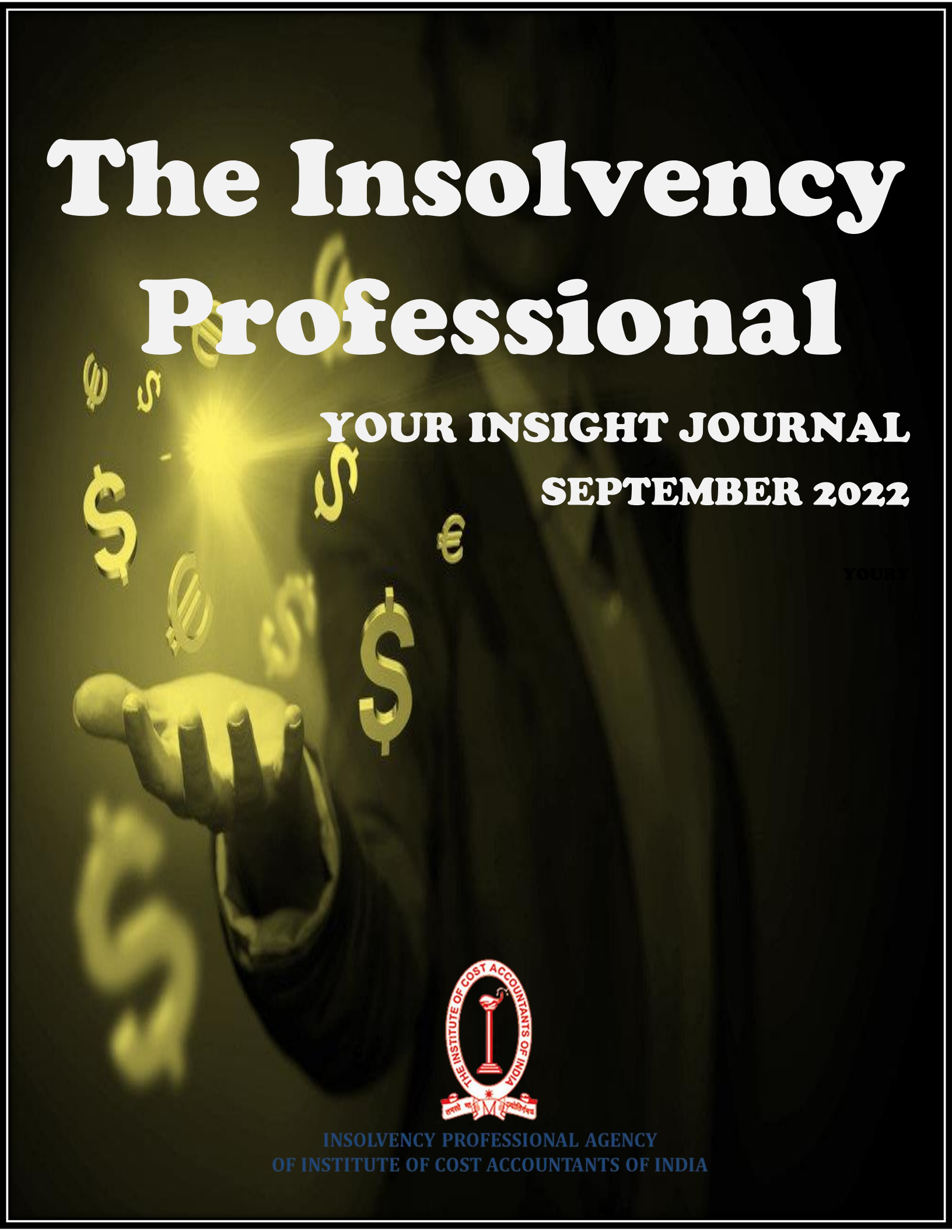
The Insolvency Professional

YOUR INSIGHT JOURNAL

SEPTEMBER 2022



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.

INDEX

CHAIRMAN'S MESSAGE

Incentivising the Insolvency Professionals

The incentives are regarded as one of the Extrinsic Motivational Tools to induce a person to strive to give his best at the work place. The incentives are of various types. One of the types is Performance-linked Incentive. It has been used as a motivational tool for several years in different professions and employments. The performance-linked incentives have been significantly instrumental and effective to enhance the levels of performance and efficiency of the individuals and eventually improving the overall performance of the organisation.

The profession of Insolvency Resolution was devoid of any special incentive to the Insolvency Resolution Professionals despite the fact that timely Completion of Corporate Insolvency Resolution Process and maximisation of the value of assets of the Corporate Debtor was the underlying objective for the introduction of the *Insolvency and Bankruptcy Code 2016.*

The Code provided a period of 180 days for the resolution of Insolvency. A further provision was made to extend the permissible time limit upto additional 90 days. However the overall time limit including the extra time taken in seeking judicial intervention was fixed at 330 days. The experience in the first 5 years to ensure completion of Insolvency Resolution with the prescribed time limits was not very encouraging. Hence, there has been a thinking as to whether an introduction of performance-linked incentive to the Insolvency Resolution Professionals would help achieve the twin objectives of timely completion and value maximisation. Accordingly, Insolvency and Bankruptcy Board of India after gathering the suggestions/feedback from other stake holders has amended the Regulations on 13.09.2022 to (i) standardise the fee structure for Insolvency Professionals & (2) provide for incentivising the Insolvency Professionals for (a) timely completion of the Process and (b) maximisation of the realisable value of the assets of the Coporate Debtors.
These new measures are expected to significantly impact the efficiency of the process under the Insolvency and Bankruptcy Code 2016 on both the counts viz. timely completion and value maximisation.

Regulations 33 & 34 deal with fixation of the expenses to be incurred by the Insolvency Resolution Professional.

If such expenses are not fixed by the Applicant who initiated the Corporate Insolvency Resolution Process, the Adjudicating Authority is competent to fix such expenses. The amount incurred by the applicant who initiated the Resolution Process, shall be ratified by the Committee of Creditors and shall be treated as Insolvency Resolution Process Cost like the fee payable to the Insolvency Resolution Professional. The amendment of 13.09.2022

also provides that the fee payable to Interim Resolution Professional or the Resolution Professional w. e. f 1.10.2022 shall not be less than the fee specified in Clause 1 for the period specified in Clause 2 of the Schedule II. The minimum fee so fixed and payable to the Interim Resolution Professional or the Resolution Professional shall range from Rs. 1.00 lakh per month to Rs. 5.00 lakh per month depending on the quantum of claims received during the resolution process. The fee so specified shall be payable from the date of appointment of the Interim Resolution Professional or the Resolution Professional till the date of submission of application for approval under section 30 or submission of application for liquidation under section 33 or submission of application for withdrawal under section 12A or the order for closure of Corporate Insolvency Resolution Process whichever is earlier.

The fee for the period after the dates specified above shall be decided by the Applicant who initiated the Resolution Process or the Committee of Creditors. A higher amount of fee can be paid based on market factors like Scale of Business Operations of the Corporate Debtor, Nature of Activity/Sector, Level of Operating Economic Activity, Complexity Related to the Process etc.

The Performance Linked Incentive will include two Components viz., For timely Completion and For Value Maximisation as follows:

If CIRP is completed in less than or equal to 165 days the incentive payable to IRP/RP will be @ 1% of the realisable value/the amount payable to the creditors as per the approved resolution plan. Similarly for completing the resolution above 165 days upto 270 days, the incentive payable shall be @ 0.75% and beyond 270 days upto 330 days @ 0.50%. No incentive is payable if CIRP is completed in more than 330 days.

The Performance Linked Incentive for Value Maximisation shall be @ 1% of the amount by which the realisation value is higher than the liquidation value after approval of the resolution plan by the Adjudicating Authority on commencement of credits by the Resolution Applicant.

Commencing 01.10.2022, CoC at its discretion may decide to pay PLI not exceeding Rs. 5.0 crore in accordance with the provisions of Clause 3 and 4 of the Schedule II or may extend any other performance linked structure as it seems necessary. Such payments shall be made out of the funds available with the Corporate Debtor, contributed by the Applicant or the members of the CoC and or raised by way of Interim Finance. Such incentives shall be included in Insolvency Resolution Process Cost.

These measures are expected to bring about efficiency in the Insolvency and Bankruptcy Resolution Process. Our members may make their best efforts to get benefit of the amended regulations and make the process more efficient and robust.

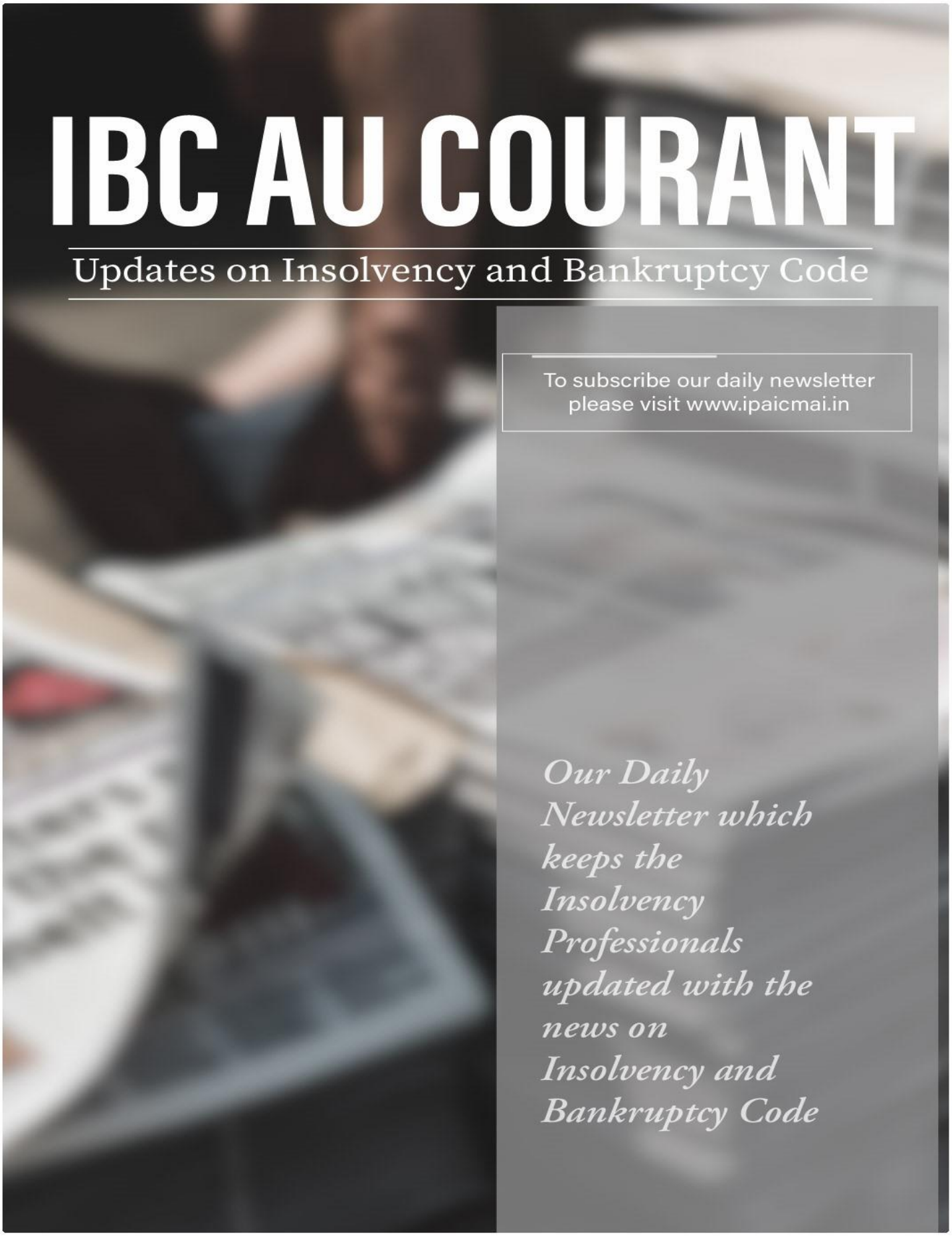
Best Wishes & Festival Greetings
Dr. Jai Deo Sharma,
Chairman, IPA ICAI

PROFESSIONAL DEVELOPMENT INITIATIVES

EVENTS

SEPTEMBER 2022

02nd – 04th September 2022	Master Class on Emerging Framework under IBC, 2016.
10th -11th September 2022	Learning Session on Evaluation Matrix, Fair Value and Liquidation Value
18th September 2022	Workshop on Evolving Framework for Resolution Plan under IBC, 2016
20th September 2022	Webinar on IU's Technology Solutions for Insolvency Professionals
21st September 2022	Interactive meet on recent Amendments under IBC, 2016.
25th September – 01st October 2022	58th Batch of Pre-Registration Educational Course.



