June'2021

THE INSOLVENCY PROFESSIONAL

YOUR INSIGHT JOURNAL

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

OVERVIEW

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

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CHAIRMAN MESSAGE

Dear Readers,

Section 7, 9 and 10 of the Insolvency & Bankruptcy Code 2016 provides for the admission of the application filed for Corporate Insolvency Resolution Process, if the NCLT, the Adjudicating Authority satisfied. The date of such admission is considered the date of commencement of the Resolution Process. NCLT is also required to appoint an Interim Resolution Professional as recommended by the Committee of Creditors (CoC) representing the Financial Creditors. An operational creditor initiating the Corporate Insolvency Resolution Process may also propose a Resolution Professional to act as an Interim Resolution Professional in terms of Section 9(4) of IBC 2016.The appointment of Interim Resolution Professional shall also be made by NCLT on the date of admission of the application. Section 22 of IBC 2016 provides for holding a meeting of the Committee of Creditors within seven days of the constitution of the CoC and resolve either to appoint the Interim Resolution Professional as a Resolution Professional or to replace the IRP by another Resolution Professional.

Regulation 26 of the Fast Track Insolvency Regulations 2017 provides for appointment of Registered Valuer by the Resolution Professional within seven days of his appointment to determine the Fair Value and Liquidation Value of the Corporate Debtors in accordance with Regulation 34. The Registered Valuers concept was envisaged in the year 2013 when Section 247 of the Indian Companies 2013 provided for the role of Registered Valuers so as to standardize the procedure for valuation in line with the International Standards. The appointment of only the Registered Valuers by the Insolvency Resolution Professional has been made mandatory w.e.f. 01.02.2019. This underscored the importance of proper valuation being regarded as a key factor to enable the Committee of Creditors to take a well informed decision to accept the valuation to determine whether to initiate the resolution process or the liquidation process. The separate registered valuer is required to be appointed for each Assets Class viz.,(a) Land and Building, (b) Plant and Machinery & (c) other Securities or Financial Assets. The Registered Valuer is required to calculate a 'Fair Value' and 'Liquidation Value' to help CoC to arrive at an appropriate decision to continue with the resolution process or go for liquidation process. If Fair Value is less than the Liquidation Value it becomes a case to go for liquidation.

Valuation Report is submitted by the valuers to the Resolution Professional who in turn makes it available to every member of CoC against their undertaking to maintain confidentiality and not to share the details of Fair Value and Liquidation Value with any one and cause undue gain or loss to himself or any other. The Resolution Professional and Registered Valuers are also required to maintain strict confidentiality in this regard.

The recent case of Videocon Industries Ltd has brought the aspect of maintaining confidentiality of Valuation Report into sharp focus. The Fair Value and Liquidation Value determined by the Registered Valuers was quite low. What had surprised the NCLT was that the Committee of Creditors accepted a Bid for Rs. 2962 crore filed by the Resolution Applicant despite being very close to the liquidation Value. This bid amount was against the total dues of the Corporate Lenders aggregating to Rs. 64,838 crores. The observation by NCLT while disposing of the case that it appears to be a case of 'Bottom Fishing' by the Resolution Applicant/Bidder viz. Twin Star Technologies - A company of Vedanta Group. The observation of NCLT speaks volumes about suspected breach of confidentiality. It was further intriguing that even this relatively small amount of Rs. 2962 crores was proposed to be paid as Rs.200 crores upfront and the balance in the form of Non-convertible Debentures at a Coupon Rate of 6.65% to be paid annually. In this process while the financial creditors were to realize about 4% of their total dues with an ultimate and huge haircut of 96%, they were to satisfy themselves with an upfront recovery of just 0.31%.

The confirmation of the resolution by NCLT was appealed against by Bank of Maharashtra in NCLAT mainly on two grounds (1) Resolution amount was close to Liquidation Value that too largely payable in the form of Non-convertible Debentures and (2) The realisable value is hardly 4% of the dues. NCLAT has stayed the decision of NCLT. This case should lay out a strong ground for introduction of **SWISS AUCTION** for the CIRP under IBC 2016.

Dr. Jai Deo Sharma
Chairman

MD MESSAGE

Dear Readers,

After months of terror brought in by the second wave of Covid-2019, the nation seems to recover in most of the states. Along with it, progress in the field of insolvency can also be seen as the month of June began with the much awaited news of approval of Resolution Plan for revival of Dewan Housing Finance Corporation Ltd (DHFL) by Mumbai Bench of National Company Law Tribunal (NCLT) after being passed through various hurdles. The Committee of Creditors of DHFL, in January had voted in favor of the resolution plan of Piramal Capital and Housing Finance Limited (PCHFL), a wholly owned subsidiary of Piramal Enterprises Ltd.

As the month progressed, another landmark development that made to the headlines, i.e. about the resolution of Jet Airways. The NCLT, Mumbai Bench order comes exactly two years after the start of the insolvency proceedings. The NCLT, Mumbai approved the resolution plan with riders. It was cleared by the NCLT that the allocation of slots will be considered by the appropriate authority as and when these are applied for. Further, it was stated that consortium will have 90 days to seek all regulatory permissions and complete formalities for restarting the airline and can seek a further extension if required.

As we progress, it can be seen that the judiciary and the market are moving at an increasing pace and maintaining the same is equally important. Having said that, one cannot ignore the possibility of third wave of Covid-2019 and we should be prepared for the same beforehand and get vaccinated at the first instance to reduce the impact that Covid-2019 can possibly have ahead in time.

Susanta Kumar Sahu

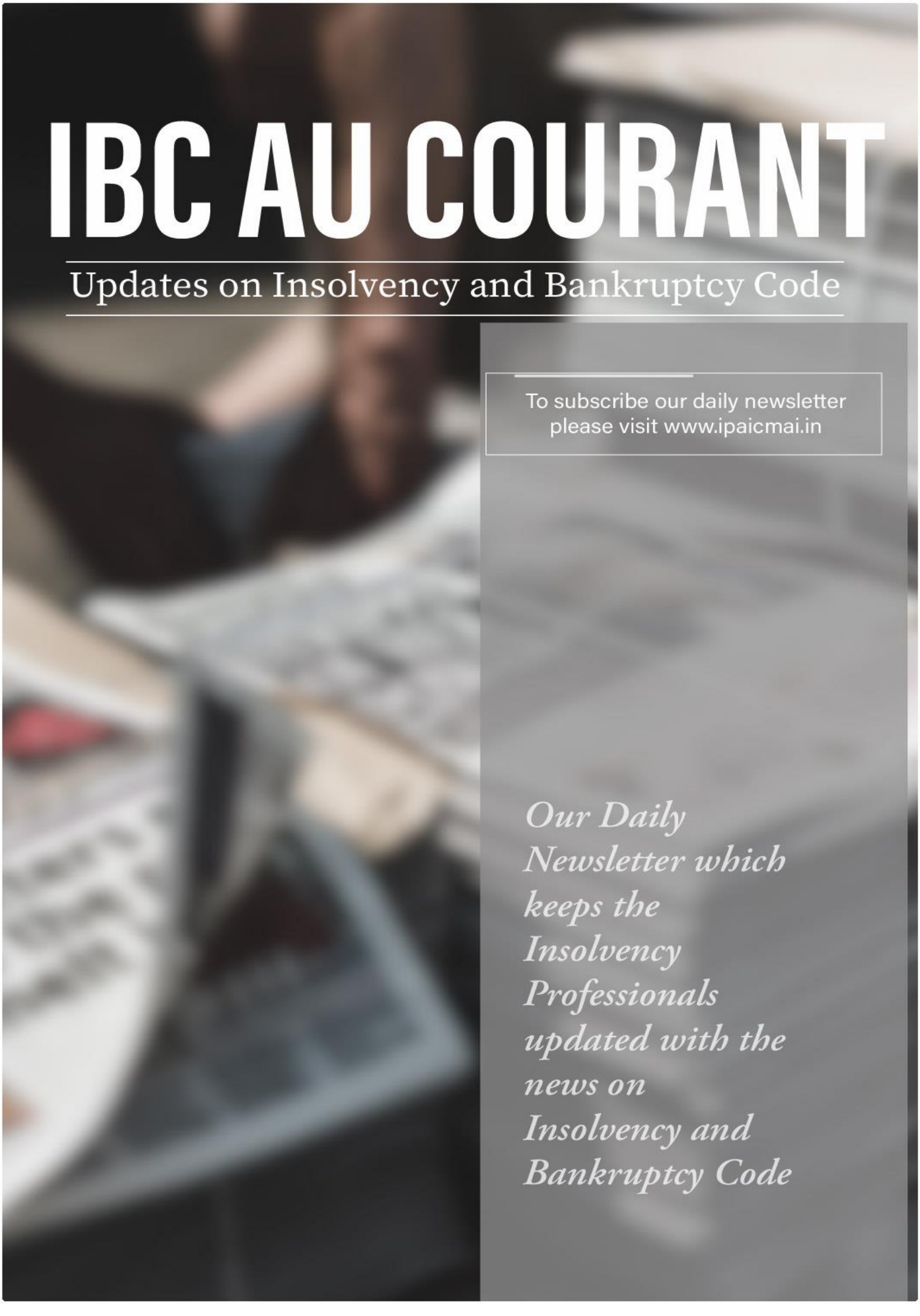
Managing Director

Professional Development Intiatives

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

EVENTS

June'21	
Date	**Events**
10th June'21	44th Batch of PREC
12th June'21	Master class on Personal Guarantors to Corporate debtors
17th June'21	Interactive Meet on Safeguarding Rights, Privileges and Interests of Insolvency Professionals
21st June'21	Roundtable on Liquidation



IBC AU COURANT

Updates on Insolvency and Bankruptcy Code

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

ARTICLES

INSOLVENCY PROFESSIONAL AGENCY
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PANDEMIC AND ITS AFFECT ON THE RESOLUTION PLAN APPROVED BY ADJUDICATING AUTHORITY

Mr. Sumit Shukla

Advocate and Insolvency Professional

A Resolution plan is an instrument for taking over the reign, by a qualified, eligible and competent person, of stressed company undergoing through the corporate insolvency process under the provisions of the Insolvency and Bankruptcy Code, 2016 upon the occurrence of default by a Company. The IBC Code lays down a detailed framework for the selection of the most viable and feasible resolution plan which is decided the committee of creditors and thus has the final say as far as the commercial wisdom is concerned however, the finally the Resolution Professional must secure, and rightly so to have checks and balances, the green light from the adjudicating authority if the resolution plan confirms to the provisions of the IBC, 2016. This articles discusses the scenario of the possible amendments / modifications / alterations in the resolution plan or even its withdrawal by the successful resolution applicant, after its approval by the adjudicating authority under different possible circumstances in the light of the provisions of the IBC, 2016.

