



भारतीय दिवाला और शोधन अक्षमता बोर्ड  
Insolvency and Bankruptcy Board of India

 **IFC** | International  
Finance Corporation  
WORLD BANK GROUP  
*Creating Markets, Creating Opportunities*

# Understanding the IBC

KEY JURISPRUDENCE AND  
PRACTICAL CONSIDERATIONS

A HANDBOOK



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## Foreword

The insolvency space is extremely fertile, especially in a market economy. It acquires richness, depth and maturity with every transaction. The insolvency regime in India is no exception. The Insolvency and Bankruptcy Code, 2016 (Code) has witnessed five legislative interventions since its enactment to strengthen the processes and further its objectives, in sync with the emerging market realities. There have also been dozens of amendments to the regulatory framework to smoothen the implementation of processes under the Code. The Adjudicating Authority, the Appellate Authority, High Courts, and the Supreme Court have all delivered numerous landmark orders and judgments explaining several conceptual issues, settling contentious issues and resolving grey areas. Insolvency as a discipline of knowledge is now well established in India.

A key pillar of the insolvency ecosystem is the regulator, namely, the Insolvency and Bankruptcy Board of India (IBBI). It is responsible for professionalising insolvency services through regulation and development of service providers, namely, insolvency professionals, insolvency professional agencies, insolvency professional entities, information utilities, registered valuers, and registered valuers' organisations. It has been the endeavour of the IBBI to ensure that the service providers are fit-and-proper persons and technically competent, and also have motivation and drive to uphold the highest standards of ethics and professionalism. In pursuance of this responsibility, the IBBI has been carrying out and promoting a variety of activities to build the capacity of service providers, and monitoring their conduct and performance closely.

The IBBI entered into a Cooperation Agreement with International Finance Corporation (IFC), a member of the World Bank Group, in 2019, which aims, inter alia, to further build capacity of insolvency professionals. In pursuance of the said Agreement, IFC has prepared this Handbook detailing the four pillars of insolvency ecosystem, and the provisions of law, practices and case laws in respect of corporate insolvency resolution and liquidation processes. This Handbook captures the evolving discipline of insolvency with all its nuances and is intended to serve as a single point of reference for insolvency professionals, and all others in the ecosystem, who wish to study more and delve into this emerging area of law and practice. I may, however, add that this Handbook is designed for the sole purpose of education.

I compliment IFC, and the authors who supported IFC, in preparation of this Handbook. I sincerely believe that insolvency professionals, prospective insolvency professionals and other students of insolvency and bankruptcy would find this Handbook useful.

*M. S. Sahoo*

Dr. M. S. Sahoo  
Chairperson  
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## Foreword

At the time of writing, the liquidity and solvency challenges triggered by the COVID-19 pandemic are expected to give rise to a wave of bankruptcy filings across the globe. The lockdown and social distancing measures that are urgently needed to contain the pandemic, have disrupted business activity and their ability to pay creditors. Optimal insolvency regimes are accordingly critical to facilitate the rescue of viable businesses and the efficient liquidation and market exit of non-viable businesses. On the other hand, weak insolvency regimes, can push viable enterprises into non-viability through lengthy and overly complex restructuring procedures or lead to the proliferation of zombie firms that leach productive resources from the market.

The World Bank Group is a Financial Stability Board designated standard setter in the field of insolvency and creditor rights alongside the United Nations Commission of International Trade Law. In this context, the World Bank has developed the principles for effective insolvency and creditor/debtor regimes (ICR Principles) to assist countries with evaluating and strengthening their insolvency regimes in line with best practices. One of the core components of the ICR Principles is promoting effective institutions, including courts, insolvency regulators and insolvency representatives. Strong institutions and professional actors promote transparency and predictability, which are key to a robust lending system and foster confidence. Investors need to assess their recovery risks including how security interests, enforcement rights and collective proceedings will be upheld through local laws.

Against this backdrop, the IFC Advisory Program has been providing technical support to the Insolvency & Bankruptcy Board of India (IBBI), one of the key cornerstones of the Indian insolvency regime. Since its enactment in 2016, the Insolvency & Bankruptcy Code (IBC) has greatly strengthened the ability of stakeholders to maximize recovery through India's insolvency regime. IBBI has played a leadership role, amongst its other responsibilities, in disseminating best practices and knowledge building tools to improve understanding of the IBC and how it operates in practice.

This Handbook provides one such tool to assist insolvency professionals and all other stakeholders in the insolvency ecosystem who wish to strengthen their understanding of the IBC and related practice. It aims at providing education on the IBC, as well as practical skills and understanding of implementation.

We would like to express our sincere thanks to all the personnel in the IBBI who have partnered with us in this important initiative and have guided us in its development, particularly Dr. M. S Sahoo, Chairperson and Mr. K.R. Saji Kumar, Executive Director of the IBBI. We would also kindly thank Ms. Surbhi Kapur, Research Associate of the IBBI, for her support in preparing the Handbook. We would also like to thank the many insolvency professionals, academics and other technical experts involved in this endeavour, who have provided their time and expertise so generously, in particular Ms. Pooja Mahajan (Managing Partner, Chandiook & Mahajan) and Mr. Neil Taylor (Managing Director, NTI) who worked tirelessly on the technical content of the Handbook. We would also like to recognize the organization and thought leadership of the World Bank Group team, including Rolf Behrndt (Practice Manager), Mahesh Uttamchandani (Practice Manager), Sagar Shankar (South Asia Regional Team) and Antonia Menezes (Global Insolvency & Debt Resolution Team) and the support of the India Country Management Unit and especially, Roshika Singh, Senior Country Officer. Finally, we would like to acknowledge the funding support received by IFC, from the Government of Japan, for the development of this Handbook.

We hope all readers find this Handbook useful and that it contributes towards strengthening the implementation of the IBC.



Jun Zhang  
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## Acronyms

AA	Adjudicating Authority
AR	Authorized Representative
CD	Corporate Debtor
CEO	Chief Executive Officer
CIRP	Corporate Insolvency Resolution Process
CoC	Committee of Creditors
DRAT	Debt Recovery Appellate Tribunal
EOI	Expression of Interest
FC	Financial Creditor
IBBI	Insolvency and Bankruptcy Board of India
IBC	Insolvency and Bankruptcy Code, 2016
ICD	Insolvency Commencement Date
IM	Information Memorandum
IP	Insolvency Professional
IPA	Insolvency Professional Agency
IPE	Insolvency Professional Entity
IRP	Interim Resolution Professional
IU	Information Utility
LCD	Liquidation Commencement Date

LLP	Limited Liability Partnership
MCA	Ministry of Corporate Affairs
MCGM	Municipal Corporation of Greater Mumbai
MRUA	Maharashtra Relief Undertaking (Special Provisions) Act
MSMEs	Micro, Small, And Medium Enterprises
NCLAT	National Company Law Appellate Tribunal
NCLT	National Company Law Tribunal
OC	Operational Creditor
PRA	Prospective Resolution Applicant
RBI	Reserve Bank of India
RFRP	Request for Resolution Plans
RP	Resolution Professional
Rs	Rupees
SARFAESI	Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest
SCC	Stakeholder Consultation Committee
SEBI	Securities and Exchange Board of India

## Introduction

The Insolvency and Bankruptcy Code, 2016 (Code/IBC) is the umbrella legislation for insolvency resolution of all entities in India—both corporate and individuals. The provisions relating to insolvency and liquidation of corporate persons came into force on December 1, 2016, while those of insolvency resolution and bankruptcy of personal guarantors to corporate debtors (CDs) came into effect on December 1, 2019. Insolvency and bankruptcy provisions for other category of individuals are yet to be notified (as on the date of this publication). The aim of codifying insolvency law is to provide for greater coherence in law and facilitate the application of consistent and lucid provisions to different stakeholders affected by business failure or the inability to pay debt. To this end, the Code repealed the Presidency Towns Insolvency Act, 1909, and the Provincial Insolvency Act, 1920, and made amendments to 11 laws, including the Companies Act, 2013, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, to give effect to the newly codified legislation. The provisions of the Code are being brought into force in phases.

It bears emphasis that the institutional framework established by the state should foster the freedom of entry for a commercial entity (that is, the freedom to start a business), the freedom of doing business or to continue doing business (by providing a level playing field), and the freedom to exit or discontinue the business. While the first two freedoms were amply recognized in the Indian regulatory landscape, the freedom to exit took concrete shape with the enactment of the Code, which provides for a mechanism for distressed businesses to resolve insolvency in an orderly and time-bound manner. The Code overhauled the legal regime for corporate distress resolution in India and replaced it

with a predictable, market-led, incentive-compliant, and time-bound mechanism. It addresses the market imperfections and plugs the information asymmetries, enabling the “freedom to exit” for commercial entities (through corporate insolvency resolution regimes) and entrepreneurs. The Code is a law for insolvency resolution. Its foundational objectives are as follows:

*“An Act to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith and incidental thereto.”*

The IBC was enacted as a critical building block of India’s progression to a mature market economy. It addresses the growing need for a comprehensive law that would be effective in resolving the insolvency of debtors, maximizing the value of assets available for creditors and easing the closure of unviable businesses. The first objective of the Code is resolution. The second objective is to maximize the value of assets of the corporate debtor” and the third objective is to promote entrepreneurship, availability of credit, and balancing the interests. The order of these objectives is sacrosanct.<sup>[1]</sup> As a key economic reform, the Code has shifted the balance of power from the debtor/borrower to the creditor. It has instilled a significantly increased sense of fiscal and credit discipline to better preserve economic value.

The outbreak of novel coronavirus (COVID-19) has resulted in uncertainty for individuals and businesses

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[1] <https://nclat.nic.in/Useradmin/upload/744324065bebc1bd0ef4a.pdf>

alike. To minimize the impact of this crisis, on June 5, 2020, the President of India promulgated the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020, which was subsequently replaced by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2020<sup>[2]</sup> which was notified on September 23, 2020 (having effect from June 5, 2020). This was in addition to the economic measures announced by the Ministry of Finance to support Indian businesses affected by the outbreak of the COVID-19 pandemic. The step was taken to ensure the continuity of business operations and ensure liquidity in businesses. The approach is aimed at giving firms breathing space so that they can explore options to reorganize internally and bilaterally. In essence, the measures are aimed at securing the continued existence of viable firms in crisis who may be victims of economic circumstances and may be prone to abysmal valuations through adversarial actions by lenders.

### Objective of Handbook

Insolvency professionals (IPs) are one of the key constituents of the insolvency ecosystem and form the cornerstone of the successful implementation of the law. The principal objective of this Handbook is to foster the maintenance of the highest standards of professionalism, credibility, independence, objectivity, and expertise in the administration and execution of processes under the law by an IP. This Handbook has been designed to facilitate knowledge building by providing all the information an IP or a prospective IP would require to function, prepare for acquiring eligibility (insolvency examination), and pursue the career in a beneficial and constructive manner. It either references or reproduces all the laws one needs to know, blending this with practical and best-practice information essential to someone in the chosen field. This Handbook will also help other professionals,

business people, students, and all those who are interested in the modern Indian insolvency ecosystem. Ultimately, it is designed to be an all-encompassing point of reference for someone working in the fast-evolving insolvency sector in India, addressing the professional, commercial, and social interests.

### Old law versus new law—what survives?

Prior to the IBC, the insolvency and bankruptcy laws in India were multilayered and fragmented.

- Individual insolvency and bankruptcy were covered under the two pre-independence legislations: the Presidency Towns Insolvency Act, 1909, and the Provincial Insolvency Act, 1920. It should be noted that pending notification of the provisions relating to individual insolvency and bankruptcy under the Code, these statutes still continue to apply.

For companies, the basic law dealing with their winding up or liquidation was the Companies Act, 1956. Although the Companies Act, 2013, replaced the Companies Act, 1956, the sections relating to winding up/liquidation under the 2013 act were not notified. Hence, till the enactment of the Code, provisions of the Companies Act, 1956, continued to govern winding up or liquidation of companies.

Winding up could be triggered under the Companies Act, 1956, if a company was unable to pay its debt. Once winding up was triggered, liquidation would follow and there was no provision to mandatorily attempt rehabilitation or reorganization of the company prior to this. Further, liquidation itself would take several years (in the absence of any time-bound closure process).

Now, with the enactment of the IBC, winding up due to an inability to pay debt cannot be

[2] <https://ibbi.gov.in/uploads/legalframework/c1d0cde66b-213275d9cf357b59bab77b.pdf>

triggered under the Companies Act, 1956, or the Companies Act, 2013. However, involuntary winding up of companies for non-insolvency-related reasons (for instance, if the company has defaulted on filing financial statements or annual returns for five consecutive financial years) can still be undertaken under the Companies Act, 2013.

The Companies Act, 2013, also contains provisions for schemes of financial reconstruction, approved by the National Company Law Tribunals — these are voluntary schemes of arrangement and compromise with the creditors and/or shareholders that are typically outside the insolvency regime (though these schemes can also be made applicable during liquidation).

Further details on the Companies Act, 1956, and the Companies Act, 2013, are available on the website of the Ministry of Corporate Affairs (MCA).<sup>[3]</sup>

- Sick Industrial Companies (Special Provisions) Act, 1985, was the primary rehabilitative statute that allowed a “sick” industrial firm to voluntarily initiate a rescue and rehabilitation process if its net worth had eroded. Two of the main reasons for its failure were the unending moratorium protection (which was sometimes abused by the debtors in possession) and the absence of a time-bound resolution process.
- Various voluntary mechanisms for debt restructuring were formulated by the Indian banking regulator, the Reserve Bank of India (RBI), in the form of instructions or circulars to the banks: corporate debt restructuring, the joint lenders’ forum mechanism, strategic debt restructuring, outside strategic debt restructuring, and the Scheme for Strategic

Structuring of Stressed Assets.

- Following the enactment of the Code, the RBI issued a revised framework for the resolution of stressed assets in its circular dated February 12, 2018, which led to the withdrawal of all previous mechanisms. Many cases were referred to and admitted for corporate insolvency resolution processes (CIRPs) subsequent to the circular. On April 2, 2019, the Supreme Court, in its judgment on *Dharani Sugars & Chemicals Ltd. Vs. Union of India & Others [Transferred Case (Civil) No. 66 of 2018 in Transfer Petition (Civil) No. 1399 of 2018 with several Writ Petitions and Transferred Cases and an SLP]*, declared this circular *ultra vires* of section 35AA of the Banking Regulation Act, 1949, on the grounds that the law permits the RBI to give directions to banks on stressed assets, only on the Central Government’s authorization and in case of a specific default.
- There are various debt and security enforcement mechanisms in India. The individual debt and security enforcement mechanisms continue to exist; however, their applicability, once insolvency resolution or liquidation under IBC commences, is restricted. Specifically, for banks and financial institutions, the two key laws are the Recovery of Debts Due to Banks and Financial Institutions Act and the SARFAESI Act.

### Principal features of the IBC

For CDs facing insolvency, the Code spells out two processes: insolvency resolution (CIRP) and liquidation. When insolvency is triggered under the IBC, all attempts are made to resolve the insolvency in a time-bound manner. If the attempt fails, the company, or the CD, will be liquidated. This is a significant

[3] <http://www.mca.gov.in>

departure from the previous winding up regime, which did not provide for this two-stage time-bound process.

While winding up under the Companies Act, 1956, could be triggered by an inability to pay debt and the rehabilitative process under the Sick Industrial Companies Act was triggered once the net worth of the company had eroded, one of the key features of the IBC is the early detection of insolvency. Hence, unlike previous regimes, insolvency is triggered under the IBC by a simple payment default of one lakh rupees (Rs. 100,000), as provided under section 4 of the Code. However, the Indian government (Central Government) is empowered to specify any other minimum default amount higher than one lakh rupees but not more than one crore rupees. By exercising this power, the MCA specified one crore rupees (Rs. 10,000,000) as the minimum default amount for the purposes of section 4 of the Code with effect from March 24, 2020. The process of insolvency resolution starts with an admission order by the Adjudicating Authority (AA).

Another departure from earlier laws is the replacement of a “debtor in possession” approach with a “creditor in control” regime. Hence, once the process starts, the powers of the existing board of directors are suspended and, during the CIRP, a creditor-approved IP is appointed to manage the CD as a going concern. The IP functions under the overall control and supervision of the Committee of Creditors (CoC, which generally comprises the financial creditors) of the CD.

The IBC is a collective mechanism for maximizing the value of assets of a CD for the benefit of the creditors and all other stakeholders. Hence, it provides a moratorium protection or “calm period” against individual or collective legal actions against the CD during the CIRP. Further, the IBC also equips the IP to apply for avoidance of certain transactions conducted by the CD prior to insolvency, to preserve and increase the pool of assets available for the collective benefit of the creditors.

Corporate insolvency resolution under the IBC is achieved with a resolution plan, which may be proposed by any eligible person (not necessarily the debtor or the promoter) and which needs to be approved by the CoC and, thereafter, by the AA. If the CIRP fails, an order to liquidate the CD is passed by the AA.

The IBC also creates institutional infrastructure to help achieve its objectives. The infrastructure comprises:

- IPs and insolvency professional agencies (IPAs) as bodies for enrolling and regulating the IPs and insolvency professional entities (IPEs) that conduct the IBC processes;
- information utilities as repositories of information;
- AAs, which are the National Company Law Tribunals (NCLTs), established under the Companies Act, 2013, and two appellate authorities: the National Company Law Appellate Tribunal (NCLAT) and the Supreme Court of India;
- the Insolvency and Bankruptcy Board of India (IBBI) as the regulator.

### Reading the Code

The IBC is a comprehensive and systemic economic reform by India that consolidates all existing laws dealing with insolvency and bankruptcy. It should be read in conjunction with the relevant rules, regulations, orders, circulars, and guidelines by the Central Government and the IBBI respectively. It has left procedural and other matters for the Central Government and the IBBI. The rationale is to be able to adapt the law quickly in response to changing conditions.

The IBC gives powers to the Central Government to make rules to carry out the provisions of the Code and identifies matters for which such rules can be made. For instance, while the IBC provides for initiation of insolvency resolution of a CD by creditors and the debtor itself, the Insolvency and Bankruptcy (Application to Adjudicating Authorities) Rules, 2016, notified by the Central Government, details the procedure for making an application to the AA for such initiation.

The IBC provides power to the IBBI, the regulator, to make regulations that are consistent with the Code and the rules, to carry out the provisions of the IBC. For instance, the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, flesh out the provisions for conducting an insolvency resolution process for corporates.

Since its enactment in 2016, the IBC has undergone five legislative interventions. It has been amended by way of (i) the Insolvency and Bankruptcy Code (Amendment) Ordinance in November 2017 (replaced by the Insolvency and Bankruptcy Code (Amendment) Act, 2018, in January 2018); (ii) the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018, in June 2018 (replaced by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, in August 2018); (iii) the Insolvency and Bankruptcy Code (Amendment) Act, 2019, which came into force in August 2019; (iv) the Insolvency and Bankruptcy Code (Amendment) Act, 2020, which came into force in December 2019; and (v) the Insolvency and Bankruptcy Code (Second Amendment) Act, 2020 (with effect from June 5, 2020). In addition, the rules and regulations have also been amended from time to time in response to the market requirements and dynamics in the implementation of the IBC.

It is very important for an IP to apply the correct version of the law to the process he is conducting. One can refer to the IBBI's website, which has the latest amended version of the Code, as well as of the rules, regulations, orders, circulars, and guidelines. The website also states the date up to which the version has been amended.

The various benches of the AA, the NCLAT, the High Courts, and the Supreme Court have been proactively interpreting the Code, rules, and regulations and have immensely contributed to the development of a rich insolvency and bankruptcy jurisprudence.

Hence, any knowledge of the IBC will be incomplete without understanding the important case laws already determined by these judicial authorities.<sup>[4]</sup>

### Reading the Handbook

This Handbook discusses the insolvency and bankruptcy law jurisprudence in India up to September 30, 2020.

The Handbook is divided into six modules, which detail the different aspects of the insolvency and bankruptcy regime in India, with an emphasis on attributing rigor to the role of an IP.

**Module 1** outlines the insolvency ecosystem, in terms of the key pillars of the institutional infrastructure, embedded in the provisions of the Code. It focuses on the essential regulatory information upon which the premise and procedure of insolvency law is predicated.

The Code secures economic freedoms and provides a predictable and orderly mechanism to resolve insolvency. It enables a failing yet viable firm to resurrect in a time-bound manner. It sets in motion a

[4] Reference: IBBI website under the Tab "ORDERS," Quarterly Newsletter of IBBI, and websites of the NCLT, NCLAT, High Courts, and Supreme Court.

process that assesses the viability of the CD to revive and maximize the value of its assets. In this vein, **Module 2** deals with the various aspects of the conduct of the CIRP under the Code, as a legal recourse for reducing information asymmetry between the debtor and the creditor.

The Bankruptcy Law Reforms Committee recommended that a provision relating to a “calm period” be introduced in the IBC so that all efforts are focused on resolution. The moratorium provisions, as discussed in **Module 3**, are framed to ensure that the CD is not burdened with additional stress arising out of debt collection/recovery arrangements. It also discusses the duties of an IP while managing the affairs of the CD as a going concern.

The IPs and the CoC constitute key institutions of public faith under the Code. For the resolution of insolvency, the Code shifts the control of a CD, when admitted into the CIRP, to the creditors, who are represented by a CoC. In this regard, **Module 4**

outlines the role and responsibilities of the CoC while exercising its commercial wisdom under the Code. Details pertaining to meetings of the CoC, invitations for expressions of interest, and submission of a resolution plan, among other things, are also covered in the module.

The entire procedure of bringing a lawful end to the life of a company can be divided into the liquidation process followed by the dissolution of the CD. **Module 5** examines the process of liquidation under the Code. Creditors cannot directly initiate liquidation proceedings unless the CIRP fails to work out a resolution plan.

