June'22

THE INSOLVENCY PROFESSIONAL

YOUR INSIGHT JOURNAL

INTERIM FINANCE -A SUPPORTING TOOL

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). With the responsibility 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 and grant membership to persons who fulfil 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 endeavour 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.

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CHAIRMAN MESSAGE

It is widely acknowledged that one of the important functions of the Government in modern world is to create adequate and efficient eco-system to render justice, equity and fair play to its peoples. Introduction of Insolvency and Bankruptcy Code 2016 was an initiative on the part of the Government of India to enable ease of exiting business in the event of failure as some business do fail. IBC 2016 focussed on treating the Corporate as a going concern to ensure protection of jobs. The efforts therefore are required to be made to explore the possibility of the survival of the Corporate in distress and thus guard against the job losses. It also helps in extending the productive life of the fixed assets of the Corporate.

IBC 2016 envisages that the control of the Corporate would shift from the Debtor to the Creditor. The Resolution Professional takes control of the Unit as the representative of the Banks and Financial Institutions. The Board of the Directors of the Corporate gets suspended and entire operations of the Company are managed by the Resolution Professional. Protecting the jobs of the employees and ensuring that the Company continues to be a going concern would serve a great social purpose and hence entails significant social cost. Ultimately, who should bear such a social cost? I feel the Government!!!

Another important aspect of IBC is an easy exit route for the corporate promotir who has failed to sustain the business. There are different stakeholders in a business and the failure of a business would lead to a situation where all the stake holders become the losers in financial terms albeit with different degrees. There may be a likelihood that some of the stake holders would not have contributed for the failure of the business. But still they may have to suffer financially. The financial cost is thus shared by many stake holders

A very significant bye-product of IBC is that the ranking of our country in "Ease of Doing Business Index" has improved from 152 in the year 2016 to 63 in the year 2020. The ease of resolving insolvency has made significant contribution to improve the ranking of India in the Ease of Doing Business. The Ease of Doing Business in the country would have a major influence in making India an attractive investment destination. The focuss of the Government on 'Make In India' gets a big fillip and gets boosted largely for the reason of the significant improvement in our ranking under 'Ease of Doing Business' after introduction of IBC 2016. Such an investment does a lot good to the nation. The Government ought to treat this as such and should willingly share such indirect costs for overall public good.

It is in this perspective, the discussion paper on the financial self sufficiency needs to be examined. The annual Financial Stability Report of RBI estimates that the NPA level of the banks in India has shown a declining trend from 7.4% as on 31.3.2021 to 5.9% as on 31.3.2022 and is expected to be around 5.4% as on 31.3.2023. The progressive reduction in the level of NPA is another good sign and IBC 2016 has also helped creating the fear of losing their business, in the minds of the promotors of the Corporate Debtors. While it is a reflection of improving debt repayment culture among the Corporate Debtors, it also symbolises the potential reduction in the number of cases coming under the scope of IBC 2O16. In such an eventuality,the number of cases and volumes of business under IBC2016 would come down forcing many Resolution Professionals out of the profession.

In such a back drop levying different fee, penalty etc on the Resolution Professionals may have the impact of making the profession unattractive. The thought on the part of IBBI to propose enhanced revenue stream to make it financially self-sufficient needs to be viewed with caution. It should be desirable for the Government to continue to fund for few more years until the IBC law is fully evolved.

The cases of the financial self sufficiency of the Regulators like SEBI stand on a different footing. In first place SEBI was also supported by the Government in its formative years. Secondly, its revenue comes from those who make an earning for themselves. Whereas in the case of IBC eco-system, the cost of CIRP is largely borne by the Banks and Financial Institutions who have not so far been earning anything on their investments as the resolution and liquidations have generally been facing huge hair cuts. If the CIRP was to be made costlier further to the Lenders, it may prove to be a disincentive for the lenders to come through IBC route for the recovery of their dues. IBBI may therefore wait to make itself financially self-sufficient at this juncture.

The IBBI may try to make IBC Eco-system attractive to the Lenders and Resolution Professionals to serve the larger interest of societal good by ensuring protection of jobs, maximisation of assets value for the corporate debtor, ease of exiting business, perpetuity of the Corporate Debtor as a going concern and improvement in the debt repayment culture in the country.

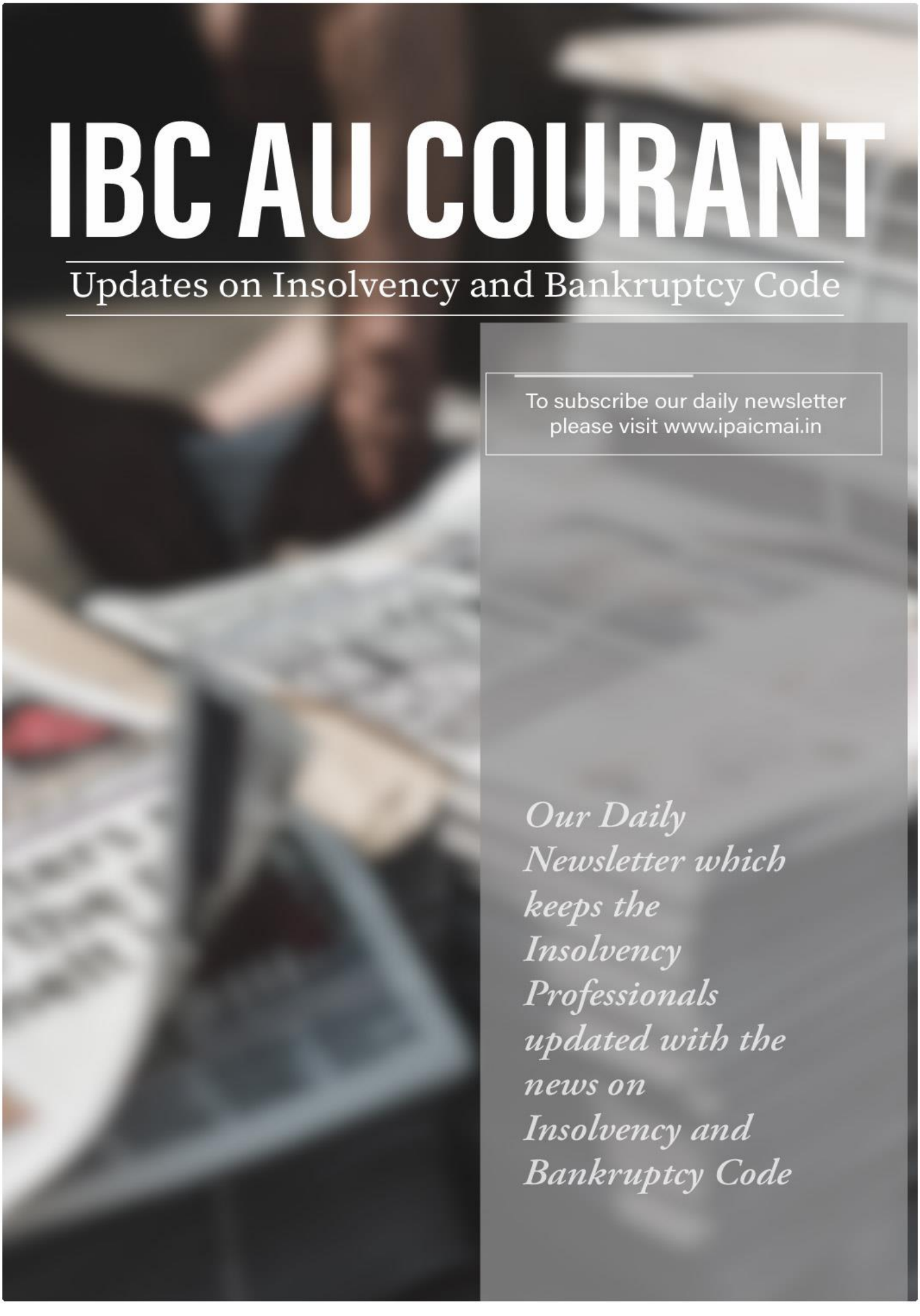
The views are personal and may not be a reflection of the stand of IPA

PROFESSIONAL DEVELOPMENT INTIATIVES

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

EVENTS

JUNE'22	
3rd June'22	Awareness Program on Insolvency Profession (AKAM) - Bhubaneshwar
3rd June'22	Awareness Program on Insolvency Profession (AKAM) - Howrah
4th June'22	Awareness Program on Insolvency Profession (AKAM) - Bangalore
4th June'22	Awareness Program on Insolvency Profession (AKAM) - Kolkata
4th June'22	Awareness Program on Insolvency Profession (AKAM) - Nagpur
4th June'22	Workshop on Management of CD as a going under CIRP and Liquidation
5th June'22	Awareness Program on Insolvency Profession (AKAM) - Jaipur
5th June'22	Awareness Program on Insolvency Profession (AKAM) - Visakhapatnam
7th June'22	Awareness Program on Insolvency Profession (AKAM) - Raipur
8th June'22	Awareness Program on Insolvency Profession (AKAM) - Coimbatore
9th June'22	Awareness Program on Insolvency Profession (AKAM) - Pune
10th-12th June'22	Master Class on Group Insolvency and Cross Border Insolvency
15th June'22	Workshop on Remuneration of Insolvency Professionals
17th-18th June'22	Learning session on Leadership and Management
25th June'22	Certificate Course on IBC
28th June'22	56th Batch of PREC.