The Insolvency and Bankruptcy Code (hereinafter "Code") aims to bring back to the track the stressed company by putting it through a Corporate Insolvency Resolution Process (CIRP) and smoothly transferring the stressed company as going concern to the hands of the persons/entities (Resolution Applicant) who by submission of the Resolution Plan have submitted their proposal in the form of resolution plan to take over their management and assets, and service their debts. The interested resolution applicants can participate in the CIRP and put forth their 'resolution plans', which are basically a comprehensive plan for taking over the reign of the company which is in default and unable to repay its outstanding debt. The resolution applicant by way of the resolution plan undertakes to revive the corporate debtor, pay the dues of its creditors and make a turn around so that the corporate debtor which is presently stressed can run smoothly as going concern and become a profit making venture. The Resolution Plan is placed before the Committee of Creditors (COC) which examines, negotiate and approve the most viable plan by a vote of 66% or higher. The approved plan by the COC is ultimately examined and approved by the Adjudicating Authority (National Company Law Tribunal) upon an application filed by the Resolution Professional which puts the CIRP to

the conclusion and the approved plan becomes a concluded contract which is regulated to some extent by the Code.

The main topic of the present article is the amendment of the resolution plan and there can be three possible stages where the amendment of the resolution plan may be needed by the resolution applicant:

(a) After the plan is submitted to the resolution professional

(b) After the plan is approved by the CoC;

I. The application for approval of plan is not submitted before the Adjudicating Authority

II. The application for approval of plan is submitted before the Adjudicating Authority and pending approval.

(c) After the plan is approved by the Adjudicating Authority

In the first case, there is no difficulty and the resolution applicant is allowed to withdraw or he can renegotiate the plan as the resolution plan has only been submitted to the resolution professional and not to the CoC.

The second stage where the plan is approved by the COC further involve two situations first where though the plan has been approved by the COC but the application for its approval has not been filed before the Adjudicating Authority and second where the application has been filed before the Adjudicating Authority for approval of the approved plan by the COC which primarily involves a legal question as to whether a Resolution Applicant who has submitted a Resolution Plan which was approved with majority vote by CoC can be allowed to withdraw the said Resolution Plan which is under consideration for approval before the NCLT?

The first situation primarily involves a situation where for some reason after the approval of the plan by the COC, the resolution applicant backtracks from his plan which for obvious reasons affects the prospects of the corporate debtor of its effective turnaround. The selection of one particular resolution plan over other submitted plans before the COC involves representation made by the successful resolution applicant to the CoC about their capacity and their intent, to

convince the CoC of their ability to perform the Resolution Plan and thus in the selection process, the successful resolution applicant eliminate other potential bidders. If the resolution applicant is allowed to resile from its resolution plan at this belated stage, it may adversely affect the Corporate Debtor so much so that it may be forced into liquidation, causing huge loss to the CoC. Thus, the resolution plan of the successful resolution applicant is selected over other prospective resolution applicants and if he resiles from the approved plan, then the entire process of the selection of fresh resolution plan has to be initiated from scratch whereby a Resolution Professional may invite fresh resolution plans. However it is advisable for the COC and the concerned resolution professional to file an application u/s 60(5) IBC, r/w Rule 11 NCLT Rules to seek direction of the Adjudicating Authority as a matter of abundant precaution and transparency. However in case there was only one resolution applicant, even then the application under Section 60(5) IBC read with Rule 11 of the NCLT Rules has to be filed before the Adjudicating Authority seeking its direction for any kind of modification or change as it would affect the corporate debtor as a going concern.

The second situation arises when after the approval of the COC, the plan is submitted before the NCLT by way of application for its approval and is pending. Can such plan be withdrawn or modified. As far as IBC, 2016 is concerned, there is no provision which allows a Resolution Applicant to amend or withdraw its resolution plan which is pending for approval of the Adjudicating Authority. In this regard, it is submitted that **Hon'ble NCLAT in Tata Steel Limited v. Liberty House Group Pte. Ltd. &Ors. Company Appeal (AT) (Insolvency) No. 198 of 2018** has held that the Resolution Applicant has no right to interfere in any decision of the Committee of Creditors at any stage, until and unless the Adjudicating Authority approves the Resolution plan in terms of Section 31 of the Code. However, the Hon'ble NCLT Ahmedabad in the case titled as ***Sunil Kumar Agarwal RP of DIGJAM Ltd. Vs. Suspended Board of Directors of DIGJAM Ltd. & Ors.*** Vide order delivered on 27.05.2020 allowed the resolution applicant to modify a plan already approved by the COC due to COVID 19 and lockdown. In this case, the resolution applicant by way of affidavit filed before the adjudicating authority sought for certain revision/modification/relaxation in Resolution Plan in respect of time frame

for payment to Financial Creditors/Operational Creditors and/or other stakeholders, due to the financial difficulties arising out of current pandemic situation of COVID 19 Virus and subsequent lockdown. While allowing the prayer of the resolution applicant it would be pertinent to mention here that the Hon'ble Adjudicating Authority observed in para 18 as under:-

"18. On perusal of the affidavit dated 29.04.2020, so filed by the Resolution Applicant, seeking modification / concession / relaxation in the time line for the payment to the Financial Creditors/Operational Creditors and/or other stakeholders, if any, due to pandemic of Covid-19 Virus, ***it is found that there is no material change in the Resolution Plan save and except modification/concession/relaxation in respect of time line of payment to the creditors and/or stakeholders****. Those concession/modification/relaxation, so sought for by the Resolution Applicant appears to be genuine and bonafide in view of pandemic COVID-19 virus and consequent lockdown which has global effect on the economy."*

The third stage essentially involves a question whether a resolution plan can be modified post approval by the adjudicating authority? In this regard it can be safely answered that a resolution applicant cannot be permitted to withdraw from the approved resolution plan or make any modification resulting into any material changes in the approved resolution plan. Once the resolution plan is approved by the adjudicating authority, it becomes binding on all the stakeholders. Further, non implementation of the resolution plan can push the corporate debtor into liquidation and it can also attract the criminal liability for contravention of the plan under Section 74 of the Code. However, owing to the COVID-19 situation and the resultant pandemic which may create a situation which makes it impossible for the resolution applicant to comply with the payment timelines as per the approved plan to the financial creditors/operational creditors or other stakeholders, the resolution applicant may approach the Adjudicating authority by invoking Section 60(5) IBC, 2016 read with Rule 11 of the NCLT Rules to seek amend and modification only to the extent of the modification in timeline but the resolution applicant cannot seek any material change in the Resolution Plan or can change the basic premise or structure of the resolution plan.

Conclusion:

The provisions under the corporate insolvency resolution process laws comes to an end once a resolution plan is approved by the adjudicating authority. While the IBC laws itself are still at a very nascent stage in India and shall continue to evolve in the upcoming years by way amendments in the Law itself as well by the of orders of Adjudicating Authorities, Appellate Authorities and Hon'ble Supreme Court. However at the Hon'ble Supreme Court in its several orders has made one thing very clear that the Committee is fully capable of deciding on the Resolution Plan in its own commercial wisdom and therefore the adjudicating authorities are not interfering in the decisions so take by the Committee of the Creditors. There are not many instances before wherein the successful resolution applicant has committed defaulted in the resolution plans after the approval by the adjudicating authority. However considering the ongoing pandemic situations the delays are inevitable and we can see introduction of new / additional provisions dealing with the implementation of the approved resolution plan. However it would interesting to see how this entire IBC eco system sails through this entire situation as one of the key objective of the Code is to keep an ailing organization as a going concern (while avoiding liquidation) which is no doubt a noble cause and is in the interest of our nation which is desperately looking forward to see more and more industrial and commercial activities in order to play major role in global environment.

Sources:

1. ***Tata Steel Limited v. Liberty House Group Pte. Ltd. &Ors. Company Appeal (AT) (Insolvency) No. 198 of 2018 Order passed by National Company Law Appellate Tribunal***
2. ***Sunil Kumar Agarwal RP of DIGJAM Ltd. Vs. Suspended Board of Directors of DIGJAM Ltd. & Ors. Order passed by NCLT, Ahmedabad***

DEMYSTIFYING FORENSIC AUDIT

Dr. S K Gupta
Managing Director
ICMAI Registered Valuers Organization

A forensic audit is an examination and evaluation of a firm's or individual's financial information for use as evidence in the court of law. A forensic audit can be conducted in order to prosecute a party for fraud, embezzlement or other financial claims. It requires specialized skills and training so as to carry out an effective Forensic Audit. The paper offers insights into Objectives, methods and Tools and Techniques for carrying out Forensic Audit.

