OCTOBER & NOVEMBER 2022

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 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 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 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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CHAIRMAN'S MESSAGE

It has been about six years that the Insolvency and Bankruptcy Code 2016 - a landmark Financial Sector Reform was introduced in India. It rendered many statutes obsolete, redundant and repealed. The Government and the Nation expected the Code to work well as envisaged and greater optimism that the Code would lead to the resolution of Insolvency cases within 180 days. The Code also provided for an onetime extension of up to 90 days to ensure resolution within 270 days for good and justifiable reasons. In as much as the Code was a new law to resolve the Insolvency, the Government had also anticipated that the need for judicial interventions may also be sought by some stake holders for varies reasons and that may also turn out to be a cause to derail the resolution time line of 180 days or 270 days. Hence an overall time frame of 330 days was fixed to accommodate such exigencies and judicial interventions. The experience of the past 6 years has witnessed that some cases are resolved within the stipulated time frame and thereby putting a seal of authenticity on the realistic foresight of the framers of the Code. On the other hand most of the resolution cases are found breaching the prescribed time lines. The average time taken in the complete Corporate Insolvency Resolution Process (CIRP) is more than 400 days. It is a serious cause of concern for the stake holders for the following reasons:

1. Prolonged proceedings consume higher amount of resources and thereby increasing the overall cost of the Resolution Process.

2. Every day's delay in resolving the Corporate Insolvency & Bankruptcy does result in the deterioration of the value of underlying assets and securities and thereby leading to reduced value realization with a higher haircut hurting the Creditors.

These two reasons alone are sound and good reasons for the Government and other stake holders to pool their brains together and evolve suitable strategies to overcome these hurdles and bring down the actual number of days taken for Corporate Insolvency Resolution Process. It would essentially call for cutting down the number of permissible days at every stage of the Resolution Process and make the Code more stringent with lesser scope for extensions and adjournments. Such a change would require the change in the mindset of all the stake-holders in the eco-system of the Insolvency Resolution in the Country. The default on the part of any stake-holder in meeting the prescribed time lines be dealt with sternly without any exception. To make such a proposition successful, the first pre-condition would be to strengthen the Adjudicating Authority - essentially by ensuring that their staff strength including the bench-strength is adequate to handle the given number of cases. Any breach of the prescribed time lines on the part of the stake holders may be made more rigorous and if need be should entail non-monetary and monetary implications for the violators. It has been often felt during journey

of IBC 2016, that apart from inadequacy of manpower, there is also greater scope and need to set up more Benches of NCLT to enable expeditious disposal of pending cases.

Apart from meeting the prescribed time lines, the huge amounts of haircuts need more serious attention of the Government. Although the main objective of the Code is to ensure the concept of a going concern, in larger societal interests, the need for a decent recovery of the dues of the creditors can not be undermined. It is basically the Financial Creditors who are the most crucial stake holders to determine the cases to be brought before the National Company Law Tribunal(NCLT) Or Debt Recovery Tribunals for resolution under the IBC 2016. The Law should also be conscious of this important fact that every per centage point of hair cut , is a loss of Public Money, which can be otherwise utilised through redeployment of money and recycle the same to scale up the standard of living in the country, while having the focus on perpetuity of the Corporate Enterprise for societal good. Continued oblivion to the lower recovery percentage of Corporate Dues for the Creditors may have serious implication for the over all health of the nation's financial system and thereby lead to a avoidable jeopardy.

The last six years have ensured a reasonable and balanced stabilization of the Code from the point of view of the judicial impediments in the Hon'ble Supreme Court, Insolvency and Bankruptcy Board of India, Ministry of Corporate Affairs, Government of India have made significant and timely contributions to streamline the entire process. The coming year could be the year to focus on enhancing the efficiency of the Code.

The reduction of the gaps between the Corporate Dues and ultimate recovery for the Creditors shall prove to be a big catalyst for the enhanced efficiency and success of the implementation of the IBC 2016 to be cheered by all. A reduction in the time taken for Corporate Insolvency Resolution Process, starting with the timely initiation of proceedings by the creditors themselves, would arrest the deterioration in the asset quality and it's realizable value and thus make the Resolution Process more attractive for the the stake holders.

It will also enhance the credibility of the process and may silence the critics who call the huge haircut as the legalization of the Corporate Loot. Registered Valuers and Resolution Professionals will have an important role in attaining the objectives of the Code.

We step into the seventh year of the experience in the journey to the IBC 2016 with a greater sense of optimism.

Best Wishes
Dr. Jai Deo Sharma,
Chairman, IPA ICAI

HEARTIEST CONGRATULATIONS TO NEWLY ELECTED PRESIDENT

OF

INSTITUTE OF COST ACCOUNATANTS OF INDIA

CMA VIJENDER SHARMA

2022-2023

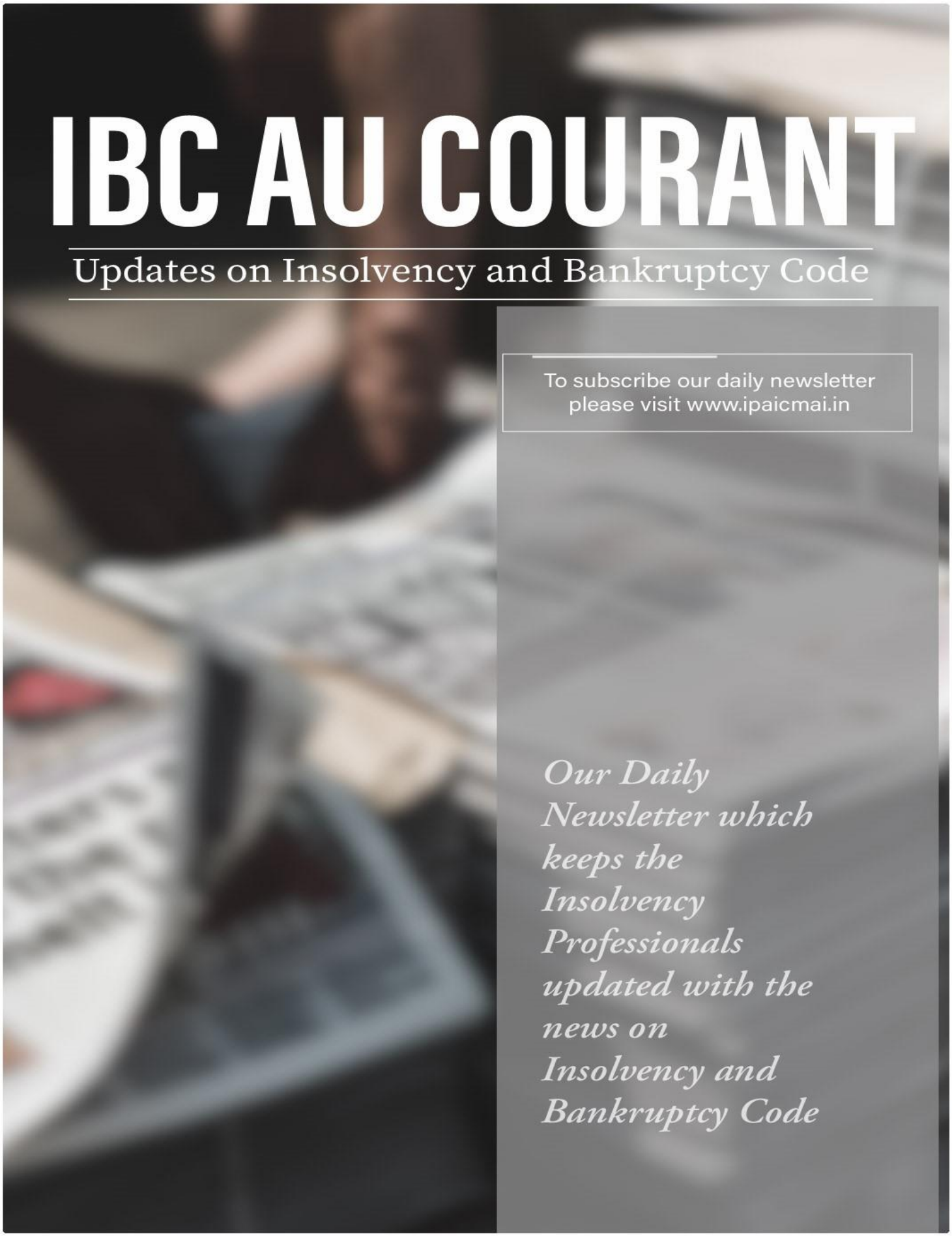
PROFESSIONAL DEVELOPMENT INITATIVES

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

EVENTS

October & November' 22

October 7, 2022	Master Class on Managing the affairs of Corporate Debtor by IRP/RP under IBC, 2016.
October 15, 2022	Learning Session on Implication of Recent Amendments in the Insolvency & Bankruptcy Code and Regulations.
October 19, 2022	Workshop on Judicial Pronouncements under IBC, 2016.
October 29, 2022	Workshop on Treatment of Contingent Liabilities under IBC, 2016.
November 1, 2022	Discussion on Insolvency Law and Practice: International Perspective
November 2, 2022	Executive Development Program (Series 3) - Chief Features of Liquidation
November 13, 2022	Workshop on Management of CD as Going Concern under CIRP & Liquidation
November 18, 2022	Refresher Course on Insolvency and Bankruptcy Code, 2016
November 25, 2022	Workshop on Not Readily Realizable Assets



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

CHANGING LANDSCAPES OF INSOLVENCY PROFESSIONAL ("IP")

ANIL BHATTAR
CA, CS and Insolvency Professional

Before the evolution of Insolvency and Bankruptcy Code, 2016 ("IBC") in May, 2016, the corporate insolvency was very difficult and cumbersome due to multiple legislations governing the same. IBC is an umbrella legislation for the development of insolvency laws in India with an underlying assurance of time-bound and efficient mechanisms for revival of distressed entities.

As per the Code, an insolvency professional ("IP") means an eligible person:

a) Enrolled with an insolvency professional agency ("IPA") as its member, and
b) Registered with Insolvency and Bankruptcy Board of India ("IBBI/the Board") as an insolvency professional ("IP").

The Corporate Insolvency Resolution Process ("CIRP") requires primarily the financial and operational creditors' approval hence, the process is a creditor controlled model but managed by the Insolvency Professional in a manner to maximise the value to all stakeholders under the given circumstances.

Therefore, the Insolvency Professional plays an vital role in the CIRP as he is the one who is empowered and has been given an undisputed fiduciary responsibility under the IBC to manage, protect, preserve and maximise the value of the Corporate Debtor as a ***"going concern"*** under clause 20 of IBC, 2016, while functioning as Interim Resolution Professional ("IRP) and Resolution Professional ("RP"). The creditor or group of creditors appoints the Insolvency Professional to function as IRP and RP at a mutually agreed professional fee for the entire length of his untiring services.

The Insolvency and Bankruptcy Board of India ("IBBI") has been making serious efforts to ensure streamlining of the overall processes and make it more transparent and robust. In this attempt, there have been various amendments to make the IBC more efficient and effective and are relevant for the professionals engaged in rendering insolvency professional services.

Out of many, two recent amendments are majorly aimed to strengthen the Insolvency Professional(s) and thus, will have far reaching impact on the insolvency process in terms of the manner, format and remuneration going forward. These amendments are of utmost importance in shaping the insolvency professionals and their services aligning with the global formats while achieving the objectives of IBC in a better way.

Corporatisation of Insolvency Professional

One is about the long pending pressing need to reckon Insolvency Professional Entity ("IPE") to provide resolution professional services. This is in line with other professional services such as chartered accountants, company secretaries, legal services etc which are being rendered under the firm's name and partners (being individual) acting on behalf of the firm.

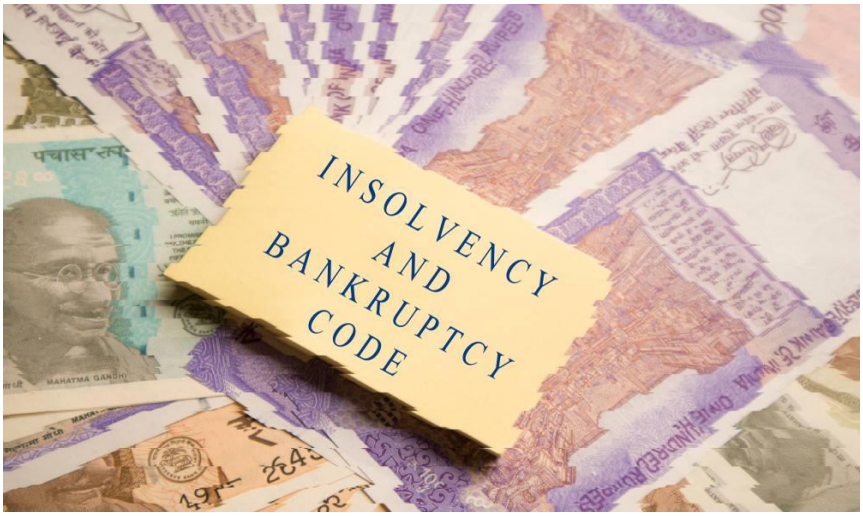
With effect from 28th September, 2022 – the definition of Professional Member as defined under 2(1)(g) of Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 has been amended to "an individual ***or an insolvency professional entity recognised by the Board under regulation 13***" and has been enrolled as a member of an insolvency professional agency.

An Insolvency Professional Entity ("IPE") is now eligible for registration as an insolvency professional under regulation 4(2) by making an application to the Board in Form AA of Second Schedule along with a non-refundable application fee of INR 2 (Two) lakh.

This means going forward, the IPE can be appointed as IRP and/or RP by registering themselves as Insolvency Professional. This is a welcome amendment as it will provide corporatisation of insolvency professional services which at present was being provided as an Individual and will bring lots of benefits in terms of:

- Hassle free registration and empanelment requirement at the entity level
- Pooling technical and managerial skills under one roof
- Efficient mechanism to address the need of capital investment
- Enabling platform to create desired infrastructure to support the process
- Streamlining compliance and tax structure
- Continuous up-gradation of professional expertise handling multiple CIRP

Remuneration of Insolvency Professional



The other important aspect of insolvency professional services is the absence of minimum threshold or benchmark of professional fee payable in any form for undertaking corporate insolvency resolution process ("CIRP"). It has been very hard to accept the responsibility of IRP/RP without commensurate fee structure in place and to negotiate for a minimum fee to make up for this time and efforts. One of the recent amendments is about the framework of overall professional fee payable to insolvency professional comprising fixed and variable fee with a minimum fee level. IBBI vide Insolvency and Bankruptcy Board of India (Insolvency

Resolution Process for Corporate Persons) Regulations, 2016 w.e.f. 13th September, 2022 inserts a new clause i.e. 34B in relation to the minimum remuneration is reproduced as under:

Fee to be paid to IRP and RP

1. The fee of interim resolution professional or resolution professional, under regulation 33 and 34, shall be decided by the applicant or committee in accordance with this regulation.

2. The fee of the interim resolution professional or the resolution professional, ***appointed on or after 1st October 2022,*** shall not be less than the fee specified in clause 1 for the period specified in clause 2 of Schedule-II:

   Provided that the applicant or the committee may decide to fix higher amount of fee for the reasons to be recorded, taking into consideration market factors such as size and scale of business operations of corporate debtor, business sector in which corporate debtor operates, level of operating economic activity of corporate debtor and complexity related to process.

3. After the expiry of the period mentioned in clause 2 of Schedule-II, the fee of the interim resolution professional or resolution professional shall be as decided by the applicant or committee, as the case may be.

4. For the resolution plan approved by the committee on or after 1st October 2022, the committee may decide, in its discretion, to pay performance-linked incentive fee, ***not exceeding five crore rupees,*** in accordance with clause 3 and clause 4 of Schedule-II or may extend any other performance-linked incentive structure as it deems necessary.

5. The fee under this regulation may be paid from the funds, available with the corporate debtor, contributed by the applicant or members of the committee and/or raised by way of interim finance and shall be included in the insolvency resolution process cost.

Minimum Fixed Fee

The minimum fixed fee as per the table – 1 below shall be paid to the IRP/RP as the case may be and for the period mentioned in the clause 2 of the aforesaid regulation:

Quantum of claims admitted	Minimum Fee PM
Less than or equal to INR 50 Cr	INR 1 Lakh
More than INR 50 Cr but less than or equal to INR 500 Cr	INR 2 Lakh
More than INR 500 Cr but less than or equal to INR 2,500 Cr	INR 3 Lakh
More than INR 2,500 Cr but less than or equal to INR 10,000 Cr	INR 4 Lakh
More than INR 10,000 Cr	INR 5 Lakh

Please note that it is minimum fee and not the maximum hence the minimum fee basis the quantum of claims admitted cannot be less than above threshold level of fee as per IBC. Besides, with this amendment the IBBI has also introduced performance-linked incentive fee for the timely resolution and value maximisation.

Performance-linked incentive fee for timely resolution (not exceeding INR 5 Cr)

Time period from commencement date	Fee as % of Realisable Value
Less than or equal to 165 days	1.00%
More than 165 days but less than or equal to 270 days	0.75%
More than 165 days but less than or equal to 330 days	0.50%
More than 330 days	0.00%

Performance-linked incentive fee for value maximisation

The performance-linked incentive fee for valuation maximisation may be paid to the resolution professional at the rate of 1% of the amount by which the realisable value is higher than the liquidation value, after the approval of the resolution plan.

Please note that for the purpose of above, "realisable value" will mean the amount payable to creditors in the resolution plan approved under section 31.