IBC AU COURANT

Updates on Insolvency and Bankruptcy Code

To subscribe our daily newsletter
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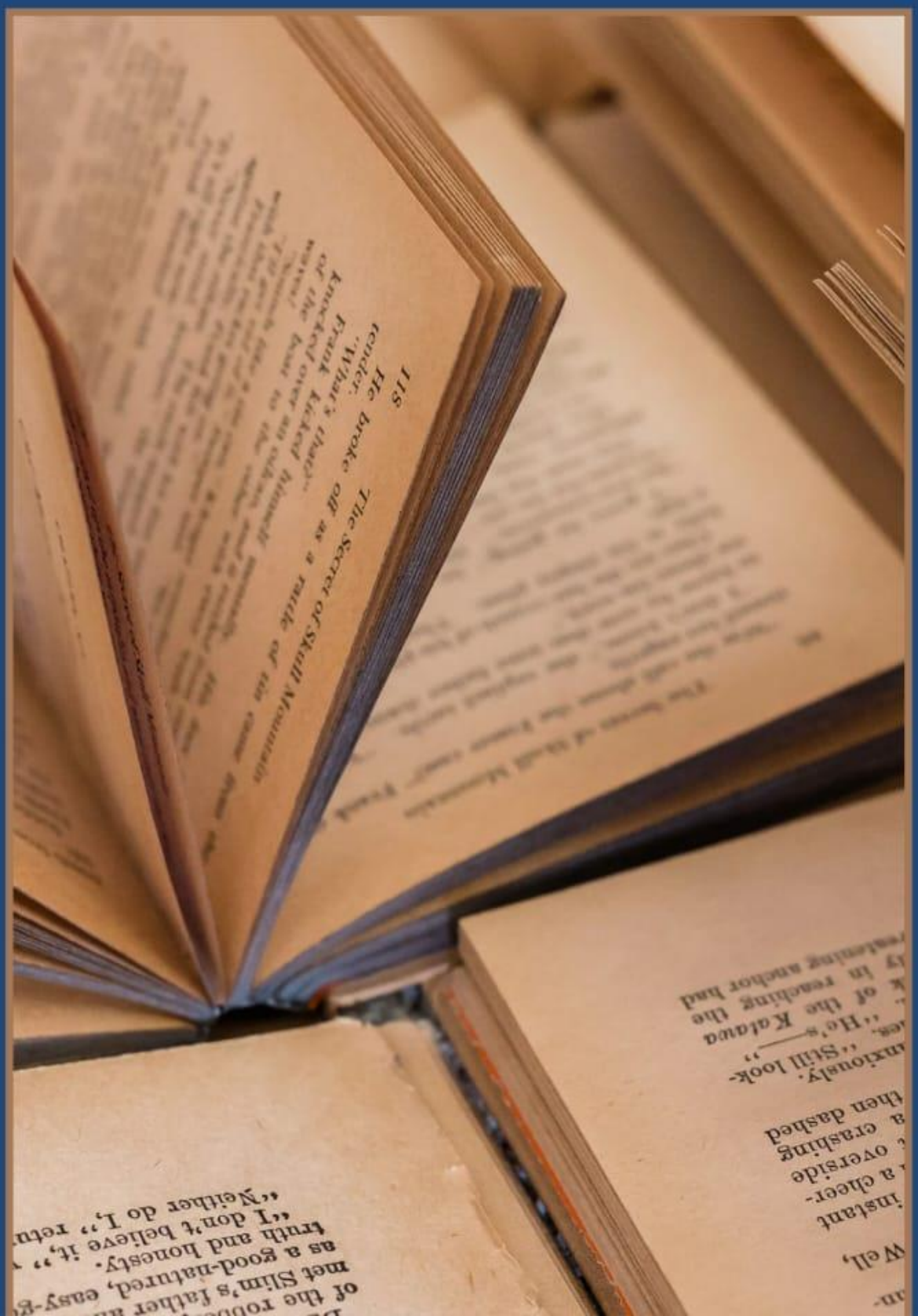
Our Daily Newsletter which keeps the Insolvency Professionals updated with the news on Insolvency and Bankruptcy Code

ARTICLES



INTERIM FINANCE- NEW LIFELINE OF CIRP

ANIL BHATTAR
Chairman
AGP Advisors Pvt Ltd.
CA, CS and Insolvency Professional

With the advent of Insolvency and Bankruptcy Code (IBC) in the year 2016, one of its main objectives is to find a viable resolution for the stressed or debt-ridden corporates and to turn it around or liquidate as per circumstances within a specific period by an appointed agency known as Resolution Professional (RP).

A Resolution Professional (RP) is empowered and has been given an undisputed fiduciary responsibility under the IBC to protect and preserve the value of the property of the Corporate Debtor and to manage its operations as a ***"Going Concern"*** under clause 20 of IBC, 2016.

One of the underlying requirements for all the Corporate Insolvency Resolution Process (CIRP) is that the RP must manage the normal affairs of the undergoing corporate debtor and meet the CIRP expenses to complete CIRP. Now, while assuming the management of corporate debtors, the RP has to augment the funds and for that he may use funds:

a) Generated with the corporate debtor's operations if any;
b) From existing financiers, if they are willing to extend further;
c) From financiers other than existing ones within permissible limits under the IBC framework.

While we all are familiar with the first two sources which are primary and imminent ones but most unlikely possible in CIRP, its third source which becomes paramount important and critical supporting tool in the CIRP (known as ***"Interim Finance")*** enabling the RP to keep alive a corporate by survival of the normal business affairs during CIRP.

As without funds in place, it will be very difficult for the RPs to run the daily operations of the corporate debtors and present it to new investors or existing financiers, a viable running and turnaround proposition. Interim finance offers a fresh life on lease for a corporate debtor to postpone from becoming a completely sick or dead corporate eventually to be liquidated or dissolved.

Thus, Interim finance plays a vital role in the CIRP and the IBC provides specific provisions for raising interim finance by the RP as under:

a) Purpose:

The very purpose of the raising interim finance is to support RP for meeting his obligation of protecting and preserving the value of the property of the company and managing its operations as a Going Concern and also to be able to meet the ongoing CIRP cost. Sometimes it is necessary otherwise even if the corporate debtor is a sick corporate and already not a going concern.

Corporate Debtors cash flow is not sufficient or negligible or dried up to make payments for essential services, workmen, security personnel etc and other professionals appointed (such as Valuer, Legal Firms etc) to carry out CIRP. The RP can resort to interim finance to meet these obligations within the IBC framework, with the consent of the Committee of Creditors (CoC).

b) Definition:

As per section 5(15) of the IBC – "interim finance means any financial debt raised by the resolution professional during the insolvency resolution process period or by the corporate debtor during the pre-packaged insolvency resolution process period, as the case may be and such other debt as may be notified."

c) Quantum:

As per section 20(c) of the IBC, the RP shall have the authority to raise interim finance provided that no security interest shall be created over any encumbered property of the corporate debtor without the prior consent of the creditors whose debt is secured over such encumbered property: *Provided that no prior consent of the creditor shall be required where the value of such property is not less than the amount equivalent to* ***twice the amount of the debt****.*

d) Repayment:

As per section 5(13)(a) of the IBC, the Insolvency Resolution Process Costs (IRPC) means the amount of any interim finance and the costs incurred in raising such finance.

This means payment of IRPC, which include interim finance, gets highest priority in a resolution plan or in liquidation so interim finance must be repaid first, prior to distribution

of proceeds to other creditors. Even in the case of liquidation also, the IRPC gets highest priority and to be repaid out of liquidation estate.

Thus interim finance is absolutely beneficial for Corporate Debtor's RP, who may reasonably ensure the very objectives of IBC are achieved through keeping corporate debtors' assets preserved to get fair value and be able to meet the costs in that process. It also helps RP to meet the ongoing CIRP costs for the overall interest of all creditors while enabling itself to perform his obligations as prescribed under IBC.

An Alternative Investment Opportunity:

It can be learnt from above that it is a secured debt with safety in terms of the highest priority within waterfall structure laid down in section 53 of IBC. With the amendment in IBC in 2018, the interest for a period of 12 months or period of liquidation (i.e. period from liquidation order date till the actual realisation of the assets), whichever is lower shall now form a part of the liquidation cost.

The Interim Financiers may find such opportunities on case to case basis as listed on the IBBI website or through public announcement and shortlist the cases where desired comfort prevails and primarily meet their criteria.

It therefore makes it very attractive for the Interim Financier looking for high returns with safety for a short period thus it can be a revolutionary investment opportunity for such lenders or investors or individuals. It has proved to be a game changer for the corporate debtor enabling the Interim Financiers to invest in a special situation (a sort of alternative investment product) which not only generates a handsome internal rate of return with minimal risks.

