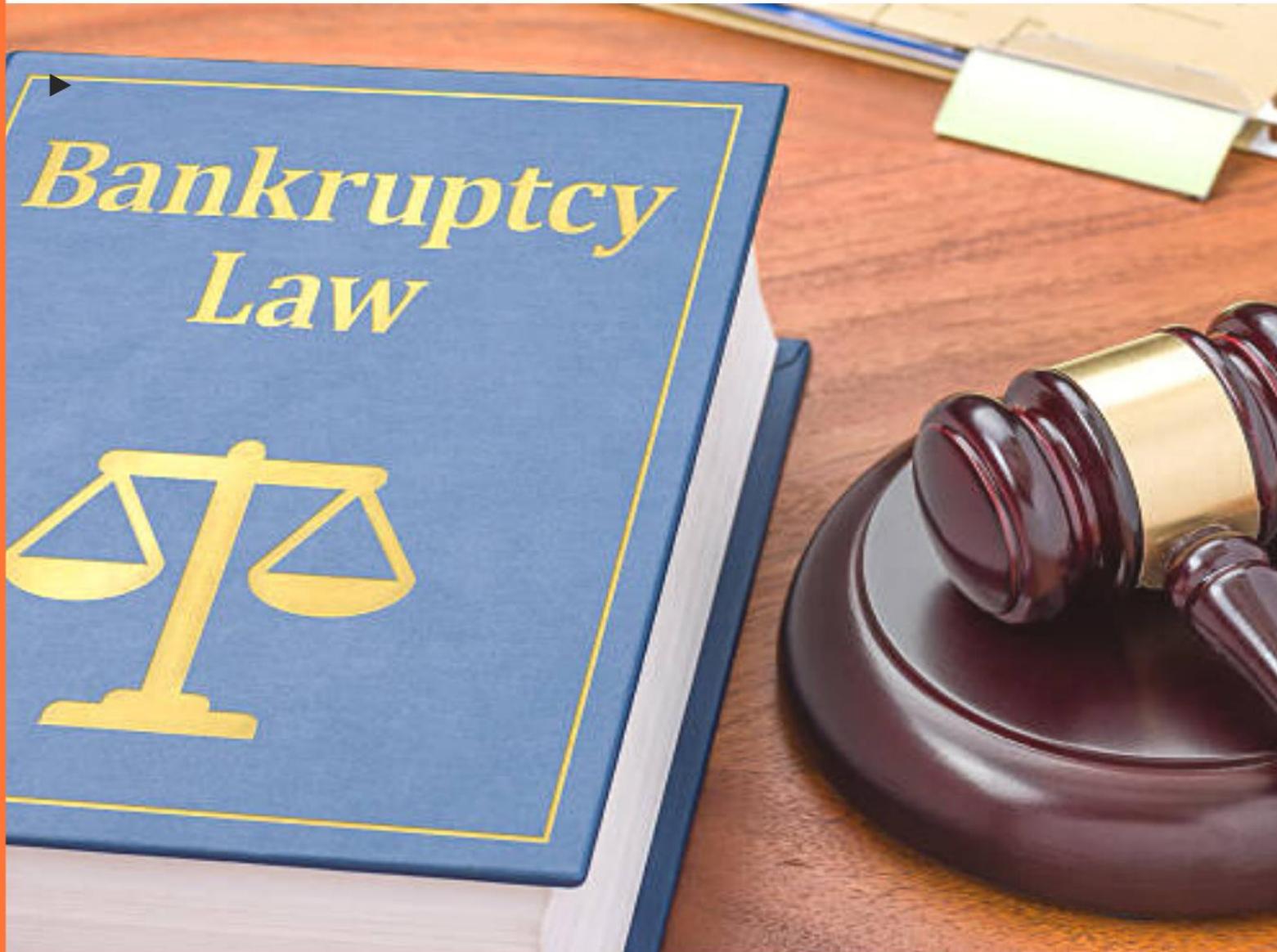


January'2021

THE INSOLVENCY PROFESSIONAL

YOUR INSIGHT JOURNAL



INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

OVERVIEW

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

INDEX

✚ FROM THE MD DESK	05
✚ PROFESSIONAL DEVELOPMENT INITIATIVES	06
✚ IBC AU COURANT	08
✚ ARTICLES	09
✓ <i>A Journey through the amendments in the regulation of liquidation process by IBBI</i>	10
✓ <i>Verification before submission of resolution plan to COC under IBC 2016</i>	15
✓ <i>Extension of Corporate Insolvency Resolution Process</i>	25
✓ <i>Home buyers</i>	30
✓ <i>Corporate Insolvency in India and other countries</i>	38
✚ QUESTIONS ON PERSONAL GUARANTORS (PGS) TO CORPORATE DEBTORS	47
✚ CASE LAWS	63
✚ GUIDELINES FOR ARTICLES	73

GOVERNING BOARD OF IPA ICAI



Dr. Jai Deo Sharma
Chairman & Independent
Director



Mr. P. N. Prasad
Independent Director



Dr. Divya Sharma
Independent Director



Mr. Narender Hooda
Independent Director



CMA Biswarup Basu
Shareholder Director



CMA Balwinder Singh
Shareholder Director



Mr. Sushil Behl
Shareholder Director



CMA Virender Sharma
Shareholder Director



Mr. Susanta Kumar Sahu
Managing Director

MD MESSAGE

Dear Readers,

It is a privilege to wish you all a Very Happy New Year 2021. The gone year was a year of much learning and unprecedented experiences. We all feel blessed that we could sail through the circumstances.

The entire past year created a lot of turbulences in the economy world-wide. The whole world was into dismay as how the matters would be handled. From Governments, to Ministries, to Economists, to Judiciaries- all were in utter dismay to plan the way forward to keep the economy going and keep all under control.

The Government of India took immediate and some remarkable measure to stand for the suffering and ailing industries and refrain them from being dragged to any economic turbulences.

Wherein different waivers were being provided towards compliance dates, similarly, were extended dates for different filings. Benefits were added for CSR and added also was suspension of admission of cases under Section 7, 9 and 10 of IBC for such Corporate Debtors and there was extension in the Moratorium also.

The Year 2021 also came up with the new concept of Pre-Packaged Insolvency Resolution Process which has been commonly termed as PPIRP. It is a corporate rescue methodology which helps amalgamate the virtues of both informal and formal insolvency proceedings empowering the stakeholders to resolve the stress of a Corporate Debtors as going concern by minimizing the time taken & cost and getting effective resolution without much value deterioration of the assets.

The success of implementation of Insolvency and Bankruptcy Code, 2016, which blew the evolution of the ecosystem by stabilizing the processes in a defined jurisprudence has laid the foundation for such new initiatives. Though PPIRP is at a cradle stage, but soon it would come up with leaps and bounds and stand as an effective measure for the stressed Corporate Debtors, Creditors, and Economy in whole.

With this new hope let us all welcome the New Year and look forward for prosperity and growth for all.

Susanta Kumar Sahu
Managing Director

Professional Development Initiatives



INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

EVENTS

January'2021	
Date	Events
5th January	Interactive meet on challenges faced by IP's
9th-10th Jan	Master class on avoidance transactions
15th - 17th Jan	Master class on evaluation matrix, fair value and liquidation
18th-24th Jan	38th batch of Pre - registration educational course

Upcoming Events (February'2021)			
Dates	Events	Fees	CPE hours
12th - 14th Feb	Master Class on COC	3000/-	6
19th -21ST Feb	Mater Class on Pre-Pack Insolvency	5000/-	6
20th Feb	Interactive meet Personal Guarantors to Corporate Debtors	300/-	1
27th -28th Feb	Master Class on Cross Border Insolvency	2000/-	4

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



A JOURNEY THROUGH THE AMENDMENTS IN THE REGULATION OF LIQUIDATION PROCESS BY IBBI

*Mr. Vijender Sharma
Director-IPA ICAI, CCM -ICMAI & Insolvency Professional*

Liquidation forms the final stage of a company's life. Once the Liquidation Process of a company is initiated and completed a company halts to exist. In India, with the enactment of Insolvency and Bankruptcy Code, 2016 (Code), introduced a revamped regime for the liquidation governed strictly under the Code and Regulation made thereunder, i.e. Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016.

The principal duty of the Liquidator is to focus on maximization of the value of the assets for the stakeholder(s) and the whole exercise to be completed within a time bound period of one year from its commencement date.

To smoothen the functionality and procedures after evaluating the different aspects of challenges, Insolvency and Bankruptcy Board of India (the Board) has always bestowed the Insolvency Professionals and the economic system with amendments, as and when required.

The Board on 13th November, 2020, through a press release has notified various procedural amendments in the regulations pertaining to the Insolvency Resolution Process for Corporate Persons Regulations, the Liquidation Process Regulations and the Information Utility Regulations.

▪ **Insolvency and Bankruptcy Board of India (Liquidation Process) (Fourth Amendment) Regulations, 2020.**

(A) **Liquidators can now transfer `not readily realisable assets` (NRRRA) to any person**

Explained: -

The **Insolvency and Bankruptcy Board of India** (IBBI) has proposed an amendment to the liquidation regulations under I&B Code, 2016 to allow **public auction of non-readily realisable**

assets (NRRA) to third parties in a bid **to avoid the stalemate or delay** created in the **liquidation process** due to such assets.

a) What are non-readily realisable assets or "NRRA"

- The board defined the term '**not readily realisable asset**' "**NRRA**" as any asset included in the liquidation estate that could not be sold through the available options and included contingent or disputed assets and assets underlying proceedings for preferential, undervalued, extortionate credit and fraudulent transactions.

Or

- The assets, which **require an indefinite time** for realisation on account of peculiar nature of such assets or special circumstances, fall in the category of sundry debts.

b) Duties of the liquidator after the realization of "NRRA" assets

- The liquidator shall be required to consult the '**stakeholders' consultation committee**' (SCC) and if the advice of the SCC is not adhered to, the liquidation **shall record the reasons** in writing for such contrary view and mention it in subsequent **progress report or final report** submitted to the **adjudicating authority**.

- If such an asset cannot be **assigned or transferred**, the liquidator may explore the possibility of assignment of NRRA through **public auction to third parties**.

c) It is important to note that 14% of overall insolvency cases resulted in a resolution plan, 53% ended up in liquidation, with almost half of the active liquidation processes stretching over a year.

d) According to IBBI, creditors with low financial capacity or those cleaning their balance sheets may be interested in receiving dues instantly, even at a discount, rather than wait out the liquidation process to receive a higher pay-out.

e) The transfer of debt by a **creditor** to a **third party** with better financial capacity may lead to improvement in allocation of resources in the economy.

▪ **Assignment of not readily realisable assets (U/s 37A)**

- A liquidator may assign or transfer a not readily realisable asset through a transparent

Process, in consultation with the stakeholders' consultation committee in accordance with regulation 31A, for a consideration to any person, who is eligible to submit a resolution plan for insolvency resolution of the corporate debtor.

- "**Not readily realisable asset (NRRA)**": Any asset included in the liquidation estate which could not be sold through available options and includes contingent or disputed assets, and assets underlying proceedings for preferential, undervalued, extortionate credit, and fraudulent transactions.
- If the liquidator fails to transfer the assets to anyone, he would have to distribute the assets amongst stakeholders, with the approval of the adjudicating authority.
- "Thus, a liquidator shall attempt to sell the assets at the first instance, failing which he may assign or transfer an asset to any person, in consultation with the stakeholders' consultation committee, and failing which he may distribute the undisposed of assets amongst stakeholders, with the approval of the AA,".
- The board also amended the regulations for insolvency resolution process for corporate persons and information utilities regulations, 2020, noting that there may be a creditor who may not be willing to wait for completion of liquidation process for realisation of his debt.
- "The IBBI amended the Regulations to enable a creditor to assign or transfer the debt due to it to any other person in accordance with the laws for the time being in force dealing with such assignment or transfer,".

(B) "**30A. Transfer of debt due to creditors.**

- A creditor may assign or transfer the debt due to him or it to any other person during the liquidation process in accordance with the laws for the time being in force dealing with such assignment or transfer.
- Where any creditor assigns or transfers the debt due to him or it to any other person under sub-regulation (1), both parties shall provide to the liquidator the terms of such assignment or

transfer and the identity of the assignee or transferee. (3) The liquidator shall modify the list of stakeholders in accordance with the provisions of regulation 31”.

