INSOLVENCY AND BANKRUPTCY BOARD OF INDIA
(Disciplinary Committee)

No. IBBI/DC/26A/2020

28th October 2020

Order

In pursuance of the directions issued by the Hon'ble High Court of Delhi *vide* order dated 7th July 2020 in the matter of *Duff & Phelps India Private Limited Vs. Insolvency and Bankruptcy Board of India & Anr.* [Writ Petition (Civil) No. 3936 of 2020]

Background

The matter in ***Duff & Phelps India Private Limited Vs. Insolvency and Bankruptcy Board of India & Anr.*** **[Writ Petition (Civil) No. 3936 of 2020]** arises out of proceedings culminating in the order of the Disciplinary Committee (DC-1) of the Insolvency and Bankruptcy Board of India (IBBI), dated 8th June 2020 against Mr. Vijay Kumar Garg, Insolvency Professional (IP). In the said writ petition, the Hon'ble High Court vide its order dated 7th July 2020 (order being uploaded on the Delhi High Court website on 11th July 2020) has given the following directions:

> *"In these circumstances, let the D&P give a representation to respondent No. 1 within three days. Respondent No. 1 may thereafter give a hearing to the D&P through video conferencing and pass a reasoned order uninfluenced by the observations made against the D&P in the impugned order. Respondent No. 1 is free to modify the impugned order accordingly as per law. Needful may be done preferably within two weeks from today."*

2. The IBBI received a representation (along with Annexures) from the Duff & Phelps India Private Limited (D&P), *vide* email dated 14th July 2020, and additional submissions *vide* email dated 19th July, 2020 which were referred to this Disciplinary Committee of IBBI (DC).

3. In compliance of the said order of the Hon'ble High Court of Delhi, the DC provided an opportunity of e-hearing to D&P on 20th July, 2020. The DC permitted D&P to be represented by Mr. Krishnendu Dutta, Sr. Advocate and Ms. Pooja Dhar, Advocate on record.

Factual Matrix

4. Mr. Vijay Kumar Garg was appointed as an Interim Resolution Professional (IRP) for the Corporate Insolvency Resolution Process (CIRP) of Gitanjali Gems Limited (GGL) by the Adjudicating Authority (AA), the National Company Law Tribunal, Mumbai Bench, *vide* its order dated 8th October, 2018. He was subsequently confirmed as the Resolution Professional (RP) for the CIRP of GGL by the Committee of Creditors (CoC) of GGL on 1st November, 2018.

5. Prior to commencement of the CIRP, the ICICI Bank (one of the financial creditors) conducted a bidding process for selecting an IRP for the CIRP. Along with the selection of Mr. Garg as proposed IRP, D&P was selected to provide infrastructure, personnel and back office support services to assist Mr. Garg for the purposes of the CIRP of GGL.

6. Accordingly, Mr. Garg executed an engagement agreement with the D&P on the date of his appointment as an Interim Resolution professional (IRP) by the AA, *i.e.*, 8th October, 2018. In terms of the said agreement, D&P was engaged to provide infrastructure and back office support services to Mr. Garg in connection with the CIRP of GGL. Similarly, Mr. Garg was also appointed as an IRP for the CIRP of the subsidiaries of GGL, namely, Nakshatra World Limited (NWL) and Nakshatra Brands Limited (NBL), on 29th January 2019. D&P was engaged to provide infrastructure, personnel and back office support services to Mr. Garg for the CIRPs of NWL and NBL *vide* agreement dated 5th February, 2019. Thus, Mr. Garg was appointed as IRP/RP and D&P was engaged to provide infrastructure, personnel and back office support services to him in connection with the CIRP of the three corporate debtors, *viz.*, GGL, NWL and NBL.

7. As per the records, prior to the commencement of CIRPs of these corporate debtors, the assets of these companies were already under attachment by various investigation agencies. In the matter of GGL, in view of the fact that the bank accounts of GGL were frozen by the investigating agencies prior to commencement of its CIRP, CoC resolved in its 1st meeting to create a corpus of Rs. 10 crores by the members of the CoC to be contributed in proportion to their voting share towards meeting the costs of the CIRP. The AA vide its order dated 5th March, 2019 directed Mr. Garg to open an 'escrow account' for the said corpus and further directed that any withdrawal from this account is to be verified and ratified by the CoC and to be placed before the AA for seeking permission for withdrawal.

8. Mr. Garg sought to withdraw Rs. 3,57,47,494/- (including GST) from the escrow account of GGL as the CIRP cost approved by the CoC and made an application before the AA to allow the same to be withdrawn from the escrow account in compliance with the directions in the said order. This amount included D&P's fee of Rs 23.75 lakhs per month, IRP fee of Rs 1.25 lakh per month as also US lawyer and Indian lawyers' fee, insurance cost for IRP along with employees of D&P, expenses till public announcement, transaction audit, conduct of various CoC meetings of GGL etc. The AA vide its order dated 14th May, 2019 in the matter of *ICICI Bank Vs. Gitanjali Gems Ltd.* observed as follows:

> *"7. In my prima facie opinion, it appears that claimed amount as corporate Resolution Process cost of Rs. 35747494/- is an exorbitant claim considering the totality of circumstances that referred the matter relating to fixation of corporate insolvency resolution process cost to the IBBI. This view is in conformity with two orders passed by IBB, New Delhi bearing Re. No. IBBI/DC/15/2019 and IBBI/DC/16/2019 and dated 21-02-2019 and 17-04-2019 respectively, wherein on the ground of unrealistic and exorbitant fees/expenses demanded by the RP their licenses were suspended to act as RP. Since a regulatory authority is keeping an eye and watching the conduct of Resolution Professionals, therefore, it is expected that before making such type of submission due care*

and professional ethics ought to be observed. This Bench has not been informed whether any Information Memorandum is prepared by the Ld. RP and whether advertisement has been made inviting Expression of Interest (EOI). It is also not on record whether any Valuation Report is procured by RP. Rather as of now, as informed, the Insolvency Process' is heading towards 'Liquidation' of the company.

8. On verification of description of the expenses, it is noticed that "D&P fees claimed at Rs. 1,59,74,250/- and likewise, rest of the fees such as Lawyer fees, meeting fees, the RP insurance appeared to be towards higher side. In the absence of explanation of each item, had to be supported by corroborative evidence, it is not possible on the part of this Bench to allow entire expenditure. If we carefully examine Insolvency Resolution Regulation 2016, it is provided in Regulation 31 r/w Regulation 33, 34 and 34A that the RP shall disclose item-wise resolution cost and on approval to be placed before Adjudicating Authority who shall fix the expenses after considering the circumstances of the case. Even if approved by CoC, these Regulations have prescribed that the Adjudicating Authority has jurisdiction whether to treat or not certain expenses incurred wholly and exclusively for the purpose of completion of Insolvency Process.

9. As a consequence, this Bench is of the opinion that a guideline can be obtained from IBBI, New Deli that whether any Regulation or any notification about the fixation of remuneration of RP has been issued as a guiding factor. I, therefore, refer this problem i.e. fixation of CIRP cost, etc. to IBBI, New Delhi. If deem fit, the said Regulatory Authority can examine the reasoning and the basis on which the members of the CoC have approved the claim of expenditure".

9. The IBBI, in compliance of the order of the AA dated 14th May, 2019, constituted an Expert Committee (Committee) for fixation of CIRP costs, reasoning and the basis on which the members of the CoC have approved Mr. Garg's claim of Rs. 3.57 crores as the CIRP cost for GGL. In para 11 of its report, the Expert Committee noted that IBBI (Insolvency Professionals) Regulations, 2016 and the circulars issued by the IBBI provided guidance in the matter of remuneration of RP and other professionals appointed by him and, in particular, paras 25, 25A, 26 and 27 of the Code of Conduct in the First Schedule to the said Regulations provide as follows:

"25. An insolvency professional must provide services for remuneration which is charged in a transparent manner, is a reasonable reflection of the work necessarily and properly undertaken, and is not inconsistent with the applicable regulations.

25A. An insolvency professional shall disclose the fee payable to him, the fee payable to the insolvency professional entity, and the fee payable to professionals engaged by him to the insolvency professional agency of which he is a professional member and the agency shall publish such disclosure on its website.

26. An insolvency professional shall not accept any fees or charges other than those which are disclosed to and approved by the persons fixing his remuneration.

27. An insolvency professional shall disclose all costs towards the insolvency resolution process costs, liquidation costs, or costs of the bankruptcy process, as applicable, to all relevant stakeholders, and must endeavour to ensure that such costs are not unreasonable."

9.1 The said Committee also took note of paras 3 and 4 of the IBBI Circular dated 16th January, 2018 relating to the fees payable to insolvency professional and other professionals appointed by an insolvency professional which provides as follows:

"*3. In view of the above, it is clarified that an insolvency professional shall render services for a fee which is a reasonable reflection of his work, raise bills / invoices in his name towards such fees, and such fees shall be paid to his bank account. Any payment of fees for the services of an insolvency professional to any person other than the insolvency professional shall not form part of the insolvency resolution process cost.*

4. Similarly, any other professional appointed by an insolvency professional shall raise bills / invoices in his / its (such as registered valuer) name towards such fees, and such fees shall be paid to his / its bank account."

