

Roles and Responsibilities of Insolvency Professionals under IBC 2016



The Insolvency and Bankruptcy Code, 2016 after President's assent was notified by Government of India on 28th May 2016. The code consolidated various Legislations which dealt with Insolvency and Bankruptcy in India and provides for insolvency resolution process for corporates, limited liability partnership, individuals, and partnership firms in time bound manner for maximization of value of assets of these persons, to promote entrepreneurship,

availability of credit and balance the interests of all stakeholders.

The Code enacted at a very crucial time when the banking industry is reeling under huge NPA prompting the Government of India to come out with Banking Regulation (Amendment) Ordinance, 2017 in May 2017. The Ordinance has been replaced by the Banking Regulation (Amendment) Act, 2017 on 25th August 2017. This Act empowers the Reserve Bank of India (RBI) to give directions to banks to act against loan defaulters. It contains provisions for handling cases related to stressed assets. Stressed assets are loans on which the borrower has defaulted or it has been restructured (such as by changing the repayment schedule). The RBI from time to time issues directions



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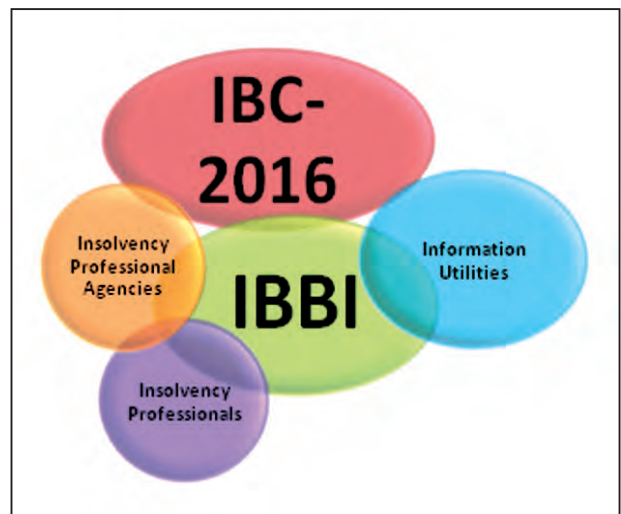


The Code paves the way for the complete overhaul of the Debt Restructuring, Corporate Sickness Resolution, Individuals and Partnership Firms Insolvency and Bankruptcy Resolution mechanism in India through Adjudicating Authority (NCLT and DRT) and strengthens the legal process.

Eco-System of Insolvency and Bankruptcy in India

The Code allows creditors to assess the viability of a debtor as a business decision, and agree upon a resolution plan for its revival as an on-going concern or a speedy liquidation. The Code creates the following Eco-System of Insolvency and Bankruptcy in India:

Insolvency and Bankruptcy Ecosystem in India



to banks for resolution of stressed assets. The Central Government can authorise the RBI to issue directions to banks for initiating proceedings in case of a default in loan repayment. These proceedings would be under the Insolvency and Bankruptcy Code, 2016.

In June 2017, the Reserve Bank of India (RBI) had identified 12 large corporate non-performing assets, accounting for 25 percent (about Rs 1.7 lakh crore) of the total bad loans in the banking system, to be immediately referred to the NCLT under the Insolvency and Bankruptcy Code (IBC). Except for Era Infra Engineering, 11 cases were admitted by the NCLT. 12 large corporate cases include Essar Steel, Bhushan Steel, Alok Industries, ABG Shipyard, Lanco Infratech, Era Infra, Jaypee Infratech etc.

(i) Insolvency and Bankruptcy Board of India: The Insolvency and Bankruptcy Board of India was established on October 1, 2016 in accordance with the provisions of the Insolvency and Bankruptcy Code, 2016. It is a regulator of Insolvency professionals, insolvency professional agencies, information utilities. Its powers and functions are as per Section 196 of the Code. The powers and functions inter-alia include specifying regulations standards for the functioning of insolvency professional agencies, insolvency professionals and information utilities; Inspection and investigation of these agencies; Monitoring the performance of these agencies; Lays down regulations, the minimum curriculum for the examination of the insolvency professionals for their enrolment as members of the insolvency professional agencies; Promote transparency and best practices in its governance.

(ii) Insolvency Professional Agency: is a regulator of Insolvency Professionals. It is a quasi-judicial body under the Code. It accepts enrolment of Insolvency Professionals, examine, and verify their applications for registration with Insolvency and Bankruptcy Board of India. As per Section 200 of the Code, the Insolvency Professional Agencies shall promote the professional development of and regulation of insolvency professionals; promote the services of competent insolvency professionals to cater to the needs of debtors, creditors and such other persons as may be specified; promote good professional and ethical conduct amongst insolvency professionals; protect the interests of debtors, creditors and such other persons as may be specified; and also promote the growth of insolvency professional agencies for the effective resolution of insolvency and bankruptcy processes under this Code.

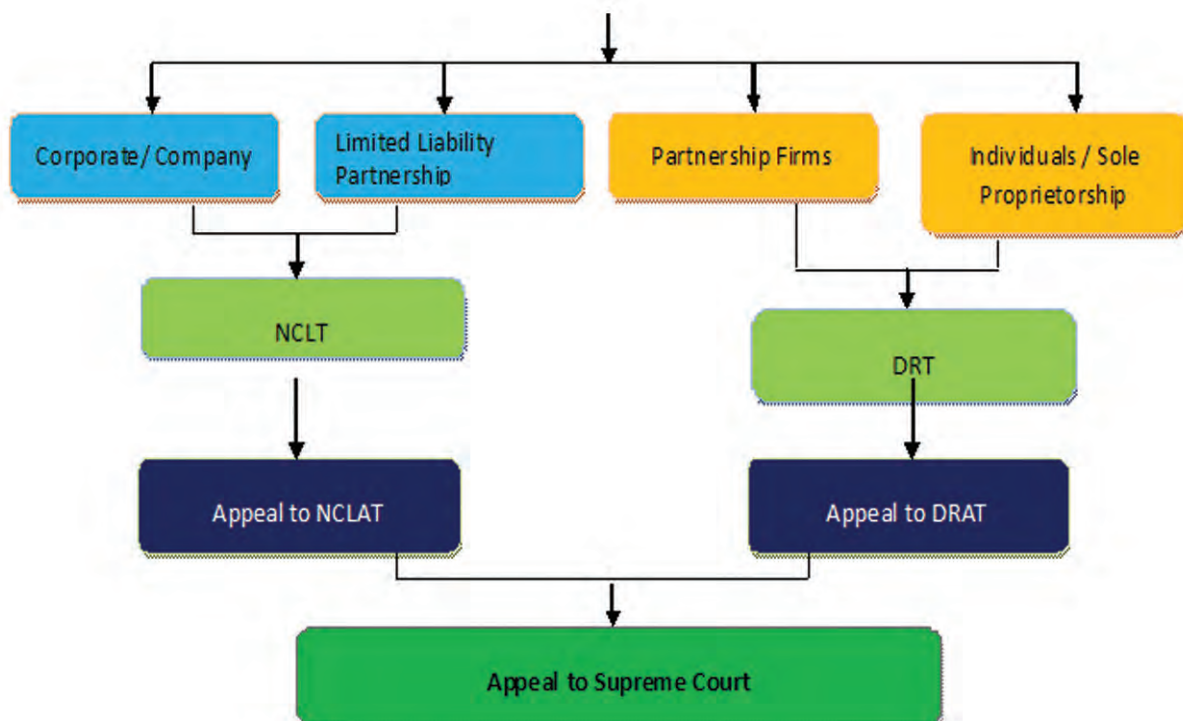
(iii) Insolvency Professionals: conduct the insolvency resolution process, take over the management of a company, assist in the collection of relevant information, collate preparation of necessary data information for resolution process, and manage the liquidation process. Section 208 of the Code enumerates the functions and obligations of insolvency professionals and these professionals are required to abide by the Code