This is very popular in the developed countries such as US, UK and Australia and where financing to run the insolvency process is known as debt-in-possession. In India, there are many Banks, NBFCs, ARCs, Special Situation Funds or even private lenders that are looking at this opportunity in a big way as a new avenue for lending. Many overseas institutional investors are eyeing to India by forming special situation funds or operating through established ARCs.

There have been cases where RPs have raised finance offering such opportunities to the Interim Financiers for extending interim finance. As per market information, AZB & Partners represented Edelweiss in the country's first significant case of IF under IBC was raised by RP of Alok Industries CIRP. In another case of a Faridabad based company owning shopping malls has raised interim finance while undergoing CIRP.

The Challenges:

While it looks very fancy to raise interim finance from the financiers by offering decent returns with safety net, there are various challenges to be considered:

a) CoC approval: Existing financiers may not be comfortable with either sharing security for additional debt burden or terms of interim finance.

b) Absence of security: Absence of non-encumbered or surplus value of already encumbered assets

c) Potential liquidation: CIRP outcome is more of liquidation with no so much value realisation may not attract the financiers.

d) Cost of interim finance: Considering its nature and special situation, the financier's expectation will always be high as compared to normal financing.

e) Process time: CIRP involves a longer period due to legal process though it is specified in the IBC to be completed within 180 days hence, chances are more that the period of financing becomes longer than contracted.

However, considering the merits and challenges, it can be still said in the above context that Interim Finance is a very useful means of finance and offers various advantages for the RPs and Corporate Debtors undergoing CIRP. As the IBC is almost evolved in India, the same way interim finance will also be in due course.

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INTERIM FINANCE IN IBC- A SUPPORTING TOOL

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ADVOVATE, CS, INSOLVENCY PROFESSIONAL

The IBC provides specific provisions for raising interim finance by the Interim Resolution Professional/ Resolution Professional for the purposes of protecting and preserving the value of the property of the company and managing its operations as a going concern – and consequently achieve a viable resolution plan for the company. The IBC classifies all interim finance raised as 'insolvency resolution process costs' ('IRPC'). Payment of IRPC gets highest priority in a resolution plan or in liquidation.

The IBC requires that, in a resolution plan, IRPC must be paid out prior to any recoveries being made by any creditor. Such payment includes interim finance (interest and principal) which also gets this priority. Similarly, in liquidation also, the distribution waterfall set out in the IBC provides for highest priority to IRPC (which must be paid out of the liquidation estate).

Interim finance is a supporting tool and an important ingredient to resolve and restructure a stressed and potentially insolvent company and in some cases can be critical for the company's business operations to survive during the corporate insolvency resolution process. A number of companies undergoing the IBC process have sought to raise formal interim finance. There has also been sufficient interest in this space from various financial institutions.

Introduction

A corporate debtor going through the insolvency resolution process runs low on funds and faces negative cash flows. Since the main objective of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "Code" / "IBC") is the revival of the corporate debtor and to prevent it from going through the process of liquidation, the Code provides for an effective tool of raising "interim finance" which may help the corporate debtor run and function as a going concern during its insolvency resolution process. The concept of interim finance in the Indian context is similar to the concept of "debtor-in-possession financing" under the United States Bankruptcy Code.

The Interim Resolution Professional (hereinafter referred to as "IRP"), and the Resolution Professional (hereinafter referred to as "RP") are empowered by the Code to raise the interim finance for the corporate debtor after their appointment in order to meet the corporate debtor's working capital expenses during the resolution process.

Since the corporate debtor already has insufficient funds and sometime no fund at all, the creditors might be hesitant to lend their money to raise the finance of the corporate debtor. In Home buyer company, homebuyers class of FC hesitate to contribute to funds for CICP. It might turn out to be a risky investment for them as not only there is uncertainty as to whether the corporate debtor will be able to repay the principal amount as well as the interest accrued on it, there are fair chances that the assets of the corporate debtor might get liquidated if the insolvency resolution process fails. Therefore, the Code addresses the said issues and provides certain safeguards to the creditors in this regard. Financial Institutions donot respond to call of Interim finance. If IRP/RP gets Interim Finance from his source, then IPA and IBBI grills the IRP/RP for taking Interim Fianance.

In realty, in almost every CIRP there is no fund in CD account. COC hesitate to approve Interim Finance most of the time. But Since IRP/RP has to continue the CIRP and keep company active and take care the value of the assets of the CD, IRP/RP has to put money from his account.

What does interim finance mean?

Interim finance, in an ordinary sense, means raising the funds or money, for a company during its regular course of business, from external sources for a specific purpose for e.g., for a particular project, event, activity, etc., or its daily operations and functions. The interim finance is generally raised to prevent losses. Rather than cancelling or postponing a particular transaction due to unavoidable factors, it is more advantageous for the company to raise funds from external financial institutions and entities.

What is interim financing under the IBC?

Once the insolvency resolution process of the corporate debtor has been initiated by the Adjudicating Authority, all the operations and daily affairs of the corporate debtor are carried out by the insolvency and resolution professional. The Code has vested the insolvency and resolution professional with the duty to take all the necessary actions that are required to keep the corporate debtor as a going concern during the insolvency resolution process.

As per Section 20(1) of the Code, the IRP has to undertake every endeavour in order to protect and preserve the value of the assets of the corporate debtor as well as manage the operations of the corporate debtor as a going concern. A similar duty of preserving and protecting the assets of the corporate debtor, including continuing the business operations of the corporate debtor, has been vested upon the RP by Section 25(1) of the Code.

For the purpose of fulfilling the duties mentioned in Section 20(1) and Section 25(1), the IRP and RP are empowered to raise interim finance for the corporate debtor during the resolution process.

Section 5(15) of the Code defines "interim finance" as any financial debt raised by the resolution professional during the period of the corporate insolvency resolution process (hereinafter referred to as "CIRP") or the pre-packaged insolvency resolution process (hereinafter referred to as "PPIRP").

In simple words, interim finance under the Code can be defined as a "short-term loan" which is raised in order to keep the corporate debtor running as a going concern when it is undergoing the insolvency resolution process. However, in the case of the RP, the action of raising the interim finance needs the approval of the Committee of Creditors (hereinafter referred to as "CoC") by a vote of sixty-six (66) percent of the voting share as mentioned in Section 28(a) of the Code.

The Hon'ble National Company Law Appellate Tribunal (hereinafter referred to as "NCLAT") in the case of *Sajeve Bhushan Deora v. Axis Bank Ltd. & Ors. (Company Appeal (AT) (Ins) No.741 of 2019)*, observed that with the approval of the CoC, the RP can raise the interim finance in order to fulfill its duties mentioned in Section 25 of the Code.

In the case of *Edelweiss Asset Reconstruction Company Ltd. v. Sai Regency Power Corporation Private Limited & Other (Company Appeal (AT) (Ins) No. 887 of 2019)*, the CoC had approved the proposal of the RP of raising non-fund based interim finance for the corporate debtor by a majority of 75%. However, the Appellant who was the dissenting creditor challenged the said action contending that the interim finance was being raised for non-essential services of the corporate debtor and thus, the Appellant cannot be forced to facilitate the same. The Hon'ble NCLAT while acknowledging the duty of the RP to raise interim finance under Section 25, held that the RP is empowered to make the decision if it has been approved by the CoC with at least 66% majority, and thus, the said decision was held to be enforceable. Therefore, in this case, the Hon'ble Tribunal allowed the RP to raise the interim finance for the corporate debtor.

When does interim finance become effective and attractive under the Code?

When the insolvency resolution process of the corporate debtor is initiated, the corporate debtor is incapable of making any payments to other entities as its cash flows may be very low or have already dried up. Now on top of it, during the insolvency resolution process, apart from the payments to the creditors, the corporate debtor also has to make certain other payments such as CIRP costs, fees of the resolution professionals and valuers, payments to the workmen, etc. The Code has made these payments mandatory irrespective of the financial position of the corporate debtor.

Therefore, it becomes necessary for the RP to resort to a method that will generate new business for the corporate debtor which in turn will generate some income and enhance the existing financial position of the corporate debtor. The net income generated by the corporate debtor can be used to make the aforementioned payments and also repay the creditors.

One of the ways provided by the Code to improve the financing position of the corporate debtor is by raising interim finance with the aid and assistance of banks or other financial institutions. Raising interim finance is an effective tool for preventing the corporate debtor from going through the process of liquidation.

For example; project 'P' needs an investment of INR 120 crores. The corporate debtor has already invested INR 100 crores. However, just before paying the last installment, the corporate debtor ran out of funds and became incapable of repaying the amounts which it owed to its creditors. In view of the financial position of the corporate debtor, the CIRP has been initiated against it. However, the corporate debtor needs only INR 20 crores for the project 'P' and if this amount is given to the corporate debtor, it can generate new business and income, as the market situation is ideal and favourable for the said project and thus, it will aid the corporate debtor in repaying all its dues to the creditors. In such situations, raising interim finance can prove to be an effective tool for improving the cash flows and financial state of the corporate debtor.