The above has been explained in the amendment through an illustration for better understanding the performance-linked incentive structure in both the scenario on aggregate basis as follows:

Illustration:

A corporate debtor having liquidation value of twenty crore rupees was resolved and the realisable value to creditors was one hundred crore rupees. The resolution plan was submitted to the Adjudicating Authority on 170th day from the insolvency commencement date. The committee has decided to pay the performance-linked incentive fees under clause 3 and 4. In this case, fee payable to the resolution professional shall be as under:

Performance-linked incentive fee for timely resolution @ 0.75% of INR 100 Cr	INR 75 Lakh
Performance-linked incentive fee for value maximisation @1.00% of INR 80 Cr (INR 100 Cr minus INR 20 Cr)	INR 80 Lakh
Total	**INR 150 Lakh**

Period for minimum fixed fee

The minimum fixed fee shall be applicable for the period, from appointment as interim resolution professional or resolution professional, till the time of –

(a) Submission of application for approval of resolution plan under section 30;

(b) Submission of application to liquidate the corporate debtor under section 33;

(c) Submission of application for withdrawal under section 12A; or

(d) Order for closure of corporate insolvency resolution process;

whichever is earlier.

Further, IBBI vide Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 w.e.f. 13th September, 2022 inserts a new IP Regulation on sharing on fee with other professional that an insolvency professional shall not accept /share any fees or charges from any professional and/or support service provider who are appointed under the processes.

The above amendments will bring the improved structural and appropriate format of insolvency professional service and offers various advantages for the IRP/RPs and Corporate Debtor undergoing CIRP. As the IBC is almost evolved, same way its corporate structure, remuneration pattern and better governance will also be in due course.

RESOLUTION PLAN UNDER IBC

WITH LATEST JUDICIAL PRONOUNCEMENTS

LALIT MAHESHWARI
ACMA, IP, LLB

SYNOPSIS

Resolution Plan is essential in the Corporate Insolvency Resolution Process considering it will lead to the revival of the Corporate Debtor. The Adjudicating Authority, COC and the Resolution Professional shall play a crucial role in seeking and approving a just and fair resolution plan by an eligible Resolution Applicant. Section 30 of the Code provides that the resolution plan shall be approved by the Committee of Creditors by a vote of not less than sixty-six per cent of voting share of the financial creditors and approved or rejected by Adjudicating Authority (A.A.) U/S 31.

Resolution Plan

As provided in **Section 5(26)** of the Code, resolution plan means a plan proposed by resolution applicant for insolvency resolution of corporate debtor as a going concern in accordance with Part II of the Code. It is further provided that a resolution plan may include provisions for the restructuring of the corporate debtor, including by way of merger, amalgamation and demerger.

Process of Preparation and Submission of Resolution Plan

Steps followed by the Resolution Professional in seeking a resolution plan and validating it for its implementation are:

Step 1: Appointment of Registered Valuer – As per **Regulation 27** of IBBI (Insolvency Resolution Process for corporate Person) Regulations ,2016, the RP shall within seven days of his appointment, but not later than forty seventh day from the insolvency commencement date, appoint two registered valuers to determine the **fair value and the liquidation value** of the corporate debtor.

Step 2: Preparation of Information Memorandum and consideration by COC- As per **Section 29(1)**, the RP shall prepare an information memorandum that shall mandatorily contain the following details of the Corporate Debtor as provided in the **Regulation 36(2)**:

(a) Assets and liabilities (including contingent liabilities);

(b) The latest annual financial statements;

(c) Audited financial statements of corporate debtor for the last two financial years and provisional financial statements for the current financial year made up to a date not earlier than fourteen days from the date of the application;

(d) A list of creditors

(e) Particulars of debts due from or to the corporate debtor with respect to related parties;

(f) Details of guarantee given in relation to the debt of the corporate debtor;

(g) The name and addresses of the members and partners holding at least 1 percent stake in the corporate debtor;

(h) Details of material litigations and ongoing investigations;

(i) Liabilities in respect to the workers and employees of the corporate debtor;

(j) Company overview of business performance, key contracts, key investment highlights and other factors which bring out the value as a going concern over and above the assets of the corporate debtor such as brought forward losses in the income tax returns, input tax credit of GST, key employees, key customers, supply chain linkages, utility connections and other pre-existing facilities;

(k) Details of business evolution, industry overview and key growth drivers in case of a corporate debtor having book value of total assets exceeding one hundred crore rupees as per the last financial statements;

As per Regulation 36(1), the Resolution Professional shall submit the information memorandum in electronic form to each member of the committee on or before the **ninety fifth day from the insolvency commencement date.**

Step 3: Preparation of criteria for considering resolution applicant and an evaluation matrix – As per Section 25(2) (h), the RP shall prepare an eligibility criterion that shall have regard to the complexity and scale of operations of the business of the corporate debtor. In addition, an evaluation matrix also needs to be prepared by the RP. **Evaluation matrix means**

such parameters to be applied and the manner of applying such parameters, as approved by the committee, for consideration of resolution plan for its approval (Regulation 2(ha))

Step 4: Publication of invitation for expression of interest – The RP shall prepare an invitation for expression of interest in Form G of the Schedule to IBBI(CIRP) Regulations, 2016, and publish the same not later than **sixtieth day** from the insolvency commencement date, from interested and eligible prospective resolution applicants to submit resolution plans (Regulation 36A (1)). The RP shall ensure the publication of Form G in:

(a) One English and one regional language newspaper with wide circulation at the location of the registered office and principal office, if any, of the corporate debtor and any other location where in the opinion of the resolution professional, the corporate debtor conducts material business operations;

(b) On the website, if any, of the Corporate Debtor;

(c) On the website, if any, designated by the IBBI for the purpose; and

(d) In any other manner as may be decided by the committee.

Step 5: Submission of expression of interest by Resolution Applicant– Any interested eligible person meeting the criteria can submit his expression of interest as a Resolution Applicant in the matter of the Corporate Debtor within such time specified in the invitation for expression of interest.

Step 6: Reviewing expression of interest by RP- The resolution professional shall conduct due diligence based on the material on record in order to satisfy that the prospective resolution applicant complies with-

(a) the provisions of clause (h) of sub-section (2) of section 25;

(b) the applicable provisions of section 29A, and

(c) other requirements, as specified in the invitation for expression of interest

Step 7: Preparation of list of resolution applicants and request for resolution plans – The As per **Regulation 36A (10)**, RP shall within **ten days** from the last date of receipt for expression of interest, review it and issue a provisional list of Prospective Resolution Applicants. The RP shall within five days of preparation of provisional list of resolution applicants, issue the request for resolution plans to the prospective resolution applicants and the objectors who have not been included in the provisional list. The request for resolution

plans shall be accompanied by information memorandum, evaluation matrix (Regulation 36B (1)).

Step 8: Submission of Resolution plan by resolution applicant and its examination by RP-

(i) As per section 30 (1), a resolution applicant may submit a resolution plan along with an affidavit stating that he is eligible under section 29 A to the resolution professional, prepared on the basis of the information memorandum and along with undertaking under **Regulation 39(1)(c)** of CIPR.

(ii) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan consists of mandatory contents as provided in the said section.

Step 9: Presentation of resolution plan before CoC- The resolution professional shall present to the Committee of Creditors (CoC) for its approval such resolution plans which confirm the conditions referred to in section along with details of **preferential transactions** observed, found or determined under **section 43,45,50 and 66** of the Code as per **regulation 39 (2)** of the CIRP.

Step 10: Approval of Resolution Plan by CoC -As per **regulation 39 (3)** of CIRP Regulations, 2016, the committee shall evaluate the plans as per evaluation matrix, record deliberations on the feasibility and viability of each resolution plan and vote on the resolution plan. **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, and such other requirements as may be specified by the Board**.

As per Section 30(5) of the Code, the resolution applicant may attend the meeting of the committee of creditors in which the resolution plan of the applicant is considered. However, the resolution applicant shall not have a right to vote at the meeting of the committee of creditors unless such resolution applicant is also a financial creditor.

As per **regulation 39 (4)** of the CIRP, **the resolution professional shall submit the resolution plan as approved by the committee of creditors to the Adjudicating Authority at least fifteen days before the maximum period for completion of corporate insolvency resolution process under section 12, along with compliance certificate in Form H.**

Step 11:Decision of Adjudicating Authority on Resolution Plan-(a) According to section 31 (1), if the Adjudicating Authority is satisfied that the resolution plan, after approval from the committee of creditors under **section 30 (4)** and fulfilling all the requirements as referred to in **section 30 (2)**, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, guarantors and other stakeholders involved in the resolution plan. The Adjudicating Authority shall, before passing an order for approval of resolution plan, must satisfy that the resolution plan has provisions for its effective implementation.

(b) **The Adjudicating Authority has powers to reject Resolution plans proposed by the Committee of Creditors**, Where the Adjudicating Authority is satisfied that the resolution plan does not confirm to the requirements referred to in sub-section (1) of section 31, it may, by an order, reject the resolution plan.

Step 12: Appeal under Section 32: Any appeal from an order approving the resolution plan shall be in the manner and on the grounds laid down in Section 61(3). As per **Section 61(3)**, an appeal against an order approving a resolution plan under section 31 may be filed on the following grounds, namely: —

(i) the approved resolution plan is in contravention of the provisions of any law for the time being in force;

(ii) there has been material irregularity in exercise of the powers by the RP during the CIRP period;

(iii) the debts owed to operational creditors of the CD have not been provided for in the resolution plan in the manner specified by the IBBI;

(iv) the insolvency resolution process costs have not been provided for repayment in priority to all other debts; or

(v) the resolution plan does not comply with any other criteria specified by the IBBI.

Step 13: Liability of prior offences under Section 32A: (1) The liability of a CD for an offence committed prior to the commencement of the CIRP shall cease and the CD shall not be prosecuted for such an offence from the date the resolution plan has been approved by the Adjudicating Authority under section 31 -

(a) If the resolution plan results in the change in the management or control of the CD, no action will be taken against the new management and the property of the CD in relation to which an offence committed prior to the commencement of the CIRP of the CD;

(b) If the management or control of the CD has been changed, and before the CIRP, any officer of the CD has conspired and abetted for the commission of an offence and the investigating authority has given a report against those officers of the CD, then they will be held liable.

The corporate debtor and any person, who may be required to provide assistance under such law as may be applicable to such corporate debtor or person, shall extend all assistance and co-operation to any authority investigating an offence committed prior to the commencement of the corporate insolvency resolution process.

Consequences when there is no Resolution Plan

The Adjudicating Authority may pass orders for the liquidation of the corporate debtor if the Resolution Plan is not filed within 180 days of the Commencement date or such other extended period. The Adjudicating Authority shall do the following: -

(i) Pass an order requiring the corporate debtor to be liquidated in the manner as laid down;

(ii) Issue a public announcement stating that the corporate debtor is in liquidation; and

(iii) Require such order to be sent to the authority with which the corporate debtor is registered.

Judicial pronouncements with regard to Section 30 & 31:

Submission of Resolution Plan

1. **Prowess International Pvt. Ltd. Vs. Parker Hannifin India Pvt. Ltd.- NCLAT order dt. 18.08.2017**

In case where all creditors have been satisfied and there is no default with any other creditor, the formality of submission of resolution plan under section 30 or its approval under section 31 is required to be expedited on the basis of plan if prepared. In such case, the AA, without waiting for 180 days of resolution process, may approve resolution plan under section 31, after recording its satisfaction that all creditors have been paid/ satisfied and any other creditor do not claim any amount.

2. State Bank of India Vs. Electrosteel Steels Ltd.-NCLT, Kolkata order dt. 20.03.2018.

The CoC is empowered under section 30(4) of the Code to independently consider the question of eligibility of all applicants under section 29A.

3.Numetal Ltd. Vs. Satish Kumar Gupta & Anr. -NCLT, Ahmedabad order dt. 19.04.2018

The RP ought to follow provision of section 29A (c) read with section 30 (4) for the purpose of affording the opportunity to the resolution applicants before declaring them ineligible.

4. Bank of Baroda and Binani Cements Ltd. & Ors. Vs. Mr. Vijay Kumar V. Iyer- NCLT, Kolkata order dt. 04.05.2018

Whenever, a resolution applicant's plan is under consideration of CoC and that plan is not at all placed before the AA for approval, and if another resolution applicant comes forward making an offer before the CIRP duration expires, and that it satisfies all the stakeholders of the CD, then there is nothing in the Code or Regulations to prevent the CoC from considering a revised offer of the other applicant.

5. Rajputana Properties Pvt. Ltd. Vs. Ultra Tech Cement Ltd. & Ors. -NCLAT order dt. 15.05.2018

While scrutinising the resolution plan under section 30(2), the RP cannot hold or decide as to who is ineligible under section 29A. Neither section 30(2) nor any other provision in the Code confers such power on the RP to scrutinise the eligibility of resolution applicants.

6. J.R. Agro Industries P Ltd. Vs. Swadisht Oils P Ltd.-NCLT, Allahabad order dt. 24.07.2018

All OCs are ranked equal. Therefore, resolution plan should not create classes of OCs and treat them differently.

7. Arcelormittal India Pvt. Ltd. Vs. Satish Kumar Gupta and Ors. -SC order dt. 04.10.2018

Section 30(2)(e) does not empower the RP to decide whether the resolution plan does or does not contravene the provisions of law. It is the CoC which will approve or disapprove a resolution plan, given the statutory parameters of Section 30.

8. Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India &Ors. -SC order dt. 25.01.2019

The CoC has the primary responsibility of financial restructuring. They are required to assess the viability of a CD by taking into account all available information as well as to evaluate all alternative investment opportunities that are available. The CoC is required to evaluate the resolution plan on the basis of feasibility and viability.

9. K. Sashidhar Vs. Indian Overseas Bank &Ors. -SC order dt. 05.02.2019

The legislature has not endowed the AA 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 FCs. The discretion of the AA is circumscribed by section 31 to scrutiny of resolution plan 'as approved' by the requisite percent of voting share of FCs.

10. MSTC Ltd. Vs. Adhunik Metalliks Ltd. &Ors. -NCLAT order dt. 15.03.2019

The resolution applicant is bound by the mandate under section 30(2)(f) and shall ensure that the resolution plan shall not be against any of the provisions of the existing law.

11. Sunil Jain Vs. Punjab National Bank & Ors. -NCLAT order dt. 24.04.2019

If goods have been supplied during the CIRP period to keep the CD as going concern, it is the duty of the RP to include the costs on such goods in the CIRP cost. If it is not included, the resolution plan in question can be held to be in violation of section 30(2)(a) of the Code.

12. Superna Dhawan & Anr. Vs. Bharti Defence and Infrastructure Ltd. &Ors. -NCLAT order dt. 14.05.2019

The NCLAT concurred with the observation of the AA that resolution plan should be planned for insolvency resolution of the CD as a going concern and not for addition of value with intent to sell the CD. The purpose to take up the company with the intent to sell the CD is against the basic object of the Code.

13. Arcelormittal India Pvt. Ltd. Vs. Abhijit Guhathakurta & Ors. -NCLAT order dt. 16.12.2019

The proviso to sub-section 31(4) of Code which relates to obtaining the approval from the CCI under the Competition Act, 2002, prior to the approval of such resolution plan by the CoC, is directory and not mandatory.

14. Shree Sidhivinayak Cotspin Pvt. Ltd. & Anr. Vs. RP of Marurti Cotex Ltd. &Anr. -NCLAT order dt. 20.08.2020

The successful resolution applicant cannot suddenly be faced with undecided claims **popping up** after the resolution plan submitted by him has been accepted and that all claims must be submitted to and decided by the RP, so that a prospective resolution applicant knows exactly, what has to be paid, in order that it may then take over and run the business of the CD.

15. Shri Dutt India Pvt. Ltd Vs. Office of the Sugar Commissioner -NCLT, Mumbai order dt. 21.09.2020

Once the resolution plan is approved under section 31 of the Code, all the assets and benefits of the contracts of the CD stands unconditionally transferred and assigned and vested in the

successful resolution applicant free from all encumbrances. All persons including Central and State Governments as well as the Local Authorities are bound by the said Order.

16. Facor Alloys Ltd. and Anr. Vs. Bhuvan Madan &Ors. -NCLAT order dt. 25.11.2020

i. The RA after taking over the CD is entitled to exercise its right over its subsidiary company. Appellant's objection regarding the inclusion of the subsidiary company of the CD in the resolution plan is not sustainable.
ii. An approved resolution plan can deal with the related party claim and extinguish the same which will ensure that the successful resolution applicant can take over the CD on clean slate.
iii. The amendment to regulation 38(1) of CIRP Regulations which mandated priority in payment to dissenting FCs. This amendment came into effect on November 27, 2019, i.e., post the approval of resolution plan by the erstwhile CoC of the CD.
iv. The approved resolution plan is not discriminatory as it does not give differential treatment among the same class of FCs merely based on assenting or dissenting FCs.

17. Seroco Lighting Industries Pvt. Ltd. Vs. Ravi Kapoor, RP for Arya Filaments Pvt. Ltd. &Ors. -NCLAT order dt. 10.12.2020

A successful resolution applicant cannot be permitted to withdraw the approved resolution plan, coupled with the fact in the instant case being the sole RA in the CIRP, which is an MSME and having knowledge of the financial health of the CD as a promoter or as a connected person cannot be permitted to seek revision of the approved plan, on the ground which would not be a material irregularity within the ambit of section 61(3) of the Code.

18. Oriental Bank of Commerce Vs. Lotus Auto Engineering Ltd. & Ors. -NCLT, New Delhi order dt. 15.12.2020

Though it is in the realm of the CoC to approve or reject a plan and of the liquidator to determine the value of the assets, such huge variations in values call for enquiry. Considering the fact that the CoC failed to approve a resolution plan valued double the liquidation value and the Liquidator set very low reserve price, the AA directed IBBI to enquire into as to why valuation

has become so low after liquidation is ordered and the FCs to enquire as to whether its representatives acted to maximise the value of the CD.

