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## THE INSOLVENCY PROFESSIONAL YOUR INSIGHT JOURNAL



INSOLVENCY PROFESSIONAL AGENCY F 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). With 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 practices, in performing its functions of enrolling, monitoring, training and professional development of the professionals registered with us. 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 relating to Insolvency and bankruptcy domain.



### **BOARD OF DIRECTORS**



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

The Insolvency and Bankruptcy Code, 2016 (IBC) consolidated the existing framework by creating a single law for insolvency and bankruptcy. The new legislation has not only improved the ease of doing business in India, but also facilitated a better and faster debt distress resolution mechanism. It has changed the credit culture in the country. IBC would be a useful instrument for international

creditors and investors from the perspective of PE funds continuing to grow their investments in India

As on date more than 2,700 IPs have been registered with IBBI and more than 2,300 cases have been admitted under corporate insolvency resolution process, around 120 corporate have landed into resolution and more than 530 corporate into liquidation. Besides this around 480 corporate have also filed for voluntary liquidation.

The record of IBC has been rather mixed since its birth in May 2016. From vested interests and protracted litigation to periodic reinterpretations of the law, the IBC mechanism has been slow in extricating cash stuck in unviable projects. Still there has been a marked improvement in the recovery process which is already leading to increased investment in the country due to the protection of creditor rights. Compared to other markets, the pace at which India has achieved this is also noteworthy. In the US, for example, it took 10 years (from 1978) for the bankruptcy law to attain some stability. At one point, they were even considering repealing it. The progress in India has been remarkable by global standards.

key changes in the Insolvency and Bankruptcy Code (IBC) have been made recently which are aimed at restricting the resolution process to 330 days, including time for litigation, and ensuring the primacy of financial creditors over operational ones in case of recoveries. This clarifies ambiguities that had arisen following a recent ruling by the National Company Law Appellate Tribunal (NCLAT) in the Essar Steel resolution case. Homebuyers have also been given a stronger voice in the bankruptcy resolution plans of developers that have not delivered projects.

The Ministry of Corporate Affairs (MCA) had invited stakeholder comments on the proposed insolvency law reforms such as group insolvency ,Individual insolvency, prepackaged insolvency resolution and other issues related to the Insolvency and Bankruptcy Code, 2016 (IBC). These will enhance the operational dimensions of IBC as an instrument for resolution of distress under various situations.

Happy reading! Dr. SK Gupta

# PROFESSIONAL DEVELOPMENT INITIATIVES

Insolvency Professional Agency of Institute of Cost Accountants of India





#### Pre-Registration Training held at Kolkata in August, 2019





Stakeholders Meet Held at Delhi on 09th August, 2019



#### Preparatory Education Couse Batch held in August, 2019





Mr. Atul Luthra Speaker for Workshop on forensic Audit held on 6<sup>th</sup> August, 2019- Speakers from PWC India





#### Mr. Ashish Makhija Speaker at Certificate course on Individual Insolvency held on 03<sup>rd</sup> August, 2019





Workshop on forensic Audit held on 3<sup>rd</sup> July, 2019- Speakers from KPMG





Pre-Registration Training held at Hotel Connaught Royale in June, 2019





Knowledge Forum on IBC, 2016 held at Bangalore on 15<sup>th</sup> April, 2019



Asia Regional Conference For Restructuring Of Non-Performing Loans held at Malaysia in April, 2019



International Conference and Investors Meet on IBC held at Hong Kong in April, 2019





Pre-Registration Training held at Hotel Radisson Blu in March, 2019

## PAN INDIA PROGRAMMES



Orientation programme on IBC, 2016 held at Coimbatore on 10<sup>th</sup> August, 2019





Orientation programme on IBC, 2016 held at Jodhpur on 27<sup>TH</sup> July, 2019





#### Orientation programme on IBC, 2016 held at Chandigarh

on 13<sup>th</sup> July, 2019



Orientation programme on IBC, 2016 held at Dehradun on 5<sup>th</sup> July, 2019

## **EVENTS CONDUCTED**

<u>April, 2019</u>		
11 <sup>th</sup> April, 2019	IBC -Scopes Challenges, Learning and Way Forward on Website	
11 <sup>th</sup> April, 2019	Insolvency and Bankruptcy Stakeholders meet	
15 <sup>th</sup> April, 2019	Interactive Session on IBC	
28 <sup>th</sup> April, 2019	Webinar on "Use of Information Utilities Services under CIRP"	
29 <sup>th</sup> April,2019 - 5 <sup>th</sup> May, 2019	17th Batch of Pre-Registration Educational Course - Ahmedabad from 29th April, 2019 to 05th May, 2019.	

<u>May, 2019</u>		
3 <sup>rd</sup> May, 2019	Fraudulent Transactions Under IBC	
4 <sup>th</sup> May, 2019	National Conference on Insolvency And Bankruptcy Code on 4th May, 2019	
8 <sup>th</sup> May, 2019	Changing Dynamics of Valuation in India - 8th May	
10 <sup>th</sup> - 12 <sup>th</sup> May, 2019	Preparatory Education Classes	
11 <sup>th</sup> May, 2019	Invitation for Conference on "Law & Economics of Insolvency & Bankruptcy" on 11th May, 2019 at Ranchi	
16 <sup>th</sup> May, 2019	Changing Dynamics of Valuation in India - 16th May	
25 <sup>th</sup> May, 2019	Orientation Programme on IBC	

<u>June, 2019</u>			
1 <sup>st</sup> June, 2019	Preparatory Education Classes		
3 <sup>rd</sup> June, 2019	Interactive Session on "Fraudulent Transactions"		
10 <sup>th</sup> June, 2019	19th Batch of Pre-Registration Educational Course - Bengaluru from 10th June, 2019 to 16th June, 2019.		
17 <sup>th</sup> June, 2019	20th Batch of Pre-Registration Educational Course - Mumbai from 17th June, 2019 to 23rd June, 2019		

July, 2019			
3 <sup>rd</sup> July, 2019	Forensic Audit		
11 <sup>th</sup> July, 2019	Webinar on Monitoring and Compliance's for IP		
12 <sup>th</sup> - 14 <sup>th</sup> July, 2019	Preparatory Education Course- Delhi		
13 <sup>th</sup> July, 2019	Awareness Program on IBC 2016		
19 <sup>th</sup> - 21 <sup>st</sup> July, 2019	Preparatory Education Course- Mumbai		
25 <sup>th</sup> July, 2019	Webinar on "Information Utility Services for Insolvency Profession- als"		
26 <sup>th</sup> July, 2019	Webinar on Fraudulent Transaction under IBC		
26 <sup>th</sup> July, 2019	National conference on IBC- Hyderabad		
28 <sup>th</sup> - 30 <sup>th</sup> July, 2019	Preparatory Education Course - Chennai		
30 <sup>th</sup> July, 2019	Webinar on Amendments in Liquidation Regulations, CIRP Regula- tions and the Code		

August, 2019		
3 <sup>rd</sup> August, 2019	Individual Insolvency	
5 <sup>th</sup> August, 2019	21st Pre Registration Educational Course Kolkata	
6 <sup>th</sup> August, 2019	Forensic Audit	
17 <sup>th</sup> - 23 <sup>rd</sup> August, 2019	22nd Batch of Pre-Registration Educational Course - Delhi	
9 <sup>th</sup> August, 2019	Stakeholders Meet-Delhi	
10 <sup>th</sup> -12 <sup>th</sup> August, 2019	Preparatory Education Course Mumbai	
17 <sup>th</sup> -19 <sup>th</sup> August, 2019	Preparatory Education Course Delhi	
21 <sup>st</sup> August, 2019	Stakeholders Meet-Kolkata	
23 <sup>rd</sup> August, 2019	Stakeholders Meet-Guwahati	