**Module 6** deals with avoidance of transactions that may have been carried out by the CD (such as preferential and/or undervalued transactions) prior to insolvency and also remedies that may be sought by the IP from those who fraudulently or wrongfully acted in a manner that was not in the best interests of the creditors of the CD.



## Module 1: The IBC Ecosystem

## 1. Introduction

A strong insolvency regime serves two purposes. It saves businesses that are viable and facilitates the exit of those that are not. The Insolvency and Bankruptcy Code (IBC), 2016,<sup>[5]</sup> has been designed to create such a regime in India. Before the IBC, India neither had an efficient rescue mechanism nor a satisfactory exit route for businesses. The IBC offers a market-directed, time-bound mechanism to resolve insolvency, wherever possible, or exit, where required.

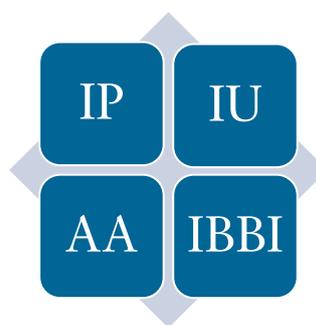
The IBC deals with the reorganization and insolvency resolution of corporate debtors (CDs), partnership firms, and even individuals. A CD is a corporate person that has defaulted on paying its debts. The IBC also provides an exit mechanism for a corporate person that has not defaulted, through a voluntary liquidation process. The provisions of the IBC relating to corporate persons came into force on December 1, 2016. Except for personal guarantors to CDs, the IBC provisions for insolvency resolution and bankruptcy of partnership firms and individuals are not in force yet.<sup>[6]</sup> This module primarily deals with insolvency resolution and liquidation of CDs.

Under the IBC, the rescue mechanism for a CD is achieved through a corporate insolvency resolution process (CIRP), while the exit mechanism is dealt with through a liquidation process. Thus, the insolvency process for a CD under the IBC proceeds in two phases—in the first phase an attempt is made to resolve the CD's default through a CIRP; if no resolution is reached, the CD is liquidated in the second phase.

To reduce delays and transaction costs, and increase efficiency in these processes, the IBC also envisages an associated institutional infrastructure and creates a new regulatory ecosystem. The efficient working of this institutional infrastructure is critical to achieve the objectives of the IBC.

This module discusses the new ecosystem created by the IBC.

### 1.1 The Four Pillars of the IBC Infrastructure



The first pillar of the IBC's institutional infrastructure is **insolvency professionals** (IPs). An IP is one of the most important components of the IBC ecosystem. An IP is a regulated and licensed professional, responsible for managing and overseeing the CIRP and/or the liquidation process of the CD, and the resolution and bankruptcy process for partnerships and individuals. IPs form a crucial pillar on which the entire edifice of the insolvency and bankruptcy process rests.

The IBC gives various powers to IPs, while subjecting them to regulatory and judicial oversight. The first level of regulatory oversight of an IP is provided by the insolvency professional agency (IPA) with which the IP is registered. To support IPs, the concept of an insolvency professional entity (IPE), a regulated service provider supporting IPs, is also recognized.

IPs are aided in the insolvency resolution, liquidation, and bankruptcy process by **information utilities** (IUs),

[5] <https://ibbi.gov.in/uploads/legalframework/bb54a1ddf9a7cd75ab-18b566a83c6370.pdf>

[6] The provisions relating to insolvency resolution and bankruptcy of personal guarantors to CDs were notified with effect from December 1, 2019.

which form the second pillar of the institutional infrastructure. The IUs are regulated and licensed repositories of information relating to the CD. IUs collect, collate, authenticate, and disseminate financial information to be used in insolvency resolution, liquidation, and bankruptcy proceedings.

The judicial oversight of IPs is provided by **adjudicating authorities** (AAs), the third pillar of the IBC's institutional infrastructure. The AAs are specialized tribunals tasked with ensuring that the insolvency resolution, liquidation, and bankruptcy process is being performed as per the IBC and its related rules and regulations.

The fourth pillar is the regulator, the **Insolvency and Bankruptcy Board of India** (IBBI).<sup>[7]</sup>

## 2. IBBI—the Regulator

The long title to the IBC provides for establishment of the IBBI as one of its objectives. The IBBI was established on October 1, 2016, under section 188 of the IBC as a body corporate. Its head office is in New Delhi.

The IBBI is a unique regulator – it regulates both the professionals involved and the transactions conducted. It has regulatory oversight over IPs, IPAs, IPEs and IUs. It also writes and enforces regulations for insolvency and bankruptcy processes, namely, the CIRP, the liquidation process, partnership and individual insolvency resolution, and partnership and individual bankruptcy.

The IBBI conducts its quasi-legislative, executive and quasi-judicial functions simultaneously. It also seeks to develop the profession and the level of transactions. It is a key pillar of the ecosystem responsible for implementing the IBC.

### 2.1 Constitution of the IBBI

Section 189 of the IBC provides for the constitution of the IBBI. It says the IBBI shall consist of the following members, who shall be appointed by the Central Government:

- a chairperson;
- three members from among the officers of the Central Government not below the rank of Joint Secretary or equivalent, one each to represent the Ministries of Finance, Corporate Affairs, and Law, *ex-officio*;
- one member nominated by the Reserve Bank of India (RBI), *ex-officio*; and
- five other members nominated by the Central Government, of whom at least three are full-time members.

Section 189 further provides that these members shall be persons of ability, integrity, and standing, with known capacity to deal with problems relating to insolvency or bankruptcy. They must have specialized knowledge and experience in the fields of law, finance, economics, accountancy, or administration. The term of office of the chairperson and all members (other than *ex officio* members) is five years, or till they reach 65, whichever is earlier; they are eligible for re-appointment.

Under section 232 of the IBC, the chairperson, members, officers, and other employees of the IBBI shall be deemed, while enforcing the provisions of the IBC, to be public servants as defined in section 21 of the Indian Penal Code, 1860.

Under section 233, no suit, prosecution, or other legal proceeding can be brought against the chairperson, member, officer, or other employee of the IBBI for anything done or intended to be done in good faith under the IBC or its rules and regulations.

[7] <https://www.ibbi.gov.in/>

## 2.2 Powers and Functions of the IBBI

The functions of the IBBI are well defined in section 196(1) of the IBC.<sup>[8]</sup> They are exercised subject to the general direction of the Central Government. They include registering and renewing/withdrawing/suspending/canceling the registration of IPAs, IPs, and IUs; specifying minimum eligibility criteria and providing regulations for them; and inspecting and investigating them if required.

The Insolvency and Bankruptcy Code (Second Amendment) Act, 2018,<sup>[9]</sup> amended section 196(1) to include a new sub-clause (“aa”) that adds to the IBBI’s functions the task of promoting the development, and regulating the working and practices, of IPs, IPAs, and IUs.

The IBBI is also empowered under section 196(2) of the IBC to make model bylaws that IPAs must follow that provide for minimum standards of professional competence, professional and ethical conduct of members, enrollment of members and the manner of granting membership, monitoring and reviewing of members, and related matters.

Overall, under section 196, the IBBI has the following broad powers and responsibilities:

- regulation and development of market processes and practices relating to the CIRP, the liquidation process, and individual insolvency and bankruptcy;
- registration and regulation of service providers for the insolvency process, including IPs, IPAs, and IUs;
- oversight of markets and service providers

through surveillance, investigation, and grievance redressal;

- enforcement of regulations for service providers and adjudication, if necessary, to ensure their orderly functioning; and
- professional development of expertise through education, examination, and training.

Section 196(3) of the IBC gives the IBBI powers similar to those of a civil court under the Code of Civil Procedure, 1908, while trying a suit. These include the power to seek discovery and production of books of accounts and other registers and documents of any person at any time or place the IBBI specifies; the power to summon and enforce attendance of people it wants to examine under oath; and the power to issue a commission to examine witnesses or documents.

Under section 230 of the IBC, the IBBI also has the power to delegate whichever powers and functions it deems necessary to any of its members or officers. Its order could also specify the conditions for delegation. However, the powers of the IBBI under section 240 (regulation-making powers) cannot be delegated. The IBBI has issued the Insolvency and Bankruptcy Board of India (Delegation of Powers and Functions) Order, 2017 (which may also be amended by the IBBI), to this effect.<sup>[10]</sup>

The IBBI has also been designated the registration authority under the Companies (Registered Valuers and Valuation) Rules, 2017<sup>[11]</sup>—notified by the Central Government under the Companies Act, 2013 — for the registration, regulation, and development of the profession of valuers in the country. Thus, IBBI also registers and regulates valuers and registered valuer organizations, the first line regulator of the valuers. Registered valuers perform various valuation functions under the Companies Act, 2013, and the IBC.

[8] <https://ibbi.gov.in/uploads/legalframework/bb54a1ddf9a7cd75ab-18b566a83c6370.pdf>

[9] [https://ibbi.gov.in/webadmin/pdf/whatsnew/2018/Aug/The%20Insolvency%20and%20Bankruptcy%20Code%20\(Second%20Amendment\)%20Act,%202018\\_2018-08-18%2018:42:09.pdf](https://ibbi.gov.in/webadmin/pdf/whatsnew/2018/Aug/The%20Insolvency%20and%20Bankruptcy%20Code%20(Second%20Amendment)%20Act,%202018_2018-08-18%2018:42:09.pdf)

[10] <https://ibbi.gov.in/uploads/DOP%20booklet%20final.pdf>

[11] [https://www.mca.gov.in/Ministry/pdf/Companies\\_Registered\\_Valuers\\_Rules\\_2017.pdf](https://www.mca.gov.in/Ministry/pdf/Companies_Registered_Valuers_Rules_2017.pdf)

## 2.3 Regulation-Making Powers of the IBBI

Under section 240(1) of the IBC, the IBBI is empowered to make regulations (consistent with the IBC and its rules) to enforce the IBC provisions. Section 240(2) lists a range of matters that may be regulated, but does not limit the scope of the regulations to just these.

Armed with these powers, the IBBI has issued various regulations related to both its own functioning and that of various service providers, as well as on different aspects of the insolvency and liquidation processes to be conducted under the IBC.

For instance, it has issued the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016,<sup>[12]</sup> which details various steps in the CIRP; the IBBI (Liquidation Process) Regulations, 2016,<sup>[13]</sup> which outlines steps in the liquidation process; and the IBBI (Voluntary Liquidation Process) Regulations, 2017,<sup>[14]</sup> for the voluntary liquidation of corporate persons who have not committed any default.

It has also issued regulations on the registration, powers, and duties of various service providers. For instance, there is the IBBI (Insolvency Professionals) Regulations, 2016,<sup>[15]</sup> relating to IPs; the IBBI (Insolvency Professional Agencies) Regulations, 2016,<sup>[16]</sup> relating to IPAs; and the IBBI (Information Utilities) Regulations, 2017,<sup>[17]</sup> regulating IUs.

[12] <https://ibbi.gov.in/uploads/legalframework/2020-08-17-234040-pjor6-59a1b2699bbf87423a8afb5f5c2a0a85.pdf>

[13] <https://ibbi.gov.in/uploads/legalframework/b37ac2f0201e2e3c-41cfa3d989f58f4d.pdf>

[14] <https://ibbi.gov.in/uploads/legalframework/a63c8886dfffb354dfd07833426574463.pdf>

[15] <https://ibbi.gov.in/uploads/legalframework/f3f-8276285c27f2386cd2a4f19cad213.pdf>

[16] [https://ibbi.gov.in/webadmin/pdf/legalframework/2019/Jul/IBBI%20\(IPA\)%20Regulation%20Upto%2023.07.2019\\_2019-07-25%2019:19:10.pdf](https://ibbi.gov.in/webadmin/pdf/legalframework/2019/Jul/IBBI%20(IPA)%20Regulation%20Upto%2023.07.2019_2019-07-25%2019:19:10.pdf)

[17] [https://ibbi.gov.in/uploads/legalframework/IU\\_Regulations\\_updated\\_till\\_25.07.2019.pdf](https://ibbi.gov.in/uploads/legalframework/IU_Regulations_updated_till_25.07.2019.pdf)

### KEY CONSIDERATION

The IBBI has set a framework for the issuing of its own regulations. To ensure transparency and encourage stakeholder participation, it has issued the IBBI (Mechanism for Issuing Regulations) Regulations, 2018,<sup>[18]</sup> which provides for public consultation and economic analysis before passing proposed regulations. Unless required to do so earlier, it reviews its regulations every three years. It has reviewed and amended various regulations from time to time following changes in the law, its experience of implementation, the growth in case law, global best practices, and the changing environment.

If there is urgency, the IBBI can, with the approval of its governing board, make or amend regulations without following the established process.

The IBBI can also provide general or specific clarification or guidance on the provisions of its regulations, either following a request for such clarification or on its own, provided such clarification or guidance is not construed as determining any question of fact or law.

[18] [https://ibbi.gov.in/webadmin/pdf/legalframework/2018/Oct/IBBI\(Mechanism%20for%20Issuing%20Regulations\)%20Regulations,%202018\\_2018-10-26%2011:59:43.pdf](https://ibbi.gov.in/webadmin/pdf/legalframework/2018/Oct/IBBI(Mechanism%20for%20Issuing%20Regulations)%20Regulations,%202018_2018-10-26%2011:59:43.pdf)

## 2.4 Inspection and Investigation by the IBBI

A key function of the IBBI is to inspect and investigate service providers (IPs, IPAs, and IUs). Sections 217–220<sup>[19]</sup> of the IBC detail the concerned provisions.

Under section 217, complaints may be filed with the IBBI against an IP, IPA, or IU. Under section 218, if the IBBI has reasonable grounds to believe that a breach has been committed by an IP, IPA, or IU, it may direct any person to act as an investigating authority to conduct an inspection or investigation. This has to be conducted within the time limit and in the manner specified in the relevant regulations. The investigating authority has the power to call for relevant documents, records, or information from any person likely to possess them, as well as powers of entry, search, and seizure. It then has to submit a detailed report on the inspection or investigation to the IBBI.

Under section 219, after completing the inspection or investigation, the IBBI can issue a show-cause notice to the relevant service provider and proceed against it in the manner specified by the relevant regulations.

Section 220 deals with the appointment of a disciplinary committee by the IBBI, comprising full-time members of the organization, to consider the reports of the investigating authority. If the disciplinary committee is satisfied that sufficient cause exists, it can:

- (a) Impose a penalty which could be three times the loss caused/likely to have been caused by the contravention that took place, or three times the amount of unlawful gain made by such contravention, whichever is

higher. When the loss or unlawful gain is not quantifiable, the total penalty should not exceed 10 million Indian rupees.

- (b) Suspend or cancel the registration of the relevant IP, IPA, or IU.

The IBBI can also direct any person who has gained unlawfully or averted a loss through any activity that contravenes IBC rules and regulations to pay an amount equivalent to this unlawful gain or averted loss. It can compensate the person who suffered the loss from this amount (if the person is identifiable and the loss suffered is directly attributable to him/her).

To enforce these sections, the IBBI has notified the IBBI (Inspection and Investigation) Regulations, 2017,<sup>[20]</sup> and the IBBI (Grievances and Complaints Handling Procedure) Regulations, 2017.<sup>[21]</sup>

The second set of regulations set out the procedure for a stakeholder to file a grievance or complaint against a service provider. The regulations also specify how such a grievance or complaint should be disposed of by the IBBI. (A grievance is defined as a written expression by a stakeholder of his suffering due to the conduct of a service provider or its associated person; a complaint is a written expression alleging contravention of any provision of the IBC or its related rules.) The IBBI is empowered to direct the service provider to redress the grievance; in the case of a complaint, it can order an inspection or investigation under the Inspection and Investigation Regulations if it feels there is a *prima facie* case.

The Inspection and Investigation Regulations detail how these should be carried out by the IBBI, and how show-cause notices against service providers should be issued and disposed of.

[19] <https://ibbi.gov.in/uploads/legalframework/bb54a1ddf9a7cd75ab-18b566a83c6370.pdf>

[20] [https://ibbi.gov.in/webadmin/pdf/legalframework/2017/Sep/14th%20Jun%2017%20Insolvency%20and%20Bankruptcy%20Board%20of%20India%20\(Inspection%20and%20Investigation\)%20Regulations,%202017\\_2017-09-25%2014:24:46.pdf](https://ibbi.gov.in/webadmin/pdf/legalframework/2017/Sep/14th%20Jun%2017%20Insolvency%20and%20Bankruptcy%20Board%20of%20India%20(Inspection%20and%20Investigation)%20Regulations,%202017_2017-09-25%2014:24:46.pdf)

[21] [https://ibbi.gov.in/webadmin/pdf/legalframework/2017/Dec/180723\\_2017-12-09%2009:59:43.pdf](https://ibbi.gov.in/webadmin/pdf/legalframework/2017/Dec/180723_2017-12-09%2009:59:43.pdf)

In *CA. Venkata Siva Kumar Vs. Insolvency and Bankruptcy Board of India & Others* [W.P. No. 9132 of 2020 and W.M.P. No. 11134 of 2020], the petitioner IP challenged the power of the IBBI to levy a fee under regulation 7(2)(ca) of the IP Regulations. The High Court examined the provisions of the IBC and observed that section 196(1)(a) expressly confers power on the IBBI to register IPAs and IPs and to renew, withdraw, suspend, and cancel such registration. Section 196(aa) expressly empowers the IBBI to regulate the working of IPs, IPAs, and IUs. Section 196(c) expressly empowers the IBBI to levy fees or other charges, including for registering IPAs and IPs and for renewing such registration. In addition, section 207(1) mandates that every IP should register himself with the IBBI within such time, in such manner, and on payment of such fee as may be specified by regulations. Moreover, section 240 empowers the IBBI to make regulations and section 240(1) does not impose any restraints on the powers of the IBBI, except that regulations should be consistent with the IBC and the rules thereunder and should be for the purposes of carrying out the provisions of the IBC. The High Court concluded that the IBBI is duly empowered under sections 196 and 207 of the IBC to levy a fee on IPs, including as a percentage of the annual remuneration of an IP in the preceding financial year.

The High Court further observed that section 196(1)(c) and 207 of the IBC and the IP Regulations are intended to fulfill the purpose of the IBC as regards the functioning of the IBBI. On examining the IBC, it is also clear that the IBBI plays a significant role as the principal regulator of insolvency and liquidation. The

High Court examined various roles played by the IBBI in the IBC processes and concluded that the IBBI does provide significant services, including in relation to IPs, and that there is broad correlation between fees and services.

It also noted that the IBC contains adequate safeguards to ensure that the Parliament effectively supervises all rules and regulations, with the power to modify or even annul them. Likewise, adequate safeguards are in place to ensure that the funds of the IBBI are used to fulfill its role under the IBC. The High Court concluded that there is no excessive delegation to the IBBI in respect of its charging IPs.

### 3. Information Utilities

Information asymmetry has long hampered corporate insolvency and bankruptcy processes in India. Creditors and other stakeholders do not have access to reliable financial information about debtors. They have to expend time and effort to establish that there is debtor default and ascertain the financial position of the CD.

To overcome this problem, the IBC mandated the creation of a regulated information industry in the form of IUs. An IU is defined in section 3(21) of the IBC as a “person” registered as such with the IBBI under section 210.

The primary function of IUs is to provide high-quality authenticated information about debts and defaults, making them important from a public policy standpoint. Consistent use of IUs and the information they provide can build a financial information database of entities that offer credit. In turn, this database can help reduce the time needed to establish debt and default, speeding up insolvency and bankruptcy processes and enabling creditors to make better decisions, while encouraging discipline among debtors.

Following his appointment, an IP will seek out as much information about the CD as quickly as possible. Though this can be done in many ways, the IBC envisages that the principal way to acquire authenticated information should be through an IU, the third pillar of the IBC.<sup>[22]</sup>

### 3.1 Registration of IUs

Section 209 of the IBC specifies that no IU can do business under the IBC unless it has a certificate of registration from the IBBI. The certificate, once granted, is valid for five years from the date of issue.

Section 210 of the IBC provides the registration process for an IU. The IU Regulations<sup>[23]</sup> issued by the IBBI provide the eligibility criteria and process for registering an IU with the IBBI. This is similar to the registration process for an IPA (discussed later in section 5.4 [p35]).

The National E-Governance Services Limited was the first IU to be established under the IU Regulations, in September 2017.

### 3.2 Functions of IUs—Core Services

Section 3(9) of the IBC defines the core services rendered by an IU as follows:

- accepting electronic submission of financial information in such form and manner as may be specified;
- safely and accurately recording financial information;
- authenticating and verifying the financial information submitted;

- providing access to information stored with the IU to people as may be specified.

Thus, an IU is a repository of financial information about debtors. The provisions of section 3(13) of the IBC define financial information as:

- records of a person's debt (including an incorporated entity);
- liabilities of the person, when the person is solvent;
- records of the assets over which security has been created;
- instances of default by the person against any debt;
- balance sheet and cash-flow statements of the person;
- any other information that may be specified.

The role of IUs in an insolvency proceeding depends on the information on debts and defaults the IU possesses, the validity of information as evidence, and the use of this information in the insolvency procedure.

An IU is expected to record and validate all financial information pertaining to a debtor. The financial information will include the details of loans availed, defaults, charges, and so on. Availability of such information, which is pre-validated, is beneficial not only in cases of insolvency resolution, but also to lenders while advancing credit. This information is critical during the following stages:

- (a) When the CIRP is triggered, it is envisaged that defaults, if any, will have been recorded in an IU, and this evidence may be used by the Adjudicating Authority (AA) to start the CIRP.