19. Kalpraj Dharamshi & Anr. Vs. Kotak Investment Advisors Ltd. & Anr. -SC order dt. 10.03.2021

i. The commercial wisdom of CoC has been given paramount status without any judicial intervention for ensuring completion of the stated processes within the timelines prescribed by the Code.

ii. There is an intrinsic assumption, that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. The opinion expressed by CoC after due deliberations in the meetings through voting, as per voting shares, is a collective business decision.

iii. The legislature has consciously not provided any ground to challenge the "commercial wisdom" of the individual financial creditors or their collective decision before the AA and that the decision of CoC's 'commercial wisdom' is made non justiciable.

iv. Appeal is a creature of statute and that the statute has not invested jurisdiction and authority either with NCLT or NCLAT, to review the commercial decision exercised by CoC of approving the resolution plan or rejecting the same

v. The commercial wisdom of CoC is not to be interfered with, excepting the limited scope as provided under Sections 30 and 31 of the Code.

20. Next Orbit Ventures Fund Vs. Print House (India) Pvt Ltd & Ors. -NCLAT order dt. 13.04.2021

If the resolution plan contemplates a change in the nature of business to another line when the existing business is obsolete or non-viable, it cannot be construed that the resolution plan is not 'feasible' or 'viable'. There is nothing in the Code which prevents a resolution applicant from changing the present line of business to adding value or creating 'synergy' to the existing assets and converting an obsolete line of business to a more 'viable and feasible' option.

21. Ghanashyam Mishra and Sons Pvt. Ltd. Vs. Edelweiss Asset Reconstruction Company Ltd. & Ors. -SC order dt. 13.04.2021

Once a resolution plan is approved by the AA under section 31(1), the claims as provided in the resolution plan shall stand frozen and will be binding on the CD and its employees, members, creditors, including the central government, any state government or any local authority, guarantors, and other stakeholders. On the date of approval of resolution plan by the AA, all such claims, which are not a part of resolution plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of the resolution plan.

22. Lalit Kumar Jain Vs. Union of India & Ors. -SC order dt. 21.05.2021

The sanction of a resolution plan and finality imparted to it by section 31 does not per se operate

as a discharge of the guarantor's liability.

23. Ebix Singapore Pvt. Ltd. Vs. Committee of Creditors of Educomp Solutions Ltd. &Anr. SC order dt. 13.09.2021

The existing insolvency framework in India provides no scope for effecting further modifications or withdrawals of CoC approved resolution plans, at the behest of the successful resolution applicant once the plan has been submitted to the AA.

A submitted resolution plan is binding and irrevocable as between the CoC and the successful resolution applicant.

24. State Tax Officer (1) Vs. Rainbow Papers Limited S.C. order dt. 06.09.2022

i. The Committee of Creditors, which might include financial institutions and other financial creditors, cannot secure their own dues at the cost of statutory dues owed to any Government or Governmental Authority or for that matter, any other dues. The NCLAT clearly erred in its observation that Section 53 of the IBC over-rides Section 48 of the GVAT Act.

ii. Section 48 of the GVAT Act is not contrary to or inconsistent with Section 53 or any other provisions of the IBC. Under Section 53(1)(b)(ii), the debts owed to a secured creditor, which would include the State under the GVAT Act, are to rank equally with other specified debts

including debts on account of workman's dues for a period of 24 months preceding the liquidation commencement date.

iii. The State is a secured creditor under the GVAT Act. Section 3(30) of the IBC defines secured creditor to mean a creditor in favour of whom security interest is credited. Such security interest could be created by operation of law. The definition of secured creditor in the IBC does not exclude any Government or Governmental Authority.

iv. The Resolution plan approved by the CoC is set aside. The Resolution Professional may consider a fresh Resolution Plan in the light of the observations made. However, this judgment and order will not, prevent the Resolution Applicant from submitting a plan in the light of the observations made above, making provisions for the dues of the statutory creditors like the appellant. *(This judgement has created confusion among IPs and the legal fraternity for Government dues. If Government dues are given priority as Secured Creditors, then other secured financial creditors will not relinquish their security interest and other secured creditors will not be able to get sufficient return of their dues. Revision application has been filed in this case. This case may be referred to constitutional bench for considering whether government dues are considered as secured creditor by operation of law or not. – View of the Author))*

Applications under section 12 A

R.SUGUMARAN
Insolvency Professional

SYNOPSIS

Section 12A of the Insolvency and Bankruptcy Code, 2016 was brought in the statue book vide Insolvency Bankruptcy Code(Second Amendment) Act, 2018 on the basis of the recommendations of the Insolvency Law Committee for withdrawal of the petition admitted by the Adjudicating Authority under Section 7 and 9 of the Insolvency and Bankruptcy Code, 2016. After Section 12A of the IBC was brought in the statute book, Regulation 30A was inserted vide notification dated 03.07.2018 which was substituted vide notification dated 25.07.2019 in the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

Background on the insertion of Section 12A of the IBC, 2016:

The Government of India constituted an Insolvency Law Committee to review the functioning and implementation of the IBC. The recommendations of the Committee were examined by the Government and it was accordingly decided to amend the IBC. One of the amendments proposed was for making provision for withdrawal of application for initiation of CIRP admitted by Adjudicating Authority. It was recommended that such an exit should be allowed provided the COC approves such action by 90% voting share.

It will also be relevant to refer to the Report of the committee which reads as follows:

Under Rule 8 of the CIRP Rules, NCLT may permit withdrawal of the application on a request by the applicant before its admission. However, there is no provision in the Code or the CIRP Rules in relation to the permissibility of withdrawal post admission of a CIRP application. It was observed by the Committee that there have been instances where an account of settlement between the applicant creditor and the corporate Debtor, judicial permission for withdrawal of CIRP was granted. The practice was deliberated in the light of the objective of the Code ac encapsulated in the Report, that the design of the Code is based on ensuring that all key stakeholders will participate collectively to assess viability. The Law must ensure that all creditors who have the capability and the willingness to restructure their liabilities must be

part of the negotiation process. The liabilities of all creditors who are not part of the negotiation process must also be met in any negotiated solution. Thus it was agreed that once the CIRP is initiated, it is no longer a proceeding only between the applicant creditor and the corporate debtor but it is envisaged to be a proceeding involving all creditors of the debtor. The intent of the code is to discourage individual actions for enforcement and settlement to the exclusion of the general benefit of all the creditors.

It could thus be seen that Section 12A of the IBC brought in the statute book on the basis of the said Committee's Report, requiring 90% of the voting share of COC for approval of withdrawal of CIRP. The commercial wisdom of the COC has been given paramount status without any judicial intervention for ensuring completion of the process within the timelines prescribed by the IBC. The provisions under Section 12A of the IBC have been made more stringent as compared to Section 30(4) of the IBC. Whereas under Section 30(4) of the IBC, the voting share of the COC for approving the Resolution Plan is 66%, the requirement under Section 12A of the IBC for withdrawal of CIRP is 90%.

Procedure for making application under Section 12A of the IBC, 2016:

An Application for withdrawal under section 12A may be made to the Adjudicating Authority before the constitution of the committee of creditors, by the applicant through the interim resolution professional or after the constitution of the committee of creditors, by the applicant through the interim resolution professional or the resolution professional, which should be duly approved by COC with 90% voting.

The application u/s 12A, shall be made in Form FA of the Schedule in IBBI(Insolvency Resolution Process For Corporate Persons) Regulations, 2016 duly signed by the applicant, with a bank guarantee towards estimated expenses incurred on or by the interim resolution professional for the purpose of regulation 33, till the date of filing of the application under clause (a) of sub regulation (1) or towards estimated expenses incurred for the purposes of clauses (aa), (ab), (c) and (d) of regulation 31 till the date of filing of the application under clause (a) of sub regulation (1).

In case, if the application is made before the constitution of COC, the interim resolution professional shall submit the application to the Adjudicating Authority on behalf of the Applicant within 3 days of its receipt. Where an application is received within 3 days of the admission of CIRP by the Adjudicating Authority and found appropriate by the interim resolution professional, before making the public announcement in Form A under Section 15 to read with Regulation 6, the said publication need not be resorted to. **Ref: Sai Tirumala Papers Private Limited vs Sri Anjaneya Cartons Private Limited in IBA/200/2020.**

In other case, where COC is already constituted, COC shall consider the application within 7 days of its receipt. Where the application is found appropriate, the COC will approve, based on a minimum 90% voting. Then the resolution professional or the interim resolution professional shall submit the application to the Adjudicating Authority on behalf of the applicant within 3 days of its approval. Based on the commercial wisdom of COC, the Adjudicating Authority may order the withdrawal of the petition. In terms of the order of the Hon'ble Supreme Court in the matter of **Swiss Ribbons Private Limited and Anr vs Union of India and others**, wherein it was held that Section 12A of IBC, 2016, can be allowed before liquidation is ordered. Normally it takes about 30 days to get the order of Adjudicating Authority from the date of application. **Ref: Join Up Corporation vs Safire Machinery Company Private Limited in TCP/141/IB/2017.**

Consequences on Approval of the Application u/s 12A of the IBC, 2016:

Where the application is approved, the applicant shall deposit an amount towards the actual expenses incurred for the purposes of CIRP till the date of approval by the Adjudicating Authority, as determined by the resolution professional or interim resolution professional within 3 days of the order of Adjudicating Authority, in the bank account of corporate debtor, failing which the bank guarantee received along with the application in Form FA shall be invoked.

On approval of the application made under 12A of the IBC, 2016, the Adjudicating Authority will direct the IRP/RP as the case may be to hand over the management to the Board of Directors whose power stood suspended by virtue of the initiation of CIRP. The IRP/RP will be discharged from the assignment of CIRP.

THIRD VALUATION REPORT UNDER REGULATION 35 OF IBBI (CORPORATE INSOLVENCY RESOLTUION OF CORPORATE PERSONS) REGULATIONS, 2016

DR. M. GOVINDARAJAN
PCS & IP

SYNOPSIS

In a corporate insolvency resolution process the valuation of properties of the corporate debtor shall be undertaken by the two registered valuers who are to be appointed by the interim resolution professional. The registered valuers are to submit their report to the interim resolution professional/resolution profession. The aggregate value of the two registered shall be taken into account if there is no significant difference is there. If there is a wide difference then the resolution processional may appoint a third valuer on the consent of Committee of Creditors. On the receipt of the third valuation it shall be considered with the other two and the liquidation value and fair value may be determined. If the appointment of the third valuer is against to the provisions of Regulation 35 there are chances to set aside the same by the appellate authority.

Appointment of Valuers

The Insolvency and Bankruptcy code, 2016 ('Code' for short) provides for corporate insolvency resolution process of a corporate debtor. The Adjudicating Authority on the application of creditor shall admit the same if it is satisfied that the application is in order and there is no disciplinary case against the interim resolution processional. The interim resolution process shall call for claims from creditors through a Public announcement. After the receipt of claims from the creditors, the same shall be verified and a Committee of Creditor ('CoC' for short) is to be formed by the interim resolution professional.

Regulation 27 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ('Regulations' for short) provides that the Resolution Professional shall, within 7 days of his appointment but not later than 47th day from the insolvency commencement date, appoint two registered valuers to determine the fair value and the liquidation value of the corporate debtor.

Regulation 35 provides that the two registered valuers appointed under regulation 27 shall submit to the resolution professional an estimate of the fair value and of the liquidation value computed in accordance with internationally accepted valuation standards, after physical verification of the inventory and fixed assets of the corporate debtor.

Appointment of third valuer

If the two estimates of a value in an asset class are significantly different, or on receipt of a proposal to appoint a third registered valuer from the committee of creditors, the resolution professional may appoint a third registered valuer for an asset class for submitting an estimate of the value computed.

'Significantly different' means a difference of 25% in liquidation value under an asset class. The average of the two closest estimates of a value shall be considered the fair value or the liquidation value, as the case may be.

Supply of valuation report to members

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.

Case law

The third valuer is to be appointed only if there is a wide variation in the valuation of the two registered valuers appointed. The third valuer is to be appointed as per the procedure laid down in Regulation 35. If it is not followed the appointment of third valuer will not be valid.

In '**Rana Saria Poly Pack Private Limited v. Uniworld Sugars Private Limited and another' - Company Appeal (AT) (Ins.) No. 422 of 2021 – National Company Law Appellate Tribunal, Principal Bench, New Delhi,** the appellant is a special purpose vehicle constituted as a Joint Venture Company of Simbhaoli Sugars Limited (in short 'SSL') and EDF Mann Group. The appellant took a loan of Rs. 100 crores from IDBI Bank to set up a refinery in the year 2012 which were secured by personal guarantees provided by the promoters of SSL and their shareholding in the SPV was also pledged in favor of IDBI Bank. Since there was default in repayment DRT proceedings were initiated. In the meanwhile the appellant filed a section 9 application before the Adjudicating Authority against the corporate debtor. The same was admitted by the Adjudicating Authority. The appellant filed a claim of Rs.2.06 crores before the Resolution Professional as an operational creditor.

Since no resolution plan has been received the Resolution Professional filed an application before the Adjudicating Authority for liquidation of corporate debtor. The same was objected

by SSE and employees of the corporate debtor. Therefore the Adjudicating Authority vide order dated 6.1.2020, directed the Resolution Professional to consider resolution plans received and place them before the CoC. The Appellant filed an IA No. 223 seeking directions to dissolve the CoC, among other reliefs, and later raised objections to IA No. 290/2020 filed by the Resolution Professional for approval of resolution plan. The application, namely IA No. 290 of 2020 was disposed of by the Impugned Order dated 17.3.2021, and the appellant being aggrieved by the said order, has filed this appeal.

The appellant submitted the following before NCLAT-

- The resolution plan submitted by Respondent No. 3 NCIRCLE Exim LLP was approved vide the Impugned Order dated 17.3.2021 in respect of the corporate debtor Uniworld Sugars Private Limited without considering the fact that the entire exercise of CIRP was carried out against the interest of the stakeholders and in violation of the mandatory provisions of IBC.
- The Resolution Professional and CoC proceeded to seek contrary reliefs from the Adjudicating Authority.
- Once proceedings under section 33 in Chapter III of the Code had commenced upon filing of CA (AT) (Ins) No. 83 of 2019 by the Resolution Professional, the CoC became *functous officio* and could not consider and approve a resolution plan which was prepared in accordance with erroneously obtained report of the liquidation amount which was not acceptable to the stakeholders.
- The resolution plan approved by the impugned order has resulted in transfer of the business of the company at a value which is much below its actual worth causing loss to all the stakeholders including the creditors.
- The Adjudicating Authority, and while approving the faulty resolution plan, the Adjudicating Authority disposed of these CAs summarily without properly and fully considering the issues raised in them.
- The resolution plan is in violation of section 30(2)(b) of the Code, which is a mandatory provision and has to be complied with in true letter and spirit.
- The liquidation value considered by the CoC has been done erroneously whereby no amount becomes payable to the Operational Creditors because of the low estimate of liquidation value in the third valuation.
- A resolution plan, based on an erroneous and undervalued liquidation value, was presented by the Successful Resolution Appellant (SRA) on the basis of a third valuation report, which was obtained without following the stipulated procedure in the Insolvency and Bankruptcy Board of India (Corporate Insolvency Resolution of Corporate Persons) Regulation, 2016 (in short 'CIRP Regulations').
- The resolution plan so obtained and approved by the Adjudicating authority is not in accordance with the legal provisions of the Code.
- In the first two valuations, there is no significant difference, and therefore there was no need to obtain a third valuation report.
- The Resolution Professional has followed the dictates of the CoC in obtaining a third valuation report, whereas the duty under Regulation 35 of the CIRP Regulations is cast on the Resolution Professional for obtaining valuation reports.

- The members of CoC also had questions about going for a third valuation of the fair and liquidation value of corporate debtor's assets.
- The entire cost of the valuation was borne by the CoC and thereafter liquidation value was Rs. 52.69 crores.
- The third valuation of liquidation value was not done in accordance with the extant CIRP Regulations and the CoC could have only taken an informed decision on a resolution plan only on the basis of a properly obtained valuation report, and since it was not done, there was a material irregularity in the approval of the resolution plan.

The respondent No. 1 (RP) submitted the following before the NCLAT-

- the appellant does not have *locus standi* to challenge the approval of the resolution plan, as it is based on commercial wisdom of the CoC,
- an appeal against an order approving the resolution plan under Section 31 can be assailed only on grounds under section 61(3) of the IBC
- the decision taken by the majority of creditors is binding on minority creditors and creditors who have no voting share, and therefore in the present case the appellant has no *locus standi* to challenge the commercial wisdom of CoC and hence the approval of the resolution plan.
- The NCLAT has to only do a limited scrutiny of legal compliances of the resolution plan with the provisions of Code and judicial review cannot be extended to carry out quantitative analysis *vis- à-vis* any individual creditor/stakeholder.
- The appellant is an operational creditor and not part of CoC.
- The amount due to the Appellant is less than 10% of the total debt and therefore appellant has no right to challenge the resolution plan.
- Regulation 27 of provides that the Resolution Professional is to appoint two valuers to determine the fair and liquidation value of the corporate debtor's assets in accordance with regulation 35, there is no bar on the CoC for conducting a fresh valuation.
- The third valuation in the present case was undertaken on the basis of the decision taken by the CoC in its 20th meeting.
- The third valuation is approved by the CoC and therefore this decision cannot be challenged.
- The object of the Code is to effect financial revival of the corporate debtor and liquidation should be the last resort.
- The Adjudicating Authority and the CoC have acted in furtherance of these aims and objectives of the Code.
- The object behind a valuation is to assist the CoC to take a well-considered decision on the resolution plan and once a resolution plan is approved by the CoC, the statutory mandate of the Adjudicating Authority under section 31(1) of the Code is to ascertain that the resolution plan meets the requirement of Section 30 of the Code.
- The Impugned Order does not go against any legal provisions of Code and the Adjudicating Company Appeal (AT) (Ins.) Nos. 422 & 741 of 2021 Authority has acted well within its jurisdiction and mandate under law, the Impugned Order should not be interfered with.