September 2019		
3 <sup>rd</sup> September 2019	Certificate Course on Cross Border Insolvency	
4 <sup>th</sup> September 2019	Webinar on claim Verification	
9 <sup>th</sup> September 2019	Workshop on services Provided by Information Utility for Resolu- tion Professional	
11 <sup>th</sup> September 2019	Workshop on how to retrieve hidden and deleted files from lap- top/computers	
13 <sup>th</sup> September 2019	Workshop on Recent Amendments under Insolvency and Bankrupt- cy Code & Regulations & their Implications	
14 <sup>th</sup> September 2019	Orientation Program on IBC in association with IBBI and RMLNLU – Lucknow	
16 <sup>th</sup> September 2019	Orientation Program on IBC in association with ICAI – Cochin	
16th-22nd September,2019	23rd Batch of Pre-Registration Educational Course	
20th September, 2019	Workshop on Insurance for Insolvency Professionals	
21st September, 2019	Orientation Program on IBC	

## BCAUCOURANT Updates on Insolvency and Bankruptcy Code



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Our Daily Newsletter which keeps the Insolvency Professionals updated with the news on Insolvency and Bankruptcy Code

### MOBILE APP LAUNCH OF INSOLVENCY PROFESSIONAL AGENCY OF THE INSTITUTE OF COST ACCOUNTANTS OF INDIA











## **AN INSIGHTFUL VIEW**



CMA Vijender Sharma Insolvency Professional

#### 1. When and why did you join this profession?

I joined this profession in Jan'2017. After independence if GST claims to be the first economic reform then IBC should be considered as the second biggest reform in Indian economy. IBC has opened tremendous potential for the professional opportunities, which requires not only - expertise in the particular field but also expertise to implement all the practical knowledge into other fields as well.

#### 2. Why did you choose a career in Insolvency?

The profession of insolvency is not just related with any particular profession i.e. accounting, costing, secretarial, managerial and legal but it requires the theoretical and practical knowledge & practical exposures to run the company as a going concern. This has given the opportunity to the professionals to step into the shoes of entrepreneur and management to utilize –his/her complete knowledge and exposure.

## 3. Are courts able to meet the Timeline framed in IBC?

Our legislature is burdened with lots of cases and number of judges is very less due to which the justice is delayed. The IBC -came into effect in dec'2016 with the maximum timeline of 270 days. However, due to burden of work on the judiciary, the timelines given under IBC have been exceeded in many cases. In order to ensure adherence to the prescribed timelines. amendment has come wherein it has now been made mandatory for all corporate insolvency processes, including litigation, to be wrapped up in 330 days. Even as per news, the government has moved to the Supreme Court for making judges of the National Company Law Tribunal (NCLT) accountable in ensuring that corporate insolvency cases are disposed off in time. As the government is making every effort for the success of the IBC so let's hope for better.

#### 4. What are the challenges in dealing with the Suspended Promoters/Directors?

The suspended promoters/directors do not generally cooperate with the IP, which is obvious as the IP takes over their company and starts to give them direction/instruction. They threaten the IP & their team members. Also the IPs & their team members do not have the support/immunity from any competent authority. Neither do they give complete control of the business to the IPs, nor do they provide complete information, documents & records which is a very big challenge. Another challenge is to deal with them as you have to keep the company as a going concern which cannot be possible without their support. Then you have to keep up with them accordingly.

## 5. What are the challenges you have faced till now?

The biggest challenge I have faced is that mostly the companies which come into CIRP are facing liquidity crunch and no banks/FI are ready to give the Interim Finance (even not the banks/FI who are the CoC member) . Neither CoC decides the method to pay for the essential expenses. In such cases, you have to work for 270 days without a single penny & also arrange professionals & security guards who have to wait for their money till the time of conclusion of the CIRP & thereafter.

Another challenge is to deal with the queries of the CoC members, as in most of the cases we found that the CoC members who have attended the meeting are not very well aware of the provisions of the IBC and they try to influence the IP to work according to their instructions. Therefore to maintain the independence, you have to say "NO" to them instead of following their instructions blindly, The code of conduct of IP provides that IP has to maintain independence and see the interests of all the stakeholders. As the IP is always under scrutiny of IPA, IB-BI & NCLT, Everyone is trying to find the fault in IP's action which is a very big challenge when you work as an IP. Further, no immunity is extended to the IP in case he / she has done something on the instructions of the CoC and not accepted by the NCLT/NCLAT/SC. Because there are many members in the CoC and every member has his/her own interpretation, then IP has to maintain the calm and act only as per the provisions of IBC

#### 6. What is your advice to upcoming IP's?

This is not a simple job and not a job of a single person (without having a team). There are lots of challenges in CIRP, liquidation, CoC meeting, dealing with the promoters/directors, maintaining the company as a going concern, taking the custody & control of the assets in CIRP & in Liquidation. Further to adhere to the process of law when you are under scrutiny of IBBI, IPA, Adjudicating Authority. In simple word the IP is a "Holy Cow"

#### 7. How has been your experience as IP so far?

Every assignment is unique with all its challenges to deal with all stakeholders of the company i.e. employees, workers, suppliers, financial creditors, Adjudicating Authority, IBBI & IPA. The Insolvency professional has to apply his wisdom by interpretation of the act & regulations to uphold the spirit of the IBC. At the same time he continuously needs to update & upgrade himself along with his team with amended provisions and decided cases.

Insolvency Professional Agency of Institute of Cost Accountants of India

ARTICLES

## TIMELINES UNDER IBC



<u>Mr. Vinay Bansal</u> Insolvency Professional

IBC had been enacted with a purpose of providing the timely resolution of the stressed assets, so as to preserve the value of the enterprise and maximize the returns for complete ecosystem. To achieve this objective, it is very important that all stakeholders assume their responsibilities in a time bound manner. The code is standing on 5 pillars, namely, Adjudicating Authority, The Insolvency & Bankruptcy Board of India, Insolvency Professional Agencies, Insolvency Professionals and Information Utilities. All of the above have been assigned specific tasks to achieve the objective of code, along with timelines to complete the assigned tasks, which are interlinked and mostly entrusted upon the Insolvency Professional and Adjudicating Authority. Since, the resolution as contemplated by the code as the ultimate objective and the responsibilities of all the pillars are interrelated and well knit, the delay happening at any step culminates into delay of whole process.

#### **Timelines as defined in Code & Regulations**

Let's have quick look at the timelines as defined in the Code and respective regulations for the ease of reference:

Applicable Sec- tion/Regulation	Activity to be Undertaken	Time Allowed	TimeLine
Section 16(1)	Commencement of CIRP & Appointment of IRP	On the date of order passed by Adjudicating Authority	Т
Regulation 6(1)	Public Announcement inviting claims against CD	Within 3 days of com- mencement of CIRP	T+3

Section 15 (1)(c)/Regulations 6(2) (c) and 12 (1)	Submission of Claims	Within 14 days from commencement of CIRP	T+14
Regulation 12 (2)	Submission of Claims	Upto 90yh day of com- mencement of CIRP	T+90
Regulation 13 (1)	Verification of claims re- ceived under Regulation 12 (1)	Within 7 days of receipt of claims	T+21
Regulation 13 (2)	Verification of claims re- ceived under Regulation 12 (2)	Within 7 days of receipt of claims	T+97
Section 21 (6A) (b)/Regulation 16 A	Application for appoint- ment of AR	Within 2 days of verifica- tion of claims received under Regulation 12 (1)	T+23
Regulation 17(1)	Report certifying constitu- tion of COC		
Section 22 (1)/Regulation 19 (1)	1 <sup>st</sup> Meeting of COC	Within 7 days of constitu- tion of COC, with 7 days' Notice	T+30
Section 22 (2)	Resolution for Appoint- ment of RP by COC	First Meeting of COC, with subsequent	T+30
Section 16 )5)	Appointment of RP	approval by AA	
Regulation 17 (3)	IRP performs the func- tions of RP till RP is ap- pointed	IF RP is not appointed by 40 <sup>th</sup> day of commence- ment	T+40
Regulation 27	Appointment of Valuer	Within 7 days of appoint- ment of RP, but not later than 40 <sup>th</sup> day of com- mencement of CIRP	T+47
Section 12 (A)/Regulation 30A	Submission of application for withdrawal of applica- tion admitted	Before issue EOI	DW
	COC to dispose of the application	Within 7 days of constitu- tion of COC or within 7 days of its receipt, which- ever is later	DW+7
	Filling application of with- drawal, if approved by COC with 90% majority, by RP to AA	Within 3 days of approval of COC	DW+10
	RP to file application with AA for appropriate relief	Within 135 days of com- mence of CIRP	T+135

