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# THE INSOLVENCY PROFESSIONAL

YOUR INSIGHT JOURNAL



INSOLVENCY PROFESSIONAL AGENCY OF  
INSTITUTE OF COST ACCOUNTANTS OF INDIA

# Overview

Insolvency Professional Agency of Institute of Cost Accountants of India (IPA ICAI) is a section 8 company incorporated under the Companies Act 2013 promoted by the Institute of Cost Accountants of India.

We are the frontline regulator registered with Insolvency and Bankruptcy Board of India (IBBI). We are given the responsibility to enroll and regulate Insolvency Professionals (IPs) as its members in accordance with provisions of the Insolvency and Bankruptcy Code 2016, Rules, Regulations and Guidelines issued thereunder and grant membership to persons who fulfill all requirements set out in its byelaws on payment of membership fee.

We are established with a vision of providing quality services and adhere to fair, just and ethical practice in performing its task which doesn't restrict only to enrolling but also to monitoring, training and educating the professionals registered with it.

We constantly endeavor to disseminate information in aspect of Insolvency and Bankruptcy code to Insolvency professionals by conducting Round tables, webinars and sending daily newsletter namely "IBC au courant" which keeps the insolvency professionals updated with the news on Insolvency and bankruptcy code.

In our journey of creating a workforce of Insolvency Professionals, we have recently launched Preparatory educational course that provides skill and knowledge which is required to prepare for Insolvency Professional Examination.

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# INDEX

<b>MESSAGES</b>	<b>1-3</b>
• President's Corner	1
• From the MD & CEO's Desk	2
<b>PROFESSIONAL DEVELOPMENT INITIATIVES</b>	<b>4-6</b>
<b>ARTICLES</b>	<b>7-27</b>
• 6th June, 2018 – The Red Letter Day For The Property Buyer's In Delayed Projects Across India	7
• Timelines Under Ibc And Its Adherence	15
• Can Tax Arrears Be Avoided Under Insolvency & Bankruptcy Code?	23
<b>PRACTICUS QUESTE</b>	<b>28-29</b>
<b>JUDICIAL DECLARATION</b>	<b>30-37</b>
<b>POLICY ACTUALIZAR</b>	<b>38-49</b>

# ABOUT US

The Insolvency Professional Agency of Institute of Cost Accountants of India (IPA ICAI), a section 8 company incorporated under the Companies Act 2013 has been promoted by the Institute of Cost Accountants of India to enrol and regulate Insolvency Professionals (IPs) as its members in accordance with provisions of the Insolvency and Bankruptcy Code 2016, Rules, Regulations and Guidelines issued thereunder.



## President's Corner

# CMA AMIT ANAND APTE

IBC is one of the biggest economic reforms adopted by India. It is a rare example of a much-needed law which has witnessed speedy roll-out and implementation. Being a one-stop solution which addresses all insolvencies in a time-bound and economically viable setup, the law has significantly helped India in achieving the historic 30-spot jump in the ease of doing business rankings.

Rescuing sinking companies or exiting doomed businesses has been a pain for investors for decades. Things have turned smoother under the insolvency and bankruptcy code of 2016, that has rebalanced the rights of promoters, banks, vendors and employees.

One of the critical pillar of this Code is the Insolvency Professional (IP), who occupies a pivotal and challenging role of addressing the various prescribed facets within the specified timelines role. These professionals

are duly licensed by insolvency professional agencies (IPAs) and Insolvency and Bankruptcy Board of India. One of the key requisite for being an effective and efficient Insolvency professional is to keep updated with the latest information in the IBC domain.

I commend the efforts of the Insolvency Professional Agency of Institute of Cost Accountants of India in bringing out a monthly online journal Insolvency Professional – Your insight...which I am sure with its high quality research content would go a long way in fulfilling the information need of IPs.

**CMA Amit Anand Apte**  
**President**



## From the MD & CEO's desk **CMA DR S. K. GUPTA**

Insolvency and Bankruptcy Code, 2016 is one of the biggest economic reforms adopted by India. It is a rare example of a much-needed law which has witnessed speedy roll-out and implementation. Being a one-stop solution which addresses all insolvencies in a time-bound and economically viable setup, the law has significantly helped India in achieving the historic 30-spot jump in the ease of doing business rankings. IBC has made significant changes in the way business failures are handled. The reform seeks to tackle the mountain of Rs. 10 trillion of non-performing assets in the banking system in the country. Rescuing sinking companies or exiting doomed businesses has been a pain for investors for decades. Things have turned smoother under the insolvency and bankruptcy code of 2016, that rebalanced the rights of promoters, banks, vendors and employees.

The Insolvency and Bankruptcy Code is thus a comprehensive and systemic reform, which will give a quantum leap to the functioning of the credit market. It's been less than two years that the Insolvency and Bankruptcy Code, 2016 (IBC) came into force. National Company Law Tribunal (NCLT) which acts as adjudicating authority and Insolvency Resolution Professional (IRP) appointed under the code are bound by timelines to dispose of an application for corporate insolvency process. Initially, the parties and lawyers were struggling with several interpretations of provisions of IBC by respective NCLT benches. However, with time there is much clarity and uniformity on the interpretation of its provisions.

IBC regime has, unlike the old insolvency laws, empowered creditors to take over the management and maximize the value to be received by them. According to (IBBI) chief M S Sahoo - "The objective of a CoC (committee of creditors) is to generate competitive resolution plans and then approve that which maximizes the value for everybody — in contrast to recovery which maximizes the value only for one set of people. There is a lot of facilitation in the law for making it happen. The objective is to revive if viable or close it (the asset) if not viable. You can't directly go to liquidation." The preliminary results of the new insolvency regime seem to indicate a significant improvement for financial creditors. The new regime has enabled an average 40-50 per cent recovery rate for them in large cases, in a time-bound manner. The earlier recovery rates were about 25 per cent."

The transition from a fragmented legal system to a unified Insolvency and Bankruptcy Code 2016 (IBC) is marked by challenges to implement it effectively and expeditiously. One of the critical pillar of this Code is the Insolvency Professional (IP), who occupies a pivotal and challenging role of addressing the various prescribed facets within the specified timelines role. These professionals are duly licensed by insolvency professional agencies (IPAs) and Insolvency and Bankruptcy Board of India, are endowed with specialized knowledge, training and perform the roles of interim resolution professional (IRP)/ resolution professional (RP)/liquidator in the insolvency, resolution and bankruptcy process as defined under the Code

Insolvency professionals are expected to run businesses, negotiate deals, investigate and advise on the viability of a business and its mode of restructuring, including inter - alia dealing with legal issues, proceedings before National Company Law Tribunal (NCLT), preparing periodic reports for NCLT & Committee of Creditors (CoC), identifying prospective Resolution applicants, getting due diligence organized, evaluating Resolution Proposals, organizing meeting(s) of the Committee of Creditors and try to evolve consensus on restructuring proposals. Their decisions impact the prospects of both creditors and debtors

The role of the Insolvency Practitioner is to administer an insolvency outcome within the legislation and to ensure a fair, efficient and quick redistribution of assets. Insolvency practice involves a balance between adherence to rules of ethical conduct and the avoidance of conflicts of interest, and the need to find cost effective methods of debt collection or restructuring under the statutory regime. The Insolvency Professional is duty bound to maintain integrity and conduct himself in a fair, transparent and diligent manner.

The Insolvency Professional Agency of Institute of Cost Accountants of India is constantly striving to provide quality services to its members including facilitating regular knowledge updates in IBC domain through webinars, seminars, Round table discussions and daily newsletter. The launch of the online Insolvency Professional Journal is an attempt to further improve connect with the members and to provide them a knowledge resource / support enabling them to effectively meet up the expectations of the stakeholders.

Happy reading !

**Dr. S K Gupta**

# PROFESSIONAL DEVELOPMENT INITIATIVES

Journey so far.....

Quarter( July-September)		
1.	Number of Roundtables and Workshops conducted	11
2.	Number of Webinars conducted	9
3.	National Conference in association with ASSOCHAM on Insolvency and Bankruptcy Code, 2016	
4.	Preparatory Educational Course	

## **Key Speakers for the Roundtables & Workshops conducted:**

**Dr. Risham Garg**, Associate Professor, National Law University, Delhi - Roundtable discussion on Cross Border Insolvency on 24<sup>th</sup> July, 2018

**CMA D Jagannathan**- Graduate Insolvency Programme on 26<sup>th</sup> July, 2018

**Advocate Ashoke Juneja**, Insolvency Professional- Roundtable Interaction on Model Evaluation Matrix on 6<sup>th</sup> August, 2018

**Mr. Madhusudhan Sharma**, Insolvency Professional – Workshop on IBBI Circulars dated 16<sup>th</sup> January, 2018 and 12<sup>th</sup> June, 2018 in regards to the Disclosures to be given by Insolvency Professional and Professionals Appointed by Insolvency Professionals while conducting CIRP and Fee and other Expenses incurred for Corporate Insolvency Resolution Process on 6<sup>th</sup> August, 2018

**Mr. Chanchal Dua**, Insolvency Professional in the case of SBJ Exports- Roundtable discussion on Conduct of COC, 16<sup>th</sup> August, 2018

**Mr. Gagan Ghai**, CEO, Crest Capital Advisors- Roundtable discussion on Valuation of Stressed Assets on 16<sup>th</sup> August, 2018

**Mr. Sanjeev Ahuja**, Insolvency Professional, LLB, CA, CMA- Workshop on Communication-

An important trait for Insolvency Professionals on 28<sup>th</sup> August, 2018

**Ms Nitu Podder**, Vinod Kothari & Associates- Roundtable Discussion on Recent Judgment on Insolvency and Bankruptcy Code, 2016 on 31<sup>st</sup> August, 2018

**Mr. Deepak Maini**, Ex- General Manager, Punjab National Bank and an Insolvency Professional – Roundtable Interaction on Insolvency and Bankruptcy Code- Bankers Perspective on 19<sup>th</sup> September, 2018

**Mr. Neera Aarora**, Independent Director, IPA ICAI & President, Cyber Research & Innovation Society and Mr. Sandeep Aarora, Co- Founder & CEO, Cyberimmersions.com- Workshop on Use of Forensic Audit in conducting Insolvency cases

**Mr. P Sankar**, Vice President, N-eSL - Roundtable Interaction on Role & Mechanism of Information Utility under IBC

### **Speakers for the Webinars:**

**Dr. S.K. Gupta**, MD & CEO (IPA ICAI)-  
Webinar on Gateway for professional  
opportunities for CMAs on 30<sup>th</sup> July, 2018 and  
8<sup>th</sup> August, 2018

**Mr. Sandeep Bhatt**, Insolvency Professional-  
Webinar on Judicial Pronouncement in IBC  
and preparations to be done while presenting  
a case before NCLT on 13<sup>th</sup> August, 2018

**Advocate Ashok Juneja**, Insolvency  
Professional- Webinar on Latest amendments  
in Insolvency and Bankruptcy Code, Rules and  
Regulations under CIRP on 6<sup>th</sup> September,  
2018

**CMA S.K. Bhatt**- Webinar on Understanding  
Liquidation Estate under Insolvency and  
Bankruptcy Code, 2016 on 11<sup>th</sup> September,  
2018

**Dr. M.S. Sahoo and Dr. Mamta Suri**- Webinar  
on IBBI Circular dated on Fee and other  
Expenses incurred for CIRP by **IPA of ICAI  
jointly with IIIP of ICAI and ICSI Institute of  
Insolvency Professionals** on 14<sup>th</sup> September,  
2018

