DECEMBER'2021

THE INSOLVENCY PROFESSIONAL

YOUR INSIGHT JOURNAL

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

OVERVIEW

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

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CHAIRMAN MESSAGE

The Insolvency and Bankruptcy code 2016 provides for a time limit of 270 days for the resolution of a Corporate Insolvency Process so as to have a time bound resolution. The underlying focus of this time limit is to ensure expeditious resolution and maximise the value for every stake holder. But during the process of implementation of the Code, it was felt that the resolution process of smaller companies, individuals etc may not be so complex to require even 270 days. Keeping this in view, the IBBI in exercise of the powers conferred under Sections 58, 196 and 208 read with Section 240 of the Insolvency and Bankruptcy Code 2016 provided for the Fast Track Corporate Insolvency Resolution Process. Section 55 to 58 of the IBC contained the provisions dealing with -

(1) Fast Track Corporate Insolvency Resolution Process,

(2) Time period for completion of fast track corporate Insolvency Resolution Process,

(3) Manner of initiating fast track corporate Insolvency Resolution Process and

(4) Applicability of Chapter II the Fast Track Resolution Process

The following categories of Debtors shall qualify to be brought under the Fast Track Corporate Insolvency Resolution Process -

a) Small Companies

b) Start Ups other than Partnership Firms

c) Unlisted Companies

with a total assets value of Rs. 1 crore as per the balance sheet of the preceding Financial Year.

The resolution or winding up of these entities is considered to be less complex and hence may not require a period of 270 days. The code therefore, was amended to provide for Fast Track Resolution within a shorter time period of 90 days from the date of commencement of Insolvency, which can be extended by another 45 days on not more than one occasion. Another reason for the introduction of Fast Track Resolution was to improve the ease of Business ranking of India. The Fast Track Corporate Resolution Process was made effective from 14 June 2017.

Section 56 of IBC provides that the Insolvency Resolution Professional can file an application to the Adjudicating Authority to extend the time period if -

(i) the Committee of Creditors is satisfied that the Resolution can not be completed within 90 days from the date of commencement of the resolution

(ii) such a resolution by CoC should be voted by 75 percent of the vote share

The CoC under such an eventuality may instruct the Insolvency Resolution Professional to file an application to the Adjudicating Authority requesting for an extension. If the Adjudicating Authority is satisfied of the merits of the case, it may grant extension of time upto 45 days beyond 90 days from the date of commencement of the Insolvency Resolution Process. In terms of Section 56 (3), such extension can be allowed not more than once.

The Application for Fast Track Corporate Insolvency Resolution can be filed with the Adjudicating Authority by the Creditors (both Financial Creditors and/or the Operational Creditors) or by the Corporate Debtor itself as provided under Section 57. While filing the Application before the Adjudicating Authority requesting for the Fast Track Corporate Insolvency Resolution Process, the proof of the existence of default as evidenced by records available with an information utility or such other means as may be specified by the Board is required to be filed with the application.

A person to be eligible to be appointed as a n Interim Resolution Professional should fulfil the following criterion:

- he should be a qualifies insolvency Resolution Professional

- he and the directors or the partners of the Insolvency Professional Entity of which he is also a partner or director, should be independent of the Corporate Debtor

- he should be eligible to be appointed as an Independent Director on the Board of the Corporate Debtor Company

- he should not be a related party to the Corporate Debtor

- he should not have been an Auditor or a Company Secretary or a Cost Auditor of the Corporate Debtor

- should not be a legal or consulting firm of the Corporate Debtor having transactions amounting to more than 10 percent of the Gross Turnover of the firm during the last 3 preceding years

- he or the Insolvency Professional Entity of which he is a Director or a Partner should not be under the restraint order of the Board

- he or the Insolvency Professional Entity of which he is a Director or a Partner should not be representing any other stake holder the the case

On being appointed as an Interim Resolution Professional he should make a public announcement of his appointment within three days of his nomination in two news papers - one in English and other one in the Regional Language. It should also be hosted on the website of the Corporate Debtor or the website as specified by the Adjudicating Authority also indicating the last date submission of the claims by the eligible categories of the creditors within ten days. Such claims can be submitted by the Operational Creditors, Financial Creditors, Workmen individually or collectively and other creditors. Wherever the claims are filed)denominated in a Foreign Currency, the amount in Rupees shall be

determined by converting the same at the Official Exchange Rate of Reserve Bank of India as on the date of commencement of the Insolvency Resolution Process.

The Insolvency Resolution Process shall constitute the Committee of Creditors consisting of the Financial Creditors and if there is no Financial Creditor the 18 largest operationa creditors shall be taken into CoC. Additionally the elected representative of workmen and the elected representative of other employees who do not fall in the category of the workmen. He should file his report to the Adjudicating Authority within 21 days from the date of his Appointment as a Interim Resolution Professional and should call the first meeting of the CoC within 7 days of filing his report.

An Insolvency Resolution Professional is entitled to ask for the supporting evidence or clarifications from the creditors who have submitted their claims to him. He is also empowered to have an access to the books of the corporate Debtor including the ones held with -

1. The Depositories of Securities

2. Professional Advisors of the Corporate Debtor

3. Information Utilities

4. Other Registries that record the ownership of Assets

5. Promotors', Directors, Partners, Board, Joint Venture Partners of the Corporate Debtor and

6. The Contractual Counter-parties of the Corporate Debtors

Wherever required he may engage the services of other professionals like Valuers for carrying out the valuation of assets and other resources. His fee and expenses are reimbursed by the CoC.

The provision for Fast Track Insolvency Resolution Process is an effective tool for early resolution and liquidation of the Debtor. An expeditious resolution helps in enhancing the value realisation for all the stake holders.

Warm Regards,

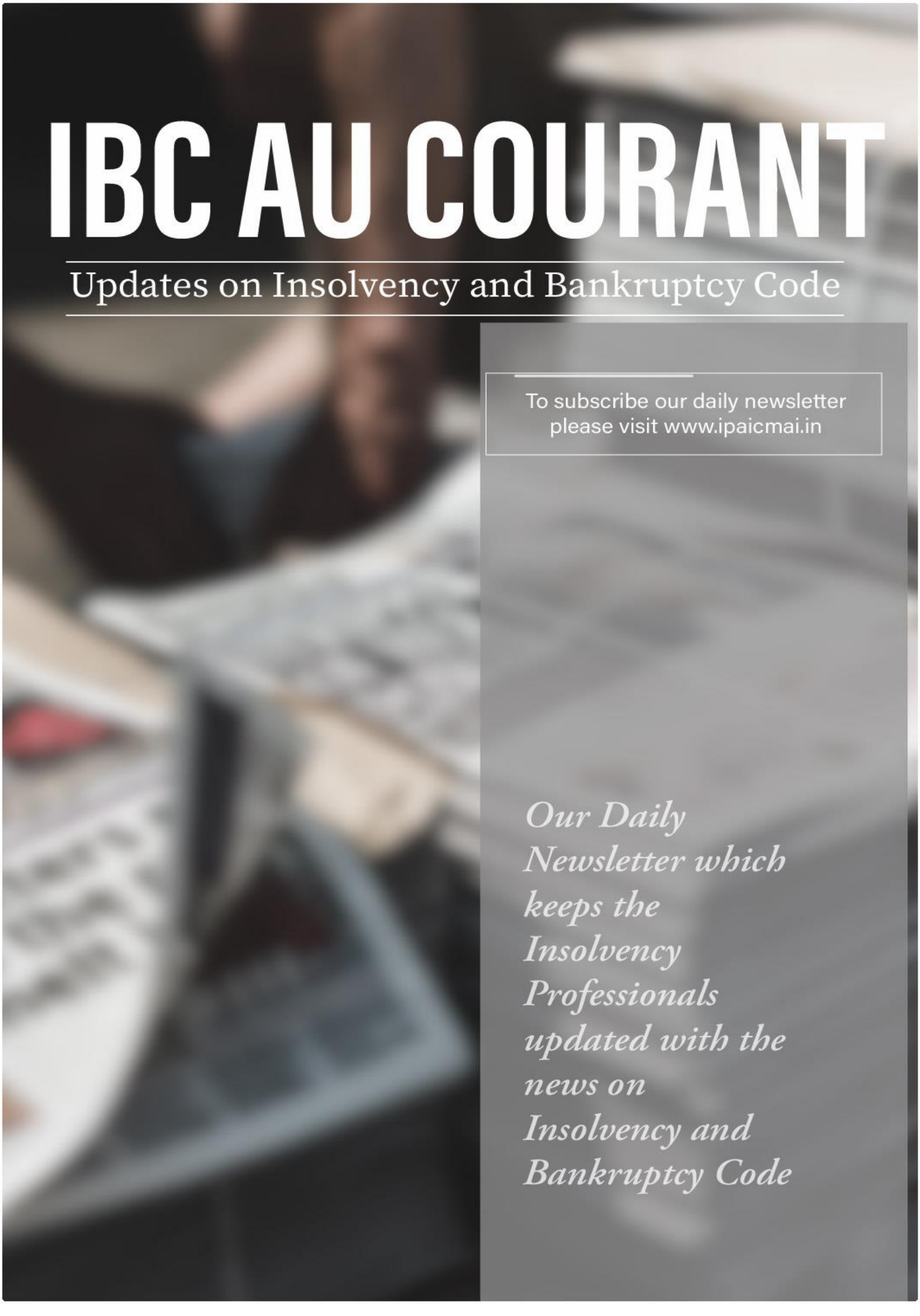
Dr. Jai Deo Sharma

Professional Development Initiatives

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

EVENTS

DECEMBER'21	
2nd - 3rd Dec'21	Master Class on Pre - Pack Insolvency Resolution Process.
3rd - 9th Dec'21	50th Batch of PREC
8th Dec'21	Seminar on Milestones achieved by IP's and RV's and way forward.
17th - 19th Dec'21	Master Class on Evaluation Matrix, fair value and liquidation Value
23rd - 29th Dec'21	51st Batch of PREC
24th Dec'21	Master Class on Emerging Scenarios under IBC