IBC AU COURANT

Updates on Insolvency and Bankruptcy Code

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

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

ARTICLES

Contents of the Notice of the 1st CoC Meeting

CA Manish Sukhani
Insolvency professional

Synopsis

For many of my fellow Insolvency Professionals and others, who are not from the secretarial practice background, this article, instead of covering the points to be covered in the Notice, shares with them the contents of the Notice of the 1st CoC Meeting during the CIRP of a corporate debtor, in the form of a template-sample draft. The sample provides opportunity to look at the structure, drafting and presentability of the Notice, which may be helpful to some potential IRPs. Most part of the draft can be used for subsequent meetings, with necessary additions/ deletions in the agenda items. Due to word limit, this article does not cover the explanatory statements.

Introduction

Section 22 (1) of the Code requires the first meeting of the committee of creditors to be held within seven days of the constitution of the committee of creditors. The Interim Resolution Professional (IRP) is required to call and chair this meeting. It is the first opportunity for the IRP to make an impression on the Committee of Creditors and to seek their approval to be the Resolution Professional of the corporate debtor. As is said, the first impression is the last impression, hence it is worthwhile for the IRP to cast an impression of a thorough professional through the Notice of the 1st CoC Meeting, which is the IRP's first formal communication with the CoC.

Chapter VI consisting of Reg 19 to Reg 24 covers the requirements with respect to a Meeting of the Committee of Creditors. Reg 21 deals specifically with the Contents of the Notice. Point (iii) of subregulation 3 of Reg 21 requires Notice to contain copies of all documents relevant to the matters to be discussed and the issues. These copies are provided by way of Explanatory Statements and/ or Annexures. Instead of reproducing these regulations here, let us look at the application of these provisions by means of a sample Notice. However, due to restriction on words, the sample compilation of the Notice hereunder does not contain details contained in Explanatory Statements and/ or Annexures, and need to be added appropriately under the relevant Part.

Cover Page of the Compilation

NOTICE

OF THE FIRST MEETING OF

THE COMMITTEE OF CREDITORS

OF

XYZ Private Limited

(CIN -_____)

(Registered Office: _____)

(Under Corporate Insolvency Resolution Process Since _____)

Day & Date: **Wednesday, 24th November, 2022**

Time: **10:00 Hours 1!0.00 AM)**

Mode: **Virtual/ Physical/ Hybrid**

Venue: **B-213-214, ORM Corporate Park, Royal Palms,**

Aarey, Goregaon East, Mumbai 400065

This Compilation includes ...

I. Abbreviations
II. List of Participants and Invitees
III. Notice, along with the Agenda
IV. Notes to the Notice and General Guidelines
V. Explanatory Statements, forming part of the Notice
VI. Annexures, forming part of the Notice
VII. Letter of Authorization (Format)

PART I

Abbreviations used in the Notice and the following statements

AA Adjudicating Authority (NCLT, _____ Bench)

AR Authorised Representative

CD Corporate Debtor (i.e. _____ Private Limited)

CIRP Corporate Insolvency Resolution Process

CoC Committee of Creditors

Code Insolvency and Bankruptcy Code, 2016

FC Financial Creditor

FY Financial Year

IA Interlocutory Application

IU Information Utility

NCLAT National Company Law Appellate Tribunal, New Delhi

NCLT National Company Law Tribunal, _____ Bench

OC Operational Creditor

IRP Interim Resolution Professional (i.e. name of the IRP)

Reg Regulation (of REG004)

REG004 Insolvency And Bankruptcy Board Of India (Insolvency Resolution Process For Corporate Persons) Regulations, 2016

RP Resolution Professional

Sec Section (of the Code)

VC Video Conferencing

PART II

1st Meeting of the CoC of XYZ Private Limited
List of Participants and Invitees

Financial Creditors

S. No.	Name of the Financial Creditor	Voting Share (%)	E-mail
1.		nn%	
2.		nn%	
3.		nn%	

Members of suspended Board of Directors of XYZ Private Limited

S. No.	Name of the Directors	E-mail
4.		
5.		

Operational Creditors if aggregate dues are at least 10% of the debt

S. No.	Name of the Operational Creditor	Name of the Representative of the OC
6.		

Invitees

S. No.	Name of the Invitee	Role/ Reason for invitation
7.		

PART III

NOTICE
OF THE FIRST MEETING OF
THE COMMITTEE OF CREDITORS OF
XYZ PRIVATE LIMITED
(CIN: _____)
(Registered Office: _____)

To,
All the members of the Committee of Creditors,
All the members of the Board of Directors,

NOTICE is hereby given that the First Meeting of the Committee of Creditors of _____ **Private Limited** will be held at **10.00 AM** on **Wednesday, November 24, 2022** at **B-213-214, ORM Corporate Park, Royal Palms, Aarey, Goregaon East, Mumbai 400065**, to transact the following businesses –

AGENDA

A. Welcome note by the Chairman

B. Roll Call & Ascertainment of Quorum

C. Matters to be discussed/ taken note of at the meeting

a. To authorize any other person to attend the CoC Meeting, if required
b. To take note of the appointment of the Authorized Representative of financial creditors
c. To take note of the List of Creditors & the Report on the constitution of the CoC
d. To take note of actions undertaken by the Interim Resolution Professional
e. To discuss on the tentative timelines for conducting the CIRP of the Company
f. To take note of the status of the Original title deeds of land, buildings and units
g. To discuss registration with an Information Utility
h. To take note of the Secretarial, Accounting and Taxation gaps, if any, noted by the IRP in the Company
i. To update about the status of various statutory compliances of the Company
j. To update on the legal cases filed by and against the Company
k. To discuss the appointment of legal firm/ a lawyer
l. To discuss the appointment of a Practising Company Secretary/ CS Firm
m. To discuss re-starting of operations
n. To discuss the status of payment of Staff Salaries at Head Office and at Plant
o. Corporate Office and Website of the Company
p. To discuss the security concerns and risks at the manufacturing, warehousing, other business location
q. To discuss the Budget
r. To discuss the appointment of registered valuers and their fee
s. To discuss the appointment of a transactional auditor and their fee

t. Any other issue with the permission of the Chair

D. Issues to be voted upon at the meeting

a. Item nos. C.a to C.s mentioned above, if required post discussion
b. To consider the reduction in the Notice period for convening meetings of CoC
c. To consider the change in quorum required for conducting CoC Meetings
d. To consider the adjournment of meeting sine die, for want of quorum
e. To ratify expenses incurred on public announcement
f. To approve the professional fees of the IRP (and his team)
g. To approve the estimated Operating Costs incurred by the IRP for running the business of the Company
h. To ratify the estimated CIRP Costs incurred by the IRP
i. To appoint the IRP as the Resolution Professional and fix his fees or to replace the IRP by another RP
j. Delegation of authority by Resolution Professional
k. To fix a limit up to which the resolution professional without the permission of the CoC, is entitled to initiate a debit transaction with the financial institution/ banks maintaining accounts of the Company
l. To approve raising of the Interim Finance
m. Any other matter discussed and deemed fit for deciding upon during the meeting through voting

E. Announcement of decisions taken at the meeting

Explanatory Statements to and copies of all documents relevant for transacting the businesses mentioned above are annexed to this Notice.

Sd/-

_____

(**Name of the IRP**)
Interim Resolution Professional
of XYZ Private Limited
Regn No.: IBBI/IPA-001/IP/P00668/2017-2018/11137
B 213, Orchard Road Mall
Royal Palms, Aarey Colony
Goregaon (East), Mumbai
Maharashtra, INDIA 400065

Place:
Date:

Email: ca.m.sukhani@gmail.com

PART IV

1st Meeting of the CoC of XYZ Private Limited

Notes to the Notice and General Guidelines

(i) A participant may attend & vote in the meeting either in person or through an authorized representative:
provided that such participant shall inform the signatory of the Notice, at least 48 hours in advance of the meeting, the identity of the authorised representative who will attend and vote at the meeting on its behalf;
The authorized representative is required to carry or email an Identity Card for his identification and authorization letter as per the format provided in this compilation.

(ii) Circular No. IBBI/CIRP/016/2018 dated 10th August, 2018 issued in exercise of the powers under clauses (aa) and (p) of sub-section (1) of section 196 of the Insolvency and Bankruptcy Code, 2016 requires that financial creditors, other than creditors under section 21 (6A) (b), must be represented in the CoC or in any meeting of the CoC, by such persons who are competent and are authorised to take decisions on the spot and without deferring decisions for want of any internal approval from the financial creditors;

(iii) An option is available to the participants to participate through video conferencing. The necessary information to enable participation through video conferencing is available in the Table marked as Table 1 hereinbelow;

(iv) In terms of Reg 16A of REG004, Mr. _____, Insolvency Professional, is to act as the Authorised Representative of the Financial Creditors in a class (_____). An application for his appointment as the Authorised Representative of the Financial Creditors in a class (_____) has been filed with the Hon'ble NCLT. His details are as follows -
IBBI Registration No.: _____
Address: _____
E-mail : _____

(v) As per provisions of Sec 24(3) of the Code, a participant being a Financial Creditor shall only be entitled to vote at the Meeting or by electronic means. The Directors of the Corporate Debtor and one representative of the Operational Creditor(s), if any, attending the Meeting shall not have any right to vote at the Meeting and shall not form a part of the quorum. A financial creditor being a related party of the Corporate Debtor shall not have any right of representation, participation or voting in the Meeting.

(vi) At the conclusion of voting at the Meeting, the decision taken on each of the items along with the names of the Members of the Committee of Creditors (COC) who voted for or against the decision, or abstained from voting will be announced.

(vii) In terms of Reg 25(3) of REG004, the IRP/RP, acting as the Chairman, shall take a vote of the members of the committee present in the meeting, on any item listed for voting after discussion on the same.

(viii) In terms of Reg 25(5) of REG004, the IRP/ RP, acting as the Chairman shall seek a vote of the members who did not vote at the meeting on the matters listed for voting, by electronic voting system in accordance with Reg 26 of REG004.