However, the Code is silent as to whether or not interim finance can be raised during the liquidation process. Therefore, interim finance can only be raised during the CIRP or PPIRP.

Safeguards available in respect of raising interim finance

While receiving interim finance from external sources can be beneficial to the corporate debtor, it might prove to be risky for the institutions that are lending the finance due to the following reasons:

(i) Uncertainty of repayment of the principal amount as the corporate debtor is already facing negative cash flows; and

(ii) Uncertainty of receipt of the interest accrued on the principal amount if the insolvency resolution process of the corporate debtor fails and it goes into liquidation.

In order to address the following issues, the Code has provided certain safeguards to the creditors who aid the corporate debtor by raising its finance.

Interest only on unencumbered assets of the corporate debtor

As per Section 20(2) of the Code, the IRP is empowered to raise interim finance, however, during the process, a security interest cannot be created over the encumbered assets of the corporate debtor without the prior consent or approval of the creditors whose debt is secured over such assets.

Therefore, the Code empowers the IRP/RP to raise interim finance only in respect of:

- Unencumbered assets of the corporate debtor; or
- Encumbered assets after taking consent or approval of the secured creditors.

This is one of the major safeguards that has been provided by the Code to the secured creditors against the unauthorized creation of security interest on the secured assets of the corporate debtor.

Priority in payment

The Code also safeguards the financial institutions and entities from whom the interim finance has been raised by guaranteeing the repayment of the amount raised, in priority to the other payments. If the corporate debtor goes through the process of liquidation even after the interim finance was raised, the repayment of the interim finance to the financial institutions will be the top priority while liquidating the assets of the corporate debtor.

As per Section 53(a) of the Code, in distributing the proceeds from the sale of the liquidation of the assets, the full payment of the insolvency resolution process costs and the liquidation costs will be the top priority.

It is interesting to note that as per Section 5(13) of the Code the term "insolvency resolution process costs" also includes the amount of interim finance and the costs incurred in raising such finance. Moreover, as per Regulation 2(ea)(vi) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (hereinafter referred to as "Liquidation Regulations"), the "liquidation cost" also means and includes the interest on interim finance for twelve months or the period from the liquidation commencement date till the repayment of interim finance, whichever is lower.

Therefore, since the interim finance is a part of insolvency resolution process cost and liquidation cost, it will be realized in full payment before the other payments that the corporate debtor has to make.

Receipt of interest accrued on the interim finance

Earlier the creditors were hesitant in aiding interim finance to the corporate debtors as there was no certainty of repayment of the principal amount as well as the interest accrued on it by the corporate debtor. However, as mentioned earlier, "liquidation cost" as defined under Regulation 2(ea)(vi) of the Liquidation Regulations, also includes the interest accrued on interim finance up to either twelve months or till the repayment of interim finance, whichever is earlier.

Therefore, even if the insolvency resolution process and liquidation process of the corporate debtor has been concluded, the creditors can claim the interest accrued on the interim finance.

This has been proved to be a major relief to the creditors as not only the certainty of repayment of the principal amount of interim finance but also the interest accrued on it is assured by the Code and the Liquidation Regulations.

Conclusion

While the availability of interim finance aids the corporate debtor in improving its state of affairs to a large extent, there are certain grey areas that have not been addressed yet.

The provisions of raising interim finance of the Code are only applicable to the corporate debtor whose operations are running on the date of the commencement of the insolvency resolution. They do not apply to the corporate debtor whose operations were stopped before the commencement of CIRP or PPIRP.

Moreover, interim finance also cannot be raised during the liquidation process of the corporate debtor, which means that even if the liquidator feels that the asset value of the corporate debtor is not sufficient to repay its dues, the liquidator cannot raise interim finance.

Now some companies have come forward to provide this significant tool namely interim finance and recently in Alok industries Ltd by Edelweiss. Otherwise this significant tool will become dream in CIRP or it will be arranged by RP/IRP from their own pockets to run the CIRP . Hence this significant tool in CIRP has become almost moon, difficult to get. Like moon looks good, it is significant, useful, indispensable but remote chance of getting

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INTERIM FINANCE: A VENTILATOR SUPPORT FOR CASH STRAPPED ENTITY

Rashmi Agarwalla

CA & IP

The term *Interim Finance* also known as rescue finance is generally used for short term loan that is availed to buy time until something changes. The interim finance may be raised by a company during its regular course of business from external sources for a rather short period of time, to prevent losses because of cancelling or postponing a particular transaction due to lack of funds. In parlance of proceedings under Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "The Code"), the term Interim Finance refers to tool of raising short term finance which may help the insolvency professional to run and function the corporate debtor as a going concern during corporate insolvency resolution process (hereinafter referred to as CIRP). The Code entrusts the responsibility of running the corporate Debtor on the Interim Resolution Professional or Resolution Professional during the CIRP. This can be a challenging job specially if the corporate debtor is a going concern but cash strapped as finance is essential to manage any organization. Thus, Interim Finance plays a crucial part in it. The Interim Finance may also be raised by the corporate debtor himself during rather newly conceived process known as Pre-packaged Insolvency resolution Process (hereinafter referred to as PP-IRP), where corporate debtor continues to be in possession of the assets.

Provisions under the Code dealing with Interim Finance.

Before proceeding to detailed understanding of the provisions of the code, let's look into the sections directly dealing with interim finance.

As per ***Section 5(15)*** of the Code, '***Interim Finance'*** *means any financial debt raised by the resolution professional during the insolvency resolution process period or by the corporate debtor during the prepackaged insolvency resolution process period, as the case may be and such other debt as may be notified*.

Section 5(13) of the Code defines '**Insolvency Resolution Process cost** which means-

(a) the amount of any ***Interim Finance*** *and the costs incurred in raising such finance;*

(b)……..

Similarly, as per ***section 23(C),*** "**pre-packaged insolvency resolution process costs**" means—

(a) the amount of any interim finance and the costs incurred in raising such finance;

(b)……

Section 20(2)(c) of the Code states that in order to manage the operations of the corporate debtor as a going concern, the interim resolution professional shall have the authority to raise interim finance provided that no security interest shall be created over any encumbered property of the corporate debtor without the prior consent of the creditors whose debt is secured over such encumbered property: Provided that no prior consent of the creditor shall be required where the value of such property is not less than the amount equivalent to twice the amount of the debt.

Similarly, ***Section 25(2)(c***) states that to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor the Resolution Professional shall undertake to raise 'Interim Finance' subject to approval of the Committee of Creditors (Hereinafter referred to as CoC) under Section 28.

As per the ***Sub section (1)*** of the ***Section 28*** dealing with approval of committee of creditors for certain actions.-

Notwithstanding anything contained in any other law for the time being in force, the resolution professional, during the corporate insolvency resolution process, shall not take any of the following actions without the prior approval of the committee of creditors namely;- (a) raise any Interim Finance in excess of the amount as may be decided by the committee of creditors in their meaning…."

Thereafter ***Section 28(3)*** of the Code provides that *No action under sub-section (1) shall be approved by the committee of creditors unless approved by a vote of sixty-six percent of the voting shares.*

Further Section 28(4) of the Code states that *Where any action under sub-section (1) is taken by the resolution professional without seeking the approval of the committee of creditors in the manner as required in this section, such action shall be void*

Need for Interim Finance

As we all know, no Corporate Debtor is by choice under CIRP or PP-IRP. It is its inability to pay its debts which is mostly due to financial distress which brings it to these processes. Hence, financial crunch and lack of liquidity to meet the day to day expenses of maintaining a Corporate Debtor under CIRP / PP-IRP as going concern is a common feature of most entities under CIRP. Very often once the Resolution Professional takes charge of a Corporate Order, he finds pending work orders which cannot be completed because of paucity of funds and hence may require influx of finance. Moreover, the payments are to be made for purchases during the CIRP as

most suppliers deter from supplying goods on credit to an entity under CIRP. Besides, the corporate debtor also has to make certain other payments such as CIRP costs, fees of the resolution professionals and valuers, salaries, rent, payments to the workmen, etc. As approval of resolution plan may take a very long time, the Resolution Professional has to derive means to fund these expenses and Interim Finance is one of the ways provided by the Code to do so. The Apex court in case of *Sajeve Bhushan Deora Vs. Axis Bank Ltd. & Ors.*, has upheld the decision of Hon'ble NCLAT which decided that it is right and duty of Resolution Professional to preserve and protect the assets of the Corporate Debtor including the continued business operations and for the purpose, interim finance can be raised subject to approval of CoC.

Features of Interim Finance

High Risk: As stated earlier, loan given as Interim Finance carry immense risk as the entity to which it is granted is already into debt which it had failed to repay. Before lending, lender must carry on very stringent due diligence and risk assessment process.

