

Insolvency and Bankruptcy News



The Quarterly Newsletter of the Insolvency and Bankruptcy Board of India



**Balancing the
Interests of Stakeholders**

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➤ Hon'ble Minister for Finance, Corporate Affairs and Defence at National Conference on Insolvency and Bankruptcy: Changing Paradigm on 19th August 2017 at Mumbai.



Balancing the Interests of Stakeholders

The Committee of Creditors needs to act in the best interest of all the stakeholders of the corporate debtor.

A corporate is an amalgam of various stakeholders. It is expected to maximise the value of its assets and consequently the interests of all its stakeholders. However, it may not always have the motivation to maximize the value of a corporate and/or promote the interests of all stakeholders simultaneously or equitably. Therefore, the law prescribes governance norms to ensure that a corporate maximizes the value of its assets, today and tomorrow, and balances the interests of all the stakeholders, and assigns the responsibility for compliance with those norms primarily to a professional, the Company Secretary, and a custodian, the Board of Directors.

A corporate (other than a financial service provider) has broadly two sources of funds, namely, equity and debt. Usually, the equity owners control and run the corporate. The Insolvency and Bankruptcy Code, 2016 (Code), however, envisages that if they fail to service the debt, the corporate in default undergoes corporate insolvency resolution process (CIRP). An Insolvency Professional (IP) carries on the business operations of the corporate as a going concern until the Committee of Creditors (CoC) draws up a resolution plan that would keep the business of the corporate going on for ever. The Code, as stated in the long title, requires a CIRP to (a) maximise value of assets of the corporate, and (b) while doing so, balance the interests of all the stakeholders, and assigns this responsibility primarily to the IP, and the CoC comprising non-related financial creditors.

The Code maximizes the value by striking a balance between resolution and liquidation. It encourages and facilitates resolution in most cases where creditors would receive at least as much as they would in liquidation. This would happen where enterprise value is 'sufficiently' higher than the liquidation value. In such cases, resolution preserves and maximizes the enterprise value as a going concern. In the remaining cases, the Code facilitates liquidation as that maximizes the value for stakeholders.

The Code enables initiation of CIRP at the earliest, even at the very first default, when enterprise value is usually higher than the liquidation value and hence the CoC has the motivation to resolve insolvency of the corporate rather than liquidate it. It mandates resolution in a time bound manner to prevent decline in enterprise value with time, reducing motivation of the CoC to opt for liquidation. It facilitates resolution; makes a cadre of professionals available to run the corporate as a going concern; prohibits suspension or termination of supply of essential services; enables raising interim finances required for running the corporate; etc.

In contrast, the Code prohibits any action to foreclose, recover or

enforce any security interest during CIRP and thereby prevents a creditor(s) from maximising his interests. It expects the creditors to recover their default amounts collectively from future earnings of the corporate rather than from sale of its assets. In the matter of Prowess International Pvt. Ltd. Vs. Parker Hannifin India Pvt. Ltd., the NCLAT reiterated: *"It is made clear that Insolvency Resolution Process is not a recovery proceeding to recover the dues of the creditors."* Further, the Code enables a financial creditor to trigger CIRP even when the corporate has defaulted to another creditor and thereby prevents any preferential treatment to a creditor over others. In the matter of Parker Hannifin India Pvt. Ltd. Vs. Prowess International Pvt. Ltd., the NCLT observed: *"The nature of insolvency petition changes to representative suit and the lis does not remain only between a creditor and the corporate debtor."*

Resolution maximizes the value of assets of the corporate and enables every stakeholder to continue with the corporate to share its fate. All of them stand to gain or lose from resolution, while stakeholders in a category receive similar treatment. In contrast, liquidation allows satisfaction of their claims one after another. If there is any surplus after satisfying the claims of one set of stakeholders fully, the claim of the next set of stakeholders is considered. On both counts, maximization of value of assets and balancing the interests, resolution triumphs over recovery as well as liquidation in most cases.

Balancing interests under CIRP assumes significance as every corporate may not have enough resources at the commencement of CIRP to satisfy the claims of all stakeholders fully, while resolution provides an opportunity to the CoC to consider and balance their interests. In fact, the Code prescribes several balances in resolution process: repayment of at least liquidation value to operational creditors; repayment of interim finance in priority; approval of resolution plan by 75% voting power; etc.

The CIRP regulations also provide for several balances. They allow a dissenting financial creditor to exit at the liquidation value and thereby protect its interests. Many creditors, however, may not like to exit at the liquidation value. And those who exit, leave the enterprise value behind. This balances the interests of financial creditors *inter-se* while tilting the balance in favour of resolution. The regulations also require a resolution plan to include a statement as to how it has dealt with the interests of all stakeholders, including financial creditors and operational creditors, of the corporate debtor.

The judicial pronouncements require consideration of the interests of all stakeholders in a resolution. In the matter of Prowess International Pvt. Ltd. Vs. Parker Hannifin India Pvt. Ltd., the NCLAT held: *"In the circumstances, instead of interfering with the impugned order, we remit the case to the Adjudicating Authority for its satisfaction whether the interest of all stakeholders have been satisfied ..."* In the matter of Prabodh Kumar Gupta Vs. Jaypee Infratech Limited and others, the NCLT observed: *"...the position of present petitioner is undisputedly of stakeholders. Therefore, the IRP appointed by this Court in respect of the corporate debtor*

company is equally expected to consider and take care of the interests of the petitioner....”

The Legislative Guide on Insolvency Law of the United Nations Commission on International Trade Law reiterates these norms: “When a debtor is unable to pay its debts and other liabilities as they become due, most legal systems provide a legal mechanism to address the collective satisfaction of the outstanding claims from assets (whether tangible or intangible) of the debtor. A range of interests needs to be accommodated by that legal mechanism: ... Generally, the mechanism must strike a balance not only between the different interests of these stakeholders, but also between these interests and the relevant social, political and other

policy considerations that have an impact on the economic and legal goals of insolvency proceedings.”

When the fundamental aim of the Code is to facilitate recasting a corporate faltering in its debt obligations, it needs to take care of the interests of all the stakeholders with equity. The CoC, which is placed in a unique position of custodian of a corporate under CIRP, has a duty to strive for resolution, and through resolution, maximize the value of assets of the corporate and balance the interests of all the stakeholders rather than one set of stakeholders.

(Dr. M. S. Sahoo)

IBBI Updates



- Hon'ble Minister of State for Corporate Affairs and Law & Justice, Shri P. P. Chaudhary interacting with Board Members and Officers of IBBI on 21st September, 2017.

Visit of Hon'ble Minister of State for Corporate Affairs

Hon'ble Minister of State for Corporate Affairs and Law & Justice, Shri P. P. Chaudhary made a special visit to the office of the Insolvency and Bankruptcy Board of India in Mayur Bhawan, Connaught Circus, New Delhi on 21st September, 2017. He reviewed the progress made in the implementation of the Insolvency and Bankruptcy Code, 2016. He discussed various issues and the challenges being faced on the way. He emphasized the need for capacity building of various constituents of the institutional infrastructure and the financial creditors who are taking business decisions under the Code.

Strategy Meet

IBBI held its first Strategy Meet on 21st-22nd July, 2017 to draw up the Strategic Action Plan for the balance period of 2017-18 outlining the specific actions and sub-actions to achieve the desired outcomes, and evolve a broad vision for the next three years. The meet was held at the Retreat Centre of 'The Energy and Resources Institute' at Gurugram. All Members of the Governing Board and all officers of IBBI participated in the Strategy Meet. It was followed by a meeting of the Governing Board.

Disciplinary Committee

On 23rd August, 2017, IBBI reconstituted the Disciplinary Committee under section 220(1) of the Code to comprise Dr. (Ms.) Mukulita Vijayawargiya, Whole Time Member, till further orders.