[22] <https://www.ibbi.gov.in/service-provider/information-utilities>

[23] [https://ibbi.gov.in/uploads/legalframework/IU\\_Regulations\\_updated\\_till\\_25.07.2019.pdf](https://ibbi.gov.in/uploads/legalframework/IU_Regulations_updated_till_25.07.2019.pdf)

- (b) When the Committee of Creditors (CoC) is formed, information from IUs may be used to determine all creditors of the debtor, which in turn will help to constitute the CoC.
- (c) The information can be used as evidence by creditors who file claims with the IP (be it during a CIRP or a liquidation process).
- (d) Under section 52 of the IBC, a secured creditor can realize its security interest outside the liquidation process provided the security is verified by the liquidator. The liquidator may verify the security from records in the IU.

Given the detailed information that IUs are expected to store, the analysis of this information can provide useful insights into the credit industry.

The IU Regulations enable IUs to provide services related to financial and operational credit in addition to information about the credit contract and default, such as providing acknowledgement, importing information from other sources, and enabling portability of the information.

The IUs, however, are required to respect all privacy and information access regulations for any services provided, including non-core services.

### 3.3 Key Design Features of IUs

Creating IUs is an important step toward effective management of insolvency and bankruptcy processes under the IBC. However, they need to install necessary safeguards. It is important that the information available with IUs is reliable. IUs have been designed with the following broad features:

#### 3.3.1 IU Record to be Accepted as Evidence

Courts and tribunals should accept the electronic records of IUs as admissible evidence. Section 7(4) of the IBC attributes evidentiary value to the information held by IUs, as the AA is required to ascertain the occurrence of a default in the payment of a financial debt within 14 days of receiving an application filed by a financial creditor (FC) under section 7(2), from, among other sources, the records stored with an IU. It can also use other evidence furnished by the FC.

For IU records to be accepted as evidence, the information stored must be reliable. The IU thus has the work of authenticating the information. Sections 3(9) (c) and 214(e) of the IBC state that once information is submitted to an IU, it must authenticate it with all concerned parties and only then store it in its records.

#### 3.3.2 Mandatory and Optional Submissions of Information

Section 215(1) of the IBC states that any person who intends to submit financial information to an IU, or access information from an IU, shall pay the required fee and submit the information in the form and manner specified by the regulations.

Section 215(2) of the IBC states that FCs shall submit financial information to an IU as well as data about assets pledged as security, as specified by the regulations. However, the legislation does not specify any penalty for not doing so. Section 215(3) of the IBC provides that operational creditors (OCs) “may” submit financial information about operational debt granted by them to the IU.

Chapter V of the IU Regulations, which came into effect from April 2017, specifies the form and manner in which creditors are to submit information

to IUs. In case of a default, the creditor cannot take advantage of the rapid and easy processes enabled by the IU mechanism if they do not submit the financial information.

### KEY CONSIDERATION

The Registrar of the National Company Law Tribunal, at its principal bench in New Delhi, issued an administrative order dated May 12, 2020,<sup>[24]</sup> directing all concerned parties to file the default record from an IU in all pending and new cases to be initiated by FCs under section 7 of the IBC to start the CIRP of a CD. The order stated that no new petitions shall be entertained without the default record from an IU under section 7 of the IBC.

The order was challenged before the High Court of Kolkata by way of two writ petitions. The High Court examined various provisions relating to IUs under the IBC and its rules and regulations. It observed that section 215 of the IBC is not mandatory in nature and the financial creditors can rely on either of the modes of evidences at hand to showcase a financial debt, that is, either a record of default from the IU OR any other document as specified that proves the existence of a financial debt. It further observed that the National Company Law Tribunal did not have any jurisdiction to pass such an order. Accordingly, the order dated May 12, 2020, was held *ultra vires* the IBC and its regulations, and struck down.<sup>[25]</sup>

On August 13, 2020, the Registrar of the NCLT

issued another order<sup>[26]</sup>, modifying its earlier order and directing the concerned parties to file default record from an IU, “wherever available with the IU” in all pending and new cases to be initiated by the FCs under section 7 of the IBC. Later, vide Order No. 25/02/2020-NCLT September 7, 2020, the said Order was withdrawn.”<sup>[27]</sup>

### 3.3.3 Disclosure of Information by IUs

As noted earlier, one of the key functions of IUs is to solve the problem of information asymmetry. Hence stakeholders, who are parties to the debt, should know the financial position of the debtor, and the information stored in IUs should be accessible to them.

Regulation 21(4) of the IU Regulations provides that after recording the status of information of the default, the IU shall communicate it to the registered users who are creditors of the debtor who has defaulted (and other parties and sureties, if any, to the debt).

The interim resolution professional (IRP)/resolution professional (RP), under section 17(2)(c), and the liquidator, under section 37(1)(a), shall have the right to access information relating to the CD available with the IUs.

In addition, regulation 23 of the IU Regulations sets out the persons who shall be allowed access to the information stored with it. The persons include the AA and the IBBI, both of whom should be provided information free of charge.

### 3.3.4 Ownership of IU Information

The IU is not the owner of the information it stores, but it has the obligation to be a good custodian. In

[24] <https://ibbi.gov.in/uploads/legalframework/e3daa98ba-b56a6098c4e9356b93095bb.pdf>

[25] *Univalue Projects Pvt. Ltd. Vs. The Union of India & Others* [W.P. No. 5595 (W) of 2020 with C.A.N. 3347 of 2020] and *Cygnus Investments and Finance Pvt. Ltd. & Another Vs. The Union of India & Others* [W.P. No. 5861 (W) of 2020 with C.A.N. 3937 of 2020].

[26] This Order No. 25/02/2020-NCLT dated September 7, 2020 is available at: <https://ibbi.gov.in/uploads/legalframework/59033887285f644c7ee94a9da1d5148b.pdf>

[27] <https://nclt.gov.in/sites/default/files/September/circulars/Information%20Utility.pdf>

particular, the IU should always make the information available to all those to whom it pertains. It should inform them if it receives any new data or if the existing information is modified.

### 3.3.5 Standardization through Application Programming Interface

Since the IBC envisages a competitive industry of IUs, section 214(h) mandates that they should have interoperability with other IUs. Thus, the IUs must adhere to a common application programming interface (published by the IBBI) through which they will interact with other stakeholders while providing their core services.

### 3.3.6 Unique Identification of Debts

The Working Group on IUs, in its report,<sup>[28]</sup> opined that debtors, creditors, and debts need to be uniquely identified and suggested how to do so. Regulation 13(1) of the IU Regulations states that the IBBI may publish technical standards, through guidelines, on how IUs should perform their core services and other services. Regulation 13(2) provides for the IBBI setting technical standards, based on the recommendations of a technical committee, with a *unique identifier for each record and each user*. The IBBI has accordingly done so. The IU tags the data relating to all debts and defaults stored in it with that unique identifier.

Once information is stored by an IU, it will prevent any loss of or modifications to that data. However, if a record is found erroneous, the IU can modify it to the extent of marking it as erroneous, while keeping the rest untouched.

## 3.4 Challenges Facing IUs

There are some challenges that arise out of the existence of IUs and the paucity of their coverage and operations.

### 3.4.1 Need for Accurate Information

The key to timely completion of an insolvency or bankruptcy process is quick availability of factual and undisputed information. FCs such as banks need accurate and reliable financial information about debtors, as establishing indebtedness is the key to any proceeding under the IBC. Lack of information, and one-sided information presented by conflicting forces, have been impediments for FCs in recovering their dues.

While the idea behind an IU is to have a financial data repository, it remains to be seen to what extent firms provide them with data about their dues to OCs and how IUs help during the insolvency process.

Is there a reluctance to share information? And if so, is it historical, or does it indicate debtor aversion to the IBC? A number of points arise:

- Some resistance to sharing information stems from IUs having a digital database and thus being susceptible to the risk of data piracy and data theft.
- An IU adds to the number of repositories of information that already exist and does not serve to consolidate them. The High Court of Kolkata has held that the submission of information to IUs is not mandatory (see section 3.3.2 [p25]). Hence, neither the creditors nor the debtors are obliged to submit financial information to the IU.
- In the course of an insolvency resolution, liquidation, or bankruptcy process, apart from the credit facilities and the security for such facilities, the critical information is the unencumbered assets (that is, assets which have not been secured to any creditor) of the

[28] <https://www.ibbi.gov.in/wg-04report.pdf>

debtor; assets under hire purchase but in the debtor's possession; details of encumbrances, such as leases; unpaid taxes of the properties or assets; the status of the debtor's properties and assets; and so on. These are not part of the financial information to be furnished or maintained by the IU.

- Finally, to ensure compliance with the IU Regulations and safeguard their interests, FCs may:
  - Establish internal policies; timelines to ensure submission of financial information on the granting of any financial debt; and internal operational processes for monitoring compliance.
  - Modify standard financing documents to include obligations on the debtor to:
- Ensure submission of relevant forms to the relevant IU within a specified period.
  - Provide the creditor with evidence of submission of forms to the IU, such as acknowledgement from the IU or evidence of a unique identification number allocated by the IU for the debt.
  - Comply with all disclosure requirements provided under the IBC and the IU Regulations as regards the relevant financial debt.

### 3.4.2 Emergence of IUs

As noted earlier, so far only one IU, the National E-Governance Services Limited, has been recognized by the IBBI. As the insolvency law evolves, its information infrastructure will also grow, and its operational

procedures will take shape. To encourage such growth, the IBBI has relaxed norms relating to the shareholding and voting structure of IUs, through amendments to the IU Regulations on September 29, 2017.<sup>[29]</sup>

Given the size of stressed banking assets in India, and the significant increase in the number of cases under the IBC in recent times, more IUs are expected to emerge.

### 3.4.3 Establishing Financial Information before the AA

As IUs are intended as databanks to collect, collate, and disseminate financial information and facilitate insolvency resolution, it is envisioned that in the long run, they will have data on the debts and credits of all businesses and will be able to create automatic triggers in cases of default, with the AA initiating the insolvency process as required. Such a system will reduce the risk of credit in the economy.

## 4. Adjudicating Authority

AAs are the tribunals that adjudicate under the IBC. Section 5(1) of the IBC designates the National Company Law Tribunal (NCLT),<sup>[30]</sup> constituted under section 408 of the Companies Act, 2013,<sup>[31]</sup> as the AA for the resolution and liquidation of corporate persons. Section 60(1) of the IBC provides that the NCLT shall be the AA for the CIRP and liquidation of corporate persons, including CDs and their personal guarantors. The NCLT has various benches all over India, with each bench having territorial jurisdiction over the state where it is located, as well as (in some cases) certain other states. Thus, the relevant AA for a CD registered in Maharashtra would be a Mumbai bench of the NCLT. The Principal Bench of the NCLT is in New Delhi.

[29] [https://ibbi.gov.in/webadmin/pdf/legalframework/2017/Oct/Gazette%20copy%20IU%20regulation\\_2017-10-05%2019:53:25.pdf](https://ibbi.gov.in/webadmin/pdf/legalframework/2017/Oct/Gazette%20copy%20IU%20regulation_2017-10-05%2019:53:25.pdf)

[30] <https://nclt.gov.in/>

[31] <http://www.mca.gov.in/Ministry/pdf/CompaniesAct2013.pdf>

The Central Government constituted the NCLT in June 2016 based on the recommendations of the Justice Eradi Committee. NCLT benches took over the jurisdiction of the former Company Law Board, the Board for Industrial and Financial Reconstruction, and the High Courts in company law matters. The Bankruptcy Law Reforms Committee, in its report of November 2015, recommended that NCLT benches should have jurisdiction over adjudications relating to corporate insolvency and liquidation, while the National Company Law Appellate Tribunal (NCLAT) should have appellate jurisdiction.<sup>[32]</sup>

For individual or partnership insolvency and bankruptcy, the AA designated by the IBC—according to section 79(1)—is the Debt Recovery Tribunal, constituted under the Recovery of Debts Due to Banks and Financial Institution Act, 1993. However, for insolvency/bankruptcy of the personal guarantor of the CD, section 60(1) of the IBC specifies that the NCLT bench wherever the CD is registered is the relevant AA. As stated earlier, except for personal guarantors to CDs, IBC provisions relating to insolvency resolution and bankruptcy of partnership firms/individuals are not in force yet. Hence, Debt Recovery Tribunals do not yet exercise jurisdiction as AAs under the IBC.

Since this Handbook deals with resolution and liquidation of corporate persons, all references to AAs here (unless otherwise specified) shall mean the NCLT.

## 4.1 Role and Jurisdiction of the AA

Chapter VI of Part 2 of the IBC deals with the provisions pertaining to the AA for corporate persons. It provides that the AA, in relation to insolvency resolution and liquidation of corporate persons, including CDs and their personal guarantors, shall be the NCLT that has territorial jurisdiction over the place where the registered office of a corporate person is located.

The AA admits the CD to insolvency (that is, starts its CIRP), and approves or rejects the resolution plan for the CD. If the plan is rejected, it passes an order for the liquidation of the CD, following which the CD is dissolved. The AA also has the power and jurisdiction to pass orders to extend the CIRP period, to seek cooperation from CD personnel, and to rule on avoidance applications filed by the IP or against the rejection of claims by the liquidator.

Further, under section 60(5), the AA has the jurisdiction to entertain or dispose of:

- any application or proceeding by or against the CD or corporate person;
- any claim made by or against the CD or corporate person, including any claims filed by or against any subsidiaries situated in India; and
- any question of priorities or any question of law or facts arising out of or in relation to the insolvency resolution or liquidation proceedings of the CD or corporate person under the IBC.

[32] [https://dea.gov.in/sites/default/files/BLRCReport-Vol1\\_04112015.pdf](https://dea.gov.in/sites/default/files/BLRCReport-Vol1_04112015.pdf)

In its judgment in the case of *Committee of Creditors of Essar Steel India Limited Through Authorized Signatory Vs. Satish Kumar Gupta & Others, in 2019*, the Supreme Court held that section 60(5)(c) of the IBC was like a “residuary jurisdiction” vested in the AA, and hence the AA had the right to decide all questions of law or fact arising out of or in relation to insolvency resolution or liquidation under the IBC. However, it also said that such residual jurisdiction did not affect section 30(2) of the IBC, which circumscribes the jurisdiction of the AA when it comes to confirming a resolution plan, as mandated by section 31(1) of the IBC. The non-obstante clause of section 60(5) speaks of any other law for the time being in force, which obviously cannot include the provisions of the IBC itself. A harmonious reading, therefore, of section 31(1) and section 60(5) of the IBC would lead to the conclusion that the residual jurisdiction of the AA under section 60(5)(c) cannot, in any manner, whittle down section 31(1) of the IBC, by the investment of some discretionary or equity jurisdiction in the AA outside section 30(2) of the IBC, when it comes to a resolution plan being adjudicated on by the AA.

## 4.2 Appeal to the NCLAT

The IBC provides for an authority, the NCLAT, as well as a procedure for appealing against the decisions of AAs.<sup>[33]</sup> The NCLAT was constituted under section 410 of the Companies Act, 2013, to hear appeals against orders of NCLTs with effect from June 1, 2016. As of December 1, 2016, the NCLAT is also an appellate authority for appeals against orders passed

by AAs under the IBC, as well as appeals against orders of the IBBI, under sections 202 and 211 of the IBC. The NCLAT is also the appellate tribunal for appeals against orders passed by the Competition Commission of India.

At present, the NCLAT has offices in Delhi and Chennai. Its principal bench is in New Delhi.

Section 61 of the IBC enables any person aggrieved by an order of an AA to appeal to the NCLAT, provided the appeal is filed within 30 days of receiving the order. The NCLAT can extend the time limit for a maximum of 15 days if it is satisfied that the appellant had genuine reasons for not being able to file within the prescribed 30 days.

The section further specifies the grounds on which an appeal against an AA order approving a resolution plan under section 31 of the IBC may be filed. Such an appeal is allowed if it is felt that the resolution plan contravenes any provision of the IBC or any other law, or if there has been any material irregularity or fraud by the RP, while exercising his powers during the CIRP or liquidation process.

## 4.3 Appeal to the Supreme Court

Any person still aggrieved by the decision of the NCLAT may file an appeal to the Supreme Court of India under section 62 of the IBC, provided the grievance is based on a question of law arising out of the order. The appeal must be filed within 45 days of receiving the order. The Supreme Court may allow a further period of not more than 15 days if it is satisfied that the appellant had good reasons for not being able to file within 45 days.

[33] <https://nclat.nic.in/>

#### 4.4 Bar on Jurisdiction

According to section 63 of the IBC, no civil court or any other authority shall have jurisdiction on any matter in which an AA or NCLAT is empowered by the IBC to pass orders. Nor can such courts grant an injunction on any action taken—or about to be taken— following an order passed by an AA.

In the 2019 case of

*M/s Embassy Property Developments Pvt. Ltd. Vs. State of Karnataka & Others [2019 SCC Online SC 1542]*, one of the issues before the Supreme Court was whether an AA has the power under the IBC to review an order passed by the Karnataka government rejecting the automatic extension of a mining lease granted by it to the CD during a period when a moratorium was in force. The Supreme Court observed that:

- (a) The Code provides a three-tier mechanism—namely the NCLT, which is the AA; the NCLAT, which is the appellate authority; and this court as the final authority—for dealing with all issues that may arise in relation to the reorganization and insolvency resolution of corporate persons.
- (b) The decision of the government of Karnataka to refuse the benefit of deemed extension of lease is in the public law domain. Hence, the correctness of the decision can be called into question only in a superior court that is vested with the power of judicial review over administrative action. As the NCLT has a special statute to discharge certain specific functions, it cannot be elevated to the status of a superior court with the power of judicial review over administrative action.
- (c) Section 60(2) deals with a situation where the insolvency resolution, liquidation, or bankruptcy of a corporate guarantor or personal guarantor of a corporate debtor is taken up when a CIRP or liquidation proceeding of such a CD is already pending before the NCLT. The purpose of subsection (2) is to group together (A) the CIRP or liquidation proceeding of a CD and (B) the insolvency resolution, liquidation, or bankruptcy of a corporate guarantor or personal guarantor of the very same CD so that a single forum may deal with both. This is to ensure that the CIRP of a CD and the insolvency resolution of the individual guarantors of the same CD do not proceed on different tracks, before different forums, leading to a conflict of interests, situations, or decisions.
- (d) In light of the statutory scheme, as culled from various provisions of the IBC, it is clear that wherever the CD has to exercise a right that falls outside the purview of the IBC, especially in the realm of public law, it cannot, through the RP, take a bypass and go before the NCLT for the enforcement of such a right. Though the NCLT and NCLAT have jurisdiction to enquire into questions of fraud, they do not have jurisdiction to adjudicate on disputes such as those arising under the Mines and Minerals (Development and Regulation) Act, 1957, and the rules issued under it, especially when the disputes revolve around decisions of statutory or quasi-judicial authorities, which can be corrected only by way of judicial review of administrative action.

(e) In *Union of India Vs. Association of Unified Telecom Service Providers of India Etc.* [M.A. (D) No. 9887 of 2020 in Civil Appeal Nos. 6328-6399 of 2015], the Supreme Court had by an earlier order calculated that a certain sum was due from various telecommunication service providers, including some under insolvency. The Supreme Court queried whether dues under the license can be said to be operational dues. It is also to be examined whether a deferred/default payment installment of a spectrum acquisition cost can be deemed as operational dues in addition to AGR dues. As per the revenue-sharing regime and the provisions of the Indian Telegraph Act, 1885, can the dues be said to be operational dues? Whether natural resources would be available to use without paying the requisite dues, whether doing so can be wiped off by resorting to the proceedings under the IBC and comparative dues of the government and secured creditors and bona fides of proceedings are also questions to be considered. The court held that it is appropriate that these questions should first be considered by the NCLT. Let the NCLT consider these aspects and pass a reasoned order after hearing all the parties.

## 5. Insolvency Professionals

An IP is defined in section 3(19) of the IBC as a person enrolled under section 206 with an IPA as a member and registered with the IBBI as an IP under section 207.

Only an IP can be appointed as an interim resolution professional (IRP), a resolution professional (RP), a liquidator, or a bankruptcy trustee under the IBC.

The AA appoints an IRP or an RP to run the CIRP of a CD, and a liquidator to run the liquidation process. A bankruptcy trustee runs the insolvency and bankruptcy process for partnerships and individuals. Hence, the IP—acting as an IPR, RP, liquidator, or bankruptcy trustee—is the foundation of the IBC.

Section 206 of the IBC says no person shall render services as an IP under the IBC without being a member of an IPA and registered with the IBBI. Under section 207, to become an IP, an individual should first enroll with an IPA as a member, and then register with the IBBI in the manner specified by the regulations, after paying the required fee. The IBBI has notified the IP Regulations,<sup>[34]</sup> which provide for registration, regulation, and oversight of IPs, and the IPA Regulations,<sup>[35]</sup> which provide for registration, regulation, and oversight of IPAs, the first-level regulators of IPs.

### 5.1 Eligibility, Qualification, Experience

Who can and cannot register as an IP is set out under regulations 4 and 5 of the IP Regulations.

#### 5.1.1 Eligibility

No individual is eligible to be registered as an IP if he/she:

- (a) is a minor;
- (b) is not resident in India;
- (c) does not have the specified qualification and experience;
- (d) has been convicted of an offence punishable

[34] <https://ibbi.gov.in/uploads/legalframework/f3f-8276285c27f2386cd2a4f19cad213.pdf>

[35] [https://ibbi.gov.in/webadmin/pdf/legalframework/2019/Jul/IBBI%20\(IPA\)%20Regulation%20Upto%2023.07.2019\\_2019-07-25%2019:19:10.pdf](https://ibbi.gov.in/webadmin/pdf/legalframework/2019/Jul/IBBI%20(IPA)%20Regulation%20Upto%2023.07.2019_2019-07-25%2019:19:10.pdf)

by a prison term exceeding six months, or for an offence involving moral turpitude, and a period of at least five years has not lapsed since the sentence expired. If a person has been convicted of any offence for which the prison term was seven years or more, he/she will not be eligible for registration at all;

- (e) is an insolvent yet to be discharged, or has applied to be adjudicated as an insolvent;
- (f) has been declared to be of unsound mind;
- (g) is not a “fit and proper” person. There are three criteria determining “fit and proper”:
  - i. integrity, reputation, and character;
  - ii. absence of convictions and restraining orders;
  - iii. competence, including financial solvency and net worth.