Forensic Audit – Meaning

The term 'forensic audit' has not been defined under any statue, therefore for the meaning of the same reliance has been placed on dictionary meaning. In general, Forensic Audit represents an area of finance that combines detective skills and financial acuity. Forensic Auditing – It is an independent, comprehensive and scientific approach of reviewing an entity's financial statements in order to determine its accuracy, free from material misstatements and importantly, to derive evidences that can be used in a court of law or legal proceeding. Forensic audit also known as forensic accounting is an examination of evidence regarding an assertion to determine its correspondence to established criteria carried out in a manner suitable to the court.

Investopedia

Forensic Audit is an examination and evaluation of a firm's or individual's financial information for use as evidence in court. A Forensic Audit can be conducted in order to prosecute a party for fraud, embezzlement or other financial claims. In addition, an audit may be conducted to determine negligence or even to determine how much spousal or child support an individual will have to pay.

Collin Greenland (2001), Demystifying Forensic Accounting, The Weekend Observer, Pg. 5, December 7, 2001

Forensic accounting (or auditing) is the integration of accounting, auditing and investigative skills in order to provide an accounting analysis suitable for the resolution of disputes (usually but not exclusively) in the courts.

Jack Bologna and Robert J. Lindquist (1987), Fraud Auditing and Forensic Accounting: New Tools and Techniques, by, JohnWiley & Sons, New York

Forensic Audit as the application of financial skills and an investigative mentality to unresolved issues, conducted within the context of the rules of evidence. As a discipline, it encompasses financial expertise, fraud knowledge, and a strong knowledge and understanding of business reality and the working of the legal system

Why is a forensic audit conducted ?

Forensic audit investigations are made for several reasons, including the following:

Corruption

In a forensic audit, while investigating fraud, an auditor would look out for:

- **Conflicts of interest –** When a fraudster uses his/her influence for personal gains detrimental to the company. For example, if a manager allows and approves inaccurate expenses of an employee with whom he has personal relations.
- **Bribery –** As the name suggests, offering money to get things done or influence a situation in one's favor is bribery.
- **Extortion –** If someone demands money in order to award a contract then that would amount to extortion.

Asset misappropriation

Asset misappropriation is the most common and prevalent form of fraud. Misappropriation of cash, creating fake invoices, payments made to non-existing suppliers or employees, misuse of assets, or theft of Inventory are a few examples of such asset misappropriation.

Financial statement fraud

Companies get into this type of fraud to try to show the company's financial performance as better than what it actually is. The goal of presenting fraudulent numbers may be to improve liquidity, ensure top management continue receiving bonuses, or to deal with pressure for market performance. Some examples of the form that financial statement fraud takes are the intentional forgery of accounting records, omitting transactions – either revenue or expenses, non-disclosure of relevant details from the financial statements, or not applying the requisite financial reporting standards.

Types of Frauds

Fraud in legal parlance could be categorized in two categories, which includes:

1. Fraud as a Civil Wrong, is a tort. While the precise definitions and requirements of proof vary among jurisdictions, the requisite elements of fraud as a tort generally are the intentional misrepresentation or concealment of an important fact upon which the victim is meant to rely, and in fact does rely, to the harm of the victim. victim to prove fraud by clear and convincing evidence.

2. Fraud as a Criminal offence, takes many different forms, some general (e.g., theft by false pretense) and some specific to particular categories of victims or misconduct (e.g., bank fraud, insurance fraud, forgery). The elements of fraud as a crime similarly vary. The requisite elements of perhaps the most general form of criminal fraud, theft by false pretense, are the intentional deception of a victim by false representation or pretense with the intent of persuading the victim to part with property and with the victim parting with property in reliance

on the representation or pretense and with the perpetrator intending to keep the property from the victim.

Fraud Triangle

There is no doubt that frauds and malpractices provide the impetus for forensic accounting or investigative auditing. But what are the factors for which people commit frauds or lead to accounting or economic irregularities .If an attempt is made to analyze the business or corporate frauds, one can unveil three main components for committing such 'white-collar crime'. **These factors are Pressure, opportunity and justification for committing fraud** which all together constitute 'fraud triangle'. Components of the fraud triangle are similar to the fuel, spark, and oxygen which together cause fire. When the three come together, inevitably fire breaks out.

Objectives of Forensic Audit

A forensic audit is therefore an independent and comprehensive process of reviewing a person's or the company's financial statements to determine if they are accurate and whether or not any financial benefit has been attained by way of presenting an unrealistic picture or any illegal activity. Objectives of Forensic Auditing:

- To use the forensic auditor's conclusions to facilitate a settlement, claim, or jury award by reducing the financial component as an area of continuing debate.
- To avoid fraud and theft.
- To restore the downgraded public confidence.
- To formulate and establish a comprehensive corporate governance policy.
- To create a positive work environment by ensuring the integrity and transparency of financial statements by actively investigating for fraud, identifying areas of risk and associated fraud symptoms and a good fraud prevention program.

Provisions of the Companies Act 2013 provide that every company now has to have proactive fraud risk management policies. The Act requires independent directors to increase safeguards against fraud and reminds them of their whistleblowing responsibilities. The Enforcement Directorate and the Serious Fraud Investigation Office and IBC 2016 have also emphasized the need for forensic audit following the rise in money laundering and Wilful default cases that are plaguing the banking system.

Methodology of Forensic Audit Investigation

A forensic auditor is required to have special training in forensic audit techniques and in the legalities of accounting issues. A forensic audit includes additional steps that need to be performed in addition to regular audit procedures. The forensic audit investigation is the utilization of specialized investigation skills to conduct the forensic audit engagements in such a manner that the outcome can be presented in court of law as evidence. The auditor should use an approach considering both the aspects of whether the fraud could have occurred and whether the fraud could not have occurred. The forensic audit investigation is the utilization of specialized investigation skills to conduct the forensic audit engagements in such a manner that the outcome can be presented in court of law as evidence. The auditor should use an approach considering both the aspects of whether the fraud could have occurred and whether the fraud could not have occurred. With this approach the forensic auditors will be able to bring the reality more closer to general public especially in the circumstances where perception and reality are not aligned. An auditor can follow a nine step methodology for fact finding in case of forensic audit engagements:

1. Accept the forensic audit engagement;
2. Evaluate the allegations or suspicions;
3. Conduct due diligence background notes;
4. Complete the preliminary stage of investigation;
5. Check the prediction assuming that there will be a litigation;
6. Begin with external investigation;

7. Gathering the required proofs and evidences;
8. Preparing report on findings; and
9. Court proceedings

Techniques and Tools of Forensic Audit

1. **Critical Point Auditing :** Critical point auditing technique aims at filtering out the symptoms of fraud from regular and normal transactions in which they are mixed or concealed. For this purpose, financial statements, books, records, etc. are analyzed mainly to find out:

- Trend-analysis by tabulating significant financial parameters.
- Unusual debits/credits in accounts normally closing to credits/debits respectively.
- Account/inventory discrepancies as evidenced from the unrecognized balance between financial records and corresponding subsidiary records (like physical verification statement, priced stores ledgers, personal ledgers, etc.)
- Accumulations of debit balances in loosely controlled accounts (like deferred revenue expenditure accounts, mandatory spares account capitalized as addition to respective machinery item, etc.)
- False credits to boost sales with corresponding debits to non-existent personal accounts, and
- Cross debits and credits and inter-account transfers, weaknesses/inadequacies in internal control/check systems, like delayed/non-preparation of bank reconciliation statements, etc.

2. **Propriety Audit:** Generally, this term is used in case of Government audit to report on Govt. accounts, i.e., all expenditure sanctioned & incurred are need-based and all revenues due to Government have been realized in time and credited to the Govt. account. In conducting the propriety audit, the core focus is on Value for Money audits aimed at lending assurance that economy, efficiency and efficacy have been achieved in the transactions for which expenditure has been incurred or revenue collected. The same analogy, with

modifications to the principles of propriety of public finance, applies in forensic audit to establish fraudulent intentions if any, on the part of the management. Financial frauds are results of wasteful, unwarranted and unfruitful expenditure from the monies available to the entity.

3. Other tools for Forensic Audit : Conventional accounting tools like trend analysis, ratio analysis, fund flow analysis, cash movement analysis are to be supplemented by forensic technology for source data and few other forensic accounting tools like:

- **Relative Size Factor:** RSF is the ratio of Largest Number to the Second Largest Number of a relevant set. RSF = Largest Number Second Largest Number RSF= highest value divided by the second highest value in a ledger account of debtors, or creditors.
- **Comparison of prices, quantities or values in an inventory.** If the RSF > 10, chances of error or fraud are great. Any set of transactions take place in certain range
- **Repetitive Tests:** Surprise tests lose their sting when an auditee can predict an auditor's plan. Timing is very effective: one way to throw a suspected auditee completely off guard is to repeat a test in quick succession. Complacency, cover-ups and even frauds are likely to be exposed in the repeat test.
- **Application of non-financial information such as space or time dimensions** to detect wrong doing

4. Common techniques used for collecting evidence

- **Substantive techniques :** For example, doing a reconciliation, review of documents, etc
- **Analytical procedures** : Used to compare trends over a certain time period or to get comparative data from different segments
- **Computer-assisted audit techniques :** Computer software programs that can be used to identify fraud
- **Understanding internal controls :** and testing them so as to understand the loopholes which allowed the fraud to be perpetrated.

