors and joint venture partners of the corporate debtor; and

(f) contractual counterparties of the corporate debtor.

Section 19 of the Code casts obligations on the personnel of the corporate debtor, its promoters or any other person associated with the management of the corporate debtor to extend all assistance and cooperation to the interim RP as may be required by him in managing the affairs of the corporate debtor and in case of default, the Interim RP may make an application to the Adjudicating Authority for necessary directions.

Critical Issues

The Interim RP may have to face the following practical problems in exercising the powers vested under section 17 of the code:

(a) It is unlikely that the existing management will easily allow the Interim RP to exercise the powers to control the management & affairs of the entity; some times it may be necessary to take the assistance of the local administration as well police, which may not be available to him, as the existing management may have influence on the local administration and in these processes, most of the available time of 30 days may get waste. Regulation 30 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides that the interim RP may make an application to the Adjudicating Authority for an order seeking the assistance of the local district administration in discharging his duties under the Code or these Regulations.

(b) The Interim RP may not be having experience of the business activities of the entity; therefore, it would be very difficult to take proper decision to continue the business activities in a proper manner.
(c) When the powers of the Board of directors will be suspended from the date of the order; many requirements for seeking approval of the Board and Audit and other committees will also be suspended and the interim RP may not be able to comply with the requirements relating to approval of the financial results, statement of accounts, Board Report, etc. as per requirement of SEBI (LODR) Regulations, 2015 as well as other compliance of the Companies Act, 2013 relating thereto.
(d) Upon exercising the powers to execute deeds and documents, including receipts and cheques on behalf of the Debtors, to carry on the operations on the going concern basis he will be liable for dishonor of cheques etc., and may have to face the legal action for a very small period of his tenure of 30 days, if his appointment could not be confirmed by the committee of creditors as the RP.

DUTIES OF INTERIM RP

Section 18 of the Code provides following duties of the Interim RPs:
(a) Collect all information relating to the assets, liabilities, finances and operations of the corporate debtor for determining the financial position of the corporate debtor, including information relating to—
  (i) business operations for the previous two years;
  (ii) financial and operational payments for the previous two years;
  (iii) list of assets and liabilities as on the initiation date; and
  (iv) such other matters as may be specified.
(b) Receive and collect all the claims submitted by creditors to him, pursuant to the public announcements made under sections 13 and 15.
(c) Constitute a committee of creditors.
(d) Monitor the assets of the corporate debtor and manage its operations until a resolution professional is appointed by the committee of creditors.
(e) File information collected with the information utility, if necessary.
(f) Take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including—
  (i) assets over which the corporate debtor has ownership rights which may be located in a foreign country;
  (ii) assets that may or may not be in possession of the corporate debtor;
  (iii) tangible assets, whether movable or immovable;
  (iv) intangible assets including intellectual property;
  (v) securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies;
  (vi) assets subject to the determination of ownership by a court or authority;
  (e) to perform such other duties as may be specified by the Board.

POWERS OF THE INTERIM RP FOR MANAGEMENT OF OPERATIONS OF THE ENTITY AS GOING CONCERN

Section 20 casts an obligation on the interim RP to make every endeavor 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 and shall have the authority—
(a) to appoint accountants, legal or other professionals as may be necessary;
(b) to enter into contracts on behalf of the corporate debtor or to amend or modify the contracts or transactions which were entered into before the commencement of corporate insolvency resolution process;
(c) to raise interim finance, provided that no security interest shall be created over any encumbered property of the corporate debtor without the prior consent of the creditors whose debt is secured over such encumbered property:
(d) to issue instructions to personnel of the corporate debtor as may be necessary for keeping the corporate debtor as a going concern; and
(e) to take all such actions as are necessary to keep the entity as a going concern.

Critical issues

The Code has provided only 30 days' time to the Interim RP, and during that period he is eligible to act as per powers given under section 20 of the Code. But practically within the 30 days' time it is not possible to understand the existing status, make up mind for further action even if he appoints accountants, legal or other professionals for his assistance, they will take certain time to start and complete the work. Therefore, he may not be practically able to take effective and proper action as are necessary to keep the entity as a going concern.

APPOINTMENT OF REGISTERED VALUERS

Regulation 27 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides that the interim RP shall within seven days of his appointment, appoint two registered valuers to determine the liquidation value of the corporate debtor in accordance with Regulation 35. It is advisable to take report for the immovable assets and Plant & Machinery from the Chartered Engineers empaneled with the Income Tax Department and the overall valuation report from the eligible Chartered Accountants or the Merchant Bankers depending upon the size and nature of the debtor's business activities.

CONSTITUTION OF THE COMMITTEE OF CREDITORS AND RELATED COMPLIANCES

Section 21 provides that the interim RP shall after collation of all claims received against the entity and determination of the financial position constitute a committee of creditors. Regulation 17 provides that the interim RP shall file a report certifying constitution of the committee to the Adjudicating Authority on or before the expiry of 30 days from the date of his appointment. Further that the interim RP shall convene the first meeting of the committee within seven days of filing of the report under this Regulation.

Critical Issue

The basic requirement for making public announcement to receive claims within 14 days from the date of his appointment and to finalise and submit report of the constitution of Committee of Creditors to the adjudicating authority and then call meeting of the creditors' committee within 7 days of his report to the Adjudicating authority by giving notice of atleast 7 days to all the committee members. The same is a neck to neck exercise, as could be seen from the following Table:

Date of appointment of Interim IP	X date
Public announcement needs to be given by Interim IP within 3 days of his appointment in the Form A	X+3 days
Invitation of claims from the creditors within 14 days of the appointment in the Form B, C and D as the case may be	X+ 14 days
Verification and Finalization of claims by the Interim IP within 7 days of end of the claim period	X+21 days

Constitution of the Committee of creditors and submission of report to the Adjudicating authority within 30 days of his appointment	X+ 30 days
Call meeting of the committee of creditors by giving not less than 7 days' notice	X+30 days
Hold meeting and submit the Report of the Committee meeting to the Adjudicating authority within 2 days of the meeting	X+32 days

COURSE OF ACTION WHICH MAY BE TAKEN BY THE INTERIM RP

In order to fulfill the obligations cast on the Interim RP, he needs to take the following steps, immediately after his appointment by the Adjudicating Authority, depending upon the size and nature of the debtor's business activities;