### 5.1.2 Qualification and Experience

Apart from being eligible, an individual needs the following qualifications to register as an IP:

- (a) He/she should have passed the Limited Insolvency Examination not before 12 months from applying for enrollment with the IPA.
- (b) After enrollment, he/she should have completed any pre-registration educational courses as may be required by the IBBI from an IPA.
- (c) He/she should also:
  - i. have successfully completed the National Insolvency Program, as may be approved by the IBBI; or
  - ii. have successfully completed the

Graduate Insolvency Program, as may be approved by the IBBI; or

- iii. have 15 years of experience in management, along with a Bachelor’s degree from a recognized university; or
- iv. have 10 years of experience as:
  - a chartered accountant enrolled as a member of the Institute of Chartered Accountants of India;
  - a company secretary enrolled as a member of the Institute of Company Secretaries of India;
  - a cost accountant enrolled as a member of the Institute of Cost Accountants of India; or
  - an advocate enrolled with the Bar Council.

### 5.2 Process of Registration

To register as an IP, an eligible and qualified person, having enrolled with an IPA, must thereafter apply to the IBBI for registration, in accordance with the IP Regulations. Broadly, the process is as follows<sup>[36]</sup>:

- (a) The application must be made to the IBBI on Form A of the Second Schedule of the IP Regulations, with a prescribed fee.
- (b) Within seven days of receiving the application, the IBBI shall acknowledge it.
- (c) The IBBI, after examining the application, may give the applicant an opportunity to remove deficiencies found in it, submit additional documents, appear before the IBBI to give clarifications, and more.

[36] <https://ibbi.gov.in/uploads/legalframework/f3f-8276285c27f2386cd2a4f19cad213.pdf>

- (d) Within 60 days of receiving the application (excluding the time given by the IBBI to remove deficiencies), the IBBI shall grant the certificate of registration on Form B of the IP Regulations if it is satisfied that the person is eligible.
- (e) If, after considering an application, the IBBI decides that the registration should not be granted or renewed, it shall communicate this to the applicant within 45 days of receiving the application, giving reasons for its decision. It shall give the applicant an opportunity to explain why the application should be accepted, to enable it to form a final opinion.
- (f) The applicant must provide such explanation within 15 days of receiving the IBBI's response. Within 30 days of receiving the explanation, the IBBI shall communicate its decision to either accept the application along with a certificate of registration, or reject it through an order, giving reasons.

### KEY CONSIDERATION

To register as an IP, an individual must clear the IBBI's Limited Insolvency Examination. This exam tests a professional's knowledge of the challenges faced by a distressed company. The IBC is an important part of this test and the professional needs to display that he/she thoroughly understands the legislation. Details about the frequency of examination, the syllabus, the fee, and the enrollment process are available on the IBBI website.<sup>[37]</sup>

The National Insolvency Program will be notified by the IBBI in due course. As of now, professionals with 10 years of experience or graduates with 15 years of managerial experience are required to pass the exam, enroll as professional members with an IPA within 12 months of passing the exam, complete a pre-registration educational course by the IPA, and then apply to the IBBI for registration as an IP.

Individuals who do not have the professional or managerial experience specified are required to complete the Graduate Insolvency Program of the IBBI, pass the Limited Insolvency Examination, enroll as a professional member with an IPA within 12 months of passing the exam, complete a pre-registration educational course by the IPA, and then apply to the IBBI for registration as an IP.

Some frequently asked questions related to IPs and their registration are available on the IBBI website: [https://ibbi.gov.in/uploads/register/FAQ\\_IPs.pdf](https://ibbi.gov.in/uploads/register/FAQ_IPs.pdf)

### 5.3 Conditions of Registration

Regulation 7(2) of the IP Regulations says that the registration granted to an IP is subject to the condition that the IP shall:

- (a) at all times abide by IBC rules, regulations, and guidelines, and the bylaws of his/her IPA;
- (b) at all times satisfy the eligibility criteria in the IP Regulations;
- (c) undergo continuing professional education as may be required by the IBBI;
- (d) not outsource any of his/her duties and responsibilities under the IBC, except those specifically permitted by the IBBI;

[37] [www.ibbi.gov.in](http://www.ibbi.gov.in)

- (e) pay the IBBI a prescribed fee every five years within a prescribed time;
- (f) in addition, pay the IBBI a fee of 0.25 percent of the professional fee earned for the services rendered as an IP in the preceding financial year, on or before April 30 of every year, along with submitting a statement on Form E of the Second Schedule of the IP Regulations (for the financial year 2019–2020, the deadline was extended to June 30, 2020);
- (g) be a citizen of India (to render services as an IP, a non-citizen must become a partner or director of an IPE recognized by the IBBI);
- (h) get prior permission from the IBBI to shift membership from one IPA to another, and only if neither of the concerned IPAs has any objection;
- (i) take adequate steps to redress grievances;
- (j) maintain records of all assignments undertaken under the Code for at least three years after completing them;
- (k) abide by the Code of Conduct specified in the First Schedule to the IP Regulations; and
- (l) abide by any other conditions as may be imposed by the IBBI.

Any delay in the payment of the fee by an IP to the IBBI attracts simple interest of 12 percent per year on the amount unpaid.

## 5.4 Insolvency Professional Agencies

Section 3(20) of the IBC defines an IPA as a person registered as such with the IBBI under section 201. The IPAs are agencies responsible for enrolling and regulating IPs as their members. They are the first-level regulators for IPs, and have to develop professional standards and a code of ethics for them. The IBBI has

issued the IPA Regulations to provide a framework for regulating IPAs.<sup>[38]</sup>

### 5.4.1 Registration as an IPA and Eligibility

Section 199 of the IBC says that no person may conduct business as an IPA and enroll IPs as members without a certificate of registration from the IBBI. The certificate, once granted, is valid for five years.

Section 200 of the IBC sets out general principles that the IBBI should follow while registering an IPA, while section 201 outlines the registration process. The IPA Regulations further detail the eligibility criteria for IPAs as well as the registration process.

The IPA Regulations state that only a company registered under section 8 of the Companies Act, 2013, can register as an IPA. Such a company should satisfy the following criteria:

- i. Its main objective should be to carry out the functions of an IPA under the IBC.
- ii. It should have bylaws and a governance structure in accordance with the IBBI (Model Bylaws and Governing Board of Insolvency Professional Agencies) Regulations, 2016.<sup>[39]</sup>
- iii. It should have a minimum net worth of 100 million Indian rupees and a minimum paid-up share capital of 50 million Indian rupees.
- iv. It must be under the control of persons who reside in India, and not more than 49 percent of its share capital should be held, directly or indirectly, by people residing abroad.
- v. It should not be a subsidiary of a body corporate through more than one layer.

[38] [https://ibbi.gov.in/webadmin/pdf/legalframework/2019/Jul/IBBI%20\(IPA\)%20Regulation%20Upto%2023.07.2019\\_2019-07-25%2019:19:10.pdf](https://ibbi.gov.in/webadmin/pdf/legalframework/2019/Jul/IBBI%20(IPA)%20Regulation%20Upto%2023.07.2019_2019-07-25%2019:19:10.pdf)

[39] <https://ibbi.gov.in/uploads/legalframework/23c5bbe11eb00b841e13759bc66e6504.pdf>

- vi. The applicant, its promoters, directors, and shareholders should be “fit and proper” persons.

To ensure diversified shareholding, the IPA Regulations also provide that no person shall at any time, directly or indirectly, either individually or together with persons acting in concert, acquire or hold more than 5 percent of the paid-up equity share capital in an IPA. (However, exceptions to the rule are also set forth—a stock exchange, a depository, a banking company, an insurance company, a public financial institution, or a multilateral financial institution may hold up to 15 percent and the Central Government, a state government, or a statutory regulator may hold up to 100 percent of the equity).

The IPA should always satisfy the eligibility criteria and other requirements set out in the IPA Regulations and seek approval of the IBBI when a person, other than a statutory body, seeks to hold more than 10 percent, directly or indirectly, of the share capital of the IPA.

#### 5.4.2 Procedure for Registration as an IPA, Its Renewal, and Surrender

Section 201 of the IBC, along with the IPA Regulations, details the process of registering an IPA, as well as the process of renewing a registration. Broadly, the process is as follows:

- (a) An application must be submitted to the IBBI using Form A (of the IPA Regulations), along with the prescribed fee. For renewal, an application should be submitted using Form A six months before the registration expires, along with the prescribed fee.
- (b) Within seven days of receiving the application, the IBBI shall acknowledge it.
- (c) After examining the application, the IBBI may give the applicant an opportunity to fix deficiencies, submit additional documents, or appear before it to give clarifications.
- (d) Within 60 days of receiving the application (excluding the time given to remove deficiencies), the IBBI shall grant the certificate of registration/renewal using Form B of the IPA Regulations, provided that, after inspection or inquiry, and keeping in mind the principles set out under section 200 of the IBC, it is satisfied that the applicant:
  - i. meets the eligibility criteria;
  - ii. has adequate infrastructure to perform its functions under the IBC;
  - iii. has employed people with adequate professional and other relevant experience to enable it to perform its functions; and
  - iv. has complied with the conditions of the certificate of registration or renewal.
- (e) If, after considering an application made, the IBBI feels the registration ought not to be granted or renewed, or be granted/renewed with additional conditions, it shall communicate the reasons for deciding thus within 45 days of receiving the application (excluding the time given to remove the deficiencies) and give the applicant an opportunity to explain why its application should be accepted, before delivering a final opinion.
- (f) The applicant must provide its explanation within 15 days of receiving the IBBI’s communication. Within 30 days of getting the explanation, the IBBI shall communicate its decision to the IPA—either accepting the

application and providing the certificate of registration, or rejecting it and giving reasons for doing so. If the IBBI rejects a renewal of registration, it shall still require the IPA to discharge its pending obligations, continuing its functions till such time as may be specified, so that its members can enroll with another IPA if they want to. It must also comply with any other directions, as considered appropriate.

The procedure for surrendering registration is also set out in the IPA Regulations.<sup>[40]</sup> An IPA must send its application for surrender to the IBBI, along with supporting details. The IBBI will then publish a notice on its website, inviting objections to the surrender within 14 days of the date of publication. Within 30 days after the last date to submit objections, the IBBI may approve the surrender application, subject to such conditions it may deem fit. The IPA may be required to satisfy pending obligations, or to continue to function for a specified time to enable its members to enroll with another IPA. Once the IBBI is satisfied that the IPA has fulfilled all pending obligations, it will publish the surrender of registration on its website.

### 5.4.3 Governing Board and Bylaws of an IPA

To ensure that every IPA is aligned with the objectives of the IBC, the IBBI is empowered, under section 203, to make regulations on the setting up of a governing board by IPAs, and specify the number of IPs and the minimum number of independent directors the board should have as members.

Under section 205 of the IBC, after obtaining the IBBI's approval, IPAs can make bylaws consistent with the model bylaws specified by the IBBI under section 196(2) of the IBC. Accordingly, the IBBI has issued the

Model Bylaws and Governing Board Regulations.<sup>[41]</sup>

The governing board is regarded as the board of directors of the company registered as an IPA. The IBBI has laid down that it should have a minimum of seven directors, including a managing director, independent directors, and shareholder directors. The number of independent directors should not be less than the number of shareholder directors and no meeting of the governing board should be held without the presence of at least one independent director.

The governing board of the IPA may form an Advisory Committee of its professional members to advise it on any matters pertaining to the development of the profession, standards of professional and ethical conduct and best practices in respect of insolvency resolution, liquidation and bankruptcy. The governing board is required to constitute other committees such as one or more Membership Committee(s) (consisting of such members as it deems fit), a Monitoring Committee (consisting of such members as it deems fit), one or more Grievance Redressal Committee(s) (with not less than three members, at least one of whom shall be a professional member of the IPA) and one or more Disciplinary Committee(s) (consisting of at least one member nominated by the IBBI).

The regulations further provide that every IPA should have bylaws covering all matters specified in the model bylaws and consistent with them. The company seeking to register as an IPA must submit its bylaws to the IBBI along with its application for registration.

IPAs should publish on their websites their bylaws, the composition of all their committees, and all policies created under the bylaws. Any amendment to the bylaws will require a resolution passed by majority vote in favor of doing so, which should be more than

[40] [https://ibbi.gov.in/webadmin/pdf/legalframework/2019/Jul/IBBI%20\(IPA\)%20Regulation%20Upto%2023.07.2019\\_2019-07-25%2019:19:10.pdf](https://ibbi.gov.in/webadmin/pdf/legalframework/2019/Jul/IBBI%20(IPA)%20Regulation%20Upto%2023.07.2019_2019-07-25%2019:19:10.pdf)

[41] <https://ibbi.gov.in/uploads/legalframework/23c5bbe11eb00b841e13759bc66e6504.pdf>

three times the number of votes, if any, cast against the resolution by the directors. The resolution also has to be filed with the IBBI for approval.

#### 5.4.4 Functions of an IPA

The functions of an IPA are elaborated in section 204 of the IBC and include the following:

- granting membership to those who fulfill all the requirements in its bylaws and pay the membership fee;
- issuing standards of professional conduct for members;
- monitoring the performance of members;
- safeguarding the rights, privileges, and interests of IP members;
- suspending or canceling the membership of IPs if they violate conditions mentioned in its bylaws;
- redressing consumers' grievances against IPs who are its members; and
- publishing information about its functions, its list of members, their performance, and any other information that may be specified by the regulations.

A key function of IPAs is monitoring the performance of their IPs. Section 196(2)(n) of the IBC states that the bylaws of IPAs should provide for a means of monitoring and reviewing the work of member IPs.

Similarly, the Model Bylaws of the IBBI specify that IPAs should have a policy to monitor the professional activities and conduct of their IPs, ensuring they adhere to the provisions of the IBC, its rules, regulations, guidelines, bylaws, and Code of Conduct, and the directions given by its governing board.

This policy must set out the frequency with which the IPA will monitor and evaluate the performance of its members. To aid IPAs in their monitoring, every IP is required to submit information to the IPA—including records of ongoing and completed engagements in the manner and format specified by the IPA—at least twice a year.

Further, IPAs must set up a Monitoring Committee to monitor their member IPs.

### 5.5 Authorization for Assignment

According to regulation 2(1)(a), an “assignment” means any assignment taken up by an IP as an IRP, RP, liquidator, bankruptcy trustee, authorized representative, or any other role under the IBC. Regulation 2(1)(aa) defines “authorization for assignment” as the authorization to undertake an assignment, issued by an IPA to its member IP, in accordance with its bylaws.

Regulation 7A of the IP Regulations says that after December 31, 2019, an IP cannot undertake an assignment under the IBC unless he/she holds a valid authorization for assignment issued on the date of acceptance or commencement of the assignment. (Naturally, this does not apply to any assignment undertaken on or before December 31, 2019.)

An authorization for assignment is issued to an IP by its IPA on application by the IP. The procedure for issuance and the eligibility criteria for obtaining such authorization are provided in the bylaws of the IPA.

Clause 12A of the Model Bylaws<sup>[42]</sup> details the procedure. The Model Bylaws state that once issued, the authorization is valid for one year or till the date on which the professional member turns 70, whichever

[42] <https://ibbi.gov.in/uploads/legalframework/23c5bbe11eb00b841e13759bc66e6504.pdf>

is earlier. So long as the member has not turned 70, the authorization can be renewed (each renewal is also valid for one year). The bylaws also set out the procedure for renewal, suspension, cancellation, and surrender of authorization.

Regulation 10 of the IP Regulations states that all actions relating to the issuance, suspension, cancellation, renewal, and surrender of authorization for assignment must be communicated to the IBBI by the IPA within one working day of taking such action.

### 5.5.1 Eligibility Criteria and Process of Obtaining Authorization for Assignment

The Model Bylaws state that a professional member shall be eligible for an authorization for assignment if he/she:

- (a) is registered with the IBBI as an IP;
- (b) is a “fit and proper” person in terms of the IP Regulations;
- (c) is not employed;
- (d) is not debarred by any direction or order of the IPA or the IBBI;
- (e) is younger than 70 years old;
- (f) has no disciplinary proceeding against him/her before the IPA or the IBBI; and
- (g) complies with all requirements on the date of application relating to:
  - i. payment of fee to the IPA and the IBBI;
  - ii. filings and disclosures to the IPA and the IBBI;
  - iii. continuous professional education; and,
  - iv. any other requirements stipulated under the IBC regulations, through circulars, directions, or guidelines issued by the IPA and the IBBI.

Broadly, the process to obtain authorization/renewal of authorization is as follows:

- (a) An application must be made to the IPA in a form and manner, and including such fee, as may be decided by the IPA. The application for renewal should not be made more than 45 days before the date of expiry of the authorization.
- (b) The IPA should consider the application in accordance with its bylaws and either issue or renew the authorization, or reject it with a reasoned order.
- (c) If the authorization is not rejected within 15 days of the date of its receipt, it shall be deemed to have been issued or renewed by the IPA.
- (d) If the application is rejected, the applicant may appeal to the Membership Committee of the IPA within seven days of receiving the order.
- (e) The Membership Committee shall pass a reasoned order disposing of the appeal within 15 days of receiving it.

### 5.5.2 Surrender of Authorization

If a member wants to surrender authorization, clause 26(1) of the Model Bylaws provides that he/she should send an application to the IPA to do so at least 30 days before he/she becomes ineligible—for example, by becoming a non-resident Indian, taking up employment, or starting any business, except as specifically permitted by the Code of Conduct.

Regulation 23 of the IP Regulations states that an IP must not engage in any employment while holding a valid authorization for assignment or while undertaking an assignment. If any such employment is taken, the IP must surrender the authorization. Clause 26(2) of the Model Bylaws adds that surrendering is not permitted while an assignment is ongoing or if the member is included in any IBBI panel for undertaking assignments.

## 5.6 Powers and Duties of an IP

Section 208 of the IBC spells out the functions and obligations of IPs. Section 208(1) provides that where any insolvency resolution, fresh start, liquidation, or bankruptcy process has been initiated, the IP's function is to order as required:

- (a) a fresh start process under Chapter II of Part III of the IBC;
- (b) an individual insolvency resolution process under Chapter III of Part III of the IBC;
- (c) a CIRP under Chapter II of Part II of the IBC;
- (d) an individual bankruptcy process under Chapter IV of Part III of the IBC;
- (e) the liquidation of a CD under Chapter III of Part II.

Further, section 208(2) of the IBC stipulates that every IP shall abide by the following code of conduct:

- (a) exercise reasonable care and diligence while performing his/her duties;
- (b) comply with all requirements and terms and conditions specified in the bylaws of the IPA of which he/she is a member;
- (c) allow the IPA to inspect his/her records;

- (d) submit a copy of the records of every proceeding before the AA to the IBBI and the IPA of which he/she is a member;
- (e) comply with any other conditions as may be specified.

Under the IP Regulations, the registration granted to an IP is subject to various conditions. These include duties of the IP, such as compliance with the IBC and all related rules, regulations, and guidelines issued under it, compliance with the bylaws of his/her IPA, and maintenance of records of the assignments undertaken.

### KEY CONSIDERATION

Section 233 of the IBC states that no suit, prosecution, or other legal proceeding may be brought against an IP or liquidator for anything done or intended to be done in good faith and according to the IBC's rules and regulations. The IP is thus accorded statutory protection for his/her actions.

### 5.6.1 Code of Conduct

One of the most important conditions for registering an IP is compliance with the Code of Conduct. The First Schedule to the IP Regulations sets out a detailed Code of Conduct that must be followed by IPs during their assignments.<sup>[43]</sup> The Code of Conduct covers the following matters:

#### Integrity and objectivity

This deals with the need for IPs to maintain integrity by being honest, straightforward, and forthright in all professional relationships; not misrepresent facts or bring disrepute to the profession, and act objectively, ensuring decisions are made without bias, conflict of interest, coercion, or undue influence. They

[43] <https://ibbi.gov.in/uploads/legalframework/f3f-8276285c27f2386cd2a4f19cad213.pdf>

must disclose the details of any conflict of interest in any assignment to the stakeholders, and must not themselves acquire, directly or indirectly, any of the assets of the debtors they are running the process for, nor knowingly permit any relative to do so.

### **Independence and impartiality**

This relates to the requirement of every IP to maintain complete independence and conduct the processes under the IBC impervious to external influences; ensure that he/she is independent of the CD and its related parties; make adequate disclosures of any pecuniary or personal relationship with stakeholders and the concerned CD; make adequate disclosures of whether he/she was an employee of or has been in the panel of any FC of the CD; not influence the decision or the work of the CoC or other stakeholders; and not adopt any illegal or improper means to achieve any bad faith objectives.

### **Professional competence**

This deals with the need for IPs to maintain and improve their professional knowledge and skills to render competent professional services.

### **Representing correct facts and correcting misapprehensions**

This concerns itself with the need for IPs to inform relevant persons of any misapprehension or wrongful consideration of a fact of which they become aware. They should not conceal any material information or knowingly make misleading statements to the IBBI, the AA, or any stakeholder.

