THE INSOLVENCY PROFESSIONAL

YOUR INSIGHT JOURNAL

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

OVERVIEW

Insolvency Professional Agency of Institute of Cost Accountants of India (IPA ICAI) is a Section 8 Company incorporated under the Companies Act -2013 promoted by the Institute of Cost Accountants of India. We are the frontline regulator registered with Insolvency and Bankruptcy Board of India (IBBI). With the responsibility to enroll and regulate Insolvency Professionals (IPs) as its members in accordance with provisions of the Insolvency and Bankruptcy Code 2016, Rules, Regulations and Guidelines issued thereunder and grant membership to persons who fulfil all requirements set out in its byelaws on payment of membership fee. We are established with a vision of providing quality services and adhere to fair, just and ethical practices, in performing its functions of enrolling, monitoring, training and professional development of the professionals registered with us. We constantly 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 CHAIRMAN'S DESK

Ever since the Hon'ble Finance Minister made an announcement in her Budget Speech - 2021-22 about setting up a bad bank to take over the stressed assets of the banks and cleansed their balance sheets, the banking fraternity has been waiting anxiously for the eventual start of such a bank. True to its promise, FM kept up her promise and the National Asset Reconstruction Company Ltd (NARCL) got all regulatory approvals from RBI in the month of January 2022 to commence its operations. Shri Natarajan Sundram, former Deputy Managing Director of State Bank of India was appointed as a full time Managing Director & Chief Executive Officer of NARCL in the month of April, 2022. Shri Karnam Sekar, former Deputy Managing Director, who retired from Indian Overseas Bank as Managing Director was appointed as a Non-Executive Chairman and Independent Director of the Bad Bank.

The Bad Bank has got a Capital of Rs.1,500 crore contributed largely by Canara Bank (12%), SBI, Union Bank of India, Bank of Baroda and Indian Bank (9.90% each), ICICI(5%), Bank of Maharashtra, IDBI(5% each), UCO Bank (4%) and Indian Overseas Bank, Axis Bank and HDFC have taken 3% each. Canara Bank a leading public Sector Bank holding highest share of the Capital of NARCL has been designated as a Sponsor Bank.

The objective of starting NARCL was to aggregate and consolidate stressed assets of the banks and financial institutions for their further resolution and to alienate illiquid and risky assets held by the banks/FIs. The lenders had initially identified 38 accounts amounting to about Rs. 83,000 crore to be transferred to NARCL in a phased manner. The NPAs amounting to Rs.50,000 crore were expected to be transferred in Phase I by 3q.3.2022. But owing to the procedural delays, these accounts could not be transferred and continue to symbolically decorate the Balance sheets of the respective banks. The NARCL is required to quote its price for takeover of each of the NPAs on offer. If it meets the acceptance of the concerned banks, the NARCL would make an upfront payment of 15% of the agreed amount/price and for the balance amount of 85% the NARCL would issue the security receipt for a tenor of 5 years backed by the guarantee of the Government of India.
The discount amount on the NPAs or the haircut component would be sought to be written off immediately so as to clean the balance sheet of the Bank.

It is a common understanding that almost all the major banks in the country have subscribed to the equity of the NARCL and are also amongst the beneficiaries of the "Operation Clean Up" of the banks' balance sheets. Most of the targeted account are either the lending under the Consortium or Joint Lenders Forum. Hence the Board Members of the NARCL being from participating banks may be familiar with the nature of the NPA, underlying security and the prospects and extent of recovery through this process of NARCL which would have the advantage of entering into an agreement with the Indian Debt Resolution Company Ltd. (IDRCL) to handle Debt Resolution Process. The major shareholding of IDRCL to the extent of 52% will be under the control of Private Sector Banks and it's Sponsor Bank is expected to bring in superior resolution techniques, preserve the value and show case the brown field assets while also attracting domestic and foreign investments.

It is in this back drop that NARCL has made its offer of Rs. 60 crore to take over a total loan portfolio of Rs. 2,623 crore of Consolidated Construction Consortium Ltd. This offers translates to less than 3% of the dues of the bank. It would involve a direct haircut of more than 97%.

Such a low offer has not only made the other channels of resolution of debts more preferable for the banks, but has also stunned the banking fraternity about the practicability and viability of the proposed mechanism of NARCL to help the banks. It is pertinent here that the promotor had earlier offered a sum of Rs. 195 crore amounting to 7.5% recovery for the banks. But the banks rejected the offer of the promotor as it was considered too low vis-a-vis the realizable value of the underlying assets and securities.

In another case of Rainbow Papers, NARCL has offered Rs.80 crore against the total outstanding dues of Rs.1,136 crore which translates to hardly 7% of the dues. This offer of NARCL is considered insignificant as the borrowers had offered a settlement at Ra. 632 crore in the year 2019 itself which was not acceptable to the banks. The offer amount in both the cases is much lower than the liquidation value.

If the intention of the Government and the Board of Directors of the NARCL are to get in and continue in the business of takeover and eventual resolution of the stressed assets of the banking industry, they have to be realistically in their approach lest they are ignored by the banks as the players of any consequence in an otherwise crowded channels of recovery of NPAs available in the eco system. NARCL should ward against its being construed as an entity, instrumental to prompt the banks to accept the low offers of the promotor as being better than that of the NARCL's offer. It should be the conscious responsibility of every recovery mechanism in our eco system to safeguard the public savings and minimize the loot at the hands of miscreant Corporate Debtors.

Let's wait for better days in the very near future where both the Creditors and the Insolvency Professionals remain relevant to the Debt Resolution Process by making IBC 2016 a resounding success through the improved efficiency in its operations - both in terms of realizable amount and also its timeliness.

Warm Regards,

Dr. Jai Deo Sharma,

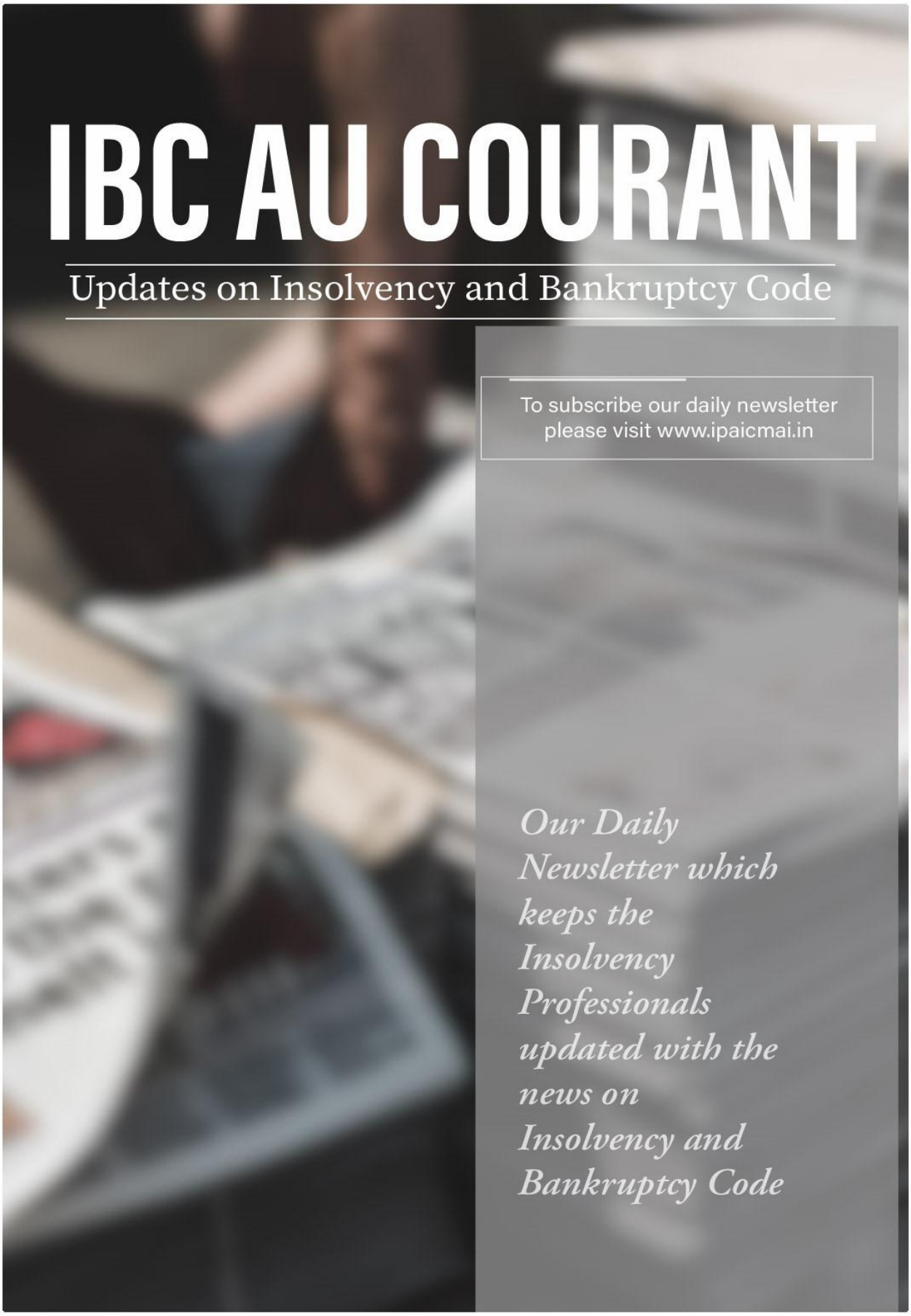
Chairman, IPA ICAI

PROFESSIONAL DEVELOPMENT INITATIVES

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

EVENTS

JULY'22	
01st – 3rd July'22	Master class on Liquidation
9th July'22	Workshop on Mediation within India's Insolvency Framework
16th – 17th July'22	Learning Session on Committee of Creditors: An Institution Public faith
22nd July'22	Workshop on Challenges Faced by RPs in Implementation and approval of Resolution Plan
29th July'22	Workshop on Treatment of Contingent Liabilities under IBC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ARTICLES

THE INSOLVENCY PROFESSIONALS ARRANGEMENT -OPTIMAL UTILISATION AND PERFORMANCE

Mr. Padmanabhan Nair
Insolvency Professional

The objective of this article is to explore the overall effectiveness of the IP/IPE network in shortening timelines and ensuring quality outcomes which are permanent, lasting and good for the economy at large. The evaluation of IP experience and better utilisation of the same as well as evaluation on quality cum cost basis rather than mere cost would help greatly. NOTHING in this article is being put forward which does not benefit the system at large. These suggestions if implemented, further the key objectives of the IBC code in a much better fashion-Resolution of companies, optimal realisation and shortening of resolution time frame. Much of this is already being implemented in countries with similar systems such as UK, USA, Canada and Singapore. It is hoped that India would move gradually along this path for the betterment and ***substantial optimisation*** *of this process.*

Introduction

Given that 5-6 years have passed re the insolvency process ,it is time to reflect on the various aspects of the network which would include the IBBI,NCLT and Information utilities along with the IP's/IPE support systems. A lot of attention has been paid to rules and regulations and the vacancies at NCLT all of which are critically important. But what about the people who put it together i.e. the IP supported by a good IPE **That represents the moving and coordinating part, the operational "supply chain"** which affects the functioning of the other three parts quite sizeably. However this segment of the four pillar network of IBC is easy to neglect as it does not reflect a powerful institution-rather a loose set of professionals run by relatively small agencies and a bunch of small companies with a low capital base. This is simply the factual situation.

Up to now the experience(of many IP's) **has been of regulation /supervision** and some training by the IBBI and respective IPA's .But the emphasis has definitely been of supervision and finding lacunae in the functioning of IP's. Some of this may be true but a lot of it prevents the IP from doing his or her job properly. **If you have to keep reporting each and everything back then there is little leeway to exercise initiative or use relevant experience**. If you look at the profile of IP's a lot of them are very experienced people who are in their post retirement phase. Many of them have held very senior positions in various institutions of repute and surely can be utilized better and given more independence of action. **It is beneficial to the system as a whole.**

Given that the objective of the code **is basically to REVIVE the corporations and ensure value maximization to the financial creditors** better utilisation of the IPIPE system would need to be looked at ,particularly the way in which they could integrate to provide a **better experience of the**

whole system-IBBI/NCLT/CoC of bankers and financial creditors et all. That is the core purpose of this paper. A lot of time has passed unfruitfully during the two years of COVID, it is essential to speed up the process and revive the MSME's in particular. And to utilize the skills of the IP's by giving them a bit of leeway in innovating and arriving at creative solutions to resolve matters. The pre-pack process whilst welcome could be a lot freer flowing as it is in most developed countries like the UK/USA. Sure there would be a few irregular transactions but that is part of the process**. If everything is strictly rule based we are not going to arrive at too many solutions of what is inherently a difficult process anyway.** A more open system with sizeable freedom to act is much better and strong focus can be on those major actions which are prone to substantial irregularities and fraud-The IBBI can monitor these much better and hand out exemplary punishment if they are few in number and not hidden in a mass of "petty misdemeanors".

Right now there is far too much reporting and less time to actually devote to speeding up the process and enhancing its quality.80% of this reporting is just "paperwork" and does not cause any substantial negative impact. It wastes the time of IBBI officials also-Time which should be used to push up major parameters such as time and value realisation and catch very clear frauds, irregularities and major operational faux pas…..At present, there is so much attention to paperwork and routine reporting that the serious deviations are probably not getting the attentions that they deserve both at the IBBI and NCLT. One can have an attention span of only so much before the focus begins to waver in any person.

As mentioned earlier, there will be misuse in any realistic and practical situation. The aim is to keep it down to less than 5-10% so that the positive gains outweigh the mishaps and errors. There are also a lot of actions which are taken in good faith to enhance the process where the IP derives no personal benefit but is merely speeding up and enhancing the quality of the process. Such examples could be marketing and selling the resolution plan using good offices and contacts, hiring experts who one knows can do an excellent job (which means that the person is known) for example in valuation and claims management, clearing small operational expenses because that keeps the company viable and employees motivated etc.

Nobody denies the fact that maximum 5-10% of transactions would be irregular often with wilful intentions/collaboration with the CD etc. But that happens everywhere and at all time. The purpose of this paper is to point out that many of the IP's are people with enormous corporate and organizational skills and that their seniority, expertise and qualifications should be used for the greater good, and that can only be done if the IBBI

i) Reduces the enormous amount of reporting and punitive fines

ii) Looks to **categorise and segregate the IP list based on expertise and seniority**

iii) Gives differential leeway to differing categories rather than just lumping IP's in one box

The same would apply to the IPE's. **There are a lot of IPE's with a wide range of services** and much of the work done "in-house" and many which outsource practically everything. The former gives excellent value to the system at large as able back up processing helps get the process moving forward properly and with minimum litigations and fuss.

Thirdly it is an appeal to the banks to add up points of the IP+IPE when evaluating suitability. A moderate IP can do a very good job if the IPE has expertise.

At the end of the day, the whole purpose of this exercise is to get

i) Maximum resolutions with highest possible collection rate for the creditors

ii) Shorten the resolution time period as much as possible

iii) Ensure that the rejuvenated company has a bright future and can contribute to the economy at large whilst giving good **running business** to the creditors and suppliers. That is what we all want.

Fees & prompt payment

Another important aspect is the remuneration to IP's. Experienced IP's are used to minimum 2-3 lacs a month for a full days job. Here there is responsibility, stress and the hostility of existing management. The capability to deal with a hostile management and still get the job moving is a special skill, born of much experience. Handling the management properly saves much time and one cannot keep resorting to Section 19 unless absolutely necessary. All this also reduces the burden of the NCLT and allows them to concentrate on important cases, with better quality judgments as a result.

Two aspects are there

i) The quantum of the fee and
ii) The regularity of the fee.

We would discuss both aspects

Regarding the quantum of the fee we cannot allow a bidding system which follows a "beggar thy neighbor" approach to the lowest common denominator. The Banks naturally would like to have the most objective parameters in order to avoid audit and other queries. But the problem is that the quotes get lower and lower as some IP's would be anxious to get an assignment at any cost to start their careers in this field. That is natural but does not serve the ultimate purpose of either the financial creditors or the code at large. Qualitative systems must come in place through objective criteria especially the handling of stressed assets even prior to the code (where it was much more difficult) and its resolution including mergers, acquisitions and joint ventures. All this is relevant to resolving the stressed assets not merely understanding of rules and procedures.

The quantum of the fee is also important and should be matched with the salaries that such professionals would earn on the regular job. Otherwise why would they leave and join this profession? Unduly high and unduly low fees should be avoided. In this context, the proposal to keep the minimum fixed fee at 1.5 lacs per month is welcome. The proposal to provide a variable incentive is also a progressive move as it is linked to realisations .However, The IP can influence this only to some extent by getting good resolution applicants so the fixed fee is very necessary as there is a lot of procedural work anyways.

However the presence of a decent variable would naturally incentivize the IP to strive for the best applicant. There are enough safeguards such as the clearing of the eligibility criteria etc. to prevent gross malpractices in this regard.

Right now the IP's get credit only when they are in charge of an assignment. Why not allow them to participate under another experienced IP and get partial credits for the same? That would be highly productive because the relatively junior IP's without support systems and financial backing can work for the really senior IP's with major assignment and gain valuable experience **which would be of immense value to the system when they get their own individual assignments. Just imagine the improvements to a system where close to 3000 IP's are improving their skills on daily basis!**

Discipline

No system can of course function without a proper code of discipline and if the abovementioned measures are undertaken **the really serious cases of indiscipline** can be undertaken by IBBI the IPA and maybe NCLT with the thoroughness that they deserve. This would discourage would be defaulters to go easy on the same. Nothing is perfect but this concentration on serious cases of indiscipline would surely reduce the amount of such incidents to 5-10% or less. **The issue is of wilful discrepancies.** We are all new in this game and by and large, anxious to move the things forward. A few mistakes will be made but are they WILFUL mistakes caused by some personal considerations to the IP that is the key to success of this venture.

The identification of what is "gross malpractice" should be codified and should constitute what is clearly malpractice and not a litany of small errors, causing insecurity in the IP and preventing focus on maximum value realisation.

A robust support system is vital and in this context the attempt to further strong IPE's as IP's themselves is welcome. Resolution is a complex process-we need strong companies who have multifarious skills to provide a strong, robust and continuous process till the resolution. Single Individuals cannot do this. An individual may fall sick, have various personal commitments and definitely not have the complete set of skills in valuation, audit, claim resolution, preparation of IM etc. The firm covers all of these to a great extent. It also gives part time roles to various IP's who would gladly accept **if they could be credited with the experience. After all Rome was not build in a day. Let the system become robust through evolution and gradual buildup of experience.** Much of this is already being implemented in countries with similar systems such as UK, USA, Canada and Singapore. It is hoped that India would move gradually along this path for the betterment and **substantial optimisation** of this process.

Is it mandatory for NCLT to admit CIRP under section 7(5)(a) of IBC or it is discretionary in nature?

Mr. Sunil Kumar Gupta
Insolvency Professional

This article deals with the power to admit application filed under section 9(5)(i) vs. 7(5)(a) by NCLT with reference to the recent Supreme Court Judgment in the case of Vidarbha Industries Power Limited v. Axis Bank Limited. In this case, the bench of Indira Banerjee and JK Maheshwari, has rejected the view of NCLT and NCLAT that once it is found that a debt existed, and a Corporate Debtor is in default in payment of the debt there would be no option to the Adjudicating Authority (NCLT) but to admit the petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC).

Background:

Section 7 Application under IBC, 2016, was filed by the respondent financial creditor, Axis Bank, before NCLT Mumbai, against the Appellant Corporate debtor, due to default in payment tune to Rs.553,27,99,322.78, inclusive of the interest charged therein.