Conclusion

To summarize, a forensic audit is a detailed engagement that requires the expertise of not only accounting and auditing procedures but also expert knowledge regarding the legal framework. A forensic auditor is required to have an understanding of various frauds that can be carried out and of how evidence needs to be collected. There are numerous different types of fraud that a forensic auditors are expected to investigate. The investigation is likely to ultimately lead to legal proceedings against one or several suspects, and members of the investigative team must be comfortable with appearing in court to explain how the investigation was conducted, and how the evidence has been gathered. Forensic auditors must therefore receive specialist training in such matters to ensure that their credibility and professionalism cannot be undermined during the legal process

FALLACY OF HAIRCUTS UNDER IBC – INSIDE STORY

Dr. C J Davis

CMA & Insolvency Professional

Decades of experience in the Banking Industry, reveals that whenever there is a resolution or liquidation of stressed companies there is a high chance for "Haircut" in the recovery of banking dues. The magnitude of Haircut is often higher in the case of liquidation than resolutions. In relation to this process, Media frequently reports that IBC is generating phenomenal Haircuts and overturns the sentiments of the overall public in general and taxpayers in particular, against IBC measures. The public opinion is in agreement with the Media reports which justify IBC's role in allowing huge Haircuts, leading to a very low recovery of bank loans which are after all public money. Media portrays IBC's decisions as an event generating a great loss to the country's wealth immediately swaying public opinion against the latter.

Coming to the ways of recovering bank dues in India, there are umpteen number of tools that are well recognized. It is well known that, IBC and conventional recovery measures result in Haircuts which will reflect in the form of write off by the banks. This article makes an attempt to explain how these measures under the IBC are often wrongly perceived by the public, triggering great concern about losses to banks. Thorough investigation and research reveal that the Haircut under IBC, being only a small portion of write offs happening in the banking sector, are set at apt levels and are aiding speedy recovery of funds and maximization of value to the stakeholders through a well-defined system and process. This study discusses the determinants of Haircuts and how it affects banks and suggests measures to set them at apt levels.

BACKGROUND

Lately, we have been observing a flurry of media reports about IBC setting large Haircuts to banks. These stories are backed by the outcome of corporates like Jet Airways, Videocon, Siva industries etc. who are incurring 95% Haircut rates. In these cases, the Media conveniently highlights the poor report card of overall recovery under IBC liquidation having a worst case 5% , and resolution is at 43%. The call is to stop the loot via bankruptcy code since IBC performed badly with an average of only 21% recovery of claims. Haircuts under IBC means difference between creditors' claims and settlement amount payable to creditors under approved resolution plan. Creditors' claims includes claim by financial creditors (claims by Banks, ARCs, NBFC, depositors and investors) and operational creditors.

RECOVERY MECHANISM

There are a number of recovery mechanisms available to banks, such as filing of a suit in civil courts or debts recovery tribunals, action under the securitization and reconstruction of financial assets and enforcement of security interest act, 2002. Banks also trying recovery through voluntary, out of court negotiated Settlement/compromise, and lok- adalat scheme.

Post-2014, banks restructuring/ resolving large borrower companies through three debt resolution mechanisms:

(i) Strategic debt restructuring (SDR) scheme of 2015 which allows creditors (banks) to take over corporates unable to pay and sell them to new owners

(ii) Sustainable structuring of stressed assets (S4A) of 2016 which lets creditors (banks) take haircuts to restore the financial viability of companies segregating sustainable and unsustainable portions of credit facilities. The above two processes had failed by financial year 2017, because of functional and governance failures. Economic survey of 2016-17, strongly recommended "bad bank" for large bad debt cases, as "public sector asset rehabilitation agency" to "take charge of the largest, most difficult debt cases for resolution.

(iii) Insolvency and bankruptcy code (IBC) commenced December 2016 which revives (resolution) or closes (liquidation) stressed companies. Banks filing cases in the National company law tribunal under the IBC process.

Haircuts or write offs happen in cases starting from civil cases (where in certain cases interest dues fully waived by court), Sarfaesi proceedings, DRT cases, OTS/ Aadalats and SDR, S4A etc restructuring cases. This can be understood from the submission of Hon. Minister Anurag Thakur, in parliament on 11 March 2021 that Scheduled Commercial Banks wrote off NPA 5 lakh cr in last 3 years, which includes the haircuts under IBC and other conventional recovery measures.

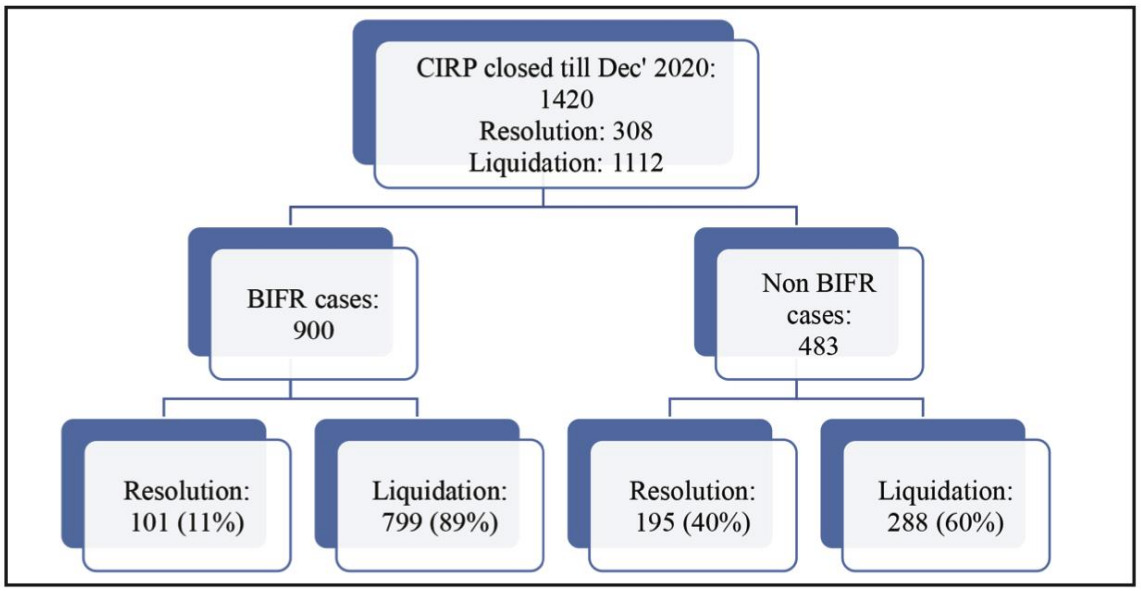
Recently, the DHFL case was settled by NCLT by accepting the resolution plan for an amount of 37,250 cr from the resolution applicant, Piramal group. Haircuts to creditors in this case is misleading to the public that the entire haircut loss amounting to 53,750 cr has been borne by

the banks, (60% of the total claim amount 91000 cr, accepted by the COC). But this is not true If we go deep into this case as we can understand that out of total claim of 86,892 cr, of financial creditors, only 41,392 cr belongs to the banks and balance amount 45,550 cr of claims belongs to the bond holders .

As per Economic survey of India 2021, chapter, monetary management and financial intermediation, reported that (source. Insolvency and bankruptcy board of India (IBBI), details of stressed asset resolution till 30 Dec 2020 (Q3 of FY21), Total number of CIRP cases admitted for the IBC proceedings stood at 4,117 (from FY17 to Q3 of FY21). Of these 4,117 cases, 308 ended in resolution (companies continue as going concerns) and 1,112 in orders for liquidation. Remarkable to note that only because of IBC 896 cases settled immediately, without CIRP Process.

Admitted	•CIRPS AT THE BEGINNING OF PERIOD -	4,117
Closure by	•APPEAL/REVIEW SETTLED -	549
	•WITHDRAWAL UNDER SECTION 12 A -	348
	•APPROVAL OF RESOLUTION PLAN -	308
	•COMMENCEMENT OF LIQUIDATION -	1,112
Ongoing	•CIRPS AT THE END OF PERIOD -	1,800

Source: IBBI



Source: IBBI

The resolution of non-BIFR cases is more than three times higher compared to BIFR old cases.

DETERMINANTS OF HAIRCUTS

The following are the key determinants of Haircuts:

1. Interest rates prevailed at the time of availing bank loan
2. Power of quarterly compounding of interest
3. Additional Penal interest and other charges after company become sick
4. Process of loan restructuring for the purpose of ever greening bank balance sheets results in higher haircuts, when banks going to IBC against the company.
5. Though the unit financially, economically not viable, interest claim on bank dues never stops.
6. Repayment of dues first goes to interest on NPA then to principal amount once the company loan account becomes NPA. This will result more write off happening in principal portion but interest dues are normally granted remissions while settling the account.
7. Cost overrun affects the project cost and when there is long delay, which includes interest on bank loan. Not only project cost overrun, but also the delay from, before and after filing claim at NCLT and additional max 340 days, the value of the company reducing. It means the more delay, more value loss of the company and after effect ballooning effect on haircuts.

8. Project delay due to litigation or getting permit, licenses doubles the banks dues in short span of time.

9. Lack of in built data analytics for prediction of company insolvency by banks which results in late resolution thereby reducing value of the company.

10. Haircut on old SICA, BFIR cases will be significant since they are almost dead and not "going concern" except for a few cases.

IMPACT OF IBC HAIRCUTS TO BANKS

1. Bank loan cases dealt under IBC are of large corporations financed under consortium lending and majority cases pertaining to public sector banks and three large private sector banks. Cases dealing with Cooperative banks, small private banks, small finance banks/rural banks are very few and they not affected badly.

2. Haircuts are not a shock to these large Banks since they already maintain (Provision coverage ratio) PCR 60 to70% .Which is made by the provision by banks depending the status of asset classification substandard, doubtful, loss with provision ranging 10 to 40% loss cases even 100%. Recovery under settlement/ haircut will result in balance sheet profit when reversal of provisions is made in the banks books.
3. Provisions, haircuts/write off making holes to the bottom-line of the banks. Long run it will erode net worth of the bank.

SUGGESTIONS

It is crucial that IBC haircuts while disclosing, furnish a detailed break up of various financial creditors - to avoid speculation in the media. Also speed up decisions by the banks rather than allow the public to make assumptions. It is a fact that claims by bankers are hurdled by decision making blocks which creates undue delay in the IBC process. In case of unforeseen delays, people seeking information on progress can look into the Bank's Annual Reports; they may be mandated to publish company wise details of haircuts under various recovery processes including IBC in banks annual reports.

Also, it is vital that liquidation and resolution be classified and disclosed separately by the authorities.

Banks make disclosure in annual report details separately of IBC haircuts and write offs during the year which will give clear information to investors and the public.

If fair value is less than bank loan principal amount then interest need not be considered for claiming from date of default or NPA.

Finally, if there is delay in making the decision to file IBC or to COC, banks can be penalisd by the regulator by mandating timeline. Reporting of haircuts in liquidation need not be highlighted since almost all companies are beyond recovery or dead at the stage of resolution. Hence, haircuts should be reported only in resolution cases, with all relevant information, which will reveal the success of IBC.

CONCLUSION

In a short span of time, IBC has made substantial recovery of blocked bank money in the NPA accounts, which is crucial to the nation. This is true as per GOI economic survey 2021, on resolution ,reported that Scheduled Commercial Banks got under IBC alone an amount of 1.73 lakh cr which is higher than the amount recovered under all other conventional mechanisms during the FY 2019/20.Out of twelve large advances outstanding claim of 3.45 lakh crore dealt by IBC, eight cases resolved and in this, the resolution of Bhushan steel , the amount realized is 35751cr and in the case of Essar steel is 41018 cr, which is substantial recovery of NPA in banking system. Now Government is setting up yet another large NPA resolution mechanism. It proposes a "Bad Bank" under the ARC (Asset Reconstruction Company) and AMC (asset management company) model in which ARC will aggregate stressed assets from banks and transfer them to AMC for resolution. In future this will reduce the impact of haircuts to banks in India.

Finally conclude that Media frenzy driven by the haircut amounts set in crores shows lack of proper research and supporting study, but as only a game to sway public emotions without reporting ground realities of recovery.

VALUATION CRITERIA UNDER IBC – "OWNERSHIP OF ASSET" & "MATERIAL DIFFERENCE"

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A resolution plan may be accepted or rejected by the CoC on the basis of valuation of assets determined by two registered valuers' under IBC. However, if the "Ownership of asset" is reported differently in two valuation reports and there is also a "material difference" in value of an asset (Land) as determined by two valuers, then the CoC may not be guided by the such valuation to take a decision on the resolution plan.

This Article seeks to highlight the observations and decision of NCLAT on an appeal filed by 'Operational Creditors' (OC) in this regard.

Valuation of assets of corporate debtor (CD) is one of the most important exercise during the whole CIRP. The IBC has made specific provisions in the Code and CIRP Regulations, with regard to appointment of valuers for determination of "Fair Value" and "Liquidation Value" of assets owned by CD. The process of sharing such valuation report with CoC has also been duly provided in IBC.

As per provisions of IBC, the resolution professional (**RP**) is required to appoint two valuers, who are registered with IBBI, for conducting the valuation of assets owned by CD and the valuation report is required to be submitted to the RP. During consideration of resolution plan, the RP is required to share the "Fair Value" and "Liquidation Value" of asset owned by CD with the CoC. The CoC may take decision to accept or reject the resolution plan based on its commercial wisdom about the feasibility and viability of the resolution plan. The values determined by the two registered valuers provide a benchmark in terms of value of assets of

CD, which the CoC is expected to take into consideration, while making its decision on the resolution plan.

If the "Fair Value" and "Liquidation Value" determined by the two valuers is nearly similar, then the RP may accept such valuation as the most appropriate realizable value of assets of CD at that point. However, if there is "***Material Difference***" in the valuation of assets as determined by two valuers, then IBC provides that the RP may appoint a third valuer for determining the valuation of assets owned by CD. The RP may, then, take appropriate decision on the "Fair Value" and "Liquidation Value" once the third valuation report is available. But what is the criteria for determining "***Material Difference***" in valuation of assets of CD??

Hon'ble NCLAT had the occasion to decide on this issue in a recent judgement pronounced in an appeal filed against the order passed by NCLT.

1) ***MATTER BEFORE NCLT***:

1.1 That the RP took all steps required to be taken as per provisions of IBC and presented the resolution plan before the CoC. The CoC approved the resolution plan and the RP submitted the resolution plan before NCLT for approval;

1.2 That ***only one resolution plan had been received by RP***, even after carrying out enough publicity with regard to the EOI, and no adverse inference could be drawn about the resolution plan or against the RP.

1.3 That two valuers were appointed as per provisions of IBC for conducting valuation of assets owned by CD and ***there was insignificant difference between the "Fair Value" and "Liquidation Value" determined by the two valuation reports***;

1.4 That the ***RP did not accept the value of assets determined by one particular valuer and the RP, himself, determined the value of assets owned by CD in accordance with the internationally accepted valuation standards after carrying out physical verification of assets***;

1.5That the RP had complied with all provisions of IBC and CIRP Regulations and the resolution plan could not be rejected ***due to some insignificant difference in valuation report submitted by two valuers***.

2) ***MATTER BEFORE NCLAT***:

2.1 ***CONTENTION OF THE APPELLANT***:

2.1.1 That the CD was a hospital and a majority of doctors were appointed as its employees while certain other doctors were appointed as visiting consultants/retainers. The visiting consultants/retained doctors were allowed to carry on their practice in their individual names also;

2.1.2 While employee doctors constituted majority of the total number of employees, the consultant/retainer doctors were nearly 2.5% of the total strength of doctors working in the hospital;

2.1.3 That although the employee doctors had filed claims under the category of "employees" and the consultant doctors had filed claims as "operational creditors" due to a technical interpretation of claim forms to be used, ***yet they should have been treated equally under the resolution plan as their roles and responsibilities were similar in every way***;

2.1.4 That the valuation of land owned by CD, which was valued by two registered valuers appointed by RP, was significantly ***different in terms of method of valuation and also in terms of total value determined***. The difference between the 'Fair Value' of land determined by two valuers was around 15.82%, which was significant, ***and therefore, a third valuer should have been appointed by RP in order to determine the appropriate value of land;***

2.1.5 That the noticeable difference in the method of valuation of land was due to the reason that ***while first valuer had mentioned that the land was owned by a third party,***

the second valuer mentioned that the land was owned by CD. Therefore, as per two valuation reports, the land was owned by different persons/entities.

2.1.6 That ***first valuer considered the land and building as "uncultivated freehold land" for determination of 'Fair Value' of land and building, and as "Government owned land leased to a third party" for determination of 'Liquidation Value'***;

2.1.7 That the ***second valuer considered the unique shape of land of the CD and adopted 'belt method' for arriving at valuation of different pieces of land and the total 'Fair Value' and 'Liquidation Value' of land was lesser than the value determined by the first valuer***;

2.1.8 That based on such factual evidence, ***it was contended that due to different treatment with regard to ownership of land and method of valuation by the two valuers, the 'Fair Value' of land determined by two valuers was significantly different (difference of 15.82%)***. Therefore, the provisions of IBC read with CIRP regulations, with regard to valuation of assets of CD, had not been complied with by the RP as he had failed to appoint a third valuer to determine the appropriate 'Fair Value' of assets owned by CD.

2.1.9 That the CoC should have taken all relevant facts into consideration while accepting the resolution plan. The CoC had inadvertently treated 'employee doctors' and 'consultant doctors' differently, although for all practical purposes, the roles and responsibilities of both set of doctors were same.

2.1.10 That the CoC should not have accepted the valuation provided by two valuers as there was significant difference in 'fair value' and 'liquidation value' determined due to difference in treatment of ownership of asset and method of valuation adopted by them.

2.2 ***CONTENTION OF THE RP/RESPONDENT***:

2.2.1 That the 'fair value' and 'liquidation value' determined by two registered valuers was nearly similar and, except for some minor clerical errors, there was no significant difference in these values as per two valuation reports and, therefore, there was no requirement to appoint a third valuer as contended by appellant;

2.2.2 That the 'valuation report' was meant to provide only an estimate of 'fair value' and 'liquidation value' of assets of CD to the CoC in order to assist CoC in taking a commercial decision and ***(quote at para 27 at page 13 of judgement) "……and the same in not a mandatory document to be relied upon by the committee to take a decision on the 'Resolution Plan' in front of it***".

2.2.3 That the difference of 15.82% between the 'fair value' of land determined by two valuers was not significant as the total 'fair value' and 'liquidation value' of all assets owned by CD was only marginally different.

2.2.4 That with regard to difference in treatment of claims submitted by 'employee doctors' and 'consultant doctors', it was mentioned that the status of these two sets of doctors was indeed different as per rules of their engagement and contracts, and hence, they had to be treated differently in the resolution plan also.

2.2.5 That the acceptance of a resolution plan is the sole prerogative of CoC and the all decisions taken as per commercial wisdom of CoC should not be open to question by NCLT or NCLAT, who are required by law, to carry out limited judicial review of a resolution plan.

2.3 ***OBSERVATIONS AND DECISION OF NCLAT:***

2.3.1 In relation to the difference in valuation of land for arriving at 'fair value' and 'liquidation value' of assets of CD, it was observed that the valuation report provided to CoC was meant to provide only a guidance in terms of value of assets owned by CD for evaluation of a resolution plan. The CoC, in its commercial wisdom, could take any view of the value arrived at by the two valuers and it was not bound by the valuation of assets provided in the valuation report.

2.3.2 The difference of 15.82% between the value of land determined by two valuers was not significant considering that the total 'fair value' and 'liquidation value' arrived at by both the valuers was almost similar.

2.3.4 That due to minimal difference between the 'fair value' and 'liquidation value' determined by two valuers, there was no need of appointing a third valuer as contended by appellant.

2.3.5 The NCLAT observed in para 53 at page 24 of judgement that (quote) -

"53. As far as the present case is concerned, ***the 'Resolution Plan'(****should have been 'Resolution Professional'****), had not accepted the Valuation Report made by the Valuer ..... Not resting with that, the 'Resolution Professional' had resorted to the agreed 'International Valuation Standards' and carried out the physical verification of the 'Corporate Debtor's fixed assets.*** Therefore, the question of appointing a 'third Valuer' on the purported ground of difference of 15.92% in the 'Fair Value' does not arise, in the considered opinion of this 'Tribunal'."

2.3.6 In relation to difference in treatment of claims of 'employee doctors' vs 'consultant doctors' the NCLAT held that certain doctors were appointed as consultants and they were allowed to practice privately also. Hence, remuneration paid to them could not be equated to the salary or such other remuneration paid to employee doctors.

2.3.7 Therefore, in the light of above findings and discussions, the NCLAT rejected the appeal filed by the appellant for reconsideration of the resolution plan. The question raised by appellant on the valuation of land and other issues were decided in favour of RP/Respondent.

Author's Views:

A. Now there are two aspects related to valuation of land which need to be considered together. ***One is "Ownership of Land" and second is "material difference" in valuation of Land***.

OWNERSHIP OF LAND:

B. The question raised by the appellant was specifically with regard to "***valuation of 'land' owned by the CD"***. The two valuers appointed by RP adopted different methods for arriving at valuation of land. Both the valuers used legally and internationally accepted valuation

methods to determine the value of land (***as there was no claim of illegality of any method used by valuers by the appellant***). Therefore, the question relating to use of a particular method by one valuer and a different valuation method by another valuer, ***could be more academic than anything else***.

C. What is, perhaps, more relevant, in this case, with regard to valuation of land ***is the "Ownership" of land by CD***. While one valuer ***treated the land as leasehold land*** on the basis of available records, the other valuer treated the ***land as "owned by CD"*** based on some other records.

D. It is widely understood that ownership of an asset definitely creates a better title of property in favour of CD. ***If the land was actually owned by CD as per available records, then all such records should have been produced before the NCLAT for verification and appreciation of the point raised by the appellant***. *Whether such records were produced by appellant before NCLAT, is not mentioned in the judgement*.

E. With regard to "***Ownership of land***" or any property for that matter, ***a different value, or let us say, a superior or higher value will be available at any time in the market, if the land in owned by the CD***. In other words, the valuation report issued by the valuer, ***which mentioned that the land was a leasehold land***, should have been questioned/contested by the appellant before the NCLAT, **by producing requisite documentation of ownership of land by CD**.

F. In relation to '***Ownership of land***' or any other property owned by CD, the IBC has assigned the duty to RP for determination of 'fair value' and 'liquidation value' by appointing two registered valuers. ***However, after the issue of valuation report, the RP is expected to evaluate these valuation reports against all facts that are available or known to***

him. The RP would be in the best position to confirm whether the land was owned by CD or was it a leasehold land.

G. ***Therefore, before sharing the valuation of assets with CoC, the RP was expected to factually verify the contents of valuation report and point out any inconsistency to the valuers. The fact of difference in 'Ownership of land' should have been brought to the notice of both the valuers and this difference should have been sorted out with valuers, himself, by the RP. If, on such evaluation, any revision was required in the value of land shown in the valuation report, then the value of land should have been corrected/amended by the valuers in their reports.***

H. In this judgement, ***it was also mentioned that the RP did not accept the value determined by one of the valuer and he, himself, proceeded to physically verify the assets and determine the value of land and building as per internationally accepted valuation standards***.

I. It is interesting to point out here that the IBC does not envisage the role of RP to include the valuation function also. An RP is expected to appoint two valuers and then evaluate their report. ***He is not expected to take this exercise upon himself to determine the value of assets and nor the value determined by him is granted any recognition under IBC***. This exercise may help an RP to evaluate the value determined by valuers in a better perspective ***but he cannot superimpose the value determined by him over the value determined by the two valuers***.

J. ***Therefore, on the basis of facts of this case, which have been mentioned in the judgement also, it would appear appropriate that if the RP did not accept the valuation of one valuer due to difference in valuation of asset for any reason, then***

under the provisions of IBC, he was obliged to appoint a third valuer for determination of estimated value of assets owned by CD.

K. Another aspect with regard to valuation, which has been stressed upon in various judgement pronounced by Hon'ble Supreme Court and NCLAT, is that the CoC is not bound by the valuation of assets given in the valuation report. The CoC can make its own judgement on accepting a resolution plan, which might be different in relation to the total asset value determined by the valuers.

L. In this context, it is helpful to point out that the CoC may be well within its powers to consider or not to consider the valuation of assets determined as per valuation report but it will certainly be a concerned party, where the valuation report itself is incorrect on facts and/or on assumptions made by valuers while determining the value of asset. In this regard, the '***Ownership of asset***' will be an important criterion, which is distinctly and specifically related to the value of an asset. It is expected that ***the CoC will not, in its commercial wisdom, be willing to compromise on the 'Ownership' criteria of an asset. Hence, the CoC should be expected to evaluate in principle, in addition to the RP, if all the assets owned by the CD have been properly valued.***

'MATERIAL DIFFERENCE' IN VALUATION OF ASSET:

M. What can be termed as "***material difference***" between the value of land determined by the two valuation reports, is again a question of fact.

N. Some guidance is available in the income tax law in the chapter of 'Capital Gains', which deals with computation of capital gains on property (which includes land, building, plant & machinery, goodwill, patents, rights, titles, etc.) sold by an assesse.

O. ***Section 50C of the Income Tax Act - The third proviso to section 50C(1) provides that where the value adopted or assessed or assessable by any government authority for the purpose of payment of stamp duty does not exceed one hundred and ten per cent of consideration received or accruing as a result of the transfer of property, then the consideration so received or accruing as a result of the transfer shall, for the purposes of computing profit and gains or capital gains from transfer of such asset, be deemed to be full value of the consideration.***

P. **Therefore, a benchmark of 10% difference in sale value of property as per sale deed and as per stamp duty value determined by law has been accepted by law to be "*acceptable difference*". Any difference above this benchmark of 10%, between the sale value and stamp duty value, is taxed in the hands of the seller of property.**

Q. Keeping the matter regarding 'Ownership of Land' aside, ***if this difference of 10% may serve as a benchmark, which is also accepted by government authorities, the difference of 15.86%, which is nearly 5.86% above this benchmark or which is more than 50% higher than the benchmark of 10%, would surely call for further investigation in this matter***.

R. Another important issue, ***which has not been mentioned in this judgement***, is ***whether the RP had even observed or pointed out to the CoC that there was a difference in valuation of land as per two valuation reports and this difference was to the tune of 15.86% and its financial impact on the value of assets was around "X" Crores***. It appears from the judgement that this matter caught the attention of the CoC, when an appeal was filed by the appellant against the acceptance of resolution plan by the CoC.

It appears from this NCLAT judgement that due to onset of COVID 19 restrictions and related difficult situation faced by CD, RP, CoC and Valuers, there was not much opportunity available

to all parties concerned to perform their functions effectively. The availability of records and physical visits of CD's premises would also have been restricted and the valuers also would have faced an uphill task in completing the valuation assignment.

In such circumstances, it would have been appropriate for all parties to take a more inclusive view of the situation in the interest of conclusion of CIRP. This goes without saying that the roles and responsibilities of RP, which have been defined by IBC, cannot be taken lightly. In the end, it is the RP, who takes the stick for any part of the assignment, which is not performed on the expected parameters or within pre-determined timelines.

CASE LAWS

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

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

- **Oriental Bank of Commerce v. Ruchi Global Limited - [2020] 117 taxmann.com 707 (NCL-AT)**

Inter se agreement between banks/financial creditors will not be a bar to filing section 7 application.

The appellant bank, part of a consortium of banks had extended Letter of Credit facility to the corporate debtor which was non-fund based and the respondent - corporate debtor was taking benefit of the same. In account of the respondent, there were outstanding dues and thus, application under section 7 was filed mentioning amount in default as on date of classifying debt as NPA. The Adjudicating Authority dismissed application filed by the appellant/financial creditor on ground that the appellant filed section 7 application without consultation or without taking approval of rest of members of the consortium and thereby committed a breach of contract. However, fact that agreement was inter se between banks, the corporate debtor could not have taken benefit of clauses in that agreement, which were binding only on banks. Further, if the appellant bank did not act in tune with the consortium agreement it may be matter of consideration for other bank/s of consortium and/or Reserve Bank of India, however, there was nothing to bar filing of section 7 application by appellant

Held that judgment the of Adjudicating Authority in dismissing application under section 7 because of consortium agreement would not be maintainable.

Case Review : Oriental Bank of Commerce v. Ruchi Global Ltd. [2019] 109 taxmann.com 318 (NCLT - Mum.) set aside.

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

- **Radhika Mehra v. Vaayu Infrastructure LLP - [2020] 117 taxmann.com 715 /[2020] 160 SCL 675 (NCL-AT)**

Appellate Tribunal under code could not have condoned delay in filing appeal beyond 45 days.

Held that section 238 of IBC makes it clear that provision of the Code will override other laws and therefore, section 61(2) of the IBC, as per which the Appellate Tribunal is not empowered to condone delay in filing appeal beyond 15 days after expiry of period of 30 days will override section 5 of Limitation Act as per which the Appellate Tribunal has power to admit an appeal after prescribed period, if the appellant satisfies the Appellate Tribunal that he had sufficient cause for not preferring appeal within such period. Therefore, the Appellate Tribunal under code could not have condoned delay in filing appeal beyond 45 days.

Case Review : Vejas Power Projects Ltd. v. Vaayu Infrastructure LLP [2020] 117 taxmann.com 714 (NCLT - Mum.), affirmed.

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

- **Rajesh Goyal v. Babita Gupta - [2020] 117 taxmann.com 720 (NCL-AT)**

Resolution can be taken even during CIRP, if any promoter as investor agrees to invest money for keeping corporate debtor as a going concern and complete real estate project within time frame.

Held that a resolution can be taken even during CIRP, if any promoter as investor agrees to invest money for keeping corporate debtor as a going concern and complete real estate project within time frame. Therefore, promoter of the corporate debtor under CIRP could be allowed to reinvest in the corporate debtor's real estate projects as an outside financial creditor and if projects are completed, creditors are paid back, a completion certificate is received from Interim Resolution Professional and other conditions are fulfilled, CIRP process would be closed and unsold flats and apartments would be handed back to the promoter.

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

- **Landmark Realty v. Siroya Developers Pvt. Ltd. - [2020] 117 taxmann.com 727 /[2020] 160 SCL 495 (NCL-AT)**

Where prior to issuance of Demand Notice by operational creditor, money suit had been filed by appellant operational creditor against corporate debtor, application filed under section 9 had rightly dismissed on ground of pre-existence of dispute.

Held that where money suit/recovery proceedings had been filed by the appellant/operational creditor against the corporate debtor prior to issue of demand notice under section 8(1) and was pending, the Adjudicating Authority rightly rejected application under section 9 on ground of pre-existence of dispute.

Case Review : Landmark Realty v. Siroya Developers (P.) Ltd. [2020] 117 taxmann.com 726 (NCLT - Mum.), affirmed.

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

- **Marathe Hospitality v. Mahesh Surekha - [2020] 117 taxmann.com 776 /[2020] 160 SCL 499 (SC)**

Where Appellate Tribunal had closed its functioning as one of its employees was suffering from Covid-19, it should find out a way for online hearing in such a situation and immediately on reopening, should start hearing of matter on interim stay.

The petitioner had filed appeal before the Appellate Tribunal, however, the Appellate Tribunal had closed its functioning as one of its employees was suffering from Covid-19.

Held that doors of justice cannot be closed, the Appellate Tribunal should find out a way for online hearing in such a situation and the Appellate Tribunal should start hearing of matter on interim stay immediately on reopening.

SECTION 206 - INSOLVENCY PROFESSIONALS - ENROLLED AND REGISTERED PERSON TO ACT

- **Duff & Phelps India (P.) Ltd. v. Insolvency and Bankruptcy Board of India - [2020] 117 taxmann.com 908 /[2020] 160 SCL 619 (Delhi)**

Where petitioner non-IPE was appointed as an insolvency professional agency by RP on instructions of CoC, pending Application on its disqualification, petitioner was permitted to continue those assignments in which it was engaged by other RPs.

The petitioner was not enrolled as insolvency professional agency. It submitted that non-IPE firms had been involved in some of biggest IBC cases in country; that the petitioner was a regulated entity being regulated by SEBI; that the RP acted only on instructions of the CoC and appointed the petitioner and no fault could be found with such appointment; that the RP had filled appropriate statutory forms with the IBBI. The petitioner urged the Court to grant interim orders in instant application. On the other hand, the respondent/IBBI contended that no person can render services as an insolvency professional without being enrolled as a member of an insolvency professional agency.

Held that it would be appropriate that the petitioner, till next date of hearing, be permitted to continue those assignments in which it was engaged by other RPs; such assignments would not be terminated based on observations made in the impugned order.

SECTION 32A - CORPORATE INSOLVENCY RESOLUTION PROCESS - LIABILITY FOR PRIOR OFFENCES, ETC.

- **Angul Energy Ltd. v. Union of India - [2020] 117 taxmann.com 861 (Delhi)**

A corporate debtor would not be liable for any offence committed prior to commencement of CIRP and corporate debtor would not be prosecuted if a resolution plan has been approved by Adjudicating Authority

Pursuant to corporate insolvency resolution process against the corporate debtor i.e. BSL which was now petitioner, resolution plan was submitted in respect of the petitioner which was approved by the CoC and NCLT. In terms of the Resolution Plan, management of the petitioner company had been taken over by new promoters, who are not connected with previous management. The petitioner filed instant petition impugning an order dated 16-8-2019 in complaint captioned 'Serious Fraud Investigation Office v. Bhushan Steel Ltd.' and summons issued to it for offences punishable under the Companies Act, 2013.

Held that a corporate debtor would not be liable for any offence committed prior to commencement of CIRP and the corporate debtor would not be prosecuted if a resolution plan has been approved by the Adjudicating Authority. Since a resolution plan had been approved by the Adjudicating Authority (NCLT), the petitioner could not be prosecuted and was to be discharged and petition was to be allowed and impugned order and summons were to be set aside.

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

- **Bijay Kumar Agarwal v. State Bank of India - [2020] 118 taxmann.com 48 (NCL-AT)**

Where CIRP application filed by financial creditor was already admitted against principal borrower, another CIRP application by same financial creditor could not be admitted against corporate guarantor for same set of claims/default.

Held that a contract of Guarantee is a contract to perform promise or discharge liability of 3rd party, in case of his default. Even without resorting to CIRP against the Principal Borrower it is always open to the financial creditor to commence CIRP under section 7 against the corporate debtor/guarantor. Further, there is no fetter in Code for projecting simultaneously two applications under section 7 against (i) Principal Borrower as well as (ii) corporate guarantor(s) or against both guarantors, but, where CIRP application filed by the financial creditor was

already admitted against the principal borrower, another CIRP application by same financial creditor could not be admitted against corporate guarantor for same set of claims/default.

Case Review : State Bank of India v. Genegrow Commercial (P.) Ltd. [2020] 118 taxmann.com 8 (NCLT - Kolkata), Set aside.

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

- **G. T. Polymers v. Keshava Medi Devices (P.) Ltd. - [2020] 118 taxmann.com 74 (NCL-AT)**

Where corporate debtor had filed civil suit against operational creditor regarding debt after receipt of demand notice, same would not be a dispute as defined in section 5(6).

The operational creditor supplied goods to the corporate debtor. Since the corporate debtor failed to clear dues, a demand notice was issued to the corporate debtor. The Adjudicating Authority however rejected CIRP application filed by the operational creditor on ground that there was pre-existing dispute between parties.

Held that, since in C-Forms delivered by the corporate debtor to the operational creditor there was reference to all invoices and ledger and bank account enteries corroborated with such invoices, dispute was spurious or hypothetical. Further, the corporate debtor had filed civil suit after receipt of demand notice and, therefore, it would not be a dispute as defined in section 5(6). Therefore, impugned judgment of the Adjudicating Authority was to be set aside and case was to be remanded to the Adjudicating Authority for admitting the CIRP application under section 9.

Case Review : G.T. Polymers v. Keshava Medi Devices (P.) Ltd. [2020] 118 taxmann.com 73 (NCLT - Hyd.), Set aside.

SECTION 60 - CORPORATE PERSONS ADJUDICATING AUTHORITIES - ADJUDICATING AUTHORITY

- **Union of India v. Oriental Bank of Commerce - [2020] 118 taxmann.com 101 /[2020] 160 SCL 729 (NCL-AT)**

Question of adding a party to a litigation has to be determined only on a case-to-case basis, hence, directions issued by NCLT to implead 'Secretary of Ministry of Corporate Affairs' as party respondent in all cases of I&B Code being illegal was to be set aside.

Principal Bench of NCLT had directed that Secretary, Ministry of Corporate Affairs, Government of India shall be made a party to all IBC and Company cases before all Tribunals. It had justified said direction on ground that it would facilitate availability of authentic record for proper appreciation of matters being contested before it. However, it was found that a wholesale, blanket and omnibus direction to implead MCA in all cases could not be issued in single stroke as question of adding a party to a litigation has to be determined only on a case-to-case basis.

Held that directions issued by NCLT were beyond power of NCLT and it would tantamount to imposition of a new rule in a compelling fashion. Therefore, impugned order making it applicable throughout country to all Benches of NCLT was untenable one and said order suffered from material irregularity and patent illegality in eye of Law, hence was to be set aside.

Case Review : Oriental Bank of Commerce v. Sikka Papers Ltd. [2020] 118 taxmann.com 100 (New Delhi), Reversed.

SECTION 196 - BOARD - POWERS AND FUNCTIONS OF

- **CA.Venkata Siva Kumar v. Insolvency and Bankruptcy Board of India(IBBI) - [2020] 118 taxmann.com 134 (Madras)**

Held that the Insolvency and Bankruptcy Board of India (IBBI) has powers to frame regulations with regard to fee payable by Insolvency Professionals (IPs) and insolvency professional agencies. Fee making power of the IBBI is not subject to any fetters except that it should be for carrying out purposes of IBC. The IBBI is duly empowered under sections 196 and 207 of the I&B Code to levy a fee on IP, including as a percentage of annual remuneration as an IP in preceding financial year. The IBBI provides significant services, including in relation to IPs and there is broad correlation between fees and services. In view of fact that direct or arithmetical

correlation as between fee received and service rendered is not necessary especially in context of regulatory fees, it is viewed that regulation 7(2)(ca) of the IP Regulations does not suffer from any constitutional infirmity on account of absence of quid pro quo. The IBC contains adequate safeguards to ensure that the Parliament effectively supervises all rules and regulations with power to modify or even annul same, likewise, adequate safeguards are in place to ensure that funds of IBBI are utilized for purposes of fulfilling role of IBBI under the IBC. Conferment of power to charge a fee and charging of such fee by using annual remuneration as a measure does not amount to delegation of an essential legislative function and therefore, it cannot be said that there is excessive delegation to IBBI.

SECTION 16 - CORPORATE INSOLVENCY RESOLUTION PROCESS - INTERIM RESOLUTION PROFESSIONAL - APPOINTMENT AND TENURE OF

- **State Bank of India v. Metenere Ltd. - [2020] 118 taxmann.com 143 /[2020] 161 SCL 513 (NCL-AT)**

Where proposed Insolvency Resolution Professional (IRP) had a long association of four decades with financial creditor serving under it and was currently drawing pension, though IRP was not disqualified or ineligible to act as an IRP, however, apprehension of bias expressed by corporate debtor qua appointment of proposed IRP was justified, hence, order directing its substitution had rightly been passed.

The NCLT by impugned order directed substitution of Insolvency Resolution Professional (IRP), who was ex-employee of the appellant bank/financial creditor on ground that such IRP was unlikely to act fairly and could not be expected to act as an independent umpire. The appellant bank assailed impugned order on ground that proposed IRP fulfilled all requirements for appointment as IRP under the Code and admittedly bore no disqualifications. It was found that

proposed IRP had a long association of four decades with the financial creditor serving under it and currently drawing pension. Thus, in view of above circumstances, though IRP was not disqualified or ineligible to act as an IRP, however, apprehension of bias expressed by corporate debtor qua appointment of proposed IRP could not be dismissed off hand, and therefore, impugned order being free from any legal infirmity was to be upheld.

Case Review : State Bank of India v. Metenere Ltd. [2020] 113 taxmann.com 379 (NCLT - New Delhi), Affirmed.

SECTION 5(13) - CORPORATE INSOLVENCY RESOLUTION PROCESS - INSOLVENCY RESOLUTION PROCESS COST

- **Committee of Creditors v. B. Santosh Babu - [2020] 118 taxmann.com 146 (NCL-AT)**

Committee of Creditors is to pay fees and cost incurred by Interim Resolution Professional, who also acted during resolution process beyond 30 days till date of liquidation and was not allowed to continue as Liquidator.

The Adjudicating Authority passed order of liquidation of the corporate debtor company on recommendation of Committee of Creditors (CoC). Interim Resolution Professional (IRP) not having been paid his fees and cost, moved an application before the Adjudicating Authority for payment of his fees and cost incurred by him. The Adjudicating Authority by impugned order, directed CoC (appellant herein) to pay fees and cost incurred by the IRP. The Appellant submitted that fees and costs of IRP were to be borne by the operational creditor who filed application under section 9 and not by him.

Held that such submission of the appellant could not be accepted as the operational creditor who moved application, not being a secured creditor may not receive any amount during liquidation and hence, could not be asked to pay dues. IRP having performed his duty and constituted CoC and thereafter, continued to function even beyond 30 days with designation of IRP and moved an application for liquidation, though was not allowed to continue as liquidator, CoC was to pay fees and cost incurred by IRP.

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

- **Babasaheb Sawalaram Chaware v. Punjab National Bank - [2020] 118 taxmann.com 148 (NCL-AT)**

Abatement of Original Suit before DRT will not affect proceedings in NCLT under IBC as dues still remain outstanding, hence, where Corporate Debtor defaulted in repaying loan availed from Bank and application before DRT had abated, in view of fact that appellant at all times admitted and acknowledged dues, CIRP application had rightly been admitted.

Bank had extended term loan to the corporate debtor company in 2005 and working capital loan, cash credit facility etc. was extended and renewed and revised from time-to-time. There were huge outstanding dues, hence, bank had issued notice under SARFAESI Act. However, application before DRT had abated. Thereafter, Bank filed application under section 7 against the corporate debtor which was admitted by the NCLT. The appellant, director of the corporate debtor submitted that section 7 application be set aside as they were forced by Bank and consortium for one time settlement and moreover, it was abated liability and hence no liability and also no notice of demand had been raised. However, Bank had sent letter to MD of Company informing that its loan account with Consortium, comprising Bank had been classified as NPA by all member Banks. Further, documents on record revealed that the appellant himself had agreed for one time settlement (OTS) with Bank and in this regard had even written a letter to a Lok Sabha M.P. to get extension of time for OTS from Consortium Banks. Thus, it is apparent that the appellant at all times admitted and acknowledged dues and making some payments kept seeking time and now had vaguely pleaded coercion, force and pressure in getting executed OTS documents. There were no particulars to spell out and no material showing coercion, force or pressure and dues outstanding relied on are not hit by limitation. Further, abatement of Original Suit before DRT will not affect proceeding in NCLT under IBC as dues still remain outstanding. Therefore, the Adjudicating Authority rightly admitted application.

Case Review : *Punjab National Bank v. Harneshwar Agro Products Power & Yeast (I) Ltd. [2020] 118 taxmann.com 147 (NCLT - Mum.), Affirmed*

Insolvency Professional Agency of Institute of Cost Accountants of India

(Section 8 Company registered under the Companies Act, 2013)

The Insolvency Professional Agency of the Institute of Cost Accountants of India (IPA ICAI), a Section 8 Company incorporated under Companies Act 2013 has been promoted by the Institute of Cost Accountants of India (Institute) and Registered with Insolvency and Bankruptcy Board of India (IBBI) to enroll and regulate Insolvency Professionals (IP) in accordance with the provisions of the Insolvency & Bankruptcy Code, 2016 (Code) and rules, regulations and guidelines issued there under:

IPA ICAI invites applications for the Post of Managing Director (on Contractual Basis)

Position	**Managing Director**
Age	Not above 55 years as on 30th June 2021. (Relaxation for 5 years i.e upto sixty years of age in exceptional cases)
Qualification	Must be a Graduate along with a Fellow Member of the Institute of Cost Accountants of India / Institute of Company Secretaries of India/ Institute of Chartered Accountants of India / MBA / Law Graduate from reputed Institute /CAIIB
Experience	A minimum of 20 years work experience as practicing professional or in reputed corporate organization / banks / Financial Institutions / Regulatory Bodies.
Job Description	• Managing Director will be administrative head of IPA ICAI and responsible for all functions of the Insolvency Professional Agency of Institute and perform such tasks and functions as per the provision of Code and rules, regulations and guidelines issued thereunder and as determined and assigned by the Governing Board of the IPA from time to time. • Liaison with the Insolvency and Bankruptcy Board of India on various matters. • Coordinate with the other IPAs for policy making in various matters and providing end to end decision- making for pertinent aspects of development of Insolvency Profession. • He/she should have strong leadership and administrative skills along with proven ability to build good working relationship. He/she should also have an impeccable track record, integrity and professional competence, with strong commitment to the cause of the profession.

	• He/she should have the ability to drive the team of executives of the IPA to meet the expectations of all stakeholders. • He/she shall be responsible for all compliance and statutory obligations as specified in the Code/ Companies Act, 2013 and various other Acts/Laws as applicable to IPA. • He/she must possess good drafting skills as well as proven track record of handling pressing issues. • He/she should have the ability of independently planning and organizing Seminars/Conferences, Workshops, Orientation programs and Training Programs for Insolvency Professionals (IPs) and also possess strong network with industry bodies and other corporate organizations. • He / she should have the ability to carry out research work including release of newsletter, daily IBC update, e Journal, Guidance notes, legal case analysis on regular basis • He/she is expected to be strong in planning and organizing, possess a problem-solving approach and attention to details to achieve quality results. • It is also expected that the Incumbent will stay abreast of all relevant changes in the environment to enhance the standards of performance of the IPA. • He/she should have ability to identify opportunities and proposes new methods of improving existing operational procedure with a focus on building a sustainable organization • He/she should have ability to develop and execute various strategic and development plans both short and long term to ensure sustainability of the IPA. • He/she should develop appropriate role profiles for various personnel working in the company and evaluate their performance at regular intervals.
Duration	The tenure for the position is for 3 (three) years on contractual basis with an option with IPA ICAI for renewal up to a period of further 3 (three) years or superannuation whichever is earlier.
Remuneration	Consolidated Remuneration up to Rs. 150000/- per month. (For deserving candidates, remuneration no bar)
Place of Posting	Delhi/NCR

General Information:

• The post is purely on contractual basis for a period of three years. This engagement is not a regular employment in the IPA-ICAI. During the period of engagement, the person should not hold a certificate of practice or engage in any other occupation. The appointment, renewal of appointment and termination of services of the Managing Director by the Governing Board shall be subject to prior approval of IBBI.

• Mere submission of application and fulfilling the eligibility criteria does not give any right to any person to appear for interview etc.

• Original and attested copies of all documents in proof of Age, Qualifications, Experience, for the minimum period of experience as indicated for the post, etc. should be submitted by the candidates if called for Interview.

• Engagement will be subject to the Rules and Regulations of the IPA in force from time to time. Other benefits (if applicable) shall be as per the rules of the IPA as amended from time to time.

• In case it is found that information furnished by a candidate is false or defective in any manner, the candidature of such person(s) will be summarily rejected as and when it comes to the notice of the management. The candidates are advised to satisfy themselves fully about the correctness of the information furnished.

• The decision of management of the IPA in the selection process shall be final.

• The management of the IPA reserves the right to reject any application without assigning any reason whatsoever.

• Canvassing in any form shall disqualify a candidate.

• Candidates are advised to submit the online Applications on e mail – **hr.md@ipaicmai.in**

• The last date for submitting online application is **28th July, 2021**

GUIDELINES FOR ARTICLES

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

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

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