Higher Interest: As these loans are made to cash strapped entities, the risk involved in lending for interim finance is high and therefore the interest rates for such loan are generally higher than normal lending rates by financial institutions. Owing to this, many lenders now find interim financing as an investment opportunity as the interest rates on these loans are highly attractive and lucrative. Despite this, there was an initial hesitancy among lenders as originally the Code provided that the lenders were entitled to interest only for the period upto the order of liquidation of Corporate Debtor or completion of moratorium period, whichever would be earlier and this meant the lender would have to wait till distribution of assets for its due without any interest for liquidation period. This issue was addressed when IBBI, vide Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2018 dated 28th March, 2018, provided, that liquidation cost would include interest on interim finance for a period of twelve months or for the period from the liquidation commencement date till repayment of interim finance, whichever is earlier.

Super Priority Loan*:* Section 5(13)(a) of the Code categorizes interim finance within insolvency resolution process costs(herein after referred to as IRPC) and section 53(1)(a) read with section 30(2)(a) of the Code accords highest priority to IRPC during liquidation and CIRP. Thus, both principal and interest on these loans are repaid in priority to other dues of the company even before the workmen dues and secured loans.

Only for running entity*:* The Code provides that the interim finance can be raised only for entities whose operations are running on the date of commencement of CIRP or PP-IRP. They do not apply to the corporate debtor whose operations were stopped before the commencement

of CIRP or PP-IRP. Moreover, it should also be noted that there is no provision for raising interim finance during liquidation even if the entity is a going concern at that time.

Short term*:* These loans are normally for short time, in most cases for period of 6 months to one year, nevertheless, practically the resolution/ liquidation is taking much longer than as has been envisaged by the Code, the actual time for repayment may be longer in certain cases. However, it is pertinent to note that, during a liquidation proceeding, a liquidator need not wait for disposal of all assets before he start disbursing the amount to stakeholders as per the waterfall mechanism set out under section 53 of the Code. More often than not, liquidators pay off dues raised as interim finance fully or partly even if assets are partly sold off.

Creation of Security for Interim Finance: As per Section 20(2) of the Code, the Resolution Professional is empowered to raise interim finance but for this a security interest can be created only over unencumbered assets of the corporate debtor or on the encumbered assets of the corporate debtor with the prior consent or approval of the creditors whose debt is secured over such assets (provided that no prior consent of such secured creditor is required where the value of such encumbered assets is not less than the amount equivalent to twice the amount of the debt). Therefore, if all of the Corporate Debtor's assets are already pledged, such loan would be unsecured. Nevertheless, since highest priority has been accorded to such loan during distribution of assets, they would still be considered highly safe.

Grey Areas

Insolvency and Bankruptcy Code is still an evolving legislation. The government has been proactive in plugging loopholes through amendments and many grey areas been addressed through jurisprudence. However, some challenges still remains. In cash-starved distressed companies, where most assets are already encumbered, and the security holders decides to enforce their security, virtually nothing may remain with the liquidator to even meet first priority payment, i.e. insolvency resolution process costs and thus lender of interim finance would be left dry handed. To address the concern, the regulation 21A(2)(a) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, provides that the amount of insolvency resolution process costs in such cases is due from the secured creditors who realize their security interests and such amounts need to be transferred to a liquidator to be included within the liquidation estate. However, there is no clarity regarding the mechanism of determining the amount due and manner and timing in which such dues are to be paid to the liquidation estate.

Secondly, there are certain ambiguities regarding the amount of claim to be filed by the interim financier on commencement of the liquidation process. The claim of the interim financier would be a changing amount as he qualifies for interest even after commencement of liquidation

proceeding. Considering that the interim financier files his claim for the amount due as on the liquidation date, this amount will increase as the time elapses. The liquidation process requires filing list of stakeholders with the amounts owed to them to the adjudicating authority, before starting any distribution. Any variation in the amounts of claims thereafter can be done only with the approval of the adjudicating authority. Therefore, clarity in respect of above is desired.

Conclusion

The role that interim finance can play in revival of cash strapped beleaguered entity cannot be exaggerated. There is a considerable time gap between the commencement of the CIRP and approval of resolution plan or distribution in case of liquidation. Resolution professionals are heavily relying on interim financier to keep the company afloat. Globally, rescue financing is not only last survival hope for the beleaguered entity but also an attractive investment opportunity for the lenders. With the timely changes in the Code, the proposition of providing interim finance has become attractive for the lenders in India too. Initially only private equity providers and some asset management companies were into this space but of late many banks like State Bank of India have developed a board approved interim financing policy in place to avail the opportunities. With growing availability and awareness regarding the interim finance, we can surely hope to see more resolution of viable companies which is the ultimate aim of the Code.

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RAISING OF INTERIM FINANCE IN CORPORATE INSOLVENCY RESOLUTION PROCESS

CS. DR. M. GOVINDARAJAN
Practising Company Secretary &
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Insolvency resolution process costs

Section 5(13) of the Insolvency and Bankruptcy Code, 2016 ('Code' for short) defines the expression 'insolvency resolution process costs' as-

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

Interim finance

Section 5(15) of the Code defines the expression 'interim finance' as any financial debt raised by the resolution professional during the insolvency resolution process period or by the corporate debtor during the pre-packaged insolvency resolution process period, as the case may be, and such other debt as may be notified**.**

Section 20(1) of the Code provides that the interim resolution professional shall make every endeavor to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern. Section 20(2)© provides that the interim resolution professional shall have the authority to raise interim finance provided that no security interest shall be created over any encumbered property of the corporate debtor without the prior consent of the creditors whose debt is secured over such encumbered property. No prior consent of the creditor shall be required where the value of such property is not less than the amount equivalent to twice the amount of the debt. **Further Section 20(5) provides that the interim resolution professional shall have authority** to take all such actions as are necessary to keep the corporate debtor as a going concern.

Approval of Committee of Creditors

Section 28(1)(a) provides that notwithstanding anything contained in any other law for the time being in force, the resolution professional, during the corporate insolvency resolution process, shall not take any of the following actions without the prior approval of the committee of creditors to raise any interim finance in excess of the amount as may be decided by the committee of creditors in their meeting. The Committee of Creditors shall have final call as to what amount, whether initial or additional, may be raised as an interim finance.

The Corporate debtor cannot raise interim finance in corporate insolvency resolution process. The Corporate debtor in pre-packaged insolvency resolution period may raise interim finance. Thus Interim Resolution Professional/Resolution Professional and Committee of Creditors have responsibilities with regard to interim finance.

Once the Committee of Creditors approved the raising of interim finance the members of the Committee of Creditors are liable to contribute for interim finance according to the proportion of their votes held in the Committee. Since the decision is to be taken by majority of 66% of voting the proposal for raising interim finance is binding on all members even though the member is not interested to contribute for the same.

In **'Edleweiss Asset Reconstruction company v. Sai Regency Power Corporation Private Limited' – NCLAT, New Delhi – Company Appeal (AT) (Ins) No. 887 of 2019 - decided on 21.08.2019,** corporate insolvency resolution process was initiated against by Sai Regency Power Corporation, the corporate debtor itself with effect from 27.03.2019. The Corporate Debtor is engaged in the business of generation and sale of electricity from its Gas based Combined Cycle Power Plant. The Committee of Creditors was constituted. The appellant is having 25% in the Committee of Creditors.

In the meeting held on 02.08.2019 the Committee of Creditors approved to raise interim finance to the extent of Rs.35.26 crores for the non fund based requirement towards GAIL and ONCG. The said resolution was passed by 75% of Committee of Creditors.

In order to generate electricity from the project, Corporate Debtor requires approximately 2,74,000 SCMD gas per day and, *inter alia*, was procuring its major requirement of gas from Oil and Natural Gas Corporation ('ONGC' for short) in terms of Gas Supply Agreement dated 19.04.2017 and balance quantity of gas was being procured from GAIL India Limited in terms of Gas Supply Agreement dated 24.12.2015. On 30.04.2019, the agreement between

Corporate Debtor and ONGC completed its term. The Resolution Professional intended to enter into fresh negotiations with ONGC but it was advised that the resolution professional has to participate in fresh tender/bid for gas supply.

The agreement with GAIL was to expire on 06.08.2019. GAIL had asked the Corporate Debtor to open/renew and submit Standby Irrevocable Resolving Letter of Credit with Face Value as mentioned and the aggregate liability of issuing bank under the Letter of Credit should also be for the amount as mentioned. The Resolution Professional then referred to the 6th meeting of Committee of Creditors and the decision taken. The appellant was reluctant to release Letter of Comfort to the lead bank. Punjab National Bank which was willing to disburse interim finance since the resolution has been passed with the approval of 75% voting share of Committee of Creditors.

The Resolution Professional filed an application before the Adjudicating Authority with the prayer to issue a certification that approved Interim Finance and any costs related to Interim Finance, since it forms part of the insolvency resolution process cost, has to be shared between all the members of the Committee of Creditors, in the proportion of their voting rights. The Adjudicating Authority allowed the application with a direction to the Committee of Creditors members including Edelweiss Asset Reconstruction Company Limited and Axis Bank to release the Letter of Comfort.