(ix) All decisions of the CoC shall be taken by a vote of not less than fifty-one per cent of voting share of the financial creditors, except for items which require higher voting share.

(x) Notice of this meeting to the class of creditors will be communicated to their authorized representative.

(xi) E-Voting details shall be provided, if required, in due course.

Table 1 Information for participating through video conferencing

Meeting ID	https://zoom.us/j/128057499
Software Requirements	Zoom Software Once you click on the link above, the website will prompt a download free software of Zoom. After downloading the software, enter meeting ID as 128057499 and you can join the meeting. If you have pre-downloaded software, it will directly take you to the Meeting page

PART VII

Letter of Authorisation

(On the letterhead of the Participant)

Date

To,

(Name of the IRP)

Interim Resolution Professional

XYZ Private Limited

Dear Sir,

Subject: Letter of Authorisation to participate and vote in the Meetings of CoC of XYZ Private Limited in terms of Regulation 21(2) of The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016

I am (We are) the Financial Creditor(s)/ member of the suspended Board/ Operational Creditor(s) of XYZ Private Limited (the "Company") and hereby authorize Ms./ Mr. _____ (hereafter as "our Authorized Representative") to participate and vote on my (our) behalf on all items taken up for voting in the meetings of the Committee of Creditors of the Company.

We undertake to be bound by the voting done by our Authorized Representative and further state that our Authorized Representative is competent and is authorised to take decisions on the spot and without deferring decisions for want of any internal approval from me (us).

Please note the identity details of our Authorized Representative as hereunder –

Particulars	**Specifics**
IBBI Registration Number (applicable if AR is an Insolvency Professional)	
Identity Proof Type	PAN/ AADHAAR/ PASSPORT
Identity Proof Number	

(Signature of the participant)

Name of the participant

Designation, if applicable

Seal of the participant, if applicable

Real Estate Insolvency - Time for A Rethink?

Sunil Kumar Gupta
FCA. IP. Valuer (SFA), FAFD, ID (MCA)

Synopsis

Real estate is one of the few industries that has grown at an exponential rate during the last two decades. However, it has lost its popularity due to stagnation and mediocre performance in terms of prices and sales. The Government recognized the issue and hence passed the Insolvency and Bankruptcy (Amendment) Code of 2018 to include real estate buyers as financial creditors, as opposed to being classified as other creditors and receiving no rights or advantages. However, it is still unclear whether this amendment has improved the condition of homebuyers.

Background

Enactment of the Insolvency and Bankruptcy Code, 2016 (IBC or Code) is a serious effort on the part of the Government of India in the direction of ease of doing business in the country. As the law is still evolving, the Regulator is keeping a close watch on the outcome of the proceedings in the courts of law, and it has been seen that it is quick in plugging the loopholes. In this direction, The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 was a big bold milestone by the Regulator, which inserted an explanation under section 5 (8) (f) which clarified that payments made by an allottee under a real estate project would be deemed to be a financial debt i.e., a homebuyer will be considered as a financial creditor.

This was a great relief to Homebuyers because prior to this it was not clear whether homebuyers are financial creditors or operational creditors. Lakhs of homebuyers across the country especially in the NCR region were facing a lot of uncertainty with regard to the delivery of possession of their flats and apartments. The Supreme Court in Bikram Chatterji Vs. U.O.I. delivered a landmark judgment protecting the interest of distraught home buyers of Amrapali Group in Noida and Greater Noida. The Court in strong words observed that they are the victims of collusion of the statutory authorities, bankers, and the developer. The builder was granted a land lease by just paying 10% of the lease amount. The project was financed by the bankers without verifying the status of lease dues. The forensic audit proved the diversion of funds by the builder to its other companies and projects. Since the home buyers were not classified into any specific category of creditors under the IBC, they had no rights under the law. It was felt by

the court that if in the insolvency resolution process, the home buyers are left in the last category of creditors, this would amount to gross injustice to them.

In spite of various judgments in the favour of homebuyers by the honourable Supreme Court and amendments made in the Act itself to protect the right of homebuyers, still, the position is very critical. Before analysing it major issues, let us see the present status:

Homebuyers have the following resources:

• RERA

• Consumer Protection Act

• IBC

Home buyers may decide to proceed before any of the above three forums, however, the motive is the deciding factor: whether it is recovery or reorganization. IBC does not allow applications for recovery of the amount. Thus, for recovery - Home buyers may proceed under RERA/ Consumer Protection Act.

An application under IBC

Home buyers are identified as Financial Creditors [Explanation (i) – Section 5 (8) (f)], hence, the application may be submitted for initiation CIRP – u/s 7, w.e.f. 6th June 2018 – {IBC (Second Amendment) Act, 2018}.

The minimum threshold for filing application {Introduced by IBC (Second Amendment) Ordinance, 2019; thereafter, IBC (Amendment Act), 2020 w.e.f. 13th March 2021}:

The application must be filed jointly, by at least –

• one hundred of such allottees under the same real estate project: or

• 10% of the total number of such allottees under the same real estate project whichever is less

The home-buyers will constitute a 'class of creditors. The voting share of an individual home-buyer shall be proportional to his/ her dues.

Are we on right track in case of real estate insolvency?

As per the Insolvency and Bankruptcy Board of India ("IBBI") quarterly newsletter for the month of January – March 2022, it is observed that:

– 1,051 out of 5,258 total insolvency proceedings admitted by the National Company Law Tribunal as on 31 March 2022, are with respect to real estate developers;

– 329 out of the aforesaid 1,051 proceedings have been withdrawn or settled or set aside on appeal, and another 274 have ended in orders of liquidation;

– As of 31 March 2022, only 62 real estate companies have been rescued under the Code which amounts to less than 6% of the total insolvency proceedings initiated against real estate developers.

Therefore, a large number of real estate projects are under consideration under IBC. Recently, the Insolvency Bankruptcy Board of India invited suggestions, vide its discussion paper dated 14th June 2022 for effective and expeditious resolution of Real Estate Projects. The discussion paper states-

"It has been represented to the Insolvency and Bankruptcy Board of India (IBBI) that real estate projects require different dispensation than normal projects.

In a dynamic environment, despite the best of intentions, a regulator may not always be able to address the ground realities on its own. On the other hand, the stakeholders may, at leisure, contemplate the important issues in the extant regulatory framework creating hindrance in the realization of the objective of the legislation and offer alternate solutions to address them inequitable manner."

As per my understanding, based on going insolvency cases, particularly of J.P. Infratech and Amarpali, the followings are major issues in real estate projects which lead to delays in resolution, even after submitting CoC approved resolution plan before the Adjudicating Authority for its approval because such homebuyer files application in the NCLT against the CoC approved resolution plan.

a) How to treat multiple claims against the same unit/flat. In most cases, a claimant has valid documents. Sometimes such claimant is proposed to be adjusted against unsold inventory or proposed newly construction on the Area which will be acquired after purchasing additional FAR if it is available, in the resolution plan. Again, an issue arises of pricing because a such homebuyer is not willing to pay additional costs beyond the agreed amount as per BBA.

b) Another issue is payment made in cash by home buyers to the builder, having a receipt on the letterhead of the builder or in any other form, however, there is no corresponding entry in the books of accounts of the builders. Therefore, it is difficult for IRP/RP to collate such a claim.

c) Calculation of interest till the CIRP date. Here the question arises of at what rate of interest because BBA is silent on this aspect. In most of the cases, BBA talks about the "Penalty" for the delay in possession. There is a clause in BBA that states the builder will charge a rate of interest say 18% if the allottee will not pay instalment on time. Allottee/ Homebuyer in such case wish to charge the same rate of interest to work out the claim amount.

d) In most of the stalled real estate projects, homebuyers already paid more than 70 to 80% of the agreed amount as stated in BBA. Due to overrun, the prospective applicant needs more funds in comparison of funds to be received or recovered from such homebuyers to complete the projects. There is no prospective inflow except the sale of unsold inventory. It is also true, by and large, nobody would like to buy a property in such type of project due to uncertainty.

e) Land dispute/registry issue: In case of leasehold land, there is already a dispute of interest rate because what we have seen that in Noida / Greater Noida, a builder acquired a piece of land on a particular scheme, like pay 10% of the land value and the remaining amount in instalment along with interest. Noida authority is not giving NOC till clearance of all dues including interest to allow the builder to make a registry. NOC is a must because it is leasehold land. There are so many homebuyers who have taken possession of flats and are unable to get a registry because of non-payment of pending land dues along with interest to the Authority.

f) Situation has become very panicky when such a homebuyer has to file a claim in case of insolvency proceedings inspite of making all payments as per BBA and having possession, residing, and paying maintenance continuously because they are unable to get a registry. There is no separate treatment in IBC for such homebuyers.

g) Recently, the Union Bank of India petitioned against Supertech for default in payments. It is clear in this case that insolvency is not usually a direct result of default of payment due to illiquidity but can also be a consequence of the violation of regulations that bind the real estate developer.

Sometimes there are judgments that establish that real estate insolvency is a different type of proposition like the National Company Law Tribunal, Chennai Bench vide its order dated April 25, 2022, in Mr. N. Kumar v. Tata Capital Housing Finance Ltd. held that the project-wise Corporate Insolvency Resolution Process of a real estate company is outside the purview of the Insolvency and Bankruptcy Code, 2016 (IBC).

Another issue came into light relating to a power struggle between homebuyers and lending institutions for dominant control over the corporate insolvency resolution process (CIRP) of real-estate developers. In the case of IDBI Trusteeship Services Limited v. Abhinav Mukherji, National Company Law Appellate Tribunal (NCLAT) confirmed the power of homebuyers to challenge lending institutions from qualifying as Financial Creditors (on a case-to-case basis) and finding a place on the Committee of Creditors (COC).

Conclusion

Whenever there is an issue, the regulator is taking immediate action and makes a suitable amendment to the Act or procedure. One should be grateful to our judiciary system which always supports the issues of homebuyers and takes too much pain as has been seen in the case of J.P. Infratech and Amarpali. It is very clear that Real Estate Business is a different type of business having multiple issues apart from default in payment. The policy question is that if there is a requirement for separate procedures for real estate insolvencies for the benefit of the allottees, should there be adequate preinsolvency measures? Or should the preference be for pre-packs or other alternative disputeresolution procedures? Pre-insolvency procedures should be made effective and the resolution of a company in the twilight zone should start much earlier; we should not wait for it to fail.

Bottlenecks in implementation of the Insolvency and Bankruptcy Code, 2016 effectively?

Jai Narayan Gupta
Insolvency professional

Synopsis

The Preamble and the objectives of the Code have envisioned various objectives for the Code such as resolution in a timely manner, maximization of value, and settling the order of priority of payment. However, due to varied interests of stakeholders, regulators, and the judiciary, the Code has not been able to achieve its set objectives. This article highlights some of the shortcomings in the practical implementation of Code, the reasons, and the remedial measures.

Preamble of the Insolvency and Bankruptcy Code, 2016 states that it is an Act to **consolidate and amend the laws** relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a **time bound** manner for **maximisation of value** of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the **order of priority** of payment of Government dues and to establish an **Insolvency and Bankruptcy Board of India**, and for matters connected therewith or incidental thereto.