▪ **Insolvency and Bankruptcy Board of India (Insolvency Resolution Process) (Fifth Amendment) Regulations, 2020.**

▪ **"2A. Record or evidence of default by financial creditor.**

For the purposes of clause (a) of sub-section (3) of section 7 of the Code, the financial creditor may furnish any of the following record or evidence of default, namely:-

- *Certified copy of entries in the relevant account in the bankers' book as defined in clause (3) of section 2 of the Bankers' Books Evidence Act, 1891 (18 of 1891);*
- *An order of a court or tribunal that has adjudicated upon the non-payment of a debt, where the period of appeal against such order has expired."*
- The Board mandated the Information Utilities to disseminate the public announcement to its registered users, who are creditors of the CD undergoing insolvency preceding. This is in addition to publishing the public announcement in the newspapers and websites as required in the Regulations. The Board in pursuance of the same, added to the principal regulations, in regulation 13, in sub-regulation (2), after clause (c), the following clause namely: –
- *"(ca) filed on the electronic platform of the Board for dissemination on its website: Provided that this clause shall apply to every corporate insolvency resolution process ongoing and commencing on or after the date of commencement of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fifth Amendment) Regulations, 2020;"*
- The Board further added in the principal regulations, in regulation 39, after sub-regulation (5), the following sub-regulation shall be inserted, namely: –
- *"(5A) The resolution professional shall, within **fifteen days** of the order of the Adjudicating Authority approving a resolution plan, **intimate each claimant**, the principle or formulae, as the case may be, for payment of debts under such resolution plan: Provided that this sub-*

regulation shall apply to every corporate insolvency resolution process ongoing and commencing on or after the date of commencement of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fifth Amendment) Regulations, 2020;”

- The Regulations provide that the “**Interim Resolution Professional**” (IRP) / “**Resolution Professional**” (RP) shall verify every claim and thereupon maintain a list of creditors and update it. He is required to file the list of creditors with the “**Adjudicating Authority**” (AA) and display it on the website, if any, of the CD. The Board amended this Regulation to require the IRP/RP to submit the list of creditors on an electronic platform for dissemination on its website. The aim of the amendment was to improve transparency and also enable stakeholders to ascertain the details of their claims at a central place.
- The resolution plan usually provides payment of debts to the creditors of the CD. To improve the level of transparency, the IBBI amended the Regulations to require the RP to intimate each claimant the principle or formulae for payment of debts under a resolution plan, within **15 days of the order of the AA** approving such resolution pla

VERIFICATION BEFORE SUBMISSION OF RESOLUTION PLAN TO CoC UNDER IBC 2016

*Satyanarayana Veera Venkata Chebrolu
Insolvency Professional*

The resolution professional has to submit to the committee of creditors all resolution plans which comply with the requirements of the IBC code and regulations made thereunder: This article is intended to understand the important aspects that are to be verified by resolution professional as well as the provisions of section 29A for conducting due diligence.

As per the statistics given by IBBI in their quarterly journal till September, 2020 a total of 278 CIRPs had yielded resolution. Under the resolution of 12 large accounts initiated by banks as directed by RBI resolution plans in respect of 9 corporate debtors were approved so far and in respect of one CD resolution plan is under process.

According to section 5(26) of IBC code Resolution Plan' means a plan proposed by resolution applicant for insolvency resolution of the corporate debtor as a going concern in accordance with part II. Before submitting resolution plan to Committee of Creditors the resolution professional shall examine each resolution plan received by him and ensure compliance with Sec 30(2) of the Code.

The resolution professional shall also to conduct due diligence in terms of regulation 36A(8) based on the material on record in order to satisfy that the prospective resolution applicant complies with such criteria as laid down by him with the approval of CoC as per section 25(2)(h) and applicable provisions of section 29A as well as other requirements as specified in the invitation for Expression of Interest (EOI).

Verification by resolution plan thus can be divided into two stages:

- **First stage:** Verification by resolution professional (RP) after receipt of expression of interest (EOI) accompanied with undertakings/ documents as listed under regulation 36

A(7) and conducting due diligence as per section 29A. This is before receiving resolution plans.

- **Second stage:** After receipt of resolution plans, verification has to be done by RP to ensure that each resolution plan received by him confirm with provisions contained under section 30(2). Verification of compliance with provisions of regulation 38 is also necessary as in case resolution plan is approved by Committee of Creditors (CoC) then RP in terms of regulation 39(4) has to submit the resolution plan which was approved by the CoC to the Adjudicating Authority (AA) along with a compliance certificate in Form H of the schedule. In form H resolution professional has to comment on the compliance with the provisions of regulation 38.

The resolution professional shall submit to the committee all resolution plans which comply with the requirements of the Code and regulations made thereunder: Regulation 39(2)

In this article some of the important aspects that are to be verified by resolution professional besides the provisions of section 29A for conducting due diligence are discussed:

1. Verification of EOI with regard to compliance with clauses under regulation 36A(7)

As per regulation 36A(5) resolution professional may verify whether prospective resolution applicant submitted the expression of interest (EOI) within the last date as announced in Form G. The EOI received after the time specified in the invitation under clause (b) of sub-regulation (3) of regulation 36A shall be rejected.

EOI should be unconditional and should be accompanied with the documents/ undertakings as listed under regulation 36A(7). Compliance with regard to regulation 36A (7) as to whether EOI is accompanied with required documents or not can be verified by preparing a check list for each of the prospective resolution applicant as under:

Check list for verification of compliance with regulation 36A (7):

Name of the prospective resolution applicant (RA) who submitted EOI:

S.No.	Particulars	Yes	No
a	Whether the prospective resolution applicant submitted an undertaking that it meets the criteria specified by the committee as per clause (h) of sub-section (2) of Section 25 and if so whether complies with ?		
b	Whether resolution applicant has submitted relevant records in evidence of meeting the criteria?		
c	Whether undertaking by the prospective resolution applicant submitted stating that it does not suffer from any ineligibility under section 29A to the extent applicable?		
d	Whether relevant information and records to enable an assessment of ineligibility under clause (c) submitted?		
e	Whether an undertaking submitted stating that it shall intimate the RP forthwith if it becomes ineligible at any time during the CIRP?		
f	Whether an undertaking submitted that every information and records provided in expression of interest is true and correct and discovery of any false information or record at any time will render the applicant ineligible to submit resolution plan, forfeit any refundable deposit, and attract penal action under the Code?		
g	Whether an undertaking submitted to the effect that it shall maintain confidentiality of the information and shall not use such information to cause an undue gain or undue loss to itself or any other person and comply with the requirements under sub-section (2) of section 29?		

2. Due diligence on prospective resolution applicant on compliance with section 29A

In terms of regulation 36A(8) the resolution professional shall conduct due diligence based on the material on record in order to satisfy that the prospective resolution applicant complies with- (a) the provisions of clause (h) of sub-section (2) of section 25 (b) the applicable provisions of section 29A, and (c) other requirements, as specified in the invitation for expression of interest.

The resolution professional may seek any clarification or additional information or document from the prospective resolution applicant for conducting due diligence under sub-regulation (8) of regulation 36A

Resolution plan can be submitted by any person as a sole or jointly or in concert with such person. However eligibility criteria as per section 29 A in all cases has to be fulfilled.

S.No.	Section 29A compliance parameters	Other details
1	Should not be an undischarged insolvent (clause a)	-
2	Not a willful defaulter clause (b)	As per the guidelines issued by RBI under the Banking regulation Act. 1949.
3	Following are not eligible if their account is Non- performing asset (NPA) - clause (c) 1. A person whose account is classified as NPA 2. A promoter of corporate debtor whose account is classified as NPA 3. A person in management of CD whose a/c is classified as NPA 4. A person having control of CD whose account is classified as NPA	Subject to at least a period of one year has lapsed from the date of such classification till the date of commencement of the CIRP of the CD. Also this clause will not apply if such account was acquired pursuant to a prior resolution plan approved under this Code to such resolution applicant for a period of three years from the date of approval of such resolution plan by the AA under the code.

4	Should not be convicted of any offence Punishable with Imprisonment for 2 years or more clause (d)	Period of imprisonment: 1.Under 12th schedule 2 years 2. Any other law – 7 years But eligible after 2 years from date of release. It will not apply for connected person referred to in clause iii of explanation I
5	Should not be disqualified to act as a Director under the Companies Act 2013- clause (e)	Not apply to connected person referred to in clause (iii) of explanation I.
6	Should not have been prohibited from Trading in Securities Market- clause (f)	From trading in securities or accessing the securities markets.
7	Should not be a promoter or in the management or control of a CD in which Preferential/ Fraudulent/ Undervalued/ Extortionate Credit Transactions has taken place and order issued by AA -clause (g)	Will not apply in such transactions if taken place prior to the acquisition of the corporate debtor by the resolution applicant pursuant to a resolution plan approved under this code or pursuant to a scheme or plan approved by a financial sector regulator or a court, and such resolution applicant has not otherwise contributed to these type of transactions.
8	Should not have executed a guarantee in favour of a creditor in respect of a corporate debtor against which an application for insolvency resolution made by such creditor has been admitted under this Code and such guarantee has been invoked by the creditor and remains unpaid in full or part - clause (h)	Earlier it is termed as 'an enforceable guarantee' which was amended on 06.06.2018
9	Should not be subject to any disability, corresponding to clauses	-

	(a) to (h), under any law in a jurisdiction outside India - clause (i)	
10	Should not have a connected person not eligible under clauses (a) to (i)- clause (j) .	For the purposes of this clause, the expression "connected person" means— as per explanation I which is as under: i) Any person who is the promoter or in the management or control of the resolution applicant or ii) any person who shall be the promoter or in management or control of the business of the corporate debtor during the implementation of the resolution plan or iii) The holding company, subsidiary company, associate company or related party of a person referred to in clauses (i) and (ii)

Ineligibility can be cured, if the resolution applicant proposing to submit the resolution plan makes payment of all overdue amounts with interest thereon and charges relating to non- performing asset accounts before submission of a resolution plan. Section 29A clause (c) however not applicable to a resolution applicant where such applicant is a financial entity and is not a related party to the CD.

As per section 30(4) if a resolution applicant is ineligible under clause (c) of section 29A, the resolution applicant shall be allowed by the committee of creditors such period, not exceeding thirty days, to make payment of overdue amounts in accordance with the proviso to clause (c) of section 29A.

MSME resolution applicants, however, are exempted under section 240A from compliance of clauses (c) and (h) of Section 29 A provided if they do not fall under willful defaulter category.

In *Tomorrows Sales Agency Pvt. Ltd. v. Rajiv Khurana*, [Company Appeal (AT) (Insolvency) No. 162 of 2018] it is held that “On the issue of ineligibility, the NCLAT found that mere retention of two of the directors of the corporate debtor by the resolution applicant does not violate any of the provision of Section 29A. Further, if the directors of the corporate debtor are employees, it is always open to the resolution applicant to allow them to continue as employees, who are otherwise operational creditors and the resolution applicant is bound to pay them”

In the case of *Essar steel*, Supreme court has held that section 29A(c) speaks of a corporate debtor “under the management or control of such person”. The expression “under” would seem to suggest positive or proactive control, as opposed to mere negative or reactive control

Second stage: After receipt of resolution plans and before submitting to CoC:

1. Verification of compliance with provisions of section 30(2): As stated above before submitting Resolution plan to Committee of Creditors by RP, it is necessary to ensure that the resolution plan is compliant with the provision of Sec 30(2) of the Code.

A check list for each resolution plan can be prepared to verify the position of compliance of section 30(2) as hereunder:

Section of the Code / Regulation No.	Requirement with respect to Resolution Plan	Clause of Resolution Plan	Compliance (Yes / No)
Section 30(2)	Whether the Resolution Plan- (a) Provides for the payment of insolvency resolution process costs in priority to payment of other debts? (b)(i) Provides for the payment of debts of operational creditors in such manner as may be specified by the Board which shall not be less than-the amount to be paid to such		

	<p>creditors in the event of a liquidation of the corporate debtor under section 53; or</p> <p>(ii) the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in subsection (1) of section 53, whichever is higher, and provides for the payment to the financial creditors who did not vote in favour of the resolution plan?</p> <p>(c) Provides for the management of the affairs of the corporate debtor after approval of the plan?</p> <p>(d) Provides for the implementation and supervision of the resolution plan?</p> <p>(e) Contravenes any of the provisions of the law for the time being in force?</p> <p>(f) Confirms to such other requirements as specified by the board?</p>		
--	---	--	--

2. Verification of compliance with provisions of regulation 38 i.e. mandatory contents of the resolution plan :

Regulation 38(2) stipulates that the resolution plan to provide term of the plan and its implementation schedule. While there is no limit in the act, as to number of years for any repayment plan but it depends on the source of funds for resolution plan and estimated cash flows of the corporate debtor.

Mechanism regarding management and control of the affairs of the company has to be set out in the resolution plan which can include resolution applicant taking over the management of the CD or planning to run the business by employing professionals. For supervision during implementation of the resolution plan a committee can be formed and the composition of the committee to be set out in the resolution plan.

Resolution professional to ensure that the resolution plan addresses the cause of default and RA has proposed mitigation. Resolution plan to demonstrate that it is feasible and viable. Viability can be observed from the projected financials. Similarly RP has to ensure whether the resolution plan has provisions for approvals required and the plan demonstrates the capability of RA to implement the same.

A check list for each of the resolution plan can be prepared to verify the position of compliance of regulation 38 as hereunder:

Section of the Code / Regulation No.	Requirement with respect to Resolution Plan	Clause of Resolution Plan	Compliance (Yes / No)
Regulation 38 (1)) Whether the amount due to the operational creditors under the resolution plan has been given priority in payment over financial creditors?) Whether the amount due to the financial creditors, who have a right to vote under sub-section (2) of section 21 and did not vote in favour of the resolution plan, has been given priority for payment over financial creditors who voted in favour of the plan?		
Regulation 38(1A)	Whether the resolution plan includes a statement as to how it has dealt with the interests of all stakeholders, including financial creditors and operational creditors, of the corporate debtor?		
Regulation 38(1B)	Whether the resolution applicant has given a statement giving details if the resolution applicant or any of its related parties has failed to implement or contributed to the failure of implementation of any other resolution plan approved by the Adjudicating Authority at any time in the past?		