The appellant filed the present appeal against the order of Adjudicating Authority. The appellant contended the following before the National Company Law Appellate Tribunal ('NCLAT' for short) -

- In view of amendment to Section 30(4) of the read Code with Section 52(8) of Code, Insolvency Resolution Process costs which include interim finance can only be recovered from secured creditors and not from unsecured creditors like appellant.
- The appellant cannot be compelled to incur additional liabilities in the form of interim finance/Letter of Comfort.
- The Committee of Creditors is free to raise corporate insolvency resolution process cost/interim finance from external sources or willing Financial Creditors which may be repaid in priority as per Section 53 of the Code.
- The Impugned Order was passed without giving opportunity of being heard to the appellant and thereby principles of natural justice were violated.
- There would be little or no value maximization even if the interim finance could be provided.
- Except for essential services the appellant could not be compelled.

The Resolution Professional contended that it is the responsibility of the Interim Resolution Professional/Resolution Professional to keep the Corporate Debtor a going concern. When the Resolution Professional has taken a decision that interim finance needs to be raised so as to ensure that the Corporate Debtor remains a going concern so as to maximize the value of the Corporate Debtor, the appellant should not have objected and cannot resist liability when it is part of the Committee of Creditors.

The NCLAT observed that when Committee of creditors in a meeting of the Financial Creditors by requisite majority takes a decision with regard to corporate insolvency resolution process costs which includes execution of responsibility put by law on the Interim Resolution Professional/Resolution Professional to keep the Company a going concern, the same cannot be treated as forcing the appellant to part with property or forcing to incur liability. The appellant has itself sought to be part of Committee of Creditors and joined it. Nobody is forcing appellant to file claim and/or to be part of Committee of Creditors. If the appellant is part of Committee of Creditors and wants to remain part of Committee of Creditors, the appellant cannot expect to only claim benefits from the process and claim that it would not take any of the liabilities and responsibilities which in the present matter, are apparently based on legal provisions for the duties to be performed by Interim Resolution Professional/Resolution Professional/Committee of Creditors. In the meeting of Committee of Creditors the appellant has right of dissent but if decision is still taken by majority provided under the statute, all of Committee of Creditors members are duty bound to abide by the decision. The NCLAT dismissed the appeal of the appellant as it found no substance in the appeal.

Disciplinary action

If the Resolution Professional has not complied with the provisions relating to interim finance there may be chances by the Board to initiate disciplinary action against him. The Insolvency and Bankruptcy Board initiated disciplinary action against Shri Dhinal Shah, Insolvency Professional. One of the allegations is regarding to interim finance. The Disciplinary Committee observed from the minutes of the 6th Committee of Creditors meeting dated 27.09.2017 that a binding term sheet for an interim finance of Rs. 10 crores was provided by EARC and Committee of Creditors was only informed of the same. Mr. Shah subsequently made an inquiry to other Committee of Creditors members in response to this. Thereafter, Mr Shah got the said term binding sheet approved from the Committee of Creditors members where incidentally EARC itself had the major voting share i.e. it gave approval to its own proposal. Therefore, the IBBI is of the prima facie view that Mr. Shah violated Section 28(1)(a), Section 208(2)(a) and (e) of the Code and Regulation 7(2)(a) and 7(2)(h) read with Clauses 10, 12 and 14 of the Code of Conduct of the IP Regulations.

The Resolution Professional submitted that the requirement of interim finance was explained in the 1st Committee of Creditors meeting dated 05.07.2017 but no resolution was passed in this regard. In the 2nd Committee of Creditors meeting dated 25.07.2017, the requirement of interim finance and the month-on-month cash position of the corporate debtor was placed before the Committee of Creditors. In the 3rd Committee of Creditors meeting dated 08.08.2017, Mr. Shah was to evaluate raising interim finance from parties from parties other than Committee of Creditors members. In the 5th Committee of Creditors Meeting dated 13.09.2017, detailed discussion regarding raising interim finance, deliberations with NBFCs and other parties for raising interim finance, squeezing of requirements to the minimum from Rs. 75 crores to Rs. 25 crores was made. It is observed that in the 6th Committee of Creditors meeting dated raising interim finance from EARC was discussed. The resolution for interim finance for an amount of Rs. 10 crores being raised from Edelweiss Asset Reconstruction Company Ltd @ 18%p.a was approved with 91% voting share.

The Disciplinary Committee analyzed the submissions put forth by the Resolution Professional. The Committee observed that it is evident that the requirement of interim finance has been placed, discussed and deliberated before the Committee of Creditors and action was taken accordingly. Various steps have been taken by the Resolution Professional time and again to discuss the requirement of interim finance with the Committee of Creditors so as to maintain the Corporate Debtor as a going concern. In the 6th Committee of Creditors meeting the Edelweiss ARC had provided the term binding sheet outlying the key terms and condition which was put up for voting and the same was approved from the Committee of Creditors with 91% majority. There is no provision under the Code which bars a Financial Creditor holding major voting share from advancing interim finance. Hence, interim finance being availed from Edelweiss ARC and the same has been approved by the Committee of Creditors with Edelweiss does not contravene any provision of the Code.

The Disciplinary Committee held that Mr. Shah was not in contravention of the provisions of the Code.

Discussion paper

The Board issued a discussion paper on remuneration of insolvency professional on 09.06.2022. In the said paper it is proposed to insert Regulation 34B in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations 2016. The proposed new Regulation 34B provides for opening of Escrow Account. The Interim Resolution Professional/Resolution Professional shall in the first meeting of Committee of Creditors give estimate of fixed fee and expenditure on hiring of other professionals/support service etc. to

the Committee of Creditors. For the said estimate of fees and expenses pertaining to the first six months period, Committee of Creditors shall either contribute to an escrow account or obtain the interim finance, towards the same.

According to this Regulation 34B-

- An insolvency professional shall create an escrow account in the name of corporate debtor, in respect of his fee, and fee for the resolution professional, immediately on his appointment as an interim resolution professional.
- The applicant or the committee, as the case may be, shall deposit in the escrow account, or in alternate arrange for interim finance for depositing in the escrow account, the amount fixed under regulation 34A within 72 hours of submission of the statement by the insolvency professional.
- The interim resolution professional or the resolution professional shall be eligible to withdraw the amount deposited in the escrow account towards his fee and shall provide the details of withdrawals to the committee in the statement prepared under regulation 34A.
- The remaining amount, if any, in the escrow account shall be released upon approval of resolution plan under section 31 or passing of an order for liquidation of corporate debtor under section 33.

Conclusion

The role of Committee of Creditors is crucial in monitoring the expenses generated through the interim finance. There shall be no fraud or misappropriation in this regard. Usually, the interest on interim finance is on the higher side. Therefore, the same should be utilized for the benefit of corporate debtor, which is ongoing basis, in raising much wealth in the corporate insolvency resolution process.

ABSTRCT

Raising interim finance in the course of corporate insolvency resolution process is an essential one to meet the expenses to run the corporate debtor as a going concern. The Code prescribes that it is the duty of resolution professional to comply with all the provisions relating to interim finance and got the approval of Committee of Creditors for raising of interim finance which may attract interest. The interim finance forms part of insolvency resolution process cost and it has priority for its payment among all payments.

CASE LAWS

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

SECTION 4 - CORPORATE INSOLVENCY RESOLUTION PROCESS - APPLICATION OF

Madhusudan Tantia v. Amit Choraria [2021] 131 taxmann.com 144 (NCL-AT)

Notification issued by Ministry of Corporate Affairs on 24-3-2020 raising minimum threshold of pecuniary jurisdiction of Adjudicating Authority from Rs. 1 lakh to Rs. 1 crore under powers conferred by proviso to section 4 of IBC has a prospective effect and could not have deprived creditors from exercising their substantive right to initiate insolvency process against defaulting debtors.

The applicant-operational creditor raised several invoices against the corporate debtor for supply of foundry and chemicals, which remained unpaid. Subsequently, the operational creditor filed an application under section 9 before the Adjudicating Authority for initiation of corporate insolvency resolution process against the corporate debtor for an unpaid operational debt of about Rs. 90 lakhs. Final hearing in matter took place on 13-3-2020 and matter was reserved for orders. However, due to outbreak of COVID-19, subsequent national lockdowns and disruption in functioning of courts and tribunals, decision was pronounced on 20-5-2020 through video conferencing. During pronouncement, the corporate debtor contended that in view of notification issued by Ministry of Corporate Affairs on 24-3-2020, section 9 application should be dismissed due to retrospective enhancement of Adjudicating Authority's pecuniary jurisdiction, thereby, raising minimum threshold from Rs. 1 lakh to Rs. 1 crore. However, the Adjudicating Authority rejected the corporate debtor's contentions and held that a statute is presumed to be prospective unless it is held to retrospective, either expressly or through necessary implication and since March 24 notification was silent on this aspect, the Adjudicating Authority held it to be prospective in nature and admitted section 9 application. A majority shareholder and director of the corporate debtor filed an appeal before the NCLAT contending that section 4 (which provides for minimum default amount) is procedural in nature and, therefore, March 24 notification must be applied retrospectively. However, it was found that any revision in minimum default amount after enactment of IBC could not deprive creditors from exercising their substantive right to initiate insolvency process against defaulting debtors.