Advisory Committees

Advisory Committee on Corporate Insolvency and Liquidation

IBBI reconstituted the Advisory Committee on Corporate Insolvency and Liquidation on 25th August, 2017 in pursuance of the IBBI (Advisory Committee) Regulations, 2017. Upon reconstitution, the composition of the Advisory Committee is as shown in Table 1.

Advisory Committee on Service Providers

IBBI reconstituted the Advisory Committee on Service Providers on 30th August, 2017 in pursuance of the IBBI (Advisory Committee) Regulations, 2017. Upon reconstitution, the composition of the Advisory Committee is as shown in Table 2.

Advisory Committee on Individual Insolvency and Bankruptcy

IBBI constituted the Advisory Committee on Individual Insolvency



- Board Members and Officers at the Strategy Meet held during 21st-22nd July, 2017 at the Retreat Centre of The Energy and Resources Institute, Gurugram.



➤ Meeting of the Advisory Committee on Corporate Insolvency and Liquidation held on 13th September, 2017 at Mumbai.



➤ Mr. Tapan Ray, Secretary, MCA visiting IBBI on 30th September, 2017

and Bankruptcy on 15th September, 2017 in accordance with the IBBI (Advisory Committee) Regulations, 2017. The composition of the Committee is as shown in Table 3.

Dr. (Ms.) Mamta Suri joins as Executive Director

Dr. (Ms.) Mamta Suri, who was serving as Chief General Manager at IRDAI, joined as Executive Director at IBBI on 16th August, 2017. She has obtained her Ph.D. in Finance from University of Delhi and M.Sc. (Insurance Risk and Management) from City University, London, UK. She is a Chartered Financial Analyst (CFA) from the Institute of Chartered Financial Analysts of India and she has completed graduation in law. She has also received Honorary membership for High Scholastic Achievement from USA.

Employees' Service Regulations

IBBI notified the IBBI (Employees' Service) Regulations, 2017 on 24th

August, 2017. These regulations make provisions from recruitment of employees to termination of their services, whether by retirement, resignation or otherwise, and their compensation. A candidate needs to have a professional qualification for direct recruitment and is preferred if he has passed the Limited Insolvency Examination.

Internship Guidelines

IBBI notified the IBBI Internship Guidelines, 2017 on 16th August, 2017 to provide an opportunity of internship to students who wish to pursue a professional career in insolvency, liquidation, bankruptcy or any other related field. A student who is pursuing a five-year or three-year degree course in law or post-graduation course in Economics, Commerce, Finance, Management, or Law, and has completed the penultimate year or stage of such degree course or post-graduation course; or a student pursuing M. Phil. / Ph. D. course in Economics, Commerce, Finance, Management, or Law, is eligible to join as an intern with IBBI.

Regulations

Amendments to CIRP and Fast Track Regulations

The IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and the IBBI (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017 provided for Forms for submission of claims by operational creditors (including workmen and employees), and financial creditors. There could be claims from a creditor who is not a financial creditor or an operational creditor and who needed a specific form for submitting its claim. IBBI amended these regulations on 16th August, 2017 to provide for a form (Form F) for submission of claims by creditors other than financial and operational creditors. This would enable an interim resolution professional to receive and collate all the claims submitted by creditors to him, pursuant to the public announcement.

Amendments to Information Utilities Regulations

IBBI notified the IBBI (Information Utilities) (Amendment) Regulations, 2017 on 29th September, 2017. According to the

amended regulations, a person may, directly or indirectly, either by itself or together with persons acting in concert, hold up to fifty-one percent of the paid-up equity share capital or total voting power of an information utility up to three years from the date of its registration. An Indian company, which is (i) listed on a recognised Stock Exchange in India, or (ii) where no individual, directly or indirectly, either by himself or together with persons acting in concert, holds more than ten percent of the paid-up equity share capital, may hold up to hundred percent of the paid-up equity share capital or total voting power of an information utility up to three years from the date of its registration. However, this dispensation is available in respect of information utilities registered before 30th September, 2018. The amendment requires that more than half of the directors of an Information Utility shall be Indian nationals and resident in India.

Public Comments Invited on Regulations

IBBI has invited comments on 4th July, 2017 from the public, including the stakeholders and the regulated entities, on the following

Table 1: Advisory Committee on Corporate Insolvency and Liquidation

S. No.	Name and Position	Position in Committee
1.	Mr. Uday Kotak, Executive Vice Chairman and Managing Director, Kotak Mahindra Bank	Chairperson
2.	Mr. Ajay Piramal, Chairman of Piramal Group & Shriram Group	Member
3.	Mr. Ashish Kumar Chauhan, Managing Director and CEO, BSE Limited	Member
4.	Mr. Gyaneshwar Kumar Singh, Joint Secretary, Ministry of Corporate Affairs	Member
5.	Mr. M. V. Nair, Chairman, Credit Information Bureau (India) Limited	Member
6.	Dr. Omkar Goswami, Chairperson, CERG Advisory Private Limited	Member
7.	Prof (Dr.) Ranbir Singh, Vice Chancellor, NLU, Delhi	Member
8.	Mr. R. K. Nair, Former Member, IRDAI	Member
9.	Mr. Somasekhar Sundaresan, Legal Counsel	Member
10.	Mr. J. K. Budhiraja, CEO, IPA of Institute of Cost Accountants of India	Member
11.	Mr. Virendra Ganda, President, NCLT & NCLAT Bar Association	Member
12.	Mr. Rajeev Rishi, Chairman, Indian Bank Association	Member

Table 2: Advisory Committee on Service Providers

S. No.	Name and Position	Position in Committee
1.	Mr. Mohan Das Pai, Chairman, Manipal Global Education	Chairperson
2.	Dr. Ajay N. Shah, Professor, National Institute of Public Finance and Policy	Member
3.	Dr. Bimal N. Patel, Director and Professor of Public International Law, Gujrat National Law University	Member
4.	Mr. J. Ranganayakulu, Former Executive Director, Securities and Exchange Board of India	Member
5.	Mr. K. V. R. Murty, Joint Secretary, Ministry of Corporate Affairs	Member
6.	Mr. P. R. Ramesh, Chairman, Deloitte India	Member
7.	Mr. Ravi Narain, Former Managing Director, National Stock Exchange of India Limited	Member
8.	Chief Executive Officer, ICSI IPA (Ms. Alka Kapoor)	Member
9.	President, INSOL India (Mr. Amarjit Singh Chandhiok)	Member

regulations notified under the Code:

- IBBI (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016;
- IBBI (Insolvency Professional Agencies) Regulations, 2016;
- IBBI (Insolvency Professionals) Regulations, 2016;
- IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016;
- IBBI (Liquidation Process) Regulations, 2016;
- IBBI (Information Utilities) Regulations, 2017;
- IBBI (Voluntary Liquidation Process) Regulations, 2017;
- IBBI (Fast Track Corporate Insolvency Resolution Process)

- Regulations, 2017; and
- IBBI (Inspections and Investigations) Regulations, 2007.

This is akin to crowd sourcing of ideas. This would enable every idea to reach IBBI. Consequently, the universe of ideas available with IBBI would be much larger and the possibility of a more conducive regulatory framework much higher. IBBI intends to process the comments received between 4th July, 2017 and 31st December, 2017 together, and after following the due process, modify regulations to the extent considered necessary. It will be the endeavor of IBBI to notify modified regulations by 31st March, 2018 and bring them into force on 1st April, 2018.



- Dr. Bibek Debroy, Member, Niti Aayog addressing the officers at IBBI on 13th July, 2017



- Whole Time Member, Dr. Mukulita Vijayawargiya led a delegation of IBBI officers on a study tour to London in September, 2017. Seen here in picture with Mr. Neil Cooper, Past-President, INSOL International, and Ms. Claire Broughton, CEO of INSOL International, in London.