IBC AU COURANT

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

ARTICLES

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

CROSSING THE PYRAMID
THE CHALLENGES THAT INSOLVENCY PROFESSIONAL FACE DURING CORPORATE INSOLVENCY RESOLUTION PROCESS

Mr. Ashok Kumar Gulla,
Insolvency Professional

The Insolvency and Bankruptcy Code, 2016 ("the Code") has been enacted on 28.05.2016 with the primary objective of arriving at reorganization and insolvency resolution of corporate persons in a time bound manner for maximization of value of assets of such persons. The role and responsibilities of IRP and thereafter by RP have been elaborated in Section 17, 18, 19 and 20 of the Code and in IBBI ("Insolvency Resolution process for Corporate Persons") Regulations, 2016 and through various circulars issued by IBBI (Insolvency Professional) Regulations, 2016. The Insolvency Professional have to adhere to the Code of Conduct for Insolvency Professional promulgated by IBBI and directions of Adjudicating Authority on various matters pertaining to CIRP of corporate debtor. The code is still evolving and various issues pertaining to the conduct of CIRP have become matter of judicial review by Hon'ble NCLT, NCLAT and Supreme Court. There are instances where the conduct and procedure followed by IRP/RP has come under criticism. This is mainly due to absence of clarity on various issues. An attempt has been made in this article to elaborate on various challenges faced by IP during CIRP.

1. Background

i. The Insolvency and Bankruptcy Code, 2016 ("the Code") has been enacted on 28.05.2016 with the primary objective of arriving reorganization and insolvency resolution of corporate persons in a time bound manner for maximization of value of assets of such persons.

ii. To achieve this objective, the application has to be filed by Financial Creditor, Operational Creditor or corporate debtor itself under Section 7,9 and 10 of the Code respectively for initiation of Corporate Insolvency Resolution Process ("CIRP") for the corporate debtor. Once such application is admitted and order pronounced by the Adjudicating Authority (AA) has the effect of initiation of CIRP for corporate debtor.

iii. The role of Insolvency Professional who is appointed as Interim Resolution Professional ("IRP") by AA commence from the date of such order. As per Section 22(1) of the Code, the IRP is then either confirmed to act as Resolution Professional ("RP") or replaced by another IP during the meeting of Committee of

Creditors("CoC"). As per Section 23(2) of the Code, the RP shall exercise power and perform duties as are vested or conferred on the IRP under the Code.

iv. The role and responsibilities of IRP and thereafter by RP have been elaborated in Section 17, Section 18, Section 19 and Section 20 of the Code and in IBBI ("Insolvency Resolution process for Corporate Persons") Regulations, 2016 and through various circulars issued by IBBI(Insolvency Professional) Regulations, 2016.

v. As per Section 17 of the Code, from the date of appointment of IRP:

a) the management of the affairs of corporate debtor shall vest in the IRP.

b) the powers of Board of Directors or powers of partners of CD, as the case may be shall stand suspended and be exercised by the IRP.

vi. These responsibilities are onerous which require IRP/RP to deal with the issues in a mature, professional and in time bound manner. He is responsible and accountable for his actions to various authorities including Committee of Creditors("CoC"), Insolvency Professional Agency ("IPA") to which he is registered as IP, IBBI and Adjudicating Authority. The Insolvency Professional have to adhere to the Code of Conduct for Insolvency Professional promulgated by IBBI. The IRP/RP is also required to adhere to the direction of Adjudicating Authority on various matters pertaining to CIRP of corporate debtor.

vii. The code is still evolving and various issues pertaining to the conduct of CIRP have become matter of judicial review by Hon'ble NCLT , NCLAT and Supreme Court. There are instances where the conduct and procedure followed by IRP/RP has come under criticism. This is mainly due to absence of clarity on various issues. An attempt has been made in this article to elaborate on various challenges faced by IP during CIRP.

2. Complete records of Corporate Debtor ("CD")

i. As per Section 18 of the Code, the IRP shall perform the following duties:

a) Collect all the information relating to the assets, finances and operations of corporate debtor for determining the financial positions of CD, including information relating to-

- Business operations for previous two years.
- Financial and operational payments for previous two years.
- List of assets & liabilities as on initiation date.
- Such other matters as may be specified.

ii. Further, as per Section 18(f) of the Code, the IRP/RP is to take control of any asset over which corporate debtor has ownership right.

iii. Hence, the important function at the commencement of CIRP is to get control on the records of CD. However, in most cases, such records are either not available or not available for the relevant period. It is likely that no staff will be there to assist in getting the said records.

iv. The IRP/RP in such cases file application under Section 19(2) of the Code, requesting the AA for the direction seeking cooperation from the erstwhile director/employees & KMPs. Such application in normal course remains pending and even if the directions are issued to the concerned officials of CD, it does not resolve the issue completely as relevant documents/ records are not properly maintained and complied. The difficulties are faced when complete record of assets of the corporate debtor is not available from the books of the CD.

v. The IRP/RP has to rely on the available documents/records and from physical verification of various assets to corroborate all piecemeal information so as to take control of the assets of corporate debtor and to prepare Information Memorandum.

vi. The IRP/RP in such a case need to report all these difficulties in the 1st meeting of CoC and also in progress report to Hon'ble NCLT.

3. Cooperation from Management

i. As per Section 19(1) of the Code, the personnel of corporate debtor, its promoters or any other person associated with the management of CD shall extend all the assistance and cooperation to IRP as may be required by him in managing the affairs of CD.

ii. The promoters who are in most cases Directors also realize that they have lost control on the CD and do not feel like assisting the IRP/RP in managing the affairs of the CD. Certain KMPs do have loyalty towards promoters and directors and do not come forth with to help IRP and his team in managing the affairs. A lot of perseverance is required to deal with the issue.

iii. In many cases, erstwhile directors may not be available to which if application filed under Section 19(2) of the Code for non-cooperation, notice cannot be served properly to their registered address. This leads to delay in the implementation of order by AA and no substantial help comes up from the side of Directors.

iv. These issues can be handled by IRP/RP with maturity and professionalism. He/She requires to emphasize employees/KMP that revival of the CD will be in the best interest of all and hence necessary support is to be provided.

4. Role of suspended Board of Directors

i. The moot question that remains to be resolved is what should be the role of Directors, as the power of Board of Directors have been suspended and what should be remunerations of these directors.

ii. The role of Directors is not clear especially when the directors are not active in managing the affairs of CD. Whether IRP/RP can remove the Directors is not clear. The code and regulations do not provide any insight on the issue regarding who has authority to appoint/remove the directors when the powers of BOD are suspended.

iii. There are situations when the directors resign or retire during the CIRP. In such a situation, minimum number of directorship as per Companies Act, 2013 are not complied. It is not clear whether such compliances are required to be carried out and who has the powers to appoint director. If the Directors are appointed in order to comply with the Companies Act, 2013; it will entail further cost without any definite advantages in conduct of CIRP. Whether CoC has the power to appoint director or IRP/RP? As per the circular instructions issued by IBBI, the IRP/RP is required to carry out all the compliances.

5. Fixed Assets not available

i. The records of fixed assets are not complete and item wise description along with location is missing in certain cases. Hence, it becomes difficult to ascertain whether all the items of Fixed Asset are available. The IRP/RP is required to create appropriate document to establish that particular items of Fixed Asset are available as on commencement of CIRP.

ii. In some cases, fixed assets mentioned as per balance sheet is more than fixed assets available in reality. There are cases of transferring substantial assets from the company before the initiation of CIRP which invites less valuation during the process of CIRP.

iii. Further, in many cases, property deeds, agreements etc are missing from the records of the company which also creates problem in resolution.

iv. Many properties entail defective title or long pending municipal or other dues. All these issues will have to be tackled by IRP/RP.