Regulation 38(2)	Whether the resolution plan provides: (a) the term of the plan and its implementation schedule? (b) for the management and control of the business of the corporate debtor during its term? (c) adequate means for supervising its implementation?		
38(3)	Whether the resolution plan demonstrates that – (a) it addresses the cause of default? (b) it is feasible and viable? (c) it has provisions for its effective implementation? (d) it has provisions for approvals required and the timeline for the same? (e) the resolution applicant has the capability to implement the resolution plan?		

Conclusion:

Hon'ble supreme court in Essar case in their order discussed about the importance of resolution professional with regard to ensuing resolution plan complete in all respects and quoted as under:

“Resolution Professional is to ensure that a resolution plan is complete in all respects, and to conduct a due diligence in order to report to the Committee of Creditors whether or not it is in order. Even though it is not necessary for the Resolution Professional to give reasons while submitting a resolution plan to the Committee of Creditors, it would be in the fitness of things if he appends the due diligence report carried out by him with respect to each of the resolution plans under consideration, and to state briefly as to why it does or does not conform to the law.”

Source: IBC Code 2016, regulations and case laws/AA orders on the subject.

Disclaimer: The content of this article is intended only for general information purpose. Any conclusions or opinions are based on the individual facts and circumstances of a particular matter and therefore may not apply in other matters. Specialist advice should be sought about specific circumstances.

EXTENSION OF CORPORATE INSOLVENCY RESOLUTION PROCESS

*Govindarajan M
Insolvency Professional*

The CIRP can be initiated under the Insolvency and Bankruptcy Code, 2016. The RP is to carry on the said process. The process is to be completed within 180 days. The same may be extended on the satisfaction of the Adjudication Authority for further 90 days. Certain events are to be excluded in computation of time limit of the process. The extension of CIRP is explained in detail with reference to decided case laws.

Corporate Insolvency Resolution Process

The corporate insolvency resolution process can be initiated against a corporate debtor by a financial creditor or by an operational creditor or by the corporate applicant itself. The Adjudicating Authority, on its satisfaction that the application filed by the applicant is complete in all aspects, shall admit the application. The date of admission of the application is the date of commencement of corporate insolvency resolution process.

Time limit

Section 12(1) of the Insolvency and Bankruptcy Code, 2016 ('Code' for short) provides that 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.

Extension

Section 12(2) of the Code provides that 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 sixty-six per cent of the voting shares.

Section 12(3) of the Code provides that 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. Any extension of the period of corporate insolvency resolution process under this section shall not be granted more than once.

The second proviso to section 12(3) of the Code which has been inserted vide Insolvency and Bankruptcy Code (Amendment) Act, 2019 with effect from 16.08.2019. The second proviso provides 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.

Impact of COVID

The COVID has an impact over the corporate insolvency resolution process. The Supreme Court of India in *suo motu* Writ Petition (Civil) No(s). 3/2020 in Re: 'Cognizance for extension of Limitation', vide order dated 23.03.2020, observed as under:-

"This Court has taken *suo motu* cognizance of the situation arising out of the challenge faced by the country on account of Covid-19 Virus and resultant difficulties that may be faced by litigants across the country in filing their petitions/applications/suits/appeals/all other proceedings within the period of limitation prescribed under the general law of limitation or under Special Laws (both Central and/or State).

To obviate such difficulties and to ensure that lawyers/litigants do not have to come physically to file such proceedings in respective Courts/Tribunals across the country including this Court, it is hereby ordered that a period of limitation in all such proceedings, irrespective of the limitation prescribed under the general law or Special Laws whether condonable or not shall stand extended with effect from 15th March 2020 till further order/s to be passed by this Court in present proceedings.

We are exercising this power under Article 142 read with Article 141 of the Constitution of India and declare that this order is a binding order within the meaning of Article 141 on all Courts/Tribunals and authorities'.

Based on the Supreme Court judgment, the Insolvency and Bankruptcy Board of India, inserted Regulation 40C to the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, vide notification dated 29.03.2020. The newly inserted regulation 40C is a special provision relating to time line. Regulation 40C provides that notwithstanding the time-lines contained in these regulations, but subject to the provisions in the Code, the period of lockdown imposed by the Central Government in the wake of COVID-19 outbreak shall not be counted for the purposes of the time-line for any activity that could not be completed due to such lockdown, in relation to a corporate insolvency resolution process.

Case laws

In re '**Parthiv Parikh, Resolution Professional of MV Omni Projects (India) Limited' – 2020 (11) TMI 129, NCLT, Ahmadabad Bench, the application for CIRP** was admitted by the Adjudicating Authority on 29.08.2019 and further, 90 days beyond 180 days was extended on 24.02.2020. The Resolution Professional has moved this application for seeking extension of 30 days as there is high probability of approval and/or acceptance of proposed Resolution Plan and thereby, the Corporate Debtor can be saved as a going concern. The Adjudicating Authority observed that looking to the very object of the Code, Committee of Creditors desires to get extension of 30 days as there is every likelihood that some resolution plan will be accepted and/or approved by the Committee of Creditor. However, the Supreme Court has observed that 330 days is the outer limit within which resolution of the stressed assets of the Corporate Debtor must take place.

The Adjudicating Authority under the given facts and circumstances, felt that if the time is extended within the outer limit of 330 days, there is every likelihood that some resolution applicant may succeed for its acceptance and approval. The Adjudicating Authority allowed the application filed by the Resolution Professional by extending 30 days from 13.08.2020.

In '**Bijoy Prabhakaran Pulipra, Resolution Professional of PVS Memorial Hospitals Private Limited – 2020 (11) TMI 123, NCLT, Kochi Bench, the Adjudicating Authority admitted the application for CIRP on 16.10.2019.** The original due date for completion of the corporate insolvency resolution process was 13th April 2020. The Adjudicating Authority excluded 32 days from the Corporate Insolvency Resolution Process, which was lost due to the order passed by National Company Law Appellate Tribunal in Appeal No.1130 of 2019 and Appeal No.1131 of 2019, and directed the Resolution Professional to complete the corporate insolvency resolution process on or before 15.5.2020. However, on 24th March 2020, complete lock down

throughout the country was ordered by the Government of India. The lockdown was extended till 30th June, 2020.

The Resolution Professional accordingly had filed MA/72/KOB/2020 with regard to the applicability of Regulation 40C of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 seeking reinstatement of the corporate insolvency resolution process pursuant to the 'Unlock 2' declared by Government of India. This Tribunal vide order dated 27.8.2020 allowed the said MA, which ultimately extended the corporate insolvency resolution process period from 15.05.2020 to 18.10.2020.

Considering the constraint of time to conduct the due diligence of the prospective Resolution Applicant based on the material available on record to examine and satisfy their eligibility to submit the resolution plan under the Code and verification of the contents of the resolution plan submitted by the prospective Resolution Applicant, the Committee of Creditors, vide its meeting held on 15th October 2020, had unanimously passed a resolution to extend the time period for the completion of the corporate insolvency resolution process by a period of ninety days, subject to the approval of the Adjudicating Authority.

The Adjudicating Authority held that in view of the fact that there is only one prospective Resolution Applicant before the Committee of Creditors as on date and the time to examine the resolution plan under the Code and verification of the contents of the resolution plan is limited, and also the intention of the Committee of Creditors to invite fresh Expression of Interest to enable more *bonafide* resolution applicants to bid for the revival of the Corporate Debtor seems to be reasonable, the request of Resolution Professional to extend the corporate insolvency resolution process period for a further period of 90 days is justifiable.

In '**Punjab National Bank v. Kudos Chemie Limited and others**' – 2021 (1) TMI 713, NCLT, Chandigarh Bench, the corporate insolvency resolution proceedings were commenced against the corporate debtor Kudos Chemie Limited on 05.07.2019. The 180 days' period was completed on 01.01.2020. Thereafter, the Adjudicating Authority extended the period of corporate insolvency resolution process by 90 days beyond 180 days vide order dated 08.01.2020 and the said extended period of 90 days was expired on 31.03.2020. On 30.03.2020, three resolution plans were received but could not be processed due to the imposition of the Lockdown with effect from 25.03.2020. In view of receipt of the resolution plans, the Committee of Creditors in its

11th meeting held on 30.03.2020 with 88.74% voting share resolved to seek extension of time of the CIR Proceedings by 60 days i.e. beyond 270 days after deducting the lockdown period from 25.03.2020 to 30.07.2020.

In view of the orders referred above and the IBBI Regulations and also in view of the receipt of resolution plans, the instant IA is disposed of by extending the period of corporate insolvency resolution process by 60 days beyond 270 days, after deducting the period from 25.03.2020 to 31.07.2020.

Exclusion of days

It is on one side to apply for extension of corporate insolvency resolution process and on the other side there are some periods that may be excluded from the time line of corporate insolvency resolution process which paves the way for the elongation of the corporate insolvency resolution process.

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 periods for the purpose of counting of total period of 270 days.

Conclusion

Even though there are provisions in the Code as well as in the regulations for the extension of corporate insolvency resolution process it is the duty of resolution professional to keep the timeline as stipulated in the Code. The extension sought for shall be a last resort.

HOME BUYERS

*Lakkaraju Srinivas
Advocate & Insolvency Professional*

After pronouncement of verdict that the amount advanced by the Home buyers to the Developer/builder will have Commercial effect of borrowing and hence they were classified as Financial Creditors and enabled them to initiate corporate insolvency Resolution Process against the defaulting developer. Accordingly, an amendment was made to the code and imposed threshold of minimum 100 members or 10% of total members in such class whichever is less is required for initiating the CIRP Process. Finally the Apex court has approved the amendment.

Under Insolvency and Bankruptcy code, the application for initiation of corporate insolvency Resolution Proceedings can be initiated by

- 1) Financial Creditor under section 7(1)
- 2) Operational Creditor under section 9(1)
- 3) Corporate Debtor under section 10(1)

Financial creditor means as per the section 5(7) the person to whom the financial debt is owed or legally assigned to. Financial debt means the amount of loan disbursed against the consideration of time value of money as per section 5(8). Operational Creditor is one who has supplied goods or services to the Corporate Debtor

Brief Background of amendment

After lot of deliberations, the amount of advance given to the builder for booking a flat will have commercial effect hence the home buyers will come under Financial Creditors. Immediately Govt of India has amended the IBC. Immediately after coming to know that home buyers will come under financial creditor, they have filed large number of petitions before the NCLT. As on 25.09.2019 the home buyers have filed 2542 cases against the builders under Insolvency and Bankruptcy code 2016 before NCLT.

This has caused much pain to the builders. They agitated against this rule and exerted pressure on the Govt of India to amend the code and demanded that single home buyer cannot move NCLT against the developer.

Finally the Cabinet on 10.12.2019 has amended the Insolvency and Bankruptcy code 2016 accordingly it is stipulated that in case of Financial Creditor in class , the minimum threshold

required for initiation of CIRP is minimum 100 members of that class or 10% of total members in such class whichever is less .

In case of allottees of the Project, the minimum thresholds is 100 members or 10% of the total members of that project whichever is less.

This has caused discomfort to the home buyers. The Home buyers filed writ petition in front of the Supreme Court challenging the amendment made to IBC. Supreme court after hearing both sides' arguments issued status quo order and stated that until hearing further in the matter by Supreme Court, NCLT cannot Object to the Petition filed by a single home buyer for want of minimum threshold number.

- A) Amount of default should be more than Rs.1.00 cr.
- B) Minimum threshold should be minimum number of allottees are 100 number or 10% of the total allottees of such project whichever is less, should join and file the application
- C) As per the amendment, it is very clear that minimum threshold required for filing an application under IBC is minimum number of allottees of 100 members or 10% of the total number of allottees of the Particular Project. That means the members of the other project of the same builder cannot join together with the allottees of defaulted project for filing an application under Insolvency and Bankruptcy code under section 7 .
- D) Once an application under Corporate Insolvency Resolution Process is filed under section 7 of IBC and it is admitted, a moratorium will be declared. There is a calm period. During the moratorium period, no recovery action can be initiated, no fresh suit or continuation of pending suit or execution of decree or judgement can be allowed The Corporate Debtor cannot be allowed to alienate or transfer the assets to others and no owner or lessor can be allowed to take back the property which is in the custody of the Corporate Debtor. IRP will be appointed. The management of the affairs of the business or control and custody of the assets will be under the control of the IRP. Powers of the Board will be suspended. IRP will call for claims and later constitute COC consists of only Financial Creditors. Operational creditors can be members only if their dues are more than 10% of the total debt. Related parties are not allowed as members of COC. In brief once CIRP initiated, entire control and custody of the assets will be transferred to IRP.

Now the question has come whether the home buyers will come under financial creditor or Operational Creditor.

Financial creditor means as per the section 5(7) the person to whom the financial debt is owed or legally assigned to. Financial debt means the amount of loan disbursed against the consideration of time value of money as per section 5(8).

Operational debt means a claim in respect of provision of goods and services including employment or a debt in respect of dues arising under any law for the time being in force and payable to the Central Govt or State Govt or any local authority

Operational Creditor means any person to whom operational debt is owed or legally assigned to Operational Creditor is one who has supplied goods or services to the Corporate Debtor

Now the question is whether the Home buyers are financial Creditors or Operational Creditors.