The successful Resolution Applicant submitted the following before NCLAT-

- The resolution plan was approved by the Adjudicating Authority submitted in the year 2020.
- The Resolution Applicant is still committed to implementing it.
- Though the payments to the operational creditors on the basis of the first, second and third valuation reports are 'nil' yet the Resolution Applicant is providing some payments to the operational creditors under the approved resolution plan.
- In Form H' submitted by the Resolution Professional the facts of the three liquidation valuations have been brought out clearly.
- None of the creditors have raised any issue on Forensic Audit Report and therefore, it does not make any material difference even if the Forensic Audit Report was not placed before the CoC and the Adjudicating Authority.
- There is no allegation made against the Successful Resolution Applicant in the present appeals and therefore the Successful Resolution Applicant should not be made to suffer if baseless allegations are made about the liquidation valuation process and value.

The NCLAT considered the submissions made by the parties to the appeal. The NCLAT analyzed the provisions of Regulations 27 (appointment of Registered Valuer), 35 (determining fair and liquidation value of the corporate debtor) of CIRP Regulations, 2016, Sections 25(duties of resolution professional), 30 (submission of resolution professional), 66 (fraudulent trading or wrongful trading) of the Code.

The NCLAT noted that the appointment of the registered valuers is to be done in accordance with the stipulated procedure in the CIRP Regulations and also how the fair and liquidation value will be estimated and later communicated to the members of CoC. A third valuation has to be undertaken in the event two estimates of valuations are significantly different, whereupon the Resolution Professional may appoint a third registered valuer.

The NCLAT observed that in the present case two registered valuers have been appointed. They gave the report on 28.05.2018. The liquidation value in respect of first valuer is 126.30 and his fair value is Rs.184.95. The liquidation value in respect of second valuer is Rs.121.01 crores and his fair value is Rs.175.29 crores.

The NCLAT observed that under the CIRP Regulations no power has been given to CoC to call for any valuation of fair and liquidation value. At the same time there is any bar under IBC provisions for the CoC to call for a fresh valuation report. The third valuation under regulation 35 is required only if the two estimates of fair and liquidation value obtained earlier is significantly different. The CoC discussed on the reference to third valuer for valuation.

The NCLAT felt that even if the CoC thought it fit to get another valuation of a more recent date, it was desirable that the procedure outlined in regulations 27 and 35 should have been followed. In the present case the third valuation estimates the liquidation value as Rs. 52.69 crores, which is even less than half of the liquidation value estimated earlier and hence significantly different from the two earlier valuations. Therefore the NCLAT was of the view

that he procedure of obtaining a third valuation and then considering it as basis for deciding the payment particularly of the operational creditors under Section 30(20(b) defective and not in accordance with the stipulated norms and procedure under the CIRP Regulations.

The explanation could have been obtained from the three valuers since they had carried out the valuation exercise and would be in a position to explain the methodology and reason. The NCLAT was of the view that the forensic audit report should have been put before the Adjudicating Authority, more so when it contained glaring instances of omission and commission with regard to the assets of the corporate debtor which could have been recovered thereby adding to the kitty available with the corporate debtor which could have accrued to the creditors.

The NCLAT held that the third valuation report of fair and liquidation should be discarded as it is not in accordance with the stipulated provision and procedure in the CIRP Regulations, and moreover the wide variance of the liquidation value of the third valuation report from the first two valuation reports also necessitates discarding of the third valuation report. Therefore, the average liquidation value of first two valuations viz. Rs. 123.66 crores should be the liquidation value on which various payments in the resolution plan should be based upon.

The NCLAT set aside the order of the Adjudicating Authority and the resolution plan only to the extent it relates to allocation of payments to the stakeholders and creditors and direct that the revision of payments and subsequent approval of the revised resolution plan should be completed within a period of two months from the date of this judgment.

Insolvency Process – Through the lens of Pre-Pack

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The Perspective

There is no exact definition of a pre-packaged insolvency. However, a pre-pack deal can be explained as a kind of restructuring plan which is agreed to by the debtor and its creditors prior to the insolvency filing and then sanctioned by the court on an expedited basis. The incumbent management typically retains control until the final agreement is agreed upon. The informality of the process is aimed at a faster resolution of distressed firms. It is a hybrid of the formal and informal insolvency process and can be applied even before a default. Even in the past, the experts have endorsed such a process citing pile of cases at various tribunals and the indefinite amount of time taken to complete insolvency resolution.

The term "pre-packaged" implies planning and prompt implementation. Pre-packaged, in the context of insolvency law, refers to the creation of a reorganisation plan and successful creditor negotiations that result in enough support before the filing of an insolvency petition. In this approach, most of the operations planned as part of the reorganisation processes have already been accomplished by the time the petition is filed with the court. Of course, the court's primary duty is to approve the reorganisation plan that the debtor has already

created and has the backing of its creditors. However, the court's involvement takes much less time than it would to execute comprehensive reorganisation processes.[1]

Pre-packaged insolvency proceedings, or 'pre-packs,' offer a unique mechanism which aims to combine the benefits of informal workouts with the legal certainty of formal insolvency proceedings. Essentially, pre-packs are hybrid mechanisms allowing out-of-court resolutions to be recognised under insolvency law with appropriate safeguards for all stakeholders.

In a pre-packaged insolvency resolution process, a corporate debtor, or a financial creditor to whom a specified percentage of the total outstanding debts of the debtor are owed, may initiate the process of formulating and finalizing a resolution plan prior to the commencement of formal proceedings.

PPIRP allows Promoters to participate, board of directors' exercise power and the corporate debtor presents the base resolution package, which is subsequently put to bidding process using the Swiss challenge. This way, PPIRP aids the corporate debtor in reaching an agreement with the creditors.

The pre-pack mechanism allows for a Swiss challenge for any resolution plans which proved less than full recovery of dues for operational creditors. Under the Swiss challenge mechanism, any third party would be permitted to submit a resolution plan for the distressed company and the original applicant would have to either match the improved resolution plan or they can lose their company. This system of insolvency proceedings has become an increasingly popular mechanism for insolvency resolution in the UK and Europe over the past decade.

Late Shri Arun Jaitley, the then Finance Minister of India, at a conference had noted that, going forward, after the initial tide of cases filed under the Code had subsided and the balance in the creditor-debtor relationship was restored in the background of the Code, there would be a "need for marrying" the statutory process for resolution of corporate insolvency under the Code, and the schemes of out-of-court debt restructuring mechanisms.

[1] Jose M. Garrido, Merits of Pre-Packaged Insolvency, Quinquennial, Insolvency and Bankruptcy Board of India (IBBI) Publication, 2022

Both empirical and anecdotal evidence suggest that the Code has rebalanced the relationship between debtors and creditors to a large extent and is leading to more responsible decision making by both debtors and creditors, which is encouraging many out-of-court workouts. Pre-Packaged insolvency proceedings, at its core, can be termed as to have the features of contractual obligations and the insolvency proceedings. It allows debtor and its creditor to form a consensus over the future course of business of debtor aligned with the interest of all stakeholders.

The Pre-packaged system is the Answer for shortening the Timelines even further while at the same time being able to maintain the Legal Sanctity of the Process through the timely detection of Stress or Default. Pre-packs can be thought of as a mix of Court-oriented processes under the IBC and the out-of-court Debt Restructuring involving the Lender Banks.

The Process under Pre-Pack emphasizes the formation of the Resolution Plan to save the stressed assets and debts of the CD, before initiating the formal provision-bound court process The purpose of pre-pack is to strike a balance between safeguarding the interest of the creditor(s) and maintaining the business and assets of the corporate debtor by facilitating a swift transition of such assets and business. The Pre-Packs reduce cost of third parties' engagements such as lawyers, accountants etc and indirect cost caused due to disruption in business, it provides an opportunity to parties to have elaborate deliberations to avoid *ex post* differences, and not to mentions it provides secrecy and confidentiality of information and save the corporate debtor from embarrassment of dragging to insolvency proceedings by the creditors.

However, given that the outcomes under those workouts do not have the same legal sanctity as resolution plans under the Code, there are some question marks about their validity in the long run. There is a need to introduce hybrid processes, that can marry the advantages of an informal workout—which are characterised as speedy, economic, and flexible processes—with the statutory protection that is accorded to formal proceedings.

Pre-Pack introduced for MSMEs in India

The Insolvency and Bankruptcy Code (Amendment) Act, 2021, with effect as of April 4, 2021, authorised the Indian Government to use the Pre-Pack Insolvency Resolution Process (PPIRP) for saving MSMEs during the outbreak. A pre-pack procedure has been proposed within the fundamental framework of the Code, in which the financial creditors have significant power, the firm enjoys a moratorium during the process, and the decision is binding on all parties. Prepack is frequently more adaptable, cost- and time-efficient than CIRP, stigma-free and less disruptive to company, and more suited to group bankruptcy. It involves a restricted role for the courts and IPs and enhances the likelihood of reorganisation.[2]

The main goal of implementing PPIRP is to ensure that MSMEs significantly contribute to the economy and employ a large portion of the population. Their business was adversely harmed by the outbreak. An alternative bankruptcy resolution procedure was created to assure speedier, more affordable, and value-maximizing solutions for all parties while considering the specific nature of their firm and a simpler corporate structure.

Structure of the Pre-pack Insolvency Resolution Process:

1. **Initiation:** The procedure may be started by the corporate debtor itself with the consent of (a) its members by special resolution; (b) unrelated financial creditors representing 66% of the financial debt; or by unrelated operational creditors in the absence of a financial creditor.
2. **Restriction on Running CIRP and Pre-Pack Process in Parallel:** The procedure cannot be carried out in simultaneously. The termination of the Pre pack must be approved by the adjudicating authority, for CIRP to begin, and the CoC can only resolve before the resolution plan has been approved.

Submission of the Base Resolution Plan by Corporate Debtor: In order to get Financial Creditors' consent to start the procedure, the Corporate Debtor must give them a base resolution plan to them.

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[2] *Report of sub-committee of the Insolvency Law Commission on Pre-Packaged Insolvency Resolution process, MCA, October 2020, https://ibbi.gov.in/uploads/resources/24c7fc03cdffff69960ce374416fa646.pdf*

Commencement of the Prepack Process: The pre-pack procedure must be started by the Corporate Debtor submitting an application to the AA. The AA will decide whether to accept or reject the application within 14 days of receiving it. AA is simultaneously needed to ratify the proposed RP's appointment or to appoint a different RP in accordance with the IBBI's proposal. The pre-pack procedure will start as soon as the AA admits your application.3

Moratorium: The moratorium would start when the pre-pack process begins. The embargo, however, would not apply to necessities like essential goods and services.

List of Claims and Preliminary Information Memorandum: The Corporate Debtor must provide the Preliminary Information Memorandum, List of Claims, and any other needed documents within two days of the start of the pre-pack process.

Constitution of CoC: The RP must form the CoC based on the list of claims he got from CD and later verified by him within seven days of the pre-pack process initiation.

Management of Corporate Debtor: The Board of Directors will continue to have managerial authority over the CD. But the CD needs the CoC's prior consent before doing several important activities, as provided in Section 28 of the Code. The entire pre-pack procedure must be carried out by the RP. The RP has been given several special responsibilities and authority.

Consideration and Approval of The Resolution Plans: The base resolution plan must be submitted by the corporate debtor to the RP at the start of the process, who will then bring it to CoC for approval. The RP will ask potential resolution applicants to submit their resolution plans if the CoC rejects the base resolution plan or if the base resolution plan affects any claims payable to OCs.

Pre-pack in other jurisdictions

1. **Canada**

In a distressed situation, a firm usually starts making efforts to sell the company. The management of the bankrupt company then has the breathing room to continue its efforts to

[3] *Harish Kumar and Itee Singhal, "Pre-pack insolvency for MSMEs: How it differs from corporate insolvency resolution process; key features", Financial Express, 2021,* https://www.financialexpress.com/industry/sme/cafe-sme/pre-pack-insolvency-for-msmes-how-it-differs-from-corporate-insolvency-resolution-process-key-features/2244529/

sell the firm after filing for protection under the Company's Creditors Arrangement Act. The firm is presented as a going concern, as opposed to a liquidation, with employment protection being a primary motivation and component in the court approval process. When a buyer is found, the court confirms the sale transaction and issues an order giving the buyer ownership of the assets free and clear of any liens, security interests, and encumbrances, all of which are transferred to the sale profits.[4]

2. France

By combining the conciliation processes with either the safeguard proceedings or the insolvency procedure, several pre-pack arrangements are utilised. The debtor must start bankruptcy procedures if they are insolvent. An out-of-court process is used by a debtor to prepare a restructuring plan while negotiating with its principal creditors. The plan is then implemented at a later time during an in-court proceeding.[5]

3. Singapore

For micro and small businesses operating in the COVID-19 environment, the Insolvency, Restructuring, and Dissolution (Amendment) Bill, 2020, proposes the implementation of a new pre-pack plan. When a company is approved for the plan, a moratorium would automatically be put into effect. There would be no need to call a creditors' meeting for the company. Instead, the company must persuade the court that if a meeting had been convened, a majority representing at least two-thirds in value of the creditors would have supported the proposed scheme. Only then the court can approve the plan.[6]

4. United Kingdom

Pre-pack, which emerged from market practise via commercial and professional innovation and had been recognized by the courts, was not covered by, or regulated by the Insolvency Act of 1986. Using the administrator's authority to sell a company's assets without the consent of creditors is a frequent tactic for selling a corporation as a going concern. The process begins

[4] *Supra 1*
[5] *Supra 1*
[6] *Supra 1*

when the firm decides to name an insolvency professional as an advisor, with the expectation that he may eventually be named as the administrator.

The sale is completed soon after the insolvency professional is formally named as the Administrator after the terms of the transaction have been agreed upon. In order to improve on the existing voluntary safeguards and offset any negative effects in the increased usage of pre-pack sales resulting from the pandemic, the UK government has suggested to adopt new legislation to mandate scrutiny of pre-pack sales to related parties. In order to address these issues, the pre-pack, which was once an informal agreement between the parties, is progressively becoming regulated.[7]

5. United States

Pre-packaged bankruptcy procedures, pre-plan sales under Section 363, and pre-arranged bankruptcy actions under Chapter 11 are all permitted by the US Bankruptcy Code. Similar to pre-pack sales in the UK is pre-plan sales in US. Once a Corporate Debtor enters reorganisation procedures, it is permitted for a bankruptcy trustee to sell all or a significant portion of its assets. The legislation doesn't provide any criteria or rules that judges should follow when evaluating pre-plan transactions or how a sale should be conducted.[8]

In a pre-packaged bankruptcy process, the Corporate Debtor arranges an agreement on the terms of the plan with significant creditors and seeks approval from groups of creditors. All creditors are given a copy of the disclosure statement and the plan. The Corporate Debtor files a Chapter 11 petition after receiving the necessary votes in support of the scheme. In p re-arranged bankruptcy proceedings, the Corporate Debtor reaches a agreement with its major creditors before filing a Chapter 11 petition. No matter whether a claimant votes in favour of the reorganisation plan individually or not, once it has been approved by the bankruptcy court, it is binding on all claims.[9]

[7] *Supra 1*
[8] *Supra 1*
[9] *Supra 1*

Analysis of the pre-pack model

Pre-Pack Insolvency framework has the following notable features:

1. **Value Maximisation**: Business valuation suffers extensively from the distressed asset life cycle. Longer duration of such cycles results in value destruction. Such destruction is aggravated by the associated costs of a formal legal proceedings. Collaterally, the reputation of the business gets disparaged which affects its prospects. The Pre-pack insolvency resolution process model is envisaged in such a manner to ensure maximisation of value by removing all such impediments through infusion of informal proceedings with a formally binding solution.
2. **Consent:** The core of Pre-pack insolvency resolution process is consensual understanding among the stakeholders to resolve the business before taking it to legal recourse. Debtor-in-possession model during the PPIRP ensures the flow of business with minimal disruptions, which is then added with the binding effect of a duly legal proceeding.
3. **Quick Resolution:** Relatively, Pre-pack proposes a quick resolution process since majority of work is done informally, which further aids in optimally higher value preservation and maximisation. The United States of America has recorded two months as average time period for Pre-pack.[10] A pre-pack sale in United Kingdom takes only a couple of hours after the appointment of the administrator.[11]
4. **Cost Effective:** Longer time for resolution translates into higher costs and value destruction simultaneously. This impediment is removed in the PPIRP since there is no cost of business disruption in terms of money and time. Additionally, the legal cost is heavily discounted.
5. **Job preservation:** Preservation of work force is an advantage in pre-pack, as the business is set to be resolved at early signs of distress itself. Netherlands and United Kingdom has solid records substantiating the significant employment retention.[12]

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[10] *Norman Kinel (2018), 'The Ever-Shrinking Chapter 11 Case', Available at: https://www.restructuring-globalview.com/2018/08/the-ever-shrinking-chapter-11-case/*

[11] *Insolvency Service (of UK) (2020), Pre-pack sales in administration report, October.*

[12] *COMMITTEE REPORT ILC*

On the other hand, the process is not without any loopholes. Major worrisome drawbacks are discussed below:

- **Serial Pre-packing:** Serial pre-packing is a tactical strategy of using pre-pack to evade settling of loans and further perpetuate unviable business. Ideally, giving another chance to a dying business is good only if the business has learnt from its previous mistakes.
- **Transparency:** Private negotiations and resultant understanding among a particular set of stakeholders, prior to the commencement of formal process is also viewed as lacking transparency. Unsecured creditors feel disenfranchised by this secrecy, particularly where the purchaser is connected to the insolvent company.[13]
- **Phoenixing of worthless companies:** Pre-pack is criticised heavily for the "companies are successively allowed to run down to the point of winding up, only to rise phoenix-like from the ashes as a new company formed and managed by an almost identical group of persons and utilising a company name similar to that under which the former company was trading."[14]

Drawbacks of Pre-pack resolution:

- Any negotiation deal agreed between the parties maybe reneged by any of the parties considering the absence of legislation and any serious repercussion thereto.
- The absence of legislation may even trigger a slew of recoveries from creditors under various laws, leading to a fractured dissolution of the debtor, ending up with the least asset value of the debtor assets. The nature of pre-packs leads to a lack of transparency, where often unsecured creditors feel disenfranchised by the secrecy.
- There is also a concern that since the process is normally confidential and only receives the consent of secured creditors, there is insufficient incentive to conduct extensive marketing that is in the interest of all creditors, especially unsecured ones. Given this, the value due to unsecured creditors may be captured by other stakeholders. There have

[13] *Teresa Graham (2014), Graham Review into Pre-pack Administration, June.*
[14] *Vanessa Finch (2009), Corporate Insolvency Law Perspectives and Principles, 2nd Edn, Cambridge University Press.*

also been some instances where pre-packages have been used by related parties where the issue is only technical and not bankrupt to profit from balance sheet reshuffle, especially to undermine its business competitors.