**Mr. P Sankar, Vice President**, N-eSL –  
Webinar on Stakeholders connect and  
working mechanism of Information Utility  
under Insolvency and Bankruptcy Code on 18<sup>th</sup>  
September

**Mr. Sameer Nath**, Financial Constant-  
Webinar on Valuation approaches & Methods

**Mr. TSN Raja**, Insolvency Professional-  
Webinar on Practical Issues in CIRP

### **INITIATIVE IN THE MONTH OF OCTOBER, 2018:**

Pre- registration Educational Course on 1<sup>st</sup> October, 2018 in Kolkata

National Conference on Insolvency and Bankruptcy Code, 2016 in association with ASSOCHAM at Chennai on 4<sup>th</sup> October, 2018

Roundtable Interaction on Resolution Strategies for Distressed Assets by Mr. Chirag Mehta, Founder & Partner at Clip Financial ON 5<sup>th</sup> October, 2018

Webinar on Bankers perspective on IBC, 2016 by Mr. Deepak Maini, Insolvency Professional & Ex GM- Punjab & Sind Bank on 9<sup>th</sup> October, 2018

Webinar on Practical aspects of IBC, 2016 by Mr. J.K. Budhiraja, Insolvency Professional & Ex CEO- IPA ICAI on 16<sup>th</sup> October, 2018

Sponsor and associate partner for CHAI PE CHARCHA on IBC Hits and Misses at PHD Chamber of Commerce and Industry, New Delhi on 26<sup>th</sup> October, 2018





**National Conference in association with ASSOCHAM on IBC, 2016**



**Webinar on IBBI Circular dated 12th June, 2018 organised jointly by all the 3 Insolvency Professional Agency**



**One day Refresher Program for Insolvency professionals organised by the BFSI Sector Skill Council**



**Workshop on Use of Forensic Audit in Conduction Insolvency Cases- Sandeep Aarora**



**AWARD PRESENTATION CEREMONY ON INDIA'S MOST IMPROVED JURISDICTION**



**Workshop on Use of Forensic Audit in Conducting Insolvency Cases- Mr. Neeraj Aarora**



# ARTICLES

# 6<sup>th</sup> JUNE, 2018 – THE RED LETTER DAY FOR THE PROPERTY BUYER’S IN DELAYED PROJECTS ACROSS INDIA

DR. RAJKUMAR S. ADUKIA  
WINNER OF NATIONAL BOOK HONOUR AWARD, 2018, B. COM. (HONS.), FCA, FCS,  
FCMA, LL.B., MBA, DIP. IFRS (UK), DLL&LW, DIPR, DIP. IN CRIMINOLOGY, PH.D.

On 6th June, 2018, the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 was promulgated by the President of India. The Ordinance provided an opening for the allottees of the delayed real estate projects to recover the advance paid by them to the developers, against the property to be delivered to them on some future date. The Ordinance was later repealed by the Insolvency and Bankruptcy (Amendment) Act, 2018, which received In the year 2016, we witnessed a major legislative overhauling in area of insolvency resolution mechanisms with the enactment of The Insolvency and Bankruptcy Code, 2016 (The Code).

The Code is unique in more than one way as not only it unified the diverse legal, institutional and regulatory framework dealing with individual, corporate and other structures of business forms, it also for the first time paved way for creditor dominated resolution mechanism. The Code is administered by Ministry of Corporate affairs and regulated by the newly established body, Insolvency and Bankruptcy Board of India (IBBI). In part II of the Code that deals with the insolvency resolution and liquidation for Corporate Debtors, the Code identified two kinds of creditors, Financial Creditor and

Operational Creditor. Section 5(7) defines financial creditor as *'any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to'*. Financial Debt has been defined in subsequent subsection as *'a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes....'*. On the other hand, subsection (20) of Section 5 defined operational creditors as *"a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred"* and operational debt is subsequently defined as *'a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority'*. No other kind of creditors were conceptualised besides these two and all 3 IBBI regulations<sup>1</sup> pertaining to Insolvency Resolution and liquidation Process for Corporate Persons were also prepared keeping these two kinds of creditors and accordingly prescribed forms for submitting claims by them. Soon after the part II of the Code was notified, issue arose in case of large builder like JP Infratech and

AMR Infrastructures, where the Flat buyers pending allotment were not sure whether to file their claim as operational creditor or financial creditor. NCLT in *Mukesh Kumar vs. AMR Infrastructures*<sup>2</sup> had held that a flat purchaser cannot be treated as 'Operational Creditor' within the meaning of Section 5(20) of the Code as the debt incurred by the Developer Company has not arisen out of provisions of goods, services or employment. It also ruled that flat buyers cannot be treated as 'financial creditors' within the meaning of Sec.5(8) of the Code since such debts are not disbursed against the consideration of the time, value of money. These rulings resulted in an outcry against the Code despite assurance by the NCLT that interest of the home buyers will be taken care of. To handle the issue, the IBBI on 16 August, 2017 amended the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, and the Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017 and introduced a form (Form F) for submission of claims by creditors other than financial and operational creditors to the interim resolution professional. Regulation 9A was also inserted under the IBBI (Insolvency Resolution Process for Corporate Persons)

Regulations, 2016 that carved out a detailed provision for filing and proving claims by other creditors. This resulted in recognition of third kind of creditors beside operational and financial creditors. However, these creditors could neither initiate CIRP process nor had right to participate in meetings of Committee of Creditors. There was no assurance of receiving liquidation value as well. In most cases the amount of money given by home buyers as advances for their purchase is usually very high, and frequent delays in delivery of possession may thus, have a huge impact. For instance, in *Chitra Sharma v. Union of India*<sup>3</sup> despite the fact that the amount of debts owed to home buyers, was claimed to be Rupees Fifteen Thousand Crore, which was significantly more than what was due to banks, banks were in a more favourable position under the Code since they were financial creditors. As a result, in some of the cases like *Chitra Sharma v. Union of India and Bikram Chatterji v. Union of India*<sup>4</sup>, the Hon'ble Supreme Court had to safeguard the rights of home buyers beyond the stipulations of the Code. On 16 November, 2017, the Government constituted a formal committee known as the Insolvency Law Committee, for the purpose of evaluating the law and ascertain the key

practical challenges in the implementation of the Code. Rights of the property buyers was one such issue that called for immediate attention. While deliberating on this issue, the Committee placed reliance on *Nikhil Mehta & Sons v. AMR Infrastructure Ltd*<sup>5</sup> in which the home buyers were held to be financial creditors as the arrangement between the home buyers and the seller of the apartments was such that the latter had committed to pay assured returns to the former till the possession of the property was handed over. A similar judgment was given in *Anil Mahindroo & Anr v. Earth Organics Infrastructure*<sup>6</sup> The Committee noted that the general practice is that these contracts are structured unilaterally by construction companies with little or no say of the home buyers. A denial of the right of a class of creditors based on technicalities within a contract that such creditor may not have had the power to negotiate, may not be aligned with the spirit of the Code.

### **Requisite Amendment in Code**

Here it would be pertinent to revisit the definition of financial debt. As per section 5(8) of the Code, the term 'financial debt' has an inclusive definition with clauses (a) to (e) enlisting certain specific scenarios under which debt is to be considered as

financial debt, and clause (f) reading as follows *'any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing'*. It is argued that as per financial terms of agreements between home buyers and builders, it is evident that the agreement is for disbursement of money by the home buyer for the delivery of a building to be constructed in the future. The disbursement of money is made in relation to a future asset, and the contracts usually span a period of 4-5 years or more. Further, as regards the manner of utilisation of the disbursements made by home buyers to the builders, the amounts so raised are used as a means of financing the real estate project, and are thus in effect a tool for raising finance, and on failure of the project, money is repaid based on time value of money. Section 5(8)(f), is a residuary clause to cover debt transactions not covered under any other clause, and the essence of the clause is that "amount should have been raised under a transaction having the commercial effect of a borrowing." Therefore, it was felt that the existing definition of 'financial debt' was sufficient to include the amounts raised from allottees under a real estate project. However, given the confusion and

multiple interpretations being taken, it was felt it would be prudent to explicitly clarify that such creditors fall within the definition of financial creditor, by inserting an explanation to section 5(8)(f) of the Code which was inserted by the Section 3 of the Insolvency and Bankruptcy (Amendment) Ordinance, 2018 effective from June 6, 2018. The Ordinance was later repealed by the Insolvency and Bankruptcy (Amendment) Act, 2018, which received assent from the President on August 17, 2018, and is effective from June 6, 2018. The newly inserted explanation reads as follows:

*For the purposes of this sub-clause,-*

- (i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and*
- (ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016).*

It is pertinent to note that, though the term 'home buyer' has been used in media coverage, committee report and even in

the preamble of the Ordinance, the actual amendment is in case of much larger section of real estate investor as the term allottee u/s 2(d) of RERA, 2016 is very wide. As per section 2(d) *"allottee" in relation to a real estate project, means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent.* To comprehend the definition, it is also essential to check the definition of term 'apartment' as stated in section 2(e) which is reproduced below:

*"apartment" whether called block, chamber, dwelling unit, flat, office, show room, shop, godown, premises, suit, tenement, unit or by any other name, means a separate and self-contained part of any immovable property, including one or more rooms or enclosed spaces, located on one or more floors or any part thereof, in a building or on a plot of land, used or intended to be used for any residential or commercial use such as residence, office, shop showroom or godown or for carrying on any business, occupation, profession or*

*trade or for any other type of use ancillary to the purpose specified.* And finally, as per section 2(n) of the RERA, 2016 *"real estate project" means the development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of land into plots or apartment, as the case may be, for the purpose of selling all or some of the said apartments or plots or building, as the case may be, and includes the common areas, the development works, all improvements and structures thereon, and all easement, rights and appurtenances belonging thereto.* Besides the insertion of the new explanation, further essential amendments were required to handle the implementation issues that would inadvertently crop up as the number of allottees in real estate projects can be huge and their representation in the meeting of CoC can be a challenging task. Therefore, changes has also been made in Section 21 by insertion of sub section 6(A) and 6 (B), to effect that the class of creditors has been permitted to be represented by a qualified insolvency professional if the Insolvency Resolution Professional (IRP) of corporate debtors makes an application to the Adjudicating Authority and such insolvency professional who becomes

authorized representative of a class of creditors is also to be paid remuneration jointly by financial creditors. Further, amendment of subsection (7) of Section 21 clarified that the Board may specify the manner of voting and the determining of the voting share in respect of financial debts covered under sub-sections (6) and (6A).

### **Effect of the Amendment**

The classification of allottees under real estate projects as financial creditors will significantly affect the rights of such allottees where the projects are delayed and sum due is over Rs. 1,00,000. As per a report<sup>7</sup>, delay in completion of under construction apartments has become a common phenomenon and the records indicate that out of 782 construction projects in India monitored by the Ministry of Statistics and Programme Implementation, Government of India, a total of 215 projects are delayed with the time over-run ranging from 1 to 261 months. After the amendment, the following positive changes have emerged as right of such investors:

- In case of delays where advance paid is over Rs. 1,00,000, an allottee of real estate project can initiate a Corporate Insolvency

Resolution Process (CIRP) against the defaulting builder under section 7 of the Code.

- During CIRP, allottees of real estate project will have right of representation in meeting of Committee of Creditors (CoC) where they can voice their concern.
- Allottees of real estate project will also have right to vote for resolution plan which is more beneficial to them.