The Supreme Court in the Pioneer Urban case has settled many clarifications and considered allottees of a real estate Project were deemed to be financial creditor under the IBC

The following issues were settled

1. Whether the Home buyers can be considered as Financial Creditor under the IBC Code 2016?
2. Whether IBC code 2016 will have overriding effect over RERA?
3. Whether the amendment is violates Article 14,19(1) (g) and 300 A of constitution of India
4. Whether the explanation added to Section 5(a)(f) is of clarificatory nature or can enlarge the scope of Section 5

The Home buyers will be considered as Financial Creditors but not Operational Creditors. The Financial debt is a debt which is paid against consideration for time value of money. The time value of money means the lenders lent money for utilisation for a purpose and the borrower after utilisation of the money for the purpose is required to repay such money or equivalent of money utilised to the lender along with interest. In the case of Home buyers, the home buyer will pay the advance amount to the builder with a hope that the flat /house he will get at a much lesser price than the amount he will pay for the fully constructed flat/house. Similarly the builder will utilise the money received in advance from the home buyer for completion of the project. In both the

cases the element of Commercial effect is observed. Hence the Home buyers are considered as Financial Creditors.

Further the Financial Creditors are interested in revival and rehabilitation of the insolvency of the corporate debtor and whereas the Operational Creditors are not interested in the revival of the business of the corporate debtor but there are interested in the recovery of their debt. Hence the Financial Creditors are finding birth in the COC and Operational Credits are not finding their place in the COC except their dues are more than 10% of the total debt In the case of home buyers, the home buyers are more interested in the financial health of the builder and also more interested in the completion of the project and they show interest in the revival and rehabilitation of the business of the builder rather than recovery of their money. This is also the reason for keeping the Home buyers under the category of financial Creditors

Further the builders generally make delay in completion of the Project and also handing over the flats to the home buyers. In such cases the home buyers will have a right to initiate the proceedings by filing an application under section 7 of the code and find their place in the COC for making collective decision for revival of the business of the corporate debtor. Since the number of home buyers are very large in number and it is very difficult to accommodate them in the COC. Further the home buyers are located in different places; it is also very difficult to arrange transportation to all of them. To obviate this problem, the concept of authorised representative is introduced. This authorised representative will attend the meeting on behalf of the members and the authorised representative will take decision on behalf of the members. The authorised representative will collect voting instructions from Creditors in a class ,attend the meeting of the COC and cast his vote in respect of each creditor in accordance with the instructions he has received. If Creditors in class have expressed different opinions say if 50% in favour and 50% against, in such case Authorised Representative will cast his vote 50% in favour and 50% against

Initially Home buyers with assured return only will be considered as

Financial Creditor

At the beginning that the developers from a real estate company used to Offer assured returns in order to promote their sales. Such advertisements will attract poor investors into the under construction projects. SEBI has also put ban on such type of sales. Many investors have invested into the project and ultimately suffered for want of repayment of their principal .The cabinet has also put ban on such type of sales and advised the investors to verify whether such scheme is

approved by SEBI or not before investing into the project. The NCLAT in the case of Nikhil Mehta and sons (HUF) Vs AMR Infrastructure has held that the amount raised by the Developer from the allotted under assured return scheme had the effect of commercial effect of a borrowing. Further the amount raised by the developer was shown as "Commitment charges" under the head "Financial cost" in the annual return which made it clear for the NCLAT to consider such allottees as Financial Creditors within the meaning of Section 5(7) of code. Further the Apex court has also held that the Home buyers can participate in the committee of Creditors to protect their interest. On the basis of the judgements pronounced by the judiciary, the Insolvency law committee in its report has suggested that there is a need to make amendments to the code to clarify further the position of Home buyers. Accordingly an amendment was made to include the Home buyers as Financial Creditors.

The Apex court has held that Section 5(8)(f) is a residuary provision which is catch all in nature and therefore the word any amount or any transaction not covered under any other clause will be considered as Financial Debt if they have effect of Commercial borrowing. Hence the advance given by the Home buyer to the real estate developer for completion of the project and handing over the flat in exchange will have effect of commercial borrowing. Hence the Home buyer will be considered as Financial Creditor

Whether the Home buyer is a secured Creditor or Unsecured Creditor ?

The Financial Creditor are of two types 1. Secured Financial Creditor and 2. Unsecured Financial Creditor. If the Financial Creditor is a secured one, he can enjoy Priority in the water fall mechanism and if he is a Unsecured Financial Creditor, he will be receiving his share of amount under the water fall mechanism after making payments to the Insolvency resolution costs/liquidation costs, Workmen dues and secured Creditors, Workers dues for 24 months and Employees dues for 12 months. Hence the chances of obtaining his share of money in the water fall mechanism are very remote. If the Financial Creditor is a secured one whether he may be financial or operational Creditor, enjoys supremacy over others. But the Home buyers are considered as Unsecured Financial Creditors and hence the chances of obtaining their chunk of share are very meagre. Hence Secured Creditor means, security interest is to be created. In case of Home buyers there is no security interest. The status of secured or unsecured largely depends upon the agreement entered into between Home buyer and Builder. If the agreement to sale establishes the fact of creation of charge on the land over the project is to be executed, in such case the home buyer will be considered as Secured Financial Creditor

What is the position of the Home buyer if he takes loan from a Bank?

Whenever the home buyer takes a loan from the bank for purchase of flat with the builder, he will have to enter into an agreement called tripartite agreement which is entered between Home buyer, builder and the bank. In such case the home buyer will create third party interest in favour of the bank. In such case the Home buyer will not be considered as financial Creditor. This was decided in the matter of Ajay Walia Vs Sun world Residency Private limited it was held by NCLT Allahabad that the home buyers who have subrogated his rights in favour of the bank cannot be considered as a Financial Creditor.

Whether the allottee is comes under financial creditor if he is a speculative investor?

It is a proven fact that some of the Home buyers are not genuine Home buyers. They are interested in the speculative business. They will first book the flat and after completion of the entire project, they will try to sell the flat at a higher price. There is a chance that these Home buyers will try to initiate the proceedings under the code with a malicious intent or fraudulently knock the door of the NCLT to put the Developer under pressure. Hence the speculative investors are not included in the category of Home buyers .In such cases, the Developer can put forth the defence that the Allottee is not a genuine home buyer, he has resorted to the insolvency not for resolution but initiated maliciously to grab the management of the corporate debtor. Further the developer can defend his case that Home buyer is a defaulter and not paid the amount as per the terms of the agreement and he is a speculative investor etc using the IBC as a coercive method to get back the amount from the developer.

Whether the disputed debt can be considered as a ground for initiation of proceedings?

The Home buyers are entitled to sustain their claim irrespective of a disputed debt as pronounced in the case of M/s Innovative Industries ltd Vs ICICI Bank it was held that whether debt is disputed or not as long as it is due entitled to initiate proceedings under the code.

Whether IBC will prevail over the RERA ?

The Apex court has held that IBC will prevail over the RERA because of the following reasons. 1. The remedies available under RERA are in addition to any other remedy available in any other statute. RERA deals with recovery of an amount but whereas the IBC deals with resolution of the insolvency of a Person. Hence the object of both the laws is different. The non*obstante clause of RERA came into force with effect from May 1st 2016 but whereas the non- obstinate clause of the code has come into operation with effect from 1st December 2016.As per the verdict of Supreme

court whichever law enacted later will prevail over the earlier law. Hence IBC will prevail over the RERA. In addition to this an amendment which introduced explanation to Section 5(8) (f) has come into force with effect from 6th June 2018. Hence in all aspects the IBC will prevail over the RERA

Whether the amendments are violative of article 14 of constitution of India and also there is no intelligible differentia exists between Financial Creditors and Operational Creditors?

The Apex court has held that Operational creditor is one who supplies goods and services to the corporate debtor. In the case of real estate sector, the Builder/Promoter will supply the goods in the form of flat/apartment and Home buyer will pay the consideration to the builder. Hence the Home buyer is the creditor and Promoter is the corporate debtor. Further the Home buyer is a Financial creditor because of the existence of commercial effect of borrowing. In addition to this the Operational Creditor is interested only in recovery of his dues whereas the Financial Creditor is more interested in the revival of the business of the corporate debtor. The Home buyer is more interested in the financial health of the builder so that he can complete the project rather than recovery of his advance amount. Hence there is an intelligible differentia between Builder and Home buyer

It was held that Home buyers are similar to other financial Creditors like Debenture holders, Fixed deposit holders. Hence Home buyers are considered as Financial creditors who have advanced amount to the builder hence the Home buyer are considered as individual Financial Creditors and belong to a larger section of Financial Creditors being represented by an authorised representative in the COC does not violate the article 14 of the constitution.

Whether the amendment is violative of article 19(1)(g) and article 300 A?

The article 19(1)(g) speaks about the fundamental right of right to practice of any Profession. The Article 300 A speaks about right to property is no longer a fundamental right rather it is a constitutional right and now exists in Article 300 A. It speaks about No person shall be deprived of his property save by the authority of law. The article protects an individual from interference by the State and dispossesses a person of the property unless it is in accordance with the procedure established by law

The amendment does not violate the above articles because the code is a beneficial legislation as it is triggered to put the Corporate debtor back on its feet so that the interest of unsecured Creditor

like home buyer/allottees who are interested in the financial health of Corporate debtor are taken care of . Under the code the management will be replaced and the replaced management can carry out the real estate project and deliver flat /apartment to the buyers and pay refund or compensation in case of late delivery or non-delivery of the flat/apartment to the home buyer. Based on the above argument it is clarified that it is not violative of the article.

The Supreme court has upheld the constitutional validity of the amendments made to the Code in the case of Manish Kumar Vs Union of India and as a result of that it is clear that no less than 10 per cent of total allottees or minimum 100 members of the same Project are required for initiating Corporate Insolvency Resolution Process against the defaulting Borrower/Developer. It is also stated that amendment is retrospective in effect and applies to the pending application also.

Disclaimer: The entire contents of this article have been prepared based on relevant provisions and as per the information existing at the time of the preparation. Although care has been taken to ensure the accuracy, completeness, and reliability of the information provided, I assume no responsibility therefore. Users of this information are expected to refer to the relevant existing provisions of applicable Laws. The user of the information agrees that the information is not professional advice and is subject to change without notice. We assume no responsibility for the consequences of use of such information. This is only a knowledge sharing initiative and the author does not intend to solicit any business or p

CORPORATE INSOLVENCY IN INDIA AND OTHER COUNTRIES

*Gopinath
Insolvency Professional*

Indian Insolvency & Bankruptcy law is a progressive, young and evolving law. Four years after implementing of this legislation, and seeks to analyze the effectiveness of the Indian Bankruptcy law 2016 in comparison with its other countries. This article has drawn a comparison of insolvency and bankruptcy procedures in India from other countries such as UK, USA, Germany, Singapore, Australia.

The Insolvency and Bankruptcy Code 2016, Code offers a uniform, comprehensive insolvency legislation comprising all companies, partnerships and individuals (other than financial firms). One of the fundamental features of the Code is that it allows creditors to assess the viability of a debtor as a business decision, and agree upon a plan for its revival or a speedy liquidation. The Code creates a new institutional framework, consisting of a regulator, insolvency professionals, information utilities and adjudicatory mechanisms, that will facilitate a formal and time bound insolvency resolution process and liquidation. IBC Act 2016, implemented in phases since August 5, 2016, was enacted to overhaul the outdated and complex corporate insolvency laws in India to address an economy-wide problem of bad loans, with its resulting impact on the banking sector and access to credit. The Code has also materially impacted the rates of default on loan repayments. In Other words, repayment rates have materially improved owing to a fear among controlling shareholders of Indian debtors that they may lose control of their (largely) family owned businesses if placed in insolvency. It is therefore equally important for existing creditors and shareholders to take note of the change in debtor-creditor dynamics introduced by the Code, given that it is now possible for creditors to credibly enforce their rights, including in ways that result in a change in ownership of debtors. Main aspects of the practical implementation of the Insolvency and Bankruptcy Code, 2016 in India. The timelines have been drastically changed to tackle the delay in settlement of cases under the said law; Four years after passing of this legislation, and seeks to analyze the effectiveness of the Indian Insolvency Law (IBC) in comparison with its counterparts. This Article has drawn a comparison of insolvency and

bankruptcy legal procedures in India from Other countries such as US, UK, Germany, Singapore, and Australia, especially UK and US comparative analysis of Insolvency Laws as follows.

Comparative Analysis of Insolvency Laws

One of the usual questions that arises in our minds is how is the Indian IBC 2016 compared to Other Insolvency Codes practiced internationally. Since internationally Insolvency and bankruptcy laws have been in place for a long time, and have dealt with several cases a look into their laws may give some more insight. As we know, IBC 2016 was enacted in May 2016 and is therefore young and evolving. It should be really appreciated how proactively and speedily the regulator (Insolvency & Bankruptcy Board of India) is reacting to every emerging situation by bringing rules and regulations to deal with various situations appropriately.