Held that March 24 notification was prospective in nature and shall not apply to pending applications filed prior to 24-3-2020.

Case Review : Foseco India Ltd. v. Om Boseco Rail Products Ltd. [2021] 130 taxmann.com 511 (Adjudicating Authority - Kol.), affirmed.

SECTION 22 - CORPORATE INSOLVENCY RESOLUTION PROCESS - RESOLUTION PROFESSIONAL - APPOINTMENT OF

Ranjeet Kumar Verma v. Committee of Creditors of Straight Edge Contract (P.) Ltd. [2021] 131 taxmann.com 145 (NCL-AT)

Where CoC, which decided to replace IRP, was itself constituted by IRP, IRP would not be permitted to argue that constitution of CoC was bad and therefore appeal against order of CoC was to be dismissed.

The appellant acting as an Insolvency Resolution Professional was replaced by the Committee of Creditors (CoC). The appellant assailed said order on ground that CoC was related to the corporate debtor and decision was taken collusively. It was noted that replacement had been done by CoC with 100 per cent voting share. Further, the appellant had no right to continue once decision was taken by CoC to replace him. That apart, the CoC which decided to replace appellant was itself constituted by the appellant.

Held that appellant would not be permitted to argue that Constitution of CoC was bad, therefore, appeal against order of CoC was to be dismissed.

SECTION 240A - MICRO, SMALL AND MEDIUM ENTERPRISES - APPLICATION OF CODE TO

Harkirat Singh Bedi v. Oriental Bank of Commerce - [2021] 131 taxmann.com 152 (NCL-AT)

Section 240A which stipulates that provisions of clauses (c) and (h) of section 29A shall not apply to resolution applicant in respect of CIRP of any MSME, and thus, where date of registration of corporate debtor as MSME was 5-6-2019 i.e. after CIRP admission order, application for registration of MSME by corporate debtor was without authorization and hence, was invalid and therefore corporate debtor was ineligible to take benefit of section 240A.

In respect of the corporate debtor, corporate insolvency resolution process was initiated and the Resolution Professional (RP) was appointed. The corporate debtor took defence that it being MSME, its director would be allowed to submit his self resolution plan by availing benefit of section 240A, which stipulates that provisions of clauses (c) and (h) of section 29A shall not apply to resolution applicant in respect of CIRP of any MSME. It was noted that date of

registration of the corporate debtor as MSME was 5-6-2019 i.e. after CIRP admission order dated 29-3-2019. Thus, the application for registration of MSME by the appellant was without authorization being subsequent to initiation of CIRP and hence was invalid.

Held that appellant was ineligible to take benefit of section 240A. Further, since there was no other resolution plan, direction of NCLT to liquidate corporate debtor was justified.

Case Review : The Oriental Bank of Commerce v. IDEB Projects Pvt. Ltd. [2021] 130 taxmann.com 514 (NCLT - Benglore), affirmed.

SECTION 5(8) - CORPORATE INSOLVENCY RESOLUTION PROCESS - FINANCIAL DEBT

Bhaskar Biswas v. Avaani Oxford Owners' Association [2021] 131 taxmann.com 160 /[2021] 168 SCL 380 (NCL-AT)

Any amount raised from an allottee under a real estate project shall be deemed to be an amount having commercial effect of a borrowing, hence where amounts were collected by developer and kept with its subsidiary, corporate debtor, for purpose of maintenance till flat owners association gets established, it was a financial debt and there being due and default in its repayment, CIRP initiated against corporate debtor could not have been interfered with.

A developer of a real estate project collected a sinking fund and maintenance deposit of Rs. 5.65 crores from proposed flat owners. The sinking fund was transferred to the corporate debtor which was a wholly owned subsidiary of the developer company for upkeep till a flat owners association was formed. Flat owners association (financial creditor) filed for proceedings under section 7 against the developer company, and also initiated proceedings against the corporate debtor. Financial creditors also filed a consumer complaint before the National Consumer Disputes Redressal Commission, and restrained developer from utilizing sinking fund. The corporate debtor appeared before the Adjudicating Authority and challenged maintainability of section 7 proceedings. The Adjudicating Authority however, summarily concluded matter and admitted the application. The appellant, suspended director the of corporate debtor filed instant appeal against order of Adjudicating Authority. It was observed that financial creditors had been pursuing with developer and corporate debtor and trying to get back money deposited by flat buyers themselves. They had also pursued rights in Consumer Forum, hence, claim made by the appellant that debt was time barred was not acceptable. However, it was noted that as per Explanation to section 5(8)(f), any amount raised from a flat allottee shall be deemed to

have effect of a borrowing, hence, claim made by the appellant that it was financial debt was acceptable.

Held that there being financial debt due and in default, CIRP initiated against the corporate debtor could not have been interfered with.

Case Review : Avaani Oxford Owners Association v. Oxford Facilities Management [2021] 130 taxmann.com 503 (Kol.), affirmed.

SECTION 5(8) - CORPORATE INSOLVENCY RESOLUTION PROCESS - FINANCIAL DEBT

Pawan Kumar v. Utsav Securities (P.) Ltd. [2021] 131 taxmann.com 211 /[2021] 168 SCL 692 (NCL-AT)

Where financial creditor had granted financial assistance to corporate debtor but there was no agreement of loan, financial creditor had failed to establish that transaction in question was a financial debt and corporate debtor had committed default and, therefore, order of NCLT admitting application filed under section 7 by financial creditor was to be set aside.

The financial creditor granted financial assistance to the corporate debtor. The corporate debtor paid interest on amount disbursed by the financial creditor once and thereafter, failed to pay further interest. The financial creditor filed an application under section 7 against the corporate debtor. The corporate debtor resisted application on various grounds such as lack of contractual agreement and an unidentified period of loan. The NCLT by impugned order admitted application under section 7 and initiated CIRP against the corporate debtor.

Held that financial contract as per rule 3(1)(d) of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 is must between the corporate debtor and the financial creditor for setting out terms of a financial debt including tenure of debt, interest payable and date of repayment. Whether financial creditor failed to establish when debt became due and payable and that corporate debtor had committed default - Held, yes - Whether since there was no agreement of loan and no document was there to stipulate period of repayment, financial creditor had failed to establish that transaction in question was a financial debt and corporate debtor had committed default - Held, yes - Whether thus, Adjudicating Authority had erroneously admitted application under section 7 and impugned order was to be set aside.

CASE REVIEW : Utsav Securities (P.) Ltd. v. Vogue Clothiers (P.) Ltd. [2020] 116 taxmann.com 122 (NCLT - New Delhi), set aside.

SECTION 238A - CORPORATE INSOLVENCY RESOLUTION PROCESS - LIMITATION PERIOD

Where corporate debtor defaulted in payment of loan disbursed by financial creditor and OTS was entered into between parties on 29-3-2016, OTS amounted to an acknowledgement and, therefore, petition filed under section 7 on 12-2-2019 was within limitation even though date of default was 27-12-2014.

Vivekanand Jha v. Punjab National Bank - [2021] 131 taxmann.com 221 (NCL-AT)/[2021] 168 SCL 790 (NCL-...

The financial creditor-bank had approved various financial facilities to the corporate debtor but the corporate debtor did not pay instalments as per agreement. Loan of the corporate debtor was declared as non-performing asset on 27-12-2014. The financial creditor filed application under section 7 on 12-12-2019 against the corporate debtor. The corporate debtor raised a defence that claim of bank was time barred. The NCLT by impugned order admitted said application. It was found that an Offer of Settlement (OTS) was entered between parties on 29-3-2016, which failed in execution.

Held that since OTS had been accepted and signed by directors of the corporate debtor, OTS would amount to acknowledgement. When acknowledgement was there, application filed on 12-2-2019 was within limitation and, thus, NCLT was justified in admitting application and rejecting claim of the corporate debtor that application was time barred.

Case Review : Punjab National Bank v. Mithilanchal Industries (P.) Ltd. [2021] 131 taxmann.com 220 (NCLT - Ahmedabad), affirmed.

SECTION 5(13) - CORPORATE INSOLVENCY RESOLUTION PROCESS - INSOLVENCY RESOLUTION PROCESS COSTS

Ravi Sankar Devarakonda v. Kesava Kolar - [2021] 131 taxmann.com 329 /[2021] 168 SCL 542 (NCLAT - Chennai)

Where NCLT declined to pass order in contempt application against corporate debtor who failed to remit CIRP costs to resolution professional despite several orders passed by NCLT itself,

NCLT had not exercised its jurisdiction in a proper and legal manner; therefore matter was to be remitted back to NCLT for passing necessary order.

The appellant was appointed as resolution professional to carry out CIRP process in respect of the corporate debtor. On appeal filed by the managing director of the corporate debtor questioning order admitting CIRP, the appellant was directed to continue his duties as resolution professional during pendency of appeal. Eventually order admitting CIRP against the corporate debtor was set aside and direction was issued to NCLT to fix CIRP costs of appellant. Despite various orders passed by the NCLT, the corporate debtor failed to pay CIRP costs to the appellant. The NCLT by impugned order declined to initiate contempt proceedings against the corporate debtor on ground that it was not known whether contemnor/corporate debtor was financially solvent or not.