### **Amendments in IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016**

After the Ordinance, IBBI promptly came up with amended IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, on 4th July, 2018. Clause (aa) has been inserted in Regulation 2(1) which defines “class of creditors” as a class with ***at least ten financial creditors*** under clause (b) of sub-section (6A) of section 21 and the expression, “creditors in a class” shall be construed accordingly. Therefore, if there are 10 or more allottees under a real estate project, whose debts are due, they will be regarded as ‘creditor in a class’. Further, Regulation 4A was inserted, which required that IRP should ascertain the class/classes of creditors and



identify three insolvency professionals (after taking their consent) for representation of creditors in a class. The IRP is to offer these choices in Public Announcement made by him/ her as per newly inserted clause (bb) to Regulation 6(2).

Regulation 8A has been inserted to provide that, allottee in real estate project can submit claim to the IRP in electronic form in Form CA, with proof evidenced by either of the following:

- the records available with an information utility
- other relevant documents like agreement for sale, letter of allotment, receipt of payment made, or any other document, evidencing existence of debt.

A creditor in a class may indicate its choice of an insolvency professional, from amongst the three choices provided by the IRP, to act as its authorised representative (AR).

Further, Regulation 16A has been inserted which details the selection of most popular AR based on the choices received. Such selected AR will be provided with the list of creditors in the class he has to represent and will be provided electronic means of communication between the AR and the creditors in the class. The AR shall circulate

the agenda to creditors in a class and announce the voting window at least 24 hours before the window opens for voting instructions and keep the voting window open for at least 12 hours. The voting share of a creditor in a class shall be in proportion to the financial debt which includes an interest at the rate of 8% p.a unless a different rate has been agreed to between the parties. The regulation also details the fees to be paid to such AR for each meeting of committee based on number of creditors in a class.

There may arise a situation where the corporate debtor say a builder has only creditors in a class and no other financial creditor eligible to join the committee, the committee shall consist of only the ARs.

### **Conclusion**

The amendments made were much needed to uphold the stake of the aggrieved property buyers. However, there still exist certain open questions, which are likely to result in further litigation. One such issue is whether such real estate investors would be regarded as secured or unsecured financial creditor as this classification can immensely change the amount of realisation if the builder company goes for liquidation. Unsecured financial creditors, get the amount left

over after meeting all liquidation expenses (which is usually very high), operational creditors and secured financial creditors. Besides, there may also be implementation issues for AR in case of large number allottees, as the whole process of distribution of agenda and voting has to be done in a very short time band. Considering the above, we can expect certain changes in IBBI (Liquidation Process) Regulation, 2017 clarifying the position of such investor in waterfall mechanism contained in Section 53 of the Code.

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## **References:**

- 1 IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, IBBI (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017 and IBBI (Liquidation Process) Regulation, 2017
- 2 C.P. NO. (IB)-30(PB)/2017
- 3 Writ Petition(s) (Civil) No.744 of 2017, Supreme Court of India
- 4 Writ Petition(s) (Civil) No.940 of 2017, Supreme Court of India.
- 5 NCLAT, New Delhi, Company Appeal (AT) (Insolvency) No. 07/2017, Date of decision – 21 July, 2017.
- 6 NCLAT New Delhi, Company Appeal (AT) (Insolvency) No. 74/2017, Date of decision – 02 September, 2017.
- 7 Khyati Rathod and Niharika Dhall, 'India: Delays in Construction Projects', (Mondaq, 24 January,2017)

# TIMELINES UNDER IBC AND ITS ADHERENCE



CA RAVINDER AGARWAL  
CHARTERED ACCOUNTANT, INSOLVENCY  
PROFESSIONAL, AUTHOR OF BOOK PUBLISHED BY  
TAXMANN "INSOLVENCY & BANKRUPTCY  
PRACTICE MANUAL

The timelines fixed under the Code are intrinsic to the corporate insolvency resolution process (CIRP) and are important to the effectiveness of IBC. The intention of the legislature is to speedy CIRP and all the stake holders including adjudicating authorities must respect the timelines prescribed under the Code. The timeline for CIRP needs to be seen from three perspectives.

## ❖ **There is enough incentive for its adherence:**

The stakeholders have the necessary motivation to complete a CIRP early as they stand to gain from the resolution and they would suffer grave consequences of liquidation if they fail to complete the process within the given time. Further, the entire process is under their control.

## ❖ **Empowered and qualified facilitators (Pillars):**

There are qualified, competent and empowered insolvency professionals, who provide assistance throughout the process. There are provisions for a calm period when nobody disturbs the corporate under CIRP. There would be information utilities which would

expeditiously provide relevant information required for CIRP.

❖ **IBC is Evolving:**

As a number of CIRPs goes through, the processes is constantly explored and inefficiencies are getting eliminated and this is being streamlined and standardised and very soon automated.

The Code broadly specifies the following time lines:

- 14 days for the AA ( Adjudicating Authorities) to admit or reject an application for initiation of CIRP;
- 7 seven days for an applicant to rectify defects in the application for CIRP;
- 10 days for the IBBI to recommend, wherever required, an IRP to the AA,
- 30 days for the IRP to discharge his duties; ○ 105 days for RP to finalise Resolution Applicant
- 180 days for creditors to complete a CIRP.

- Only one time extension up to 90 days by the AA in deserving cases

As per Section 12 of the IBC “Corporate insolvency resolution process (CIRP) shall be completed within a period of 180(one hundred and eighty days) from the date of admission of the application to initiate such process.”

NCLT can further extend a period of 90 days.

This can be substantiated from Section 85 (4) of the IBC which states that “The moratorium ceases to have effect at the end of the period of one hundred and eighty days.”

This time factor has so far prevented the resolution professional, in majority of the cases, to identify the resolution applicant within the stipulated time period.

The challenge to meet deadline also resulted in changing of identification process and criteria till the fag end of the resolution period. This has led to delays in the completion of the resolution process.

Therefore, in most of the cases the extension of 90 days was allowed by the

NCLT and the purpose of 90 day extension i.e. extension by NCLT in exceptional circumstances was defeated.

Realising the above challenge the IBBI has come up with an introduction of Regulation 35A in Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2018; As per this regulation, “The resolution professional shall identify the prospective resolution applicants on or before the 105th day from the insolvency commencement date.”

Thus, a break-even point of 105 days has been set out to simultaneously find out a resolution applicant as well by the Resolution Professional.

REVISED TIME LINES effective 1st April, 2018: With the introduction of Regulation 35A, there can be 3 possible timelines i.e.

First – 105 days for identification of resolution applicant,

Second – 180 for completion of resolution process, and

Third – 270 days for completion of resolution process in exceptional circumstances and if extended by 90 days by NCLT.

### **Timelines are Mandatory or directory ?**

Section-12 of the IBC is very clear about the “Timely resolution of insolvency”

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

*(2) The resolution professional shall file an application to the Adjudicating Authority to extend the period of the corporate insolvency resolution process beyond one hundred and eighty days, if instructed to do so by a resolution passed at a meeting of the committee of creditors by a vote of sixty-six per cent. of the voting shares.*

*(3) On receipt of an application under sub-section (2), if the Adjudicating Authority is satisfied that the subject matter of the case is such that corporate insolvency resolution process cannot be completed within one hundred and eighty days, it may by order extend the duration of such process beyond one*

*hundred and eighty days by such further period as it thinks fit, but not exceeding ninety days:*

*Provided that any extension of the period of corporate insolvency resolution process under this section shall not be granted more than once.*

*Section 12A. Withdrawal of application admitted under section 7, 9 or 10.*

*12A. The Adjudicating Authority may allow the withdrawal of application admitted under section 7 or section 9 or section 10, on an application made by the applicant with the approval of ninety per cent. voting share of the committee of creditors, in such manner as may be prescribed.*

It is absolutely clear that timely resolution of insolvency is the basic purpose of the code but many judgements from time to time have diluted or compromised due to whatever reasons but the code has become a victim of our overburdened judicial system, where timely actions was always missing. This can also prove fatal for this new born baby which was termed as game changer by many from time to time.

The interpretation Section 12 of the Code was done by different courts as per their convenience and resultantly tinkered with the crucial time lines of the IBC

NCLT, Mumbai, while examining Section 12 of the Code, had distinguished between revival and extension of an application.

The NCLAT's ruling in Quinn Logistics India Private Limited vs Mack Soft Tech Private Limited in its order dated May 8, 2018,(Refer page no 266 of "Insolvency and Bankruptcy Practice manual" authored by CA Ravinder Agarwal). It "excludes" time periods from the 270-day ambit, the following intervening periods can be excluded:

1. Period for which CIRP stayed by a court of law
2. Period 'RP' not functioning /appointed
3. Period between the date of order of admission and date on which RP takes charge
4. Period after hearing the case, if order is reserved till finally passing of order
5. Period between order of CIRP set aside by the Appellate Tribunal

and reversed by Hon'ble Supreme court

6. Any other circumstances which justifies exclusion of certain period

However, after exclusion of the period, the total number of days cannot exceed 270 days which is the maximum time limit prescribed under the code.

The judgments permitting the time spent on matters which are beyond the control of parties to be excluded is a creativity of our judicial system.

Recently in **Deccan Chronicle Holdings Limited (DCHL)** case NCLAT have extended the resolution process by more **than seven months**. The two-member bench of NCLAT said, "For the purpose of counting the total period of corporate insolvency resolution process (CIRP), the period of pendency of the appeal i.e. from 11th December 2017 till the date of this judgement be excluded. Once one or other resolution plan is approved, Resolution Professional will place the same before the Adjudicating Authority (NCLT) for its order under Section 31 (of IBC)."

The other judicial pronouncements which directly or indirectly touched upon

the timelines are tabulated below for reference.

SN	Name of Case
1	JK Jute Mills Co. Ltd. vs Surendra Trading Co
2	Macquarie Bank Ltd vs Shilpi Cable Technologies Ltd
3	Quantum Limited Vs. Indus Finance Corporation Ltd
4	Amar Remedies Limited vs IDBI Bank Limited & Ors.
5	Quinn Logistics India Pvt Ltd vs Mack Soft Tech pvt Ltd
6	RBL Bank Ltd vs MBL Infrastructure Limited
7	Shah Brothers Ispat Pvt Ltd vs Diamond Engineering Chennai Pvt Ltd
8	S.Rajendran Vs NOCL

You would observe from the above that these may be relevant to that case but it may set a wrong precedent and likely to be misused.

Apprehension by Finance Minister in August, 2017 about timelines

The apprehension about courts adhering to time lines provided under IBC was felt by our finance minister in August, 2017.

<https://economictimes.indiatimes.com/news/politics-and-nation/courts-havetwo->

[standards-on-statutory-timelines-arun-jaitley/articleshow/60134806.cms](https://www.bbc.com/news/business-45678901) The News item above has following important reading:

*"Conventionally, our courts always have two standards," Jaitley said, speaking at an industry event on insolvency organised by the Ministry of Corporate Affairs.*

*"When timelines are made for the executive, they (courts) normally maintain these are binding. But when timelines are made for judicial institutions, the courts have conventionally held that these are only directional," he said.*

*Citing his experience when he was law minister, Jaitley said an amendment to the Civil Procedure code.*

*"We had amended the Civil Procedure Code and put strict timelines. And came the judgement from the Supreme Court which said courts will decide their own timetable and these are only directional which are mentioned by Parliament. These are not mandatory on us (courts)," Jaitley said.*

*He hoped that the newly-passed Insolvency and Bankruptcy Code, which*

*lays stress on time-bound resolution of bad assets of banks, does not meet a similar fate, he said.*

India's overburdened judicial system and its tryst with timelines, has been an unhappy one.