6. Finalization of Financial Statements

i. As per the companies act, 2013, the financial statements of the CD need to be got audited within six months of end of financial year. It is common with most CD that

financial records are not complete and IRP/RP have to take extra efforts to get the audit complete.

ii. The statutory auditor in their report put responsibility on the management with regard to verification of fixed assets, inventory and other assets of CD.

iii. In a situation when Board of Directors(BOD) is suspended and only some directors are working with the CD, who has responsibility of verification.

iv. In case of multiple subsidiaries of Corporate Debtor, consolidation of account creates problem because many subsidiaries are shell companies where directors are absconding or companies are inactive for many years or companies did not filled balance sheet for previous years.

7. Claim Verification

i. As per Books of CD are not complete in most cases, hence claims received are difficult to verify with the books of CD. There may not be staff who can verify that a particular entry/invoice or bill submitted by creditor is correct. Under these circumstances, the IRP/RP has to use his judgement to admit the claim. However, their could be instances where this is challenged at AA.

ii. In case of real estate matters, same flat is allotted to multiple parties. Further, in case of tripartite agreement with banks, builder and home buyers, claim is submitted by both the banks and home buyer for the same flat/amount. Therefore, claim admission is a problem in case of home buyers cases.

8. Negotiation with vendors/service providers

i. One of the major responsibilities of RP is to ensure that CD continues to be going concern. In this connection, he is to ensure timely supply of material and services and also to procure orders. This requires negotiation with suppliers, service providers, workmen/employees and customers

ii. Due to liquidity crunch, the vendors will demand timely payment either in advance or on delivery. The IRP/RP has to examine the cashflow and to satisfy that they will be able to meet these payments in time so as to built up as reputation with vendors about fulfilling the commitments.

9. Recovery from Debtors

i. Recovery from Debtors is tedious task due to non-availability of proper documents/records/address and these may be pending for a long period. Further, if RP sends notice or legal notice to the addresses given, many come back unaddressed leading to initiation of another litigation.

10. Valuation Reports

i. The RP is required to appoint two registered valuers for determining fair and liquidation value of the corporate debtor as on CIRP date. The valuers are required to provide such valuation well before Resolution Plans are received and discussed in CoC. Hence all the relevant records and clarifications are to be provided to valuers in time.

11. Conduct of transaction audit

i. While for Preferential, undervalued and extortionate transactions under Sec43, 45 and 50 of the Code has look back period of 2 years, no such period is stipulated for fraudulent transactions under Sec66 of the Code. Hence, IRP/RP has to decide on his own regarding the period for such audit while deciding on the scope of work with the transaction auditor.

ii. Further, long pendency of application filed before AA in such cases does not benefit the lenders. There is no clarity who should follow up these applications once resolution plan is approved.

12. Meeting of Committee of Creditors("CoC")

i. As per Section 28(1) of the Code, the RP during the CIRP is required to take prior approval of the CoC on certain matters listed in the said code. There are instances where IRP/RP has failed to obtain consent in each case for CoC which has become issue against the RP.

ii. The IRP/RP is required to hold meeting of the Committee of Creditors("CoC") to discuss and seek their consent on various issues pertaining to conduct of CIRP. These include fixing eligibility criteria under Section 25(2)(h) of the Code, for inviting EOI, Evaluation Matrix, RFRP and then final discussion and approval of Resolution Plans. All these deliberations are time consuming and anomaly is required to obtain between the members of CoC. The RP is required to make presentation with data and facts so that the CoC are in a position to decide and vote on the particular agenda items. At times there are delays in getting particular approval from the members of CoC. The IRP/RP is required to adhere to the timelines. The issues that are mostly faced by RP is that certain costs are not approved and approval of Resolution Plan is delayed as members of CoC who attend the meeting have to seek approval of their committees.

iii. The IRP/RP has sought consent in certain matters from CoC or acted as per direction of CoC. However, it was subsequently observed by AA or IBBI that RP

has acted beyond his powers. All such situations create a major hurdle for the RP to function.

13. Compliances

As per Companies Act, 2013, and SEBI Regulations the CD have to ensure following compliances:

i. Minimum no. of directors
ii. Finalization of Balance sheet
iii. Audit committee
iv. Grievance Committee
v. Independent Directors
vi. Approval on remunerations of KMPs/ Directors.
vii. Holding of AGM
viii. Holding of shareholders meetings
ix. Appointment of auditors
x. Timely Intimation to stock exchanges (LODR)

As per circular dated 3rd January, 2018, the IRP/RP is required to carry out all the compliances. The IRP/RP face certain challenges in completion of compliances.

14. Sec 29A compliance

i. Thorough check on Section 29A applicability for the prospective resolution applicants is a hurdle because many norms cannot be verified from outside source and reliance have to placed on the declaration by the Applicant like record of any conviction or imprisonment, subject ot any disability under law in a jurisdication outside India.

15. The way forward

i. The IP is required to get well versed with the duties and responsibilities for conduct of CIRP. He need to maintain the team who will support to carry on these responsibilities. The capabilities of the team in varied areas come useful in meeting these challenges.

ii. The IP in addition to the familiarity with the code, regulations and legal process should display maturity, negotiation skills and supportive in nature to address issues from various stakeholders.

iii. There are various areas where IBBI need to provide clarifications through amendment in regulations. These include role of IP in meeting various compliances under Companies Act, 2013 and other issues pertaining to conduct of CIRP including managing the affairs of Company.

IBC'S SCORE CARD

Dr. S K Gupta
Managing Director, ICMAI RVO
Mr. Hitesh Mundhra, Advocate
Student, Graduate Insolvency Program, IICA

When the Insolvency and Bankruptcy Code (IBC) came into force five years ago, it was rightly hailed as a landmark reform move to speedily transfer capital locked in unproductive assets to productive uses. The IBC has certainly proved to be a superior process compared to the earlier systems but clearly, it will have to evolve with experience in order to be effective

The Perspective

The growth and development of an economy are fundamentally dependent on free and fair competition. A pre-requisite for promoting competitiveness is ensuring that players in the competition have the freedom to enter and exit the market freely. In some ways, the dramatic reform of industrial de-licensing adopted in 1991, essentially allowing unfettered entry, was a watershed moment. However, the aspect of free departure was not addressed. The implementation of the Indian Insolvency and Bankruptcy Code (IBC) is a significant step toward allowing businesses to exit the market freely.

The Indian Insolvency and Bankruptcy Code (IBC) was enacted to fix an ailing system. Prior to the introduction of the law, it took years for a company to wind up, which often resulted in protracted litigation. The inadequacy of the prevailing mechanisms under the Sick Industrial Companies Act and the Companies Act were long debated, but reform was put on the back burner. Then, in 2014, the Bankruptcy Law Reforms Committee was formed. Finally, in 2016, the reform came to fruition with the enactment of the IBC (IBC), bringing to an end a defaulters' paradise. The Committee expressed that speed was of the essence to minimise the need for liquidation and to ensure better recovery. Therefore, among the key changes brought in by the IBC were prescribed time limits to resolution.

The IBC was introduced on 1st April 2017. Since its inception, it has been used as the saviour for creditors' rights. It has become an instrument for safeguarding the interest of the various stakeholders in the resolution and liquidation process of corporate. The IBC, brought in to improve the credit culture in the country and counter industrial sickness, has been closely watched by policymakers and experts for its effectiveness. The fifth anniversary of the IBC is

celebrated this time around. The implementation of the IBC has been one of the most significant reforms in recent years and has significantly helped in improving the business environment.

The Insolvency Resolution Process for Corporate ("CIRP") may result in either approval of a resolution plan or an order for Liquidation. It may also be closed prematurely by the mutual settlement between debtors and creditors or withdrawal of the application by the initiator. This article aims to analyse the economic scorecard of the five (5) years of IBC.

Withdrawal of cases before admission

The life cycle of a distressed asset is brief. If the distress is not handled in time, it will lead to detrimental value erosion of an investment with time. In order to safeguard such value degradation, the IBC has influenced Debtors' behaviour by posing a realistic threat of a change of ownership if the distress is not addressed. Thereby ensuring early detection and resolution of distressed by debtors in the early stages. To avoid the severe repercussion from the resolution process as enshrined under the IBC, proactive steps are taken to resolve the default by the Debtor when the same is impending. The majority of the Debtors have been able to salvage their business either before filing an application or after filing the application but before its admission or even after admission of the application.

As of July 2021, 17836 applications aggregating to a default amount of INR 5.5 lakh crores had been withdrawn before admission under the terms of the IBC. This number increased to 18,629 applications, and the amount for default amounted to INR. 5.90 lakh crores by September 2021.

Some of the Corporate Debtor(s) "CD(s)" failed to address the distress or were unable to adopt an appropriate resolution framework to address the stress made through the entire resolution process. However, because the CD's worth had been significantly damaged at this point, only a few were salvaged, while the majority have had to face Liquidation.