9.2 Further the said Committee also noted that para 6 of the Circular dated 12th June, 2018 provides as follows:

"*6. Keeping the above in view, the IP is directed to ensure that:- (a) the fee payable to him, fee payable to an Insolvency Professional Entity, and fee payable to Registered Valuers and other Professionals, and other expenses incurred by him during the CIRP are reasonable; (b) the fee or other expenses incurred by him are directly related to and necessary for the CIRP.*"

9.3 The Committee was of the view that after considering the fact that GGL was not a going concern and all assets and books of accounts of the GGL were seized by different investigation agencies, no valid reason is discernable for Mr. Garg to have continued the services of D&P and such continuance at the originally agreed rates may not be in the best interest of GGL, and observed:

"*In the above circumstance, the Committee is of the view that fees of D & P claimed as part of IRPC is neither reasonable nor can be regarded as necessary for the CIRP.*"

9.4 The report of the Expert Committee has been filed with the AA in compliance of the order dated 14th May, 2019.

10. The IBBI on having reasonable grounds to believe that Mr. Garg had contravened provisions of the Insolvency and Bankruptcy Code, 2016 (Code), regulations, and directions issued thereunder, appointed an Inspecting Authority (IA) under section 218 of the Code to conduct an inspection of Mr. Garg *vide* order dated 5th September, 2019 in respect of his role as an IRP and / or RP in the CIRP of GGL, NWL and NBL. On the basis of the findings of the IA, the

IBBI had issued a Show Cause Notice (SCN) to Mr. Vijay Kumar Garg on 11th December 2019 under section 219 of the Code.

11. The SCN alleged that Mr. Garg had contravened several provisions of the Code, *viz.*, sections 5(13), 5(14), 12, 20 (2)(a), 25, and clauses (a) and (e) of section 208 (2) of the Code, clauses (a), (h) and (i) of regulation 7(2) of the IBBI (Insolvency Professional) Regulations, 2016 (IP Regulations) and the Code of Conduct under the First Schedule to IP Regulations , regulation 31 the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016 (CIRP Regulations) and IBBI Circular No. IBBI/IP/013/2018 dated 12th June, 2018, particularly,-

    (a) in appointing D&P which is not a professional;
    (b) in seeking payment of full fee to the D&P in all the three matters where control of the assets could not be taken by the RP as being under the control of the investigating agencies and scope of the work as agreed upon which included preparation of information memorandum and monitoring and management of the corporate debtor could not be done except collection and verification of claims;
    (c) in incurring the cost for purchasing insurance policies from ICICI Lombard General Insurance company to provide insurance to the D&P and including this expense unrelated to CIRP in the Insolvency resolution process cost (IRPC); and
    (d) conduct of two CoC meetings after filing of application for liquidation.

DC-1 Order

12. The SCN was referred to the DC-1 which considered the SCN, the written and oral submissions of IP Mr. Vijay Kumar Garg and material available on record and issued the Order dated 8th June, 2020.

12.1 As regards the issue regarding appointment of D&P for the CIRP, DC-1 observed that: "*the appointment of D&P in the CIRP process was in violation of the provisions of section 20(2) of the Code as the D&P is not a professional having authorisation of a regulator of any profession to render any professional service, and its conduct and performance is not subject to oversight of any regulator of any profession.*" Section 20 (2) (a) of the Code states that the interim resolution professional shall have the authority to appoint accountants, legal or other professionals as may be necessary.

12.1.1 DC-1 also observed: "*As is evident from the scope of work envisaged in the minutes of the CoC meetings as well as the engagement letters, D&P was only engaged to provide infrastructure, personnel and back office support services which cannot be classified as 'professional services' involving skill or even a 'profession' falling within the definition given in Black's Law Dictionary (as abovementioned). Further, D&P cannot be regarded as an IPE since it has not been recognized by the Board under Regulation 12 of the IP Regulations. Thus, D&P does not fall within the definition of the term 'professional'.*"

12.1.2 DC- further observed: "*as per the scope of work (as indicated in the joint proposal dated 06 September, 2018 submitted by Mr. Vijay Kumar Garg, an IP assisted by D&P to ICICI*

Bank), its mandate was: (i) initial analysis and strategy, (ii) taking control of business, (iii) monitoring business and cash, (iv) assisting in development of business resolution plan, (v) finalising the resolution plan, and (vi) approval of resolution plan. None of these services is a service of a professional. The first three are responsibilities of the RP himself and for this, he may need support services, for which he has option either to use his employees or take assistance of an IPE, if he is a member of that IPE. Services at (iv) and (v) are the responsibilities of a resolution applicant. The service at (vi) is the responsibility of CoC and the RP. None of these services fall within the ambit of services of a professional. Procurement of services, other than services of a professional, is not permissible under section 20(2)."

12.2 As regards the issue pertaining to the fee that would be payable to the D&P, DC-1 noted in its order at page 9 about various provisions relating to the IRPC and the fee, particularly, the definition of IRPC in clause (e) of sub-section (13) of section 5 of the Code and regulation 31 of CIRP Regulations as well as IBBI Circular dated 12th June 2018 (as referred to in para 9.2). Section 5 (13) of the Code defines the IRPC in the following words:

"insolvency resolution process costs" means—

(a) the amount of any interim finance and the costs incurred in raising such finance;
(b) the fees payable to any person acting as a resolution professional;
(c) any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern;
(d) any costs incurred at the expense of the Government to facilitate the insolvency resolution process; and
(e) any other costs as may be specified by the Board."

Regulation 31 of the CIRP Regulations provides as under:

"Insolvency Resolution Process Costs" under Section 5(13)(e) shall mean –

(a) amounts due to suppliers of essential goods and services under Regulation 32;
(aa) fee payable to authorised representative under [sub-regulation (8)] of regulation 16A;
(ab) out of pocket expenses of authorised representative for discharge of his functions under [Section 25];
(b) amounts due to a person whose rights are prejudicially affected on account of the moratorium imposed under section 14(1) (d);
(c) expenses incurred on or by the interim resolution professional to the extent ratified under Regulation 33;
(d) expenses incurred on or by the interim resolution professional fixed under Regulation 34; and
(e) other costs directly relating to the corporate insolvency resolution process and approved by the committee."

12.2.1 It also referred to the following observations of the Expert Committee:

"*The Committee notes that D&P was engaged by the RP for providing back office support services to RP (as per engagement agreement dated 08.10.2018). The scope of the back-*

office support work is indicated in items 1 to 7 at page 2 of the agreement. In the present case, except collection and verification of claims around 37 in number, no other item of work was undertaken. The RP has admitted that he was unable to take custody and control of the assets of the CD.

The Committee notes that evaluation of efforts of D&P and amounts payable as fee to D&P was initially estimated to support the entire range of services to be rendered by RP during CIRP (as stated in the role of D & P vis-à-vis time line under IBC, mentioned at paragraph 7 above). However, it is a fact that it was actually confined to supporting the services which the RP was able to render. Therefore, the Committee notes that fee for D &P quoted for supporting those services of RP during CIRP which were not undertaken, did not accrue.

Accordingly, assessment of fee for services rendered by D&P in CIRP is confined to and restricted to the extent of services which in the opinion of the Committee would have supported the services rendered by RP.

Further, the time sheets of D & P furnished by RP are very generic. It indicates activities of verification of claims in October, 2018 (during IRP period) and verification of few claims/revised claims in November-December 2018. Other than the above, most of the other activities mentioned in the time sheets are of the nature of discussions, meetings, follow up, etc. The need for any role of D & P in these activities is beyond the reasoning of the Committee, as lawyers are separately engaged (for which separate bills have been raised by the lawyers) and RP is expected to directly discuss the matters with them.

Also, several activities mentioned therein are those which RP is expected to perform as part of his duties. For instance, meeting investigating authorities, discussions with lenders, lawyers, ex-employees, gaining understanding of PMLA cases and documentation, drafting and reviewing petitions with lawyers, negotiations for transaction audit etc.

As per the model times for CIRP specified under Regulation 40A of the CIRP Regulations, various actions including appointment of valuers, determination of irregular transactions, invitation and submission of EoI should have been completed within 90 from Insolvency commencement date (ICD) (i.e., by 8th January, 2019). None of these activities have been undertaken in the present case.

Considering the fact that CD was not going concern and all assets and books of accounts of the CD were seized by different investigation agencies, there do not seem to be any valid reason for the RP to have continued the services of D&P and such continuance at the originally agreed rates may not be in the best interest of the CD.

