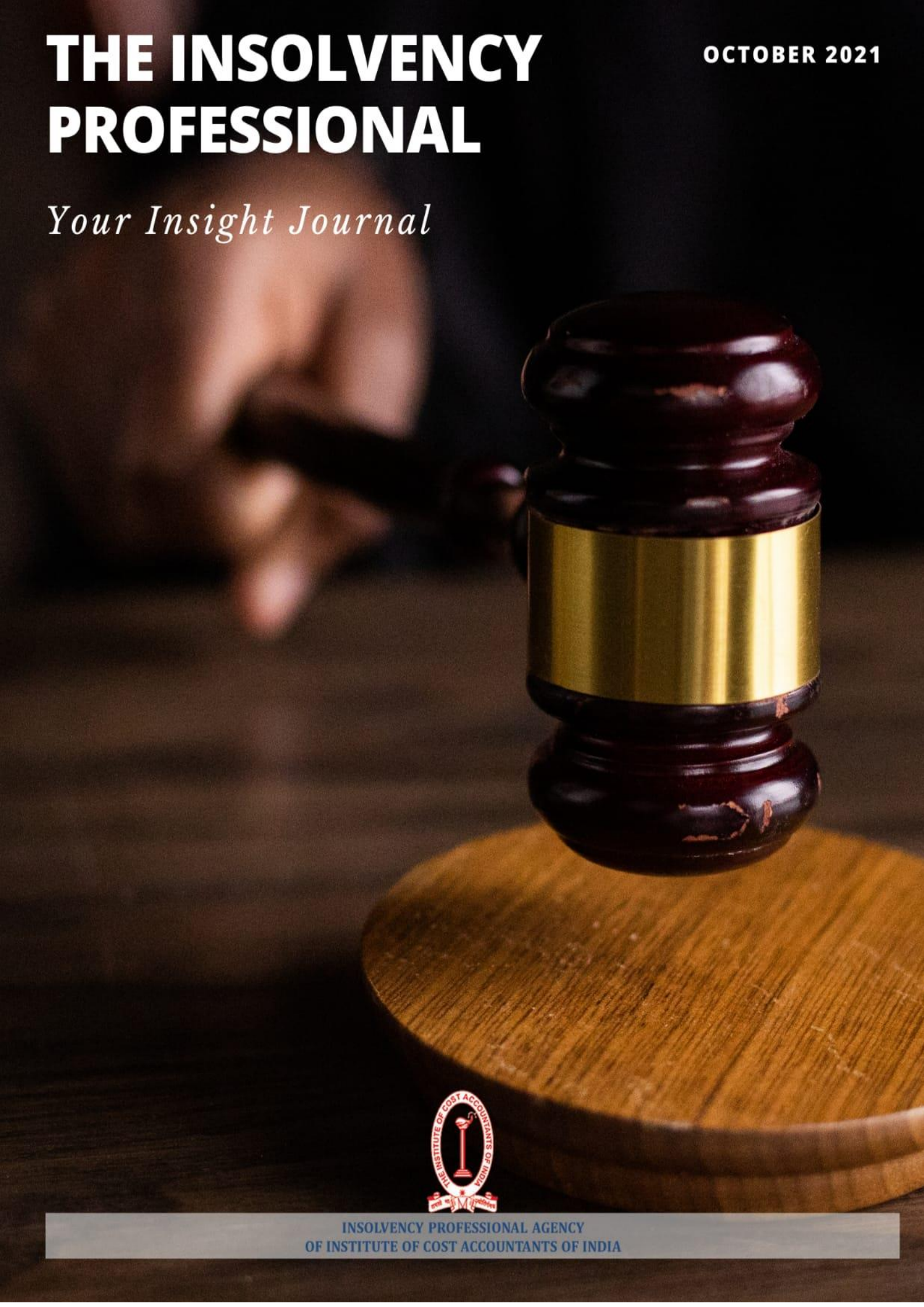
THE INSOLVENCY PROFESSIONAL

OCTOBER 2021

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

The Regulations governing the Resolution Process for Personal Guarantors to the Corporate Debtors have been notified as early as 20.11.2019. But it gained more importance only in 2021 after the case of Anil Ambani was pronounced by the Hon'ble Supreme Court. In this backdrop, I would consider it appropriate to discuss the Regulation in this message. The first concern is the eligibility of the Resolution Professional for a Resolution Process. He should be independent of the Guarantor to the Corporate Debtor and so be the insolvency professional entity of which he is a partner or a director. Any pending or ongoing disciplinary proceedings or any restraint order by the IBBI or the IPA of which he is a professional member shall also render the Resolution Professional ineligible. It should also be ensured that not only he but also the insolvency professional entity of which he is a partner or a director, including the other partners/directors of such insolvency professional entity may not be representing any party in the said resolution process. He should also not be a related party of the Guarantor or the Corporate Debtor. He is ordinarily required to file a consent to the Adjudicating Authority in Form A.

An important aspect of the responsibilities of the Resolution Professional is to issue a public notice inviting the claims from the creditors along with the proof to substantiate their claim and such claims should be submitted by the creditors at their cost to the Resolution Professional before the last date mentioned in the notice. The Resolution Professional is entitled to call for such other evidence or clarification considered necessary by him from the Creditors. Verification of such claims and arriving at the correct amount of the claim including preparation of the list of the creditors should be done within 30 days from the date of publishing the notice inviting claims. Any error in the claim amount can be rectified/modified any time before the repayment plan is approved by the Committee of the Creditors. It is likely that a creditor assigns or transfers the debt to a third party. In such an eventuality, both the parties, i.e. assignor/transferor and assignee/transferee shall provide the Resolution Professional a copy of the assignment/transfer Deed containing the terms of such assignment/transfer and the identity and details of the assignee/transferee. Such a happening would be required to be intimated to all the creditors and the Adjudicating Authority within two days.

The final list of the creditors containing the amount of claim, amount admitted, security interest wherever available should be provided to the creditors, guarantor, Adjudicating Authority (with repayment plan) after it is presented to the Committee of the Creditors

for its approval. The Resolution Professional is also required to prepare a detailed statement of affairs of the guarantor and such statement shall inter alia include the details of net assets and liabilities and the statement of income and I T Return for the three preceding financial years apart from the current financial year. The break-up of creditor-wise secured and unsecured amount due, the details of debt owed by the guarantor to his associates, guarantee given in relation to any of his debts and the details of the financial statements of the firms where he is proprietor or a partner be included in the statement of affairs.

The Resolution Professional is liable to convene a meeting of the Committee of Creditors by giving a clear notice of not less than 48 hours. The Creditors would have a voting share proportional to the debt owed to him. Unless otherwise specified, the decision of the creditors would require more than 50% of the vote share of the creditors who voted. Thirty three percent of the total voting share in person, by proxy or through video conference shall constitute Quorum. The minutes of the meeting of the CoC should be circulated through electronic mode by the Resolution Professional to all the members within 48 hours of the conclusion of the meeting. The members of the CoC who did not vote in the meeting shall be allowed to vote up to twenty-four hours from the time the minutes of the meeting are circulated. The Repayment Plan shall contain all the items of sources and uses of funds as specified in Section 17 of the Regulations. The related parties or the associates of the Resolution Professional, Corporate Debtor, Guarantor and other entities or companies specified under section 18 are prohibited from purchasing the underlying assets. Breach of repayment plan would revert the matter to the Adjudicating Authority while implementation would make the guarantor eligible for Discharge on application by the Resolution Professional before the Adjudicating Authority for appropriate order.

Warm Regards,

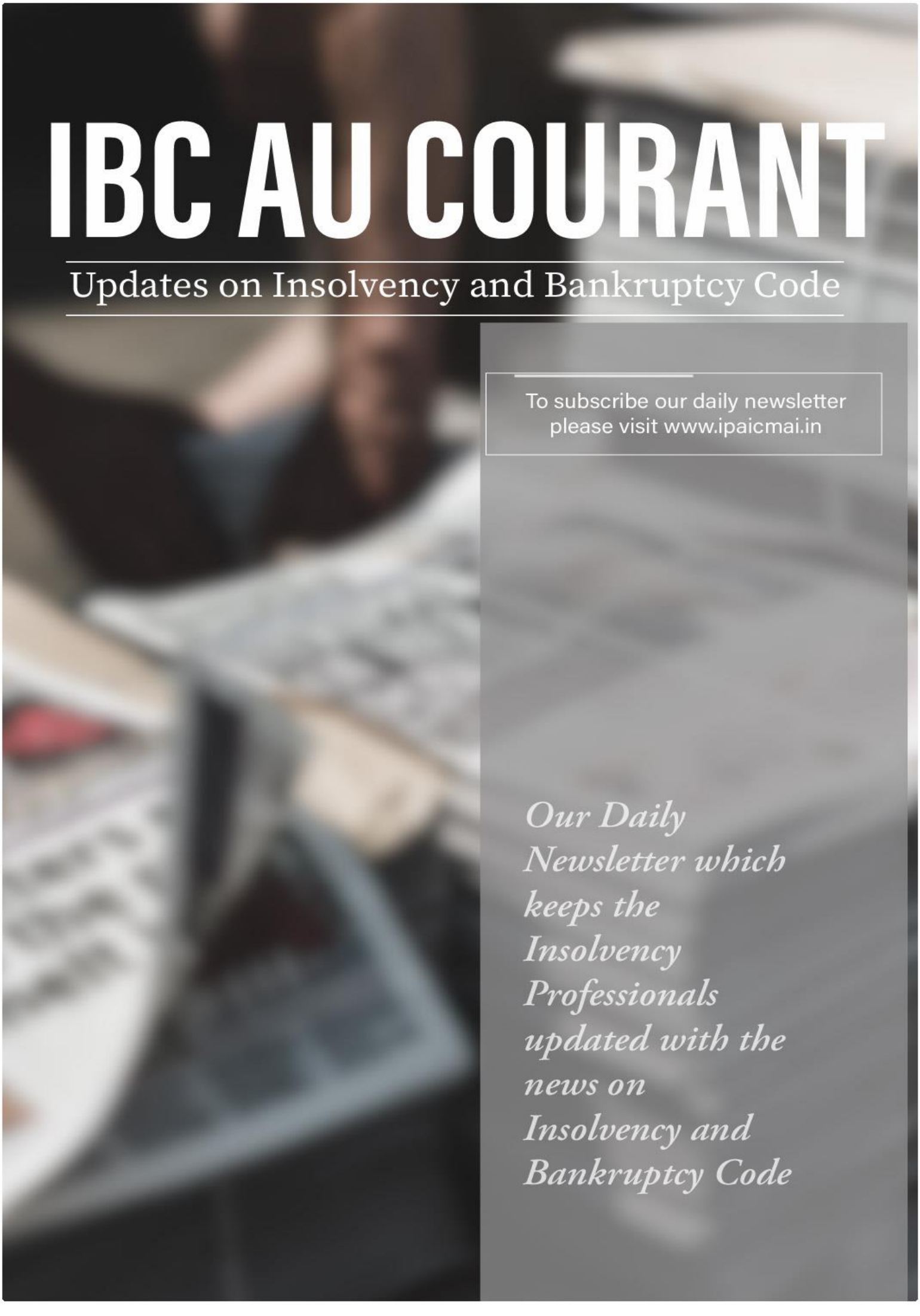
Dr. Jai Deo Sharma

Professional Development Initiatives

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

EVENTS

OCTOBER'21	
3rd October, 2021	Sensitization Program on Professional Misconduct
6th-12th October, 2021	48th Batch of PREC
8th -10th October, 2021	Master class on IBC and recent Amendments
14th October, 2021	Master Class on Regulatory Framework for Insolvency Professionals
29th October, 2021	Learning Session on Emerging Frame for Individual Insolvency



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
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

REVISION OF ORDER PASSED BY GST AUTHORITY IS OUTSIDE RESOLUTION PROFESSIONAL'S AMBIT

CS. DR. M. GOVINDARAJAN
Practising Company Secretary &
Insolvency Professional

The IRP/RP is to call for claims from the creditors of the corporate debtor by causing a public announcement. On receipt of the claims the IRP/RP has to verify the claims and admit or reject the claim. If the claim is not precise then the IRP/RP has to make best judgment based on the records available. If any additional information is received, then the IRP/RP may revise the claim based on the information received and on documentary evidences. But the IRP/RP has not been given the adjudicatory powers to decide the amount of claim. It is against the provisions of the Insolvency and Bankruptcy Code. In this article the powers of RP are discussed in detail with reference to decided case law by NCLAT, Chennai Bench

On the admission of the application filed by financial/operational creditor against a corporate debtor, by the Adjudicating Authority, the Interim Resolution Professional ('IRP' for short) will cause public announcement calling for claims from the creditors. On receipt of the claims from the creditors the IRP is to verify the claims and constitute the Committee of Creditors based on the claim. Where the claim is not precise due to any contingency or other reasons the IRP or Resolution Professional ('RP' for short) shall make the best estimate of the amount of the claim based on the information available with him. The claim may be revised when additional information is received by IRP/RP, then it may be revised accordingly. But the IRP/RP has not been given adjudicatory role in the admission of claim.

The National Company Law Appellate Tribunal, Chennai Bench confirmed that the IRP? RP has not been given any adjudicatory role in the admission of claim in **'Binoy Prabhakaran Pulipara, Resolution Professional of PVS Memorial Hospital Private Limited v. State Tax Officer (Works Contract), SGST Department, Kerala' in Company Appeal (AT) (CH) (Insolvency)No. 42 of 2021,** (decided on 07.10.2021). In the said case the application for corporate insolvency resolution process ('CIRP' for short) against PVS Memorial Hospital Private Limited was filed by OCS Group (India) Private Limited under Section 9 of the Insolvency and Bankruptcy Code, 2016 ('Code' for short). The application was admitted by the Adjudicating Authority, Kochi Bench on 16.10.2019. The appellant was appointed as IRP and later as RP.

The GST Department, Kerala submitted a claim of Rs.28.42 crores to the RP in Form B. Initially the RP has admitted the claim of the Department in entire. Mrs. P.V Mini, Promoter and suspended Managing Director of the Corporate Debtor informed the RP that the amount claimed by the department is exorbitantly high and the Department has charged GST on the total turnover of the corporate debtor without taking into account of the Notification dated 28.06.2017. She assured that she would be able to provide the information to RP through the internal auditor of the company.

The RP recommended appointing a Chartered Accountant who is specialized in GST to make the revised computation and accept the revised claim amount accordingly. The Committee of Creditors, in a meeting held on 15.07.2020 directed the RP to explore other possibilities to re-verify the claim amount. The RP revised the claim of the Department to Rs.1.07 crores after due verification with the books of accounts of the corporate debtor and the electronic ledgers maintained with the Department. The RP has sent the revised intimation to the Department on 10.08.2020.

Against the decision of the RP the Department filed an application before the Adjudicating Authority under section 60(5) of the Code with the prayer to allow the claim of the Department in full. The Adjudicating Authority, vide their order dated 04.11.2020, directed the RP to file an appeal before the Joint Commissioner of the Department for the reassessment of GST payable by the corporate debtor based on the audited financial statements for the Financial year 2018 – 19 and the Notification issued by the Board dated 28.06.2017 within two weeks from the date of the order. The Joint Commissioner shall take a decision in this regard as early as possible.

After that, with the permission of the Committee of Creditors at its 23rd Meeting held on 12.11.2020, the Appellant had filed Miscellaneous Application before the Adjudicating Authority, Kochi Bench to issue necessary clarifications to the Appellant in respect to the filing of the Appeal before the Joint Commissioner, SGST Department as directed by the Adjudicating Authority vide its Order dated 4.11.2020. The following are the clarifications sought by the RP-

- Whether the RP has the authority under Regulation 13 and 14 of the CIRP Regulations to file an appeal before the Joint Commissioner, GST, as part of the verification and determination of a claim submitted by the GST department in Form B?
- Whether the judgment, decree or Order, if any, passed by the Appellate Authority under CGST Act pursuant to the Appeal, against the Corporate Debtor shall be binding on Corporate Debtor when the Moratorium declared by the Adjudicating Authority, Kerala Bench by virtue of section 14 of the Insolvency and Bankruptcy Code is in effect?

- Whether the requirement of the pre-deposit of Rs. 3.79 crores mandated under Section 107 of the GST Act, shall be prejudicial to the interest of the CIRP, as the said section is inconsistent with Regulation 13 and 14 of the CIRP Regulations due to the overriding effect of Insolvency and Bankruptcy Code, 2016 over the Goods and Service Tax Act, 201?

The Adjudicating Authority, vide their order dated 28.01.2021, directed that there is no error in their earlier order and the clarification for the pre deposit of Rs.3.79 crores mandated under GST Act for preferring appeal, need not be considered at present.

Against this order the appellant filed appeal before the NCLAT, Chennai Bench. The appellants submitted the following before the NCLAT-

- The GST department made a claim of Rs.28.42 crores.
- Since the appellant was unable to verify the claims of the Department with the books of accounts of the corporate debtor and the electricity connection was also disconnected for non-payment of dues, the appellant provisionally admitted the entire claim of the Department.
- The appellant obtained information from the suspended Managing Director of the corporate debtor and has access to the books of accounts of the corporate debtor and verified the same with the help of suspended Managing Director.
- The appellant found that the GST Department has calculated the GST liability for non filing of the return for the financial years 2018-19 and 2019-2020 on the best judgment basis on the total turnover of the corporate debtor.
- The medical services rendered by the corporate debtor are exempted from the levy of tax.
- In the best interest of the corporate debtor the appellant revised the claim to Rs.1.06 crores and sent detailed information in this regard to the Department on 10.08.2020.
- The Department filed a petition against the findings of the RP before the Adjudicating Authority which in turn directed the appellant to file an appeal before the Joint Commissioner, GST Department within two weeks from the date of the order.

The Department submitted the following before the NCLAT-

- The corporate debtor was in arrears to the Department by means of tax, interest and penalty to the tune of Rs.28.42 crores.
- The Department submitted the claim to RP on 19.02.2020.

- The RP admitted the entire claim on 18.03.2020 after verifying the relevant records submitted by the Department.
- After five months from the date of admission, the RP revised the claims to Rs.1.06 crores only and rejected a substantial portion of the claim of the Department on the ground that the charging of GST on the total turnover of the corporate debtor is not correct.
- The corporate debtor rendered both exemption and non exemption services.
- Against the rejection of the claim the Department filed an application before the Adjudicating Authority contending that the rejection of the claim by the RP under Regulation14 is not sustainable because there is no preciseness in the amount claimed by the creditors due to any other contingency or reasons.
- Regulation 14 does not provide adjudicatory role to RP.
- Section 62 of CGST/SGST Act 2017 permits assessment of non-filers of Returns by which assessing authority can, after due service of notice, assess the said taxable person to the best of his judgment, taking into account the relevant materials, which is available or which has been gathered and issued 18 assessment orders. Accordingly, 18 assessment orders were issued against the Corporate Debtor. In the absence of any challenge against the above said 18 orders under the Statutory provisions against the Assessee / Corporate Debtor, the same has attained finality.
- The Adjudicating Authority directed the RP to file an appeal before Joint Commissioner of the Department.
- Instead of filing appeal before Joint Commissioner, the RP filed an application for clarification on certain issues. The Adjudicating Authority held that there is no error in its earlier order.
- All the assessment orders were passed before the declaration of moratorium.
- Since there is no challenge against the said orders by the corporate debtor the said orders become final.
- The Adjudicating Authority approved the resolution plan as submitted by the RP.
- The present appeal has been filed as an attempt to escape from the liability and to avoid contempt proceedings against the appellant for not obeying the order of the Adjudicating Authority.
- The assessed tax cannot be edited or reduced by the appellant himself.
- Any revision of assessment order can be done only in accordance with the provisions of the GST Acts.
- Section 238 of the Code cannot be read as conferring any appellate or adjudicatory jurisdiction in respect of issues arising under other statutes.
- The reduction of the claim and further reduced allocation is illegal and prejudicial to the Nation’s public interest and economy.

- The revision was made by the appellant only at the instance of the suspended Managing Director of the Corporate Debtor and the same is not *bonafide*.

The NCLAT considered the submissions put forth by the parties to the appeal. The question taken by NCLAT for their consideration is on the scope of revision by the RP in the exercise of powers conferred under Regulation 14. The NCLAT observed that under Regulation 14, IRP/RP is entitled to determine the amount of claim in a case where the amount claimed by the creditor is not precise due to any contingency or other reasons. In such circumstances, IRP is authorized to make the best estimate of the amount of the claim based on the information available with him. In this case the RP revised the claim of the GST department on the information received from the suspended Managing Director of the corporate debtor. The said exercise is beyond the jurisdiction of RP. The RP was not given power to adjudicate under GST Act. The RP, considering the Committee of Creditors as an authority in law, had exercised the powers of GST Authorities which is without jurisdiction and not sustainable in law. The Committee of Creditors has no role in accepting or rejecting any claim. It is the sole duty of RP. The aggrieved person on the decision of RP can agitate before the Adjudicating Authority.

The NCLAT held that the RP has committed an error in exercising their power and exercised the powers of GST Authorities under the pretext of Regulation 14 of the Code which is not sustainable.

PROVISIONS U/S 19(2) - AN OVERVIEW

Mr. Sumit Shukla

Advocate & Insolvency Professional

This article provides an insight on the provisions under section 19(2) of the IBC, the purpose for which these provisions were laid down, its application by the IRP in real life and whether these provisions has benefited the Corporate Debtors during the Corporate Insolvency Resolution Process.

Provisions u/s 19 of the Insolvency and Bankruptcy Code, 2016 binds the ex-management of the Corporate Debtor to extend its full cooperation to the IRP and the RP during the Corporate Insolvency Resolution Process. The very intent of these provisions is to ensure that the ex-management who was in control of managing the business operations as well as in the decisions of the corporate debtor remain not only answerable towards the process of the Law but also to make a point and justify with respect to the decisions that they had taken prior to the commencement of CIR Process. It has been seen in most of the cases that suspended management of the corporate debtor does not fully cooperate with the IRP and that is one of the main reasons for delay in the CIRP. Many jurisdictions like Singapore, UK etc. have similar provisions in their respective insolvency laws which make provisions for imposing penalty or punishment for any form of non-cooperation on the part of the suspended management with the IRP. However, in India insolvency framework the application u/s 19(2) is not taken in to consideration as compared to other applications which the RP/IRP filed before the adjudicating authority. There is also no data available in public domain with respect to the filing/non-filing and outcome of the applications filed u/s 19(2) specifically for those reflecting its impact before and after the intervention of the adjudicating authority.

Provisions under section 19 of the Code are under:

19. (1) The personnel of the corporate debtor, its promoters or any other person associated with the management of the corporate debtor shall extend all assistance and cooperation to the interim resolution professional as may be required by him in managing the affairs of the corporate debtor.

(2) Where any personnel of the corporate debtor, its promoter or any other person required to assist or cooperate with the interim resolution professional does not assist or cooperate, the interim resolution professional may make an application to the Adjudicating Authority for necessary directions.

(3) The Adjudicating Authority, on receiving an application under sub-section (2), shall by an order, direct such personnel or other person to comply with the instructions of the resolution

professional and to cooperate with him in collection of information and management of the corporate debtor.

Upon plain reading of provisions u/s 19(1) the Code evidently makes it incumbent on the ex-management of Corporate Debtor to cooperate with the IRP so that the IRP can effectively take necessary steps for the timely resolution of the corporate debtor. Further Provisions u/s 19(2) enables the IRP to approach the adjudicating authority and seek suitable relief in case the ex-management does not assist and cooperate with the IRP during the corporate insolvency resolution process. Whereas under the provisions of section 19(3) the adjudicating authority has the powers to direct the concerned ex-management to fulfil the requirements of the IRP.

Therefore, a plain reading of these provisions clearly defines a well-established mechanism is made available to the IRP that, if used effectively, can ensure the Cooperation from the ex-management. Absence of timely and complete cooperation is, without any doubt, is one of the key root causes which adversely affects the corporate insolvency resolution process of the corporate debtor which can be prevented provided the timely and effective steps are taken by the IRP and subsequently those are regularly monitored as well. It is also interesting to note that section 19 clearly defines that ex-management shall extend all its cooperation to the Interim Resolution Professional however does not mention specifically with respect to the filing of application by the Resolution Professional. The Adjudicating Authority has the powers to pass the orders compelling those who do not cooperate during the CIRRP however the outcome of such applications are far below the expectations which the legislature would have while placing the Provisions of section 19 of IBC. However, for non cooperation with the IRP, the ex-management can be held liable for punishment under Section 70 of the Code, which is a general provision penalizing any party who are liable for misconduct in the CIRP. It is logical to consider that immediately after commencement of the CIRP, the IRP would require more cooperation from the ex-management however it is also a fact that the ex-management's cooperation is critical for the entire CIRP Process. Moreover it has been observed in various cases that Resolution Professionals, after their appointment by the adjudicating authority, also requires the cooperation from the ex-management with respect to the steps which they have to take such as to get the valuation done, prepare Information Memorandum which later provides a baseline to the COC members in the decision making from the Fair & Liquidation Value as well as to the prospective resolution applicants to prepare a resolution plan by referring to the Information Memorandum. This becomes more critical when COC decides to replace the IRP with the appointment of a new RP. It is further noted that in the first 30 days the IRP is mostly busy in the activities related to receipt and verification of claims and form the Committee of the Creditors to conduct the 1st meeting of the COC member in a timely manner and therefore cooperation from the ex-management may not be an immediate priority for the IRP. And therefore in the first 30 days of the CIRP, the IRPs are expected to be more careful and proactive

with respect to seeking cooperation and assistance from the ex-management on various aspect of the CIRP which are going to ease their work after the completion of first COC meeting when suddenly the RP gets a very small window of appointment of the valuers and preparation of the Information Memorandum. And any failure on the part of the IRP in realizing / taking steps on account of the non-cooperation may cost dearly to the Corporate Debtor & its stakeholders and even if the resolution is achieve the same can not be termed timely and effective as has been envisaged in the Code. Such a delay, whether in extending the cooperation by the ex-management or in filing the application or even in disposal of 19(2) applications may also add burden to the RP at a later stage if IRP fail to observe and take steps with respect to the non-cooperation well in time. It is expected from the IRP to file an application u/s 19(2) well in time by preempting any situation wherein the non-cooperation may adversely affect CIRP Process at a later stage.

As regards to the applications u/s 19(2) filed by the resolution professionals is concerned, it has been observed that most of such applications does not yield any timely, effective and logical results and most of the time the ex-management remain abstain from the proceedings before the adjudicating authority or seeks excessive time to file a reply.

In case of MSME Corporate Debtor where the ex-management is not debarred from submitting the resolution plan there are possibility of deliberate non-cooperation from the ex-management to prevent the other PRAs from obtaining the better visibility about the corporate debtor which finally benefits the ex-management in the absence of the competition during the CIRP.

The Hon'ble NCLT, Chandigarh in case of M/s Educomp Infrastructure and School Management Limited and others vs. Mr. Vinod Kumar Dandona CA No. 335/2018in CP(IB) No.10/Chd/Hry/2018 observed that although Section 19 of the IBC mandates that ex-personnel of the corporate debtor (for example, former employees or directors of a company) to fully co-operate with the corporate debtor, this obligation does not extend to unrelated parties. In the absence of cooperation, powers have been conferred on the adjudicating authority-NCLT to take appropriate action. The language of Section 19 suggests that it must issue directions to such defaulting personnel of the ex-management to comply with the directions of the resolution professional and to co-operate with him. The aforesaid powers are mandatory in character so as to enable the Resolution Professional to complete the CIRP expeditiously and manage the affairs of the Corporate Debtor as going concern. Therefore, there is no escape for those persons concerned to extend full cooperation to the IRP/RP concerned. In this case the Hon'ble NCLT also observed that the statutory auditor of the corporate debtor who is in possession of the financial statements of the corporate debtor is under a statutory obligation to furnish the copies of the audited accounts along with all schedules and annexures for the specified period to the Resolution Professional. The Hon'ble Bench also observed that once the non cooperation is established, the operation of Section 70 of the Code is almost automatic. This Section 70

prescribes that wherein the officer of the corporate debtor does not disclose to Resolution Professional all the details of the property, details of transaction and/or any other information required for insolvency professional, is subject to punishment. These provisions also prescribes that if the officer of the corporate debtor delivers the information in part thereof shall also be subject to punishment under this Section. The ambit and scope of Section 70 of the Code is very large because several other instances such as preventing others for production of books of account, creation of fictitious losses, debiting of unverifiable expenses, any attempt to falsely proof of claim or not holding the meeting of creditors within last 12 months are all examples where punishment prescribed is not less than 3 years, may extend to 5 years and a fine of Rs. 1 Lakhs, may extend to Rs. 1 crores or both can be imposed. Thereafter for the further course of action, the special courts is designated to execute the punishment.

Conclusion: Provisions of Section 19 of the Code are extremely crucial for the corporate debtor as well as its stakeholders and most of the provisions of the Code are greatly dependent upon the level of the cooperation that the ex-management extends to the IRP. Any Non-Cooperation may not only adversely affect the effectivity of the provisions of the CIR Process with respect to the Valuations, PUFE / Avoidance transactions, Information Memorandum and so on which has direct correlation with the outcome of the Corporate Insolvency Resolution Process including its impact on the stakeholders specially those who does not have any say in the decision making process during CIR Process i.e. operational creditors e.g. Government and Statutory authorities, Workmen and Employees. Any delay in the filing of the application will also reduced the effectivity of the over all process. While the adjudicating authority and the Insolvency and Bankruptcy Board of India should also have an oversight on the Cooperation of the ex-management as well as about the steps taken by the IRP including its timing as in the event of the approval of the Resolution Plan such applications stands disposed off which thus potentially benefitting the ex-management specifically in those cases where the ex-managements, who is an MSME, submits the Resolution Plan. COC as well as the other stakeholders must also see whether the IRP is getting the timely and full cooperation from the ex-management and whether the effective and timely steps has been taken by the IRP or now as eventually the outcome of the CIRP will also have bearing on them and nearly in all the cases the non-cooperation will only add to the losses to the stakeholders.

DISTRIBUTION IN THE ORDER OF PRIORITY UNDER IBC 2016- SECTION 53

CMA Satyanarayana Veera Venkata Chebrolu,
Insolvency Professional

The liquidator has to distribute the proceeds from the sale of liquidation assets in the order of priority as per section 53 of IBC Code. This article is intended to understand the manner in which the sale proceeds to be distributed to various stakeholders and other guidelines in this regard.

The proceeds from the sale of liquidation assets shall be distributed in the order of priority as per section 53 of IBC 2016. The Liquidator shall not commence distribution without filing the list of stakeholders and the asset memorandum with the Adjudicating Authority as per Liquidation regulation 42 (1)

Further as per Liquidation regulations 42(2) the liquidator shall distribute the proceeds from realization within ninety days from the receipt of the amount to the stakeholders after deducting the insolvency resolution process costs, if any, and the liquidation costs before such distribution is made.

The order of priority, which is popularly known as waterfall mechanism under IBC, in which the liquidation assets to be distributed has been stipulated in section 53 of the Code.

The following assets however do not form part of liquidation estate as per section 36(4) and hence not available for distribution.

a. Assets owned by a third party which are in possession of the corporate debtor which includes assets held in trust, bailment contracts, sums due to any workmen or employee from PF, pension & gratuity fund and other contractual arrangements which stipulate only use of assets.
b. Held as collateral by Financial service provider and are subject to netting and setoff
c. Personal assets of shareholder or partner of CD provided not held on account of avoidance transactions.
d. Assets of any Indian or foreign subsidiary of CD
e. Any other assets as may be specified by Board

Deficit in realization of assets makes it necessary to prioritize the distribution of liquidation assets based on the ranking

The position of distribution of liquidation assets and the order of priority in which amount was distributed with regard to 254 liquidations where final reports submitted so far, as per IBBI quarterly newsletter for the quarter ending June, 2021 is furnished hereunder:

(Rs. In crores)

Section	Particulars	No. of claimants	Amount of claims admitted	Amount distributed
52	Secured creditors who have not relinquished security interest	27	916.89	155.58
53(1)(a)	CIRP and Liquidation cost	NA	NA	56.55
53(1)(b)	(i) Workmen dues (for 24 months) and (ii) secured creditors (security interest relinquished) will rank equally	1463	27429.44	911.11
53(1)(c)	Employees dues for 12 months	822	13.34	1.83
53(1)(d)	Financial debts owed to unsecured creditors	285	1369.77	29.15
53(1)(e)	(i) Statutory dues prior to 24 months before the date of commencement of Liquidation (ii) debts owed to a secured creditors for any unpaid amount after enforce-ment of security interest shall rank equally	198	2231.82	11.87
53(1)(f)	Remaining debts	943	1687.25	34.58
53(1)(g)	Preference shareholders	4	11.54	0.10
53(1)(h)	Equity shareholders	98	26.95	1.51
	Unclaimed proceeds	-	-	4.85
	Total	**3840**	**33687.00**	**1207.13**

1. **CIRP and liquidation cost** – Section 53(1)(a): CIRP costs as defined in section 5(13) and CIRP regulation 31 includes amount due to suppliers of essential goods and services, fee and out of pocket expenses to authorised representative, amount due to a person whose

rights are prejudicially affected on account of moratorium imposed, expenses incurred by IRP and RP to the extent ratified/ fixed and other costs directly related to CIRP approved by CoC. The amount of interim finance and the cost incurred in raising the same also forms part of the CIRP expenses.

Liquidation cost as per regulation 2 (1)(ea) means (i) fee payable to the liquidator under regulation 4; (ii) remuneration payable by the liquidator under sub-regulation (1) of regulation 7; (iii) costs incurred by the liquidator under sub-regulation (2) of regulation 24; (iv) costs incurred by the liquidator for preserving and protecting the assets, properties, effects and actionable claims, including secured assets, of the corporate debtor; (v) costs incurred by the liquidator in carrying on the business of the corporate debtor as a going concern; (vi) interest on interim finance for a period of twelve months or for the period from the liquidation commencement date till repayment of interim finance, whichever is lower; (vii) the amount repayable to contributories under sub-regulation (3) of regulation 2A; (viii) any other cost incurred by the liquidator which is essential for completing the liquidation process.

The amount contributed under Liquidation regulation 2A sub-regulation (2) shall be repayable with interest at bank rate referred to in section 49 of the Reserve Bank of India Act, 1934 as part of liquidation cost.

2. **Workmen dues (for 24 months) and secured creditors (security interest relinquished) –**Section 53(1)(b)

If the secured creditor relinquishes their interest on security, they will be ranked *pari passu* with workmen dues for a period of 24 months.

Workmen's dues: Under IBC workmen's dues for 24 months preceding the liquidation starting date are ranked the second highest below insolvency resolution process costs and liquidation costs. Hence workmen dues are to be paid in full unless the assets are insufficient to meet them, in which case they shall be distributed in equal proportion.

However as per section 36(4)(iii) all sums due to any workman or employee from the provident fund, the pension fund and the gratuity fund shall not be included in the liquidation estate assets and shall not be used for recovery in liquidation and hence outside scope of sec.53.

Secured creditors: Secured creditors who have relinquished the security interest are the largest claimants in terms of amount as well as number as can be observed from the above data in the distribution process of liquidation proceeds.

Secured creditors in the liquidation proceedings have two options i.e. either (a) relinquish its security interest to the liquidation estate and receive proceeds from the sale of assets by the liquidator in the manner specified in section 53; or (b) realise its security interest in the manner specified in section 52 of the Code.

If the secured creditor relinquishes its security interest the creditor will not be treated at par with other unsecured creditors but will be paid in priority to unsecured creditors under section 53(1)(b)

Secured creditor claim is only to the extent of the value of the security interest that is relinquished by the creditor as stated by the Insolvency Law committee in their report Feb.2020.

Regulation 21(1) states that a secured creditor shall inform the liquidator of its decision to relinquish its security interest to the liquidation estate or realise its security interest, as the case may be, in Form C (meant for operational creditor) or Form D (meant for financial creditor) of Schedule II. Thus both the type of creditor i.e financial and operational if they are secured will fall under this section.

Security interest shall be presumed to be part of the liquidation estate if the secured creditor does not intimate its decision regarding the same, to the liquidator within thirty days from the liquidation commencement date.

Liquidation regulation 21(A)(2) states that where a secured creditor proceeds to realise its security interest, it shall pay as much towards the amount payable under clause (a) and sub-clause (i) of clause (b) of sub-section (1) of section 53, as it would have shared in case it had relinquished the security interest, to the liquidator within ninety days from the liquidation commencement date; and the excess of the realised value of the asset, which is subject to security interest, over the amount of his claims admitted if any, to the liquidator within one hundred and eighty days from the liquidation commencement date

If the amount payable is not certain by the date the amount is payable the secured creditor shall pay the amount, as estimated by the liquidator

Where a secured creditor fails to comply the above regulation 21A (2), the asset which is subject to security interest, shall become part of the liquidation estate as per regulation 21(3)

In case of pari-passu charge: The Hon'ble NCLT, Mumbai vide order dated 22.10.2019, in the matter of Edelweiss Asset Reconstruction Co Ltd vs Abhijeet MADC Nagpur Energy Pvt Ltd, stated that secured creditor if wants to realize its security in accordance with section 13(9) of SARFAESI Act, 2002 then he must have 60% in the value of the secured debt and in that case such action shall be binding on all such secured creditors.

In case of second charge: Second charge holder has a subsequent charge over the remainder of the asset of the same company, which is remaining after settling the claims of the first charge holder.

However, in the case of Gujarat Oleo Chem Limited in company Appeal with NCLAT (AT) (Insolvency) No.731/2020 - with regard to the claim of Technology Development Board to treat them as secured creditor NCLAT has stated that the Secured Creditor holds first charge or second charge is material only if the Secured Creditor elects to realise its security interest.

Hence, a direction was given to the Liquidator to treat the Secured Creditors relinquishing the security interest as one class ranking equally for distribution of assets under Section 53(1)(b)(ii) of I&B Code and distribute the proceeds in accordance therewith. A stay has been however granted by Hon'ble Supreme Court on 29.06.2021 in this case

In respect of floating charge: In respect of floating charge if it is carrying a restrictive clause then subsequent charge will not rank in priority. However no mention is made in the IBC Code with regard to floating charge.

Proving security interest: in terms of Liquidation Regulation 21 the existence of security interest may be proved by secured creditors on the basis of:

1. Records available in an information utility, if any
2. Certificate of charge registered with the Registrar of Companies or
3. Charge Registered with Central Registry of Securitisation Asset Reconstruction and Security Interest of India (CERSAI)

Section 53(2) stipulates that any contractual arrangements between recipients under sub-section (1) with equal ranking, if disrupting the order of priority under that sub-section shall be disregarded by the liquidator

3. **Employees dues for 12 months- Section 53(1)(c):** Wages and unpaid dues owed to employees other than workmen for the period upto twelve months preceding to the liquidation commencement date will come in the next priority.

4. Financial debts owed to unsecured creditors: Section 53(1)(d)

The financial creditors who do not have any security falls under this category. Even if a financial creditor is having security and if it is not proved as per regulation 21 they will be treated as unsecured and their claim will fall under this category. Financial creditors who have relinquished security interest and has any deficit will also stand in queque with unsecured creditors with respect to deficit amount.

In the case of Annamalai foods Pvt Limited vs.Axis Bank Limited , NCLT Chennai in MA 154/2018 in CP/94/IB/2018 dated 10.08.2018 held that "since charge has not been created in relation to a fixed deposit of Rs.50 lacs, the respondent bank is not a secured creditor as claimed by it"

5. Statutory dues prior to 24 months before the date of commencement of Liquidation and debts owed to a secured creditors for any unpaid amount after enforcement of security interest. Section 53(1)(e)

The following dues shall rank equally between and among the following:

(i) any amount due to the Central Government and

(ii) the State Government

includes the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;

(iii) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;

If secured creditors realise their security interest to the extent of their security interest, balance dues remaining if any falls under this section i.e. 53(1)(e) of the liquidation waterfall and will rank *pari passu* with government dues thus falls much lower in priority, below unsecured financial creditors

With regard to priority of dues to Government, in the case of Leo Edibles & Fats Ltd Vs. The Tax Recovery Officer (Central), Income Tax Department, Hyderabad, & others-Hyderabad High Court stated that tax dues, being an input to the Consolidated Fund of India and of the States, clearly come within the ambit of Section 53(1)(e) of the Code.

6. **Remaining debts and dues: section 53(1)(f):** Under this head remaining debts and dues such as the following will fall

1. Workmen dues for the period of more than 24 months preceding liquidation commencement date as upto 24 months are covered under section 53(1)(b)
2. Wages and any unpaid dues owed to employees other than workmen for the period above 12 months preceding the liquidation commencement date i.e. not covered under section 53(1)(c)
3. Statutory dues to Central and State Government for the period above two years which are not covered under section 53(1)(e)
4. Deficit of secured operational creditor who has relinquished security interest.
5. Dues to other operational creditors
6. Any other dues not covered under section 53(1)(a) to 53(1)(e)

Thus, under the IBC, operational creditors are ranked much lower in the hierarchy when it comes to the liquidation of the corporate debtor's assets.

7. Preference shareholders if any: Section 53(1)(g):

Preference shareholders will have preference in distribution of dividend and assets in the event of liquidation of a company over other shareholders. Hence, they are having priority in payment over the equity shareholders.

8. **Equity shareholders**: Section 53(1)(h): The balance amount if any available after distribution to claimants and after payment to preference shareholders will be distributed to Equity shareholders.

As stated in the IBC Code in the explanation to section 53(3) that at each stage of the distribution of proceeds in respect of a class of recipients that rank equally, each of the debts will either be paid in full, or to be paid in equal proportion within the same class of recipients, if the proceeds are insufficient to meet the debts in full.

Unclaimed proceeds of liquidation or undistributed assets to be transferred to Corporate Liquidation A/c- Liquidation Regulation 46

A liquidator shall deposit the amount of unclaimed dividends, if any, and undistributed proceeds, if any, in a liquidation process along with any income earned thereon till the date of deposit into the Corporate Liquidation Account before he submits an application for closure of liquidation process where the CD is sold as going concern or for dissolution under sub-regulation (3) of regulation 45. A stakeholder, who claims to be entitled to any amount deposited into the Corporate Liquidation Account, may apply to the Board in Form J for an order for withdrawal of the amount

Conclusion:

After the assets of the corporate debtor completely liquidated and affairs of the company wound up, the Liquidator can apply to the Adjudicating Authority for dissolution of the corporate debtor.

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BRIEF NOTE ON RESOLUTION OF VS LIGNITE POWER PVT. LTD UNDER CIRP

By Dr. G V Narasimha Rao
Insolvency Professional

VS Lignite Power Private Limited ("VSLP" or "Company") is 135 MW lignite-based power plant, located at Bikaner, Rajasthan. Due to lack of Long Term PPA, the company incurred losses and was admitted into CIRP on 18th September 2019 and was successfully resolved under CIRP dated 14th May 2021.

RP successfully restarted a shut down plant and ran the plant as a going concern without any funding support from CoC or any outside source. Although there was no Long term PPA, RP managed to liaison with traders for short term PPA for about 18 months in the middle of COVID Pandemic and successfully handed it over to the successful Resolution Applicant

Company details

Background

VS Lignite Power Private Limited ("VSLP" or "Company") is operating a 135 MW (1x135 MW), lignite-based power plant, located at Gurha Village, Bikaner District, in the state of Rajasthan. The plant was commissioned on 30th March 2010. The power plant gets its lignite from Gurha East lignite mine owned and operated by the Company. Lignite is the primary fuel for the power project and used for steam generation.

The company was admitted into CIRP on 18th September 2019 and resolved under CIRP dated 14th May 2021.

Total Admitted claims during CIRP: INR 2,005 crs (FCs: 993Crs, OCs: 103 crs, Others: 908 crs)

Summary of the power plant of VSLP is as under:

Particulars	Details
Plant capacity	135 MW (1 X 135 MW)
Location	Gurha Village, Bikaner District, Rajasthan, about 5 km from NH 15 connecting Bikaner & Jaisalmer.
Fuel	Lignite, Gurha (East) Lignite Captive Block, about 3 km from the plant site

Water	17.5 Cusecs from Indira Gandhi Nahar Pariyojana (IGNP) Canal, about 50 km from plant site.
Status	In operation since COD achieved in March 2010

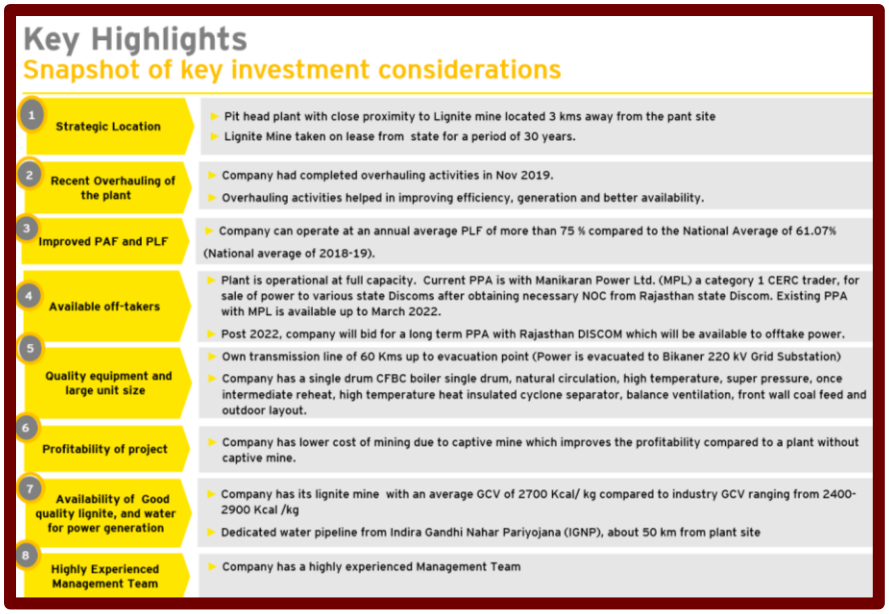
Power Off-take Arrangement (PPA)

Prior to CIRP, VSLP had operated the power plant supplying power generated to the Industrial Consumers in Rajasthan under Group captive power model during the initial four years and enjoyed annual revenue more than Rs.240 Crores. However, post the directions issued by the Govt of Rajasthan in Dec 2014, for amending the mining lease with additional condition of restricting the power sale only to the State Discom/ State Designated Agencies under the Long Term PPA, the company terminated the PPA's with the captive customers, and had been intermittently supplying power to Rajasthan Discom and other Discoms on short term basis, resulting in significant financial stress on account of lower PLF and also lower tariff realization. On the date of commencement of CIRP, VSLP didn't have any medium term or Long term PPA which was a major drawback. It only had a short term arrangement with a Power trader, for sale of power to various State Discoms/ Power Exchange Sale etc, based on temporary NOC's issued by Rajasthan Discom for the short-term sale, in order to comply with directions as per Mining Rider Agreement.

Plant status on commencement of CIRP

The plant was in a shutdown state on the date of commencement of CIRP. However, over the years, due to intermittent stoppage of plant and no complete overhauling, plant efficiency came down and Station Heat rate increased considerably. Accordingly, Company went for shutdown and complete overhauling of Boiler Turbine and Generator on July 27, 2019 was undertaken. Under overhauling activity, major activities include change of Refractory tiles, Air preheater works, change in boiler tubes and repair of Turbine.

Key Highlights of the plant



Water Source

Dedicated water pipeline from Indira Gandhi Nahar Pariyojana (IGNP) Canal, about 50 km from plant site.

Power evacuation

a) The total power generated from the 135MW generator is being evacuated to Bikaner 220kV Grid Substation (GSS).
b) The terminal point for the project is the switch yard and the power plant site are located at an approximate distance of sixty (60) kilometres from the Bikaner 220kV GSS

Reasons for Stress

Following are the potential reasons for stress of the Company:

c) Lack of Long term PPA: The company initially had Long term PPA with the captive users which was subsequently terminated in 2015. Post which company entered into short term PPA with state Discom in July 2015 for about an year and that was not renewed further.
d) Lack of funds to meet the working capital requirement
e) NOC issues from state Discom: Company could not secure long-term NOC from state Discom for sale of power outside the state Discom.
f) Mounting Statutory dues and UI charges: Dues such as mine closure deposit, Unscheduled Interchange charges, mine royalty charges remained unpaid due to cash flow constraints.

Working capital requirement

On the date of commencement of CIRP, cashflows were not sufficient to even pay the bare minimum expenses in keeping the corporate Debtor as going concern such as employee salaries and worker wages. RP was successful in raising funds from the CoC and negotiating with the vendors who had delivered material / extended their services during the CIRP period, and secured securing extended credit period. Upon successful completion of overhauling, the plant restarted its operations from November 2021 and by payment of necessary charges, NOC from state Discom for the month of November 2021 was also obtained to supply power.

Challenges overcome by RP during CIRP

Improvement in Technical parameters post CIRP

Over the years due to intermittent stoppage of plant and no complete overhauling, plant efficiency came down and Station Heat rate increased considerably. However, post overhauling of the plant during CIRP following improvements were observed:

- PLF increased from 30% in FY19 to as high as 95% in December 2019 and PAF as high as 100%.
- Daily Average PLF since restarting the plant is 95% and daily Average PAF is 99%.
- The Expected Annualised PLF is expected to range between 75%-80% which is more than industry Average

During the CIRP, the Company sold power to various Discoms through Manikaran Power Ltd. at tariff of INR 2.4 per unit and was able to recover its costs.

Gathering investor interest

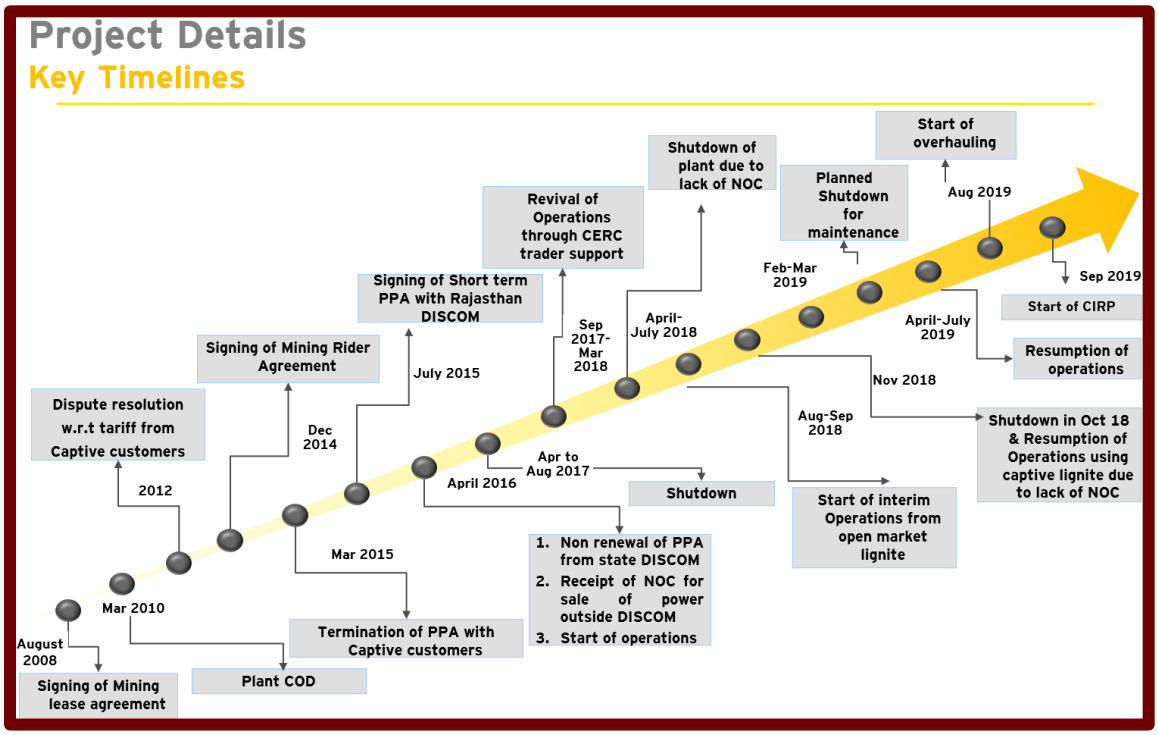
Due to lack of PPA, there was subdued interest from investors which was overcome by pursued efforts in convincing them on the advantages of the plant and key mitigations factors for overcoming risks. Overall about 10 Prospective Resolution Applicants have submitted EOIs of which only 3 have provided the Resolution plans which was voted by CoC in favour of Sherisha Technologies Pvt. Ltd in December 2020. Approval from Adjudicating authority was received in March 2021 and the plan was implemented and was successfully handed over to the successful RA in May 2021.

Resolved disputes with Water contractor

Due to lack of sufficient cash flows, certain vendors including water supply contractor had delayed payments during CIRP. Further, RP vide the transaction audit report observed extortionate transaction with water supply agreement due to which there was further delay in his payments. The water supply contractor threatened non-supply of water and the plant operations have been jeopardised. With timely legal support the situation was managed and the plant was never stopped due to such multiple challenges. Thus securing maximum resolution plan value and recovery to all the stakeholders.

Due to successful rounds of negotiations with the RAs, value of the plans have also significantly increased by over 50% during the CIRP process.

Other details



CASE LAWS

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

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

Where CIRP proceedings had been initiated against corporate debtor on account of default in repayment of its dues under loan agreement and NCLT admitted CIRP application after verifying document evidencing outstanding loan amount, order of NCLT was to be upheld.

- **SREI Equipment Finance Ltd. v. Rajeev Anand - [2020] 119 taxmann.com 136 /[2020] 162 SCL 605 (SC)**

CIRP proceedings had been initiated against the corporate debtor on account of default in repayment of its dues under loan agreement. The NCLT, after a perusal of documents, pleadings, and supplementary affidavit explaining payment already made, including counter affidavit, came to conclusion that default was committed by the corporate debtor in repayment of its dues under loan Agreement and hence admitted the section 7 application. The NCLAT set aside order of the NCLT admitting section 7 application on ground that there was no evidence in support of the fact that any amount was outstanding. However, it was found that documents evidencing outstanding loan amount were produced. Further, a counter affidavit by the corporate debtor was also produced in which a clear admission of debt being outstanding was made.

Held that order of the NCLAT was to be set aside and that of NCLT was to be restored.

Case Review : Rajeev Anand v. Srei Equipment Finance Ltd. [2020] 114 taxmann.com 61/158 SCL 432 (NCL - AT), set aside.

SECTION 63 - CORPORATE PERSON'S ADJUDICATING AUTHORITIES - CIVIL COURT, NOT TO HAVE JURISDICTION

- **GE Power India Ltd. v. NHPC Ltd. - [2020] 119 taxmann.com 158 (Delhi)**

Jurisdiction vested in NCLT while dealing with a resolution plan is of wide ambit and any question of law or fact in relation to insolvency resolution has to be determined by NCLT; jurisdiction of Civil Court is expressly barred.

A contract was entered between the plaintiff's predecessor Alstom and LIL. Said project was awarded to LTHPL by LIL. Consequently, LIL was liquidated by the NCLT and LTHPL was acquired by the defendant NHPC under a resolution plan which was approved by the NCLT. The plaintiff filed a suit against NHPC, for allegedly infringing the plaintiff's copyright in drawings/specifications and other documents prepared pursuant to contract between the

Plaintiff's predecessor Alstom and LIL. NHPC however, submitted that it had received drawings from LTHPL in terms of the resolution plan of LTHPL and also disputed the High Court's jurisdiction to try suit itself, stating that it was expressly barred under sections 60, 63, 231, and 238 of the IBC.

Held that sections 63 and 231 create a bar on jurisdiction of the Civil Court in respect of any matter in which the NCLT and the NCLAT has jurisdiction under IBC and the Adjudicating Authority under Code is competent to pass any order. Further jurisdiction vested in the NCLT while dealing with a resolution plan is of wide ambit and any question of law or fact in relation to insolvency resolution has to be determined by the NCLT. Dispute raised in present suit falls within ambit of section 60 (5) as same arises out of and/or is in relation to insolvency resolution plan of LTHPL, hence has to be adjudicated by the NCLT and proceedings in the Civil Court are barred.

(i) SECTION 31 - CORPORATE INSOLVENCY RESOLUTION PROCESS - RESOLUTION PLAN - APPROVAL OF

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

(i) Where corporate debtor was operating in SEZ and in resolution plan, an estimated amount was provided to be paid to Customs Department for de-notification of SEZ which was subject to assessment by Development Commissioner, there was no need to intervene in merits of Resolution plan.

CIRP against the corporate debtor was admitted. The NCLT approved the Resolution Plan. The corporate debtor was operating in an area notified as SEZ which had been exempted from duties of Customs. The appellant - Specified Officer of SEZ contended that exemption concession in respect of customs duty granted by the NCLT was in direct conflict with provisions of SEZ Act, 2005. However, it was found that it was only an estimated amount that was provided in the Resolution Plan which was to be paid to Customs Department for de-notification of SEZ. Said sum was subject to assessment to be made by the Development Commissioner. It was also noted that dues or penalty payable was to be calculated at time of exit from SEZ with approval of the Development Commissioner.

Held that the appellant-Specified Officer had failed to carve out a case for judicial intervention in merits of the Resolution Plan.

(ii) Appeal filed even 30 days beyond extended timelines of 45 days envisaged under proviso to section 61(2), would barred by limitation.

The appellant-Specified Officer of SEZ claimed that it was not a party to CIRP proceeding before the Adjudicating Authority but came to know about NCLT's order approving the Resolution Plan. The appeal was filed by him 30 days beyond extended timelines of 45 day as envisaged under proviso to section 61(2).

Held that appeal being hopelessly time barred deserved to be dismissed on count of limitation alone.

Case Review : Indian Opportunities III Pte. Ltd. & Vistra ITCL (India) Ltd. v. Sai Wardha Power Generation Ltd. [2019] 111 taxmann.com 421 (NCLT - Hyd.) affirmed.

SECTION 14 - CORPORATE INSOLVENCY RESOLUTION PROCESS - MORATORIUM

- **Vijay Kumar V Iyer v. Bharti Airtel Ltd. - [2020] 119 taxmann.com 178 (NCL-AT)**

No dues can be set off during period of Corporate Insolvency Resolution Process (CIRP) when moratorium is in force as provisions of Code will prevail over accounting conventions.

Held that accounting conventions cannot supersede any express provisions of specific law on subject. No dues can be set off during period of Corporate Insolvency Resolution Process (CIRP) when moratorium is in force as provisions of the Code will prevail over accounting conventions.

Case Review : Bharti Airtel Ltd. v. Vijaykumar V. Iyer [2019] 106 taxmann.com 103/154 SCL 56 (NCLT - Mum.), set aside.

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

- **Rakesh Wadhwan v. Bank of India - [2020] 119 taxmann.com 180 /[2020] 162 SCL 209 (NCL-AT)**

Where debt owed by corporate debtor to financial creditor bank was more than Rupees One Lakh and default in repayment of such debt was admitted and Adjudicating Authority had afforded ample opportunity to both parties to settle matter amicably, but, despite that, corporate debtor failed to make payment or arrive at a settlement, application filed under section 7 had rightly been admitted.

Respondent No. 1 Bank (Financial creditor) filed an application under section 7 for initiation of CIRP against the corporate debtor on ground that it committed default in repayment of facilities

granted to extent of Rs. 522 crores. However, during pendency of the petition, the corporate debtor proposed to settle matter by submitting One Time Settlement (OTS). Resultantly, the petition was withdrawn. After that, the corporate debtor again committed default in making payment as per terms of OTS. In compliance of OTS, the corporate debtor had issued post-dated cheques which were all also dishonoured. Therefore, respondent-bank revoked OTS and called upon the corporate debtor to pay off Rs. 522 crores. After that, respondent filed second petition, which was admitted by the impugned order. The corporate debtor stated that the impugned order had been passed without affording an opportunity to the corporate debtor to file reply and the Adjudicating Authority had not given any finding of debt and default, and order had been passed even though application was not complete. However, even though statutory provisions under the Code do not permit to provide several opportunities to the corporate debtor in hope of settlement, the Adjudicating Authority had tried its best to afford ample opportunity to both parties to settle matter amicably. But, despite that, the corporate debtor failed to make payment or arrive at a settlement. Further, debt in instant case was of more than rupees one lakh and default in repayment of such debt was admitted and application in Form-1 was also complete.

Held that no interference was called for in teh impugned order of the Adjudicating Authority admitting petition.

Case Review : Bank of India v. Housing Development and Infrastructure Ltd. [2020] 119 taxmann.com 179 (NCLT - Mum.), affirmed.

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

- **V Nagarajan Resolution Professional v. SKS Ispat and Power Ltd. - [2020] 119 taxmann.com 182 (NCL-AT)**

Where appellant had neither filed any application for condonation of delay nor filed any evidence to prove that certified/free copy was not supplied to appellant on date of order, time limit of filing of appeal without any application for Condonation of Delay could not have been extended.

Held that as per section 61 an appeal filed before the Appellate Tribunal against Order of the Adjudicating Authority can be filed within 30 days. However, proviso to section 61 provides that the Appellate Tribunal may allow an appeal to be filed after expiry of statutory period of 30 days and this extension of 15 days depends upon satisfaction of the Appellate Tribunal, on being shown sufficient cause for not filing Appeal within time limit. Where the appellant had

neither filed any application for condonation of delay nor filed any evidence to prove that certified copy was not supplied to appellant on date of order, time limit of filing of appeal without any application for condonation of delay could not have been extended.

Case Review : V. Nagarajan v. SKS Ispat & Power Ltd. [2020] 119 taxmann.com 181 (NCLT - Chennai), affirmed.

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

- **Committee of Creditors of Educomp Solutions Ltd. v. Ebix Singapore Pte. Ltd. - [2020] 119 taxmann.com 184 (NCL-AT)**

Adjudicating Authority, after approval of Resolution Plan by CoC has no jurisdiction to entertain or to permit withdrawal of Resolution Plan.

Successful resolution applicant filed application seeking withdrawal of its resolution plan already approved by the Committee of Creditors (CoC) of the corporate debtor before the NCLT, due to investigations by the Special Frauds Investigation Office and other governmental agencies against the corporate debtor company. The Adjudicating Authority by means of impugned order allowed successful resolution applicant to withdraw its approved 'Resolution Plan' which was approved by a majority of 75.36 per cent voting share of CoC and pending approval before the Authority as per section 31.

Held that the Adjudicating Authority, in law cannot enter into arena of majority decision of the 'Committee of Creditors' other than grounds mentioned in section 32(a to e). Once resolution plan is approved by the CoC and thereafter submitted to the NCLT for its approval, then NCLT is to apply its judicial mind to 'Resolution Plan' so presented and after being subjectively satisfied that plan meets or does not meet requirements mentioned in section 34 may either approve or reject such plan. Where resolution applicant had accepted conditions of the 'Resolution Plan' keeping in mind that no change or supplementary information to the 'Resolution Plan' shall be accepted after submission date of the 'Resolution Plans', applicant could not have been allowed to withdraw the approved 'Resolution Plan'. The NCLT after approval of Resolution Plan by the CoC has no jurisdiction to entertain or to permit withdrawal of the Resolution Plan.

Case Review : EBIX Singapore Pte. Ltd. v. Mahendra Kumar Khandelwal [2020] 119 taxmann.com 183 (NCLT - New Delhi), set aside.

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

- **Rita Kapur v. Invest Care Real Estate LLP - [2020] 119 taxmann.com 200 /[2020] 162 SCL 806 (NCL-AT)**

Insolvency proceedings could not be triggered on basis of debt which had been converted into equity as once debt is converted into capital it cannot be termed as financial debt.

The appellant had given loan to a company to be repaid in four installments. However, the appellant claimed that she had not been paid either principal amount or interest and her loan had been converted into equity, against terms and conditions of the loan agreement. Further her late husband had also invested in the company which amount had also not been repaid. Hence, the appellant claiming to be a financial creditor of the company filed an application under section 7 seeking to initiate CIRP against the company. The Adjudicating Authority by impugned order rejected application of the appellant. It was found that provisions of section 7 provide for initiation of CIRP by the financial creditor only and that too, if there is a debt and default. However, once debt was converted into capital it could not be termed as financial debt and the appellant could not be described as a financial creditor.

Held that grievance of the appellant did not fall under provisions of the Code and CIRP at instance of the appellant could not have been initiated.

Case Review : Rita Kapoor v. Invest Care Real Estate LLP [2020] 119 taxmann.com 199 (NCLT - New Delhi), affirmed.

SECTION 22 - CORPORATE INSOLVENCY RESOLUTION PROCESS - RESOLUTION PROFESSIONAL - APPOINTMENT OF

- **State Bank of India v. Metenere Ltd. - [2020] 119 taxmann.com 239 /[2020] 162 SCL 504 (SC)**

Merely because resolution professional was earlier remained in service of the creditor bank and was getting pension, he could not be dis-entitled to be resolution professional.

Held that merely because the resolution professional remained in service of the creditor bank and was getting pension, he could not be dis-entitled to be resolution professional. Such an order passed by the NCL-AT, was not to be treated as a precedent.

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

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

- **Regional Provident Fund Commissioner-II v. Bijay Murmuria - [2020] 119 taxmann.com 240 /[2020] 162 SCL 621 (NCL-AT)**

Beyond period of appeal of 30 days, power of Appellate Tribunal to allow appeal shall not exceed 15 days more.

Order was passed by the NCLT approving resolution plan on 7-12-2018. The appellant stated that the appellant became aware of order of the NCLT through the Resolution Professional on 2-7-2019 and thereafter received a certified copy of order on 24-1-2020. Limitation of 30 days expired on 24-2-2020 and instant appeal was filed on 17-3-2020. The appellant sought to condone delay of 22 days in filing instant appeal. It was noted that the appellant received communication from company secretory of the corporate debtor on 11-12-2018 therefore the appellant had knowledge since 11-12-2018.

Held that beyond period of appeal of 30 days, power of the Appellate Tribunal to allow appeal shall not exceed 15 days more, after expiry of 30 days period of filing appeal, the Appellate Tribunal cannot condone delay beyond prescribed 15 days.

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

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

- **Vistara ITCL (India) Ltd. v. Dinkar Venkatasubramanian - [2020] 119 taxmann.com 241 /[2020] 162 SCL 709 (NCL-AT)**

Where appellant lent money to third party, and not to corporate debtor directly, creation of pledge of shares by corporate debtor would not tantamount to a guarantee or indemnity so as to bring it within meaning of financial debt.

Held that creation of pledge of shares by the corporate debtor does not tantamount to a guarantee or indemnity so as to bring it within meaning of financial debt. Since claim of the appellant in capacity of a secured financial creditor was rejected back in year 2017, it was not open to the appellant to raise same issue in 2020. Also since creation of pledge of shares by the corporate debtor was said to be in regard to money lent to third parties and appellants had not lent any money directly to the corporate debtor, basic ingredients of financial debt i.e. debt along with interest disbursed against time value of money was lacking, therefore, application

seeking direction to RP to include the appellant in CoC as a secured financial creditor was not maintainable.

Case Review : Corporation Bank v. Amtek Auto Ltd. [2020] 119 taxmann.com 57 (NCLT-Chandigarh), affirmed.

SECTION 42 - CORPORATE LIQUIDATION PROCESS - APPEAL AGAINST DECISION OF LIQUIDATOR

- **Bharat Heavy Electricals Ltd. v. Anil Goel - [2020] 119 taxmann.com 242 (NCL-AT)**

Liquidator had fiduciary responsibility and duty to avoid loss/further loss to corporate debtor, hence, where appellant operational creditor pointed out material errors and illegalities in auction process followed, only because appellant did not ask for stay of auction, would be no reason not to cancel auction sale after having noted irregularities.

The appellant-operational creditor and the corporate debtor signed Letter of Award (LOA) for supply and erection of plant and machinery. There being dues pending under LOA, the appellant initiated Arbitration proceedings against the corporate debtor for recovery of its dues. Subsequently, CIRP under section 7 was filed against the corporate debtor. The appellant submitted its claim before IRP/RP. Due to failure of CIRP, liquidation proceedings were initiated and liquidator was appointed, who published public notice of liquidation process. The appellant filed its claim before the liquidator and also claimed statutory charge/lien on plant and machinery erected by the appellant at project site and on unused material. The liquidator, provisionally admitted claim at Rs. 290 crores as against amount claimed at Rs. 665 crores. The appellant filed an appeal challenging liquidator's order. Subsequently, the liquidator issued an advertisement for auction of assets of the corporate debtor including plant and machinery supplied by the appellant. The Adjudicating Authority set aside order of the liquidator provisionally admitting claim of the appellant and directed the liquidator to verify claims of the appellant afresh and pass a reasoned order. Thereafter, the liquidator issued a Sale Certificate in favour of 'A' (auction purchaser). The liquidator accepted the appellant's monetary claim at Rs. 572 crores but rejected its claim of lien and/or charge and categorised the appellant as unsecured creditor. The appellant prayed for cancellation of auction and restitution, primary request being for return of its goods. The Adjudicating Authority held that action of the liquidator in issuing sale certificate before deciding claim of security interest of the appellant was not correct, however, since no application was made by the appellant for stay of auction process and same had been completed, auction sale could not have been canceled.

Held that the liquidator had fiduciary responsibility and duty to avoid loss/further loss to the corporate debtor, hence, when the appellant had from initial stage itself moved the liquidator and the Adjudicating Authority with regard to auction sale which had come to its notice and

sought reliefs, only because the appellant did not ask for stay of auction, would be no reason not to cancel auction sale even after noticing material errors and illegalities in process followed. Further, auction purchaser having paid consideration would also be no reason not to set aside auction, considering illegal factors. Therefore, claim of the appellant seeking setting aside of auction was to be accepted.

Case Review : Bharat Heavy Electricals Ltd. v. Anil Goel [2019] 112 taxmann.com 296 (NCLT - Kolkata), set aside.

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.
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