Regulation 36(1)	Submission of IM to COC	Within 2 weeks of appointment of RP, but not later than 54 <sup>th</sup> day of commencement	T+54
Regulation 35 A	RP to form an opinion on preferential and other transactions	Within 75 days of the commencement of CIRP	T+75
	RP to make a determina- tion on preferential and other transaction	Within 115 days of com- mence of CIRP	T+115
	RP to file application with AA for appropriate relief	Within 135 days of com- mence of CIRP	T+135
Regulation 36A	Publish Form G	Within 75 days of com- mencement	T+75
	Invite EOI		
	Submission of EOI	Atleast 15 days from issue of EOI	T+90
	Release of Provisional List of RA's	Within 10 days from last date of receipt of EOI	T+100
	Submission of objections to provisional list of RA's	Within 5 days of release of provisional list	T+105
	Final list of RA's by RP	Within 15 days of release of provisional list	T+115
Regulation 36 B	Release of RFP, Evaluation Matrix & Information Memorandum	Within 5 days of issue of Provisional list	T+105
	Receipt of Resolution Plans	Within 30 days of release of RFP	T+135
Regulation 39 (4)	Submission of COC approved Resolution Plan to AA	Post Approval by COC	T+165
Section 31 (1)	Approval of Resolution Plan by AA		T+180

#### Sanctity of above timelines

Most of the above timelines are compulsory in nature, which have been given in the body of regulations However, with respect to the ones given only in the table of Model timelines, the RP can use some discretion. It can also be observed that, some of the timelines may be a bit difficult to adhere to, due to various practical aspects. For example, if the number of claimants is large, it would be difficult for the RP to check and scrutinize all such claims in timelines of 30 and 90 days. To form an opinion on preferential & other transactions, 75 days have been prescribed. This may pose a bit of difficulty for RP, as initial period of 30-40 days goes away in formation COC etc. and balance period may not be sufficient to understand such complex preferential and other transactions of CD. Further, in case the Corporate Debtor is a large account, finalizing the Resolution Plan may be difficult to achieve in 135 days.

The amended Regulation also suggests that, RP can reject the Resolution plans received late by him. This will allow the RP to achieve the timelines of resolution process, whereas earlier RP was obliged to consider the Resolution Plans received late also, on the pretext of maximizing the value of Corporate Debtor.

#### <u>Changes introduced resulting in improved effi-</u> <u>ciency</u>

Legislature has brought in many amendments in the original Code, which would improve the working and also enhance the efficiency in terms of achievement of the prescribed timelines.

Appointment of IRP to continue till the date of appointment of the Resolution Professional. Uptill prior to this amendment, various practical difficulties were getting created, and appointment of Resolution Professional was getting delayed, which in turn resulted into delay in resolution process. However, as per the new amendment, now the IRP will continue to hold his office, until the RP gets appointed by the Adjudicating Authority. Reduction in requirement of voting % to pass certain resolutions from 75% to 66% would certainly result in reducing the logjam in the Committee of Creditors and save considerable time in the overall resolution process. Again, prior to this amendment, making consensus amongst the members of COC used to take a longer time, as greater number of members were required to pass any resolution, whereby even routine matters used to get delayed. However, with this new amendment, resolutions can be passed even with lesser number of members.

Earlier, no timelines were prescribed for "forming an opinion" on "preferential and other transactions", but now timelines have been prescribed to simplify and organize the CIRP process. This process is easier said than done. Being a cumbersome and complex process of determining the true nature of transactions, it is bound to take time by the Resolution Professional, however prescribing timelines for this task may also act as a dual edged sword. It may save time in overall resolution process, however, it might result in introducing slight inefficiency in judging the transactions.

#### **Judicial pronouncements on timelines**

In a recent judgement given by hon NCLAT, in the matter of "J.K. Jute Mills Co. Ltd. v/s Surendra Trading Co. "examined whether the time limits prescribed under the IBC, including those for the admission or rejection of an insolvency application by the National Company Law Tribunal (NCLT) are mandatory or directory. The NCLAT held that the time limit of 14-days is directory rather than mandatory, and that the NCLT has inherent powers to extend the 14-day period on a case-to-case basis in the interest of fairness and justice. The NCLAT observed that time is of the essence under the IBC, which requires that the NCLT and all stakeholders perform within the time limits prescribed except in exceptional circumstances. The NCLAT ruled that the 7-day period provided to applicants to rectify defective applications was mandatory, and no concession can be granted in this regard. the NCLAT went on to observe that the 270-day period prescribed under the IBC, for completing the insolvency resolution process, is mandatory in nature and all stakeholders would be bound by it.

#### <u>Timelines realistic or not, practical difficulties in</u> <u>achieving defined timelines</u>

Earlier, the IRP was authorized to appoint the registered valuers to value the liquidation value of enterprise under Insolvency proceedings. However, as per the amendments, now only Resolution professional can appoint the registered valuers to ascertain the liquidation value. Considering the fact that, liquidation value is to be determined as on the date of commencement of CIRP, this change can lead to delays in the insolvency process and also distortions in the estimation of liquidation due to time gap introduced between valuation date and date of valuation.

From the analysis of above judicial pronouncements, it can be inferred that, the Resolution Professional becomes the fulcrum of complete resolution process and owns the primary responsibility for the achievement of the timelines. He is required to take along all the stakeholders and walk a tight rope in this respect. RP must update the COC members of all the developments along with the respective timelines including the fall outs that could arise from inaction of the COC members, so as to ensure full cooperation from their side as well. Also, with more exposure to the live situations and fast developing jurisprudence, we would see a marked improvement in achieving the objectives of Code in defined timelines.

#### NON-PERFORMING ASSETS IN MSME'S AND MEASURES TAKEN BY THE GOVERNMENT OF INDIA TO PROTECT THE INTEREST OF THE MSMES



<u>G Sriram</u> <u>Senior Partner (Mamta Binani & Associates)</u>

#### Introduction

'MSME' stands for Micro, Small and Medium Enterprises., which form one of the imperative parts of the Indian economy.

As per RBI's data, India's MSME sector contributes to nearly a third of the gross domestic product, accounting for about 45% of manufacturing output and 40% of country's total outward shipments.

SMEs not only play a crucial role in providing large employment opportunities at comparatively lower capital cost than large industries but also help in industrialization of rural & backward areas, thereby, reducing regional imbalances, assuring more equitable distribution of national income and wealth.

#### Non-Performing Assets:-

In the recent years the NPA's in the MSME Sector have gradually increased.

#### Few of the reasons of NPAs in MSME's are:

- 1. Lack of demand,
- 2. Shortage of working capital,
- 3. Non-availability of raw materials,
- 4. Power shortage,
- 5. Marketing problems,

- 6. Labour and management problems,
- 7. Equipment problems etc.

Besides the above mentioned problems the main problem faced by the MSME's are *delayed payments* from the receivers of their goods and services which leads to NPA'S in MSME's. Therefore to address the delayed payment issues and to reduce the Financial stress and also to safeguard the interest of MSME's the Government of India has taken various measures of late which have been detailed below:-

#### 1. <u>Reserve Bank of India's Circular on Non-</u> <u>Performing Assets</u>

In a circular dated February 12, the RBI withdrew all existing stressed asset schemes and the joint lenders forum mechanism. Banks were told that they must start working on a resolution plan even if an account is overdue by a day. Failure to come up with a resolution plan in 180 days would lead to the account being referred for insolvency proceedings. But, the RBI has excluded the MSME's from the applicability of these Guidelines which have the loan exposure up to 25 crores and shall continue to be guided by the instructions contained in Circular No. FIDD.MSME & NFS.BC.No.21/ 06.02.31/2015-16 dated March 17, 2016 which deals with the Framework for Revival and Rehabilitation of Micro, Small and Medium Enterprises (MSMEs).