Ease of Doing Business and resolving insolvency Ranks from the year 2017 to 2020

Country	Ease of doing business				Ease of resolving insolvency		
	2017 (190)	2018 (190)	2019 (190)	2020 (190)	2017 (190)	2018 (190)	2019 (190)
India	130	100	77	63	136	103	108
United States (US)	8	6	8	6	5	3	3
United Kingdom (UK)	7	7	9	8	13	14	14
German	17	20	24	22	3	4	4
Singapore	2	2	2	2	29	27	27
Australia	15	14	18	22	21	18	20

source: compiled from World Bank's Doing Business report 2017 to 2020

Insolvency Resolution Parameters and Credit Data						
Indicator	India	US	Germany	UK	Australi a	Singapore
Rank	52	2	4	14	20	27
Recovery Rate	71.6 %	81%	79.8%	81%	82.7%	88.7%

Time years	1.6	1.0	1.2	1.0	1.0	0.8
---------------	-----	-----	-----	-----	-----	-----

Source: World Bank Doing Business Report, 2019

Insolvency Framework in United Kingdom

COMPARATIVE CHART - UNITED KINGDOM AND INDIA

Comparative Chart

Basis of Comparison	UK Insolvency Act, 1986	Insolvency and Bankruptcy Code 2016
Who can start Insolvency Bankruptcy Process	Creditors; or Debtor Company; or Holders of qualifying floating charges(QFC)	Financial Creditors (Sec. 7); Operation Creditors (Sec. 9) Corporate Debtor Sec. 10
Moratorium	Yes, after the Court Appoints administrators.	Yes, as per Section 14.
Period for insolvency process	12 months with creditors consents /court's approval it can be extended up to 6 more months	330 days (Section 12).
Management Control during insolvency proceeding	Management control passes to insolvency practitioners or administrators. However the daily operations of the company remain in the hands of the directors.	Insolvency Professional as IRP/RP, to be appointed by the Adjudicating Authority Insolvency. Board of directors gets suspended with the appointment of IRP

Resolution Plan	08 weeks of Admin. Appointment or extended period as court may allow. The resolution plan approval requires a simple majority in value of those creditors present & voting.	Based on the information memo (S 29), a revolution plan can be submitted (S 30). S 30.4 needs that the plan is to be approved by COC by 66% voting share. S31 needs that such an approved Resolution plan by CoC should be approved by AA.
Sale of assets During insolvency	Admin. is like an agent of the company, has the power to contract without personal liability. They have the power to sell any of the debtor property without the permission of the court.	RP may do so after the approval of CoC. (S 28).
Insolvency Proceeding Costs	Cost is borne by Debtor.	CIRP initiated under Sec. 7/9 - Creditors CIRP initiated under Sec. 10 - Debtor
Priorities of the payments - to be read from top to bottom in the order of priorities	Secured lenders- Expenses of the insolvent estate- Employees 04 months prior to insolvency- Prescribed Part protected portion of the money to unsecured creditors - a formulae Floating charge creditors Unsecured creditors Equity holders	Insolvency cost workmen dues for 24 months- Secured creditors Employees for preceding 12 months- Unsecured creditors- State dues or secured creditors for any amount unpaid any remaining debts & dues- Pref. shareholders Equity holders
Cross Border Insolvency	Inside EU – EU Insolvency Regulation Outside EU – UNCITRAL Model Law on Cross Border Insolvency Proceedings	UNCITRAL Model Law on Cross-Border Insolvency has been recommended but not yet been adopted.

Insolvency Framework in United States

COMPARATIVE CHART - UNITED STATES AND INDIA		
Comparative Chart		
Basis of Comparison	Chapter 11 Of US Bankruptcy Code	Insolvency and Bankruptcy Code, 2016
Who can start Insolvency & Bankruptcy Process	Debtor Company	Financial Creditors (Sec. 7); Operational Creditors (Sec. 9) & co the Debtor (Sec. 10)
Moratorium	Yes, after filing the petition in Bankruptcy Court	Yes, as per Section 14.
Period for insolvency process	Period of 120 days extendable upto 18 months on sound reasons	330 days (Section 12).
Management Control during insolvency proceeding	Management continues. Debtor in Possession (DIP) approach is adopted.	Insolvency Professional as IRP/RP, to be appointed by the Adjudicating Authority. Board Of directors gets suspended with an ointment of IRP

Resolution Plan	Debtor has an exclusive period of 04 months (ext. up to 18 months) to propose and seek approval from impaired creditors & shareholders within two months. Each class Of creditors whose rights have been impaired to vote in favor by majority and 2/3 in amount actually voting	Based on the information memo (Section 29), a resolution plan In can be submitted (S 30). Section 30 needs that the plan is to be approved by CoC by 66% voting share. Section 31 needs that such approved Resolution plans by CoC should be approved by AA.
-----------------	--	--

Sale of assets during insolvency	Section 363 allows a debtor to sell substantially all of its assets free of liens. This allows assets to be sold quickly and avoids further erosion of the value due to losses	RP may do so after the approval of CoC (Section 28).
Insolvency Proceeding Costs	Cost is borne by Debtor. Lenders may provide finance to Debtor against lien (superior) over assets which are not pledged to other lenders.	CIRP initiated under Sec. 7/9 Creditors CIRP initiated under Sec. 10 Debtor
When the process comes to an end	Resolution plan confirmation discharges debtor's pre obligation other than what is proposed in the plan. if plan is not confirmed then conversion to Bankruptcy proceeding as per Chapter 7	180 day with a max 90 day one time extension (S 12) with the approval of the Resolution plan by AA (S 31) failing which liquidation proceedings as per S 33.

Priorities of the payments - to be read from top to bottom in the order of priorities	Secured creditors- Insolvency proceeding cost- Claims arising during the gap period- Employees wages & benefits- Deposit claims Govt. tax claims- Unsecured claims- Equity interest	Insolvency cost workmen dues for 24 months -Secured creditors -Employees for preceding 12 months- Unsecured creditors- State dues or secured creditors for any amount unpaid any remaining debts & dues -Pref. shareholders equity holders
Cross Border Insolvency	Chapter 15 of US Bankruptcy Code deals with the Cross Border Insolvency. US has also substantially implemented UNCITRAL Model Law on Cross Border Insolvency into their domestic legislation.	UNCITRAL Model Law on Cross Border Insolvency has been recommended but not yet been adopted.

A Bird's eye views on cross country comparison

S. No	Details	India	UK	US	Australia	Germany	Singapore
1.	Law governing Insolvency	IBC, 2016	UK Insolvency Act, 1986	chapter 11 of US Bankruptcy code	Bankruptcy Act, 1966, the Corporations Act, 2001 and Australia Act, . An Securities and Investments Commission Act 2001	Germany Insolvency code (Ins O)	Chapter 50 of the Companies Act, 1967

2.	Who can start proceeding	Creditors Corporate Debtor	Creditors, debtors, Holders of qualifying floating charges(QFC)	Debtor Company	Creditors, Directors Or Debtor	Debtor company or creditors	Company its directors creditors.
3.	Moratorium	Yes	Yes	Yes	Yes	Yes	Yes
4.	Management Control	Board of directors suspended with the appt. of IP	Insolvency Practitioner but Daily operations remains with the directors	Management continues Debtor In Possession (DIP) approach	Receiver and administrator	Debtor in case of self administration else Debtor	Judicial Manager (officer of the court) takes over running of company
5.	Approval of Resolution Plan	Approved by COC by 66% votes	By simple majority in value of creditors	By majority And 2/3 Amount actually voting	Approval from majority of the creditors required	By majority of creditors	By majority of creditors
6.	Insolvent Proceedings Costs	Whoever Initiated the process	Born By Debtor	Borne by Debtor	Whoever initiates the process	Born by Debtor	Whoever initiates the process

7.	Border Insolvency	sec.23 4&235 of the uncitral not yet adopted	Inside EU Insolvency Regulation, Outside EU uncitral Model Law	UNCITRAL Model law Has substantially been adopted	Australia also adopted UNCITRAL model law	UNCITRAL Model law is not Adopted , own set Of rules are complied	Singapore adopted the UNCI TRAL model Of Cross Border Insolvency
----	-------------------	--	--	---	---	---	--

Conclusion:

Indian Insolvency & Bankruptcy law is a progressive law and the main emphasis is on its resolution process. One of the major differences compared to the US laws is that US laws stipulate a "Debtor in Possession" approach (management remains in control on running the company) whereas Other countries & Indian laws envisage the management of the company through insolvency professionals. All the laws look for a resolution plan on going concern basis over liquidation. Insolvency regulator IBBI is proactively addressing the emerging situations which is remarkable. IBC has brought a culture change in corporate India, but it is a journey which has only just started.

References:

IBC Act 2016

<https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics>

<https://www.legislation.gov.uk/ukpga/1986/45/contents>

http://sso_age.gov.sg/act/CoA1967

<http://restructuring.backermckenzie.com/wp-content/uploads/sites/23/2016/12/Globa>

[I-Restructuring-Insolvency-Guide-New-Logo-Australia](#)

FAQ's on Personal Guarantors to Corporate Debtors

CMA Vijender Sharma
Director-IPA ICAI, CCM – ICMAI
& Insolvency Professional



Q-1 Who is a Personal Guarantor to Corporate Debtors (CD)?

A-1 A Personal Guarantor (PG) is an individual who is the surety in a contract of Guarantee to the Corporate Debtor.

Guarantor means a Debtor who is a PG to a CD and in respect of whom Guarantee has been invoked by the creditor and remains unpaid in full or part.

Debtor includes a Judgement Debtor.

- Principal Debtor must be a Corporate Debtor; Guarantor must be individual
- Guarantee has been invoked
- Invocation of Guarantee must be in terms of the Guarantee deed; provisions of sec 126-147 of the Contracts Act
- Usually Guarantee is invoked by notice
- Remains unpaid in full or part

Q-2 Who can be the associates of the Personal Guarantor?

A-2

- a) A person who is a relative of the Debtor or
A relative of the spouse of the Debtor.
- b) A person who is in partnership with the Debtor.
- c) A person who is a spouse or
A relative of any person with whom the Debtor is in partnership.
- d) A person who is employer of the Debtor or

Employee of the Debtor.

- e) A person who is a trustee of a trust in which the beneficiaries of the trust include a Debtor or The terms of the trust confer a power on the trustee which may be exercised for the benefit of the Debtor; and
- f) A company, where the Debtor or the Debtor along with his associates, own more than **50%** of the share capital of the company or control the appointment of the board of directors of the company.

Explanation - For the purposes of this sub-section, "relative", with reference to any person, means anyone who is related to another, if-

- i. They are members of a Hindu Undivided Family;
- ii. One person is related to the other in such manner as may be prescribed;

The manner of relationship shall mean the manner as provided in the explanation to clause 24A of S5.

Q-3 Who can file the application for initiation of Insolvency Resolution Process (IRP) of Personal Guarantor (PG) to Corporate Debtors (CD)?

A-3 An application U/s 94 of the Code Read with Rule 6 of I&B (Application to AA for IRP for Personal Guarantors to Corporate Debtor) Rules, 2019, can be filed by the Guarantor, either Personally or Through a Resolution Professional, to the Adjudicating Authority (AA).Or

An application U/s 95 of the Code Read with Rule 7(2) of I&B (Application to AA for IRP for Personal Guarantors to Corporate Debtor) Rules, 2019, can be filed by a Creditor, either by HIMSELF or JOINTLY with other Creditors or THROUGH A RESOLUTION PROFESSIONAL, to the AA.

Q-4 Is there any Form, Fees prescribed to file the application for the Resolution Process of the Personal Guarantor?

A-4 Yes,

Forms and Fees to file the application for the resolution process of the Personal Guarantor are as following:

Form A along with fees of Rs. 2,000/-, in case of application filed u/s 94 of Code.

Form C along with fees of Rs. 2,000/-, in case of application filed u/s 95 of the Code.

Q-5 Does it require issuing advance notice to the Personal Guarantor, before filing of application to AA?

A-5 Yes, Advance notice of 14 days in Form B, is required in case of application filed by the creditor u/s 95 of the Code. Application can be filed only if debt stated in the demand notice is not repaid by the Debtor within 14 days of service of Demand Notice.

Unlike demand notice in Form 3 of the IBBI (Application to Adjudicating Authority) Rules, 2016, the demand notice in case of personal insolvency does not give a chance of disputing the notice.

Q-6 Is there any minimum threshold limit to initiate Insolvency Resolution Process against Personal Guarantor to Corporate Debtors?

A-6 Yes, an application for Insolvency Resolution Process may be filed before the AA on a minimum default of Rs.1000.

Q-7 Who will be Adjudicating Authority (AA) for the Personal Guarantor to the following:-

A-7 a) To Corporate Debtors;

b) To individual;

c) To partner or partnership firm;

- National Company Law Tribunals (NCLT) will be the AA for the Personal Guarantor to CD.

- Debt Recovery Tribunal (DRT) will be the AA for the Personal Guarantor to Individual

- Debt Recovery Tribunal (DRT) will be the AA for the Personal Guarantor to Partner or partnership firm.

Q-8 Can the application to initiate the Insolvency Resolution Process of Personal Guarantor can be filed for any debt?

A-8 An application **u/s 94** or **u/s 95** shall be submitted only in respect of debts which are not excluded debts.

Q-9 Is it mandatory to serve the copy of the application filed **u/s 94** or **u/s 95**, to the RP or to Debtor/every financial creditor and the Corporate Debtor to whom the guarantor is a Personal Guarantor or to the Board?

A-9 Yes, In case the applicant has not served the copy of the application to the RP earlier, then he shall provide the same to the RP & Board within **three days** of his appointment **u/s 97(5)** of Code.

Q-10 Whether Debtor (Guarantor) is Disqualified to file the application **u/s 94** of Code?

A-10 Yes. A Debtor shall not be entitled to make an application under sub-section (1) if he is -

a) Un discharged bankrupt;

b) Undergoing a fresh start process;

c) Undergoing an Insolvency Resolution Process; or

d) Undergoing a bankruptcy process.