1. The Code came into being to **consolidate and amend the laws.** Such laws pertained to reorganisation and insolvency resolution. However, in practice invariably, the applicant under IBC for CIRP is moved by the motive of getting his dues paid. It is irony that the lenders, particularly Public Sector Banks, who are interested in realisation of tangible assets of the Corporate Debtor. They are not interested in resolution or avoidable transactions or receivables or inventories etc. although they lent on primary security of these assets. The word "reorganisation" or "resolution" is totally missing in their mindset. The same story goes with other financial or operational creditor.

2. The Code came into being to promote entrepreneurship. However, the matrix of rating the Resolution Applicants is titled towards the early realisation of dues. Committee of Creditors seem to not concerned with the concept of promoting entrepreneurship.

3. The Code came into being to promote availability of credit. But the facts are otherwise. The Financial Creditors are unwilling to fund the Resolution Applicants after the takeover of the Corporate Debtor or its assets as going concern. Although,

the lenders would provide finance which would be substantially lower than the finance they provided earlier on the same assets, and to a substantially financially better-off firm, yet they are shy in providing the finance. Even they are shy of providing Interim Finance during CIRP although such interim finance would be eligible for refund at the first instance at the time of resolution or distribution on liquidation.

4. The Code came into being to promote balance the interests of all the stakeholders. However, the operational creditors are the worst sufferer. While most of the Financial Creditors are generally entities with large manpower and monetary resources and they continuously monitor the funds provided to the Corporate Debtor, the operational creditors are the entities with small means. The social impact of loss for the operational creditors is substantially higher for the operational creditors, yet they are totally ignored while distributing the proceeds on resolution or liquidation. Another area where the interests of the stakeholders are ignored is that the application for contribution by the suspended board of directors or other beneficiary to the assets of the Corporate Debtor, is not in the priority list of the Adjudicating Authority. There are instances, where the Adjudicating Authority even removed the Resolution Professional on flimsy grounds on the application of the suspended board of directors when the Resolution Professional filed application u/s. 66 for fraudulent transactions benefitting the promoters with conclusive evidences.

5. The Code came into being to alter in the order of priority of payment of Government dues. In general, government dues take precedence over other dues. However, the Code specifically provides that Government dues would be take back seat in the list of priorities. But, some recent judicial pronouncements have tried to dilute this objective by stating that such dues are secured debts and also that these need not be claimed and that in the name of employees dues, PF authorities, Income Tax authorities, municipal tax authorities, electricity distribution companies etc. have started claiming interest and penalty etc. as priority payments. Perhaps, the reason why judicial authorities have dared to travel beyond the provisions of the IBC is due to the fact that the IBBI, as regulatory authority, has failed to prevail its authority over the judiciary, who were supposed to provide supportive role in the IBC.

6. The Act came into being to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto. While the Board has several proactive measures to streamline the procedures to implement the Code, yet it has not been able to address some core issues, now ailing the IBC procedures, particularly the time bound resolution for which the slow pace of addressing the matters by Adjudicating Authority is the single most important factor. Moreover, the Board and the IPAs are involved in unnecessary multiple reporting requirements by IPs, like CIRP7 to be filed by RP every 30 days till the closure of the CIRP, the delay not being attributable to the RPs and for filing, a fixed time slot of 4 days is provided after each 30 days and the RP cannot file before this time slot and after this time slot, penalty is payable by RP, while for delay in CIRP, he was not responsible. Another matter of obtaining renewal of AFA is also seems to be unnecessary, which serves no

additional purpose other than what are already provided for in the statute. The constitutional validity of AFA is pending adjudication before Delhi High Court. Another matter is the 6 monthly exercise of empanelment of IPs for the purpose of reference by NCLT. Firstly, such empanelment enables only those IPs eligible to apply for empanelment, who hold the AFA for the entire period of next 6 months. This requirement seems to be misplaced since in such a situation, all the IPs would be able to get themselves empanelled only for 6 months in a year, which indirectly acts as depriving them of the opportunity to get assignments through NCLT. Further, the guidelines state that IPs would be given assignments based on their existing assignments and the pending disciplinary proceedings etc. These are dynamic information, subject to change on day to day basis and a static information in the panel for 6 months cannot address such objective. Apart from these, there are several matters which come up before Adjudicating Authority as a matter of routine, like filing the progress reports, confirmation of change in RPs by CoC, recognition of IRP appointed as RP, directing the persons to cooperate u/s. 19 of Code of Regulation 9 of the Liquidation Regulation, on which the Adjudicating Authority issues a simple order directing to cooperate, which serves no substantial purpose. These matters waste the valuable time of the Adjudicating Authority. IBBI could establish branches to address these matters itself to the IPA could be delegated such matters.

7. The Code came into being to resolve in a time bound manner. It is irony that even Apex Court has stated that the timeline stated in the Code is only directory and not mandatory, which the regulatory Board has chosen to ignore. Nevertheless, the wording of the Code indicates that it was supposed to be mandatory. The matters are fixed and adjourned freely and frequently without any substantive headway. Particularly in the matters of avoidable transactions, the NCLT is more prone to adjourn the matters without stating the reasons in the Order. But, who will bell the cat? It is high time that even judiciary needs to be brought within the scrutiny as far as efficiency of procedures are concerned.

8. The Code came into being for maximisation of value of assets of persons in need of resolution. It is the open secret that in most of the cases, the unscrupulous promoters divert funds towards Not Readily Realisable Assets and/or write Off the same and/or "incurring" (or rather buying) the losses in the transactions and/or taking the assets beyond the reach of the FCs, RPs, or Liquidators. Many of such cases are possessed by CBI, SFIO and other investigating agencies. There is hardly any communication, cooperation and coordination of RP/Liquidator with such agencies in the resolution process. Several instances of fraudulent security surface, which were somehow, entertained by the lenders at the time of disbursement of loan, without adequate due diligence. All these matters form part of the PUFE Applications. However, such applications meet the step-motherly treatment in the hands of all, be it FCs, CoC, SBOD, NCLT etc. Needless to say, substantial part of the assets are hidden inside such transactions and unless and unless these matters are addressed with honesty and objectively, the unscrupulous promoters, who side-lined such assets elsewhere would enjoy both the worlds, before and after the IBC

i) Section 26 of the Code which provides that the CIRP of a Corporate Debtor shall remain unaffected while an Avoidance Application remains pending adjudication. The Delhi High Court in the Venus Recruiters Judgment seems to have taken a view and limited the scope of Section 26 by stating that the process of collecting information, forming an opinion, determining an Avoidance Transaction, and filing an Application against the same is 'independent of various other steps which are part of the CIRP' and the same cannot be interpreted in a manner to say that the applications filed for the avoidance of transactions under Section 25(2)(j) can survive the CIRP itself. However, an in-depth reading of Section 26 with Section 31 of the Code as well as Regulation 39(4) read with Form-H of the Schedule of the IBBI (Insolvency Resolution Process of Corporate Person) Regulations, 2016 (CIRP Regulations), gives an understanding that the independent nature of Section 26 is not only limited to the initial process of filing an Avoidance Application or till the Plan is approved, but should ideally continue till an Avoidance Application is taken to its logical conclusion.

ii) Two essential facts make the Venus Recruiters judgment distinguishable. Firstly, in that case, the Avoidance Application was filed by the Resolution Professional 'after' the Plan was approved and since the office of a Resolution Professional becomes functus officio upon the approval of the Plan, such Resolution Professional was not competent to file an Avoidance Application. Secondly, as per the Resolution Plan in the said case, the proceeds of the Avoidance Application were to go to the Successful Resolution Application as opposed to the creditors.

iii) Interestingly, the interpretation of the Venus Recruiters Judgment fell for consideration before the NCLAT in the judgment titled 63 Moons Technologies Limited (formerly Known as Financial Technologies (India) Ltd) v. The Administrator of Dewan Housing Finance Corporation Ltd & Ors, wherein it was held that it was not for the Committee of Creditors (CoC) to decide the beneficiaries of an Avoidance Application, and such decision is to be taken by the Adjudicating Authority. Neither of these two judgments prevent the continuation of an Avoidance Application, especially if such a clause is expressly mentioned in the Resolution Plan.

iv) A reading of some of the statutory provisions vindicates the above position. Regulation 39(2) of the CIRP Regulations provides that details of avoidable/reversible transactions are required to be placed before the CoC along with compliant Resolution Plans and with orders on such Avoidance Applications, if any. Therefore, the IBBI was conscious that orders on a Avoidance Application may not necessarily be passed before approval of a Resolution Plan.

Challenges for "Interim Finance in IBC"

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Many a times Interim Finance becomes an 'SOS Measure' during the Corporate insolvency resolution process("CIRP"). Interim Finance becomes an imperative requirement from the perspective of a Resolution Professional in order to maintain the 'Going concern status' during the CIRP process or even to maintain the 'Corporate Debtor Entity'. since it is essential to have minimum liquidity available for the Resolution process, Interim finance becomes an SOS measure- like oxygen to maintain life support in some distressed companies becoming indispensable for the CIRP process to continue.

When and why is it needed?

Most of the cases now being referred for the IBC process are already in the category of 'Distressed Assets' resulting either in 'Negative Cash Flows' or at the very least not yielding any positive Cash Flows for the CIRP process. As we know that, while the CIRP is under process, the RP has to ensure the going concern status of the Corporate Debtor. While ensuring to do so, the RP has to make some essential payments like payment to appointed professionals (Like Valuers, Forensic Auditors, Lawyers and Voting platforms etc.), payment to the security personnel, payment to the workmen, etc, which are essential for the CIRP process and cannot be kept pending until the funding is available form the 'Successful Resolution Applicant' post approval of the 'Resolution plan'.

However, the cashflows of the 'Corporate Debtor' may either be Non existent or may be insufficient to make such payments. In some cases, the Corporate Debtor may not be in a position to generate even the bare minimum amount required for the 'Essential payments' as described above. In such cases, the RP needs to raise interim funding subject to the permission of the Creditors Committee (CoC)

As per Section 20(1) of the Code, the Resolution Professional is required to protect and preserve the value of the assets of the corporate debtor as well as manage the operations of the corporate debtor as a going concern. The duty of preserving and protecting the assets of the corporate debtor, including continuing the business operations of the corporate debtor, has also been vested upon the RP by Section 25(1) of the Code.

Therefore a Resolution Professional has to fulfill the duties cast upon him under Section 20(1) and Section 25(1).

IBC, within section 20(2)(c), not only empowers the resolution professional to raise interim finance, but under section 25(2)(c) it also imposes a duty upon him to do so if it is required

to maintain the corporate debtor as a going concern. Such finance can be raised by interim resolution professional in terms of section 20(2)(c) before the formation of the CoC or by a resolution professional according to section 28(1)(a) after the formation of the CoC.

Interim finance can therefore be an important tool for effective reorganization so as to prevent liquidation.

Let us examine the IBC code provisions to facilitate 'Raising of Interim Finance'.

Section 5(15) of the Code defines "interim finance" as any financial debt raised by the resolution professional during the period of the corporate insolvency resolution process. 'Interim finance is accorded 'Super-priority status' in payment waterfall across jurisdictions.

Section 5(13)(a) categorises interim finance as part of CIRP costs. Therefore, according to section 5(13)(a) read with section 53(1)(a) of the IBC, it is accorded highest priority for both 'Payment of Interest' and 'Repayment of Principal' during corporate insolvency resolution process (CIRP) through section 5(13)(a) read with section 30(2)(a).