#### 2. <u>Amendments in Insolvency and Bankruptcy</u> <u>Code, 2016</u>

The Ministry of Corporate Affairs has made the requisite facilitative amendments in section 29A in the Insolvency and Bankruptcy Code (IBC) 2016 through the IBC amendment act 2018 which deals with the disqualification of resolution applicants which have previously barred the promoters of the Company and LLP's including promoters of MSME to bid or submit the Resolution Plan for their own company which is facing insolvency proceedings.

But after the amendments, the section 240A has been inserted by the Ministry through the IBC Amendment Act, 2018 which will allow the MSME promoters to bid for their enterprises which are undergoing Corporate Insolvency Resolution Process (CIPR). However, the person should not be a wilful defaulter and does not attract other disqualifications.

#### 3. <u>The Trade Receivables Discounting System</u> (TReDS) for MSME'S

To ensure timely availability of funds to the MSME sector, the RBI also facilitated the setting up of electronic bill factoring exchanges in the country. These exchanges provide for a swift discounting of MSME bills and help MSMEs raise funds without delay.

The RBI has formulated the scheme for setting up and operating the institutional mechanism for facilitating the financing of trade receivables of MSMEs from corporate and other buyers, including Government Departments and Public Sector Undertakings (PSUs), through multiple financiers will be known as Trade Receivables Discounting System (TReDS). The Reserve Bank of India also issued the Guidelines for the Trade Receivables Discounting System (TReDS) in this regard on July 2, 2018

The TReDS will facilitate the discounting of both invoices as well as bills of exchange. Further, as the underlying entities are the same (MSMEs and corporate and other buyers, including Government Departments and PSUs), the TReDS will deal with both receivables factoring as well as reverse factoring so that higher transaction volumes come into the system and facilitate better pricing.

All corporate firms with an asset size above Rs 500 crore must come on to TreDS platform (Trade Receivables Electronic Discounting System).

Further, the Ministry of MSME has also issued the Gazette Notification Dated 02<sup>nd</sup> November 2018 in this regard.

According to this notification all companies registered under the Companies Act, 2013 (18 of 2013) with a turnover of more than Rs. 500 crore (rupees five hundred crore) and all Central Public Sector Enterprises shall be required to get themselves boarded on the Trade Receivables Discounting System platform, set up as per the notification of the Reserve Bank of India. The Registrar of Companies in each State shall be the competent authority to monitor the compliance of these instructions by companies under its jurisdiction and the Department of Public Enterprises, Government of India shall be the competent authority to monitor the compliance of such instructions by Central Public Sector Enterprises.

All companies with turnover of more than Rs 500 crore would have to now come on Trade Receivables e-Discounting System (TReDS) platform, so that there is no cash flow problem for MSMEs.

#### 4. <u>Rupees One Crore Loan to MSME's within</u> 59 Minutes

On September 2018 the Hon'ble Prime Minister had announced a 59 minute loan scheme for the MSME's.

Under this scheme the MSME seeking loan from Government may apply loan through the online government's website which offers automated processing of loan that provides with a inprincipal approval in less than an hour. The automated, contact-less business loan approvals are currently provided for loans worth Rs 10 lakh to Rs 1 crore. The rate of interest starts from 8% and collateral coverage is not mandatory because these loans are connected to Credit Guarantee Fund Trust for Micro and Small Enterprises (CGTMSE) scheme.

The website reduces the turnaround time from 20-25 days to 59 minutes. After approval, the loan will be disbursed in about a week After Announcement of this Scheme, Public sector banks have approved more than 1.12 lakh loan applications of MSMEs totalling Rs 37,412 crore.

\*\*\*As on December 25, out of over 1.31 lakh applications, the state-owned banks have accorded in-principal approval to 1.12 lakh applicants

#### 5. <u>Development of MSME's Owned by the</u> <u>Women Entrepreneurs</u>

To develop and encourage the MSME's owned by the women entrepreneurs the Ministry of MSME has issued the notification dated 9th November, 2018 that every Public sector companies is now required to source at least a 25% of their requirement from MSMEs against 20% earlier and, within that, 3% would have to be done from units run by women.

#### 6. <u>Other Notification by Ministry of Micro</u> <u>small and medium scale enterprises to pro-</u> <u>tect the MSME'S</u>

To protect the interests of the MSMEs and to ensure timely and smooth flow of credit to MSMEs and minimise sickness among them, the Ministry of MSME had issued a Gazette notification on 2<sup>nd</sup> November 2018 that all companies who get supplies of goods or services from micro and small enterprises and whose payments to micro and small enterprise suppliers exceed forty five days from the date of acceptance or the date of deemed acceptance of the goods or services as per the provisions of the Act, shall submit a half yearly return to the Ministry of Corporate Affairs stating the following:

(a) The amount of payments due; and

(b) The reasons of the delay.

#### 7. <u>Notification by Ministry of Corporate Af-</u> <u>fairs Companies should file the Half yearly</u> <u>Return</u>

Subsequent to the Notification given by the Ministry of MSME on 02<sup>nd</sup> November 2018, the Ministry of Corporate Affairs have issued a gazette notification dated 22/01/2019 mandating that all the Specified Companies shall file details of all outstanding dues to Micro or small enterprises suppliers existing on the date of notification of this order within thirty days from the date of publication of this notification in MSME Form I.

Every specified company shall file a return as per MSME Form I annexed to this Order, by 31st October for the period from April to September and by 30th April for the period from October to March.

### **Details of this Notification**

#### 1. <u>Whether all the Companies have to file the</u> <u>initial return within 30 days from the Date</u> <u>of publication of this Notification?</u>

Every Specified Company which gets supplies of goods or services from micro and small enterprises and whose payments to micro and small enterprise suppliers exceed forty five days from the date of acceptance or the date of deemed acceptance of the goods or services as per the provisions of the MSME Act 2006 shall file the initial return in MSME Form I with Ministry of Corporate Affairs within 30 days from the date of publication of this notification.

#### 2. What is mean by Specified Companies?

All the companies, who get supplies of goods or services from micro and small enterprises and whose payments to micro and small enterprise suppliers exceed forty five days from the date of acceptance or the date of deemed acceptance of the goods or services as per the provisions of section 9 of the Micro, Small and Medium Enterprises Development Act, 2006 (27 of 2006) are referred as "Specified Companies".

#### 3. What are the details required to be collected from the MSME suppliers before filing the return with Ministry of Corporate Affairs by the Companies?

- Certificate of Registration (Udyog Aadhar) Issued by the Ministry of Micro Small and Medium Scale Enterprises to the MSME to ensure that the concerned entity is an MSME
- Copy of Pan Card of the MSME
- 4. <u>What are the details required to be filed</u> <u>about the MSME suppliers while filing the</u> <u>return with Ministry of Corporate Affairs by</u> <u>the Company?</u>

- Financial Year in which the Amount Fell due
- Total Amount due
- Date on which the Amount fell due etc.

#### 5. <u>Any further Returns are required to be filed</u> by the Company after filing the Initial Return?

Yes, after filing the initial return every specified company who gets supplies of goods or services from micro and small enterprises and whose payments to micro and small enterprise suppliers exceed forty five days from the date of acceptance or the date of deemed acceptance of the goods or services as per the provisions of the MSME Act 2006 shall file the half yearly returns for the period ended April to September and October to March every year.

- 6. <u>What is the due date of filing the Half Year-</u> ly Returns?
- For the period from October to March the Due Date is on or before 30<sup>th</sup> April of every year
- For the period from April to September the Due Date is on or before 31<sup>st</sup> October of every year

#### 7. <u>Who has to sign the returns in this e-form</u> <u>MSME I?</u>

The following Managerial Personnels of the Company are authorised to sign and submit the e form with the Registrar of the Companies in whose Jurisdiction the Company's registered office is situated.

- Director of the Company whose din number is in Active status and not a disqualified Director under the Companies Act 2013.
- Chief Executive Officer of the Company
- Manager of the Company
- Company Secretary of the Company.

#### **Conclusion:**

It is sure that the above measures that have been taken by the Government of India will definitely help the MSME's from getting payments from the receivers of their goods and services. Timely availability of funds in the form of loans and an increase in the cash flow will reduce the NPA'S and financial stress among the MSME sector.

## PRACTICUS QUESTE

Insolvency Professional Agency of Institute of Cost Accountants of India

## FAQS ON FILING DISLCOSURES

IBBI Circular dated 16<sup>th</sup> January, 2018: Disclosures by Insolvency Professionals and other Professionals appointed by Insolvency Professionals conducting Resolution Processes

When an Insolvency Professional (herein after referred as "IP") is required to file relationship disclosure?

An Insolvency Professional is required to file relationship disclosure (includes "NIL Disclosure") during:

- Appointment as Interim Resolution Professional/Resolution Professional;
- Appointment of other professionals for assistance
- Constitution of committee of creditors
- Raising of interim finance
- Supply of information memorandum

Disclosures for above mentioned events shall be filed within 3 days from the occurrence of the event. For filing disclosures, please refer **"Disclosure User Manual"** available at http://ipaicmai.in/IPAWAP/UM IPAWAP.pdf.

#### How an IP should disclose relationship while filing disclosures?

Interim Resolution Professional/Resolution Professional should select relationship of Kind A/B/C/D. IP should clearly read the circular before disclosing the relationship and determine the existence of relationship. However, if no option among A/B/C/D is selected, it will automatically result to no relationship for that particular filing of disclosure.

#### How an IP can edit the submitted disclosure?

If an IP wants to edit any disclosure, he/she shall state the reason for the same to the Monitoring Officer and shall mail the concern at monitoring@ipaicmai.in. After the receipt of mail, Monitoring Officer will connect the concerned IP with the IT department of IPA ICAI.

#### How an IP can get assistance if he/she is facing issue(s) while submitting disclosures?

If an IP is facing any issue while submitting disclosures, he/she shall share the screenshot of the page where issue has emerged and mail the same stating the issue monitoring@ipaicmai.in. After the receipt of mail, Monitoring Officer will connect the concerned IP with the IT department of IPA ICAI.

#### What are the consequences of non-submission of disclosures?

If an IP is filing disclosure on the portal for the very first time and delay is observed in the same (apart from technical issues), then an advisory from IPA ICAI will be sent to the member with regard to the compliance of the timelines of the circular for future filings. However if for further filings also delay with regard to timeline is observed then a Warning Letter shall be issued to an IP. On three times consecutive delay/non submission of pending disclosure (apart from technical issue), the matter will be referred to Monitoring Com mittee for further actions. However if a situation warrants, then matter may also be referred before Disciplinary Committee for further action.

Whereas if delay is observed in case of those IPs (apart from technical issue) who have already handled assignments, a Warning Letter shall be issued to the IP. On two times consecutive delay/non submission of pending disclosure (apart from technical issue), the matter will be referred to Monitoring Committee for further actions. However if a situation warrants, then matter may also be referred before Disciplinary Committee for further action

## IBBI Circular dated 12th June, 2018: Fee and other Expenses incurred for Corporate Insolvency Resolution Process

#### When an IP is required to file cost disclosure?

An IP who acted as an Interim Resolution Professional shall file Form 1 and 2 within 7 days from demitting the office. However an Interim Resolution Professional will be able to file Form 1&2 only when disclosure with regard to the "Appointment of IRP" has been duly filed on the portal.

An IP who acted as Resolution Professional shall file Form 3 within 7 days from demitting the office. However a Resolution Professional will be able to file Form 3 only when disclosure with regard to the "Appointment of RP" has been duly filed on the portal.

For filing disclosures, please refer "Disclosure User Manual" available at

http://ipaicmai.in/IPAWAP/UM IPAWAP.pdf.

#### Whether cost disclosure should be filed in the event of non-receipt of fees?

Interim Resolution Professional/Resolution Professional should file the disclosures timely irrespective of the fact whether fee has been received or not. A "Remarks" column has been provided where IP can state additional information (if required).

Whether an IP should file Form 1 & 2 if Interim Resolution Professional has not been appointed as Resolution Professional but performing the functions of Resolution Professional?

In such case IP should file Form 1 & 2 when he demits the office of corporate debtors in terms of his/her responsibilities and duties.

#### How an IP can edit the submitted disclosure?

If an IP wants to edit any disclosure, he/she shall state the reason for the same to the Monitoring Officer and shall mail the concern at <u>monitoring@ipaicmai.in</u>. After the receipt of mail, Monitoring Officer will connect the concerned IP with the IT department of IPA ICAI.

#### In which head an IP shall disclose the fee paid to the Insolvency Professional Entity (IPE)?

IP shall disclose the fee paid to the IPE for rendering support services under the head "Support Services". Moreover IP should note that IPE should raise a separate invoice in its name with regard to the support services offered to the IP.

#### How an IP can get assistance if he/she is facing issue(s) while submitting disclosures?

If an IP is facing any issue while submitting disclosures, he/she shall share the screenshot of the page where issue has emerged and mail the same stating the issue monitoring@ipaicmai.in. After the receipt of mail, Monitoring Officer will connect the concerned IP with the IT department of IPA ICAI.

#### What are the consequences of non-submission of disclosures?

If an IP is filing disclosure on the portal for the very first time and delay is observed in the same (apart from technical issues), then an advisory from IPA ICAI will be sent to the member with regard to the compliance of the timelines of the circular for future filings.

Whereas if delay is observed in case of those IPs (apart from technical issue) who have already handled assignments, a Warning Letter shall be issued to the IP. On two times consecutive delay/non submission of pending disclosure (apart from technical issue), the matter will be referred to Monitoring Committee for further actions. However if a situation warrants, then matter may also be referred before Disciplinary Committee for further action.
# JUDICIAL DECLARATION

Insolvency Professional Agency of Institute of Cost Accountants of India

# **Observations**

DATE	ADJUDICATING AUTHORITY	CASE NAME	<u>STATUS</u>	KEY FINDINGS
31-01-2019	Supreme Court	In the matter of Vijay Kumar Jain Vs Standard Chartered Bank & Ors	Dismissed	The Supreme Court allowed the appeal of ex directors and set aside the order of Appellate Au- thority and Adjudicating Author- ity of rejecting the prayer of an appellant, the erstwhile direc- tors of the Corporate Debtor for getting copy of the resolution plans from the resolution pro- fessional. It was observed that the statutory scheme of IBC and CIRP Regulations made it clear that "though the erstwhile Board of Directors are not members of the committee of creditors, yet, they have a right to participate in each and every meeting held by the committee of creditors, and also have a right to discuss along with members of the committee of Creditors all resolution plans that are presented at such meetings under Section 25(2)(i)"
11-02-2019	Supreme Court	In the matter of Rai Bahadur Shree Ram and Company Pvt Ltd (the sharehold- er and promoter of Ferro Alloys Corpo- ration Limited) Vs Rural Electrification Corporation Limited & others	Dismissed	The Supreme Court dismissed this appeal & affirmed the NCLAT judgment which held that insol- vency proceedings against the corporate guarantor may be un- dertaken without initiating prior proceedings against the principal debtor under the Insolvency and Bankruptcy Code 2016.
19-02-2019	NCLT	In the matter of Swadisht Oils Pri- vate Limited vs J. R Agro Industries Pri- vate Limited	Resolution	Application was filed before the Adjudicating Authority by the res- olution professional under section 60(5) of the IBC for determining the eligibility of one of the resolu- tion applicant under section 29A of the IBC and it was held that the resolution applicant was not eligi- ble under section29A(c),(e) &(j) of the IBC but the plan submitted by the resolution applicant was con- sidered for voting by COC as the application under section 60 (5) of the IBC could not be decided be-