The appellant filed a stay application on the ground that appeal was filed by (Maharashtra Electricity Regulatory Commission) MREC against the order dated. 3rd November 2016 passed by Appellate Tribunal for Electricity (APTEL) in favor of the Appellant, which is pending in the Supreme Court, and thus unable to realize the sum of tune Rs. 1,730 Crores, which is due and payable to the Appellant. Thus, the current situation's abruptness is not because of its own fault but due to the statutory authorities.

NCLT simply brushed aside the case of the Appellant that an amount of Rs.1,730 Crores was realizable by the Appellant in terms of the order passed by APTEL in favour of the Appellant, with the cursory observation that disputes if any between the Appellant and the recipient of electricity or between the Appellant and the Electricity Regulatory Commission were inconsequential.

Referring to the judgment in **Swiss Ribbons v. Union of Indian, (2019) 4 SCC 17**, the NCLT held that the imperativeness of timely resolution of a Corporate Debtor, who was in the red, indicated that no other extraneous matter should come in the way of expeditiously deciding a petition under Section 7 or under Section 9 of the IBC.

NCLAT affirmed the NCLT's finding while observing that NCLT was only required to see whether there had been a debt and the Corporate Debtor had defaulted in making repayment of the debt, and that these two aspects, if satisfied, would trigger the CIRP.

Subsequently, appeal was filed before the Apex Court.

Appellant grounds/arguments:

The nature of the business of the Appellant, cannot be under the ambit of IBC, hence the application should not be admitted

Section 7 (5)(a) IBC, 2016 read with Rule 11 NCLT Rules,2016, which clears that NCLT while examination of the existence of debt has the discretion to admit or not admit the application.

It is noteworthy to analyze that word 'may' used in Section 7(5) IBC, 2016, must be interpreted to say that it is not mandatory for the Adjudicating Authority to admit every application where there is the existence of debt, subsequently it also important to go through the intent of legislature over the particular issue is clear as it has used 'may' rather than 'shall'.

The respondent, in response to the contentions of the Appellant, stated that Appellants admitted the default of the payment. Further, they contested that, IBC cast a mandatory obligation on the Adjudicating Authority to admit an application of the Financial Creditor, under Section 7(2), once it is found that the Corporate Debtor had committed default in repayment.

SC Ruling:

Hon'ble Apex Court noticed that firstly, there are noticeable differences between the procedure of filing application by Financial Creditor and filing application by Operational Creditor under the code, prescribed under Section 7 and Section 9, IBC, 2016 respectively. Therefore, in case of an application filed by a Financial Creditor, the Adjudicating Authority may examine the expedience of initiation of CIRP, by taking into account all relevant facts and circumstances, including the overall financial health and viability of the Corporate Debtor, thereafter in its discretion admit/not admit the application of a Financial Creditor, as contrary to the provisions written in section 9(2), IBC, 2016.

Purposefully, Legislature used the word 'may' in Section 7(5)(a) of the IBC,2016 related to the initiation of CIRP by Financial Creditor but has used the expression 'shall' in the otherwise almost identical provision of Section 9(5) of the IBC relating to the initiation of CIRP by an Operational Creditor.

Thus, IBC confers discretionary power on the Adjudicating Authority under Section 7(5)(a), IBC,2016, which, however, should not be exercised arbitrarily or capriciously.

The Court observed there can be no doubt that a Corporate Debtor who is in the red should be resolved expeditiously, following the timelines in the IBC. No extraneous matter should come in the way. However, the viability and overall financial health of the Corporate Debtor are not extraneous matters.

On NCLT's finding that the dispute of the Corporate Debtor with the Electricity Regulator or the recipient of electricity would be extraneous to the matters involved in the petition, the Court observed that while the disputes with the Electricity Regulator or the Recipient of Electricity may not be of much relevance, an award of the APTEL in favour of the Corporate Debtor, cannot be

completely be disregarded by the NCLT, when it is claimed that, in terms of the Award, a sum of Rs.1,730 crores, that is, an amount far exceeding the claim of the Financial Creditor, is realisable by the Corporate Debtor.

Both, the Adjudicating Authority (NCLT) and the Appellate Tribunal (NCLAT) proceeded on the premises that an application must necessarily be entertained under Section 7(5)(a) of the IBC, if a debt existed and the Corporate Debtor was in default of payment of debt. In other words, the Adjudicating Authority (NCLT) found Section 7(5) (a) of the IBC to be mandatory. The Adjudicating Authority (NCLT) was of the view that Section 7(5)(a) did not admit any other interpretation, with which the Appellate Tribunal (NCLAT) agreed. The Appellate Tribunal (NCLAT) affirmed the finding of the Adjudicating Authority (NCLT) that the Adjudicating Authority was only required to see whether there had been a debt, and the Corporate Debtor had defaulted in making the repayments. These two aspects, when satisfied, would trigger Corporate Insolvency.

The Court, hence, set aside the NCLAT and NCLT orders and directed NCLT to re-consider the application of the Appellant for stay of further proceedings on merits in accordance with law.

Takeaways:

Section 9(5)(i) vs. Section 7(5)(a) of IBC:

The Adjudicating Authority have discretionary power to admit the application of a Financial Creditor filed u/s 7. However, Section 9(5)(i) is mandatory, almost there are identical provision relating to the initiation of CIRP by an Operational Creditor.

However, such discretionary power cannot be exercised arbitrarily or capriciously. If the facts and circumstances warrant exercise of discretion in a particular manner, discretion would have to be exercised in that manner.

The object of the IBC is to first try and revive the company and not to spell its death knell. This objective cannot be lost sight of, when exercising powers under Section 7 of the IBC or interpreting the said Section.

Conclusion:

It is a very relevant case, provide relief where default is temporary or due to any specific reasons. Simply a mere default is not a reason to admit CIRP application. The said judgment may also adversely impact on recovery of NPA Bank / Financial Institution because it will be a fresh defense that can be taken by a Corporate Debtor against the initiation of insolvency proceedings against it by a financial creditor, especially in cases where an award or decree exceeding the default amount is already passed in the Corporate Debtor's favour and such award or decree is either pending an execution or an appeal against such decree or award is filed by the Award-Debtor or Judgment-Debtor. It also seems that there would be an additional responsibility on the NCLT to examine the financial health of corporate debtor who is in default. This may trigger delay in resolution under

IBC. Bigger question is how the NCLT will access the financial health? Whether it would rely on the audited financial statement of the CD or to provide instruction to get access it from some independent professional.

It would be interesting to see how the Supreme Court's judgment impacts the pending petitions filed under Section 7 of the Code before the NCLTs and how NCLT/NCLAT will take the view if application is pending under both the sections.

Principles of Natural Justice, IBC and the CIRP

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CA & Insolvency Professional

In this article, we understand the various principles of natural justice, its relevance and applicability to some of the matters falling under the scope of the Insolvency and Bankruptcy Code, 2016, and then summarily understand the processes during the Corporate Insolvency Resolution Process where the principles need to be respected by the Interim Resolution Professional/ the Resolution Professional.

INTRODUCTION

Let's start with the 3 Principles of Natural Justice. They are –

1 - *"Nemo judex in causa sua".* This is the Rule against bias, effectively means no one should be a judge in his own case.

2 - *"Audi alteram partem".* This is the Rule of fair hearing, effectively means no party should be unheard.

3 - Reasoned Decision. This is the Rule of providing reasons or justifications to the decision, i.e., a Speaking Order, effectively removing arbitrariness in decision making.

Supreme Court throughout various judicial pronouncements has emphasized the importance of principle of natural justice in a welfare state, like India. The gravity of principle of natural justice is in the assurance of a fair trial provided to persons as a matter of right. In **Maneka Gandhi v. Union of India**, the Supreme Court held that even if the procedure established by law is right, fair and just but it can be set aside on being arbitrary or on not being reasonable.

In **A.K. Kraipak v. Union of India**, the Supreme Court Held:

"*The rules of natural justice operate in areas not covered by any law validly made, that is, they do not supplant the law of the land but supplement it. They are not embodied rules, and their aim is to secure justice or to prevent miscarriage of justice. If that is their purpose, there is no reason why they should not be made applicable to administrative proceeding also, especially when it is not easy to draw the line that demarcates administrative enquiries from quasi-judicial ones, and an unjust decision in an administrative enquiry may have a more far-reaching effect than a decision in a quasi-judicial enquiry."*

Now, lets examine the standing of **the Principles of Natural Justice in the context of the Code**.

Section 424 (1) of the Companies Act, 2013 reads as –

Procedure Before Tribunal and Appellate Tribunal

"The Tribunal and the **Appellate Tribunal** shall not, while disposing of any proceeding before it or, as the case may be, an appeal before it, be bound by the procedure laid down in the Code of Civil Procedure, 1908, but shall be guided by the principles of natural justice, and, subject to the other provisions of this Act or of the Insolvency and Bankruptcy Code, 2016 and of any rules made thereunder, the Tribunal and the Appellate Tribunal shall have power to regulate their own procedure."

The use of the phrase 'any proceeding' in the Section means this provision covers all proceedings before the Tribunal and not just the ones under the Companies Act, 2013. Thus, all proceedings under the Insolvency and Bankruptcy Code, 2016 also get covered under Section 424 (1).

In **Sree Metaliks Limited & Anr. v. Union of India and Anr.**, moved before the Calcutta High Court, the petitioner challenged the constitutionality of Section 7 of the Insolvency and Bankruptcy Code, 2016 ('IBC') and the related Rules, on the ground that Section 7 does not afford an opportunity of hearing to the corporate debtor in a Section 7 petition. Therefore, it violated the principles of natural justice. The Hon'ble High Court addressed the application of Principles of Natural Justice in an NCLT/ NCLAT proceeding and other pertinent points as hereunder-

1. Silence of the IBC on following Principles of Natural Justice in S. 7 proceeding The High Court held that the NCLT and the NCLAT are empowered to hear a Section 7 petition and an appeal against the same, respectively, under the scheme of the IBC. The constitution of the NCLT/NCLAT is derived from the Companies Act 2013 ('2013 Act'), under which, while disposing of any proceeding before them, they are not bound to follow the procedure under the Code of Civil Procedure 1908 ('CPC'). They have the liberty to regulate their own procedure, subject to the provisions of the IBC, the 2013 Act and the rules made pursuant to them. The IBC as well as the rules made thereunder are mute on the right of the respondent debtor to be heard on a Section 7 petition."

2. Adherence to Principles of Natural Justice necessary in light of Section 424, Companies Act.

However, the High Court held that Section 424 of the 2013 Act mandates the NCLT/ NCLAT to abide by the Principles of Natural Justice above all. A Section 7 proceeding may result in insolvency declaration of the respondent that may ultimately lead to liquidation. These will have drastic consequences for the respondent debtor; hence, he cannot be condemned unheard.

3. Principles of Natural Justice necessary for the determination of 'default' under Section 7

Further, the High Court held that the determination of 'default' is crucial for a Section 7 petition to succeed. This requirement necessitates that a reasonable opportunity must be given to the respondent debtor to contest the claim of 'default', before the petition is admitted. Pertinently, a Section 7 proceeding is adversarial in nature, so that also necessitates a reasonable opportunity of hearing be given to the respondent debtor.

4. Principles of Natural Justice to be read into a law in absence of express wordings ousting the same

The High Court further held a point of law that the Principles of Natural Justice should be read into a law if (a) the law silent about the right to fair hearing, and (b) it does not expressly oust the Principles of Natural Justice. Applying it to the IBC, the court had already discussed that the IBC is silent on affording a reasonable hearing opportunity to the respondent debtor in a Section 7 proceeding. Further, regarding the second condition, IBC does not also oust the Principles of Natural Justice, as evident from Section 7(4) of the IBC and Rule 4 of the Rules. Rule 4(3) requires the financial creditor bringing in the Section 7 petition to send a copy of the application to the registered office of the respondent debtor.

5. Adherence to Principles of Natural Justice not necessary in every situation The High Court further discussed that the NCLT/ NCLAT are not, in every situation, required to provide a reasonable opportunity of hearing to the respondent. There may be cases where they pass ex-parte ad-interim orders against a respondent. However, in such situation, the NCLT/ NCLAT must record the reasons for not following the Principles of Natural Justice and must thereafter provide that opportunity to the respondent before confirming the ex-parte ad-interim order.

Based on the above, the Hon'ble Calcutta High Court concluded that Section 7 proceedings do not violate the Principles of Natural Justice, and hence are not unconstitutional. Further, on specific facts, the High Court held that the petitioner would be free to approach the NCLT/ NCLAT regarding the impugned order of admission and highlight that the NCLT/ NCLAT are bound to follow the Principles of Natural Justice.

Rule 34 (1) of the National Company Law Tribunal Rules, 2016 is noteworthy at this stage. It states as follows:

"In a situation not provided for in these rules, the Tribunal may, for reasons to be recorded in writing, determine the procedure in a particular case in accordance with the Principles of Natural Justice."

In **Ravi Ajit Kulkarni vs. State Bank of India** (Company in Appeal (AT) (Insolvency) No. 316 of 2021) before the Hon'ble NCLAT, the Appellant claimed that no notice of hearing was issued by the Adjudicating Authority nor by the Advocate of Respondent giving intimation with regard to date of hearing of the matter. The issue raised was whether the Adjudicating Authority failed to issue notice to the Appellant and thus Principles of Natural Justice were not followed.

Though, considering the facts of the case, the impugned order of the Adjudicating Authority was not completely set aside, the Hon'ble Appellate Tribunal has remarked the following in its judgment –

"… However, considering the judgment of the Hon'ble Supreme Court in the matter of 'Swiss Ribbons', it appears to us that keeping Principles of Natural Justice in view, limited notice of the application should be given to the Personal Guarantors of the Corporate Debtors. The limited notice has to be only to secure presence of the Personal Guarantor referring to the Interim Moratorium which has commenced…"

Now, that it is amply clear that the Principles of Natural Justice shall apply to judicial/ quasi-judicial proceedings and matters under the Code, let's examine whether an IRP/ RP is required to take cognizance of its applicability while acting as such during a CIRP.

Role of Insolvency Professionals

The Hon'ble Supreme Court has held in the Swiss Ribbons matter that the resolution professional is given administrative as opposed to quasi-judicial powers.

However, what emerges from the case **A.K. Kraipak v. Union of India**, cited above, is that despite there being differences and distinctions between the Quasi-Judicial and Administrative powers/ processes, both procedures cast a duty to act fairly. This duty arises from the same general principles, as do the rules of natural justice. Even if If the proceeding is of quasi-judicial or administrative nature, it must adhere to the Principles of Natural Justice and fairness. The fairness in action creates the transparency in the system, which in turn builds the trust of the stakeholder in the system.

Therefore, the IRP/ RP, while performing administrative functions, should adhere to the principles of natural justice. Three key functional areas during the CIRP, where the application of the principles of natural justice can be vouched for, are as follows –

1 - Publication of notice

Regulation 6(2)(b) requires the public announcement to be published in one English and one regional language newspaper **with wide circulation** at the location of the registered office and principal office, if any, of the corporate debtor and any other location **where in the opinion of the interim resolution professional**, the corporate debtor conducts material business operations.

The IRP must ensure that the newspapers selected for publication have 'wide' circulation, so as to reach out to maximum possible creditors of the corporate debtor, giving them opportunity to file their claims. The IRP is also required to decide on other locations for publications, where, in his opinion, effectively, some creditors of the corporate debtor may get opportunity to learn about the start of insolvency resolution process of the corporate debtor and the call to submit their claims.

Though, there is no regulatory obligation on the IRP/ RP to apprise the creditors of the call to submit their claims, it is in spirit of the principles of natural justice that all the creditors, as evident from the books of the corporate debtor and to the extent practical, be given due notice of the initiation of the CIRP of the corporate debtor and their right to submit claims with supporting documents with the IRP/ RP within the time frame as per the regulation. Hence, it is a recommended good practice for the IRPs/ RPs to attempt to reach out to the creditors, who have failed to respond to the public notice.

2 - Admission of Claims

Regulation 13(1) requires the interim resolution professional or the resolution professional, as the case may be, **to verify every claim**, as on the insolvency commencement date, within seven days from the last date of the receipt of the claims, and thereupon maintain a list of creditors containing names of creditors along with the amount claimed by them, **the amount of their claims admitted** and the security interest, if any, in respect of such claims, and update it.

While verifying the claims, the IRP/ RP is applying his mind to decide whether a sum or a part thereof, claimed by a creditor is to be admitted or not. The decision of the IRP/ RP to disallow a certain sum of claim-amount should just not be based on reasonable grounds and be free from arbitrariness, principles of natural justice require that the same must also be communicated to the claimant, along with the reasons for disallowance, so that a fair chance is provided to the aggrieved party to counter the logic behind disallowance or remedy the shortcomings in his submission of claims. Even if a personal communication is not contemplated in the regulations, appropriate remarks must be added against the claimant's name in the list of creditors required to be maintained and updated, so as to provide a fair understanding of the grounds of disallowance of any claim amount or part thereof.

3 - Dealings with Potential Resolution Applicants

Regulation 36A (8) requires the resolution professional to conduct due diligence based on the material on record **in order to satisfy** that the prospective resolution applicant complies with-

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

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

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

Further, Regulation 36A(12) requires the resolution professional to issue, **on considering the objections received,** the final list of prospective resolution applicants within ten days of the last date for receipt of objections, to the committee.

Again, while preparing the provisional list and the final list of prospective resolution applicants, the RP is required to make decisions on aspects of compliance of various provisions by the prospective resolution applicant, and accordingly either include or exclude someone from the lists. This decision-making is required to be based on justifiable reasons and objectivity based. The applicant aggrieved by the decision of the RP must be apprised of the ground/(s) on which their name get excluded from the list, and should be given opportunity to address the same, as it flows from the principles of natural justice.

From the discussions above, we gather that principles of natural justice is deeply wire d in any free and fair judicious society and requires every decision-maker, whether in judicial, quasi-judicial or administrative role, making decisions that have any element of public bearing, to base their decisions on logic and reasons, free from clutches of subjectivity and arbitrariness, and provide opportunity to any aggrieved party to counter the grounds on which the decisions are to be based.

Leveraging Mediation for achieving desirable Insolvency Process outcomes

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Mediation- a structured process, well, almost.

Mediation as a concept (a reasonably structured process) has been prevailing since the ancient times. It is also identified as 'Assisted Negotiation'. It is a process wherein two or more parties to a dispute voluntarily submit their dispute to a mediator to arrive at an agreement optimal for the parties indulged in the process. It primarily aims at identifying the needs and interests of the parties by resorting to a standard, though a semi-flexible procedure. Conciliation, Mediation are essentially types of the alternate dispute resolution processes (popularly called as ADR techniques) wherein the parties themselves become the decision makers. The process of mediation comes with the desired flexibility and does away with the rigidity associated with the traditional litigation setting and remains an informal and flexible process all through, designed to cater the needs of the parties. The mediator does not adjudicate or advise the parties, he merely plays the role of an enabler, a facilitator and a catalyst. Mediation proceedings are not subjected to any strict rules of procedure. The parties are at liberty to present information they consider to, be relevant, including such information which cannot otherwise be referred to in a court of law. A direct interface amongst the parties suitably assisted/coordinated by the mediator is encouraged. The benefit of such out-of-court processes is in the fact that the parties have an opportunity to amicably settle the issue with all possible information symmetry with additional benefits of saving time and cost incorporating desired flexibility & exploring out of the box solutions and all this, while maintaining full confidentiality.