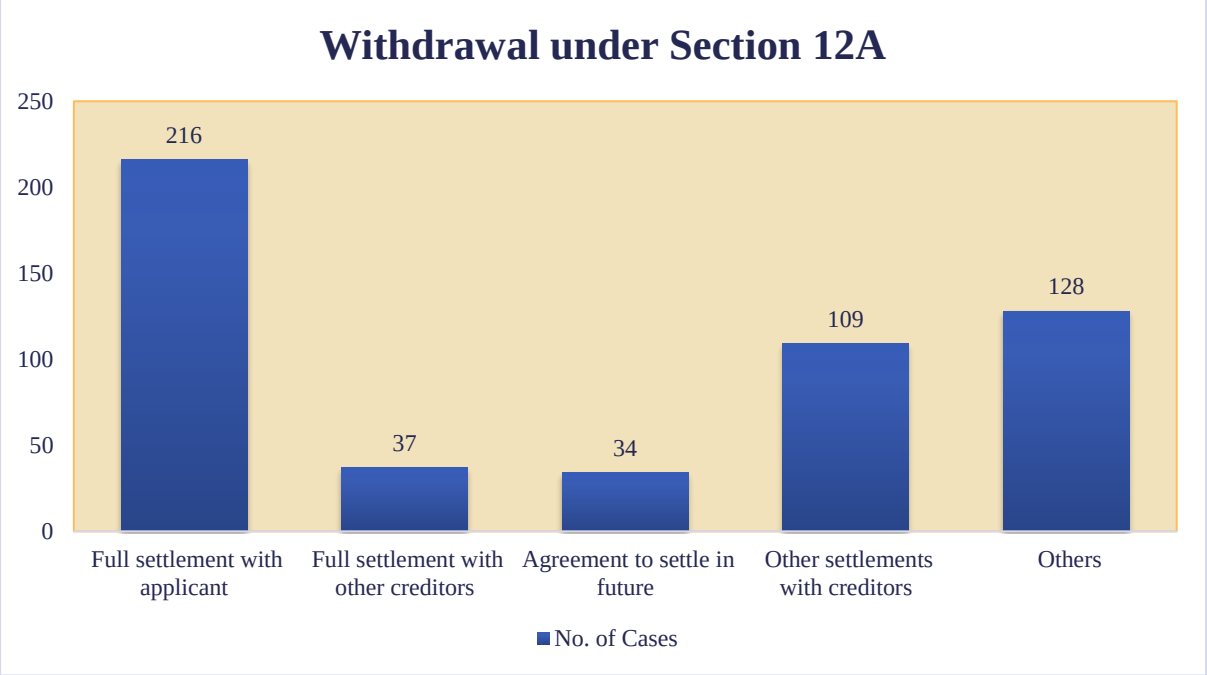
Recovery rate under IBC

The average recovery rate under IBC has been 45 percent (%), and this compares favorably with the U.S., where the recovery rate is 59 percent (%). Some analysts will say one or two substantial recoveries skew this 45 percent (%), and they will exclude that and say there have been only 25 percent (%) recoveries. In actuality, we want to stress that those outliers also arose because of IBC, so they cannot be excluded. One cannot cherry-pick the data and compute the average to say that it is only 25 percent (%). As soon as we exclude contingent

liabilities from the denominator, India's actual recovery rate from IBC might even go higher than 45 percent (%). However, the recovery rate is also expected to improve as around three-fourths of these cases are vintage ones, with the units being either sick or defunct. Judging the IBC according to recovery rates alone would mean confusing the symptoms with the problem. A more practical approach would be to examine the efficiency of the inputs than that of the output of the regulation.

Withdrawal under Section 12 A

Approximately 12 percent (%) of the admitted cases have been withdrawn under Section 12A, indicating an acceptable resolution proposed by the Debtor, amicably agreed upon by the Parties. The reason for withdrawal and distribution of claims in CIRPs have been highlighted in the table below:



Graph 1: Reasons for Withdrawal under Section 12A

From the above graph, it can be inferred that the deterrent of losing the CD's ownership has compelled the Debtors to settle in full in the majority of instances, followed by partial settlements with Creditors. It has also been observed that in a few cases, to safeguard the overall interest of the CD and minimize the value degradation, the Creditors have also opted to settle the debt with other Creditors. Furthermore, as can be observed, the agreement to pay off its debt in the future has been the least preferred mode of resolution by the Creditors.

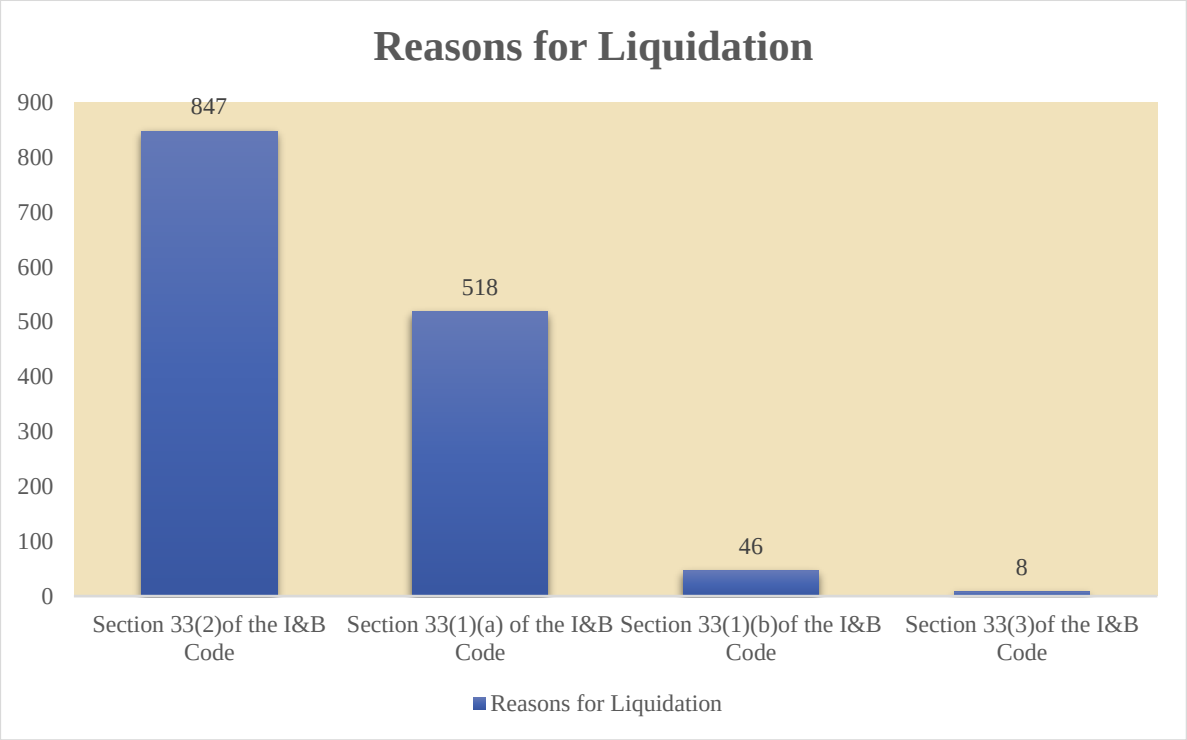
Funds recovered by corporates under the resolution process

The primary objective of the IBC is attempting to rescue a CD in distress. The IBC has rescued 421 CDs till September 2021 through resolution plans, one-third of which were in deep distress. However, 1419 CDs have been referred for Liquidation. It is worth noting that the CDs that have been rescued had assets valued at INR. 1.48 lakh crore, while the CDs referred for Liquidation had assets valued at INR 0.52 lakh crore when they were admitted to the CIRP. Thus, around 74% of distressed assets were rescued in value terms. Of the CDs sent for Liquidation, three-fourth were either sick or defunct and of the firms rescued, one-third were either sick or defunct.

The realizable value of the assets available with the 421 CDs rescued when they entered the CIRP was only INR. 1.48 lakh crore, though they owed INR. 7.94 lakh crore to Creditors, i.e., they had a shortfall of about 81.36 percentage (%). The resolution plans realized about INR. 2.55 lakh crore, which is around 172 percentage (%) of the liquidation value of these CDs. Any other recovery option or Liquidation would have recovered at best 100 percentage (%), including the cost of recovery/liquidation, while the Creditors recovered 172 percentage (%) under the IBC. The excess recovery of 72 percentage (%) is a bonus from the IBC. Though recovery is incidental under the IBC, the Financial Creditors recovered 34.24 percentage (%) of their Claims, which only reflects the extent of value erosion when the CDs entered CIRP. Yet, it is the highest among all options available to Creditors for recovery. Resolution plans, on average, are yielding 84 percentage (%) of the fair value of the CDs. These realizations are exclusive of realizations that would arise from the value of equity holdings post-resolution, resolution of personal guarantors to those CDs, and from the disposal of applications for avoidance transactions.