				fore the expiry of 270 days of the CIRP process.
13-02-2019	NCLT	In the matter of Tirupati Jute Indus- tries Limited vs Small Industries Development Bank of India	Liquidation	It was held that the Adjudicating Authority under IBC does not have the jurisdiction to hold the lease deed executed by the corporate debtor after receipt of notice under section13(2) of SARFAESI Act is bad in law and pass any or- der of eviction of such lease hold- er from possession of the premis- es of the corporate debtor, as ac- cording to the Code Adjudicating Authority is not competent to pass any order for eviction.
29-01-2019	Supreme Court	In the matter of Swaraj Infrastruc- ture Private Lim- ited v. Kotak Mahindra Bank Limited	Dismissed	Supreme Court held that the se- cured creditor's entitled to file winding-up petition even after having obtained a decree from the debt's recovery tribunal and since winding-up proceedings under the Companies Act are not proceed- ings "for recovery of debts" due to banks, the bar contained in Sec- tion 18 read with Sec- tion34oftheRDBAct would not ap- ply. Therefore, the secured credi- tor's winding-up petition is main- tainable without the secured cred- itor giving up or relinquishing its security.
19-02-2019	NCLT	In the matter of Global Coke Limited	Dismissed	During CIRP any interim applica- tion is not maintainable because of the declaration of the morato- rium. It was also held that any un- encumbered assets of the corpo- rate debtor can be sold by the resolution professional as per Regulation 29(1)(2)of IBBI (IRP for Corporate Person)Regulation, 2016 . Therefore, there is no pro- vision in the Code or in the Regu- lation enabling the Resolution professional to dispose off these goods as requested or to hando- ver the goods to the Applicant's prayed for.
26-02-2019	NCLAT	In the matter of Monnet Power Company Limited Vs. Bharat Heavy Electricals Limited	Dismissed	Unlike the Liquidator, The resolu- tion professional cannot act in a number of matters without the approval of the Company Appeal (AT) (Insolvency) No. 743 of 2018

1+-12-2010		Brilliant Alloys Pri-	ווונוש	application for withdrawal of CIRP
14-12-2018	Supreme Court	In the matter of	Dismissed	ance interest of all the stakehold- ers, availability of credit and for promotion of entrepreneurship. Also, while considering the 'Reso- lution Plan', the creditors focus is on resolution of the borrower (Corporate Debtor ) in line with the spirit of the 'I&B Code'. There- fore, it was held that the share holders and promoters are not the creditors and thereby the 'Resolu- tion Plan' cannot balance the maximization of the value of the assets of the 'Corporate Debtor' at par with the 'Financial Creditors' or 'Operational Creditors' or 'Se- cured Creditors' or 'Unsecured Creditors'. They are also ineligible to submit the 'Resolution Plan' to again control or takeover the management of the 'Corporate Debtor' and if no amount is given to the promoters/ shareholders and the other equity shareholders who are not the promoters, have been separately treated by providing certain amount in their favour the Appellant cannot claim to have been discriminated. The Supreme Court allowed the
19-02-2019	NCLAT	In the matter of Lalit Mishra & Oth- ers Vs. Sharon Bio Medicine Limited &Others	Dismissed	The resolution under the I&B Code Is not a recovery suit and the object is the maximization of the value of the assets of the 'Corporate Debtor', and to bal-
				committee of creditors under Sec- tion 28 of the Code, which can by a two-thirds majority, replace one resolution professional with an- other, In case they are unhappy with his performance. Thus, the resolution professional is really a facilitator of the resolution pro- cess, whose administrative func- tions are overseen by the commit- tee of creditors and by the Adjudi- cating Authority. There- fore'Resolution Professional 'is directed only to act in accordance with the directions of the Adjudi- cating Authority.

		vate Limited Vs. S. Rajagopal & Others		before NCLT under section60 (5) of IBC. As it was held that Sec- tion12A of IBC read with regula- tion 30A of the CIRP Regulations specifically deals with withdrawal of CIRP after admission. Sec- tion12A provides that CIRP can be withdrawn after admission, if the same is approved by ninety per cent voting share of the commit- tee of creditors. Regulation 30A imposes an additional condition for withdrawal of CIRP that such application shall be filed before issue of invitation for expression of interest under regulation 36A.Therefore, regulation30A has to be read along with the main provision of section 12A and the condition under regulation30A can only be considered as directo- ry in nature depending on the facts of each case.
12-12-2018	Supreme Court	In the matter of Jaipur Metals & Electricals Employ- ees Organisation Vs. Jaipur Metals & Electricals Ltd.	Dismissed	The Supreme Court found error in the High Court's judgment, which set aside the NCLT order of admit- ting application under the Code on the ground of lack of jurisdic- tion. The Supreme Court observed that proceeding under the Code is an independent proceeding, which has nothing to do with the transfer of pending winding up proceedings before the High Court. It is open for an applicant at any time before a winding up order is passed against the corpo- rate debtor to apply for resolution proceeding under the Code. It is supported by non-obstante clause of section 238 of the Code. High Court cannot set aside the NCLT proceeding on the ground of lack of jurisdiction. On this ground, the Supreme Court set aside the High Court judgment and allowed the continuation of the NCLT proceed- ings.



# CASE STUDY

# CASE STUDY

The Constitutional validity of various provisions of the Insolvency and Bankruptcy Code, 2016 has been assailed in the case of

# **Swiss Ribbons Private Limited vs. Union of India**

# **KEY OBSERVATIONS**:

# APPOINTMENT OF MEMBERS OF THE NCLT AND THE NCLAT NOT CONTRARY TO THIS COURT'S JUDGMENTS

Supreme Court held that none of the members of the NCLT or the NCLAT had been appointed contrary to the judgments of this Court in Union of India v. R. Gandhi, President, and Madras Bar Association. It also noted down the affidavits filed before this Court to show that all such members had been appointed by a Committee consisting of two Supreme Court Judges and two bureaucrats, in conformity with the aforesaid judgments.

# NCLAT BENCH ONLY AT DELHI

Supreme Court has assured that this judgment will be followed and Circuit Benches will be established as soon as it is practicable. Therefore, it was recorded this submission and direct the Union of India to set up Circuit Benches of the NCLAT within a period of 6 months from the date of judgment.

# THE TRIBUNALS ARE FUNCTIONING UNDER THE WRONG MINISTRY

Supreme Court referred the Madras Bar Association (I) case where it had observed that the administrative support of all tribunals shall fall under the exclusive purview of the Ministry of Law and Justice. The management of the NCLTs and NCLAT by the Ministry of Corporate Affairs in terms of allocation of business rules was challenged on this ground. Supreme Court stated that it is obvious that the rules of business, being mandatory in nature, and having to be followed, are to be so followed by the executive branch of the Government. Therefore, the Supreme Court directed the Union of India to follow both in letter and spirit, the judgment of this Court.

# <u>CLASSIFICATION BETWEEN FINANCIAL CREDITOR AND OPERATIONAL CREDITOR NEITHER DISCRIMINATORY,</u> NOR ARBITRARY, NOR VIOLATIVE OF ARTICLE 14 OF THE CONSTITUTION OF INDIA

For the classification between financial and operational creditors, Supreme Court argued that the differentiation between the two types of creditors occurs from the nature of the contracts entered into with them.

Financial contracts involve large sums of money given by fewer persons, whereas operational creditors are much larger in number and the quantum of dues is generally small.

Financial creditors have specified repayment schedules and agreements which entitle such creditors to recall the loan in totality on defaults being made, which the operational creditors do not have.

Further, financial creditors are, from the start, involved with the assessment of viability of corporate debtors and are, therefore, better equipped to engage in restructuring of loans as well as

reorganization of the corporate debtor's business in the event of financial stress. All these differentiae are not only intelligible, but directly relate to the objects sought to be achieved by the Code.

Also, most financial creditors, particularly banks and financial institutions, are secured creditors whereas most operational creditors are unsecured, payments for goods and services as well as payments to workers not being secured by mortgaged documents and the like. The distinction between secured and unsecured creditors is a distinction which has obtained since the earliest of the Companies Acts both in the United Kingdom and in this country.