- The regulatory and statutory exemptions that a company enjoys under the CIRP process would also be unavailable for such a process unless it acquires court approval, as there are times when one may not get necessary exemptions without court's intervention.

How many cases of Prepack in India?

Only two insolvency cases have been initiated under PPIRP since its inception: Delhi-based Loon Land Developers and Ahmedabad-based GCCL Infrastructure & Projects.[15]

Why is there less than expected interest?

The poor performance of PPIRP can be attributed to resistance from the financial institutions. Voluntary haircut is the ultimate decision in CIRP while the same happens at the initial stage itself in PPIRP. There is also a fear of entanglement with the investigating authorities such as CBI, CVAC and CAG on the grounds of collusion.

What more can be done to make Pre-pack popular?

The Prepack model learnt from comparable frameworks from other jurisdictions. For instance, "Phoenixing" of companies was prevalent in UK and so India adopted a framework which renders the applicant not to sell any assets without the explicit approval of the empowered creditors. The process of valuation of distressed business is strong likewise of CIRP. Moreover, Swiss challenge mechanism is introduced to derive the maximum value out of the process. Accordingly, the CoC can invite public bids, after the submission plan from current management, which will act as a base threshold. Thus, India has formulated a strong framework

[15] Jagadish Shettigar & Pooja Mishra, Faculty members at BIMTECH, *Why pre-pack insolvency failed to find takers*, The Mint Newspaper, 19-09-2022, Available at: https://www.livemint.com/politics/policy/why-pre-pack-insolvency-failed-to-find-takers-11663531286274.html

learning from the mistakes of other jurisdictions. Nevertheless, considering the low usage rate of PPIRP, certain additional features and safeguards can be added to the structure.

There exists a lack of framework for the closed-door negotiation which results in resistance among bankers due to the fear of future scrutiny[16]. In order to solve this, RBI shall come up with regulatory frameworks, including but not limited to,

1. **A Guiding policy:** RBI shall come up with a defined quantitative policy which will guide the bank's decision to pursue either PPIRP or CIRP. This will rule out the discretionary power of banks and will yield in consistency which further results in a predictable legal solution.
2. **Centralised Disclosure:** Banks shall track the quantum of loans extended to PPIRP restructurings. Consequently, it must be reflected in the bank's internal ratings and early warning systems (EWS). Banks should also disclose such loan exposure in their balance sheets.
3. **Post-deal Disclosures:** The banks shall update the details of MSMEs which underwent prepack to a public forum like Information Utility. Ideally, a third party can analyse the viability of the business. This can also enable transparency on all pre-pack deals.

By and large, even when all these features are tweaked, the ultimate saviour would be to impart the knowledge of PPIRP mechanism to the general public. Since most of the MSMEs are concentrated in suburban and rural areas, awareness programs shall be conducted in the grassroots levels.

Extending the pre pack model to large corporates

Multiple stakeholders are considering the pre-packaged insolvency resolution process (PPIRP/pre-pack) as an alternative to the current bankruptcy resolution options of Corporate Insolvency Resolution Process (CIRP). PPIRP is already accessible as an alternate resolution method in most established bankruptcy regimes. Pre-emptive, out-of-court conversations

[16] Vellayan Subbiah and Pranay Mehotra, *Pre-Pack Insolvency Resolution Process: Judiciously strengthening IBC in times of crisis,* Quinquennial, Insolvency and Bankruptcy Board of India (IBBI) Publication, 2022.

between the borrower and lenders are made possible by PPIRP, making it easier to collaborate on the creation of a bankruptcy resolution plan. According to what has happened in other nations, PPIRP's flexibility frequently results in better recovery rates and shorter recovery times.[17]

As on date, the prepack model has been made accessible only to MSMEs. Considering the bigger businesses, the choices available for resolution process for corporates are either fully formal or fully informal. Prepack is the most feasible infusion of both formal and informal methodologies. It is right time to explore prepack as an additional option for stress resolution even for bigger corporates. It should be made available alongside of CIRP in such a manner that CIRP gets pushed as a last resort.

Key recommendations of sub-committee of Insolvency Law Committee

1. Pre-packed insolvency resolution process (PPIRP) framework to be within the basic structure of the insolvency code as an additional option for a resolution that blends both formal and informal options. It can be brought in quickly via an Ordinance.
2. PPIRP would pursue the same objectives as the IBC, with checks and balances to prevent any abuse.
3. Pre-pack should be available for all corporate debtors and for any stress—pre and post default.
4. Pre-packs in case of pre-default can be considered if 75% of creditors consent.
5. The corporate debtor (CD) can initiate pre-pack with the consent of a simple majority of (a) unrelated FCs (b) its shareholders. No two proceedings – pre-pack and CIRP – shall run in parallel. There shall be a cooling-off that a pre-pack cannot be initiated within three years of closure of another pre-pack.
6. Corporate debtor to remain in control and possession of current promoters and management during the pre-pack process.

[17] Vellayan Subbiah and Pranay Mehotra, *Pre-Pack Insolvency Resolution Process: Judiciously strengthening IBC in times of crisis,* Quinquennial, Insolvency and Bankruptcy Board of India (IBBI) Publication, 2022

7. Moratorium under Section 12 to be available from the pre-pack commencement date till closure or termination of the process but will not cover essential or critical services.
8. Pre-pack shall not end up with liquidation, except when the committee of creditors decides to liquidate the corporate debtor with a 75% voting share.
9. Section 29A of the IBC, which prohibits promoters of defaulting firms from participating in the process to continue in the case of PPIRP.
10. The resolution value need not necessarily be higher than the realisable value.

Conclusion

Following Britain's success, the Pre-packaged Resolution Insolvency Process (PPIRP) was envisaged to rescue MSMEs through a debtor-initiated reorganisation plan. Thereafter, the process will be monitored and carried forward by the resolution professional. However, it is to be noted that only two enterprises have availed themselves of this process. The low availability of the process can be attributed to the voluntary haircuts and fear of entanglement with the investigating authorities. Even though, this hints at the slow pace of acceptance, it is nevertheless necessary to extend this model to the large corporates, for them to have an alternative quicker resolution option considering the advantages of it. As with all economic laws, dynamic experimentation will be the impetus to a stronger insolvency regime in India.

Though India has delayed its inception of pre-packaged insolvency, it has addressed the major issues faced by the MSME sector and accordingly, sheltered their needs. By keeping the base of CIRP intact, the legislators have scrutinised the structure of Insolvency Bankruptcy Code, 2016 and thereby made it less burdensome to the courts with simultaneous commencement of PPIRP. Whilst it also provides for an option to the creditors where they could shift their claims from PPIRP to CIRP.

A comprehensive and robust framework for PPIRP is imperative for India. PPIRP provides flexibility to the corporate debtor and its creditors to arrive at a mutually agreed mechanism for resolution of the debt. Upon a mutual agreement, legal sanctity thereto is granted by the AA. Moreover, the PPIRP lays down the unique approach of 'debtor in possession and a creditor in

control model' which protects the corporate debtor from deterioration in the value of assets and goodwill. PPIRP will further assist the MSMEs to manage the Covid-19 pandemic induced financial stress by reducing litigation. PPIRP is nothing but another arm of Alternative Dispute Resolution mechanism wherein the parties can work out a plan informally and obtain a ratification thereto by the AA.

Under the current Indian regime of IBC, insolvency professionals are still developing the necessary expertise required with time. Just as the law under the UK regime has evolved, the application of pre-packaged insolvency in India will require a much higher degree of expertise of insolvency professionals. In addition, creditors must build trust not only in these liquidators/insolvency professionals, but also in the framework created so that there is an understanding between creditors when negotiating and approving plans.

THE CHINKS IN ECO SYSTEM OF IBC

MR DINESH KUMAR SETH

SYNOPSIS

The eco system of IBC that has been developed through the legislation and practice over the last 5 years is facing challenges in its smooth functioning. The various stakeholders involved in the process of its implementation have faltered in understanding the basic nature, thereby achieving limited success envisioned from it. The article looks through the whole process from the perspective of a practising Insolvency Professional and point out the imperfections that have become the norm.

The insolvency law has brought laurels for India by pushing up the rankings at 77 in World Bank's Doing Business Report (https://pib.gov.in/newsite/PrintRelease.aspx?relid=184513) and reaching 37th rank in World Competitiveness Index (https://indbiz.gov.in/india-reaches-37th-rank-on-the-world-competitiveness-index/).

These rankings have been upgraded substantially after the Insolvency and Bankruptcy Code has been put into operation in the year 2016. The IBC envisioned Resolution Professional, an independent person, conducting the whole insolvency process in a transparent and fair manner so that the value of the stressed business can be maximised for all the stakeholders. Clearly, RP is the pivot around which the whole process revolves. The rights and duties have been elucidated in the Code itself for the Resolution Professional to carry out the whole process in an effective and efficient manner. The RP has been designated as an Officer of the Court discharging a statutory public function.

The Resolution Professional is introduced to an entity under stress for its complete turnaround. The management of the Corporate Debtor (CD) is presumed to be taken over by RP and all the existing resources of the CD are to be made available for achieving the desired purpose. However, it has been found that the practical situation differs a lot from this theoretical position and the eco system under which the RP has to perform the duties is full of road blocks. Let us visualise the process and the various chinks noticed during this process.

- The appointment of an Insolvency Professional for undertaking the CIRP is practically in the hands of the CoC. Since most of the secured lenders are Banks, the IPs are

empanelled and thereafter selected on the basis of the selection process of these banks. At any point of time, the IP can be changed by these CoC members and therefore, the IP has to function as per the whims and fancies of these members. To an extent, the independence of the IP is curtailed as she has to toe the line of the CoC disregarding the optimal solution to the problems of the CD under stress.

- The filing of application for insolvency is a watershed moment that disconnect all relations of the creditor and debtor. The creditor in possession principle under insolvency puts the CD into a combative mood and the flow of information comes to a complete standstill between the creditor and debtor. To make the matters worse, the admission of the application takes unusually long time and the assets of the business stand at at a high risk of getting squandered away during this process, as the existing management tries to extract maximum out of the CD before giving its control to a court appointed person.

- The RP is to take control of the business of the CD immediately after the appointment without having any credible knowledge about the details of them. Once, the lenders account become NPA, the shareholders and the directors of the business do not provide update about the business and assets to the lenders and therefore, the information available with the applicant under Section 7 of IBC is outdated. The situation becomes more precarious when the application is filed by the Operational Creditor, who was unaware about the complete activities of the CD. Thus, the RP never possess adequate information about the various resources of the CD and feels handicapped to take proper action after appointment. In most of the cases, the RP assumes charge of a business bereft of any working assets and the presumption of going concern is diluted to a great extent at the time of admission of application itself.

- Although, the appointment order from NCLT directs all stakeholders to provide cooperation to the RP during the process, the cooperation from various parties need to be forced through a separate order of the court under section 19(2) of IBC, 2016. In the absence of the complete information, the RP prepares half baked Information Memorandum, on the basis of which the EOIs are to be invited from the prospective Resolution Applicants. This becomes a vicious circle, whereby, the lack of information in the IM does not attract many investors and the value discovery of the business does not happen in an optimal manner. The offers made by the prospective investors get rejected due to low value and this results into Liquidation of the business, destroying the value maximisation rule.

- Even if the workable information is arranged for taking control of the business, seeking cooperation form the employees, suppliers and the customers is a herculean task. The non availability of cash in the system and uncertainty about the future outcome of the insolvency put various stakeholders on the tenterhooks and this disrupts the supply chain, increases the cost of goods, reduces the orders from the customers and eventually brings the whole system to a halt. The availability of interim finance for stressed business is hard to come by and the existing lenders are always reluctant to provide for

the same. This makes a going concern into a dead business that ultimately suffers in achieving a decent valuation.

- Committee of Creditors lead the whole process of Insolvency resolution and therefore it demands that the members should be well experienced and mature in their behaviour to optimise the results. However, the young officers with little experience of banking and business are getting involved from the bank side, that does not help in exhibiting commercial wisdom while carrying out the process. The inexperience particularly gets displayed while doing the negotiation with the Resolution Applicants. The resolution applicants prepare their resolution plans in a strategic and financial perspective and the evaluation of the same require business acumen as well as knowledge about the financial restructuring. The young officers are always found wanting on these aspects that puts the whole CoC in a bad shape. The principle of supremacy of commercial wisdom of CoC does not get a convincing approval from various stakeholders and thereby causing disillusionment.

- The supremacy of Committee of Creditors in taking major decisions is another stumbling block. The CoC consists of secured financial creditors dominated by the lenders that have inadequate commercial acumen to run and sustain a stressed business. Their main concern is to achieve cost control in the whole insolvency process without taking any risk. The turnaround of a stressed business require calculated risk taking, quick decision making, keeping the business lubricated with funds, skilful negotiation with the stakeholders and painting a hopeful picture to the prospective investors. The RP is completely dependent on the CoC for approving the proposed actions on the stated fronts and can not move an inch without their consent. The CoC members perceive the turnaround of the CD as an impossible task and most of the ingenious proposals from the RP fell flat. Even a minor move proposed by RP takes a long time to get consent and looses its value due to delay.

- The control over the assets of the CD, especially, the tangible and immovable in nature is a must for the RP to start its work. However, many a times, these assets are not properly demarcated and the title of ownership is so intertwined with the personal assets of the promoters that access to the premises of the CD is restricted. Although, the insolvency process of guarantors to the CD has been notified to be taken up under the jurisdiction of the same NCLT, where, the insolvency process of the CD is undergoing, the process of the insolvency of the PG is a separate one with its own challenges. This makes the identification and acquiring control of the assets of CD a very cumbersome task for the RP.

- The recovery from debtors of the CD is another task that is not supported by the CoC members, as it entails incurring of cost that is not approved by them. The overseas debtors have a high probability of recovery but they are rarely pursued for recovery due to poor knowledge, unwillingness and cost involved in the process.

- The evaluation of the Resolution Plan is done by the secured financial creditors for maximising their own recovery with total disregard to the claims and status of other creditors. The evaluation matrix is designed to provide maximum weight for the amount paid to secured financial creditors and that creates hurdles while getting approval and/or implementation of the resolution plan. The other creditors that are not part of the CoC never get consulted in the whole process and the conflict of interest is always present when the Resolution Plan is approved by CoC members that are to receive substantial amount out of the distribution of waterfall mechanism. The RP is made to act like a mute spectator over here and despite being aware about the pitfalls of the whole distribution, she has no say in putting forth her point of view. This results into increased litigation at the time of final approval/implementation of the resolution plan.

- The monitoring of the Resolution Plan is an important constituent of the whole process, whereby, the Successful Resolution Applicant takes control of the CD and works around the turnaround of the operations. Resolution Professional along with the major CoC members become a part of this implementation committee. However, the various relaxations and waivers that have been approved through the resolution plan for the resolution applicant is a nightmare to get approved from the relevant authorities. These regulatory authorities do not take cognisance of the NCLT order and take unreasonably long time to provide those relaxations that causes delay for the implementation of the plan. In this whole process, the erstwhile CoC members are only concerned about the recovery of their money at each stage of the implementation and the support needed for the Resolution applicant is hard to come by. The Resolution Professional, although, is the Chairman of the implementation committee, has no power to get the contents of the resolution plan implemented in to. The overall experience of the Successful Resolution Applicant has been sub optimal to disillusionment due to these patchy issues and the urge to carry out inorganic expansion through IBC gets significantly reduced.

The robustness of the eco system under which the various roles are to be performed in the insolvency resolution process is a sine qua non for the sustainability of the IBC. The delays caused in the process due to ineffective and inefficient functioning have a direct adverse impact on the value maximisation mantra. It is not only the legislation but the practice of the law should also be above par and the role of parliament, judiciary, CoC, RP and various other associated persons need to be improved. IBC has brought laurels for India and it can bolster the image further by providing a seamless and smooth functioning and each cog in the wheel has to play its part in meaningful manner.

Challenges in meeting CIRP timelines

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Time is the essence of IBC

The Insolvency and Bankruptcy Code core essence is for timely resolution of distress occurred in the company and to keep the unprecedented reform with the upcoming challenges, the Government has amended the Code six times during the last six years.

The BLRC observed that:

"Speed is of essence for the working of the bankruptcy code, for two reasons.

First, while the 'calm period' can help keep an organisation afloat, without the full clarity of ownership and control, significant decisions cannot be made. Without effective leadership, the firm will tend to atrophy and fail. The longer the delay, the more likely it is that liquidation will be the only answer.