Cases referred for Liquidation

The IBC provides for reorganization in two ways, first by a resolution plan, failing by Liquidation. The market makes a choice, and the law is only an enabler. Liquidation, per se, is not all bad. It is through Liquidation that the resources sunk in the failed firms are released for more efficient uses in the economy.



Graph 2: Reasons for Liquidation

The 1419 CIRP cases that have ended into Liquidation have claims amounting to INR. 7.38 lakh crore. However, they had assets on the ground, valued only at INR. 0.52 lakh crore. Until September 2021, the final reports have been submitted only in 264 cases, and out of them, 164 cases have been dissolved. Many of these CDs did not have any assets when they entered the process under the IBC. However, some of the CDs were sold as a going concern despite such stringent circumstances. The total amount of their claim amounted to INR. 432.16 crores. The amount realized by selling as a going concern was 336.76 crores instead of the liquidation value of INR. 290.03 crores.

Furthermore, of the total 164 CDs that have ended with the order of dissolution till September 2021, with the total admitted claim amounting to INR 29,573.49 Crore, of which the total liquidation value was INR 1443.93 Crore, the total realized value was INR. 1338.35 crore, which was approximately 92 percentage (%) of the Liquidation Value, of which about INR. 12565.45 Crore was distributed to stakeholders, with the time taken to complete the liquidation process being about 436 days on average.

Conclusion

It can, however, be said that the performance of the IBC cannot and should not be manifested only from the actual empirical data. The authentic influence of the IBC is hidden and can be understood from the change in behaviour of the firm and its stakeholders, especially when it comes to credit discipline, exercising influence in order to prevent bankruptcy, and strengthening the creditors-debtors relationship in the bargaining process. One of the

manifestations of the impact is the improvement in the ranking of India in terms of the ease of doing, as can be captured by the World Bank. This change in the Debtor's behaviour can also be analysed from the RBI Reports on Trends, which

records a decline of about INR. 36,671 crores of Gross NPAs as well as decline of about INR 65537 Crore in Net NPAs in the Financial Year 2019-2020 from the preceding Financial Year Although the recovery rate may be modest at this point, but it is substantially greater in the early stages of distress, thanks in large part to the IBC. The implementation of IBC has dealt with severe cases in the last few years and is expected to revive the financial crisis by solving many more issues of stressed assets in the coming years.

PROCEEDINGS AGAINST THE SUSPENDED DIRECTORS AND MANAGEMENT OF CORPORATE DEBTOR

DR. M. GOVINDARAJAN,
PCS & Insolvency Professional

The Insolvency and Bankruptcy Code, 2016 enables the revival of corporate debtors by means of corporate insolvency resolution process. Once the application is admitted the Directors of the corporate debtor are suspended and they are obliged to hand over all the affairs of the corporate debtor to the Interim Resolution Professional. If the suspended directors do not comply with the same the Interim Resolution Professional may approach the Adjudicating Authority for its directions. In many a case the Adjudicating Authority directed the suspended directors to comply with their orders. Even the help of police officials were provided to the Interim Resolution Professional. Even the Adjudicating Authority may direct to take criminal action against the suspended directors.

Corporate Insolvency Resolution Process

The Insolvency and Bankruptcy Code, 2016 ('Code') provides for the initiation of corporate insolvency resolution process against a corporate debtor. If the application filed before the Adjudicating Authority under Section 7 of section 9 or section 10 is correct the Adjudicating Authority may admit the application and the corporate insolvency resolution process commenced on the date of admission of the application.

Moratorium

The Adjudicating Authority after admission of the application under section 7 or section 9 or section 10, shall, by an order-

- declare a moratorium;
- cause a public announcement of the initiation of corporate insolvency resolution process and call for the submission of claims; and
- appoint an interim resolution professional.

Suspended directors

Section 17 of the Code provides that from the date of appointment of the interim resolution professional-

- the management of the affairs of the corporate debtor shall vest in the interim resolution professional;

- the powers of the board of directors or the partners of the corporate debtor, as the case may be, shall stand suspended and be exercised by the interim resolution professional;
- the officers and managers of the corporate debtor shall report to the interim resolution professional and provide access to such documents and records of the corporate debtor as may be required by the interim resolution professional;
- the financial institutions maintaining accounts of the corporate debtor shall act on the instructions of the interim resolution professional in relation to such accounts and furnish all information relating to the corporate debtor available with them to the interim resolution professional.

Obligations

Section 19 of the Code provides that the personnel of the corporate debtor, its promoters or any other person associated with the management of the corporate debtor shall extend all assistance and cooperation to the interim resolution professional as may be required by him in managing the affairs of the corporate debtor. If such persons do not assist or cooperate, the interim resolution professional may make an application to the Adjudicating Authority for necessary directions. The Adjudicating Authority, on receiving an application shall by an order, direct such personnel or other person to comply with the instructions of the resolution professional and to cooperate with him in collection of information and management of the corporate debtor. This provision is also applicable to suspended directors.

Since the entire management of the corporate debtor is vested with the interim resolution professional the suspended directors ought to handover all the documents, information, assets etc. to the interim resolution professional without fail for the smooth running of the corporate insolvency resolution process.

In the beginning of this Code many of the corporate debtors did not co-operate with the interim resolution professionals and gave torture to them. The Adjudicating Authority gave a helping hand to the insolvency professionals holding that they are the officers of the Adjudicating Authority. The interim resolution professional is to comply with the orders of the Adjudicating Authority now and then. After that only the scenario has been changed.

Directions of Adjudicating Authority

Even now cases are there before Adjudicating Authority on non co-operation of suspended directors of the corporate debtor. In such cases the Adjudicating Authority directed the suspended directors to comply with the order of Adjudicating Authority by handing over the documents, information, assets etc. In some cases the police authorities are directed in

handing over all the things to the interim resolution professional by the suspended directors of the corporate debtor.

In **'Noble Co-operative Bank Limited v. Jarvis Infratech Private Limited' – 2022 (1) TMI 15 – NCLT, New Delhi**, the Adjudicating Authority directed the interim resolution professional to file a criminal case against the suspended directors for their non-co-operation in handing over the assets of the corporate debtor.

In this case corporate insolvency resolution process was initiated against the corporate debtor. The application was admitted by the Adjudicating Authority and the appellant was appointed as Interim Resolution Professional. The appellant requested the suspended directors to make over the assets etc. of the corporate debtor to him. But the same was not done despite many requests. Therefore, the applicant filed an application before the Adjudicating Authority with the following prayers-

- to direct the suspended directors and management under Respondent No. 2 & 3 of the Corporate Debtor to handover the complete books of accounts and other financial records and information to Resolution Professional.
- direct the suspended directors and management under Respondent No. 2 & 3 of the Corporate Debtor to handover all the Fixed Assets which belong to the Corporate Debtor to Resolution Professional
- direct the suspended directors and management under Respondent No. 2 & 3 of the Corporate Debtor to provide clarification and explanation as to the financial transactions which have been reported in Provisional Transaction Audit Report
- direct the suspended directors and management under Respondent No. 2 & 3 of the Corporate Debtor to extend full assistance and cooperation in complete harmony and peace to the Resolution Professional as is provided by Section 17, 18 and 19 and any other provision of the Code,
- Any other order as this Hon'ble Tribunal deems fit.

The applicant submitted before the Adjudicating Authority that the applicant sought the information and documents from the respondents, but till today, the respondents have neither handed over the documents, nor furnished the information.

The respondent No. 1submitted the following before the Adjudicating Authority-

- Respondent was medically unfit and was in the high risk category for contracting COVID Virus, which severely hampered the ability of the answering respondent to assist the applicant.
- The alleged non-cooperation is not at all intentional or willful, which is evident from the sequence of events elaborated above. In fact, the applicant is also to be blamed for the alleged non-cooperation as he refused to meet the answering respondent anywhere but Noida, for the reasons best known to him.
- The various lockdowns in the National Capital Region due to the COVID-19 Pandemic severely impacted the movement of the people including the answering respondent and the applicant himself. In fact, the applicant has himself sought extension of time periods for the resolution of the Corporate Debtor on account of the COVID-19 Pandemic.
- This respondent was only responsible for marketing and sales and the respondent no. 2 Tarun Kemani was the head of the accounts and all the records and books of accounts were maintained by him.
- The Adjudicating Authority may pass directions *qua* the handover of books and accounts to respondent no. 2 Tarun Kemani and not this respondent.
- To the best of the knowledge of this respondent, all the books of the accounts, tally data, bank statements, account statements have been handed over by the respondent no. 2 Tarun Kemani to the applicant. If the applicant required further documents, the same may be sought from the respondent no. 2 Tarun Kemani.
- In regard to the handover of fixed assets of the corporate debtor to the applicant, the following facts are of relevance, which would show that the applicant is responsible for the loss of all the fixed assets of the corporate debtor-
    - The applicant is the only person to blame for the loss of fixed assets and the documents pertaining to the operation of the corporate debtor.
    - The applicant is to pay the rent of the office of the corporate debtor maintained at Nehru Place in order to continue at the premises and keep and maintain the documents and fixed assets of the corporate debtor but the applicant refused to pay the rent at the office of the corporate debtor. Therefore, the landlord of the corporate debtor insisted for vacation of the premises.
    - This respondent informed the applicant of the locking of the premises by the landlord vide email dated 04.09.2020.
    - In view of the above and upon instructions of the applicant, this respondent took the pains of taking all the documents and fixed assets of the corporate debtor to the office of Pantel Technologies Private Limited in Noida.
    - The applicant purposely did not take the handover of documents despite inspecting the same, only with the motive to save rent of any premises, which would have been required had he taken handover of the assets and documents.