Thus, preserving the corporate debtor as a going concern, while ensuring maximum recovery for all creditors being the objective of the Code, financial creditors are clearly different from operational creditors and therefore, there is obviously an intelligible differentia between the two which has a direct relation to the objects sought to be achieved by the Code.

The Supreme Court therefore, held that the distinction that the Code carves out between operational creditors and financial creditors is not violative of Article 14 of the Constitution of India

# <u>SECTIONS 21 AND 24 AND ARTICLE 14: OPERATIONAL CREDITORS HAVE NO VOTE IN THE COMMITTEE OF</u> <u>CREDITORS</u>

Supreme Court observed that operational creditors do not have the requisite expertise to determine the viability and feasibility of business as they are generally involved in the supply of goods and service. It was noted that the operational creditors or their representatives could be present in the meeting of the Committee of Creditors if the amount of their aggregate dues was not less than ten per cent of the debt. Also, the NCLAT has, while looking into viability and feasibility of resolution plans that are approved by the committee of creditors, always gone into whether operational creditors are given roughly the same treatment as financial creditors, and if they are not, such plans are either rejected or modified so that the operational creditors' rights are safeguarded. Operational creditors are not discriminated against or that Article 14 has been infracted either on the ground of equals being treated unequally or on the ground of manifest arbitrariness.

# SECTION 12A IS NOT VIOLATIVE OF ARTICLE 14

The main thrust against the provision of Section 12A is the high threshold i.e. ninety per cent of the committee of creditors has to allow withdrawal. Supreme Court elaborated the fact that once the Code gets triggered by admission of a creditor's petition under Sections 7 to 9, the proceeding that is before the Adjudicating Authority, being a collective proceeding, is a proceeding in rem. Also, the requirement of approval of ninety percent of the members of the Committee of Creditors ensures that the liabilities of all the creditors are addressed in an omnibus settlement as most of the financial creditors have to grant their approval to the settlement proposal. The committee of creditors does not have the last word on the subject as the NCLAT can always set aside such decision under Section 60 of the Code

Supreme court also held that at any stage where the committee of creditors is not yet constituted, a party can approach the NCLT directly, which Tribunal may, in exercise of its inherent powers under Rule 11 of the NCLT Rules, 2016, allow or disallow an application for withdrawal or settlement. Therefore, on the above grounds Section 12A passes constitutional muster.

# EVIDENCE PROVIDED BY PRIVATE INFORMATION UTILITIES: ONLY PRIMA FACIE EVIDENCE OF DEFAULT

It was argued that private information utilities that have been set up are not governed by proper norms. Also, the evidence by way of loan default contained in the records of such utility cannot be conclusive evidence of what is stated therein.

To which the Supreme Court replied that the Information Utilities Regulations, in particular Regulations 20 and 21, make it clear that on receipt of information of default, an information utility shall expeditiously undertake the process of authentication and verification of information and this makes it clear that apart from the stringent require

ments as to registration of such utility, the moment information of default is received, such information has to be communicated to all parties and sureties to the debt. This concludes that evidence provided by private information utilities are only prima facie evidence of default.

## **RESOLUTION PROFESSIONAL HAS NO ADJUDICATORY POWERS**

Supreme Court clarify that the resolution professional has no adjudicatory powers. Also, the resolution professional has to vet and verify claims made, and ultimately, determine the amount of each claim and they are given adminis-trative as opposed to quasi-judicial powers.

Further, unlike the liquidator, the resolution professional cannot act, in most circumstances, without the approval of the Committee of Creditors, which retains the power to replace one resolution professional with another, by a two-thirds majority. Thus, the resolution professional has been recognized only as a facilitator of the resolution process, whose administrative functions are overseen by the Committee of Creditors and by the Adjudicating Authority.

## CONSTITUTIONAL VALIDITY OF SECTION 29A

Section 29A of the Code was first introduced by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017, amending the Code and provides for which persons are ineligible to be resolution applicants in a Corporate Insolvency Resolution Process. The constitutional validity of various aspects of Section 29A, as dealt by the Supreme Court in the instant case, are categorized as follows:

(a) Retrospective Application – It was argued that Section 29A of the Code had retrospectively impaired the right of erstwhile promoters to participate in the recovery process for the corporate debtor. The Supreme Court observed that a statute is not retrospective merely because it affects existing rights. Therefore, no vested right is taken away by application of Section 29

(b) Section 29A(c) not restricted to malfeasance – It was argued that there is no reason to not permit an erstwhile manager not guilty of malfeasance or of acting contrary to the interest of the corporate debtor from taking part in the resolution process and also there is no vested right in an erstwhile promoter of a corporate debtor to bid for the immovable and movable property of the corporate debtor in liquidation.

(c) Exemption of Micro, Small, And Medium Enterprises from Section 29A- ILC Report of 2018 exempted MSMEs industries from Section 29A(c) and 29A(h) of the Code because business of an MSME attracts interest primarily from a promoter of an MSME and may not be of interest to other resolution applicants. There have been various amendments that are repeatedly being made in respect of MSMEs to the Code, and to subordinate legislation based upon Committee Reports which are looking into the working of the Code. The fact has also been brought that legislature is alive to serious anomalies that arise in the working of the Code and have taken proactive steps to rectify them.

# SECTION 53 OF THE CODE DOES NOT VIOLATE ARTICLE 14

The Position of Operational Creditor in the waterfall provided under section 53 of the Code was argued as they rank below all other creditors, including unsecured financial creditors and it is having a deleterious effect to their interest. To uphold the constitutionality of Section 53 of the Code, the Supreme Court stated that repayment of financial debts infuses capital into the economy inasmuch as banks and financial institutions are able, with the money that has been paid back; to further lend such money to other entrepreneurs for their businesses. Also, it mentioned that workmen's dues, which are also unsecured debts, have traditionally been placed above most other debts. Thus, it finally concluded that unsecured debts may be of various kinds, and when there is legitimate interest, in tandem with the object of the Code, sought to be protected, the same cannot be called unconstitutional. It has been held that Section 53 of the Code does not violate Article 14 of the Constitution of India. Charter of responsibilities of IRP/RP and Committee of Creditors in a CIRP

> Insolvency Professional Agency of Institute of Cost Accountants of India



Phase	Section	Section Regulation Responsibility		Who is responsible?		
				IRP/RP	CoC	-
	13(2) & 15	6(1) & 6(2)	Making public announcement within 3 days of appointment and calling for submission of claims			NA
	17		Management of affairs of the CD, exercise the powers of the Board of Directors of the CD, etc.			NA
	17(2)(e)		Compliance with the requirements under any law on behalf of the CD during CIRP			NA
	18(1)(a)		Collect all information relating to the assets, liabilities, finances and operations of the CD			NA
	18(1)(b)	13 & 14	Receive, collate and verify claims, including best estimate of claims where it is not precise			NA
	21(6A) & (b)	4A & 16A	Ascertaining class(es) of creditors, identifying and selecting AR, applying to AA for appointment of AR, providelistofsuch creditorstoAR, provideelectronicmeansofcommunicationbetweenARandsuch creditors			NA
	18(1)(c) &21(1)	17(1)	Constitution of CoC and filing report with the AA			NA
	22(1)	17(2)	Holding the first meeting of the CoC within seven days of filing report under regulation 17(1)			NA
IRP	22	17(3)	Carrying on as RP from 40 <sup>th</sup> day till RP is appointed			NA
IKP	18(1)(e)		Filing information with information utility			NA
	18(1)(d) & (f)		Monitor the assets of CD, manage its operations, take control and custody of its assets			NA
	19(2)		Make application to the AA, in case of non-cooperation from CD, its promoter or any other person required to assist or cooperate with IRP			NA
	20(1) & 20(2)(e)		$\label{eq:protect} Protect and preserve the value of property of the CD and manage its operations as a going concerned on the constraint of the constraint$			NA
	20(2)(a)		Appoint accountants, legal or other professionals, as may be necessary			NA
	20(2)(b)		${\sf Enter}\ into\ contracts on behalf of {\sf CD} or a mend\ contracts entered\ into\ before\ commencement\ of {\sf CIRP}$			NA
	20(2)(c)		Raise interim finance (within the limits set by CoC)			NA
	20(2)(d)		Issue instruction to personnel of the CD for keeping it as a going concern			NA
	21(10)		${\sf Makefinancial information available to CoC with inseven days of such requisition under section 21 (9) }$			NA
	22(2)		Confirmation of IRP as RP or replacement with another IP as RP			66
	22(3)(b)		File application with the AA for replacement of IRP with proposed RP			NA
	23(3)		Providing all information, documents and records pertaining to CD to RP			NA
	12A	30A	Filing of withdrawal application before the AA			90
	240(1)	33	Ratifying the expenses of IRP			51
	18(1)(g)	34A*	Disclosure of insolvency resolution process costs			NA
	208 (2) (e)	39A	Preservation of records relating to CIRP of CD			NA