of Conduct. Code of Conduct have been given in **FIRST SCHEDULE “Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations 2016”** notified on 23rd November 2016. The Code provides for such other powers and duties upon the insolvency professionals to enable them to carry out insolvency process, voluntary liquidation, liquidation and bankruptcy process efficiently.

(iv) Insolvency Information Utilities: The Code provides for information utilities which collect, collate and disseminate financial information related to debtors. Creditors will report financial information of the debt owed to them by the debtor. Such information will include records of debt, liabilities and defaults. Duties and powers of Information utilities are as per “Insolvency and Bankruptcy Board of India (Information Utilities) Regulations 2017” notified on 31st March 2017.

(v) Adjudicating Authorities: The adjudicating authority under the IBC is “**National Company Law Tribunal (NCLT)**” for Corporate Debtors (Companies & LLPs) and the “**Debt Recovery Tribunal (DRT)**” for individuals and partnership firms.

Adjudicating Authorities



Roles and Responsibilities of Insolvency Professionals

As mentioned in the Eco-System of Insolvency and Bankruptcy, the powers, duties and responsibilities enable the insolvency professionals to play a vital role in the insolvency and bankruptcy resolution process. The Code provides for Insolvency Resolution and Liquidation/Bankruptcy for Corporate Persons and Individuals and Partnership Firms separately. **Part-II** of the Code provides for *Insolvency Resolution and Liquidation for Corporate Persons* while **Part-III** of the Code provides for *Insolvency and Bankruptcy for Individuals and Partnership Firms*. The code provides for two phases, the first phase of the insolvency and bankruptcy process is the period of insolvency resolution during which insolvency is assessed and a solution is reached within a stipulated time period. In case a solution is not reached within the specified time limit or insolvency process fails, the second phase of the process begins wherein the entity is declared bankrupt. At this point a corporate debtor enters into Liquidation whereas an individual enters into bankruptcy resolution.

The Code provides time bound insolvency resolution process— 180 days after the process is initiated, plus a 90-day extension — for resolving insolvency. The Code also provides for FAST TRACK INSOLVENCY RESOLUTION PROCESS— 90 days after the process is initiated, plus a 45-day extension — for resolving insolvency in fast track mode.

As on 17th September 2017, the Insolvency and Bankruptcy Board of India (IBBI) website shows 904 Insolvency Professionals registered with IBBI and is likely to be more than 1000 insolvency professionals by the end of September 2017. About 1,000 insolvency petitions had been triggered since early 2017, when the first case of *Innovative Industries Limited v. ICICI Bank Limited* was admitted under IBC 2016. It is estimated that about 80 percent of these were withdrawn following out-of-court settlements. About 60 percent of the cases brought to the NCLT are initiated by operational creditors, as industry estimates show.

Role of Insolvency Professionals: The Code envisages the following Roles of Insolvency Professionals:

- (i) As **Interim Resolution Professionals (Section 16)** and manage the affairs of the Corporate Debtors as “going concern” during the insolvency

- resolution process in interim period of 30 days;
- (ii) As **Representative of a Creditor in CoC under Section 21(6)(c)**: Where terms of financial debt extended as a part of consortium and provide for a single trustee or agent, a creditor may appoint an insolvency professional (*other than the resolution professional*) at his own cost **to represent himself in the committee of creditors to the extent of his voting share**;
- (iii) As **Resolution Professional (Section 22)**, the creditors committee may either appoint the same “**interim resolution professional**” for preparing the “**Resolution Plan**” and managing the affairs of the Corporate Debtor as “going concern” during the insolvency resolution process or may appoint other Professional (CMA) in his place;
- (iv) As **Representative of a Creditor in CoC under Section 24(5)**: Any creditor who is a member of the committee of creditors may appoint an insolvency professional *other than the resolution professional* to represent such creditor in a meeting of the committee of creditors;
- (v) As **Liquidator (Section 33)** to be appointed by Adjudicating Authority (NCLT) on the initiation of “Liquidation Process”;
- (vi) As **Voluntary Liquidator (Section 59)** to be appointed by Corporate Debtors;
- (vii) As **Insolvency Resolution Professional (Section 82) by Adjudicating Authority** in case of FRESH START PROCESS for “*Insolvency and Bankruptcy for individuals and Partnership Firms*”;
- (viii) As **Insolvency Resolution Professional (Section 97) by Adjudicating Authority** for initiating the insolvency resolution process by debtor (**under section 94**) or creditor/creditors (**under section 95**) in case of “*Insolvency and Bankruptcy for individuals and Partnership*”;
- (ix) **Appointment as bankruptcy trustee (Section 125)** by Adjudicating Authority for initiating the bankruptcy by debtor (**under section 122**) or creditor (**under section 123**) in case of “*Insolvency and Bankruptcy for individuals and Partnership Firms*”

In this article, I am giving briefly the role of Insolvency Professional as Interim Resolution Professional (IRP) and Resolution Professional (RP) in relation to Corporate Insolvency Resolution Process (CIRP) as under:

