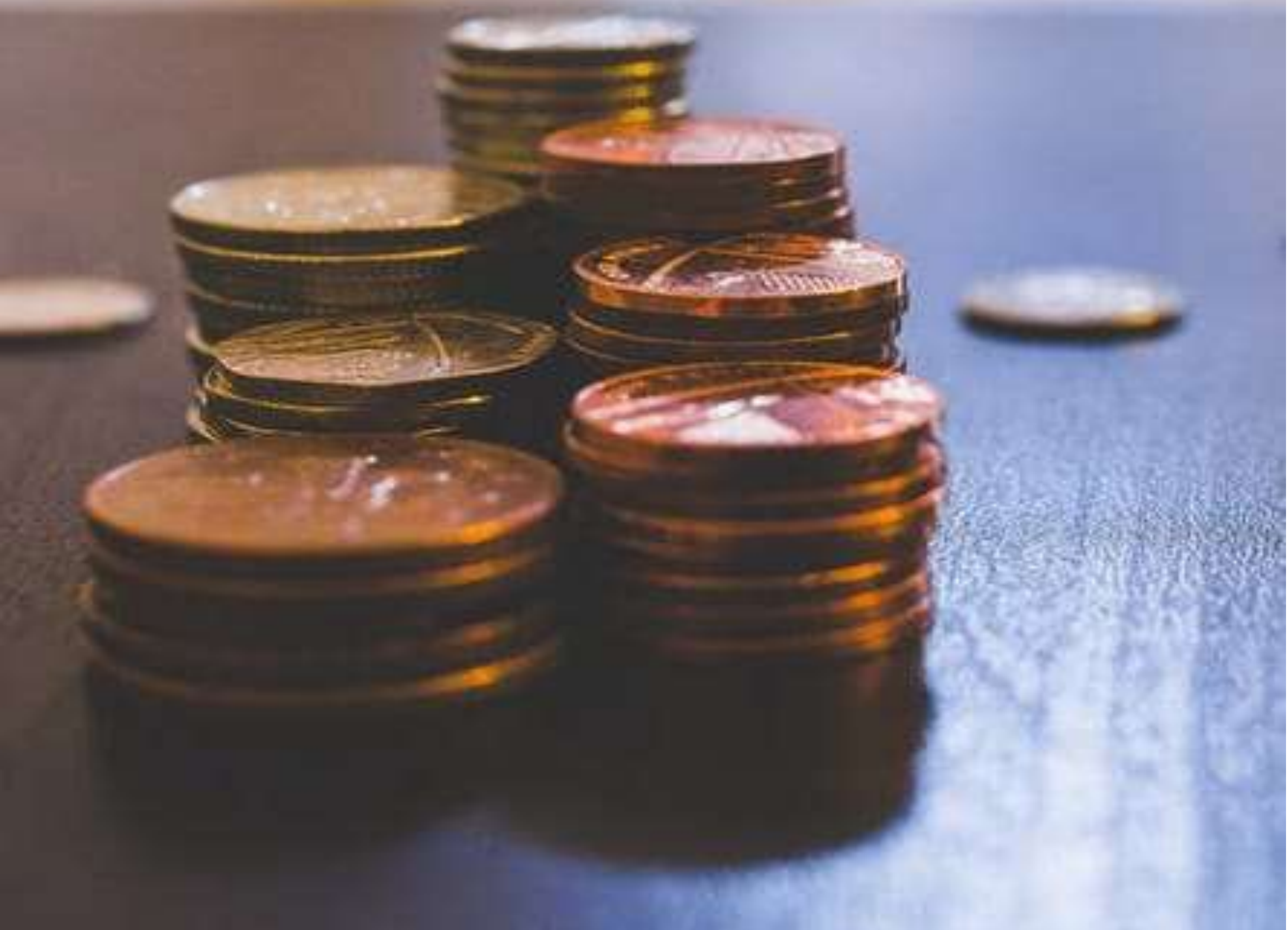
October,2019

THE INSOLVENCY PROFESSIONAL

YOUR INSIGHT JOURNAL



OVERVIEW

Insolvency Professional Agency of Institute of Cost Accountants of India (IPA ICAI) is a Section 8 company incorporated under the Companies Act 2013 promoted by the Institute of Cost Accountants of India. We are the frontline regulator registered with Insolvency and Bankruptcy Board of India (IBBI). With the responsibility to enroll and regulate Insolvency Professionals (IPs) as its members in accordance with provisions of the Insolvency and Bankruptcy Code 2016, Rules, Regulations and Guidelines issued thereunder and grant membership to persons who fulfill all requirements set out in its byelaws on payment of membership fee. We are established with a vision of providing quality services and adhere to fair, just and ethical practices, in performing its functions of enrolling, monitoring, training and professional development of the professionals registered with us. We constantly endeavor to disseminate information in aspect of Insolvency and Bankruptcy code to Insolvency professionals by conducting Round tables, webinars and sending daily newsletter namely “IBC Au courant” which keeps the insolvency professionals updated with the news relating to Insolvency and bankruptcy domain.

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INDEX

- **FROM THE MD & CEO'S DESK** **4**
- **PROFESSIONAL DEVELOPMENT INITIATIVES** **6-14**
- **EVENTS CONDUCTED** **15**
- **IBC AU COURANT** **16**
- **ARTICLES** **17**
  - Distribution of funds in CIRP **18-21**
  - Resolution plan **22-25**
  - Performance analysis of Essar steel limited Pre, during and post CIRP a case study **27-32**
- **CASE LAWS**
  - Nui Pulp and Paper Industries Pvt. Ltd. Vs. M/s. Roxcel Trading GMBH **34**
  - Jignesh Shah & Anr vs Union of India & Anr **34-35**
  - Duncans Industries Ltd vs. A. J. Agrochem **35-36**
  - Padmaiah Vuppu vs. Reliance capital Aif Trustee Company Pvt. Ltd. & ORS **37**
  - Sagar sharma & anr vs.phoenix arc pvt. Ltd. & anr **37-38**
  - Jet airways (India) Ltd vs. State bank of Indi **38**
  - Mr. A. Maheshwaran vs. Stressed Assets Stabilization fund & Anr **39**
- **GUIDANCE NOTE ON AUTHORISATION FOR ASSIGNMENT** **40-42**

From the MD & CEO's desk

CMA (DR.) S.K. GUPTA

The Insolvency and Bankruptcy Code, 2016 is considered a landmark reform among various 'Ease of doing Business' initiatives undertaken by the Government of India. It consolidated all past provisions to institutionalize a common legislation for insolvency resolution and reorganization of corporate entities, partnership firms and individuals in a time bound manner. The Insolvency and Bankruptcy Code (IBC) has improved business climate in the country by making it easier for enterprises to exit in case of difficulties. IBC has created a set of professionals who help, advice and also show the path through which businesses can exit if situations are adverse.

The Insolvency and Bankruptcy Board of India (IBBI) has issued the discussion papers on Corporate Insolvency Resolution Process (CIRP) and Corporate Liquidation Process wherein various issues related to relinquishment of security interest, applicability of section 29A of the Code to Compromise and Arrangement and so on have been discussed.

The government has announced the creation of the dedicated fund to provide last-mile financing of Rs 25,000 crore for completion of on-going housing projects. These include those that have turned NPA and are facing bankruptcy proceedings, but not been liquidated. Under the waterfall mechanism, last-mile funding will be treated as priority.

The government is actively considering introducing a short, time-bound, online financial bidding process in corporate insolvency cases to improve transparency and reduce litigation. Currently, creditors of a company undergoing insolvency proceedings are free to negotiate with potential bidders individually, which has led to offers being revised, bids coming in after the deadline and associated litigation, prolonging the process.

The Centre aims to quicken resolution proceedings by setting a time limit for financial bids. Once a resolution applicant submits a plan and the plan meets basic eligibility criteria, shortlisting of eligible ones can be done and then they be given them a window for, say 48 hours, to do financial bidding on a platform.

The government is examining suggestion to raise threshold of Rs 1 lakh default to invoke the Insolvency and Bankruptcy Code (IBC) to reduce number of cases in the NCLT. It has been observed that in few

sectors there has been a spate of applications coming where single class borrower has triggered IBC. If a single homebuyer is triggering IBC because one lakh threshold has crossed or one day default has crossed, otherwise well-functioning company comes to NCLT. It is not a very happy situation.

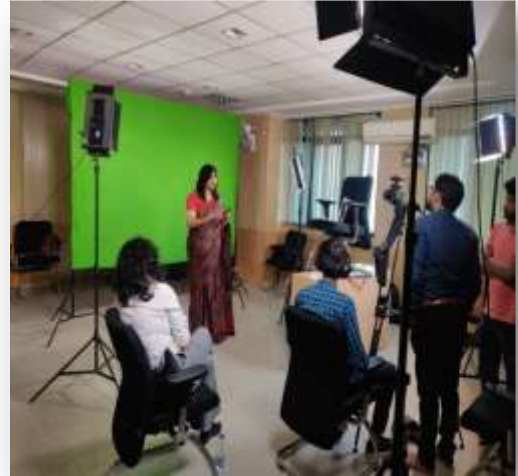
Prepackaged insolvency resolution, allowing creditors and shareholders with a pre-negotiated corporate reorganization plan to approach NCLT, may be taken forward by the government as a key route in the time to come. This will aid the existing framework and cut costs and the time taken during the resolution process. This is part of a consultation process under the law panel of the IBC identifying issues impacting its efficacy and make recommendations.

Suggesting substantial changes to competition regulatory framework, a government-constituted high level panel has recommended a green channel route for automatic approval of certain combinations, including those under the insolvency law, by the Competition Commission. Under the Competition Act, combinations (mergers and acquisitions) beyond a certain threshold require clearance from the Competition Commission of India (CCI).