Phase	Section	Section Regulation Responsibility			Who is responsible?	
				IRP/RP	CoC	
	23(1)		Conduct of the CIRP in compliance with the procedure under the Code and Regulations			NA
	23(2) r/w 17		Management of affairs of CD, excercise the powers of the Board of Directors of CD, etc.			NA
	23(2) r/w 17(2)(e)		Compliance of the requirements under any law on the behalf of CD during CIRP			NA
	24(8)	22(1)	Modifying percentage of voting rights required for quorum			51
	24 & 25(2)(f)	23 - 26	Convene, attend and conduct of meetings of CoC, including participation through video conferencing and voting through electronic means			NA
	24 & 25(2)(f)	18	Convene meetings of CoC whenever required or on request made by members of CoC representing 33% of voting rights			NA
	24 & 25(2)(f)	19(2)	Reduction of notice period for holding CoC meeting			51
	25(1)		Preserve and protect the assets of the CD including continued business operations of CD			NA
	25(2)(a)		Take control and custody of all assets of CD			NA
	25(2)(b)		Represent and act on behalf of the CD with third parties, exercise rights for the benefit of CD in judicial, quasi-judicial and arbitration proceedings			NA
	25(2)(c) & 28(1)(a)		Approval to raise interim finance			66
	25(2)(d)		Appoint accountants, legal or other professionals			NA
	25(2)(e)	13 & 14	Maintain updated list of claims, including verification and determination			NA
RP	25(2)(g) & 29(1)	36(1)	Preparation and circulation of IM to CoC			NA
	240(1)	36(3)	$\label{eq:providing} Providing information having a bearing on the Resolution Plan, upon request from a member of the CoC$			NA
	29(2)	36(4)	Obtaining confidentiality undertaking from prospective RAs and CoC			NA
	25(2)(h)	36A(1)-(3)	Publishing of invitation for EOI from prospective RAs			NA
	25(2)(h)	36A(4)(a)	Specifying criteria for prospective RAs			51
	25(2)(k)	36A(8) & (9)	Due diligence of EOIs received to assess compliance with criteria specified including seeking clarification/additional information			NA
	25(2)(k)	36A(10)	Issue provisional list of eligible prospective RAs			NA
	25(2)(k)	36A(12)	Issue final list of eligible prospective RAs			NA
	25(2)(g) & (h) r/w 29	36B(1)-(5)	Issue of IM, EM and RFRP (including performance security requirements)			NA
	25(2)(h)	36B r/w 2(ha)	Details/parameters of EM and RFRP			51
	25(2)(k)	36B(6)	Extend the timeline for submission of Resolution Plans			51
	25(2)(k)	36B(7)	Re-issue of RFRPs			51
	25(2)(i)	37,38 & 39	Present all Resolution Plans which fulfill required criteria at the meeting of CoC			NA
	25(2)(j)		File application for avoidance of transactions			NA
	27		Replacement of RP			66
	28(1)(b)		Creation of security interest over assets of CD			66
	28(1)(c)		Change the capital structure of CD			66
	28(1)(d)		Record any change in the ownership interest of the CD			66

Phase	Section	tion Regulation Responsibility		Who is responsible?		Voting (%)
		-		IRP/RP	CoC	-
	28(1)(e)		Payment limits from bank accounts of CD			66
	28(1)(f)		Undertake any related party transaction			66
	28(1)(g)		Amend any constitutional documents of the CD			66
	28(1)(h)		Delegate its authority to any other person			66
	28(1)(i)		Dispose of or permit the disposal of shares of any shareholder of the CD or their nominees to third parties			66
	28(1)(j)		Make any change in the management of the CD or its subsidiary			66
	28(1)(k)		Transfer rights or financial debts or operational debts under material contracts otherwise than in the ordinary course of business			66
	28(1)(I)		${\sf Make changes in the appoint ment or terms of contract of such personnel as may be specified by the {\sf CoC}}$			66
	28(1)(m)		Make changes in the appointment or terms of contract of statutory auditors or internal auditors of the CD			66
	25(2)(d)	27	Appointment of Registered Valuers			NA
	24(8)	28	Notifying each participant of CoC and AA of any change in CoC consequent to assignment or transfer of debt by a creditor			NA
RP	28(1)(k)	29	Sale of assets outside the ordinary course of business			66
	19	30	Applying to the AA seeking assistance of local district administration			NA
	12A	30A	Filing of withdrawal application before the AA			90
	240(1)	34	Fixing of expenses of RP			51
	25(2)(k)	34A*	Disclosure of insolvency resolution process costs			NA
	25(2)(j), 43,45, 50, 66	35A	(i) Determination of transactions of the nature of preferential, undervalued, extortionate, fraudulent trading or wrongful trading; (ii) intimation to the IBBI; and (iii) applying to the AA for appropriate relief			NA
	30(2) & (3)	38 & 39(2)	Submission of compliant resolution plans to CoC (mandatory contents including details of previous non imple- mentation, if any, of Resolution Plan by RAs) along with details of irregular transactions (if any)			NA
	30(4)	39(3)	Evaluation (strictly as per EM) and approval of Resolution Plan with modifications (if any), with reasons recorded for approval or rejection			66
	30(6)	39(4)	Submission of Resolution Plan approved by CoCto AA along with compliance certificate in Form Hand the evidence of receipt of performance security			NA
	23(1) Proviso		Continuing to manage the operation of CD until the order is passed by the AA under section 31			NA
	240	39(5)	Commmunicating order of the AA on Resolution Plan to participants and RAs			NA
	208(2)(e)	39A	Preservation of record relating to CIRP of CD			NA
	12 (2)	40	Application to the AA for extension of CIRP period			66

Phase	Section Regulation Responsibi	Responsibility	Who is Responsible?		Voting (%)	
		U		IRP/RP	CoC	
	208(2)	7(2)(h) r/w First Schedule of IP Regulations	Abide by the code of conduct			NA
IRP/RP	208(2)	Items - 8 & 8A of First ScheduleofIP Regulations**	Disclosure of pecuniary or personal relationship with stakeholders or association with FC			NA

### \* Read with Circular No. IBBI/IP/013/2018 dated 12th June, 2018 issued by IBBI

\*\* Read with Circular No. IP/005/2018 dated 16th January, 2018 issued by IBBI

#### Legend:



### Responsibility

Authority of IRP/RP, as the case may be, with the approval of CoC

No role

### Abbreviations

AR	Authorized Representative
CD	Corporate Debtor
CIRP	Corporate Insolvency Resolution Process
сос	Committee of Creditors
EM	Evaluation Matrix
EOI	Expression of Interest
FC	Financial Creditor
IBBI	Insolvency and Bankruptcy Board of India
IM	Information Memorandum
IP Regulations	IBBI (Insolvency Professionals) Regulations, 2016
IRP	Interim Resolution Professional
NA	Not Applicable
RA	Resolution Applicant
RFRP	Request for Resolution Plan
RP	Resolution Professional



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