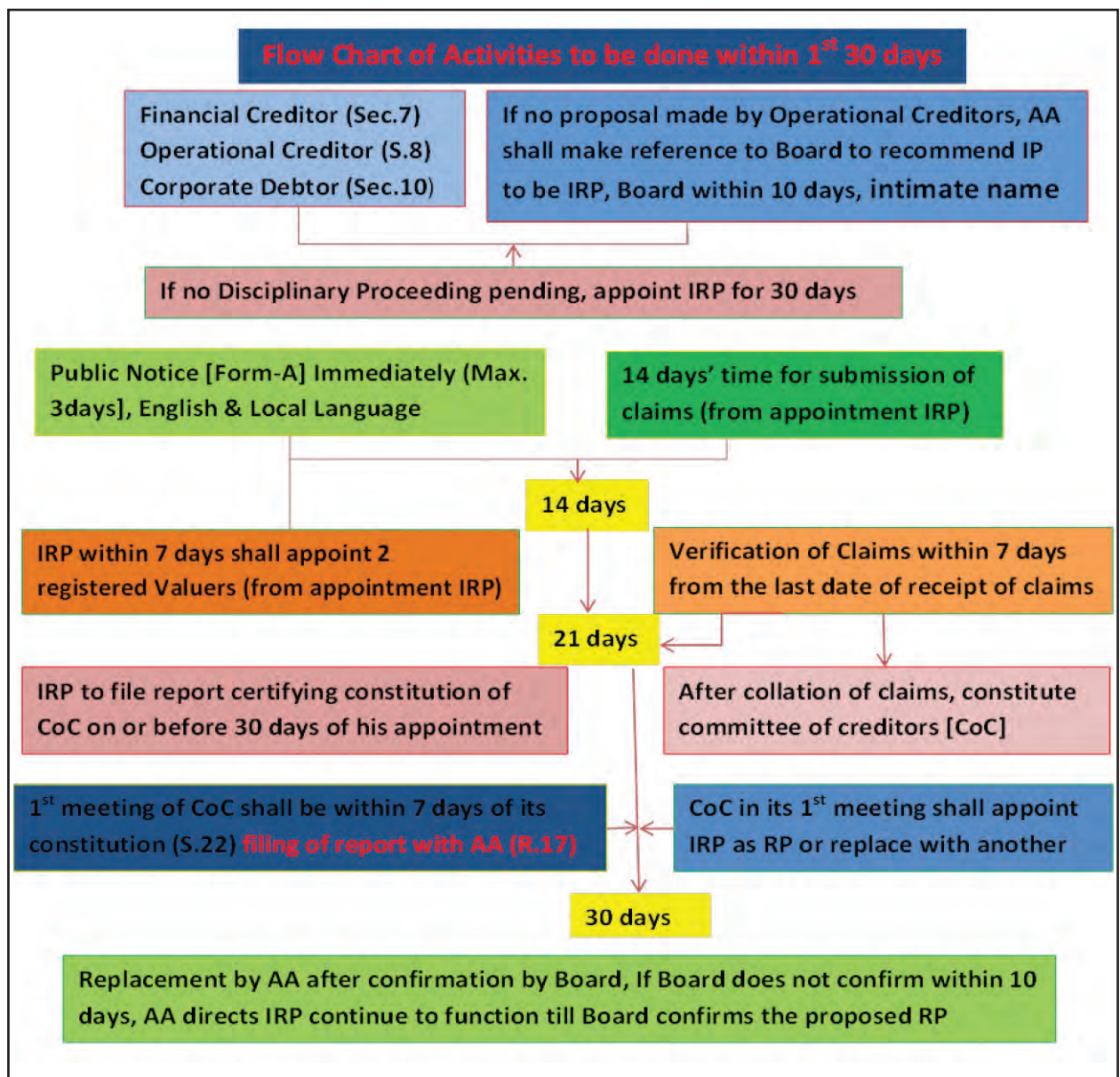
Role played by IRP/RP in relation to CIRP

An application for initiating the Corporate Insolvency

COVER STORY

Resolution Process (CIRP) can be initiated under the “Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016 by **financial creditor** in FORM 1 (Rule 4 read with Section 7 of the Code); or **operational creditor** in FORM 5 (Rule 6 read with Section 8 & 9 of the Code) or **corporate applicant** in FORM 6 (Rule 7 read with Section 10 of the Code). For initiating CIRP, the financial creditor and corporate applicant are required to propose “Interim Resolution Professional” in FORM 2 of the said Rules, whereas in case of operational creditor, proposing of IRP by him is optional. If operational creditor does not propose

IRP, the Adjudicating Authority (AA) shall write to IBBI for appointing IRP and that shall intimate AA with period of *ten days* of such request. On admission of an application as above, NCLT appoints an IRP for a period of thirty days. IRP is required to complete many activities within a period of 30 days e.g. issuance of public announcement in newspapers; appointment of Registered Valuers; collection and verification of claims; constitution of Committee of Creditors (CoC);, conducting first meeting of CoC etc. The Flow Chart below explains these activities:



In addition to above activities by IRP, the following are also to be done within a period of 30 days as IRP:

(A) Management of the affairs of the corporate debtor (Section 17)

There is a paradigm shift from the existing 'Debtor in possession' in Sick Industrial Companies (Special Provisions) Act, 1985 [SICA Act 1985] to a 'Creditor in Control' regime in the IBC 2016. During the period of CIRP, the powers of Board of Directors shall stand suspended and these powers shall vest in IRP. Officers, managers, financial institutions maintaining the account of corporate debtor shall act as per the instructions of IRP. But it has been seen in many cases, the transfer of powers from the management of corporate debtors is not smooth. As per the provisions of **Regulation 30** of the *Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Applicant) Regulations 2016*, many IRPs have to take assistance of local district administration.

Recently, NCLT Chennai Bench in September 2017 in the case of **Central Bank of India and State Bank of India v. Ashok Magnetics Ltd.**, has directed the police to give proper assistance and personal security to an insolvency professional appointed in the above case. The insolvency professional had complained of resistance from the company for not handing over the charge of the assets of the company to initiate the insolvency proceedings.

(B) Management of operations of corporate debtor as "ON GOING CONCERN"

The IRP is to make every endeavour 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. Towards these endeavours he may have to appoint accountants, legal or other professionals as may be necessary; enter into contracts, modify/amend them; raise interim finance; issue instructions to personnel of the corporate debtor as may be necessary for keeping the corporate debtor as a going concern; and (e) take all such actions as are necessary to keep the corporate debtor as a going concern.

(C) Duties of interim resolution professional (Section 18)

The Code casts many duties under section 18 to be performed by IRP. The IRP shall perform the following duties, namely:—

(a) collect all information relating to the assets, finances

and operations of the corporate debtor for determining the financial position of the corporate debtor, including information relating to—

- (i) business operations for the previous two years;
- (ii) financial and operational payments for the previous two years;
- (iii) list of assets and liabilities as on the initiation date; and
- (iv) such other matters as may be specified;

(b) receive and collate all the claims submitted by creditors to him, pursuant to the public announcement made under sections 13 and 15;

(c) constitute a committee of creditors;

(d) monitor the assets of the corporate debtor and manage its operations until a resolution professional is appointed by the committee of creditors;

(e) file information collected with the information utility, if necessary; and

(f) take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including—

- (i) assets over which the corporate debtor has ownership rights which may be located in a foreign country;
- (ii) assets that may or may not be in possession of the corporate debtor;
- (iii) tangible assets, whether movable or immovable;
- (iv) intangible assets including intellectual property;
- (v) securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies;
- (vi) assets subject to the determination of ownership by a court or authority;

(g) to perform such other duties as may be specified by the Board (IBBI).