Challenges in availing Interim Finance

Despite the above specific and enabling provisions of Law recognising due importance and criticality of Interim Finance for CIRP proceedings, paradoxically the instances of Interim Finance remain woefully low. Though the data available in the public domain is insufficient to find out exact numbers of Interim Finance cases, it may be fair to conclude and understand that the instances of Interim Finance are very few in practical context.

The author may be among many such instances of 'Resolution professional' making intense efforts for availing interim Finance without success. The same appears to be the case despite all the enabling provisions of Law and efforts by Resolution professional for Interim Finance remaining in vain.

Why so? Why despite clear enunciation of Law and clear guidelines, success of 'Interim Finance deals' still elude the Insolvency processes? Why despite the rise in number of insolvency proceedings against distressed companies , Financial Institution & banks are largely unwilling to lend to them?

Reasons may be many but let us try to analyse the practical aspects encountered while negotiating with 'Interim Finance Financiers' for Interim Finance

A) Even though interim financing has its superpriority status, but any priority has no meaning in absence of cash flows. If the entity slips into liquidation, the only way cash flows would occur is by disposal of assets, and the same may take some time. However the time difference between 'Order for liquidation' and 'Realisation of assets' sufficient for payback to interim financier, results in fear of recoveries of principal amount and about loss of interest among the 'Interim Finance Providers'

B) Plethora of Litigations in the CIRP process – Most of the CIRP cases nowadays involve protracted litigations between different stakeholders which are resulting in enormous amount of time being lost before the resolution process is completed. Interim Finance providers, (some of whom may have provided Interim Finance earlier in some cases) are extremely wary now of taking up any new cases of Interim Finance proposals based on their past experiences.

C) The Financiers perceive that Interim Finance may turn out to be a risky investment for them as not only there is uncertainty as to whether the corporate debtor will be able to repay the principal amount as well as the interest accrued on it, there are fair chances that the assets of the corporate debtor might get liquidated if the insolvency resolution process fails. The Financiers perceive that Interim Finance may turn out to be a risky investment for them as not only there is uncertainty as to whether the corporate debtor will be able to repay the principal amount as well as the interest accrued on it, there are fair chances that the assets of the corporate debtor might get liquidated if the insolvency resolution process fails

D) Impact of Liquidation- When a liquidation order is passed against a corporate debtor, the moratorium is vacated. As a result, secured creditors are free to enforce their respective Security interests on their own outside of the CIRP process. Almost all assets of a corporate debtor are usually encumbered in distressed companies. In such situations of post moratorium status, when all the Secured creditors, enforce their security rights there is usually no value left to distribute from the liquidation estate. Therefore despite interim finance being accorded highest priority as per the Code, lenders risk not being fully paid out as the liquidation estate does not have much value left.

Though in a way, IBC Code provides remedial provisions about payment of CIRP cost by Secured creditors who realize their security interests, however in the practical sense this proviso fails to achieve its purpose as there is no complete clarity on what can be considered 'due' from the secured creditors resulting in further litigations. The actual pay back by Secured Creditors (who have realised their security Interest) is also resisted further by them risking the payback of the Interim Finance

Therefore Potential 'Interim Financiers' being privy to such recent developments of time taken by a liquidator to either try to persuade recalcitrant secured creditors to make these payouts and legal costs required to be incurred to persuade recalcitrant secured creditors remain very circumspect for further lending of 'Interim Finance' to say the least.

E) Receipt of interest accrued on the interim finance

In the past, one of the biggest issue facing the Interim Financier was the fact that there was no interest accrual once liquidation proceedings commence. As a result, the interim financier faced the threat of losing interest for the period which elapsed during liquidation of the assets of the company to enable repayment to the Interim financier. Even though the status of interim funds is that of a 'Super priority loan' i.e. the loan that shall be repaid before all other pending Expenses / loans that were remaining in the books of the corporate Debtor, Interim Financiers remain hesitant to lend Interim Finance. This is because, as per the Code, the lenders were entitled to interest only for the period upto the order of liquidation of Corporate Debtor or completion of moratorium period (along with extension of 90 days), whichever is earlier. The interest used to stop from the date of the liquidation order. Liquidation Regulations have been amended to allow interest on interim finance for a maximum period of 12 months during the Liquidation process. Though IBBI (Liquidation Process) Amendment Regulations, 2018 has provided, that w.e.f 01.04.2018, liquidation cost includes interest on interim finance for a period of twelve months or for the period from the liquidation commencement date till repayment of interim finance, whichever is earlier.. Thus, Interim Finance facility will now be able to accrue interest for a maximum period of 1 year during liquidation. However still the Interim Financiers are required to forego 'Accrual of interest' if the liquidation proceedings take more than one year time period to realise value at least sufficient to pay off the interim financier.

F) Creation of security

IRPs and RPs are permitted to create security while raising interim finance in limited circumstances which are: (i) on unencumbered assets of a corporate debtor, or (ii) on encumbered assets of a corporate debtor after taking approval of the requisite lender who has a prior security interest over those assets (provided that no prior consent of such secured creditor is required where the value of such encumbered assets is not less than the amount equivalent to twice the amount of the debt).

G) Thus Keeping in mind the above adverse factors (which are common knowledge in the fraternity of Interim Finance providers) and commercial wisdom, the 'Interim Financier' has to be sufficiently incentivized in terms of 'Return on investment', and and duly secured about "Return/Refund of investment", so as to encourage the interim Finance practices.

In the practical experience of interim financing faced by the writer, the rates quoted by lenders, have been usually 600-800 bps higher than comparable lending rates to other companies in the normal course of business. The Interim

> Finance facility is also demanded to be secured fully. However COC members are usually reluctant in approving such demanding terms of interim finance which appear to be too exorbitant to them intrems of Interest rate or Security demands which they fear shall dilute their interests in the Assets of the Corporate Debtor.

Despite the Super priority status of interim finance as per the IBC Code, the existing lenders in COC are usually extremely reluctant in either providing any finance themselves or approving terms of interim finance which appear to be exorbitant to them."

The terms of Interim finance has to be approved by the committee of creditors by a vote of sixty-six percent of the voting share as specified in Section 28(a) of the Code and that remains a difficult process to finally achieve success. This again poses its own set of challenges and issues as the various members of the COC may not come to a common agreement or platform regarding approval of the terms and somewhat higher interest rates quoted by the Interim Financier. On the other hand the delay or reluctance on the part of the COc members further unnerves the Interim Financier as he perceives it to be a situation where the deal or the Resolution Professional himself is unable to carry the consent of the COC members. Most of the cases of Interim Finance lose their steam in this process of matching up of the two conflicting expectation levels of 'Interim Financier' vis a vis 'COC members'.

All of the above finally result in rare success of achieving a Interim Finance deal thereby depriving the CIRP process of this very critical input at a most vital period of time to avoid Liquidation.

The risk-return tradeoff for the Interim Finance requires that the potential return rises with the corresponding increase in risk. Using this principle, Interim Financiers associate high levels of risk with higher potential returns. According to the risk-return tradeoff, Interim Finance may be viable only if Interim Finance investor is compensated about a high possibility of risk and losses with adequate returns acceptable to the members of the Creditors Committee. This in the practical sense remains a very significant challenge to overcome in times to come.

In the perception of the author, COC members need to consider the larger implications of the benefits to be derived via interim finance in the interest of the CIRP process, rather than being concerned about only high interest rates demanded by the Interim Financiers and/ or dilution of the security available to them.

SPEEDING UP THE CIRP PROCESS

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Synopsis

The IBC code has speeded up the recoveries no doubt about it .But the timelines are often not met and are often way above the prescribed limit. There are two aspects to the remedy i) Policy and structural issues and ii) Procedural issues. The former are for the Government and judiciary to look at but the latter could be debated and discussed more freely as they are relatively easier to implement. Issues like claims, reporting formalities, difficulties of operational creditors and easing information access for Insolvency professionals could certainly shorten the process by as much as 50-60 days. These aspects are briefly discussed so that they may stimulate further thought in the IBC community.

SPEEDING UP THE CIRP PROCESS-NECESSARY MEASURES

The judicial system has been very prolonged in our country, leading to investors to lose confidence in investing. This applies to both domestic and local investors and especially wealthy NRI's who work overseas but ultimately are looking at coming to the mother country once their overseas career is over. No one wants to have a 10 year judicial process

CIRP ostensibly was to speed up the revival of companies and replace the managements with better skills, technology and strategic markets etc. Hence a number of measures were undertaken viz

i) Time frame of 180 days plus additional grace of 270 days.
ii) Tribunals to hear the matters instead of the regular courts.
iii) Experienced and trained professionals to carry out a structured process so that the matter is not left hanging due to lack of coordination.
iv) An overarching apex body with an organized structure to supervise and ensure smooth and transparent processes (IBBI).

Analysis of data of admitted applications from the filings made before the IBBI by the IPs, shows that no application was admitted in 14 days. Further, time taken for admission of section 9 applications in the last 2 financial years is presented in the following table:

Year	Data available for applications admitted u/s 9	Average time taken for admission from date of filing (Days)	No. of applications where admission took <1 year	No. of applications where admission took 1-2 year	No. of applications where admission took more than 2 years
2020-21	153	468	54	84	15
2021-22	207	650	39	86	82

Source: IBBI

Section 9 of the Code provides a time limit of 14 days for admission or rejection of an application for initiating insolvency proceedings. It is observed that one key reason for delay in admitting the application is that there is a requirement to verify the existence of debt and default. It is often times difficult to ascertain existence of debt and default from the evidence filed along with the application for admission. Besides, promoters of the CD file objections to the application on grounds contesting the existence of the transaction, debt or the default. Thus, significant time is lost in the process of establishing the debt and default.

Overall the IBC code has significantly improved the resolutions and or liquidations .But, as can be seen, there were significant delays over and above the targeted timeline. Many of the reasons and remedial suggestions are discussed below.

i)Revised Guidelines-In September 2022 there were significant measures taken by IBBI to improve the quality of the process(and ultimately recovery).Fees of Insolvency professionals were hiked to enable better support services and indeed there is a mechanism for accredited Insolvency Professional Entities to become IP's themselves. The Information Memorandums can become qualitatively better and marketing of the process can be actively undertaken. Directors can participate more actively in the process and the Banks and Institutions are being asked to share information in a more transparent manner. Moreover with better cooperation from the promoters and Directors there would be less need to file IA's under Sec 19 leading to much better compliance on the CIRP timeline. PUFE transactions are being declared to the Resolution Applicants more effectively, allowing them to take their decisions in a more informed way. All this would make .In a snapshot the summary of changes would look like this

Recently, there have been a number of measures that have been added for various reasons and these have had varying impacts on the said purposes. The purpose of this article is to examine their impacts on the processes particularly the timelines and quality.

Section / Regulation	Description of Activity	Norm	Latest Timeline (previous timeline)
Regulation 36A	Publish Form G.	Within 60 days of commencement	T+60
	Invitation of EoI		(T+75)
	Submission of EoI	At least 15 days from issue of EoI (Assume 15 days)	T+75 (T+90)
	Provisional List of RAs by RP	Within 10 days from the last day of receipt of EoI	T+85 (T+100)
	Submission of objections to provisional list	For 5 days from the date of provisional list	T+90 (T+105)
	Final List of RAs by RP	Within 10 days of the receipt of objections	T+100 (T+115)
Regulation 36B	Issue of RFRP, including Evaluation Matrix and IM	Within 5 days of the issue of the provisional list	T+105 (T+105)
	Receipt of Resolution Plans	At least 30 days from issue of RFRP (Assume 30 days)	T+135
Regulation 39(4)	Submission of CoC approved Resolution Plan to AA	As soon as approved by the CoC	T+165
Section 31(1)	Approval of resolution plan by AA		T+180

Whilst these changes are welcome, there are other issues which could be looked at to expedite the process in a clear and transparent manner. The main ones is the blockage at the NCLT where among other things.

i)**The sheer number of cases are overwhelming the tribunals** so that not enough attention is given to all the major cases of large exposure of funds, and which involve the sustenance of so many families

ii)Some promoters and allied interests of the CD and its associates are looking to stall the proceeding due to various reasons

iii) Frivolous cases which are also put in to block proceedings.