Second, the liquidation value tends to go down with time as many assets suffer from a high economic rate of depreciation. From the viewpoint of creditors, a good realisation can generally be obtained if the firm is sold as a going concern. Hence, when delays induce liquidation, there is value destruction. Further, even in liquidation, the realisation is lower when there are delays. Hence, delays cause value destruction. Thus, achieving a high recovery rate is primarily about identifying and combating the sources of delay[18]*."*

This seems to be a promising code where timely resolution of distress can enhance for the protection of interest of the stakeholders and the helping for the revival of the company. This can deteriorate the Credit culture of the economy for a great extent as the banks being a primary creditor for the companies with huge capital requirements this seems to be protecting the

[18] https://ibbi.gov.in/BLRCReportVol1_04112015.pdf

interest of the creditors and also attract the foreign investors to provide capital assistance to the companies.

In no other jurisdiction of the world. There are timelines for Insolvency and Bankruptcy proceedings.

Overall Timeline Under the Code

The CIRP process starts on the date the application is admitted. This is taken as the insolvency commencement date. **Section 12(1)** states that the CIRP should be completed within 180 days of the commencement date.

Section 12(2) further states that the RP may file an application with the AA to extend this 180-day period by a further 90 days if instructed to do so through a resolution passed by a vote of 66 percent of the voting shares of the CoC. This extension can be given only once

Section 12(3) of the IBC provides that a CIRP must mandatorily be completed within 330 days from the insolvency commencement date, including any extension of the period of the CIRP granted and the time taken in legal proceedings in relation to the resolution process. When the CIRP of a CD has been pending for over 330 days, it must be completed within 90 days from the date of the amendment. Thus, the overall timeline for completing a CIRP now stands at 330 days.

In **Arcelor Mittal India Private Limited Vs. Satish Kumar Gupta and Others** the Supreme Court referred to regulation 40A of the CIRP Regulations and observed that "**it is of utmost importance for all authorities concerned to follow this model timeline as closely as possible**."

This is how the recent cases are in favour of completion of CIRP on time.

The challenges starts from the beginning of the procedure from the stage of ascertaining the claim amount

Before the IRP can commence, all parties need an accurate and undisputed set of facts about existing credit, collateral that has been pledged, etc.

Under the present arrangements, considerable time can be lost before all parties obtain this information. Disputes about these facts can take up years to resolve in court.

The objective of an IRP that is completed in no more than 180 days can be lost owing to these problems.

*"A study by **Ernst &Young** indicates that since 2018, the number of cases admitted under the Code has increased manifolds. However, most of the cases have crossed the time prescribed by the Code. Of the 1,497 ongoing cases as on September 30, 2019, (57%) were ongoing for more than 180 days and 535 (35%) had crossed the 270-day timeline. It appears that the CIRP is not being completed in prescribed time which is a source of concern".*[19]

The **second important source of delays** lies in the adjudicatory mechanisms. In order to address this, the Committee recommends that the National Company Law Tribunals (for corporate debtors) and Debt Recovery Tribunals (for individuals and partnership firms) be provided with all the necessary resources to help them in realising the objectives of the Code.

- ***Out of 2170 ongoing CIRPs, as on March 31, 2020, 34 % have taken 270 days or more, 22.8 % have taken between 180 to 270 days, 25.8 % have taken between 90 and 180 days and close to 17.4 % have taken under 90 days.***
- ***But the average time taken for approval of resolution plans of 221 CIRPs was 415 days and for approval of liquidation in 69 cases was 270 days***.[20]

DAYS TAKEN

a) ***MORE THAN 270 DAYS -1358 CASES***
b) ***180-270 DAYS -67 CASES***
c) ***90-180 DAYS -88 CASES***
d) ***LESS THAN 90 DAYS -210 CASES***[21]

A major finding is that there is a **correlation between debt size and the delay of the proceedings.** 60% of RP perceived that the debt size is directly proportional to the time taken for completion of CIRP.

[19] https://ibbi.gov.in/uploads/whatsnew/1d8b31fc65f7ac6f09a973be8f12f868.pdf
[20] https://blog.ipleaders.in/mandatory-timeline-cirp-practice-fact-fiction/
[21] https://ibbi.gov.in/uploads/publication/290a3e0f6b5a0318e2a75282fe262d1c.pdf

The reality is that most of the cases are more over then 330 days as due to its pendency of cases before adjudicating authority or the promoter or director of the company just in order to give a hardball to the RP and the creditors keep on filing Appeal to the appellate authority and the supreme court just to stop the process from proceeding further.
But this further and further deteriorates the value of assets of the company increase the cost of CIRP cost which increase the resolution plan size of the company.

Challenges for meeting CIRP timelines

According to the code as well as the judgements meeting the deadline is a challenging task. As per

"**Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta** held Ordinarily the time taken in CIRP must be completed within the time limit of 330 days from the insolvency commencement date, including the time taken in litigation process. However, in few cases where it can be shown to the Adjudicating Authority and/or Appellate Tribunal under the Code that only a short time is left in completion of corporate insolvency resolution process beyond 330 days, and it would be interest of all stakeholders that the corporate debtor be put back on its feet instead of being sent into liquidation and that the time taken in legal proceedings is largely due to factors owing to which the fault cannot be ascribed to the litigants before the Adjudicating Authority and/or Appellate Tribunal, the delay or a large part thereof being attributable to the tardy process of the Adjudicating Authority and/or the Appellate Tribunal itself, it may be open in such cases for the Adjudicating Authority and/or Appellate Tribunal to extend time beyond 330 days.

The conditions prescribed for extension of timeline were a) If it is advised by the Committee of Creditors (COC) by passing a resolution with the requisite majority provided under the IBC, and b) In cases which are exceptional".[22]

[22] https://ibbi.gov.in/uploads/order/d46a64719856fa6a2805d731a0edaaa7.pdf

Reasons that lead to timelines being breached at different stages of CIRP

Primary 80% of the total delay occurs at the following 4 stages -

- Date of Issue list of resolution applicants (RAs)
- Date of issue of RFRP
- Date of EOI- Surprisingly at the stage of Issue of interest takes almost 75 days which is more than prescribed timeline
- Approval of resolution plan- Approval takes 270 days more than prescribed timeline.

Further, there are consistent delays in some stages irrespective of whether the company completed its resolution process within the time. It includes the followings:

- Admission of application
- Submission of Claims
- Date of public announcement
- Date of resolution to appoint RP
- Issue of provisional list of RAs - The final list of RA almost takes 115 days more than timeline mentioned.
- Issue of RFRP
- No cooperation from the part of erstwhile management is a huge hinderance in completing the work on time and the RP being threatened by them can also hinder the process which seems to be primary problem.

- Approval of resolution plan

A resolution applicant whose resolution plan is pending approval by the Adjudicating Authority may also attempt to seek modifications to the resolution plan or withdraw it altogether as the commercial basis underlying the resolution plans may change during the pendency of the application for approval of the resolution plan.[23]

The recent case **EBIX Singapore vs COC of Edu comp** the supreme court addressed the delay in CIRP of the company.

In short, the Resolution plan was approved by COC but the resolution applicant wants to withdraw/modify the plan. The supreme court held that the recognition of a power of

[23] https://ibbi.gov.in/uploads/whatsnew/7c9bde175431a4abb8c33bb105e1f2dd.pdf

withdrawal or modification after submission of a CoC approved Resolution Plan, by judicial interpretation, will have the effect of disturbing the statutory timelines and delaying the CIRP, leading to a depletion in the value of the assets of a corporate debtor in the event of a potential liquidation.[24]

The Main causes for delay are as

a) **Delay by adjudicating authority***:* Admission of application for CIRP takes much longer than the prescribed timeline. This is the case for companies irrespective of whether they complete the insolvency resolution within the prescribed timeline of 270 days. In fact, 27.4% of the total delay is caused in taking approvals of the resolution plan from the CoC. It is important to note that most of the CDs get extensions at this stage.

b) **Delay in Submission of Claims**

The COC shall be constituted once the claims are received but there is a huge delay in collating the claims. The COC should be held within 7 days of constitution of COC thereby indicating first COC held within 30 days of ICD. And the claims being rejected by RP goes before AA and further gets delayed so a final list of claims are not ascertained. There is a huge mess in collating the claims stage itself.

c) **Delay in issue list of Resolution Applicant:** There is almost 30 days delay for the issue of the provisional list of RAs and in preparation of the final list of RAs. The delay may be due to the reason that between the issue of provisional list and final list, the prospective RAs whose application has been rejected based on the eligibility criteria such as contravention of **Section 29A** etc. are given a chance to raise objection.

d) **Correlation between debt size and delay**

There is an indirect relation between the debt size and the delay in Timeline. 60% of the RPs perceived that the debt size is directly proportional to the time taken in completion of the CIRP, whereas 40% say that there is no relation between the two and cause of delays is a combination of many variables put together.

[24] https://ibbi.gov.in//uploads/order/09603f1bdb3fb1e8bab88b34ee66a52c.pdf

e) **Non-cooperation by CD:** When the CD is of the opinion that the company should not leave his hands, he files malicious cases against the RP and series of appeal against any decision. Destruction of Evidence of company's Finance and other vital documents. RPs can take legal recourse under section 19(2) of the Code, only 3% of the RPs filed such an application. As per the survey, 75% of the RPs believed that there are general inhibitions in sharing information with them. Arguably this could also be because more than 80% of the CDs lack documentation models and books of accounts are poorly maintained. These action of the Promoter delays the process. Given that there has been a jurisdictional shift from the old insolvency regime wherein CDs enjoyed the control over the assets when the company underwent insolvency, the insolvency cases under IBC witness non-cooperation by CD. This has become a major cause of concern as it causes delay in insolvency. It is submitted that 79% of RP's are of the view that there is general inhibition in sharing information, 67% stated that it is tough to get financial and operational Information about the company undergoing CIRP.

f) **Difficulty in accessing information about the company and improper documentation model***:* Importance of availability of information for timely resolution of insolvency cannot be emphasised more. One of the keys to timely completion of an insolvency or bankruptcy process is quick availability of factual and undisputed information. Imprecise and ambiguous financial reporting often marks the bankruptcy environment.24 Financially distressed firms could delay reports, this has been empirically proven.

Non-filing and non-compliance are also some reasons for delay in CIRP. This indicates lack of proper books. Almost 83% of RPs are of the view that companies lack proper documentation model for both statutory register and non-statutory register. It is worth noting that only 3% of the RPs filed the application under **section 19(2)** of the Code to take help of local authorities on grounds of non-cooperation by the CD.[25]

[25] https://ibbi.gov.in/uploads/whatsnew/1d8b31fc65f7ac6f09a973be8f12f868.pdf

Steps to improve CIRP Timeline-Suggestions

Technology can be used for bridging the information asymmetry which most often results in delay. In any case, it may be useful for the adjudicators to take note of this while granting extension of the timeline.

1. **Building court's capacity***:* The data in the research analysis clearly suggests that maximum delay is taking place at the stages of admission of CIRP and approval of resolution plan by the AA. For securing the success of the Code, reducing delay in admission is most crucial part.

2. **Strengthening documentation management system***:* It is submitted that the companies lack a proper documentation model for both statutory and non-statutory records. It is tough for RPs to get information pertaining to financial and operational aspects of the company. Record keeping is quintessential for the insolvency process to run smoothly.

3. **Information Utility (IU) needs to be better utilised-** Currently, there is only one such entity in India. There is a need to bring in more participants in the ecosystem. There are some entry barriers that may be prohibiting others to enter the market. It is beyond the scope of this research to deep dive into this question but what remains important to note is that to create a sound and swift insolvency process, the law must allow interested players to enter. The rules need to focus on creating the right incentives. In this regard, IUs can provide vital infrastructural support.
4. **Non-cooperation by CD***:* As part of the CIRP conducted under the Code, the CD does not fully cooperate with the RP and that is one of the major reasons for delay in the entire CIRP.

   AA in the matter of ***M/s. Educomp Infrastructure & School Management Limited*** **(Petitioner-CD) and** ***Mr. Ashwini Mehra, Resolution Professional v. Mr. Vinod Kumar Dandona, Suspended Director and Ors.,*** held that the CD shall be held responsible for non-submission of the information as well as for non-cooperation with the RP and be

liable for punishment under section 70 of the Code. Section 70 is a general provision penalising any parties who are liable for misconduct in the CIRP.

5. **Building up a robust market for stressed assets in India***:* The size of stressed assets in India, there is huge potential for growth in the secondary stress market. It is clear from the above paragraph that substantial delay is witnessed at the stages of the issuance of EOI and RFRP. Further, the survey findings suggest that external factors such as marketability of assets is one of the critical causes contributing to delays in resolution of companies. As of today, if an investor is interested in acquiring any corporate asset undergoing CIRP under IBC, there is no one stop website where such an investor can visit to identify a target company which can suit the requirements of the investor in any given sector.[26]These are some measures to overcome the delay in CIRP timelines and complete maximum revival on time.

CONCLUSION

The gap that exists between the letter of law and practice as seen in this study, can be redeemed if a pragmatic approach is adopted in strengthening the existing insolvency framework as suggested by this study.

The primary aim of IBC process is to make it faster, better, stronger and make it the best Indian Law which the world nations can adopt and refer to Indian Judgements for reference purpose.

Mediation has become a counterweight to adjudication and has gained recognition as a suitable mechanism for addressing the difficulties of insolvency disputes by allowing the parties to negotiate debt repayment instead of filing a lawsuit.

[26] https://ibbi.gov.in/uploads/whatsnew/1d8b31fc65f7ac6f09a973be8f12f868.pdf

CASE LAWS

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

SECTION 62 - CORPORATE PERSON'S ADJUDICATING AUTHORITIES - SUPREME COURT, APPEAL TO

Zilion Infraprojects (P.) Ltd. v. Indure (P.) Ltd. [2022] 136 taxmann.com 8 /[2022] 171 SCL 309 (SC)

Where NCLT rejected application filed by operational creditor for initiation of CIRP against corporate debtor and NCLAT confirmed order of NCLT, in view of fact that operational creditor filed appeal before Supreme Court under section 62 only against order of NCLT and not against order of NCLAT, same was to be dismissed as incompetent.

The operational creditor was awarded work orders by the corporate debtor for erection, fabrication, commissioning of thermal power plant. During course of carrying out work, the corporate debtor pointed out various breaches and delays on part of the operational creditor and ultimately, the corporate debtor terminated said contract. The operational creditor demanded payment of bills and issued demand notice under section 8. In its reply, the corporate debtor stated that the contract and claim of the operational creditor were in dispute. The operational creditor filed an application under section 9 against the corporate debtor. NCLT by impugned order rejected said application and appeal against order of NCLT was confirmed by NCLAT.

Held that since, operational creditor filed instant appeal only against order of NCLT, however, order of NCLAT was not in challenge, said appeal was fundamentally incompetent and thus, same was to be dismissed.

Case Review: Zillion Infraprojects (P.) Ltd. v. Indure (P.) Ltd. [2022] 136 taxmann.com 31 (NCLAT - New Delhi), affirmed.

SECTION 30 - CORPORATE INSOLVENCY RESOLUTION PROCESS - RESOLUTION PLAN - SUBMISSION OF

Ajay Gupta v. Pramod Kumar Sharma [2022] 136 taxmann.com 39/[2022] 171 SCL 302 (SC)

NCLT was justified in levelling playing field by allowing other resolution applicants to modify their resolution plans, when it allowed one resolution applicant to do so on his application.

In respect of the corporate debtor, CIRP was initiated and RP was appointed. During course of deliberations over resolution plan submitted by the appellant and other resolution applicants, defects/technical difficulty was pointed out by CoC. Appellants proposal for modification/amendment of the resolution plan was approved by NCLT but, at the same time,

NCLT correspondingly allowed other resolution applicants to place any modification in their submitted resolution plan. It was a case of the appellant that its resolution plan came to be known to everyone and hence, no opportunity should have been given to others to modify their plan. It was noted that certain key features/stipulations of the resolution plan were sought to be amended by the appellant.

Held that when it was being permitted at request of appellant himself, an order passed by NCLT so as to balance position of respective parties and to provide level playing field by granting corresponding permission to other resolution applicant to place any modification in their submitted resolution plan before CoC could not be faulted, thus, order passed by NCLT required no interference.

Case Review: Ajay Gupta v. Pramod Kumar Sharma, RP of B.B. Foods (P.) Ltd. [2022] 135 taxmann.com 375 (NCLAT - New Delhi), affirmed.

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

D & I Taxcon Services (P.) Ltd. v. National Company Law Tribunal [2022] 136 taxmann.com 134 (Calcutta)

Where there was mere allegation of violation of rule 44 of NCLT Rules, 2016 an appeal, either under section 421(1) of 2013 Act or under section 61 of IBC, would be a more efficacious and exhaustive remedy available to petitioner in comparison to writ petition.

Held that mere allegation of violation of rule 44 of NCLT Rules, 2016 could not be sufficient justification to invoke writ jurisdiction. An appeal, either under section 421(1) of 2013 Act or under section 61 of IBC, would be a more efficacious and exhaustive remedy available to petitioner in comparison to writ petition.

SECTION 238A - CORPORATE INSOLVENCY RESOLUTION PROCESS - LIMITATION PERIOD

Gulabchand Jain v. Punjab National Bank [2022] 136 taxmann.com 194 (NCL-AT)

Where decree was passed in favour of financial creditor on 6-10-2017 for loan which was declared Non-Performing asset on 13-6-2009 and corporate debtor had acknowledged loan given to it by

financial creditor by giving proposal for OTS, financial creditor should get fresh period of limitation of three years and application filed under section 7 on 31-5-2018 for initiation of CIRP against corporate debtor was not barred by limitation.