Table 3: Advisory Committee on Individual Insolvency and Bankruptcy

S. No.	Name and Position	Position in Committee
1.	Mr. Justice B. N. Srikrishna, Former Justice, Supreme Court of India	Chairperson
2.	Mr. C. B. Bhawe, Chairperson, Indian Institute for Human Settlements and Former Chairman, SEBI	Member
3.	Professor Dipankar Gupta, Sociologist and Author	Member
4.	Mr. Prithvi Haldea, Founder Chairman, Prime Database	Member
5.	Dr. (Ms.) Poornima Advani, Former Chairperson, National Commission for Women and Advocate	Member
6.	Mr. R. V. Verma, Former CMD, National Housing Bank	Member
7.	Mr. Sanjeev Sanyal, Principal Economic Advisor, Ministry of Finance	Member
8.	Representative of Ministry of Corporate Affairs	Member
9.	CEO, Indian Institute of Insolvency Professionals of ICAI (Mr. Sunil Pant)	Member
10.	President, Society of Insolvency Practitioners of India (Mr. Sumant Batra)	Member

Technical Committee for Information Utilities

The Technical Committee constituted by IBBI on May 3, 2017 under the IBBI (Information Utilities) Regulations, 2017 under the chairmanship of Dr. R. B. Barman, submitted its first report on 16th August, 2017. This report has recommendations on 14 out of 18 matters for which technical standards are required to be laid down by IBBI through Guidelines issued under the Regulations. The technical standards will ensure and enforce the reliability, confidentiality and security of financial information to be stored by Information Utilities.

The Technical Committee consciously did not prescribe any specific choice of technology or platform, so that each IU can exercise its own choice. Instead, it recommended that the IUs adopt robust data governance standards to take care of complete integrity of the IU database. In order that a single version of truth can be established, there should be unfettered access to data among the IUs, while each IU is free to maintain its own repository of mutually exclusive and exhaustive data.

Working Group on Individual Insolvency and Bankruptcy

Following the practice of engaging stakeholders in development of the regulatory framework, IBBI constituted a Working Group under the chairmanship of Mr. A. S. Chandhok on 13th June, 2017 for recommending the strategy and approach for implementation of the provisions of the Insolvency and Bankruptcy Code, 2016 to deal with insolvency and bankruptcy in respect of (i) Guarantors to Corporate Debtors, and (ii) Individuals having Business, and drafting related Rules and Regulations. The Working Group



► A meeting of the Technical Committee for Information Utilities in progress in New Delhi.

has submitted its first report dealing with insolvency resolution process of individuals and firms on 11th September, 2017. It intends to submit a separate report for bankruptcy process of individuals and firms. Along with the first report for insolvency resolution process of individuals and firms, the Working Group has submitted (i) the draft Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Individuals and Firms) Rules, 2017, and (ii) the draft Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Individuals and Firms) Regulations, 2017. IBBI has sought public comments by 31st October, 2017 on these draft rules and regulations.

Notifications

Reconstitution of Financial Stability and Development Council

The Central Government, vide a notification in the official gazette on 18th September, 2017, modified the constitution of the Financial Stability and Development Council (FSDC) to include the Secretary, Ministry of Corporate Affairs and the Chairperson, IBBI as its Members. The Council is chaired by the Hon'ble Finance Minister and includes Governor, Reserve Bank of India; Finance Secretary and / Secretary, Department of Economic Affairs; Secretary, Department of Financial Services; Chief Economic Adviser, Ministry of Finance; Chairman, Securities and Exchange Board of India; Chairman, Insurance Regulatory and Development Authority of India, and Chairman, Pension Fund

Regulatory and Development Authority. The mandate of the Council includes dealing with issues relating to financial stability, financial sector development, inter-regulatory co-operation, financial literacy, financial inclusion, macro-prudential supervision of the economy, co-ordinating India's international interface with Financial Action Task Force, Financial Stability Board, etc.

Facilitation by SEBI

The SEBI amended the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 on 14th August, 2017 to provide exemption from open offer obligations for acquisitions pursuant



➤ A meeting of the Working Group on Individual Insolvency and Bankruptcy at New Delhi.

to resolution plans approved under the Code. It also amended the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 on the same day to exempt the preferential issue of equity shares made in terms of the resolution plan approved under the Code from norms relating to preferential issue norms such as pricing,

disclosure, etc.

Vide a circular dated 4th August, 2017, SEBI required a listed entity to disclose to stock exchanges when it has defaulted in payment of interest / instalment obligations on debt securities (including commercial paper), Medium Term Notes (MTNs), Foreign Currency Convertible Bonds (FCCBs), loans from banks and financial institutions, External Commercial Borrowings (ECBs), etc., within one working day from the date of default. However, vide a circular dated 29th September, 2017, the implementation of the circular dated 4th August, 2016 has been deferred.

Facilitation by RBI

The RBI amended the Credit Information Companies Regulation, 2006 on the 11th August, 2017 to allow Resolution Professionals to access the information with Credit Information Companies in so far as the credit information of the corporate debtor, in respect of which he has been so appointed, is concerned. The amended regulations also allow Information Utilities to access the information with Credit Information Companies as specified users.

Transactions

Corporate Insolvency Resolution Process

As of the end of September, 2017, 353 corporates were undergoing the resolution process, as shown in Table 4. The distribution of stakeholders who triggered resolution processes are given in Table 5.

First Resolution Plan

The corporate debtor (Synergies Dooray Automotive Limited) had a negative net worth at the end of March, 2004 and consequently was declared a sick company by the BIFR on 14th February 2007. With coming into force of the SICA (Repeal) Act, 2003, the proceeding before the BIFR got abated in November, 2016. The corporate debtor applied for insolvency resolution under the Code. The application was admitted on 23rd January, 2017. At the time of admission, it had total assets of Rs. 11.95 crore in books and liquidation value

of Rs. 8.17 crore. It received three resolution plans. The Committee of Creditors approved the resolution plan with 90.16% voting share while the rest abstained from voting. The plan was approved by NCLT, Hyderabad Bench on 2nd August, 2017. This was the first resolution plan approved under the Code.

The resolution plan provided for amalgamation of the corporate debtor with a related party, Synergies Castings Limited with effect from 31st March, 2017. The details of the plan are given in Table 6.

All financial creditors, whether they voted in favour of the plan or abstained from voting, received similar treatment. As compared to the outstanding financial debt of Rs. 972 crore, the outcome (recovery) of Rs. 55 crore does not appear good. As compared to the liquidation value of Rs. 8.17 crore, however, the recovery does not appear unreasonable.

Table 4: Corporate Insolvency Resolution Transactions

Quarter	No. of Corporates undergoing Resolution at the beginning of the Quarter	Admitted	Closure by			No. of Corporates undergoing Resolutions at the end of the Quarter
			Appeal / Review	Approval of Resolution Plan	Commencement of Liquidation	
Jan - Mar, 2017	0	37	1	-	-	36
Apr - Jun, 2017	36	125	10	-	-	151
Jul - Sep, 2017	151	214	3	2	7	353
Till Date	NA	376	14	2	7	353

Table 5: Initiation of Corporate Insolvency Transactions

Quarter	No. of Resolutions Processes Initiated by			Total
	Financial Creditor	Operational Creditor	Corporate Debtor	
Jan - Mar, 2017	9	7	21	37
Apr - Jun, 2017	31	59	35	125
Jul - Sep, 2017	82	101	31	214
Till Date	122	167	87	376

Table 6: Synergies Dooray Resolution Plan

Dues to	Amount Claimed / Due (Rs. crore)	Amount to be Paid (Rs. crore)	Remarks
Financial Creditors	972.15	54.69	Payments to be made in staggered manner over time.
Operational Creditors	00.23	00.01	
Government and Statutory Dues	03.89	03.89	
Total	976.27	58.59	Against Liquidation Value of Rs. 8.17 crore

Additionally, shareholders of the corporate debtor got 93,275 shares of face value of Rs.10 each, which account for 0.48% of the shares of Synergies Castings Limited.

This kind of outcome is consistent with the expectation under the Code in initial days of its implementation. The resolution process gives good outcomes when the process is initiated at the earliest and also completed at the earliest. If it is initiated very late, as happened in this case, the corporate is only worth its liquidation value, which even decays further with time. When that is not done, the resolution process yields either liquidation or abysmal recovery. The corporates coming up now for resolution committed the first default about 10-20 years ago. That is why only two corporates went for resolution while seven others went for liquidation in this quarter. A few years down the line, corporate debtors would come up for resolution at the earliest instance of default of Rs. 1 lakh, that is, when they have reasonably good health and hence the outcome then would be good.

CIRP of Jaypee Infratech

In pursuance of the authorization under the Banking Regulation (Amendment) Ordinance, 2017, the RBI directed banks to file applications for insolvency resolution under the Code in respect of 12 accounts, including Jaypee Infratech Ltd. IDBI Bank filed an application for insolvency resolution of the corporate debtor, Jaypee Infratech Ltd. before the NCLT, Allahabad Bench for an underlying default of Rs. 526.11 crore. The application was admitted and accordingly resolution commenced on 9th August, 2017.

The corporate debtor is in the business of construction of homes. Reportedly, it has taken money in instalments for delivery of homes. As on the date of commencement of resolution, it was yet to deliver homes to about 35,000 buyers, though the timeline for delivery of many homes is over. In the matter of Prabodh Kumar Gupta Vs. Jaypee Infratech Ltd., the NCLT had observed: “we feel appropriate to observe as such that the position of present petitioner is undisputedly of stakeholders. Therefore, the IRP appointed by this Court in respect of the corporate debtor company is equally expected to consider and take care of the interests of the petitioner along with other creditors/ stake holders (e.g. home/ flat buyers) and to receive/ collect their respective claims in

accordance with laws.” The law was yet to be settled as to whether home buyers are financial creditors, operational creditors or any other creditor, claimant or stakeholder, and how their interests would be dealt with, in a resolution plan. This created some unrest among home buyers and resulted in a few PILs before the Apex Court.

The first meeting of the CoC was scheduled on 8th September, 2017. However, the same could not be held as the NCLT proceedings were stayed by Apex Court vide its interim order dated 4th September, 2017 in the matter of Chitra Sharma and Ors Vs. Union of India and Ors. Vide its order dated 11th September, 2017, the Apex Court modified its order dated 4th September, 2017 directing the IRP to take over the management of the corporate debtor and to formulate and submit an interim resolution plan, which shall make all necessary provisions to protect the interests of the home buyers, within 45 days. It also directed that Mr. Shekhar Naphade, learned senior counsel along with Ms. Shubhangi Tuli, Advocate-on-Record, shall participate in the meetings of the CoC to espouse the cause of the home buyers and protect their interests. It further directed Jaiprakash Associates Limited, the holding company of the corporate debtor, to deposit a sum of Rs. 2,000 crore before the Apex Court on or before 27th October, 2017.

Thereafter, the CoC met on 19th September, 2017. In pursuance of the order of the NCLT, dated 1st September, 2017, a representative of IBBI attended the said meeting to take care of the interests of the depositors/FD holders.

Voluntary Liquidations

IBBI notified on 31st March, 2017 the IBBI (Voluntary Liquidation Process) Regulations, 2017 to enable a corporate to liquidate itself voluntarily if it has no debt or if it will be able to pay its debts in full from the proceeds of the assets to be sold under the liquidation. In pursuance to these Regulations, ten corporates had initiated voluntary liquidation proceedings by 30th June, 2017. During this quarter, 32 corporates initiated such proceedings.

Orders

This section presents a brief of select decisions of judicial and quasi-judicial bodies during the quarter July-September, 2017.

Supreme Court

Innoventive Industries Ltd. Vs. ICICI Bank and Anr. (Civil Appeal Nos. 8337-8338 of 2017)

The Hon'ble Supreme Court extensively interpreted the Code

with a message: “we thought it necessary to deliver a detailed judgment so that all Courts and Tribunals may take notice of a paradigm shift in the law. Entrenched managements are no longer allowed to continue in management if they cannot pay their debts.”

It summed up the Code: “The scheme of the Code, therefore, is to make an attempt, by divesting the erstwhile management of its powers and vesting it in a professional agency, to continue the business of the corporate body as a going concern until a resolution

plan is drawn up, in which event the management is handed over under the plan so that the corporate body is able to pay back its debts and get back on its feet. All this is to be done within a period of 6 months with a maximum extension of another 90 days or else the chopper comes down and the liquidation process begins.”

Interpreting section 17(b) of the Code, it observed: “once an insolvency professional is appointed to manage the company, the erstwhile directors who are no longer in management, obviously cannot maintain an appeal on behalf of the company. In the present case, the company is the sole appellant. This being the case, the present appeal is obviously not maintainable.”

Interpreting the non-obstante clause in section 238 of the Code, it observed: “It is clear that the later non-obstante clause of the Parliamentary enactment will also prevail over the limited non- obstante clause contained in Section 4 of the Maharashtra Act. For these reasons, we are of the view that the Maharashtra Act cannot stand in the way of the corporate insolvency resolution process under the Code.”

Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited (Civil Appeal No. 9405 of 2017)

The Hon'ble Supreme Court has settled several issues in this matter. As regards 'existence of a dispute' under section 8(2)(a) of the Code, it clarified that what is material is that a dispute must exist in fact. It should not be spurious, hypothetical or illusory and it should not be a patently feeble legal argument or an assertion of fact unsupported by evidence. It is not material whether the dispute would succeed or not and it is not necessary to examine the merits of the dispute at this stage.

As regards the word 'and' in 'existence of a dispute, if any, and record of the pendency of the suit...' under section 8(2)(a) of the Code, it clarified that 'and' must be read as 'or'. “If read as “and”, disputes would only stave off the bankruptcy process if they are already pending in a suit or arbitration proceedings and not otherwise. This would lead to great hardship; in that a dispute may arise a few days before triggering of the insolvency process, in which case, though a dispute may exist, there is no time to approach either an arbitral tribunal or a court. Further, given the fact that long limitation periods are allowed, where disputes may arise and do not reach an arbitral tribunal or a court for upto three years, such persons would be outside the purview of Section 8(2) leading to bankruptcy proceedings commencing against them. Such an anomaly cannot possibly have been intended by the legislature nor has it so been intended.”

As regards timelines for disposal of applications by NCLT and NCLAT under section 64 of the Code, it observed: “The strict adherence of these timelines is of essence to both the triggering process and the insolvency resolution process. As we have seen, one of the principal reasons why the Code was enacted was because liquidation proceedings went on interminably, thereby damaging the interests of all stakeholders, except a recalcitrant management which would continue to hold on to the company without paying its debts. Both the Tribunal and the Appellate Tribunal will do well to keep in mind this principal objective sought to be achieved by the Code and will strictly adhere to the time frame within which they are to decide matters under the Code.”

Surendra Trading Company Vs. Juggilal Kamlatpat Jute Mills Company Limited and Others (Civil Appeal No. 8400 of 2017)

The Hon'ble Supreme Court held that the time of seven days prescribed in the Code for removal of defects by an applicant is directory. It observed: “Further, we are of the view that the judgments cited by the NCLAT and the principle contained therein applied while deciding that period of fourteen days within which the adjudicating authority has to pass the order is not mandatory but directory in nature would equally apply while interpreting proviso to sub-section (5) of Section 7, Section 9 or sub-section (4) of Section 10 as well. After all, the applicant does not gain anything by not removing the objections in as much as till the objections are removed, such an application would not be entertained. Therefore, it is in the interest of the applicant to remove the defects as early as possible. Thus, we hold that the aforesaid provision of removing the defects within seven days is directory and not mandatory in nature.”

High Court

Sanjeev Shriya Vs. State Bank of India and Ors. (Civil Writ Petition No. 30285 of 2017)

The Hon'ble Allahabad High Court considered the issue as to whether the proceedings against a guarantor of a corporate debtor before a Debt Recovery Tribunal (DRT) under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 must be stayed in the light of the on-going insolvency resolution of the corporate debtor before the NCLT under the Code. It observed that until liabilities of the corporate debtor and guarantor are in a fluid stage and not crystallized, the guarantors cannot be held liable and it cannot allow the creditor to pursue two remedies on the same cause of action. Therefore, it stayed the proceedings before the DRT till the finalization of corporate insolvency resolution process or till the NCLT approves the resolution plan under section 31 or passes an order for liquidation of corporate debtor under section 33 of the Code, as the case may be.

National Company Law Appellate Tribunal

Mother Pride Dairy India Pvt. Ltd. Versus Portrait Advertising & Marketing Pvt. Ltd. (Company Appeal (AT) (Insolvency) No. 94 of 2017)

The Hon'ble NCLAT observed: “In view of Rule 8 of Insolvency & Bankruptcy (Adjudicating Authority) Rules, 2016, it was open to the Operational Creditor to withdraw the application under Section 9 before its admission but once it was admitted, it cannot be withdrawn even by the Operational Creditor, as other creditors are entitled to raise claim pursuant to public announcement” It, however, made it clear that the order admitting application for CIRP will not come in the way of the appellant to satisfy and settle the claim of other creditors.

Lokhandwala Kataria Construction Pvt. Ltd. Vs. Nisus Finance & Investment Manager LLP (Company Appeal (AT) (Insolvency) No. 95 of 2017)

Interpreting rule 8 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, the Hon'ble NCLAT declined the request to close an insolvency proceeding: “Thus, before

admission of an application under Section 7, it is open to the Financial Creditor to withdraw the application but once it is admitted, it cannot be withdrawn and is required to follow the procedures laid down under Sections 13, 14, 15, 16 and 17 of I&B Code, 2016. Even the Financial Creditor cannot be allowed to withdraw the application once admitted, and matter cannot be closed till claim of all the creditors are satisfied by the corporate debtor.”

Nikhil Mehta and Sons Vs. AMR Infrastructure Ltd. (Company Appeal (AT) (Insolvency) No. 07 of 2017)

The Hon'ble NCLAT perused the agreement between the parties and the 'annual returns' of the respondent and based on the same, observed that the amount paid by the appellants (flat buyers) fulfilled the condition of 'disbursement against the consideration of time value of money'. The corporate debtor raised the amount through transactions of sale and purchase agreement having the commercial effect of a borrowing as per section 5(8)(f) of the Code and hence the appellants are financial creditors under section 5(7) of the Code.

Rubina Chadha & Anr. Vs. AMR Infrastructure Ltd. (Company Appeal (AT) (Insolvency) No. 8 of 2017)

Making it clear that the Interim Resolution Professional should consider claims of every claimant, the Hon'ble NCLAT observed: *“The appellants herein, whether they are ‘Financial Creditor’ or ‘Operational Creditor’ or ‘Secured Creditor’ or ‘Unsecured Creditor’, as claim to be creditors are now entitled to file their respective claims before the ‘Interim Resolution Professional’, as may be appointed and the advertisement as may be published in the newspaper calling of such application(s) with regard to resolution of ‘Corporate Debtor’- AMR Infrastructure Ltd. In such case, their claim should be considered by the Interim Resolution Professional IRP) and the Committee of Creditors, in accordance with the provisions of the ‘I&B Code’”*

Uttam Galva Steels Limited Vs. DF Deutsche Forfait AG & Anr (Company Appeal (AT) (Insolvency) 39 of 2017)

While setting aside an order of the Adjudicating Authority admitting an application for insolvency resolution, the Hon'ble NCLAT directed: *“Learned Adjudicating Authority will fix the fee of ‘Interim Resolution Professional’, if appointed and the Respondents will pay the fees of the Interim Resolution Professional, for the period he has functioned.”*

Prowess International Pvt. Ltd. Vs. Parker Hannifin India Pvt. Ltd.(Company Appeal (AT) (Insol.) No. 89 of 2017)

The corporate debtor settled the dispute with the operational creditor and other creditors and filed an interlocutory application for closure of the CIRP. The Adjudicating Authority rejected the application. The matter came on appeal before the Hon'ble NCLAT which clarified that it is not a recovery proceeding which can be closed if recovery is made. It observed: *“It is made clear that Insolvency Resolution Process is not a recovery proceeding to recover the dues of the creditors. I & B Code, 2016 is an Act relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner...”* It clarified that resolution may not wait for 180 days

for closure: *“Thereafter, in case(s) where all creditors have been satisfied and there is no default with any other creditor, the formality of submission of resolution plan under section 30 or its approval under section 31 is required to be expedited on the basis of plan if prepared. In such case, the Adjudicating Authority without waiting for 180 days of resolution process, may approve resolution plan under section 31, after recording its satisfaction that all creditors have been paid/ satisfied and any other creditor do not claim any amount in absence of default and required to close the Insolvency Resolution Process.”*

Neelkanth Township & Construction Pvt. Ltd. Vs. Urban Infrastructure Trustees Limited (Company Appeal (AT) (Insolvency) No. 44 of 2017)

The Hon'ble NCLAT considered the issue whether the application under section 7 of the Code is admissible if the claim is barred by limitation. It held: *“there is nothing on the record that Limitation Act, 2013 is applicable to I & B Code.... The I & B Code, 2016 is not an Act for recovery of money claim, it relates to initiation of Corporate Insolvency Resolution Process.”*

International Road Dynamics South Asia Pvt. Ltd. Vs. Reliance Infrastructure Ltd. (Company Appeal (AT) (Insolvency) No. 72 of 2017)

Interpreting section 9 of the Code, the Hon'ble NCLAT held: *“We are of the view that different claim(s) arising out of different agreements or work order, having different amount and different dates of default, cannot be clubbed together for alleged default of debt, the cause of action is being separate. For the said reasons, we hold that the joint application preferred by appellant under Section 9 is defective, as distinct from incomplete, and, was not maintainable.”*

National Company Law Tribunal

Rio Glass Solar SA Vs. Shriram EPC Ltd. (CP/537/(IB)/CB/2017)

Along with the application under section 9 of the Code for initiating CIRP, the operational creditor submitted bank statement of a foreign bank to the NCLT, Chennai. This raised an issue whether the bank statement of a foreign bank, which is not a 'financial institution' within the meaning of section 3(14) of the Code, is admissible under the Code. The NCLT observed: *“...It is a fact that the Operational Creditor has no account in India. Therefore, it is not at all possible to produce a certificate from any Bank in India. If the arguments of the counsel of the Corporate Debtor are considered, then, the same will render the provisions of the I&B Code otiose. In other words, the purpose and object of the legislation would be defeated”*. Accordingly, vide order dated 10th August, 2017, NCLT admitted the application.

State Bank of India Vs. Essar Steel India Limited (CP No.40/7/NCLT/AHM/2017)

The NCLT, Ahmedabad held that the ongoing debt restructuring process does not come in the way of insolvency resolution process. Even the corporate insolvency resolution process can consider the debt restructuring plan as one of the resolution plans, if submitted by any of the resolution applicants. It further held: *“If Insolvency Resolution Process is commenced by appointing*

Interim Resolution Professional, no doubt the Board of Directors would be suspended. That does not mean the entire machinery of the Company is suspended. Even after appointment of IRP, all the employees of the Company, top to bottom, would continue to function under the control of IRP instead of the Board of Directors.” Accordingly, vide order dated 2nd August, 2017, the NCLT admitted the application filed by State Bank of India under section 7 of the Code.

IDBI Bank Limited Vs. Lanco Infratech Limited (CP (IB) No.111/7/HDB/2017)

The NCLT, Hyderabad took note of Clause 22 of the Code of Conduct for Insolvency Professionals as provided in the First Schedule of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations 2016. The Clause provides that an insolvency professional must refrain from accepting too many assignments, if he is unlikely to be able to devote adequate time to each of his assignment. Keeping this in view it did not approve appointment of one IRP with an observation: *“Therefore, we agreed with the submissions of the respondents considering his previous three assignments to large companies and the current corporate debtor itself is a large company we are of the prima facie view that the proposed IRP would not find sufficient time to act as IRP for the respondent Company. Most of the activities prescribed in the IBC code are time bound. Therefore, we had suggested to change the aforesaid IRP, accordingly the financial Creditor viz. IDBI proposed another IRP... and accordingly we appointed him as an IRP for the Corporate Debtor.”*

Magicrete Buildings Solutions Pvt. Ltd. Vs. Pratibha Industries Limited (T. C. P. No. 409/ (MAH)/2017)

An applicant under section 9 of the Code needs a certificate from a Bank maintaining its accounts for filing an application for CIRP. However, the Bank was not issuing it. The NCLT considered this and directed: *“It is hereby made clear that all citizens of the country are bound by the statute governing people of this country, therefore, the Bank is not exempted under the statute”*

Mr. Sanjeev Jain Vs. M/s. Eternity Infracon Pt. Ltd. (CP No. (IB)- 113(ND)/2017)

The applicant claiming to be an operational creditor filed an application under section 9 for initiation of CIRP as the corporate debtor had defaulted in repayment of investment. The NCLT declined to admit the application on the ground that the claim of investments cannot be considered as operational debt. It observed that operational debt is a claim in respect of provision of good and services and it is not any debt other than ‘financial debt’. It further declined to convert the application under section 9 to section 7. It cited the case of the State of U. P. Vs. Babu Ram Upadhyay where the Hon’ble Apex Court has held: *“When a statute requires a thing to be done in a particular manner, it can only be done in that manner or not all. All other methods are forbidden.”* It observed: *“Equity has no place when law is clear”.*

In the matter of Amit Spinning Industries (IB-131 (PB)/2017)

Amit Spinning Industries Ltd. had filed a reference before BIFR

in October, 2011 and was declared sick on 17th July, 2012. Despite availing several opportunities, it did not come up with any viable scheme before BIFR for almost five years, but enjoyed moratorium. While admitting an application for CIRP under the Code, the NCLT observed *“The facts reveal that the Corporate Applicant has already availed the moratorium as provided under Section 22(1) of SICA. Therefore, we feel it would be in fitness of things that the Insolvency Resolution Process in the present case should be speedy, preferably within a period of 100 days”.*

Industrial and Commercial Bank of China Limited & Anr. Vs. Alok Industries Limited (I.A. No. 188/NCLT/AHM/2017)

As per section 446 of the Companies Act, 1956, when a winding up order has been made or the Official Liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced, or if pending on the date of the winding up order, shall be proceeded with, against the company. Therefore, the NCLT held that there is no bar in the Code expressly or impliedly debarring a creditor from triggering the insolvency resolution process under section 7, 9 and 10 of the Code. Section 11 lists out persons not entitled to make the application. SBI does not come under any clause of section 11 of the Code. Thus, there is nothing to prevent the SBI and its Associate Banks, who are financial creditors, from triggering the insolvency resolution process under section 7 of the Code. It observed: *“Pendency of winding up proceedings before Hon’ble High Court before its admission, is no bar either for initiation of proceedings under section 7 of the Code or for continuation of such proceeding.”*

Bharatbhai Vrajlalbhai Selani Vs. State Bank of India (C.P. (I.B) No. 63/10/NCLT/AHM/2017)

The NCLT held that initiation of proceedings under the SARFAESI Act or the pendency of proceedings before the DRT is not a ground for not commencing the ‘Insolvency Resolution Process’, in view of the overriding effect given to section 238 of the Code. It observed: *“The object of the Code is, no doubt, to protect the genuine Corporate Debtors with a view to maximize their value of assets and find out a ‘Resolution Plan’. Incidentally, in the process of evolving a Resolution Plan, there is an opportunity for the Corporate Debtor to have a moratorium and thereby delay the other recovery proceedings. But, that is only for a prescribed period of 180 days or for a further period of 90 days, if extended by the Adjudicating Authority. Therefore, to say that Corporate Debtor with a view to have the benefit of moratorium or with a view to delay the proceedings under the SARFAESI Act filed this Application do not find acceptance.”*

Schweitzer Systemtek India Private Limited Vs. Phoneix ARC Private Limited (TCP No. 1059/I&BP/NCLT/MB/MAH/2017)

The NCLT held that the personal properties of promoters which were mortgaged to Dhanlaxmi Bank Limited and which subsequently stood assigned to the respondent due to assignment of debt by Dhanlaxmi Bank Limited and in respect of which an order for taking over the possession was passed by the Chief Metropolitan Magistrate would remain outside the ambit of moratorium period commencing upon admission of the application. It relied upon section 14 of the Code, which states that moratorium shall be declared for prohibiting any action to recover or enforce

any security interest created by the corporate debtor in respect of “its” property. The word “its” was interpreted to denote the property owned by corporate debtor and the property not owned by corporate debtor would not fall within the ambit of moratorium.

Anrak Aluminium Limited Vs. State Bank of India (CP (113) No.127/10/HDB/2017)

Anrak Aluminium Limited filed an application seeking CIRP under section 10 of the Code. The NCLT found that the corporate debtor has completed the project, but could not commence commercial operations due to non-availability of raw material as APMDC has cancelled the bauxite supply agreement. For absolutely no act of omission or commission on the part of project sponsors and solely on account of direct State Government force majeure, a potential national asset has been lying in an unproductive and wasting state for over four years. The NCLT, considering the public money (Rs. 5,712 crore) already invested by the Banks and contribution of promoters towards the project which had a potential employment generation of more than 1000 employees directly and indirectly, instead of winding up/liquidating the corporate debtor, directed all the parties to explore various possible avenues for operating/running of the company rather than winding up/ liquidating the

same. However, the parties pleaded with a closed view to liquidate the corporate debtor and they failed to produce any document to prove that they have taken up with State Government / APMDC to revoke the cancellation of bauxite supply agreement. In the interest of all stakeholders, the NCLT did not admit the application.

Edelweiss Asset Reconstruction Company Limited Vs. Synergy Dooray Automotive Limited and Ors, (CA NO. 43 and 57 of 2017)

It was contended by the applicant that SCL, a related party of the corporate debtor assigned a substantial chunk of total debt of the corporate debtor to MFL, a financial creditor on 24th November, 2016, immediately prior to the reference of the corporate debtor before BIFR abated pursuant to coming into effect of the Sick Industrial Companies (Repeal) Act on December 1st, 2016 is questionable and suspicious. While the related party could not have become a member of the CoC, the assignee financial creditor could. After perusing various records, the NCLT held the opinion that there is no relationship between SCL and MFL. Accordingly, MFL is not a related party and is fully competent to participate in CoC. At most it can be said to be similar to ‘tax planning’ rather than tax avoidance.

Service Providers

Insolvency Professionals

Till 31st December, 2016, 977 individuals were granted registration as IPs for a limited period (six months). Since 31st December, 2016, individuals, who have the required qualification and experience and have passed the Limited Insolvency Examination, are being registered as IPs. In this category, 1107 individuals were registered at the end of September, 2017. The details are given in Table 7.

Replacement of IRP

Section 22(2) of the Code states that the CoC may in the first meeting, by a majority vote of not less than seventy-five percent of the voting share of the financial creditors, either resolve to appoint the IRP as the RP or to replace the IRP by another IP to function as the RP. Accordingly, till 30th September, 2017, 35 IRPs have been replaced with RPs as shown in Table 8.

Recommendation for IRP

Section 16 (3)(a) of the Code requires the Adjudicating Authority to make a reference to IBBI for recommendation of an IP who may act as an IRP in case an operational creditor has made an application for CIRP and has not proposed an IRP. IBBI, within ten days of the receipt of the reference from the Adjudicating Authority, is required under section 16(4) of the Code to recommend the name of an IP against whom no disciplinary proceedings are pending. It has framed the ‘Insolvency Professionals to act as Interim Resolution Professionals (Recommendation) Guidelines, 2017’ for this purpose. In accordance with these Guidelines, IBBI recommended 60 names of IPs to Adjudicating Authority for appointment as IRPs.

Workshop for Insolvency Professionals

With a view to build capacity of newly registered IPs, IBBI arranged

Table 7: Registration of Insolvency Professionals as on 30th September, 2017

City/Region	Enrolled with			Total
	The Indian Institute of Insolvency Professionals of ICAI	ICSI Insolvency Professionals Agency	Insolvency Professional Agency of Institute of Cost Accountants of India	
Delhi	131	103	29	263
Rest of the Northern Region	101	67	16	184
Mumbai	133	53	16	202
Rest of Western Region	81	44	7	132
Chennai	28	27	3	58
Rest of Southern Region	67	57	16	140
Kolkata	72	15	6	93
Rest of the Eastern Region	26	5	4	35
All India	639	371	97	1107



➤ Mr. D. Ravikumar, Hon'ble Member, NCLT, Hyderabad addressing the workshop at Hyderabad on 16th September, 2017

two workshops on 26th-27th July, 2017 at Kolkata and 15th-16th September, 2017 at Hyderabad with a total participation of 75 IPs. IBBI intends to organize more such workshops in future.

Limited Insolvency Examination

IBBI has been conducting the Limited Insolvency Examination since 31st December, 2016 through the National Institute of Securities Markets. The examination is available from 100+ locations in the country daily. In the first phase of the examination which was available from 31st December, 2016 to 30th June, 2017, 1202 candidates passed the examination. The Second Phase of the examination with revised syllabus and question bank was launched on 1st July, 2017 and will be available till 31st December, 2017. In the quarter July-September, 2017, 476 candidates have passed examination. The details of the examination are given in Table 9.

Insolvency Professional Agencies

There are three registered Insolvency Professionals Agencies (IPAs) under the Code. On recognition of their role as front line regulators, IBBI has institutionalized a monthly meeting with them on 7th of every month and has been meeting them from 7th July, 2017 onwards.

In pursuance of the IBBI (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016, IBBI has

Table 8: Replacement of IRP with another IP as RP as on 30th September, 2017

CIRP initiated by	No. of CIRPs where IRP has been replaced by another IP as RP
Corporate Applicant	25
Operational Creditor	5
Financial Creditor	5
Total	35

Table 9: Limited Insolvency Examination

Phase / Month	No of attempts (Some candidates made more than one attempt)	No. of successful attempts
First Phase	5329	1202
July, 2017	847	173
August, 2017	771	142
September, 2017	850	161
Total	7797	1678

nominated Dr. S. P. Narang, former Secretary of the Institute of Company Secretaries of India and Mr. S. Balasubramanian, former Chairman of the Company Law Board, to their Disciplinary Committees and Appellate Authorities respectively.

Insolvency Professional Entities

The Regulations provide for recognition of Insolvency Professional Entities (IPEs). An IP may use the organizational resources of an IPE of which he is a partner or director. 16 IPEs were recognized at the end of June, 2017. During the quarter July – September, 2017, 23 IPEs were recognized, while one IPE was de-recognised. As on 30th September, 2017, there were 38 IPEs.

Information Utilities

An Information Utility (IU) stores financial information that helps to establish defaults as well as verify claims expeditiously and thereby facilitates completion of transactions under the Code in a time bound manner. It constitutes a key pillar of the insolvency and bankruptcy ecosystem, the other three being the Adjudicating Authority, IBBI and Insolvency Professionals. IBBI registered National E-Governance Services Limited (NeSL) on 25th September, 2017 as an IU under the IBBI (Information Utilities) Regulations, 2017. NeSL becomes the first IU registered by IBBI and this registration is valid for five years from the date of registration. NeSL has been promoted by SBI, Canara Bank, Bank of Baroda and others.

Events

National Conference on Insolvency and Bankruptcy: Changing Paradigm

Ministry of Corporate Affairs (MCA), National Foundation for Corporate Governance (NFCG) and IBBI organized a National Conference on 'Insolvency and Bankruptcy: Changing Paradigm' on 19th August 2017 at Mumbai. Shri Arun Jaitley, Hon'ble

Minister of Finance, Corporate Affairs and Defence was the Chief Guest at the Conference. Dr. Urjit Patel, Governor, RBI; Mr Ajay Tyagi, Chairman, SEBI and Dr. M. S. Sahoo, Chairperson, IBBI also addressed the inaugural session. In the Conference Hon'ble Mr. M. K. Shrawat, Member, NCLT; Dr. (Ms.) Mukulita Vijayawargiya, WTM, IBBI; Mr. Amardeep Singh Bhatia, JS, MCA; Ms. Latha Venkatesh, Executive Editor, CNBC TV18; Mr.

Uday Kotak, Executive Vice Chairman & MD, Kotak Mahindra Bank Ltd; Mr. Sunil Mehta, MD & CEO, Punjab National Bank; Mr. Ajit Gulabchand, Chairman and MD, Hindustan Construction Company Ltd; Mr. Hari Shankaran, Vice Chairman and MD, Infrastructure Leasing and Financial Services Ltd; Mr. Vijaya Bahuguna, CEO & MD, Asset Reconstruction Company (India) Ltd; Mr. Nikhil Srivastava, Director, KKR India Advisors Pvt. Ltd; Mr. Bahram N. Vakil, Managing Partner, AZB & Partners; and Mr. Darius J. Khambata, Senior Counsel shared their experiences on the implementation and compliance of the Insolvency and Bankruptcy Code, 2016.

The speech delivered by the Hon'ble Finance Minister on the occasion is as follows:

The Honourable Governor of the RBI, Dr. Urjit Patel, the Chairperson of SEBI, Mr. Ajay Tyagi, Dr. Sahoo, Mr. Chandrajit Banerjee, ladies and gentlemen:

It has now been a few months since the IBC has been implemented. I don't think many of us, including those who participated in demanding a law of this kind, and worked in the process of making it happen, realised what the implications of this law would be. Because, for endless number of years, we lived in a system which effectively protected the debtors and allowed the assets to rust away. If we look at the situation as it existed, effectively there was hardly a law as far as individual or partnership insolvency was concerned. You had insolvency laws in the States which were almost ineffective. You had a provision in the Companies Act which provided for commercial insolvency, the inability to pay debts, and a remedial action, but in an extremely slow-moving process, which usually resulted in some sort of a settlement in the court. If a company eventually did go into liquidation, the bulk of the assets got rusted and recoveries were almost impossible.

The SICA experiment was an absolute failure. It was brought in with an idea that companies which are sick would be revived irrespective of whether they were capable of being revived or not. The only effective purpose it served was that the debtors got an iron curtain around them. Then the iron curtain, which prevented the creditors from making recoveries, continued indefinitely. Therefore, effectively there was very little purpose that the SICA was able to achieve for which it was created.

As I heard in the later part of Dr. Urjit Patel's speech just now, he was mentioning, the alternative mechanisms the RBI did create for the banking system. These were intended to give the banking system a lot of flexibility, in order to restructure the debts, in order to distinguish the sustainable part of the debt from the unsustainable part of the debt, and to bring all the banking creditors together and frame a scheme by which effectively some realisations could take place. This did meet with some success, but eventually, I think, it was still extremely difficult for the creditors to be effectively able to chase the defaulting debtors.

If we look at the mechanism of the Debt Recovery Tribunals which were created, it was intended that the court procedure took too much time and, therefore, we must liberate these tribunals from the rigidities of the court procedure, and enable our banking creditors at least or the financial institutions to have a fast track process. But eventually the Debt Recovery Tribunals were somewhat faster,

but not as effective as envisaged.

I think, for some period of time, the effective law which did serve the meaningful purpose was the SARFAESI law. And I do recollect, I was in the Government at that time when the law was conceived in the year 2000 or 2001. The overwhelming opinion was that it would be a per se unreasonable process. Unreasonable, because our normal was that you have to wait till the cows come home in order to realise the debt, and here is a procedure by which you go on day one and take over, after notice, the assets of the debtor. Being a creditor, in our jurisprudence, was inherently putting you to disadvantage. I remember, the officer concerned in the expenditure ministry and I had then teamed up, framed and reframed the law, got it through a group of ministers, had difficulty in having it cleared by Parliament, had greater difficulty in having the challenge sustained before the Court. Finally, I do remember, from 12% or 13%, very large NPAs, it did succeed in bringing them down radically over the next 2-3 years. So that was probably one exception to this whole principle which proved to be effective.

Now when the IBC was conceived, there was a small group of experts and the officer guiding them was Mr. Tyagi, and they went into long consultations and did draft this law, made repeated presentations. Much that Parliament comes in for criticism, I think, this probably would be a record of some sort that in December 2015, the law got introduced in Parliament. It got referred to Joint Committee which sat almost day after day, and presented its report in the month of March. Within 3 or 4 months, by May 2016, we had the law in place. Today, almost 15-16 months thereafter, we are now already discussing the last 9 to 10 months of the implementation of the law.

I think, this has significantly reversed the debtor-creditor relationship. And when I am talking of debtor, I am talking essentially of defaulting debtor. To raise a debt is nothing improper, that's how businesses work. Now the reasons for insolvency could be many. It could be genuine business losses because of a particular sector of an economy, or some company getting into difficulty. It could be a case of mismanagement. It could also be a case of deliberate mismanagement, including some malfeasance on behalf of the promoters. And on account of multiple reasons, these insolvencies may occur. I think, now that the law has been put in place, the competent authority, the NCLT has been constituted. We are taking special effort to make sure that the infrastructure there is also strengthened and brought in consonance with the requirements of this particular law.

How does one make it effective? For one, there are strict timelines which the legislation has, and I think, it is extremely important that these timelines have to be adhered to. Conventionally Indian courts always have two standards. When timelines are made for the executive, they normally maintain these are binding. When timelines are made for judicial institutions, courts have conventionally held that these are only directory. A typical case in point is, I remember as law minister, I had amended the Code of Civil Procedure and put strict timelines. So pat came the judgement of the Supreme Court that said that courts will decide their own time table, and that these are all directory, which are mentioned by Parliament, these are not mandatory on us. So, I do hope, these remain as mandatory as possible and these timelines are adhered to, because that is really the essence of the law. Speed really will

help in the effective implementation of the law itself.

The creation of the institution of the resolution professionals, because these are people with expertise in different fields of finance, who are now going to be transformed into resolution professionals. They will have to remain detached, they will have to avoid any possible conflict of interest, and they will have to be extremely objective. Therefore, when they step into the shoes of management itself, it's their quality of professionalism which will ensure how quickly the resolution takes place.

It is not merely the resolution which will be the eventual target, it will also be as to what happens during the pendency itself. That is where there is a grey area. It is the judicial pronouncements which really resolve all the grey areas and then define them in black and white. A legislation is a skeleton structure normally. The flesh and blood to it is provided by the judicial interpretation. Therefore, the manner in which a company before the IBC is to run during the proceedings, does its business comes to a standstill? How does the normal operation take place? And I think, the powers in my own reading under section 17 and the subsequent paragraphs and clauses of the section of the Act are absolutely clear, and if some purposive interpretation is given to them, the resolution professional itself, by themselves or upon the direction of the tribunal, could be further empowered to make sure that the effective functioning of the company doesn't come to a standstill. Because if it comes to standstill, then let alone resolving the insolvency, one will only be adding to it by allowing existing operations to come to a standstill, with its assets getting devalued over a period of time. That is something they will probably have to avoid. Therefore, you will require effective supervision and directions to that effect as far as the tribunals are concerned, therefore, the powers of the Resolution Professional will also have to be very clearly defined. There is a role for the Committee of Creditors which has been provided for, who has a direct and positive interest in making sure that all those assets and business themselves are preserved.

This is not the only law that we have changed. We have changed the procedures as far as DRTs are concerned, and we have changed the provisions of the SARFAESI law also, which provide for a very liberalized regime as far as ARCs are concerned. I think, if we take the cumulative effect of all these laws, the message now in the legislation is loud and clear, that the debtors will have to certainly make sure that their debts are serviced. If they don't, then there is an effective alternative mechanism by which you exit, or you take in a partner, and some alternative mechanism by which businesses can be saved. The ultimate object really is not the liquidation of assets, the ultimate object as a preference is to save these businesses, get either the existing promoters with or without partners, or new entrepreneurs to come in and make sure these valuable assets are preserved.

I think what is extremely important also is that 9-10 months may be too short a period to have any major reactions on what improvements are further required. We probably will have to wait for a period of time and then ensure as to how much of this law

is made effective by various pronouncements of the tribunals, the appellate tribunal, the courts which takes place and then over a period of time, I think, what are the improvements in the law which are required to make sure that the purpose for which it is been created is the purpose which is sub-served.

But one thing is very clear that the old regime by which the creditor would get tired chasing the debtor and end up recovering nothing is now over. If a debtor has to survive, he will have to service his debts or else he will have to make way for somebody else. I think this is the only correct way by which businesses would now be run and this message I think has to go loud and clear to all.

I am extremely grateful to all of you, who are here, because most of you would be somewhat directly or vicariously connected with this issue and we will be too eager to know from you as to what further evolution either by a legislative process or by a process of judicial pronouncements in this branch of the law would be required.

Thank you very much once again, Dr. Banerjee for having this conference.

Decoding the Insolvency and Bankruptcy Code, 2016

IBBI, in association with FICCI, organized a program, 'Decoding the Insolvency and Bankruptcy Code, 2016' for Insolvency Professionals, industry participants and other stakeholders on 29th July 2017. Hon'ble Justice of the Supreme Court, Mr. A. K. Sikri delivered the Keynote Address. Dr. M. S. Sahoo, Chairperson, IBBI; Ms. Suman Saxena, Whole Time Member, IBBI; Mr. Amardeep Singh Bhatia, Joint Secretary, MCA; Mr. Virender Ganda, Senior Advocate and President, NCLT and NCLAT Bar Association; Mr. Sumant Batra, President, SIPI and Mr. Siddharth Birla, Chairman, Xpro India Ltd and Digjam Ltd. provided insights from the perspectives of the Government, regulator, industry, law, and practice.



► Hon'ble Justice of the Supreme Court, Mr. A. K. Sikri at the program, 'Decoding the Insolvency and Bankruptcy Code, 2016' on 29th July, 2017 at New Delhi.

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