- Intimation for the admission of the application by the Adjudicated Authority, appointment of the Interim RP, applicability of the Moratorium period, etc. to the Stock Exchange within 24 hours of the orders.
- Submit intimation to the IPA and the Board regarding his appointment as the Interim RP.
- Access the information from the Insolvency Utility Service Agencies, if any as may be available.
- Host the aforesaid orders on the website of the debtors, if any.
- Serve copy of the orders to all the directors, committee members and promoters informing suspension of their powers till the further orders of the Adjudicating Authority.
- Inform all the Key Managerial Personnel and head of departments to report him on daily basis.
- Call a meeting of all the head of department, legal consultants, auditors, to convey the aforesaid orders and take various report relating to the business activities, list of the creditors, all the movable and immovable assets, pending legal cases by or against the company, employees, bank account particulars, fund flow statement, upto the date of the admission of the application by the Adjudicating authority.
- Give necessary instructions to the legal consultants/advocate for submission of the copy of the orders before the Court, tribunals, and other forum for moratorium conditions.
- Give public announcement in the newspapers for submission of the claims by the creditors, etc., within the stipulated time.
- Appoint consultants to take assistance.
- Inform Bank, Financial Institutions and financial creditors for his appointment and change in the signatories for operations of the Bank Accounts, as may be considered appropriate by the Interim RP for smooth banking transactions.
- Appoint suitable valuers for valuation of the assets etc.
- Receive and verify the claims being received from the creditors with the books of accounts and approve or reject the same.
- Give intimation of approval or rejection of the claims to the respective creditors with the stipulated time and prepare list of the same for providing it to the Adjudicating Authority.
- Upload/provide information from time to time to the Board, IPA and Information Utility.
- Constitute Committee of the Creditors along with their voting rights and submit a report to the Adjudicating Authority within 30 days from his appointment.
- Prepare Information Memorandum and forward the same to the applicant for preparation of the Resolution Plan.
- Ensure that all the compliances and filing of returns, payment of taxes, creditors are as per terms and conditions within the stipulated time.
- Call a meeting of the Committee of the creditors by giving notice of not less than 7 days to seek approval for appointment of the Resolution Professionals, resolution plan, insolvency expenses incurred so far and other matters as may be required.
- Forward report and Minutes of the Creditors Committee Meeting to the Adjudicating Authority for further directions.
- Discharge all the duties and responsibilities under the Code and Regulations as may be applicable from time to time.
- Ensure compliances and fulfillment of the duties as imposed by the Adjudicating Authority and under the Code and Regulations thereto from time to time.
- If the Interim RP has not been appointed as the RP, to hand over charge to other RP as may be appointed by the Adjudicating Authority.

APPOINTMENT OF RESOLUTION PROFESSIONAL

Section 22 of the Code provides that the first meeting of the committee of creditors shall be held within seven days from the constitution of the committee of creditors. The committee of creditors, may, in their first meeting, by a majority vote of not less than 75% of the voting share of the financial creditors, either resolve to appoint the interim RP as a RP or to replace the interim RP by another RP.

CONCLUSION

The Government has provided in the Code a mechanism for resolving Insolvency and Bankruptcy through Insolvency Professionals subject to the supervision and control of the Adjudicating Authority. IBBI and the IP Agency will regulate the activities of the RP. Now only the Registered IPs can act as the RP or Trustee and Liquidators under the Companies Act, as well as under the Code. For the purpose of the quality of the services required to carry on the business of the debtors on going concern basis and to maximize the value of the debtors, the entry norms for the IPs are strict, requiring professional standing for not less than 10 years for the CA, CS, CWA and Advocates subject to passing of the examination. Therefore, to work as the RP is a new and challenging opportunity which needs thorough experience of the legal, financial and accounting frame work as well as commercial mind to run the business of the debtor as the going concern. CS

SOURCE/ BIBLIOGRAPHY:

1. Report of the Bankruptcy Law Reforms Committee dated 4th Nov., 2015
2. Insolvency And Bankruptcy Code, 2016 and the regulations notified there under

ACRONYMS USED:

Code or IBC : Insolvency and Bankruptcy Code, 2016
Board or IBBI: Insolvency and Bankruptcy Board of India
CIRP: Corporate Insolvency Resolution Process
IRP: Insolvency Resolution Process
IP: Insolvency Professional
RP: Resolution Professional
IPA: Insolvency Professional Agency
LLP: Limited Liability Partnership
SEBI (LODR): SEBI (Listing Obligation and Disclosure Requirements) Regulations, 2015
NCLT: National Company Law Tribunal
CA: Chartered Accountants
CS: Company Secretary
CMA: Cost and Management Accountant

ARTICLE

Insolvency Professionals: - Role, Duties, Challenges And Opportunities

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The Bankruptcy Code ("Code") has revamped the bankruptcy and insolvency laws in India, and most importantly, done away with the scattered legislations that existed earlier and consolidated all laws under one umbrella. It is an overhaul of the existing law dealing with insolvency & paves a smooth passage for much needed reforms. The Code seeks to achieve certainty in recovery and enforcement proceedings and moreover it is a useful tool for creditors and investors specifically for international creditors and investors, who are generally looking at opportunities in the Indian Economy.

The Insolvency and Bankruptcy Code offers a time bound resolution process aimed at maximising the value of distressed businesses. This will benefit not just the creditors and debtors of the companies but also the overall economy because capital and productive resources will get redeployed relatively quickly. Further, to achieve maximum value of the distress business, the Code assigns duties and responsibilities to the Insolvency Professionals.

Global institutions are continuing to grow their investments in India and in this context they are increasing their exposure to Indian entities and laws. Over the years, many concerns have been existing and / or raised amongst international investors on the regulatory and country specific risk while transacting or doing business in India. That considering such a scenario, this code is set to provide a major boost to the India economy, especially on account of timely resolution and certainty in recovery.

The Bankruptcy Code is a unified and comprehensive piece of legislation for the resolution of insolvency in respect of companies, limited liability partnerships, partnership firms and individuals. The Code creates a new institutional framework which consists of adjudicatory bodies, a regulator, Insolvency Professionals and information utilities.

In contrast to the current regulatory landscape, the Code does not make any distinction between the rights of international and domestic creditors or between classes of financial institutions. Specific attention is drawn to the rights of unsecured and secured creditors in the priority of their claims and therefore provides level playing field for an effective insolvency resolution. The strict timelines for resolution of insolvency and liquidation proceedings are an incentive and provide the requisite impetus for the economic growth.

The code provides for the constitution of a new insolvency regulator i.e. the Insolvency and Bankruptcy Board of India ("Board"). Its role is to oversee the functions of insolvency intermediaries i.e. Insolvency Professionals, Insolvency Professional Agencies and Information Utilities for regulating the insolvency process.

As per the Code, Insolvency Professional means a person enrolled with an Insolvency Professional Agency as its member and registered with the Board as an Insolvency Professional. Insolvency Professional Agency means any person registered with the Board as Insolvency Professional Agency. As defined in section 206 of the Code no person shall render his services as Insolvency Professional without being enrolled as a member of an Insolvency Professional Agency and registered with the board.