Mediation seeks to provide an expeditious, economical and private resolution of the disputes that might have cropped up between the parties. The parties to a dispute are facilitated by a mediator who, in a way, supplements the thought processes of the parties with least intervention. The objective is to enable the parties to arrive at a conclusion on their own, by reducing the gap in expectations of the parties in disputes, they normally would have. The parties discover the multifaceted dimensions of their relationship and strive to come to a desired result. Some of these issues cannot be dealt with in a conventional court setting where admissibility of information, etc. as evidence is governed by strict rules. In matters relating to business and personal relationships, confidentiality is often an important aspect for the parties involved.

Mediation in insolvency matters

The global trend towards Mediation in Insolvency matters serves different purposes in the broader framework of insolvency. Primarily, it may seek to solve a two-party dispute and avoid the complication and the corresponding costs of resorting to litigation in an overcomplicated scenario. In furtherance to this, multiparty mediation may facilitate avoidance of insolvency, and thus in a way it can operate in pre-insolvency situations primarily to mediate between debtors and creditors. Once an insolvency proceeding commences then it can promote refinancing, restructuring or resolution plan amongst the interested parties in the insolvency situation. This is in addition to trying a harmonious interpretation of the relevant provisions and exploring options for settlements, parties might have within the framework of law and further making an attempt to make the insolvency process a true team effort. The voluntary process of Mediation in its multi-dimensional character, the insolvency framework makes it quasi-necessary some kind of legal or judicial intervention on the basis of involvement of number of parties.

Parties can commence Mediation, either before the initiation of insolvency process or during the insolvency process.

With the restrictions as stated in Law (and/or in absence of enabling provisions), it is being accepted at large that the parties cannot resort to mediation in the adjudication of bankruptcy applications, formal / informal restructurings such as applications of postponement of bankruptcy by the process of Conciliation. Mediation can be instrumental for the stakeholders who are indulged in a dispute who yearn to come to a potential solution through discussions and negotiations in matters pertaining to continuity of the business and the payment of debt as soon as possible with the aid of consensual discussions. Therefore, the debtor and/or ideally its leading financial creditors who have their inherent interest and the finance creditors who have their interest in the matter of continuity of business for the resolution of debt can give momentum to commence the mediation proceedings. In similar vein, parties including debtor, creditors and/or insolvency administration who yearn to conclude an amicable settlement with their counterparties and resolve their disputes may also give effect to commence mediation process. A stich in time saves nine does apply equally in matters of commercial nature as in other cases.

Rules /provisions normally would have to be framed to enable use of mediation/techniques barring few jurisdictions where there are certain relevant references already made and are bring tried out. A potential insolvency situation is an optimal /ripe case to attempt /explore a mediation between the debtor and creditors. Post initiation of the insolvency process, often there is an important role of the professional (called insolvency professional or administrator) who is entrusted with the objective/power/authority to run the insolvency process. The starting of the insolvency may not leave many options with the debtor to treat all the creditors equally or fairly hence mediation can play a very important role at this stage too, where needs/interests of various stakeholders (creditors) might be different from others for obvious reasons depending on their size, type, stakes and interdependency, etc (like financial creditors, operational creditors).

Different stakeholders would have different/varying relationships with the debtor hence different set of needs & interests. Simple adjudication by a third party and a static laid down law/rules can seldom take care of dynamic needs in changing environment.

Here one has to be mindful in identifying right/appropriate cases fit for mediation, which avoid inherent issues of criminality and/or fraud.

Need for Mediation in Insolvency Matters

Mediation, particularly in the pre-insolvency stage, is encouraged by many institutions at the international level pertaining to the fact that many instruments are following it like the World Bank principles for Effective Insolvency and Creditor Rights System, the UNCITRAL Model Law on International Commercial Conciliation (2002), the UNCITRAL Practice Guide on Cross- Border Insolvency Cooperation (2009) including some pertinent recommendations on the practice of Mediation in the matters pertaining to Insolvency.

As highlighted by Judge Gropper the savings in time and cost that comes with it and the increased chance of debtor's recovery can prove to be a beneficial factor for considering mediation in the insolvency proceedings. In the year of 2014, the European Commission came out with a New Approach to Business Failure and Insolvency. However, it is to be taken into consideration that the legal environment in a particular country encompassing the business laws and the national perspectives compromise the efficiency and effectiveness of mediation. While many European Union or non-European Union countries such as Belgium, Greece, Italy, Portugal, Spain, UK, Australia, Japan and Singapore respectively have undertaken recent reforms in the insolvency laws to take mediation in, however the success of these reforms is not granted. Still, many countries are not convinced by this particular approach. This has compelled the European Commission to issue a Proposal for a Directive of the European Parliament and the Council on resisting the restructuring frameworks, second chance and resorting to measures to increase the efficiency of restructuring, insolvency, discharge procedures and amending Directive on grounds of the lack of the said 2014 Recommendation's success in reaching a bottom-up harmonization pertaining to these matters across the European Union. Undoubtedly, the 2014 European Commission Recommendation and the proposed Directive on restructuring particularly mention mediation as a mechanism to help the revival of business. In short, it mentions the important role endorsed by Mediator as witnessed in the Common Law regime. On the touchstone of flexibility of this ADR method, it can be stated that the mediation is in consonance with the new EU Approach to business failure and insolvency.

Cross-Border Restructuring

The international insolvency should not be deprived of the benefits of mediation, as it is a great tool to avoid complex litigation scenarios. Since the premise of mediation continues to be 'the solution' (more than 'the justice'), many creative solutions are possible through give & take mechanism. There always exists a potential for a solution to most complicated/complex situations till the time

we keep exploring. The Art. 72 of EU Regulation of the European Parliament and the Council on insolvency proceedings allocates the mediating tasks to the coordinator of the insolvency proceedings opened over debtor-companies belonging to the same category of group. This provision can be considered as a first rule wherein it particularly mentions the mediation in cross-border insolvency matters, and this adherence to mediation in domestic insolvencies too will boost its use in the international framework.

In order to reduce the divergences and inefficiencies it is imperative to encourage greater coherence between the respective insolvency frameworks which otherwise would hamper the early restructuring of viable companies in financial difficulties and subsequently no possibility of second chance for the honest entrepreneurs, thereby, to reduce the cost of restructuring both for debtors and creditors. A greater coherence and an increase in the efficiency in national insolvency rules would maximize the returns to all types of creditors and investors and promote cross-border investment too. Greater coherence facilitates the restructuring of groups of companies irrespective of where the members of the group are located in the Union. Furthermore, by removing the barriers to effective restructuring of viable companies helps in saving jobs and also contributes wide to economy at large.

The Prevalence of Mediation in the EU Members state

It has been observed that the EU Recommendation introduces the mediator as a new insolvency professional, but does not describe eloquently the mediator's role. The European legislator only provides that:

(a) The function of the mediator comprises of assisting the parties, so as to arrive at a compromise with regard to a restructuring plan;

(b) Where the parties cannot manage the negotiation by themselves, mediator may be appointed *ex officio* or on request by the debtor or creditors.

This lack of information concerning the role and professional qualifications creates a vacuum in the sphere of such an '*insolvency mediator'* introduces the need for a comparative study of the practical use of mediation in those few EU Member States that have developed a practice of mediation for the rescue of distressed company, as request by the European Commission Recommendation.

Practice of Mediation in matters pertaining to insolvency in France

The French Insolvency Law provides a set of flexible proceedings, such as: *Mandat ad hoc, Conciliation Procedure, Procedure de Sauvegarde.* It is pertinent to note that, these proceedings exhibit different characteristics, but they are equipped with the same objective: they consider the interference of/assistance from some third party between the debtor and financial creditors to facilitate negotiations, with view of reaching a consensual restructuring agreement, thus not adhering to open the ordinary means of insolvency proceedings. *Mandat ad hoc* is a flexible

procedure, which can be initiated by debtor in financial difficulties, though not insolvent, at that time. Taking into account, the request of the debtor the President of the Court may appoint a *Mandataire ad hoc* and the duration of the procedure is freely determined by the President having regard to the debtor's application. There is a close regulation of Conciliation Procedure.

The results derived from this particular method consists of rescheduling of payments; or reducing debtor's indebtedness; but often the rescue strategy demands more sophisticated operations. If the debtor has reaped the benefits *via* opening of conciliation proceedings, it is to note that following the termination of the earlier proceeding, the debtor is not able to file for another consecutive conciliation proceeding for at least three months. In order to make the same enforceable, the agreement reached through the conciliation procedure should be approved by the President of the Court.

In the practice of the French insolvency system debtors tend to start to conduct negotiations within the *mandat ad hoc's* framework. Then, when an agreement is about to be reached, the debtor requests for the opening of conciliation proceedings in order to benefit from a court approval of the restructuring agreement.

Even more interestingly, apparently the success rate of these proceedings was approximately 70% SFA is an accelerated financial safeguard proceeding to rapidly implement a restructuring plan without affecting the position of non-financial creditors. With the ordinance of March 12, 2014, the French legislator introduced the accelerated safeguard proceeding as a new variant for conciliation, which have a different *"deterrent effect"* on minority creditors. SFA procedure allows to cram-down all creditors, except employees, and not only financial creditors. Since minority creditors are aware that their hold-up value is rather limited, often, in practice they prefer to negotiate some limited advantages within the framework of a consensual conciliation agreement.

Practice of Mediation in matters pertaining to insolvency in Spain

In Spain, the legislator has implemented many changes in the insolvency system. The reforms amended several parts of the Insolvency Law, out of Court solutions.

The Spanish Royal Decree 2015, specifically introduced some amendments both in the voluntary payment settlement regulation as well as in the Mediator role. Currently, the Spanish law promotes three types of out-of-Court agreements*: Acuerdo de Refinanciación; Acuerdo de Refinanciación Homologado and Acuerdo Extrajudicial de Pagos.* Fundamentally, these three procedures are conducted without any judicial intervention. As long as certain conditions are met, they also permit a greater protection to debtors: during the negotiation period, no creditors (with some exceptions to public creditors) may file for executions over the company's assets; no creditors may file for bankruptcy; once approved, the agreement is protected from *ex-post* avoidance actions.

In the year of 2013, it has been observed, that the Spanish Insolvency Act has included a new chapter regulating the '*insolvency mediator*'. To enhance the rescue of distressed small and medium-sized businesses (SMEs), the Spanish legislator considers the intervention of a *Mediador concursal* as a

valuable solution in helping debtors to seek an agreement on payments with creditors. In this scenario, the role of this insolvency professional is not limited to resolving disputes, but at the same time the professional needs to address the key issues of organizing and managing meetings between debtor and creditors, drafting restructuring plans and other supporting activities that have a major role for the success of the procedure.

Therefore, in light of the spectrum of functions it offers Mediation can be considered to be an effective alternative dispute resolution system that can be applied by the parties in dispute and fill the gap which financially distressed debtors are in urgent need of due to the absence of a legislation regulating the informal restructuring proceedings and insufficient formal restructuring proceedings. Both financially distressed debtor and its creditors may apply mediation and negotiate the terms of the debt restructuring, the reorganization project of the business, the protection period and repayment of the debt on the new due dates throughout the mediation process. The role performed by the mediators in this scope can be to facilitate communication across all the stakeholders, with a view to help them arrive at a voluntary resolution which allow the business to survive and the debtor to pay back more of its debts than if its business was forced to close down and be liquidated.

It is rightly said that a going concern entity is more beneficial and valuable to its stakeholders in more ways than one as opposed to its stripped-down value of assets.

It is to be taken into consideration that a one way of facilitating the process is by introducing guidelines, which in practice operate as a structured code of conduct for work-out participants such as those contained in the London approach. Through the incorporation of Mediation mechanism an enhanced work-out practice is allowed for restructuring process, it can help us to solve the inter-creditor conflicts.

Use of Mediation in Indian Insolvency Framework

The insolvency law in India has come a long way with the introduction and gradual evolution of the Insolvency and Bankruptcy Code, 2016 ('Code'). The main objective of the Code is to restructure and rehabilitate the companies along with balancing the interests and the rights of varied stakeholders. However, efficient implementation of the Code has suffered for multiple reasons. Misuse of the law for debt recovery rather than insolvency resolution, protracted timelines, overburdening of NCLTs are some of the difficult aspects experienced while implementing the Code.

In order to realise the true spirit of this legislation, it becomes imperative to find a solution which has the potential to address such issues. Mediation, as a possible solution, has been advocated by various working groups and committees from time to time. It may not be a panacea but surely can be an enabler of sorts and can surely come to the rescue of IBC at the current/crucial juncture.

The Report of the Working Group on Individual Insolvency as published by IBBI recommended to amend the code for the purpose of providing time bound mediation in respect of insolvency of individuals and the partnership firms.[1] The report further recommended for the recognition of

anew cadre of professional mediators and certain mediation centres to provide mediation facility. It is to be noted, that the same process can be applied on the matters pertaining to Corporate Insolvency cases. A mandatory reference to mediation within the framework of Insolvency Code is the need of the hour.

An honest attempt with a right mind set coupled with necessary enabling provisions in law would give it the much-required impetus and we should allow it to evolve from there.

Judicial precedents

In one Dutch judgment2, the Court observed, "On the occasion of this hearing, the Court of Appeal will in any case also want to discuss with the parties whether the parties can reach an amicable settlement in whole or in part, or whether referral to (insolvency) mediation is an option."

In the Indian context, in the case of V.K. Parvinder Singh v. Intec Capital Ltd. An Appeal was filed by the authorised representative of the Promoters against the admission order passed by the Adjudicating Authority and further they submitted that they are ready to settle the claims of the Financial Creditors. This was done prior to the Constitution of Committee of Creditors (hereinafter referred to as 'CoC'). Since the parties to the present case agreed for the mediation, the Appellate Tribunal appointed a retired Judge to commence the mediation proceedings between the parties. Finally, the matter was settled through mediation and the report was placed before the Appellate Tribunal. The Hon'ble Appellate Tribunal set aside the order of Adjudicating Authority and recorded that the terms of settlement should be treated as the orders and directions of this Appellate Tribunal. With this precedent set, we ideally should have had a mechanism to promote/endorse the option of mediation as and when, wherever and whenever possible at all stages of insolvency. Come to think of it, the only thing that can happen with application of mediation techniques is a potential solution/settlement/amicable solution, else the normal applicable legal rules and regulations would apply, nevertheless.

In the recent times, mediation can be used as a powerful tool to resolve the disputes between the home buyers and the promoters in matter concerning real estate disputes. It is imperative to note that under the current regime, the creditors are best aware of the financial viability of the corporate debtors and they should be provided with mediation as a tool for initiating the course of action. A focused effort involving all the relevant stakeholders is the need of the hour to devise a formal /platform for the desired push to the noble concept of Mediation.

Conclusion

As stated before, mediation itself is not a panacea, a way to resolve all the insolvency matters, but there are no doubts that a disruption of the company value can be prevented if all the parties involved in the restructuring process adopt a more problem-solving attitude. The disputes in the context of insolvency and bankruptcy can be very well tackled with the tool of Mediation as it is time and cost effective in nature and it has the potential to preserve the value of the estate of debtor to fulfil the debts to the Creditors thus benefiting Creditors to the maximum. Mediation's goals however go beyond the dispute resolution approach to avoid the impoverishment of the company's

asset. In order to resolve the corporate distress, Mediation in a particular way imposes responsibility on the shoulder of the participants for the effective restructuring process. Another positive impact of a collaborative effort (through mediation) is preserving of the relationships between the stakeholders (creditors and the corporate debtor, in IBC) which further benefits the larger cause of value maximisation ensuring creative & convincing solutions & resolutions.

Litigation often ends up being a time consuming and a cumbersome process, particularly when the insolvency practitioners are equipped with limited resources. It is particularly, not in the interest of the Creditors to indulge in a long process of litigation. Mediation can surely help in fulfilling the duties and the obligations of insolvency practitioners as it may lead to early and quick disposal of disputes, hence should be the first port of call failing which one should explore alternatives.

The new paradigm of business rescue moves the focus from Courts which traditionally have a control role in formal insolvency procedure to the actors (namely debtors, creditors and all the parties interested), who are the real players of out of Court debt restructurings. In addition to those actors, an appointed mediator (or a trained insolvency professional himself), would play a key role. This can ensure proper functioning of negotiations and the efficient handling of procedures for the benefit of creditors as well as another stakeholder.

The IBC should not get labelled as a static/strict procedural code while trying to address a dynamic situation which often revolves around a commercial issue. It must be mindful of the time value of money, timely resolutions, and the objectivity of the process. It needs to provide enough flexibility to deal with unwarranted/uncalled for situations in a business cycle, especially with business in distress and mediation for one gives an amazing option to come out with creative, out of the box solutions. Mediation, nicely incorporated can assist in timely/amicable solutions, preserve the relationships, hence work towards the value maximisation for the larger cause, which continues to be the premise of IBC. The best part being the possibility to gain on time, cost and effort and absolutely nothing to lose but for friction and that is welcome. Finally, the courts would have a sigh of relief due to reduction in litigation

The Insolvency and Bankruptcy Code is an economic legislation, and it needs an amendment to incorporate mediation as its integral part. With Mediation Bill under final touches in the parliament, the legislature would do good to have enabling provisions in the bill itself to make it easy for the IBC space to adopt mediation and embrace it with open arms. Mediation surely needs its desired and well-deserved space and place in IBC.

For many in the fraternity, Mediation continues to be a 'thought process' and a 'way of life' which should be adopted by one and all. Its application is all pervasive, just requiring the right mind set and a conducive thought process.

"Whether OTS proposal falls within the ambit of acknowledgment of debt"

Mr.Puneet Dhawan
BA. LLB(H), Insolvency Professional

*National Company Law Appellate Tribunal ("**NCLAT**") while over-ruling the decision of Learned Adjudicating Authority, National Company Law Tribunal, Mumbai Bench in **Tejas Khandhar v. Bank of Baroda**[3], while relying upon the ratio laid down by the Hon'ble Apex Court in **'Dena Bank (now Bank of Baroda) Vs. C. Shivkumar Reddy And Anr.'**[4] was of the considered view that OTS proposal dated 01.08.2016 and the subsequent one on 27.03.2018 falls within the definition of the ambit of **'acknowledgement of debt'** as envisaged under Section 18 of the Limitation Act, 1963.*

Financial Creditor: Bank of Baroda
Corporate Debtor: Tejas Khandhar

Facts in nutshell:

The *'Financial Creditor BoB'* extended financial assistance to the *'Corporate Debtor'* through various term loans for an amount of Rs.9,91,00,000/-.

A loan recall Notice dated 08.10.2013 under Section 13(2) of the SARFAESI Act, 2002 was issued demanding payment of Rs.6,11,42,097/-.

On 30.09.2016, the Debt Recovery Tribunal ('DRT') allowed the Bank to recover a sum of Rs.50,00,000/- and thereafter a sum of Rs.20,00,000/- towards interest.

A One Time Settlement ('OTS') dated 27.03.2018 was entered into between the parties.

An OTS proposal was extended vide Order dated 07.03.2018 which the Bank vide letter dated 27.03.2018 had accepted the same.

Learned Adjudicating Authority, NCLT, Mumbai admitted the application under Section 7 filed by the Financial Creditor BoB holding that in the facts of the instant Application, amount of default being above a sum of Rupees One Lakh and the Application having filed on proper form, this Application deserves to be admitted.

The suspended director of Corporate Debtor preferred an appeal under Section 61 of the IBC, 2016 contending that the Ld. NCLT incorrectly admitted Section 7 Application, as the same was barred by

[3] (2022) ibclaw.in 496 NCLAT Company Appeal AT (insolvency) no. 371/2020 (Arising out of order dated 10.01.2020 passed by NCLT Bench, Mumbai)

[4] (2021) 10 SCC 330

Limitation, on ground that date of default is 22.09.2013 whereas Application was filed by the Financial Creditor on 11.07.2019.

Ground raised that as three years Limitation period has expired on 22.09.2016, the Application filed by the Financial Creditor was ***'barred by Limitation'***.

Appellant placed reliance on the Judgement ***'Corporation Bank' Vs. 'SJN Energy Infrastructure Pvt. Ltd.[5]', 'Bimal Kumar Manubhai Savalia' Vs. 'Bank of India'[6], and in 'Bishal Jaiswal' Vs. 'Asset Reconstruction Company'[7].***

Another ground raised was that Financial Creditor BoB did not raise the plea of extension of Limitation or 'acknowledgement of debt' under Section 18 of the Limitation Act, and therefore could not agitate this plea at such a belated stage in Appeal.

Question of law?

Whether OTS proposal falls within the ambit of acknowledgment of debt under Section 18 of the Limitation Act?

Analysis and decision:

The NCLAT relied upon the ratio laid down by the Hon'ble Supreme Court in ***'Laxmi Pat Surana' Vs. 'Union Bank of India & Anr***.'[8], and ***'Dena Bank (now Bank of Baroda)' Vs. 'C. Shivkumar Reddy and Anr.'***[9], Relevant Paras 138 to 141:

138. While it is true that default in payment of a debt triggers the right to initiate the Corporate Resolution Process, and a Petition under Section 7 or 9 of the IBC is required to be filed within the period of limitation prescribed by law, which in this case would be three years vide from the date of default by virtue of Section 238A of the IBC read with Article 137 of the Schedule to the Limitation Act, the delay in filing a Petition in the NCLT is condonable under Section 5 of the Limitation Act unlike delay in filing a suit. Furthermore, as observed above Section 14 and 18 of the Limitation Act are also applicable to proceedings under the IBC.

139. Section 18 of the Limitation Act cannot also be construed with pedantic rigidity in relation to proceedings under the IBC. This Court sees no reason why an offer of One Time Settlement of a live claim, made within the period of limitation, should not also be construed as an acknowledgment to attract Section 18 of the Limitation Act.

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[5] (2020) SCC Online NCLAT 408,
[6] (2020) SCC Online NCLAT 400
[7] Company Appeal (AT) (Insolvency) No. 385 of 2020.

[8] (2021) 8 SCC 481
[9] (2021) 10 SCC 330.

140. To sum up, in our considered opinion an application under Section of the IBC would not be barred by limitation, on the ground that it had been filed beyond a period of three years from the date of declaration of the loan account of the Corporate Debtor as NPA, if there were an acknowledgement of the debt by the Corporate Debtor before expiry of the period of limitation of three years, in which case the period of limitation would get extended by a further period of three years.

141. Moreover, a judgment and/or decree for money in favour of the Financial Creditor, passed by the DRT, or any other Tribunal or Court, or the issuance of a Certificate of Recovery in favour of the Financial Creditor, would give rise to a fresh cause of action for the Financial Creditor, to initiate proceedings under Section 7 of the IBC for initiation of the Corporate Insolvency Resolution Process, within three years from the date of the judgment and/or decree or within three years from the date of issuance of the Certificate of Recovery, if the dues of the Corporate Debtor to the Financial Debtor, under the judgment and/or decree and/or in terms of the Certificate of Recovery, or any part thereof remained unpaid." (Emphasis Supplied).

NCLAT Bench further held that the date of default has been mentioned as 13.09.2013, which stood revived with the OTS proposal dated 01.08.2016 filed vide I.A. 1155/2016 before the DRT Pune, well within the three year period. Subsequently, another settlement proposal dated 07.03.2018 was accepted by the Bank on 27.03.2018, wherein a timeline was provided for the payment of the balance amount. The OTS proposal dated 01.08.2016 filed vide I.A. 1155/2016 falls within the ambit of 'acknowledgement of debt' as defined under Section 18 of the Limitation Act, 1963, which is further fructified by the admitted OTS dated 27.03.2018 again within three years of the previous proposal where the 'debt' is acknowledged to be 'due and payable'.

The ratio of the Hon'ble Supreme Court in ***'Dena Bank (now Bank of Baroda)' Vs. 'C. Shivkumar Reddy and Anr.',*** is squarely applicable to the facts of this case as there is a jural relationship between the 'Corporate Debtor' and the Respondent Bank and there is an 'acknowledgement of debt' vide the OTS dated 27.03.2018, which falls within the ambit of Section 18 of the Limitation Act, 1963.

The Bench was pleased to dismiss the appeal filed by the Appellant Corporate Debtor.

Viewpoints:

The decision passed by the NCLAT has paved the way for many creditors. The offer of OTS of a live claim, made within the period of limitation should be construed as an acknowledgement to attract Section 18 of the Limitation Act. Hence, an Application under Section 7 of the Code would not be barred by limitation, on the ground that it had been filed beyond a period of 3 years from the date of declaration of the loan account of the Corporate Debtor as NPA, if there was an acknowledgement of the debt by the Corporate Debtor before expiry of the period of limitation of 3 years, in which case the period of limitation would get extended by a further period of 3 years.

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

DECLARATION OF ESSAY COMPETITION RESULT

Topics:

- IBC: An evolving jurisprudence, the milestones achieved and way forward
- Keystrokes for a successful resolution plan

Winner 1: Mr. Rajesh K Gupta

Winner 2: Mr. S. Shivaswamy

Winner 3: Mr. Prasad Dharap

INSOLVENCY PROFESSIONAL AGENCY OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

IBC: AN EVOLVING JURISPRUDENCE, THE MILESTONES ACHIEVED, AND THE WAY FORWARD

Mr. Rajesh K Gupta

Insolvency Professional

In simple words, Insolvency means the inability of a person to pay their bills as and when they become due and payable, while Bankruptcy means that a person is declared incapable of paying their dues and payable bills and Liquidation refers to the process of winding up a corporation or incorporated entity. Insolvency and Bankruptcy Code, 2016 deals with all three types of situations.

There was no comprehensive legal framework for Insolvency and Bankruptcy prior to the enactment of the Insolvency and Bankruptcy Code. The framework that prevailed was through various laws and that framework was fragmented and ineffective. The Union Government has been trying for a long time for a comprehensive, effective, and single framework that addresses the shortcomings of the prevailing Insolvency and Bankruptcy framework. Finally, on the recommendations of the Banking Law Reforms Committee, the Insolvency and Bankruptcy Code (IBC) was enacted on May 28, 2016, to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms, and individuals in a time-bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interest of all the stakeholders including alteration in the order of priority of payment to Government dues and its provisions related to Corporate Insolvency Resolution Process (CIRP) and Liquidation Process (LP)have been made applicable from Dec 01, 2016.

Further, the provisions related to Personal Guarantors to Corporate Debtors have been made applicable from Dec 01, 2019.

Further, The Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019 were notified on 15.11.2019. These rules provide a generic framework for insolvency and liquidation proceedings of systemically important Financial Service Providers (FSPs) other than banks. The Rules shall apply to such FSPs or categories of FSPs, as will be notified by the Central Government under section 227 from time to time in consultation with appropriate regulators, for the purpose of their insolvency and liquidation proceedings.

Further, the pre-packaged insolvency resolution process (PPIRP) for corporate debtors classified as micro, small and medium enterprises (MSME) has been notified from 04.04.2021.

The unique features of the Insolvency and Bankruptcy Code are as under:

(1)A comprehensive regime dealing with all aspects of insolvency and bankruptcy of all kinds.

(2)Separating commercial aspects of insolvency and bankruptcy proceedings from judicial aspects and empowered stakeholders and adjudicating authorities to decide the matters within the domain expeditiously.

(3)Moving away from erosion of net worth to a more objective default in payment for initiation of the insolvency process.

(4)Moving away from the debtor in possession regime to creditors in control regime where creditors decide matters with the assistance of insolvency professionals.

(5)Providing a collective mechanism to resolve insolvency rather than recovery of loan by a creditor.

(6)Achieving insolvency resolution in a time-bound manner and empowering the stakeholders to complete transactions in time.

In India, the Insolvency and Bankruptcy framework is regulated by the Insolvency and Bankruptcy Code, 2016 along with the following rules and regulations.

Rules

The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

The Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019.

The Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019.

The Insolvency and Bankruptcy (Application to Adjudicating Authority for Bankruptcy Process for Personal Guarantors to Corporate Debtors) Rules, 2019.

The Insolvency and Bankruptcy (Pre-Packaged Insolvency Resolution Process) Rules, 2021.

Regulations

The Insolvency and Bankruptcy Board of India. (Insolvency Professional Agencies) Regulations, 2016.

The Insolvency and Bankruptcy Board of India. (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016.

The Insolvency and Bankruptcy Board of India. (Insolvency Professionals) Regulations, 2016.

The Insolvency and Bankruptcy Board of India. (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

The Insolvency and Bankruptcy Board of India. (Liquidation Process) Regulations, 2016.

The Insolvency and Bankruptcy Board of India. (Voluntary Liquidation Process) Regulations, 2017.

The Insolvency and Bankruptcy Board of India. (Inspection and Investigation) Regulations, 2017.

The Insolvency and Bankruptcy Board of India. (Information Utilities) Regulations, 2017.

The Insolvency and Bankruptcy Board of India. (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017.

IBBI (Grievance and Complaint Handling Procedure) Regulations, 2017.

IBBI (Mechanism for Issuing Regulations) Regulations, 2017

IBBI (Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Regulations, 2019.

IBBI (Bankruptcy Process for Personal Guarantors to Corporate Debtors) Regulations, 2019.

IBBI (Pre-Packaged Insolvency Resolution Process) Regulations, 2021.

Order

The Insolvency and Bankruptcy Code (Removal of Difficulties) Order, 2017.

The Ecosystem for Implementation of Code consists of four pillars viz, the Insolvency Professionals and Insolvency Professional Agencies, Information Utilities, Adjudicating Authorities (NCLT & DRT), and the Insolvency and Bankruptcy Board of India.

Insolvency Professionals – Insolvency Professional means a person enrolled with an insolvency professional agency as its member and registered with the Board as an insolvency professional. They act as intermediaries in the insolvency resolution process or liquidation process. In Liquidation, they are known as Liquidators. They would play a key role in the efficient working of the insolvency, bankruptcy, and liquidation process.

Insolvency Profession Agencies – These agencies are required to be registered with the Insolvency and Bankruptcy Board of India and responsible for the enrolment of persons, eligible as per the bye-laws of the agency, as intermediaries who would play a key role in the efficient working of the insolvency, bankruptcy, and liquidation process.

Information Utilities – These agencies are required to store facts about lenders and terms of lending in electronic databases and will be used by Adjudicating Authority to ascertain default. The purpose of this intermediary (Information Utility) is to remove information dependency on the Debtor's management for critical information that is required to resolve insolvency and this information would be available to creditors, resolution professionals, liquidators, and other stakeholders in insolvency and bankruptcy proceedings.

Adjudicating Authorities – The Code contains two adjudicating authorities. National Company Law Tribunal (NCLT) exercises the jurisdiction, powers, and authority over insolvency cases of

companies and Limited Liability Partnership (LLPs) and Debt Recovery Tribunals (DRTs) which handle cases involving individual and partnership firms.

Appellate Authorities – The Code proposes two appellate authorities. National Company Law Appellate Tribunal (NCLAT) is the appellate authority for hearing appeals against the orders passed by NCLT, while the Debt Recovery Appellate Tribunal (DRAT) is the appellate authority for hearing appeals against the orders passed by DRT.

Insolvency and Bankruptcy Board of India – It was established under the IBC. It has the mandate for regulation of insolvency professionals, insolvency professional agencies, and information utilities besides exercising other powers and functions as envisaged under the IBC.

IBC- AN EVOLVING JURISPRUDENCE

IBC EVOLVING THROUGH THE JUDICIARY

After the applicability of IBC, its provisions have been interpreted by Stakeholders involved, as per their own perspectives. Numerous grey areas have also emerged, and further disputes have also arisen. These disputes have gone on to the Adjudicating Authority for their adjudication, and thereafter these matters have advanced to the Appellate Authority, and the Higher Judiciary i.e. Apex Court, and after due deliberations, they have provided clarity, certainty, and predictability on such issues, with the passage of time.

The Apex Court has given judgments on various issues concerning the IBC. These judgments have illustrated and evolved the jurisprudence of IBC to a large extent. *Some of the landmark judgments on important issues are as under:*

- ***Scheme of the Code***
  To attempt, by divesting the erstwhile management of its powers and vesting it in a professional agency, to continue the business of the corporate debtor as a going concern until a resolution plan is drawn up. After approval of the resolution plan, management is handed over to the successful applicant so that the corporate debtor can pay back its debt and get back on his feet. To give paramount importance to the committee of creditors and the scope of judicial review by the adjudicating authority is limited to the extent provided under section 31 of the code and of the appellate authority is limited to the extent provided under section 61(3) of the code.[10]

- ***Purpose of the Code***
  To consolidate the insolvency process under several disparate statutes and it is a comprehensive and time-bound framework with smooth transitions between reorganization and liquidation, with an aim to maximize the value of all persons and balance the stake of all the stakeholders.[11]

- ***Speed is the essence of Resolution***

[10] Ghanashyam Mishra and Sons Pvt. Ltd. Vs Edelweiss Asset Reconstruction Company Ltd . (W.P.(C) No 1177 of 2020 decided on 13.04.2021

[11] Ebix Singapore Pvt Ltd Vs Educomp Solutions & Anr (W.P.(C) No 3244 of 2020 decided on 13.09.2021

Adjudicating mechanisms were identified as one of two important sources of delay which need to be equipped with the right resources.[12]

- ***Objective and Institutional framework under the Code***

  It has been aimed at aligning insolvency laws with international standards. Further, its aim is to promote entrepreneurship and availability of credit, ensured the balanced interest of all stakeholders, and promote time-bound resolution of insolvency in the case of corporate persons, partnership firms, and individuals. The highlight of the Code is the institutional framework it envisions. These institutions and structures are aimed at promoting corporate governance and also enable a time-bound and formal resolution of insolvency[13].

- ***Gradual Implementation of Code***

  The method adopted by the Central Government to bring into force different provisions of the code has a specific design: to fulfill the objectives underlying the code, having regard to its priorities….the Central Government followed a stage-by-stage process of bringing into force the provisions of the code, regard being had to the similarities or dissimilarities of the subject matter and those covered by the code[14].

- ***Constitutional Validity of IBC Provisions***

  The Apex Court has upheld the provisions of the Code.[15]

- ***Constitution of NCLT/NCLAT***

  Constitution of NCLT/ NCLAT was upheld on the affirmation of the Union Government that they would comply with the guidelines evolved by the Hon'ble Apex Court in the case of Madras Bar Association and it will be under the administrative charge of the Ministry of Law.[16]

- ***Power of Resolution Professional as against Liquidator***

  The resolution professional is the only facilitator, the liquidator does not work under COC. The Resolution Professional is given only administrative powers and the liquidator who determines the claim is given quasi-judicial power[17].

- ***Limitation Act***

  Provision of limitation act are applicable to the proceedings under IBC since its inception[18].

- ***Role of Resolution Professional***

[12] Ebix Singapore Pvt Ltd Vs Educomp Solutions & Anr (W.P.(C) No 3244 of 2020 decided on 13.09.2021
[13] Lalit Kumar Jain Vs Union of India (T.P(C) no 245 of 2020 decided on 21.05.2021
[14] Lalit Kumar Jain Vs Union of India (T.P(C) no 245 of 202X0 decided on 21.05.2021
[15] Swiss Ribbons Pvt .Ltd & Anr. Vs Union of India W.P.(C) No 99 of 2018 decided on 25.01.2019
[16] Swiss Ribbons Pvt .Ltd & Anr. Vs Union of India W.P.(C) No 99 of 2018 decided on 25.01.2019
[17] Swiss Ribbons Pvt .Ltd & Anr. Vs Union of India W.P.(C) No 99 of 2018 decided on 25.01.2019
[18] BK Educational Services Pvt Ltd Vs Parag Gupta and Associates , Civil Appeal no 23988 of 2017 decided on 18.09.2019

The role of RP is not adjudicatory whereas it is administrative in nature[19].

- ***Timelines***
  Timelines specified in IBC are mandatory[20].

- ***Recovery Forum***
  IBC is not intended to be a substitute for a recovery forum[21].

- ***Dispute***
  Whenever there is an existence of a real dispute, the provisions of IBC cannot be invoked[22].

- ***Principle of Natural Justice***
  The adjudicating authority is obliged to give a reasonable opportunity to be heard to the Corporate Debtor[23].

- ***Differentiation made between Financial and Operational Creditors***
  Particular treatment of a financial creditor does not violate any provisions of the constitution[24].

- ***Applicability of Sections 29 A & 12 A***
  The Apex Court has upheld the above provisions of the Code [25].

- ***Home Buyers***
  Acknowledged as financial creditors and brought the homebuyers at par with financial and operational creditors for triggering the CIRP[26].

- ***IBC vis-a-vis RERA***
  IBC and RERA would run concurrent to each other and in case of conflict, the IBC would prevail over RERA[27]. In view of the provisions of section 238, the provisions of the code will have an overriding effect, if there is any inconsistency with any of the provisions of the law for the time being in force or any instrument having effect by virtue of any such law.

- ***Creditor Status***
  Noida authority would have the status of operational creditor instead of a financial creditor[28].

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[19] Committee of COC of Essar Steels India Ltd Vs Others, Civil Appeal No 8766-67 of 2019 decided on 15.11.2019
[20] Arcelor Mittal India Pvt Ltd Vs Others Civil Appeal no 9402-05 of 2018 decided on 04.10.2018
[21] Mobilox Innovations Pvt Ltd Vs Kirusa Software Pvt Ltd Civil Appeal no 9405 of 2017 decided on 21.09.2017
[22] Mobilox Innovations Pvt Ltd Vs Kirusa Software Pvt Ltd Civil Appeal no 9405 of 2017 decided on 21.09.2017.
[23]Sreemetaliks Ltd. Vs Union of India (W.P.(C) No 7144(W) Of 2017 decided on 07.04.2017
[24] Akshay Jhunjhunwala & Anr. Vs Union of India (W.P.(C) No 627 0f 2017 decided on 02.02.2018.
[25] Swiss Ribbons Pvt Ltd & Anr. Vs Union of India (W.P.(C) No 99 0f 2018 decided on 25.01.2019.
[26] Pioneer Urban Land and Infrastructure Ltd. Vs Union of India (W.P.(C) No 43 0f 2019 decided on 09.08.2019)
[27] Pioneer Urban Land and Infrastructure Ltd. Vs Union of India (W.P.(C) No 43 0f 2019 decided on 09.08.2019)
[28] Noida Vs Anand Sonbhadra (W.P.(C) No, Civil Appeal No2222, 2367-2369 of2021 decided on 17.05.2022

- ***The Repugnancy of State Laws with IBC***
  It was held that in the case of conflict between a State Law and a Central Law, the central law will prevail. So IBC will prevail over previously enacted inconsistent state law[29].

IBC EVOLVING THROUGH THE MINISTRY OF CORPORATE AFFAIRS

The Government of India has entrusted the Ministry of Corporate Affairs (MCA) with the responsibility to administer the Insolvency and Bankruptcy Code. Further, the Ministry of Corporate Affairs has constituted Insolvency Law Committee (ILC) to strengthen and monitor the implementation of the Code. The committee collects suggestions on issues from different stakeholders and makes deliberations on the issues and also considers legal principles and makes recommendations and provides amendments to the IBC and other regulations, which are required for attaining the objective and purpose of the Code.

Till now, the Committee has submitted three reports and made recommendations on the insolvency and bankruptcy framework to the Ministry of Corporate Affairs. The summarised details of the reports are under:-

ILC submitted its first report to MCA on 26.03.2018 and recommended amendments to the IBC, Schedule XI & XII, Corporate Insolvency Process Rules & Regulations, and Liquidation Regulations.

ILC submitted its second report to MCA on 16.10.2018 and recommended the adoption of the UNCITRAL Model Law on Cross Border Insolvency.

ILC submitted its third report to MCA on 20.02.2020 and recommended regarding the CIRP, Liquidation Process, action against avoidable transactions, and improper trading in CIRP and Liquidation Process, Fresh Start Process, Personal Insolvency Resolution, and Bankruptcy Process.

Sub-Committee of the ILC submitted its report to MCA on 31.10.2020 and recommended a regulatory framework for the Pre-Pack Insolvency Resolution Process.

ILC submitted its fourth report to MCA on 16.07.2021 and recommended a framework for the Pre-Pack Insolvency Resolution Process for MSME with an alternative route for resolving insolvency.

ILC submitted its fifth report to MCA on 20.05.2022 and make recommendations for furthering the objectives of the IBC.

Further, on the recommendations of MCA, The Union Government amended the Code six times, till now, to address the various evolving issues. The following are the details of the amendment of the Code.

[29] Innovative Industries Ltd Vs ICICI Bank & Others (W.P.(C) No 8337-8338 of 2017 decided on 31.08.2017)

- ***Insolvency and Bankruptcy Code (Amendment) Act, 2018.***
  This Amendment Act is deemed to have come into force on 23.11.2017, the day on which the Ordinance was promulgated.
- ***Insolvency and Bankruptcy Code (Second Amendment) Act, 2018.***
  This Second Amendment Act is deemed to have come into force on 06.06.2018, the day on which the Ordinance was promulgated.

- ***Insolvency and Bankruptcy Code (Amendment)Act, 2019***
  This Amendment Act came into force on 16.08.2019.

- ***Insolvency and Bankruptcy Code (Amendment) Act, 2020.***
  This Amendment Act is deemed to have come into force on 28.12.2019, the day on which the Ordinance was promulgated.

- ***Insolvency and Bankruptcy Code (Second Amendment) Act, 2020*.**
  This Second Amendment Act is deemed to have come into force on 05.06.2020, the day on which the Ordinance was promulgated.

- ***Insolvency and Bankruptcy Code (Amendment)Act, 2021***
  This Amendment Act is deemed to have come into force on 04.04.2021, the day on which the Ordinance was promulgated.

Some of the important changes in IBC through amendments are as under:

- ***Insertion of Section 29A****30*
  A new section 29A has been inserted prohibiting certain persons from submitting a resolution plan.

- ***Widening definition of Financial Creditor****31*
  An explanation has been inserted in sub-clause (f) of clause (8), providing for the inclusions of allottees under a real estate project under the definition of financial creditors recognizing their status as financial creditors.

- ***Insertion of Section 12A****26*
  A new section 12A has been inserted providing for the withdrawal of insolvency proceedings against the corporate debtor.

- ***Time of passing of Liquidation Order****32*

[30] Insolvency and Bankruptcy Code (Amendment)Act, 2018
[31] Insolvency and Bankruptcy Code (Second Amendment)Act, 2018
[32] Insolvency and Bankruptcy Code (Amendment)Act, 2019

Section 33 has been amended clarifying that the committee of creditors may pass an order to liquidate the corporate debtor at any time after its constitution, before the approval of the resolution plan, and even before the preparation of the information memorandum.

- ***Time- Limit for Resolution Process***[33]
  Section 12 has been amended by adding two more proviso which provides that the resolution process must be completed within 330 days including an extension and litigation period.

- ***Minimum Threshold of default for filing an Insolvency Petition for certain classes of financial creditors (home buyers)***[34]
  Section 7 has been amended and provides a Minimum of 100 allottees or 10% of total allottees of the same real estate project, whichever is less.

- ***Insertion of Section 32A***[35]
  A new Section 32A has been inserted providing for security and immunity to the corporate debtor and its new management /officials as well as its properties.

- ***Threshold of default for filing an Insolvency Petition*** [36]
  Increased from Rs1 lakh to Rs 1 Crore.

- ***Temporary suspension of initiation of CIRP under sections 7,9, and 10 of the Code – Insertion of Section 10A***[37]
  A new Section 10A has been inserted providing a temporary suspension of sections 7, 9 & 10, allowing the creditors and the corporate debtor itself to file for insolvency. The period of suspension was 25.03.2020 to 24.03.2021. As a result, no application for initiating CIRP had been filed in respect of any default arising during this period.

- ***Immunity from action under section 66***[38]
  A new subsection (3) under Section 66 has been inserted that disallows the resolution professional / liquidator from filing an application for action against the directors or partners of the corporate debtor with respect to a default arising during the suspended period i.e. 25.03.2020 to 24.03.2021.

Introduction of the Pre-Packaged Insolvency Resolution Process [39]

A new Section III-A has been inserted into part II of the Code to provide an alternate insolvency resolution process for corporate persons classified as Micro, Small, and Medium Enterprises

[33] Insolvency and Bankruptcy Code (Amendment)Act, 2019
[34] Insolvency and Bankruptcy Code (Amendment)Act, 2020
[35] Insolvency and Bankruptcy Code (Amendment)Act, 2020
[36] Notification No 4 dated 24.03.2020 issued by MCA.
[37] Insolvency and Bankruptcy Code (Second Amendment)Act, 2020
[38] Insolvency and Bankruptcy Code (Second Amendment)Act, 2020
[39] Insolvency and Bankruptcy Code (Amendment)Act, 2021

(MSME) known as the Pre-Packaged Insolvency Resolution Process (PIRP) comprising sections 54A to 54 P containing provisions toward different facets of the process.

- ***Threshold of default for filing of an Insolvency Petition, Time – Limit, and Regime under Pre Packaged Insolvency Resolution Process***[40]
  The threshold for Corporate MSME– Minimum default Rs 10 lakh and no maximum limit.

  The regime for Corporate MSME - Debtor-in-Possession Model.

The timeline for completion for Corporate MSME – is 120 days from the pre-packaged insolvency commencement date.

For smooth functioning of the IBC, The Ministry of Corporate Affairs is taking necessary steps as and when it feels, such steps are required and makes recommendations for amendments to the IBC for achieving the purpose of the IBC. The action on the part of MCA is also evolving the jurisprudence of IBC.

IBC EVOLVING THROUGH THE INSOLVENCY AND BANKRUPTCY BOARD OF INDIA

Insolvency and Bankruptcy Board of India (IBBI) is one of the Pillars of the Code. It is a regulator under IBC. It regulates all service providers along with transactions under IBC.

It has regulatory oversight over Insolvency Professionals, Insolvency Professional Agencies, Valuers, and Information Utilities. It lays down regulations to govern transactions, namely, Corporate Insolvency Regulation Process including Personal Guarantor to Corporate Debtor, Liquidation Process, Individuals Insolvency and Bankruptcy under the IBC. It further enforces the Code, rules, and related regulations.

The main functions of the Board include:

(a)Register insolvency professional agencies (IPA), insolvency professionals (IP), and information utilities (IU) and renew, withdraw, suspend or cancel such registrations.

(b)Monitor the performance and carry out inspections and investigations on IPAs, IPs and IUs and pass orders as required for compliance of the provisions of the Code and regulations.

(c)Publish such information, data, research studies and other and other information as may be specified by regulations.

(d)Collect and maintain records relating to insolvency and bankruptcy cases and disseminate information relating to such cases.

(e) Constitute such committees as may be required including in particular the committees laid down in section 197.

(f) Maintain websites and universally accessible repositories of electronic information as may be necessary.

[40] Insolvency and Bankruptcy Code (Amendment)Act, 2021

(g) Make regulations and guidelines on matters relating to insolvency and bankruptcy as may be required under this Code including a mechanism for time-bound disposal of the assets of the corporate debtor.

IBBI has regulatory and supervisory powers under IBC. For regulating service providers and other stakeholders, IBBI has issued and is issuing circulars, guidelines, and notifications for various regulations, for attaining the objective of the code and thus evolving the jurisprudence of IBC.

IBC- THE MILESTONES ACHIEVED

The Insolvency and Bankruptcy Code has been considered landmark legislation and the biggest economic and financial reform next to Goods and Service Tax, in independent India. A comparison of the World Bank Ease of Doing Business Report 2017 and 2020 clearly indicates a shift in India's 'doing business' rankings pre and post-IBC enactment. India's resolving insolvency rank improved from 136 in 2017 to 52 in 2020, and the average time taken for resolution was reduced from 4.3 years in 2017 to 1.6 years in 2020: India's rank of ease of doing business improved from 155 in 2017 to 63 in 2020, getting credit rank improved from 62 in 2017 to 25 in 2020 and starting a business rank improved from 151 in 2017 to 136 in 2020. In IBC, the average recovery rate in notable cases is 40-45% as compared to pre-IBC. It was 25-30%. This suggests improvement in recovery for creditors. It helps in failing of Gross NPA from 11.2% in 2017-2018 to 9.1% in 2018-2019.

IBC has changed the thinking, working, and behavior of the person running the corporates. It has created alarm in the mind of errant management of promoters of corporate, that they can no longer retain their corporates if they turn defaulters. Now, many defaulting corporates are trying to enforce financial discipline in the corporates run by them.

IBC has reduced the failure of the businesses, as it provides a framework for revival or rehabilitation of business if the said business is viable. If revival is not possible, it facilitates the closure of said business with minimum time and least cost, thus, enabling an entrepreneur to get out of business with ease.

IBC has had grand success in changing the culture of credit and unlocking the funds which were stuck up in non-performing and stressed assets. Credit markets are continuously developing. The raising of money by entrepreneurs from the Bond Market and Non-Banking institutions has also increased. There are higher recoveries in default cases, which result in bringing down the cost of borrowing and declining risk.

IBC has provided for the creation of institutions like IBBI, NCLT, NCLAT, DRT, DRAT, and Information Utility. All these institutions have developed a huge infrastructure and they are still developing their infrastructure to cater to the stakeholders under IBC. Further, it provides for the creation of a data bank of defaulters.

IBC has changed the prevailing recovery mechanism after its enactment. Pre-IBC, institutions have been opting for recovery under DRT Act and SARFAESI Act for their recovery and the said recovery

is expensive, inefficient, time -consuming and sometimes ineffective. Post-IBC, institutions have been opting for IBC. Further, RBI has recommended banks go through recovery under IBC for 12 cases. Tata Steel and Bhushan Steel cases are among these cases, which were resolved under IBC.

IBC- THE WAY FORWARD

IBC is now six years old since its enactment. The Union Government has done a lot and is continuously doing to make it effective. The Government is taking swift action on finding any loophole or when an issue emerges and hopes to do in the time to come.

In the coming days, we are looking forward to the following:-

That the Government will notify Fresh Start Process, Insolvency Resolution, and Bankruptcy for individuals and partnership firms.

That the Government will notify the comprehensive framework on Cross Border Insolvency based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross Border Insolvency.

That the Government will create better and more infrastructure in the Courts and Tribunals. It will increase the bench strength in the NCLT, NCLAT, DRT, and DRAT for timely and quicker insolvency resolution and liquidation process. There will be expeditious hearings and time-bound disposal of cases. Further, it is expected that Government will evolve a mechanism so that the Judiciary may be able to meet timelines under IBC.

That, the concerned authorities will notify the rules/guidelines for strengthening the rights of the Homebuyer, in relation to providing details of other homebuyers of the project to the home buyer who wants to initiate insolvency proceedings in the NCLT against the default of the real estate owner.

That the Government will make the necessary changes for securing the rights of the creditors and expect that there will be a robust insolvency regime where there are more resolutions and liquidation are minimal.

The stage of coming under IBC is important and crucial. Most creditors are taking the corporate debtor to IBC as a last resort, which erodes the value of that corporate debtor and makes the revival of that corporate debtor very difficult and will move towards liquidation. In the coming days, it is expected that the Government will make and notify mandatory guidelines for the coming of a corporate debtor under IBC in case of default by a corporate debtor.

At last, the Jurisprudence of any legislation takes time to evolve and IBC was no exception. As IBC is new legislation and with the passage of time, IBC is evolving and will continue to do so. It is evolving toward the main objective of the code i.e. resolution of the corporate debtor. It is creating credit discipline among the entrepreneur. The Government has taken necessary steps for the smooth functioning of the Code and hopes will continue to do so for strong insolvency and bankruptcy regime.

An Evolving Jurisprudence, the Milestones Achieved and Way Forward

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Insolvency & Bankruptcy Code or IBC, passed by the Parliament in 2016, is undoubtedly one of the biggest & boldest reforms ushered in by the Modi Government to address the problem of mounting NPAs plaguing the Banking/ Financial Sector with a crippling effect on the economy. The IBC 2016, passed by the Parliament has 255 Sections divided into 5 Parts. The GOI later on notified Part wise regulations of the Code to signal its implementation barring Part 3 from Section 73-187 related to Personal Insolvency including Partnership firms. Besides enacting and notifying IBC , the GOI inter-alia set up 3-tiered authority with Insolvency & Bankruptcy Board of India at apex level, Insolvency Professional Agencies and Information Utility at mid -level besides mandating IBBI to appoint qualified Insolvency Professionals to carry out Insolvency Resolution/Liquidation with the avowed objective to "bring the insolvency law in India under a single unified umbrella to steer the insolvency resolution process". The Code also envisaged the entire Resolution process to be completed within a given time frame of 180- maximum 330 days from date of admission- with another important objective of maximising value of assets. Simultaneously, the Government through Ministry of Corporate Affairs, also set up 2 members National Company Law Tribunals/benches as Adjudicating Authorities at State levels on par with High Courts besides National Company Law Appellate Tribunal at New Delhi to provide legal clothing to the Resolution Plans/Liquidation approved. The advent of IBC also saw the death of several other outdated quasi-judicial authorities viz. BIFR, SICA & Company Law Board besides amendments to over 20 Central Acts. The IBC is a complete code and enjoys primacy over every other Union/State Acts.

It is definitely an interesting study on the role of judiciary or evolving jurisprudence of this path breaking legislation meant to eradicate the scourge of NPAs from the Financial system. However, there are no set parameters or valuation standards and time frame to count milestones achieved as the Code continues to evolve at every turn of events to face emerging challenges. Besides, while evaluating the role of Adjudicating Authority and evolving jurisprudence, a caveat must be also added that the IBC had envisaged a very limited role to the judiciary confined to giving assent to the initiation of insolvency process by admitting the petition and thereafter endorsing the decisions of CoC as per the laid down regulations. It was also in conformity with the avowed policy of the Government that believes in "Minimum Government and Maximum Governance! The present study is undertaken by keeping inherently limited but significant role of the judiciary in view. Hence the role of judiciary vis-à-vis other arms of IBC apparatus become crucial. In the following paras an attempt has been made to get insight into the evolving jurisprudence by discussing some landmark judgements that had a bearing on the success of IBC. Milestones achieved and way forwards have been summed up in the concluding paras.

It must be acknowledged that IBC brought about tectonic shift in the way stressed assets are treated by putting Creditors in control of the affairs. What it meant to convey was that a Corporate Debtor as an entity largely financed by public is a distinct entity from its promoters and deserves to be preserved/resolved rehabilitated without promoters being in control. In several other advanced economies and the US in particular, Bankruptcy Law have been in their Statute for long with Debtor in Possession (DIP). In India since most business enterprises are privately owned but publicly funded, Creditor in Control is a more desired option. That such a legislation- depriving promoters from his control- was surely going to unruffle many feathers and resistance from the corporate group was not entirely unexpected. However, unlike GST- another landmark legislation – that evoked sharp reaction from the affected parties and vested interests, including political class, the opposition to IBC was muted in the beginning and its passage in the parliament rather smooth. But corporate lobby, never lacking in resources, took the matters to the court and waged concerted and prolonged battle with the authorities/Banks/FIs to save their business empire/vested interests.

The journey of IBC, in the last 5 years, hasn't been smooth as it was ridden with several challenges from the word go about its validity , applicability and primacy over other laws , not to speak about the disruption faced on account of covid driven pandemic. Almost every section of IBC besides the Code as a whole had to pass strict legal scrutiny/ challenges at every level. Sections 1-3 about the objectives of the Code with definition of various terminology, Section 5 regarding the definition of stakeholders, Section 7-10, being the most relevant for initiating insolvency process by Financial Creditors, Operational Creditors & Corporate Applicants, Section12 about the time period stipulated for disposal, Section 14 about general moratorium, Section 19 about the cooperation to IRP, Section 21 on the function of CoC, Section 22-30 about duties/responsibilities of RP besides Section 29A on related party and Section 238 on the primacy of IBC have been the most contentious ones. Though these aspects of the Code were confirmed, reaffirmed, clarified and lucidly explained by NCLT/NCLAT/Supreme Court, whenever challenged by affected by parties, it also consumed considerable time and resources that ultimately compromised the objective of maximisation of assets value. It would not be possible to review all the judgments within the limited scope available but an honest attempt has been made to study some land mark judgments that had far reaching bearing to get insight into evolving jurisprudence.

In the very first landmark judgement, in the matter of **Innoventive Industries Ltd. vs. ICICI Bank & Anr.** on 31/08/2017, the Supreme Court put to rest the scepticisms inter-alia about the position of erstwhile directors vis-à-vis RP, its primacy over other laws including Maharashtra Relief Undertaking (special provision) Act 1958, rationale for bringing Insolvency law under single umbrella for speedier resolutions, nature of claims ,debt, default, definition of Operational Creditors vis-à-vis Financial Creditors, pre- existence of disputes besides emphasising on the need to stave off liquidation by putting corporate debtors back on rails. A few days before this landmark judgment NCLT, Ahmedabad 21.08.2017 in the case of **Bharatbhai Vrajlalbhai Selani Vs.State Bank of India** had reiterated that " the object of the Code is no doubt to protect the genuine CD with a view to maximise its value of assets and find out a resolution plan to revive the CD". The SC as late as March'21 by yet another judgment in **Kridhan Infrastructure Pvt. Ltd. (now known as Krish Steel and Trading Pvt. Ltd.) Vs. Venkatesan Sankaranarayan & Ors**. [Civil Appeal No. 3299 of

2020] on 01/03/2021 observed that *"Time is a crucial facet of the scheme under the Code and to allow such proceedings to lapse into an indefinite delay will plainly defeat the object of the Code".* All these above- mentioned cases fully established and confirmed the validity of the Code by the highest judicial authority in the country. NCLT Hyderabad on 21/02/2017 in the matter of **K. K. V. Naga Prasad Vs. Lanco Infratech** Ltd. rightly observed that *"The tribunal cannot go in to roving enquiry into the disputed claims of parties as the object of the Code is to ensure reorganization and insolvency resolution of corporate persons, individuals, etc.*, in a time bound manner for maximisation of value of assets." The same sentiments have been reiterated several times in the past by various tribunals even as lately as 25/02/2021 in the matter of **State Bank of India Vs. Shri Lal Mahal Ltd. NCLT, New Delhi**

In the well-known case of **SBI Vs Ramakrishnan & Anr**, NCLAT had struck down the appeal filed by SBI against the impugned orders of NCLT restraining them from initiating recovery proceedings against the guarantor as non-maintainable. The NCLAT orders had relied on the established dictum of "liability of guarantors being Co-extensive with of borrower" and ruled out separate proceedings against the personal guarantor. At that time the absence of definitions on "Guarantors" in the Code was observed and subsequently inserted at 2(e) by IBBI by a hurriedly brought amendment. The SC took note of the same while allowing **Civil Appeal No. 3595 of 2018 with4553 of 2018** filed by SBI and observed "Section 2(e) of the Code, which was brought into force on 23.11.2017 would, when it refers to the application of the Code to a personal guarantor of a CD applies only for limited purpose contained in sub-sections (2) and (3) of section 60 empowering AA to admit applications under the code. However, confusion relating to enforcement of securities against the guarantors/ corporate guarantors continued unabated as reflected in plethora of cases filed and disposed of by various benches. SC had to once again step in to clear the confusion in the matter of **Insolvency and Bankruptcy Board of India Vs. Lalit Kumar Jain & Ors** SC on 29.10.2020. The SC observed that *"The Code is at a nascent stage and it is better that the interpretation of the provisions is taken up by the SC to avoid any confusion and to authoritatively settle the law. It directed that no further petitions involving the challenge to the notification dated November 15, 2019, which brought into force certain provisions relating to the personal guarantors (PGs) to CDs, shall be entertained by any High Court."* **The High Court, New Delhi on 02/11/2020 in Kiran Gupta Vs. State Bank of India & Anr**. echoed the same sentiments "*Neither section 14 nor section 31 of the Code place any fetters on a bank/financial institutions from initiation and continuation of proceedings against the guarantor for recovering of their dues. The liability of the principal borrower and guarantor remain coextensive and a bank/financial institution is entitled to initiate proceedings against the personal guarantor under the SARFAESI Act during the continuation of the CIRP against the principal borrower".*

Section 5(6) relating to the dispute subsisting in the contract on account of quality of goods or service, breach of warranty or the amount itself has a huge bearing on the admissibility of the petition. In a significant judgment in the matter of **Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd.** dated 21/09/2017, Supreme Court has held that the test of existence of a dispute: (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. "The dispute should not be a mere eyewash and attempt to derail the OC's entitlement to initiate the proceedings under sections 8 and 9 of the Code" thus ruled in **Simplex Infrastructures Ltd. Vs. Agrante Infra Ltd.** NCLT, New Delhi10.08.2017.

In yet another landmark judgment on a batch of WPs & SLPs in the matter of **Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors.** , on 25.01.2019, SC not only reiterated the objective of the Code by drawing clear demarcation between interest of the CD from its promoters but also clarified inter-alia the special significance of Rule 11 of NCLAT, Moratorium under Section 14, role of CoC in evaluating Resolution Plan, role of RP besides upholding the constitutional validity of Section 29A and stressing on the responsibility of CoC. *"The Code is a beneficial legislation which puts the CD back on its feet and is not a mere recovery legislation for creditors. The interests of the CD have, therefore, been bifurcated and separated from that of its promoters/those who are in management.* ***The defaulter's paradise is lost. In its place, the economy's rightful position has been regained".***

Section 7 of the Code relating to Financial Creditors and general moratorium coming into effect under Section 14 had adverse effect on the home buyers. Once application for CIRP is admitted, moratorium, under Section 14 of IBC, on all ongoing and fresh proceedings in various courts/tribunal comes into effect. It is pertinent to note that at time of introduction of IBC in 2017, for the purpose of CIRP, only the dues to Financial Creditors and Operational Creditors were reckoned. However, when confronted with the absence of special rights to home buyers, a largely visible and vocal group, a separate category as "Other Creditors" was inserted in CIRP Regulations dated 16th August, 2017, without specifying their stake in CoC. However, aggrieved by the ambiguity and pointed neglect, number of WPs under Article 32 were filed before SC by the home buyers. In **Chitra Sharma & Ors Vs. Union of India & Ors**, the petitioner had termed IBC proviso, on account of moratorium under Section 14, highly discriminatory and deeply prejudicial besides rendering them remedy less under Consumer Forums, Real Estate Regulatory Authority (RERA), and Civil Court on account of moratorium in place. In another similar case of **Nikhil Mehta & Sons (HUF) & Ors Vs M/s AMR Infrastructure Ltd**, dated 21/07/2017 NCLAT on appeal, confirmed the status of home buyers as **Financial Creditor** on the grounds that money advanced was against the consideration of time value of money besides sale purchase agreement having commercial effect on the borrowings.

IBBI also intervened pro- actively and introduced amendments to CIRP Regulations in August 17 & then again through an ordinance on 6th June'18, whereby home buyers were given status of Financial Creditor. The Hon'ble Supreme Court keeping in mind the Ordinance and to do complete justice exercised its power under **Article 142 of the Constitution** and decided batch of Writ Petitions vide order dated 09.08.2018 in **Chitra Sharma Case**, inter-alia allowing Homebuyers to be part of COC as FCs. The Hon'ble Supreme Court also rescued Homebuyers from Developer/Builder in **Bikram Chatterjee & Ors Vs. UOI & Ors,** famously known as "***Amrapali Group Case***", and issued various directions including cancelation registration of *Amrapali Group of Companies* under RERA. In **Jaypee Kensington Boulevard Apartments Welfare Association & Ors. Vs. NBCC (India) Ltd. & Ors**. Corporate Debtor: Jaypee Infratech Ltd. Civil Appeal No. 3395 of

2020 dated 24/03/2021, the SC settled many knotty issues inter-alia explaining the rationale for according status of secured FCs to home buyers in preference to Banks/FIs. Spate of such orders should have had cascading effect on all similar pending cases and prevented further litigations. However, strangely such a decision instead yielded to the manipulative tactics of the corporate debtors many of whom went on raising spurious dispute over the payment of bills where none existed and contesting his liability to pay the same. The legislative intent behind admission of application within 15 days based on simple test of debt and default went for a toss. The problem of unwarranted delays and non- adherence to the time frame got further exacerbated in the wake of **Sree Metaliks Ltd. & Anr. Vs. Union of India & Anr**. HC, Calcutta dated 07.04.2017 wherein the High Court ruled that "*When the NCLT receives an application under section 7, it must afford a reasonable opportunity of hearing to the CD as section 424 of the Companies Act, 2013, mandates it to ascertain the existence of default as claimed by the FC in the application."* In another case of **Essar Steel India Ltd. Vs. Reserve Bank of India** HC, Gujarat on 17.07.2017 clarified that "*the filing of an application may not result into mechanical admission of application. The AA in exercise of judicial discretion needs to deal with such application in accordance with law and based upon facts, evidence and circumstance placed before it. The AA is certainly required to extend hearing and reasonable opportunity to the company to explain as to why such an application should not be entertained*". Section 7(4) of the Code specifically lays down that "The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor under sub-section 3. However, the judiciary has been from the very beginning reluctant to accept any stipulations that impinged on their "independent functioning". When Creditors insisted on hearing their version first before admission of petition, the sanctity of 14 days for admission got buried in prolonged litigations.

Section 12 specifically lays down time frame of 180 days for completion of CIRP to achieve the objective of maximising asset value. But once the application was admitted it became incumbent on the IRP/RP to complete the process within 180 days. In series of judgments viz. **Innoventive Industries Ltd. Vs. ICICI Bank** & Anr. SC on 31.08.2017 reiterated "*Time is of essence in seeing whether the corporate body can be put back on its feet, so as to stave off liquidation.*" "The statutory scheme laying down time limits sends a clear message that time is the essence of the Code." Thus observed SC on 19.09.2017 in the matter of **Surendra Trading Company Vs. Juggilal Kamlapat Jute Mills Company Ltd. & Ors.** Then in the **Arcelor Mittal India Pvt. Ltd. Vs. Satish Kumar Gupta & Ors.** , SC on 04.10.2018 observed thus" Section 12, construed in the light of the object sought to be achieved by the Code, and in the light of the consequence provided by section 33, makes it clear that the periods mentioned are mandatory and cannot be extended. Regulation 40A of the CIRP Regulations presents a model timeline of the CIRP, and it is of utmost importance for all authorities concerned to follow this model timeline as closely as possible. **Despite such well-meaning observations of the judiciary appreciating the legislative intent, cases continued to drag on for months as hearing got postponed for one or the other reason**.

It is not to suggest that Judiciary was either unaware or insensitive to the problems of the genuine stakeholders, corporate applicants, Creditors, RPs etc. When faced with an extraordinary situation

on account of covid driven pandemic, SC in the matter of Cognizance for Extension of Limitation, took suo motu cognizance of the situation arising out of COVID-19 and resultant difficulties that may be faced by litigants as to period of limitation prescribed under general law of limitation or under Special Laws (both Central and/or State). In exercise of its powers under Articles 141 and 142 of the Constitution, it ordered extension of period of limitation for all proceedings, from 15.03.2020, until further orders, and declared that the order is binding on all courts/tribunals and authorities. SC withdrew such extension 1 year later after normalisation of situations.

Section12A provides modalities for withdrawal of application by the applicant on settlement of debt, something not originally envisaged under IBC. Though AA can exercise powers under Rule 8 of NCLT before admission no such liberty was available after admission. The Section 60(5) of IBC empowers AA in the areas not specifically provided to pass such orders in conjunction with Rule 11 of NCLT but withdrawal of application was beyond its jurisdiction. The inherent powers of NCLT/NCLAT 11 clearly states *"Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the Appellate Tribunal to make such orders or give such directions as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Appellate Tribunal."* This issue was resolved by Hon'ble Supreme Court in the matter of **Lokhandwala Kataria Construction Private Limited Vs. Nisus Finance And Investment Managers LLP** by exercising special powers under Article 141 & 142 of the constitution, allowed withdrawal of application while upholding the decision of NCLAT in dismissing same earlier. SC observed that since both the parties have come to settlement it would make sense to allow such withdrawal. SC' decision led to the insertion of section 12A - " *The Adjudicating Authority may allow the withdrawal of application admitted under* section 7 *or* section 9 *or* section 10*, on an application made by the applicant with the approval of ninety per cent voting share of the committee of creditors, in such manner* as may be prescribed*,"* -through an amendment with effect from 06.06.2018. Such an amendment made the task of withdrawal much easier resulting in speedy settlements in many cases.

Section 14 of IBC , placing moratorium on all existing suits/proceedings before any court or tribunals and future proceedings including by Statutory Authorities like IT/GST is the most powerful section facilitating RP to conduct CIRP without any legal impediments or hindrances. In one of the earliest of cases SC in 2017 settled the issue of moratorium in **Alchemist Asset Reconstruction Company Ltd. Vs. Hotel Gaudavan Pvt. Ltd. & Ors.** on 23.10.2017. SC stated "*The mandate of the Code is that the moment an insolvency application is admitted, the moratorium that comes into effect under section 14(1)(a) expressly interdicts institution or continuation of pending suits or proceedings against CD."*

In a rather controversial but successful CIRP(?) in respect of **Edelweiss Asset Reconstruction Company Ltd. Vs. Synergies Dooray Automotive Ltd. & Ors.**, the Corporate Debtor exploiting loopholes in the newly minted IBC , got the shares of Synergy Castings Limited, a related party, transferred to **Millennium Finance Limited** , Financial Creditors to facilitate its backdoor entry into CoC. Thereafter they got the Resolution Plan submitted by Synergy Castings limited, approved by CoC with 94% haircut vide NCLT Hyderabad order dated 02/08/2017. The entire settlement was reached in just 2 CoC. Meetings However IBBI acted quickly to plug loophole in the Code by way of

amendment to Section 29A barring the promoters and its related party to submit Resolution Plan. Promoters of MSME registered Companies are however exempt from the provision of Section 29A and are allowed to bid for the same. In the matter of **K. Periyasamy & 1 another Vs. J.Manivannan** [MA/347/2019 in CP/422/IB/2018] NCLT, Chennai order dated 01.05.2019 reiterated. "The certificate issued by the Ministry of MSME raises no objection to the fact that the CD is an MSME. Hence, clauses (c) and (h) of section 29A are not applicable to the CD.

Many applications filed under Section 9 of IBC by Operational Creditors got settled before admission as promoters could not risk losing control over their business besides reputation. But there was also a downside of Operational Creditors as they stood to lose their stake in the majority of resolved cases. **Whether OC can be so easily dispensed with or dismissed on the specious argument of "not contributing to the development of CD and not having charge on the assets"?**

In several cases the Apex court have held that Operational Creditor cannot claim that he should be given equivalent amount to one which has been given to the Financial Creditors – **Jaybee Lamination Pvt. Ltd. Vs. Trans-Fab Power India Pvt. Ltd.** – NCLAT New Delhi. The tribunal relied on the earlier judgment of SC wherein it has been settled by Hon'ble Supreme Court in **Committee of Creditors of Essar Steel India Limited vs. Satish Kumar Gupta & Ors. [2019]** , that there cannot be equality in two different categories of claimants.

It must be stated to the credit of NCLTs/NCLATs/ SC that they haven't interfered in the resolution process and allowed freedom to approve any plan as part of CoC' Commercial wisdom . The cases illustrated above besides hundreds of others did largely help achieve the objective of IBC in maximising assets value, If not entirely. However, there are some visible downsides that can be ignored only at the risk of reducing IBC to irrelevance. The moot question often raised is why application once filed can't be admitted within a reasonable time of say 2 months if not 2 weeks as stipulated in the Code? Why no support is extended to IRP/RPs in discharging his duties and applications filed under Section 19(3) seeking directions to Civic/Police administration evokes less than sympathetic response? What is the real cause of pendency of hundreds of cases that are heard barely 2-3 times in a year? The IBC is different from other similar legislations on account of Avoidance of Transactions that are to be examined under Sections 43, 45, 49 & 66 of the Code about Preferential , Undervalued , Extortionate and Fraudulent Transactions (PUFE). But in reality, only one in 5 cases, IAs regarding PUFE are filed and only in a handful of cases AA have adjudicated! Is it a reflection on the judiciary or the competence of IPs? Whether the success of the code is to be judged from the number of cases settled or the percentage of recovery effected? Can we consider a Videocon group case with liabilities over ₹ 66,000 crores and settled for just₹2,900 crores as a success where the haircut exceeds 95%? In 2 of the much talked about cases viz. Essar Steels Ltd and Bhushan Steels ltd of 12 large NPA cases, also referred as Dirty Dozen, the resolution was successful and recovery almost 60% . That is nothing short of a miracle because resolution of such cases outside IBC wouldn't have been possible. However, in respect of other accounts success by way of resolution amount were far short of expectations with haircut exceeding 80%. Besides when the progress is viewed in the backdrop of cases pending for months together awaiting decision

with even the maximum resolution period of 330 days having exceeded -almost twice in some cases, we are constrained to admit that lot more needs to be done.

I believe that no purpose will be served by just arriving at some fancy figure of milestones achieved and feel elated over it. Suffice it to say that a beginning has been made and all the main actors are playing their role as warranted in the fast-evolving scenario. All the above-mentioned cases are landmark judgments and can be termed as milestones that have greatly contributed to the evolution of IBC . The SC judgments that led to the insertion of Section 5(e) on Personal Guarantors, 12A on withdrawal of application, 29 A on related party have added new dimension to the Code. The net effect of these judgments will be realised in the days to come and can't be quantified at this juncture. But lot more needs to be done. There is an urgent need to identify the factors leading to delay in admission/ resolution and suitable steps adopted to overcome such lacunae. Similarly, the CDs have a right to be heard but they have no right to derail the CIRP process. Not more than 2 chances spanning over 2 months maximum to be allowed.

Another very urgent modification required in the jurisprudence is to make the verdict of other NCLTs and NCLATs as binding on all AAs to avoid unnecessary litigations, just as in case of High Courts . If after series of IAs and Appeals any issue has been settled by NCLAT or Supreme Court, the same should become applicable in all future cases. The absence of such mechanism leads to many AAs and external authorities like IT/GST/PF Dept quoting earlier impugned order to engage in meaningless litigations. The most glaring case of such inconsistent approach relates to claims on account of PF/Gratuity payable to the employees of a CD undergoing CIRP/Liquidation. Though payment of wages /PF/Gratuity etc has been settled in the past more precisely in the matter of Precision Fasteners, Moser Baer Karamchari Union and more recently on 12th May NCLAT in the matter of Regional Provident Commissioner Employees Provident Fund Organisation Vs. Vandana Garg , RP GVR Infra Projects Limited . In fact, while dismissing the Appeal by RPFC, NCLAT has been quite scathing " ……. *certain tax authorities were not abiding by the mandate of I&B Code and continuing with the proceedings, has brought out the 2019 amendment so as to cure the said mischief*". However strangely just a few days back in a similar case NCLT Kochi in the matter of Acharya Techno Solutions Pvt Ltd, the AA had ordered release of full amount to PF Commissioner without insisting on submission of claim for G. Such an order is not only erroneous but result of non-application of mind. Such a situation ought to be avoided to save time and resources from unnecessary litigations.

The role of the judiciary can't be viewed in isolation without taking into account the role played by other stakeholders viz. IBBI, IPAs besides hundreds of IPs responsible for driving the insolvency process. Cooperation from other statutory authorities and their appreciation of IBC is also very important. It can be easily surmised that both the IBBI and the Judiciary have been quite pro -active and aware of their key responsibilities and alive to the emerging situation by playing their assigned role in the evolving jurisprudence. Since its adoption in 2016 the Code has seen 8 amendments - twice in each years in response to the challenges posed by the litigants and observations made by BCLT/NCLAT/SC besides similar amendments to Regulations on CIRP/Liquidation/Voluntary liquidations. It is must be acknowledged that SC, besides other wings of judiciaries, which is only

required to confirm the legality and Constitutional validity of the decisions of NCLT/NCLAT has time and again reiterated that objective of the code and tried to protect the interest of the genuine creditors. All the above judgments besides hundreds of others in the last 5 years have helped evolve IBC into a very robust legislation. It can't be denied that IBC struck at the root of vested interests, consolidated over the years on the back of system opacity and raw greed, that was damaging the very core of the economy. The landmark judgments can be counted as milestone but the journey ahead is long and challenging. The redeeming feature is that our experience so far does inspire confidence in the jurisprudence of overcoming such challenges.

Keystrokes for a successful resolution plan

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Background:

No doubt there is a silver lining amidst the country's NPA clouds as the Insolvency and Bankruptcy Code, 2016 **("IBC")** has started in full swing. However, with the new code set in, it is important to understand the various elements of the code that actually can be game changers not only for the applicants but the overall economic development at large. Amongst several others – one and the important one remains to be The Resolution Plan.

A Resolution Plan is one of the significant and differential components of the IBC. A very precise and multi-dimensional understanding of the concept of Resolution Plan is essential keeping in mind all the related legal issues & required compliances. Whether for mandatory condition that must be adhered to while preparing the Resolution Plan or for other key elements, regulations like Corporate Insolvency Resolution Process Regulations, 2016 (CIRP) & the Code needs to be mastered, to have a successful plan.

Before we start understanding the Keystrokes for a successful resolution plan, I would like to discuss the circumstances which has resulted in submission of a resolution plan. As a part of Corporate Insolvency Resolution Process (CIRP), which aims at revival of the corporate entity that has run off the track, Expression of Interest are called for getting a resolution plan from the prospective resolution applicants as a part of CIRP process. Ofcourse all this is done keeping in mind the maximization of value of assets of the entity so as to promote entrepreneurship and making available the credit which is the basic objective of introduction of code.

What is a Resolution Plan?

As per provisions of Section 5 (26) of IBC, Resolution plan is defined as a plan proposed by Resolution Applicant for Insolvency Resolution of the Corporate Debtor (CD) as a going concern in accordance with Part II of IBC.

Further as per explanation to Section 5(26) of IBC, a resolution plan may include provisions for the restructuring of the corporate debtor, including by way of merger, amalgamation and demerger.

In simple words, a Resolution Plan is a plan submitted by a successful resolution applicant for defaulted entity as a going concern, which is perfectly in compliance with the provisions of the IBC and the regulations framed therein. Provisions for restructuring like amalgamation, merger or demerger can be included in the resolution plan even if there are separate provisions under Companies Act, 2013 for the same.

The flow of a successful resolution plan will be that it will be submitted first to the Resolution Professional who after being satisfied that it meets all the required provisions of the code and the regulations framed therein, as also ensuring that it is in compliance with the RFRP document, will place it before the COC (Committee of Creditors) for their approval and after getting such approval will place it before Adjudicating Authority (AA) for its final approval.

Even though this plan is primarily based on the Information Memorandum and Request for Resolution Plan (RFRP document) prepared by the Resolution Professional (RP), nothing stops the resolution applicant from gathering information about the unit from "information Utility" and also from the other forums from which you can get authentic information about the entity like MCA, SEBI etc.

Who is a Resolution Applicant?

A resolution applicant is a person who submits the resolution plan to a resolution professional. Even the creditors or the promotors of the Corporate Debtor can become resolution applicants and submit a resolution plan. The Code provides for an eligibility criterion for any prospective resolution applicant and the evaluation criteria for resolution plan submitted which is to be prescribed by the Resolution Professional after obtaining approval of The Committee of Creditors. This is done to ensure that only serious resolution applicants participate in the process of CIRP. The IBC defines a resolution applicant as a person who individually or jointly submits a resolution plan to the resolution professional and is not disqualified u/s 29A.

Who is not or cannot be a Resolution Applicant?

Section 29A of IBC, 2016, specifies the persons who are not eligible to be a resolution applicant. The section defines that a person will not be able to submit a resolution plan if that person or any other persons acting jointly with that person is:

- An undischarged insolvent
- A wilful defaulter
- Having an account of a corporate debtor, at the time of submitting the insolvency resolution plan, under the management of such person or of whom such person is a promoter, categorized as a non-performing asset under the guidelines of the RBI and that one year has elapsed since such classification until the date of initiation of CIRP of the corporate debtor.
- Has been convicted for any offence punishable with imprisonment.
- Is disqualified to act as a director under the Companies Act, 2013.
- Is prohibited by the Securities and Exchange Board of India from trading in securities or accessing the securities markets.
- Has been a promoter or in the management or control of a corporate debtor for which an order for PUFE transactions has been passed by the AA or
- Has any other disability defined in the code.

What are the main ingredients of a resolution plan?

Section 30 of IBC spells out the necessary ingredients for a Resolution Plan. Amongst other things, as per Section 30(2)(e) of IBC, a Resolution Plan submitted by Resolution Applicant should not be in contravention to any of the provisions of the law for the time being in force. This clearly means that under the provisions of IBC, there should not be any mechanism in the Resolution Plan which will be tantamount to bypassing or breaching any provision of any other law. In case the Resolution Applicant envisages any relief or concessions from any State/Central Government/Authority in the Resolution Plan, it should be ensured that such reliefs or concessions are permissible under the provisions of law in force.

Regulation 37 of the CIRP Regulations, lays down various measures that should be addressed in the Resolution Plan. If any such measure included in the resolution plan, then the Resolution Applicant will have to obtain from the concerned department all the necessary clearances or permission which may be required for such transfer of the asset like Forest department clearance, environmental clearances etc.

If a resolution plan envisages significant acquisition of shares, then the necessary compliances with the regulator & related Regulation that are applicable will have to be followed. Additional equity has to be compliant with the relevant provisions of Companies Act, as may be applicable. The above is in contrast with the provisions as contained under SICA which permitted the BIFR to grant exemption from complying with the SEBI Takeover norms and also the provisions of Companies Act w.r.t. preferential allotment of shares without complying with the applicable provisions of the Companies Act 2013.

If the proposal requires merger or amalgamation, it has to be ensured that such merger does not contravene the provisions of the Competition Act. Thus at times permission may be required to be obtained from Competition Commission of India (CCI). As such, the resolution applicant has to have knowledge about such allied laws while preparing a Resolution Plan.

In case the resolution plan envisages any preferential allotment of shares to the creditors or proposed strategic investor, or conversion of debt or obligation into long term instruments then the applicant has to ensure compliance with the relevant provisions of Companies Act 2013.

Regulation 38, covers the mandatory condition of the resolution plan. It stipulates that the resolution plan shall identify the source of funds that will be used for the payment and order of priority of such payment. A resolution plan should provide for insolvency resolution process cost and should ensure that it should be paid in priority over other creditors. With respect to the payment to be made to the operational creditor, it should be ensured that liquidation value due to operational creditors shall be made and such payment shall be made in priority to any financial creditor and which has to be made before the expiry of thirty days after the approval of a resolution plan by the Adjudicating Authority. With respect to the payment made to the dissenting financial creditors (Creditors voting against the resolution plan) regulation states that Resolution plan must ensure that liquidation value due to such creditors as per section 53 of the code, shall be provided and such payment is made before any recoveries are made by the financial creditors who voted in

favour of the resolution plan. Besides these priorities, a resolution plan should also provide for term of the plan and implementation schedule. It should also provide for the management and control of the business of the corporate debtor.

There appears to be no automatic statutory remedy for a failure of the Resolution Plan. However, Section 33(4) read with Section 33(5) provides that any contravention in the provisions of the Resolution Plan can be brought to the notice of NCLT for the purpose of seeking liquidation of the Corporate Debtor and if the NCLT determines that the Corporate Debtor has contravened the provisions of the Resolution Plan, it shall pass a liquidation order. Therefore, the above provision means that in case of failure / noncompliance of a Resolution Plan, the Corporate Debtor can face liquidation orders under the provisions of the IBC.

From the above analysis it is abundantly clear that Resolution Professional has to perform his duty very carefully. Performing his duties and making sure that the submitted resolution plan does not contravene the provision of the law for the time being in force is like, walking on a tight rope and making sure he does not fall from the rope. He therefore needs continuous legal/ Technical/secretarial support from his team members and external advisors.

Whom to Submit Resolution Plan?

IBC Sec. 30 (1) states that, a resolution applicant may submit a resolution plan to the resolution professional prepared on the basis of the information memorandum. (2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan—

(a) Provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the repayment of other debts of the corporate debtor.

(b) Provides for the repayment of the debts of operational creditors in such manner as may be specified by the Board which shall not be less than the amount to be paid to the operational creditors in the event of a liquidation of the corporate debtor under section 53.

(c) Provides for the management of the affairs of the Corporate debtor after approval of the resolution plan.

(d) The implementation and supervision of the resolution plan.

(e) Does not contravene any of the provisions of the law for the time being in force.

(f) Conforms to such other requirements as may be specified by the Board.

Further, resolution professional will also ensure that the Resolution Plan is accompanied with affidavit that the Resolution Applicant is eligible under section 29A of Insolvency Code and undertaking that information and records provided are true and correct and if found false, deposit may be forfeited – Regulation 39(1) of CIRP Regulations, 2016.

If the resolution plan does not comply with the regulations, it will be rejected – Regulation 39(1A) of CIRP Regulations, 2016.

The resolution professional shall present to the Committee of Creditors (CoC) for its approval such resolution plans which confirm the conditions in section 30(2) of IBC as well as relevant CIRP regulations.

Once the resolution plan is submitted, the CoC shall evaluate the resolution plans received as per evaluation matrix to identify the best resolution plan and approve it with modifications as it deems fit – Regulation 39(3) of CIRP Regulations, 2016.

Whether a Resolution applicant or his representative can attend the COC meeting?

Sec 30 (5) states that, the resolution applicant may attend the meeting of the committee of creditors in which the resolution plan of the applicant is considered: Provided that the resolution applicant shall not have a right to vote at the meeting of the committee of creditors unless such resolution applicant is also a financial creditor.

Whether negotiation can take place between CoC and RA?

Maximization of stakeholder's value being the basic objective of the code, nothing stops COC and RA to negotiate and renegotiate the value and other terms and conditions of the plan before the plan is accepted or rejected by the COC.

Who Grants Approval to Resolution Plan?

The Committee of Creditors (CoC) may approve a resolution plan by a vote of not less than 66%, of voting share of the financial creditors, after considering its feasibility and viability, and such other requirements as may be specified by the IBBI (Board) as mentioned in section 30(4) of Insolvency Code.

Approval or rejection of plan is at the discretion of CoC – RP or Adjudicating Authority cannot interfere in this decision taken by COC, If, resolution plan is approved / not approved by Committee of Creditors (CoC) with 66% majority, adjudicating authority (NCLT) has no jurisdiction to exercise its powers over the decision taken by Committee of Creditors (CoC) but is left with an option of taking the corporate entity to liquidation and passing a liquidation order.

Who will submit the plan to Adjudicating Authority?

After approval of Committee of Creditors (CoC), the resolution professional shall submit the resolution plan to the Adjudicating Authority – section 30(6) of Insolvency Code, 2016.

If the Adjudicating Authority (NCLT) is satisfied that the resolution plan as approved by the Committee of Creditors (CoC) meets the requirements as referred to section 30(2) of I & B Code, 2016, it shall by pass an order approving the resolution plan.

The Adjudicating Authority has limited jurisdiction in the matter of approval of a resolution plan, which is well-defined and circumscribed by Sections 30(2) and 31 of IBC. In the Adjudicatory process concerning a resolution plan under Insolvency Code, there is no scope for interference with the commercial aspects of the decision of the Committee of Creditors (CoC). Once the resolution plan is approved by COC, there is no scope for substituting any commercial term of the resolution plan. If the Adjudicating Authority or the Appellate Authority, as the case may be, would find any shortcoming in the resolution plan vis-à-vis the specified parameters, it would only send the resolution plan back to the Committee of Creditors, for re-submission after satisfying the parameters delineated by Insolvency Code.

Copy of order of AA shall be sent to participants and the resolution applicant. Any approval in general meeting or Board meeting is not required.

The resolution plan so approved shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan – section 31(1) of Insolvency Code, 2016.

The copy of approved resolution plan shall be sent by resolution professional to participants – Regulation 39(5) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

Can a Resolution Plan approved by the CoC be withdrawn?

There is no explicit provision in the code, for allowing withdrawal of the Resolution Plan. The provisions relating to withdrawal are only for the applications filed u/s 7, 9 and 10 for initiation of CIRP – no provisions have been expressly made for withdrawal of Resolution Plans.

The Hon'ble Supreme Court has held that enabling withdrawals or modifications of the Resolution Plan, once it has been submitted to the AA, would create another tier of negotiations which will be wholly unregulated by the Code and would either result in a down-graded resolution amount of the Corporate Debtor and/or a delayed liquidation with depreciated assets which frustrates the very purpose of IBC.

The issue of withdrawal of resolution plans has come up several times, some instances have been mentioned here. In the matter of Kundan Care Products Limited, the Hon'ble NCLAT allowed modification of the Resolution Plan after its submission to the AA, by invoking A. 142 of the Indian Constitution. An excerpt of the Kundan case, is as under:

"In the case of Kundan Care both the Resolution Applicant and the CoC, have requested for changes to be made in the Resolution Plan because of the uncertainty over the PPA, cleared by the ruling of this Court in Gujarat Urja (supra), a one-time relief under Article 142 of the Constitution is provided."

In the case of Seroco Lighting Industries Private Limited, the Resolution Plan was approved by the NCLT. However, due to significant changes in the overall economic condition of the CD, the Resolution Applicant approached the NCLT for permitting revision in the Resolution Plan. NCLT rejected the plea of the Resolution Applicant. Against this judgement, appeal was made by Seroco to Appellate Tribunal. NCLAT upheld the judgement of NCLT on the grounds that "Seroco being a company formed by its former employees (who would have been aware of its financial condition) and also being the sole Resolution Applicant, the modification / withdrawal shall not be permitted."

What should be the Table of Contents of a typical Resolution Plan?

Details which should normally be the contents of the resolution plan are elucidated below. These are illustrative in nature and not exhaustive.

1. Definitions and interpretations of the terms that are used in your resolution plan. (This should mention that where a particular term has not been defined, the applicable definition as per code will be adopted).

2. Executive Summary (which will give all the important aspects at a glance).

3. Brief about Corporate Debtor (This can be taken from Information Memorandum prepared by the RP, as also from the website of CD or the information available in public domain from some authentic source. This brief explains how well the resolution applicant has understood the CD and has therefore taken an informed decision by way of participating in its revival process).

4. Overview of Resolution Applicant. (This should give all possible details about the RA like since when established, the sector or area of operation, all the statutory registration details, volume of activity, organisational structure etc).

5. Creditworthiness or Financial Ability of the Resolution Applicant and Source of Funds from where the funds will be invested. (Better to enclose the net worth certificate issued by CA as also the source of fund from where the proposed plan is going to be funded etc. This will help to gain confidence of COC and Bench in RA as to smooth completion of turnaround of the entity and that it will not stick in the middle for wants of funds.)

6. Prior experience of managing / turnaround of the Companies if any (If the RA possesses any such experience in the past, that should be categorically mentioned as it will further support the ability of the RA).

7. Key Challenges and Trends in Industry.

8. Note on Turn around – (here one should first address the issues that lead the unit go into financial distress and how the RA has planned to overcome the causes that were responsible for failure of unit).

9. Financial Plan – (A financial projection for a period of 5 to 7 years need be given after taking into account the price that has been agreed to be paid. These projections will demonstrate that the unit can run properly and will be financially visible. Here the entire issues relating to labour employees

and other operational creditors etc needs to be addressed in detail. This is because only a financially visible plan only can be accepted).

10. Important terms for implementation of plan (Here it should be remembered that there cannot be conditions as a conditional plan is void ab initio and is not acceptable. However, terms can be mentioned like we can say that the consideration will be paid in 4 equal quarterly instalments).

11. Business Plan (A write up on the business plan including assumptions and financial projections basis which the financial proposal has been drafted. The business plan may provide details of proposed management team, fund infusion and its sources to meet capital expenditure/ working capital requirement, operational and marketing plan, etc.)

12. Implementation Schedule – Should give a detailed plan of how the plan is going to be implemented.

13. Mechanism regarding the management and control of the affairs of the Company (Here RA should demonstrate as to what expertise he possesses or how RA can engage expert personnel for effectively managing and controlling the affairs of the company).

14. Manner of Supervision and implementation of plan. (This requires that a monitoring committee be set up who will do this job.).

15. Declaration that the plan is not in contravention of provisions of any applicable law for the time being in force.

16. Statement on how the interest of all the stakeholders has been taken care of.

17. Sources of funds from which the proposed payments shall be made.

18. Reliefs and concessions sought for.

19. Financial projections & assumptions.

20. Schedules (as may be required as per RFRP document).

What are the measures in Regulation 37 of CIRP Regulations?

A resolution plan shall provide for the measures, as may be necessary, for insolvency resolution of the corporate debtor for maximization of value of its assets, including but not limited to the following:

(a) Transfer of all or part of the assets of the corporate debtor to one or more persons.

(b) Sale of all or part of the assets whether subject to any security interest or not.

(ba) Restructuring of CD, by way of merger, amalgamation and demerger.

(c) The substantial acquisition of shares of the CD, or the merger or consolidation of CD with one or more persons.

(ca) Cancellation or delisting of any shares of the corporate debtor, if applicable.

(d) Satisfaction or modification of any security interest.

(e) Curing or waiving of any breach of the terms of any debt due from the CD.

(f) Reduction in the amount payable to the creditors.

(g) Extension of a maturity date or a change in interest rate or other terms of a debt due from the CD;

(h) Amendment of the constitutional documents of the CD;

(i) Issuance of securities of the CD, for cash, property, securities, or in exchange for claims or interests, or other appropriate purpose;

(j) Change in portfolio of goods or services produced or rendered by the CD;

(k) Change in technology used by the CD; and

(l) Obtaining necessary approvals from the Central and State Governments and other authorities.

38. Mandatory contents of the resolution plan.

(1) The amount payable under a resolution plan –

(a) To the **operational creditors** shall be paid in priority over financial creditors;

Comment:

The Code under section 30 provides for the payment of debts of operational creditors which shall not be less than the amount to be paid to the OC in the event of liquidation of the corporate debtor in accordance to waterfall mechanism lined up under section 53 of the Code.

(A)To the **financial creditors**, who have a right to vote under sub-section (2) of section 21 and **did not vote in favour** of the resolution plan, **shall be paid in priority** over financial creditors who voted in favour of the plan.

Comment:

Financial creditor is the only one who has a say as well as a voting right to approve a plan. Therefore, it becomes necessary for a RA to lure the FC to crack the deal by offering more to FC.

(1A) A resolution plan shall include a statement as to how it has dealt with the interests of all stakeholders, including financial creditors and operational creditors, of the corporate debtor.

Comment:

The guiding light of the Code i.e., the Preamble gives an insight as to what it sought to achieve through the Code which includes balancing the interest of all stakeholders – workers are paid, the

creditors in the long run will be repaid in full, and shareholders /investors are able to maximize their investment. Therefore, each and every stakeholder should be taken care of.

(IB) A resolution plan shall include a statement giving details if the resolution applicant or any of its related parties has failed to implement or contributed to the failure of implementation of any other resolution plan approved by the Adjudicating Authority at any time in the past.

Comment

If such information is hidden and subsequently found out or comes to the notice of the bench, there is a great risk that the order passed earlier will be reversed and the money invested by such resolution applicant shall be forfeited.

(2) *A resolution plan shall provide:*

(a) The term of the plan and its implementation schedule;

(b) The management and control of the business of the corporate debtor during its term; and

(c) Adequate means for supervising its implementation.

Comment:

With respect to implementation of the plan, the Code under Regulation 38 (2) requires the RP to substantiate the following:

- **The terms of the plan and the implementation schedule** like –

(1) Timeline for payment CIRP Cost, OC, dissenting FC and to other stakeholders if any

(2) Obtaining approval under Competition Commission Act, RBI in relation to ECBs, SEBI depending on case to basis. Further, actions like infusion of fresh equity, am

- **The management and the control of the business of the corporate debtor during its term;** and

- **Adequate mean for supervision of its implementation** during which the RA may or may not propose RP to be a part of monitoring committee

(3) *A resolution plan shall demonstrate that* –

(a) It addresses the cause of default.

(b) It is feasible and viable.

(c) It has provisions for its effective implementation.

(d) It has provisions for approvals required and the timeline for the same.

(e) The resolution applicant has the capability to implement the resolution plan.

Conclusion:

To sum up, once the Resolution Plan is approved by the committee of creditors under section 30 (4) and subsequently by the AA by its order under section 31(2), the **Resolution Plan becomes binding on the CD and its employees, members, creditors, guarantors and other stake holders including the Central Government, any State Government, or any other local authority to whom statutory dues are owed.** Section 238 of the Code having the overriding effect stipulates that in the case of any inconsistency between the provision of the Code and other laws the former shall prevail which is augmented by the Apex Court in its various judgments, as and when the priority of Code was challenged. Lastly, Section 32 A of the Code which came into effect on 28th December 2019, gives immunity to the resolution applicant relating to the liability of a CD for an **offence** (civil or/and criminal) committed prior to the commencement of the corporate insolvency resolution process.

CASE LAWS

SECTION 238A - CORPORATE INSOLVENCY RESOLUTION

- **Crown Tobacco Company (P.) Ltd. v. Crale Foodlinks (P.) Ltd. [2021] 133 taxmann.com 61 / [2022] 169 SCL 288 (NCL-AT)**

Where operational creditor entered into a business conduction agreement in 2010 with corporate debtor and corporate debtor defaulted in payment of outstanding dues, NCLT rightly held that petition filed under section 9 on 12-3-2018 was not within limitation period and all claims prior to 12-3-2015 were barred by limitation.

The appellant-operational creditor entered into a business conduction agreement (BCA) in 2010 till 2017 with the respondent-corporate debtor for operating restaurant & Lounge bar from business premises of which the appellant had valid license. However, dues as regards monthly conducting fees and utility bills were outstanding and the appellant filed petition under section 9 on 12-3-2018 before NCLT which by the impugned order dismissed petition holding that all claims before 12-3-2015 were barred by limitation.

Held that, since there was pre-existing dispute between parties and reasons mentioned by NCLT while dismissing petition were to be agreed with, there was no merit is the appeal and same was to be dismissed.

Case Review : Crown Tobacco Co. (P.) Ltd. v. Crale Food Link (P.) Ltd. [2020] 120 taxmann.com 168 (NCLT-Mum.), affirmed.

SECTION 5(8) - CORPORATE INSOLVENCY RESOLUTION

- **Sree Bhadra Parks and Resorts Ltd. v. Sri Ramani Resorts and Hotels (P.) Ltd. [2021] 133 taxmann.com 103 /[2022] 169 SCL 331 (NCLAT - Chennai)**

Where financial creditor entered into a share purchase agreement with corporate debtor and had advanced a sum to corporate debtor, which it failed to repay when agreement did not fructify, sum advanced came within definition of financial debt and NCLT was justified in admitting application under section 7 on failure of corporate debtor to repay said debt.

The respondent-financial creditor had entered into a share purchase agreement with the appellant-corporate debtor to purchase 100 per cent shares of the corporate debtor for a consideration. The financial creditor had paid an advance to the corporate debtor. However, agreement did not fructify and the corporate debtor promised to pay back advance paid by the financial creditor but the

corporate debtor failed to pay the same. The financial creditor filed an application under section 7. The Adjudicating Authority by impugned order admitted said application initiating CIRP proceedings against the corporate debtor.

Held that since the corporate debtor had promised to repay advance paid by the financial creditor, such promise came squarely within ambit of definition of financial debt and the respondent was a financial creditor in the eyes of law. Since the corporate debtor had not adhered to its commitment in respect of share purchase agreement and had not paid debt due, impugned order passed by the Adjudicating Authority in admitting application under section 7 didn't suffer from any irregularity and, therefore, appeal was to be dismissed.

Case Review : Sri Ramani Resorts and Hotels (P.) Ltd. v. Sree Bhadra Parks and Resorts Ltd. [2021] 133 taxmann.com 102 (NCLT - Kochi), affirmed.

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

- **Gail India Ltd. v. Ajay Joshi (Resolution Professional of Alok Industries Ltd.) [2021] 133 taxmann.com 142 (NCL-AT)**

Where intervention application filed by appellant-operational creditor opposing resolution plan on ground of discrimination among operational creditors was rejected by Adjudicating Authority, operational creditors being paid as per section 30(2) resolution plan was rightly approved by Adjudicating Authority.

CIRP was initiated against the corporate debtor. Resolution applicants furnished a resolution plan which was approved by the Committee of Creditors and same was further approved by the Adjudicating Authority. The appellant-operational creditor filed an intervention application disputing the Resolution plan on ground of discrimination stating that said resolution plan created a class within a class of operational creditor as it provided for 100 per cent payment to operational creditors having dues less than Rs. 3 lakhs and provided a payment 'NIL' to operational creditors having dues over Rs. 3 lakhs, which included the appellant. The Adjudicating Authority by impugned order rejected the intervention application and approved the resolution plan.

Held that there is no embargo for classification of operational creditor(s) into separate/different classes for deciding way in which money is to be distributed to them by 'Committee of Creditors' because of fact, undoubtedly, they do have subjective final discretion of 'Collective Commercial Wisdom' in relation to amount to be paid and quantum of money to be paid, to a certain category or

incidental category of creditors, balancing interests of 'stakeholders' and 'operational creditors'. Since 'operational creditors' were paid as per section 30(2)(b), impugned order passed by the Adjudicating Authority did not suffer from any material irregularity or patent illegality in the eyes of law.

Case Review : State Bank of India v. Alok Industries Ltd. [2019] 104 taxmann.com 182 (NCLT - Ahd.) affirmed.

SECTION 14 - CORPORATE INSOLVENCY RESOLUTION PROCESS - MORATORIUM

- **Harish Taneja v. Dakshin Haryana Bijli Vitran Nigam [2021] 133 taxmann.com 146 /[2022] 169 SCL 195 (NCL-AT)**

Supply of essential goods or services like electricity to corporate debtor should not be terminated or suspended or interrupted during moratorium period, however, dues arising from such supply during moratorium are paid and if they are not paid, section 14 will not protect.

Outstanding dues towards consumption of electricity during CIRP process was not paid. Consequently, electricity supply of the corporate debtor had been disconnected by the respondent-operational creditor during moratorium period. The appellant-Resolution professional filed an application stating that there was no money in corpus of the corporate debtor and liquidation of the corporate debtor was pending. The Adjudicating Authority by impugned order directed the Resolution Professional to pay outstanding dues of electricity for restoration of electricity. Under section 14(2) supply of essential goods or services to the corporate debtor should not be terminated or suspended or interrupted during moratorium period, however, dues arising from such supply during moratorium are paid and if they are not paid, section 14 will not protect. Use of electricity for running printing business of the corporate debtor during CIRP period could not get protection as essential supply and, therefore, impugned order was not to be interfered with.

Case Review : Rajat Mitra v. Perfact Color Prints Ltd. [2021] 133 taxmann.com 145 (NCLT - New Delhi), affirmed.

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

- **Damodar Valley Corporation v. Cosmic Ferro Alloys Ltd. [2021] 133 taxmann.com 156 (NCL-AT)**

Where appellant-operational creditor disconnected electricity supply to corporate debtor for failure to pay outstanding dues and successful resolution applicant sought for enhanced power supply without any security deposit, in absence of any specific orders by Adjudicating Authority on waiver of security deposit while approving resolution plan, dues of electricity were to be paid by successful resolution applicant along with security deposit for increasing enhanced power supply.

Pursuant to an application filed by the financial creditor, CIRP proceedings were initiated against the corporate debtor. The appellant-operational creditor had supplied power to the corporate debtor. Power supply was disconnected due to outstanding electricity dues. Successful resolution applicant requested for increase in contract demand from 10 MVA to 20 MVA and asked for re-connection of electricity supply with waiver of security deposit. The appellant rejected request for restoration of connection as no security deposit was given. The Adjudicating Authority by impugned order approved the resolution plan without any specific order of waiver of security deposit and directed the appellant to reconnect electricity supply to the corporate debtor without insisting any payment of deposit.

Held that in absence of any specific orders by the Adjudicating Authority while approving resolution plan, the appellant was not obliged to grant any waiver of payment of security deposit over next five years for increase in contract demand or supply of electricity by a 132 KV supply line. Any statutory or legitimate dues which might be demanded from Successful Resolution Applicant (SRA) for supply of any services should be paid by SRA and no waiver for any period of time for future was permissible. Dues of electricity supplied to the corporate debtor during CIRP if not paid, should be paid out of CIRP costs and same should be ensured by the Resolution Professional. Therefore, impugned order was to be set aside with a direction that any security deposit or other charges for requested increase in contract demand and enhanced supply line for electricity would have to be paid to the appellant.

Case Review : Cosmic Ferro Alloys Ltd. v. Damodar Valley Corpn. [2021] 133 taxmann.com 155 (NCLT - Kol.), set aside.

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

- **Harish Raghavji Patel v. Shapoorji Pallonji Finance (P.) Ltd. [2021] 133 taxmann.com 183 (NCL-AT)**

Inherent power under rule 11 of NCLAT Rules can be exercised only when no other remedy is available to litigant and nowhere a specific remedy is provided by statute, hence, where procedure had been prescribed under section 12A for withdrawal of petition filed under section 7, exercising inherent power under rule 11 of NCLAT Rules to take on record terms of settlement and pass order for withdrawal of petition under section 7 would amount to abuse of process of Appellate Tribunal, hence could not have been allowed.

The Adjudicating Authority by impugned order admitted petition against the appellant-corporate debtor filed by the financial creditor under section 7. The appellant filed an appeal against the impugned order and submitted that before constitution of CoC, settlement had been arrived at between parties and therefore, prayed that terms of settlement may be taken on record. It was further submitted that the Appellate Tribunal exercising inherent power under rule 11 of the NCLAT, Rules, 2016 could set aside impugned order and quash the order initiating CIRP against the corporate debtor in terms of settlement.

Held that inherent power can be exercised only when no other remedy is available to litigant and nowhere a specific remedy is provided by statute. Since procedure for withdrawal of petition under sections 7, 9 or 10 of the IBC before and after constitution of CoC had been provided in section 12A, there was no justification to invoke inherent power of the instant Appellate Tribunal and to take on record terms of settlement and pass order for withdrawal of petition under section 7. Exercising inherent power under rule 11 would amount to abuse of process of the Appellate Tribunal, hence, could not have been allowed.

Case Review : Shapoorji Pallonji Finance (P.) Ltd. v. Rajesh Construction Company (P.) Ltd. [2021] 133 taxmann.com 182, affirmed.

SECTION 33 - CORPORATE LIQUIDATION PROCESS - INITIATION OF

- **Gulabchand Jain v. Ramchandra D. Choudhary [2021] 133 taxmann.com 208 /[2022] 169 SCL 175 (SC)**

CoC is empowered to take a decision in regard to liquidation of corporate debtor even after approval of Resolution Plan by CoC and laying it before Adjudicating Authority for approval, subject to only exception that such course cannot be adopted after approval of Resolution Plan by Adjudicating Authority.

The NCLAT by impugned order held that CoC is empowered to take a decision in regard to liquidation of the corporate debtor even after approval of the Resolution Plan by CoC and laying it before the Adjudicating Authority for approval, subject to only exception that such course cannot be adopted after its confirmation i.e., after approval of Resolution Plan by the Adjudicating Authority.

Held that there being no reason to interfere with the impugned order passed by the NCLAT, Civil Appeal was to be dismissed.

Case Review : Gulabchand Jain v. Ramchandra D. Choudhary, Resolution Professional of Vijay

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SECTION 32A - CORPORATE INSOLVENCY RESOLUTION PROCESS - LIABILITY FOR PRIOR OFFENCE

- **Dewan Housing Finance Corporation Ltd. v. Union of India [2021] 133 taxmann.com 338 /[2022] 170 SCL 193 (Bombay)**

Where corporate debtor was a co-accused, along with its erstwhile directors and promoters in certain criminal proceedings and concurrently, CIRP proceedings were going on against corporate debtor before NCLT in which resolution plan had been approved which resulted in change in management of corporate debtor in favour of persons not related to erstwhile management of corporate debtor, merely because appeals before NCLAT were filed with a specific prayer to grant stay of resolution plan, and NCLAT by reasoned order, declined to stay order, application filed by corporate debtor under section 32A, could not be said to be premature and not maintainable.

The corporate debtor DHFL was a co-accused, along with its erstwhile directors and promoters, in certain criminal proceedings. Concurrently, CIRP proceedings were going on against DHFL before NCLT and resolution plan submitted by PCFHL was approved by NCLT. DHFL made an application before CBI Special Court seeking its discharge from criminal proceedings which were on alleged acts committed by DHFL prior to initiation of CIRP which was rejected. On writ petition, DHFL argued that since it had been taken over by PCFHL, it should be absolved from all earlier liabilities. It was found that the resolution plan had been approved by NCLT and such a resolution plan had resulted in change in management of DHFL in favour of persons who were not related to erstwhile management of DHFL. Further, merely because appeals before NCLAT were filed with a specific prayer to grant stay of resolution plan, it could not be said that application under section 32A was premature and not maintainable as NCLAT by reasoned order, declined to stay NCLT order.

Held that, immunities under 32A could not have been denied and thus, all criminal proceedings against DHFL were to be discharged.

SECTION 97 - INDIVIDUAL/FIRM'S INSOLVENCY RESOLUTION PROCESS - RESOLUTION PROFESSIONAL, APPOINTMENT OF

- **L. Ramalakshmamma v. State Bank of India [2021] 133 taxmann.com 342 /[2022] 170 SCL 411 (NCLAT - Chennai)**

Provisions of section 97(1) and 97(2) of 'IBC' whereby 'Adjudicating Authority' is required to obtain confirmation of Board prior to appointment of 'Resolution Professional' are only directory in nature and not mandatory, hence, where 'Adjudicating Authority' had exercised its judicial discretion for appointment of IRP without adhering to section 97 in fair manner, same could not be found fault with.

The Adjudicating Authority had passed 'Impugned Orders' whereby an 'Interim Resolution Professional' was appointed. Appellants submitted that 'Impugned Orders' were cryptic, unreasoned, non est and non-speaking orders which were passed in violation of ingredients of IBC as the 'Adjudicating Authority' by 'Impugned Orders' had appointed 'IRP' without adhering to mandatory section 97. However, on going through word 'shall' employed in section 97(1), it is viewed that it is only 'Directory' and not 'Mandatory' and NCLT may pick up any one for appointment of 'IRP'. Moreover, if viewed from object and purpose to be achieved by the 'IBC', word 'employed' in section 97(1) can only be construed as 'directory' and not a mandatory one, that too by adopting a purposeful, meaningful, practical, pragmatic and result oriented approach, with a view to prevent an aberration of justice and to secure ends of justice.

Held that provisions of section 97(1) and 97(2) of the Code whereby the 'Adjudicating Authority' is required to obtain confirmation of Board prior to appointment of 'Resolution Professional' being only directory in nature and not mandatory and the Adjudicating Authority' having exercised its judicial discretion in fair manner for appointment of an 'IRP', same could not be found fault with.

Case Review : L. Ramalakshmamma v. State Bank of India [2021] 133 taxmann.com 341(NCLT - Hyd.) and L. Madhusudhan Rao v. State Bank of India [2021] 132 taxmann.com 309 (NCLT - Hyd.), affirmed.

SECTION 5(1) - CORPORATE INSOLVENCY RESOLUTION PROCESS - ADJUDICATING AUTHORITY

- **Shailendra Singh v. Nisha Malpani (Resolution Professional) [2021] 133 taxmann.com 346 (NCL-AT)**

Under I&B Code, 2016 Adjudicating Authority (NCLT) adjudicates all proceedings before it and renders its decision, just because I&B Code does not specifically mention about contempt provisions, it cannot be said that 'Adjudicating Authority' has no powers of contempt.

The appellant was an advocate who was appointed by the respondent Resolution Professional as a counsel for the corporate debtor and fixed fees per appearance with clerkage, and fees for drafting, Photostat, court fee and other miscellaneous expenses was to be paid as per the invoices raised by the appellant. According to appellant, he had very diligently performed his duties as a Counsel while representing his client and duly raised the bills towards legal fees and the payment for the bills were duly made from time-to-time. However, bills remained pending as the IRP was replaced by the CoC. The appellant filed an application before NCLT to clear professional dues along with litigation cost and the RP on 7-11-2019 assured to take necessary steps to pay arrears of fees and Tribunal directed him to make payment within two days. The appellant stated that RP did nothing even after lapse of 3.5 months of passing order of 7-11-2019 to make payment within two days. The appellant filed a contempt application under section 425 of the Companies Act, 2013 read with section 12 of the Contempt of Courts Act, 1971 and rule 11 of NCLT Rules, before the Tribunal for initiating contempt proceedings against the respondent RP for wilful disobedience of the Order dated 7-11-2019 and for issuance of appropriate directions to the respondent for clearing the Bills. The Adjudicating Authority by impugned order on 23-9-2020 dismissed the contempt application filed by the appellant on ground that 'IBC' is devoid of 'contempt jurisdiction', and left it open to the appellant to seek remedy through recourses available.

Held that ingredients of section 425 of the Companies Act, 2013 do not mention that provisions of power under the Contempt of Courts Act, 1971 are applicable only in respect of proceedings before

'Tribunal' confined in respect of provisions of the Companies Act, 2013. Under I&B Code, 2016, the Adjudicating Authority (NCLT) adjudicates all proceedings before it and renders its decision, just because I&B Code does not specifically mention about contempt provisions, it cannot be said that the 'Adjudicating Authority' has no powers of contempt. 'Contempt proceedings' can be exercised by 'National Company Law Tribunal', being 'Adjudicating Authority' as per section 5(1). A conjoined reading of sections 408 and 425 of the Companies Act, 2013 will unerringly point out that power to punish for 'Contempt' is vested with 'Tribunal' shall be while adjudicating on matter not only confined to the Companies Act, 2013 but also to matters relating to the I&B Code, 2016.

Case Review : Alchemist Asset Reconstruction Co. (P.) Ltd. v. NIIL Infrastructure (P.) Ltd. [2021] 133 taxmann.com 345 (NCLT - New Delhi), reversed .

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

- **Committee of Creditors of Educomp Solutions Ltd. v. Mahender Kumar Khandelwal [2021] 133 taxmann.com 349 (NCL-AT)**

Where Adjudicating Authority dismissed application filed by Resolution Professional under section 30(6), seeking approval of Resolution Plan filed by Resolution Applicant ESPL, as infructuous, on ground that application filed by Resolution Applicant seeking withdrawal of Resolution Plan had been allowed, in view of fact that withdrawal order passed by Adjudicating Authority was set aside, Adjudicating Authority shall decide application under section 30(6) as expeditiously as practicable and resolution applicant shall be bound by Plan.

The Adjudicating Authority dismissed application filed by the Resolution Professional under section 30(6), seeking approval of Resolution Plan filed by the Resolution Applicant ESPL, as infructuous, on ground that application filed by the Resolution Applicant seeking withdrawal of Resolution Plan had been allowed. The Committee of creditors/appellants challenged withdrawal order which was allowed and withdrawal order passed by the Adjudicating Authority was set aside. The appellant contended that order impugned in the instant case which rendered plan approval application as infructuous, had been passed only on basis of withdrawal order, which had already been set aside, hence, as main order had already been set aside, instant appeal ought to be allowed with direction to the Adjudicating Authority to dispose of the Plan Approval Application on merits.

Held that a submitted Resolution Plan is binding and irrevocable as between CoC and the Successful Resolution Applicant in terms of provisions of IBC and CIRP Regulations, therefore, impugned order

was to be set aside and the Adjudicating Authority shall proceed in accordance with law and decide application under section 30(6) as expeditiously as practicable and resolution applicant shall be bound by the Plan.

Case Review : Educomp Solutions Ltd., In re [2021] 133 taxmann.com 348 (NCLT - New Delhi), set aside

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

- **Committee of Creditors of Meenakshi Energy Ltd. v. Consortium of Prudent ARC Limited & Vizag Minerals and Logistics (P.) Ltd. [2021] 133 taxmann.com 353 (NCLAT - Chennai)**

Where RP filed an application before Adjudicating Authority for extension of CIRP period and though said application was pending before Adjudicating Authority, meanwhile RP/CoC received/considered resolution plans for corporate debtor, order of Adjudicating Authority whereby it directed CoC and RP to only consider resolution plan received before expiry of CIRP period and forego resolution plans received subsequently was to be upheld.

Corporate Insolvency Resolution Process (CIRP) was initiated against the corporate debtor and Resolution Professional (RP) was appointed. In CoC meeting, resolution plan furnished by the respondent/resolution applicant was presented and lengthly discussed. Since, CIRP period was about to expire, RP sought extension of CIRP period for 90 days which was allowed. Subsequently, said extended period also expired. RP filed an application before the Adjudicating Authority to further extend period of CIRP. No extension of CIRP period was granted by the Adjudicating Authority, although an application was pending determination before the Adjudicating Authority. Meanwhile, Committee of Creditors had received/considered an resolution plan after expiry of CIRP period.

Held that order of the Adjudicating Authority whereby it directed Committee of Creditors and RP to only consider resolution plan received before expiry of CIRP period and forego resolution plans received subsequently was to be upheld.

Case Review : State Bank of India v. Meenakshi Energy Ltd. [2021] 133 taxmann.com 352 (NCLT - Hyd.) (para 117) affirmed.

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

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

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

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

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

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

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

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

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

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