- A Debtor(Guarantor) shall not be eligible to file the application u/s 94, if an application under this Chapter has been admitted in respect of the Debtor during the period of twelve months preceding the date of submission of the application under this section.

Q-11 Is it mandatory to propose the name of an insolvency professional (IP) with app liquidation?

A-11 No, It is not mandatory to propose the name of an IP in the application.

- In case the application is not filed through RP, the AA **may appoint the RP** from the **data base of Insolvency Professionals**.
- If the application is filed by the applicant himself and the **RP is proposed**, If AA finds disciplinary proceedings against the RP proposed by the applicant, **the AA appoints an RP from the panel of IPs shared by the IBBI**.

Q-12 Is there any form to submit the written consent by the RP before his appointment?

A-12 Yes, the Insolvency Professional shall submit his written consent in **Form A** of IBBI (Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Regulations, 2019.

Q-13 What are the disqualifications to be appointed as RP?

A-13 A resolution professional shall be disqualified:

- If he is related party of the Corporate Debtor;
- If he is an associate of the Guarantor;
- If he is acted as IRP, RP, or liquidator in respect of CD ;
- If he is not subject to any **ongoing disciplinary proceedings** or a **restraint order of the Board** or of the **insolvency professional agency** of which he is a professional member; and
- The insolvency professional entity of which he is a **Partner** or a **Director**, or **any other Partner** or **Director of such insolvency professional entity** does not represent any party in the Resolution process.

Q-14 What will be the status of moratorium in this process?

A-14 When an application is filed **u/s 94** or **u/s 95** an Interim Moratorium shall commence on the date of the application in relation to all the debts, and shall cease to have effect on the date of admission of such application;

When the application is admitted under section 100, a moratorium shall commence in relation to all the debts and shall cease to have effect at the end of the period of 180 days beginning with

the date of admission of the application or on the date the Adjudicating Authority passes an order on the repayment plan under section 114, whichever is earlier.

During the interim-moratorium period -

- i. Any pending legal action or proceeding in respect of any debt shall be deemed to have been stayed; and
- ii. The creditors of the Debtor shall not initiate any legal action or proceedings in respect of any debt.

During the Final Moratorium Period-

- i. Any pending legal action or proceeding in respect of any debt shall be deemed to have been stayed;
- ii. The creditors shall not initiate any legal action or legal proceedings in respect of any debt; and
- iii. The Debtor shall not transfer, alienate, encumber or dispose of any of the assets or his legal right or beneficial interest therein;
- iv. Where the application has been made in relation to a **firm**, the interim moratorium shall operate against all the partners of the firm as on the date of the application.

Q-15 Who shall issue the public notice and what is timeline to issue the public notice about the commencement of resolution process of PG?

A-15 The AA shall **issue** the **Public Notice** within 7 days as per section 102 of Code.

Q-16 Is there any timeline to conduct Insolvency Resolution Process? If yes, what is it?

A-16 Yes, The maximum timeline period is given for 180 days.

Q-17 Can the IRP or RP can be replaced? If yes, who can initiate and how much voting percentage require for such decision?

A-17 Yes, The replacement can be done by Debtor or the creditor if they are in the opinion for the replacement of the RP and may apply to the AA for replacement of such RP.

Any decision taken by the creditors should be supported with more than 51%. Voting rights.

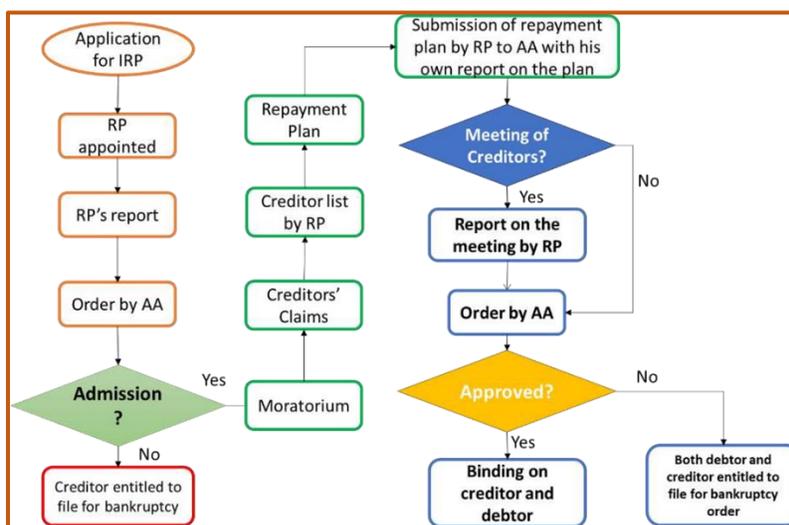
The RP shall share all information with the new RP in respect of Insolvency Resolution Process and co-operate with the new resolution professional in such matters as may be required.

Q-18 What are the steps to be taken by the RP after being appointed by AA?

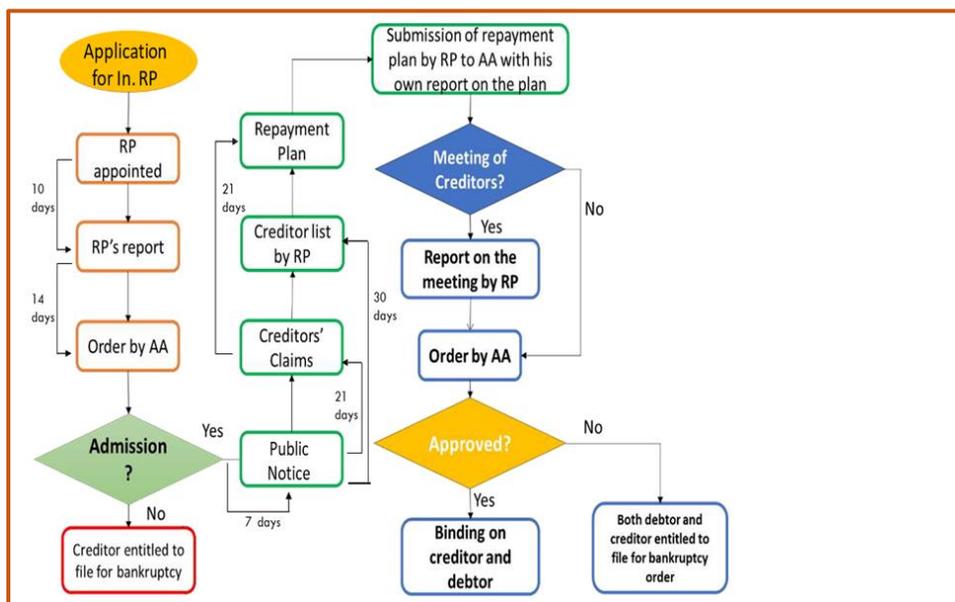
A-18

- i. Submit report to AA for admission or rejection of application **u/s 94** or 95.
- ii. If application rejected by AA, then creditors are entitled to file for bankruptcy.
- iii. If application admitted by AA, then RP will be instructed by AA to for the purpose of conducting negotiations between the Debtor and creditors and for arriving at a repayment plan.
- iv. W.e.f. order of AA, the Final moratorium shall commence
- v. The RP shall prepared a list of creditors within 30 days from the date of notice, based on the information disclosed in the application filed **u/s 94** or 95 & claims received by RP.
- vi. The RP shall make the list of creditors available for inspection by the persons who submitted claims with proof, serve copy to the guarantor, publish it on the website of guarantor, if any, present at meeting of creditors and filed certified copy with AA along with repayment plan.
- vii. RP shall prepare the statement of affairs.
- viii. RP consulted to the Debtor for preparation of the repayment plan.
- ix. RP shall submit the report along with repayment plan to AA within 21 days from the last date of submission of claim or submit the report along with repayment plan, as approved by creditors to AA on or before completion of 120 days from the resolution process commencement date.
- x. RP shall provide the copy of documents within 3 days from the date of such filing.
- xi. Convene the meeting of creditors, if required and/or on request of creditors having 33% voting share.
- xii. Prepare and send the minutes of meeting within 48 hrs of conclusion of meeting.
- xiii. Issue notice of meeting which shall not be less than 48 hrs.
- xiv. If the resolution professional is opined, the guarantor has failed in implementation of the repayment plan, the resolution professional shall, within three days of knowledge of such failure, issue a notice to the guarantor identifying the failure and requiring him, within fifteen days of receipt of the notice, to-
 - a) Address such failure if it can be addressed, or
 - b) Provide an explanation for the failure.
- xv. If the guarantor addressed the above, the RP shall report the failure to creditors within seven days of the date of failure addressed or explanation provided for such failure.

- xvi. If the guarantor do not addressed the above, the RP may apply for directions to AA, if he is of the opinion that the failure will affect the implementation of the repayment plan.
- xvii. RP shall supervise the implementation of the repayment plan.
- xviii. RP shall file an application on completion of repayment plan within 14 days(subject to extension of further 7 days) for discharge order.
- xix. The RP may file the application of non-co-operation by guarantor to AA, for direction.



Q.19 What will be the timelines for various functions of RP?



Q-20 Is there any committee of creditors?

A-20 No, there is no committee of creditors.

Q-21 Who will be the participants of meeting of creditors?

A-21 A person entitled to attend a meeting of creditors and includes a creditor, the guarantor, the resolution professional, and any other person authorised through a resolution by creditors to attend such meeting;

Q-22 What will be the role of creditors?

The creditors are entitled to participate & vote in the meeting of creditors. The creditors are entitled to take the decision of approval of repayment plan, resolution process cost.

Q-23 Is it mandatory to convene the creditors meeting?

A-23 Though, it is not mandatory for RP to convene the meeting for approval of repayment plan. In such case, the RP has to record the reason in his report to the AA. Further, as per the provision of regulation of PG, the RP has to convene the meeting of creditors on request by creditors having 33% voting share of creditors.

Q-24 What is the minimum quorum to convene the meeting of creditors?

A-24 The minimum quorum to convene the meeting is 33%. Provided that the creditors in a meeting may modify the percentage of voting share required for quorum in respect of any future meetings of the creditors.

Q-25 What is the minimum time period to send the notice of the meeting of creditors?

A-25 Not less than 48 hrs.

Q-26 What is the timeline to send the minutes of meeting to the participants?

A-26 Within 48 hrs of conclusion of meeting.

Q-27 Is there option available to seek the vote through e-voting?

A-27 Yes.

Q-28 Whether creditor can appoint the proxy to attend and vote on its behalf in the meeting? If yes, what is the process to be followed for the same?

A-28 Yes, A creditor shall deliver Form C, Refer I&B (IRP for PG to CD) Regulations, 2019), duly completed to the resolution professional at least 24 hours prior to the meeting of creditors. A

proxy may vote by electronic means on behalf of the creditor. A creditor cannot appoint an associate of the guarantor, as a proxy to attend and vote on its behalf.

Q-29 Who will prepare the statement of affairs?

A-29 The RP shall prepare the statement of affairs.

Q-30 What is the mandatory requirements to be incorporated in to the statement of affairs?

A-30 The statement of affairs shall include the following information of the guarantor -

- a) Assets and liabilities for the preceding three financial years and the current financial year;
- b) Details of the **excluded assets** and **excluded debts**;
- c) Income statement for the preceding **3 financial years** and the **current** financial year;
- d) Income-tax returns filed by the guarantor, if any, for the preceding three financial years;
- e) Creditor wise amount due, broken up into secured and unsecured debts for the preceding three financial years;
- f) Details of debt owed by guarantor to his associates for the preceding three financial years;
- g) Guarantees given in relation to any of his debts, and whether any of the guarantors is an associate of the guarantor; and
- h) Details of the financial statements for the business owned by the guarantor, or of the firm in which he is a partner, as the case may be, for the preceding three financial years, if applicable.

Q-31 What is a repayment plan?

A-31 "Repayment plan" means a plan prepared by the Debtor in consultation with the resolution professional under section 105 containing a proposal to the committee of creditors for restructuring of his debts or affairs.

Q-32 What is the mandatory content of repayment plan?

A-32 A repayment plan containing a proposal to the creditors for restructuring of his debts or affairs.

The repayment plan may authorise or require the resolution professional to -

- a) Carry on the Debtor's business or trade on his behalf or in his name; or
- b) Realise the assets of the Debtor; or
- c) Administer or dispose of any funds of the Debtor

The repayment plan shall include the following, namely: -

- a) Justification for preparation of such repayment plan and reasons on the basis of which the creditors may agree upon the plan;
- b) Provision for payment of fee to the resolution professional;
- c) The term of the repayment plan and its implementation schedule, including the amounts to be repaid and dates of repayment to creditors;
- d) The source of funds that will be used to pay resolution process costs and that such payment shall be made in priority over any creditor;
- e) A minimum budget for the duration of the repayment plan, to cover the reasonable expenses of the guarantor and members of his immediate family to the extent they are dependent on him, provided that at least ten percent of the realisable income of the guarantor shall be utilised for repayment of debts;
- f) Financing required for implementation of the repayment plan;
- g) If the guarantor has any business, the manner in which it is proposed to be conducted during the course of the repayment plan, and the role of the resolution professional;
- h) The manner in which funds held for the purposes of the repayment plan, invested or otherwise dealt with, pending repayment to creditors;
- i) The functions which are to be undertaken by the resolution professional, including supervision and implementation of the repayment plan;
- j) Variation of onerous terms of a contract or transaction involving the guarantor;
- k) The details of excluded assets and excluded debts of the guarantor; and
- l) Terms and conditions for the discharge of the guarantor.
- m) Such other matters as may be specified.