There are also numerous difficulties in collecting information regarding the financial position of the CD. The information acquired by the IRP/RP form the basis for the information memorandum (IM). The IM is crucial to establish a base line of the CD and is required to be shared with prospective resolution applicants for them to assess the CD before making a resolution plan. Valuation of the CD is also based on the available information regarding assets and liabilities. Timely preparation of the IM and completion of the valuation exercise are crucial to timely completion of the CIRP.

Some of the remedies are at statutory level such as the filling up the vacancies of the court and deciding on the criteria for selection of the personnel of the ecosystem. It is the intent of this article to focus more on the procedural aspects.

Suggested Remedies

1. **Overload of NCLT**-A large number of cases which are filed before the NCLT are of operational creditors. Much of this exposure is normal i.e. 1-5 crores. The operational creditor is only interested in getting his money back and therefore it is not really required to go into complications of assets, cash flow etc.

   Could a simpler procedure be devised for operational creditors and could it be decided by a separate wing of the IBBI itself or a separate judicial body with combination of judicial personnel who are well versed in these aspects.
   This would allow the judges to focus a lot more on S7 and S 10 CIRP cases which have a lot of complicated issues and often really large exposures. The quality and speed of decisions would be positively affected as the **sheer quantity of S9 cases** (and hence judicial time consumed) would be removed

2. **Number of Reports** may be reduced so that all components of the system could focus on the actual purpose of the code i.e. the revival of the units. The IP's should be more focused on the unit itself, understanding the business and preparing a quality Information Memorandum, focused on valuation forensic audit ,PUFE transactions etc. rather than worrying about continuous reports which have to be sent. Moreover with the need to focus on marketing the resolution plan and prepare Industry related data and Business plan ,as per the recent

amendments the bandwidth of the RP to deliver within the specified timelines has to be looked at., somewhere. **Quarterly rather than monthly reporting** with specific details relating to major violations would serve the purpose. The Committee of Creditors are anyway taking major reviews at each milestone and that should serve the purpose of effective monitoring.

3. **Rationalisation of Claims Process**

Some points on substantiation of claims – The proofs should be submitted before last date as specified in public announcement. However, it can submitted later any time before approval of resolution plan by the Committee.

Cost of proof shall be on creditor of proving debt due to him – Regulation 11 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

Very time consuming and difficult .**There has to be some STOP CHECK on verifications of claims.** As per the current interpretations and judicial pronouncements if claimants and creditors can keep giving claims till the last minute, it becomes very difficult and complicated for the RP to collate and leads to constant extension of time.

Instead of requiring bank statements and other documents which are difficult to get and bother the OC unduly maybe there could be a two tier system

i)Upto INR 5 crores the GST returns and invoice/demand notice would suffice. This would cover operational creditors who find it difficult to produce affidavit/notice of disputes etc.

ii) Regular procedure for OC's dues above 5 crores. Here the OC's are generally well organized, have full time finance departments and near perfect automated records over several years.

This would also significantly reduce the quantity of claims that the RP and also the NCLT has to look at As mentioned elsewhere in the article, it is best if the entire operational creditor process be moved away to a separate body .This could also be segregated initially, value wise to say, below INR 5 crore and above INR 5 crore…

While **the resolution professional does not formally have the power to reject claims**, there has to be some mechanism by which the resolution professional can deny the verification of claims due to reasons such as the debt being barred by limitation, late filing of the claims or improper format of the proof of the debt .**Else it goes on and on and delays the process unduly**

The tendency of the adjudicating authority to admit claims even at a stage where the CIRP would be disrupted such as the admission of claims after the Committee of Creditors had approved the resolution plan

Unless the IBC is fortified with mechanisms to reduce and efficiently deal with the rejection of claims, delays would happen endlessly creditors whose claims are rejected would continue to face prejudice.

4. **Confusion over competing liabilities**-The Hon'ble Supreme Court (SC) in its judgment dated 6th September, 2022 while considering as to whether the provisions of the Insolvency and Bankruptcy Code, 2016 (IBC/Code) and, in particular, section 53 thereof, overrides section 48 of the Gujarat Value added Tax Act 2003 (GVAT Act), held that financial creditors cannot secure their own dues at the cost of statutory ones owed to a government authority in approving a resolution plan to revive a sick company under the Code .This puts the government dues on a higher plane even if is an operational creditor.

5. **Overstress on accurate valuation** Excessive amount of stress on valuation could delay the process unduly. If the business is of any size or significance, the **Resolution Applicants would do their own valuation** .Therefore the valuation done under the auspices of the RP is a mere guideline for decision making. Unless there is a really big difference, the average of the two valuations should be taken and done with. Appointment of a third valuer is not only expensive but is likely to delay the process by more than a month, in practice. The RP is better off focusing on the details of the Information Memorandum and sharpening the criteria in form G.

In conclusion one may stay that apart from structural and policy changes which are in the hands of the higher authorities, there **could also be some procedural changes** which could be implemented relatively quickly to speed up the process.

Analysis of Section 12 of IBC & Regulation 40-C of IBBI (Insolvency Resolution Process For Corporate Persons) Regulations, 2016 for Extension of CIRP period for the further period upto 90 days

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Synopsis

To further promote ease of doing business and liberalization of judicial process of law, an initial extension of CIRP period for the further period upto 90 days as legislated/regulated under Section 12 of IBC & Regulation 40-C of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 be assigned to the collective joint wisdom of CoC & RPs with its complete reporting to NCLT E-portal, IBBI & IPA's E-portal so that NCLT Benches can concentrate their time on exceptional important issues .

IBC Code consolidates and amends the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders, wherein CIRP Period means the period of one hundred eighty days from the date of admission of the corporate insolvency resolution process application by the Adjudicating Authority or as extended subject to approval by the CoC and Adjudicating Authority. CIRP is the process through which it is determined whether the person who has defaulted is capable of repayment or not (IRPs will evaluate the assets and liabilities to determine the repayment capability). If the Corporate Debtor is not capable of repaying the debt then the said company (Corporate Debtor) is restructured or liquidated.

As per the IBC Code, the procedure involved in the Corporate Insolvency Resolution Procedure(CIRP) should be completed within 180 days or within the extended period of 90 days and mandatorily be completed within 330 days including any extension and the time taken in legal proceedings. In short, the resolution procedure should be completed within 330 days, failing which the Adjudicating Authority will initiate liquidation procedure under Chapter III of the Code. The Section 12 of the Code can be classified as under:-

1. Time limit for completion of CIRP-Sec. 12(1);
2. Extension of the time limit-Sec. 12(2) & (3);

3. Cap on the time limit-Provisos to Sec. 12(3);
4. Exclude certain period from the time limit;
5. Resolution plan not completed within the time limit.

If the Resolution Plan is not approved or Liquidation is not recommended by CoC in the initial period of 180 days from the CIRP commencement date, CoC or RPs are required to file Interlocutory Application under Section 12 read with Regulation 40-C of IBBI (Insolvency Resolution Process For Corporate Persons) Regulations, 2016 to extend the Corporate Insolvency Resolution Process period for the further period upto 90 days. Section 12(2) of the IBC states that the Resolution Professional (RP) may file an application with National Company Law Tribunal (NCLT) 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% of the voting shares of the Committee of Creditors (CoC). Such extension can be given only once.

The related provisions of ***Section 12 - Time-limit for completion of insolvency resolution process*** are reproduced below :-

(1) Subject to sub-section (2), the corporate insolvency resolution process shall be completed within a period of one hundred and eighty days from the date of admission of the application to initiate such process.

(2) The resolution professional shall file an application to the Adjudicating Authority to extend the period of the corporate insolvency resolution process beyond one hundred and eighty days, if instructed to do so by a resolution passed at a meeting of the committee of creditors by a vote of 1[sixty-six] per cent. of the voting shares.

(3) On receipt of an application under sub-section (2), if the Adjudicating Authority is satisfied that the subject matter of the case is such that corporate insolvency resolution process cannot be completed within one hundred and eighty days, it may by order extend the duration of such process beyond one hundred and eighty days by such further period as it thinks fit, but not exceeding ninety days:

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

Provided further that the corporate insolvency resolution process shall mandatorily be completed within a period of three hundred and thirty days from the insolvency commencement date, including any extension of the period of corporate insolvency resolution process granted under this section and the time taken in legal proceedings in relation to such resolution process of the corporate debtor:

Provided also that where the insolvency resolution process of a corporate debtor is pending and has not been completed within the period referred to in the second proviso, such resolution process shall be completed within a period of ninety days from the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019.

The related provisions of ***Regulation 40 of IBBI (Insolvency Resolution Process For Corporate Persons) Regulations, 2016 - Extension of the corporate insolvency resolution process period are reproduced below :-***

(1) The committee may instruct the resolution professional to make an application to the Adjudicating Authority under section 12 to extend the insolvency resolution process period.

(2) The resolution professional shall, on receiving an instruction from the committee under this Regulation, make an application to the Adjudicating Authority for such extension.

Extension of time period of the corporate insolvency resolution process under section 12 of Insolvency and Bankruptcy Code, 2016:

Sub-section (2) of Section 12 of IBC permits Resolution Professional to file an application to the Adjudicating Authority for extension of the period of the corporate insolvency resolution process, only if instructed to do so by a resolution passed at a meeting of the committee of creditors by a vote of 66% of the voting shares. The provision does not stipulate that such application is to be filed before the Adjudicating Authority within 180 days. If within 180 days including the last day i.e. 180th day, a resolution is passed by the committee of creditors by a majority vote of 66% of the voting shares, instructing the resolution professional to file an application for extension of period in such case, in the interest of justice and to ensure that the resolution process is completed following all the procedures time should be allowed by the Adjudicating Authority who is empowered to extend such period up to 90 days beyond 180th day.

If an application is filed by the 'Resolution Professional' or the 'Committee of Creditors' or 'any aggrieved person' for justified reasons, it is always open to the Adjudicating Authority/Appellate Tribunal to 'exclude certain period' for the purpose of counting the total period of 270 days- NCLAT(New Delhi) in case of Quinn Logistics India Pvt. Ltd. Vs Mack Soft Tech Pvt. Ltd.

In order to obtain extension of the period of corporate insolvency resolution process, companies under CIPR through the CoC or Resolution Professional were/are filing Interlocutory application under section 12(1) of the code read with regulation 40 of the IBBI

(Insolvency Resolution Process for Corporate Persons) Regulations, 2016 to extend the corporate insolvency resolution process.

As per the Insolvency and Bankruptcy Code, 2016 (the Code), the procedure involved in the Corporate Insolvency Resolution Procedure(CIRP) should be completed within 180 days or within the extended period of 90 days and mandatorily be completed within 330 days including any extension and the time taken in legal.