### **Timely Action by IBBI on timelines**

The CIRP process before 3rd July, 2018 had many overlapping timelines which were not only causing confusion amongst stakeholders but also resulted into various consequent litigation. The effect of these was inordinate delays in the entire CIRP.

IBBI not only realised but promptly acted by amending CIRP regulation to bring more clarity to avoid litigation and unwarranted delays.

The analysis of impact on time lines due to amendment in CIRP is tabulated below



PARTICULARS	Earlier	Post Amendment
Submission and Verification of claims	Creditors could submit their claims up to the final approval of the resolution plan by the committee of creditors.	Creditors who fail to submit their claims within 14 days of the appointment of IRP, can now submit their claims within 90 days of the insolvency commencement date and the RP requires to verify these claims within 7 days of the last date of receipt the claims.
Appointment of Registered Valuers	Registered valuers were appointed within 7 days of the appointment of the IRP	Registered valuers are now to be appointed by the RP within 7 days of his appointment, or latest by 47th day from insolvency commencement date.
Preferential and other Transactions	No fixed timeline	Timeline for preferential and other transactions: a)Forming an opinion: -- within 75 days b)making a determination: -- ----within 115 days c) application before AA: -----within 135 days
Expression of Interest (EOI)	Earlier, there was no fixed format or set timelines for invitation of EoI's, which led to a lot of unnecessary litigation	A formal process for invitation of EoI's(Form G,for publishing the invitation of an EoI ), timelines for submission of EoI's and release of a provisional list and final list of prospective RA.
Evolution Matrix		Now RP is required to issue an evaluation matrix and IM, along with the request for submission of resolution plans detailing all the criteria based on which the resolution plans will be evaluated by CoC
Rejection of late EOI'S and Resolution Plans	Statutory support for rejecting the late submissions of Resolution plan was not available	The amended CIRP regulations as provided for the automatic rejection of late submissions of EoI's and resolution plans

## **Conclusion**

Time lines provided under the code are critical for corporate insolvency resolution and sincere effort should be made for its adherence by all stake holders including adjudicating authorities. All delays permitted should be recorded and articulated on the compelling circumstances in which necessitated to do so, as per the provisions of section-64 of the code.

No doubt there are teething operational issues which are being constantly explored and eliminated by IBBI.

There are certain timelines which are still required to be re looked as these have actually increased pressure on IRP/RP to meet the already stringent timelines, sometimes meeting these timelines may not be practically possible.

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# CAN TAX ARREARS BE AVOIDED UNDER INSOLVENCY & BANKRUPTCY CODE?



V. SIVASUBRAMANIAN ADVOCATE AND  
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PARTNER WITH LAKSHMIKUMARAN & SRIDHARAN.

## Waterfall under IBC

Where liquidation proceedings are initiated under the Insolvency and Bankruptcy Code, 2016 (IBC or the 'Code'), Government dues which includes tax arrears will come up for payment only at the fifth stage of the waterfall prescribed under section 53 ('Distribution of assets') of the Code after full settlement of the earlier four namely:-

(a) the insolvency resolution process costs and the liquidation costs paid in full;

(b) debt owed to secured creditors (who have relinquished their security interest) and workmen dues for the preceding 24 months, ranked pari passu;

(c) wages and unpaid dues owed to employees for the preceding 12 months; and

(d) financial debts owed to unsecured creditors.

Government dues in respect of the whole or any part of the period of two years preceding, are placed in the fifth position [clause 53(e)(i) of the Code] in the order of priority for distribution at par with debts owed to a secured creditor for any amount unpaid following the enforcement of security interest, just ahead of all remaining or miscellaneous debts and dues [clause 53(f)].

Where there is no liquidation, for example, during corporate insolvency resolution process (CIRP) the waterfall mechanism of section 53 does not directly apply. However, section 30 (Submission of resolution plan) of IBC mandates inter alia that the resolution plan shall provide for repayment of the debts of operational creditors in such manner as may be specified by the Board which shall not be less than the amount to be paid to the operational creditors in the event of a liquidation of the corporate debtor under section 53.

### **Tax as first charge save as provided in IBC**

However, many individual tax statutes specify a first charge in respect of the tax arrears under the respective statute. For example, -

- (a) Section 178 (Company in Liquidation) of the Income Tax (IT) Act, 1961 provides for appropriation of the liquidation proceeds towards clearance of the tax dues notwithstanding anything to the contrary contained in any other law for the time being in force except the provisions of IBC.
- (b) Section 142A of the Customs Act, 1962<sup>1</sup> specifies that the liability

under the said Act shall be the first charge on the property of the assessee, save as otherwise provided in specified sections of the Companies Act, 1956, Recovery of Debts Due to Banks and the Financial Institutions Act, 1993 and the Securitisation and Recovery of Reconstruction of Financial Assets and the Enforcement of Security Interest Act, 2002, and IBC.

- (c) Section 82 of the Central Goods and Services Tax Act, 2017 stipulates that the amount payable by a taxable person or any other person under the said Act shall be a first charge on the property of such taxable person or such person, save as otherwise provided in IBC.

**However, it is also important to note here that section 238 of IBC provides for an overriding effect to the Code over all other laws, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.**

### **Treatment of tax arrear under liquidation**

Let us consider a situation wherein the first four items in the waterfall (listed above)

fully cover the liquidation value of the assets of a corporate debtor. This means that if the company were to go into liquidation, there will be no money left to make payment of the government dues or the other creditors covered by the fifth and subsequent items of the waterfall. In this situation, can the Tax Administration still claim priority on the basis of the relevant provision in the tax statute or say an order of attachment of property prior to the liquidation proceedings under the Code?

The Hon'ble High Court for Telangana and Andhra Pradesh clearly answered in the negative recently in the context of liquidation proceedings under the Code in the case of *Leo Edibles & Fats Ltd. v. The Tax Recovery Officer*<sup>2</sup>. The Hon'ble Court directed registering the property sold in liquidation though the property had been attached by IT Department under recovery proceedings, holding that the property, even if encumbered, will still be part of the liquidation estate subject to the aforesaid waterfall under IBC.

In its Order dated 10/8/2018 in the case of *Pr. Commissioner of Income Tax v. Monnet Ispat and Energy Ltd*<sup>3</sup>, the Hon'ble Supreme Court has also upheld the position that given section 238, the Code will override anything inconsistent

contained in any other enactment, including the IT Act.

### **Can a resolution plan omit to provide for tax arrears?**

**But will this position hold good even for non-liquidation proceedings say for CIRP?**

**We note that the company will go into liquidation only when CIRP fails. So can the Committee of Creditors (CoC) propose a resolution plan in which the tax arrears are not fully provided for? If yes, what would be the legal impact of such a resolution plan on the tax arrears?**

Strictly speaking, there is no explicit prohibition in the Code or the Regulations thereunder from CoC approving such a resolution plan as such. Since the liquidation value otherwise would not have accommodated the tax arrears, it may be argued that the provisions of section 30 are not also violated here.

**As per section 31 of IBC, the resolution plan as approved by the Adjudicating Authority (AA) shall be binding on the corporate debtor, and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan. Reading this provision together with the overriding effect under section 238 of IBC and the savings mentioned above in the taxation statutes for proceedings**

**under IBC, could lead to an interpretation that no payment of tax arrears will arise once the resolution plan is approved by AA.**

### **Implications for Tax Administration**

However, it is important to note that the above stance may have huge implications for the Tax Administrations with large arrears pending collection. For example, the gross arrears of direct taxes pending collection as at start of Financial Year 2017-18<sup>4</sup> as Rs. 10,44,688 crore. The central excise arrears amounted to Rs. 84,200 crore<sup>5</sup>. The order of magnitude of these arrears may not be different from say the Gross Non-performing Assets (NPAs) of Banks which stood at Rs. 7,91,800<sup>6</sup> crore at the end of 2016-17. The trends in recovery rates are not very different either.

In any case, 'crown' or 'tax' debt cannot be treated at par with other operational debt. There is also a consensus of judicial opinion<sup>7</sup> that the tax arrears due to the State have priority over private debts unless the law provides otherwise<sup>8</sup>.

So, the Tax Administration may take a stand that the arrears will continue to remain the first charge as mandated in the tax statute since the IBC waterfall is applicable only for liquidation. If so, once the corporate debtor is back to health, the

argument would be that the Tax Administration can once again seek to recover the arrear as first charge!

Tax arrears arise under the corresponding tax statute and so it would be appropriate for these arrears also to subsist only in terms of an explicit legal provision. Though the resolution applicant may not need to settle the tax arrears, the Tax Administration may still not write-off the amount without explicit legal mandate to do so. This notwithstanding the position that the resolution plan may provide for obtaining necessary approvals from the Tax Authorities<sup>9</sup> as one of the measures required for implementing it.

Here we need to note that in CIRP, unlike under sections 92 (Discharge order with Fresh Start), 119 (Discharge order on the basis of repayment plan in personal/firm insolvency) and 138 (Discharge order from bankruptcy debt for individuals and firms) of the Code, IBC does not explicitly provide for discharge of the corporate debtor from the tax liability once the resolution plan is approved. Hence it could be argued that technically the tax liability is not discharged in the absence of a specific provision despite the 'binding' nature of the resolution plan.

Moreover, the tax arrears are written off in terms of the limited powers delegated under the Delegation of Financial Powers Rules. In larger cases, the power lies only with the Finance Minister himself. Will he be - both politically and otherwise - inclined to write off the tax arrears of large corporates?

In fact, these arguments may get more nuanced and litigious in cases of tax legislations wherein there is no explicit savings for the provisions of the Code (e.g. some State VAT legislations) unlike as in the above listed enactments. The liquidation value (which is revealed only to the CoC that too after the resolution plans are received) may also be open to challenge by the Tax Administration in some cases.

Finally, I am sure the Tax Administrations should also be wary of compromising and collusive situations resulting in loss of revenue which cannot be the intention of the law and should be curbed as far as possible<sup>10</sup>.

The international practice increasingly is to treat tax arrears as unsecured claims at par with claims from other unsecured creditors (similar to the position under the waterfall in cases of bankruptcy proceedings under IBC) with the Tax Authorities in some

countries being allowed to vote on an arrangement or reorganisation plan (which is different from the position under IBC).

### Who will bell the cat?

Though the resolution plans are not being published for public information, given the litigious nature of the issue (as discussed above), I understand that for now the resolutions usually do not propose write-off of tax arrears. This may be because of the risk exposure if the position is held to be otherwise on a legal challenge and the tight timelines under IBC.

Of course, nothing stops such a proposal from being attempted – in fact this may also help in settling the legal position early. But who will bell the cat?

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### References:

<sup>1</sup> Section 11E of the Central Excise Act, 1944 also have similar provisions.

<sup>2</sup> Judgment dated 26/7/2018 in WP No. 8560 of 2018.

<sup>3</sup> Petition(s) for Special Leave to Appeal (C) No(s). 6483/2018 arising out of final judgment and order dated 04-09-2017 in ITA No. 543/2017 passed by the High Court of Delhi.

<sup>4</sup> Refer para 1.10.1 of the CAG Audit Report No. 40 of 2017

<sup>5</sup> Refer para 1.12 of the CAG Audit Report No. 42 of 2017.

<sup>6</sup> Refer Table V.14 of RBI Report on Trend and Progress of Banking in India 2016-17.