The repayment plan may provide for the following-

- a) Transfer or sale of all or part of the assets of the guarantor along with the mode and manner of such sale;
- b) Administration or disposal of any funds of the guarantor;
- c) Satisfaction or modification of any security interest;
- d) Reduction in the amount payable to creditors;
- e) Curing or waiving of any breach of a debt due from the guarantor;
- f) Modification in the terms of repayment of any debt due from the guarantor;
- g) Part of the income of the guarantor to be used for the repayment of the debt, and the manner of calculating the income of the guarantor;
- h) The manner in which funds held for the purpose of repayment to creditors, and not so repaid at the end of the repayment plan, are to be dealt with; and

i) Such other matters as may be required by the creditors.

Q-33 What will be the process for submission & verification of claims?

The creditors shall register their claim before the RP in **Form B** by sending details of the claims by way of electronic communications or through **courier, speed post or**

Registered letter, on or before the last date as specified in public notice i.e. up to 21 days from the resolution commencement date.

- In addition to the claim, the creditor shall provide to the resolution professional, **Personal information** and such particulars as may be prescribed
- The **creditor shall bear the costs** relating to submission of the claim, including proof, under these regulations.

A creditor may prove its claim on the basis of:-

- a) Records available in an information utility, or
- b) Any other documentary evidence which substantiates the existence of claim.
 - The RP may call for such other evidence or clarification as he deems fit from a creditor for substantiating the whole or part of its claim
 - The RP shall verify each claim as soon as it is received and prepare a list of creditors
 - Where the amount claimed by a creditor is not precise due to any reason, the RP shall make the best estimate of the amount of the claim based on the information available with him.
 - The RP shall modify the amounts of claims admitted, including the estimates of claims made, as soon as may be practicable, after he comes across additional information warranting such revision, till the approval of a repayment plan by the creditors.
 - The **claims** denominated **in foreign currency** shall **be valued in Indian currency** at the official exchange rate as on the resolution process commencement date.

Q-34 Is there any debar to purchase or acquire any interest in the property of the guarantor, directly or indirectly, without permission of Adjudicating Authority?

A-34 Yes, The following persons shall not purchase or acquire any interest in the property of guarantor, directly or indirectly, without permission of the Adjudicating Authority –

- a) The RP or any partner or director of the insolvency professional entity of which the RP is a partner or director;
- b) Any professional appointed by the RP for the resolution process;
- c) Any creditor;

- d) Any company where the guarantor or a creditor is a promoter or director;
- e) Any associate of the guarantor, creditor or resolution professional.

The AA may set aside purchase or acquisition made contrary to the provisions of this regulation and may make such order as it may deem fit.

Q-35 Whether the creditor can assign or transfer his debt to any other person during the resolution process for period? If yes, then what is the process to be followed under the provision of IBC, 2016?

A-35 Yes, Where a creditor assigns or transfers the debt to any person during the resolution process period, both parties shall provide the resolution professional the terms of such assignment or transfer, and the identity and details of the assignee or transferee.

The RP shall notify each creditor and the AA of any resultant change in the list of creditors **within** 2 days of such change.

Q-36 Is there any categorization of creditors into Financial/Operational/Employees & Workers/Others, as like in the CIRP?

A-36 No.

Q-37 What is the power of Creditors Committee to accept or reject the repayment plan?

A-37 The repayment plan or any modification to the repayment plan shall be approved by a majority of more than three-fourth in value of the creditors present in person or by proxy and voting on the resolution in a meeting of the creditors.

Q-38 What includes in resolution process cost?

A-38 "Resolution Process Costs" shall mean-

- a. Fees payable to the resolution professional;
- b. Expenses incurred on and by the resolution professional for carrying out the resolution process, including the fee of professionals engaged, if any;
- c. Finances raised for the resolution process, and costs incurred in raising such finances; and
- d. Such other costs directly relatable to the resolution process, to the extent approved or ratified by the creditors.

Q-39 Who will bear the "Resolution Process Cost"?

A-39 The Debtor (Guarantor) provides in repayment plan, the source of funds that will be used to pay resolution process costs and that such payment shall be made in priority over any creditor.

Q-40 What will be the effect of approval of repayment plan?

A-40 AA approval for the repayment plan under **U/s 114**, the repayment plan shall –

- a) Take effect as if proposed by the Debtor in the meeting; and
- b) Be binding on creditors mentioned in the repayment plan and the Debtor.

Q-41 What will be the effect of rejection of repayment plan?

A-41 Where the AA Rejects the repayment plan under section 114, the Debtor and the creditors shall be entitled to file an application for bankruptcy under Chapter IV.

Q-42 As CIRP, does this process can also be withdrawn? If yes, what will be the process to withdraw the application?

A-42 Yes, The Adjudicating Authority may permit withdrawal of the application submitted under Rule 6 or Rule 7, as the case may be:-

- a) Before its admission, on a request made by the applicant;
- b) After its admission, on the request made by the applicant, if 99% of the creditors agree to such withdrawal.
- c) An application for withdrawal shall be in Form D.

Q-43 What includes in excluded assets?

A-43 “excluded assets” for the purposes of this part includes –

- a) Unencumbered tools, books, vehicles and other equipment as are necessary to the Debtor or bankrupt for his personal use or for the purpose of his employment, business or vocation,
- b) Unencumbered furniture, household equipment and provisions as are necessary for satisfying the basic domestic needs of the bankrupt and his immediate family;
- c) Any unencumbered personal ornaments of such value(i.e. shall not exceed one lakhs rupees), of the Debtor or his immediate family which cannot be parted with, in accordance with religious usage;
- d) Any unencumbered life insurance policy or pension plan taken in the name of Debtor or his immediate family; and

- a) An unencumbered single dwelling unit owned by the Debtor of such value(i.e. shall not exceed,-
i) in the case of dwelling unit in an urban area, twenty lakh rupees; (ii) in the case of dwelling unit in rural area, ten lakh rupees).

Q-44 What includes in excluded debt?

A-44 “excluded debt” means: -

- a) liability to pay fine imposed by a court or tribunal;
- b) liability to pay damages for negligence, nuisance or breach of a statutory, contractual or other legal obligation;
- c) liability to pay maintenance to any person under any law for the time being in force;
- d) liability in relation to a student loan; and
- e) Any other debt as may be prescribed.

Q-44 What is a Partnership Debt?

A-44 “Partnership Debt” means a debt for which all the partners in a firm are jointly liable;

Q-45 What is timeline to submit the repayment plan before the Adjudicating Authority?

A-45 On or before completion of 120 days from the resolution process commencement date.

Q-46 What is the timeline to submit the report to AA on repayment plan?

- A-46 The RP shall submit the repayment plan U/s 105 along with his report on such plan to the Adjudicating Authority within a period of 21 days from the last date of submission of claims U/s102.
- The RP shall file the repayment plan, as approved by the creditors, along with the report mentioned U/s 106 or U/s 112, as the case may be, with the AA on or before completion of 121 days from the resolution process commencement date.

Q-47 What will be role of RP after approval of repayment plan by AA and in implementation & supervision of repayment plan?

- A-47 The resolution professional may apply to the AA for directions, if necessary, in relation to any particular matter arising under the repayment plan.
- The resolution professional shall within 14 days (subject to extension of further 7 seven days) of the completion of the repayment plan, forward to the persons who are bound by the

repayment plan under section 115 and the Adjudicating Authority, the following documents, namely -

- a) A notice that the repayment plan has been fully implemented; and
- b) A copy of a report by the resolution professional summarising all receipts and payments made in pursuance of the repayment plan and extent of the implementation of such plan as compared with the repayment plan approved by the meeting of the creditors.

- **Where a repayment plan comes to an end prematurely, the resolution professional shall submit a report to the AA which shall state -**

- a) The receipts and payments made in pursuance of the repayment plan;
- b) The reasons for premature end of the repayment plan; and
- c) The details of the creditors whose claims have not been fully satisfied.

On the basis of the repayment plan, the RP shall apply to the AA for a discharge order in relation to the debts mentioned in the repayment plan and the AA may pass such discharge order.

- If in the opinion of the resolution professional, the guarantor has failed in implementation of the repayment plan, the resolution professional shall, within **3 days** of knowledge of such failure, issue a notice to the guarantor identifying the failure and requiring him, within **15 days** of receipt of the notice, to-

- a) Address such failure if it can be addressed, or
- b) Provide an explanation for the failure.

If the guarantor, within the period specified:-

- a) Addresses the failure in implementation of the repayment plan; or
- b) Provides a satisfactory explanation for such failure,

- The RP shall report the failure to creditors within **7 days** of the date of failure addressed or explanation provided for such failure.
- If the guarantor do not addressed the above, the RP may apply to the AA under *Ss (2) of S 116* for directions, if he is of the opinion that the failure will affect the implementation of the repayment plan.

Q-48 When the role of the RP will be over?

A-48 When the AA will pass the discharge order on the application of RP **u/s 119** read with regulation 21 of PG regulations, 2019.

Q-49 What is remedy available with the RP in case of noncooperation by guarantor?

A-49 In the event of non-cooperation of the guarantor at any time during the resolution process period or during the implementation of the repayment plan, the RP shall prepare a statement to this effect and file the same with the AA for appropriate directions.

Q-50 Can AA direct for the modification in the repayment plan?

A-50 Yes, Where the AA is of the opinion that the repayment plan requires modification, it may direct the RP to re-convene a meeting of the creditors for reconsidering the repayment plan.

Q- 51 When the AA will pass the discharge order?

A-51 On the application of RP **u/s 119** (Read with **regulation 21** of PG regulations, 2019) On consideration of the notice and the report (**U/Ss (1) of S 117**), the AA may pass the discharge order.

Q-52 Is there any punishment for furnishing the false information etc. by creditor in Insolvency Resolution Process?

A-52 Yes,

- If a Debtor or creditor provides information which is false in any material particulars to the RP, he shall be punishable with imprisonment for a term which may extend to 1 year, or with fine which may extend to 5 lakh rupees, or with both.
- If a creditor promises to vote in favour of the repayment plan dishonestly by accepting any money, property or security from the Debtor, he shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to three times the amount or its equivalent of such money, property or security accepted by such creditor, as the case may be, or with both:
- Provided that where such amount is not quantifiable, the total amount of fine shall not exceed five lakh rupees.

CASE LAWS



INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

✚ Principal Commissioner of Income Tax v. C. Ramasubramaniam - [2020] 115 taxmann.com 211 (NCL-AT)

Income-tax Department even if Secured Creditor, cannot claim to be a Secured Creditor when Form B of IBB1(CIRP) Regulation, 2016 is filed

Income-tax department attached refund of the assessee-corporate debtor by an attachment order which was valid for six months. Period of six months expired and the resolution professional sought direction to income tax department to withdraw attachment order and to release refund. The Adjudicating Authority noting that the corporate debtor is under liquidation, allowed application of the resolution professional and directed income tax department to release refund. The appellant-Income tax department contended that the appellant was a secured creditor, however it was also accepted that debt being payable in law, the appellant was an operational creditor. It was noted that in form B of the Insolvency and Bankruptcy Board of India (Corporate insolvency resolution process) regulation, 2016, there was no provision made for the operational creditor to claim that the corporate debtor had created security interest.

Held that even if Income-tax department was a secured creditor, it could not claim to be a secured creditor when form B was filed, and how matter was to be sorted out was only upto the liquidator to decide. Therefore order of the Adjudicating Authority was not to be interfered with and the appellant however was to be allowed to make claim before the liquidator.

Case Review : C. Ramasubramaniam v. Dy. CIT [2020] 115 taxmann.com 210 (NCLT - Mum.), Affirmed.

SECTION 60 - CORPORATE PERSON'S ADJUDICATING AUTHORITY - ADJUDICATING AUTHORITY**✚ Kotak Mahindra Prime Ltd. v. Bijay Murmuria - [2020] 115 taxmann.com 217 (NCL-AT)**

Where once creditors filed its claim and same was taken into consideration by successful resolution applicant and also same treatment had been given in revised resolution plan as to other similarly situated creditors, such creditors could not pursue suit or arbitration proceeding for same claim against corporate debtor on completion of moratorium.

CIRP was initiated against the corporate debtor on an application filed under section 7 by IDBI Bank. Appellants-creditors filed their respective claims before the Resolution Professional, however, Resolution Professional refused to entertain their claim as claims were not filed within time. Further, resolution plan in respect of the corporate debtor submitted by a successful resolution applicant was approved by the Adjudicating Authority. Appellants, vide instant appeal, contended that resolution plan was against provisions of section 30 and it did not take care of claims filed by appellants. In alternative, appellants sought to pursue arbitration proceedings in terms of sub-section (6) of section 60 against the corporate debtor. It was noted that successful resolution applicant provided revised offer in resolution plan to appellants which was taken into consideration and same was observed to be justified by instant Appellate Tribunal.

Held that it was always open to appellants to proceed with suit or arbitration on completion of moratorium, however, once appellants filed its claim and same was taken into consideration by successful resolution applicant and also same treatment had been given to other similarly situated creditors, appellants could not pray to pursue suit or arbitration proceeding or to file fresh suit for the same claim.

Case Review : Kitply Industries Ltd. v. IDBI Bank Ltd. [2019] 101 taxmann.com 410 (NCLT - Guwahati), Affirmed.