The Adjudicating Authority observed that the respondent Nos. 1 and 2 are the suspended directors of the corporate debtor. Both the respondents were managing the affairs of the company before the corporate insolvency resolution process was initiated. The first respondent showed his inability due to COVID 19 to produce the documents etc. and shirked his responsibility to the respondent No.2. The first respondent cannot be escaped from the liability. Since both the respondents were in charge of the affairs of the company both are liable to produce the documents and furnish the required information to the Resolution Professional. Both of them failed to furnish the same. The Adjudicating Authority directed the Resolution Professional to initiate a criminal against both the respondents under section 70 of the Code along with the other sections of law.

A FRESH PERSPECTIVE ON MEDIATION

Mr. Sanjeev Ahuja
Founder – Missing Bridge

Well, we hear a lot about Mediation now a days. This is primarily for reasons emanating from the business environment which are in a way forcing the Government to do something real and fast in this space. Mediation has been known to be a collaborative way of resolving disputes. It can be the most flexible and creative tool in terms of finding solutions suiting either side, ideally with the aid of a neutral facilitator and it is touted to be a cheaper mode of ADR.

Sense of Urgency in imbibing Mediation

The reasons which likely are putting the added pressure on the government and judiciary now a days in imbibing mediation are two-fold.

- One, Singapore Convention on Mediation (2019) is inviting lot of attention from world over and countries are actively exploring its ratification, Georgia being the 9th one in the list. India may not want to be late (as we missed the bus earlier wanting to be the hub for the International Arbitration and regret it till date) and in any case would need a law of its own before the convention can be ratified, having been a signatory to the said convention already.
- Second pressing need, which we keep hearing all through by almost everyone linked or connected to the Judicial system is the huge backlog we have in respect of pendency of cases in the courts. Well, ask me and I would have always wanted this not to be the reason for the required and desired push to Mediation but then, since we need both push and pull, let this reason be one for the push. The inherent benefits of Mediation are so many and such that, if they are properly explained and understood, the Courts would in any case become the last option/resort (as also wished by our CJI recently in his remarks while the opening of an (ADR) Alternate Dispute Resolution platform).

What is Mediation and What it does

- For once, let us define and understand Mediation. "*Mediation, is a collaborative (and non-adversarial) mechanism for dispute resolution, a mechanism which can boast of true party autonomy, flexibility, exploring potentially creative solutions (through out of the box thinking), incorporating a give and take on either side, in an often non-formal set up, to achieve an amicable settlement to the liking of either side, and continues to be voluntary and confidential through the entire process (suitably aided by a neutral/third party called Mediator)*"

- It surely requires both a pull and a push from various corners so that it can be adopted as a default tool by everyone in case of disputes. This is a process which ensures that one need not lose to make the other win and of course remains the only mechanism which can save and preserve your existing (all kinds of) relationships. It also does away with the often criticised 'winner takes all' approach normally seen in case of awards/judgements. This in turn has the tendency to reduce the need to enforce the settlement as the same is achieved through an open and a voluntary dialogue amongst the parties. The expectation, hence, is the reduced requirement for courts to intervene when parties have resolved amongst themselves. After all, it is heard at times that Mediation is more about 'solutions' and less about 'justice' and I would give it a big thumbs up.

- **Catalysing a Culture of Mediation**

  The challenge at times though, remains the frequent use of the term ADR but limiting its usage to Arbitration. High time we all understand the ADR in its true sense, as the term includes many/other alternative tool(**s**) to resolve disputes. For many, this abbreviation continues to be a synonym to Arbitration and Arbitration alone and that is, sad. The other tools include Mediation, Conciliation, Negotiation, etc and significant aspect being that all these other tools essentially are the 'collaborative ways' versus the 'adversarial tool' of Arbitration. Hence as mentioned, the awareness, explanation and understanding of the most suitable **ADR** tool (or shall we say, the most **A**ppropriate tool for **D**ispute **R**esolution), **Mediation**, is somewhat missing and a lot needs to be done in this direction. The backlog of cases would/could be just that additional reason for the push.

Apprehensions about Mediation

Some apprehensions, some doubts about the legitimacy of the process, enforcement of settlements, legality, etc in the arena of Mediation had to be addressed and the current Bill on Mediation out for discussion is/was supposed to that. Would this be achieved by the current structure and design of the draft bill out there? What we surely need is to grab this opportunity of picking up the crown of the "**Hub of Mediation**' and avoid history repeating itself. Surely, we also don't want to be losing out to our friendly neighbour in this race.

The way Forward

The need of the hour is a balanced pull and push of this amazing process of Mediation, so that everyone can adopt Mediation as a default tool to resolve their disputes for all the benefits

highlighted earlier and by thereby reducing the intervention of the courts to the bare minimum. We need to see this process from a completely new/fresh prism to avoid any baggage influencing the drafting or interpretation of this piece of legislation. *Mediation requires a change in the very mindset and requires the acceptance that we always would have disputes, but we would also have a mechanism to resolve them amongst ourselves*. High time we ensure that the basic traits and pre-requisites of policy making are put to proper use and we can see through, pre-empt, and visualize what would fly and what might create confusion. We would need to avoid (eventual) frequent tweaks and amendments, leading to unfortunate situation of one step forward and two backwards.

CASE LAWS

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

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

- **Dilip L Narang v. Jitendra Kantilal Shah [2020] 120 taxmann.com 21 (NCL-AT)**

Where no final settlement had been reached between parties, application for initiation of corporate insolvency resolution process against corporate debtor was rightly admitted.

The financial creditor had filed an application under section 7 for initiation of corporate insolvency resolution process against the corporate debtor. NCLT by impugned order admitted said application. The appellant-shareholder submitted that one opportunity should be given for settlement with the corporate debtor.

Held that since no final settlement had been reached between the parties, no relief was to be granted to the appellant and appeal was to be dismissed.

Case Review : Jitendra Kantilal Shah v. Sutlej Housing (P.) Ltd. [2020] 120 taxmann.com 20 (NCLT - Mum.), affirmed.

SECTION 61 - CORPORATE PERSON'S ADJUDICATING AUTHORITIES - APPEALS AND APPELLATE AUTHORITY

- **Pulikkodan Joseph Antony v. Union of India [2020] 120 taxmann.com 27 (Kerala)**

Where pursuant to order of NCLT, Registrar of Companies had issued order requiring company of which petitioner was director to furnish copies of certain documents for purpose of investigation proposed under section 210 and petitioner-director preferred appeal before NCLAT against order of NCLT, writ petition filed to quash order of Registrar of Companies was disposed of permitting petitioner to pursue all his contentions before NCLAT.

Pursuant to order of NCLT, the Registrar of Companies issued order requiring the respondent-company to furnish copies of certain documents for purpose of investigation proposed under section 210. The petitioner, who was director of the respondent-company, preferred an appeal before NCLAT which was admitted and listed, however, on account of Covid situation, the Appellate Tribunal was not holding sittings. The petitioner filed writ petition seeking quashing of order issued by the Registrar of Companies.

Held that since the petitioner had filed appeal before the NCLAT against orders of NCLT and a stay petition also had been filed, the High Court need not adjudicate any issue on merits and, therefore, writ petition was disposed of permitting petitioner to pursue all his contentions before NCLAT.

SECTION 215 - INFORMATION UTILITIES - FINANCIAL INFORMATION - PROCEDURE FOR SUBMISSION, ETC., OF

- **Univalue Projects (P.) Ltd. v. Union of India [2020] 120 taxmann.com 127 (Calcutta)**

Section 215 is not mandatory in nature; financial creditors can rely on either of modes of evidences at hand to showcase a financial debt, that is, either a record of default from Information Utility (IU) or any other document as specified which proves existence of a financial debt.