### **Occupation, employability, and restrictions**

This deals with the requirement for an IP to refrain from accepting too many assignments if he/she is not likely to be able to devote adequate time to each

assignment; and to not engage in any employment when he/she is undertaking an assignment or holds a valid authorization for assignment. An IP should not accept (or allow his/her relatives to accept) any employment with (other than through open competitive recruitment) or render professional services to (other than services under the IBC), a creditor having more than 10 percent voting power, the successful prospective resolution applicant (PRA), the CD, or any of their related parties until one year has lapsed from the date of his/her cessation from the CIRP process. Further, an IP should not engage or appoint any of his/her relatives/related parties for any work relating to his/her assignments or provide any service for, or in connection with, an assignment that is being undertaken by any of his/her relatives or related parties.

### **Gifts and hospitality**

This provides that an IP, or his/her relative, must not accept any gifts or hospitality that undermines or affects his/her independence as an IP. In addition, an IP must not offer gifts, hospitality, or financial or any other advantage to a public servant or any other person with the intention of obtaining or retaining work for himself or an advantage in his/her profession.

### **KEY CONSIDERATION**

The credibility of the processes under the IBC depends on the IP observing the Code of Conduct specified in the First Schedule of the IP Regulations. Section 208(2) of the IBC provides that every IP shall take reasonable care and diligence while performing his duties and perform his functions in such manner and subject to such conditions as may be specified. The Code of Conduct covers maintaining integrity and professional competence while rendering a professional service, representing correct facts and correcting errors, not concealing material information, and not acting in bad faith or negligently.

### 5.6.2 Compliance with the IBC and Regulations

Other than the IP Regulations and various guidelines and circulars issued by the IBBI to IPs from time to time setting out general duties of IPs, the IBC and related regulations contain specific powers and duties of an IP, when acting as an IRP, RP, liquidator, or bankruptcy trustee.

Part I of the IBC, which provides for the CIRP and liquidation process, sets out the role, responsibilities, power, and duties of the IRP and RP (while conducting the CIRP) and the liquidator (while conducting the liquidation process). These provisions should be read along with the related regulations (CIRP Regulations and Liquidation Regulations), which further detail the process. These powers and duties are discussed in detail in other modules.

It is important to note that as soon as an IP is appointed as an IRP, under section 17(1) of the IBC, the management of the affairs of the CD vests in the IRP and the powers of the board of directors or the partners of the CD stand suspended and are to be exercised by the IRP. This continues when the IRP is confirmed as the RP. When the IRP is replaced by the RP, it is the RP who then exercises the powers of the board of directors of the CD. This continues until the CIRP is completed. During the CIRP, the management of the CD rests with the IRP/RP, who then stands in the position of the board of directors of the CD. This is a significant departure from the regime under the Sick Industrial Companies Act, which existed before the IBC was passed: the debtor continued to be in possession of the company, even when the company was referred to the Board of Industrial and Financial Reconstruction, the predecessor of the IBBI, for reconstruction.

During the liquidation process, under section 34 of the IBC, all the powers of the board of directors, key managerial personnel, and partners of the CD (as the case may be) also cease to have effect and are vested in the liquidator on passing of the liquidation order.

### 5.6.3 Compliance with Other Laws

A corporate person undergoing a resolution or liquidation process under the IBC needs to comply with the provisions of applicable laws during the process.

In a circular issued on January 3, 2018,<sup>[44]</sup> the IBBI directed that while acting as an IRP, RP, or liquidator under the IBC, an IP shall exercise reasonable care and diligence and take all necessary steps to ensure that the corporate person undergoing any process complies with the applicable laws. It was also clarified that if a corporate person, during any of the processes under the IBC, suffers any loss, including penalty, because of non-compliance with a provision of the laws, the loss shall not form part of the insolvency resolution process cost or liquidation process cost under the IBC. Further, the IP will be responsible for the non-compliance of applicable laws if it is because of his/her conduct.

Hence, as the person who manages the affairs of the CD and exercises the powers of the board, the IP is responsible for ensuring the CD complies with applicable laws.

In some cases, there have been specific amendments of other laws to clarify the obligations of an IP while running an IBC process for a CD.

For instance, a special procedure has been prescribed under the Central Goods and Services Tax Act, 2017, for CDs undergoing a CIRP that allows the IRP/RP to

[44] [https://ibbi.gov.in/webadmin/pdf/legalframework/2018/Jan/CIRP%202\\_2018-01-03%2018:42:00.pdf](https://ibbi.gov.in/webadmin/pdf/legalframework/2018/Jan/CIRP%202_2018-01-03%2018:42:00.pdf)

undertake filings under the act for the CD. It has also been clarified that the IRP/RP will be liable to furnish returns, make payments of tax, and comply with all the provisions of the law during the CIRP period.<sup>[45]</sup>

For companies listed on Indian stock exchanges, the Securities and Exchange Board of India (SEBI) has amended the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015,<sup>[46]</sup> to provide that while its provisions relating to the composition of board/board meetings shall not apply to companies undergoing a CIRP, the role and responsibilities of the board of directors/board committees under the regulations shall be fulfilled by the IRP or RP in accordance with sections 17 and 23 of the IBC. Further, certain events relating to the CIRP of a listed CD are to be mandatorily disclosed to the stock exchanges—these obligations will fall on the IRP/RP on their appointment.

To enable statutory compliance of the Companies Act, 2013, by the IRPs, RPs, and liquidators for their respective CDs, the Ministry of Corporate Affairs (MCA) issued a circular on February 17, 2020, enabling IPs to file forms on the MCA website's registry (called MCA21). This circular says that the IRP/RP/liquidator must first file the order of the AA approving him/her as the IRP/RP/liquidator in Form INC-28 on MCA21. The jurisdictional Registrar of Companies shall then examine and approve the INC-28 form. On approval, the IRP/RP/liquidator will be able to make filings on behalf of the company. The circular further provides that for all subsequent filings, the IP will call himself/herself the “chief executive officer” (CEO) and the master data of the company will clearly display that the company is under a CIRP

or liquidation; the name of the IP should reflect in the CEO column. The INC-28 form will need to be filed again once the status of the company changes (when the resolution plan is approved, or the CIRP application is withdrawn or liquidation commences).<sup>[47]</sup>

#### 5.6.4 Appointment of Professionals—No Outsourcing

Section 20(2)(a), section 25(2)(d), and section 35(1)(i) of the IBC specifically empower the IRP, the RP, and the liquidator respectively to appoint accountants, legal, or other professionals as may be necessary for assistance carry out his/her responsibilities.

However, one of the conditions for registering the IP under regulation 7(2)(bb) of the IP Regulations is that the IP shall not outsource any of his duties and responsibilities under the IBC, except those specifically permitted by the IBBI.

In a circular issued on January 3, 2018,<sup>[48]</sup> the IBBI directed that an IP shall not outsource any of his/her duties and responsibilities under the IBC to any third person. Hence, duties such as managing the operations of the CD as a going concern (during the CIRP), or inviting and examining resolution plans (during the CIRP), and liquidating the liquidation estate (during the liquidation process) are to be performed by the relevant IP himself/herself.

[45] <https://www.cbic.gov.in/resources//htdocs-cbec/gst/notfctn-11-central-tax-english-2020.pdf>, <https://www.cbic.gov.in/resources//htdocs-cbec/gst/circular-cgst-134.pdf>

[46] [https://ibbi.gov.in/webadmin/pdf/legalframework/2018/Jun/186130\\_2018-06-05%2023:29:05.pdf](https://ibbi.gov.in/webadmin/pdf/legalframework/2018/Jun/186130_2018-06-05%2023:29:05.pdf)

[47] <https://ibbi.gov.in/uploads/legalframework/15bd03848aa2b32cc15fca08d878503.pdf>

[48] [https://ibbi.gov.in/webadmin/pdf/legalframework/2018/Jan/CIRP%203\\_2018-01-03%2018:42:38.pdf](https://ibbi.gov.in/webadmin/pdf/legalframework/2018/Jan/CIRP%203_2018-01-03%2018:42:38.pdf)

## KEY CONSIDERATION

In the matter of *Mr. Vijay Kumar Garg, Insolvency Professional (IP), No. IBBI/DC/26/2020 dated June 8, 2020*,<sup>[49]</sup> the Disciplinary Committee of the IBBI examined the act of an RP appointing a firm to provide support services during the CIRP. The Disciplinary Committee observed that primarily, it is the RP who has the responsibility to integrate all the professional services required by him during the CIRP and he is not permitted to outsource the job of integration to a third party. The committee further observed that the IBC provides for appointing an IP based on his capabilities and strength to handle CIRPs. If the RP does not possess the requisite strength to manage the CIRP and needs additional support to perform his primary functions, it is advisable that the RP build up his own capacity before taking up any assignments under the IBC.

Regarding the appointment of professionals by the RP, the Disciplinary Committee observed that “professionals” in India are generally members of a professional body that adheres to a Code of Conduct and has acquired expertise in a specialized field such as legal, valuation, or accounting. The Disciplinary Committee also distinguished between the appointment of an IPE by the IP and the appointment of any other company/limited liability partnership (LLP) to provide support services to the IP. It noted that a company/LLP generally pursues its activities as per the objectives contained in its charter and can apply for registration for all legal objects. As such, no restrictions are imposed on incorporating a company/LLP in terms of net worth, holding of shares, majority capital contribution by its members, and composition of board/partnership that exists in the case of IPEs. An IPE is recognized by the IBBI in accordance with regulation 12(1) of the IP Regulations if its sole objective is to provide support services to IPs, who are its partners or directors, as the case may be.

The Disciplinary Committee noted that providing infrastructure, personnel, and back office support services cannot be classified as “professional services” involving skill or even a “profession” falling within the definition given in Black’s Law Dictionary. Further, the firm engaged cannot be regarded as an IPE since it has not been recognized by the IBBI under regulation 12 of the IP Regulations. Thus, it does not fall within the definition of the term “professional.” Because the firm is not a professional with the authorization of a regulator of any profession to render any professional service, and its conduct and performance are not subject to oversight by any regulator of any profession, the Disciplinary Committee held that appointing a firm is in contravention of section 20(2) of the IBC.

### 5.6.5 Stakeholder Communication

In his/her role as an IRP, RP, or liquidator, the IP will engage in various communications with the stakeholders of the CD. In the circular issued

on January 3, 2018,<sup>[50]</sup> the IBBI directed that in all communications, whether by way of public announcements or otherwise to a stakeholder or to an authority, the IP shall prominently state his/her name, address, and email, as registered with the IBBI, his/her

[49] <https://ibbi.gov.in/uploads/order/2edd5a8a324c763b8e5ba42b354278aa.pdf>

[50] [https://ibbi.gov.in/webadmin/pdf/legalframework/2018/Jan/CIRP%20I\\_2018-01-03%2018:41:03.pdf](https://ibbi.gov.in/webadmin/pdf/legalframework/2018/Jan/CIRP%20I_2018-01-03%2018:41:03.pdf)

registration number as an IP granted by the IBBI, and the capacity in which he/she is communicating (as IRP, RP, or liquidator of the CD).

It has been clarified that an IP may use a process (CIRP or liquidation), and a specific address and email in his communications if he considers it necessary, provided such process and specific address and email are in addition to the other details required to be furnished and the IP continues to service the process, specific address, and email for at least six months after concluding his role in the process.

### 5.6.6 Maintaining Confidentiality

The Code of Conduct requires an IP to ensure that the confidentiality of information relating to the insolvency resolution, liquidation, or bankruptcy process is maintained at all times. However, this shall not prevent him from disclosing any information with the consent of the relevant parties as required by law.

There are also specific provisions in the IBC for keeping the information confidential and for providing information to stakeholders under a confidentiality agreement. For example, section 29(2) of the IBC requires a confidentiality undertaking from resolution applicants before they are provided access to relevant information about the CD.

Any unauthorized access of confidential information, or its leakage, has the potential to affect the processes under the IBC. In a circular issued on February 23, 2018,<sup>[51]</sup> the IBBI directed that an IP, whether acting as an IRP, RP, or liquidator, except to the extent provided in the IBC and the rules, regulations, or circulars issued under it, shall keep every piece of related information confidential, and not disclose or provide access to any information to any unauthorized person.

[51] [https://ibbi.gov.in/webadmin/pdf/legalframework/2018/Feb/Confidentiality%20of%20Information%20relating%20to%20Processes%20under%20the%20IBC,%202016-R\\_2018-02-24%2010:19:37.pdf](https://ibbi.gov.in/webadmin/pdf/legalframework/2018/Feb/Confidentiality%20of%20Information%20relating%20to%20Processes%20under%20the%20IBC,%202016-R_2018-02-24%2010:19:37.pdf)

## 5.7 Information and Reporting Responsibilities of an IP

An IP has certain disclosure requirements under the IBC and underlying regulations, such as:

### 5.7.1 Disclosure of Records by an IP under the IBC

Under section 31(3)(b) of the IBC, once an AA passes an order for approval of a resolution plan, the RP shall forward all records relating to the conduct of the CIRP and the resolution plan to the IBBI to be recorded in its database.

When an order is issued to dissolve a CD, under section 54 of the IBC, a copy of the dissolution order must be forwarded to the authority with which the CD is registered within seven days from the date of the order.

Further, under section 208(2)(d) of the IBC, the IRP/RP shall provide a copy of the records of every proceeding before the AA to the IBBI and the IPA of which he is a member.

### 5.7.2 Relationship Disclosures

The IP is required to make certain disclosures at the time of his/her appointment (as IRP, RP, or liquidator) and thereafter in accordance with the Code of Conduct. These disclosures are necessary to ensure transparency and establish the independence and impartiality of the IRP/RP. The Code of Conduct provides that:

- An IP shall disclose the existence of any pecuniary or personal relationship with any of the stakeholders entitled to distribution under sections 53 or 178 of the IBC, or the concerned corporate person/debtor, as soon as he becomes aware of it. He/she should do so by making a declaration to the applicant, the CoC, and the person proposing his/her appointment, as applicable.

- An IP shall disclose whether he was an employee of, or has been on the panel of, any FC of the CD, to the CoC and to his IPA, and the IPA shall publish the disclosure on its website.

On January 16, 2018, the IBBI issued a circular<sup>[52]</sup>

(called the Relationship Circular) requiring IPs and other professionals appointed by IPs for a CIRP to make certain disclosures “*in the interest of transparency*” to their IPAs. As per the Relationship Circular, an IP shall disclose to the IPA of which he/she is a member his relationship, if any, with the following stakeholders, within the following timelines:

Relationship of the IP with	Disclosure to be made within three days of
CD	appointment
Other professionals (registered valuer(s) / accountant(s) / legal professional(s) / other professional(s) as appointed by the IP)	appointment
FC(s)	the constitution of the CoC
Interim finance provider(s)	the agreement with the interim finance provider
Prospective resolution applicant(s)	the supply of the information memorandum to the PRA
If a relationship with any of the above comes to notice, or arises subsequently	of such notice arising

Further, the IP shall also disclose the relationship of other professionals with any of the following stakeholders within the following timelines:

Relationship of the other professional(s) with	Disclosure to be made within three days of
IP	appointment of the other professional
CD	appointment of the other professional
FC(s)	the constitution of the CoC
Interim finance provider(s)	the agreement with the interim finance provider or three days of the appointment of the other professional, whichever is later
PRA(s)	the supply of the information memorandum to the PRA or three days of the appointment of the other professional, whichever is later
If a relationship with any of the above comes to notice, or arises subsequently	such notice arising

[52] [https://ibbi.gov.in/webadmin/pdf/legalframwork/2018/Jan/Disclosures-Circular-12.01.2018%20\(1\)-1\\_2018-01-16%2018:26:45.pdf](https://ibbi.gov.in/webadmin/pdf/legalframwork/2018/Jan/Disclosures-Circular-12.01.2018%20(1)-1_2018-01-16%2018:26:45.pdf)

The Relationship Circular defines a “relationship” as any one or more of four kinds of relationships at any time or during the three years preceding the appointment:

Kind of relationship	Nature of relationship
<b>A</b>	where the IP or the other professional has derived 5 percent or more of its gross revenue in a year from professional services to the related party
<b>B</b>	where the IP or the other professional is a shareholder, director, key managerial personnel, or partner of the related party
<b>C</b>	where a relative (spouse, parents, parents of spouse, sibling of self and spouse, and children) of the IP or the other professional has a relationship of kind A or B with the related party
<b>D</b>	where the IP or the other professional is a partner or director of a company, firm, or LLP, such as an IPE or registered valuer, the relationship of the A, B, or C kind of every partner or director of such company, firm, or LLP with the related party

The IPA should facilitate the disclosures and publish them on its website within three working days of receiving the disclosure. The Relationship Circular also provides, as Annexure A, a model schematic presentation of disclosures to guide IPAs and IPs.

Further, according to the Relationship Circular, the IP shall also confirm to the IPA that the appointment of every other professional has been made at an “arms’ length” relationship.

While the Relationship Circular is applicable to CIRPs, regulation 3(2) of the Liquidation Regulations requires the liquidator to also disclose the existence of any pecuniary or personal relationship with the concerned CD or any of its stakeholders, as soon as he becomes aware of it, to the IBBI and the AA. Further, regulation 7(2) of the Liquidation Regulations requires that a professional appointed or proposed to be appointed by the liquidator to assist him/her shall disclose to the liquidator the existence of any pecuniary or personal relationship with any of the stakeholders, or the concerned CD as soon as he/she becomes aware of it.

### 5.7.3 Costs Disclosure

Regulation 34(A) of the CIRP Regulations states that the IRP/RP should disclose insolvency resolution process costs item wise, in such manner as may be required by the IBBI. On June 12, 2018, the IBBI issued the Cost Circular requiring IPs to disclose to their IPAs the fee and other expenses incurred during a CIRP on the relevant Form in Annexure C to the circular.<sup>[53]</sup>

The circular said that for all CIRPs ongoing on and subsequent to July 15, 2018:

- The Cost Sheet for the CIRP (Form I and Form II of Annexure C of the Cost Circular) should be submitted by the IRP within seven days of the IRP demitting office. (Demitting means leaving office, either on completion of term as IRP, or on resignation, removal, or reappointment as RP.)
- The Cost Sheet for the CIRP (Form III of Annexure C of the Cost Circular) should be submitted by the RP within seven days of the RP demitting office.

[53] [https://www.ibbi.gov.in/webadmin/pdf/whatsnew/2018/Jun/Circular%20on%20Fee%20and%20other%20Expenses%20incurred%20for%20CIRP%20\[June%202018\]\\_2018-06-18%2014:06:58.pdf](https://www.ibbi.gov.in/webadmin/pdf/whatsnew/2018/Jun/Circular%20on%20Fee%20and%20other%20Expenses%20incurred%20for%20CIRP%20[June%202018]_2018-06-18%2014:06:58.pdf)

An IPA shall share such disclosures made by its IPs on an appropriate electronic platform within three working days of receiving it, and also monitor disclosures made by its IPs, and submit a monthly summary of non-compliance by its IPs with the Cost Circular to the IBBI by the 7<sup>th</sup> of the succeeding month. The IPAs should take appropriate measures to ensure compliance with the Cost Circular by its IPs.

#### 5.7.4 Monitoring of IPs by IPAs

As discussed, the Model Bylaws require IPAs to have a monitoring policy that includes details on the frequency of monitoring and evaluating the performance of their members. Hence, the IP should refer to the bylaws of its IPA to get further information on its monitoring policy and the disclosures it may be required to make to its IPA. As per the Model Bylaws, a professional member should submit to the IPA information, including records of ongoing and concluded engagements as an IP, in the manner and format specified by the IPA, at least twice a year.

The circular prescribes seven forms for reporting:

Form name	Details	To be filed by	Timeline
IP 1	<i>Pre-Assignment:</i> Includes acceptance of an assignment by an IP as IRP/RP/liquidator/bankruptcy trustee, the details of the IP and the applicant, and terms of consent and engagement	IP	Within 3 days of giving consent on prescribed forms
CIRP 1	Includes details from the <i>commencement of the CIRP till the issue of a public announcement</i> such as details of the IRP, the CD, and the applicant, public announcement, and non-compliances.	IRP	Within 7 days of making public announcement
CIRP 2	Includes details from the <i>public announcement till the replacement of the IRP</i> such as details of the authorized representative selected by the IRP, receipt and verification of claims, and constitution and first meeting of the CoC	IRP	Within 7 days of replacement of IRP

Further, given the institutional role of IPAs, and to facilitate monitoring of both their performance and compliance of statutory requirements, and in the interest of transparency and accountability, the IBBI, in consultation with IPAs, has devised the format for an annual compliance certificate to be submitted by the IPAs to the IBBI and to be displayed on its website within 45 days of the end of the financial year. The format is attached to the circular issued by the IBBI to IPAs on April 19, 2018.<sup>[54]</sup>

#### 5.7.5 Monitoring Circular

On August 14, 2019, the IBBI issued the Monitoring Circular<sup>[55]</sup> to IPs, IPEs, and IPAs to strengthen monitoring of IPs. It requires IPs to submit information about the CIRPs being handled by them, in prescribed forms, within prescribed timelines. The contents of the Monitoring Circular were also inserted in the CIRP Regulations as regulation 40B by way of an amendment dated November 27, 2019.

[54] [https://ibbi.gov.in/webadmin/pdf/legalframework/2018/Apr/19%20April%202018%20Annual%20Compliance%20Certificate%20for%20Insolvency%20Professional%20Agencies\\_2018-04-20%2011:48:17.pdf](https://ibbi.gov.in/webadmin/pdf/legalframework/2018/Apr/19%20April%202018%20Annual%20Compliance%20Certificate%20for%20Insolvency%20Professional%20Agencies_2018-04-20%2011:48:17.pdf)

[55] <https://www.ibbi.gov.in/uploads/legalframework/8c1242899c43155edda4bda46f3ef4d.pdf>

Form name	Details	To be filed by	Timeline
CIRP 3	Includes details from the <i>appointment of the RP till the issue of the information memorandum (IM) to members of the CoC</i> such as details of the RP, the IM, and registered valuers	RP	Within 7 days of issue of IM to members of CoC
CIRP 4	Includes details from the <i>issue of the IM till the issue of request for resolution plans (RFRP)</i> such as expression of interest, RFRP, and evaluation matrix	RP	Within 7 days of issue of RFRP
CIRP 5	Includes details from the <i>issue of the RFRP till completion of the CIRP</i> such as a list of claimants, details of resolution applicants, and resolution plans received	RP	Within 7 days of approval or rejection of resolution plan or issue of order for liquidation
CIRP 6	<p><i>Event-specific disclosures:</i></p> <ul style="list-style-type: none"> <li>• Filing of application for preferential transaction, undervalued transaction, extortionate transaction, and fraudulent transaction</li> <li>• Raising of interim finance</li> <li>• Insolvency resolution process for guarantors</li> <li>• Extension of period of CIRP</li> <li>• Exclusion of period of CIRP</li> <li>• Premature closure of CIRP (appeal, settlement, withdrawal)</li> <li>• Request for liquidation before completion of CIRP</li> <li>• Non-implementation of resolution plan as approved by the AA</li> </ul>	IRP/RP	Within 7 days of occurrence of event

The submission is to be made (and forms uploaded) on the electronic platform of the IBBI. The IBBI has made the forms available on the electronic platform and may modify them from time to time.

Regulation 40B(3) of the CIRP Regulations mandates that an IP shall ensure that the forms and its enclosures filed under regulation 40B are accurate and complete. Regulation 40B(4) enables an already filed form to be modified (corrected or updated) on payment of a prescribed fee.

Regulation 40B(5) provides that the IP shall be liable to any action which the IBBI may take as deemed fit under the IBC/regulations made thereunder, including refusal to issue or renew authorization for assignment if the IP fails to file the relevant forms (with requisite information and records), files inaccurate or incomplete information, or is delayed in filing the form.

The Monitoring Circular also directs the IPA to:

- (a) Monitor filings by its members and, based on them, act against any member who fails to file any of the forms along with relevant information and records when due.
- (b) Scrutinize at least 10 percent of the forms filed by its members in a month, selected on a random basis, and take action against the member filing inaccurate or incomplete information, or not complying with the IBC and the regulations.
- (c) Submit a quarterly summary report in respect of (a) and (b) to the IBBI within 15 days of the close of the quarter.

### 5.7.6 Maintain Records

Since an IP may need to justify his/her actions, IPs are advised to maintain a record of all their decisions during the process of insolvency. These records may be subject to audit and inspection by an IPA or any other authority. A record should be kept of steps taken during the CIRP and the conclusions reached. These should be sufficient to enable a reasonable and informed third party to come to a view about the appropriateness of the actions.

IPs must maintain the records in such form and manner that the retrieval of details is feasible for years thereafter. They must submit the records to the IBBI and their IPA as per the provisions of the IBC and its regulations.

## 5.8 Insolvency Professional Entities

The IP Regulations recognize the concept of an IPE—a company, registered partnership firm, or LLP whose sole objective is to provide support services to

IPs. An IPE is jointly and severally liable for all acts or omissions of its partners or directors as IPs committed during such partnership or directorship.

A company, registered partnership firm, or LLP is eligible for recognition as an IPE by the IBBI if it fulfills the following conditions:

- (a) its sole objective is to provide support services to IPs;
- (b) it has a net worth of not less than 10 million Indian rupees;
- (c) in the case of a company, the majority of its shares are held by IPs who are its directors, and in the case of a registered partnership firm or LLP, the majority of capital is contributed by IPs who are its partners;
- (d) the majority of its partners or directors are IPs;
- (e) the majority of its full-time directors are IPs in case it is a company; and
- (f) none of its partners or directors are a partner or director of another IPE.

To be recognized as an IPE, the eligible person may submit an application for recognition to the IBBI on Form C of the Second Schedule of the IP Regulations, along with a prescribed fee. If the IBBI is satisfied, it may grant the person a certificate of recognition as an IPE on Form D of the Second Schedule to the IP Regulations.

The IPE is required to inform the IBBI (within seven days) when an individual ceases to be a director or partner or joins as a director or partner, using Form F of the Second Schedule of the IP Regulations, as well as pay a prescribed fee.

An IPE has to pay the IBBI a fee calculated at the rate of 0.25 percent of the turnover from the services rendered by it in the preceding financial year, on or

before April 30 of every year, in addition to submitting a statement on Form G of the Second Schedule of the IP Regulations. Any delay in fee payment attracts simple interest of 12 percent per year on the unpaid amount. An IPE must also submit to the IBBI, by October 15 every year, a compliance certificate (Form H) for the preceding financial year.

Certain timeline relaxations have been granted by the IBBI for disclosures and payment of fees due to the disruptions caused by the COVID-19 pandemic, as outlined in the Insolvency and Bankruptcy Board of India (Insolvency Professionals) (Amendment) Regulations, 2020.<sup>[56]</sup>

## 5.9 Appointment of an IP as an IRP, RP, or Liquidator

An IP is appointed as an IRP, RP, or liquidator of a CD by an order of the AA, provided the relevant IP has consented to it in a prescribed form.

The first assignment of an IP is likely to be appointment as an IRP to conduct the CIRP of a CD. When the AA passes an order initiating the CIRP of a CD, it also appoints an IRP to conduct the CIRP in accordance with the IBC.

As detailed in Module 2, an FC or OC or the corporate applicant itself can initiate the CIRP of a CD by filing an application before the jurisdictional AA as per the Insolvency and Bankruptcy (Application to AA) Rules, 2016.<sup>[57]</sup> If an FC or a corporate applicant is applying to the AA, they are mandated to propose the name of an IP who should be appointed as the IRP of the CD. If the application is by an OC, they have an option (as opposed to a mandate) to propose an IRP's name.

To propose its name as the IRP, an IP must use Form 2 (Written Communication by Proposed IRP), which is included with the Application to AA Rules. Form 2 provides the IP's consent to act as an IRP for a particular CD, and includes a disclosure from the IP of proceedings in which he is serving as an IRP, RP, or liquidator as well as disclosures in accordance with the Code of Conduct. Hence, in Form 2, the IP must disclose any discrepancies, such as a conflict of interest.

The applicant should enclose the executed consent form (Form 2) with its application for initiation of a CIRP. Where the application is admitted by the AA, the IP is appointed as the IRP for the CD by the AA if no disciplinary proceedings are pending against him. Where an application is made by the OC and no proposal for an IRP is made, the AA refers to the IBBI for the recommendation of an IRP and the IBBI is required to recommend the name of the IP (to be appointed as the IRP) against whom no disciplinary proceedings are pending, within 10 days of receipt of such reference.

To reduce the time taken to appoint an IP as the IRP, RP, or liquidator, the IBBI has prepared a panel of IPs. From time to time, the IBBI issues guidelines on including IPs on the panel. Only eligible IPs holding valid authorization for appointment are included in the panel subject to the submission of a valid expression of interest (EOI) and meeting other conditions as specified in the guidelines. The AAs may refer to this panel while appointing an IRP/RP/liquidator (where no IP has been proposed).

The IRP appointed for a CD can continue as the RP or can be replaced by another IP as the RP (See Module 3). Where the replacement of the IRP with another IP is approved by the CoC, the AA appoints the IP as the RP. Here again, written consent is needed from the IRP (if the IRP continues as the RP, as resolved by the CoC) as well as from the proposed RP

[56] <https://ibbi.gov.in/uploads/legalframework/ac467ecac3ad7a0f66433d-3cbdfa03d.pdf>

[57] [https://ibbi.gov.in/webadmin/pdf/legalframework/2019/Mar/Application\\_to\\_Adjudicating\\_Authority\\_Rules-upto%2019.03.2019\\_2019-03-28%2013:12:13.pdf](https://ibbi.gov.in/webadmin/pdf/legalframework/2019/Mar/Application_to_Adjudicating_Authority_Rules-upto%2019.03.2019_2019-03-28%2013:12:13.pdf)

(if the IRP is being replaced by the CoC) using Form AA of the CIRP Regulations.

If the AA passes an order for liquidation, it also appoints the liquidator. In most cases, the RP for the CD continues as the liquidator of the CD. Only in certain cases (see Module 5) is the RP replaced by another IP as the liquidator. In both circumstances, the IP proposed to be appointed as the liquidator is required to give written consent to act as the liquidator.

### KEY CONSIDERATION

The IBBI has clarified that a disciplinary proceeding against an IP commences with the issue of a show-cause notice to the IP and concludes with the disposal of the show-cause notice by a reasoned order.<sup>[58]</sup>

## 5.10 Initial Considerations for Accepting the Assignment

### 5.10.1 Know Your Debtor

Before agreeing to take up an assignment as an IRP, RP, or liquidator, it is recommended that the IP gather information about the CD. This would include:

- reviewing available financial information about the CD, including its audited financial statements;
- obtaining a draft copy of the application to the AA for commencement of the CIRP to understand the details of the debt and the default;
- reviewing the website of the CD and other public sources of information such as the website of the MCA and the website of

stock exchanges (if the CD is listed) for general information, including details of its promoters, directors, and auditors;

- discussing the financial position of the CD with the applicant.

This would not only prepare the IP for the assignment, but also help him/her assess whether he/she is eligible to be appointed as the IRP/RP/liquidator of the CD and whether he/she has the capacity and competence to take the assignment. The IP should also read the declarations/consent forms giving consent to the assignment.

### 5.10.2 Self-Check on Registration and Authorization for Appointment

An IP will be able to act as an IRP/RP/liquidator of the CD only if he/she holds valid registration as an IP as well as valid authorization for assignment from his IPA (with effect from January 1, 2020). The IP should check the registration's validity period and apply for renewal when the registration/authorization is close to expiring. Further, the IP must not be engaged in any employment or business at such time (except as provided in the Code of Conduct) as it would entail surrender of authorization for assignment.

### 5.10.3 Self-Check on Eligibility and Independence

Regulation 3 of the CIRP Regulations sets out the eligibility requirement for being appointed as a resolution professional (IRP or RP) of a CD.<sup>[59]</sup> Similarly, regulation 3 of the Liquidation Regulations sets out the eligibility requirements for being appointed as the liquidator of a CD.<sup>[60]</sup>

[58] [https://ibbi.go78v.in/webadmin/pdf/legalframework/2018/Apr/Disciplinary%20Proceeding\\_2018-04-24%2010:34:13.pdf](https://ibbi.go78v.in/webadmin/pdf/legalframework/2018/Apr/Disciplinary%20Proceeding_2018-04-24%2010:34:13.pdf)

[59] <https://ibbi.gov.in/uploads/legalframework/2020-08-17-234040-pjor6-59a1b2699bbf87423a8afb5f5c2a0a85.pdf>

[60] <https://ibbi.gov.in/uploads/legalframework/96336966a318bbeff79f7dc0c115f08e.pdf>

An IP shall be eligible to be appointed as the IRP/RP/liquidator of a CD if he/she, and all partners and directors of the IPE of which he/she is a partner or director, are “independent” of the CD. A person will be considered “independent” of a CD if he/she:

- (a) is eligible to be appointed as an independent director on the board of the CD under section 149 of the Companies Act, 2013, where the CD is a company;
- (b) is not a related party of the CD; or
- (c) is not and has not been in the last three financial an employee, a proprietor, or a partner:
  - of a firm of auditors or secretarial auditors in practice, or cost auditors of the CD, or
  - of a legal or consulting firm that has/had any transaction with the CD amounting to 5 percent or more of the gross turnover of that firm.

In both the CIRP Regulations and the Liquidation Regulations, regulation 3 also provides that the IRP/RP/liquidator who is a director or a partner of an IPE shall not continue as the IRP/RP/liquidator if the IPE or any other partner or director of such IPE represents any of the other stakeholders in the same CIRP/Liquidation process. Hence, an IP should not take up the assignment as an IRP/RP/liquidator if his IPE or any other partner or director of the IPE is representing any of the other stakeholders in the same CIRP or liquidation process.

These regulations follow the principle set out in the Code of Conduct of IPs maintaining their independence and integrity. Hence, before accepting an assignment, the IP should consult the provisions of the Code of Conduct and the CIRP Regulations and Liquidation Regulations to determine his/her eligibility for appointment as well as independence, conflict of interest, and relationship with the CD.

#### 5.10.4 Too Many Assignments

In the consent form for appointment (Form 2), the IP is required to disclose the assignments handled by him/her under the IBC.

Clause 22 of the Code of Conduct provides that an IP must refrain from accepting too many assignments if he is not likely to be able to devote adequate time to each. Hence, when an IP is approached to act as an IRP, RP, or liquidator for a CD, he/she should evaluate whether he/she has the time and capacity to handle the assignment, considering other existing assignments. This would also depend on the nature of the assignment, the size and business of the CD, the likely complexities that may arise in the matter, and the availability of an experienced support team.

There have been cases where AAs have asked the applicant creditor to suggest another IP as the IRP where they believe that the proposed IRP already has too many/other complex assignments, which would affect his/her ability to act as the IRP.

### 5.11 Practical Challenges Facing the Insolvency Professional

#### 5.11.1 Friction with the Management

The IBC does not provide for a debtor in possession regime. It is the IP who becomes vested with the powers of the board of directors of a company on his appointment. Hence, it is natural that there may be some degree of friction with the former management and promoters and sometimes even with the employees. Examples from practice include situations where IPs have not been allowed to enter the premises of the CD or were denied important information.

Moreover, the loyalty of the workforce may remain with the promoters or former management team. Employees may have been working with them for a

considerable time and may feel both confused and threatened by the change in circumstances. The employees are informed that an IP is now in charge of the business, but they may also hear that in a matter of months, the promoter may return to the boardroom. This can cause a clash of loyalties and an atmosphere of disquiet. It is amid this atmosphere that the IP will have to seek information, documentation, and cooperation from the management and employees and run the CD as a going concern.

### 5.11.2 Lack of Understanding

Challenges may arise as a result of stakeholders' lack of understanding of the IBC and its objectives. Creditors may not fully understand the implications of the moratorium provisions and seek to recover money from the CD by debiting its account after the insolvency commencement date (where such debit powers are provided). The statutory and legal authorities and departments may issue demand notices or start or continue new proceedings against the CD despite the moratorium. The IP may not be able to open a new bank account because bankers may have a different understanding of this process and still require a board resolution in their required formats to authorize the opening of the account. Sometimes the infrastructure of the relevant authorities (online or offline) may not allow accounts to be opened. All such issues arise on account of lack of understanding of the CIRP process and it is often left to the IRP and his team to educate various stakeholders on the implications of the CIRP commencement.

### 5.11.3 Safety and Security Challenges

Some of the physical challenges undertaken by IPs (such as labor and security issues) present a potential threat to their safety.

IPs are advised to have insurance cover to protect themselves, their colleagues, and their actions

before they undertake the management of a CIRP or liquidation. This amounts to indemnity cover that will offer protection for the errors and omissions committed while rendering professional services.

Sometimes those managing CDs face greater issues. While working as an IRP/RP/liquidator, IPs in India have faced extreme challenges, such as kidnapping, ransom demands, physical attacks, torture, and detention. As a result, personal insurance policies often offer psychiatric cover for situations where a professional is detained or tortured during the CIRP or the liquidation process.

Very often, the policies offered prove inadequate against the threats presented when carrying out the various functions of their role, and as greater difficulties are experienced, more research is required on how to tackle them.

Where the IP is faced with hostile workers or unions, or where the IP is unable to enter the unit of the CD, he/she should contact the local police and produce a copy of the order passed by the AA to the police authorities for assistance.

### 5.11.4 Lack of Finance

Once the IP takes charge as the IRP/RP or liquidator, he/she should assess the funds in the various accounts of the CD, the non-cash investments and the cash flow of the CD. In many cases, the CD will lack sufficient funds to meet the CIRP or liquidation costs. The funds may not even be enough to pay the IP's fee, or to take control and custody of the assets of the CD. In such a case, once the financial position of the CD is assessed, the IP should try to raise finance to meet the costs. Existing lenders may be approached. However, in many cases, the IP will find it very challenging to raise financing from outside sources because lenders do not wish to take on further exposure to the CD.

### 5.11.5 Compliance with the Law

IPs are responsible for ensuring compliance with all applicable laws. There may be challenges faced in assessing the compliance status and the legal requirements for a particular CD, as well as challenges in ensuring compliance in certain cases.

Such challenges may arise where the CD has not been operational for some time, where there is lack of sufficient documentation, or where the management is not cooperating in providing sufficient information to the CD to assess and ensure compliance. Further, the non-compliance may have been continuing for a long period, making it difficult for the IP to ensure future compliance. In some cases, the legal and statutory authorities may insist on the IP completing or rectifying past compliances, or paying past dues of the authorities before they permit filing of documents by the IP.

There may also be instances where the cash flows of the CD are not enough to engage professional or legal advisers or to pay the requisite fees to the legal and statutory authorities.

#### KEY CONSIDERATION

In its order dated January 16, 2019, in the matter of *Asset Reconstruction Company (India) Pvt. Ltd. Vs. Shivam Water Treatment Pvt. Ltd.*, the AA held that an RP is acting as an officer of the court and any hindrance in the working of the CIRP will amount to contempt of court. In its order dated February 18, 2019, in the same matter, the AA once again clarified that the RP is discharging his/her duties as court officer and any non-compliance with the court officer's directives will be deemed as contempt of court.

An IP is the driving force and the nerve center in the insolvency proceeding of a CD. The law facilitates and empowers the IP to discharge his/her responsibilities effectively. It obliges every

officer of the CD to report to him/her and to assist and cooperate. There is an assurance of supply of essential goods and services to, and a moratorium on proceedings against, the CD. The IP is empowered to appoint professionals to assist and can use the support services of an IPE. He/she can apply to the AA for orders against the management/employees for non-cooperation, avoidance of certain transactions, or breach of moratorium. He/she has protection for actions taken in good faith and there is a bar on the trial of offences against an IP except on a complaint filed by the IBBI.

All such tools can be employed by the IP to address challenges in running an IBC process. There have also been various statutory and regulatory changes to address the practical issues faced by IPs. Further, various amendments have been made to the IBC and related regulations, as well as other laws to facilitate the processes under the IBC. For instance, e-filings on MCA21 by IPs has been allowed and filing of GST returns by IPs has been facilitated.

Judicial pronouncements, including by the AA in the form of various orders, have also been helping IPs discharge their responsibilities. AAs have passed orders for providing police protection to IPs, orders (including, in some cases, warrants) against promoters and management to ensure cooperation, orders compelling CoC members to pay the costs of the CIRP, orders against creditors who breach the moratorium, and more. A summary of these orders can be accessed on the website of the IBBI.<sup>[61]</sup> To aid IPs in the process, the

[61] <https://ibbi.gov.in/uploads/legalframework/c9e28d21f9f-20b874a818f5e3f5bbd70.pdf>

IBBI has issued facilitation letters to IPs and other stakeholders, summarizing some of these orders and discussing the role of government and its agencies in the CIRP and liquidation processes. These facilitation letters can be accessed on the IBBI's website.<sup>[62]</sup>

## 6. Overriding Effect of the Code

Section 238 of the IBC says that the provisions of the IBC override anything contained in any other law in force or any instrument having effect by virtue of such law.

This provision accords supremacy to the IBC over any other law, if it is inconsistent with the IBC. The IBC is a complete code on matters relating to insolvency and bankruptcy. However, other applicable laws will continue to apply for all other matters.

In many statutes, amendments have been made to clarify that some—or all—of the provisions of those other statutes are subject to the provisions of the IBC.

### *Innoventive Industries Ltd. Vs. ICICI Bank & Another [(2018) 1 SCC 407]*

In this first case of CIRP admission under the IBC, the Supreme Court examined whether a financial creditor could commence insolvency proceedings under the IBC when the CD was protected from repaying debt under the Maharashtra Relief Undertaking (Special Provisions) Act, 1958 (MRUA). The Supreme Court held that the act is repugnant to the IBC. Under the MRUA, the state government may take over the management of the undertaking and impose a moratorium in much the same manner as that contained in the IBC. By giving

effect to the MRUA, the plan/scheme that may be adopted under the IBC will directly be hindered. There would be a direct clash between moratoriums under the two statutes. The non-obstante clause of the IBC will prevail over the non-obstante clause in the MRUA. On account of the non-obstante clause in the IBC, any right of the CD under any other law cannot come in the way of the IBC.

In *Pr. Commissioner of Income Tax Vs. Monnet Ispat And Energy Ltd. [SLP No. 6483- 2018 & other petitions]*, the Supreme Court held that the IBC would override anything inconsistent contained in any other enactment, including the Income Tax Act, 1961.

In *M/s Embassy Property Developments Pvt. Ltd. Vs. State of Karnataka & Others [2019 SCC Online SC 1542]*, the Supreme Court observed that it is clear that the IBC is a complete code in itself. As observed by this court in *M/s Innoventive Industries Limited Vs. ICICI Bank*, it is an exhaustive code on insolvency in relation to corporate entities and others. It is also true that the IBC is a single unified umbrella code, covering all law relating to insolvency resolution of corporate persons and others in a time-bound manner. However, while observing this, the Supreme Court also delved into the jurisdiction of the NCLT and the NCLAT and held that in light of the statutory scheme, wherever the CD has to exercise a right that falls outside the purview of the IBC, especially in the realm of the public law, it cannot, through the RP, take a bypass and go before the NCLT for the enforcement of such a right.