INELIGIBILITY

Following individuals shall not be registered as Insolvency Professional:-

a) Minor
b) Non resident
c) Person who does not have the qualification and experience specified in regulation.
d) Person who has been convicted by any competent court for an offence punishable with imprisonment for a term exceeding six months or for an offence involving moral turpitude

and a period of five years has not be elapsed from the date of expiry of the sentence

e) Person who has been convicted of any offence and sentenced in respect thereof to imprisonment for a period of seven years or more
f) Person who is an undischargedinsolvent or has applied to be adjudicated as an insolvent
g) Person who has been declared to be unsound mind
h) Person who is not fit and proper person

QUALIFICATION AND EXPERIENCE REQUIRED FOR IP

An individual shall be eligible for registration as IP , if he:-

a) Has passed the National Insolvency Examination
b) Has passed the Limited Insolvency Examination and has fifteen years of experience in management, after he received a Bachelor's degree from a university established or recognised by law
c) Has passed the Limited Insolvency Examination and has ten years of experience as:
   (i) A chartered accountant enrolled as member of the Institute of Chartered Accountants of India
   (ii) A company secretary enrolled as a member of the Institute of Company Secretaries of India
   (iii) A cost accountant enrolled as a member of the Institute of Cost Accounts of India
   (iv) An Advocate enrolled with a Bar council

REGISTRATION PROCEDURE

An individual enrolled with an Insolvency Professional Agency as a professional member may make an application to the Board in FORM A of the Second Schedule along with the non-refundable fee of Rupees Ten Thousand only to the Board. The Board shall acknowledge the application made by the Applicant within seven days of its receipt. The Board may require the applicant to submit additional documents, information or clarification that it deems fit or may require the applicant to appear before the Board in person or through its representative.

Once the Board is satisfied after inspection or inquiry as it deems necessary that the applicant is eligible, it may grant certificate of registration to the applicant to carry on the activities of an Insolvency Professional in FORM B of the Second Schedule, within 60 days of the receipt of the application excluding the time given by the board for presenting additional documents, information or clarification or appearing in person.

If after considering an application, the Board is of prima facie opinion that the registration ought not be granted, it shall communicate the reasons for forming such an opinion and give the applicant an opportunity to explain why his application should be accepted within 15 days of the receipt of the communication from the Board, to enable it to form a final opinion.

RECOGNITION OF INSOLVENCY PROFESSIONAL ENTITIES

A Limited Liability Partnership, a registered Partnership firm or a Company may be recognised as an Insolvency Professional entity when majority of partners of the Limited Liability Partnership or registered Partnership firm are registered as Insolvency Professional or a majority of the whole time director of the company are registered as Insolvency Professional.

Eligible person may make an application for recognition as an Insolvency Professional entity to the Board in FORM C. If Board is satisfied after inspection or inquiry as it deems necessary that the Applicant is eligible, it may grant a Certificate of recognition as an Insolvency Professional entity in FORM D.

FUNCTIONS AND OBLIGATION OF INSOLVENCY PROFESSIONAL

Role of Insolvency Professional in corporate insolvency resolution process

In the corporate insolvency resolution process insolvency professional plays two roles one as an INTERIM RESOLUTION PROFESSIONAL (IRP) and other as RESOLUTION PROFESSIONAL (RP).

IRP shall be appointed by Adjudicating Authority (NCLT) within 14 days from the insolvency commencement date. Where the application for Corporate Insolvency Resolution Process ("CIRP") is made by financial creditor or the corporate debtor, the RP as proposed shall be appointed as the IRP if no disciplinary proceedings are pending against him. Where application is made by the operational creditor and no proposal for IRP is made then NCLT shall make a reference to the Board for recommendation of an IRP. The committee of creditors may at its first meeting with majority vote of not less than 75 % of the voting share of the financial creditor either resolve to appoint the IRP as a RP or to replace the IRP by another RP.

IRP shall perform following functions:-

a) Collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor.
b) IRP shall within maximum 3 days from his appointment, shall make public announcement and provide the last date for submission of proof of claim, which shall be 14 days from the date of appointment of IRP.
c) Receive and collate all the claims submitted by creditors to him pursuant to the public announcement
d) Constitute a committee of creditors
e) Monitor the assets of the corporate debtor and manage its operations until a resolution professional is appointed by the committee
f) File information collected with the information utility
g) Take control and custody of any assets over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor or with information utility or the depository of securities or any other registry that records the ownership of assets.

RP shall perform following functions;-

a) Preserve and protect the assets of the corporate debtor and continued business operations of the corporate debtor.
b) Represent and act on the behalf of the corporate debtor with third parties, exercise rights for the benefits of the corporate debtor in judicial, quasi- judicial or arbitration proceedings
c) Raise interim finances subject to the approval of the committee of the creditors.
d) Appoint accountants, legal or other professionals in the manner as specified
e) Maintain an updated list of claims
f) Convene and attend all meetings of the committee of the creditors
g) Prepare the information memorandum
h) Invite prospective lenders, investors and any other persons to put forward resolution plans
i) Present all resolution plans at the meetings of the committee of creditors
j) File application for avoidance of transactions

ROLE OF INSOLVENCY PROFESSIONAL IN LIQUIDATION

Where NCLT passes an order for liquidation of the corporate debtor, the resolution professional appointed for the CIRP shall act as liquidator unless replaced by the NCLT.

Liquidator shall perform following functions:-

a) To take into his custody or control all the assets, property effects and actionable claims of the corporate debtor
b) To evaluate the assets and property of the corporate debtor
c) To take such measures to protect and preserve the assets and properties of the corporate debtor as he considers necessary.
d) To carry on the business of the corporate debtor for its beneficial liquidation as he considers necessary.
e) Sell the immovable and movable property and actionable claims of the corporate debtor in liquidation by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels in such as may be specified
f) To draw, accept, make and endorse any negotiable instrument including bill of exchange, hundi or promissory note in the name and on behalf of the corporate debtor, with the same effect with respect to the liability as if such instruments were drawn, accepted, made or endorsed by or on behalf of the corporate debtor in the ordinary course of the business
g) To institute or defend any suit, prosecution or other legal proceeding, civil or criminal
h) To investigate the financial affairs of the corporate debtor to determine undervalued or preferential transactions
i) Liquidator shall prepare and submit to NCLT following reports:-
   (i) A preliminary reports within 75 days from the liquidation commencement process
   (ii) An asset memorandum progress report
   (iii) Sale report
   (iv) Minutes of consultation with stakeholder
   (v) The final report prior to dissolution
j) He shall maintain registers and books in relation to the corporate debtor and preserve for eight years.
k) He shall make public announcement in FORM B within 5 days from his appointment
l) He shall form an estate of the assets mentioned in section 36(3) of the code which will be called the liquidation estate in relation to the corporate debtor then prepare an asset memorandum within 75 days from the liquidation commencement date.
m) He shall receive or collate claims of creditors within 30 days from the date of commencement of liquidation process
n) He shall verify the claims within 30 days from the last date for receipt of claims and may either admit or reject the claim
o) He shall determine the value of claims admitted in such manner as specified by the Board
p) He shall make list of the stakeholder on the basis of the claim submitted and accepted.
q) He shall appoint at least 2 registered valuers to value the assets and with the permission of NCLT distribute amongst the stakeholder, as asset that cannot be readily or advantageously sold due to its peculiar nature or other circumstances.