The appellant-corporate debtor took financial credit from the respondent-financial creditor bank. Account of the corporate debtor was declared Non-Performing Asset (NPA) on 13-6-2009. The financial creditor bank initiated proceedings before DRT and DRT passed a decree on 6-10-2017 in favour of the financial creditor. On 31-5-2018, the financial creditor bank filed application under section 7 for initiation of CIRP against the corporate debtor. NCLT by impugned order admitted said application. On appeal, the corporate debtor contended that application filed on 31-5-2018 was well beyond period of limitation and could not have been admitted.

Held that by decree passed on 6-10-2017 the financial creditor should get fresh period of limitation of three years and application under section 7 having been filed within 3 years from 6-10-2017 could not be held to be barred by limitation. Since the corporate debtor had written letter to the financial creditor giving proposal for OTS for outstanding dues, such letters acknowledging debt should give benefit to the financial creditor for extension of limitation period and, thus, application filed under section 7 could not be said to be barred by limitation.

Case Review: Vijay Timber Industries v. Punjab National Bank [2022] 136 taxmann.com 193 (NCLT - AHM), affirmed.

SECTION 45 - CORPORATE LIQUIDATION PROCESS - UNDERVALUED TRANSACTIONS - AVOIDANCE OF

Adriatic Sea Foods (P.) Ltd. v. Suresh Kumar Jain [2022] 136 taxmann.com 227 /[2022] 171 SCL 633 (NCL-AT)

Where possession of subject mortgaged property was handed over to appellant, suspended director of corporate debtor, by corporate debtor at meagre payment of Rs. 25 lakhs of property for which NOC was issued by bank for sale of an amount of not less than Rs. 17.86 crores, transaction of sale was preferential and undervalued transaction and Adjudicating Authority had rightly cancelled said transaction.

The corporate debtor mortgaged its property for availing credit facilities from bank. The bank granted a conditional no objection certificate to the corporate debtor for sale of said property for at least Rs. 17.18 crores. The corporate debtor decided to sell said property. The property was sold by agreement dated 5-8-2019 for Rs. 11 crores to the appellant, suspended director of the corporate debtor, who paid only Rs. 25 lakhs. The Adjudicating Authority on 19-9-2019 admitted application filed under section 7 to initiate CIRP against the corporate debtor. The respondent-resolution professional filed an interlocutory application praying for reversing

preferential transaction, undervalued transactions and vesting into assets of the corporate debtor. NCLT by impugned order passed an order for cancelling sale of property and directed possession of said property to be handed over to the resolution professional.

Held that insolvency commencement date was 19-9-2019 and it was less than one and half month before said date that subject transaction of sale was made by the corporate debtor and, therefore, transaction was within relevant period under section 46 for avoidable transaction or undervalued transaction i.e. period of one year preceding insolvency commencement date. Possession was handed over to appellant by the corporate debtor at meagre payment of Rs. 25 lakhs of property for which NOC was issued by bank for sale of an amount not less than Rs. 17.86 crores, which proved that sale transaction was undervalued and, therefore, the Adjudicating Authority had rightly come to conclusion that transaction was an undervalued transaction. Since entire proceedings beginning from decision to transfer of property was not legally done, same was preferential transaction and undervalued transaction in favour of the appellant, which was entered only with an intent to defeat rights of creditors and, therefore, no error had been committed by the Adjudicating Authority in allowing application filed by the Resolution Professional under sections 43 and 45.

Case Review: Suresh Kumar Jain (RP) of MK Overseas (P.) Ltd. v. Shakeel Ahmed [2022] 135 taxmann.com 376 (NCLT - New Delhi), affirmed.

SECTION 8 - CORPORATE INSOLVENCY RESOLUTION PROCESS - DEMAND BY OPERATIONAL CREDITOR

Brand Realty Services Ltd. v. Sir John Bakeries India (P.) Ltd. [2022] 136 taxmann.com 230 /[2022] 171 SCL 460 (NCLAT- New Delhi)

Mere fact that reply to notice under section 8 (1) having not been given within 10 days or no reply to demand notice having been filed by corporate debtor does not preclude corporate debtor to bring relevant materials before Adjudicating Authority to establish that there is pre-existing dispute, which may lead to rejection of section 9 application.

Held that section 9(1) enables the operational creditor to file application under section 9 if no payment has been received by the operational creditor from the corporate debtor or no notice of dispute under section 8(2) has been received. However, statutory scheme under sections 8 and 9 does not indicate that if reply to notice is not filed within 10 days by the corporate debtor or no reply to notice under section 8(1) have been given, the corporate debtor is precluded from raising question of dispute. Mere fact that reply to notice under section 8 (1) having not been given within 10 days or no reply to demand notice having been filed by the corporate debtor does not preclude the corporate debtor to bring relevant materials before the Adjudicating Authority to establish that there is pre-existing dispute, which may lead to rejection of section 9 application.

Case Review: Brand Realty Services Ltd. v. Sir John Bakeries India (P.) Ltd. [2020] 118 taxmann.com 269/162 SCL 789 (NCLT - New Delhi) reversed.

SECTION 236 - SPECIAL COURT - TRIAL OF OFFENCE BY

Satyanarayan Bankatlal Malu v. Insolvency and Bankruptcy Board of India [2022] 136 taxmann.com 317 (Bombay)

Offences under Insolvency & Bankruptcy Code are triable by Special Court consist of Metropolitan Magistrate or Judicial Magistrate First Class and not by a Court consist of Judge holding office of a Sessions Judge or Additional Sessions Judge.

Instant petition under article 227 of the Constitution of India read with section 482 of the Criminal Procedure Code, 1973 assails the order, Issue Process, under section 73(a) and section 235A passed by the Additional Sessions Judge, in Special Case on a Complaint filed by the Insolvency and Bankruptcy Board of India (board), a statutory body established under the Code. Presently, only ground, on which impugned order had been challenged was that, the Additional Sessions Judge did not have jurisdiction to entertain the complaint filed by the respondents (board). It was petitioner's case that the Additional Sessions Judge, in which respondents filed a complaint, was not a Special Court , for trying the offences under the Code, in terms of section 236 thereof.

Held that Special Court which is to try offences under Insolvency & Bankruptcy Code is established under section 435 (2) (b) of the Companies Act, 2013 which consists of Metropolitan Magistrate or Judicial Magistrate First Class and not by a Court consist of Judge holding office of A sessions Judge or Additional Session Judge.

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

Axis Bank Ltd. v. Samruddhi Realty Ltd. [2022] 136 taxmann.com 319 (NCLAT - Chennai)

Where allottees/retail home buyers had approached appellant for financial assistance which was disbursed by appellant as Loan amounts to respective allottees which was then disbursed by allottees to corporate debtor and on corporate debtor going into CIRP and liquidation, appellant had filed its claims, however, appellant had not subjectively satisfied that money which it was

claiming was disbursed to 'corporate debtor' for time value of money as per section 5(8), claim of appellant was rightly rejected by liquidator.

The corporate debtor was engaged in business of construction and development of residential accommodation. Allottees/retail home buyers had approached the appellant bank for financial assistance which was disbursed by the appellant as Loan amounts to respective allottees which was then disbursed by allottees to the corporate debtor. CIRP application in respect of the corporate debtor was admitted by the Adjudicating Authority. The appellant submitted its claims before RP which was rejected. Subsequently, the Adjudicating Authority passed an order for initiating liquidation proceedings against the corporate debtor and a liquidator was appointed. The appellant submitted its claim before the liquidator which was also rejected on ground that disbursement of amount for time value of money had been made by the appellant in favour of the allottee i.e borrower and not the corporate debtor and further the appellant was not a financial creditor in terms of provisions of Code.

Held that the appellant when it questions determination of liquidator to effect that the appellant is not a 'financial creditor', then, as per section 42, in respect of accepting or rejecting claim, an 'Appeal' is to be preferred against decision of the liquidator to the 'Adjudicating Authority' within 14 days of receipt of such decision. The liquidator having accepted allottees claim, the appellant was not entitled to vary/modify same, especially when allottees were not parties to application before the Adjudicating Authority. Appellant not having subjectively satisfied the Tribunal that money which it was claiming was disbursed to the 'corporate debtor' for time value of money as per section 5(8), the Adjudicating Authority was right in dismissing application.

Case Review: Axis Bank Ltd. v. Samruddhi Realty Ltd. [2022] 136 taxmann.com 318 (NCLT - Beng.) (para 53) affirmed (See Annex).

REGULATION 47A OF THE INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (LIQUIDATION PROCESS) REGULATIONS, 2016 - EXCLUSION OF PERIOD OF LOCKDOWN

Standard Surfa Chem India (P.) Ltd. v. Kishore Gopal Somani - [2022] 136 taxmann.com 323 (NCL-AT)

Where appellant successful bidder sought extension of time in complying with auction proceedings due to 2nd wave of Covid-19 outbreak, Adjudicating Authority should have extended timeline to extent permissible under applicable laws and regulations as satisfaction of creditor claims while ensuring asset maximization is underlying principle of IBC, which cannot be overridden on account of meagre delays induced by a force majeure event.

The appellant emerged as successful bidder in e-auction of Pondicherry unit of the corporate debtor. Liquidator issued a letter of intent stipulating 90 days timeline for making full payment to complete auction. Before expiry of said 90 days, appellant preferred an IA before NCLT seeking time extension in complying with auction proceedings However, NCLT vide impugned order dismissed said IA. On appeal, it was found that the applicant had sought an extension of 3 months due to 2nd wave of Covid-19 outbreak on ground of regulation 47A which provided that period of Lockdown imposed by Central Government in wake of Covid-19 outbreak shall not be counted for computation of timeline for any task that could not be completed due to Lockdown in relation to any liquidation process. It was found that regulation 47 which deals with Model Timeline for Liquidation Process is only directory in nature and was provided under regulation as a guiding factor to complete liquidation process in a time-bound manner and in exceptional circumstances, such a time limit can be extended. Further, E-Auction Process Information Document also provided discretion to the liquidator to extend timeline and since impact of 2nd wave of Covid-19 was everywhere in India, of which judicial notice could be taken.

Held that in said special circumstances, liquidator ought to have sought permission of the Adjudicating Authority to extend timeline and the Adjudicating Authority should have extended timeline to extent permissible under applicable laws and regulations. The Adjudicating Authority did not consider that satisfaction of creditor claims while ensuring asset maximization is underlying principle of IBC, which cannot be overridden on account of meagre delays induced by a force majeure event. Therefore, appeal deserves to be allowed by setting aside impugned order.

Case Review: State Bank of India v. Advance Surfactants India Ltd. [2022] 136 taxmann.com 322 (NCLT - New Delhi) (para 35) set aside (See Annex).

SECTION 238A - CORPORATE INSOLVENCY RESOLUTION PROCESS - LIMITATION PERIOD

SVG Fashions (P.) Ltd. v. Ritu Murli Manohar Goyal [2022] 136 taxmann.com 374 / 171 SCL 762 (SC)

Where NCLAT reversed NCLTs order initiating CIRP against corporate debtor being barred by limitation, however, while passing said order NCLAT overlooked pleadings of operational creditor that since cheques with letter dated 28-9-2015 were issued by corporate debtor towards payment of liability, which were returned dishonoured, same amounted to acknowledgement of debt and thus, CIRP petition filed on 20-4-2018 was well within limitation period, failure of NCLAT to look into such a very vital aspect vitiated its order, especially when NCLT had recorded a specific finding of fact; order of NCLAT was to be set aside.

The operational creditor sold various fabrics to the corporate debtor and raised invoices. The corporate debtor committed default in making payments. The operational creditor thus, filed an application under section 9. The corporate debtor raised a dispute that instant application was barred by limitation. It was a case of the operational creditor that six cheques had been handed over to it by the corporate debtor along with letter dated 28-9-2015 however, these cheques were dishonoured when presented for payment. NCLT thus held that there was an acknowledgement of liability on part of the corporate debtor and therefore, application filed on 20-4-2018 was within period of limitation. Consequently, NCLT ordered admission of application under section 9. The NCLAT completely overlooked pleadings revolving around letter and six cheques and reversed the order passed by NCLT.

Held that failure of the NCLAT as first appellate authority to look into such vital aspect vitiated its order, especially when NCLT had recorded a specific finding of fact. Therefore, order of NCLAT was liable to be set aside and matter was to be remanded to NCLAT for fresh consideration.

Case Review: Ritu Murli Manohar Goyal v. SVG Fashions Ltd. [2020] 116 taxmann.com 888/[2021] 163 SCL 357 (NCLAT - New Delhi), reversed.

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

Jord Engineers India Ltd. v. Valia & Co. [2022] 136 taxmann.com 380 / 171 SCL 767 (SC)

Where NCLAT by impugned order admitted petition for initiating CIRP against corporate debtor, but, said order was passed without notice to other side, order passed by NCLAT was to be set aside.

The operational creditor supplied goods to the corporate debtor. Amount due to the corporate debtor was Rs. 4.72 crores. The corporate debtor defaulted in re-payment, thus the operational creditor filed an application under section 9 against the corporate debtor. Said application was admitted by NCLT. Order of NCLT was set aside by the NCLAT, essentially on ground that demand notice was served by an advocate holding no position with or in relation to the operational creditor. Subsequently, in view of decision in case of Macquarie Bank Ltd. v. Shilpi Cable Technologies Ltd. [2017] 88 taxmann.com 180/[2018] 145 SCL 236 (SC), wherein it was held that a notice on behalf of the operational creditor by a lawyer would be in order, NCLAT by impugned order admitted said application.

Held that since said order was passed by NCLAT without notice to the other side, the corporate debtor was deprived of a reasonable opportunity of hearing, thus, it was just and proper that impugned order of NCLAT was to be set aside and matter be restored to file of NCLAT for decision afresh.

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

Case Review: Jord Engineers India Ltd. v. Valia & Co. [2018] 96 taxmann.com 413/149 SCL 262 (NCL - AT), reversed.

SECTION 5(21) - CORPORATE INSOLVENCY RESOLUTION PROCESS - OPERATIONAL DEBT

Jain Heights and Structures (P.) Ltd. v. Bheemasamudra Land Developers and Builders [2022] 136 taxmann.com 401 /[2022] 171 SCL 236 (NCLAT - Chennai)

Where respondent-operational creditor rendered certain services in respect of plot of land sold by it to corporate debtor for which corporate debtor agreed to pay a sum vide Memorandum of Understanding but failed to pay same, respondent's claim was an operational debt as it had provided services and it fell under category of operational creditor.

Appellant owned 96 per cent of paid up equity share capital in corporate debtor, which had purchased a plot of land for a sale consideration from respondent-operational creditor - Respondent rendered certain services for said property like development and conversion of said property to residential property - Corporate debtor had agreed to pay a sum of Rs. 6 crores for such services vide Memorandum of Understanding (MoU) apart from sale consideration - However, corporate debtor failed to make payment for said services and respondent issued demand notice and corporate debtor denied execution of MoU - Respondent filed an application under section 9 for initiation of CIRP against corporate debtor - NCLT admitted said application by impugned order - Whether since covenants mentioned in MoU clearly mentioned and admitted that payment of Rs. 6 crores was a liability on part of corporate debtor for services rendered, definition of operational debt was attracted as respondent had provided services and in consideration thereof corporate debtor admitted its liabilities for said services - Held, yes - Whether respondent fell under category of operational creditor as an operational debt was owed to it - Held, yes - Whether since respondent's claim was an operational debt and respondent fell under category of operational creditor and there was no pre-existing dispute, NCLT had rightly admitted application filed by respondent-operational creditor - Held, yes [Paras 36, 41 and 42].

Case Review: Bheemasamudra Land Developers and Builders v. Metrik Infraprojects (P.) Ltd. [2022] 136 taxmann.com 400 (NCLT - Beng.), affirmed.

Union Bank of India v. Kapil Wadhawan [2022] 137 taxmann.com 24 /[2022] 171 SCL 344 (NCL-AT)

After approval of resolution plan by Committee of Creditors (CoC) and pending approval, Adjudicating Authority cannot direct CoC to convene a meeting and place settlement proposal as offered for consideration, decision and voting on that within a certain period.

The respondent No. 3 RBI in exercise of its powers under section 45-IE of RBI Act, 1934, superseded board of directors of DHFL (corporate debtor) and appointed administrator of the company. In furtherance of the CIRP process, proposals were received from various resolution applicants and a resolution plan was approved by CoC. The administrator filed an application before Adjudicating Authority for the approval of resolution plan approved by CoC and same was heard and reserved for orders by NCLT. The respondent No. 1 ('K') was a promoter of DHFL forwarded settlement proposals (settlement proposal 1 and 2) which would ensure repayment in full principle amount due to DHFL, however proposals were not considered, accepted or rejected by CoC. The respondent No. 1 filed an application before NCLT seeking directions against RBI to direct the administrator to place such purported settlement proposals before CoC. NCLT by impugned order directed the administrator to place settlement proposal dated 29-12-2020 sent by respondent No. 1 before CoC for its consideration, decision, voting and inform to the Adjudicating Authority outcome of same.

Held that after approval of resolution plan by Committee of Creditors (CoC) and pending approval, the Adjudicating Authority cannot direct CoC to convene a meeting and place settlement proposal as offered for consideration, decision and voting on that within a certain period. Once Resolution Plan is approved by a 100 per cent voting share of CoC, jurisdiction of the Adjudicating Authority is confined by provisions of section 31(1) to determine whether requirements of section 30(2) have been fulfilled in plan as approved by CoC. Since application under section 31 for approval of resolution plan was pending before NCLT, order of NCLT directing CoC to consider second settlement proposal of respondent was beyond jurisdiction of NCLT and, hence, same was unsustainable and liable to be dismissed.