In the above circumstance, the Committee is of the view that fees of D & P claimed as part of IRPC is neither reasonable nor can be regarded as necessary for the CIRP."
[emphasis supplied]

12.2.2 The DC-1 noted from the minutes of the 1st CoC meeting (in the matter of GGL, NWL and NBL) that D&P was engaged for providing infrastructure, personnel and back office

support at a fee of Rs. 23,75,000/- per month (excluding taxes and out of pocket expenses) for GGL and Rs. 6,87,500/- per month (excluding taxes and out of pocket expenses) each for NWL and NBL. The fee payable to Mr. Garg was Rs. 1, 25,000/- per month in the CIRP of GGL. It observed:

"the payment agreed to be paid to D&P in GGL is 19 times of the fee payable to RP. It is inconceivable that the cost of providing infrastructure, personnel and back office support services in GGL is 19 times of the fee payable to the RP." [emphasis supplied]

Thus, the DC-1 found that there was contravention of sections 20 (2) (a), 25 (2) (d), 208 (2) (a) & (e) of the Code, regulation 7 (2) (a), (h) & (i) of the IP Regulations read with clause 27 of the Code of Conduct as given in the First Schedule of the IP Regulations and IBBI Circular dated 12th June 2018.

12.3 With regard to the issue of purchase of insurance policy, the DC-1 noted that Mr. Garg received approval from the CoC for purchase of insurance policy solely for himself but he purchased insurance policy, *viz.,* Directors & Officers Liability Insurance (D&O) and Professional Liability Insurance (PL) for the total insurance premium (inclusive of taxes) of Rs. 33,04,000/- in the name of a third party, *i.e.,* D&P and Mr. Garg was insured under the same. DC-1 found that Mr. Garg was, therefore, not straightforward, and forthright in his professional relationships and this act of Mr. Garg was in violation of the clause 1 of the Code of Conduct in the First Schedule of the IP Regulations.

12.3.1 The DC-1 took note of not only the provisions of clause (e) of sub-section (13) of section 5 of the Code and regulation 31 of CIRP Regulations but also of paras 7 and 8 of the 12th June Circular as follows: The IBBI Circular dated 12th June 2018 provides as under:

"7. The Code read with regulations made thereunder specify what is included in the insolvency resolution process cost (IRPC). The IP is directed to ensure that:-

(a) no fee or expense other than what is permitted under the Code read with regulations made thereunder is included in the IRPC;

(b) no fee or expense other than the IRPC incurred by the IP is borne by the corporate debtor; and

(c) only the IRPC, to the extent not paid during the CIRP from the internal sources of the Corporate Debtor, shall be met in the manner provided in section 30 or section 53, as the case may be.

8. It is clarified that the IRPC shall not include:

(a) any fee or other expense not directly related to CIRP;

(b) any fee or other expense beyond the amount approved by CoC, where such approval is required;

(c) any fee or other expense incurred before the commencement of CIRP or to be incurred after the completion of the CIRP;

(d) any expense incurred by a creditor, claimant, resolution applicant, promoter or member of the Board of Directors of the corporate debtor in relation to the CIRP;

(e) any penalty imposed on the corporate debtor for non-compliance with applicable laws during the CIRP; [Reference: Section 17 (2) (e) of the Code read with circular No. IP/002/2018 dated 3rd January, 2018.]

(f) any expense incurred by a member of CoC or a professional engaged by the CoC;
(g) any expense incurred on travel and stay of a member of CoC; and
(h) any expense incurred by the CoC directly; [Explanation: Legal opinion is required on a matter. If that matter is relevant for the CIRP, the IP shall obtain it. If the CoC requires a legal opinion in addition to or in lieu of the opinion obtained or being obtained by the IP, the expense of such opinion shall not be included in IRPC.]
(i) any expense beyond the amount approved by the CoC, wherever such approval is required; and
(j) any expense not related to CIRP"."

12.3.2 The DC-1 observed that: "*Initially the RP charged the premium paid in full towards the insurance policies to the IRPC, however, subsequently (i.e. after being pointed out by the IA) made an attempt to rectify this irregularity by obtaining a copy of the letter dated 20th December, 2019 from D&P clarifying the understanding between RP and D&P regarding bearing the pro-rata cost. Thus, the RP created an additional burden on the ailing Corporate Debtor by unnecessarily extending benefits to a third party i.e. D&P. Therefore, the RP failed to act in a forthright manner which is in contravention of Sections 5(13), 208 (2) (a) & (e) of the Code and Regulation 7 (2) (a), (h) & (i) of the IP Regulations read with clause(s) 1 & 2 of the Code of Conduct as given in the First Schedule of the IP Regulations, Regulation 31 of the CIRP Regulations and IBBI Circular dated 12th June 2018.*"

12.4 With regard to the issue regarding conduct of CoC meetings after filing of application for liquidation, DC-1 found that 7th and 8th meeting of CoC were convened post the completion of the CIRP period and after filing application for liquidation on 17th April 2019 (on account of the resolution passed by CoC in its sixth meeting for filing such application) not only in order to ratify the expenses incurred by the RP after the completion of the CIRP period but also for other items beyond the ratification of expenses. DC-1 found that the RP had contravened provisions of Sections 5(13), 5 (14), 12, 208 (2) (a) & (e) of the Code and Regulation 7 (2) (a), (h) & (i) of IP Regulations read with clause(s) 14 & 27 of the Code of Conduct as given in the First Schedule of the IP Regulations and Regulation 31 of the CIRP Regulations.

12.5 The DC-1 observed that Mr. Garg, by not appointing a professional and by appointing a person who is not a professional, deprived the corporate debtors of professional services and instead of protecting and preserving the value of the corporate debtors, Mr. Garg frittered away the resources of ailing corporate debtors for unlawful purposes, thereby contravened provisions of the Code, regulations and the Code of Conduct for ulterior purposes. The DC-1 states in para 4.2 of its order that:

"*Mr. Vijay Kumar Garg has contravened provisions of:*
i. Sections 5(13), 5(14), 12, 20 (2)(a), 25, 208(2)(a) and (e) of the Code,
ii. Regulation 31 of the CIRP Regulations,
iii. Regulations 7(2)(a), 7(2)(h) and 7(2)(i) of the IP Regulations, 2016 read with clauses 1, 2, 14 and 27 of the Code of Conduct under the said Regulations, and

iv. *IBBI Circular No. IBBI/IP/013/2018 dated 12th June, 2018 on "Fee and other expenses incurred for Corporate Insolvency Resolution Process."*

12.5.1 The DC-1 disposed of the SCN by an order dated 8th June 2020 with the following directions: -

"

i. *Mr. Vijay Kumar Garg shall pay a penalty equal to 25% of fee payable to him as per agreed terms and conditions in CIRPs of GGL, NBL and NWL where he has acted as an IRP/RP. The penalty amount shall be deposited by a crossed demand draft payable in favour of the "Insolvency and Bankruptcy Board of India" within 45 days of this order. The Board in turn shall deposit the penalty amount in the Consolidated Fund of India.*
ii. *Mr. Vijay Kumar Garg shall ensure that no amount beyond the reasonable fee, as determined by the Expert Committee, is paid to D&P. If any amount beyond this has been paid, Mr. Vijay Kumar Garg shall make it good to the CD within 45 days of this order and confirm the same to the Board.*
iii. *Mr. Vijay Kumar Garg shall undergo pre-registration educational course from the IPA of which he is a member and pass the Limited Insolvency Examination again to build his capacity to take up assignments on his own.*
iv. *Mr. Vijay Kumar Garg may take any new assignment/ process under the Code, only after compliance with the three [(i), (ii) and (iii) above] directions.*
v. *Mr. Vijay Kumar Garg shall, however, continue to conduct and complete the assignments/processes he has in hand as on the date of this order."*

Petition in the High Court

13. D&P filed a writ petition in the High Court of Delhi bearing Writ Petition (Civil) No. 3936 of 2020 challenging the order of the DC-I dated 8th June, 2020 in the matter of *Duff & Phelps India Private Limited* Vs. *Insolvency and Bankruptcy Board of India & Anr.* It has, *inter alia*, been submitted in the petition that the impugned order, having been passed without affording D&P a right to be heard, may cause immeasurable reputational harm to D&P with consequent impact on its worldwide businesses both potential and on ongoing. The Hon'ble High Court vide its order dated 7th July 2020 (order being uploaded on the website of Delhi High Court on 11th July, 2020) has given the following directions:

"In these circumstances, let the D&P give a representation to respondent No. 1 within three days. Respondent No. 1 may thereafter give a hearing to the D&P through video conferencing and pass a reasoned order uninfluenced by the observations made against the D&P in the impugned order. Respondent No. 1 is free to modify the impugned order accordingly as per law. Needful may be done preferably within two weeks from today."

Representation by D& P

14. In compliance of the said order of the Hon'ble High Court of Delhi, D&P submitted the representation to IBBI vide email dated 14th July, 2020 which has been referred to this DC.

14.1 D&P in its representation submitted that in the impugned order of DC-1, dated 8th June 2020, certain observations were made against D&P without providing it an opportunity of hearing and those observations have been collated by D&P in para 4 (a) to (k) of its representation. Those observations of DC-1 and responses of D&P thereof, in 'Conclusion' para 9 of the said representation is tabulated below in the Table:

SR No.	**Observations in the order of DC-1 pointed out by the D&P**	**Representation by D&P**
1	"As is evident from the scope of work envisaged in the minutes of the CoC meetings as well as the engagement letters, D&P was only engaged to provide infrastructure, personnel and back office support services which cannot be classified as professional services involving skill or even a "profession" falling within the definition given in Black's Law Dictionary (as abovementioned)." **(Page 8 of the DC Order)** *"Further, D&P cannot be regarded as an IPE since it has not been recognized by the Board under Regulation 12 of the IP Regulations. Thus, D&P does not fall within the definition of the term professional."* **(Page 8 of the DC Order)** "Mr. Garg claims that he appointed D&P for professional services. Since D&P is not a professional, having authorisation of a regulator of any profession to render any professional service, and its conduct and performance is not subject to	*This observation is incorrect, because as noted in paragraph 6 above, D&P is a professional entity, comprising of professionals such as chartered accountants, chartered financial analysts, cost accountants, technological, mechanical and civil engineers, company secretaries and the like. Further, the law does not require that only an IPE can provide support services to an IRP / RP.*

	oversight of any regulator of any profession, appointment of D&P is in contravention of section 20(2) of the Code." **(Para 4.1(d), Page 23 of the DC-1 Order)**	
2	"Within the first few months of the CIRP, the RP had become aware of the fact that there were no cash flows of the Corporate Debtor and all the assets of the Corporate Debtor were attached under various investigative authorities. It was the duty of the RP, at this stage, to discontinue the services as not required and to appoint professionals according to need. Making payment of CIRP cost and expenses does not entitle them to continue at an exorbitant fee." **(Page 12 of the DC-1 Order)**	*This observation is manifestly incorrect. As noted in paragraph 7 above, the fees was arrived at in a reasonable and transparent manner by way of a bid process. Therefore, it cannot be termed as exorbitant. Further, the fees agreed to be paid to D&P was negotiated and ratified by the CoC members in the 1st CoC meeting of the corporate debtors and was further discussed in the 7th and 8th CoC meetings of GGL, based on evolving circumstances of the case and was subject matter of extensive negotiations. In fact, D&P has given up a substantial part of its fees in relation to CIRP of GGL, as is evident from the 8th CoC minutes of GGL.*
3	"The RP engaged D&P in the 1st CoC meeting of GGL held on 1st November 2018 to provide infrastructure, personnel and back office support services while the appointment of D&P for NBL and NWL (subsidiaries of GGL) was made on 6th March 2019 in their 1st CoC meeting. There was a time gap of approx. 4 months between the two appointments, during which the RP became well aware of the fact that the assets of the Corporate Debtor were already attached by various investigation authorities and could not be taken over. This shows that the engagement of D&P for NBL and NWL	*This observation is incorrect and you may refer to our submissions in paragraph 7 above. The engagement of D&P was deliberated upon and negotiated by the CoC members, and accordingly, D&P was appointed in the CIRPs of each of the Corporate Debtors based on ratification of the CoC members. Further, as highlighted in our submissions above, there cannot be a finding of "siphoning off" of any monies as the Corporate Debtor did not have any monies available. The CIRP costs were proposed to be funded through a corpus which was created by the CoC members themselves. Further, as noted above, D&P has not been paid even a single rupee till date in relation to its engagement in the CIRP of GGL.*

	(subsidiaries of GGL) at an exorbitant rate of Rs. 6,87,500 per month each (plus taxes and out of pocket expenses) was nothing but a way of siphoning off the money of the Corporate Debtor." **(Unnumbered para, Page 12 of the DC-1 Order)**	
4	"D&P is not a professional, having authorisation of a regulator of any profession to render any professional service, and its conduct and performance is not subject to oversight of any regulator of any profession, therefore, appointment of D&P is in contravention of section 20(2) of the Code. Fee of Rs. 23, 75,000/-(excluding taxes) per month to D&P in the matter of GGL which is 19 times of the fee payable to the RP cannot be said to be reasonable. Fee of Rs. 6,87,500 /-(excluding taxes and out of pocket expenses) per month each in case of NBL and NWL to D&P also cannot be said to be reasonable." **(Unnumbered para, Page 13 of the DC-1 Order)**	*This observation is incorrect, because as noted in paragraph 6 above, D&P is a professional entity, comprising of professionals such as chartered accountants, chartered financial analysts, cost accountants and the like. Further, as noted in paragraph 7 above, the quantum of fees to be paid to D&P was arrived at through a bid process and was the subject matter of extensive discussions and negotiations with the CoC members, based on the evolving circumstances of the case.* *Additionally, please note that D&P agreed basis negotiations with the CoC in the 8th CoC meeting to charge fees for its services rendered for only 180 days from the commencement of the CIRP against GGL (i.e. until April 6, 2019), despite the fact that it continued to provide full services to the RP at least for an additional period of 6 months after April 6, 2019 without charging a single rupee for the same.*
5	"In this case, the IRP appointed D&P under section 20(2) of the Code, as per pre-agreed plan prior to his appointment as IRP, under the influence of a creditor, who has no locus either in running the business of the CD or conduct of the CIRP." **(Para**	*This observation is incorrect, because as noted in paragraph 7 above, D&P was selected through a bid process which was conducted by the lead financial creditor of GGL, and D&P's appointment was ratified by the CoC members in the 1st CoC meeting of GGL. Further, as you are well aware, when quotes are invited from IRP / RP, banks typically request for the name of the back end service provider as well, since they need to ensure that the support service provider has the necessary expertise and capability required in relation to the account.*

	4.1(a), Page 23 of the DC-1 Order)	*The selection of the IRP / RP is typically done through a bid process which also prescribes a technical criteria, and therefore, the technical expertise of the back end service provider is relevant and the RP is required to notify the name of the back end service provider / support service provider at the time of submission of the bid. Based on the quotes received, it is within the domain of the CoC members seeking the quotes to choose the relevant RP and the support service provider. This is the process which is typically followed in various accounts and this kind of observation about a financial creditor and D&P is unfortunate, considering that our appointment has been debated and agreed upon and ratified by the CoC in the 1st CoC meeting itself.*
6	"As claimed by Mr. Garg, the appointment of the IRP (Mr. Garg) and D&P was always envisaged collectively, and they were appointed on their collective strength and credentials of the RP and D&P. It makes it clear that he has been appointed not on his own strength or merit, but on the strength of D&P. This makes him beholden to D&P and explains his undue favour to D&P." **(Para 4.1(f), Page 23 of the DC-1 Order)**	*This observation is incorrect, and you may refer to paragraph 8, wherein reference has been made to the engagement agreement entered into between RP and D&P. Further, when quotes are invited from IRP / RP, banks typically request for the name of the back end service provider as well, since they need to ensure that the support service provider has the necessary expertise and capability required in relation to the account. As you are well aware, this has been the practice followed in most accounts, and this account is no exception to it.*
7	"In order to get the assignment, Mr. Garg mortgaged the interests of the CD to the creditor, by committing to engage D&P and transfer crore of rupees to D&P in the guides of fee." **(Para 4.1(g), Page 23 of the DC-1 Order)**	*This observation is incorrect, and please refer to our submissions in paragraph 7 above. Each step, right from invitation to D&P to participate in the bid process for providing support services to being appointed and all steps taken thereafter, have been under the direction and supervision of the RP and the CoC members.*
8	"Mr. Garg and D&P never had a professional-client relationship. The relationship between them is	*This observation is incorrect, and you may refer to paragraph 8, wherein reference has been made to the engagement agreement entered into between RP and D&P, which clearly lays out the professional relationship between RP and D&P. Further, as*

	mysterious." **(Para 4.1(j), Page 23 of the DC-1 Order)**	*highlighted in paragraph 7 above, please note that D&P was selected through a bid process which was conducted by the lead financial creditor of GGL, and D&P's appointment was ratified by the CoC members in the 1st CoC meeting of each of the corporate debtors.*
9	"Engagement of D&P is only a façade to siphon off funds of the ailing CD." **(Para 4.1(j), Page 24 of the DC-1 Order)**	*This observation is incorrect and you may refer to our submissions in paragraph 7 above. The engagement of D&P was deliberated upon and negotiated by the CoC members, and accordingly, D&P was appointed in the CIRPs of each of the Corporate Debtors. Further, as highlighted in our submissions above, there cannot be a finding of "siphoning off" of any monies as the Corporate Debtors did not have any monies available. The CIRP costs were proposed to be funded through a corpus which was created by the CoC members themselves. Further, as noted above, D&P has not been paid even a single rupee till date in relation to its engagement in the CIRP of GGL.*
10	"Mr. Vijay Kumar Garg converted the noble insolvency profession to a business, converted professional client relationship to that of money lending and borrowing, manipulated the market for insolvency professional services, attempted to siphon off crores of rupees from the ailing CD to its partner in crime, acted under the influence of one creditor, and contravened every provision of the Code, Regulations and the Code of Conduct for ulterior purposes." **(Para 5.1, Page 24 of the DC-1 Order)**	*This observation is incorrect. Please refer to our response in relation to Observation 9 in this regard.*
11	"The DC is inclined to allow payment of fee, as determined by the Expert Committee to D&P in the matter of GGL, even though the engagement of D&P is	*The observation is incorrect and the appointment of D&P is not illegal. Due process was followed for the appointment of D&P, and such appointment was negotiated and discussed in the CoC meetings and fees was ratified by the CoC members. Please refer*

	illegal." **(Para 5.1, Page 24 of the DC-1 Order)**	*to our submissions in paragraph 7 above in this regard.*

Written Submissions by D&P

15. In compliance of the said order of the Hon'ble High Court of Delhi, this DC considered the representation dated 13th July, 2020 received from D&P vide email dated 14th July, 2020. The representation was later supported by additional written submissions vide email dated 19th July, 2020 & 21st July, 2020.

15.1 D&P vide its representation and additional written submissions, *inter alia,* submitted that-

(a) D&P is a leading and reputed advisory firm, comprising of professionals such as chartered accountants, chartered financial analysts, cost accountants, technological, mechanical and civil engineers, company secretaries and the like. D&P is global advisory firm with presence in more than 25 countries across the world. D&P is actively involved in multiple restructuring / insolvency matters across several jurisdictions.

(b) D&P is a professional entity and has been engaged in various CIRPs as back end/support service providers for more than 2 (two) years. D&P is currently involved in providing assistance to 8 ongoing CIRPs.

(c) The IBBI, being the insolvency regulator, has been overseeing all IBC matters since the enactment and notification of the IBC in 2016, and is, therefore, well aware that most cases undergoing CIRP process are not being handled by IPEs. The law nowhere provides that Insolvency Professional Entities (IPEs) are the only entities that can act as support service providers to an IRP / RP. In fact, the Code does not even make a reference to an IPE and Regulation 12 of the IBBI (Insolvency Professional) Regulations, 2016 only deals with recognition of IPEs. The Code only makes a reference to the term "professionals". D&P comprises of professionals, and the law nowhere requires that IPE entities are the only entities which are allowed to provide support services to IRP / RP.

(d) As a matter of practice, most of the firms that have been providing support services to RP/ IRPs, are entities that are neither IPEs nor are they regulated by any regulator like ICAI, ICSI, etc. and examples can be drawn out of the first 12 large cases which were referred for CIRP by the Reserve Bank of India ("RBI") (i.e. the Dirty Dozen). Eight of the twelve large accounts which were referred were in fact handled by entities which were not registered as IPEs. These include CIRP matters such as Essar Steel Limited, Bhushan Steel Limited, Monet Ispat & Energy Limited, Electrosteel Limited, Amtek Auto Limited, Era Infra Engineering Limited, Lanco Infratech Limited and Alok Industries Limited.

(e) In the context of large corporate accounts, it is pertinent to note that most of these firms are not registered as IPEs. These entities, though comprising of professionals (such as CAs, cost accountants, etc), are not professionals themselves, as they are not regulated by ICAI, ICSI or the like, since most of these entities are consultancy or advisory firms, such as D&P. ICAI, ICSI only discharge certain statutory functions that are provided under the relevant statutes, they do not regulate all the businesses of a firm. In fact, since disclosures related to appointment of IPEs/support service providers/other professionals are made to IBBI by IRPs / RPs for all completed and ongoing CIRPs, D&P would request IBBI to examine data in this respect, since non-IPEs provide support services to RPs/ IRPs as of practice, and there are a plethora of such instances that can be found in the market today.

(f) There are also various judicial precedents (of the Supreme Court, High Courts etc.) where the term "professional" has been interpreted. The DC Order has construed the term "professional" in a very narrow and restrictive way which is incorrect and is detrimental to the interest of the insolvency market in India.

(g) Further, the observation in the DC Order relating to scope of services of D&P is wholly misplaced. The scope of services provided by D&P is the nature of services that are provided by each support service provider to IRP/RP in mostly all CIRP cases. These services are provided to the IRP/RP and are subject to the IRP/RPs control, supervision, and direction.

(h) That there were no monies in GGL's account to incur any CIRP costs so D&P had to incur additional costs and pay for part of the CIRP costs out of its own pockets so as to further the CIRP process. However, all expenses incurred by D&P towards CIRP costs have been debated and ratified by the CoC members in their various meetings, including in the 1st CoC meeting dated November 1, 2018 and the 7th CoC meeting dated May 31, 2019. No remuneration has been paid to D&P in relation to its services rendered in the CIRP of GGL till date.

(i) D&P's proposal to act as support service provider to IRP/RP of GGL was selected through a bid process which was conducted by ICICI Bank Limited (as the lead financial creditor of GGL at the time), and D&P's appointment was subsequently ratified by the CoC members of GGL in the 1stCoC meeting dated 1st November, 2018. There were various discussions and negotiations in relation to D&P's fees, which were deliberated and noted in the 1stCoC meeting held on 1stNovember, 2018 and the 7thCoC meeting held on 31stMay, 2019. Apart from conducting a fair and transparent selection process, the decision to award the contract to D&P for rendering the requisitioned services was a commercial call, one which was reached through an elaborate process of negotiations not only with lead bank at the inception, but also subsequently with the members of the CoC. The CoC members applied their commercial wisdom when negotiating and finalizing the fees for D&P. It is now a settled principle of law that the commercial decisions taken by the CoC cannot be substituted or questioned, even by a court of law. This has been laid down by the Supreme Court in the matter of *K.Sashidhar* Vs. *Indian Overseas Bank,* (2019) 12 SCC 150.

(j) Since the corporate debtors had no monies, there could have been no siphoning off of funds. In order to arrive at a finding of siphoning of funds, it is first required to be determined that the monies of the corporate debtors have been diverted or utilized by D&P for its own benefit. In fact, there is no visible cash flows and the Corporate Debtor's bank accounts stand frozen/attached by the investigating agencies. Therefore, no allegation of siphoning of money by D&P is sustainable *sans* any benefit accruing to D&P.

(k) Any and all expenses which were approved to be incurred by D&P towards CIRP costs were undertaken only after due approval and discussion with members of the CoC and the monies to fund the CIRP costs were also contributed by the CoC members themselves (in the form of the corpus), there can possibly be no conspiracy or siphoning off of monies. The monies have been funded by the CoC and their utilization has been approved by the CoC members based on extensive discussions and negotiations in the various CoC meetings. A perusal of CoC minutes clearly brings out that D&P fees has been discussed and negotiated in detail in multiple CoC meetings, and the same has been fixed and agreed

upon after following a transparent bid process. Therefore, the question of siphoning off does not arise.

(l) Further, subsequent to negotiations with the CoC members in the 8th CoC meeting of GGL, D&P agreed to not charge fees for time period after April 6, 2019 and only charged fees for services rendered for 180 days from the commencement of the CIRP against GGL *(i.e.* until April 6, 2019). This was despite the fact that D&P continued to provide full services to the RP for at least an additional period of 6 months. The allegation that D&P is RP's 'partner in crime' in siphoning off funds from the Corporate Debtor was never referenced in the draft inspection report or the SCN and the Disciplinary Committee proceeded to issue a finding on an allegation that was never brought forth in the first place. Had the SCN disclosed such allegations and the same been issued to D&P, D&P would have had advance notice of the same and assisted the Disciplinary Committee in arriving at the correct conclusion both on fact and in law on this issue.

(m) The Engagement Agreement entered into between RP and D&P clearly sets out the professional relationship between both parties.

(n) When quotes are invited from IRP / RP, banks typically request for the name of the back end service provider as well, since they need to ensure that the support service provider has the necessary expertise and capability required in relation to the account. The selection of IRP / RP is typically through a bid process which also prescribes a technical criteria, and therefore, the technical expertise of the back end service provider is relevant and the RP is required to notify the name of the back end service provider / support service provider at the time of submission of bid.

(o) Further, part of the costs towards CIRP expenses were incurred by D&P (including payment for insurance of RP) so as to ensure the going concern status of the Corporate Debtor and to continue running the CIRP process smoothly. However, there was substantial delay in opening of account establishing the corpus due to several issues surrounding ED attachment order and the possibility of ED attaching the monies in the account. Accordingly, the CoC members decided to move the NCLT to seek approval to open an account in the name of GGL. In the meantime, there was a need to make payments to ensure to ensure continuity of the CIRP process, and the CIRP process could not have been compromised due to these issues. Based on these circumstances, D&P made payments towards CIRP costs, and each of these costs were ratified by the CoC.

(p) Additionally, based on negotiations with CoC members in the 8th CoC meeting of GGL dated 1st August 2019, D&P agreed to charge fees for its services rendered for only 180 days from the commencement of the CIRP against GGL (i.e. until 6th April 2019) because the CoC decided not to extend the CIRP period beyond the initial 180 days. D&P agreed to do so despite the fact that it continued to provide full services to the RP at least for an additional period of 6 months after 6th April 2019 without charging a single rupee for the same (and continues till date to provide service as technically the CIRP is still continuing since the AA is yet to direct the end of CIRP and direct liquidation of the Corporate Debtors).

(q) The D&P has submitted that the Disciplinary Committee is constituted under Section 220 of the Code, and its powers are laid down in Section 220 of the Code read with Regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016 ("IP Regulations"). The Disciplinary Committee has the powers to *inter alia* suspend or cancel registration of IPs or their authorization for assignment and impose penalties against IPs.

(r) The Disciplinary Committee only has jurisdiction over IPs and Insolvency Professional Entities ("IPEs"), and not over any back-end service providers or third parties. Therefore, the Disciplinary Committee does not have the power to, and should not have made any observations in relation to any third party, and in this particular case, relating to D&P without appropriate investigation or inspection. The observations made in the order in relation to D&P and any financial creditor are without jurisdiction. Accordingly, such part of the order in so far as it relates to D&P should be declared as inoperative and should be expunged from the order forthwith.

(s) It is also submitted that the Code does not define the term "professional". The interpretation of the term "professional" is a complicated question of law. It is very clearly not aligned to the reading put upon it by the DC in the order, and this reading of the term "professional" is incorrect and is not supported by authorities, or indeed by the common understanding of the word "professionals". It is submitted that the interpretation of the term "professional" does not fall within the jurisdiction of the Disciplinary Committee and therefore this issue of jurisdiction of Disciplinary Committee should be decided upfront.

(t) Even in ongoing or closed CIRPs of large accounts where IBBI has conducted investigations/ inspections or where Disciplinary Committee has conducted hearings and passed orders, the back end/support service providers would not fall within the definition of "professional" as has been interpreted by the Disciplinary Committee in the order. The interpretation given to the word "professional" by the Disciplinary Committee order is completely at variance with market practice and IBBI's own orders in the past. This will lead to a disruption of the market as this will not only have an effect on the other accounts that D&P is handling as back-end service provider (which the IBBI is well aware of), but also on the majority of large accounts (*i.e.* where debt size is in excess of Rs. 2000 crores) that have been resolved or are undergoing CIRP presently. Therefore, we submit that the Disciplinary Committee, in its wisdom, should not exercise such jurisdiction.

Hearing before the DC

16. In compliance of the said order of the Hon'ble High Court of Delhi and upon receipt of said representation from D&P, this DC provided an opportunity of e-hearing on 20th and 21st July, 2020 to D&P. This DC permitted the D&P to be represented by Mr. Krishnendu Dutta, Sr. Advocate and Ms. Pooja Dhar, Advocate on record.

16.1 Mr. Dutta and Ms. Dhar appeared on behalf of D&P before this DC on 20th and 21st July 2020. Mr. Kuntal Shah, Senior Adviser and Mr. Aviral Jain, Managing Director of D&P respectively were also present during personal hearing on both days. Mr. Dutta drew the attention of this DC to various observations in the order dated 8th June 2020 by the DC-1 which disposed of the SCN dated 11th December 2019 issued to Mr. Vijay Kumar Garg, IP in respect of his conduct as an IRP/RP in the CIRP of GGL, NWL and NBL.

16.2 Mr. Dutta reiterated the submissions made in the representation. He submitted that IBBI has jurisdiction to regulate the IP and can take action against them but does not have jurisdiction to pass adverse observations regarding third party service providers like D&P, which is not an IP.

16.3 Mr. Dutta has submitted that the observations in the DC-1 Order include that D&P has been labelled as partner in crime, prejudicial finding that D&P and Mr. Vijay Kumar Garg never had a professional relationship, terming the arrangement between D&P and Mr. Vijay Kumar Garg as a mysterious arrangement and alleging that there was an unholy alliance to siphon away money of the corporate debtor, are without any basis.

16.4 Mr. Dutta proceeded towards expounding on the points in the representation regarding the relationship of D&P and Mr. Vijay Kumar Garg, engagement of D&P. Mr. Dutta has submitted that D&P is a 'professional' and its fee was ratified and fixed in the 1st CoC meeting of GGL dated 1st November 2018. An agreement dated 8th October 2018 was entered between D&P and Mr. Vijay Kumar Garg.

16.5 Mr Dutta has submitted in line with the representation that it is the market practice that large international reputed organisations are engaged to provide similar services as provided by D&P in high value CIRPs including those of the first 12 large insolvency accounts as referred by the RBI.

16.6 Three queries were raised by this DC during hearing:

(a) Whether Mr. Garg acted independently of D&P.

(b) Whether professionals employed in such entities are employees or partners or independent professionals.

(c) When corpus regarding the same had already been created as per minutes of the 1st CoC meeting dated 1st November 2018, what was the reason for D&P to make payments towards the CIRP expenses of GGL?

With regard to the above queries, Mr. Dutta submitted that further instructions would have to be sought by him regarding the queries raised by the DC. The hearing was therefore adjourned for the next day.

16.7 On 21st July 2020, Mr. Dutta provided his reply to the queries in writing vide email dated 21st July 2020. On the issue of independence of Mr. Garg, it has been submitted that there is absolutely no material on record to show that the he was not acting independent of D&P. In this regard, this DC was shown certain emails exchanged between Mr. Garg and D&P employees and it was submitted that these clearly establish his independence. Mr. Garg remained the key decision maker and directed the CIRP (including in all matters that D&P has been involved in). Mr. Garg presided and chaired the meetings of the CoC and conducted all functions and roles as mandated under the Code. D&P, just like any other advisor only supported him. The D&P team supporting him clearly worked under his supervision and control.

16.8 On the issue of D&P being a 'professional' under the Code, it has been submitted that, D&P's back end support team consists of employees, in line with the relevant market practice. For instance, large firms (such as Big 4s), which have handled the CIRP's including the first 12 insolvency cases, typically hire individuals as employees, who then surrender their individual certificate of practice. Similarly, doctors are in the employment of hospitals or government

organisations, and are therefore "employees", but would still be called professionals. Lawyers in large UK firms are hired as "employees", and not retainers, but are of course treated as "professionals". The surrender of a certificate of practice does not take away from the fact that a person remains a professional. It is submitted that there is no general law which provides that professionals must be practicing and cannot be employed. Therefore, the question of whether a person is employed is immaterial to determine if he is a professional.

16.9 It has been further submitted that the Oxford's Advanced Learners Dictionary (relied by the Hon'ble Supreme Court in *Mohmoodkhan Mahboobkhan Pathan* Vs. *State of Maharashtra*, (1997) 10 SCC 600) defines "professional" to mean "*of, relating to or belonging to a profession, eg: architecture, law 1 or medicine: the acting / teaching / dental profession*", and defines "profession" to mean "*a paid occupation, esp one that requires advanced education and training*". Therefore, the above definition does not support interpretation of professional as relied upon by the DC-1. Further, as IBBI is well aware that this definition runs contrary to the market practice, most large accounts (exceeding Rs. 2,000 crore) are being handled by support service providers which are not regulated by Institute of Chartered Accountants of India (ICAI) (being consulting firms and not audit arms of the firms) and are not registered as IPEs. Many of these accounts have been inspected by IBBI as a regulator and the Disciplinary Committee has also examined the conduct of RPs in these mandates through IPA disclosure and Form CIRP 2.

16.10 Mr. Dutta further submitted that a closer reading of the section 20(2)(a) will bring out that the term profession has been used in a broader non-technical sense. It is submitted that the term "professional" and "accountant" in section 20(2)(a) of the Code have been used in a generic sense. It is pertinent to note that the term used in section 20(2) (a) of the IBC is "accountant" and not "chartered accountant" or "cost accountant". This usage of the term includes individuals with degrees and diplomas and not just qualified professionals. Therefore, the term "professionals" has to have a generic meaning and the wording is to be used in a generic sense and it would be incorrect to interpret the term in the same manner in which IBBI prescribes qualifications for IPs under the IP Regulations. Therefore, interpreting the term 'professional' in the same manner as the Disciplinary Committee would render the support service providers engagement by various RPs null and void.

16.11 On the issue of why D&P was funding the CIRP costs for GGL when a corpus was available, it has been submitted that no corpus was available during the CIRP period. This is evident from various CoC minutes which bring out that: (a) CoC wanted the AA to approve the opening of an account for establishing a corpus for the CIRP before funding it; (b) D&P was paying part of the CIRP fee. A perusal of the order of the AA, dated 5th March 2019, brings out that the AA permitted a corpus to be created which resultantly meant that Mr. Garg did not have access to any funds as the corpus was not created till the date of the order. Further, the said order directed Mr. Garg to approach the AA for the withdrawal of any funds from the corpus.

16.12 Mr. Dutta again reiterated the submissions made in the representation dated 13th July 2020 and additional submissions dated 19th July 2020. He prayed that all references to D&P in the DC-1 Order and the observations made in relation to D&P should be forthwith expunged.

Analysis and Findings

17. With respect to the contention of D&P that the Disciplinary Committee only has jurisdiction over IPs and IPEs, and not over any back-end service providers or third parties, and should not have made any observations in relation to any third party, and in this particular case, relating to D&P without appropriate investigation or inspection, this DC notes that inspection was conducted by the IBBI relating to the role of Mr. Garg as IRP/RP of GGL, NBL & NWL. Thereafter, SCN was issued on the basis of the Final Inspection Report. The SCN was disposed of by the DC-1 vide its order dated 8th June 2020. The DC finds that, as per the Engagement Letter, the powers of the RP which should have been exercised by the RP himself, were enumerated in the said Letter to be performed by D&P. Therefore, the observations were made in the context of exercise of the RP's powers by D&P, hence, are contextual observations. However, the directions were issued only in respect of the IP and no directions or penalties have been issued against D&P.

17.1 With respect to the issue regarding whether D&P is a 'professional' or not, the provisions of the Code are spelt out in clear terms. The observations in respect of the services claimed to have been provided by D&P and the observations in respect of what constitutes a "Profession" must be read in the context of the provisions of the Code. Therefore, the observations have to be read in that limited context of the Code. In this case, it cannot be said that D&P was performing "professional services" under the Engagement Agreement, as contemplated under the provisions of the Code.

17.1.1 It is pertinent to appreciate the clear and express bar imposed by the Code on any person rendering services as an insolvency professional without being enrolled as a member of an Insolvency Professional Agency and being registered with the IBBI. Sections 206 and 207 read as under:

> "*206. No person shall render his services as insolvency professional under this Code without being enrolled as a member of an insolvency professional agency and registered with the Board.*
>
> *207. (1) Every insolvency professional shall, after obtaining the membership of any insolvency professional agency, register himself with the Board within such time, in such manner and on payment of such fee, as may be specified by regulations.*
>
> *(2) The Board may specify the categories of professionals or persons possessing such qualifications and experience in the field of finance, law, management, insolvency or such other field, as it deems fit.*"

17.1.2 Thus, in the letter and spirit of the Code, it is a registered insolvency professional alone who is entitled to exercise functions as an insolvency professional. This means that nobody else, that is, no person who does not possess those qualifications and requirements is

directly or indirectly permitted to perform those functions. It is not the case of D&P that it qualifies as insolvency professional (who is in any case, required to be an individual and not a firm or a corporate entity). Therefore, under the garb of an Engagement Agreement, it was not permissible for Mr. Garg who was appointed for the purpose of carrying out certain statutory functions and is qualified to carry out those statutory functions, to pass them on to any other agency, in this case, D&P. As observed by the DC-1 in the order dated 8th June, 2020, the Resolution Professional is required to carry out his/her functions himself and must have the capacity to deliver on those obligations before he/she consents to be appointed as a Resolution Professional.

17.1.3 This DC has once again gone through the Engagement Agreement dated 8th October 2018 under which D&P was engaged by Mr. Vijay Kumar Garg as IRP. In the said document, IP Mr. Garg, inter alia, states that, "*As IRP of the Company, I wish to engage Duff & Phelps to provide the Back-Office Support Services to me as agreed herein*". The scope of work of D&P as elaborated in the engagement agreement is as under:

> "***SCOPE OF BACK OFFICE SUPPORT SERVICES***
>
> *The Back Office Support Services provided by Duff & Phelps to the IRP hereunder shall be comprised of the following:*
>
> 1. *Assisting IRP in carrying out his obligations under IBC, which generally include providing the following services to the IRP in respect of the CIRP of the Company:*
>
> a. *Collect all available information relating to the assets, finances and operations of the Corporate Debtor including information relating to its business operations for previous 2 years, financial and operational payments for last 2 years, list of assets and liabilities as on the CIRP commencement date.*
> b. *Receive, collate and verify all the claims received from the creditors.*
> c. *Assist the IRP in constituting a committee of creditors of the Company (the 'COC') and to convene and conduct COC meetings of the IRP's behalf.*
> d. *Monitor and manage the operations and assets of the Corporate Debtor.*
> e. *File information collected on behalf of the IRP, as applicable and necessary.*
> f. *Assist the IRP to take control and custody of any asset over which Corporate Debtor has ownership rights.*
> g. *Prepare the information memorandum.*
> h. *Submit a resolution plan to the adjudicating authority as approved by the Committee of Creditors.*
>
> 2. *To review the accounts and operations of the Company and to assist and advise the IRP on the management affairs and continuing the operation considering the initiation of the CIRP.*
> 3. *To assist IRP in preparing status reports / progress reports and other reports for submission before the Adjudicating Authority.*
> 4. *To assist the IRP before the COC / NCLT or any other Court of Law with respect to CIRP process of the Company.*
> 5. *To attend to all requirements in the CIRP of the Company as may be required of the IRP from time to time, as per the instructions of IRP.*

6. *To assist IRP to take such action as may be required by Insolvency and Bankruptcy Board of India ('IBBI') and to render assistance to IRP in carrying out its functions of IRP in terms of Sections 17, 18, 20, 23 and 25 of the IBC.*
7. *To assist IRP in conducting the entire CIRP of the Company and manage the operations of the company at overall level during the CIRP period.*"

However, the scope of the services elaborated in the said document are virtually or substantially the same as the statutory duties entrusted to the IRP/RP himself. The Engagement Agreement indicates that the very same statutory functions that are required to be performed by Mr. Garg are to be performed by D&P. The Code does not contemplate that the IRP/RP who is a qualified professional required to perform the very important function of managing the corporate debtor, coordinating between different agencies, while keeping it a going concern and steering it to a resolution should allow a third party who is not regulated under the Code to perform those very functions. This would defeat, *inter alia*, the provisions of Section 206.

17.1.4 Section 20 (2)(a) confers power upon the Interim Resolution Professional to appoint accountants, legal or other professional "as may be necessary". Thus, there has to be a necessity for a professional to be appointed. Although, the type of professionals that can be engaged is not exhaustively set out in this provision, the examples of professionals given are accountants, legal professionals, etc. In the present case, no necessity has been shown for the appointment of D&P by Mr. Garg at the relevant time, on the contrary as found in the earlier order dated 8th June, 2020, there was no necessity in view of the fact that this was a case where there was no cash flow of the corporate debtor and all its assets were attached with various investigative authorities. Mr. Garg was aware of this and therefore, it was necessary for him to ensure that the costs incurred were not excessive and not disproportionate given the situation in this case. In the instant case, immediately on expiry of 180 days, the CoC recommended liquidation. In this context, the costs being incurred, that too by engaging third parties to do a job required to be done by the Resolution Professional, were totally unjustified. The Resolution Professional was under a duty to conserve the assets and funds of the corporate debtor which had already been bled by its promoters.

17.1.5 The purpose of section 20(2)(a) is to enable the IRP to appoint other professionals to carry out duties which he/she may not be having the competence to carry out, as for example (but not limited to) accountancy or the legal profession. There is no provision to appoint another party to carry out the very function that the RP/IRP is required to carry out. The term "professional" must be seen in the above context. This DC is not concerned with D&P acting as a "professional" in any other context outside the purview of the Code and its observations should not be stretched beyond the context and the case before it. In this case, the duties enumerated under the Engagement Agreement are well within the scope of Mr. Garg's own expertise, other than support services. It was not to carry out, much less to take over the IRP/RP's duties. D&P has not even claimed to have performed any functions as a professional which were outside the core functions or expertise of the RP or which the latter was not qualified to do. Therefore, the costs which were being thrust on the corporate

debtor or were intended to be so thrust was certainly an arrangement that does not pass muster of the Code.

17.1.6 The AA vide its order dated 8th October 2018, appointed Mr. Vijay Kumar Garg as an IRP on the application filed by ICICI Bank Ltd. a Financial Creditor of the corporate debtor. Under Section 7(3)(b), the Financial Creditor invoking Section 7 of the Code is required to furnish the name of the Resolution Professional proposed to act as IRP. It was ICICI bank that furnished the name of Mr. Vijay Kumar Garg and thus he came to be appointed as IRP. At this stage, the AA was not informed of any inter se arrangement by which any of the functions of the IRP were to be performed by any third party. In any case, there is no provision for such an appointment of a third party and the same would amount to a contravention of the Code except as permitted in accordance with section 20(2)(a) as stated above. There is no provision under the Code or Regulations for a "collective bid" or "pre agreed plan" as is found in the present case. Therefore, the pre-agreed inter-se arrangement for engagement of D&P is not in accordance with Code.

17.1.7 The Code, regulations and circular provide in unambiguous language the provisions relating to appointment of professionals and the guidance for Insolvency Resolution Process Costs (IRPC). Section 20(1) of the Code mandates the interim resolution professional (IRP) under section 20(2)(a) of the Code to appoint 'accountants, legal or other professionals' as may be necessary for the purposes of section 20(1). Similarly, section 25(2)(d) of the Code authorises the RP to appoint 'accountants, legal and other professionals' in the manner specified by the Board, for the purposes of section 25(1). Further, Regulation 27 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations) requires the RP to appoint two registered valuers to determine fair value and liquidation value of the corporate debtor.

17.1.8 This DC notes that the explanations to regulations 33 and 34 of the CIRP Regulations clarify that expenses, which form part of the insolvency resolution process costs, to include any fee to be paid to the IRP or the RP, as the case may be, fee to be paid to insolvency professional entity (IPE), if any, and fee to be paid to professionals, if any. Regulation 34A of the CIRP Regulations provides that the IRP or the RP, as the case may be, shall disclose item-wise insolvency resolution process costs in such manner as may be required by the Board. Clause 25A of the Code of Conduct for IPs under the First Schedule to the IP Regulations provides that an IP shall disclose the fee payable, *inter alia*, to professionals engaged by him.

17.1.9 The provisions with respect to expenses incurred while engaging 'professionals' were clarified by the IBBI *vide* Circular No. IBBI/IP/013/2018 issued on 12th June 2018. Circular No. IBBI/IP/013/2018 dated 12th June, 2018 specifies disclosures relating to: (a) fee payable to Registered Valuers, Accounting Professionals, Audit Professionals, Legal Professionals and other Professionals, if any, (b) fee payable to IRP and RP, and (c) fee payable for support services to an IPE, if any. Further, Circular No. IP/005/2018 dated 16thJanuary, 2018 requires an IP conducting resolution process to disclose his relationship, if any, with other Professional(s) engaged by him, along with their Professional

Membership Numbers. Circular No. IP/004/2018 dated 16thJanuary, 2018 requires that any payment of fees for the services of an IP and any other professional(s) appointed by an IP shall be paid to his / its bank account.

17.1.10 This DC further notes that section 19 read with section 23 of the Code mandates that the personnel of the corporate debtor, its promoters or any other person associated with the management of the corporate debtor shall extend all assistance and cooperation to the IRP and the RP as may be required by him in managing the affairs of the corporate debtor. The IP can seek directions from the AA in case such persons do not assist or cooperate. In *M/s. Subasri Realty Private Limited* Vs. *Mr. N. Subramanian &Anr.*[Company Appeal (AT) (Insolvency) No. 290 of 2017], the Hon'ble NCLAT clarified that after appointment of the RP and declaration of moratorium, the Board of Directors of a corporate debtor stands suspended, but that does not amount to suspension of Managing Director or any of the Directors or officers or employees of the corporate debtor. To ensure that the corporate debtorremains as a going concern, all the Directors and employees are required to function and assist the RP who manages the affairs of the corporate debtor during the CIRP. This makes it clear that the IRP or the RP, as the case may be, shall endeavour to make use of professional services available inside the corporate debtor, failing which he may appoint other professionals.

17.2 The contention of D&P is that the Corporate Debtor had no money and fee of D&P was to be paid out of the corpus of the financial creditors and that even otherwise, not a single rupee was paid to them and thus, there could have been no finding in DC-I Order on siphoning. In this regard, this DC notes that D&P fees for GGL was Rs. 25 lacs per month in addition to the out of pocket expenses. There is nothing to show as to why it was necessary to continue the engagement of D&P when GGL was not a going concern and all assets and books of accounts had been seized by different investigation agencies. As mentioned in the report of the Expert Committee, there is no justification for the fee being charged by D&*P vis-a-vis* the actual services provided.

17.2.1 Further, in the present case, the DC notes that it was agreed between Mr. Garg and D&P that the latter would be given Rs. 23,75,000/- per month which is 19 times the amount that would be earned by Mr. Garg himself. This amounts to drawing out/attempting to draw out exorbitant amounts from the already bleeding corporate debtor which were not justified/warranted or at all necessary in the circumstances. It is extremely unusual for any back-office support service provider to be paid more, let alone so many times more, in fees than the registered, qualified professional himself. It is in this context that the expression "mysterious" used in the earlier order should be seen.

17.2.2 As already stated, RPs are required to perform their own functions, and where necessary engage support services. For the integrity, efficiency and effectiveness of the process under the Code, RPs must be able to devote themselves to their statutory duties and take on only as many assignments as they are able to properly handle. This is vital for proper functioning of the Code.

17.2.3 It has been submitted on behalf of D&P that it was not actually paid any monies, and on that ground the observations of "siphoning" are contested. In this regard, this DC notes the observations of the Expert Committee that, in a situation such as this where the assets were seized and no real attempts were made at revival, such large amounts of "fees" could not

be said to be "reasonable". It is also to be noted that in the DC-1 order dated 8th June 2020, it has been stated that the engagement of D&P at exorbitant rate "*was nothing but a way of siphoning off the money of the Corporate Debtor*", "*Engagement of D&P is only a façade to siphon off funds of the ailing CD*" and that the RP "*attempted to siphon off*". In this regard, this DC notes that such observations/remarks must be viewed in the context that there were no monies in GGL's account and that its assets were frozen/attached by various investigating agencies, despite the same, D&P was engaged at an exorbitant rate for GGL and its subsidiaries. (The expression "siphon" is used in the sense of "drawing out" or "taking out") .Moreover, there is no finding in the DC-1 order that siphoning has already taken place. The expressions used are "way of siphoning" or "attempted to siphon off". If actual siphoning takes place, then the disciplinary committee is empowered to exercise powers under section 220 (4) of the Code.

17.2.4 D&P has stated that it has not received any amounts from the CIRP of GGL, this DC notes that, the fact remains that Mr. Garg did make an application to the AA seeking its permission to withdraw Rs. 3.57 Crores from GGL's escrow account for the expenses incurred by it during the CIRP. It is at this juncture that the AA made the following observations *vide* its order dated 14th May, 2019:

> "*7. In my Prima facie opinion, it appears that the claimed amount as Corporate Insolvency Resolution Process cost of Rs.3,57,47,494/- is an exorbitant claim considering the totality of the circumstances.*
>
> ***
>
> *9. As a consequence, this Bench is of the opinion that a guideline can be obtained from IBBI, New Delhi that whether any Regulation or any Notification about the fixation of remuneration of RP has been issued as a guiding factor. I, therefore, refer this problem i.e. fixation of CIRP cost, etc. to IBBI, New Delhi. If deem fit, the said Regulatory Authority can examine the reasoning and he basis on which the members of the CoC have approved the claim of expenditure.*"

17.2.5 It has been repeatedly contended that CoC had already approved the arrangement and the fees agreed to be paid to D&P. However, as per section 20 (2) (a) of the Code, the IRP has full authority to appoint accountants, legal or other professional, as may be necessary, without the approval of the CoC. The CoC's approval is only required for fixing the expenses including fee required to be paid to the professionals engaged by the IRP/RP and other expenses to be incurred for the purpose of the CIRP as per regulation 34 of the CIRP Regulations. Even if the expenses have been approved by the CoC, such a pre-agreed inter-se arrangement is not envisaged under the Code. CoC is certainly empowered to take commercial decisions with respect to the resolution plan and as provided in the Code. However, their purported approval of such an arrangement does not mean that it passes muster under the Code, nor does it prevent the Board from taking disciplinary action.

17.2.6 It has been contended that in other CIRPs (including 12 large accounts) as well, the IRP/RP has engaged non-IPE entities like D&P to provide back office support services. In this regard, this DC notes that the terms of engagement of some of such entities did not provide for exercise of powers of the IRP by the support service provider. The Board takes due cognizance of any irregularities which are brought to its notice.

17.2.7 With regard to the observations that D&P is a "partner in crime", this DC is of the view that disciplinary proceedings being in civil in nature, para 5.1 of DC-1 Order may be suitably modified.

Order

18. In the order dated 8th June 2020 of DC-1, it is noticed that the observations are made against IP Mr. Garg for his conduct in the CIRP and the directions were issued only in respect of the IP and no directions or penalties have been issued against D&P. The observations as alleged to be adverse against D&P are in the context of the engagement of services of D&P by the IP in contravention of the provisions of the Code and the regulations framed thereunder.

18.1 After considering the representations made by the D&P, oral and written submissions made during personal hearing and in the light aforesaid findings, this DC opines as follows.

(i) It is the duty of the IP to ensure reasonable fees as well as appoint only those professionals which were required on need basis. The IP is required to carry out his own statutory duties.

(ii) Further, the conduct of Mr. Garg in continuing to engage services of D&P at an exorbitant rate for the subsidiaries of the GGL is not justified specially in the light of fact of attachment of assets of the corporate debtors by various authorities.

(iii) The exorbitant/disproportionate fees of D&P has been observed by the AA as well as the Expert Committee constituted by the IBBI in compliance of order dated 14th May 2019 passed by the AA. Engaging its services at an exorbitant cost by an IRP/RP appears to be an attempt to siphon off/draw out money from the already ailing corporate debtor.

(iv) An arrangement by which high and disproportionate fees are to be paid to a third party, that too, 19 times higher than that due to the IP, would be contrary to the letter and spirit of the Code as it would amount to bleeding the corporate debtor further when such high costs were not required to be incurred in the facts and circumstances of the case. It did not matter whether or not the monies were actually received by D&P. The amounts were intended to be received, and Mr. Garg made an application to the AA for a release of funds for this purpose.

19. In view of the above, this DC hereby deems fit to modify para 5.1 of the order of the DC-1 dated 8th June 2020 as follows for the reasons recorded as hereinabove:

"5.1 Mr. Vijay Kumar Garg converted the noble insolvency profession to a business, manipulated the market for insolvency professional services, acted under the influence of one creditor and contravened various provision of the Code, Regulations and the Code of

Conduct for ulterior purposes. Such conduct does not call for any leniency. However, in view of the directions of the AA and the recommendations of the IBBI's Expert Committee of IBBI about reasonableness of fee, the DC is inclined to allow payment of fee, as determined by the Expert Committee to D&P in the matter of GGL."

20. Accordingly, the representation of D&P is disposed of in compliance of the directions of the Hon'ble High Court of Delhi.

- Sd -

Dated: 28th October, 2020
Place: New Delhi

(Dr. Mukulita Vijayawargiya)
Whole Time Member, IBBI
& Disciplinary Committee