ROLE OF INSOLVENCY PROFESSIONAL IN FRESH START ORDER PROCESS

IP may make application to the NCLT on behalf of the debtor, who is unable to pay debts and fulfils the conditions specified in section 80 of the Code for fresh start for discharge of his qualifying debt. IP shall examine the application made by corporate debtor for fresh start within 10 days of his appointment and submit a report to the NCLT either recommending acceptance or rejection of the application. IP shall consider and examine the objection made by the creditor to whom a qualifying debt is owned. On the basis of examination IP shall prepare a list of qualifying debts for the purpose of discharge order. IP may submit an application to the NCLT seeking revocation of its order on admission or rejection of application made for fresh start.

> ‘A Limited Liability Partnership, a registered Partnership firm or a Company may be recognised as an Insolvency Professional entity when majority of partners of the Limited Liability Partnership or registered Partnership firm are registered as Insolvency Professional or a majority of the whole time director of the company are registered as Insolvency Professional.’

ROLE OF INSOLVENCY PROFESSIONALS IN INDIVIDUAL INSOLVENCY PROCESS

a) IP may make an application for insolvency resolution process on behalf of debtor who committed default, to NCLT.
b) IP shall examine the Application for insolvency resolution plan by debtor or creditor within 10 days of his appointment and submit a report the NCLT recommending for approval or rejection of the Application.
c) IP shall register the claim of the creditors and prepare a list of creditors on the basis of information of claim of creditor registered.
d) IP shall submit the repayment plan along with his report on such plan to the NCLT within 21 days from the last date of submission of claims.
e) IP shall conduct the meeting of creditors and prepare a report of the meeting on repayment plan.
f) IP shall supervise the implementation of the repayment plan. IP shall within 14 days of the completion of the repayment plan, forward to the person who are bound by the repayment plan and NCLT.

ROLE OF BANKRUPTCY TRUSTEE

a) Bankruptcy Trustee (“BT”) shall register the claims of the creditors within 7 days of the publication of the notice then prepare the list of the creditors within 14 days from the bankruptcy commencement date.
b) BT shall convene the meetings of creditors and decide the quorum of the meeting then conduct the meeting of the creditors.
c) BT shall apply to the NCLT for a discharge order on the expiry of one year from the bankruptcy commencement date or within

7 days of the approval of the committee of creditors of the completion of the administration of the estate of the bankrupt.

d) BT shall perform following functions:

e) Investigate the affairs of the bankrupt relies the estate of the bankrupt.

f) Distribute the estate of the bankrupt.

CHALLENGES FOR INSOLVENCY PROFESSIONAL

Professionals in India have been operating in an environment that protects industrial undertakings and large commercial enterprises from closure in spite of losses and inability to pay debts, by laws such as SICA or State Relief Undertakings Act, which are still operative. From the freedom to pay the debts or other liabilities as and when you are able to do so, the law is changing to declare you insolvent, if you have no money to pay the debt when it falls due for payment. The focus of the professionals advising business enterprises has to shift to prudent cash flow forecasting and management practices.

Although the definition of IP under the Code makes no reference to chartered accountants, cost accountants, company and lawyers, it is clear, now from the regulations that only such professionals (and other eligible professionals) will have to undertake the tasks of insolvency resolution and liquidation of corporates. The task of IPs will relate to the following categories of enterprises.

1. All companies with debt of INR1 lakh and above.
2. Industrial undertakings and large commercial enterprises
3. Infrastructure projects
4. Medium, small and micro enterprises.
5. Individuals and partnership firms (debts of INR 1,000 and above)
6. Fresh start cases of individuals with annual income of INR60.000 or less.

IPs will have to pick the category of insolvents from among these to focus on. If individual insolvencies and fresh start cases are to be taken up, it will require different kinds of enterprise and manpower to handle such cases. The Code provides that if there is no IP suggested by the creditor, the IBBI will nominate the IP. It is presumed that a panel of IPs to be maintained by the IBBI will be different for locations and types of insolvents, otherwise the system will be difficult to operate. In any case, IPs will have to decide their respective areas of operation and indicate them in their application for registration as IPs.

In certain economics (such as the US), insolvency law has the concept of "debtor in possession" and on commencement of insolvency, a moratorium becomes operative and the debtor is allowed to remain in possession, formulate a resolution plan and obtain approval from all stakeholders. The Indian law prescribes a concept of "creditor in control", and the IP is required to take possession of all assets and take over the management of the enterprise. This is part of IPs' responsibilities is the most challenging and could be eased if the insolvency enterprise extends cooperation to the IP and facilitates the takeover of assets and management. IPs will have to decide how possession of assets will be taken; whether each and every item will be included by making an exhaustive inventory or symbolic possessions will be taken, trusting the existing personnel of the enterprise if a resolution plan is not worked out, it is expected that the company management will cooperate with the IP and ensure that all assets are accounted for, preserved and protected, that no valuable assets will be concealed or disposed of without the knowledge of the IP, and that the enterprise is allowed to be operated as a going concern.

Lastly, the IPs need to note that the Code at every stage of the appointment of an interim or final IP or approval of change of IP requires that the IBBI certify that there are no disciplinary proceedings pending against the IP and give specific approval for appointment of IP. Further, disciplinary proceedings may be initiated against the liquidator or resolution professional based on an application made by a creditor in cases where undervalued transactions are not reported by them. These provisions indicate a concern that IPs may deal with assets of the business enterprise for gaining pecuniary or other advantage for themselves or for other third parties to the detriment of other claimant and stakeholders. Professionals planning to undertake assignments as an insolvency resolution professional will have to ensure that the officials selected are independent persons with no relationship with or interest in the business enterprise and are efficient, competent and honest with good reputation and character and integrity beyond any doubt.

The Code offers a time bound resolution process aimed at maximising the value of distressed businesses. This will benefit not just the creditor and debtor of the companies but also the overall economy because capital and productive resources will get redeployed relatively quickly. Further, to achieve maximum value of the distress business, the Code assigns duties and responsibilities to the Insolvency Professionals and despite the lot of challenges in their way, the Insolvency professionals are trying to achieve the same in the manner as prescribed under the Code.

However, the successful implementation of the Code depends on scrupulous planning so that the same doesn't impact the effectiveness of the code in an adverse manner and thus in pursuance of the same, the legal authorities need to have requisite planning since the same might tend to strain the nascent institutional infrastructure that is being rushed to operationalize the IBC. Hence, it of utmost importance, at this stage to look that the present IBC does not suffer from the dilemma & predicament of earlier reform attempts thereby defeating the very purpose of the IBC.

Lastly, with the present code coming in to force, it will not only ensure time bound settlement Insolvency but will also create a comprehensive insolvency legislation which will enable faster turnaround of companies & businesses and at the same time revitalise the debilitating corporate market which is much required in the present economic scenario of our country and is indeed a step forward towards the transformation in the legal era. CS

Conceptual Walkthrough with Revised Model GST Law

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INTRODUCTION

Taxes on goods and services are already there in our country in different forms like Excise Duty, VAT, Service Tax, Entry Tax, Entertainment tax etc. All these are different levies by Central or State Governments and are having altogether different sets of taxable events, rates, procedures and compliances. The existing legal framework of these indirect taxes pose some challenges and issues before tax payers like:

- Multiplicity of taxes.
- Cascading effect of taxes (tax on taxes).
- Classification issues.
- Excessive compliances.
- Fractured flow of Input Credits.

The proposed GST regime is bound to affect most aspects of every business be it procurement, supplies, Geographical Presence etc. Accordingly, it is advisable for all business entities, specially those having multiple locations or are having multiple registrations, to analyze their business structure in the light of the proposed law and have a complete impact analysis of their business process.

A single Goods and Services Tax (GST) was envisaged with a view to over come all these issues of tax payers. Ideally GST is a comprehensive Consumption Based Value Added Tax to be levied at all stages of supply of goods and/or services, whereby Input Tax Credit on all types of business procurements (i.e. goods, services and capital goods) should be available without State Geographical Barriers.

Since the desired Constitutional Amendments have already been made and notifications for giving effect to provisions of the same have been issued, it is only a matter of time before GST is levied in the country. The Government, on many occasions had disclosed its intention to levy GST as early as possible. It may be noted that as per constitutional amendment, the government will loose power to levy existing taxes from 15th September 2017 and hence it can be inferred that GST will become reality in our country latest by September 2017.

In our country, instead of single comprehensive tax, GST is proposed to be levied on Dual Tier basis i.e. on all transactions of supply of goods and services; two taxes namely 'State Goods and Service tax' (SGST) and 'Central Goods and Services Tax' (CGST) shall be charged. If such transaction takes place in the course of inter-state trade or commerce, then instead of two different taxes one single tax to be called as 'Integrated Goods and Services Tax' (IGST) Shall be levied, the rate of which shall be equivalent to sum total of SGST and CGST.

The GST the result of not only major a tax reform, but also a complete business reform for a number of reasons. It will greatly affect business practices and parameters. Therefore apart from tax professionals, it is important that the basic concepts of the GST should be understood by businessmen, as well as the finance, procurement and sales teams of every business entity.

SALIENT FEATURES OF THE MODEL GST LAW

Some of the important aspects of the GST, on the basis of revised model GST law released by the Government in November 2016, are summarized hereunder.

TAXABLE EVENT

In the present regime, levy of tax on goods are at the time of sale thereof or in case of services at the time of provision of services. The term Sale of goods and Provision of Services, under the present respective legislations, normally creates charge when particular goods are sold by one person to another or some services are provided by one person to another for a

consideration.

In the proposed tax regime, the taxable event will be Supply of Goods and Services. The term 'Supply' is much broader than existing charge of taxes i.e. Sale and Provision and it includes all commercial supplies such as Sale, Transfer, Barter, Exchange, License, Rental, Lease, Disposal etc. In the proposed GST law, it is not necessary that Supply should be there from one person to another, i.e. even self supplies can come under GST net. Further the proposed law provides a list of activities/ transactions whereby even if no consideration is charged the transaction will be treated as deemed supply - that means liability to pay GST will still be there. For instance if a company situated in Jaipur sends some of its assets (stock or otherwise, on which ITC was taken at the time of purchase) from its Jaipur office to its Mumbai office to be used there, the liability to pay GST will arise on such transactions, despite the fact that neither there were two persons involved nor any consideration was there in such transaction.

TIME OF SUPPLY

The term 'Time of Supply' signifies the point of time when liability to pay any tax arises. It will be altogether a new concept for existing dealers of goods i.e. paying VAT on their sales. In the present sales tax law, the time of supply is sale of goods i.e. directly linked to taxable event. However, under GST regime the tax on supply of goods shall be required to be paid at the earliest of following two events:

1. Date of issue of the invoice by supplier or the last date when he is required to issue the invoice.
2. Date on which payment is received by the supplier.

Further the model law provides that the invoice is to be made at the time or before delivery of the goods. Hence for all practical purposes the tax will have to be paid at the time of earliest of all major commercial events i.e. preparation of Invoice or Receipt of payment. In the existing system payment of VAT/ CST or Excise duty doe not have any bearing on the receipt of advances, whereas under the GST regime, even if the delivery has not been given or sales has not been completed, if the advance is received the tax liability has to be discharged. Provisions for time of supply for services are more or less similar to the present provisions of 'Point of Tax' in the Service Tax Laws.

Time of supply provisions for supply of goods on approval basis and Continuous Supply of Goods/ Services are separately given to provide deserving relief. All tax payers have to modify their systems and procedures so that all relevant dates are captured to determine correct Time of Supply for all transactions and taxes be paid timely.

PLACE OF SUPPLY

The concept of place of supply is important to work out whether a particular transaction is Intra-State or Inter State. If a particular transaction is Intra-State, there will be two taxes i.e. SGST & CGST. If the transaction is in the course of Inter-State Trade, one tax i.e. IGST will be levied. The rate of tax of IGST will be equivalent to sum total of SGST & CGST.

A particular supply shall be treated as Intra-State if the 'Location of Supplier' and the 'Place of Supply' are in same state. On the contrary if the 'Location of Supplier' and the 'Place of Supply' are in different states then the supply will be treated as Inter-State. Further the following transactions are specifically treated as Inter-State transactions:

i) Import of Goods/ Services in India.
ii) Supply where 'Location of supplier' is in India and the 'Place of Supply' is outside India. (export and some other supplies which cannot be technically classified as Export due to non realization of consideration in convertible foreign exchange or supply to distinct person of same entity).
iii) Supply to/ by a SEZ unit or developer.
iv) Any other supplies which are not an Inter-State Supplies, as may be specified.

Accordingly, any transaction with SEZ developer or unit will be Inter-State transaction even if the both parties to transaction are in the same state. Further since Union Territories without state legislature (eg Chandigarh) are not State and any transaction originating from them shall be treated as Inter-State Transaction and accordingly will attract levy of IGST.