First Meeting of CoC and Appointment of Resolution Professional (Section 22)

The first meeting of the committee of creditors (CoC) is to be held within *seven days* of the constitution of the committee of creditors.

The CoC, may, in the first meeting, by a **majority vote of not less than seventy-five percent** of the voting share of the financial creditors, either resolve

to appoint the interim resolution professional as a resolution professional or to replace the interim resolution professional by another resolution professional.

Where the CoC resolves to continue the interim resolution professional as resolution professional, it shall communicate its decision to the interim resolution professional, the corporate debtor and the Adjudicating Authority; OR if it resolves to replace the interim resolution professional, it shall file an application before the Adjudicating Authority for the appointment of the proposed resolution professional.

On receipt of communication from CoC, the Adjudicating Authority shall forward the name of the resolution professional proposed to the IBBI for its confirmation and shall make such appointment after confirmation by the IBBI.

Where the Board does not confirm the name of the proposed resolution professional within ten days of the receipt of the name of the proposed resolution professional, the Adjudicating Authority shall, by order, direct the interim resolution professional to continue to function as the resolution professional until such time as the Board confirms the appointment of the proposed resolution professional.

Duties of Resolution Professional (Section 25)

It is the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor.

For the above purposes, he shall undertake the following actions, namely:—

- (a) take immediate custody and control of all the assets of the corporate debtor, including the business records of the corporate debtor;
- (b) represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial or arbitration proceedings;
- (c) raise interim finances subject to the approval of the committee of creditors under section 28;
- (d) appoint accountants, legal or other professionals in the manner as specified by Board (IBBI);
- (e) maintain an updated list of claims;

- (f) convene and attend all meetings of the committee of creditors;
- (g) prepare the information memorandum in accordance with section 29;
- (h) invite prospective lenders, investors, and any other persons to put forward resolution plans;
- (i) present all resolution plans at the meetings of the committee of creditors;
- (j) file application for avoidance of transactions in accordance with Chapter III, if any; and
- (k) such other actions as may be specified by the Board (IBBI).

Duties of Members

Code of Conduct as given under **FIRST SCHEDULE** of the *Insolvency Professionals Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations 2016* are to be complied with by the Insolvency Professionals. Also *Insolvency Professionals Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations 2016* gives the duties of members of the Insolvency Professionals Agencies as follows:

In the performance of his functions, a professional member shall-

- (a) act in good faith in discharge of his duties as an insolvency professional;
- (b) endeavour to maximize the value of assets of the debtor;
- (c) discharge his functions with utmost integrity and objectivity;
- (d) be independent and impartial;
- (e) discharge his functions with the highest standards of professional competence and professional ethics;
- (f) continuously upgrade his professional expertise;
- (g) perform duties as quickly and efficiently as reasonable, subject to the timelines under the Code;
- (h) comply with applicable laws in the performance of his functions; and
- (i) maintain confidentiality of information obtained in the course of his professional activities unless required to disclose such information by law.

Preparation of Information Memorandum

As per Section 29 of the Code, the Information Memorandum shall be prepared by the Resolution

Professional. Whereas as per Regulation 36 of *Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations 2016*, the Information Memorandum shall be submitted by either Interim Resolution Professional or Resolution Professional in electronic form to each member of committee of creditors and any potential resolution applicant. As majority of information contained in Information Memorandum should be known to 1st committee of creditors, the information memorandum as per the contents mentioned in clause (a) to (i) of sub-regulation (2) of Regulation 36 may be prepared by Interim Resolution Professional. Briefly Information Memorandum should contain information related to assets and liabilities as on the date of insolvency; latest annual financial statements; audited financial statements for last two years and provisional financial statements for current year made upto a date not earlier than 14 days from the date of application of insolvency; list of creditors; particulars of debts due from related parties; details of guarantees; names and addresses of the members or partners holding at least 1% stake in the entity along with size of debt; details of material litigations/ investigations; number of workers and employees and liabilities of corporate debtor towards them. Other details as per clauses (j) to (l) of sub-regulation (2) of Regulation 36 such as liquidation value and liquidation value due to operational creditors should be provided by Resolution Professional. As the information as contained in Information Memorandum shall be utilized by the Resolution Applicant for providing Resolution Plan of the corporate debtor, so the information prepared by IRP and RP should be utmost relevant to facilitate good Resolution Plan.

Resolution Applicant and Contents of Resolution Plan

Based on the Information Memorandum as discussed above, the Resolution Applicant shall prepare Resolution Plan of the corporate debtor. As per the definition provided under **Section 5(25)**, "**Resolution Applicant**" means any person who submits a resolution plan to the resolution professional; **Section 5(26)** defines: "**resolution plan**" means a plan proposed by any person for insolvency resolution of the corporate debtor as a going concern in accordance with Part II; Resolution Plan can be submitted by any person such as corporate debtor, creditor, shareholders, third party not related to insolvency process, professionals etc. Whosoever submits the resolution plan to Resolution Professional, it shall provide the measures required for implementing

it, including but not limited to the matters provided under Regulation 37 of CIRP Regulations 2016.

Also, the Resolution Plan shall contain the mandatory contents as given under Regulation 38 of CIRP Regulations 2016 read with section 30(2) of the Code, which inter-alia include the following:

- (1) A resolution plan shall identify specific sources of funds that will be used to pay the –
 - (a) insolvency resolution process costs and provide that the insolvency resolution process costs will be paid in priority to any other creditor;
 - (b) liquidation value due to operational creditors and provide for such payment in priority to any financial creditor which shall in any event be made before the expiry of thirty days after the approval of a resolution plan by the Adjudicating Authority; and
 - (c) liquidation value due to dissenting financial creditors and provide that such payment is made before any recoveries are made by the financial creditors who voted in favour of the resolution plan.
- (2) A resolution plan shall provide:
 - (a) the term of the plan and its implementation schedule;
 - (b) the management and control of the business of the corporate debtor during its term; and
 - (c) adequate means for supervising its implementation.

Some issues as decided by Courts/ NCLAT/NCLT

1. Whether NCLT is bound to issue notice to and hear the corporate debtor to ascertain a default

NCLAT in the case of *Innoventive Industries Limited v. ICICI Bank Limited* held that National Company Law Tribunal (NCLT) is bound to issue only a **limited notice** to the corporate debtor before admitting a case under Section 7 of the IBC, 2016. NCLAT has clarified that adherence to principles of natural justice would not mean that in every situation the NCLT is required to afford reasonable opportunity of hearing to the corporate debtor before passing its order.

2. Is it Mandatory to Serve Notice under Section 8(1) of IBC 2016 before filing the application u/s 9 of IBC 2016 by an

operational creditor?