Held that since NCLT had requisite power to punish a contemnor and to adjudicate contempt petition on merits, NCLT by passing impugned order had not exercised its jurisdiction in a proper and legal manner, therefore, matter was to be remitted back to NCLT for passing necessary order.

Case Review : Ravi Shankar Devarakonda v. Kesava Kolar [2021] 131 taxmann.com 328 (NCLT - Bengaluru), set aside.

SECTION 3(7) - CORPORATE INSOLVENCY RESOLUTION PROCESS - CORPORATE PERSON

Asset Reconstruction Company (India) Ltd. v. Mohammadiya Educational Society - [2021] 132 taxmann.com 37 /[2021] 168 SCL 802 (NCL-AT)

Where financial creditor filed an application initiating CIRP proceedings against respondent-society for default in payment, respondent society was not a corporate person to whom provisions of IBC would apply and, therefore, application was not maintainable.

The appellant-financial creditor filed application under section 7 against the respondent-society for default in payment. The respondent claimed that it was not body corporate and, therefore, application was not maintainable. NCLT by impugned order dismissed application holding that the respondent was not body corporate.

Held that since the respondent was not a company as defined in clause 2(20) of Companies Act, 2013 or 'limited liability partnership' as defined under Limited Liability Partnership Act, 2008 or any other person incorporated with limited liability under any law for time being in force, respondent society could not be said to be a 'corporate person' to whom provisions of IBC could apply.

Case Review : Asset Reconstruction Co. (India) Ltd. (ARCIL) v. Mohammadiya Educational Society [2021] 132 taxmann.com 36 (NCLT - Hyd.), affirmed.

SECTION 31 - CORPORATE INSOLVENCY RESOLUTION PROCESS - RESOLUTION PLAN - APPROVAL OF

Ashish Saraf v. Bhuvan Madan [2021] 132 taxmann.com 76 /[2021] 168 SCL 789 (SC)

Commercial wisdom of Committee of Creditors (CoCs) in approving or rejecting a resolution plan is essentially based on a business decision which involves evaluation of a resolution plan based on its feasibility and is non-justiciable, hence commercial wisdom of CoCs in rejecting settlement proposal emanating from appellants, with requisite majority and instead approving resolution plan of a resolution applicant, could not have been challenged by appellants.

The NCLAT by impugned order held that commercial wisdom of Committee of Creditors (CoCs) in approving or rejecting a resolution plan is essentially based on a business decision which involves evaluation of a resolution plan based on its feasibility and is non-justiciable, hence commercial wisdom of CoCs in rejecting settlement proposal emanating from appellants, with requisite majority and instead approving resolution plan of a resolution applicant, could not have been challenged by the appellants.

Held that said impugned order could not be interfered with.

Case Review : Rai Bahadur Shree Ram & Co. (P.) Ltd. v. Bhuvan Madan [2020] 118 taxmann.com 489/162 SCL 413 (NCLAT - New Delhi) (para 2) and Facor Alloys Ltd. v. Bhuvan Madan [2021] 125 taxmann.com 24 (NCLAT - New Delhi), affirmed.

SECTION 100 - INDIVIDUAL/FIRM'S INSOLVENCY RESOLUTION PROCESS - APPLICATION ADMISSION OR REJECTION OF

Surendra B. Jiwrajka v. Omkara Assets Reconstruction (P.) Ltd. - [2021] 132 taxmann.com 111 (Bombay)

Before Adjudicating Authority takes any decision with respect to admission or rejection of application upon receipt of report from resolution professional in terms of section 100, parties to insolvency resolution process are required to be heard.

An application was filed by the respondent before the Tribunal to initiate insolvency resolution process against the petitioner and for appointment of resolution professional. The application was opposed by the petitioner on the ground that petitioner had already assigned the entire loan to another party, therefore, the application under section 95 of IBC was not maintainable. Petitioner further contended that resolution professional had no power to decide the issue and therefore, before proceeding further Tribunal should decide on maintainability of the application to initiate insolvency resolution process. Notwithstanding such objection raised by the petitioner, the Tribunal took the view that provisions of the IBC, more particularly from sections 95 to 100, do not contemplate entertaining any objection at that stage till the receipt of report from the resolution professional. Therefore, objection raised by the petitioner was rejected where after resolution professional was appointed and he was directed to submit report in terms of IBC.

Held that from an analysis of provisions contained in sections 95 to 100 of the IBC, it is found that a definite time-line has been provided at each stage of proceeding. That apart, interim moratorium in terms of section 96 which commences from date of application remains in force till date of admission of such application under section 100. Though time-lines have been prescribed at each stage of proceeding leading to acceptance or rejection of application under section 100, it is found that no such time-line has been prescribed for submission of report by resolution professional though section 100 provides that the adjudicating authority shall take a decision either admitting or rejecting application within 14 days from date of submission of report. Therefore, before the adjudicating authority takes a decision to either admit or reject application upon receipt of report from resolution professional, parties to insolvency resolution process are required to be heard.

SECTION 60 - CORPORATE PERSON'S ADJUDICATING AUTHORITIES - ADJUDICATING AUTHORITY

TATA Consultancy Services Ltd. v. Vishal Ghisulal Jain, Resolution Professional of SK Wheels (P.) Ltd. [2021] 132 taxmann.com 232 /[2022] 170 SCL 153 (SC)

Where facilities agreement entered between appellant and corporate debtor had been terminated, however, there was nothing on record to indicate that termination of facilities agreement was motivated by insolvency of corporate debtor, NCLT did not have any residuary jurisdiction to entertain present contractual dispute and, thus, in absence of jurisdiction over dispute, NCLT could not have imposed an ad-interim stay on termination notice.

The appellant and the corporate debtor had entered into a Build-Phase Agreement followed by a Facilities Agreement which obligated the corporate debtor to provide premises with certain specifications and facilities to the appellant for conducting examinations for educational institutions. Clause 11(b) of Facilities Agreement stated that either party could terminate agreement immediately by written notice to other party, provided that a material breach committed by latter was not cured within thirty days of receipt of notice. Before initiation of CIRP, appellant had on multiple instances communicated to the corporate debtor that there were deficiencies in its services and the corporate debtor was put on notice that penalty and termination clauses of Facilities Agreement may be invoked. There was nothing on record to indicate that termination of Facilities Agreement was motivated by insolvency of the corporate debtor. Appellant had issued notice of termination in terms of clause 11(b) of Facilities Agreement.

Held that NCLT can exercise its residuary jurisdiction under section 60(5)(c) to adjudicate contractual disputes between parties provided such dispute had arisen in relation to insolvency of corporate debtor. Therefore, NCLT did not have any residuary jurisdiction to entertain instant contractual dispute which had arisen de hors insolvency of the corporate debtor and, thus, in absence of jurisdiction over dispute, NCLT could not have imposed an ad-interim stay on termination notice. Therefore NCLAT had incorrectly upheld interim order of NCLT.

Case Review : Tata Consultancy Services Ltd. v. Vishal Ghisulal Jain [2021] 123 taxmann.com 294/163 SCL 645 (NCL-AT), set aside.

SECTION 31 - CORPORATE INSOLVENCY RESOLUTION PROCESS - RESOLUTION PLAN - APPROVAL OF

Committee of Creditors of Wind World (India) Ltd. v. Suraksha Asset Reconstruction Ltd. [2021] 132 taxmann.com 287 /[2022] 169 SCL 200 (NCL-AT)

Adjudicating Authority had no jurisdiction to rely on residuary powers of section 60(5)(c) to entertain application of Successful Resolution Applicants for withdrawal of resolution plan once resolution plan was approved by Committee of Creditors (CoC) and it was placed before Adjudicating Authority under section 31.

Corporate Insolvency Resolution Process (CIRP) was initiated against the corporate debtor. Resolution Plan (RP) was approved by the Committee of Creditors (CoC) and same was placed for approval before the Adjudicating Authority under section 31. Meanwhile, successful resolution applicants sought to withdraw resolution plan claiming that resolution plan had lost its relevance as more than 600 days had lapsed and resolution plan was pending for approval by the Adjudicating Authority. The Adjudicating Authority by impugned order permitted successful resolution applicant to withdraw resolution plan.

Held that the Adjudicating Authority had no jurisdiction to rely on residuary powers of section 60(5)(c) to entertain application of successful resolution applicants for withdrawal of resolution plan. Once the resolution plan had been approved by CoC, successful resolution applicants could not be allowed to withdraw resolution plan.

Case Review : Suraksha Asset Reconstruction Ltd. v. Shailen Shah RP for Wind World (India) Ltd. [2020] 119 taxmann.com 446 (NCLT - Ahd.), set aside.

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✓The article should also have an executive summary of around 100 words.

✓The article should contain headings, which should be clear, short, catchy and interesting.

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