The concept of Place of Supply is not new to the Service Tax assesses. The dealers paying VAT & CST are familiar with the concept of Intra and Inter State Sales; however provisions classifying particular supply of goods as inter state or intra state are fairly different from the present legal provisions.

In the GST Regime the concept of Place of Supply is very important, because if for any reason any tax payer deposits the IGST instead SGST/CGST or vice versa, then as per provisions of proposed law, unlike present regime, one has to first deposit the correct tax and then claim refund of the wrongly deposited tax.

VALUATION

Once it is settled that tax(GST) is to be paid, and what time it is to paid and which tax (IGST or CGST/SGST) is to be paid the next question that arises is at which value the tax is to be paid. Normally GST is to be paid on the 'Transaction Value' that is the actual price of supply. Transaction Value of a supply includes:

- All statutory levies other than GST.
- Any Obligation of Supplier which as been paid by the Recipient.
- Expenses incidental to supply including any amount charged for anything done by the supplier at the time or before supply, in respect of supply of goods/ services.
- Interest, late fee, or penalty for delayed payment of consideration.
- Non-Govt. Subsidies directly linked to the price.

> 'One of the main objectives of introducing GST is seamless flow of credit along the supply chain and hence mitigating cascading effect of taxes. Under GST regime normally credit of input tax on all goods and services, used or intended to be used for business, shall be allowed to the registered tax payer, which is restricted under current tax regime in many ways and hence results into higher cost of goods and/ or services.'

However the Transaction Value shall not include:

- Any discount given before or at the time of supply, as evidenced from Invoice and
- Any discount after the supply has effected, where the discount is in terms of an agreement entered into at or before such supply and the recipient has reversed the respective ITC.

Where supply is between related parties or price is not the sole consideration of supply then instead of Transaction Value, value of the supply has to be determined as per prescribed Valuation Rules. In such a case an attempt will have to be made to determine the arms length or the real price of the supply for levy of GST point of view.

INPUT TAX CREDIT

One of the main objectives of introducing GST is seamless flow of credit along the supply chain and hence mitigating cascading effect of taxes. Under GST regime normally credit of input tax on all goods and services, used or intended to be used for business, shall be allowed to the registered tax payer, which is restricted under current tax regime in many ways and hence results into higher cost of goods and/ or services. However, a registered tax payer shall be entitled to ITC if the following conditions are satisfied:

a) He is in possession of Tax Invoice/ Dr. Note/ Prescribed Tax paying document.
b) He has actually received the goods and/ or Services.
c) Tax Charged in the invoice has actually been paid to the credit of your Account.
d) He has furnished required return under the GST Law.

Further, in case of ITC of Services there is requirement to pay the value of supply along with tax to the supplier within three months form the date of issue of invoice by the supplier, failing which ITC shall be reversed along with interest liability in the manner yet to be prescribed.

In the present tax regime, there are several litigations on the allowability of ITC on the conditions of matching of taxes paid by vendors on respective sale. However this matching concept is presently not there in the excise and service tax. In GST provisions for invoice level matching of input tax credit have been made for all supplies of goods and services. In result if a supplier does not deposit taxes to the credit of government account, the recipient will not be allowed to avail the ITC despite the fact that he had paid such taxes to the supplier. Accordingly one needs to carefully select the vendor from whom such goods and/ or services are to be purchased/ procured. If a tax payer does not select the vendor diligently for procuring inputs under GST regime, it can result into double payment of taxes, hence categorization of vendors becomes necessary.

Further, as it is a destination based consumption tax, there is a set order of utilizing input tax credit under GST regime, which is as under:

- IGST in order of IGST, CGST and SGST;
- CGST in order of CGST and IGST;
- SGST in order of SGST and IGST;

Cross utilization of credit between CGST and SGST shall not be available. Further, unlike CENVAT Credit there is no specific concept of availment and utilization of credit under Model GST Law. Alike, current indirect taxes, reversal of input tax credit is there when inputs, input services or capital goods are used partly for business and non business purpose, or taxable and exempted supplies purposes.

TRANSITION TO GST

Migration or Transition to GST is a process of existing tax payers' transition into GST regime from the existing indirect taxation

regime. Among many, two most important aspects of transition are Input Tax Credit and Registration:

- Carry forward of complete and eligible Input tax credits paid on goods, input services and capital goods. The tax payer might have paid Sales Tax, Services Tax and Excise Duty on inwards supplies in the existing tax regime which are eligible to be carried forward. Further it may be possible that those eligible credit may not be reflected in the returns filed in the existing laws. Identification and proper compliances to carry forward the same are most important aspect of the Transitional phase.
- It is better to decide the place or places of registration in the proposed regime as soon as possible. It may be noted that unlike existing service tax system whereby the tax payer can take centralized registration, as per model GST law there will not be any system of centralized registration. Persons located in different States will have to take separate registration under GST. In addition to it, person having multiple business verticals in the same State will be having option to take different registrations within the same State. All registrations shall be treated as a separate taxable person from adjudication and compliances point of view under proposed GST law.

COMPLIANCES UNDER GST

Apart from six different conceptual aspects of the proposed GST, discussed above, another important area is compliances. Compliances under GST is the area whereby any tax payer is under obligation to make payment of taxes an file different returns and statements . In GST regime normally a tax payer is required to file minimum three monthly statements/ returns per registration apart from annual return. Further in case the tax payer is required to deduct tax at source an additional return per month per registration is required to be filed. That means if any tax payer is having three registrations and is required to deduct TDS, he shall be filing 147 statements/ returns in a financial year. Moreover in most places these statements requires invoice level entry, i.e. information contained in each and every invoice has to be uploaded in the monthly statements e.g. Name, Address, GSTIN of Recipient, description of goods/services, HSN code, Details of tax etc. Apart from filing of statement and returns, in case of post supply events, such as return and/or rejection of goods, difference in rates, quantity etc. the GST law specifies adjustments of the same in a particular manner through debit and/or credit notes, which in turn also be reported through monthly statement/ returns.

CONCLUSION

The GST is bound to affect most aspects of business be it procurement, Supplies, Geographical Presence etc. Accordingly, it is advisable for all business entities , especially those having business in multiple locations or are having multiple registrations, to analyze their business structure in the light of the proposed law and have a complete impact analysis of their business process. In the absence of proper planning there may be situations whereby investment in working capital may rise significantly. CS

Brief Analysis of NCLT Principal Bench's Decision on "Limitation Period" U/S 241 and 242 of the Companies Act, 2013

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INTRODUCTION

The law on limitation plays a very important role in any litigation. The first challenge any petition generally faces is its non-maintainability on the ground of its date of filing beyond the prescribed period of limitation and hence, prayer is made for its dismissal on that ground only. While in most of the provisions of the Companies Act, there exists a specific provision as to the period within which the aggrieved petitioner can prefer a petition against the wrongful decision, yet in some provisions of the Companies Act, namely, allegations of "oppression and mismanagement", there is no specific provision mentioned in the relevant provision of the law as to the period within which the petition has to be filed and in those cases the provisions of the Limitation Act, 1963 come to the rescue of the petitioner and how the Court/National Company Law Tribunal (NCLT) views the same is very important as it sets the trend in future cases.