<sup>7</sup> Refer Hon'ble Supreme Court decision in the cases of *Dena Bank v. Bhikhabhai Prabhudas Parekh & Co.* [(2000) 5 SCC 694] and *Central Bank of India v. State of Kerala* [(2009) 4 SCC 94].

<sup>8</sup> Refer Footnote 4 supra.

<sup>9</sup> As per mandate under Regulation 37(j) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ['CIRP Regulations']

<sup>10</sup> Refer para 74 of the UNCITRAL Legislative Guide on Insolvency Law (2005). Cases of contextual collusion between the promoters and creditors cannot also be ruled out.

# PRACTICUS QUESTE



### **Who is the corporate guarantor according to the Insolvency and bankruptcy code, 2016?**

“Corporate guarantor” means a corporate person who is the surety in a contract of guarantee to a corporate debtor.

### **When does the corporate resolution process start?**

Corporate resolution process starts on the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under sections 7, 9 or section 10, as the case may be, provided that where the interim resolution professional is not appointed in the order admitting application under section 7, 9 or 10, the insolvency commencement date shall be the date on which such interim resolution professional is appointed by the Adjudicating Authority.

### **What is the trigger for filing of an application by financial creditor before Adjudicating Authority?**

Under section 7 of the Code, the trigger for filing of an application by financial creditor before Adjudicating Authority is when a minimum default of Rs. One lakh in respect of any financial debt has occurred.

### **Can an applicant withdraw the application admitted under section 7 or section 9 or section 10 of Insolvency and bankruptcy Code, 2016?**

Yes, the Adjudicating Authority may allow the withdrawal of application admitted under section 7 or section 9 or section 10, on an application made by the applicant with the approval of ninety per cent. voting share of the committee of creditors, in such manner as may be prescribed within three days of such approval.

### **Who can be invited to submit resolution plan?**

It is now mandatory for the resolution professional to invite prospective resolution applicants, who fulfil such criteria as may be laid down by him with the approval of committee of creditors, having regard to the complexity and scale of operations of the business of the corporate debtor and such other conditions as may be specified by the board, to submit a resolution plan or plans and who shall not suffer from any disqualification mentioned under section 29A.

### **Is moratorium applicable on a personal guarantor or a corporate guarantor to a corporate debtor?**

No, as Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 has amended sub section (3) to provide that moratorium shall not apply to a surety in a contract of guarantee to a corporate debtor and that the moratorium will be restricted to the assets of the corporate debtor only.

### **What is the term of an appointment of an Interim resolution professional appointed by Adjudicating Authority under Insolvency and Bankruptcy Code, 2016?**

No, as Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 has amended sub section (3) to provide that moratorium shall not apply to a surety in a contract of guarantee to a corporate debtor and that the moratorium will be restricted to the assets of the corporate debtor only.

**Is it mandatory under the Insolvency and Bankruptcy Code, 2016 for an operational creditors to submit a certificate from financial institution to prove non- payment of operational debt?**

No, as the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 has amended the requirement for operational creditors to submit a certificate from financial institution to prove non- payment of operational debt optional and introduced other means of proving non-payment of operational debt by corporate debtor, like records with Information Utilities or any other such proof as may be notified by the Central Government.

**Is it required by a corporate applicant to take the approval from the shareholders of the corporate debtor before filing Corporate Insolvency Resolution Process application under Insolvency and Bankruptcy Code, 2016?**

Yes, as it was observed that many applications were filed on behalf of the corporate debtor under the Code without an underlying shareholder approval and since Corporate Insolvency Resolution Process is a significant event for a corporate debtor which may also lead to its liquidation shareholder's approval is essential and thus, the Code has been amended to provide for the requirement to obtain an approval of shareholders by special resolution or an approval of at least three-fourth of the total number of members, as the case may be, as a precondition for filing for Corporate Insolvency Resolution Process.

**What is the voting share threshold for routine decision of the Committee of creditors?**

Section 21 (8) of the Code as amended by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 provides that all decisions of the Committee of creditors shall be taken by a vote of not less than 51 per cent of the voting share of the financial creditors.

**Whether Corporate Debtor can prefer appeal through its Board of Directors u/s 61 of the Code?**

Yes, Corporate Debtor can prefer appeal through its Board of Directors u/s 61 of the Code because during moratorium Board of Directors is suspended only from its functions.

**Whether moratorium covers stay on criminal proceedings of Corporate Debtor?**

No, moratorium is not applicable on any criminal proceedings of corporate debtor.

**What key factors an Insolvency Professional (IP) should keep in mind while filling cost disclosures pursuant to IBBI Circular dated 12<sup>th</sup> June, 2018?**

An IP who acted as an IRP to Corporate Debtor shall fill Form I and Form II of the Circular within a period of 7 days from demitting his office as an IRP and an IP who acted as a RP to Corporate Debtor shall fill only Form III of the Circular within a period of 7 days from demitting his office as an RP. IP should ensure that while filling cost disclosure there should be no deviation between the disclosure provided by him with regard to the number professionals engaged by him during the assignment and fee paid to them. Eg: If pursuant to IBBI Circular dated 16<sup>th</sup> January, 2018; an RP has disclosed that he has appointed 2 Registered Valuer, 1 Accountant and 1 Legal Associate then cost disclosure shall contain fee paid to the appointed professionals only.



# JUDICIAL DECLARATION



## Relevant Judicial Pronouncements in the Month of August, 2018- Resolution and Liquidation

Bench: **National Company Law Tribunal New Delhi Bench, New Delhi**

Corporate Debtor: **Carnation Auto India Limited**


Financial Creditor: **Punjab National Bank**

Amount of Debt: **Rs. 110.64 Crore**

Date of Order: **01-08-2018**

Relevant Section: **Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016- Initiation of Corporate Insolvency resolution process by Financial Creditor**

- ❖ Application was filed by the financial creditor against the corporate debtor for initiation of Corporate Insolvency Resolution Process against Corporate Debtor.
- ❖ Interim Resolution Professional appointed was Mr. Mukesh Mohan. Later, Mr. Arving Garg was appointed as the resolution Professional.
- ❖ It was clearly stated that Corporate Debtor failed to regularize the accounts despite request and demands by the applicant financial creditor, subsequently amount due to corporate debtor was transferred to non-performing asset account on 30.09.2015.
- ❖ The respondent corporate debtor raised an objection that there was no valid authorization in favour of representative of applicant bank to initiate corporate insolvency resolution process against corporate debtor, but was clearly specified later before the tribunal that the objection raised by corporate debtor cannot sustain.
- ❖ Respondent corporate debtor also raised an objection that the amount claimed by the applicant bank is a disputed amount and a counter claim has been filed by the respondent corporate debtor before DRT and therefore in absence of adjudication of the quantum of default, the instant application under section 7 of the Code is legally not tenable and liable to be dismissed.
- ❖ The objection was later rejected as the Tribunal is not an adjudicating authority to ascertain the quantum of amount of default or to pass decree as to how much is actually due to the applicant financial creditor. The Code requires the adjudicating authority to only ascertain and record satisfaction in a summary adjudication as to the occurrence of default before admitting the application. Besides in an application under section 7 of the Code, it is no matter that the debt is disputed so long as the debt is due and payable. Also, the pendency of SARFAESI proceedings and proceedings before DRT will not preclude the applicant bank to trigger corporate insolvency resolution process under Section 7 of the Code. The initiation of proceedings under the SARFAESI and the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, is no bar for initiation of insolvency proceedings under the Code, in view of the overriding effect given in the provisions of Section 238 of the Code. In the facts once the default is more than one lac, the objection of the Respondent that the amount due has not been adjudicated upon cannot stand.
- ❖ The tribunal was satisfied that the application was complete and the applicant financial creditor was entitled to claim its outstanding financial debt due to the corporate debtor and that there has been a default in payment of the financial debt therefore, in terms of Section 7 (5) (a) of the Code, the application was admitted.

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- ❖ It was brought to the notice of Adjudicating Authority that the resolution applicant backed out and it was also not approved by the members in COC. And as there were no resolution plan committee of creditors recommended for the liquidation which was later approved.
  - ❖ Order was passed to liquidate the corporate debtor and also appoint resolution professional as the liquidator.

**Bench: National Company Law Tribunal Kolkata Bench**

**Corporate Debtor: M/s Jalan Intercontinental Hotels Limited**


**Financial Creditor: M/s Edelweiss Asset reconstruction Company Limited**

**Amount of Debt: Rs. 127.03 Crores**

**Date of Order: 24-08-2018**

**Relevant Section: Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016- Initiation of Corporate Insolvency resolution process by Financial Creditor**

- ❖ Petitioner prayed for initiation of corporate insolvency resolution process against corporate debtor, however issues were raised by the respondent.
- ❖ Firstly, Mr. Meghraj deshमुख has no authority to initiate the insolvency resolution process as he is only authorised to appear before company law board, quasi-judicial authorities and to file winding up petitions. It was carefully observed and referred the case of Deutsche forfeit AG vs Uttam galva steel limited which states that the nature of insolvency proceedings under the code cannot be seen as something different from the winding up proceedings and the petition thus, was found to be instituted through a duly constituted authority, the issue was held in favour of petitioner and against respondent.
- ❖ Secondly, the petitioner was not the assignee of the original creditor and therefore the petitioner was not entitled to file petition under section 7 of IBC, 2016.
- ❖ Also, the learned Debt recovery tribunal rejected the plea of the respondent that the assignment deed was invalid.
- ❖ Three citation were referred namely, Punjab national bank and Ors, alchemist asset reconstruction company limited vs M/s Hotel Gaudaven private limited and Union Bank of India vs Guruashish Construction Private Limited and it was decided that petitioner as an assignee of the original creditor can file a petition of this nature and therefore petition was maintainable.
- ❖ Thirdly, whether this tribunal has got jurisdiction to entertain this petition because of the pendency of parallel proceedings before Hon'ble High Court of Kolkata and before Hon'ble Debt Recover Tribunal, Kolkata. Sub section (1) of section 14 of IBC, 2016 safeguards the right of the creditor for invoking provisions of the code irrespective of the pendency of any cases elsewhere and it was said that the pendency of the winding up petition before a High court, not at all debars filing a petition for insolvency resolution process by a financial creditor before this tribunal.
- ❖ Mr. Kuldeep Verma was appointed as an Interim resolution professional

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- ❖ The resolution plan of Shri Ram Residency Private Limited was approved by the CoC with 99.67 voting percent.
  - ❖ Order was passed that revival plan of the company in accordance with the approved resolution plan shall come into force with immediate effect.

**Bench: National Company Law Tribunal Mumbai Bench**

**Corporate Debtor: Gupta Global Resources Private Limited**

**Financial Creditor: State Bank of India, Punjab National Bank and others**

**Amount of Debt: Rs. 38.50 Crores**

**Date of Order: 28-08-2018**

**Relevant Section: Section 10 of the Insolvency and Bankruptcy Code, 2016 read with Rule 7 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016- Initiation of Corporate Insolvency resolution process by Corporate Applicant**

- ❖ The Bench was of the view that the corporate debtor has committed default and the petition contains the particulars as required u/s s10 of Insolvency and Bankruptcy code, hence the bench admitted this petition.
- ❖ Mr. Atul Rajwadkar was appointed as Interim Resolution Professional and was also allowed to continue until the tribunal approved the appointment of Shri Bala Mouli as resolution professional
- ❖ There were certain points which were resolved to be voted for approval but only two items were approved with majority, but Committee of creditors did not approve any resolution plan.
- ❖ The authority clarified that there was 60 days delay in appointing resolution professional and it shall not be excluded from the corporate insolvency resolution process period as it is evident in the code that Interim resolution professional shall continue functioning until resolution professional takes the charge.
- ❖ It is also clearly stated that if the authority does not receive resolution plan within the timeline specified, it has to pass an order for liquidation.
- ❖ On perusal of the application filed by the resolution professional, adjudicating authority passed order to appoint resolution professional as a liquidator and liquidate Gupta Global Resources Private Limited.



Bench: **National Company Law Tribunal Mumbai Bench**

Corporate Debtor: **Bluplast Industries Limited**

Financial Creditor: **ICICI Bank Limited**

Amount of Debt: **34.35 Crores**

Date of Order: **10-08-2018**

Relevant Section: **Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016- Initiation of Corporate Insolvency resolution process by Financial Creditor**

- ❖ Petition was filed by the financial creditor for initiating insolvency proceedings against corporate debtor.
- ❖ Mr. Vishal Bidawatjika was appointed as an Interim resolution professional
- ❖ The resolution professional filed an application with the bench under sections 43 and 44 of the code for recovering an amount from the promotor directors of the corporate debtor which remains outstanding out
- ❖ of the total amount of preferential transaction and also sought extension of corporate insolvency resolution process period to further 90 days.
- ❖ In the meeting of committee of creditors, it was resolved to file an application seeking liquidation of the corporate debtor as only one resolution plan was received and which was later rejected.
- ❖ The bench ordered to liquidate the corporate debtor and appointed resolution professional as the liquidator.

Bench: **National Company Law Tribunal Chandigarh Bench, Chandigarh**

Corporate Debtor: **Supreme Text Mart Limited**

Financial Creditor: **Allahabad Bank**

Amount of Debt: **Rs.20.76 Crores**

Date of Order: **08-08-2018**

Relevant Section: **Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016- Initiation of Corporate Insolvency resolution process by Financial Creditor**

- ❖ Application was filed by the financial creditor against the corporate debtor after fulfilling all the requirements of the law
- ❖ Interim resolution professional appointed was Mr Bhupesh Gupta.
- ❖ After inviting EOI for submission of resolution plan, all the plans received were rejected by the committee of creditors and also extension was taken beyond 180 for a period of 90 days for completion of resolution process.
- ❖ But since no new resolution plans were received before expiry of 270 days committee of creditors decided to recommend liquidation of the corporate debtor.
- ❖ It was stated that Corporate Debtor can undergo liquidation as a going concern according to amended Clause (e) of Section 35 of the Code which states a liquidator shall have the



power and duty to carry on the business of the Corporate Debtor for its beneficial liquidation and the liquidator may sell the Corporate Debtor as a going concern.

- ❖ The Adjudicating Authority passed the order for liquidation of the Corporate Debtor and appoint resolution professional as the liquidator.

**Bench: National Company Law Tribunal Single Bench, Chennai**

**Corporate Debtor: G B Engineering Enterprises Private Limited**

**Financial Creditor: State Bank of India, Axis Bank and City Union Bank**

**Amount of Debt: Rs. 37.49 Crores**

**Date of Order: 06-08-2018**

**Relevant Section: Section 10 of the Insolvency and Bankruptcy Code, 2016 read with Rule 7 of the Insolvency and Bankruptcy( Application to Adjudicating Authority) Rules, 2016-  
Initiation of Corporate Insolvency resolution process by Corporate Applicant**

- ❖ Corporate insolvency resolution process was initiated against Corporate Debtor after considering the facts and circumstances given along with the application.
- ❖ Mr. R. Sundaram had been proposed by the Corporate Debtor for the appointment of Interim resolution professional. Later, Mrs CS Satyadevi Alamuri was appointed as Resolution professional by the adjudicating authority.
- ❖ It was averted by the resolution profession that Invitation for Expression of Interest was advertised in two newspapers on 07-05-2018. It was further stated by the resolution professional that one applicant submitted Expression of Interest but received no Resolution Plan. It was averred by the resolution professional that the corporate debtor had miniscule operations with large fixed overheads expenses that were unable to be serviced by revenue generated and due to lack of funds for bankers debts it was opined in the 4th COC meeting that there was no scope of getting a resolution plan and no resolution plan was approved till the expiry of CIRP.
- ❖ As no resolution plan was received by the adjudicating authority till the expiry of CIRP it ordered to liquidate the corporate applicant and resolution professional was appointed as the liquidator and the matter in relation to M/s GB Engineering Enterprises Private Limited stands disposed off.





Bench: **National Company Law Tribunal Allahabad Bench**

Corporate Debtor: **Parerhat Gas Industries Limited**

Financial Creditor: **Punjab National Bank**

Amount of Debt: **Rs. 118.42**

Date of Order: **08-08-2018**

Relevant Section: **Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016- Initiation of Corporate Insolvency resolution process by Financial Creditor**

- ❖ Application has been filed by the financial creditor against the corporate debtor for initiation of CIRP.
- ❖ Financial creditor has filed the particulars of the financial debt as well as the records and evidence of the default.
- ❖ The respondent corporate debtor filed a memo by expressing its no objection for initiation of the CIRP. However some questions were raised on the actual amount due under debts and liability of the Corporate Debtor Company but it was evident from the documents given that default has occurred and it also meets the requirement of section 3(11) and 3(12) of the code to trigger the CIRP in respect of Corporate debtor Company.
- ❖ Interim Resolution Professional appointed was Shri Anupam Tiwari.
- ❖ Mr. Pawan Goel was appointed as Liquidator by the tribunal and the order has been passed to direct the liquidator to submit its progressive report and follow up action taken by four weeks.

Bench: **National Company Law Tribunal Single Bench, Chennai**

Corporate Debtor: **LCS City Makers Pvt. Ltd**


Financial Creditor: **M/s Sundaram BNP Paribas Home Finance Limited and others**

Amount of Debt: **Rs. 1.90 Crores**

Date of Order: **08-08-2018**

Relevant Section: **Section 10 of the Insolvency and Bankruptcy Code, 2016 read with Rule 7 of the Insolvency and Bankruptcy( Application to Adjudicating Authority) Rules, 2016- Initiation of Corporate Insolvency resolution process by Corporate Applicant**

- ❖ Corporate insolvency resolution process was initiated against Corporate Debtor and moratorium was declared
- ❖ Corporate debtor had filed books of accounts evidencing default committed by it and also filed the demand notice issued by one of the financial creditor under SRFAESI Act.
- ❖ Mr. Mr. S.R. Krishnan had been proposed by Corporate debtor for appointment as the Interim resolution professional and he was appointed as resolution professional
- ❖ Resolution was passed in the committee of creditors meeting to liquidate the corporate debtor and same was approved by the adjudicating authority.
- ❖ The tribunal ordered to appoint Mr. S.R. Krishnan as the company liquidator and initiation of liquidation of LCS City Makers Pvt. Ltd stands disposed off.



Bench: **National Company Law Tribunal Bangaluru Bench**  
Corporate Debtor: **M/s Lukup Media Private Limited**  
Financial Creditor: **Shri Harsha H Mutt**  
Amount of Debt: **Rs.72.18 Crore**  
Date of Order: **10-08-2018**

Relevant Section: **Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016- Initiation of Corporate Insolvency resolution process by Financial Creditor**


- ❖ The financial creditor has contended that the corporate debtor has committed default in paying the loan amount and pleaded to initiate corporate insolvency resolution process against corporate debtor.
- ❖ The financial creditor had produced evidence which were sufficient to conclude that he had advanced various amount from time to time to the corporate debtor towards loan.
- ❖ Interim Resolution professional appointed was Mr. Ravi Shankar Devarakonda who was later appointed as resolution professional.
- ❖ Public announcement was made for inviting the claims from the creditors and claims were received from two financial creditor and seventy five operational creditors.
- ❖ Advertisement was made for inviting the expression of interest but no EOI and resolution plans were received. Thus, committee of creditors unanimously passed resolution to file application for liquidation by resolution professional.
- ❖ The bench ordered to liquidate the corporate debtor and appointed resolution professional as the liquidator.

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Bench: **National Company Law Tribunal Mumbai Bench, Mumbai**  
Corporate Debtor: **Prag Distillery private limited**  
Financial Creditor: **Standard Chartered Bank**  
Amount of Debt: **Rs 12.67 Crores**  
Date of Order: **09-08-2018**

Relevant Section: **Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016- Initiation of Corporate Insolvency resolution process by Financial Creditor**

- ❖ The petition was filed by the financial creditor and on the perusal of the documents filed by the creditor the bench admitted the application.
- ❖ Interim resolution professional appointed was Ms Dipti Mehta
- ❖ After sending an invitation of EOI no resolution applicants came up with the plan till the expiry of 270 days which is the maximum period allowed for resolution process under code. One resolution plan was received on 270 th day but the committee of creditors sought time to review and decide about the plan, but since it could not decide beyond the expiry of 270 days, the committee of creditors directed the resolution professional to file a petition for order of liquidation of the corporate debtor as a going concern as prescribed



under the code so as to fetch more value which is permissible under section 32(c) of Insolvency and Bankruptcy (liquidation process) regulations, 2016.

- ❖ The bench passed the order for liquidation of corporate debtor as a going concern.

Bench: **National Company Law Tribunal Mumbai Bench, Mumbai**

Corporate Debtor: **Pandit Automotive Private Limited**

Financial Creditor: **M/s Reliance Commercial Finance Limited**

Amount of Debt: **Rs.30.38 Crores**

Date of Order: **09-08-2018**

Relevant Section: **Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016- Initiation of Corporate Insolvency resolution process by Financial Creditor**

- ❖ Application filed by the financial creditor for the initiation of corporate insolvency resolution process against corporate debtor was admitted.
  - ❖ Ms Anagha Ansingaraju was appointed as Interim resolution professional and later as resolution professional.
  - ❖ Public announcement was made for inviting the claims from the creditors, twelve Financial Creditors and 180 Operational Creditors had filed their claims.
  - ❖ Advertisement was also issued for inviting the expression of interest and potential resolution applicant, resolution professional received response to the EOI from 5 Potential resolution applicants but received no response for resolution plan
  - ❖ Committee of creditors thus with requisite majority passed the resolution to liquidate corporate debtor
  - ❖ The bench ordered to liquidate the corporate debtor and appointed resolution professional as the liquidator.
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# POLICY ACTUALIZAR



**Section 8 (Insolvency resolution by operational creditor):** The definition of the term 'dispute' has been amended to even include such disputes which are not pending in a suit or arbitration proceedings. Earlier, the definition had an anomaly which implied that there must be existence of dispute and a pending suit / arbitration before triggering of the insolvency process. In the sub section (b) of section 8 (2) the word 'repayment' has been substituted with the word 'payment'.

**Section 9 (Application for initiation of corporate insolvency resolution process by operational creditor):** The requirement for operational creditors to submit a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor has to be furnished only if available. Operational creditor shall now submit as proof of its debt, available records with an Information Utility or such other proof confirming that there is no payment of an unpaid operational debt by the corporate debtor.

**Section 10 (Initiation of Corporate Insolvency Resolution process by corporate applicant):** Corporate applicant along with the application shall now also furnish the special resolution passed by its shareholders or a resolution passed by at least 3/4th of the total number of its partners, as the case may be, for filing of the corporate insolvency resolution process application.

The presence or absence of pending disciplinary proceedings against the proposed Resolution Professional shall now be a ground for acceptance or rejection of application for corporate insolvency resolution process filed by the corporate

applicant. Earlier this condition was there only when corporate insolvency resolution process applications were filed by financial or operational creditors.

**Section 12 (Time-limit for completion of insolvency resolution process):** For extension of corporate insolvency resolution process period beyond 180 days the committee of creditors voting threshold is reduced from 75% to 66% of voting share.

**Section 12A (Withdrawal of application admitted under Section 7, 9 or 10):** An application for withdrawal of an application admitted under section 7, 9 or 10 of the Code (for closure of corporate insolvency resolution process) may be submitted by the interim resolution professional or the resolution professional, as the case may be, before issue of invitation for expression of interest, along with a bank guarantee towards estimated cost incurred for certain purposes under the process. The committee of creditors shall consider the application within seven days of its constitution or seven days of receipt of the application, whichever is later. If the application is approved by the committee of creditors with 90% voting share, the resolution professional shall submit the application to the Adjudicating Authority on behalf of the applicant, within three days of such approval for withdrawal of an application filed under section 7, 9 or 10 of the Code. Prior to this, there was no provision in the Code or the CIRP Rules in relation to permissibility of withdrawal post admission of a CIRP application. However, a consistent pattern that emerged in many CIRP cases was that for a settlement between applicant creditor and the debtor leading to withdrawal of CIRP post admission, consensus was also required amongst all creditors and the debtor.)

**Section 14 (Moratorium):** The scope of the moratorium be restricted to the assets of the Corporate Debtor only and Moratorium shall not be applicable to a surety in a contract of guarantee to a corporate debtor and in such transaction as may be notified by the Central Government in consultation with any financial regulator. As many guarantees for loans of corporates are given by its promoters in the form of personal guarantees, if there is a stay on actions against their assets during a CIRP, such promoters (who are also corporate applicants) may file frivolous applications to merely take advantage of the stay and guard their assets.

**Section 15 (Public announcement of corporate insolvency resolution process):** Public announcement of the corporate insolvency resolution process shall also specify the last date for submission of claims.

**Section 16 (Appointment and tenure of interim resolution professional):** Where the appointment of resolution professional is delayed, the interim resolution professional shall perform the functions of the resolution professional from the fortieth day of the insolvency commencement date till a resolution professional is appointed.

**Section 17 (Management of the affairs of the corporate debtor by interim resolution professional):** The interim resolution professional will also be responsible for complying with the statutory requirements under applicable laws while managing the affairs of the corporate debtor during CIRP. To avoid any ambiguity, 'management of corporate affairs' also includes responsibility for statutory compliances.

**Section 21 (Committee of Creditors):** Authorised Representatives of financial

creditors who are related parties to the corporate debtor are now disqualified from participating in the Committee of creditors. A carve out has been provided for financial creditors that are regulated by a financial sector regulator and have become a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares of the corporate debtor, prior to the insolvency commencement date.

Persons other than the financial creditors shall not be a part of the committee of creditors for the purposes of representation and voting

Where a financial debt—

(a) is in the form of securities or deposits and the terms of the financial debt provide for appointment of a trustee or agent to act as authorised representative for all the financial creditors, such trustee or agent shall act on behalf of such financial creditors

(b) is owed to a class of creditors exceeding the number as may be specified, other than the creditors covered under clause (a) or subsection (6), the interim resolution professional shall make an application to the Adjudicating Authority along with the list of all financial creditors, containing the name of an insolvency professional, other than the interim resolution professional, to act as their authorised representative who shall be appointed by the Adjudicating Authority prior to the first meeting of the committee of creditors

(c) is represented by a guardian, executor or administrator, such person shall act as authorised representative on behalf of such financial creditors, and such authorised representative under clause (a) or clause (b) or clause (c) shall attend the meetings of the committee of creditors, and vote on behalf of each financial creditor to the extent of his voting share.

The remuneration payable to the authorised representative- (i) under clauses

(a) and (c) of sub-section (6A), if any, shall be as per the terms of the financial debt or the relevant documentation; and (ii) under clause (b) of sub-section (6A) shall be as specified which shall be jointly borne by the financial creditors.

Manner of participation and voting in the committee of creditors is provided for, where the financial debt-

- (i) is in the form of securities and deposits
- (ii) is owed to a class of creditors (other than under consortium arrangement or syndicated facility) exceeding the specified number;
- (iii) is represented by a guardian, executor or administrator.

The decisions of routine nature shall require approval from 51% of voting share of committee of creditors instead of present provision requiring approval from 75% of voting share.

**Section 22 (Appointment of resolution professional):** Voting threshold for obtaining the approval of the committee of creditors for appointment of resolution professional reduced from 75% to 66% of voting share.

Consent of an insolvency resolution professional to continue as resolution professional or for appointment of Resolution professional is required to be obtained.

**Section 23 (Resolution professional to conduct the corporate insolvency resolution process):** Resolution professional shall continue to manage the operations of the corporate debtor after the expiry of the corporate insolvency resolution process period post submission of the resolution plan, until an order is passed by the adjudicating authority.

**Section 24 (Meeting of Committee of Creditors):** The resolution professional shall give notice of each meeting of the committee of creditors to members of committee of creditors as well as the authorised representatives referred to in sub sections (6) and (6A) of section 21 and sub-section (5).

**Section 25 (Duties of resolution professional):** Now section 25 has been amended by substituting the clause (h) of section 25 which states inviting of prospective resolution applicants, who fulfil such criteria as may be laid down by him (RP) with the approval of committee of creditors, having regard to the complexity and scale of operations of the business of the corporate debtor and such other conditions as may be specified by the Board, to submit a resolution plan or plans

**Section 25A (Rights and duties of authorised representative of financial creditors):** This section has been inserted to provide for the rights and duties of the authorised representatives of financial creditors.

The authorised representative under sub-section (6) or sub-section (6A) of section 21 or sub-section (5) of section 24 shall have the right to participate and vote in meetings of the committee of creditors on behalf of the financial creditor he represents in accordance with the prior voting instructions of such creditors obtained through physical or electronic means.

It shall be the duty of the authorised representative to circulate the agenda and minutes of the meeting of the committee of creditors to the financial creditor he represents.



The authorised representative shall not act against the interest of the financial creditor he represents and shall always act in accordance with their prior instructions.

If the authorised representative represents several financial creditors, then he shall cast his vote in respect of each financial creditor in accordance with instructions received from each financial creditor, to the extent of his voting share.

If any financial creditor does not give prior instructions through physical or electronic means, the authorised representative shall abstain from voting on behalf of such creditor.

The authorised representative shall file with the committee of creditors any instructions received by way of physical or electronic means, from the financial creditor he represents, for voting in accordance therewith, to ensure that the appropriate voting instructions of the financial creditor he represents is correctly recorded by the interim resolution professional or resolution professional, as the case may be.

***Section 27 (Replacement of resolution professional by committee of creditors):*** The threshold for replacing the existing resolution professional appointed with another resolution professional has been reduced from 75% to 66% of voting share, subject to a written consent from the latter.

***Section 28 (Approval of committee of creditors for certain actions):*** The threshold for voting for all actions under this Section such as raising of interim finance, create any security interest over the assets of corporate debtor, undertake any RPT etc. has been reduced from 75% to 66% of voting share.

***Section 29A (Persons not eligible to submit resolution plan):***

- the person is an undischarged insolvent;
- the person is a wilful defaulter in terms of the RBI Guidelines issued under the Banking Regulation Act, 1949;
- the person has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset in accordance with RBI Guidelines issued under the Banking Regulation Act, 1949 and at least a period of 1 (One) year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor: Provided that the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to non-performing asset accounts before submission of resolution plan
- the person has been convicted for any offence punishable with imprisonment for 2 (Two) years or more
- the person is disqualified to act as a director under the Companies Act, 2013
- the person is prohibited by SEBI from trading in securities or accessing the securities markets
- the person has been a promoter or in the management or control of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place and an order has been made

by the adjudicating authority under the provisions of the Code

- a person who has executed an enforceable guarantee in favour of a creditor, in respect of a corporate debtor against which an application for insolvency resolution made by such creditor has been admitted under the Code;
- a person who has been subject to the above listed disabilities under any law in a jurisdiction outside India;
- connected persons, i.e. persons connected to the person disqualified under any of the aforementioned points, such as those who are promoters or in management or control of the resolution applicant, or will be promoters or in management or control of the business of the corporate debtor during the implementation of the resolution plan, the holding company, subsidiary company, associate company or related party of the above referred persons – exception has been carved out for scheduled banks, asset reconstruction companies registered with RBI under Section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, and alternative investment funds registered with SEBI.

***Section 30 (Submission of resolution plan):***

The resolution plan submitted by Resolution professional deemed possess shareholder approval required under the Companies Act, 2013 or any other law for the time being in force.

The voting threshold for approving the resolution plan has been reduced from 75% to 66% of voting share.

Clarification has been provided that the eligibility criteria in section 29A as amended by this Ordinance, shall be applicable to resolution applicants that have not submitted resolution plans on the date of coming into force of this Ordinance.

***Section 31 (Approval of the resolution plan):***

The Adjudicating authority shall, before passing an order of approval of resolution plan, ensure that the resolution plan has a satisfactory implementation plan.

Specifically provided that necessary approvals required under any law for the time being in force, may be obtained within a period of One year from the date of approval of the resolution plan or such time as is specified in the relevant law for obtaining such approvals, whichever is later.

Where the resolution plan contains a provision for combination, as referred to in section 5 of the Competition Act, 2002, the resolution applicant shall obtain the approval of the Competition Commission of India under that Act prior to the approval of such resolution plan by the committee of creditors.

***Section 33 (Initiation of liquidation):***

The threshold for obtaining the approval of the Committee of Creditor for making an application to the adjudicating authority to pass a liquidation order has been reduced from 75% to 66% of voting share.

***Section 34 (Appointment of liquidator and fee to be paid):***

There is now a requirement to obtain consent of an resolution professional to continue as a liquidator.

The adjudicating authority shall by order replace the resolution professional if the resolution professional fails to submit written consent.

There is now a requirement to obtain consent of an Insolvency Professional to act as the liquidator.

**Section 42 (Appeal against the decision of Liquidator):** Now, even those claims which have been accepted by the liquidator may be appealed.

**Section 60 (Adjudicating Authority for corporate persons):** If any application for corporate insolvency resolution process or liquidation of a corporate debtor is pending before an Adjudicating authority, then an application for insolvency resolution or liquidation or bankruptcy, as the case may be, of a corporate guarantor or personal guarantor of such corporate debtor must be filed before the same Adjudicating authority

The proceeding for insolvency resolution, liquidation or bankruptcy, as the case may be, of a corporate guarantor or personal guarantor of a corporate debtor pending in any court or tribunal shall stand transferred to the Adjudicating authority dealing with the insolvency resolution process or liquidation proceeding of such corporate debtor.

**Section 76 (Punishment for non-disclosure of dispute or payment of debt by operational creditor):** Where an operational creditor has wilfully or knowingly concealed in an application under section 9 the fact that the corporate debtor had notified him of a dispute in respect of the unpaid operational debt or the full and final payment of the unpaid operational debt or any person who knowingly and wilfully authorised or permitted such concealment such operational creditor or person, as the case may be, shall be punishable with imprisonment for a term from one year to five years or with fine from one lakh rupees to one crore rupees, or with both.

**Section 196 (Powers and functions of Board):** The Board shall perform a function to promote the development of, and regulate,

the working and practices of, insolvency professionals, insolvency professional agencies and information utilities and other institutions, in furtherance of the purposes of this Code.

Levy fee or other charges for carrying out the purposes of this Code, including fee for registration and renewal of insolvency professionals, insolvency professional agencies and information utilities

**Section 235A (Punishment where no specific penalty or punishment is provided):** Where no specific penalty or punishment is provided the punishment provided is fine which shall not be less than one lakh rupees but which may extend to two crore rupees.

**Section 238A (Limitation):** The provisions of the Limitation Act, 1963 shall, as far as may be, apply to proceedings or appeals under the Code before the adjudicating authority or the NCLAT, as the case may be.

**Section 240A (Application of this code to micro, small and medium enterprises):** Central government may be in the public interest by notification direct that any of the provisions of this code shall not apply/apply to MSMEs with such modifications as may be specified in the notification.

The provisions of clause (c) and (h) of section 29A shall not apply to the resolution applicant in respect of corporate insolvency resolution process of any MSME.

### **IBBI amends the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016**

The regulations provide that wherever the corporate debtor has classes of creditors having at least ten creditors in the class, the interim resolution professional shall offer a choice of three insolvency professionals in

the public announcement to act as the authorised representative of creditors in each class. A creditor in a class may indicate its choice of an insolvency professional, from amongst the three choices provided by the interim resolution professional, to act as its authorised representative. The insolvency professional, who is the choice of the highest number of creditors in the class, shall be appointed as the authorised representative of the creditors of the respective class

An application for withdrawal of an application admitted under section 7, 9 or 10 of the Code (for closure of corporate insolvency resolution process) may be submitted to the interim resolution professional or the resolution professional, as the case may be, before issue of invitation for expression of interest, along with a bank guarantee towards estimated cost incurred for certain purposes under the process. The committee of creditors (CoC) shall consider the application within seven days of its constitution or seven days of receipt of the application, whichever is later. If the application is approved by the CoC with 90% voting share, the resolution professional shall submit the application to the Adjudicating Authority on behalf of the applicant, within three days of such approval.

Where rate of interest has not been agreed to between the parties in case of creditors in a class, the voting share of such a creditor shall be in proportion to the financial debt that includes an interest at the rate of eight per cent per annum.

Where the appointment of resolution professional is delayed, the interim resolution professional shall perform the functions of the resolution professional from the fortieth day of the insolvency

commencement date till a resolution professional is appointed.

A meeting of the CoC shall be called by giving not less than five days' notice in writing to every participant. The CoC may, however, reduce the notice period from five days to such other period of not less than forty-eight hours where there is any authorised representative and to twenty-four hours in all other cases. The authorised representative shall circulate the agenda to creditors in a class and announce the voting window at least twenty-four hours before the window opens for voting instructions and keep the voting window open for at least twelve hours.

The resolution professional shall form an opinion whether the corporate debtor has been subjected to certain transactions (preferential transactions, undervalued transactions, extortionate transactions or fraudulent transactions) by 75th day and make a determination of the same by 115th day of the insolvency commencement date. Where the resolution professional makes such a determination, he shall apply to the Adjudicating Authority for appropriate relief before 135th day of the insolvency commencement date.

The resolution professional shall publish an invitation for expression of interest (EoI) by the 75th day from the insolvency commencement date. The invitation shall specify the criteria, ineligibility, the last date for submission of EoI and other details and shall not require payment of non-refundable deposit. Any EoI received after the specified time shall be rejected. The resolution professional shall conduct due diligence based on material on record and issue a provisional list of prospective resolution applicants within 10 days of the last date of submission of EoI. On considering objections to the provisional

list, the resolution professional shall issue the final list of prospective resolution applicants, within 10 days of the last date for receipt of objections.

The resolution professional shall issue the information memorandum, the evaluation matrix and the request for resolution plans (RFRP), within five days of issue of the provisional list to the prospective resolution applicants and allow at least 30 days for submission of resolution plans. The RFRP shall detail each step in the process, and the manner and purposes of interaction between the resolution professional and the prospective resolution applicant, along with corresponding timelines. The resolution plan needs to demonstrate that (a) it addresses the cause of default; (b) it is feasible and viable; (c) it has provisions for its effective implementation; (d) it has provisions for approvals required and the timeline for the same; and (e) the resolution applicant has the capability to implement the resolution plan. The CoC shall evaluate the resolution plan strictly as per the evaluation matrix to identify the best resolution plan and may approve it with the required majority. If approved by the CoC, the resolution professional shall endeavour to submit the resolution plan approved by the CoC to the Adjudicating Authority at least fifteen days before the maximum period for completion of corporate insolvency resolution process, along with a compliance certificate in the specified Form.

The regulations provide for a model timeline of the corporate insolvency resolution process assuming that the interim resolution professional is appointed on the date of commencement of the process and the time available is hundred and eighty days, as under:

Section / Regulation	Description of Activity	Norm	Timeline
Section 16(1)	Commencement of CIRP and appointment of IRP	....	T
Regulation 6(1)	Public announcement inviting claims	Within 3 Days of Appointment of IRP	T+3
Section 15(1)(c) / Regulations 6(2)(c) and 12 (1)	Submission of claims	For 14 Days from Appointment of IRP	T+14
Regulation 12(2)	Submission of claims	Up to 90th day of commencement	T+90
Regulation 13(1)	Verification of claims received under regulation 12(1)	Within 7 days from the receipt of the claim	T+21
Regulation 13(2)	Verification of claims received under regulation 12(2)		T+97
Section 21(6A) (b) / Regulation 16A	Application for appointment of AR	Within 2 days from verification of claims received under regulation 12(1)	T+23
Regulation 17(1)	Report certifying constitution of CoC		T+23
Section 22(1) / Regulation 19(1)	1st meeting of the CoC	Within 7 days of the constitution of the CoC, but with seven days' notice	T+30
Section 22(2)	Resolution to appoint RP by the CoC	In the first meeting of the CoC	T+30
Section 16(5)	Appointment of RP	On approval by the AA	.....
Regulation 17(3)	IRP performs the functions of RP till the RP is appointed	If RP is not appointed by 40th day of commencement	T+40
Regulation 27	Appointment of valuer	Within 7 days of appointment of RP, but not later than 40th day of commencement	T+47
Section 12(A) / Regulation 30A	Submission of application for withdrawal of application admitted	Before issue of EoI	W
	CoC to dispose of the application	Within 7 days of its receipt or 7 days of constitution of CoC, whichever is later.	W+7
	Filing application of withdrawal, if approved by CoC with 90% majority voting, by RP to AA	Within 3 days of approval by CoC	W+10
Regulation 35A	RP to form an opinion on preferential and other transactions	Within 75 days of the commencement	T+75
	RP to make a determination on preferential and other transactions	Within 115 days of commencement	T+115
	RP to file applications to AA for appropriate relief	Within 135 days of commencement	T+135
Regulation 36 (1)	Submission of IM to CoC	Within 2 weeks of appointment of RP, but not later than 54th day of commencement	T+54
Regulation 36A	Publish Form G	Within 75 days of commencement	T+75
	Invitation of EOI		
	Submission of EoI	At least 15 days from issue of EoI (Assume 15 days)	T+90
	Provisional List of RAs by RP	Within 10 days from the last day of receipt of EoI	T+100
	Submission of objections to provisional list	For 5 days from the date of provisional list	T+105
	Final List of RAs by RP	Within 10 days of the receipt of objections	T+115
Regulation 36B	Issue of RFRP, including Evaluation Matrix and IM	Within 5 days of the issue of the provisional list	T+105
	Receipt of Resolution Plans	At least 30 days from issue of RFRP (Assume 30 days)	T+135
Regulation 39(4)	Submission of CoC approved Resolution Plan to AA	As soon as approved by the CoC	T+165
Section 31(1)	Approval of resolution plan by AA		T=180

[AA: Adjudicating Authority; AR: Authorised Representative; CIRP: Corporate Insolvency Resolution Process; CoC: Committee of Creditors; EoI: Expression of Interest; IM: Information Memorandum; IRP: Interim Resolution Professional; RA: Resolution Applicant; RP: Resolution Professional; RFRP: Request for Resolution Plan]

## INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (INSOLVENCY RESOLUTION PROCESS FOR CORPORATE PERSONS) (FOURTH AMENDMENT) REGULATIONS, 2018

In the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (hereinafter referred to as the principal regulations), in regulation 2, in sub-regulation (1), clause (f) shall be omitted.

In the principal regulations, in regulation 21, for sub-regulation (3), following subregulation shall be substituted, namely: - “(3) The notice of the meeting shall contain the following- (i) a list of the matters to be discussed at the meeting; (ii) a list of the issues to be voted upon at the meeting; and (iii) copies of all documents relevant to the matters to be discussed and the issues to be voted upon at the meeting.”.

In the principal regulations, in regulation 25, for sub-regulation (5), the following subregulations shall be substituted, namely: - “(5) The resolution professional shall- (a) circulate the minutes of the meeting by electronic means to all members of the committee and the authorised representative, if any, within forty-eight hours of the conclusion of the meeting; and (b) seek a vote of the members who did not vote at the meeting

on the matters listed for voting, by electronic voting system in accordance with regulation 26 where the voting shall be kept open for at least twenty-four hours from the circulation of the minutes.

(6) The authorised representative shall circulate the minutes of the meeting received under sub-regulation (5) to creditors in a class and announce the voting window at least twenty-four hours before the window opens for voting instructions and keep the voting window open for at least twelve hours.”.

In the principal regulations, in regulation 26, after sub-regulation (1), the following subregulation shall be inserted, namely: - “(1A) The authorised representative shall exercise the votes either by electronic means or through electronic voting system as per the voting instructions received by him from the creditors in the class pursuant to sub-regulation (6) of regulation 25.”

In the principal regulations, in regulation 38, for sub-regulation (1), the following subregulation shall be substituted, namely: - “(1) The amount due to the operational creditors under a resolution plan shall be given priority in payment over financial creditors.”.

In the principal regulations, in regulation 39, - (a) in sub-regulation (1), clause (b) shall be omitted; (b) sub-regulation (3A) shall be omitted;

In the principal regulations, after regulation 39, the following regulation shall be inserted, namely: - “39A. Preservation of records.-The interim resolution professional or the resolution professional, as the case may be, shall preserve a physical as well as an electronic copy of the records relating to corporate insolvency resolution process of the corporate debtor as per the

record retention schedule as may be communicated by the Board in consultation with Insolvency Professional Agencies.”

### Exemption under section 10 of Income Tax Act, 1961

In exercise of the powers conferred by clause (46) of section 10 of the Income-tax Act, 1961 (43 of 1961), the Central Government hereby notifies for the purposes of the said clause, ‘Insolvency and Bankruptcy Board of India’, New Delhi, a board established by the Central Government, in respect of the following specified income arising to that board, namely:-

- (a) Grants-in-aid received from Central Government
- (b) Fees received under the Insolvency and Bankruptcy Code, 2016 (31 of 2016)
- (c) Fines collected under the Insolvency and Bankruptcy Code, 2016 (31 of 2016)
- (d) Interest income accrued on (a), (b) and (c) above.

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

- (a) Shall not engage in any commercial activity
  - (b) Activities and the nature of the specified income shall remain unchanged throughout the financial years
  - (c) Shall file return of income in accordance with the provision of clause (g) of sub-section (4C) of section 139 of the Income-tax Act, 1961.
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INSTITUTE OF COST ACCOUNTANTS OF INDIA