In *Era Infra Engineering Limited V/s Prideco Commercial Services Private Limited*, the operational creditor had in past served demand notice under Section 271 of Companies Act, 2013 and was relying on the said demand notice initiated the proceeding under IBC 2016. The Adjudicating Authority (NCLT) have on receipt of the application under Section 9 of I&B Code 2016, from operational creditor i.e. Prideco Commercial Services Private Limited had triggered the Corporate Insolvency Process against the Corporate Debtor *Era Infra Engineering Limited* and accordingly appointed an Insolvency Resolution Professional and declared the moratorium under Section 14 of I&B Code 2016. The Hon'ble NCLAT in the appeal set aside the order passed by NCLT and quashed all orders, interim arrangement including declaration of moratorium and appointment of Insolvency Resolution Professional. The NCLAT observed that serving of notice under Section 271 of Companies Act, 2013 cannot be considered as sufficient notice as required to be served under Section 8(1) of I&B Code 2016 in the prescribed format.

3. Is the timeline of 14 days provided under IBC 2016 to admit and initiate the CIRP is extendable?

In *J K Jute Mills Company Limited V/s Surendra Trading Company*⁴, the Appellate Tribunal (NCLAT) held that the object behind the time period prescribed under Section 7, Section 9 and Section 10, like Order VIII Rule 1 of CPC is to prevent the delay in hearing the disposal of the cases. The Adjudicating Authority cannot ignore the provisions. But in appropriate cases, for the reasons to be recorded in writing, it can admit or reject the petition after the period prescribed under Section 7 or Section 9 or Section 10. **Accordingly, the time period of 14 days under Section 7, 9 and 10 which is to be counted from the 'date of receipt of application' means 'date on which the application is listed for admission / order.'**

The nature of provisions, contained in Section 7, 9 and 10 in respect of time limit for admission/rejection of an application by adjudicating authority, being procedural in nature, cannot be treated to be a mandate of law and the object behind these provisions is only to prevent delay in hearing and disposal of cases.

NCLAT further held that the period of 7 days granted to an applicant to remove defects is mandatory and on failure to observe this, application is fitted to be rejected.

Also, the time limit of 180 days + 90 days (extension) for completion of insolvency resolution process under section 12 is mandatory.

4. What does "dispute" and "existence of dispute" means for the purpose of determination of a petition under section 9 of the Insolvency and Bankruptcy Code, 2016?

In *Kirusa Software Private Ltd. v. Mobilox Innovations Private Ltd*, an appeal was preferred before the Appellate Tribunal by the operational creditor against the rejection of his application by NCLT, Mumbai Bench on the ground that the operational creditor had received notice of dispute disputing the debt allegedly owed to operational creditor.

NCLAT mentioned that Section 3(6) of the Code defines "**Claim**" to mean a right to payment and included within its ambit disputed and undisputed, legal, equitable, secured, including arising out of breach of contract. **Therefore, "right to payment" is foundation for making a claim under the Code.**

NCLT held that the term "**dispute**" is "inclusive" and not "exhaustive". The same has to be given wide meaning provided it is relatable to existence of the amount of the debt, quality of good or service or breach of a representation or warranty.

NCLAT mentioned admittedly in sub-section (6) of Section 5 of the IBC, the Legislature used the words '*dispute includes a suit or arbitration proceedings*'. If harmoniously read sub-section (2) of Section 8 of the IBC, where words used are '*existence of a dispute, if any, and records of the pendency of the suit or arbitration proceedings*,' the result is disputes, if any, applies to all kinds of disputes, in relation to debt and default. The expression used in sub-section (2) of Section 8 of the IBC '*existence of a dispute, if any*,' is disjunctive from the expression '*record of the pendency of the suit or arbitration proceedings*'. Therefore the term '**dispute**' cannot be restricted merely to a pending suit or arbitration proceedings, the word '**includes**' ought to be read as "**means and includes**", including proceedings initiated or pending before consumer court, tribunal, labour court or mediation, conciliation etc.

5.

- (a) Whether definition of "dispute" is inclusive?
- (b) Is the concurrence of debtor required for assignment?
- (c) Where the contract provides for jurisdiction for English laws, whether the application can be filed under the Insol-

olvency and Bankruptcy Code?

(d) Can Power of Attorney holder(s) initiate CIRP under the Code?

In a landmark judgement by NCLT, Mumbai Bench in case of *M/s. DF Deutsche Forfait AG and Anr. M/s. Uttam Galva Steels Ltd.* the above mentioned questions were decided and are given below:

(a) Whether definition of “dispute” is inclusive?

NCLT, Mumbai Bench decided whether the definition of “dispute” under section 5(6) is exhaustive, as the definition of “dispute” is primarily meant for application where notice has been served by an operational creditor under section 8. The Bench confined meaning that the word “**includes**” shall be read and understood as “**means**” with reference to the pendency of a suit or arbitration proceeding – the word “**dispute**” is qualified as such.

(b) Is the concurrence of debtor required for assignment?

The debt was assigned by AIC HandelsGmbH (AIC) by a discounting agreement / forfeiting agreement to DF Deutsche Forfait AG (Deutsche), assigning the entire debt with present and future rights, claims, and demands to it by endorsing the bills of exchange accepted by Uttam Galva. Subsequently, Deutsche further assigned part of its debts to Misr Bank Europe GmbH (“Misr”) through another discounting agreement. A notification of the same was sent by Deutsche to Uttam but was not confirmed by Uttam. The Bench remarked that the assignment of debts in India need not be confirmed by the corporate debtor.

(c) Where the contract provides for jurisdiction for English laws, whether the application can be filed under the Insolvency and Bankruptcy Code?

The sales contract between Uttam and AIC was governed by English law. Therefore, the corporate debtor raised an objection that the operational creditors cannot proceed without dealing with English law. The Bench observed that the corporate debtors has been under alarming situation and is consistently into losses. The Bench was of the view that if any further delay is made in accepting the application, it will become nothing but defeat the purpose and object of the Code. It was held that it was for Uttam Galva to show that the English Law was applicable and it has not been done so. Further, Uttam Galva has not shown that confirmation of assignment is a requisite under the Indian Law.

(d) Can Power of Attorney holder(s) initiate CIRP under

the Code?

The corporate debtor contemplated that there is no explicit provisions in the Power of Attorney pertaining to initiate CIRP against the corporate debtor under the Code. The Bench stated that upon commencement of the new law which has led to the repeal of the previous law, the power of the Power of Attorney does not extinguish upto the extent the Code has repealed the Companies Act, 2013 and therefore the Power of Attorney is a valid.

6. Can the application be withdrawn after its admission for CIRP?

In *Lokhanwala Kataria Constructions Private Limited V/s. Nisus Finance & Investment Manager LLP* there are two cases one decided by NCLAT and later by Supreme Court of India. Both the cases are important for IPs so these are given simultaneously below:

The appeal was preferred by the Corporate Debtor (“Appellant”) against order dated June 15, 2017 passed by NCLT, Mumbai Bench (“Adjudicating Authority”) whereby the application filed by financial creditor (“Respondent”) under Section 7 of the Code was admitted.