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

II. SECTION 53 - CORPORATE LIQUIDATION PROCESS - ASSETS, DISTRIBUTION OF

-

🚩 B.R. Traders v. Venkataramanarao Nagarajan - [2020] 115 taxmann.com 235 (NCL-AT)

i. Where in resolution plan submitted by resolution applicant quoted amount was much below liquidation value of corporate debtor and also did not stipulate infusion of money for maximization of assets of corporate debtor, such resolution plan was to be rejected.

ii. Where order of liquidation was already passed against corporate debtor and it appeared that certain amount was pending on part of both operational creditor and corporate debtor towards each other; until claim and counter claim was decided between parties, question of handing over any asset and machinery of corporate debtor to operational creditor could not arise.

I. In CIRP of corporate debtor, appellants filed application for direction to the resolution professional and members of CoC to consider resolution plan submitted by the appellant. The Adjudicating Authority rejected prayers of appellant. In absence of any resolution plan, resolution professional on instructions of CoC filed application for liquidation of the corporate debtor which was admitted. The appellant contended that resolution plan submitted by resolution applicant was within time and appellant would have potential to be in a position to revive the corporate debtor. Stand of the CoC was that resolution applicant quoted amount which was below liquidation value of the corporate debtor.

Held that resolution plan which offered less than liquidation value and assets of the corporate debtor and also did not stipulate infusion of money for maximization of assets of the corporate debtor, same was to be against provisions of I&B Code and violative of section 30(2).

II. Appellant supplied plant and machinery to the corporate debtor. Pursuant to initiation of CIRP against the corporate debtor, order of liquidation was passed against the corporate debtor. Appellant claimed that plant and machinery belonged to it which were lying at premises of the corporate debtor. It was stated that as per agreement between the appellant and the corporate debtor, either party was entitled to terminate agreement if other party enters into bankruptcy, liquidation etc. The resolution professional however submitted that after initiation of CIRP, it was not open to the appellant to terminate agreement. It was noted that certain amount was payable by the appellant to the corporate debtor and the corporate debtor was also liable to pay certain amount to the appellant.

Held that it was clear that until claim and counter claim by the corporate debtor and the appellant was decided, question of handing over any asset and machinery of the corporate debtor under liquidation to appellant did not arise.

Case Review : B.R. Traders v. Venkataramanarao Nagarajan [2019] 103 taxmann.com 97 (NCLT - Chennai), Affirmed.

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

✚ **S.A. Pharmachem (P.) Ltd. v. Alok Industries Ltd. - [2020] 115 taxmann.com 307 (NCL-AT)**

Where once resolution plan was approved by Adjudicating Authority and was not under challenge, said plan reached finality and same was binding upon all stakeholders including operational creditors, financial creditors and others.

In CIRP of the corporate debtor, resolution plan was approved by the Adjudicating Authority. Appellants-Operational creditors contended that it had supplied goods during CIRP period and the RP directed for settlement of payments against current invoices. It was at stage of approval of the resolution plan by the Adjudicating Authority that appellants came to know that a sum had been set aside for payment of CIRP cost and thereafter on basis of verbal information, it had an apprehension that for amounts due against goods supplied during CIRP period, interim resolution cost would not be paid to him and in fact payment made against pre-CIRP invoices would be set-off against same. It was noted that order approving the resolution plan was not under challenge in instant appeals.

Held that once the resolution Plan was approved by the Adjudicating Authority and was not under challenge, said plan reached finality and same was binding upon all stakeholders including operational creditors, financial creditors and others.

Case Review : Apna Organic (P.) Ltd. v. Alok Industries Ltd. [2020] 115 taxmann.com 306 (NCLT - Ahd.), Affirmed.

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

✚ K. B. Polychem (India) Ltd. v. Kaygee Shoetech (P.) Ltd. - [2020] 115 taxmann.com 360 (NCL-AT)

If demand notice sent to director of corporate debtor was not returned and also there was no specific denial of service by corporate debtor, demand notice was to be deemed served and CIRP application under section 9 could not be rejected on ground of service of demand notice.

The applicant filed an application under section 9 after sending demand notice to the corporate debtor. The appellant stated that demand notice was sent by speed-post but it was returned with remark of postal authorities as 'not available'. The Adjudicating Authority rejected CIRP petition on ground that service of demand notice of the corporate debtor was not established. The appellant contended that demand notice sent to director of the corporate debtor was not returned hence demand notice shall be deemed served. It was apparent that the corporate debtor had not denied service of demand notice in its reply to the CIRP petition.

Held that since the appellant had given sufficient evidence to show delivery of demand notice and there was no specific denial of service of demand notice by the corporate debtor, the Adjudicating Authority erred in rejecting application filed under section 9, therefore, instant appeal was to be allowed and the Adjudicating Authority was to be directed to pass order of admission.

Case Review : K.B. Polychem (India) Ltd. v. Kaygee Shoetech (P.) Ltd. [2020] 115 taxmann.com 359 (NCLT - Kol.), Reversed.

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

Ugro Capital Ltd. v. Bangalore Dehydration and Drying Equipment Co. (P.) Ltd. (BDDE) - [2020] 115 taxmann.com 362 (NCL-AT)

Where CIRP application filed in furtherance of judgment and decree passed by High Court was rejected on submission of corporate debtor that a review of decree was filed, however no such record of evidence was placed on record by corporate debtor and since CIRP petition was filed within period of limitation, order rejecting CIRP application was to be set aside and Adjudicating Authority was to be directed to pass an order for admission.

The appellant-financial creditor filed an application under section 7 in furtherance of judgment and decree passed by the High Court wherein a sum of Rs. 8.04 crores along with interest etc. was awarded in favour of the appellant. In response to the said petition, the corporate debtor submitted before the Adjudicating Authority that they had filed an application seeking review of said decree and same was pending before the High Court. The Adjudicating Authority rejected said CIRP application. The appellant contended that no such purported and alleged application for review or record of evidence was placed on record by the corporate debtor to support said averments. It was noted that CIRP petition was filed within period of limitation. It was also noted that corporate debtor misled the Adjudicating Authority about pendency of review application as the corporate debtor had neither challenged said decree nor filed any review till filing of application under section 7 by the appellant.

Held that the Adjudicating Authority had failed to appreciate that the corporate debtor had mischievously not placed any record about alleged review application, therefore, order rejecting CIRP application filed by the appellant was to be rejected and the Adjudicating Authority was to be directed to pass an order for admission of petition under section 7.

Case Review : Asia Pragati Captin Pvt. Ltd. v. Bangalore Dehydration and Drying Equipment Co. (P.) Ltd. [2020] 115 taxmann.com 361 (NCLT - Bang.), Reversed.

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

✚ **Rajesh Narang v. LIC Housing Finance Ltd. - [2020] 116 taxmann.com 14 (NCL-AT)**

Where on date of admission of CIRP application of financial creditor, advocate of corporate debtor appeared and advanced numerous arguments to oppose admission of CIRP application, plea taken by corporate debtor that order of admission of CIRP was passed without giving opportunity of hearing was to be rejected.

The corporate debtor availed financial assistance from the financial creditor. Due to default in repayment of amount, account of the corporate debtor was declared as NPA, A settlement was arrived between parties for repayment of pending dues and corporate debtor gave three post-dated cheques as a security for payment of outstanding amount to financial creditor. As financial creditor did not receive entire amount as per settlement, it presented post dated cheques for encashment. However, cheques were bounced with endorsement 'insufficient funds'. The application filed by financial creditor was admitted. The corporate debtor opposed impugned order on ground that no opportunity was given to it to address arguments.

Held that since advocate of the corporate debtor appeared and advanced numerous arguments to oppose admission of CIRP application and there was nothing on record to suggest that the corporate debtor was not present on date of admission of CIRP application, plea taken by the corporate debtor that order of admission was passed without giving opportunity of hearing was to be rejected. Therefore, appeal filed against order of admission of CIRP application was to be dismissed.

Case Review : LIC Housing Finance Ltd. v. Durha Vitrak (P.) Ltd. [2020] 115 taxmann.com 426 (NCLT - New Delhi), Affirmed.

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

✚ **Hammond Power Solutions (P.) Ltd. v. Sanjit Kumar Nayak Resolution Professional - [2020] 116 taxmann.com 136 / [2020] 159 SCL 63 (NCL-AT)**

Where resolution plan submitted by resolution applicant did not take care of interest of all stakeholders, impugned order passed by Adjudicating Authority admitting said resolution plan was to be set aside.

In respect of the corporate debtor, Corporate Insolvency Resolution Process (CIRP) was initiated. Resolution plan submitted by resolution applicant was approved by the Committee of creditors CoC and the Tribunal. It was noted that in said resolution plan, resolution applicant proposed to pay NIL amount to operational creditors. Said resolution plan had shown zero amount for workmen's dues also. However, reason for giving NIL amount was not reflected in said resolution plan.

Held that since said resolution plan submitted by resolution applicant did not take care of interest of all stakeholders including operational creditors, impugned order passed by Adjudicating Authority admitting said resolution plan was to be set aside .

Case Review : Ritesh More & Morsons Ltd.[2019] 107 taxmann.com 373 (NCLT - Kolkata), Reversed.

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

🚩 Ultra Tech Nathdwara Cement Ltd. v. Union of India - [2020] 116 taxmann.com 152 (Rajasthan)

Evaluation of all dues and liabilities as they exist on date of finalization of resolution plan has been left in exclusive domain of resolution professional with approval of COC.

A company Binani Cement suffered huge losses and was unable to pay the debts to the Financial Creditor i.e. Bank which preferred an insolvency application under Section 7 before NCLT. A corporate insolvency resolution process was initiated by the NCLT under the provisions of the IBC 2016 and Insolvency Resolution Professional was appointed whose appointment was confirmed by Committee of Creditors (CoC). The petitioner company was one of the resolution applicants in the Corporate Insolvency Resolution Process. In the meeting of the COC, the resolution plan submitted by Ultra Tech was approved unanimously and it was declared to be the successful resolution applicant. The NCLT duly approved proportion/distribution of the payment to be made by the petitioner company to all the creditors. The resolution professional collated claims of all operational creditors after following the due process of law and with due

diligence, verified the claim of the respondent Goods and Service Tax Department to the extent of Rs.72.85 crores towards liabilities of excise duty and service tax. The resolution plan was approved by the National Company Law Appellate Tribunal. The petitioner Ultra Tech then took over the management and operations of Binani Cement. Despite the resolution plan having attained finality and having been executed, the respondents GST department raised numerous demands from the petitioner for the period from April 2012 to June 2017. The petitioner had made full and final payment as proposed by resolution professional. The petitioner filed instant writ petition being aggrieved by demand notices sent by respondent GST department whereby the petitioner was called upon to pay Goods and Service Tax (G.S.T.) for the period before it took over a company Binani Cements.

Held that once offer of resolution applicant is accepted and resolution plan is approved by appropriate authority, same is binding on all concerned to whom industry concern may be having statutory dues. Financial creditors have to be given a precedence in ratio of payment when resolution plan is being finalized. It is financial creditors who are given right to vote in COC whereas, operational creditors viz. Commercial Taxes Department of Central Government or State Government as the case may be, have no right of audience. Evaluation of all dues and liabilities as they exist on date of finalization of resolution plan has been left in exclusive domain of resolution professional with approval of COC. Courts are given an extremely limited power of judicial review into resolution plan duly approved by COC. Where pursuant to an order of NCLAT corporate debtor was taken over by petitioner - resolution applicant, demand raised by respondent CGST department for GST from petitioner for period prior to date on which it took over corporate debtor was illegal, arbitrary and liable to be quashed.

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

Gajendra Parihar v. Devi Industrial Engineers - [2020] 116 taxmann.com 568 (NCL-AT)

Where operational creditor deployed boom pump at project site of corporate debtor on hire basis and raised invoices for service rendered by it and corporate debtor on several occasions through e-mails made complaints to operational creditor regarding deficient and defective boom pump and services provided by operational creditor, since there was a pre-existing dispute between parties, instant CIRP application filed against corporate debtor was to be dismissed.

A work order was issued by the corporate debtor to the operational creditor for deployment of boom pump at project site of the corporate debtor on hire basis. Operational creditor raised invoices for service rendered by it. On corporate debtor's failure to pay dues, the operational

creditor filed CIRP petition. The corporate debtor pleaded that invoices raised by the operational creditor were wrong. It also pleaded that goods and services supplied by the operational creditor were deficient and defective and same was duly informed to the operational creditor vide various correspondences including e-mails, calls and messages during subsistence of work order, however, the operational creditor did not pay any heed to it.

Held that CIRP application was to be dismissed since there was pre-existing dispute between parties.

Case Review : Devi Industrial Engineers v. Chandrelekha Constructions (P.) Ltd. [2020] 114 taxmann.com 244 (NCLT - New Delhi) reversed

GUIDELINES FOR ARTICLES

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 be communicated to the members, preferably by e-mail.*

Disclaimer: *The information contained in this document is intended for informational purposes only and does not constitute legal opinion, advice or any advertisement. This document is not intended to address the circumstances of any particular individual or corporate body. Readers should not act on the information provided herein without appropriate professional advice after a thorough examination of the facts and circumstances of a particular situation. There can be no assurance that the judicial/quasi-judicial authorities may not take a position contrary to the views mentioned herein.*

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



**INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA**