SUMEDHA
adding values to value

Confederation of Indian Industry

The Insolvency & Bankruptcy Code, 2016

The Changing Landscape

August 2022

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Foreword

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The insolvency and Bankruptcy Code, 2016 ("IBC" or "the Code") is a landmark piece of reform in the economic history of India. Within six years of introduction, the Code has developed an efficient insolvency ecosystem which has increased the recovery rate and reduced the timeframe to resolve the insolvency process.

The insolvency ecosystem comprising of 4044 Insolvency Professionals, 91 Insolvency Professional Entities, 1 Information Utility, 4637 Registered Valuers, 63 Registered Valuer Entities, 16 Registered Valuer Organizations, NCLT (16 benches), NCLAT (2 benches), IBBI, and the Government Judicial System (jointly elements of insolvency ecosystem) together have developed a vibrant process for the smooth operation of the insolvency proceedings.

Since December 2016, these elements of the insolvency ecosystem have jointly handled 5258 CIRPs, of these, 3406 are closed (1317 closed on appeal/ review/settled/ withdrawn, 480 closed on approval of resolution plan, and 1609 ended with commencement of liquidation). The elements jointly enabled recovering INR 2,25,293 Crore to FCs as against their total exposure of INR 6,84,901 Crore. Contrary to the earlier mechanism, the recovery rate of financial creditors from the resolution cases has been ~33% and the recovery rate out of liquidation cases has been ~7%. Importantly, post successful resolution, many such companies have turned around and have become profitable. Sometimes the effectiveness of the Code has been questioned on the ground of poor recovery. But it should not be forgotten that many companies, which undergone CIRP, were either in BIFR, non-functional, or both. A lot of them did not have any assets to capture value when they entered into CIRP.

Sometimes it has been observed that CIRPs consume more time than the time stipulated by the regulator. The average time taken for closure of CIRP yielding resolution and liquidation has been 528 days and 412 days respectively. Still, it is much lower, when compared with the previous regime. Earlier it used to take an average of 4.3 years to resolve bankruptcy in India. The same run rate has been less than a year in countries like Japan, Singapore, Finland, and Canada.

Earlier, the case of bankruptcy or default was dealt with by multiple regulations and out-of-court settlement processes. However, due to the complexity of the multiple laws, the procedures were fragmented, expensive and time-consuming with a very low recovery rate.

Despite all, the Code is not a magic wand. It might have shortcomings. But the regulator has been very active throughout by bringing necessary amendments and making the Code a vibrant one.

CII-Sumedha has prepared this knowledge series, which covers the overall performance metrics, certain judgements, important amendments suggested by IBBI, and highlights some disciplinary action against insolvency professionals.

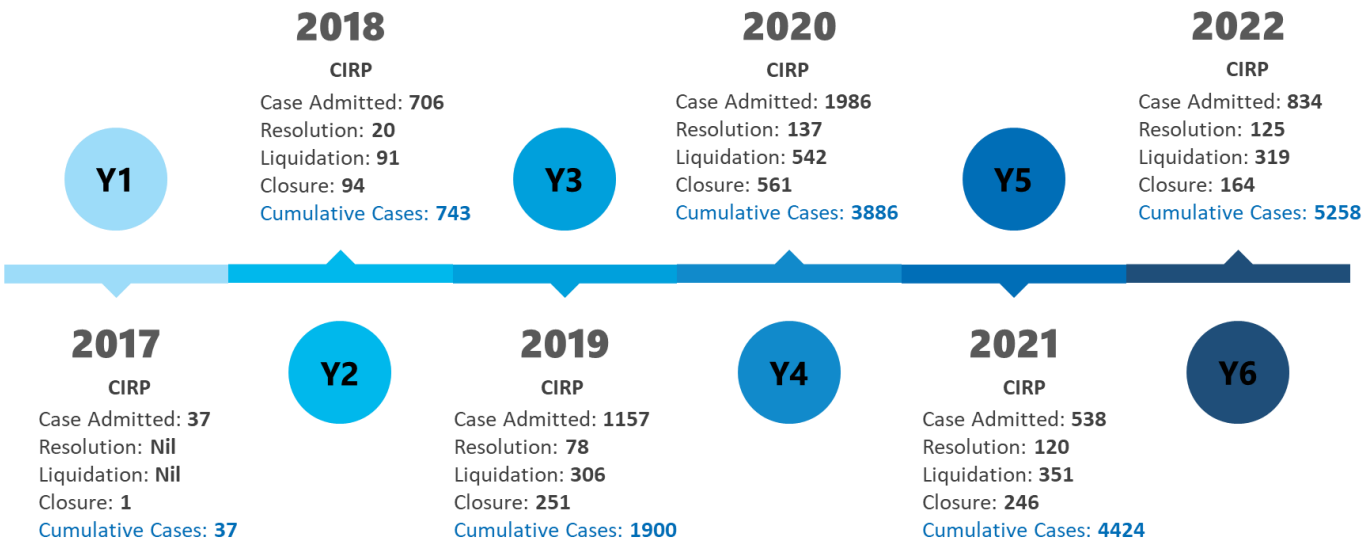
August 2022
Kolkata

Revisiting the Code

With the introduction of the Insolvency and Bankruptcy Code 2016, India has made tremendous progress in resolving stressed assets. The code, which was introduced after abolishing the multiple regulations, improved the collection efficiency from stressed assets and reduced the time to resolve disputes. Since the introduction of the Code, India's rank in the 'Resolving Insolvency' parameter in World Bank's EODB framework has improved substantially. However, the process is taking more than the prescribed timeline to complete due to litigations at a different stage of the CIRP process and inadequate regulatory infrastructure.

Admission of Cases Continues to Remain High

From inception till the end of the financial year 2022, a total of 5258 corporates were admitted for resolution, out of which 2089 cases were closed either on approval of resolution plans or on commencement of liquidation. Another 1317 cases were closed by appeal/review or withdrawal under section 12A of the code. A continuous admission of such huge cases reflects the effectiveness of the code in the resolution of stressed assets in the country. At the end of the financial year 2022, a total of 1852 cases are active and are under different stages of the CIRP process.



Source: IBBI

Operational Creditors Filed the Majority Cases

Out of 5258 cases admitted, operational creditors filed the majority (2699 or ~51%), while financial creditors filed 2236 or ~43% cases. A total of 319 cases were filed by the corporate debtors.

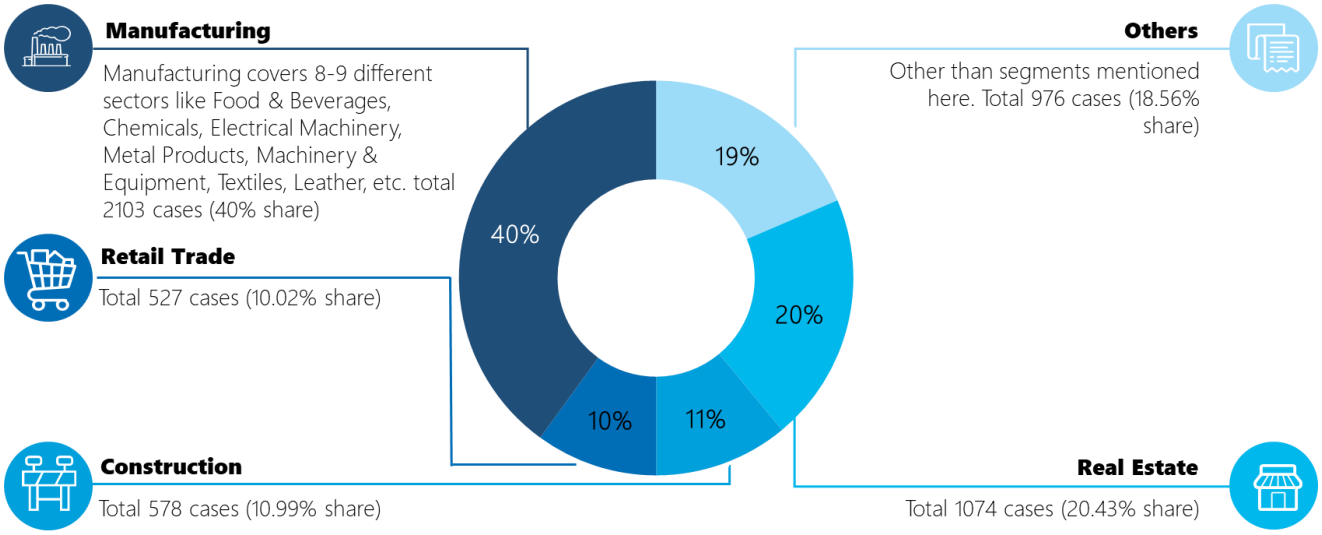
Table: 1 *CIRP Initiated By*

Year	Operational Creditors	Financial Creditors	Corporate Debtors	Total
FY 2017	7	8	22	37
FY 2018	310	285	111	706
FY 2019	570	516	71	1157
FY 2020	1052	882	51	1986
FY 2021	318	198	22	538
FY 2022	442	347	42	834
Total	**2699**	**2236**	**319**	**5258**

Source: IBBI

Four Sectors Form ~81% of the Admitted Cases

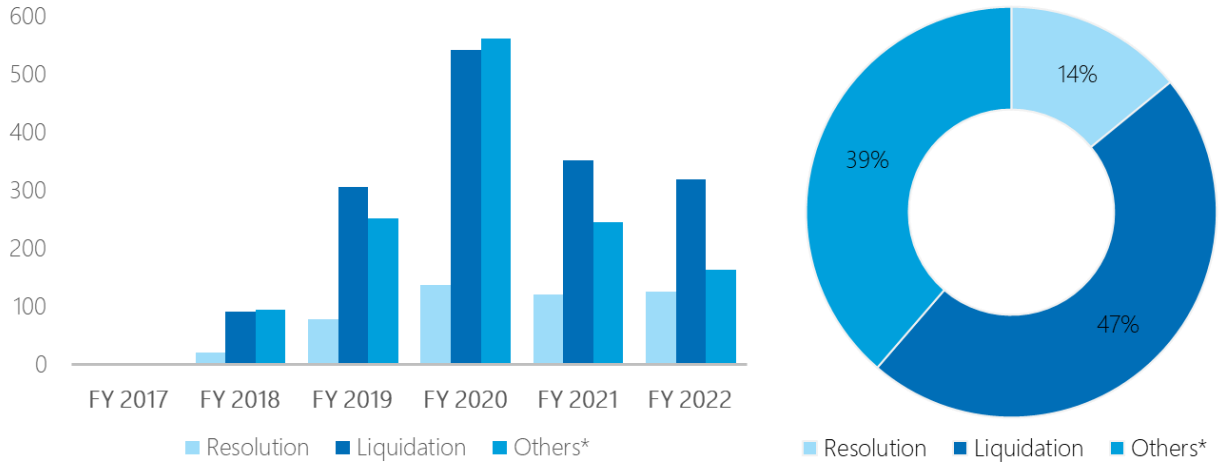
Out of a total 5258 cases admitted, 81% of the cases are from the four sectors viz, manufacturing, real estate, construction, and retail.



Source: IBBI

Closure by Liquidation Dominates

From the all-closed cases, it is seen that liquidation dominates over resolution. Out of 3406 closed cases, only ~14% of cases ended up with accepted resolution plans against ~47% of cases ended up with commencement of liquidation. Balance cases were closed by appeal, review, or settled, and withdrawn under Section 12A. Out of the 1609 liquidation cases, in 1196 cases (~74%), the corporate debtors were either in BIFR or non-functional or both. Many of them were fundamentally so weak that they even didn't receive any resolution plan for approval. In 1399 cases, the liquidation values were higher than the resolution value. For financial creditors, recovery is important too along with resolution, so they prefer liquidation. In 182 cases, the resolution values were higher than the liquidation value still they were closed by the commencement of liquidation. This remains a concern where companies are being liquidated despite having a proper resolution plan in place.



**Others include closure by Appeal/Review/Settled/or Withdrawal U/s 12A, Source IBBI*

Table 2: *CIRPs ending with Orders for Liquidation at the end of Financial Year 2022*

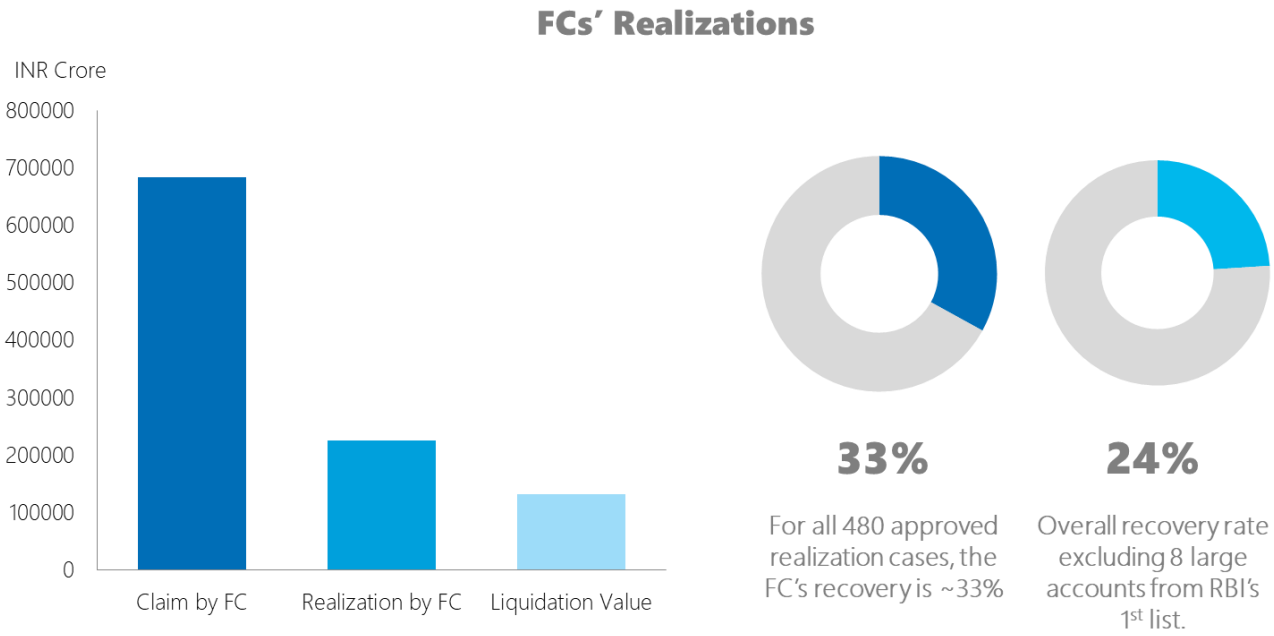
	FC	OC	CD	Total
Either in BIFR or Non-functional or both	508	558	130	1196
Resolution Value > Liquidation Value	94	57	31	182
Resolution Value ≤ Liquidation Value[1]	607	652	140	1399

Source IBBI

[1] Includes cases where no resolution plans were received and cases where liquidation value is zero or not estimated.

Poor Recovery Rate; Haircuts Remain High at 67%

As of March 2022, a total of 480 resolution cases were reported. The total admitted claims amount of the financial creditors in those cases was INR 6,84,901 Crore. The financial creditor recovered/would recover INR 2,25,294 Crore only, therefore the effective recovery rate has been ~33% (haircut ~67%). The cumulative liquidation value of those 480 cases was INR 131448 Crore. Therefore, financial creditors' realization has been ~171% of the liquidation value.



Source IBBI

The recovery rate in 328 liquidation cases, where the final report has been submitted is really poor. Claimants have recovered only ~4% of their claim amounts. Out of the 1281 ongoing liquidation cases, IBBI has aggregated the data for 1220 corporate debtors. The cumulative claim amount in those 1220 CDs has been INR 8,18,051 Crores against the liquidation value of INR 39,279 Crore. Therefore, claimants could recover ~5% of the claim amount from those 1220 ongoing liquidation cases.

Table 3: *Recovery Rate in 328 Liquidations where Final Report Submitted*

INR Crore

Stakeholders under Section[2]	Amount of claims Admitted	Liquidation Value	Amount Distributed	Recovered
52	1408	178.86	185.23	13.15%
53 (1) (a)	NA	2625.15	135.27	
53 (1) (b)	56693		2275.22	4.01%
53 (1) (c)	58		1.86	3.22%
53 (1) (d)	2888		41.91	1.45%
53 (1) (e)	2726		13.29	0.49%
53 (1) (f)	2571		36.18	1.41%
53 (1) (g)	0		0	NA
53 (1) (h)	37		2.83	7.70%
Total	**66381**	**2804.01**	**2691.79**	**4.06%**

Source: IBBI

[2] Distribution of assets (Section 53 of IBC)
53 (1) (a): the insolvency resolution process costs and the liquidation costs paid in full;
53 (1) (b) the following debts which shall rank equally between and among the following:
53 (1) (b)(i) workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and
53 (1) (b)(ii) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;
53 (1) (c) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;
53 (1) (d) financial debts owed to unsecured creditors;
53 (1) (e) the following dues shall rank equally between and among the following: -
53 (1) (e)(i) any amount due to the Central Government and the State Government including 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;
53 (1) (e) (ii) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;
53 (1) (f) any remaining debts and dues;
53 (1) (g) preference shareholders, if any; and
53 (1) (h) equity shareholders or partners, as the case may be.

A Delay in the Process

Out of 1852 ongoing CIRPs, ~66% of cases have been active for more than 270 days. The regulation provides that the CIRP shall mandatorily be completed within 330 days from the insolvency commencement date. As per the data provided by the IBBI, a total of 480 CIRP cases ended with the approval of the resolution plan and the average time taken to complete all those cases has been 412 days.

Table 4: *Status of ongoing CIRPs and Liquidation Process as of March 31, 2022*

Ongoing CIRP	1852
> 270 days	*1217*
> 180 days ≤ 270 days	*161*
> 90 days ≤ 180 days	*231*
≤ 90 days	*243*
Ongoing Liquidations	**1281**
> Two years	*659*
> One year ≤ Two years	*312*
> 270 days ≤ 1 year	*73*
> 180 days ≤ 270 days	*69*
> 90 days ≤ 180 days	*98*
≤ 90 days	*70*

Source: IBBI

The liquidation process of 1609 corporate debtors has been initiated since the inception of the code. Out of which, a final report has been submitted for 328 cases, and for the balance of 1281 cases, the liquidation process is ongoing. Approximately ~51% of ongoing liquidation cases are older than two years. Another ~24% of ongoing cases are between one to two years old. This indicates that the liquidation of the corporate debtor is a long-term process.

Avoidance of Transaction

Under the Code, the resolution professional has the authority to reverse any transaction which was willfully done by the corporate debtor to divert the fund before the code is evoked. Till the end of the financial year 2022, a total of 777 such cases with cumulative claim values of INR 2,20,661 Crore were reported by RPs. Out of which 71 transactions involving INR 15,106 Crores were disposed of out of which INR 49 Crore has been recovered. Therefore ~90% of such cases involving INR 205,010 Crore worth of claims are still pending with NCLTs. In the case of Jaypee Infra, the possession of 758 acres out of total of 858 acres of land was given back to the corporate debtor. Earlier the 858 acres of land were valued at INR 5500 Crore (not considered in any figure mentioned here).

Table 5: *Details of Avoidance Applications and Disposal*

INR Crore

Sl. No.	Nature of transactions	Applications Filed		Applications Disposed		
		Number of Transactions	Amount Involved	Number of Transactions	Amount Involved	Amount Clawed Back
1	Preferential	123	14435.39	20	518.45	29.17
2	Undervalued	15	884.31	1	351.64	0
3	Fraudulent	132	21759.68	10	353.96	3.69
4	Extortionate	3	70.68	-	-	-
5	Combination	504	183511.04	40	13881.95	16.58
Total		**777**	**220661.1**	**71**	**15106**	**49.44**

Source: IBBI

Twelve Large Accounts

RBI identified 12 large defaulters and accordingly resolution process was initiated. Till date, the CIRP of 8 such accounts were ended with the approval of the resolution plan and 2 were ended with commencement of liquidation. Balance two companies are under the CIRP process and the outcome is yet to be decided.

The financial creditors recovered approximately 51% of their exposure from these 8 companies where CIRP ended with resolution. Out of these 8, 5 are from the metal sector, and financial creditors recovered ~59% of their exposure from these companies. The overall recovery rate excluding these 8 large accounts moderates to ~24%.

Table 6: *Twelve Large Accounts*

INR Crore	Claims of FCs Dealt Under Resolution			Realisation by all Claimants as a percentage of Liquidation Value
Name of CD	Amount Admitted	Amount Realised	Realisation as % of Claims	
Completed				
Electrosteel Steels Limited	13175	5320	40.38%	183.45%
Bhushan Steel Limited	56022	35571	63.49%	252.88%
Monnet Ispat & Energy Limited	11015	2892	26.26%	123.35%
Essar Steel India Limited	49473	41018	82.91%	266.65%
Alok Industries Limited	29523	5052	17.11%	115.39%
Jyoti Structures Limited	7365	3691	50.12%	387.44%
Bhushan Power & Steel Limited	47158	19350	41.03%	209.12%
Amtek Auto Limited	12641	2615	20.69%	169.65%
Total 8 Accounts	**226372**	**115509**	**51.03%**	
Under Process				
Era Infra Engineering Limited	Under CIRP			
Lanco Infratech Limited	Under Liquidation			
ABG Shipyard Limited	Under Liquidation			
Jaypee Infratech Limited	Under CIRP			

Source: IBBI

Important IBC Judgments

List of important orders/judgments with respect to the insolvency and bankruptcy code, 2016 – January to August 2022

1. A judicial interpretation of Section 29A(h) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "the Code").

Section 29A(h) is stated hereinbelow:

"A person shall not be eligible to submit a resolution plan if such person, or any other person acting jointly or in concert with such person has executed a guarantee in favour of a creditor in respect of a corporate debtor against which an application for insolvency resolution made by such creditor has been admitted under this Code and such guarantee has been invoked by the creditor and remains unpaid in full or part."

The Hon'ble Supreme Court in the matter of Bank of Baroda & Anr. V/S. MBL Infrastructures Limited & Ors. , held that - *The word "such creditor" in Section 29A(h) has to be interpreted to mean similarly placed creditors after the application for insolvency application is admitted by the adjudicating authority. As a result, what is required to earn a disqualification under the said provision is a mere existence of a personal guarantee that stands invoked by a single creditor, notwithstanding the application being filed by any other creditor seeking initiation of the insolvency resolution process.*

Reference: Judgment of the Hon'ble Supreme Court dated 18.01.2022 in Civil Appeal No. 8411 of 2019 – In the matter of Bank of Baroda & Anr. V/s. MBL Infrastructures Limited & Ors.

2. Whether the Appellant(s)/ Applicant is entitled to be given a copy of the Resolution Plan or any part of the Resolution Plan in the Appeal. The question which has arisen in the present proceeding is as to whether the Resolution Plan after it being approved by the Adjudicating Authority, still continues to be a confidential document, so as to deny access to any of the claimants?

The Hon'ble NCLAT, New Delhi in the matter of Association of aggrieved Workmen of Jet Airways (India) Limited V/s. Jet Airways (India) Ltd. & Ors. stated that - Resolution Plan after its approval by the Adjudicating Authority is no more a confidential document, so as to deny access to even a claimant. It is true that the Resolution Plan even though it is not a confidential document after its approval, cannot be made available to each and to anyone who has no genuine claim or interest in the process. On various grounds access to Resolution Plan even if it is not a confidential document after approval can be denied in proper and appropriate cases. However, the Hon'ble Court in this matter directed that part of the Resolution Plan which deals with the claim of workmen and employees should be provided to the Appellant by Successful Resolution Applicant.

Reference: Judgment of Hon'ble NCLAT, New Delhi dated 20.01.2022 in Company Appeal (AT) (Insolvency) No. 643 of 2021 & I.A. No.1700 of 2021 – In the matter of Association of aggrieved Workmen of Jet Airways (India) Limited V/s. Jet Airways (India) Ltd. & Ors.

3. Section 60(2) of the Code requires that for an insolvency Resolution Process to be initiated against the guarantor there must be CIRP or Liquidation Process pending against the principal borrower/Corporate Debtor – Is this correctly interpreted?

The Hon'ble NCLAT, New Delhi in the matter of State Bank of India V/s. Mahendra Kumar Jajodia observed that - The purpose and object of the sub-section 2 of Section 60 of the Code is that when proceedings are pending in 'a' National Company Law Tribunal, any proceeding against Corporate

Guarantor should also be filed before **'such'** National Company Law Tribunal. The idea is that both proceedings be entertained by one and the same NCLT. **The sub-section 2 of Section 60 does not in any way prohibit the filing of proceedings under Section 95 of the Code even if no proceedings are pending before NCLT.** It further observed that **Section 60(2) is applicable only when CIRP or Liquidation Proceeding of a Corporate Debtor is pending, when CIRP or Liquidation Proceeding is not pending with regard to the Corporate Debtor there is no applicability of Section 60(2).**

Reference: Order of Hon'ble NCLAT, New Delhi dated 27.01.2022 in Company Appeal (AT) Insolvency No. 60 of 2022 and Company Appeal (AT) Insolvency No. 61 of 2022 – In the matter of State Bank of India V/s. Mahendra Kumar Jajodia and in the matter of State Bank of India V/s. Bhanwar Lal Jajodia

4. Is there a difference between the 'supersession of Directors' under the RBI Act and the 'suspension of Directors' under the Code? Whether a 'Superseded director', who had vacated office on supersession of Board under RBI Act, is entitled to the notice of CoC meeting and has the right to participate in the meeting of the CoC?

The Hon'ble NCLAT, New Delhi in the matter of Dheeraj Wadhawan V/s. The Administrator, Dewan Housing Finance Corporation Limited & Ors. held that - Superseded Directors are those Directors who have been removed or deemed to have demitted office and who were not holding the position of Director on the CIRP commencement date, cannot be considered a Director Simpliciter to benefit from participating in the meeting of CoC. Section 45-IE (4)(a) of the RBI Act provides that upon making an order of supersession of the Board of Directors of a non-banking financial company, Director shall from the supersession of the Board of Directors vacate their offices. After vacation or removal from the office of the Director, the said person cannot claim their entitlement to participate in the CoC of the Corporate Debtor. A removed Director from the Board of Directors cannot interfere in the Company's affairs per contra a suspended Director always remains on the erstwhile Board of the Company and assist the IRP/RP as per requirement.

Reference: Order of Hon'ble NCLAT, New Delhi dated 27.01.2022 in Company Appeal (AT) (Insolvency) No. 785 of 2020 and Company Appeal (AT) (Insolvency) No. 647 of 2021 – In the matter of Dheeraj Wadhawan V/s. The Administrator, Dewan Housing Finance Corporation Limited and in the matter of Dheeraj Wadhawan V/s. The Administrator, Dewan Housing Finance Corporation Limited & Ors.

5. Entitlement of wages/salaries of the workmen/employees during the CIRP period and the amount due and payable to the respective workmen/employees towards Pension Fund, Gratuity Fund and Provident Fund.

The Hon'ble Supreme Court in the matter of Sunil Kumar Jain and others V/s. Sundaresh Bhatt and others held that-if during the CIRP the corporate debtor was a going concern, the wages/salaries of such workmen/employees who worked, shall be included in the CIRP costs and in case of liquidation of the corporate debtor, dues towards the wages and salaries of such workmen/employees who worked when the corporate debtor was a going concern during the CIRP, being a part of the CIRP costs are entitled to have the first priority and they have to be paid in full first as per Section 53(1)(a) of the IB Code. The wages and salaries of all other workmen/employees of the Corporate Debtor during the CIRP who have not worked and/or performed their duties when the Corporate Debtor was a going concern, shall not be included automatically in the CIRP costs. Only with respect to those workmen/employees who worked during CIRP when the Corporate Debtor was a going concern, their wages/salaries to be included in the CIRP costs and they shall have the first priority over all other dues as per Section 53(1)(a) of the IB Code.

However, the wages and salaries of the workmen/employees of the pre-CIRP period will have to be governed as per the priorities mentioned in Section 53(1) of the IB Code.

Further, Section 36(4)(iii) of the IB Code specifically excludes "all sums due to any workman or employee from the provident fund, the pension fund and the gratuity fund", from the ambit of "liquidation estate assets". Considering Section 36(4) of the IB code and when the provident fund, gratuity fund and pension fund are kept out of the liquidation estate assets, the share of the workmen's dues shall be kept outside the liquidation process and the

concerned workmen/employees shall have to be paid the same out of such provident fund, gratuity fund and pension fund if any, available and the Liquidator shall not have any claim over such funds.

Reference: Judgment of Hon'ble Supreme Court dated 19.04.2022 in CIVIL APPEAL NO. 5910 OF 2019– In the matter of Sunil Kumar Jain and others V/s. Sundaresh Bhatt and others.

6. Understanding the timelines for filing of applications for reporting transactions under Sections 43, 45, 49 and 66 and the scope and time period of transactions covered therein.

The issues raised are as mentioned hereinbelow:

i. Whether an Application by the Resolution Professional relating to a Transaction covered under Section 43, 45, 49 and 66 is mandatory to be filed within the period of 135th Day of the Insolvency Commencement Date and in the event, the Application is filed beyond such period, the same is liable to be rejected due to non-compliance of Regulation 35A of CIRP Regulations, 2016?

ii. Whether time period prescribed under Regulation 35A of the CIRP Regulations, 2016 is mandatory or directory?

iii. Whether Transaction claimed to be defrauding the Creditor under section 49 and fraudulent trading or wrongful trading within meaning of Section 66 can be questioned only within time period as prescribed under Section 46 i.e. one year or 2 years respectively and Application alleging defrauding the Creditors and transaction to be fraudulent trading or wrongful trading is liable to be rejected if it is filed beyond the period prescribed under Section 46 of the Code?

The Hon'ble NCLAT, New Delhi In the matter of Aditya Kumar Tibrewal V/s. Om Prakash Pandey & Ors. held that the Application filed by the Resolution Professional relating to Sections 43 and 45 read with Sections 66 and 60(5) of the Code is not to be rejected filed beyond the period of 135th Day of Insolvency Commencement Date only on the ground of non-compliance of Regulation 35 A of the CIRP Regulations, 2016. It shall depend on the facts of each case as to whether there are genuine reasons to consider the Application on merits even if filed beyond the 135th day. The Hon'ble Tribunal further held that the expression "shall" in regulation 35A (1), 35A(2) and

35A(3) is not mandatory and the requirement of "forming an opinion" under Section 35A(1) "make a determination" under Section 35A(2) and "shall apply to the Adjudicating Authority for appropriate relief on or before 135th day of the Insolvency Commencement Date" are only directory.

The Hon'ble Tribunal further held that the Application questioning the transactions covered by Section 49 and 66 of the Code are not to be rejected on the ground that the Application has been filed beyond the period prescribed under Section 46 of the Code. The timeline prescribed for transactions under Section 46 does not cover the transactions covered by Sections 49 and 66 of the Code.

Reference: Judgment of Hon'ble NCLAT, New Delhi dated 06.04.2022 in Company Appeal (AT) Insolvency No. 583 of 2021 – In the matter of Aditya Kumar Tibrewal V/s. Om Prakash Pandey & Ors.

7. Section 7(5)(a) of the IBC, confers discretionary power on the Adjudicating Authority (NCLT) to admit an application of a Financial Creditor under Section 7 of the IBC for initiation of CIRP.

This is a landmark judgment by the Hon'ble Supreme Court in the matter of Vidarbha Industries Power Limited V/s. Axis Bank Limited. The Hon'ble Court observed that Legislature has in its wisdom used the word 'may' in Section 7(5)(a) of the IBC in respect of an application for CIRP initiated by a financial creditor against a Corporate Debtor but has used the expression 'shall' in the otherwise almost identical provision of Section 9(5) of the IBC relating to the initiation of CIRP by an Operational Creditor. **It is apparent that the Legislature intended Section 9(5)(a) of the IBC to be mandatory and Section 7(5)(a) of the IBC to be discretionary.** The Adjudicating Authority may at its discretion not admit the application of a Financial Creditor.

Even though Section 7 (5)(a) of the IBC may confer discretionary power on the Adjudicating Authority, such discretionary power cannot be exercised arbitrarily or capriciously. If the facts and circumstances warrant exercise of discretion in a particular manner, discretion would have to be exercised in that manner.

Reference: Judgment of Hon'ble Supreme Court dated 12.07.2022 in Civil Appeal No. 4633 OF 2021 – In the matter of Vidarbha Industries Power Limited V/s. Axis Bank Limited

8. Whether the Adjudicating Authority is bound to admit an application under section 7 of the Code when it is alleged that there is contributory negligence arising out of non-disbursement of the amount sanctioned by the Financial Creditor leading to the alleged default by the Corporate Debtor?

The Hon'ble NCLT, Kolkata bench in the matter of State Bank of India V/s. N. S. Engineering Projects Private Limited held that Section 7(5)(a) of the Code stipulates that where the Adjudicating Authority is satisfied that a default has occurred, it may by order admit such application. It cannot be extended to a fact situation where the Financial Creditor, by its own acts of omission and commission, contributes to the default on the part of the Corporate Debtor. In the present case, it was observed that the Lender's Independent Engineer's Report (LIE Report), commissioned by the Financial Creditor did not point to any failure on the part of the Corporate Debtor or its promoters to perform its obligations in terms of the sanction letter. Therefore, there was no reason whatsoever for the Financial Creditor not to disburse the amounts in terms of the sanction letters. There is no denial of the fact, either in the pleadings or during arguments, that the Financial Creditor did not affect disbursements in terms of the sanction letters. The Hon'ble Tribunal further stated that rather than pleading innocence on either the failure or the below-par performance of a commercial endeavour and lay the entire blame at the door of the entrepreneur, the Financial Creditor has to look hard into the mirror. The present proceedings initiated by the Financial Creditor seem to be for purposes other than insolvency resolution of the Corporate Debtor, and are, therefore, liable to be rejected.

Reference: Order of Hon'ble NCLT, Kolkata bench dated 28.06.2022 in CP (IB) No.1905/KB/2019 and CP (IB) No.1857/KB/2019 – In the matter of State Bank of India V/s. N. S. Engineering Projects Private Limited and in the matter of Punjab National Bank V/s. N. S. Engineering Projects Private Limited

9. Whether the adjudicating authority (NCLT) or the appellate authority (NCLAT) can sit in an appeal over the commercial wisdom of the Committee of Creditors (CoC) or not.

The Hon'ble Supreme Court In the matter of Vallal RCK V/s. M/s Siva Industries and Holdings Limited and others observed that the adjudicating authority or the appellate authority cannot sit in an appeal over the commercial wisdom of CoC. The interference would be warranted only when the adjudicating authority or the appellate authority finds the decision of the CoC to be wholly capricious, arbitrary, irrational and de hors the provisions of the statute or the Rules.

Reference: Judgment of Hon'ble Supreme Court dated 03.06.2022 in Civil Appeal Nos. 1811-1812 OF 2022– In the matter of Vallal RCK V/s. M/s Siva Industries and Holdings Limited and Others

10. Can the proceedings under the SARFAESI Act continue once the CIRP was initiated and the moratorium was ordered?

The Hon'ble Supreme Court in the matter of Indian Overseas Bank V/s. M/S RCM Infrastructure Ltd. and another held that - In view of the provisions of Section 14(1)(c) of the IBC, which have overriding effect over any other law, any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the SARFAESI Act is prohibited. The Hon'ble court further held that the appellant Bank could not have continued the proceedings under the SARFAESI Act once the CIRP was initiated and the moratorium was ordered.

Reference: Judgment of Hon'ble Supreme Court dated 18.05.2022 in Civil Appeal No. 4750 of 2021– In the matter of Indian Overseas Bank V/s. M/S RCM Infrastructure Ltd. and another

11. Impact of Section 60(6) of the Insolvency and Bankruptcy Code, 2016, and whether the aforesaid provision gives rise to a new lease of life to a proceeding at the instance of the corporate debtor on the basis of a moratorium which is put in place by virtue of the order passed under section 14 of the IBC and whether corporate debtor can take advantage of the same to bring the application in this case filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the 1996 Act').

Section 60(6) is stated hereinbelow:

"Notwithstanding anything contained in the Limitation Act, 1963 or in any other law for the time being in force, in computing the period of limitation specified for any suit or application by or against a corporate debtor for which an order of moratorium has been made under this Part, the period during which such moratorium is in place shall be excluded."

The Hon'ble Supreme Court in the matter of New Delhi Municipal Council V/s. Minosha India Limited held that - section 60(6) of the IBC does contemplate the exclusion of the entire period during which the moratorium was in force in respect of the corporate debtor in regard to a proceeding as contemplated therein at the hands of the corporate debtor.

Reference: Judgment of Hon'ble Supreme Court dated 27.04.2022 in Civil Appeal No. 3470 of 2022 – In the matter of New Delhi Municipal Council V/s. Minosha India Limited

12. Whether a 'purchaser' can be considered as an operational creditor under the IBC?

The Hon'ble Supreme Court in the matter of M/s Consolidated Construction Consortium Limited V/s. M/s Hitro Energy Solutions Private Limited observed that Section 5(21) of the Insolvency and Bankruptcy Code, 2016 defines 'operational debt' as a "claim in respect of the provision of goods or services". The operative requirement is that the claim must bear some nexus with a provision of goods or services, without specifying who is to be the supplier or receiver. The phrase "in respect of" in Section 5(21) has to be interpreted

in a broad and purposive manner in order to include all those who provide or receive operational services from the corporate debtor, which ultimately leads to an operational debt.

Therefore, the appellant is an operational creditor under the IBC, since an 'operational debt' will include a debt arising from a contract in relation to the supply of goods or services from the corporate debtor.

Reference: Judgment of Hon'ble Supreme Court dated 04.02.2022 in Civil Appeal No. 2839 of 2020 – In the matter of M/s Consolidated Construction Consortium Limited V/s. M/s Hitro Energy Solutions Private Limited

13. Section 14 of I & B Code deals with 'moratorium', it is not a hindrance for the 'Authority' and the Officers under the 'Prevention of Money Laundering Act, 2002' to deny a person of the tainted 'Proceeds of Crime'. Suffice it for this 'Tribunal' to point out that a person who is involved in 'Money Laundering' is not to be allowed to enjoy the fruits of 'Proceeds of Crime' with a view to ward off is Civil indebtedness, in respect of his Creditors.

In the matter of Kiran Shah, V/s. Enforcement Directorate, Kolkata, the 'Financial Creditor' had authorised the 'Interim Resolution Professional'/'Resolution Professional' to prefer an 'Application' before the 'Adjudicating Authority' to secure the release of the property which was arbitrarily attached by the Respondent/Enforcement Directorate and later affirmed by the 'Adjudicating Authority' PMLA. The Hon'ble NCLAT, New Delhi observed that the objective, and purpose of two enactments (1) 'I & B Code' and (2) 'PMLA' even though at the first blush appear to be at logger's heads, there is no repugnancy and inconsistency between them, in lieu of the fact the text, shape and its colour are conspicuously distinct and different, operating in their respective spheres. More importantly, when confiscation of the 'Proceeds of Crime' takes place, the said Act is performed by the Government, not in its status/capacity/role as Creditor. The Hon'ble Tribunal further stated that the 'Tribunal' makes it candidly clear that filing of Application under Section 60(5) of the I & B Code is not an 'all pervasive' one, thereby conferring 'Jurisdiction' to an 'Adjudicating Authority' (NCLT) to determine 'any question/issue of priorities', the question of Law or Facts

pertaining to the 'Corporate Debtor' when in reality in 'Law', the 'Adjudicating Authority' (NCLT) is not empowered to deal with the matters falling under the purview of another authority under PMLA.

Reference: Judgment of Hon'ble NCLAT, New Delhi dated 03.01.2022 in COMPANY APPEAL (AT)(INSOLVENCY) NO.817/2021 – In the matter of Kiran Shah, V/s. Enforcement Directorate, Kolkata

14. Whether the sale of Corporate Debtor as a 'Going Concern, in Liquidation Proceedings, includes its liabilities? Whether the Successful Bidder can withdraw from the Bid after payment of the EMD and seek for a refund of the amount paid on the ground that the offer made by the Bidder was a 'conditional offer'?

The Hon'ble NCLAT, New Delhi in the matter of M/s. Visisth Services Limited V/s. S. V. Ramani and Ors. held that Sale as a 'Going Concern' means the sale of assets as well as liabilities and not assets sans liabilities. Sale of a Company as a 'Going Concern' means the sale of both assets and liabilities, if it is stated on 'as is where is basis.

The Hon'ble Tribunal further held that by paying the EMD amount and accepting the Bid, the Successful Bidder cannot now say that it was not a concluded contract. The Bidder-Appellant is bound by the terms and conditions of the Bid document and no communication to the Liquidator stating that it is a conditional offer, is sustainable. The Hon'ble Tribunal further observed that if the Bidder is allowed to withdraw from the Bid at this stage and seek a refund on the ground that their conditional offer has not been accepted, then the liquidation process would be a never-ending one, defeating the scope and objective of the Code. Therefore, the bidder cannot be entitled to the EMD amount and the amount paid towards the Bid Purchase document, if he does not comply with the terms of the contract.

Reference: Judgment of Hon'ble NCLAT, New Delhi dated 11.01.2022 in COMPANY APPEAL (AT) (INSOLVENCY) No.896 of 2020 – In the matter of M/s. Visisth Services Limited V/s. S. V. Ramani and Ors.

15. Whether after Approval of the resolution plan by the COC and pending Approval, the Adjudicating Authority can direct the COC to convene a meeting and place the settlement proposal as offered for consideration, decision and voting on that within a certain period?

The Hon'ble NCLAT, New Delhi in the matter of Union Bank of India V/s. Kapil Wadhawan & Ors. observed that - once the Resolution Plan is approved by a 100 per cent voting share of the CoC, the jurisdiction of the Adjudicating Authority was confined by the provisions of Section 31(1) to determining whether the requirements of Section 30(2) have been fulfilled in the plan as approved by the CoC. Further, there was no scope for negotiations between the parties once the CoC had approved the Resolution Plan. Thus, contractual principles and common law remedies, which do not find a tether in the wording or the intent of the IBC, cannot be imported in the intervening period between the acceptance of the CoC and the Approval by the Adjudicating Authority.

Reference: Judgment of Hon'ble NCLAT, New Delhi dated 27.01.2022 in Company Appeal (AT) (Insolvency) No.370 of 2021 and Company Appeal (AT) (Insolvency) No.376-377 of 2021 and Company Appeal (AT) (Insolvency) No.393 of 2021 – In the matter of Union Bank of India V/s. Kapil Wadhawan & Ors. and in the matter of The Administrator, Dewan Housing Finance Corporation Limited V/s. Kapil Wadhawan & Ors. and in the matter of Piramal Capital & Housing Finance Limited V/s. Kapil Wadhawan & Ors.

16. Can NCLT and Liquidator refuse to grant an extension to the Appellant without considering Regulation 47 A of the Liquidation Process Regulation 2016? Whether the Appellant is entitled to the exclusion/extension of time for the period of Lockdown due to Covid 19 as stipulated under Regulation 47 A of the IBBI (Liquidation Process) Regulation, 2016?

The Hon'ble NCLAT, New Delhi in the matter of Standard Surfa Chem India Pvt. Ltd. V/s. Kishore Gopal Somani observed that Regulation 47 A provided that the period of Lockdown imposed by the central government in the wake

of the Covid 19 outbreak shall not be counted for computation of timeline for any task that could not be completed due to Lockdown in relation to any liquidation process. Although, the applicability of the Regulation was dependent on the Lockdown declared by the Central Government. Therefore, we are doubtful about the relevance of Regulation 47A in the instant case because Lockdown was declared by Tamil Nadu State and not the Central Government.

The Hon'ble Tribunal further stated that - it is pertinent to mention that Liquidation Process Regulation 47 deals with the Model Timeline for Liquidation Process. Model Timeline is only a directory in nature. It cannot be considered a deadline. It is provided under Regulation as a guiding factor to complete the liquidation process in a time-bound manner. In exceptional circumstances, such a time limit can be extended. Therefore, the said appeal was allowed.

Reference: Judgment of Hon'ble NCLAT, New Delhi dated 14.02.2022 in Company Appeal (AT) (Insolvency) No. 684 of 2021 – In the matter of Standard Surfa Chem India Pvt. Ltd. V/s. Kishore Gopal Somani

17. Judgment of Hon'ble NCLAT, Chennai bench dated 17.02.2022 in Company Appeals (AT) (CH)(Insolvency) No.164, 176, 218 & 219 of 2021 – In the matter of Periasamy Palani Gounder V/s. Radhakrishnan Dharmarajan & Ors. and other connected appeals

The following objections were raised by the Appellant in this matter:

a) The 'Form G' for inviting 'EOI' was neither published on the Corporate Debtor's website nor posted on the website designated by the IBBI.

b) The IRP had received claims from a large set of Unsecured Financial Creditors. Still, the IRP/RP did not proceed to accept or reject the Unsecured Financial Creditors' claims, which resulted in excluding the said unsecured creditors from the entire decision-making process.

c) CoC has not considered the OTS DT. 21.1.2021.

d) The approved resolution plan discriminates between the related party unsecured financial creditors with other unsecured financial creditors.

e) The estimate of the Fair Value and Liquidation Value of the Corporate Debtor is computed without physical verification of the Corporate Debtor's assets. Therefore, the entire valuation process of the Corporate Debtor is in total disregard of the Regulations.

f) The Resolution Applicant is disqualified under Section 164 (2) (b) of the Companies Act 2013 and hence ineligible under Section 29 A (e) of the Insolvency and Bankruptcy Code to submit a Resolution Plan.

g) The COC does not approve the revised Resolution Plan.

In light of the above, whether the approved Resolution Plan contravenes Section 30 (2) and Sec 61(3) of the Insolvency and Bankruptcy Code 2016?

The Hon'ble NCLAT, Chennai bench in the matter of Periasamy Palani Gounder V/s. Radhakrishnan Dharmarajan & Ors. and other connected appeals observed the following:

a) A valuation consisting of mere naked values without a detailed report is not valid. It is a settled proposition that the Valuation exercise is conducted to facilitate the CoC's decision-making process. Therefore, the existence of a valid and accurate valuation report is a sine qua non for the COC to exercise its commercial wisdom. A natural sequitur to those above would be that a detailed valuation report is necessary for the CoC to exercise its commercial wisdom objectively.

b) The Adjudicating Authority's observation **that a statutory provision regulating a matter of practice or procedure will generally be read as a directory and not mandatory is erroneous. Compliance with statutory requirements in regulating a matter of practice and procedure is mandatory.** The Tribunal is a creature of statute, and by interpretation, it cannot dilute the statutory compliances.

c) However, the IBC does not treat Related Party as a separate class for any other purpose. Therefore, a rationale nexus must exist for any classification between the object sought to achieve the classification and sub-classification. Therefore, Related Party Financial or Operational Creditor cannot be discriminated under the Resolution Plan only on being a Related Party.

d) Based on the discussion above, it is clear that IBC treats related parties as a separate category for specified purposes, excluding from the CoC under Section 21 and disqualifying them from being Resolution Applicants under Section 29A. However, the IBC does not treat Related Party as a separate class for any other purpose. Therefore, a rationale nexus must exist for any classification between the object sought to achieve the classification and sub-classification.
Therefore, the Related Party financial or operational creditor cannot be discriminated against under the Resolution Plan, denying their right to get payments under the resolution Plan only on being a Related Party. It is also made clear that by getting only payment under the Resolution Plan, related party creditors could in no way sabotage the CIRP.

Based on the above discussion, it is clear that the approved Resolution Plan is in contravention of Section 30 (2) of the Insolvency and Bankruptcy Code 2016, which contravenes the provision of law.

Reference: Judgment of Hon'ble NCLAT, Chennai bench dated 17.02.2022 in Company Appeals (AT) (CH)(Insolvency) No.164, 176, 218 & 219 of 2021 – In the matter of Periasamy Palani Gounder V/s. Radhakrishnan Dharmarajan & Ors. and other connected appeals

18.Consideration of belated claims filed by the Homebuyers of the Corporate Debtor

In the matter of Puneet Kaur V/s. K V Developers Private Limited & Ors., the following issues were raised:

(1) Whether the Adjudicating Authority has rightly rejected the IAs filed by the Appellant(s) seeking direction to include their claims, which were belatedly filed?

(2) Whether after approval of the Resolution Plan on 20.07.2021 by CoC, the claim of the Appellant(s) stood extinguished?

(3) Whether the Resolution Professional was obliged to include the details of Homebuyers as reflected in the records of the Corporate Debtor in the Information Memorandum, even though they have not filed their claim before the Resolution Professional within time?

(4) Whether Resolution Applicant ought to have also dealt with Resolution Plan regarding Homebuyers, whose names and claims are reflected in the record of the Corporate Debtor, although they have not filed any claim?

The Hon'ble Tribunal observed that extinguishment of the claim of the Appellant(s) shall happen only after approval of the Plan by the Adjudicating Authority. The argument of the Respondents that since CoC has approved the Resolution Plan, the claim of the Appellant(s) has been extinguished, cannot be accepted as there is no extinguishment of the claim of the Appellant(s) on approval of the Plan by the CoC.

The Hon'ble Tribunal further observed that the liabilities which have been undertaken by the Corporate Debtor, huge money received by the Corporate Debtor from Homebuyers, whose claims, which could not be filed within time, could not be wished away by the Resolution Professional, on the convenient ground that claims have not been filed by such Homebuyers. The purpose of CIRP of Corporate Debtor is to find out all liabilities of the Corporate Debtor and take steps towards resolution. Unless all liabilities of the Corporate Debtor are not known or included in the Information Memorandum, the occasion to complete the CIRP shall not arise.

The Hon'ble Tribunal stated that the claim of those Homebuyers, who could not file their claims, but whose claims were reflected in the record of the Corporate Debtor, ought to have been included in the Information Memorandum and Resolution Applicant, ought to have been taken note of the said liabilities and should have appropriately dealt with them in the Resolution Plan. Non-consideration of such claims, which are reflected in the record, leads to inequitable and unfair resolution as is seen in the present case. To mitigate the hardship of the Appellant, we thus, are of the view that ends of justice would be met, if the direction is issued to Resolution Professional to submit the details of Homebuyers, whose details are reflected in the records of the Corporate Debtor including their claims, to the Resolution Applicant, on the basis of which Resolution Applicant shall prepare an addendum to the Resolution Plan, which may be placed before the CoC for consideration.

Reference: Judgment of Hon'ble NCLAT, New Delhi dated 01.06.2022 in Company Appeal (AT) (Insolvency) No. 390 of 2022 – In the matter of Puneet Kaur V/s. K V Developers Private Limited & Ors.

19. Treatment of Provident Fund (PF) dues under a Resolution Plan

The Hon'ble NCLAT, New Delhi in the matter of Sikander Singh Jamuwal V/s. Vinay Talwar & Ors. observed that Resolution Applicant is also liable to pay the contribution and other sums due from the employer under any provisions of this act as the case may be in respect of the period up to the date of such transfer. All this requires that the explicit provisions of the above said PF Act needs to be complied with. This aspect is justiciable as a duty has been cast on the Resolution Professional/Adjudicating Authority/ on this Tribunal. This is not commercial wisdom as compliance with the law is a must.

Further, PF dues are not the assets of the CD as amply made clear by the provisions of Section 36(4)(a)(iii) of the I& B Code, 2016. Therefore, the Hon'ble Tribunal directed the Successful Resolution Applicant to release full provident fund dues in terms of the provisions of the Employees Provident Funds and Miscellaneous Provident Fund Act, 1952.

Reference: Judgment of Hon'ble NCLAT, New Delhi dated 11.03.2022 in Company Appeal(AT) (Ins)No. 483 of 2019 – In the matter of Sikander Singh Jamuwal V/s. Vinay Talwar & Ors.

20. Order of Hon'ble NCLT, Ahmedabad bench dated 20.06.2022 in IA/238(AHM)2022 in CP(IB) 320 of 2018 – In the matter of Arrhum Tradelink Pvt Ltd V/s. Vineeta Maheshwari Liquidator of Kaneria Granito Ltd & Anr

In this matter, an application was filed under Section 60(5)(c) of the Insolvency and Bankruptcy Code, 2016 by the unsuccessful bidder with a prayer to direct the liquidator to declare the applicant as the successful bidder and cancel the bid of M/s. Torrecid India Pvt. Ltd. (R-3) which has been accepted by the liquidator. The Hon'ble Tribunal had to determine whether they should accept and certify the result of the e-auction sale in respect of the successful bidder or direct the liquidator to accept the bid of the applicant who has offered to purchase the Corporate Debtor as a going concern.?

In this matter, the liquidator held e-auction of the assets of the Corporate Debtor and had decided to sell the assets by e-auction adopting two

methods simultaneously. (i) to sell the assets on a stand-alone basis, and (ii) to sell the Corporate Debtor as a going concern.
The applicant was ready to take the Corporate Debtor as a going concern whereas the successful bidder had offered the same amount as the price of the assets of the Corporate Debtor on a stand-alone basis.

Clause-12 of the tender document stated that "the bidder having highest bid shall be the successful bidder. In case of highest bidder under auction options no. 1 and 2 are equal, then, the bidder who has given an offer for sale of the Corporate Debtor as a going concern shall be declared as successful bidder". The Hon'ble NCLT, Ahmedabad bench observed that the liquidator ought to have taken into consideration of the broad object of Insolvency and Bankruptcy Code, 2016 to sell the Corporate Debtor as a going concern and it was the pre-condition for e-auction set out by the liquidator herself. The liquidator put the clause in the tender document that in case the highest amount is offered by all the bidders and the bid amount is the same then the bidder who wishes to purchase the Corporate Debtor as a going concern shall be declared to be the successful bidder.

The Hon'ble Tribunal further observed that - It is the object of the Insolvency and Bankruptcy Code, 2016 i.e., to maximize the value of the assets of the corporate person and promote entrepreneurship etc. It is not the object of the Insolvency and Bankruptcy Code, 2016 only to clear the debts of the creditors of such a corporate person. It is the duty of the liquidator to protect the existence of the Corporate Debtor as far as possible and avoid its death by ultimately pushing the Corporate Debtor to be dissolved.

Reference: Order of Hon'ble NCLT, Ahmedabad bench dated 20.06.2022 in IA/238(AHM)2022 in CP(IB) 320 of 2018 – In the matter of Arrhum Tradelink Pvt Ltd V/s. Vineeta Maheshwari Liquidator of Kaneria Granito Ltd & Anr

21. The objective of the IBC is for the Resolution of the Stressed Assets, especially for an MSME unit and Liquidation is the last resort.

The Hon'ble NCLT, Guwahati Bench In the matter of Bank of India V/s. Agnipa Energo Pvt. Ltd. stated that the objective of the IBC is for the Resolution of Stressed Assets, especially for an MSME unit and Liquidation is the last resort.

The Hon'ble Tribunal further observed that it is neither Commercial Wisdom nor a Commercial Decision of the CoC /FC to reject a Resolution Plan which offers to them an amount of Twenty times more than the Liquidation Value. The Hon'ble Tribunal stated the prayer made by the Applicant for liquidation of the CD needs to be rejected in achieving the Objectives of the IBC and the interest of all Stakeholders including the sole FC and the stalled MSME Unit.

Reference: Order of Hon'ble NCLT, Guwahati Bench dated 04.02.2022 in IA No. 10 of 2021 IN C.P. (IB) No. 37/GB/2019 – In the matter of Bank of India V/s. Agnipa Energo Pvt. Ltd.

22. Whether a financial creditor is entitled to recover dues of the Corporate Debtor from the legal heirs of the Personal Guarantors?

The Hon'ble NCLT, Kolkata Bench in the matter of Bank of Baroda V/s. Ms Divya Jalan held that - When a section 95 application is filed, the assets of the Personal Guarantor are hit by moratorium and if we put the legal heirs of the deceased Personal Guarantor into the shoes of the Personal Guarantor then their personal assets will also get automatically hit by moratorium, which will cause grave prejudice to the rights of the third party. However, there is no provision in the code which envisages that the concept of legal heirs stepping into the shoes of the deceased Personal Guarantor.

In this instant case, the petitioner can take appropriate steps to recover the guaranteed amount from the assets/estates of the deceased Personal Guarantor rather than the personal assets of the legal heirs of the Personal Guarantor. Further, the legislature is very much clear in defining the term 'Personal Guarantor', the Code talks about the estate/assets of the Personal Guarantor only.

Reference: Order of Hon'ble NCLT, Kolkata Bench dated 11.02.2022 in CP (IB) No. 363/KB/2021 – In the matter of Bank of Baroda V/s. Ms. Divya Jalan

23. Joint Sale under Insolvency and Bankruptcy Code, 2016 and SARFAESI

The Hon'ble NCLAT, New Delhi in the matter of Ayan Mallick V/s. Pratim Bayal, Liquidator & Ors. observed that when the Adjudicating Authority is satisfied that joint sale shall bring maximization of assets of the Corporate Debtor and the possession of the properties of the Guarantors have already been taken under SARFAESI and both land and factory need to be sold together to maximize the value of the assets, we fail to see that how the Appellant shall be prejudiced in any manner.

Reference: Order of Hon'ble NCLAT, New Delhi dated 13.05.2022 in Company Appeal (AT) (Insolvency) No. 456 of 2022 – In the matter of Ayan Mallick V/s. Pratim Bayal, Liquidator & Ors.

24. Whether CIRP can be initiated against any Personal Guarantor(s) to a Corporate Debtor before initiation and/or irrespective of CIRP against the Corporate Debtor? Whether insolvency resolution process(es) can be initiated against the Personal Guarantors of an NBFC / Financial Services Provider before initiation and/or irrespective of CIRP against the NBFC? If so, under what criteria?

The Hon'ble NCLT, Jaipur Bench in the matter of Shapoorji Pallonji Finance Private Limited V/s. Rekha Singh held that -Application(s) for CIRP can be initiated against any Personal Guarantor(s) to a Corporate Debtor irrespective of CIRP against the Corporate Debtor, which issue is no longer res integra. Further, Insolvency resolution process(es) can be initiated against the Personal Guarantor(s) of an NBFC / FSP irrespective of CIRP against the NBFC, provided that the concerned NBFC falls within the category of those FSPs having assets size of Rs. 500 cores or more, thus being included in the definition of Corporate Debtor under IBC and being construed as Financial Service Provider wherever the term Corporate Debtor occurs in the Code.

Reference: Order of Hon'ble NCLT, Jaipur Bench dated 22.02.2022 in IA No. 229/JPR/2021 in CP No. (IB) 25/95/JPR/2021 – In the matter of Shapoorji Pallonji Finance Private Limited V/s. Rekha Singh

25. A prospective Resolution Applicant is required to submit an "unconditional EOI" within the time stipulated under the invitation.

In the matter of Punjab National Bank V/s. Saptarishi Hotels Pvt Ltd, an application was filed by the RP seeking extension of the CIRP period as there is no clarity from the NITHM/ Govt of Telangana on terms of renewal of lease. The revised plans were submitted by the Prospective Resolution Applicants. However, due to the non-finalization of lease terms, the PRA's submitted conditional plans.

The Hon'ble NCLT, Hyderabad Bench observed that a prospective Resolution Applicant is required to submit an unconditional EOI within the time stipulated under the invitation. The Hon'ble Tribunal further observed that both the CoC and the resolution professional have actively indulged in not only promoting free negotiation of the terms of the resolution plan put forth by the parties/prospective resolution applicants but also seeking time to fulfil the "contractual terms dictated by the prospective resolution applicants, in utter disregard the IBBI Regulation, supra, and the intent of IBC.

The Hon'ble Tribunal stated that resolution of corporate insolvency, within the timeline prescribed, is the prime aim and objective of IBC and liquidation is the *ultimate* resort. However, we cannot under the guise of insolvency resolution, allow the CoC or the Resolution Professional, herein to pursue the cause of this nature which is, *per se*, contrary to the IBBI Regulation, *supra*, besides meant for the 'comfort' of the prospective resolution applicants.

We, therefore, do not hesitate to say that the members of CoC and the Resolution Professional are responsible for the loss of time prescribed under the Code, which is valuable and limited for completion of CIRP.

Reference: Order of Hon'ble NCLT, Hyderabad Bench dated 14.03.2022 in IA(IBC)/200/2022 in CP(IB) No.599/7/HDB/2019 – In the matter of Punjab National Bank V/s. Saptarishi Hotels Pvt Ltd

26. Whether a person, who holds a Recovery Certificate would be a financial creditor within the meaning of clause (7) of Section 5 of the IBC?

The Hon'ble Supreme Court in the matter of Kotak Mahindra Bank Limited V/s. A. Balakrishnan & Anr. held that liability in respect of a claim arising out

of a Recovery Certificate would be a "financial debt" within the meaning of clause (8) of Section 5 of the IBC. Consequently, the holder of the Recovery Certificate would be a financial creditor within the meaning of clause (7) of Section 5 of the IBC. As such, the holder of such certificate would be entitled to initiate CIRP, if initiated within a period of three years from the date of issuance of the Recovery Certificate.

Reference: Judgment of Hon'ble Supreme Court dated 30.05.2022 in Civil Appeal No.689 of 2021 – In the matter of Kotak Mahindra Bank Limited V/s. A. Balakrishnan & Anr.

27. Judgment of Hon'ble Supreme Court dated 01.08.2022 In Civil Appeal Nos. 84-85 of 2020 – In the matter of Asset Reconstruction Company (India) Limited V/s. Tulip Star Hotels Limited & Ors.

In this matter, the Corporate Debtor apparently acknowledged its liabilities towards the Appellant in its Financial Statements from 2008-09 to 2016-17. The Hon'ble Supreme Court observed that the NCLAT erred in law in holding that the Books of Account of a company could not be treated as an acknowledgement of liability in respect of debt payable to a financial creditor. It is, therefore, imperative that the provisions of the IBC and the Rules and Regulations framed thereunder be construed liberally, in a purposive manner to further the objects of enactment of the statute. The time stipulation of fourteen days in Section 7(4) to ascertain the existence of default is apparently directory not mandatory.

There is no specific period of limitation prescribed in the Limitation Act, 1963, for an application under the IBC, before the Adjudicating Authority (NCLT). An application for which no period of limitation is provided anywhere else in the Schedule to the Limitation Act is governed by Article 137 of the Schedule to the said Act. Under Article 137 of the Schedule to the Limitation Act, the period of limitation prescribed for such an application is three years from the date of accrual of the right to apply. There can be no dispute with the proposition that the period of limitation for making an application under Section 7 or 9 of the IBC is three years from the date of accrual of the right to sue, that is, the date of default.

The Hon'ble Court held that an application under Section 7 of the IBC would not be barred by limitation, on the ground that it had been filed beyond a period of three years from the date of declaration of the loan account of the

Corporate Debtor as NPA, if there were an acknowledgement of the debt by the Corporate Debtor before expiry of the period of limitation of three years, in which case the period of limitation would get extended by a further period of three years.

Reference: Judgment of Hon'ble Supreme Court dated 01.08.2022 In Civil Appeal Nos. 84-85 of 2020 – In the matter of Asset Reconstruction Company (India) Limited V/s. Tulip Star Hotels Limited & Ors.

28. Total amount for maintainability of claim will include both principal debt amount as well as interest on delayed payment.

In the matter of Prashant Agarwal V/s. Vikash Parasrampuria & Ors., the contention was raised that the application for initiation of Corporate Insolvency Resolution Process under Section 9 of Insolvency and Bankruptcy Code, 2016 (IBC), was not maintainable as the principal operational debt claim amounted to Rs. 97,87,220 which is below the minimum threshold limit of Rs. 1 crore. The Hon'ble NCLAT, Principal Bench observed that all the invoices clearly stipulated the provision of Interest on delayed payment. It was also observed that payments of three invoices have been made in full and for one invoice in part against said invoices by the Corporate Debtor and no dispute on this clause was ever raised as noted from the record available. Since interest on delayed payment was clearly stipulated in the invoice and therefore, this will entitle to "right to payment" (Section 3(6) IBC) and therefore will form part of "debt" (Section 3(11) IBC). Therefore, the Hon'ble Tribunal held that the total amount for maintainability of claim will include both principal debt amount as well as interest on delayed payment which was clearly stipulated in the invoice itself.

Reference: Judgment of Hon'ble NCLAT, Principal Bench dated 15.07.2022 in Company Appeal (AT) (Ins) No. 690 of 2022– In the matter of Prashat Agarwal V/s. Vikash Parasrampuria & Ors.

29. Overriding effect of the Insolvency and Bankruptcy Code, 2016 over Real Estate (Regulation and Development) Act, 2016.

In the matter of Prabhat Ranjan Singh V/s. SLB Welfare Association, an application was filed by the Interim Resolution Professional seeking directions against the Respondent i.e., SLB Welfare Association to handover the

peaceful custody and control of the project side being real estate project being an asset of the Corporate Debtor to the Applicant in terms of provisions of the Code. The Respondent submitted that the Corporate Debtor had defaulted in completing the project within the stipulated time and in a proceeding arising out of RERA the U.P. RERA, by order dated 30.09.2019 directed revocation of the registration of the promoter under Section 7 of the RERA Act, 2016 which was subsequently upheld by Hon'ble Allahabad High Court vide order dated 09.03.2021 and decided to handover the project to the Respondent as per Section 8 of RERA Act, 2016 to ensure completion of the project.

The Ld. Counsel submitted that under Section 238 of the Insolvency and Bankruptcy Code, 2016 (IBC), the IBC will have over-riding effect over all other laws and therefore the order passed under the RERA Act will not come in the way of the Corporate Insolvency Resolution Process. The Ld. Counsel relied upon the judgment of the Hon'ble Supreme Court of India in the matter of Pioneer Urban Land and Infrastructure Limited and Anr. Vs. Union of India and others, Writ Petition (Civil) No. 43 of 2019 dated 09.04.2019 wherein the Hon'ble Supreme Court has held that RERA and the Code must be held to co-exist and, in event of a clash, RERA must give way to the Code.

The Hon'ble NCLT, New Delhi bench, therefore, directed the Respondent, SLB Welfare Association to hand over peaceful possession and custody of the project in question to the Applicant.

Reference: Order of Hon'ble NCLT, New Delhi bench dated 25.07.2022 in IA 2427/2022 in IB-11(ND)/2022 – In the matter of Prabhat Ranjan Singh V/s. SLB Welfare Association

30. Timely completion of the Resolution Process is necessary

The Hon'ble NCLAT, New Delhi in the matter of Shrinathji Trading Company V/s. Sanwaria Consumer Limited & Ors. observed that the statutory scheme given in the IBC regarding the time period of CIRP in section 12 of IBC stipulates that a total of 330 days could be spent in obtaining a prospective resolution plan. In the present case, approximately 559 days were over since the initiation of CIRP till the date of the Impugned Order and enough opportunities have already been given to the prospective resolution applicant to provide a resolution plan without success. The Hon'ble Tribunal concluded that timely completion of the resolution process has been considered necessary without delaying the stage of liquidation if circumstances so require.

Reference: Judgment of Hon'ble NCLAT, New Delhi dated 27.07.2022 in Company Appeal (AT) (Ins.) No. 480 of 2022 – In the matter of Shrinathji Trading Company V/s. Sanwaria Consumer Limited & Ors.

31. Whether a Resolution Professional is competent to decide or reject the claims of the Financial Creditor by himself without presenting the complete facts before the CoC on the admissibility of the claims.

In this matter, the issue at hand was, whether the Appellant/Resolution Professional was correct in holding that Regulation 12(2) of CIRP Regulations places an embargo on resubmission of claims by such Financial Creditors who have earlier submitted their claims under CIRP Regulation 12(1) before the last date mentioned in the public announcement but their claim was rejected for want of authentication or substantiation.

The Hon'ble NCLAT, New Delhi observed that CIRP Regulation 12 does not lay down any specific embargo on a creditor who on having failed to satisfy the Resolution Professional with respect to the claims submitted by him under Regulation 12(1) from refiling his claim under Regulation 12(2) as long as it is done on or before the ninetieth day of the insolvency commencement date.

The Hon'ble NCLAT, New Delhi stated that CIRP Regulations need to be viewed in a purposive manner so as to advance the cause of insolvency resolution while safeguarding the interest of all the stakeholders.

Further, reference was drawn to Hon'ble Supreme Court's view in *'Swiss Ribbons Pvt. Ltd. & Anr.' Vs. Union of India & Ors. – Writ Petition (Civil) No. 99 of 2018* wherein it held that Resolution Professional has no adjudicatory power and that he is *"really a facilitator of the resolution process, whose administrative functions are overseen by the CoC and by the Adjudicating Authority."* The Resolution Professional has been vested with administrative as opposed to quasi-judicial power. In view of the above, the Appellant/Resolution Professional by summarily rejecting the belated claims at his own level without presenting the complete facts to the CoC has misconstrued his role, duties, and responsibilities.

The Hon'ble Tribunal observed that the Resolution Professional is an important instrumentality in the insolvency resolution process and his role is crucial and critical to fulfil the objective of the IBC. It is therefore incumbent upon him to discharge his responsibilities with the highest standards of professional excellence, dexterity, integrity, rectitude, and good faith. The Adjudicating Authority based on the facts and documents presented before

it, found lack of professionalism on part of the Appellant/Resolution Professional in analyzing the admissibility of claims before him.

Reference: Judgment of Hon'ble NCLAT, New Delhi dated 27.07.2022 in Company Appeal (AT)(Insolvency) No. 762 of 2022 – In the matter of Sumat Kumar Gupta V/s. Vardhman Industries Limited

32. Whether a Personal Guarantee shall extinguish, on acquiring citizenship of a foreign country?

The main contention raised in the matter of Sudip Dutta V/s. State Bank of India was that The I&B Code is applicable only to those Personal Guarantors who are Indian citizens and the foreign citizens do not come within the ambit of Personal Guarantors. The Hon'ble NCLAT, New Delhi observed that the provision under Section 60(1) makes it clear that the residence of Personal Guarantor is not taken into consideration when proceedings against the Personal Guarantor are initiated. The Personal Guarantor, who is whether residing in India or residing outside India, when an application is filed against the Personal Guarantor the jurisdiction shall be before the Adjudicating Authority in whose territorial jurisdiction the registered office of the Corporate Person is located. The mere fact that the Appellant now claims to be a citizen of Singapore and has given an address of Singapore is wholly irrelevant for initiating proceedings against the Appellant.

The Hon'ble Tribunal further observed that the keyword in Section 234 of the Code is "in relation to assets or property of corporate debtor or debtor, including a personal guarantor of a corporate debtor, as the case may be, situated at any place in a country outside India". Applicability of Section 234 arises only in a case where assets or property of a personal guarantor are situated at any place in a country outside India. In the present case, the assets of the Personal Guarantor, as claimed in the application under Section 95, are not claimed to situate in any place outside India. The present is not a case where CIRP has been initiated with regard to any of the assets of the Personal Guarantor which are situated outside the country, hence, reliance on Section 234 and 235 was wholly misplaced in this matter.

The Hon'ble Tribunal held that the Deed of Guarantee of the Appellant executed on 19.10.2015 still continues and binds him and he cannot escape his obligation under the Personal Guarantee given by him on the mere fact that he has obtained citizenship of Singapore w.e.f. 18.06.2018.

The statutory scheme of the code does not contain any indication that the Personal Guarantor of a Corporate Debtor can escape from its liability under the Personal Guarantee Deed merely on the ground that he is now started residing in another country and acquired citizenship in another country and is no more an Indian citizen.

Reference: Judgment of Hon'ble NCLAT, New Delhi dated 29.07.2022 in Company Appeal (AT) (Insolvency) No. 807 of 2021– In the matter of Sudip Dutta V/s. State Bank of India along with other connected Appeals

33. Whether the fee of an RP falls under the definition of a 'Claim' as defined under the Code.

In the matter of Rita Gupta V/s. M/s. Shilpi Cable Technologies Ltd. & Ors., the following issues were raised:

- Whether the fee of an RP falls under the definition of a 'Claim' as defined under the Code?
- Whether the fee of a Resolution Professional is required to be fixed by CoC, failing which such decisions/determination is to be made by the Adjudicating Authority under the provisions of Section 60(5) of the Code read with Regulation 33(2) of the CIRP Regulation to fix the fees as payable to the RP?
- Whether the Liquidator is having the jurisdiction to decide the fee of the RP as the CoC is no longer in existence?

The Hon'ble NCLAT, New Delhi held that the fees and expenses incurred by the Resolution Professional (RP) come under the ambit of Insolvency Resolution Process Cost and the Liquidator cannot adjudicate upon the Insolvency Resolution Process Cost. Regulation 34 of the IBBI Regulations specifies that the Committee of Creditors (CoC) shall fix the expenses which are incurred by the Resolution Professional. The word 'expenses' includes the fee to be paid to the Resolution Professional. Viewed from any angle, **the fees of an RP cannot be considered to be a 'Claim' as defined under Section 3(6) of the Code.** The Liquidator can only verify and adjudicate the 'Claims' as defined under the Code. **Since the amount of fees payable to an RP is not a 'Claim', the same cannot be determined or verified by Liquidator.**

The Hon'ble Tribunal further held that it is **Adjudicating Authority which has to decide fees in the absence of a CoC and the RP cannot be directed to prefer a 'Claim' before the Liquidator.**

Reference: Judgment of Hon'ble NCLAT, New Delhi dated 01.08.2022 in Company Appeal (AT) (Insolvency) No. 10 of 2020 – In the matter of Rita Gupta V/s. M/s. Shilpi Cable Technologies Ltd. & Ors.

34. IBC is not a Recovery Proceeding

An appeal was filed against an order of Adjudicating Authority rejecting Section 9 Application where one of the grounds for rejection was that the Corporate Debtor is an 'MSME' and a 'going concern' and a 'viable entity'.

The Hon'ble NCLAT, New Delhi in the matter of M/s Agarwal Veneers V/s. Fundtonic Service Pvt. Ltd. observed that the Preamble of IBC is carefully worded to describe the spirit and objective of the Code to be 'Reorganisation' and 'Insolvency Resolution', specifically omitting the word 'Recovery'. The Parliament has made a conscious effort to ensure that there is a significant difference between 'Resolution' and 'Recovery'. **The Hon'ble Supreme Court has time and again observed that the fundamental intent of IBC is 'maximising the value of assets' in the process of 'Resolution'.**

Reference was drawn to 'Mobilox Innovations Private Limited' Vs. 'Kirusa Software Private Limited', (2018) 1 SCC 353, wherein the Hon'ble Apex Court has examined in detail the United Nations Legislative Guide on Insolvency, in which the IBC finds its roots. Any Application to commence CIRP can be denied when the Creditor is using Insolvency as an inappropriate substitute for Debt Recovery Procedures. **If IBC is purely used for the purpose of Debt Recovery, particularly when the amounts due are small, and the Company is a solvent entity and is a going concern, the question of 'Reorganising' or 'Resolution of the Company' does not arise.** This Tribunal in 'Binani Industries Limited' Vs. 'Bank of Baroda & Anr.', Company Appeal (AT) (Ins.) No. 82 of 2018, has differentiated between 'Recovery' and 'Resolution' and has observed that IBC is not a Recovery Proceeding. 'Recovery' dispossesses the 'Corporate Debtor' of its assets while a Resolution is an effort to keep it afloat.

The said appeal was dismissed on the above grounds.

Reference: Judgment of Hon'ble NCLAT, New Delhi dated 05.08.2022 in Company Appeal (AT) (Ins) No. 968 of 2020 – In the matter of M/s Agarwal Veneers V/s. Fundtonic Service Pvt. Ltd.

Important Amendments Suggested/Notified by IBBI

A. Notification No IBBI/2022-23/GN/REG088 dated 4th July 2022 on Insolvency and Bankruptcy Board of India (Insolvency Professionals) (Amendment) Regulations, 2022

The IBBI notified the Insolvency and Bankruptcy Board of India (Insolvency Professionals) (Amendment) Regulations, 2022 to make the process more efficient. The key amendments are as follows: -

1. An insolvency professional shall disclose his relationship, if any, with the corporate debtor, other professionals engaged by him, financial creditors, interim finance providers, and prospective resolution applicants to the insolvency professional agency of which he is a member, within the time specified hereunder:

Relationship of the insolvency professional with	Disclosure to be made within three days of
(1)	(2)
Corporate debtor	his appointment.
Registered valuers/accountants/ legal professionals/ other professionals appointed by him	appointment of the professionals.
Financial creditors	the constitution of the committee of creditors.
Interim finance providers	the agreement with the interim finance provider.
Prospective resolution applicants	the supply of information memorandum to the prospective resolution applicant.
If the relationship with any of the above comes to notice or arises subsequently	of such notice or arising.

2. An insolvency professional shall ensure disclosure of the relationship if any, of the other professionals engaged by him with himself, the corporate debtor, the financial creditor, the interim finance provider, if any, and the prospective resolution applicant, to the insolvency professional agency of which he is a member, within the time specified as under:

Relationship of the other professional with	Disclosure to be made within three days of
(1)	(2)
Insolvency professional	the appointment of the other professional.
Corporate debtor	the appointment of the other professional.
Financial creditors	constitution of the committee of creditors.
Interim finance providers	the agreement with the interim finance provider or three days of the appointment of the other professional, whichever is later.
Prospective resolution applicants	the supply of information memorandum to the prospective resolution applicant or three days of the appointment of the other professional, whichever is later
If the relationship with any of the above comes to notice or arises subsequently	of such notice or arising.

For the purposes of the above amendments, 'relationship' shall mean any one or more of the following four kinds of relationships at any time or during the three years preceding the appointment of other professionals:

Kind of relationship	Nature of relationship
(1)	(2)
A	Where the insolvency professional or the other professional, as the case may be, has derived 5% or more of his / its gross revenue in a year from professional services to the related party.
B	Where the insolvency professional or the other professional, as the case may be, is a shareholder, director, key managerial personnel or partner of the related party.
C	Where a relative (spouse, parents, parents of spouse, sibling of self and spouse, and children) of the insolvency professional or the other professional, as the case may be, has a relationship of kind A or B with the related party.
D	Where the insolvency professional or the other professional, as the case may be, is a partner or director of a company, firm or LLP, such as an insolvency professional entity or registered valuer, the relationship of kind A, B or C of every partner or director of such company, firm or LLP with the related party.

3. An insolvency professional shall prominently state in all his communications to a stakeholder, his name, address, e-mail, registration number and validity of authorisation for assignment, if any, issued by the insolvency professional agency of which he is a member.

4. An insolvency professional shall raise bills or invoices in his name towards his fees, and such fees shall be paid to him through a banking channel.
5. An insolvency professional shall ensure that the insolvency professional entity or the professional engaged by him raises bills or invoices in their own name towards their fees, and such fees shall be paid to them through banking channels.
6. An insolvency professional shall not include any amount towards any loss, including the penalty, if any, in the insolvency resolution process cost or liquidation cost, incurred on account of non-compliance of any provision of the laws applicable to the corporate person while conducting the insolvency resolution process, fast track insolvency resolution process, liquidation process or voluntary liquidation process, under the Code.

B. Discussion Paper on changes in the corporate insolvency resolution process to reduce delays and improve the resolution value dated 27th June 2022(Awaits Notification):-

The Code provides for insolvency resolution of corporate firms in a time-bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and to balance the interests of all the stakeholders. The objective of the Code, inter alia, is to maximize the value of assets of the CD, timely completion can only be achieved if the processes are completed according to the model timelines and the stakeholders actively cooperate with each other for the achievement of objectives of the Code. The proposed amendments would aid in faster completion of processes, remove ambiguities, and aid and facilitate IPs thereby increasing value and realisation for stakeholders. The proposed amendments would also balance the interest of stakeholders.

1. Change in timelines for activities under CIRP

Regulation 40A of the CIRP Regulations provides the timelines for activities in a CIRP. At present, timelines are seemingly presented in a linear manner creating a false impression that the activities are to be performed in a sequential manner. However, on the basis of finer analysis, various activities can be sub-divided into the following broad categories and a number of such activities can be done in parallel, such as Claims related activities (like claim filing and collation, formation of CoC etc.), Assets related activities (like the appointment of valuers, getting valuation determined), Activities related to identifying prospective resolution applicants (RAs) (Invitation and submission of EOI, finalization of the list of RAs after dealing with objections to preliminary list), Activities related to avoidance transactions (forming opinion, determination and filing of the application before AA), Activities requiring

information collection (Preparation of IM, Issue of RFRP, IM, receipt and examination of resolution plans).

2. *Guiding factors for the CoC to decide on early liquidation*

There are several CIRPs in which the CD is defunct and has no assets or insignificant assets, in extreme cases, there is no office or premises, and the CD exists only on paper. In such cases, the RP and the creditors have no option but to liquidate the CD. However, in most cases, the RP attempts a resolution before filing for liquidation orders. This forces the conduct of the CIRP where the chances of resolution do not exist and imposes a cost on the creditors in paying the RP and other process costs. It also delays the liquidation process and leads to a loss of value of the assets of the CD. In order to avoid such situations and to enable the CoC to arrive at an early decision, the IBBI has proposed that the CoC may take into consideration certain factors in deciding on liquidation during the early stages of CIRP, such as the CD being defunct or non-operational for 3-5 years, product/service offered is obsolete, the technology employed is obsolete, lack of intangible assets like brand value, intellectual property, accumulated losses/depreciation, investments that are yet to mature etc. Other factors may also be included. Deliberation on these factors may form part of the recommendation of liquidation made to the AA.

3. *Dealing with assets provided through a personal guarantor as part of the CIRP of the CD*

In many CIRPs the factory or the project is built and the plant and machinery of the CD are laid on land that belongs to a third party, through a lease agreement that provides the right to use to the CD for a specified amount of time. The law enables that such right to use can be transferred to the resolution applicant through an approved resolution plan. However, since the land belongs to a related party of the CD/promoter, the resolution applicants are hesitant to come forward as the right to use may be contested or denied at any time or litigated on frivolous grounds by the third party. This has disincentivised several resolution applicants in proposing plans even for viable CDs. Such cases have proven very difficult to resolve as the land is not part of the resolution estate. In order to avoid such a situation, the IBBI has proposed that the assets belonging to promoters/guarantors without which meaningful resolution of CD is not possible, and which are already mortgaged/charged to creditors for securing the loan of the CD can be made part of the resolution estate with the consent of the mortgagee/charge holder (creditor).

4. Discussion of valuation report with CoC

The CIRP Regulations expressly provide that the valuation report be shared with the CoC when the resolution plans have been received. Till such stage, the CoC has limited knowledge of the valuations viz. Fair Value and Liquidation Value. They in effect decide on the eligibility criteria of PRA's and the evaluation matrix with such limited knowledge. Allowing access to the valuation reports to the CoC would enable informed deliberations and better IM. This may facilitate better price discovery for the CD. Since the CoC members provide confidentiality agreements at a later stage, the same may be obtained earlier in order to enable them access to the valuation results. This will also provide time and enable the CoC to decide if there is a need for a third valuer to be appointed. IBBI has proposed that along with RP, CoC must be given an opportunity to interact with valuers to understand their valuation methods, underlying assumptions, and justifications so that a veritable valuation is accepted. The confidentiality agreements or disclosures may be taken before the such discussion is carried out.

5. Need for repeating the valuation exercise

Fair and Liquidation value is calculated on the insolvency commencement date (ICD). However, it is possible that valuation has eroded over a period of time on account of various reasons like the COVID-19 pandemic, obsolescence of plants & machinery, stoppage of CD as a going concern etc. There are several cases where the resolution applicants are applying to withdraw the plans or modify the plans due to the change in the market situation as a long time has lapsed from the time the proposal was made. The valuers were of the view that the validity of a report extends to 6 - 9 months as beyond that the change in market conditions may not be the same as when the valuation was done. Taking into account the above views the need for repeating the valuation exercise is being explored. IBBI has proposed that The CoC may decide to repeat the valuation exercise in CIRPs where the timeline has extended beyond the mandatory 330 days due to difficult market conditions or force majeure conditions or legal stalemate.

6. Status of the CoC after approval of the resolution plan by the CoC

It has been found that approval of the resolution plan is taking considerably longer because of a large number of interlocutory applications which need to be decided before the approval of the resolution plan. At present, post approval of the resolution plan/ decision to liquidate the CD, there is no clarity as to the role of CoC. Also, after approval of the resolution plan, it has been held in a plethora of cases that the role of RP also ceases to exist, and he becomes functus officio. In reality, approval of resolution plans/ liquidation orders takes time for various reasons and in cases where the CD is a going concern the RP and the CoC are required to take major decisions. The lack

of clarity on the status of the RP and CoC during the period from submission of approval of resolution plan before AA till approval of resolution plan/ order of liquidation leads to uncertainty. In order to avoid such a situation, IBBI has come up with a proposal that The RP shall continue to conduct the CoC meetings during the period between approval of the plan by the CoC and approval by the AA. During such period he shall through the meetings keep the CoC informed on the progress on CIRP, approval of the resolution plan and confer with the CoC in all matters regarding the operations of the CD.

7. Minimum entitlement for dissenting financial creditors

The amount to be paid to dissenting financial creditors in accordance with sub-section (1) of section 53 in the event of a liquidation of the corporate debtor is a notional amount which is not known because the same can only be determined in the event of liquidation when the assets are liquidated while this is being determined when the CD is being resolved. At present, one view in the market is that the liquidation value should be taken as a proxy for the same. This is the liquidation value at the insolvency commencement date (ICD). However, the liquidation value as defined in the regulations is the value determined at the ICD and does not reflect the liquidation value which will result when the assets are liquidated which will be much later. Since the value of assets deteriorates with time and so in most cases, liquidation value as defined in regulations is higher than the actual realisation upon liquidation. This seems to create a perverse incentive for creditors to dissent to a resolution plan and receive a higher value and militates against the objective of resolution. If many FCs dissent to a resolution plan in the greed of looking for higher entitlement it may push the CD into liquidation. Thus, the amount obtained under the resolution plan is a better indicator of the present market value of the CD. This value is likely to be higher than the value realized on liquidation as in resolution the value is on the going concern basis. Hence, the resolution plan value received would be a better indicator of the market value of assets at the time rather than determination of liquidation value at the insolvency commencement date. To ensure that they get a fair deal, they need to be given out of resolution plan amount, an amount which is available to them as per waterfall. The minority financial creditors should be protected if they are being provided in the resolution plan, a value which is much less than the amount they will get as per the waterfall out of the resolution value. However, in resolution plans, sometimes operational creditors are provided amounts which are higher than their entitlements as per waterfall. Since the operational creditors are being paid higher than their entitlements, the pie for distribution to financial creditors will be less than the resolution value entitled to them as per waterfall. This may create an incentive to the dissenting financial creditors as they may get a higher amount than the payment as per the waterfall as that does not take out the excess payment

to OCs beyond the amount due as per waterfall. To overcome such a situation, IBBI has proposed that The payment to dissenting financial creditors shall be linked to the realisable amount in the event of liquidation when the resolution plan has been approved. This would be instead of the current provision of linking it to the amount due to them in the event of liquidation, which is a notional number. To protect the interest of minority dissenting financial creditors while ensuring that there is no perverse incentive to dissent, dissenting financial creditors should be paid as follows:- Distribution as per 53(1) out of [Resolution plan value – Value given to operational creditors above their entitlement as per section 53 out of Resolution plan Value].

8. Need for IRP /RP to communicate to call creditors to submit claims

It is observed that in several cases the claimant/creditors are unable to file claims due to reasons like lack of information about the CIRP. This is a common occurrence in real estate cases where the allottees are not in touch with the CD on a regular basis. However, the information regarding claimants/creditors/allottees is available with the CD. There is a need to provide timely information to creditors regarding the initiation of CIRP and the last date for filing of claims. To avoid such a situation, IBBI has come up with a provision that The IRP shall communicate the initiation of CIRP and the details of the public announcement including the last date for submission of claims to all creditors of the CD.

C. Notification No. IBBI/2022-23/GN/REG084 dated 14th June 2022 on Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons)(Second Amendment) Regulations 2022

The IBBI notified the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons)(Second Amendment) Regulations 2022 to make the process more efficient.

The key amendments are as follows:-

1. The operational creditor shall, along with application under section 9, furnish copies of relevant extracts of Form GSTR-1 and Form GSTR-3B filed under the provisions of the relevant laws relating to Goods and Services Tax and the copy of the e-way bill wherever applicable: Provided that provisions of this regulation shall not apply to those operational creditors who do not require registration and to those goods and services which are not covered under any law relating to Goods and Services Tax.

2. The personnel of the corporate debtor, its promoters or any other person associated with the management of the corporate debtor shall provide the information within such time and in such format, as sought by the interim resolution professional or the resolution professional, as the case may be.
3. The creditor shall provide to the interim resolution professional or resolution professional, as the case may be, the information in respect of assets and liabilities of the corporate debtor from the last valuation report, stock statement, receivables statement, inspection reports of properties, audit report, stock audit report, title search report, technical officers report, bank account statement and such other information which shall assist the interim resolution professional or the resolution professional in preparing the information memorandum, getting valuation determined and in conducting the corporate insolvency resolution process.
4. If the two estimates of a value in an asset class are significantly different, or on receipt of a proposal to appoint a third registered valuer from the committee of creditors, the resolution professional may appoint a third registered valuer for an asset class for submitting an estimate of the valuation.
5. Resolution Plan must provide for the manner in which proceedings in respect of avoidance transactions, if any, under Chapter III or fraudulent or wrongful trading under Chapter VI of Part II of the Code, will be pursued after the approval of the resolution plan and the manner in which the proceeds, if any, from such proceedings shall be distributed.

D. Discussion Paper on enabling entities to become insolvency professionals dated 14th June 2022(Awaits Notification)

The Insolvency and Bankruptcy Code, 2016 (Code) provides for a class of regulated professionals, namely, insolvency professional who plays an important role in the resolution of corporate debtors (CDs) in distress. The Code envisages the resolution of stressed entities in a time-bound manner so as to ensure the maximisation of the value of assets. A key feature of such insolvency resolution is the endeavour to keep the company in going concern condition i.e., the company remains operational, while it is getting resolved. The continued business operation of the company helps in the protection of the interests of all stakeholders and also ensures that the company remains attractive to willing buyers when the insolvency resolution process is being carried on. Section 25 of the Code casts the duty of continued business operations of the stressed company on Resolution Professional. This is in addition to various other functions performed by him under the Code and regulations, to enable orderly resolution of the company. A resolution professional acts as a crucial pillar, on which the fate of the corporate debtor rests. It is noteworthy to mention that in normal situations, the board of directors perform crucial functions for a company. During insolvency resolution under the Code, the existing board of directors is

suspended, and the resolution professional takes on that role which involves the performance of multifarious activities. The regulations provide for only professionally qualified and adequately experienced persons to be registered as Insolvency Professionals. However, ensuring continued business operations of a stressed company is an onerous job and it may not be possible for a single professional to take on the multi-task activities of the board of directors, along with other important insolvency resolution process functions, that too in a time bound manner. It has been observed that to fulfil their duties under section 25 of the Code, the resolution professional tends to outsource his functions to other persons such as Insolvency Professional Entities, Process advisors etc. The supporting entities are often not under any strong regulatory framework. Accordingly, it is not possible to fix accountability on unregulated entities.

In the aforesaid background, a need is felt to revisit the policy of allowing only individuals to be registered as insolvency professionals. The institution of insolvency professionals can be strengthened by widening the eligible category of persons to include other juristic persons as well. Thus, in addition to individuals, entities (a company, limited liability partnership, registered partnership firms) may also be allowed to get enrolled, registered and act as insolvency professionals. An entity working as a resolution professional, with all its paraphernalia of resources and experience, would enhance the efficiency of the insolvency resolution process and deliver better outcomes.

Thus, to offer multi-pronged benefits to the insolvency landscape and to bring forth the benefits of a stronger governance system as well as for better conduct of the processes owing to the resourcefulness and corporate governance and risk management mechanisms, IBBI has come up with a significant proposal

i. to allow the existing IPEs to become IPs since they have the infrastructure and requisite exposure to providing support services to IPs,
ii. existing IPEs, after seeking registration as IPs, may also continue to provide support services to IPs.

E. Discussion Paper on Streamlining the Liquidation Process dated 14th June 2022(Awaits Notification)

1. *Streamlining the Constitution of SCC*

Regulation 31A of the Liquidation Regulations provides that an SCC shall be constituted within 60 days from LCD, to advise the liquidator on matters relating to (a) appointment of professionals and their remuneration under regulation 7 and (b) sale under regulation 32. The decision(s) taken by the liquidator prior to the constitution of SCC shall be placed before SCC in its first meeting, for information. However, the liquidator takes significant decisions related to appointment (including that of valuers) and sale of assets

in the first 60 days (i.e., before the constitution of SCC), and mandates such decisions to be placed before the committee on an ex-post basis weakens the accountability of liquidator. Further, the present composition of SCC includes representatives of all classes of stakeholders, irrespective of the amount of their claims (in proportion to total claims against the CD). In order to avoid such situation, IBBI has proposed that the CoC as constituted during CIRP on the basis of admitted claims shall function as SCC during the liquidation process with the voting share of members of SCC being the same as that in the CoC. The stakeholders who are part of CoC without voting rights will be part of SCC without voting rights. The liquidator shall convene the first meeting of SCC within seven days of the liquidation commencement date. After adjudication of claims received during the liquidation process and within 60 days of the liquidation commencement date, the composition of the SCC will be changed with stakeholders having voting rights in proportion to the share of payments they will receive as per the waterfall mechanism in Section 53 if the liquidation value as per the latest valuation available is taken as the proceeds for sale. In case, any valuation is undertaken subsequently, the voting rights of the stakeholders may be revised accordingly.

2. *Relinquishment of Security Interest by Secured Financial Creditors*

Regulation 21A (1) of the Liquidation Regulations provides that where a secured financial creditor does not intimate its decision regarding relinquishment of its security interest within thirty days from the LCD, the assets shall be presumed to be part of liquidation estate. However, it is experienced by the liquidator that intimation of relinquishment is generally communicated belatedly piecemeal resulting in a delay in the auction process. Hence IBBI has proposed that A secured creditor shall intimate its decision regarding the realisation or relinquishment of its security interest under section 52 of the Code, in the first meeting of the SCC itself (instead of the currently mandated 30 days from liquidation commencement date). Where a secured creditor does not intimate its decision in the first meeting, the assets covered under the security interest shall be deemed to be part of the liquidation estate. Further, if a secured creditor decides not to relinquish its security interest, such creditor shall not be part of the SCC and the voting share of remaining members of the SCC shall be modified accordingly.

3. *Replacement of Liquidator*

At present, there is no provision like section 27 to provide for the replacement of the liquidator during the liquidation process. To further empower the stakeholders during the liquidation process, IBBI has proposed that the SCC may, by a majority vote of not less than sixty-six per cent, present and voting, propose the replacement of the liquidator and it shall file an application

before the Adjudicating Authority for appointment of the proposed liquidator.

4. *Valuation*

Regulation 35 of the Liquidation Regulations provides that the liquidator shall either consider the valuation as conducted during the CIRP or appoint valuers for fresh valuation if required under the circumstances, within seven days of the LCD. However, there are several problems with the present arrangement of valuation during the liquidation process. Firstly, though the Liquidation Regulations provide that the liquidator shall consider the valuation as conducted during the CIRP and conduct fresh valuation if required under the circumstances, it has been observed the liquidators are opting for fresh valuation in majority of liquidation cases. Secondly, the actual realisation from sale depends more on the marketing efforts by the liquidator, extent of market participation resulting therefrom during the auction and transparency of the process, rather than the reserve price, which only acts as the benchmark for conducting an auction. In this regard, IBBI has come up with a proposal that the liquidator shall consider the valuation report as arrived at during the CIRP for conducting an auction. However, where the liquidator is of the opinion that fresh valuation is required, he shall seek the advice of SCC for the same and such valuation may be considered for subsequent auctions.

5. *Events-based timelines of Auction*

Accurate value discovery plays a crucial role in matching the supply and demand of stressed assets in the market, and the auction is an effective mechanism for determining such value in a fair and transparent manner. Regulations 33(1) of Liquidation Regulations stipulates that the liquidator shall ordinarily sell the assets of the CD through an auction in the manner specified in Schedule I. Schedule I, inter alia, mentions a detailed mechanism for auction including marketing strategy for the sale of assets, terms and conditions of sale, mode of auction (electronic or physical), etc. to be adhered to by the liquidator. Schedule I of the Liquidation regulations, however, does not specify any timelines from the issue of public notice of auction to the date of auction. Taking unfair advantage of this regulatory gap, liquidators in some processes have conducted e-auction within an unreasonably short period of 5-6 days, despite the nature of assets requiring a much larger timeframe. Such an act has limited market participation in auction leading to either failure of auction or sale of assets to a buyer, pre-identified in an unfair manner, thereby compromising transparency and fairness of the process. To overcome such a situation, IBBI has proposed events-based timelines with an overall limit of 35 days. Further, the first auction notice, for sale of corporate debtor as a going concern or in other manner, may be issued within 45 days

from LCD subject to the process of compromise or arrangement under Regulation 2B being not pending. If the first auction notice has been issued for the sale of the corporate debtor as a going concern only, it is proposed that the second auction notice shall also include the possibility of selling the assets in other manner(s) though it may give an option of selling CD as a going concern as well. IBBI has also proposed that in the event of failure of an auction, the successive auction notice shall be issued within the next 15 days of a failed auction (while following the foregoing events-based timeline) unless the SCC agrees to an extension of this timeline, on the specific ground(s).

6. *Treatment of Avoidance Applications*

Regulation 44 of the Liquidation Regulations provides that the liquidator shall liquidate the corporate debtor notwithstanding the pendency of any application for the avoidance of transactions. Thus, the liquidation proceeding or dissolution of the CD or closure of the process should not be held up even if the matters relating to avoidance transactions are yet to be disposed of. By giving clarity on the treatment of such proceedings after the dissolution of the CD/closure of the process, IBBI has proposed that Before the filing of an application of dissolution or closure of the process by liquidator, SCC shall decide the manner in which proceedings in respect of avoidance transactions or fraudulent or wrongful trading, if any, will be pursued after the closure of liquidation proceedings and the manner in which the proceeds, if any, from such proceedings shall be distributed. This decision shall be part of the final report filed before the AA.

F. Discussion Paper on Remuneration of an Insolvency professional dated 9th June 2022 (Awaits Notification)

This paper deals with the issue of the fee of an insolvency professional (IP) acting as an interim resolution professional (IRP)/ resolution professional (RP) in the corporate insolvency resolution process (CIRP) who has a significant role in ensuring the timely completion of the CIRP in addition to the indispensable role played by each stakeholder including the Adjudicating Authority (AA), the committee of creditors (CoC), resolution applicants, etc. To this end, the paper suggests changes to the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations).

The fixed fee structures (with floor fees) for IPs would help avoid disputes between the parties and save the considerable time of parties involved as well as an AA in dealing with litigations in relation to fees payable to IP. It will ensure a certain minimum amount of payment of fees to the IP for the

services rendered by him. Also, incentivisation of IPs would help achieve the core objectives of the Code such as timely resolution and value maximisation. Further, the escrow account mechanism would also help eliminate the uncertainty of payment of fees to IP. Hence, IBBI has come up with the following proposals with regard to the above: -

1. *Fixed Fee Structure*

It is proposed that the fixed fee structure, as given in the table below, be considered as reasonable fee for an IP acting as IRP/RP, in CIRP for the period from his appointment till the submission of the CoC-approved resolution plan before AA. This would be the minimum (floor) fees payable to the IP, and applicants/CoC shall remain free to consider a higher amount of fees for IP, depending on the merits of the case.

Fee of IP in CIRP –Fixed Fee (Minimum) Per Month

Quantum of Claims Admitted	^Fee (Rs. Lakh)
(i) <= Rs. 50 crore	1.50
(ii) > Rs.50 crore < = Rs.100 crore	2.00
(iii) > Rs.100 crore < = Rs.500 crore	2.50
(iv) > Rs.500 crore < = Rs.1,000 crore	3.00
(v) > Rs.1,000 crore < = Rs.2,500 crore	3.50
(vi) > Rs.2,500 crore < = Rs.10,000 crore	5.00
(vii) > Rs.10,000 crore	7.50

^Payable from his appointment till submission of CoC-approved resolution plan to AA. CoC may also decide the fee of an IP for the period from submission of CoC approved resolution plan to AA till approval of the resolution plan by the AA or passing of an order for liquidation by the AA.

2. *Performance-linked Incentive Fee*

a. Performance-linked fee structure for timely resolution

It is proposed that the variable fee structure as given in the table below, be considered reasonable for IP who has completed CIRP on time.

Performance Linked fee structure for timely completion of CIRP

^^Timelines	Fee as % of actual realisable value*
(i) <= 180 days	1.00
(ii) > 180 days < = 270 days	0.75
(iii) > 270 days < = 330 days	0.50
(iv) > 330 days	0.00

^^Covering the period from Commencement of CIRP and appointment of IRP [u/s 16(1) of the Code] till submission of CoC approved Resolution Plan to AA [under regulation 39(4) of CIRP Regulations]

**Subject to a maximum amount not exceeding Rs.5 crore, and actual payment to be made only upon approval of resolution plan by AA [u/s 31(1) of the Code].*

b. Performance-linked fee structure relating to Value Maximization

It is proposed that a variable fee calculated at the rate of 1% of the positive difference between the actual realisable value and fair value subject to a maximum amount not exceeding Rs.5 crore, be considered as a reasonable amount for incentivising IPs who have facilitated the value maximisation. However, said performance-linked fee is indicative in nature, and CoC may devise any other incentive structure, or it may decide not to give such incentive.

As mentioned earlier, the fiduciary duties of fixation of fee of IP lie with the applicant / CoC. Similarly, in addition to fixation of fees, the applicant/CoC, being the beneficiaries of the services of IP are also bound to ensure that amounts payable to IP are in fact paid. It, therefore, becomes necessary to provide an escrow account mechanism to ensure certainty of payment of fees to IP.

IP shall in the first meeting of CoC give an estimate of fixed fee and expenditure on the hiring of other professionals/support services etc. to the CoC. For the said estimate of fees and expenses pertaining to the first six months period, CoC shall either contribute to an escrow account or obtain the interim finance, towards the same.

3. *Escrow Account*

An insolvency professional shall create an escrow account in the name of the corporate debtor, in respect of his fee, and fee for the resolution professional, immediately on his appointment as an interim resolution professional. The applicant or the committee, as the case may be, shall deposit in the escrow account, or alternate arrangements for interim finance for depositing in the escrow account, the amount fixed under regulation 34A within 72 hours of submission of the statement by the insolvency professional. The interim resolution professional or the resolution professional shall be eligible to withdraw the amount deposited in the escrow account towards his fee and shall provide the details of withdrawals to the committee in the statement prepared under regulation 34A. The remaining amount, if any, in the escrow account shall be released upon approval of the resolution plan under section 31 or passing of an order for liquidation of the corporate debtor under section 33.

G. Notification No IBBI/2021-22/GN/REG/080 dated 9th February 2022 on Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Amendment) Regulations, 2022

In the said notification, the key amendments are as follows: -

I. Meetings of the committee.

1) A resolution professional may convene a meeting of the committee as and when he considers necessary.
2) A resolution professional may convene a meeting if he considers it necessary, on a request received from members of the committee and shall convene a meeting if the same is made by members of the committee representing at least thirty-three per cent of the voting rights.
3) A resolution professional may place a proposal received from members of the committee in a meeting if he considers it necessary and shall place the proposal if the same is made by members of the committee representing at least thirty-three per cent of the voting rights.

II. Preservation of records

4) The interim resolution professional or the resolution professional, as the case may be, shall preserve copies of all such records which are required to give a complete account of the corporate insolvency resolution process.
5) Without prejudice to the generality of the obligations under sub-regulation (1), the interim resolution professional or the resolution professional, as the case may be, shall preserve copies of records relating to or forming the basis of: -
    a. his appointment as interim resolution professional or resolution professional, including the terms of appointment;
    b. handing over / taking over of the assignment;
    c. admission of corporate debtor into corporate insolvency resolution process;
    d. public announcement;
    e. the constitution of the committee and meetings of the committee;
    f. claims, verification of claims, and list of creditors;
    g. engagement of professionals, registered valuers, and insolvency professional entity, including work done, reports etc., submitted by them;

h. information memorandum;
i. all filings with the Adjudicating Authority, Appellate Authority and their orders;
j. invitation, consideration and approval of the resolution plan;
k. statutory filings with Board and insolvency professional agencies;
l. correspondence during the corporate insolvency resolution process;
m. insolvency resolution process cost; and
n. preferential, undervalued, extortionate credit transactions or fraudulent or wrongful trading.

6) The interim resolution professional or the resolution professional shall preserve:
   a. electronic copy of all records (physical and electronic) for a minimum period of eight years; and
   b. a physical copy of records for a minimum period of three years;

from the date of completion of the corporate insolvency resolution process or the conclusion of any proceeding relating to the corporate insolvency resolution process, before the Board, the Adjudicating Authority, Appellate Authority or any Court, whichever is later.

7) The interim resolution professional or the resolution professional shall preserve the records at a secure place and shall be obliged to produce records as may be required under the Code and the Regulations.

Explanation - The records referred to in this regulation include records pertaining to the period of a corporate insolvency resolution process during which the interim resolution professional or the resolution professional acted as such, irrespective of the fact that he did not take up the assignment from its commencement or continue the assignment till its conclusion.

Disciplinary action against Insolvency Professionals

Name of Insolvency Professional	Contravention	IBBI Comments and Learning from the Contravention
Mr. Mudappallur Varieth Gangadharan..... Order dated 28th July 2022	It is observed that after discussing various agendas listed for discussion in the 10th CoC meeting held on 7th August 2020, resolutions including one for Mr. Mudappallur Varieth Gangadharan's appointment as Liquidator were put for e-voting. It is, however, observed that Mr Gangadharan abruptly suspended/terminated the e-voting before the scheduled closure and before all the financial creditors could vote, on the ground, inter-alia, that one of the CoC members wanted to appoint another insolvency professional as liquidator.	Regulation 26 of CIRP Regulations requires a resolution professional to provide each member of the committee the means to exercise its vote by either electronic means or through the electronic voting system in accordance with the provisions of this Regulation. Further, regulation 25(5) of CIRP Regulations, inter-alia, requires resolution professional to seek a vote of the members who did not vote at the meeting on the matters listed for voting, by the electronic voting system in accordance with regulation 26 where the voting shall be kept open for at least twenty-four hours from the circulation of the minutes. The act of Mr. Mudappallur Varieth Gangadharan to terminate the voting is premature when an agenda bearing his interest was being considered and is mala-fide in nature. Termination of the e-voting facility for the 10th CoC meeting as accepted by Mr. Gangadharan on the ground that one of the CoC members wanted to appoint another IP as liquidator does not appear to be in consonance with provisions of the Code. Thus, the DC is of view that Mr. Mudappallur Varieth Gangadharan has contravened provision of Regulation 25(5) & 26 of the CIRP Regulation and clauses 1, 2, 3, 5 and 14 of the Code of Conduct. The DC, in the exercise of the powers conferred under section 220 of the Code read with Regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016 and Regulation 13 of the IBBI (Inspection and Investigation) Regulations, 2017 suspended the registration of Mr. Gangadharan for a period of one year.

Name of Insolvency Professional	Contravention	IBBI Comments and Learning from the Contravention
Mr. Gonugunta Murli.....Order dated 22nd July 2022	(1) Mr Murli has not submitted Form I and Form II on time. Board Circular No. IBBI/IP/013/2018 dated 12.06.2018 stipulates that Form – I and Form-II have to be submitted by the IRP within seven days of his demitting office as IRP. As Form I and Form-II have been filed by Mr. Murli with delay in respective CDs, the Board is of the prima facie view that Mr. Murli has inter alia violated Board Circular No. IBBI/IP/013/2018 dated 12.06.2018 and Clause 13 of the Code of Conduct as specified in the First Schedule of IP Regulations (Code of Conduct). Mr. Murli submitted that he has submitted Forms I and II in respective CDs within the deadline but due to technical issues the submitted forms were saved in the IPA website. He realized later that the form has not been saved therefore he submitted it once again after the deadline.	Being professional Mr. Murli should have been careful enough to ensure that all the statutory filings, as required, are filed without delay, duly saved, and uploaded at respective websites. Hence, the DC, in the exercise of the powers conferred under Section 220 of the Code read with Regulation 13 of the IBBI (Inspection and Investigation) Regulations, 2017 and Regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016 disposes of the SCN with a warning to Mr. Gonugunta Murli to be extremely careful and ensure full compliance with the provisions of the Code and Regulations made thereunder in all his assignments, well within the prescribed timelines. Mr. Gonugunta Murli is also directed to undergo a pre-registration educational course specified under regulation 5(b) of the IP Regulations from the IPA where he is registered. Mr. Murli shall not accept any new assignment under the Code till the successful completion of the pre-registration education course.
	(2) Section 25(2)(d) of the Code casts the duty on an IP to appoint accountants, legal or other professionals in the manner specified by the IBBI. Further, regulation 27 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations) provides that the resolution professional shall, within seven days of his appointment but not later than forty-seventh day from the insolvency commencement date, appoint two Registered Valuers (RV) to determine the fair value and the liquidation value of the CD in accordance with regulation 35 of CIRP Regulations. Instead of appointing the individual partners of Valuer firms as Registered valuers, Mr Murli has issued the appointment letter in the name of the Valuer firm for the valuation of Land & Building and Plant & Machinery of the Corporate Debtor.	Mr Murali should have due care in the appointment of registered valuers to conduct the valuation under the Code. It is pertinent to mention that an Insolvency Professional has the highest professional responsibility. His conduct and performance have a substantial bearing on the survival of an ailing entity. He, therefore, should endeavour to perform all his tasks with due diligence and utmost care. Hence, the DC, in the exercise of the powers conferred under Section 220 of the Code read with Regulation 13 of the IBBI (Inspection and Investigation) Regulations, 2017 and Regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016 disposes of the SCN with a warning to Mr. Gonugunta Murli to be extremely careful and ensure full compliance with the provisions of the Code and Regulations made thereunder in all his assignments, well within the prescribed timelines. Mr. Gonugunta Murli is also directed to undergo a pre-registration educational course specified under regulation 5(b) of the IP Regulations from the IPA where he is registered. Mr. Murli shall not accept any new assignment under the Code till the successful completion of the pre-registration education course.

Name of Insolvency Professional	Contravention	IBBI Comments and Learning from the Contravention
Mr. Anil Tayal.....order dated 20th July 2022	This is with regards to the appointment of a third party for claim collation and verification. The IRP has appointed two firms for the collation/verification of claims.	According to Section 18(1)(b) of the Code, IRP should receive and collate all the claims submitted by creditors to him pursuant to the public announcement. Further, regulation 13(1) of CIRP Regulations states that the IRP/RP should verify every claim, as on the insolvency commencement date (ICD), within seven days from the last date of the receipt of the claims, and thereupon maintain a list of creditors containing names of creditors along with the amount claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims, and update it. Hence, the duty to verify and collate claims is cast upon IRP/RP. IBBI circular No. IP/003/IBBI dated 03.01.2018 requires that a resolution professional shall not outsource any of his duties and responsibilities under the Code. IBBI has referred to various circulars such as Circular No. IP/003/2018 dated 03.01.2018, Circular No. IBBI/IP/013/2018 dated 12.06.2018 and judgement of Apex Court in the matter of Committee of Creditors of Essar Steel India Limited Through Authorised Signatory Vs. Satish Kumar Gupta & Ors. (Civil Appeal No. 8766-67 of 2019) and mentioned that Mr. Tayal cannot outsource his duties as IRP/RP. Further, the expenses should be reasonable in corelation to the work done. However, a lenient view is warranted in light of availability of CoC approval on engagement and associated cost.

Name of Insolvency Professional	Contravention	IBBI Comments and Learning from the Contravention
Mr. Dilip Kumar Niranjan.....order dated 13th July 2022	(1) This is with regards to the Incorrect application of the law for determining voting results. On perusal of minutes of 1st and 2nd CoC meeting, the Board observed that the voting result of creditors in class has not been determined as per section 25A(3A) of the Code. In both the meetings, more than 50% of the creditors in class who took part in voting had voted in favour of a resolution regarding the appointment of RP in the CIRP of CD. As more than 50% of creditors in class taking part in voting had voted in favour of the resolution, the same should have been treated to have been voted by all the creditors in class. Further, as the creditors in class were having more than 66% of the voting share in the CoC, the agenda should have been declared as passed. However, it has been recorded by Mr. Niranjan in the minutes of the 1st and 2nd CoC that as the appointment of RP under section 22(2) of the Code required a majority vote share of 66%, the resolution is not considered to be passed. It is thus evident that Mr. Niranjan has failed to maintain and upgrade his professional knowledge required under clause (10) of the Code of Conduct of IP Regulations resulting in incorrect application and interpretation of provisions of the Code. In view of the above, the Board is of prima facie view that he inter alia violated section 25A(3A), 208(2)(a) and 208(2)(e) of the Code, regulations 7(2)(a), 7(2)(h) of IP Regulations and clause 10 of Code of Conduct of IP Regulations.	As per section 25A (3A) of Code, the Authorised Representative (AR) shall cast his vote on behalf of all the Financial Creditors (FCs) he represents in accordance with the decision taken by a vote of more than 50% of the voting share of the FCs he represents, who have cast their vote. Mr. Niranjan has confused himself between the application of relevant provision with respect to voting share with respect to creditors in a class. Mr. Niranjan erroneously applied section 22(2) of the Code for calculating voting share of FCs while there is a specific provision for calculating voting share in the case of the creditor in a class ie section 25A(3A) of the Code on which jurisprudence has also been settled by the Hon'ble Supreme Court. Hence DC finds that Mr. Niranjan has violated section 25(3A), 208(2)(a) and (e) of the Code, regulations 7(2)(a), 7(2)(h) of IP Regulations, and clause 10 of the Code of the Conduct of IP Regulations.

Name of Insolvency Professional	Contravention	IBBI Comments and Learning from the Contravention
Mr. Dilip Kumar Niranjan.....order dated 13th July 2022	(2) This is with regards to the violation of timelines. Mr. Niranjan was IRP of CD for 295 days from 05.09.2019 till AA replaced him vide order dated 26.06.2020. Despite the prolonged tenure, he did not prepare Information Memorandum (IM) and failed to publish form G. It is also observed that the Registered Valuers (RV) have been appointed only on 19.11.2019 i.e. after 75 days of insolvency commencement date (ICD) as against the requirement of within 47 days of ICD. Further, the cost disclosure in the form I was submitted to ICSI-IIP, Insolvency Professional Agency (IPA), on 08.03.2021 i.e. after 248 days of demitting office. In view of the above, the Board was of prima facie view that Mr. Niranjan inter alia violated section 208(2)(a) and 208(2)(e) of Code, regulation 17(3) and 40A of CIRP Regulations, regulation 7(2)(a), 7(2)(h) of IP Regulations and clause 13 of Code of Conduct of IP Regulations.	Mr. Niranjan has not acted swiftly in obtaining documents from the suspended directors and filing application section 19(2) of the Code which led to delay in performing his statutory duties as IRP like preparation of IM, publishing of form G. He delayed appointment of registered valuers and gave no reason for the delay in filing cost disclosure in form I to IPA. Hence DC finds that Mr. Niranjan has violated sections 208(2)(a) and 208(2)(e) of Code, regulation 17(3) and 40A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations), regulation 7(2)(a), 7(2)(h) of IP Regulations and clause 13 of Code of Conduct of IP Regulations.

Name of Insolvency Professional	Contravention	IBBI Comments and Learning from the Contravention
Mr. Dilip Kumar Niranjan.....order dated 13th July 2022	(3) This is with regards to inflation of the Professional fee charged by the Resolution Professional. There was no progress in CIRP for six months. The delay in the progress of CIRP is attributable to litigation caused by incorrect computation of voting result first for the appointment of Mr. Niranjan as RP and later for his replacement with another IP. This delay led to inflation of the fees claimed by him. The fee is unreasonable considering that there was no progress in CIRP for six months out of 9 months and 20 days for which Mr. Niranjan worked as IRP and RP as observed by Hon'ble AA.	Mr. Dilip Kumar Niranjan should have been more careful and vigilant in conducting the CIRP and should have been cautious and prompt in discharging his duties as an IRP of the CD. The Code, like any other economic law, is evolving over period. The jurisprudence around home buyers is also being fortified on a continuous basis. Considering the factual position, the fees claimed by Mr. Niranjan is usurious in corelation to the task performed by him and progress in CIRP. If such fees are allowed to be accepted, it will lead to a wrong precedent for the whole profession of IP. Hence DC finds that Mr. Niranjan has violated section 208(2)(a), 208(2)(e) of Code, regulation 7(2)(a), 7(2)(e) of IP Regulations, clause 25 of Code of Conduct. DC directs that Mr. Dilip Kumar Niranjan shall not be paid remaining fee as it stands forfeited. DC directs that Mr. Dilip Kumar Niranjan shall (i) undergo pre-registration educational course specified under regulation 5(b) of the IP Regulations from the IPA where he is registered and (ii) work for at least six months as an intern with senior insolvency professional.

Name of Insolvency Professional	Contravention	IBBI Comments and Learning from the Contravention
Mr. Mahender Kumar Khandelwal.....order dated 13th July 2022	(1)This is with regards to payment made by the erstwhile management during CIRP. It was observed that there were certain OCs who did not file their claims but were paid some amounts from the account of CD. The DC notes that payments were made by the suspended management after the ICD to some creditors who subsequently did not file their claims. The DC also notes the submission made by Mr. Mahender Kumar Khandelwal that certain outstanding payments of the OC were made by the erstwhile management of the CD in the ordinary course of business between the ICD and the date of the RP taking over the operations of the CD.	RP is duty bound under section 18(1)(f) of the Code to take control and custody of assets of the CD. However, Mr. Mahender Kumar Khandelwal neither took control of the assets of the CD after the ICD nor he had taken the appropriate action against the suspended management for making the said payments after ICD in violation of section 14 and section 17 of the Code. Mr. Mahender Kumar Khandelwal should have taken over control of the assets of the CD in time. Mr. Mahender Kumar Khandelwal should have initiated appropriate proceedings for violation of section 14 section 17 of the Code against the suspended directors.

Name of Insolvency Professional	Contravention	IBBI Comments and Learning from the Contravention
Mr. Mahender Kumar Khandelwal.....order dated 13th July 2022	(2) This is with regards to an IP continuing to run the affairs of the CD in the capacity of the Monitoring Professional after approval of the resolution plan. The Code of Conduct specified in the First Schedule of IP Regulations inter alia provides that an IP should maintain confidentiality and avoid conflict of interests. This is done with an intent to enhance the credibility of the ecosystem under the Code. Further, to ensure that the direct or indirect interest of an IP must not compromise the interests of the stakeholders, Clause 23A of the said Code of Conduct prohibits an IP from rendering professional services to stakeholders, 'other than services under the Code', till the expiry of one year from cessation of the CIRP handled by an IP. Thus, within the said restraint period the IP can accept only those activities that are permitted under section 208 of the Code and clause 23A of the Code of Conduct. Mr. Mahender Kumar Khandelwal had become part of the Monitoring Committee and failed to abide by the said Code of Conduct under Clause. Mr Khandelwal has submitted that the appointment of the Resolution Professional as the Monitoring Professional and member of the Steering Committee was envisaged in terms of the Resolution Plan for the Corporate Debtor, which was approved by the Hon'ble NCLT in terms of Section 31 of the Code and was binding on all stakeholders. Mr. Mahender Kumar Khandelwal submitted that his appointment as part of the Monitoring Professional was envisaged under the Resolution Plan solely for the purpose of facilitating the implementation of the resolution plan and ensuring a smooth takeover by the successful resolution applicant. Such continuation of appointment as a Monitoring Professional to facilitate implementation is not barred under the provisions of the Code and has in fact, been the general practice under various resolution plans at the time of their implementation post approval by the Ld. NCLT.	Mr. Mahender Kumar Khandelwal had become part of the Monitoring Committee and failed to abide by Clause 23A of the said Code of Conduct which prohibits an IP from rendering professional services to stakeholders, 'other than services under the Code', till the expiry of one year from cessation of the CIRP handled by an IP. Mr Khandelwal's appointment as part of the Monitoring Professional and member of the Steering Committee was envisaged in terms of the Resolution Plan for the Corporate Debtor, which was approved by the Hon'ble NCLT. However, the fact remains evaluation of the plan was rested with CoC headed by him. There is no documentary evidence to suggest that he, at any point in time, apprised the CoC about this condition as included in the resolution plan of the SRA, being violative of the provision of the Code. It was his duty under section 30 of the Code to ensure that the resolution plan does not contravene any provision of the Law. His failure to do so casts doubt on his intentions when seen in conjunction with the fact that he was the beneficiary of such omission. Hence the DC suspended the registration of Mr Khandelwal for a period of two years. (A Stay has been provided by the Hon'ble High Court, New Delhi as per writ filed).

Name of Insolvency Professional	Contravention	IBBI Comments and Learning from the Contravention
Mr. Sunil Kumar Agarwal.....order dated 5th July 2022	This is with regard to the failure to file an avoidance application. It is observed that Mr. Sunil Kumar Agarwal appointed transactional auditors vide engagement letter dated 18.03.2020, to conduct the transaction audit of the CD. The auditors pointed out undervalued transactions, transactions defrauding creditors, extortionate credit transactions and fraudulent transactions in their report. Further in the seventh CoC meeting dated 01.05.2020, conducted by Mr. Sunil Kumar Agarwal, a transaction report was discussed and CoC in the said meeting resolved to file an avoidance application before AA for necessary orders. Further, Board was also in receipt of an email dated 20.05.2020 from Mr. Sunil Kumar Agarwal intimating the Board that the application under section 66 of the Code in terms of Regulation 35A(2) of the CIRP Regulations was under filing process. It is noted from Mr. Sunil Kumar Agarwal's reply to the IA, that he did not file the avoidance application before AA since the CIRP was getting withdrawn. It is pertinent to mention that even though when such transactions were pointed out by the transaction auditors appointed by Mr. Sunil Kumar Agarwal, CoC also approved for the filing of avoidance application before AA, yet the said application was not filed before AA for necessary orders.	The Code and regulation 35A of the CIRP regulations clearly specify that the onus of filing avoidance transactions rests with the RP. For filing the same, CoC's permission is neither necessary nor a pre-condition. Therefore, Mr. Sunil Kumar Agarwal erred in his judgment in the first place to move to the CoC before filing the avoidance application. This wasted some time in between. Further, even if it is not required, the CoC's decision to file an avoidance transactions application was available to him on 01.05.2020. Thereafter, there has been a delay in preparing the application and depositing the money with the Bharatkosh for filing the avoidance transactions application. Therefore, with little effort, Mr. Sunil Kumar Agarwal was in a position to file the avoidance transactions application even before IA no. 752 of 2019 was heard. The DC hereby imposes a penalty on Mr. Sunil Kumar Agarwal equal to 50 per cent of the fee he has received during the entire period of the CIRP of the CD and directed him to undergo a pre-registration educational course from the IPA of which he is a member.

Name of Insolvency Professional	Contravention	IBBI Comments and Learning from the Contravention
Mr. Yogesh Kumar Gupta.....order dated 1st July 2022	(1)Mr. Gupta updated the list of creditors by removing those Financial Creditors (homebuyers) who have not paid their dues towards insolvency resolution process costs (IRPC).	According to section 21(2) of the Code, the CoC shall comprise all FCs of CD. Neither the Code nor any regulations made under the Code provide for any provision for exclusion of FCs from CoC for non-payment of IRPC. Mr Gupta has recorded in the minutes that an application shall be moved before AA for the removal of the name of creditors who have not paid their share towards CIRP cost and construction cost. Rather than seeking directions from AA, Mr. Gupta excluded FCs from CoC and deprived them from their rights given by the Code. This is a blatant violation of the provisions of the Code and Regulations made therein. If such kind of action is permitted, then RPs would abuse their powers by removing CoC members. Hence, the DC, in the exercise of the powers conferred under section 220 (2) of the Code read Regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016 and Regulation 13 of the IBBI (Inspection and Investigation) Regulations, 2017 suspended the registration of Mr. Yogesh Kumar Gupta for a period of three years.
	(2) Mr Gupta has incurred some expenses on construction work at Greater Noida site without approval of CoC. On being questioned about the increased expenditure on construction, Mr. Gupta stated that he is not required to obtain approval of CoC as it is a going concern, which is factually incorrect. Regulation 34 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations) requires that the committee shall fix the expenses to be incurred on or by the resolution professional and the expenses shall constitute insolvency resolution process costs.	Regulation 34 of the CIRP Regulations states that "The committee shall fix the expenses to be incurred on or by the resolution professional and the expenses shall constitute insolvency resolution process costs." Explanation provided under Regulation 34 of the CIRP Regulations clarifies that "expenses" include "other expenses to be incurred by the resolution professional." Thus, it is clear that RP has to take the approval of the CoC for the expenditure incurred to run the CD as a going concern. Hence, the DC, in the exercise of the powers conferred under section 220 (2) of the Code read Regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016 and Regulation 13 of the IBBI (Inspection and Investigation) Regulations, 2017 hereby suspends the registration of Mr. Yogesh Kumar Gupta having for a period of three years.

Name of Insolvency Professional	Contravention	IBBI Comments and Learning from the Contravention
Mr. Mahender Kumar Khandelwal..... order dated 8th April 2022	Regulation 24(7) of CIRP Regulations requires an IP to circulate the minutes of CoC meetings within 48 hours of the said meeting. However, it has been observed that out of the 6 CoC meetings conducted by Mr. Khandelwal, the minutes of 3 CoC meetings have been circulated after the expiry of period of 48 hours. Mr Khandelwal has submitted that the delay in the circulation of the minutes was unintentional. Further, the delay was duly due to a public holiday. However, considering that there were public holidays after the meetings, the minutes were circulated within 48 working hours, exclusive of the public holidays.	The resolution professional shall circulate the minutes of the meeting to all participants by electronic means within forty-eight hours of the said meeting. In the calculation of 48 hours for circulation of minutes, public holidays such as Saturday and Sunday are not countable as per this order. The DC is of the opinion that the submissions made by Mr. Khandelwal are satisfactory and no contraventions could be made out.

Glossary

NCLT	National Company Law Tribunal
NCLAT	National Company Law Appellate Tribunal
IBBI	Insolvency and Bankruptcy Board of India
IP	Insolvency Professional
COC	Committee of Creditors
CD	Corporate Debtor
FC	Financial Creditor
OC	Operational Creditor
NPA	Non-Performing Assets
IBC/The Code	The Insolvency and Bankruptcy Code,2016
FSP	Financial Service Provider
RBI	Reserve Bank of India
CIRP	Corporate Insolvency Resolution Process
AA	Adjudicating Authority
NNPA	Net Non-Performing Assets
DRT	Debts Recovery Tribunal
ARC	Asset Reconstruction Company
PSB	Public Sector Bank
IRP	Insolvency Resolution Professional
RP	Resolution Professional
IP	Insolvency Professional
BIFR	Board of Industrial and Financial Reconstructio+B6n
SICA	Sick Industrial Companies Act

Sumedha Management Solutions Pvt. Ltd.

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