At the time of the hearing of appeal, the respondent stated that the dispute between the parties has been settled and part amount has also been paid. But the Appellate Authority noted the provisions of Rule 8 of IBBI (Application to Adjudicating Authority) Rules, 2016 which empowers the Adjudicating Authority to **permit withdrawal of the application on request of the applicant before its admission.**

In view of the above Rules, the **Appellate Authority held that an application made under Section 7 can be withdrawn only before its admission by the Adjudicating Authority but once the application is admitted**, it cannot be withdrawn and the procedures laid down under Sections 13 to 17 of the Code need to be followed.

The appellant filed appeal before the Hon’ble Supreme Court of India which observed even though prima facie it seems that NCLAT does not have inherent powers (while exercising powers under the Code), however, since both the parties were before the Hon’ble Supreme Court, exercising its power to do complete justice under Article 142 of the Constitution

of India and to put a quietus to the matter and took on record the settlement agreements and disposed of the appeal in terms of the settlement arrived at amongst the parties.

7. Can Home Buyers be treated as “Financial Creditors”?

In *Nikhil Mehta and Sons V/s. AMR Infrastructure Ltd.* An appeal was filed by the Financial Creditors against the order dated 23rd January, 2017 passed by NCLT, Principal Bench New Delhi whereby the Adjudicating Authority held that the appellants are not Financial Creditors as defined under Section 5(7) of Insolvency and Bankruptcy Code, 2016. One of the unit was purchased by the appellants under the “**Committed Return Plan**”. The Respondent paid committed return/assured return each month for sometime but later stopped. It was noticed by NCLAT that the respondent was deducting TDS on the amount paid as committed returns/assured returns under Section 194(A) of Income Tax Act, 1961, as “*interest, other than Interest on Securities*”.

The Appellate Authority held that the appellants are “investors” and had chosen the “committed return plan”. It further held that the amount due to the appellants came within the meaning of “**debt**” defined under section 3(11) of the Code. The Appellate Authority also noted from the Annual Return and Form 16-A of the respondent that the respondent had treated the appellants as “investors”. Thus, the Appellate Authority held that the amount invested by appellants came within the meaning of ‘**Financial Debt**’ as defined under section 5(8)(f) of the Code, and held that it was clear from the MoU that the amount disbursed to appellants was “**against consideration of time value of money**”. Thus, the appellants were “Financial Creditors” under section 5(7) of the Code.

8. Whether home buyers are operational creditors?

In *Col. Vinod Awasthy V/s. AMR Infrastructures Limited*, The matter was filed before the NCLT, Hyderabad Bench under Section 9 of the Code dealing with the initiation of corporate insolvency process by Operational Creditor.

The application was dismissed by NCLT on the grounds that the petitioner claiming to be the operational creditor was not covered under the definition of “Operational Creditor” as provided under Section 5(20) of the Code. **As per the NCLT order, an Operational Creditor means any person to whom a corporate debt is**

owed and whose liability from the entity comes from a transaction or operation. Under the said case the Operational Creditor had neither supplied any goods nor rendered any services to acquire the status of an Operational Creditor.

Further the assured returns which were claimed to be the debt by the petitioner were not covered under the definition of “Operational Debt” under Section 5(21) of the Code. **As per NCLT order, operational debt means a debt arising out from the provisions of goods or services, employment or government dues.** Under the said case, the debt had not arisen from any of the aforementioned actions.

9. Whether the Home Buyers are other Creditors?

In *IDBI Bank Limited V/s. Jaypee Infratech Ltd.*, the NCLT, Allahabad Bench (Adjudicating Authority) admitted the application for initiation of CIRP.

Soon after the judgment was passed by Adjudicating Authority admitting the application, confusion and anxiety arose among the homebuyers with regard to:

- Whether home buyers are “creditors”?
- Whether they are “financial creditor” or “operational creditor”?
- Which form is to be used for submission of claims etc.

In the meanwhile, the IBBI came out with amendment in the “*Insolvency and Bankruptcy Board of India (Corporate Insolvency Resolution Process) Regulations, 2016*” and inserted new Regulation 9A providing for filing of claims by ‘*other creditors*’ who are neither Financial Creditors nor Operational Creditors along with bringing out Form ‘F’ for filing of such claims by ‘*other creditors*’.

10. Whether Home Buyers are Financial Creditors or Operational Creditors?

In the case of *Rubina Chadha & Anr. Vs. AMR Infrastructure Ltd.*, the Hon’ble NCLAT observed: “*The appellants herein, whether they are ‘Financial Creditor’ or ‘Operational Creditor’ or ‘Secured Creditor’ or ‘Unsecured Creditor’, as claim to be creditors are now entitled to file their respective claims before the ‘Interim Resolution Professional’, as may be appointed and the advertisement as may be published in the newspaper calling of such application(s) with regard to resolution of ‘Corporate*

Debtor’- AMR Infrastructure Ltd. In such case, their claim should be considered by the Interim Resolution Professional (IRP) and the Committee of Creditors, in accordance with the provisions of the ‘I&B Code’.

From the above cases it is clear that the home buyer is a stakeholder and entitled to submit the claim. The Interim Resolution Professional (IRP) is required to decide whether he is a Financial Creditor, Operational Creditor, or other creditor, based on application of mind as to the nature of contract the parties have and other attending circumstances.

11. Is Limitation Act 1963 applicable under IBC?

In *Neelkanth Township & Construction Pvt. Ltd. v. Urban Infrastructure Trustees Ltd.* an appeal was filed by a corporate debtor (Neelkanth Township & Construction Pvt. Ltd.) against the order of NCLT allowing commencement of insolvency proceedings on the action of the financial creditor (Urban Infrastructure Trustees Ltd). The financial creditor had subscribed to optionally convertible debentures (OCDs) issued by the corporate debtor. OCDs carried nil or 1% p.a. interest rate and matured in years 2011, 2012 and 2013. The order of the NCLT was challenged by the corporate debtor mentioning the debentures matured in years 2011, 2012 and 2013 and initiation of corporate insolvency resolution process filed in year 2017 is time barred.

NCLAT held that that in the absence of any provision in IBC, the Limitation Act, 1963 would not be applicable to initiation of Corporate Insolvency Resolution Process.

12. Whether a copy of the certificate from the financial institutions along with application by the operational creditor is directory or mandatory?

Smart Timing Steel Ltd. v. National Steel & Agro Industries Ltd.

The appellant who claimed to be ‘Operational Creditor’ filed an application under Section 9 of the Code for initiation of Corporate Insolvency Resolution Process, enclosing some of the relevant documents. However, no copy of “the certificate from the Financial Institution maintaining account of the ‘Operational Creditor’” as prescribed under clause(c) of subsection (3) of Section 9 was enclosed.

On perusal of entire Section (3) along with subsections and clauses, inclusive of proviso, it would be

crystal clear that, the entire provision of sub-clause (3) of Section 9 required to be mandatorily followed and it is not empty statutory formality.

The argument that the foreign companies having no office in India or no account in India with any “Financial Institution” will suffer in recovering the debt from Corporate Debtor cannot be accepted as apart from the Code, there are other provisions of recovery like suit which can be preferred by any person.

Accordingly NCLAT dismissed the appeal stating that the provisions of Section 9(3)(c) is mandatory.

What skills an Insolvency Professional should possess?

Under the Code, as per section 17 of the code, management of affairs will be vested in Interim Resolution Professional/ Resolution Professional, he should have knowledge of following Acts:

- (i) Insolvency and Bankruptcy Code 2016, Rules and Regulations framed thereunder. He/she should study Banking Legislative Reform Committee (BLRC) report, which is very exhaustive will be good source of knowledge on Insolvency and Bankruptcy;
- (ii) Managerial and administrative skills, knowledge of business, professional competency, as all the powers of suspended Board of Directors shall vest in him;
- (iii) Companies Act, 2013 and Rules and Regulations framed thereunder;
- (iv) Banking, Finance and accounting;
- (v) In case of listed companies, he/ she should have knowledge of SEBI Rules and Regulations and study the reporting requirements under SEBI;
- (vi) Negotiation Skills;
- (vii) Valuation/ Sale of Assets, if required to be sold during Insolvency Process;
- (viii) Taxation (Direct and Indirect Taxes);
- (ix) Business/ commercial;
- (x) Operations of the corporate debtors;
- (xii) Time Management to adhere to time lines given in the Code;
- (xiii) Corporate Financial Restructuring, Merger and takeover.

What an Insolvency Professional should do on his appointment as IRP/ RP

- (1) Before appointment, Letter of consent to act as IRP

to be given;

- (ii) Check the details given in the Application, whether these details matching with the books of account of the applicant; In case of operation creditor proof of claim if operation creditor proposes to appoint IRP himself;
- (iii) In case of Corporate Debtor, ensure both secured and unsecured financial creditors are considered;
- (iv) In case of corporate debtor, check pending legal cases – list required to be filed with NCLT;
- (v) On admission of application of Financial Creditor (Section 7) or Operational Creditor (Section 9) or Corporate Debtor (Section 10), the NCLT orders issuance of public notice, declare Moratorium and appoint Interim Resolution Professional (IRP);
- (vi) On receipt of NCLT Order, the appointed IRP should immediately go to concerned entity of corporate debtor and handover the letter for his taking over the management of affairs of the corporate debtor. In case of difficulty in handing over the charge by the concerned management, should make an application to the Adjudicating Authority for an order seeking the assistance of the local district administration in discharging his duties under the Code or the Insolvency and Bankruptcy Board of India (Insolvency Process for Corporate Persons) Regulations 2016 herein after refer “CIRP Regulations”;
- (vii) Issue Public Notice within *three days* from his appointment as per Form Aof the Schedule of Regulations to be published in two Newspapers one in local language and other in English language, giving *fourteen days'* time appointment of the interim resolution professional for submission of claims;
- (viii) Host copy of Advertisement on the website, if any, of the corporate debtor; and on the website, designated by the Board for this purpose;
- (ix) Appoint two registered valuers to determine the liquidation value of the corporate debtor in accordance with Regulation 35 (Regulation 27) of CIRP Regulations;
- (x) Powers of the Board of Directors or the partners of the corporate debtor, as the case may be, shall stand suspended and are to be exercised by the interim resolution professional;
- (xi) Entire responsibility of running the corporate debtor as a going concern vests with the IRP;
- (xii) Collect details of all bank accounts, confirmation of balances, details of unused cheques etc.
- (xiii) Write letters to financial institutions/Banks maintaining the Bank accounts, informing them taking over the management of affairs by IRP/RP under the order of NCLT, changing the authorization to operate Bank Accounts and acting by financial institutions/ Banks only on your instructions;
- (xiv) Collect a complete list of fixed and other assets;
- (xv) Collect a complete list of operations of the corporate debtors, its units, and branches;
- (xvi) Issue instructions to corporate debtor running of the company as a going concern pursuant to the provisions contained in Section 20(2)(d) of the IBC, 2016;
- (xvii) Also ask the corporate debtor to provide details and comply with the provisions of Section 18 of the IBC, 2016.
- (xviii) Issue instruction to corporate debtors that all payments shall be made with prior approval of IRP/RP;
- (xix) Verify and determine the claims of claimants within 7 days from the last date of receipt claims as per the provisions of Regulation 13, 14 and 15 of CIRP Regulations;
- (xx) After verification and collation of claims, constitute committee of creditors of financial creditors; or where the corporate debtor has no financial debt or where all financial creditors are related parties of the corporate debtor, the committee as per the provisions of Regulation 16

- CIRP Regulations with operational creditors;
- (xxi) Verify the books of account of corporate debtor to ascertain Extortionate credit transaction (Regulation 5 of CIRP Regulations); Avoidance of Transactions; Under-Valued and Preferential transactions;
- (xxii) Preparation of Information Memorandum as provided under Section 29 read with Regulation 36 of CIRP Regulations;
- (xxiii) File a report on or before expiry of 30 days with NCLT certifying constitution of committee of creditors;
- (xxiv) Conduct the meetings of committee of creditors as per the provisions of Regulation 18-26 of the CIRP Regulations;
- (xxv) Sale of assets outside the ordinary course of business of the corporate debtor shall resorted to only if he is of the opinion that such a sale is necessary for a better realisation of value under the facts and circumstances of the case;
- (xxvi) Seek the approval of committee of creditors for certain actions as enumerated under Section 28 of the code;
- (xxvii) In the first meeting of committee of creditors seek approval of creditors having a majority vote of not less than seventy five percent of voting shares of financial creditors, either to appoint IRP as Resolution Professional or replace him with another Resolution Professional;
- (xxviii) The committee of creditors shall inform the IRP for his continuance and in case of his replacement with another Resolution Professional shall file application before the NCLT for appointment of proposed RP.
- (xxix) As the appointment of proposed RP is to be confirmed by IBBI within ten days of receipt of name of RP, in case of delay of appointment of proposed RP, the NCLT by an order may direct IRP to function as RP until the IBBI confirms the appointment of RP [Section 22(5) of Code];
- (xxx) Liquidated value of the assets of corporate debtors shall be determined based on the provisions contained in Regulation 35 of CIRP Regulations;
- (xxxii) RP to invite prospective lenders, investors, and any other persons to put forward resolution plans.
- (xxxiii) Resolution Plan shall be prepared based on Information Memorandum and it shall be as per the provisions of Section 30 of the Code read with Regulation 37 and 38 of the CIRP Regulations; The Resolution Plan should not contravene any provisions of law for the time being enforced in India;
- (xxxiv) All the Resolution Plans submitted by the Resolution Applicants shall be put up to the committee of creditors with the recommendation RP. The committee of creditors may approve any resolution plan with such modifications as it deems fit;
- (xxxv) The resolution applicant may attend the meeting of the committee of creditors in which the resolution plan of the applicant is considered. However, he shall not have a right to vote at the meeting of the committee of creditors unless such resolution applicant is also a financial creditor;
- (xxxvi) The committee of creditors may approve a resolution plan by a vote of not less than seventy five per cent of voting share of the financial creditors; (Section 30(4) read with Regulation 39 of CIRP Regulations);
- (xxxvii) The resolution professional shall submit the resolution plan as approved by the committee of creditors to the Adjudicating Authority [Section 30(6)];
- (xxxviii) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as provided in section 30(2); it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan.

(xxxviii) Where the Adjudicating Authority is satisfied that the resolution plan does not confirm to the requirements under section 31(1) it may, by an order, reject the resolution plan.

(xxxix) After the order of approval under section 31(1):

- (a) the moratorium order passed by the Adjudicating Authority under section 14 shall cease to have effect; and
- (b) the resolution professional shall forward all records relating to the conduct of the corporate insolvency resolution process and the resolution plan to the IBBI to be recorded on its database.

Extension of the corporate insolvency resolution process period

As provided in Regulation 40 of CIRP, the committee of creditors may instruct the resolution professional to make an application to the Adjudicating Authority under section 12 to extend the insolvency resolution process period. Accordingly, the resolution professional shall, on receiving an instruction from the committee under this Regulation, make an application to the Adjudicating Authority for such extension.

If the Adjudicating Authority is satisfied that the subject matter of the case is such that corporate insolvency resolution process cannot be completed within one hundred and eighty days, it may by order extend the duration of such process beyond one hundred and eighty days by such further period as it thinks fit, but not exceeding ninety days:

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

than once.

Fee for CIRP for Interim Resolution Professional/ Resolution Professional

Unlike Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations notified on 15th December 2016, the CIRP Regulations do not provide for any fee structure.

The Liquidation Process Regulations provide: Liquidator's Fee shall be entitled to such fee and in such manner as has been decided by the committee of creditors before a liquidation order is passed under sections 33(1)(a) or 33(2).

In all cases other than those covered above, the liquidator shall be entitled to a fee as a percentage of the amount realized net of other liquidation costs, and of the amount distributed, as per table of fee given under Regulation 4 of the said Regulations.

In case of CIRP Regulations, the fee for Corporate Insolvency Resolution Process shall be market driven and decided by the market forces. In case of Financial Creditors or Corporate Applicant, the fee shall be based on negotiated amount by the IRP for 30 days. The fee fixed and agreed to by the Applicant will form the part of "Insolvency Resolution Cost" to the extent of it has been ratified by the committee of creditors, the balance amount over and above ratified amount is to be paid by the Applicant to IRP.

Further, Fee for Resolution Professional shall be determined by committee of creditors and shall form the part of "Insolvency Resolution Cost".

In case of Operational Creditors, the proposal for appointment of IRP by them is not mandatory while submitting the application with the Adjudicating Authority. In their cases, as per section 16 (3) of

The Code enacted at a very crucial time when the banking industry is reeling under huge NPA prompting the Government of India to come out with Banking Regulation (Amendment) Ordinance, 2017 in May 2017. The Ordinance has been replaced by the Banking Regulation (Amendment) Act, 2017 on 25th August 2017. This Act empowers the Reserve Bank of India (RBI) to give directions to banks to act against loan defaulters.

the Code, if there is no proposal for an interim resolution professional is made, the Adjudicating Authority shall make a reference to the Board for the recommendation of an insolvency professional who may act as an interim resolution professional. The Board, within ten days of the receipt of a reference from the Adjudicating Authority under section 16(3), recommend the name of an insolvency professional to the Adjudicating Authority against whom no disciplinary proceedings are pending.

The term of the interim resolution professional shall not exceed thirty days from date of his appointment.

As per the news published by The Economic Times dated 5th July 2017, the following is mentioned:

IRPs and RPs (Interim Resolution Professionals and Resolution Professionals), collectively called IPs, can earn Rs 2 to Rs 15 lakh, depending on the size of business and debts of cases, professionals said.

For cases between operational creditors and companies, income opportunities are in the range of Rs 50,000 to Rs 1,50,000 a month as the nature of the cases are less complex.

NCLT in the case of **S3 Electrical & Electronics Pvt. Ltd v. Brian Lau** held that minimum fee suggested by a statutory Institute of Cost Accountants of India cannot be regarded as excessive and allowed fee charges based on the calculation made by Interim Resolution Professional amounting to Rs. 5.25 lakhs was allowed.

NCLT Chandigarh in *Jeena and Co.* allowed the fee assessed by Interim Resolution Professional at Rs. 3lakh. Out of the total fee of Rs. 3lakhs, the Operational Creditor paid Rs. 1.75 lakhs to the Interim Resolution Professional which was reimbursed to him by the Corporate Debtor. It was directed that the remaining amount of Rs.1.25lakhs should be paid to the Interim Resolution Professional by the Corporate Debtor within two weeks


Conclusion

Many of Insolvency Professionals have entered into the field of Insolvency and Bankruptcy and working as Interim Resolution Professionals or Resolution Professionals. The Code, Rules and Regulations framed under the Code cast onerous responsibilities on them.

They have to be very careful while taking up the assignments and prepare well before they enter into the premises of corporate debtors as IRP or RP. They should build the capacity and develop the skill as given in the article. The Insolvency and Bankruptcy Board of India, Insolvency Professional Agencies registered with IBBI, and Trade Associations are also holding various seminars and conferences to educate and build the capacity of professionals to perform well in their assignments. Also, the Insolvency Professional Agencies are conducting Round Tables discussions, Study Circles' meetings and also conducting the training programs for the Insolvency Professionals. Many such programs have already been held and there shall be many programs on the said topics.

In various Round Table Discussions conducted, this is being shown that the Code still requires a lot of hand-holding by the judiciary to put in place adequate safeguards and guidelines to ensure its smooth, effective, and fair enforcement. The Code is in a nascent stage and its success depends substantially on quality of IPs and how well the IPs performs their functions under the Code.

IPs forms the backbone of the IBC. Their role requires a fine balancing act, given that they are in charge of managing the debtor company and are accountable to the committee of creditors and the adjudicating authority for their actions.

The IPs must perform their role without any misfeasance, and within well-defined entry barriers to the profession. They should provide regular reports regarding their assignments to IPA and IBBI. As per Section 208(2)(d) they are required to submit a copy of the records of every proceeding before the Adjudicating Authority to the Board as well as to the insolvency professional agency of which he is a member. As per section 196(g) of the Code, IBBI is to monitor the performance of insolvency professional agencies, insolvency professionals and information utilities and pass any directions as may be required for compliance of the provisions of this Code and the regulations issued hereunder. 

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