Case Review : Kapil Wadhwan v. Administrator Dewan Housing Finance Corporation Ltd. [2021] 127 taxmann.com 378 (NCLT - Mum.), set asid

SECTION 5(7) - CORPORATE INSOLVENCY RESOLUTION PROCESS - FINANCIAL CREDITOR

Amit Arora v. Tourism Finance Corporation of India [2022] 137 taxmann.com 206 /[2022] 171 SCL 702 (NCL-AT)

Where respondent-TFCI had given loan to corporate debtor by loan agreement, it was proper financial creditor, which had disbursed loan against time value of money and since there was default in repayment of loan, application filed under section 7 by TFCI had been correctly admitted by NCLT.

The respondent TFCI had provided loan to the corporate debtor for construction of a hotel by virtue of a loan agreement. Shares of the corporate debtor were pledged in favour of TFCI to secure said loan. The corporate debtor defaulted in repayment of loan. TFCI as financial creditor filed application under section 7 to initiate CIRP against the corporate debtor. The Adjudicating Authority admitted said application by impugned order.

Held that since TFCI had given loan to the corporate debtor by loan agreement, it was proper financial creditor, which had disbursed loan against time value of money and since TFCI was a financial creditor who had provided loan to the corporate debtor and debt was in default, application filed under section 7 had been correctly admitted by NCLT.

Case Review : Tourism Finance Corporation of India Ltd. v. Arvavir Buildcon (P.) Ltd. [2022] 137 taxmann.com 205 (NCLT - New Delhi), affirme

SECTION 35 - CORPORATE LIQUIDATION PROCESS - LIQUIDATOR - POWERS AND DUTIES OF

Concast Steel & Power Ltd. v. Sarat Chatterjee & Co. (VSP) (P.) Ltd. [2022] 137 taxmann.com 231 (Calcutta)

Where a company, having been declared insolvent by National Company Law Tribunal, had gone under liquidation and liquidator had been acting in suit with reference to movable suit property in question and had taken all necessary steps therein and thus, was fighting tooth and nail with regard to this litigation, mere delay in making an application for substituting his name in records of suit would not in any manner lead to an abatement of suit.

The original suit was filed by one DS. In the said suit the then plaintiff had sought to claim relief, inter alia, in respect of 11, 074.09 metric tonnes of met coke lying as Visakhapatnam (Goods). Later it was amalgamated in one of the companies which was a party to the suit. Subsequently, diverse orders had been passed in the suit from time-to-time by competent courts and a special officer was appointed to deal with property, which was the subject matter in the original suit. The amalgamated company had gone into liquidation by an order dated 26-9-2018, passed by the National Company Law Tribunal, Kolkata Bench. In the meeting held by the Special Officer, appointed as receiver by the court, on 19-10-2020, and 13-1-2021, the applicant/defendant no. 2, company in liquidation, informed the special officer that his client went into liquidation and therefore the company will not be able to share any costs for the suits and proceedings since they do not have the funds to do so. The liquidator was present and took part in the said meeting and supported the submission made by the company in liquidation. Thereafter, in the meeting held on 17-9-2021, the company in liquidation submitted that the special officer does not have any jurisdiction or power to decide on the issue of whether he can proceed with the sale process in view of the fact that the plaintiff company had been ordered to go into liquidation. In the above meeting the special officer had decided to proceed with the sale and for such purpose had fixed a meeting on 5-10-2021, on a virtual platform for discussing the sale notice and the terms and conditions for sale. The applicant/defendant no. 2 emphasized on order 22 rule 8 and contended that the liquidator had declined or neglected to pursue the litigation. So, in light of the same, the suit stands abated. He had further submitted that as the suit had abated, the sale of the ten thousand metric tons of Met Coke should be stayed and his client should be given possession of the same. The liquidator however submitted that he was always acting in the suit as would be evident from the appearance of the liquidator before the special officer appointed by this Court with regard to the sale of ten thousand metric tons of Met Coke and also appeared in the Court before the Single Bench and also the Division Bench in this matter. He has, however, submitted that in spite of having assured the Court that an application would be made for addition of the liquidator the same had been made belatedly. He submitted that in the present case the suit had not abated as there was no direction from the Court and no notice was given to the liquidator with regard to the abatement of the same.

Held that upon a plain reading of order 22 rule 8 of CPC it is patently clear that in case of a company that goes into liquidation, suit shall not abate unless liquidator declines to pursue said suit. Where a company, having been declared insolvent by National Company Law Tribunal, had gone under liquidation and liquidator even after having assured High Court that steps would be taken for impleading himself into litigation failed to do so, such failure may amount to a lackadaisical approach of liquidator but cannot under any circumstances be seen as a positive assertion to decline to continue suit. Further, where it was evident that liquidator had been acting in suit with reference to movable suit property in question and had taken all necessary steps therein and thus, was fighting tooth and nail with regard to instant litigation, mere delay in making an application for substituting his name in records of suit would not in any manner lead to an abatement of suit.

SECTION 53 - CORPORATE LIQUIDATION PROCESS - ASSETS, DISTRIBUTION OF

Kuldeep Enterprises v. ABG Shipyard Ltd. [2022] 137 taxmann.com 268 /[2022] 171 SCL 456 (NCL-AT)

Where appellant-operational creditor prayed for direction to liquidator of corporate debtor to disburse amount of its claim, NCLT had rightly dismissed said application holding that appellant would get amount only after adjudication and in waterfall mechanism as prescribed under section 53.

The appellant-operational creditor had filed an application under section 60 before NCLT for direction to liquidator of the corporate debtor to disburse amount of its claim. NCLT by impugned order held that prayer was totally vague as the appellant would get claim amount only after adjudication and in waterfall mechanism as prescribed under section 53.

Held that any distribution of sale proceeds had to be in compliance of waterfall mechanism under section 53 and, therefore, there was no irregularity in impugned order passed by NCLT and same was to be affirmed.

Case Review Kuldeep Enterprises v. ABG Shipyard Ltd. [2022] 137 taxmann.com 267 (NCLT - Ahd.), affirmed.

SECTION 12 - CORPORATE INSOLVENCY RESOLUTION PROCESS - TIME LIMIT FOR COMPLETION OF

Ananta Charan Nayak v. State Bank of India - [2022] 138 taxmann.com 423 (NCLAT- New Delhi)

Where offer of one time settlement by corporate debtor was pending before financial creditor, acceptance of settlement proposal by financial creditor was a matter entirely in ambit of financial creditor and, therefore, proceedings for initiation of CIRP before Adjudicating Authority could not have been held up and delayed, waiting for a response by financial creditor.

The corporate debtor was engaged in business of engineering, procurement and construction in road and railway projects etc. The respondent-financial creditors had been doing business with the corporate debtor for more than 30 years. The respondent-financial creditor filed an application under section 7 for initiation of CIRP against the corporate debtor. NCLT by

impugned order admitted said application. On appeal, the appellant, suspended director of the corporate debtor, contended that appellant had offered One Time Settlement (OTS) to the financial creditor but pending decision of OTS, NCLT passed impugned order to detriment of the corporate debtor.

Held that IBC does not provide for keeping CIRP proceedings in abeyance and application filed under section 7 has to be decided in a stipulated timeframe. Since acceptance of settlement proposal by financial creditor was a matter entirely in ambit of financial creditor, proceedings before NCLT could not have been held up and delayed waiting for a response by the financial creditor. Since no settlement had been reached, contention of the appellant was not sustainable and, therefore, impugned order passed by NCLT was not to be intervened.

Case Review : State Bank of India v. Nayak Infrastructure (P.) Ltd. [2022] 138 taxmann.com 422 (NCLT – Guwahati, affirmed.

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

Ramsarup Industries Ltd., In re [2022] 138 taxmann.com 432 (NCLT - Kolkata)

Where, there were some delay in insolvency resolution process of corporate debtor, however, successful resolution applicant was ready to implement resolution plan, just because liquidation value was more than enterprise value, application seeking liquidation of corporate debtor was to be dismissed.

The corporate debtor underwent a CIRP in which a resolution plan submitted by resolution applicant 'SS' was approved by NCLT. Since 'SS' failed to implement plan even after four years, one of member of monitoring Agency of the corporate debtor i.e CFM applied for liquidation of the corporate debtor even while other members monitoring committee were willing to give a chance to 'SS' to implement plan. It was found that there were some delays in insolvency resolution process of the corporate debtor but now 'SS' was ready and willing to implement resolution plan and resolution amount was parked in an account separately earmarked for such purpose.

Held that sending the corporate debtor into liquidation just because liquidation value is more than enterprise value, would not be in keeping with objectives of IBC; IBC is not about maximizing value of all costs even if it means corporate death, which will inevitably ensue if company is sent into liquidation. Since CFM was pursuing for liquidation because liquidation value was more than enterprise value, same could not be a ground for sustaining application for liquidation and it was not in line with objects of the Code. Thus, application seeking

liquidation of the corporate debtor and challenging implementation of approved resolution plan was to be dismissed.

SECTION 10A - CORPORATE INSOLVENCY RESOLUTION PROCESS - SUSPENSION OF

B. Sreekala v. Al Sadiq Sweets - [2022] 139 taxmann.com 501 (NCLAT - Chennai)

Where respondent-operational creditor and corporate debtor entered into an agreement and as per agreement amount was due and payable on 25-4-2020, application filed by respondent under section 9 on 16-9-2020 was not maintainable as per provision of section 10A as no application for initiation of CIRP of corporate debtor could be filed for any default arising on or after 25-3-2020 for a period of six months or such further period not exceeding one year from such date as may be notified in this behalf etc.

The respondent-operational creditor entered into an agreement with the corporate debtor for export of cashew kernels. The corporate debtor raised pro forma invoice to the respondent and was paid Rs. 1 lakh. The respondent issued a demand notice under section 8 demanding amount paid to the corporate debtor. The respondent filed an application dated 16-9-2020 under section 9 for initiation of CIRP against the corporate debtor. NCLT by impugned order admitted said application holding that the corporate debtor was in default of debt due and payable. On appeal, the appellant-promoter/director of the corporate debtor contended that jurisdiction threshold to file application under IBC was Rs. 1 crore and same was being notified in Notification dated 24-3-2020 issued under section 4. The appellant further stated that when date of default was after 25-3-2020, application filed under section 9 would be barred by section 10A. It was found that contract was terminated on 30-4-2020 and there was a dispute in regard to contract for delivery of goods between parties.

Held that threshold limit under section 10A for initiation of CIRP is Rs. 1 Crore vide Notification dated 24-3-2020, but in instant case, 'Default' claimed from the corporate debtor was Rs. 1 Lakh and 'interest' amount, which was denied by the corporate debtor. In view of fact that under contract, amount was due and payable on 25-4-2020, as per provision of Section 10A, application filed by the operational creditor/respondent No. 1 under section 9 was not maintainable as no application for initiation of CIRP of the corporate debtor would be filed for any default arising on or after 25-3-2020 for a period of six months or such further period not exceeding one year from such date as may be notified in this behalf etc.. Admitting application

and declaring moratorium was clearly unsustainable in eyes of law, therefore, impugned order passed by NCLT admitting section 9 application was to be set aside.

Mahesh Chand Agrawal., In re [2022] 138 taxmann.com 515 (IBBI)

SECTION 208 - INSOLVENCY PROFESSIONAL - FUNCTIONS AND OBLIGATIONS OF

Where 'M', who was registered as member of Registered Valuer Organisation had concealed material information in his application form for registration regarding pendency of 3 FIRs filed against him by PNB for his role as valuer, concealment of material facts by 'M' was in violation of rule 3(1)(k) of Companies (Registered Valuers and Valuation) Rules, 2017 and Model Code of Conduct for Registered Valuers and, therefore, registration of 'M' as Registered Valuer was to be cancelled.

'M', who was Member of Registered Valuer Organisation, had concealed material information in his application form for registration regarding pendency of 3 FIRs filed against him by Central Bureau of Investigation on basis of complaint made by PNB for his role as valuer.

Held that it is duty of a prospective valuer to be responsible, accountable and to maintain integrity, however, in instant case concealment of material facts of chargesheet being filed by CBI against 'M' affected his integrity and reflected his inability to adhere to standards of professional ethics, which was in violation of rule 3(1)(k) of Companies (Registered Valuers and Valuation) Rules, 2017 and Model Code of Conduct for Registered Valuers. Thus, in exercise of powers conferred vide notification of Central Government No. GSR 1316(E) dated 18-10-2017 under section 458 of Companies Act, 2013 and in pursuance of rule 15 and rule 17 of Companies (Registered Valuers and Valuation) Rules, 2017, registration of 'M' as Registered Valuer was to be cancelled.

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

Vineet Khosla v. Edelweiss Asset Reconstruction (Co.) Ltd. - [2022] 139 taxmann.com 527 (NCLAT- New Delhi)

Where all correspondences between parties evidenced acknowledgement of debt by corporate debtor, there was neither any fraud practiced by financial creditor nor there was any misrepresentation made by financial creditor before Appellate Tribunal, which had dismissed appellant's appeal against liquidation order passed by NCLT and, therefore, order of NCLAT could not be said to be obtained by fraud.

The corporate debtor availed loan facility from EXIM bank and committed default in repayment of loan. Bank approached DRT for recovery of outstanding amount. DRT issued certificate for recovery in favour of the bank against the corporate debtor and bank assigned its debt due to the corporate debtor in favour of the financial creditor. Later, the financial creditor filed application under section 7 and same was admitted by NCLT. Since no resolution plan came to be approved, Resolution Professional filed an application for order of liquidation against the corporate debtor. The appellant-suspended director of the corporate debtor filed an application to recall CIRP admission order. NCLT allowed liquidation application filed by the Resolution Professional and dismissed application filed by the appellant. Aggrieved by said orders, the appellant filed appeal before Appellate Tribunal, which was dismissed by impugned order dated 7-1-2022. The appellant filed application challenging said order stating that the financial creditor committed fraud, which mislead NCLAT in passing impugned order.

Held that since all correspondences between parties evidenced acknowledgement of debt by the corporate debtor, there was neither any fraud practiced by the financial creditor nor there was any misrepresentation made by the financial creditor before the Appellate Tribunal and, therefore, impugned judgment could not be held to be obtained by fraud. Therefore, instant application challenging the impugned order of the Appellate Tribunal was to be dismissed.

SECTION 238A - CORPORATE INSOLVENCY RESOLUTION PROCESS - LIMITATION PERIOD -

Kotak Mahindra Bank Ltd. v. A. Balakrishnan [2022] 138 taxmann.com 567 /[2022] 172 SCL 696 (SC)

A liability in respect of a claim arising out of a recovery certificate issued by DRT would be a 'financial debt' within meaning of section 5(8) and consequently, holder of recovery certificate would be entitled to initiate CIRP, if initiated within a period of three years from date of issuance of recovery certificate.

IBHL bank sanctioned financial assistance to borrowers and the corporate debtor stood as corporate guarantor. Borrowers defaulted in payment - IBHL assigned its debts to the appellant bank. Since payment was still pending, the appellant initiated proceedings before Debt Recovery Tribunal and obtained a recovery certificates against borrowers and guarantor. On basis of said recovery certificates, the appellant claimed to be a financial creditor filed an application for initiating CIRP against the guarantor and same was admitted by the Adjudicating Authority. NCLAT by impugned order held that since default was of year 1997, CIRP application filed in year 2018 was hopelessly time barred and, thus, order admitting CIRP application was to be set aside.

Held that liability in respect of a claim arising out of a recovery certificate would be a financial debt within meaning of section 5(8) and consequently, holder of recovery certificate would be a financial creditor within meaning of section 5(7). Holder of such certificate would be entitled to initiate CIRP, if initiated within a period of three years from date of issuance of recovery certificate. Since application under section 7 was filed within a period of three years from date on which recovery certificate was issued, i.e. in year 2017, NCLAT had erred in holding that it was barred by limitation and, thus, order of NCLAT was to be set aside.

Case Review : A. Balakrishnan v. Kotak Mahindra Bank Ltd. [2021] 125 taxmann.com 215/164 SCL 603 (NCLAT - New Delhi) (para 86) reversed.

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

Amsons Communication (P.) Ltd. v. ATS Estates (P.) Ltd. [2022] 139 taxmann.com 583 (NCLAT- New Delhi)

Where appellant-operational creditor filed application under section 9 claiming unpaid operational debt, which included interest but same was disputed by corporate debtor who had paid principal amount, NCLT rightly rejected application filed by appellant holding interest as unconscionable, irrational and unjustified.

The appellant-operational creditor was engaged in advertisement related work with the respondent-corporate debtor. The appellant filed an application under section 9 for initiation of CIRP against the corporate debtor and claimed an amount along with interest. The corporate debtor made payment of principal amount to the appellant. NCLT issued notice to the corporate debtor who disputed the claimed interest. NCLT by impugned order rejected application filed under section 9 and held claim of interest as unconscionable, irrational and unjustified.

Held that since the respondent in its reply to notice issued under section 9 had refuted claim of the appellant and also denied any liability towards any interest, claim regarding interest was clearly disputed. Since in application filed under section 9 it was stated that rate of interest claimed by the appellant was 3 per cent whereas in invoices it was mentioned at 5 per cent interest rate per month, there was no clarity even on part of the appellant as to what rate of interest was liable to be paid by the corporate debtor. The Adjudicating Authority after taking into consideration of all facts and circumstances had rightly turned claim of interest as unconscionable, irrational and unjustified and had rightly recorded finding that claim for interest on delayed payment was a disputed fact by the corporate debtor and it could only be adjudicated by a court of competent jurisdiction. Thus, NCLT had rightly rejected application filed by the appellant under section.

INVITING APPLICATIONS FOR ENROLLMENT OF IPES AS IP WITH INSOLVENCY PROFESSIONAL AGENCY OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

INSOLVENCY PROFESSIONAL AGENCY
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2. Copy of certificate of Recognition issued by IBBI
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4. Enrolment Form

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✓ The article should be topical and should discuss a matter of current interest to the professionals/readers.

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

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