Brainstorming ideas for promoting ease of doing business and liberalization of judicial process of law for an initial extension of CIRP period for the further period upto 90 days as legislated/regulated under Section 12 of IBC:-

An immediate overhaul of Section 12 of IBC & Regulation 40-C of IBBI (Insolvency Resolution Process For Corporate Persons) Regulations, 2016 is urgently needed for promoting ease of doing business and liberalization of judicial process of law for an initial extension of CIRP period for the further period upto 90 days as legislated/regulated under Section 12 of IBC & Regulation 40-C of IBBI (Insolvency Resolution Process For Corporate Persons) Regulations, 2016. This statutory provision of initial extension of CIRP period be assigned to the collective joint wisdom of CoC & RPs with its complete reporting to NCLT E-portal, IBBI & IPA's E-portal. Even in the past under the purview of Foreign Exchange Regulation Act, whenever any Indian Corporate is receiving foreign equity from abroad or non-resident shareholders, Indian Corporates need to take first in-principle approval from Reserve Bank of India before the receipt of foreign remittance in Bank Accounts and after receipt of foreign remittance in Bank Accounts post facto final approval for allotment of shares to non-resident shareholders. But in the year 1999, after liberalization of provisions of foreign remittance for receiving foreign equity from abroad or non-resident shareholders, Indian Corporates need to do only reporting by e-filing or submitting Form FC-GPR (Foreign Currency Gross Provisional Return) with the Regional Office of Reserve Bank of India in accordance with the provisions of Foreign Exchange Management Act, 1999 (FEMA).

Conclusion

The assignment of process of law for an initial extension of CIRP period for the further period upto 90 days to the collective joint wisdom of CoC & RPs with its complete reporting to NCLT E-portal, IBBI & IPA's E-portal shall reduce the burden of Hon'ble NCLT Benches to some extent wherein NCLT Benches can concentrate their time on exceptional important issues. Therefore, IBBI/NCLT may consider to assign the task of 1st extension of CIRP period to the collective joint wisdom of CoC & RPs with its complete reporting to NCLT E-portal, IBBI & IPA's E-portal. Government of India and related Regulatory Agencies namely IBBI & MCA should consider to make suitable amendments in the assignment of 1st extension of CIRP period to the collective joint wisdom of CoC & RPs with its complete reporting to Regulatory Agencies.

CASE LAWS

SECTION 53 - CORPORATE LIQUIDATION PROCESS - ASSETS, DISTRIBUTION OF

SESA Group Employees Provident Fund v. Dewan Housing Finance Corporation Ltd. [2022] 135 taxmann.com 4 /[2022] 172 SCL 397 (NCLAT-New Delhi)

Where appellant trusts submitted that order passed by Adjudicating Authority approving Resolution Plan was to be set aside as said Resolution Plan was in contravention of EPF Act, 1952 and PFs and gratuity funds did not belong to corporate debtor and therefore should have been released first, however, fact that EPF Act prioritises payments where employer falls into insolvency and in instant case appellants were investors in NCDs of Corporate debtor and corporate debtor was not appellants employer, EPF Act would be inapplicable to corporate debtor ; resolution plan approved by 93.65 per cent of voting share of CoC and distribution mechanism approved by 86.95 per cent of voting share of CoC could not have been interfered with.

The Adjudicating Authority by order approved Resolution Plan submitted by PCHFL in case of the corporate debtor company. The appellant Trusts submitted that order passed by the Adjudicating Authority approving Resolution Plan was to be set aside as the order of Adjudicating Authority approving said Resolution Plan was in contravention of EPF Act, 1952 as administrator failed to consider and appreciate that money invested in pension fund, PFs and gratuity funds did not belong to the corporate debtor and therefore should have been released first before any other repayments begin and should not have been included in liquidation estate assets. However, it was found that EPF Act prioritises payments where employer falls into insolvency. In the instant case appellants are investors and the corporate debtor is not appellants employer. Moreover, investments made in the corporate debtor are commercial decisions and there was no compulsion on appellant to invest its funds in Non-Convertible Debentures (NCDs) of the corporate debtor.

Held that EPF Act is inapplicable to the corporate debtor in the instant case. Further, the appellants had voted as part of respective NCD holders in favour of resolution plan which later came to be approved by 93.65 per cent of voting share of CoC and distribution mechanism had been approved by 86.95 per cent of voting share of CoC. Neither the Adjudicating Authority nor the Appellate Authority has been endowed with jurisdiction to reverse commercial wisdom of CoCs and thus, the Adjudicating Authority could not have interfered on merits with commercial wisdom of CoCs. Even otherwise, appellants in the instant case were getting much more than liquidation value of investment and as long as creditor gets minimum liquidation value, said distribution will be fair and equitable, therefore, impugned order could not be interfered with.

Case Review : R. Subramaniakumar v. Committee of Creditors [2022] 134 taxmann.com 376 (NCLT - Mum.), affirmed

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

Meena Jain v. Silvertoan Papers Ltd. - [2022] 135 taxmann.com 59 (NCL-AT)

Where account confirmation document on basis of which operational creditor claims extension of limitation for filing CIRP was under cloud of forgery and criminal complaint had been filed by corporate debtor for same, no error had been committed by NCLT in rejecting CIRP application by not placing reliance on account confirmation document.

The operational creditor supplied wheat straws to the corporate debtor and raised invoices. On account of non-payment of operational debt, the operational creditor filed application under section 9 to initiate CIRP against the corporate debtor. The Adjudicating Authority rejected said application holding that debt fell due on 10-9-2016 and therefore, CIRP application filed beyond a period of three years i.e. on 26-11-2019 was barred by time. The operational creditor claimed extension of limitation on ground that by virtue of confirmation of accounts by accountant of the corporate debtor on 1-4-2017, there would be fresh period of limitation and therefore said application could not be said to be barred by time. It was noted that account confirmation document was under cloud of forgery and criminal complaint had been filed by the corporate debtor for forgery of signature by the operational creditor on said document.

Held that no error had been committed by the Adjudicating Authority in rejecting operational creditors CIRP application by not placing reliance on account confirmation document.

SECTION 61 - CORPORATE PERSONS ADJUDICATING AUTHORITIES - APPEALS AND APPELLATE AUTHORITY

Apya Capital Services (P.) Ltd. v. Guardian Homes (P.) Ltd. [2022] 135 taxmann.com 105 (NCL-AT)

Power to recall judgment is not permitted in IBC; neither section 424 of Companies Act, 2013, nor rule 11 of NCLAT Rules, 2016 grants power to NCLAT to recall an order passed by it after said order has been challenged before Supreme Court, same being dismissed.

The Appellate Tribunal had passed an order dated 8-12-2020, admitting application of the appellant under section 7. The applicant submitted that Appellate Tribunal had committed an ex-facie error apparent on fact of record since it had treated applicant as a 'financial creditor' under IBC and application preferred by it before NCLT, as one filed under section 7 of IBC when it was apparent from record and also an admitted case of applicant that he was an 'operational creditor' and had preferred application under section 9. Accordingly, said judgment of the Appellate Tribunal was challenged before the Supreme Court, and, the Supreme Court dismissed appeal filed by the applicant. Thereafter, the applicant filed fresh application before instant Appellate Tribunal with a prayer to recall judgment and order dated 8-12-2020 passed by the Appellate Tribunal.

Held that neither section 424 of the Companies Act, 2013, nor rule 11 of the NCLAT Rules, 2016 grants power to NCLAT to recall an order passed by it after said order has been challenged before the Supreme Court, same being dismissed. The power to recall judgment is not permitted in IBC. Therefore, application filed by the applicant was to be dismissed as not maintainable.

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

Rajasthan State Road Development & Construction Corporation Ltd. v. Vasundhra Gupta [2022] 135 taxmann.com 111 (NCL-AT)

Where work order for construction of a building awarded to corporate debtor had been terminated by appellant-Corporation and there was nothing on record to indicate that termination of work order was motivated by insolvency of corporate debtor, NCLT did not have any residuary jurisdiction to entertain present contractual dispute and, thus, in absence of jurisdiction over dispute, NCLT could not have imposed an stay on operation of termination of work order.

The appellant-Corporation awarded work order to the corporate debtor for construction of a building. Before initiation of CIRP, several extensions were granted to the corporate debtor for completion of work, however, the corporate debtor was not able to complete work. Thus, the corporation issued order for cancellation/termination of said work order. There was nothing on record to indicate that termination of work order was motivated by insolvency of the corporate debtor. The corporation had issued notice of termination to the corporate debtor in exercise of power given in clauses 59 and 60 of said work order.

Held that residuary jurisdiction of the Adjudicating Authority cannot be invoked if termination of a contract is based on grounds unrelated to Insolvency of corporate debtor, therefore, NCLT did not have any residuary jurisdiction to entertain instant contractual dispute which had arisen de hors insolvency of the corporate debtor and, thus, in absence of jurisdiction over dispute, NCLT could not have imposed stay on operation of termination order.

Case Review : Vasundhra Gupta v. Rajasthan State Road Development & Construction Corpn. Ltd. [2022] 135 taxmann.com 110 (NCLT - Jaipur), reversed.

SECTION 14 - CORPORATE INSOLVENCY RESOLUTION PROCESS - MORATORIUM - GENERAL AUTHORITY

Union Bank of India v. National Housing Bank [2022] 135 taxmann.com 142 (NCL-AT)

Where NHB agreed to provide financial assistance for housing or refinance housing loans to DHFL and loans granted by NHB were secured by way of pari passu charge inter alia over movables including receivables of DHFL, such receivables were to be considered as a third party asset held in trust by DHFL on behalf of NHB and thus, when CIRP was initiated against DHFL and Moratorium was declared, such receivable would be treated as out of purview of CIRP and would not form part of assets of DHFL and should be returned to bank.

DHFL availed financial assistance from National Housing Bank (NHB) under its refinance and other schemes. Loans granted by NHB were secured by way of pari passu charge inter alia over movables including receivables of DHFL.

Held that such assets/receivable under refinance scheme of NHB be deemed to be held by DHFL in trust for benefit of refinancing institution, i.e. NHB in terms of section 16B of NHB Act and DHFL could not use these receivables for its purposes or uses or treat them as its property. Therefore, when CIRP was initiated against DHFL, the Adjudicating Authority had not erred in excluding from scope of moratorium those assets which were owned by a NHB being a third party and which were in hands of DHFL under a contract.

Case Review : National Housing Bank, In re [2022] 134 taxmmann.com 374 (NCLT - Mum.), affirmed.

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

Raghu K S v. R. Subramaniakumar [2022] 135 taxmann.com 145 /[2022] 171 SCL 366 (NCL-AT)

Where fixed deposit holders of corporate debtor challenged resolution plan approved by NCLT on ground that they have a right to get refund of their deposits fully, however in said plan they were given biggest haircut in terms of distribution mechanism and thus, said plan was violative of provisions of code, in view of fact that said issue was also raised in Vinay Kumar Mittal v. Dewan Housing Finance Corporation Ltd. [2022] 134 taxmann.com 333 (NCL-AT) against same resolution plan wherein it was held that approved resolution plan that extinguishes fixed deposits without fully paying fixed deposit holders was legally valid and thus, in view of aforesaid it was not proper to decide again same issue.

Appellant-depositors invested in fixed deposits with the respondent company. Subsequently, on an application filed by the RBI, the corporate insolvency resolution process was initiated against the respondent-corporate debtor and moratorium was declared. The resolution plan submitted by the resolution applicant 'Piramal' was approved by the Adjudicating Authority. Appellants alleged that they have a right to get refund/repayment of their deposits fully. However in said resolution plan, fixed deposit holders were given biggest haircut in terms of distribution mechanism envisaged despite being most vulnerable class and out of admitted claims of Rs. 5375 crores, only a sum equivalent to Rs. 1243 crores (i.e. 20 per cent) had been directed to be paid to fixed deposit holders, and thus, said resolution plan was violative of provisions of the code and was to be declared illegal. It was noted that said issue was also raised in Vinay Kumar Mittal v. Dewan Housing Finance Corporation Ltd. [2022] 134 taxmann.com 333 (NCL-AT) against the same resolution plan by the fixed deposit holders of DHFL wherein it was held that approved resolution plan that extinguishes fixed deposits without fully paying fixed deposit holders, was legally valid.

Held that it was not proper to decide again same issue, therefore, impugned order passed by the Adjudicating Authority needed no interference and therefore, instant appeal against the same was to be disposed off.

Case Review : Raghu K.S. v. DHFL [2021] 133 taxmann.com 448 (NCLT - Mum.), affirmed.

SECTION 4 - CORPORATE INSOLVENCY RESOLUTION PROCESS - APPLICATION OF

Tharakan Web Innovations (P.) Ltd. v. National Company Law Tribunal, Kochi [2022] 135 taxmann.com 187 /[2022] 171 SCL 386 (Kerala)

Section 4 of IBC, after amendment on 24-3-2020 clearly says that Part II of IBC shall apply to matters relating to insolvency and liquidation of corporate debtors where minimum amount of default is Rs. 1 crore, therefore, no application could have been filed after 24-3-2020 regarding an amount where default was less than Rs. 1 crore, even if date of default was prior to 24-3-2020.

Held that corporate insolvency resolution process gets triggered the moment there is a default as mentioned in section 4. Triggering can be at instance of the corporate debtor itself or a financial creditor or an operational creditor. Section 4, after amendment on 24-3-2020 clearly says that Part II of the IBC shall apply to matters relating to insolvency and liquidation of the corporate debtors where minimum amount of default is Rs. 1 crore. Therefore, no application could have been filed after 24-3-2020 regarding an amount where default was less than Rs. 1 crore, even if date of default was prior to 24-3-2020.

Case Review : Tharakan Web Innovations (P.) Ltd. v. Cyriac Njavally [2021] 127 taxmann.com 288 (NCLT - Kochi), set aside.

SECTION 238 - OVERRIDING EFFECT OF CODE

Sirpur Paper Mills Ltd. v. Union of India [2022] 135 taxmann.com 188 (Telangana)

Where NCLT by order had admitted resolution plan in case of corporate debtor, which provided that all assessments or other proceedings relating to period prior to completion date shall stand terminated and all consequential liabilities would stand abated, hence, impugned notices which sought to initiate assessment proceedings under section 143 (3) of Income-tax Act on corporate debtor for a period which was squarely covered by resolution plan as approved by NCLT were wholly unsustainable in law and deserved to be quashed and set aside.

NCLT by order had admitted resolution plan in case of the corporate debtor and said resolution plan provided that all dues under Act whether asserted or unasserted, crystallized or uncrystallized, present or future in relation to any period prior to completion date shall stand extinguished and the corporate debtor shall not be liable to pay any amount against

such demand. It further provided that all assessments or other proceedings relating to period prior to completion date shall stand terminated and all consequential liabilities would stand abated. Further, all notices proposing to initiate any proceeding against the corporate debtor in relation to period prior to date of Tribunal's order and pending on that date shall stand abated and should not be proceeded against.

Held that impugned notices which sought to initiate assessment proceedings under section 143(3) of the Income-tax Act for a period which was squarely covered by resolution plan as approved by NCLT were wholly unsustainable in law and deserved to be set aside and quashed. However, in view of clear statement in resolution plan, the corporate debtor would be entitled to carry forward unabsorbed and accumulated losses and to utilize such amounts to set off future tax obligations, as and when such carry forward and set off was claimed by the corporate debtor in future, i.e. beyond period covered by the resolution plan.

SECTION 36 - CORPORATE LIQUIDATION PROCESS - LIQUIDATION ESTATE

Monitoring Agency of Anush Finlease & Construction (P.) Ltd. v. State Bank of India [2022] 135 taxmann.com 251 (NCL-AT)

As per RBI Guidelines FDRs being margin money kept with bank for issuing bank guarantee in favour of beneficiary is construed as substratum of a trust created to pay to beneficiary to whom bank guarantee is given and cannot be treated as an asset of corporate debtor.

Pursuant to application filed under section 7, CIRP had been initiated against the corporate debtor and resolution plan approved by CoC had been approved by the Adjudicating Authority. Prior to insolvency resolution, corporate debtor had obtained authorisation for 40 export promotion capital goods from Additional Directorate General of Foreign Trade. The corporate debtor maintained FDR's with respondent-banks against authorisation and licence. Said FDRs were being maintained against bank guarantees issued by the corporate debtor. The appellant monitoring agency of the corporate debtor requested respondents to release said FDRs but they failed to comply. Being aggrieved, the appellant filed application before the Adjudicating Authority but same was dismissed.

Held that as per RBI Guidelines and various judgments in this regard, margin money is construed as substratum of a trust created to pay to beneficiary to whom bank guarantee is given and cannot be treated as an asset of the corporate debtor, therefore, the Adjudicating Authority rightly dismissed application of the applicant.

Case Review : Phoenix ARC (P.) Ltd. v. Anush Finlease & Construction (P.) Ltd. [2022] 135 taxmann.com 250 (NCLT - New Delhi), affirmed.

SECTION 3(12) - CORPORATE INSOLVENCY RESOLUTION PROCESS - DEFAULT

Manoj Kumar Agarwal v. Mehndipur Balaji Infra Developers (P.) Ltd.- [2022] 135 taxmann.com 258 (NCL-AT)

Where appellant-promoter had filed petition under section 7 against corporate debtor for default in repayment of loan advanced by him but there was no existence of default and there was no evidence to substantiate due date of repayment, requirements of section 7 for initiation of CIRP were not complied with as far as default was concerned and, therefore, petition filed under section 7 was to be dismissed.

The appellant and other 'Promoters'/Promoter-Directors' incorporated the corporate debtor to engage in 'real estate business' and infused funds to develop real estate projects. These funds were internal loan to the corporate debtor. The appellant filed petition under section 7 before the Adjudicating Authority on failure of repayment of loan by the corporate debtor. The Adjudicating Authority by the impugned order rejected said petition for initiation of corporate insolvency resolution process (CIRP) against respondent/corporate debtor on ground that appellant was not able to justify that there was an existence of 'default'.

Held that instant case appeared to be a case of sections 241 and 242 of the Companies Act of oppression and mismanagement between members/shareholders of the company, and required resolution under Chapter XVI of the Companies Act, 2013. The appellant was unable to substantiate existence of 'Default' when amount in question became due and payable. Since there was no existence of default, when amount claimed by the appellant became due and payable and also there was no evidence to substantiate due date of repayment, requirements of section 7 for initiating corporate insolvency resolution process on ground of default were not complied with and, therefore, appeal was to be dismissed.

Case Review : Manoj Kumar Agarwal v. Mehndipur Balaji Infra Developers (P.) Ltd. [2022] 135 taxmann.com 257 (NCLT - All.), affirmed.

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

CFM Asset Reconstruction (P.) Ltd. v. Vishram Narayan Panchpor RP [2022] 135 taxmann.com 299 (NCL-AT)/[2022] 170 SCL 567 (NCL-AT)

Where although 'assignee' of loan had filed an application to withdraw CIRP application, RP had not presented said application before Adjudicating Authority and instead constituted Committee of Creditors, RP had defeated endeavour of assignee seeking pre-Committee of Creditors constitution withdrawal under regulation 30A(1)(a) and therefore, impugned order passed by Adjudicating Authority whereby it dismissed interlocutory application filed by assignee challenging action of RP was to be set aside.

An application under section 7 filed by the financial creditor 'JSBL' against the corporate debtor was admitted by the Adjudicating Authority and RP was appointed. Subsequently, the financial creditor assigned loan together with underlying security interest with respect to the corporate debtor, in favour of appellant-ARC. 'JSBL' intimated the RP about said assignment of debt with an intention to withdraw their claim. The appellant/assignee had also apprised RP about assignment of loan and apprised RP that since CoC was not constituted and they were in process of reconstructing of debt of the corporate debtor, they would not wish to continue with CIRP of the corporate debtor. However, RP had deliberately neglected to present withdrawal application before the Adjudicating Authority and instead constituted Committee of Creditor and, thus, thwarted an endeavour of the appellant in seeking a pre-Committee of Creditors constitution withdrawal as per regulation 30A(1)(a).

Held that the impugned order passed by the Adjudicating Authority whereby it dismissed interlocutory application filed by the appellant/assignee challenging action of RP was to be set aside.

Case Review : CFM Assets Reconstruction (P.) Ltd. v. Vishram Narayan Panchpor [2021] 124 taxmann.com 177/164 SCL 105 (NCLT - Mum.), reversed.

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

Harrish Khurana v. One World Realtech (P.) Ltd. [2022] 135 taxmann.com 315 (NCL-AT)/[2022] 170 SCL 393 (NCL-AT)

Where appellant was engaged by statutory auditor of corporate debtor in his personal capacity to provide certain services, appellant did not have relationship of operational creditor with corporate debtor and, therefore, debt with respect to pending payment was not operational debt, which should be paid by corporate debtor.

The appellant had filed petition under section 9 against the corporate debtor stating that he was engaged by the respondent corporate debtor through its Statutory Auditor for rendering professional services and the corporate debtor failed to pay his pending payment. The

Adjudicating Authority by impugned order dismissed said application holding that there was no privity of contract between the appellant and the corporate debtor and, therefore, their relationship as operational creditor and corporate debtor was not established.

Held that since the appellant was employed by 'A', statutory auditor of the corporate debtor, in his personal capacity to provide certain services, the appellant did not have relationship of operational creditor with the corporate debtor for provision of any services. Since the appellant had not been able to establish or show evidence of his engagement or employment by the corporate debtor, the appellant had not provided any services to corporate debtor and, therefore, debt with respect to pending payment was not operational debt, which should be paid by corporate debtor. Therefore, there was no infirmity in order of the Adjudicating Authority.

Case Review : Harrish Khurana & Associates v. One World Realtech (P.) Ltd. [2022] 135 taxmann.com 314 (NCLT - New Delhi), affirmed.

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The articles sent for publication in the journal "The Insolvency Professional" should conform to the following parameters, which are crucial in selection of the article for publication:

✓ The article should be original, i.e., not published/broadcasted/hosted elsewhere including any website. A declaration in this regard should be submitted to IPA ICAI in writing at the time of submission of article.

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

✓ It should preferably expose the readers to new knowledge area and discuss a new or innovative idea that the professionals/readers should be aware of.

✓ The length of the article should be 2500-3000 words.

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

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

✓ The authors must provide the list of references, if any at the end of article.

✓ A brief profile of the author, e-mail ID, postal address and contact numbers and declaration regarding the originality of the article as mentioned above should be enclosed along with the article.

✓ In case the article is found not suitable for publication, the same shall not be published.

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