PROFESSIONAL DEVELOPMENT INITIATIVES

Insolvency Professional Agency of Institute of Cost Accountants of India

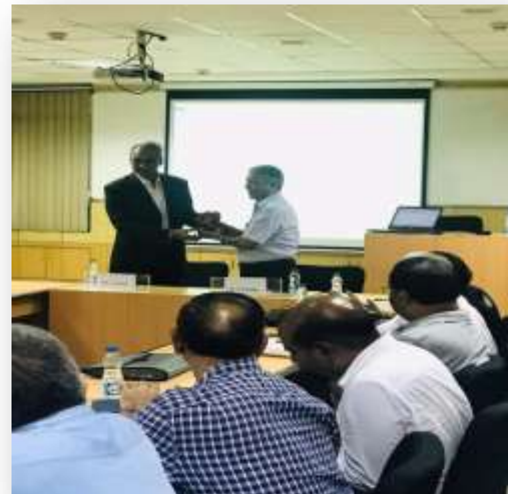
BFSI Recording Session at the IPA ICAI



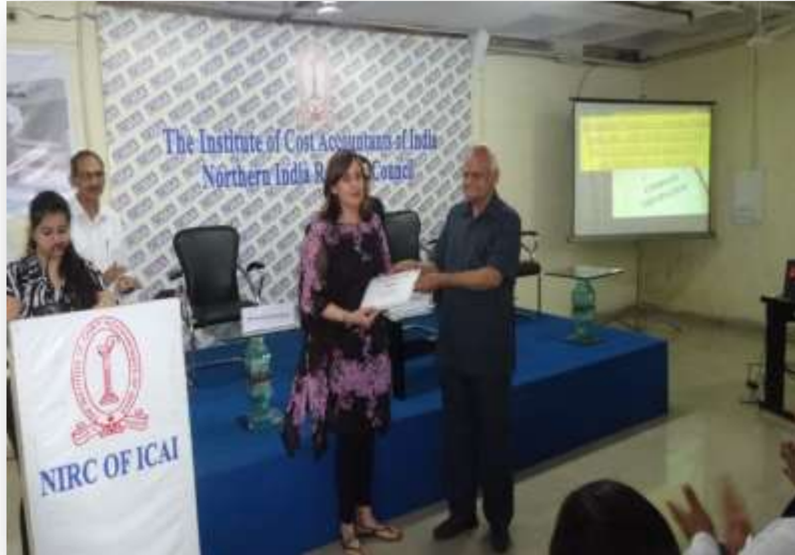
Certificate Course on Cross Border Insolvency

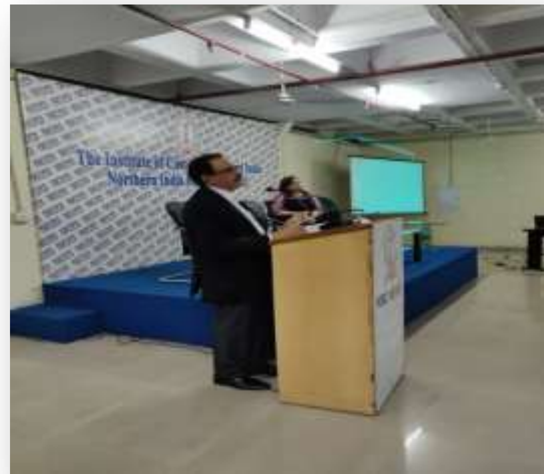
Round Table on How to Retrieve Hidden or Deleted data from Computers

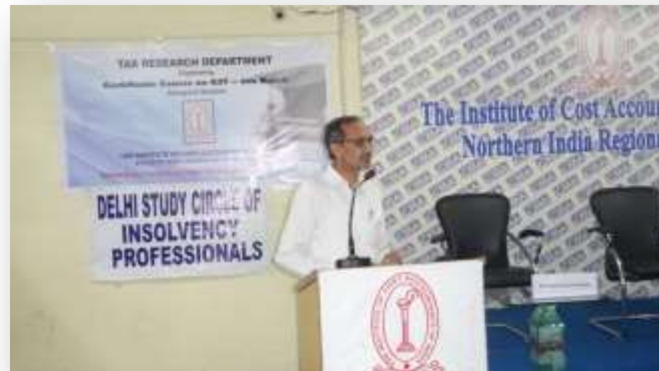
Round table on Verification of Claims



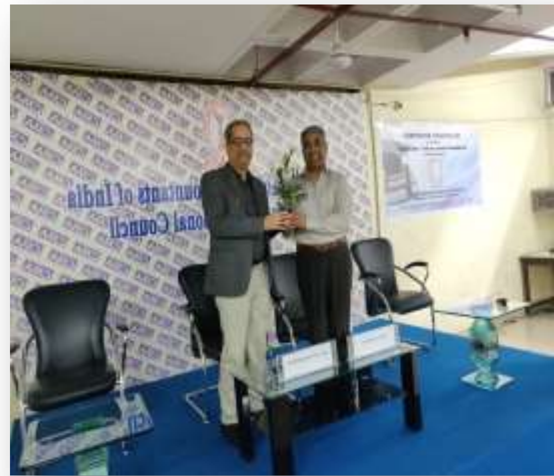
Awareness Program on IBC, 2016 with Delhi Study Circle of IPs


NIRC OF ICAI

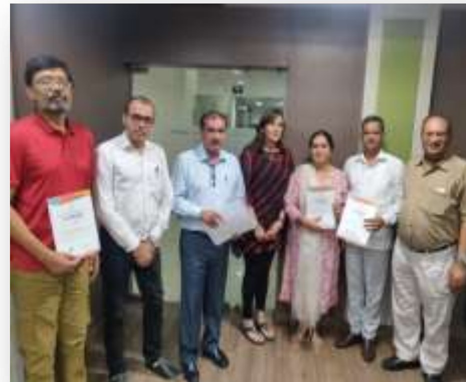


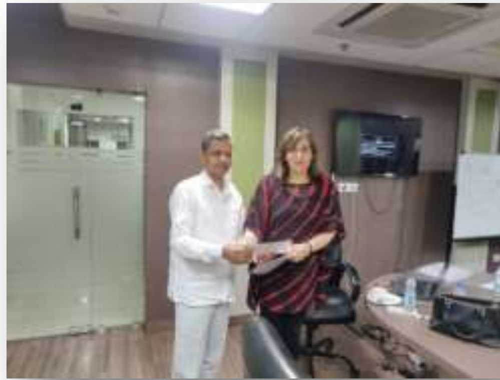

TAX RESEARCH DEPARTMENT
DELHI STUDY CIRCLE OF
INSOLVENCY
PROFESSIONALS

Program on Insurance of IPs

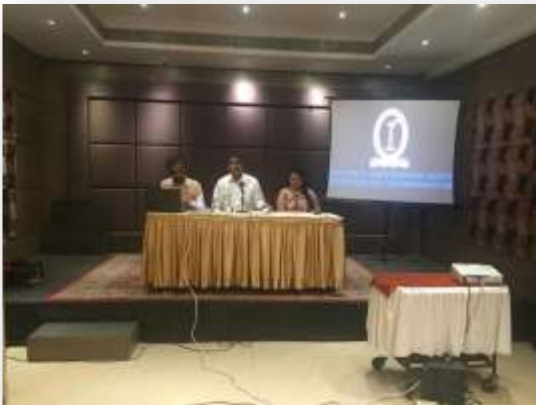


Preparatory Education Course



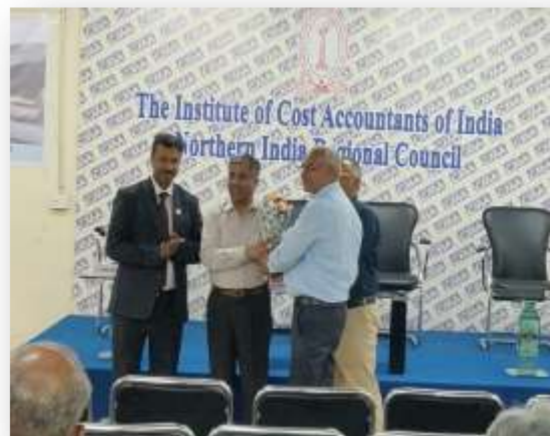


Stakeholders Meet on IBC,2016 at Guwahati



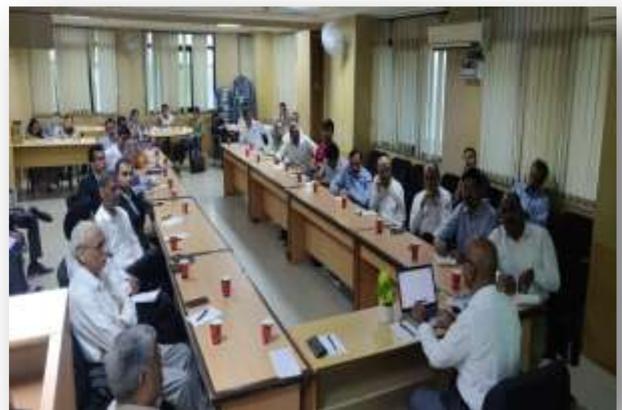
Meeting with the World bank Consultant Mr. David Kerr

Awareness Program on IBC, 2016 with NIRC

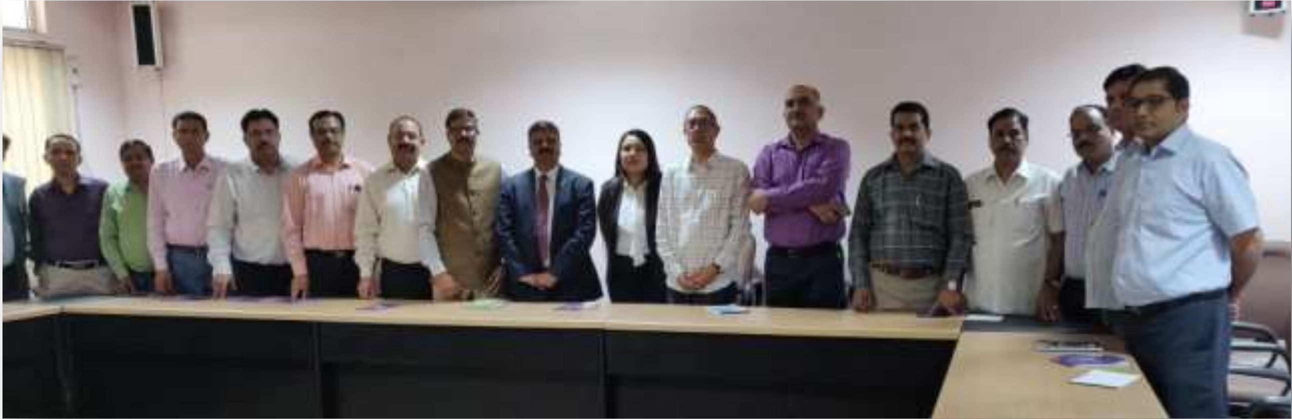


Certification Course on Group Insolvency

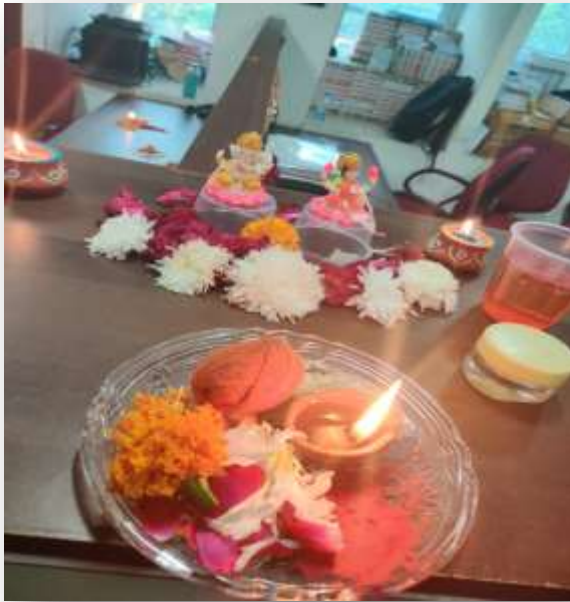
Verification of Claims by Mr. Anand Sonbhadra



Income tax Programme at Bareilly



Diwali Poojan in Office



EVENTS CONDUCTED

October, 2019	
16th October 2019	Orientation Program on IBC in association with NIRC of Institute of Cost Accountants of India
18th October 2019	Roundtable on Verification of Claims
19th October 2019	Certificate Course on Group Insolvency

September, 2019	
3rd September 2019	One Day Certificate Course on Cross Border Insolvency – 3rd August 2019
4th September 2019	Webinar on claim Verification
9th September 2019	Workshop on services provided by Information Utility for Resolution Professional
11th September 2019	Workshop on how to retrieve hidden and deleted files from laptop/computers
14th September 2019	Orientation Program on IBC in association with IBBI and RMLNLU - Lucknow
16th September 2019	Orientation Program on IBC in association with ICAI – Cochin
16th – 22nd September 2019	23rd Batch of Pre-registration Educational Course – Jaipur
20th September 2019	Workshop on Insurance for Insolvency Professionals

Invitation for Public Comments

IBBI invites Public Comments on Discussion Paper on Corporate Liquidation Process

IBBI invites Public Comments on Discussion Paper on Corporate Insolvency Resolution Process

Link available on https://www.ibbi.gov.in/

IBC AU COURANT

Updates on Insolvency and Bankruptcy Code

To subscribe our daily newsletter please visit www.ipaicmai.in

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

Insolvency Professional Agency of Institute of Cost
Accountants of India

DISTRIBUTION OF FUNDS IN CIRP

Mr. Arvind Mangla
Insolvency Professional, Ex Banker

Approval of resolution plan & distribution of funds during CIRP, are governed by Section 30 of the Code. Relevant provisions of the Code after amendment w.e.f. 16.08.2019 , are as under;

Section 30. Submission of resolution plan. -
(1) A resolution applicant may submit a resolution plan along with an affidavit stating that he is eligible under section 29A to the resolution professional prepared on the basis of the information memorandum.

(2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan -

- (a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the payment of other debts of the corporate debtor;
- *(b) provides for the payment of debts of operational creditors in such manner as may be specified by the Board which shall not be less than-*

- (i) the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under section 53; or

- (ii) the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of section 53, whichever is higher, ***and provides for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of section 53 in the event of a liquidation of the corporate debtor***.

Explanation 1. — For removal of doubts, it is hereby clarified that a distribution in accordance with the provisions of this clause shall be fair and equitable to such creditors.

Explanation 2. — For the purpose of this clause, it is hereby declared that on and from the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019, the provisions of this clause shall also apply to the corporate insolvency resolution process of a corporate debtor-

- *(i) where a resolution plan has not been approved or rejected by the Adjudicating Authority;*
- *(ii) where an appeal has been preferred under section 61 or section 62 or such an appeal is not time barred under any provision of law for the time being in force; or*
- *(iii) where a legal proceeding has been initiated in any court against the decision of the Adjudicating Authority in respect of a resolution plan;*
- (c) provides for the management of the affairs of the Corporate debtor after approval of the resolution plan;
- (d) The implementation and supervision of the resolution plan;

- (e) does not contravene any of the provisions of the law for the time being in force
- (f) confirms to such other requirements as may be specified by the Board.

Explanation. — For the purposes of clause (e), if any approval of shareholders is required under the Companies Act, 2013(18 of 2013) or any other law for the time being in force for the implementation of actions under the resolution plan, such approval shall be deemed to have been given and it shall not be a contravention of that Act or law.

(3) The resolution professional shall present to the committee of creditors for its approval such resolution plans which confirm the conditions referred to in sub-section (2).

(4) The committee of creditors may approve a resolution plan by a vote of not less than sixty-six per cent. of voting share of the financial creditors, after considering its feasibility and viability, ***the manner of distribution proposed, which may take into account the order of priority amongst creditors as laid down in sub-section (1) of section 53, including the priority and value of the security interest of a secured creditor*** and such other requirements as may be specified by the Board:

The portion in italics is after amendment, and the present discussion is centered on the impact of the amendments shown in bold letters.

Relevant / corresponding Cirp regulations read as under;

 # Regulation 35. Fair value and Liquidation value.

(2) After the receipt of resolution plans in accordance with the Code and these regulations, the resolution professional shall provide the fair value and the liquidation value to every member of the committee in electronic form, on receiving an undertaking from the member to the effect that such member shall maintain confidentiality of the fair value and the liquidation value and shall not use such values to cause an undue gain or undue loss to itself or any other person and comply with the requirements under sub-section (2) of section 29:

(3) **The resolution professional and registered valuers shall maintain confidentiality of the fair value and the liquidation value.**".

 # Regulation 38. Mandatory contents of the resolution plan.

(1) The amount due to the operational creditors under a resolution plan shall be given priority in payment over financial creditors.

(1A) A resolution plan shall include a statement as to how it has dealt with the interests of all stakeholders, including financial creditors and operational creditors, of the corporate debtor.

From the above it can be observed that

i) Sub-section (2) of section 30 has inherent contradictions.

- "*The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan*"……… "*and provides for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, in such manner as may be specified by the Board*",

The quantum of distribution to dissenting FC will be known only after the approval of the resolution plan, than how RP can confirm to the CoC that the Resolution Plan being submitted provides for the payment of dissenting FC as per section 30(2).

ii) In the recent amendments (w.e.f. 16.08.2019), the concept of minimum amount [in terms of Section 53(1)] to be paid to operational creditor, has been extended to dissenting financial creditor also, which has far reaching consequences. **A financial creditor will be tempted to become a dissenting creditor if his proposed share in the**

resolution plan is lower than the liquidation value of the underlying assets in his secured credit, increasing the chances of pushing greater number of cases towards liquidation

iii). The amended provisions of the Code now mandates that the resolution plan approved by the CoC provides for the distribution of funds as per Section 53(1) of the Code. Prerequisite to the distribution of funds of resolution plan as per Section 53(1) is the preparation of the list of creditors accordingly. In my view the said amendments, have indirectly thrust upon RP, the duty to follow the provisions of Section 38 to 42 of the Code in preparing the list of creditors, to facilitate CoC in distribution of funds as per section 30(4) of the Code.

iv). After the receipt of valuation report, RP is to recast the list of creditors in terms of Section 53(1), including the priority and value of the security interest of a secured creditor, thus incorporating the value of security interest, to facilitate the CoC to approve the resolution plan, which has to take into account the order of priority amongst creditors as laid down in sub-section (1) of section 53, ***including the priority and value of the security interest of a secured creditor***.

v). Value of security interest can be taken from the valuation report. A resolution applicant is not privy to the valuation report, as per CIRP regulation no 35. The implications of these amendments are that distribution of funds can not be proposed in the resolution plan, which will be decided by the CoC, on the basis of recasted list of creditors, as per the provisions of section 30 & determining the share of dissenting FC.

vi). The position in respect of the value of security is also not clear. Whether it is, the fair value or liquidation value of the security interest, or average of the both (reserve price as per liquidation regulations), which is to be taken for the purpose of approval of distribution by the CoC under section 30(4) read with section 53(1).

vii). An unsecured financial creditor has 4th priority in distribution of funds u/s 53(1). Inclusion of a portion of financial credit, in excess of value of security interest, in 2nd priority will affect the rights of employees who have 3rd priority under the waterfall. Amendments in section 30(4) of the code have implications to identify and determine the secured and unsecured portion of the credit, on the basis of value of security interest. which has further widened the function of IRP/RP from simply collecting and collating the claims of creditors in CIRP.

viii). In a nutshell, the resolution applicant, as per the amended section 30(4), is not left in a position to propose the distribution of funds to creditors, in the resolution plan, as the funds will be distributed as laid down in sub-section (1) of section 53, including the priority and value of the security interest of a secured creditor.

Here observations of NCLT Allahabad (24.07.2018) in J.R. Agro Industries P Limited V/s. Swadisht Oils P Ltd. [CA 59 of 2018 in CP 13/ALD/2017] are worth noting:-

- *(Page 33/50)* ***"Notably, distinction under section 53 is a two-fold distinction – (i) secured/unsecured, and (ii) operational/financial****. As regards secured creditors, it does not matter whether the creditor is financial or operational, since section 53(1)(b) uses the expression "secured," and there is no indication as to the nature of debt (financial/operational) owed to such secured creditor. However, when it comes to unsecured creditors,* ***unsecured financial creditors appear in the 4th rank; but unsecured operational creditors come in the 6th rank.****"*

On collation / verification of claims during CIRP, the provisions of Code & Regulations are in variance**.** As per section 18(b) of the Code, one of the duties of an IRP is to receive and collate all claims submitted by creditors to him pursuant to the public announcement & as per section 25, RP's duty is to maintain an updated list of claims**.** Whereas Regulation 13 of the CIRP Regulations mandates that the IRP/RP shall verify the claims submitted to him / her within a period of seven days from the last date of receipt of claims.

Recent amendments in Section 30, has added confusion on the role to be played by the IRP / RP on verification / collation of the claims & / or to facilitate the CoC to decide distribution of funds as per section 30(4).

Despite the above amendments, NCLAT (24.10.2019) in Commissioner of Income Tax-6 Chennai Vs. Star Agro Marine Exports Pvt. Ltd.[CA (AT)(Insolvency) no.717 of 2019] had ordered as under;

"Prima facie, we find that the amount as proposed by the "Successful Resolution Applicant" is discriminatory and the same treatment has not been given to the "Operational Creditors" as given to the "Financial Creditors"

In the circumstances, we grant one opportunity to the "Successful Resolution Applicant" providing the same treatment to the "Operational Creditors" including the Appellant. Affidavit be filed within two weeks."

So the Resolution Professional is in a catch 22 situation. Whether he is to;

- Collate the claims of creditors as per the provisions of the Code [Section 18(b)]
- Verify the claims of creditors as per CIRP Regulations (Regulation 13).
- Follow the Law laid down by the Hon'ble SCI in Swiss Ribbons Pvt. Ltd. & Anr. V/s Union of India & Ors. [Writ Petition (Civil) No. 99 of 2018].
- Facilitate CoC in distribution of funds as per Section 30(4) r/w Section 53(1) of the Code.
- Follow / abide by the dictates of NCLAT.

Board should immediately look into the matter & initiate suitable steps to amend the provisions of the Code and/or CIRP Regulations in consonance with the amendments to section 30 of the Code, to remove confusion & unnecessary litigation.

RESOLUTION PLAN

Mr. Rajendra Kumar

Dy Registrar of Companies,
O/o Central Registration Centre,
Ministry of Corporate Affairs

"Debt" within the meaning of section 3(11) of the I&B Code, 2016 means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt. "Default" in terms of section 3(12) of the I&B Code, 2016 means non- payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be. It is the situation of insolvency. insolvency is the condition of a person who is unable to pay off his debts as they fall due, or in the usual course of trade and business. As well, Bankruptcy is a legal process through which insolvent person may seek relief from some or all of their debt. In most jurisdictions, bankruptcy is imposed by a court order, often initiated by the debtor. Thus, Bankruptcy is not the synonym for insolvency.

Section 2 provides the applicability of the Code. Section 3(23) of the Code includes the "person" who may initiates Corporate Insolvency Resolution Process under 6 of the Code. As per the Preamble of the Code, *inter-alia*, it is an act to ***reorganisation and insolvency resolution and balance the interest of all the stakeholders.*** However, the Preamble itself provides that it is an act to reorganization and insolvency resolution.

The reorganization may be of any type. The IBC (Amendment) Act, 2019, No.26 of 2019, effective from 16.08.2019 has made Explanation in Section 5(26), "Resolution Plan" may include restructuring of the corporate debtor, including by way of merger, amalgamation and demerger. The "Resolution Plan" means a plan proposed by Resolution Applicant for insolvency resolution of the corporate debtor as a going concern in accordance with Part II. However, there are various objective of the Code, the priorities of the Code are defined by the Hon'ble NCLAT *in Binani Industries Limited Vs. Bank of Baroda & Anr.-Company Appeal (AT)(Insolvency) No.82 of 2018 etc*. NCLAT Date of decision 14th November, 2018. The NCLAT discussed the objective of the I & B Code. The Appellate Authority held the first order objective is 'resolution'. The second order objective is ''maximisation of value of assets of the Corporate Debtor and the third order is promoting entrepreneurship, availability of credit and balancing the interests". The order of object is sacrosanct.

2. Role of the Adjudicating Authority

The Adjudicating Authority has not to interfere with the Resolution Plan approved by the Committee of Creditors, if it meets the requirements as referred to in sub-section (2) of Section 30, it shall by order approve the resolution plan which shall be binding on all the stakeholders. *In the matter of Binani Industries Ltd v. Bank of Baroda & Ors*. Company Appeal (AT) (Insolvency) No. 82 of 2018, NCLAT with Company Appeal (AT)(Insolvency) No. 123 of 2018 Delhi. NCLAT order dated 14.11.2018. The 'I&B Code' defines 'Resolution Plan' as a plan for Insolvency Resolution of the 'Corporate Debtor' as a going concern. It does not spell out the shape, colour and texture of 'Resolution Plan', which is left to imagination of stakeholders read with long title of

the 'I&B Code', functionally, the 'Resolution Plan' must resolve Insolvency (rescue a failing, but viable business); should maximise the value of assets of the 'Corporate Debtor', and should promote entrepreneurship, availability of credit, and balance the interests of all the stakeholders. Resolution Plan is not sale, not an auction, not recovery and not liquidation. *In the matter of Essar Steel Ltd* IA *No.431 of 2018 in CP(IB) Nos.39 & 40 of 2017 and allied IAS.* NCLT Ahmedabad date of order 8.3.2019**.** The Adjudicating Authority held that once the resolution plan is approved by the committee of creditors, thereafter, the aforesaid plan is binding on all the stakeholders. The Adjudicating Authority has limited scope to suggest or recommend but cannot make judicial review of the commercial decision taken by the CoC. Reliance was placed upon the matter of *K.Sashidhar v. Indian Overseas Bank and Others [2019] 148 CLA 497(SC). In K. Sashidhar vs. Indian Overseas Bank & Ors., Date of decision* 5th February, 2019. The Hon'ble Supreme Court held: "the legislature has not endowed the adjudicating authority (NCLT) with the jurisdiction or authority to analyse or evaluate the commercial decision of the CoC much less to enquire into the justness of the rejection of the resolution plan by the dissenting financial creditors". It further observed: "Besides, the commercial wisdom of the CoC has been given paramount status without any judicial intervention, for ensuring completion of the stated processes within the timeliness prescribed by the I&B Code. In para 3 of this judgement, the Hon'ble Supreme Court held: "The CoC is called upon to consider the resolution plan under section 30(4) after it is vetted and verified by RP as being compliant with all statutory requirements specified under section 30(2)". In the said judgement, the Hon'ble Supreme Court observed: "The Resolution Professional is not required to express his opinion on matters within the domain of the financial creditors, to approve or reject the resolution plan, under section 30(4) under the I & B Code". Thus, IP and CoC have a complete and clear understanding of their roles and responsibilities in a CIRP under the Code.

In the case of Encore Asset Reconstruction Company Private Limited Vs. Calyx Chemicals & Pharmaceuticals Limited; Co. Appeal (AT) (Insolvency) No.657 of 2019. Date of order 30.08.2019. The Committee of creditors approved the Resolution Plan by 77.08% voting share. It resulted into haircut of 95.2%. The appellant dissented the Resolution Plan and abstained from voting. In pursuance of filing appeal, the Appellate Authority held that in the absence of any discrepancies or discrimination, it is not inclined to interfere with the impugned order. *In the matter of ICICI Bank Ltd. v. Innoventive Industries Ltd.*- MA No. 529 of 2017. The application was filed by the workmen of *Innoventive Industries Ltd* contending that if the company (corporate debtor) is liquidated, the workmen will suffer as corporate debtor had been providing livelihood to more than 2000 families. NCLT observed that the jurisdiction of NCLT lies to exercise its power under section 31 of the Code only when a plan is approved by CoC. When no decision has been taken by CoC, no jurisdiction will lie to NCLT as jurisdiction given under section 30 is only limited to approve or reject the Resolution Plan approved by CoC with super majority. Thus, the application was dismissed. [The voting of 75% by committee of Creditors with regard to resolution plan has reduced to 66% vide Insolvency and Bankruptcy Code (Amendment) Act, 2018, effective from 6.06.2018]. Thus, the Adjudicating Authority has no role to interfere in the Resolution Plan approved by the Committee of Creditors.

***3.* Role of Adjudicating Authority with regard to treatment to operational creditors**

The NCLAT at the time of approval of the resolution plan has to examine that the operational creditors are roughly given the same treatment which is given to the financial creditors in terms of sub-section (2)(b) of section 30 of the Code. It provides for the payment of the debts of operational creditors in such manner as may be specified by the Board which shall not be less than the amount to be paid to the operational creditors in the event of a liquidation of the corporate debtor under section 53. Section 53(1) provides for payment to the claimants in the waterfall mechanism. Section 53(1)(b)(ii) provides for making payment to the Financial Creditors. As opposed Section 53(1)(f) provides for making payment to Operational Creditors. Thus, after making payment to the

Financial Creditors, the turn of Operational Creditors come. As only the Financial Creditors are part of the Committee of Creditors, then the Resolution Plan is approved in such a way which has provision of 100% payment to the Financial Creditors as against notional amount rupee one or roughly not equal amount is provided for the operational creditors (refer the matter of M/s *Essar Steel Ltd.)* in terms of compliance of section 30(2) of the Code. However, Resolution Plan is approved by the Committee of Creditors but it is against the Preamble of the Code itself and it is not the intention of legislature. Thus, the Adjudicating Authority has to ensure that the operational creditors are given roughly the same treatment alike Financial Creditors. *In the matter of Essar Steel Ltd IA No.431 of 2018 in CP(IB) Nos.39 & 40 of 2017 and allied IAS. NCLT Ahmedabad date of order 8.3.2019*. The Adjudicating Authority held that the liabilities of all creditors who are not part of the negotiation process must also be met in any negotiated solution. The lordship held that the dues of operational creditors must get *at least similar treatment as compared to the dues of Financial Creditors*. In the same case, the Adjudicating Authority held that the Resolution Professional shall examine each Resolution Plan received by him to confirm that each Resolution Pan (a) provides for the payment of insolvency resolution process costs in a manner specified by the board in priority to the repayment of other debts of the corporate debtor; (b) provides for the repayment of the debts of operational creditors in such manner as may be specified by the Board which shall not be less than the amount to be paid to the Operational Creditors in the event of a liquidation of the Corporate Debtor under section 53; (c) provides for the management of the affairs of the Corporate Debtor after approval of the Resolution Plan; (d) the implementation and supervision of the resolution plan; (e) does not contravene any of the provisions of the law for the time being in force; (f) confirms to such other requirement as may be specified by the board; (g) the resolution professional shall submit the resolution plan as approved by the committee of creditors to the Adjudicating Authority. *In the case of Ayush Agrawal Vs. C.A.Kannan Tiruvengadam & Anr.*, company Appeal (AT)(Insolvency) No.606 of 2018. NCLAT Date of decision 18.09.2019. The Respondent-Successful Resolution Applicant has filed a summary chart of disbursement of funds to Financial Creditors (secured)-80.54%, Financial Creditors (Unsecured)- 16.11%, Operational Creditors (Workmen & Employees)-100%, and Operational Creditors (Others) 60.75%. The Appellant (Operational Creditors) claimed 70.80% as per resolution plan. It was accepted on behalf of the Respondent to be paid to the Operational Creditors other than workmen 60.75%, as against initially provided 70.8%. The Hon'ble Appellate Authority directed the Respondent to provide the Appellant (Operational Creditor other than workmen) 60.75% as admitted to be paid by the Insolvency Professional, i.e. roughly the same amount. *In the case of Central Bank of India vs.* Resolution Professional of *the Sirpur Paper mills Ltd. & Ors*.-Company appeal (AT)(Insolvency) No. 256 of 2018. The NCLAT held that the Board cannot override the provisions of I&B Code nor it can be inconsistent with the Code. The NCLAT further held that Clauses (b) and (c) of Regulation 38(1) being inconsistent with the provisions of I&B Code, and the legislators having not made any discrimination between the same set of group such and 'Financial Creditor' or Operational Creditor', Board by its Regulation cannot mandate that the Resolution Plan should provide liquidation value to the Operational Creditors' (clause (b) of regulation 38(1) or liquidation value to the dissenting Financial Creditors (clause (c) of regulation 38(1)]. Such regulation being against Section 240(1) can not be taken into consideration and any resolution plan which provides liquidation value to the Operational Creditors(s) or liquidation value to the dissenting 'Financial Creditor (s) in view of clause (b) and (c) of Regulation 38(1), without any other reason to discriminate between two sets of creditors similarly situated such as Financial Creditors or the Operational Creditors cannot be approved being illegal. After the decision, the Board amended/repealed the Regulation 38 having found it discriminatory. *In Swiss Ribbons Pvt Ltd & Anr.* Vs. Union of India & Ors-2019 SCC Online SC 73: Date of Decision 25th January, 2019, wherein the Hon'ble Supreme Court observed that NCLAT has, while looking into viability and feasibility of resolution plans that are approved by the

committee of creditors, always gone into whether operational creditors are given roughly the same treatment as financial creditors, and if they are not, such plans are either rejected or modified so that the operational creditors right are safeguarded**.**

In the matter of Standard Chartered Bank Vs. Satish Kumar Gupta, R.P. of Essar Steel Ltd. & Ors., Company Appeal (AT) (Ins.) No.242 of 2019*,* NCLAT Date of decision 4/07/2019. NCLAT held that the suggestion of 'Resolution Applicant' to distribute the financial package offered by it only to the 'Secured Financial Creditors', denying the right of 'Operational Creditors' and other stakeholders, is also against the provision of Section 30(2) and Regulation 38(1A) and thereby can not be upheld. (para 144, page 73). The NCLAT held that if both Section 5(7) and Section 5(8) are read together, it is evident that there is no distinction made between one or other 'Financial Creditor'. All persons to whom a financial debt is owed by the 'Corporate Debtor', which debt is disbursed against the consideration for time value of money, whether they come within one or other clause of Section 5(8), all of such person form one class i.e. 'Financial Creditor' they cannot be sub-classified as 'Secured' or 'Unsecured Financial Creditor' for the purpose of preparation of the 'Resolution Plan' by the 'Resolution Applicant' (para 164, p-84). A 'Resolution Plan' shows upfront payment in favour of the Creditors including the 'Financial Creditors', 'Operational Creditors' and the other Creditors. It is not a distribution of assets from the proceeds of sale of liquidation of the 'Corporate Debtor' and, therefore, the 'Resolution Applicant' cannot take advantage of Section 53 for the purpose of determination of the manner in which distribution of the proposed upfront amount is to be made in favour of one or other stakeholders namely- the 'Financial Creditor', 'Operational Creditor' and other creditors. Thus, the NCLAT held that Section 53 cannot be made applicable for distribution of amount amongst the stakeholders as proposed by the 'Resolution Applicant' in its 'Resolution Plan'.

Thus, the Resolution Plan approved by the Committee of Creditor containing provision for different payment plan to different category of creditors was not approved by the Appellate Authority. Therefore, NCLAT modified the resolution plan for giving the same treatment to the Financial and Operational Creditors (p-104 to 106). The NCLAT further directed that after distribution of the amount of Rs.42000 crore in the directed manner, if any amount is found to have been generated as profit during the Corporate Insolvency Resolution Process, it should be distributed amongst all the Financial Creditors and the Operational Creditors on pro-rata basis of their claims subject to the fact that it should not exceed the admitted claim (page-110). The order of the Hon'ble NCLAT was challenged in the Hon'ble Supreme Court, which is sub-judice. Thereafter, the Insolvency and Bankruptcy Code (Amendment) Act, 2019, w.e.f. 16.08.2019 included the amendment provision in section 30(2)(b) of the Code:

"(b) provides for the [payment] of debts of operational creditors in such manner as may

be specified by the Board which shall not be less than-

(i) the amount to be paid to such creditors in the event of liquidation of the corporate debtor under section 53, or (ii) the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order or priority in sub-section (1) of section 53, whichever is higher, and provides for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of section 53 in the event of a liquidation of the corporate debtor.

4. Conclusion- If the Resolution Plan comply with the laid down provisions, then the Adjudicating Authority has no intervention, it shall approve the Resolution Plan. As regards compliance of section 30(2)(b) of the I&B Code, it does not mean that the operational creditors should be given equivalent to liquidation value. The 'Resolution Applicant' cannot take advantage of Section 53 for the purpose of

determination of the manner in which distribution, i.e. *In the matter of Standard Chartered Bank Vs. Satish Kumar Gupta, R.P. of Essar Steel Ltd. & Ors., (supra),* the 'Resolution Applicant' cannot take advantage of Section 53 for the purpose of determination of the manner of distribution. If the Resolution Plan does not contain roughly the same treatment to the Financial and Operational Creditor, it may amend/ modify the resolution plan. The Resolution Applicant shall modify the resolution plan otherwise the Adjudicating Authority shall reject the resolution plan. The provision of section 30(2)(b) requires amendment regarding roughly the same treatment to the financial and operational creditors in terms of Preamble of the I&B Code.

PERFORMANCE ANALYSIS OF ESSAR STEEL LIMITED : PRE, DURING AND POST CIRP A CASE STUDY

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MD &CEO –IPA ICMAI

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Company Profile

Essar was incorporated in 1976 as Essar Steel Ltd (ESL). According to analysts, the Ruia family played a significant role in the development of the industry. Essar was the first private sector company, which was permitted by the government to set up a 2-Million Tonnes Steel Plant. ESL is a fully integrated flat carbon steel manufacturer from iron ore to ready-to-market products. Its products find wide acceptance in highly discerning consumer sectors, such as automotive, white goods, construction, engineering and shipbuilding. It is the India's largest exporter of flat steel products and aims to reach 25 MTPA capacity.

It is the India's largest exporter of flat products, selling almost one-third of our production to the highly demanding US and European markets, and to the growing markets of South East Asia and the Middle East. A number of major client companies have approved its steel for their use, including Caterpillar, Hyundai, Swaraj Mazda, the Konkan Railway and Maruti Suzuki. Essar Steel has acquired extensive quality accreditations. Its lean team gives it one of the highest productivities and lowest manpower costs among steel plants internationally. It is totally integrated - from raw material to finished products, adding value at every stage of the manufacturing process. It is the first Indian company to brand flat products, under the name 24-carat steel.

Company's plants include

Hazira Steel Complex- Essar Steel operates the world's largest gas-based hot briquetted iron (HBI) plant with a production capacity of 5.1 Million Tonnes per annum (MTPA). The plant uses state-of-the-art technology, which ensures high quality raw material for the steel plant. Essar Steel is one of the world's lowest cost producers of HBI on a per Tonnes basis. The plant is supported by a captive power plant of 32MW, which

operates at 100% capacity. The complex includes two flying shear lines of capacity 0.2 MTPA each, and two slitting lines of capacity 0.2 MTPA each, catering to the market of plates and sheets.

Essar Steel Algoma Inc- Established in 1901, Essar Steel Algoma Inc. is an integrated steel producer based in Sault Ste. Marie, Ontario, Canada. Formerly operating as Algoma Steel, it was acquired in June 2007 by Essar Steel Holdings Limited. Its current production capacity is 2.4 Million Tonnes per annum (MTPA). Algoma's cornerstone asset, the Direct Strip Production Complex (DSPC) is the newest continuous, thin slab caster in North America, positioning Algoma as a leading supplier of high strength, light gauge steel. In addition, Algoma's heat-treat plate facility provides a full range of quality steel grades for abrasion resistant, ballistic and other specialty plate applications. Other key mills at the plant include a slabcaster, a 106-inch strip mill (one of the widest in North America), a 166-inch plate mill, a cold mill, a just-in-time blanking facility and a welded shapes and profiles division.

PT Essar Indonesia- It commenced its commercial operations in 1997. With a current rolling capacity of 400,000 MT per annum, PT Essar has a state-of-the-art galvanizing line with a capacity of 150,000 metric Tonnes per annum. The company focuses on manufacturing value-added soft cold rolled products.

Visakhapatnam Complex- Essar Steel has built an 8.0 MTPA iron ore pelletisation plant in Visakhapatnam, Andhra Pradesh, India with technology supplied by Lurgi GmbH of Germany.

Essar Steel Minnesota LLC- It has access to iron ore resources of over 1.4 billion Tonnes. The plant will have an annual capacity of 2.5 Million Tonnes per annum (MTPA) when completed.

Essar Steel Caribbean Limited (ESCL)- It is a 2.5 Million Tonnes per annum (MTPA) integrated steel plant for flat products in the strategically located Point Lisas Industrial Zone, Couva, Trinidad.

Paradeep facility- It is a 6 MTPA integrated steel project located in Orissa, India.
Essar Steel is the first steel company to set up the only retail chain for steel products under the brand name Essar Steel Hypermart. It has a strong network of over 60 Steel Hypermarts. The outlets are conveniently located across the length and breadth of the country to cater to the customised requirements of small and medium enterprises. The hypermarts offer a comprehensive range of flat steel products for a variety of applications. Other product lines, like longs, structural, and tubular, are also being developed to make Essar Steel Hypermart a one-stop-shop for steel products.

Product range of the company includes:

Hot rolled products-
Coils- In raw as well as pickled and oiled form of 180 mm - 2000 mm/7.08' - 78.74' width, 1.60 mm - 20.00 mm/0.063' - 0.79' thickness and 25 MT (max) weight.
Plates- of 5-20mm thickness, 750-2000 mm width, 2500-12000 mm length, and as per DIN 1016 (in mm) thickness tolerance.
Sheets- Essar Steel's high precision shearing line (Bronx-UK) turns out top quality steel sheets meeting demanding international standards.
Shot Blasted and Primed- Shot blasted and painted steel from Essar offer the cleanest surfaces and a comprehensive environment protection to its steel.

Cold rolled products- Hot rolled coils from Essar Steel are used to produce cold rolled products in the coils/ plates and sheets form. Cold Rolled Closed Ann-ealed (CRCA)/Cold Rolled Full Hard (CRFH) type, of 600 mm -

1525 mm/23.63' - 60.04' width, 0.14 mm - 3.175 mm/0.0055' - 0.125' thickness with Matte, Bright, Dull surface finish.

Galvanized products- Galvanized Plain (GP)/Galvanized Corrugated (GC) type, 600 mm - 1370 mm/23.62' - 53.94' width, (BMT) 0.14 mm - 3.175 mm/0.0055' - 0.125' thickness, with Regular spangle, Minimised Spangle, Zero Spangle surface finish.
Essar Global Limited is a diversified business corporation with a balanced portfolio of assets in the manufacturing and services sectors of Steel, Energy, Power, Communications, Shipping Ports & Logistics, and Construction. Essar Global has offices in Asia, Africa, Europe and the America.

Essar Steel Limited: Strategic Target Positioning

Segment	Hot rolled steel, chequered plates, Shot blasted plates, Cold rolled steel, TMT Bars, Galvanised corrugated sheets
Target Group	Sectors such as automotive, white goods, construction, engineering and shipbuilding
Positioning	Company having value added segments in the steel industry, a diversified distribution network & integrated nature of operations

ESL – Performance analysis

Pre CIRP

The financial health of Essar Steel Limited (ESL) deteriorated from 2015 onwards due mainly to high cost of operations, mismanagement of resources, and external business environment impacting the steel sector. However, the signs of decay did not appear suddenly. Over the years, the decline in business became more prominent. Indian promoters have historically relied on debt to grow, and the Ruias were no different. Its statement of indebtedness showed a principal outstanding of Rs. 50,786 crore as of 31 March 2017, of which Rs.5,016 crore was interest outstanding. Essar's cash flows were not enough to repay its outstanding debt. With little or no remedial measure undertaken by the management, the rot became sustained, forcing the company to bankruptcy.The Corporate Insolvency Resolution Process (CIRP) of ESL was commenced on 2nd August 2017, and the resolution was approved on 8th March 2019.

The key performance indicators reflecting the operational and financial position of the company during the period 2015 to 2017 are as under:

Performance indicators	2015	2016	2017
Current Ratio	0.61	0.23	0.18
Interest Coverage Ratio	1.20	0.27	0.20
Inventory days	60.67	58.79	40.10
Return on Assets (%)	0.78	-6.91	-9.55
Return on capital employed (%)	12.95	-3.48	-3.12

Assets turnover	0.30	0.25	0.40
Sales / working capital (%)	-2.13	-0.52	0.62
EBITM (%)	-6.18	-8.72	-5.09
Altman Z Score- is a predictability ratio that indicates future possibility of bankruptcy of the company	.30	- .83	-.77
Du Pont Ratio - The Du Pont ratio gives a comprehensive view of company's performance. Du Pont ratio = (Net Profit/sales) x (Sales/Asset) x (Asset/Equity)			
NP/Sale	-0.37	-0.78	-0.76
Sale/Asset	0.25	0.26	0.40
Asset/Equity	21.07	19.26	18.38
Du Pont	-2.01	-3.89	-5.65

From the above analysis it is apparent that the Essar Steel Limited had a poor operational and financial position during the period 2015 to 2017 with all financial indicators including Altman Z score and Du Pont ratios pointing towards impending distress in the company.

During CIRP

Heads	Pre CIRP % change (March 2017)	Pre-during CIRP % change (March 2018)	Reasons for Change
			Income
Sales	48	25	Declined due to overall decline in demand for steel products, both globally and domestically.
			Expenses
Material Cost	36	28	Material cost reduced due to decline in output.
Employee Cost	-5	5	Manpower cost increased due to resumption and scaling up of production.
Other Expenses	91	52	Other expenses which include power and fuel, administrative expenses, selling and distribution expenses decreased due to improved efficiency and better expenses control.
Finance Expenses	16	33	Finance expenses increased due to increased current liabilities consequent upon increased volume of output.
Depreciation	1	-7	Depreciation amount declined due to decrease in net block including impaired assets.
			Profitability
EBITDA margin %	14	12	Margins remained almost similar in pre and during CIRP
PBT Margin (%)	-34	-35	Margins remained almost similar in pre and during CIRP

From the above analysis it appears that the performance of the company during the period of CIRP was more or less the same as in pre CIRP period. Though the rot was stemmed to some extent due mainly to deep

rooted operational and financial inefficiencies and bottlenecks compounded by the external environment including government policies regarding Steel sector and the demand and prices of the steel products.\

Post CIRP

Debt-ridden Essar Steel has registered an EBITDA (earnings before interest, tax, depreciation and amortization) of Rs 4,229 crore during its Corporate Insolvency Resolution period (over 600 days). The company earned Rs 4,000 crore from its operations between August 2017 and February 2019. In addition, an earning of Rs 229 crore for March 2019. Moreover, this amount "excludes Rs 734 crore EBITDA utilised for Finance Costs (Financial Lease, LC/BG Charges to banks and finance charges on payables to suppliers etc) for maintaining the Corporate Debtor (Essar Steel) as a going concern. Crude steel production witnessed growth of 9.5% at 1.88 Million Tonnes and the company posted operating profit of Rs 1,120 crore in the quarter ending June 2019. This is more than twice Essar Steel had earned when Resolution professional took over the debt-laden alloy maker about two years ago. Net sales increased in the quarter by 3% at Rs 8,100 crore

Operating profit is also 2.5% higher than the same period last year and more than double of the March quarter, when low steel prices had hit realisations for the entire steel industry.The improvement has come due to cost efficiency and better inventory management, aided by better product mix. the company is meeting working capital requirements through internal cash and is not borrowing anymore from banks. Essar's performance was despite withdrawal of funding lines by MSTC to the tune of Rs 700 crore. MSTC used to provide funding lines for import.

At the end of March 2019, Essar's production stood at 6.78 Million Tonnes compared to 6.18 Million Tonnes in 2017-18 and 5.47 Million Tonnes in 2016-17. Essar recorded an 80 per cent capacity utilization in downstream units and a substantial increase in production of value added products comprising galvanising, colour coated products and pipes. Resolution professional ,who is now chairman of the monitoring committee is of the view that the performance of Essar was possible on account of support from the financial creditors and the management. It also establishes the plant capability.

The resolution of steel non-performing assets (NPAs) got a fillip after a series of government policy initiatives to support the domestic steel industry was followed by a sustained increase in steel prices. Together they have made steel a more viable business Prices of hot rolled coil (HRC) had touched a low of about Rs 28,000 a Tonnes at the end of FY16 and then moved up to around Rs 46,000 in Q1FY19. After dipping in Q3 2018 to Rs 38,000

At the time of the first round of bidding, those interested had access to the January 2018 numbers, when Essar recorded an EBITDA (operating earnings) of Rs 1.9 billion, sales of Rs 23.8 bn and production of 540,000 Tonnes. From there, it steadily moved to an EBITDA of Rs 3 billion, sales of Rs 25 billion and production of 550,000 Tonnes in April 2018. Production in May 2018 was even higher at 580,000 Tonnes. When the insolvency process started for Essar in August 2017, the EBITDA was Rs 1.8 billion, sales at Rs 18.15 bn and production at 454,000 Tonnes.

Even though the company demonstrated an improved performance post the CISR resolution, one of the concern is, of course weak demand outlook of steel industry. In India, the flat steel price has fallen steeply in recent years. India Ratings and Research (Ind-Ra) has also revised down its outlook on the Indian steel sector from 'stable-to-negative' for the remainder of FY20 owing to sluggish steel demand growth expectations. A Moody's Steel Asia Outlook has said that India's steel demand will slow to mid-single digit growth due to weak auto and manufacturing demand.

For Arcelor Mittal, which made a bid for ESL amounting Rs. 42000 crore successfully, there are several other costs need to be incurred. It has to spend another Rs. 2500 crore for the slurry pipeline in Odisha and will need

to invest up to Rs. 15000 crore more for reducing dependence on gas usage in iron making. Arcelor Mittal's resolution plan for Essar Steel includes a capital expenditure plan of Rs 18,697 crore to take the finished steel goods capacity of the plant to 8.5 Million Tonnes by 2024. The long-term aspiration is to increase finished steel shipments between 12 and 15 Million Tonnes through the addition of new iron and steel-making assets

Conclusion

Essar Steel Limited has shown significant improvement in operational and financial performance in post CIRP phase. Despite a sluggish demand growth in steel sector, the company has shown improvement in operations cash flow, efficiency and profitability. Essar Steel, one of the Reserve Bank of India's (RBI's) first 'Big 12' of non-performing assets to be auctioned under the Insolvency and Bankruptcy Code 2016, is likely to clock its best-ever performance this financial year. However, in future, how the company addresses the market and operational challenges need to be keenly observed.

CASE LAWS

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

NUI PULP AND PAPER INDUSTRIES PVT. LTD. VS. M/S. ROXCEL TRADING GMBH

Case Name: NUI Pulp and Paper Industries Pvt. Ltd. vs. M/s. Roxcel Trading GMBH
Company Appeal: Company Appeal (AT) (Insolvency) No. 664 of 2019
Appellant: NUI Pulp and Paper Industries Pvt. Ltd.
Respondent: M/s. Roxcel Trading GMBH
Order Date: 17-Jul-19
Court/Bench: NCLAT, New Delhi

- NCLAT held that once an application under Sections 7 or 9 is filed by the Adjudicating Authority, it is not necessary for the Adjudicating Authority to await hearing of the parties for passing order of 'Moratorium' under Section 14 of the 'I&B Code'.
- To ensure that one or other party may not abuse the process of the Tribunal or for meeting the ends of justice, it is always open to the Tribunal to pass appropriate interim order
- It is always open to AA to pass ad-interim order before admitting any application u/s 7 or 9 or 10, if it is necessary for meeting the ends of justice or to prevent abuse of the process of the Tribunal.

JIGNESH SHAH & ANR VS UNION OF INDIA & ANR

Case name: Jignesh Shah & Anr Vs Union of India & Anr
Appeal: Civil Appeal No. 455 Of 2019
Appellant: Jignesh Shah & Anr
Respondent: Union of India & Anr
Judgement date: 25-Sep-19
Court/bench: Supreme Court

- On 20th August, 2009, a share purchase agreement was executed between MCX and IL&FS , whereby IL&FS agreed to purchase of 442 lakh equity shares of MCX-SX from MCX.
- La-Fin as a group company of MCX issued a letter of undertaking to IL&FS on 20th August, 2009 to repurchase the shares of MCX-SX after a period of one year but before the a period of 3 years from the date of investment.IL&FS therefore, on August,2012 issued a letter to exercised its option to sell its entire holding to MCX. it replied that it was no legal or contractual obligation to buy the aforesaid shares.
- IL&FS filed a suit in Bombay High Court for specific performance of the letter of undertaking, Bombay High Court passed an injunction order restraining La-Fin from alienating its assets pending disposal of the suit.
- On 21st October,2016 IL&FS filed a winding up petition u/s 433 of Companies Act 1956 against La-FIn in the Bombay High Court. Due to introduction of IBC, 2016, case was transferred to NCLT as a application u/s 7 and the statutory form was filled up by IL&FS indicating that the date of default was 19th August, 2012.

- The said application has been admitted with the observation that the bar of limitation would not be attracted as the Winding up Petition was filed within three years of the date on which the Code came into force, viz., 1st December, 2016

BEFORE NCLAT

- The NCLAT also affirmed the order of NCLT and reject the application of appellant.

BEFORE SUPREME COURT

- The Hon'ble Supreme Court held that the bar of limitation of 3 years as prescribed under Article 137 would be attracted from the date when default occurred and not from the date of filing of winding up petition.

- Since, the Winding up Petition filed on 21st October, 2016 being beyond the period of three-years mentioned in Article 137 of the Limitation Act is time-barred, and cannot therefore be proceeded with any further. Accordingly, the impugned judgment of the NCLAT and the judgment of the NCLT is set aside.

- The bar of limitation of three years would be attracted from the date when the default occur and not from the filing of winding up petition

Duncans Industries Ltd Vs. A. J. Agrochem

Case Name: Duncans Industries Ltd vs. A. J. Agrochem
Appeal Civil Appeal No: 5120 Of 2019
Appellant: Duncans Industries Ltd
Respondent: A. J. Agrochem
Order Date: 4-Oct-19
Court/Bench: Supreme Court

FACTS:

- The respondent is an operational creditor of the appellant. It used to supply pesticides, insecticides, herbicides etc. to the appellant. According to the respondent operational creditor, a sum of Rs.41, 55,500/ was due and payable by the appellant corporate debtor to the respondent operational creditor.
- That the respondent initiated the proceedings against the appellant corporate debtor before the NCLT u/s 9 of the IBC. Initiation of the proceedings under the IBC by the respondent operation creditor was opposed by the appellant corporate debtor mainly and solely on the ground that, as provided under Section 16G (1)(c) of the Tea Act, once the management of tea unit has been taken over by the Central Government, then the proceedings for winding up or appointment of receiver cannot be initiated without the consent of the Central Government.

NCLT & NCLAT

- By an order dated 05.10.2018, learned NCLT held that in view of the statutory provisions under Section 16G of the Tea Act and as the prior consent of the Central Government has not been obtained, the proceedings under Section 9 of the IBC shall not be maintainable.
- In an appeal before the NCLAT by the respondent operational creditor, by the impugned judgment and order, the NCLAT has reversed the order passed by the NCLT, Kolkata and has held that the respondent's application under Section 9 of the IBC would be maintainable even without the consent of the Central Government in terms of Section 16G of the Tea Act.

SUPREME COURT DECISION

- The Apex Court held that the proceedings under Section 9 of the IBC shall not be limited and/or restricted to winding up and/or appointment of receiver only.
- The winding up/liquidation of the company shall be the last resort and only on an eventuality when the corporate insolvency resolution process fails. As observed by this Court in Swiss Ribbons Pvt. Ltd., referred to hereinabove, the primary focus of the legislation while enacting the IBC is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate debt by liquidation and such corporate insolvency resolution process is to be completed in a time bound manner.
- Therefore, the entire "corporate insolvency resolution process" as such cannot be equated with "winding up proceedings". Therefore, considering Section 238 of the IBC, which is a subsequent Act to the Tea Act, 1953, shall be applicable and the provisions of the IBC shall have an overriding effect over the Tea Act, 1953.
- Any other view would frustrate the object and purpose of the IBC. If the submission on behalf of the appellant that before initiation of proceedings under Section 9 of the IBC, the consent of the Central Government as provided under Section 16G(1)(c) of the Tea Act is to be obtained, in that case, the main object and purpose of the IBC, namely, to complete the "corporate insolvency resolution process" in a time bound manner, shall be frustrated.
- The sum and substance of the above discussion would be that the provisions of the IBC would have an overriding effect over the Tea Act, 1953 and that no prior consent of the Central Government before initiation of the proceedings under Section 7 or Section 9 of the IBC would be required and even without such consent of the Central Government, the insolvency proceedings under Section 7 or Section 9 of the IBC initiated by the operational creditor shall be maintainable.

- Considering Sec. 238 of the IBC, which is a subsequent Act to the Tea Act, 1953, shall be applicable & the provisions of the IBC shall have an overriding effect over the Tea Act, 1953

PADMAIAH VUPPU VS. RELIANCE CAPITAL AIF TRUSTEE COMPANY PVT. LTD. & ORS

Case Name: Padmaiah Vuppu vs. Reliance Capital AIF Trustee Company Pvt. Ltd. & Ors
Company Appeal: Company Appeal (AT) (Insolvency) No. 1025 of 2019
Appellant: Padmaiah Vuppu
Respondent: Reliance Capital AIF Trustee Company Pvt. Ltd. & Ors
Order Date: 14-Oct-19
Court/Bench: NCLAT New Delhi

- The case of the Appellant is that M/s Reliance Capital AIF Trustee Company Pvt. Ltd. disbursed loan in favour of M/s Fortuna Buildcon India Pvt. Ltd. (Principal Borrower).
- While granting such loan, the purported guarantee was given by M/s Fortuna Projects (India) Private Limited (Corporate Debtor) through the erstwhile Managing Director. According to the counsel for the Appellant, the Managing Director had no jurisdiction to provide such guarantee on behalf of M/s Fortuna Projects (India) Private Limited.
- Though such plea has been taken but it is not disputed that Corporate Guarantee was given by the Corporate Debtor to M/s Reliance Capital AIF Trustee Company Pvt. Ltd. (Financial Creditor) in favour of the Principal Borrower.
- The Corporate Guarantee was given by the Managing Director of the Corporate Debtor against the provisions of Section 185 of the Companies Act, 2013 and no Board or Special Resolution was passed.
- However, it is not in dispute that the Corporate Guarantee was executed on 2nd September, 2014 and since then the matter was not challenged by any of the Shareholder / Director of the Corporate Debtor before any competent authority or Court of Law. In such circumstance, it is not open to any Shareholder/ Director/ Managing Director to raise such issue in petition under Section 7 of the I&B Code, as the Adjudicating Authority has no jurisdiction to decide the question of legality and propriety of the Corporate Guarantee executed by the Corporate Debtor.

- If any Corporate Guarantee is given against the provisions of the Companies Act, it is not open to any Shareholder, Director or MD to raise such issue in petition u/s 7 of the Code

SAGAR SHARMA & ANR VS.PHOENIX ARC PVT. LTD. & ANR

Case Name: Sagar Sharma & Anr Vs.Phoenix Arc Pvt. Ltd. & Anr
AppealCivil Appeal No.: 7673 Of 2019
Appellant: Sagar Sharma & Anr
Respondent : Phoenix Arc Pvt. Ltd. & Anr
Order Date: 30-Sep-19
Court/Bench: Supreme Court

- The Apex court held that Article 141 of the Constitution of India mandates that our judgments are followed in letter and spirit.
- The date of coming into force of the IBC Code does not and cannot form a trigger point of limitation for applications filed under the Code. Equally, since "applications" are petitions which are filed under the Code, it is Article 137 of the Limitation Act which will apply to such applications.
- Accordingly, we set aside the judgment under appeal and direct that the matter be determined afresh. It will be open for both sides to argue the case on facts on the footing that Article 137 of the Limitation Act alone will apply.
- The date of coming into force of the IBC Code does not & cannot form a trigger point of limitation for applications filed under the Code and if applications filed u/s 7, Article 137 of the Limitation Act alone will apply

Jet Airways (India) Ltd Vs. State Bank of India

Case Name: Jet Airways (India) Ltd Vs. State Bank of India & Anr
Company Appeal: Company Appeal (AT) (Insolvency) No. 707 of 2019
Appellant: Jet Airways (India) Ltd
Respondent: State Bank of India & Anr
Order Date: 26-Sep-19
Court/Bench: NCLAT, New Delhi

- NCLAT held that in the present case, we make it clear that the CoC have no role to play as the agreement reached between the 'Dutch Administrator' and the Resolution Professional of India is on the basis of the direction of this Appellate Tribunal.
- In spite of the same, unfortunately the CoC interfered with the matter and put its view to the Resolution Professional resulting into difference of the suggestions.
- 'The Dutch Trustee' is equivalent to the Resolution Professional of India, therefore, as per law he has a right to attend the meeting of the CoC.
- However, as we do not want to overlap the power between one and other, we are of the view that the suggestion given by the 'Dutch Trustee' (Administrator) as shown in its 'Clause 6.1.2' should be part of the Agreement – 'Cross Border Insolvency Protocol'.
- If parallel insolvency proceedings have been initiated against the Corporate Debtor, the respective authority of other country has also right to participate in the meeting of CoC & joint CIRP will continue in accordance with IBC.

Mr. A. Maheshwaran Vs. Stressed Assets Stabilization Fund & Anr

Case Name: Mr. A. Maheshwaran Vs. Stressed Assets Stabilization Fund & Anr.
Company Appeal: Company Appeal (AT) (Insolvency) No. 954 of 2019
Appellant: Mr. A. Maheshwaran
Respondent: Stressed Assets Stabilization Fund & Anr.
Order Date: 16-Sep-19
Court/Bench: NCLAT, New Delhi

- During the hearing, learned counsel for the Appellant submitted that there is a dispute about the amount claimed by the Respondent (Financial Creditor).
- NCLAT referred Innoventive Industries Ltd. v. ICICI Bank, (2018) 1 SCC 407] judgment and held that it is evident that even if a debt is disputed, if the amount is more than Rupees One Lakh, the application under Section 7 is maintainable.
- What is the exact amount of claim, that is only considered at the stage of the 'Corporate Insolvency Resolution Process', when the 'Interim Resolution Professional' after collating the claims, including the claim of the Respondent, may ascertain what amount is payable to the Respondent.
- If a debt amount is disputed & the amount is more than Rs. 1 Lakh, application u/s 7 is maintainable & exact amount of claim will be considered at the stage of the CIRP.

GUIDANCE NOTE ON "AUTHORISATION FOR ASSIGNMENT"

Provisions under IBBI (Insolvency Professionals) Regulations, 2016

Insolvency and Bankruptcy Board of India (hereinafter referred as "IBBI") introduced the concept of "Authorisation for Assignment" vide their notification dated 23rd July, 2019.

The term "Assignment" is defined under Regulation (2)(1)(a) of IBBI (Insolvency Professionals) Regulations, 2016 which means *any assignment of an insolvency professional as interim resolution professional, resolution professional, liquidator, bankruptcy trustee, authorised representative or in any other role under the Insolvency and Bankruptcy Code,2016 (hereinafter referred as "Code").*

The term "Authorisation for Assignment" is defined under Regulation (2)(1)(aa) of IBBI (Insolvency Professionals) Regulations, 2016 which means *an authorisation to undertake an assignment, issued by an insolvency professional agency to an insolvency professional, who is its professional member, in accordance with its bye-laws.*

Regulation 7A of IBBI (Insolvency Professionals) Regulations, 2016 provides that an Insolvency Professional shall not accept or undertake any assignment after 31st December, 2019 unless he holds a valid authorisation for assignment on the date of such acceptance or commencement of such assignment, as the case may be.
Provided that the provisions of these regulation shall not apply to an assignment which an Insolvency Professional is undertaking as on 31st December,2019 or on the date of expiry of his authorisation for assignment.

Alternatively, if an Insolvency Professional is accepting any assignment w.e.f 1st January, 2020; then he/she is required to have a valid "Authorisation for Assignment" duly issued by the Insolvency Professional Agency of which he/she is a member. An Insolvency Professional cannot accept any assignment under the Code w.e.f 1st January, 2020 if he/she doesn't hold valid "Authorisation for Assignment".

Illustration: If an Insolvency Professional registered with Insolvency Professional Agency of Institute of Cost Accountants of India wants to act as an Interim Resolution Professional for a corporate debtor on or after 1st January, 2020 then at the time of giving consent or at the time of commencement of assignment the concerned Insolvency Professional should hold a valid "Authorisation for Assignment" issued to him/her by Insolvency Professional Agency of Institute of Cost Accountants of India.

Further Regulation 11(8) (ba) of IBBI (Insolvency Professionals) Regulations, 2016 provides that in the event of passing of order to dispose of show cause notice (if any) issued to any Insolvency Professional, Disciplinary Committee of IBBI may even order for suspension or cancellation of authorisation for assignment issued to the Insolvency Professional.

Provisions under IBBI (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016 and Bye-Laws of Insolvency Professional Agency of Institute of Cost Accountants of India

Issuance/Renew of authorisation for assignment
Clause 12 A of Bye-Law VI of IBBI (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016 and Bye-Laws of Insolvency Professional Agency of Institute of Cost Accountants of India provides that:

a) The Agency, on an application by its professional member, may issue or renew an authorisation for assignment.
b) A professional member shall be eligible to obtain an authorisation for assignment, if he:

i. is registered with IBBI as an insolvency professional;
ii. is a fit and proper person in terms of the *Explanation* to clause (g) of regulation 4 of the IBBI (Insolvency Professionals) Regulations, 2016;
iii. is not in employment;
iv. is not debarred by any direction or order of the Agency or the Board;
v. has not attained the age of seventy years; vi. has no disciplinary proceeding pending against him before the Agency or the Board; vii. complies with requirements, as on the date of application, with respect to-

• payment of fee to the Agency and the Board;
• filings and disclosures to the Agency and the Board;
• continuous professional education; and
• other requirements, as stipulated under the Code, regulations, circulars, directions or guidelines issued by the Agency and the Board, from time to time.

c) An application for issue or renewal of an authorisation for assignment, shall be in such form, manner and with such fee, as may be provided by the Agency:
Provided that an application for renewal of an authorisation for assignment shall be made any time before the date of expiry of the authorisation, but not earlier than forty- five days before the date of expiry of the authorisation.
d) The Agency shall consider the application in accordance with the bye-laws and either issue or renew, as the case may be, an authorisation for assignment to the professional member in Form B or reject the application with a reasoned order.
e) If the authorisation for assignment is not issued, renewed or rejected by the Agency within fifteen days of the date of receipt of application, the authorization.shall be deemed to have been issued or renewed, as the case may be, by the Agency.
f) An authorisation for assignment issued or renewed by the Agency shall be valid for a period of one year from the date of its issuance or renewal, as the case may be, or till the date on which the professional member attains the age of seventy years, whichever is earlier.
g) An applicant aggrieved of an order of rejection of his application by the Agency may appeal to the Membership Committee within seven days from the date of receipt of the order.
h) The Membership Committee shall pass an order disposing of the appeal by a reasoned order, within fifteen days of the date of receipt of the appeal.

Power of Disciplinary Committee to suspend/cancel authorisation for assignment

Clause 24(2) (ba) of Bye-Law X of IBBI (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016 and Bye-Laws of Insolvency Professional Agency of Institute of Cost Accountants of India provides that in the event of passing of any order by the Disciplinary Committee of Agency, the Disciplinary Committee may even order for suspension or cancellation of authorisation for assignment issued to the Insolvency Professional.

Process of surrender of authorisation for assignment

Clause 26 of Bye-Law XI of IBBI (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016 and Bye-Laws of Insolvency Professional Agency of Institute of Cost Accountants of India provides that if a professional member is willing to surrender his authorisation for assignment , then he/she shall make an application to surrender his authorisation for assignment to the Agency at least thirty days before he-

a) becomes a person resident outside India;
b) takes up an employment; or
c) starts any business, except as specifically permitted under the Code of Conduct, and upon acceptance of such surrender, the same shall be intimated to the IBBI by the Agency within one working day of acceptance of surrender.

No application for surrender of authorisation for assignments shall be accepted by the Agency, if:

a) the authorisation for assignment has been suspended;
b) an assignment is continuing; or
c) name of the professional member is included in any panel prepared by the Board for undertaking assignment.

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The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA