March'22

# THE INSOLVENCY PROFESSIONAL

YOUR INSIGHT JOURNAL

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

# OVERVIEW

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

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# FROM THE DESK OF CHAIRMAN

The second wave of Covid-19 was lesser in its severity, but the spread has been so wide that it took more lives in the country. The large scale of vaccination, improvements in health infrastructure, better preparedness to handle the crisis, higher levels of the production of medical oxygen were the positive factors in containing the severity. The lockdowns were too far and between coupled with lesser restrictions on travel and movement ensured that the impact on the economy and employment was of lower magnitude as compared to the previous year which witnessed very high levels of disastrous economic and unemployment conditions. The Central Government and other Agencies played important roles in guiding and assisting those of the States which experienced large scale of infections. Overall management of Covid-19 in India also earned commendations of World Health Organisation.

Despite all that the discovery of post-Covid collateral diseases and new mutations added to the woes of the government apart from the sudden surge in the demand of medical oxygen.

The Banking System acts as a lifeline of the economy. Public Sector Banks (PSB's) in India constitute the predominant medium for implementation of the stimulus packages of the Government to help mitigate the impact of Covid on the economy of the country. The large canvas of the banking through Jan Dhan Accounts was useful for the purposes of Direct Benefits of Transfer to the poorer strata of the Society.

The first wave coupled with the second has put PSB's in a spot as the credit extended by them in first wave did enhance the level of the already high NPA position due to the likely failure of businesses on account of the severity of the second wave of the pandemic. This is exacerbated despite the best efforts on the part of the government in sprucing up the collateral demand and the dependency on the credit to increase the demand leading to creation of additional toxic assets.

Without a strong and direct fiscal stimulus and autonomous spending to create demand, credit-growth, policies are likely to be less effective as the entrepreneurial capacity to borrow has also been dented and hence the banks are reluctant to lend. Another deterrent for banks to lend liberally is that they are already overburdened with non-performing assets and the apprehensions that this can only get worse due to reduced margins and profits. High inflation has also reduced the purchasing power of the people in largely fixed income groups. The redeeming factor has been the continuation of free ration to more than eighty crore people by the Government. This would strengthen the case of those arguing that the government does not have the resources to recapitalize these banks and they must resort to equity sale to private investors to mobilize resources to meet capital adequacy norms. That would, in most cases, require the dilution of the government's stake to a degree that spells the end of a dominantly public sector banking system. The attempts on the part of the Government to shy away from recapitalisation of PSBs is largely characterised by the intent and not by the inadequacy of resources. Allocation of resources is always a function of setting priorities. The need of the hour is to strengthen the PSBs as the instrumentalities of the Government to cope up with the unprecedented health and economic crisis.

In the midst of the adversities created by the crisis and with a dim prospect of an immediate recovery, many firms would either fall in the category of those ineligible for additional credit by virtue of being considered uncreditworthy or would be reluctant to take on debt, given

the uncertainty about their capacity to service that debt. The forecast of a healthy growth of economy is likely to be led by certain sectors while majority will have to struggle to beat the impact. In such circumstances, making credit the instrument to drive the recovery does not make sense, unless demand can be raised through autonomous spending of some kind.

One of the key drivers of economic recovery in India will be the efficient movement of capital from inefficient firms to efficient ones. The economic downturn caused by the coronavirus pandemic has been severe, and India's economy was no exception to have suffered the damage during the year 2020–2021 and 2021-22. Though the economy is recovering faster than initial estimates, sustained economic recovery will not take place if stressed businesses cannot restructure their debts properly and timely. The failing firms would need to be facilitated to resolve efficiently. India's bankruptcy law and measures like Pre-packaged resolution of MSME sector could prove to be a shot in arms to overcome these challenges.

The whole nation is keenly watching the role of IBC 2016 as a mechanism and effective tool to the help the economy makes a smart turnaround. I wish all success to the professionals in the Insolvency Regime as the key game changers at such a critical phase of our economy.

***Dr. Jai Deo Sharma***
***Chairman IPA ICAI***

# FROM THE DESK OF MANAGING DIRECTOR

The Insolvency and Bankruptcy Code (IBC), since its inception in the year 2016, has helped recover approximately Rs. 2.5 lakh crore, which is around one-third of the admitted financial claims from insolvent firms, marking a significant swing in the insolvency resolution process and credit culture in India.

The figures of June 30, 2021, exhibit that IBC has enabled a recovery of almost Rs 2.5 lakh crore, against admitted financial claims of approximately Rs 7 lakh crore i.e. recovery rate of 36% for the 396 cases resolved out of the total 4,541 admitted. Of the remaining cases, 1,349 were under liquidation; 1,114 cases got closed under appeal/ review/ settled or withdrawn and 1,682 cases were outstanding.

As per an estimate, the stressed assets in the Indian banking system, comprising gross NPAs and loan booked under restructuring are presently at approximately 10-11%.

The recent resolution of a large financial services firm with a recovery of approximately Rs 37,000 crore against admitted financial claim of approximately Rs. 87,000 crore, translating to a recovery rate of approximately 43%, underscores the efficacy of IBC. The resolution value was approximately 1.4 times the liquidation value.

Average resolution time for the resolved cases is 419 days compared to the stipulated timeline of a maximum of 330 days. About 75% of outstanding cases have already been pending for more than 270 days.

A closer look at the data shows, however, the recovery rate and resolution timelines have a lot more room for improvement. This makes a continuous strengthening of the Code and stabilisation of the overall ecosystem imperative.

Indeed, while the IBC has tilted the power equation in favour of creditors from debtors and helped strengthen India's insolvency resolution ecosystem, its performance against its twin objectives – maximisation of recovery and time-bound resolution – has been somewhat a mixed bag.

Besides low recovery rate and longer timeframe, a key challenge is the high number of cases going to liquidation. As of June 30, 2021, nearly one-third of the 4,541 admitted cases had gone into liquidation with a recovery rate estimated at merely 5%. That said, around three-fourths of these cases were either sick or defunct. With closure of these vintage cases, recovery rate as well as timelines are expected to improve.

Notwithstanding these challenges, the IBC has played a key role in resolution of stressed assets so far. Its effectiveness will continue to be tested given the higher magnitude of stressed assets in the Indian financial system. In this milieu, the government has been proactive in addressing issues being faced by various stakeholders. In August last year, the Standing Committee on Finance made recommendations to reinforce the IBC and the associated ecosystem. The critical recommendations include:

(a) Create specialised National Company Law Tribunal (NCLT) benches to hear only IBC matters.

(b) Establishing professional code of conduct for committee of creditors (CoC).

(c) Strengthening the role of resolution professionals.

(d) Digitalising IBC platforms to make the resolution process faster and maximise the realisable value of assets.

To be sure, the government has already cleared appointment of 18 new members to NCLT. Similarly, public opinion has been sought and work is in progress for several reforms likely to be made viz. Code of Conduct for CoC, Higher role of IUs in establishing the default, adoption of strict timelines for approval of CIRP, strengthening the Voluntary Liquidation Process and management of IBC fund etc.

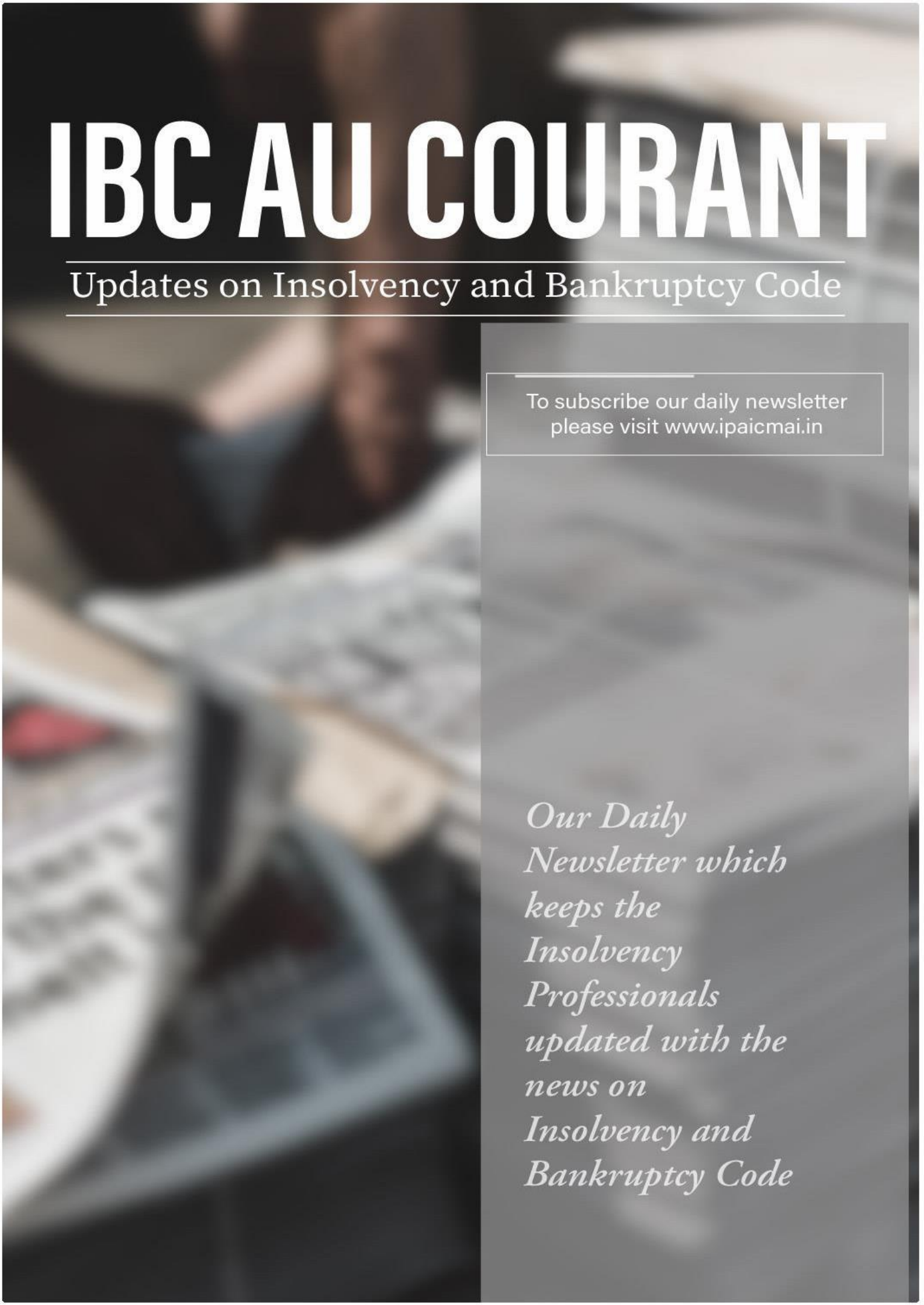
Timely implementation of these recommendations will go a long way to strengthen the Code. Quick rollout of insolvency frameworks for group/cross-border, financial service providers and personal insolvency will further expand the ambit of IBC.

***AVM Rakesh Kumar Khattri (Retd.)***
***Managing Director-IPA ICAI***

# PROFESSIONAL DEVELOPMENT INITIATIVES

# EVENTS

| MARCH, 2022 | |
|---|---|
| 2nd March, 2022 | Seminar on Evolution & Emerging Scenario under IBC and Valuation |
| 4th - 5th March, 2022 | Learning Scenario on Cross Border Insolvency |
| 5th March, 2022 | Seminar on IBC and its Emerging Scenario |
| 11th -13th March, 2022 | Master Class on CIRP & Liquidation: Timelines and Challenges |
| 12th March, 2022 | Seminar on IBC and its Emerging Scenario- Dehradun |
| 12th March, 2022 | Seminar on IBC and its Emerging Scenario- Mumbai |
| 18th - 24th March 2022 | 54th Batch of PREC |
| 20th March, 2022 | Workshop on Committee of Creditors |
| 24th March, 2022 | Workshop on Ethics for Insolvency Professionals |



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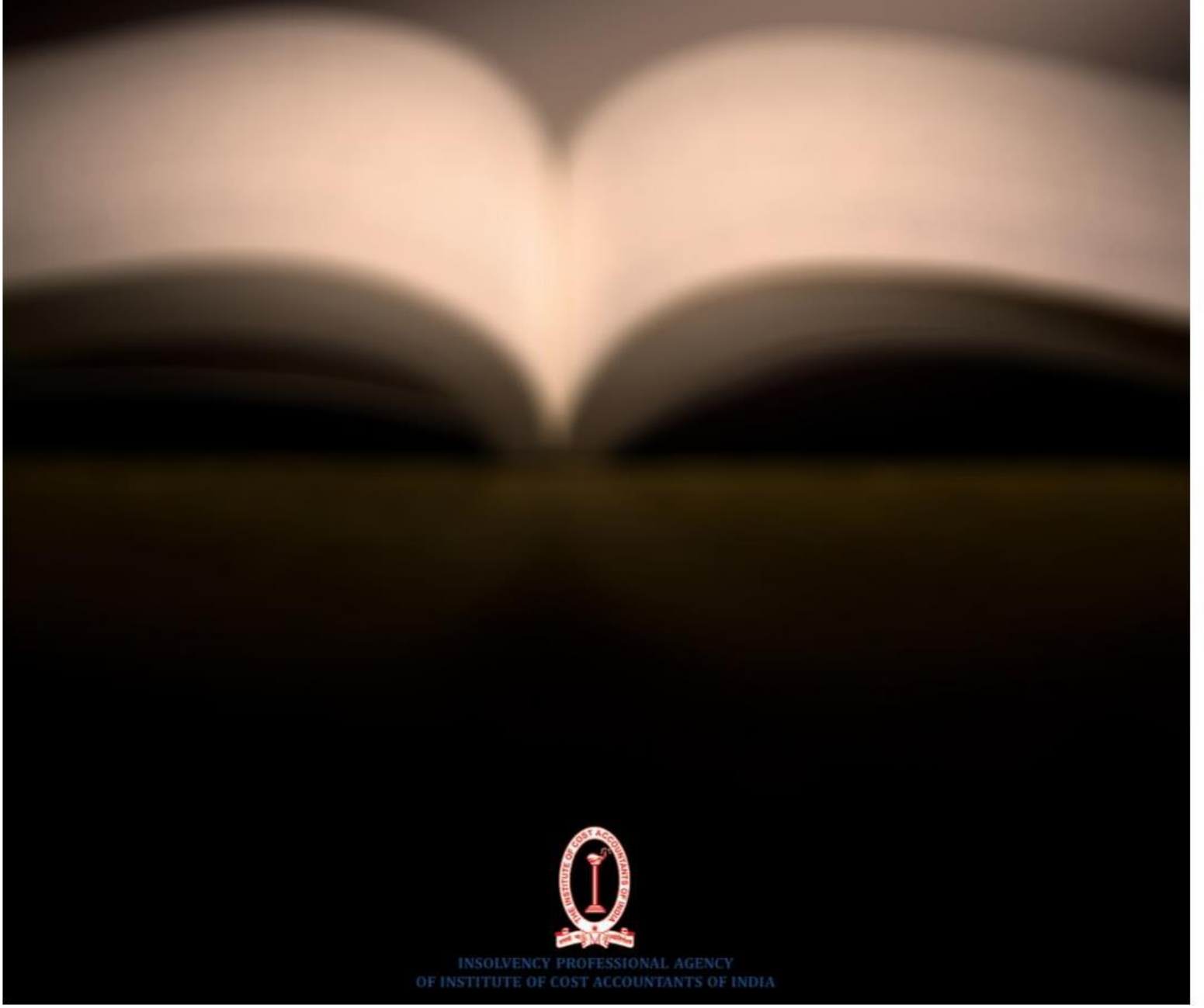
*Our Daily Newsletter which keeps the Insolvency Professionals updated with the news on Insolvency and Bankruptcy Code*

# ARTICLES



INSOLVENCY PROFESSIONAL AGENCY
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# NETHERLANDS - DUTCH SCHEME

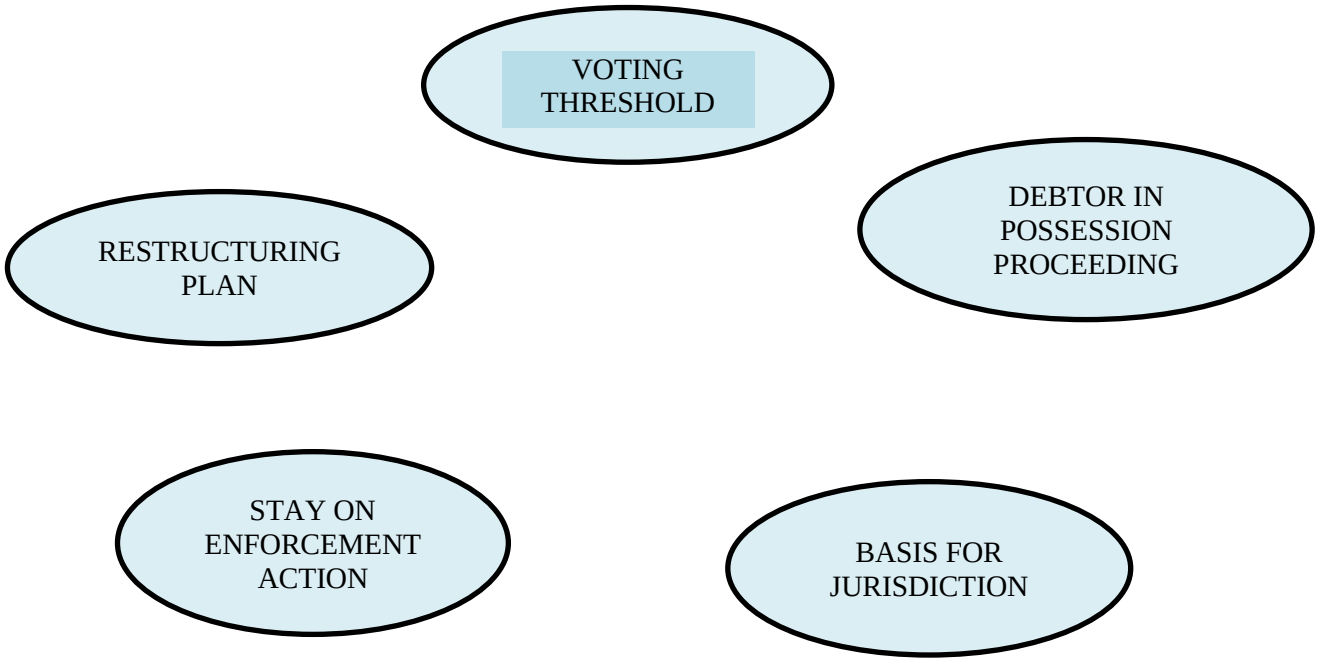
**Ms. Dipti Atul Mehta**
**Company Secretary and Insolvency Professional**

The Act on Court Confirmation of Extrajudicial Restructuring Plans, also referred to as Dutch Scheme (Wet Homologatie Onderhands Akoord, 'WHOA' enter in to force. The WHOA introduce a Dutch scheme combining the features of chapter 11 of the US Bankruptcy Code and UK Scheme of arrangement procedures.

## INTRODUCTION

On 1st Jan 2021 the Act on Court Confirmation of Extrajudicial Restructuring Plans, also referred to as Dutch Scheme (Wet Homologatie Onderhands Akoord, 'WHOA' enter in to force. The WHOA introduce a Dutch scheme combining the features of chapter 11 of the US Bankruptcy Code and UK Scheme of arrangement procedures.

## FEATURES



**Restructuring plan**- Restructuring expert will be permitted to propose a restructuring plan

**Voting Threshold –** The restructuring plan has to be approved by a two-third majority of each voting class.

**Debtor in possession proceeding** - In Dutch scheme proceeding debtor remain in control of the company affairs throughout.

**Stay of Individual Enforcement Action –** For the period of four months debtors will be permitted to apply for stay of individual enforcement actions and bankruptcy request.

**Board Basis for jurisdiction and Group Restructuring -**For certain qualifying criteria, the Dutch courts will have jurisdiction to confirm restructuring plans for both Dutch and non-Dutch companies, allowing for cross-border group restructurings to be centralized in the Netherlands.

**WHO CAN INITIATE THE PROCESS?**

- By a debtor
- By one or more creditor
- Shareholders or
- Mandatory employees' representation of the debtor

**APPOINTMENT OF RESTRUCTURING EXPERT**

The creditors, shareholder and the work council may request the court to appoint a restructuring expert if it is reasonably likely that the debtor will not be able to continue paying his liabilities. The court appointed expert will prepare a restructuring plan on the debtor behalf. The court will only appoint restructuring expert if this is in the interest of the joint creditors of debtors. The restructuring plan which is prepared on behalf of the debtor the creditor, shareholder and the debtor have the option to express their views on the same. Appointment of restructuring expert can be done by debtor itself also. The debtor has an obligation to provide all the information and documents to the restructuring expert after his appointment to fulfil all its task. The debtor is responsible for the payment of fees of restructuring expert.

**CLASS COMPOSITION OF THE CREDITORS**

Debtor has the option to divide the creditors and shareholders in different class that are subject to restructuring plan. If the position differs creditors must be divided in to separate classes. The difference will exist in both the right they would have if the debtor would liquidate in bankruptcy as well as their treatment under the plan.

The creditor must be in separate classes according to their statutory ranking. In addition, small enterprise trade creditors (defined as enterprises with a maximum 50 employees, or less than € 6 million assets and € 12 million in net annual revenue) small enterprise trade creditors can prevent the adoption of a restructuring plan if they do not receive a distribution under the plan equal to at least 20% of their claim.

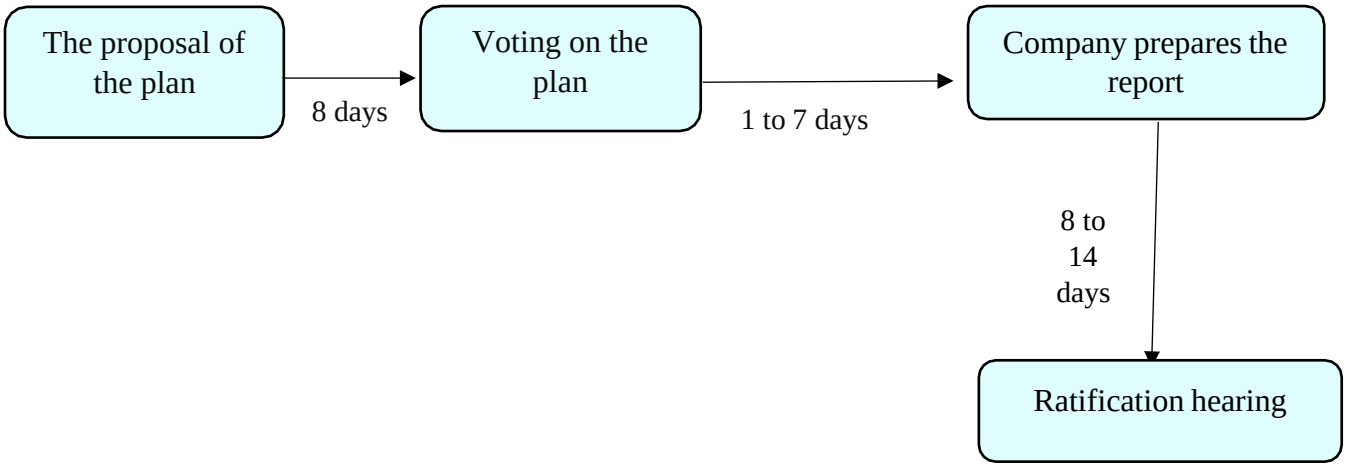
The secured creditor position has been amendment under the WHOA. The WHOA specifically provides that a secured creditor claim will be bifurcated into secured claim to the extent of the

value of any collateral unsecured claim for the deficiency and that the secured and unsecured claim must be classified separately for voting of restructuring plan. The extent to which a claim is secured shall be calculated based on the value that the secured creditor would be expected to receive in a bankruptcy liquidation by virtue of its security rights.

The secured financial creditor have been expected from the obligation to offer dissenting creditors that are part of a dissenting class a cash distribution under the plan that is equal to the amount that they would have received in the bankruptcy liquidation. Instead, for the plan to be eligible for conformation it is sufficient to offer such a dissenting secured financial creditor who is part of dissenting class of creditors any distribution other than shares for the plan eligible for confirmation.

**VOTING**

The voting can be take place physically in writing or electronically after the final restructuring plan is negotiated, the plan has to be present in front of the creditors and shareholders by the debtor at least eight days prior to the voting. The person whose right are affected under the plan are entitled to vote. If the 2/3rd majority in the amount of debt or equity class shareholder participate in vote. Then it is consider as the restructing plan is accepted.



**RESTRUCTURING PLAN**

The debt listing is form of contract between debtors, creditors, and shareholders. The debtor determines the contents of the restructuring plan. The information required by the creditors and the shareholders to form the view must be included in the restructuring plan.

The restructuring plan must include

- Class formation and its basis
- Financial consequences of the plan for each class
- Expected value of assets and activities of the debtor
- Expected proceeds in case of liquidation
- Applied valuation methods
- Voting procedures

**DIRECTIONS FROM THE COURT**

The debtor and the restructuring expert before putting plan to vote may request court to determine the issues that are relevant in the context of putting a plan in to vote.

The issues are as follows:

- The information provided in the plan or the appended documents as well as the valuation proposed
- Class formation
- Admission of creditor and shareholder for voting purpose
- Voting procedure and the period within which the voting will take place
- If the plan is accepted by all the classes, there would be a plan to for refusal as meant to prevent confirmation of the plan
- If the plan is not accepted by all the classes, there would be a plan to for refusal as meant to prevent confirmation of the plan.

**COURT CONFIRMATION**

The restructuring expert and the debtor may submit the written request to the court even if the one class of creditors has accepted the plan. The court will thereafter schedule the hearing date within eight to fourteen days after submission of final restructuring plan by the debtor.

The shareholder and creditors who has not in the favour of the restructuring plan may use this period to request to the court to dismiss the restructuring plan on the grounds provided by WHOA. The court will provide it decision as soon as possible.

The court can deny the request to confirm the plan if:

- The debtors state as meant in Article 370(1) doesn't exist
- The voting procedure has not been complied
- The restructuring expert and debtors have not complied all their obligation to creditors and shareholders
- The shareholder or creditor should have been admitted to the vote on the plan for the different amount unless the decision could not reasonably have led to different outcome

of vote.

- Performance of the plan is not adequately guaranteed.
- If the debtors wish to obtain new financing to implement the plan and if its materially prejudice the interest of the creditors
- The salary, fees, expenses and disbursement for the restructuring expert or the observer appointed by the court have not been paid.
- The other reasons that militate against confirmation.

**EFFECTS OF THE PLAN**

The plan confirmed will be binding on debtors, all creditors and shareholders with the voting right. The plan is nevertheless binding on the creditor or shareholder where the vote on the plan was not cast by the creditor or the shareholder but by the third party.

**MORATORIUM**

The automatic moratorium is not carter by the WHOA, the debtor or the restructuring expert may request the court to grant a moratorium against the individual enforcement actions by the creditors. The moratorium will exit for four months.

The court will grant a moratorium if it prima facie appears that:

- For the continuation of the business of the company during the preparation of and the negotiations in relation with the composition the moratorium is necessary.
- The joint interest of the creditors of the company is required for the moratorium.

The court may attach certain conditions to a moratorium (the determination of the period in which voting on the composition must take place or the appointment of the observer).

**CRAM DOWN**

The WHOA provides for horizontal cram down and the vertical cram down if the voting requirement and other requirements are met.

Therefore, the implementation of the restructuring plan can be done without the consent of the entire group of the creditors. The cross-class clam down can never clam up. This prevent single or small groups of holdout creditors from delaying or blocking restructuring plan.

The WHOA provide appropriate protection for creditors and shareholder the option of cram down but that may be disproportionately disadvantaged without their consent.

**COMPARISON BETWEEN US, UK AND NETHERLANDS**

| Particular | UK | Germany | Netherland |
|---|---|---|---|

| | | | |
|---|---|---|---|
| Debtor includes | Debtor (excluding certain financial institutions) liable to wound up under Insolvency Act 1986. | All debtors (other than financial institutions) which have their COMI in Germany. | All debtor (other than financial institution which have their COMI in Netherlands or establishment or sufficient connection |
| Debtor in possession | Yes | Yes | Yes |
| Who can initiate | The debtor, a creditor or shareholder of the company. | The debtor can only initiate the process. | The debtor creditor or shareholder can initiate the process |
| Appointment of restructuring officer/expert | In UK it is not require to appoint the restructuring expert | The court appoint the restructuring officer. | If the debtor, creditor, or shareholder request to appoint restructuring expert than court will appoint. |
| Moratorium | The moratorium can be apply by the company under Part A1 of the Insolvency Act 1986. | The debtor can apply for moratorium on foreclosure and security enforcements. | The debtor can ask the court to order moratorium and such moratorium last for four months |
| Separate Class | Shareholder and creditor form a class for the purpose of voting on restructuring plan | Creditors of the similar rights and shareholder if the restructuring extend to the equity | The creditors are divided in to two separate class |
| Majority threshold | 75% by value and 50% by number | Majority 75% of the voting right | 2/3rd in value |
| Liability that doesn't involve | Certain creditors are excluded from the UK Restructuring Plan: (1) creditors in respect of debts | Employment and pension obligations cannot be compromised or rearranged by way of a restructuring | The Dutch Scheme cannot release or reduce liabilities arising from employment contracts. |

| | | | |
|---|---|---|---|
| | incurred during the moratorium under Part A1 of the Insolvency Act 1986 and (2) certain priority pre-moratorium debts (including in respect of goods and services supplied during the moratorium) if the restructuring plan is proposed within a 12 week period following the end of the moratorium. | plan. Consequently, a restructuring plan is not capable of facilitating any lay-offs, adjustments of pension schemes or reduction of pension obligations. Claims resulting from intentional tort liability and monetary fines also cannot be compromised or rearranged by way of a restructuring plan. | |

**TAX**

The general tax rule applies as the WHOA doesn't provide for specific Dutch tax rules. For the purpose of Dutch, the corporate income tax a debtor will have to recognise taxable income if under the restructuring plan the debts of the debtor are written off or waived. Although a debt waiver in principle constitutes a taxable release of the debt, the debtor could apply for an exemption provided that certain conditions are met, and which exemption is restricted to amounts exceeding the amount of available tax losses, if any, that are available to the debtor. As a result, a debt waiver typically results in a forfeiture of tax losses but not in an actual amount of corporate income tax becoming payable.

In case of Dutch creditor whose claim are partly waive under restructuring plan such waiver will generally result in a tax-deductible loss for Dutch corporate income tax purposes although anti-abuse provisions may apply, which are particularly relevant if the debt restructuring involves related parties of the debtor.

In case of debt equity swap under the restructuring plan this will not result in the debtor having to recognise a taxable gain. In case a Dutch creditor has already recognised a tax loss in relation to the debtor, then certain anti-abuse provisions may prevent the Dutch creditor from realising tax exempt income on its newly obtained shareholding in the debtor pursuant to the Dutch participation exemption regime.

**INTERNATIONAL RESTRUCTURING**

The benefit of the Dutch Scheme is that it will be available to both the Dutch companies that have Centre of Main Interest (COMI) in the Netherlands and foreign companies. If the debtors applies for the restructuring plan which fall under the scope of European Insolvency Regulation, the final restructuring plan will benefit from automatic recognition in courts of all the EU member states.

If it opted for voluntarily debtors may also apply for "non-public" Dutch Scheme proceedings which is not registered under Insolvency register and in which court proceeding will take place

in judges chambers. These proceedings fall outside the scope of EU regulation on Insolvency proceedings, and this is not limited to debtors with either COMI or an "establishment" in the Netherlands. A non- public proceeding is open to any debtor with connection to Netherlands which for example may be established or evidence if substantial part of Group companies or debtor asset are in Netherlands or documents are governed by Dutch law or the forum choice is Dutch courts.

**FLEXIBILITY**

The restructuring plan which are under WHOA are essence free in form and content. The legislator intention is to minimise the involvement of the court and freedom is given to the parties involve. To the extent that implementation of the restructuring plan requires a shareholder resolution the court confirm restructuring plan will act a substitute for such a resolution.

The court has the power to issue tailored ruling during the process aimed at the safeguard interest of creditors and shareholders.

**CONCLUSION**

The Dutch scheme provide additional tools that may be used to further promote the development and implementation of the restructuring plan. The WHOA provide wide range of option to restructure a debtor's financial obligation it includes deferring or partially releasing the payment, obligation, amending the terms of debt instruments or offering debts of equity swap. It provides for restructuring that stretch beyond Dutch borders. The features of the WHOA has been tested in the first three month of the legislation introduce. The court has shown the interest in handling the various request made, whilst safeguarding the interest of the creditors and shareholders.

# IBC CODE AND REGULATIONS-An Analysis

***By CA Vikram Kumar, Insolvency Professional***

The IBC Code, 2016 contains 255 Sections and related Rules, Regulations, Circulars, Notifications and guidelines. The entire process of insolvency moves within the provisions provided in these related provisos. But many a times it has been found that the correlation between some sections with some regulation or rule or circular has a missing link. An analysis of the same has been done on the same.

The provisions of Section 240(1) are reproduced below:

**"240. Power to make regulations. –**

(1)The Board may, by notification, make regulations consistent with this Code

and the rules made thereunder, to carry out the provisions of this Code."

The regulations issued by the IBBI are subservient to the Code and Rules framed thereunder. It is therefore crucial that the regulations framed by IBBI don't override the provisions of the Code and the Rules framed thereunder by the Central Government.

The Adjudication Authority in the past have issued judicial pronouncements wherein certain provisions of the regulations have been held to be ultra vires or not in sync with the provisions laid down in the Code.

In this article, we list below as illustration, some of such orders which has held certain provisions of the Regulations to be ultra vires or not in sync with the provisions of the Code.

**Orders passed by the adjudicating authorities where regulations have been held to be ultra vires or not in sync of the provisions laid down in the Code.**

**i. State Bank of India Vs. Su Kam Power Systems Ltd [ (IB)540(PB)/2017, dated 05.09.2018] &**

**Punjab National Bank Vs. Bhushan Power & Steel Limited [CA no. 152(PB)/2018 in CP NO. (IB)-202(PB)/2017 dated 23.04.2018**

In the above order the Hon'ble NCLT Principal Bench held that "Regulation 36A – Invitation for expression of interest" to be ultra vires of Section 240(1) of IBC, 2016. The reasons for considering regulation 36A to be ultra vires as articulated by the Hon'ble NCLT is summarized below:

a. IBC does not permit the division of the process firstly by inviting "EOI" and then by asking to file resolution plans. If speed is the essence of the whole process, then one consolidated process is better suited.

b. Section 25(2)(h) added on 23.11.2017 does not contemplate floating of any expression of interest.

c. By use of the words "EOI", speed is retarded and time is wasted.

**ii. Central Bank of India vs. Resolution Professional of the Sirpur Paper Mills Ltd [Company Appeal (AT) (Insolvency) No. 526 of 2018 dated 12.09.2018],**

Regulation 38(1)(c) which provided that "A resolution plan shall identify specific sources of funds that will be used to pay the liquidation value due to dissenting financial creditors and provide that such payment is made before any recoveries are made by the financial creditors who voted in favour of the resolution plan." was held to be invalid and contrary to the provisions laid down in the Code. The above provision mandated that the resolution plan can only pay liquidation value to the dissenting financial creditors i.e., the assenting financial creditors and dissenting financial creditors are to be treated separately even though they may be similarly situated creditors/ or belong to the same class. (The above provisions of Regulation 38(1)(c) were later deleted w.e.f. from05.10.2018.

**iii. Francis John Kattukaran Vs. The Federal Bank Ltd [Company Appeal (AT) (Insolvency) No. 242 of 2018 dated 13.11.2018]**

The Hon'ble NCLAT held that as per provisions of Section 12A of the Code, only applicant can file an application for withdrawal of CIRP, therefore the application for withdrawal can be filed only by the applicant, who initially filed application under Section 7 or 9 and not by the IRP or RP as provided in Regulation 30A of the CIRP regulations.

**iv. Brilliant Alloys Private Limited Vs. Mr. S. Rajagopal & ors. [SLP no. 31557/2018, dated 14.12.2018]**

The Hon'ble Supreme Court held that Regulation 30A was not in sync with Section 12A of the Code as Regulation 30A permitted for withdrawal of CIRP process only before issue of EOI, whereas no such restriction was specified in Section 12A of the Code.

Regulation 30A was latter amended w.e.f. 25.07.2019, post order of the

Hon'ble Supreme Court.

**v. Invent Assets Securitisation & Reconstruction Pvt. Ltd. Vs. Rajmal Labhchand Mogra [Company Appeal (AT) (Insolvency) No. 709 of 2019 dated 26.11.2021]**

In the said case, the IRP was not confirmed as the RP and the CoC directed the IRP not to continue with the CIRP process. The IRP continued with the CIRP process in compliance with Regulation 17(3) of the CIRP Regulations.

The Hon'ble NCLAT interpreted the provisions of Section 22(3)(b) read with Section 22(5) and Regulation 17(3) of the CIRP Regulations and held as stated below:

a.That Section 22(5) requires an order by the Adjudicating Authority for the IRP to continue as the Resolution Professional. The Hon'ble NCLAT held that, regulation 17(3) cannot be read in a manner which may have effect of defeating the purpose and object of Section 22(5) by allowing the IRP to continue without there being any order of the Adjudicating Authority.

b.The provision of Section 22(5) requiring an order of the Adjudicating Authority to continue the IRP to function will become redundant if it is held that even without an order under Section 22(5), he can continue by virtue of Regulation 17(3).

c.Regulation 17(3) being sub servient to provisions of the Code, cannot be interpreted in a manner to defeat the scheme as delineated by Section 22(5).

Some of the above orders have been contested by the IBBI and are pending at various stages of adjudication.

Wherever, the regulations are not in sync with the Code, the insolvency professionals are faced with a predicament, as the regulations are binding on the insolvency professionals.

There are certain provisions of the Code and Regulations which are inconsistent and needs reconsideration as detailed below:

Regulations not in sync with the Code or regulations which are not consistent with the other provisions of other regulations:

**1. IBBI (Liquidation Process) Regulations, 2016**

The provisions of Regulation 2A are stated below:

"Regulation 2A- Contributions to liquidation costs

(1) Where the committee of creditors did not approve a plan under sub- regulations (3) of regulation 39B of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the liquidator shall call upon the financial creditors, being financial institutions, to contribute the excess of the liquidation costs over the liquid assets of the corporate debtor, as estimated by him, in proportion to the financial debts owed to them by the corporate debtor.

(2) The contributions made under the plan approved under sub-regulation (3) of regulation 39B of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 or contributions made under sub-regulation (1), as the case may be, shall be deposited in a designated escrow account to be opened and maintained in a scheduled bank, within seven days of the passing of the liquidation order."

The regulation 2A stipulates that, the CoC shall contribute towards the liquidation cost as per plan approved under Regulation 39B of the CIRP Regulations or where the said plan under Regulation 39B is not approved, as per the liquidation cost estimated by the liquidator within 7 days of the liquidation commencement date.

We shall now examine whether it is feasible and mandatory for the financial creditors to contribute the liquidation cost within seven days of the passing of the liquidation order [emphasis added]

The contribution by financial creditors, being financial institutions shall be made in the ratio of the claims admitted by the liquidator. Hence the contribution by the financial creditors can only be made once the claims are submitted and admitted by the Liquidator. In this context, it is pertinent to take note of the following points:

a.Under Regulation 12(2)(b)- Claims can be submitted within 30 days of the liquidation commencement date, hence it is not feasible for the financial creditors to contribute the estimated liquidation cost within 7 days of the liquidation order.

b.Under Regulation 30- Claims are to be verified with 60 days of liquidation commencement date, hence only after the 60th day of the liquidation commencement date, the liquidator shall be in a position to seek contribution towards liquidation cost from the financial creditors.

c.Under Regulation 21A- the secured creditors can within a period of 30 days from the liquidation commencement date decide as to whether or not they want to relinquish their security interest. If the secured creditor proceeds to realise its security interest, then the said secured creditor shall pay its share of CIRP & Liquidation cost [Sec 53(1)(a)] and workmen dues [Sec 53(1)(b)(i)] within 90 days from the liquidation commencement date, so again, the question of contribution by such creditors under Reg 2A within 7 days of the liquidation commencement date does not arise.

contribution by unsecured financial creditors is again questionable as the said unsecured financial creditors may not recover any amount paid towards liquidation cost as per the priority listed under Section 53. Hence the unsecured financial creditors would be very skeptical in funding the liquidation cost.

e.There is no provision in the Code which stipulates mandatory contribution of liquidation cost by the financial creditors and the Regulations being subservient to the provisions of the Code cannot override the provisions of the Code.

f.The provisions pertaining to the fees to be paid to the liquidator is stated in Section 34(9) of the Code, which is stated below:

**"Section 34- Appointment of liquidator and fee to be paid. –**

(9) The fees for the conduct of the liquidation proceedings under sub- section (8) shall be paid to the liquidator from the proceeds of the liquidation estate under section 53". [emphasis added]

Therefore, the fees can be paid only from the liquidation estate and not otherwise.

Hence the provisions of Regulation 2A needs to be suitably modified to ensure that the said regulation is consistent with the provisions of the Code.

**2.**Personal Insolvency Resolution Process [PIRP]

The various inconsistencies in the provisions pertaining to the PIRP process as contained in the Code and the Regulations framed thereunder are summarized below:

a) Admission or rejection of an application for PIRP

Section 100 pertains to the admission or rejection of an application by the adjudicating authority for initiating an application for PIRP.

It is pertinent to refer to Section 100(2) in this regard which is stated below:

**"Section 100- Admission or rejection of application. –**

(2) Where the Adjudicating Authority admits an application under sub- section (1), it may, on the request of the resolution professional, issue instructions for the purpose of conducting negotiations between the debtor and creditors and for arriving at a repayment plan."

There are no provisions contained in the regulations or in the Code for the process to be adopted by the resolution professional for seeking the said instructions from the Adjudicating Authority as specified in Section 100(2) of the Code for the purpose of conducting negotiations between the debtor and creditors and for arriving at a repayment plan.

The resolution professional is only required to submit a report under Section 99 of the Code wherein the resolution professional can recommend for approval or rejection of the application for PIRP. Hence therefore the provisions of section 99 should be amended so that the resolution professional while issuing the report under Section 99 can request the Adjudicating Authority for issuing necessary instructions for the purpose of conducting negotiations between the debtor and creditors for arriving at a repayment plan.

b) Moratorium under Section 101

In connection with the provisions pertaining to moratorium as contained in Section 101 , it is pertinent to refer to Section 101(3) of the Code, which is stated below:

**"Section 101-. Moratorium:**

(3)Where an order admitting the application under section 96 has been made in relation to a firm, the moratorium under sub-section (1) shall operate against all the partners of the firm."

The application for PIRP is filed by the debtor under Section 94 and by the creditor under Section 95, section 96 pertains to the interim moratorium from the date of filing of the application for PIRP. Hence the reference to section 96 in Section 101(3) prima facie appears to be a typographical error and the same should be modified as Section 94 or 95 as the case may be.

c) Public notice and claims from creditors

The provisions pertaining to public notice and claims from creditors are contained in Section 102 of the Code. It is pertinent to refer to Section 102 of the Code, which is stated below:

**"102. Public notice and claims from creditors. –**

(1) The Adjudicating Authority shall issue a public notice within seven days of passing the order under section 100 inviting claims from all creditors within twenty- one days of such issue.

(2) The notice under sub-section (1) shall include–

(a) details of the order admitting the application;

(b) particulars of the resolution professional with whom the claims are to be registered; and

(c) the last date for submission of claims.

(3) The notice shall be -

(a) published in at least one English and one vernacular newspaper which is in circulation in the state where the debtor resides;

(b) affixed in the premises of the Adjudicating Authority; and

(c) placed on the website of the Adjudicating Authority."

In this connection it is pertinent to take note of the following:

i. The format of the public notice is not specified in the Regulations.

ii. The Adjudicating Authority is mandated to issue the public notice, however the process for the same is not prescribed or specified.

iii. The public notice has to be affixed in the premises of the Adjudicating Authority and is to be placed on the website of the Adjudicating Authority, however the process to be adopted for the same is neither prescribed nor specified.

Therefore, more clarity is required regarding the process to be adopted by the resolution professionals to comply with the provisions of Section 102.

d) Payment of fees to the resolution professional for PIRP assignment. In connection with the payment of fees to the resolution professional for PIRP assignment is concerned, the relevant provisions are stated below:

**"Section 105- Repayment Plan**

(3) The repayment plan shall include the following, namely: -

(a) ustification 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)such other matters as may be specified."

**"Regulation 17. Contents of repayment plan**.

(1) The repayment plan shall provide the following -

(b) 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;"

From the above-mentioned provisions, it appears that the personal guarantor against whom the PIRP process is initiated shall pay the fees to the resolution professional, however in situations where the personal guarantor has no assets or assets are not sufficient to cover the resolution process cost, there is a lack of clarity on the subject. It is suggested that the provisions of the Code/Regulations must provide for payment of the fees of resolution professional by the creditors/ applicant to alleviate any scope of ambiguity in the matter.

e) Submission of the report of resolution professional on repayment plan to the Adjudicating Authority

There are inconsistencies in the timelines for submission of report of resolution professional on repayment plan to the Adjudicating Authority as explained below.

The provisions pertaining to the submission of the report of resolution professional on repayment plan to the Adjudicating Authority is stated below:

**"Section 106- . Report of resolution professional on repayment plan-**

(1) The resolution professional shall submit the repayment plan under section 105 along with his report on such plan to the Adjudicating Authority within a period of twenty-one days from the last date of submission of claims under section 102."

As per Section 102 of the Code- the Adjudicating Authority shall issue a public notice within seven days of passing the order under section 100 inviting claims from all creditors within twenty- one days of such issue. Hence 7 days is permitted for issue of public notice and thereafter 21 days are allowed for submission the claims i.e., in total 28 days (7days + 21 days) are allowed for the process of issuing public notice and submission of claims.

As per section 105, the RP is mandated to submit his report on the repayment plan to the Adjudicating Authority within a period of twenty- one days from the last date of submission of claims under section 102

i.e. (21 days +28 days) = 49 days.

The timelines for submission of the above-mentioned report as per the Regulations 19 is stated below:

**"Regulation 19. Filing with the Adjudicating Authority.**

(1) The resolution professional shall file the repayment plan, as approved by the creditors, along with the report mentioned in sections 106 or 112, as the case may be, with the Adjudicating Authority on or before completion of one hundred and twenty days from the resolution process commencement date."

Hence the Code mandates 49 days for submission of the report under Section 106 of the Code, whereas Regulation 19 permits 120 days for the submission of the said report.

It is crucial that the above ambiguity/ inconsistency be removed for effective compliance by the resolution professionals.

f) Rights of secured creditors in relation to repayment plan

The provisions pertaining to the rights of secured creditors in relation to repayment plan as contained in Section 110 of the Code is stated below:

**"Section 110- Rights of secured creditors in relation to repayment plan. -**

(1) Secured creditors shall be entitled to participate and vote in the meetings of the creditors.

(2) A secured creditor participating in the meetings of the creditors and voting in relation to the repayment plan shall forfeit his right to enforce the security during the period of the repayment plan in accordance with the terms of the repayment plan.

(3)Where a secured creditor does not forfeit his right to enforce security, he shall submit an affidavit to the resolution professional at the meeting of the creditors stating -

(a) that the right to vote exercised by the secured creditor is only in respect of the unsecured part of the debt; and

(b) the estimated value of the unsecured part of the debt.

(4)In case a secured creditor participates in the voting on the repayment plan by submitting an affidavit under sub-section (3), the secured and unsecured parts of the debt shall be treated as separate debts.

(5)The concurrence of the secured creditor shall be obtained if he does not participate in the voting on repayment plan but provision of the repayment plan affects his right to enforce security."

Unlike the CIRP process, the secured creditors in the case of PIRP process are entitled to enforce their security interest during the PIRP process as stated in Section 110 of the Code. The various issues in connection with the above stated provision of Section 110 is stated below:

a.There is no provision for valuation of the assets of the personal guarantor by the resolution professional in the PIRP process. Hence the basis on which the secured and unsecured amount of claim for a secured creditor is to be determined by the RP is unclear.

b.The provisions of Section 110(3) may be amended to provide that the secured creditor shall along with the affidavit provide a copy of the valuation report as valued by a registered valuer for the value of security interest held by the secured creditor and the value of the unsecured part of debt shall be accordingly determined.

g) Approval of repayment plan by creditors

The provisions pertaining to the Approval of repayment plan by creditors as contained in Section 111 of the Code is stated below:

**"Section 111- Approval of repayment plan by creditors. -**

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."

As per the above provisions of Section 111, the repayment plan is to be approved by more than 75% of the creditors present in person or by proxy and voting on the resolution, however the provisions as contained in Regulation 15 (Voting by creditors) and Regulation 16 (Voting by proxy) are contrary to the provisions of Section 111 as detailed below:

**"Regulation15- Voting by creditors**

(1) The resolution professional shall take a vote of the creditors present in the meeting on any item listed for voting after discussion on the same.

(2) At the conclusion of the meeting, the resolution professional shall prepare minutes of the meeting, including the names of creditors, who voted for, against or abstained from voting on the items put to vote in the meeting.

(3) The resolution professional shall-

(a) circulate the minutes of the meeting by electronic means to all participants of the meeting within forty-eight hours of the conclusion of the meeting, and

(b) seek a vote on the items listed for voting in the meeting from the creditors who were not present in the meeting or did not vote at the meeting, by electronic means, where the voting shall be kept open for at least twenty-four hours from the circulation of the minutes as per clause (a)."

**16. Voting by proxy.**

(1) A creditor, who is entitled to vote at a meeting of creditors, shall be entitled to appoint an individual, who shall not be an associate of the guarantor, as a proxy to attend and vote on its behalf.

(2) For the purpose of sub-regulation (1), a creditor shall deliver Form C, duly completed to the resolution professional at least twenty-four hours prior to the meeting of creditors.

(3) A proxy may vote by electronic means on behalf of the creditor.

Hence, it would be evident that, though section 111 permits voting by creditors present in person or by proxy and voting on the resolution in a meeting of the creditors, the regulation permits the voting by electronic means also. This anomaly needs to be resolved.

h) Typographical error in section 113

**The provisions of Section 113 are stated below:**

113. Notice of decisions taken at meeting of creditors. –

The resolution professional shall provide a copy of the report of the meeting of creditors prepared under section 99 to -

(a) the debtor;

(b) the creditors, including those who were not present at the meeting; and

(c)the Adjudicating Authority.

Section 113 refer to section 99 to ---, however the report on the meeting of creditors on repayment is prepared by the RP under Section 112. The report under section 99 is prepared by the RP prior to admission of the application for initiation of PIRP, hence the reference to section 99 under Section 113 needs to be suitably amended.

i)\Anomaly in Section 118(4) of the Code:

The provisions of Section 118 are stated below:

118. Repayment plan coming to end prematurely. -

(1) A repayment plan shall be deemed to have come to an end prematurely if it has not been fully implemented in respect of all persons bound by it within the period as mentioned in the repayment plan.

(4) The debtor or the creditor, whose claims under repayment plan have not been fully satisfied, shall be entitled to apply for a bankruptcy order under Chapter IV

The reference to "debtor" in section 118(4) appears to be erroneous as the debtor shall not have any claim in the repayment plan. The said provision needs to be suitably amended.

j) Effect of non-filing of an application for Bankruptcy:

If an application for PIRP is not admitted by the Adjudicating Authority or if the repayment plan of a debtor is not approved by the Adjudicating Authority or the repayment plan is not fully implemented by the debtor, an application for bankruptcy can be filed as per Section 121 of the Code under the following circumstances:

(a) where an order has been passed by an Adjudicating Authority under sub-section 4 of section 100; or

(b) where an order has been passed by an Adjudicating Authority under sub-section 2 of section 115; or

(c) where an order has been passed by an Adjudicating Authority under sub-section 3 of section 118.

As the debtor is not discharged during the PIRP process, the debtor can now only be discharged through the bankruptcy process, however what happens under the circumstances where an application for bankruptcy is not filed by the debtor or the creditor? shall the debtor remain undischarged? more clarity is need on this issue as there are no provisions on this vital question.

**3.Insolvency and Bankruptcy Code, 2016.**

The various inconsistencies in the provisions of the Code are listed below:

a)The provisions pertaining to Section 12 is stated below:

Section 12 - Time-limit for completion of insolvency resolution process. –

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

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

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

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

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

As per Section 12(3)-the period of CIRP process can be extended by a maximum period of 90 days and the said extension of the CIRP process can be extended only once. [emphasis added]

However, in practice the Adjudicating Authorities are allowing two extensions namely (a) First extension for 90 days under Section 12(2) and

(b) Second extension for 60 days under second proviso to section 12(3).

Therefore, the provisions of Section 12 may be suitably modified to remove this anomaly as this creates confusion for the practicing insolvency professional.

b)With respect to the various provisions pertaining to the avoidance of transactions, there are several anomalies in the provisions as contained in the Code as detailed below:

**i. Provisions of Section 25(2)(j)**

"25. Duties of resolution professional. –

(2)For the purposes of sub-section (1), the resolution professional shall undertake the

following actions, namely: -

(j) file application for avoidance of transactions in accordance with Chapter III, if any"

It is pertinent to note that the duties of RP as stated in section 25(2)(j) refer to avoidance of transactions in accordance with Chapter III only. Chapter III of part II covers section 33 to 54 only. Section 66 pertaining to Fraudulent trading or wrongful trading is contained in chapter VI of part-II. Hence reference to only chapter III in section 25(2)(j) is therefore erroneous.

**ii.** Provisions of Section 35(1)(l)

**"35. Powers and duties of liquidator. –**

(1)Subject to the directions of the Adjudicating Authority, the liquidator shall have the following powers and duties, namely:

(l) to investigate the financial affairs of the corporate debtor to determine undervalued or preferential transactions;"

It is pertinent to note that the duties of the liquidator as stated in section 35(1)(l) refer to determining undervalued transactions (Section 45 of the Code) or preferential transactions (section 43 of the Code). The reference to extortionate transactions (section 50 of the Code) and fraudulent transactions (section 66 of the Code) has been erroneously missed out. Hence the said section needs to be suitably modified.

**iii.** Provisions of Section 66(1) & (2)

**"66. Fraudulent trading or wrongful trading. -**

(1) If during the corporate insolvency resolution process or a liquidation process, it is found that any business of the corporate debtor has been carried on with intent to defraud creditors of the corporate debtor or for any fraudulent purpose, the Adjudicating Authority may on the application of the resolution professional pass an order that any persons who were knowingly parties to the carrying on of the business in such manner shall be liable to make such contributions to the assets of the corporate debtor as it may deem fit.

(2)On an application made by a resolution professional during the corporate insolvency resolution process, the Adjudicating Authority may by an order direct that a director or partner of the corporate debtor, as the case may be, shall be liable to make such contribution to the assets of the corporate debtor as it may deem fit, if-"

It is pertinent to note that section 66(1) is applicable to the CIRP process and the liquidation process, however the power to file an application has been erroneously provided only to the resolution professional in section 66(1) and not to the liquidator. Therefore, the reference to the liquidator also needs to be incorporated in section 66(1).

Section 66(2) refers to the CIRP process and resolution professional only, the reference to the liquidation process and the liquidator is erroneously missing.

Further Section 66(2) casts liability only on the director or partner of the corporate debtor, the reference to the creditor of the corporate debtor has been erroneously missed out. It is pertinent to refer to section 67(2) in this regard, which casts liability under section 66(1) and 66(2) also on the creditors of the corporate debtor.

Therefore, suitable modification needs to be carried out.

**iv.** Provisions of Section 59(6)

**"59. Voluntary liquidation of corporate persons. –**

(6) The provisions of sections 35 to 53 of Chapter III and Chapter VII shall apply to voluntary liquidation proceedings for corporate persons with such modifications as may be necessary."

It is pertinent to note that Section 59(6) refers to the applicability of chapter III and chapter VII of part II of the Code to the voluntary liquidation process. The reference to Chapter VI which contains the provisions of 66 has been inadvertently missed out. Therefore, suitable modification needs to be carried out.

# ARTICLE IBC

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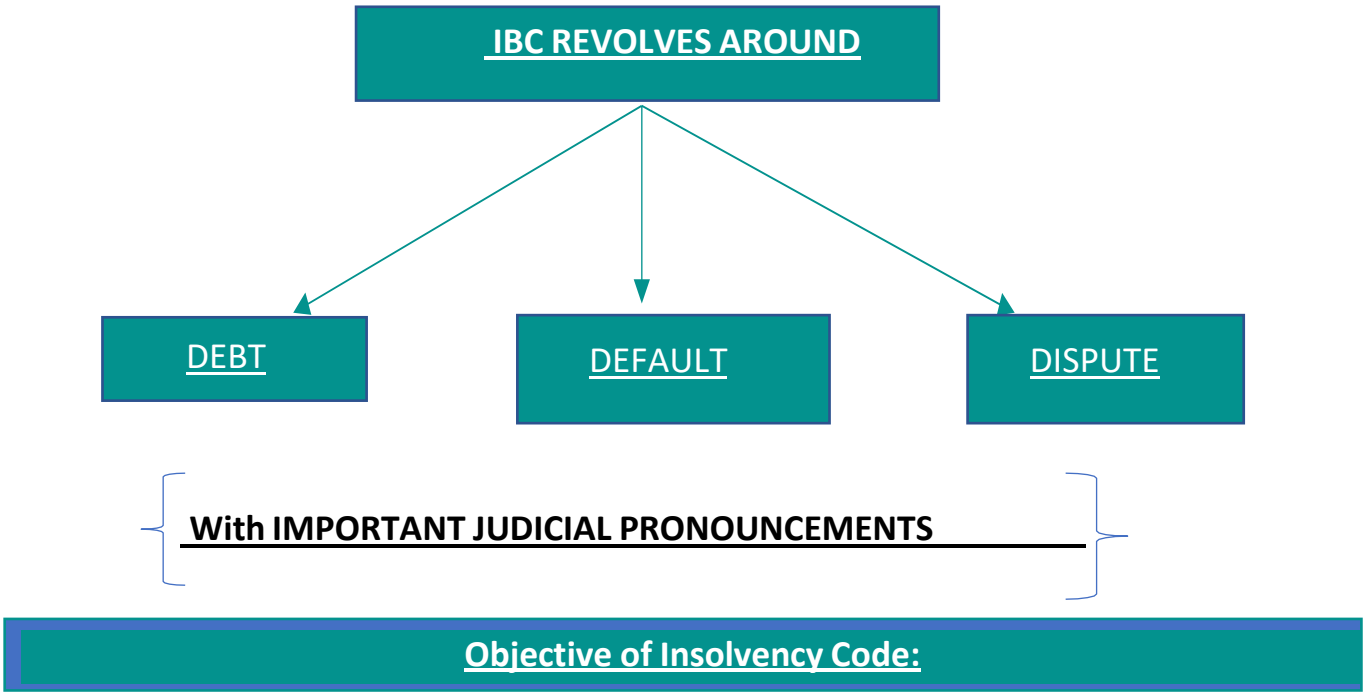
The vision of law is to encourage entrepreneurship and innovation. Some business ventures will always fail, but they will be handled rapidly and swiftly. Entrepreneurs and lenders will be able to move on, instead of being bogged down with decisions taken in the past. IBC helps in time-bound mannerresolution and easy exit.

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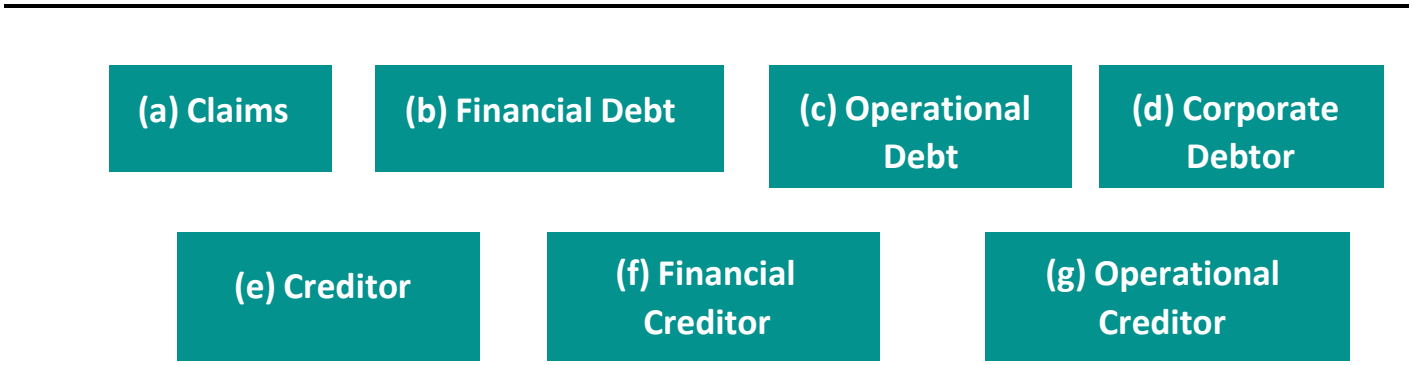
## 1. What is Debt under the Code?

As per Section 3(11) of the Code, "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debtand operational debt.

For understanding the word Debt, we have to understand the following terms:-




1. Right to remedy for breach of contract under any law for thetime being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured orunsecured.

Judicial pronouncements with regard to Section 3(6): Claim

2. International Road Dynamics South Asia Pvt. Ltd. Vs. Reliance Infrastructure Ltd. And D. A Toll RoadPvt. Ltd. NCLAT order dt. 01.08.2017

"The different claim(s) arising out of different agreements or work order, having different amount anddifferent dates of default, cannot be clubbed together foralleged default of debt, as the cause of action is separate."

a. Innoventive Industries Ltd. Vs. ICICI Bank & Anr.

**SC order dt. 31.08.2017**

"'Claim' under section 3(6) of the Code means a right to payment, even if it is disputed."

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

"'Claim' gives rise to 'debt' only when it is due and 'default' occurs only when debt becomes due and payable and is not paid by the debtor."

**a. What is included in the Financial Debt?**

As per **Section 5(8) of the Code, "financial debt**" means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes -

(a) any money borrowed against the payment of interest;
(b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;
(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument.
(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;
(e) any receivables sold or discounted other than any receivables sold on non-recourse basis.

(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing.

**[Explanation-** For the purposes of this sub-clause, -

(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and

(ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016;]

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate orprice and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guaranteeor indemnity for any of the items referred to in above sub clauses (a) to (h) of this clause;

Judicial pronouncements with regard to Section 5(8) : FinancialDebt

i. DF Deutsche Forfait AG & Anr. Vs. Uttam Galva Steel Ltd. NCLT, Mumbai order dt. 10.04.2017

"A transaction will be considered as an operational debtif the payment is made to goods or services and if moneyis lent in contemplation of returns in the form of interestwill be a financial debt."

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

"A financial debt is a debt together with interest, if any, which is disbursed against the consideration for time value of money."

iii. Shailesh Sangani Vs. Joel Cardoso &Anr. NCLAT order dt. 30.01.2019

"It is manifestly clear that money advanced by a Promoter, Director or a Shareholder of the CD as a stakeholder to improve financial health of the Companyand boost its economic prospects, would have the commercial effect of borrowing on the part of CD notwithstanding the fact that no provision is made for interest thereon."

*iv.* **Pioneer Urban Land and Infrastructure Ltd. &Anr.Vs. Union of India & Ors. SC order dt. 09.08.2019** *"In real estate projects, money is raised from the allottee, against consideration for the time value ofmoney. Thus, allottees are to be regarded as FCs."*

v. Narendra Kumar Agarwal & Anr. Vs. Monotrone Leasing Pvt. Ltd. & Anr. NCLAT order dt. 19.01.2021

"If Inter-Corporate Deposit is made for a certain periodwhich was to be paid back with interest, then suchtransaction will fall in the definition of 'financial debt'."

vi. Orator Marketing Pvt. Ltd. Vs. Samtex Desinz Pvt. Ltd. [Civil Appeal No. 2231 of 2021] SC order dt. 26.07.2021

"The definition of 'financial debt' does not expressly exclude an interest free loan. 'Financial debt' would have to be construed to include interest free loans advanced to finance the business operations of the corporate body."

**b. <u>What is included in Operational Debt?</u>**

As per Section 5(21) of the Code, "Operational Debt" means a claim inrespect of

(a) provision of goods, or

(b) provision of services including employment, or

(c) a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, anyState Government or any local authority.

Judicial pronouncements with regard to Section 5(21) :Operational Debt

**1.** Renish Petrochem FZE Vs. Ardor Global Pvt. Ltd.

**NCLT, Ahmedabad order dt. 31.07.2017**

"The amount due from the buyer of the goods, and whichis due to the seller and is guaranteed by the guarantee agreement, is also an operational debt."

**2.** Parmod Yadav & Anr. Vs. Divine Infracon Pvt. Ltd.NCLT, New Delhi order dt. 28.09.2017

"Lease of immovable property cannot be considered as a supply of goods or rendering of any services and thus cannot fall within the definition of operational debt."

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

"Operational debt would include a claim in respect of the provision of goods or services, includingemployment, or a debt in respect of payment of dues arising under any law and payable to the Government orany local authority."

**4.** Pr. Director General of Income Tax (Admn. & TPS)Vs. Synergies Dooray

Automotive Ltd. & Ors. **NCLAT order dt. 20.03.2019**

"All statutory dues including Income Tax, Value AddedTax, etc., come within the meaning of operational debt."

*5.* **Shree Ram Lime Products Pvt. Ltd. Vs. Gee IspatPvt. Ltd. NCLT, New Delhi order dt. 22.10.2019** *"The dues towards the Government, be it tax on income or on sale of properties, would qualify as operationaldebt and must be dealt with accordingly."*

**6.** JSW Steel Ltd. Vs. Mahender Kumar Khandelwal &Ors. NCLAT order dt. 25.10.2019

"In case assets seized by the ED were purchased out of the proceeds of crime, the amount as may be generated out of the assets would come within the meaning of operational debt payable to the ED for which it may fileclaim in terms of the Code."

*7.* **Kolkata Municipal Corporation and Anr. Vs. Unionof India and Ors. HC, Calcutta order dt. 29.01.2021** *"The property seized by Kolkata Municipal Corporation(KMC) towards recovery of municipal tax dues from CD,can be the subject-matter of the CIRP under the Code asthe claim of KMC had attained finality and fastened aliability upon the CD, thus constituting an 'operationaldebt' under section 5(21) of the Code."*

**8.** Union of India Vs. Vijaykumar V. Iyer NCLAT orderdt. 13.04.2021

"Dues of Central Government /Department of Telecommunications under the License Agreement fall within the ambit of 'operational debt' under the Code."

**c. Who is Corporate Debtor & Corporate Person under the Code?**

I. As per Section 3(8) of the Code, **Corporate Debtor** means a **corporate person** who owes a debt to any person.

II. A **Corporate Person** as defined under section 3(7) is as follows: -

a) a company as defined under section 2(20) of the Companies Act,2013.
b) a limited liability partnership as defined in Section 2(1) (n) of theLimited Liability Partnership Act, 2008; or,
c) any other person incorporated with limited liability under any law for the time being in force but shall not include any financialservice provider.

Judicial pronouncements with regard to Section 3: Definitions

i. Apeejay Trust Vs. Aviva Life Insurance Co. India Ltd. NCLT, New Delhi order dt. 04.11.2019

"The CD cannot use the provisions of section 3, as a blanket cover to claim exclusion from proceedings underthe Code on the ground that it is a financial service provider"

ii. Laxmi Pat Surana Vs. Union Bank of India &Anr. SCorder dt. 26.03.2021

"If a corporate person extends guarantee for the loan transaction concerning a principal borrower not being a corporate person, it would still be covered within the meaning of expression "corporate debtor" in section **3(8).**"

*iii.* **Hindustan Construction Company Ltd. & Anr. Vs.Union of India & Ors. SC order dt. 27.11.2019** *"National Highway Authority of India (NHAI) is a statutory body which functions as an extended limb ofthe Central Government and performs Governmental functions which obviously cannot be taken over by an RP, or by any other corporate body nor can NHAI ultimately be wound up under the Code. For all these reasons, it is not possible to either read in, or read down; the definition of 'corporate person' in Section3(7) of the Code to include NHAI."*

iv. Asset Reconstruction Company (India) Ltd. Vs. Mohammadiya Educational Society and other matters NCLAT order dt. 03.08.2021

"Under section 3(7) of the Code, Co-operative Societiesare not 'corporate persons' to whom the provisions of the Code applies."

**d. Who is Creditor under the Code?**

As per Section 3(10) of the Code, "creditor" means any person to whom adebt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder

Judicial pronouncements with regard to Section 3(10): Creditor

i. Biogenetics Drugs Pvt. Ltd. Vs. Themis Medicare Ltd. NCLT, Ahmedabad order dt. 18.02.2021

"A 'decree holder' though covered under the definition of 'creditor' under section 3(10) would not fall within theclass of FCs or OCs and therefore, a decree holder cannot initiate CIRP against the CD with an objective toexecute the decree."

**e. Who is Financial Creditor?**

Financial Creditor means any person to whom a financial debt is owed andincludes a person to whom such debt has been legally assigned or transferred to.

Judicial pronouncements with regard to Section 5(7) : FinancialCreditor

i. Nikhil Mehta and Sons Vs. AMR Infrastructure Ltd.

**NCLAT order dt. 21.07.2017**

"The parties who have entered into agreement, for purchase of flat or shop or any immovable property, which contains a clause of assured or committed returnsare 'financial creditors' under the Code."

ii. Edelweiss Asset Reconstruction Company Limited Vs. Kalptaru Alloys Pvt. Ltd. NCLT, Ahmedabad order dt. 05.09.2017

"The assignee of the debt is also entitled to file application and such assignee steps into the shoes of theFC."

iii. B.V.S. Lakshmi Vs. Geometrix Laser Solutions Pvt.

**Ltd. NCLAT order dt. 22.12.2017**

"Essential criteria for being an FC: (i) A person to whom a financial debt is owed and includes a person whom such debt has been legally assigned or transferredto (ii) The debt along with interest, if any, is disbursed against the consideration for time value of money and include any one or more mode of disbursed as mentionedin clause (a) to (i) of sub-section (8) of Section 5."

iv. Export Import Bank of India Vs. Resolution Professional JEKPL Pvt. Ltd. NCLAT order dt .14.08.2018

"On the basis of counter indemnity obligation, EXIM Bank comes within the definition of section 5(7) r/w section 5(8) of the Code."

v. Chitra Sharma and Ors. Vs. Union of India and Ors.

**SC order dt. 09.08.2018**

"Home buyers are brought within the purview of the financial creditors under the Code."

*vi.* **Pioneer Urban Land and Infrastructure Ltd. &Anr.Vs. Union of India &Ors. SC order dt. 09.08.2019** *"The allottees/home buyers were included in the mainprovision, i.e., section 5(8)(f) with effect from theinception of the Code. The Explanation was added in2018 merely to clarify doubts that had arisen. Thedeeming fiction that is used by the Explanation is to put beyond doubt the fact that allottees are to be regardedas financial creditors within section 5(8)(f) of the Code."*

vii. Mohanlal Dhakad Vs. BNG Global India Ltd.

**NCLAT order dt. 22.02.2021**

"In a 'Recurring Investment Plan' wherein the CD failedin its commitment to offer the allotment of plots of land as promised by it or pay the assured returns, or repay the sums collected by it along with interest on the maturity of the schemes etc, the investor's position is thatof a FC as per section 5(7) read with section 5(8) of theCode."

viii. Phoenix ARC Pvt. Ltd. Vs. Ketulbhai Ramubhai Patel SC order dt. 03.02.2021

"The SC reiterated that a person having only security interest over the assets of CD, even if falling within the description of 'secured creditor' by virtue of collateral security extended by the CD, would not be covered

by thedefinition of 'financial creditor' under the Code. It heldthat the CD in the matter has only extended security through pledge of shares and there was no liability to repay the loan taken by the borrower on the CD. Therefore, the creditor in such a case will at best be secured creditor qua CD and not the FC qua CD."

**f. <u>Define the term operational creditor.</u>**

As per Section 5 (20) of the Code, "Operational Creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred.

Judicial pronouncements with regard to Section 5(20) :Operational Creditor

i. Innoventive Industries Ltd. Vs. ICICI Bank & Anr.

**SC order dt. 31.08.2017**

"An OC means a person to whom an operational debt isowed, and an operational debt under section 5(21) means a claim in respect of provision of goods or services."

ii. Suresh Narayan Singh Vs. Tayo Rolls Ltd. NCLAT order dt. 26.09.2018

"The workmen of a Company come within the meaning of an OC in terms of section 5(20) r/w section 5(21) of the Code."

iii. Standard Chartered Bank Vs. Satish Kumar Gupta,

**R.P. of Essar Steel Ltd. & Ors. NCLAT order dt. 04.07.2019**

"The OCs can be classified in three different classes fordetermining the manner in which the amount is to be distributed to them (as per section 5(21). However, they are to be given the same treatment, if similarly situated."

*iv.* **Cooperative Rabobank U.A. Singapore Branch Vs.Shailendra Ajmera NCLAT order dt. 29.04.2019** *"Any operational debt to an FC, the assignee or transferee shall be considered as an OC to the extent ofsuch assignment or legal transfer."*

v. IRK Raju Vs. Immaneni Eswara Rao & Ors. NCLATorder dt. 30.01.2020

"Custom Duty as a statutory due is only operational in nature when it is paid to the relevant authority, and not when it is repaid to a party that has paid such statutory authority."

**5. What is the meaning of the term 'default?**

As per Section 3(12) of the Code, "default" means non-payment of debt whenwhole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case maybe.

Judicial pronouncements with regard to Section 3(11) & 3(12) :Debt & Default

**1.** Innoventive Industries Ltd. Vs. ICICI Bank & Anr.

**SC order dt. 31.08.2017**

"'Default' is defined in section 3(12) of the Code in verywide terms as non- payment of a 'debt' once it becomes due and payable, which includes non- payment of even part thereof or an instalment amount."

**2.** Krishna Enterprises Vs. Gammon India Ltd.

**NCLAT order dt. 27.07.2018**

"If in terms of any agreement, interest is payable to the OC or the FC, then 'debt' will include interest, otherwise, the principal amount is to be treated as 'debt'which is the liability in respect of the 'claim' which can be made from the CD."

**3.** B.K. Educational Services Pvt. Ltd. Vs. Parag Guptaand Associates SC order dt. 11.10.2018

"The context of section 3(12) of the Code is actual non-payment by the CD when a 'debt' has become due and payable."

4. Transmission Corporation of Andhra Pradesh Ltd. Vs. Equipment Conductors and Cables LtdSC orderdt. 23.10.2018

"Existence of an undisputed 'debt' is sine qua non of initiating CIRP."

5. Brand Realty Services Ltd. Vs. Sir John Bakeries India Pvt. Ltd. NCLT order dt. 22.07.2020

"When the definitions of 'operational debt', 'debt' and 'default' are read together, it can be said that the definition of 'debt' as defined under the Code does not mean 'operational debt' only, rather it includes 'financial debt' as well as liability or obligation in respect of a claim, which is due from any person, and 'default' means non-payment of 'debt', but in order to trigger section 9 of the Code, an OC is required to establish a 'default' for non- payment of 'operational debt' as defined under section 5(21) of the Code and if aperson fails to establish that, they cannot initiate CIRP."

6. Park Energy Pvt. Ltd, Vs. Syndicate Bank and Anr.

**NCLAT order dt. 24.08.2020**

"Mere fact of 'debt' being due and payable is not enoughto justify the initiation of CIRP at the instance of the FC,unless the 'default' on the part of the CD is established."

7. Rita Kapur Vs. Invest Care Real Estate LLP and Ors.[NCLAT order dt. 02.09.2020

"It is latently and patently clear that once the 'debt' is converted into 'capital', it cannot be termed as 'financialdebt'."

8. Promila Taneja Vs. Surendri Design Pvt. Ltd.

**NCLAT order dt. 10.11.2020**

"The legislature was conscious regarding liabilities arising from a particular type of lease and it made specific provision in section 5(8)(d) to make it a 'financial debt'. No such provision was made in respectof an operational debt."

9. **Anand Rathi Global Finance Ltd. Vs. Doshi HoldingsPvt. Ltd. NCLT, Mumbai order dt.19.02.2021** *"CIRP can be initiated against a CD which has* 'defaulted' in repaying the loan in the capacity of co- borrower/pledger, as the liability of borrower and co- borrower/pledgor is co-extensive under the Indian Contract Act, 1872."

3. Define the term Dispute under the Code.

As per Section 5 (6) of the Code, "Dispute" includes a suit or arbitration proceedings

relating to –

(a) The existence of the amount of debt;
(b) The quality of goods or service; or
(c) The breach of a representation or warranty.

Judicial pronouncements with regard to Section 5(6) : Dispute

1. Simplex Infrastructures Ltd. Vs. Agrante Infra Ltd.

**NCLT, New Delhi order** dt.10.08.2017

"The dispute should not be a mere eyewash and attemptto derail the OC's entitlement to initiate the proceedingsunder sections 8 and 9 of the Code."

2. Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd. SC order dt. 21.09.2017

"The test of existence of a dispute is: (a) whether the corporate debtor has raised a plausible contention requiring further investigation which is not a patently feeble legal argument or an assertion of facts unsupported by evidence (b) whether the defence is not spurious, mere bluster, plainly frivolous or vexatious (c)a dispute, if it truly exists in fact between the parties, which may or may not ultimately succeed."

3. Chetan Sharma Vs. Jai Lakshmi Solvents (P) Ltd. &Anr. NCLAT order dt. 10.05.2018

"A unilateral transfer of liability does not constitute a 'dispute' within the meaning of section 5(6) and an inter-se dispute between two groups of shareholders of the CDdoes not constitute a 'dispute' in reference to OCs. The 'dispute' under section 5(6) of the Code must be between the CD and the OCs."

4. Anuj Khanna Vs. Wishwa Naveen Traders &Anr.

**NCLAT order dt. 25.11.2020**

"On the 'existence of a dispute', it was observed that section 5(6) is an inclusive provision and does not confine the AA from considering the existence of a dispute from a broader angle. Therefore, dispute interms of section 8(2)(a) of the Code shall not be limited to instances specified in the definition under section 5(6)."

- **<u>As per Section 4 of IBC</u>**

Insolvency and liquidation of Corporate Debtor where the minimum amount of the default is one lakh rupees provided that the Central Government may, by notification, specify the minimum amount of defaultof higher value which shall not be more than one crore rupees.

***As per the Central Government S.O. 1205(E), dated 24.03.2020, the Central Government specifies one crore rupees as the minimum amountof default. Now for Corporate Debtor the minimum default amount is Rs.one crore.***

As per the Central Government vide notification S. O. 1543(E dated 09.04.2021, specifies Ten lakhs' rupees as the minimum amount of defaultfor the matters relating to the Pre-Packed Insolvency Resolution Process ofCorporate Debtor.

For individual the default amount is of Rs. 1000. As per section 78 CentralGovernment may by notification, specify the minimum amount of default of higher value which shall not be more than one lakh rupees. **For individual IBC provision has not been notified.**

- **<u>Instantly Code is not a substitute for recovery forum</u>**

Wherever there is existence of real dispute, provision of the IBC Code cannot be invoked. Insolvency code is not intended to be substitute to recovery forum:

Mobilox Innovations Private Limited vs. Kirusa Software Private Limited, 2018(1) SCC 353.

Application under Section 7 is not a recovery proceeding or a proceedingfor determination of claim on merit, which can be decided only by a courtof competent jurisdiction. Application under Sections 7, 9 or 10 of the Code being not money claim or suit and not being an adversarial litigation,the Adjudicating Authority is only required to be satisfied that there is a 'debt' and default has occurred.

V.R. Hemantraj Vs. Stanbic Bank Ghana Ltd. & Anr. NCLAT Orderdated 29.08.2018.

# CASE LAWS

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

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

- **Invent Assets Securitization and Reconstruction (P.) Ltd. v. Xylon Electrotechnic (P.) Ltd. - [2021] 125 taxmann.com 16 /[2021] 164 SCL 343 (SC)**

*Determination of claim of proceedings before DRT would neither extend time nor exclude period of limitation, date of default would be computed with effect from date of account of corporate debtor being classified as NPA in February, 2010 and thus, CIRP application filed against corporate debtor in 2020 for default committed in 2010 would be barred by limitation; Appeal dismissed.*

Cash credit facility was sanctioned by Bank in favour of the corporate debtor in January, 2008. The Bank classified account of the corporate debtor as NPA in February, 2010. Debt was assigned to the appellant reconstruction company by Bank. CIRP application filed by the appellant was rejected by NCLT on ground that claim of appellant was barred by limitation. The Appellant/financial creditor contended that debt had been acknowledged by the corporate debtor in its balance sheet of financial years from 2010 to 2016. Further, Union Bank had filed for recovery of outstanding financial debt before DRT in February, 2011 which was allowed and appeal against Judgment of DRT was pending before DRAT. The NCLAT by impugned order held that that determination of claim of proceedings before DRT would neither extend time nor exclude period of limitation, date of default would be computed with effect from date of account of the corporate debtor being classified as NPA and thus, CIRP application filed against the corporate debtor in 2020 for default committed in 2010 would be barred by limitation.

Held that Appeal against said impugned order was to be dismissed.

***Case Review*** : Invent Assets Securitization and Reconstruction (P.) Ltd. v. Xylon Electrotechnic (P.) Ltd. [2020] 119 taxmann.com 250 (NCL - AT), affirmed.

## SECTION 14 - CORPORATE INSOLVENCY RESOLUTION PROCESS - MORATORIUM

- **P. Mohanraj v. Shah Brothers Ispat (P.) Ltd. - [2021] 125 taxmann.com 39 (SC)/[2021] 167 SCL 327 (SC)**

*Moratorium provision contained in section 14 would apply only to corporate debtor, natural persons mentioned in section 141 continuing to be statutorily liable under Chapter XVII of Negotiable Instruments Act.*

Criminal complaints were filed by the respondent against the company and the appellants under section 138 read with section 141 of the Negotiable Instruments Act before the Additional Chief Metropolitan Magistrate (ACMM) and summons were issued by the ACMM to the company and the appellants in both the criminal complaints. Subsequently, the Adjudicating Authority admitted the application under section 9 of the IBC filed by respondent against company and directed commencement of the corporate insolvency resolution process with respect to the company and a moratorium in terms of section 14 of IBC was ordered. Pursuant thereto, on

24-5-2018, the Adjudicating Authority stayed further proceedings in the two criminal complaints pending before the ACMM. In an appeal filed to the National Company Law Appellate Tribunal (NCLAT), the NCLAT set aside this order, holding that section 138, being a criminal law provision, cannot be held to be a 'proceeding' within the meaning of section 14 of the IBC. In an appeal, the Supreme Court ordered a stay of further proceedings in the two complaints pending before the ACMM. The question that arose in this appeal was whether the institution or continuation of a proceeding under section 138/141 of the Negotiable Instruments Act could be said to be covered by the moratorium provision, namely, section 14 of the IBC.

Held that section 138 of Negotiable Instruments Act proceeding being conducted before a Magistrate would certainly be a proceeding in a court of law in respect of a transaction which relates to a debt owed by the corporate debtor. For period of moratorium no section 138/141 of the NI Act, 1881 proceeding can continue or be initiated against the corporate debtor and moratorium provision contained in section 14 of the IBC, 2016 would apply only to the corporate debtor, natural persons mentioned in section 141 continuing to be statutorily liable under Chapter XVII of the NI Act. However criminal proceedings which are not directly related to transactions evidencing debt or liability of the corporate debtor would be outside the scope of expression 'proceedings' under section 14. Thus, where individuals or firms are concerned, recovery of any property by an owner or lessor, where such property is occupied by or in possession of individual or firm can be recovered during moratorium period, unlike property of a corporate debtor.

***Case Review*** : Shah Brothers Ispat (P.) Ltd. v. P. Mohanraj [2018] 97 taxmann.com 233 (NCLAT - New Delhi), set aside.

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

- **Gujarat Urja Vikas Nigam Ltd. v. Amit Gupta - [2021] 125 taxmann.com 150 /[2021] 167 SCL 241 (SC)**

*Where appellant, a Government of Gujarat undertaking, sought to terminate Power Purchase Agreement (PPA) with corporate debtor only on account of CIRP being initiated against Corporate Debtor, NCLT/NCLAT could have exercised jurisdiction under section 60(5)(c) to stay termination of PPA by appellant, since allowing it to terminate PPA would certainly result in corporate death of Corporate Debtor due to PPA being its sole contract.*

The appellant, a Government of Gujarat undertaking, was a successor to the Gujarat Electricity Board, and was also the holding company of all the State Power Utilities in Gujarat. The appellant and the corporate debtor entered into a Power Purchase Agreement (PPA) in accordance with which the appellant had to purchase all the power generated by the corporate debtor. The NCLT admitted a petition filed by the corporate debtor under section 10, commenced the Corporate Insolvency Resolution Process in respect of the corporate debtor, issued an order of moratorium and the first respondent was appointed as the Interim Resolution Professional. Thereafter, the appellant issued notice to the corporate debtor for termination of Power Purchase Agreement. The Resolution Professional of the corporate debtor filed applications under section 60(5) before the NCLT in regard to the Notices issued by the

appellant to the corporate debtor, and sought an injunction restraining the appellant from terminating the PPA. The National Company Law Tribunal as well as the National Company Law Appellate Tribunal stayed the termination by the appellant of its Power Purchase Agreement with the corporate debtor. On appeal, the appellant submitted that the NCLT/NCLAT cannot exercise jurisdiction under the IBC over disputes arising from contracts such as the PPA.

Held that where the appellant, a government of Gujarat undertaking, sought to terminate Power Purchase Agreement (PPA) with the corporate debtor only on account of CIRP being initiated against the corporate debtor, NCLT/NCLAT could have exercised jurisdiction under section 60(5)(c) to stay termination of PPA by the appellant, since allowing it to terminate PPA would certainly result in corporate death of the corporate debtor due to PPA being its sole contract.

***Case Review*** : Gujarat Urja Vikas Nigam Ltd. v. Amit Gupta [2021] 125 taxmann.com 149 (NCL-AT), affirmed.

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

- **Satish Chand Gupta v. Servel India (P.) Ltd. - [2021] 125 taxmann.com 205/[2021] 164 SCL 541 (NCL-AT)**

*Where deposits had been received by corporate debtor and interest had been credited against it over a period of time consistently, as a consideration for time value of money, default in payment of accepted amounts will qualify as financial debt under section 5(8).*

The respondent/corporate debtor had accepted certain amounts from the appellant against payment of interest and credited interest in a consistent manner against such amounts for a continuous period of five years.

Held that bearing in mind that payment of interest on amounts borrowed by the company was nothing but a consideration for time value of money and in as much as 'interest' is compensation paid by borrower to lender for using lender's money over a period of time, it was to be concluded that the appellant's status was that of a 'financial creditor' as per section 5(7) read with section 5(8). Further, fact that there was a default in payment of accepted amounts by the corporate debtor, it comes within purview of definition of 'financial debt'. Thus, application filed by the appellant/financial creditor under section 7 for initiation of CIRP would be clearly sustainable.

***Case Review :*** Satish Chand Gupta v. Servel India (P.) Ltd. [2021] 125 taxmann.com 204 (NCLT - New Delhi), set aside.

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

- **AAJ Legal & Management Consultancy LLP v. Keltech Infrastructures Ltd. - [2021] 126 taxmann.com 116 (SC)**

*Where latest arrangement between financial creditor and corporate debtor was builder buyer agreement in terms of which outstanding dues of corporate debtor were to be appropriated towards consideration of flat and even possession of flat had been offered, and no default on part of corporate debtor stood established in terms of said agreement, application filed by financial creditor under section 7 had rightly been dismissed.*

Memo of Understanding (MoU) was executed between parties as per which the appellant/financial creditor gave a loan to the respondent/corporate debtor. As all post dated cheques were not honoured, the financial creditor issued letter demanding repayment of entire loan which was not replied. Thus, the financial creditor filed petition under section 7 which was dismissed. NCLT found that on 1-10-2016, the financial creditor had entered into an agreement with the corporate debtor to purchase a flat in complex which the corporate debtor was developing and in terms of said agreement outstanding dues of the corporate debtor were to be appropriated towards consideration of flat. The NCLAT agreed with view taken by the Adjudicating Authority that said agreement dated 1-10-2016 was latest in point of time and in terms of said agreement, even possession of flat had been offered in March 2018 and thus no default on part of the corporate debtor stood established in terms of said agreement.

Held that no ground to interfere with judgment of NCLT/NCLAT was found and accordingly instant appeal was to be dismissed.

***Case Review :*** Aaj Finance & Credit Ltd. v. Keltech Infrastructure Ltd. [2020] 118 taxmann.com 266/[2021] 163 SCL 62 (NCLAT - New Delhi) (para 10) affirmed.

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

- **Asset Reconstruction Co. (India) Ltd. v. Bishal Jaiswal [2021] 126 taxmann.com 200 /[2021] 166 SCL 82 (SC)**

*An entry made in a balance sheet of a corporate debtor would amount to an acknowledgement of liability under section 18 of Limitation Act.*

The corporate debtor availed loan from various lenders to set up a thermal power project. Subsequently, the account of the corporate debtor was declared as a NPA by lenders 31-7-2013. On 20-6-2015, the appellant issued a notice under section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (SARFAESI Act) and on 1-6-2016, the appellant took actual physical possession of the project assets of the corporate debtor under the SARFAESI Act. On 26-12-2018, the appellant filed an application under section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC) before the National Company Law Tribunal (NCLT). NCLT admitted section 7 application observing that the balance sheets of the corporate debtor, wherein it acknowledged its liability, were signed before the expiry of three years from the date of default, and entries in such balance sheets being acknowledgments of the debt due to the purposes of section 18 of Limitation Act, 1963, the section 7 application was not barred by limitation. In an appeal filed to the NCLAT, the corporate debtor relied upon the Full Bench judgment of the NCLAT in V. Padmakumar v. Stressed Assets

Stablisation Fund [2021] 123 taxmann.com 331 (NCL -AT) in which a majority of own members (Justice (Retd.) A.I.S. Cheema, Member (Judicial) dissenting) held that entries in balance sheets would not amount to acknowledgement of debt for the purpose of extending limitation under section 18 of the Limitation Act. After a preliminary hearing, a three-Member Bench passed an order on 25-9-2020, Bishal Jaiswal v. Asset Reconstruction Co. (India) Ltd. [2021] 123 taxmann.com 390/164 SCL 429 (NCL - AT) doubting the correctness of the majority judgment of the Full Bench and referred the matter to the Acting Chairman of the NCLAT to constitute a Bench of coordinate strength to reconsider the judgment in V. Padmakumar (supra). A five-Member Bench of the NCLAT, vide the impugned judgment dated 22-12-2020, refused to adjudicate the question referred, stating that the reference to the Bench was itself incompetent.

On appeal to the Supreme Court:

Held that an entry made in a balance sheet of a corporate debtor would amount to an acknowledgement of liability under section 18 of the Limitation Act.

***Case Review :*** V. Padmakumar v. Stressed Assets Stablisation Fund [2021] 123 taxmann.com 331 (NCL - AT) and Bishal Jaiswal v. Asset Reconstruction Co. (India) Ltd. [2021] 126 taxmann.com 199 (NCL - AT), set aside.

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

- **India Resurgence ARC (P.) Ltd. v. Amit Metaliks Ltd. - [2021] 126 taxmann.com 222 (NCL-AT)**

*Considerations including priority in scheme of distribution and value of security in resolution plan are matters falling within realm of Committee of Creditors and such business decision taken in exercise of commercial wisdom of Committee of Creditors would not warrant judicial intervention unless creditors belonging to a class being similarly situated are not given fair and equitable treatment.*

CIRP against the corporate debtor was admitted. The Adjudicating Authority by impugned order approved resolution plan submitted by the successful resolution applicant since it was approved by CoC with 95.35 percent voting shares and same did not contravene any provisions of law for time being in force and also met all requirement to be satisfied under section 30. The appellant assailed impugned order, primarily on ground that while approving the resolution plan, value and quality of security interest of the appellant was not considered by the successful resolution applicant and the committee of creditors.

Held that considerations including priority in scheme of distribution and value of security are matters falling within realm of Committee of Creditors and such business decision taken in exercise of commercial wisdom of committee of creditors would not warrant judicial intervention unless creditors belonging to a class being similarly situated were not given fair and equitable treatment. Therefore, impugned order did not suffer from any legal infirmity.

*Case Review* : Order of NCLT in Raj Singhania v. VSP Udyog (P.) Ltd. [2021] 126 taxmann.com 221 (NCLT-Kol.), affirmed.

## SECTION 33 - CORPORATE LIQUIDATION PROCESS - INITIATION OF

**Ashish Mohan Gupta v. Hind Motors India Ltd. (In Liquidation) - [2021] 127 taxmann.com 34 (NCL-AT)**

*It is not necessary to pursue section 230 of Companies Act at stage of liquidation, as same is not part of procedure of IBC and, therefore, where corporate debtor was in liquidation, appeal against order of rejection of scheme of amalgamation under section 230 was to be dismissed.*

The appellant was promoter and director of the corporate debtor against whom liquidation order was passed. The appellant moved to NCLT against the liquidation order and had proposed scheme of amalgamation under section 230. The NCLT by impugned order rejected application filed by the appellant.

Held that section 230 of the Companies Act is not part of scheme of IBC as far as Liquidation is concerned. When it is found that it is not necessary to pursue section 230 of the Companies Act at stage of Liquidation, same not being part of procedure of the IBC, when the corporate debtor is in liquidation, appeal against order of rejection of scheme under section 230 was to be dismissed.

***Case Review :*** Ashish Mohan Gupta v. Hind Motors Ltd. [2021] 126 taxmann.com 224 and Ashish Mohan Gupta v. Liquidator for Hind Motors [2021] 126 taxmann.com 223 (NCLT - Chd.), affirmed.

## SECTION 14 - CORPORATE INSOLVENCY RESOLUTION PROCESS - MORATORIUM

- ***Directorate of Economic Offences v. Binay Kumar Singhania - [2021] 127 taxmann.com 173 /[2021] 168 SCL 601 (NCL-AT)***

*Where properties of corporate debtor were seized and registered office was sealed much prior to initiation of CIRP and moratorium had been declared after properties were attached by Directorate of Economic Offences (DEO) and produced before Designated Court of Economic Offences, section 14 of IBC had no overriding effect and properties could not be detached for purpose of liquidation.*

Pursuant to an application under section 9, CIRP against the corporate debtor was initiated and the liquidator was appointed. However, Directorate of Economic Offences (DEO) had sealed registered office of the corporate debtor and attached bank accounts for fraudulent transactions in terms of section 3 of West Bengal Protection of Interest of Depositories in Financial Establishment Act, 2013. The liquidator filed an application under section 33(5) stating that

documents kept in registered office were essential to conduct liquidation process. The NCLT by impugned order directed the DEO to de-attach all properties attached and to restore possession thereof to the liquidator.

Held that since properties of the corporate debtor were seized and registered office was sealed much prior to initiation of CIRP and moratorium had been declared after properties were attached by the DEO and produced before Designated Court of Economic Offences, section 14 of the IBC had no overriding effect on section 3 of WBPIDFE Act. Director of the corporate debtor and property of corporate debtor could not get immunity from prosecution and, therefore, attached property, which was confiscated by Designated Court of Economic Offences, could not be deattached. Further attached property was not in possession and control of DEO, therefore DEO could not de-attach property which was already confiscated by Designated Court of Economic Offences. Therefore, impugned order was not sustainable in law and, same was to be set aside.

***Case Review :*** Binay Kumar Singhania v. Directorate of Economic Offences, Government of West Bengal [2021] 126 taxmann.com 219 (NCLT - Kolkata), set aside.

## SECTION 238 - OVERRIDING EFFECT OF CODE

- **Raman Roadways (P.) Ltd. v. *State of Maharashtra - HIGH COURT OF BOMBAY -* [2021] 127 taxmann.com 187 (Bombay)**

*IBC has overriding effect under section 238 read with section 53 thereof which will prevail over any demand made under section 8 of Maharashtra Motor Vehicles Taxation Act, 1997.*

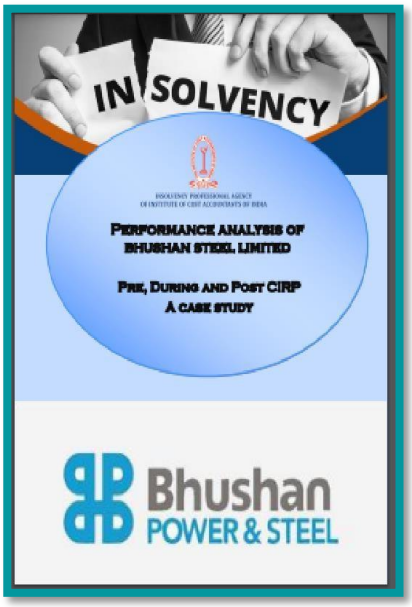
The NCLT admitted section 7 application filed by the Punjab National Bank against corporate debtor a logistic company. By its order dated 19-11-2018, the NCLT ordered liquidation as regards the corporate debtor upon the unanimous resolution passed by the Committee of Creditors (CoC) and appointed Respondent No. 4 as a liquidator. Several secured creditors furnished their certificate for relinquishment of security interest as regards to immovable and movable assets of the corporate debtor which included the hypothecated subject vehicles. Respondent No. 4 as liquidator had taken custody and control of subject vehicles and it conducted auctions of many vehicles including the 153 subject vehicles belonging to the corporate debtor. Respondent No. 3 issued demand notice in the name of Respondent No. 4 seeking payment of tax under the Maharashtra Motor Vehicles Taxation Act, 1997. The tax demand was in respect of 161 vehicles. Respondent No. 4 in reply to said demand notice stated that the Respondent No. 4 had sold the vehicles pursuant to the auction conducted. The dues of the statutory department which included Respondent No. 3 could only be paid/settled in accordance with section 53(e)(i) and section 53(f) of IBC. An Application for non-user of the 153 vehicles was filed by the petitioner under section 3(3) of the MMVT Act. Pursuant to the Application of the petitioner, Respondent No. 3 carried out inspection in relation to 93 vehicles. Thereafter, Respondent No. 3 issued another demand notice for tax stated to be due on 1-12-2014 to 31-8-2020. Pursuant to the demand notice, Respondent Nos. 2 and 3 blacklisted all 153 subject vehicles purchased by the Petitioner. Thereafter, the Petitioner addressed a Representation to the Respondent No. 3 seeking transfer of the subject vehicles after referring to the facts leading to the purchase of the subject vehicles by the Petitioner under the IBC. It

was mentioned in the Representation that the subject vehicles were not in use. Thereafter, Respondent No. 1 issued a notification exempting payment of road tax under MMVT Act for a period on and from 1-4-2020 until 30-9-2020 i.e. during the pandemic. Being aggrieved by the action of Respondent Nos. 1 to 3 of not transferring ownership of the subject vehicles purchased by the Petitioner in the auction by Respondent No. 4 and the issuance of the tax demand notices, the petitioner filed the instant Petition.

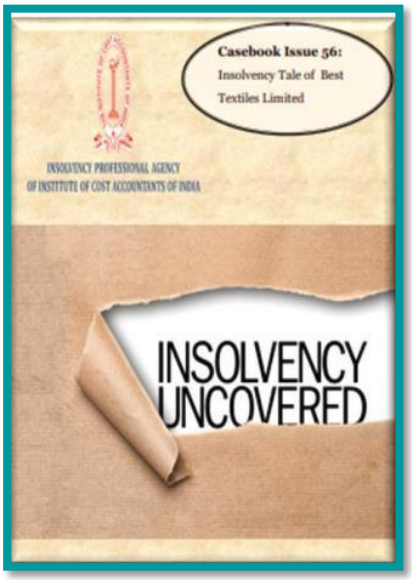
Held that IBC has overriding effect under section 238 read with section 53 thereof which will prevail over any demand made under section 8 of the MMVT Act, 1997. Provisions of the IBC make it clear that statutory dues which come within meaning of 'operational debt' can be claimed against the corporate debtor in liquidation only under provisions of the IBC. These claims are necessarily to be lodged with liquidator and payable under waterfall mechanism provided in section 53 of the IBC. Therefore, where the liquidator had sold certain vehicles of the corporate debtor, however, there were certain dues of Transport Authority pending against the corporate debtor, it would be open for the Transport Authority to lodge their claims before the Liquidator and their claims could only be satisfied under waterfall mechanism for payment as provided for in section 53 of the IBC. Transport Authority could not have raised demands of tax against auction purchaser having purchased vehicles of the corporate debtor in auction by the liquidator.

# PUBLICATIONS

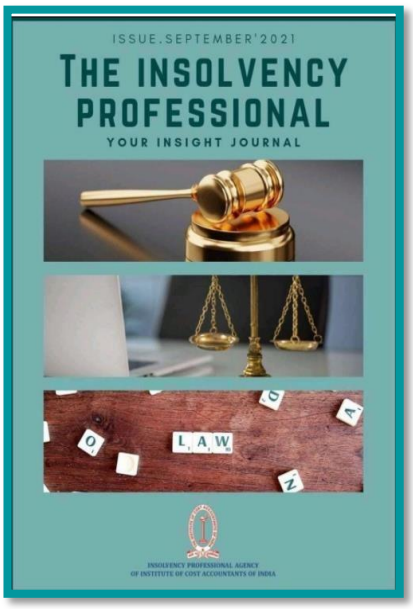

IBC AU COURANT




SUCCESS STORY




CASE BOOK

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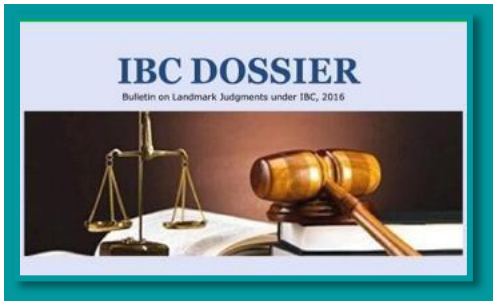


IBC DOSSIER

# GALLERY

## PROGRAM IN PUNE

## PROGRAM IN MUMBAI


## FELICITATION OF DR. NAVRANG SAINI, WTM-IBBI BY DIRECTOR OF IPA ICAI

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

- ✓ ***The article should be original, i.e., not published/broadcasted/hosted elsewhere including any website. A declaration in this regard should be submitted to IPA ICAI in writing at the time of submission of article.***
- ✓ ***The article should be topical and should discuss a matter of current interest to the professionals/readers.***
- ✓ ***It should preferably expose the readers to new knowledge area and discuss a new or innovative idea that the professionals/readers should be aware of.***
- ✓ ***The length of the article should be 2500-3000 words.***
- ✓ ***The article should also have an executive summary of around 100 words.***
- ✓ ***The article should contain headings, which should be clear, short, catchy and interesting.***
- ✓ ***The authors must provide the list of references, if any at the end of article.***
- ✓ ***A brief profile of the author, e-mail ID, postal address and contact numbers and declaration regarding the originality of the article as mentioned above should be enclosed along with the article.***
- ✓ ***In case the article is found not suitable for publication, the same shall not be published.***

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