The registrar of National Company Law Tribunal at its Principal Bench in New Delhi had passed impugned order dated 12-5-2020, that prima facie, appeared to have been issued with the approval of the Acting President of the NCLT, New Delhi. The order dated 12-5-2020 imposed a mandatory prescription on all financial creditors, as defined under the extant provisions of the Insolvency and Bankruptcy Code, 2016 to submit certain financial information as a record of default before the Information Utility ('IU') as a condition precedent for filing any new application under section 7. The order further transcended to impose this purported mandatory prescription retrospectively on all those applicants/financial creditors who had pre-existing applications filed under section 7 and pending before various benches of the NCLT, prior to such final hearing of these applications. Petitions had been filed by the petitioners filed writ petition challenging impugned order dated 12-5-2020. The petitioner stated that by virtue of being a financial creditor who had such a pre-existing application filed under section 7 of the I&B Code, 2016 pending before the NCLT at its Kolkata Bench, the impugned order had the effect of adversely altering its substantive rights as granted to a creditor under the provisions of the I&B Code, 2016.

Held that financial creditors can rely on either of modes of evidences at hand to showcase a financial debt, that is, either a record of default from Information Utility (IU) or any other document as specified which proves existence of a financial debt. It is not mandatory for financial creditors to submit financial information to IU, therefore, section 215 is not mandatory in nature.

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

- **Atin Arora v. Oriental Bank of Commerce [2020] 120 taxmann.com 178 /[2020] 162 SCL 386 (Calcutta)**

Adjudicating Authority in a case covering matters with regard to Insolvency, Bankruptcy and Resolution Process would be National Company Law Tribunal within whose jurisdiction registered office of corporate debtor was situated.

NCLT, Kolkata Bench admitted an application filed by Bank being financial creditor under section 7 and directed initiation of corporate insolvency resolution process (CIRP) against the corporate debtor. The petitioner filed an application praying for recalling of said order and also for setting aside CIRP application filed by the financial creditor alleging that the financial creditor had suppressed before the Tribunal that registered office of the corporate debtor had already been shifted from Kolkata to Odisha, which was already in knowledge of the financial creditor. The petitioner alleged that by suppressing change of address of registered office of the corporate debtor from Kolkata to Odisha and mentioning registered office address of Kolkata, impugned order was obtained by fraud and mis-representation and jurisdiction of Tribunal, Kolkata was invoked illegally. It was further stated that NCLT, Cuttack Bench had territorial jurisdiction to entertain all matters relating to Insolvency Resolution and Liquidation of the corporate persons, whose registered offices were within State of Odisha.

Held that the Adjudicating Authority in a case covering matters with regard to Insolvency, Bankruptcy and Resolution Process as mandated by section 60 would be National Company Law Tribunal, within whose jurisdiction registered office of the corporate debtor was situated. Therefore, order passed by NCLT, Kolkata Bench was to be set aside and quashed and NCLT, Kolkata Bench was to be directed to transfer proceedings to NCLT, Cuttack Bench.

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

- **Girish Baduni v. Punjab National Bank [2020] 120 taxmann.com 195 /[2021] 163 SCL 136 (NCL-AT)**

Where corporate debtor and suspended directors were served by IRP on e-mail given on MCA portal as well as on personal e-mail ID of suspended directors, argument of appellant, ex-director of corporate debtor, that he was unaware about commencement of Corporate Insolvency Resolution Process of corporate debtor was not credible and had no force.

The corporate debtor availed various credit facilities from the financial creditor/respondent but the corporate debtor did not maintain financial discipline and, therefore, account of the corporate debtor was classified as NPA. On failure of the corporate debtor to pay outstanding amount, the financial creditor filed petition under section 7 and same was admitted by NCLT vide impugned order. The appellant who was ex-director of the corporate debtor filed an appeal against the impugned order. It was found that the corporate debtor was duly served with notice, but did not appear before NCLT and also deliberately filed appeal before the Appellate Tribunal after a delay of 110 days to delay process of insolvency of the corporate debtor.

Held that since the corporate debtor and suspended directors were served by IRP on e-mail given on MCA portal as well as on personal e-mail ID of suspended directors, argument of the appellant that he was unaware about commencement of Corporate Insolvency Resolution Process of the corporate debtor was not credible and had no force. Therefore, appeal against impugned order was to be dismissed.

Case Review : Punjab National Bank v. Atlas Alloy (India) (P.) Ltd. [2019] 111 taxmann.com 419 (NCLT - Jaipur), affirmed.

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

- **Kind Special Steels (India) (P.) Ltd. v. Amtek Auto Ltd. [2020] 120 taxmann.com 196 (NCL-AT)**

Where fresh offers were to be invited in respect of CIRP of corporate debtor but entire CIRP was not directed to recommence de novo, appellant's application for revision of liquidation value payable to it was to be dismissed.

The appellant claiming to be an operational creditor of the corporate debtor filed application seeking a direction to Resolution Professional to revise and ascertain liquidation value payable to the appellant. The appellant had filed application under section 60(5) subsequent to approval of resolution plan. Appellant's case was that the Supreme Court had directed to invite fresh offers as approved Resolution Plan was non-implementable. NCLT rejected the appellant's contention as well as application. It was found that Supreme Court had opened a limited window only permitting/inviting of fresh offers and entire Corporate Insolvency Resolution Process was not directed to recommence de novo.

Held that on facts, the appellant's claim for revision of liquidation value was not maintainable and therefore, appeal was to be dismissed.

Case Review : Corporation Bank v. Amtek Auto Ltd. [2020] 119 taxmann.com 57 (NCLT - Chd.), affirmed.

SECTION 33 - CORPORATE LIQUIDATION PROCESS - INITIATION OF

- **Kridhan Infrastructure (P.) Ltd. v. Venkatesan Sankaranarayan [2020] 120 taxmann.com 197 (NCL-AT)**

Where resolution applicant failed to implement resolution plan, liquidation of corporate debtor was to be ordered and no opportunity to revive corporate debtor as per terms of resolution plan was to be provided to resolution applicant.

Corporate insolvency resolution process against the corporate debtor was initiated and Resolution Professional was appointed. Resolution plan of the appellant/resolution applicant was approved by the Adjudicating Authority. However, there had been inordinate delay in implementation of the resolution plan as the resolution applicant had miserably failed to infuse equity funds as per terms of the resolution plan and, therefore, COC members with majority of 99.28 per cent voting share passed a resolution for liquidation of the corporate debtor. NCLT ordered liquidation of the corporate debtor.

Held that since the resolution applicant had suffered a loss, financial position of the resolution applicant was not in a favourable circumstance to implement the resolution plan, and therefore, an opportunity to revive the corporate debtor as per terms of the resolution plan was not to be provided to the appellant(s)/resolution applicant to prevent an aberration of justice and also to better preserve 'economic value of assets'. The resolution applicant even after eight months of approval of resolution plan had not followed timelines for equity infusion and this was rightly observed by the Adjudicating Authority in impugned order and therefore, appeal filed by the resolution applicant was to be dismissed.

Case Review : Venkatesan Sankaranarayan v. Kridhan Infrastructure (P.) Ltd. [2020] 120 taxmann.com 97 (NCLT-New Delhi) (para 87) affirmed.

SECTION 33 OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016 - CORPORATE LIQUIDATION PROCESS - INITIATION OF

Even if section 33(5) bars institution of suits against corporate debtor, once a liquidation order had been passed, Adjudicating Authority could not have quashed suit filed against liquidator in Civil Court.

- **E.C. John v. Jitender Kumar Jain [2020] 120 taxmann.com 199 /[2021] 163 SCL 127 (NCL-AT)**

The corporate debtor company had gone into liquidation and a liquidator was appointed. The appellant claimed to be in possession of part of property of the corporate debtor on strength of a letter. Hence, it approached civil court seeking direction/decree for grant of prohibitory injunction restraining the liquidator from disturbing lawful possession. The liquidator moved application against the appellant and others claiming that Civil Court had no jurisdiction in view of provisions of sections 33(5), 60(5), 63(3) and 238 of the I&B Code, 2016. The Adjudicating Authority allowed said application, quashed Civil Suit and also directed the appellant not to disturb possession of the liquidator or to create obstruction.

Held that even if section 33(5) bars institution of suits against the corporate debtor, once a liquidation order had been passed, the Adjudicating Authority could not have quashed suit filed against the liquidator in Civil Court. However since the appellant did not show that he was in possession of property in question and an owner or tenant, the Adjudicating Authority rightly directed appellant not to disturb or obstruct possession of the liquidator with regard to property concerned.

Case Review : Roofit Industries Ltd., In re [2020] 120 taxmann.com 198 (NCLT - Mumbai), affirmed

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

- **Naresh Kumar Sharma v. Shekhar Resorts Ltd. [2020] 120 taxmann.com 201 /[2021] 163 SCL 316 (NCL-AT)**

Approval of Resolution Plan is a business decision taken by Committee of Creditors with requisite majority based on their commercial wisdom and same is non-justiciable.

Held that approval of Resolution Plan is a business decision taken by the Committee of Creditors with requisite majority based on their commercial wisdom and same is non-justiciable. Resolution Plan submitted by the Respondent No. 2 (Resolution Applicant) had been approved by the Committee of Creditors with 100 per cent voting share and all statutory and regulatory compliances had been made. The appellant, suspended Board of Directors of the corporate debtor, assailed said order on ground that the Resolution Plan of Respondent No. 2 offered Rs. 143 crores whereas actual value of properties of the corporate debtor was Rs. 490 crores. However, it was found that fair value of property ascertained at Rs. 157.12 crore and liquidation value being ascertained at Rs. 125.92 crore, respectively. The Respondent No. 2 offered Rs. 143.50 crore which in opinion of the Committee of Creditors was best plan providing for satisfaction of claims of all stakeholders and being viable and feasible. All aspects of matter had been taken into consideration by the Committee of Creditors based on their commercial wisdom. Further, the Code does not provide that value given by the Resolution Applicant should match fair value or liquidation value, therefore, appeal against impugned order of the Adjudicating Authority admitting resolution plan submitted by the Respondent No. 2 as approved by the Committee of Creditors was to be set aside.

Case Review : Vikram Kumar v. NCJ Infrastructure (P.) Ltd. [2020] 120 taxmann.com 200 (NCLT - New Delhi), affirmed.

SECTION 61 - CORPORATE INSOLVENCY RESOLUTION PROCESS - CORPORATE PERSONS ADJUDICATING AUTHORITIES - APPEALS AND APPELLATE AUTHORITY

- **Deepakk Kumar v. Phoenix ARC (P.) Ltd. [2020] 120 taxmann.com 204 (NCL-AT)**

Insolvency and Bankruptcy Code, 2016 does not contain any provision for review and an applicant cannot seek umbrage under section 420(2) of Companies Act, 2013 for filing review application on purported ground of rectifying any mistake apparent from record.

Held that power to review is not an inherent power and must arise out of a statute or by necessary implication. The power to review must not be confused with any court's Appellate Jurisdiction as there is no scope of a fresh hearing or arguments or correcting an erroneous view in case of a review application. The I&B Code does not contain any provision for review and an applicant cannot seek umbrage under section 420(2) of the Companies Act, 2013 for filing review application on purported ground of rectifying any mistake apparent from record. Under guise of review, Tribunal would not rehear parties both on facts and law. Where there are two views involved on a point, same is not a ground for review. Further, when there is no

mistake apparent from record, then an application for review by concerned applicant cannot be construed to be one under section 420 or under rule 11 of NCLAT Rules.

Case Review : Deepak Kumar v. Phoenix ARC (P.) Ltd. [2020] 120 taxmann.com 203 (NCLT - New Delhi), affirmed.

SECTION 238A - CORPORATE INSOLVENCY RESOLUTION PROCESS - LIMITATION PERIOD

- **Ishrat Ali v. Cosmos Co-operative Bank Ltd. [2020] 120 taxmann.com 288/[2020] 162 SCL 549 (NCL-AT)**

For purpose of computing period of limitation of application under section 7, date of default is date of declaration of account of corporate debtor as 'NPA'; a judgment or a decree passed by a Civil Court/Debt Recovery Tribunal for recovery of money cannot shift forward date of default for purpose of computing period for filing an application under section 7.

Held that for purpose of computing period of limitation of application under section 7, date of default is date of declaration of account of the corporate debtor as 'NPA'. A judgment or a decree passed by a Court for recovery of money by Civil Court/Debt Recovery Tribunal cannot shift forward date of default for purpose of computing period for filing an application under section 7. An action taken by the 'financial creditor' under section 13(2) or section 13(4) of the 'SARFAESI Act, 2002' cannot be termed to be a civil proceeding before a Court of first instance or appeal or revision before an Appellate Court and other forum and, therefore, action taken under section 13(2) of 'SARFAESI Act, 2002' cannot be counted for purpose of exclusion of period of limitation under section 14(2) of the Limitation Act, 1963.

Case Review : Cosmos Co-operative Bank Ltd. v. Micro Dynamics (P.) Ltd. [2020] 120 taxmann.com 287 (NCLT - Mum.), set aside.

SECTION 33 - CORPORATE LIQUIDATION PROCESS - INITIATION OF

- **GSEC Ltd. v. Fenil Bharatbhai Shah [2020] 120 taxmann.com 372 (NCL-AT)**

Where resolution applicants sought further time to be granted for consideration of their resolution plans as regards liquidation of corporate debtor, since prescribed period of CIRP expired even after extension was granted by adjudicating authority, resolution applicants could

not raise issue of exclusion of certain period when such opportunity was available at time of seeking of extension of CIRP period.

The Adjudicating Authority ordered liquidation of the corporate debtor. Appellants - Resolution Applicants, sought further time to be granted for consideration of their resolution plans. It was noted that CIRP period was already expired even after the Adjudicating Authority vide its order extended CIRP for a further period of '90 days' beyond prescribed period of '180 days'.

Held that since no exclusion of any period was sought while seeking extension of CIRP period, appellants could not be allowed to raise issue of exclusion of certain period at later stage when such opportunity was available at time of seeking of extension of CIRP period. However, appellants were at liberty to provide scheme/arrangement to takeover the corporate debtor by moving an application in terms of section 230(a) of the Companies Act, 2013.

Case Review : Chandan Prakash Jain v. Ardor Global (P.) Ltd. [2020] 116 taxmann.com 239 (NCLT - Ahd.) affirmed.

SECTION 5(6) - CORPORATE INSOLVENCY RESOLUTION PROCESS - DISPUTE

- **Lasa Engineers (P.) Ltd. v. Devas Engineering Systems (P.) Ltd. [2020] 120 taxmann.com 373 /[2020] 162 SCL 691 (NCL-AT)**

Where before issuance of demand notice under section 8(1) corporate debtor disputed claim of operational creditor, there was a pre-existence of dispute and therefore application for initiation of CIRP against corporate debtor was rightly dismissed by Adjudicating Authority.

The Appellant - operational creditor filed application under section 9 for initiation of CIRP against the corporate debtor.

Held that since before issuance of demand notice under section 8(1), the corporate debtor disputed claim and took plea that same was barred by limitation, there was a pre-existence of dispute, therefore application for initiation of CIRP against the corporate debtor was rightly dismissed by the Adjudicating Authority.

Case Review : Lasa Engineers (P.) Ltd. v. Devas Engineering Systems (P.) Ltd. [2019] 102 taxmann.com 319/152 SCL 172 (NCL - Chennai), affirmed.

SECTION 12A - CORPORATE INSOLVENCY RESOLUTION PROCESS - WITHDRAWAL OF APPLICATION

- **Ashok Kumar M. Lulla v. Suryaa Chamball Power Ltd. [2020] 120 taxmann.com 374 (NCL-AT)**

In view of settlement reached between parties, wherein corporate debtor paid its dues to operational creditor in terms of settlement, application filed under section 9 was to be disposed of as withdrawn.

The respondent - operational creditor received a purchase order for procurement and installation of weighbridge at premises of the corporate debtor. Application under section 9 was filed against the corporate debtor, who failed to pay dues. The Adjudicating Authority admitted application. Thereafter, there was a settlement between parties and corporate debtor paid its dues to operational creditor in terms of said settlement.

Held that since there was no other claim received by IRP against corporate debtor, therefore in exercise of inherent power conferred under Rule 11, application filed under section 9 was to be disposed of as withdrawn.

Case Review : Suryaa Chamball Power Ltd. v. Prakriti Power (P.) Ltd. [2019] 111 taxmann.com 38 (NCLT - Jp.), set aside.

SECTION 7 - CORPORATE INSOLVENCY RESOLUTION PROCESS - INITIATION BY FINANCIAL CREDITOR

- **G.R.K. Reddy v. Phoenix ARC (P.) Ltd. - [2020] 120 taxmann.com 375 (NCL-AT)**

Where corporate debtor failed to pay one time settlement amount as agreed between corporate debtor and financial creditor even after expiry of two years, CIRP petition filed under section 7 was rightly admitted by adjudicating authority.

The Central Bank of India sanctioned various term loans to the corporate debtor for its residential projects. The corporate debtor defaulted in servicing debt and loans were assigned to an asset reconstruction company. The corporate debtor defaulted in repaying loan amount and CIRP petition under section 7 was filed against the corporate debtor. One time settlement was arrived at between parties and case was adjourned. However, the corporate debtor even after two years failed to generate funds to clear debt, therefore CIRP petition was admitted.

Held that since the corporate debtor sought time to settle matter before the Adjudicating Authority but even after two years, it failed to do so, therefore no relief was to be granted to the corporate debtor. However, instant order was not to precluding the appellant to complete project within CIRP period or to settle matter with all allottees, financial creditors/operational creditors and might take advantage of section 12A.

Case Review : Phoenix ARC (P.) Ltd. v. New Chennai Township (P.) Ltd. [2019] 109 taxmann.com 249 (NCLT - Chennai) (SB), affirmed.

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