In this article, an attempt has been made to highlight a recent decision of the Principal Bench of the NCLT on the applicability of the provisions of the Limitation Act, 1963 in NCLT proceedings specially when the allegations are under sections 241 and 242 of the Companies Act, 2013 (in short "the Act of 2013") relating to oppression and mismanagement on the ground of removal from directorship of the company and on the ground of increase in the shareholding of the company without affording any opportunity to the petitioner.

Very recently the Principal Bench of the NCLT in the case of Esquire Electronics v. Netherlands India Communications Enterprises Limited (CP No.108/ND/2016) has examined the applicability of the provisions of the Limitation Act, 1963 in NCLT proceedings specially when allegations are under sections 241 and 242 of the Companies Act, 2013 relating to oppression and mismanagement on the ground of removal from directorship of the company and on the ground of increase in the shareholding of the company without affording any opportunity to the petitioner. In this article, this decision has been analysed to clear the doubts which had been persisting on the limitation issue.

The Principal Bench of NCLT consisting of its President Justice M.M. Kumar and Judicial Member Ms. Ina Malhotra, in its judgement/order dated 6.10.2016 in CP No.108/ND/2016 (*Esquire Electronics v. Netherlands India Communications Enterprises Limited*) in the matter of a petition under sections 241 and 242 of the Act of 2013, discussed elaborately the issue regarding the period of limitation in respect of petitions before the NCLT and its observations/ discussions are very relevant, which reads as under:-

> "It is a well settled principle of law that law comes to the rescue of those who are vigilant about their rights. For measuring the extent of vigilance, the legislature has provided period of limitation under the Limitation Act, 1963 (for brevity, 'Limitation Act'). The Limitation Act incorporated by reference and has been applied to matters concerning companies by Section 433 of the Companies Act, 2013 (for brevity, '2013 Act'). It is pertinent to first notice Section 433 of 2013 Act which reads as follows:

"*433 - The provisions of the Limitation Act, 1963 (36 of 1963) shall, as far as may be, apply to proceedings or appeals before the Tribunal or the Appellate Tribunal, as the case may be.*"

In its aforesaid order, the Principal Bench of the NCLT observed that "a perusal of the aforesaid provision makes it patent that the Limitation Act would apply to the proceedings or appeals before the Tribunal or the Appellate Tribunal. The question then is, what would be the period

of limitation in cases where the petitioner has complained of illegal induction of respondents as directors and wrongful reduction of their share capital with the allegations against the respondents of grabbing majority shareholding unfairly as an act of oppression. It appears that there is no specific provision made either in the substantive section of the Limitation Act or in the Articles as per the Schedule. A close scanning of the schedule, however, reveals that Articles 1-112 deal with various types of suits viz., suits relating to accounts where period of limitation is three years, suits relating to contracts where again the period of limitation is three year; suits relating to declarations, suits relating to immovable properties, suits relating to movable properties, suits relating to Trust and Trust property and miscellaneous matters. In most of the cases, the period of limitation is three years except the suit for possession of a hereditary office etc. (from Articles 107 to 110) where the period of limitation prescribed is 12 years or Articles 111 and 112 where the period prescribed is 30 years."

The NCLT also noted and observed that "It appears that the matters concerning illegal removal or induction of directors has not been specifically dealt with in any of the articles. It also becomes obvious that no period of limitation has been provided for illegal reduction of shareholding with mala-fide intention to acquire majority shareholding. In these circumstances, the question is which provision of the Limitation Act would apply. ***The answer is found in Article 113 which deals with the subject of suits for which there is no prescribed period of limitation"*** (emphasis supplied). And as per the said Article 113 of the Limitation Act, the limitation period begins to run from the time when the right to sue accrues and the limitation period prescribed is three years.

The NCLT further observed that "it is equally well settled that when the adjudication results in passing of a decree by a Court or Tribunal, then it is preceded by filing of suits. Every suit is commenced by filing of a plaint. The Supreme Court, in the case of *Manish Mohan Sharma v. Ram Bahadur Thakur Ltd* (AIR 2006 SC 1690) held that Section 634A of the Companies Act, 1956, read with Sections 397 & 398 indicate that all orders passed by the Company Law Board in an application under sections 397 and 398 are enforceable like decrees without any limit on the nature of the order passed by the Company Law Board. In that case, it was further held that the order passed by the Company Law Board in terms of the Memorandum of Family Arrangement was a preliminary decree and the final decree was to be passed after complete implementation of its terms. It was further held that the Company Law Board, when it deals with an application u/s 634A of the 1956 Act and sits as an executing court, then it is subject to all the limitations to which a Court executing a decree is subject."

The aforesaid view is based on the provisions of Companies Act, 1956 and the position of the present Tribunal is far superior than the erstwhile Company Law Board in the matter concerning implementation of orders passed by the Tribunal. Sections 424 of 2013 Act classifies the nature of proceedings before the Tribunal and provides as under:-

"424 - (1) The Tribunal and the Appellate Tribunal shall not, while disposing of any proceeding before it or, as the case may be, an appeal before it, be bound by the procedure laid down in the Code of Civil Procedure 1908 (5 of 1908) but shall be guided by the principles of natural justice, and, subject to the other provisions of this Act [or of the Insolvency and Bankruptcy Code, 2016] and of any rules made thereunder, the Tribunal and the Appellate Tribunal shall have power to regulate their own procedure.

(2) The Tribunal and the Appellate Tribunal shall have for the purpose of discharging their functions under this Act [or under the Insolvency and Bankruptcy Code, 2016], the same powers as are vested in a civil court under the Code of Civil Procedure 1908 (5 of 1908) while trying a suit in respect of the following matters, namely:-
   (a) summoning and enforcing the attendance of any person and examining him on oath;
   (b) requiring the discovery and production of documents,
   (c) receiving evidence on affidavit;
   (d) subject to the provisions of sections 123 and 124 of the Indian Evidence Act 1872 (1 of 1872) requisitioning any public record or documents or a copy of such record or document from any office
   (e) issuing commissions for the examination of witnesses or documents
   (f) dismissing a representation for default or deciding it ex-parte
   (g) setting aside any order of dismissal of any representation for default or any order passed by it ex-parte and
   (h) any other matter which may be prescribed.

(3) Any order made by the Tribunal or the Appellate Tribunal may be enforced by that Tribunal in the same manner as if it were a decree made by a Court in a suit pending therein, and it shall be lawful for the Tribunal or the Appellate Tribunal to send for execution of its orders to the Court within the local limits of whose jurisdiction,-
   a) In the case of an order against a company, the registered office of the company is situated; or
   (b) In the case of an order against any other person, the person concerned voluntarily resides or carried on business or personally works for gain.

(4) All proceedings before the Tribunal or the Appellate Tribunal shall be deemed to be judicial proceedings within the meaning of sections 193 and 228 and for the purposes of section 196 of the Indian Penal Code (45 of 1860) and the Tribunal and the Appellate Tribunal shall be deemed to be Civil Court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974)."

In the aforesaid decision of the Principal Bench of NCLT also stated that "A perusal of the aforesaid provisions would reveal beyond any doubt that the Tribunal is not bound by the procedure laid down by the Code of Civil Procedure. For the purposes of discharging their functions under the 2013 Act or under the Insolvency/Bankruptcy Code, it is vested with the same powers as are vested in a Civil Court under the Code of Civil Procedure while trying a suit in respect of the matter specified in items 2(a) to 2(h). Sub-section (3) makes it further clear that any order made by the Tribunal may be enforced by it in the same manner as if it were a decree made by a Court in a suit pending therein. It has further been clarified that all proceedings before the Tribunal are deemed to be judicial proceedings within the meaning of Sections 193 and 228 and for the purpose of section 196 of the Indian Penal Code. The Tribunal is deemed to be a Civil Court for the purpose of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973."

Another feature in this regard is revealed by section 425 of the 2013 Act. The Tribunal has been vested with the same jurisdiction, powers and authority in respect of its contempt as the High Court has and it may exercise for this purpose all the powers under the

> The orders passed by the Tribunal are executable as decree of the Court and in case of any violation of its orders, section 425 vests the Tribunal with the power of issuing contempt. Once it is a decree, then it follows that the proceedings under section 241 and 242 of 2013 are necessarily proceedings in a suit. It has all trappings of a suit. Therefore, the period of limitation provided for suits would, ipso-facto, be applicable as the Limitation Act has been specifically made applicable by section 433 of 2013 Act. Therefore, in cases where no period of limitation has been provided, the residuary Article 113 would be applicable and the period of limitation would be three years from the date the right to sue accrues.

provisions of Contempt of Courts Act, 1971. Therefore, it becomes evident that the orders passed by the Tribunal are executable as decree of the Court and in case of any violation of its orders, section 425 vests the Tribunal with the power of issuing contempt. Once it is a decree, then it follows that the proceedings under section 241 and 242 of 2013 are necessarily proceedings in a suit. It has all trappings of a suit. Therefore, the period of limitation provided for suits would, ipso-facto, be applicable as the Limitation Act has been specifically made applicable by section 433 of 2013 Act. Therefore, in cases where no period of limitation has been provided, the residuary Article 113 would be applicable and the period of limitation would be three years from the date the right to sue accrues.

NCLT thereafter held that "it is also pertinent to mention that the provision of section 5 of the Limitation Act would not apply to proceedings before the Tribunal as it is the original Court of jurisdiction and the petition filed before it u/s 241 and 242 of the 2013 Act are in the nature of suits. The adjudication by the Tribunal would result in passing of a decree which is executable by virtue of the provisions made in sections 424 and 425 of the 2013 Act."

After prefacing its order with the various principles of law, equity and justice, the NCLT in the impugned order noted that the petition was filed in July 2016 on the allegations that the Petitioner claimed that the Respondents 2 to 5 be removed as Directors and that directions be issued to bona-fide shareholders of the companies to reconstitute the Board of Directors by excluding Respondents 2 to 5 and that all resolutions passed by the Respondent No.1 company allotting shares to various shareholders between 2000 and 2012 be declared as null and void and that as a consequential relief, the names of such allottees be deleted from the register of members of the Respondent No.1 company by rectifying the same.

The NCLT noted that Respondent No.1 company was incorporated in 1996 and the Petitioners alleged that they had no knowledge of its incorporation and that the said Respondent No.1 company was incorporated despite there being a Joint Venture Agreement dated 20.12.1995 between the Petitioner No.1 and Respondent No.6 company along with two other companies. The Petitioner alleged that Respondent No.1 company was incorporated fraudulently which has the same name as was considered by the Joint Venture Agreement dated 20.12.1995. The Petitioners also alleged that Respondent No.1 company failed to file audited balance sheet since the year 2003 till 2016 and that no AGM had been ever convened after 2012. Further, even prior to 2012, as per the records available with the Registrar of Companies (ROC), no AGM of the Respondent No.1 company was conducted for the year 2002 till 2010 and that no statutory filings and compliances had been made since 2012. Even the filings prior to 2012 were incomplete and that the AGM was held in September 2012 which was illegal. There were allegations of oppression and mismanagement against Respondent Nos. 2 and 3 with further allegations of siphoning of funds in the name of fictitious creditors of the company. *The NCLT noted that the last AGM of Respondent No.1 company was held on 29.9.2012 and in the documents filed with the ROC, there was no mention of names of either of the Petitioners and, likewise, a copy of the Annual Return of the Respondent No.1 again would show that the Petitioners were neither directors nor shareholders in Respondent No.1 company.* Accordingly the NCLT was of the view that *the cause of action, if any, arose to the Petitioners on 30.9.2012 and the instant petition having been filed on 25.7.2016, it was clearly beyond the period of three years provided by Article 113 of the Limitation Act.* The Petitioners counsel attempted to stretch the period of limitation by referring to certain e-mails between the period 21.8.2013 to 2.10.2015, but the NCLT noted that those emails did not even touch upon the issued raised in the company petition. After hearing the arguments of the Petitioners and perusal of the documents, *the NCLT held that the Petitioners had never been director or shareholder in Respondent No.1 company and the Petitioners had no locus standi to file the company petition and held that the petition was hopelessly time barred* and attempts had been made to rake up issues pertaining to the years 2000 to 2012 and that the petitioners had no locus standi to file the company petition as they were neither director, shareholder or members of the Respondent No.1 at any stage whatsoever and dismissed the petition being hopelessly time barred.

CONCLUSION

The aforesaid elaborate decision of the Principal Bench of the NCLT on the important issue relating to calculation of period of limitation in respect of petitions seeking reliefs against oppression and mismanagement filed under sections 241 and 242 of the Companies Act, 2013 will clear the doubts and uncertainties prevalent on this preliminary issue and will guide the other Benches of the NCLT located in different cities. The professionals are well advised to be guided by the principles enunciated by the Principal Bench of the NCLT and help in adherence to the period prescribed for completion of hearing of petitions, as mandated in section 422 of the Companies Act, 2013. CS