[62] <https://ibbi.gov.in/uploads/legalframework/8ab02252cd52b6eb35744281098ef73c.pdf>



## Module 2: Initiating The CIRP

## 1. Introduction

The CIRP is a process provided in the IBC for resolution of insolvency of a CD. Except for voluntary liquidations (which only apply if there is no default in payment of any debt by the CD), direct liquidation of the CD is not possible under the IBC. This is unlike the previous regime of winding up under the Companies Act, 1956, or the revised Companies Act, 2013, which did not prescribe any resolution process before winding up of a company.

The IBC regime provides that if a CD defaults on paying a debt, an application may be made to the jurisdictional AA by a creditor of the CD or by the CD itself to initiate a CIRP. Once a CIRP starts, every attempt is made to resolve and reorganize the CD. Such attempts may yield the following results:

- The CD may get “resolved”—when a resolution plan for the CD is approved by the requisite majority of the CoC of the CD and the plan is then approved by the AA by way of an order passed under section 31 of the IBC; or
- The CD does not get resolved through the CIRP—for instance, if no resolution plan is received or approved for the CD, or if the CoC, prior to receiving any resolution plan takes a decision to liquidate the CD. The non-resolution of insolvency through a CIRP would lead to an order passed by the AA under section 33 of the IBC to liquidate the CD, thereby starting the liquidation process.

Hence, every CIRP, will lead to either an order of approval of the resolution plan by the AA or an order of liquidation of the CD. It should be kept in mind that the primary aim of the IBC is to revive and save the CD (that is, to resolve). Only once the CIRP fails does the liquidation follow.

In the seminal case of *Swiss Ribbons Private Limited and Another Vs. Union of India and Others* [(2019) 4 SCC 17], the Supreme Court upheld the constitutionality of the IBC and observed that the foremost and primary objective of the IBC is the reorganization and insolvency resolution of the CD in a time-bound manner.

In *Binani Industries Ltd Vs. Bank of Baroda & Another* [CA (AT) (Ins) 82/2018 & Others], the NCLAT observed that the first order objective of the IBC is resolution, the second order objective is maximization of the value of assets of the firm, and the third order objectives are promoting entrepreneurship, availability of credit, and balancing the interests of stakeholders. This order of objectives is sacrosanct.

## 2. Flowchart of the CIRP Process

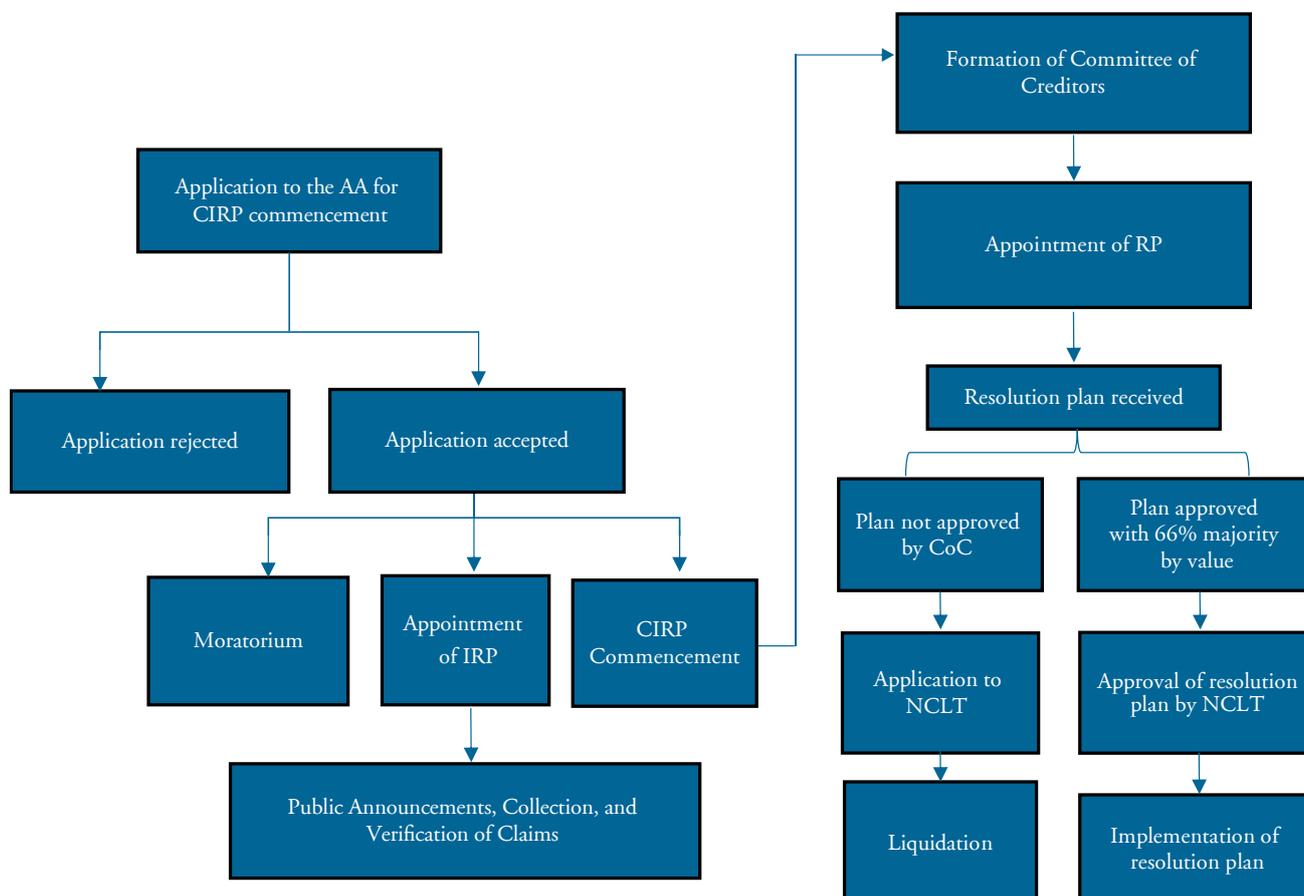
The IBC contains the processes for starting and running the CIRP. To supplement this:

- The Central Government has issued the Application to AA Rules, which detail the process and various steps involved in applying to the AA to initiate the CIRP.<sup>[63]</sup>
- The IBBI has issued the CIRP Regulations, which detail the process and various steps involved in running a CIRP.<sup>[64]</sup>

Below is a flowchart of the CIRP process, which starts with applying to the AA to initiate the CIRP and ends with the order of the AA either approving the resolution plan or liquidating the CD.

[63] <https://ibbi.gov.in/uploads/legalframework/97f265ffe63b83fa6ca7c2c01795be66.pdf>

[64] <https://ibbi.gov.in/uploads/legalframework/2020-08-17-234040-pjor6-59a1b2699bbf87423a8afb5f5c2a0a85.pdf>



### 3. Commencement of the CIRP

#### 3.1 Default as the Trigger

Section 6 of the IBC provides that where a CD commits a default, an FC, OC, or the corporate applicant (including the CD) itself, may initiate a CIRP for the CD, in the manner detailed under Chapter II of Part II of the IBC. Hence, the trigger for initiating the CIRP is the default by the CD.

“Default” is defined in section 3(12) of the IBC as non-payment of a debt when the whole or any part or installment of the amount of debt has become due and payable, and is not paid by the debtor or the CD, as the case may be.

Section 4 of the IBC provides that Part II of the IBC (which deals with the CIRP and liquidations) shall apply to matters relating to the insolvency and liquidation of CDs where the minimum amount of the default is 100,000 Indian rupees. The Central Government may, by notification, specify a higher minimum amount, but it shall not be more than 10 million Indian rupees.

Recognizing the stress faced by companies as a result of COVID-19, the Central Government passed a notification on March 24, 2020,<sup>[65]</sup> increasing the threshold of default to 10 million Indian rupees.

[65] <https://ibbi.gov.in/uploads/legalframework/48bf32150f5d6b30477b74f652964edc.pdf>

### KEY CONSIDERATION

The CIRP of a CD commences with an order from the AA (in whose jurisdiction the CD is registered), admitting an application to initiate the CIRP of the CD filed by an FC, an OC, or the corporate applicant. The date of this order is the insolvency commencement date (ICD).

## 3.2 COVID-19 Suspension

In addition to increasing the default threshold, the Central Government passed the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020, on June 5, 2020,<sup>[66]</sup> to exclude defaults arising from the impact of the pandemic and the nationwide lockdown for the purposes of insolvency proceedings. This was subsequently replaced by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2020 which was notified on September 23, 2020 (having effect from June 5, 2020).

The ordinance has inserted section 10A into the IBC, which provides that no application to initiate a CIRP of a CD shall be filed for any default arising on or after March 25, 2020, for a period of six months or such further period, not exceeding one year from such date, as may be notified. The ordinance also provides that no application shall ever be filed to initiate a CIRP for a default occurring during this period.

The ordinance clarifies that section 10A shall not apply to any default committed before March 25, 2020.

## 4. Financial Creditors

Section 7(1) of the IBC states that an FC, either by itself or jointly with other FCs, or any other person

on behalf of the FC, as may be notified by the Central Government, may file an application for initiating a CIRP against a CD before the AA when a default has occurred in payment of financial debt by the CD. For the purpose of section 7(1), a default includes a default on a financial debt owed not only to the applicant FC but to any other FC of the CD.

An FC is defined under section 5(7) of the IBC as any person to whom a financial debt is owed (and includes a legal assignee/transferee).

A ‘financial debt’ is defined in section 5(8) as a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes:

- (a) money borrowed against the payment of interest;
- (b) any amount raised by acceptance under any acceptance credit facility or its de-materialized equivalent;
- (c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock, or any similar instrument;
- (d) the amount of any liability in respect of any lease or hire-purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;
- (e) receivables sold or discounted other than any receivables sold on a non-recourse basis;
- (f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial

[66] <https://ibbi.gov.in/uploads/legalframework/741059f0d8777f311ec76332ced1e9cf.pdf>

effect of a borrowing. The explanation to this provision provides that any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing and that the expressions “allottee” and “real estate project” shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016;

- (g) any derivative transaction undertaken in connection with protection against or benefit from fluctuation in any rate or price. To calculate the value of the derivative transaction, only the market value of such transaction shall be considered;
- (h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary

letter of credit, or any other instrument issued by a bank or financial institution;

- (i) the amount of liability in respect of any of the guarantees or indemnities for any of the items referred to in subclauses (a) to (h) above.

An FC can be secured or unsecured. The IBC does not make a distinction between secured and unsecured FCs for the purpose of initiating a CIRP of a CD.

Multiple FCs may file an application to initiate a CIRP jointly. Further, since a default for the purpose of section 7 includes a default in respect of a financial debt owed not only to the applicant FC but to any other FC of the CD, if a loan was given to a CD by a consortium of banks, and if there is a default in repaying the loan, any member of the consortium may seek initiation of a CIRP of the CD as an FC.

### *Anuj Jain Interim Resolution Professional for Jaypee Infratech Limited Vs. Axis Bank Limited Etc. [2020 SCC Online SC 237]*

The issue before the Supreme Court was whether a creditor who has been given security by the CD for a third-party debt would be an FC under the IBC. The Supreme Court observed that for a debt to become “financial debt,” the basic elements are that it ought to be a disbursement against the consideration for the time value of money. It may include any of the methods for raising money or incurring liability prescribed in sub-clauses (a) to (f) of section 5(8). It may also include any derivative transaction or counter-indemnity obligation as per subclauses (g) and (h) of section 5(8). It may also be the amount of any liability in respect of any of the guarantees or indemnities for any of the items referred to in subclauses (a) to (h). The requirement of existence of a debt that is disbursed against the consideration for the time value of money remains an essential part of any of the transactions/dealings stated in subclauses (a) to (i) of section 5(8), even if it is not necessarily stated therein.

The court added that for a person to be designated as an FC of the CD, it has to be shown that the CD owes a financial debt to such a person. Understood this way, it becomes clear that a third party to whom the CD does not owe a financial debt cannot become its FC.

The court delved into the unique position and role of the FC with respect to the CD and observed that keeping the objectives of the IBC in view, the position and role of a person having only security interest over the assets of the CD could easily be contrasted with the role of an FC because the former shall have only the interest of realizing the value of its security (there being no other stake involved and least of all any stake in CD's growth or equitable liquidation) while the latter would, apart from looking at safeguards of its own interests, also and simultaneously be interested in the rejuvenation, revival and growth of the CD. The court held that a person having only security interest over the assets of the CD, even if falling within the description of 'secured creditor' by virtue of collateral security extended by the CD, would nevertheless stand outside the sect of FCs. Hence, if a CD has given its property in mortgage to secure the debts of a third party, it may lead to a mortgage debt and, therefore, it may fall within the definition of 'debt' under Section 3(10) of the IBC. However, it would remain a debt alone and cannot partake the character of a 'financial debt' within the meaning of Section 5(8) of the IBC.

In *Laxmi Pat Surana Vs. Union of India and Another [Company Appeal (AT) (Insolvency) No. 77 of 2020]*, the NCLAT held that a financial debt includes a debt owed to a creditor by a principal and guarantor. An omission or failure to pay the debt by the guarantor, when the principal sum is claimed, comes within the scope of default under section 3(12). Therefore, a CIRP can be initiated by an FC who had taken guarantee for the debt against the guarantor for failure to repay the money taken by the principal borrower.

## 4.1 Home buyers

When the IBC was passed, several petitions were filed against real estate developers under the IBC by allottees who had entered into "assured returns/committed returns" agreements with them, whereby, on payment of a substantial portion of the total sale consideration upfront at the time of execution of the agreement, the developer undertook to pay a certain amount to the allottees on a monthly basis from the date of execution of the agreement till the date of handing over possession. The NCLAT held that the amounts raised by developers under assured return schemes had the "commercial effect of a borrowing" and, as such, these allottees were held to be FCs within the meaning of section 5(7) of the IBC<sup>[67]</sup>.

Subsequently, proceedings were also admitted under section 7 of the IBC against certain real estate

developers, including Jaypee Infratech Limited. Given the lack of clarity on the status of allottees of real estate developers, the Insolvency and Bankruptcy Code (Amendment) Ordinance was passed on June 6, 2018 (later replaced by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018<sup>[68]</sup>). It added an explanation to section 5(8)(f) to clarify that the amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing. So, home buyers who have provided funds to real estate companies by way, for example, of a deposit to buy a home or investment property, are considered to be FCs and, as such, can file an application for initiating the CIRP of the real estate company under section 7 of the IBC.

[67] [https://ibbi.gov.in/webadmin/pdf/order/2017/Jun/21stJuly2017\\_in\\_the\\_matter\\_of\\_Nikhil\\_Mehta\\_and\\_Sons\\_Vs\\_AMR\\_Infrastructure\\_Ltd\\_Company\\_Appeal\\_AT\\_Insolvency\\_No\\_07\\_of\\_2017.pdf](https://ibbi.gov.in/webadmin/pdf/order/2017/Jun/21stJuly2017_in_the_matter_of_Nikhil_Mehta_and_Sons_Vs_AMR_Infrastructure_Ltd_Company_Appeal_AT_Insolvency_No_07_of_2017.pdf)

[68] [https://ibbi.gov.in/webadmin/pdf/whatsnew/2018/Aug/The%20Insolvency%20and%20Bankruptcy%20Code%20\(Second%20Amendment\)%20Act,%202018\\_2018-08-18%2018:42:09.pdf](https://ibbi.gov.in/webadmin/pdf/whatsnew/2018/Aug/The%20Insolvency%20and%20Bankruptcy%20Code%20(Second%20Amendment)%20Act,%202018_2018-08-18%2018:42:09.pdf)

### *Pioneer Urban Land and Infrastructure Limited and Another Vs. Union of India & Others [(2019) 8 SCC 416]*

In this case, while dismissing the various petitions filed by builders, the Supreme Court upheld the constitutional validity of the status of allottees as FCs. The Supreme Court also observed that delays in completing apartments have become a common phenomenon, and that amounts raised from home buyers contribute significantly to the financing of the construction of such apartments. It was important, therefore, to clarify that home buyers are treated as FCs so that they can trigger the IBC under section 7 and take their rightful place on the CoC when it comes to making important decisions on the future of the construction company, which is executing the real estate project in which such home buyers are ultimately to be housed. It also observed that in real estate projects, money is raised from the allottee, against consideration for the time value of money, and the amounts raised from allottees under real estate projects are subsumed within section 5(8)(f) even without adverting to the explanation introduced by the amendment act. This puts beyond doubt the fact that allottees are to be regarded as FCs within section 5(8)(f) of the IBC.

On December 28, 2019, the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019, was promulgated (replaced by Insolvency and Bankruptcy Code (Amendment) Act, 2020<sup>[69]</sup>) to provide a minimum threshold for filing section 7 applications by creditors in a class (such as home buyers).

As per the amendment, for financial creditors that are creditors in a class, an application for initiating a CIRP against a CD shall be filed jointly by at least 100 creditors in the same class or not at least 10 percent of the total number of such creditors in the same class, whichever is less. If the creditors are allottees under a real estate project, the application shall be filed jointly by at least 100 of such allottees under the same real estate project or at least 10 percent of the total number of such allottees under the same real estate project, whichever is less. It was also clarified that if there are pending applications, such application shall be modified to comply with these requirements within 30 days of the commencement of the said Act, failing which the application shall be deemed to be withdrawn before its admission. It should be noted that several home buyers have challenged the constitutionality of the amendments before the Supreme Court.<sup>[70]</sup>

[69] <https://ibbi.gov.in/uploads/legalframework/d36301a7973451881e00492419012542.pdf>

[70] *Manish Kumar Vs. Union of India* [Writ Petition (Civil) No. 26 of 2020]

## 4.2 Application by an FC

An FC has to apply to initiate a CIRP against a CD under section 7 of the IBC, using Form 1 as provided for in the Application to AA Rules. This should be accompanied by the documents and records required by, and specified in, the Application to AA Rules.<sup>[71]</sup>

The form is divided into five parts, each providing for the submission of the following particulars:

- Part I: Particulars of the applicant FC, giving the details of each FC making the application— submission of details like the name, date of incorporation, and identification number.
- Part II: Particulars of the CD—details like the name, identification number of the CD, nominal share capital, and paid-up share capital of the CD.
- Part III: Particulars of the proposed IRP— details like the name, address, email address, and registration number of the proposed IRP.
- Part IV: Particulars of the financial debt— details like the total amount of debt granted

[71] <https://ibbi.gov.in/uploads/legalframework/97f265ffe63b83fa6ca7c2c01795be66.pdf>

along with the date(s) of disbursement, the amount claimed to be in default, and the date on which the default occurred.

- Part V: Particulars of financial debt, documents, records, and evidence of default.

As per section 7(3) of the IBC, the FC shall, along with the application, furnish:

- (a) a record of the default recorded with the IU or such other evidence of default as may be specified;
- (b) the name of the IP proposed to act as an IRP; and
- (c) any other information as may be specified by the IBBI.

### KEY CONSIDERATION

The Registrar of the NCLT issued an administrative order dated May 12, 2020,<sup>[72]</sup> directing all concerned parties to file default record from an IU in all pending and new cases to be initiated by the FCs under section 7 of the IBC to start CIRP of the CD. The order stated that no new petitions shall be entertained without the default record from an IU under section 7 of the IBC.

On August 13, 2020, the Registrar of the NCLT issued another order<sup>[73]</sup>, modifying its earlier order and directing the concerned parties to file default record from an IU, “*wherever available with the IU*” in all pending and new cases to be initiated by the FCs under section 7 of the IBC.

The FC should submit the application to the AA as per the applicable rules/procedures of the relevant AA, along with prescribed fee of 25,000 Indian rupees in favor of the Pay and Accounts Officer, Ministry of Corporate Affairs, payable in Mumbai, New Delhi, Kolkata, or Chennai.

### *Palogix Infrastructure Private Limited Vs. ICICI Bank Limited [Company Appeal (AT) (Insol) No. 30 and 54 of 2017]*

This case explored whether a power of attorney holder who was given the power of attorney prior to the enactment of the IBC can sign and file an application under section 7 of the IBC on behalf of the applicant creditor. The NCLAT held that:

- Power of attorney needs to be interpreted strictly so that powers given are not abused by an agent or that the actions are restricted only to the extent the power is indicated or given.
- Authorization in the case of a company would mean a specific authorization by the board of directors of the company by passing a resolution. Therefore, the application under section 7, if signed and filed by a general power of attorney holder without specific authorization, is not maintainable.
- An FC, being a juristic person, can only act through an authorized representative.
- A power of attorney holder is not empowered to file the application under section 7 of the IBC but an authorized person has the power to do so.

*In Mahesh Kumar Sureka Vs. SBER Bank and Others [Company Appeal (AT) (Insolvency)]*

[72] <https://ibbi.gov.in/uploads/legalframework/e3daa98ba-b56a6098c4e9356b93095bb.pdf>

[73] <https://ibbi.gov.in/uploads/legalframework/59033887285f644c7ee94a9da1d5148b.pdf>

*No. 319 of 2017*], the NCLAT held that if any authorized officer of an FC has the authority to sanction a loan, he will also be authorized to initiate proceedings under the IBC and the application under section 7 cannot be rejected because no specific letter of authorization has been issued by the FC in favor of such an officer designate.

### 4.3 Ascertaining the Existence of Debt and Default

Once the FC has furnished the prescribed information (see section 4.1 [p29]), the AA shall, under section 7(4) of the IBC, ascertain the following within 14 days of receiving the application:

- (a) the existence of a debt and default from the records of the IU or the records/documents submitted by the concerned FC,
- (b) whether the application is complete, and

- (c) that there are no disciplinary proceedings pending against the proposed IRP.

If the application is incomplete, the AA will give notice to the applicant to rectify the errors within seven days of the notice.

The first application to be filed under section 7 of the IBC was by ICICI Bank (the FC) against Innoventive Industries Limited (the CD). The application was admitted by the Mumbai bench of the AA. The directors of the CD appealed against the admission order. The NCLAT upheld the order passed by the AA. The directors then appealed to the Supreme Court. The Supreme Court observed that since the application filed by the FC was the very first application that had been moved under the IBC, it was necessary to deliver a detailed judgment so that all courts and tribunals would take notice of a paradigm shift in the law. The Supreme Court noted that entrenched managements are no longer allowed to continue in management if they cannot pay their debts and went on to examine various aspects of the IBC, especially section 7 (see box below).

#### *Innoventive Industries Ltd. Vs. ICICI Bank & Another [(2018) 1 SCC 407]*

The Supreme Court held that:

- An FC can trigger section 7(1) of the IBC for default of a financial debt owed by the CD to any FC. It need not be a debt owed to the FC who is the applicant.
- Under section 8 of the IBC, a dispute that existed before the receipt of a demand notice/invoice by the CD will make the application of an OC inadmissible. On the other hand, under section 7, the moment the AA is satisfied that a default has occurred, the application of the FC **must be admitted** unless it is incomplete, in which case it may give notice to the applicant to rectify the errors within seven days of receiving a notice from the AA.
- The concept of “default” under the IBC is very wide. It is simply a non-payment of debt that has become due and includes non-payment of even a part of it. Even non-payment of a disputed financial debt when due would constitute a default under the IBC. In other words, so long as the debt is due it does not matter if it is disputed.

- The CD is entitled to point out that a default has not occurred in the sense that the “debt” is not due. It is irrelevant that the debt is disputed, so long as it is due, that is, payable unless interdicted by some law, or it has not yet become due in the sense that it is payable at some future date.
- One of the arguments made on appeal was that the CD was protected from repaying debt under the Maharashtra Relief Undertaking (Special Provisions Act), 1958, which renders an application under the IBC unmaintainable. The Supreme Court held that the MRUA is repugnant to the IBC, as under the MRUA the state government may take over the management of the undertaking and impose a moratorium in much the same manner as contained in the IBC. By giving effect to the MRUA, the plan/scheme that may be adopted under the IBC will directly be hindered. There would be a direct clash between moratoriums under the two statutes. The non-obstante clause of the IBC will prevail over the non-obstante clause in the MRUA, and any right of the CD under any other law cannot come in the way of the IBC.
- On the appeal against AA’s admission order by the erstwhile directors of the CD in the name of the CD, the Supreme Court held that once an IRP is appointed to manage the CD, the erstwhile directors, who are no longer part of its management, cannot maintain the appeal on the CD’s behalf.

## 5. Operational Creditors

An OC is defined under section 5(20) of the IBC as any person to whom an operational debt is owed (and includes a legal assignee/transferee).

An “operational debt” is defined in section 5(21) as a claim in respect of the provision/supply of goods or

services to the CD including employment or a debt in respect of payment of dues arising under any applicable law and payable to the Central Government, any State Government or any local authority.

An application to initiate a CIRP against a CD may be filed by an OC under section 9 of the IBC. However, before filing the application, the OC must serve a demand notice on the CD under section 8 of the IBC.

### KEY CONSIDERATION

In some cases, a question will arise whether the creditor who has filed the application is an FC or an OC. This may become the first point of adjudication. For example, is an applicant an FC if he/she has paid share application money against which shares have not been issued? Is the applicant an FC or an OC if his/her application refers to an unrefunded security deposit? In such cases, the AA may first have to determine whether the nature of the debt is operational or financial or neither. Only a creditor who is an FC or an OC can initiate a CIRP. A creditor who is neither cannot file the application (though he/she may be able to file a claim before the IRP/RP once the CIRP commences).

In *Swiss Ribbons Private Limited and Another Vs. Union of India and Others [(2019) 4 SCC 17]*, the Supreme Court held that a review of the definition of “financial creditor” and “financial debt” makes it clear that a financial debt is a debt together with any interest that is disbursed against the consideration

for the time value of money. It may further be money that is borrowed or raised in any of the manners prescribed in section 5(8) or otherwise, as section 5(8) provides an inclusive definition. On the other hand, an “operational debt” would include a claim for the provision of goods or services, including employment, or a debt in respect of payment of dues arising under any law, and payable to the government or any local authority.

The court further observed that most FCs, particularly banks and financial institutions, are secured creditors whereas most OCs are unsecured—payments for goods and services as well as payments to workers not being secured by mortgaged documents and the like. The distinction between secured and unsecured creditors has been made since the earliest of the Companies Acts was passed both in the United Kingdom and in this country. Moreover, the nature of the loan agreements with FCs differs from contracts with OCs for supplying goods and services. FCs generally lend finance on a term loan or for working capital that enables the CD to set up or operate its business. On the other hand, contracts with OCs relate to the supply of goods and services in the operation of the business. Financial contracts generally involve large sums of money. In contrast, the dues of operational contracts are generally lower. In the running of a business, OCs can be many as opposed to FCs. In addition, FCs have specified repayment schedules, and defaults entitle FCs to recall a loan in totality. Contracts with OCs do not have such stipulations. Also, the forum in which dispute resolution takes place is completely different. Contracts with OCs can and do have arbitration clauses where dispute resolution is done privately. The court observed that operational debts also tend to be recurring in nature and the possibility of genuine disputes in the case of operational debts is much higher compared to financial debts.

The court held that, most importantly, FCs are, from the very beginning, involved with assessing the viability of the CD. They can and do engage in restructuring the loan as well as reorganizing the CD’s business when there is financial stress. These are steps that OCs do not and cannot take. Thus, to preserve the corporate debtor as a going concern, while ensuring maximum recovery for all creditors, the IBC needs to distinguish between FCs and OCs. The difference directly relates to the IBC’s objectives.

## 5.1 Demand Notice

Section 8(2) of the IBC states that an OC may, on the occurrence of a default, deliver a demand notice of unpaid operational debt or copy of an invoice demanding payment of the default amount to the CD in such form and manner as may be prescribed.

For the purposes of the IBC, a demand notice is either a notice or a copy of an invoice (both in the prescribed form) that should be served by an OC on the CD, demanding payment of unpaid operational debt, prior to the initiation of a CIRP against the CD. The notice must be on Form 3, while the invoice

demanding payment must be on Form 4, appended to the Application to AA Rules.<sup>[74]</sup>

Broadly, Form 3 requires the details of operational debt, including the amount of debt, details of the relevant transactions and the date it fell due, the details of default including the amount in default, the date of occurrence of default and the workings of computation of default and date of default, the details of the security and retention of title arrangements (if any), the records and evidence of debt and default, and relevant provisions

[74] <https://ibbi.gov.in/uploads/legalframework/97f265ffe63b83fa6ca7c2c01795be66.pdf>

of law or contract or other documents under which the debt fell due.

Rule 5 of the Application to AA Rules states that the demand notice must be delivered to the CD:

- (a) at the registered office of the CD by hand, registered post, or speed post with acknowledgement due, or
- (b) by electronic mail service to a whole-time director or designated partner or key managerial personnel, if any, of the CD.

A copy of the demand notice served by an OC should also be filed with an IU, if any. At the time of publication, there is only one IU, so this is not often done.

In most cases, the demand notice is delivered through registered post/hand delivery, or via an email. Acknowledgment/proof of delivery of the demand notice must be provided to the AA as part of the application by the OC under section 9 of the IBC.

***Innovative Industries Ltd. Vs. ICICI Bank & Another [(2018) 1 SCC 407]***

The Supreme Court held that the scheme under section 7 stands in contrast to the scheme under section 8 of the IBC where an OC, on the occurrence of a default, has to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in section 8(1) of the IBC. Under section 8(2), the CD can, within a period of 10 days of receiving the demand notice or copy of the invoice mentioned in subsection (1), bring to the notice of the OC the existence of a dispute or the record of the pendency of a suit or arbitration proceedings that began before such notice or invoice was received by the CD. If there is such a dispute, the CD no longer comes under the ambit of the IBC.

## 5.2 After Service

Section 8(2) of the IBC states that the CD shall, within 10 days of receiving the demand notice, bring to the notice of the OC:

- (a) the existence of any dispute or record of the pendency of a suit or arbitration proceedings filed before receiving the notice or invoice relating to the dispute;
- (b) evidence that the unpaid operational debt has been settled—by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the CD; or by sending an attested copy of the record that the OC has cashed a cheque issued by the CD.

If no payment has been received after the expiry of the 10-day period, the OC may file an application before the AA to initiate a CIRP.

### KEY CONSIDERATION

In some cases, the parties amicably settle the issue to avoid the initiation of a CIRP, and the necessary payments are received by the OC. In others, after the demand notice has been served on the CD, a response is usually received from the CD disputing the payment.

## 5.3 Ten Days Later: Application for Initiating a CIRP

If, within 10 days of receiving the demand notice, the CD neither pays the outstanding amount nor brings to the notice of the OC the existence of any dispute or record of pendency of any suit or arbitration proceedings filed before the receipt of the notice/invoice related to the dispute, the OC may file an application to initiate a CIRP against the CD under section 9 of the IBC.

Generally, an application is filed after the notice is served, as many CDs agree to settle only after the matter reaches the AA. Hence, after 10 days, the OC files an application under section 9 of the IBC using Form 5 (as per rule 6 of the Application to AA Rules). This is accompanied by the documents and records required by and specified in the Application to AA Rules.<sup>[75]</sup>

The form is divided in five parts, each providing for the submission of the following particulars:

- **Part I:** Details of the applicant OC—name, identification number, and more.
- **Part II:** Details of the CD—its name, identification number, nominal share capital, and paid-up share capital.
- **Part III:** Details of the proposed IRP—the name, address, email address, and registration number of the proposed IRP.
- **Part IV:** Particulars of the operational debt—the total amount of debt, details of the transactions that resulted in the debt, along with the date(s) on which the debt fell due, the default amount claimed, and the date on which the default occurred.
- **Part V:** Details of the operational debt, documents, and records and evidence of default.

As per section (3) of the IBC, the OC shall, along with the application, furnish:

- (a) a copy of the demand notice delivered by the OC to the CD;
- (b) an affidavit to the effect that there is no notice given by the CD relating to a dispute in the

unpaid operational debt (that is, no notice under section 8(2) of the IBC);

- (c) a copy of a certificate from financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the CD, if available;
- (d) a copy of any record with an IU confirming that there has been no payment of an unpaid operational debt by the CD, if available;
- (e) any other proof confirming that there has been no payment of the unpaid operational debt by the CD or such other information as may be prescribed.

*Macquarie Bank Limited Vs. Shilpi Cable Technologies Ltd. [(2018) 2 SCC 674]*

In this case, the Supreme Court held that a certificate from the financial institution maintaining accounts of an OC (as provided for in section 9(3) of the IBC) is not mandatory for triggering a CIRP of the CD. The debt and default can be proved by other documents as well. The court also held that an authorized agent or a lawyer acting on behalf of a client can issue a demand notice under section 8(2) of the IBC. Section 9(4) of the IBC states that an OC may propose an IP to act as an IRP. If not proposed, the AA will appoint an IRP, usually from the panel formed by the IBBI.

The application should be submitted by the OC to the AA complying with the applicable rules/procedures of the relevant AA, along with a demand draft of 2,000 Indian rupees in favor of the Pay and Accounts Officer, Ministry of Corporate Affairs, payable in Mumbai, New Delhi, Kolkata, or Chennai.

[75] <https://ibbi.gov.in/uploads/legalframework/97f265ffe63b83fa6ca7c2c01795be66.pdf>

## 5.4 Ascertaining the Existence of Debt and Default

Once the OC has furnished the prescribed information (see section 5.3 [p68]), the AA shall, under section 9(5) of the IBC, either:

- Admit the application

The AA shall admit the application only if:

- (a) the application is complete;
- (b) there is no payment of the unpaid operational debt;
- (c) the demand notice has been delivered by the OC;
- (d) no notice of dispute has been received by the OC or there is no record of dispute in the IU; and
- (e) no disciplinary proceeding is pending against the proposed IRP.

or

- Reject the application

The AA shall reject the application if any of the five conditions listed above are not met within 14 days of receipt of the application.

If the application submitted is incomplete, the AA will give notice to the applicant to rectify the errors within seven days of being given notice by the AA to do so.

An important distinction between the application filed by an FC and an OC is that in the case of the latter, the AA admits the application only if there is no dispute regarding the existence of the debt. Where the AA is not satisfied with the evidence and documentation submitted by the OC and considers that a genuine dispute remains over the alleged debt, the AA may dismiss the petition, advising the parties to approach other forums.

If there is a genuine dispute over the debt, the AA will not admit the application. The test applied is whether there is a plausible contention that requires further investigation. Moreover, the dispute cited must not be a patently feeble legal argument or an assertion of fact unsupported by evidence.

In *Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Limited [(2018) 1 SCC 353]*, the Supreme Court undertook a detailed analysis of the provisions relating to applications by an OC under section 9 of the IBC and laid down the following principles:

- When examining an application under section 9 of the IBC, the NCLT will have to determine:
  - i. whether there is an operational debt exceeding Rs 100,000;
  - ii. whether the documentary evidence furnished with the application demonstrates that the debt is due and has not yet been paid;
  - iii. whether there are any disputes between the parties over the debt, or a record of pendency of any suit or arbitration proceeding filed before the receipt of the demand notice in relation to the dispute.
  - iv. If any of the above conditions are not satisfied, the OC's application will be rejected by the AA.

- Any “notice of dispute” issued by the CD under section 8(2) of the IBC must bring to the notice of the OC the “existence of a dispute,” or the fact that a suit or arbitration proceedings relating to a dispute is pending between the parties. What is important is that the dispute must predate the receipt of the demand notice.
- The AA must determine whether or not a dispute over the debt existed from before. It is difficult to import the expression “*bona fide*” (good faith) into section 8(2) to judge if a dispute existed or not. The AA should just decide whether there is a likelihood of such dispute that requires further investigation. The AA does not need to be satisfied that the defense is likely to succeed. So long as a dispute truly exists, the AA has to reject the application.
- The definition of “dispute” in section 5(6) is inclusive. It must relate to one of the three subclauses of section 5(6)–(a) the existence of the amount of debt, (b) the quality of goods or service, or (c) the breach of a representation or warranty, either directly or indirectly.

In *K. Kishan Vs. M/s. Vijay Nirman Company Pvt. Ltd.* [2017 SCC Online SC 1665], the Supreme Court examined whether challenging an arbitration award under section 34 of the Arbitration and Conciliation Act, 1996, can be considered as the “existence of dispute or pendency of arbitration proceeding” under section 8 of the IBC. The court held that:

- An OC cannot use the IBC either prematurely or for extraneous considerations, or as a substitute for the debt enforcement procedure. Challenging the arbitration award would be sufficient to indicate the award is disputed and, therefore, such pending arbitration proceedings would be considered a pre-existing dispute. Filing of section 34 of the Arbitration and Conciliation Act, 1996, against the arbitration award shows a pre-existing dispute and continues until the final adjudication under sections 34 and 37 of the Arbitration and Conciliation Act, 1996.
- There may be cases where a section 34 petition challenging an arbitration award may clearly and unequivocally be barred by limitation. It is only in such clear cases that the insolvency process may then be put into operation.

## 6. Corporate Applicant

Section 10 is the provision for voluntary initiation of a CIRP by the CD or relevant persons who may be authorized or who are in charge of the CD.

Section 10(1) of the IBC states that, where a CD has committed a default, a corporate applicant may file an application with the AA to initiate a CIRP of the CD.

A corporate applicant is defined in section 5(5) of the IBC as:

- (a) the CD;
- (b) a member or partner of the CD who is authorized to make an application for a CIRP under the constitutional document of the CD;
- (c) an individual in charge of managing the operations and resources of the CD; or

- (d) a person who has control and supervision over the financial affairs of the CD.

## 6.1 Application by a Corporate Applicant

The corporate applicant has to make an application to initiate the CIRP of the CD (under section 10), using Form 6 provided in the Application to AA Rules. This should be accompanied by the documents and records required by and specified in the Application to AA Rules.<sup>[76]</sup>

Form 6 is divided into five parts, each providing for the submission of the following particulars:

- Part I: Particulars of the corporate applicant—details of all directors, promoters, and partners; the date of incorporation, nominal and paid-up share capital; and details of the authorized representative, along with details of the CD.
- Part II: Particulars of the proposed IRP—details such as the name, address, email address, and registration number of the proposed IRP.
- Part III: Particulars of the financial or operational debt—details of the financial or operational creditors, the total amount of debt along with the date(s) when the debts were incurred, particulars of the security amount claimed to be in default, and the date on which the default occurred.

Section 10(3) of the IBC states that the corporate applicant shall, along with the application, furnish:

- (a) information relating to its books of account and such other documents for such period as may be specified;
- (b) information relating to the proposed IRP; and
- (c) a special resolution passed by shareholders of the CD or the resolution passed by at least 75 percent of the total number of partners of the CD, as the case may be, approving filing the application.

The application should be submitted by the corporate applicant to the AA along with a demand draft of 25,000 Indian rupees favoring the Pay and Accounts Officer, Ministry of Corporate Affairs, payable in Mumbai, New Delhi, Kolkata, or Chennai.

## 6.2 Special Resolution

An application under section 10 must be accompanied by a special resolution passed by shareholders of the CD. Votes cast in favor of the resolution must be at least three times the number of votes cast against it. In other words, the resolution has to be carried by a minimum of 75 percent, in person or by proxy, of the valid votes in its favor (section 114 of the Companies Act, 2013).

If the entity is a partnership, the resolution must be passed with at least three-quarters of the total number of partners of the CD approving filing the application.

This requirement was introduced through the Insolvency and Bankruptcy (Amendment) Ordinance 2018 (later replaced by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018<sup>[77]</sup>), from June 6, 2018.

[76] <https://ibbi.gov.in/uploads/legalframework/97f265ffe63b83fa6ca7c2c01795be66.pdf>

[77] [https://ibbi.gov.in/webadmin/pdf/legalframework/2018/Aug/The%20Insolvency%20and%20Bankruptcy%20Code%20\(Second%20Amendment\)%20Act,%202018\\_2018-08-18%2018:40:34.pdf](https://ibbi.gov.in/webadmin/pdf/legalframework/2018/Aug/The%20Insolvency%20and%20Bankruptcy%20Code%20(Second%20Amendment)%20Act,%202018_2018-08-18%2018:40:34.pdf)

### 6.3 Ascertaining the Existence of Debt and Default

As in the case of an OC, once the corporate applicant has furnished the prescribed information, the AA shall, under section 10(4) of the IBC, either:

- admit the application if it is complete and no disciplinary proceeding is pending against the proposed IRP; or
- reject the application if it is incomplete or any disciplinary proceeding is pending against the proposed IRP.

The decision must be taken within 14 days of receiving the application.

If the application is incomplete, the AA will give notice to the applicant to rectify it within seven days of being given notice by the AA to do so.

In *M/s. Unigreen Global Private Limited Vs. Punjab National Bank and Others [Company Appeal (AT) (Insolvency) No. 81 of 2017]*, the NCLAT examined the scope of discretion available to an AA in admitting or rejecting a section 10 application. The NCLAT held that the AA must admit an application filed by a CD to initiate a CIRP if it is satisfied that:

- the default has occurred,
- the application is complete, and
- the CD is not barred under section 11 of the IBC.

Facts unrelated to or beyond the requirement of the IBC or the forms prescribed cannot amount to suppression of facts and cannot be looked at by the AA for denying admission.

## 7. Fraudulent or Malicious Initiation of Proceedings

While evaluating whether to initiate a CIRP, the applicant(s) should be aware of the potential impact of section 65 of the IBC, which deals with fraudulent or malicious initiation of proceedings. This provision says that if any person initiates a CIRP or liquidation process fraudulently, or with malicious intent, for any purpose other than the resolution of insolvency, or liquidation, the AA may impose on him/her a penalty of 100,000 Indian rupees to 1 Crore Indian rupees.

In practice, section 65 is rarely used—and only if someone initiates an action without there being any debt or default. If the conditions of the specific sections (section 7, 9, or 10) are satisfied, the AA will admit the application and start the CIRP rather than looking into the motives for initiating CIRP proceedings.

## 8. Applicability of the Limitation Act

Section 238A was inserted in the IBC through the Insolvency and Bankruptcy (Amendment) Ordinance 2018 (later replaced by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018<sup>[78]</sup>), to make the provisions of the Limitation Act, 1963, apply to proceedings or appeals before the AA, the NCLAT, the Debt Recovery Tribunal, and the Debt Recovery Appellate Tribunal.

Thus, applications under sections 7, 9, or 10 cannot be admitted for time-barred debts.

[78] [https://ibbi.gov.in/webadmin/pdf/legalframework/2018/Aug/The%20Insolvency%20and%20Bankruptcy%20Code%20\(Second%20Amendment\)%20Act,%202018\\_2018-08-18%2018:40:34.pdf](https://ibbi.gov.in/webadmin/pdf/legalframework/2018/Aug/The%20Insolvency%20and%20Bankruptcy%20Code%20(Second%20Amendment)%20Act,%202018_2018-08-18%2018:40:34.pdf)

In *B.K. Educational Services Private Limited Vs. Parag Gupta and Associates [(2019) 11 SCC 633]*, the Supreme Court observed that the intention of lawmakers, from the very beginning, was to apply the Limitation Act, 1963, to the NCLT and the NCLAT while deciding applications filed under section 7 and section 9 of the IBC and appeals. The relevant section of the Limitation Act is section 137. No doubt, the right to sue accrues when a default occurs. But if the default has occurred more than three years before the date of filing the application, it would be barred by section 137, except in cases where the delay can be condoned under section 5 of the Limitation Act.

It also held that section 238A of the Code should apply the provisions of the Limitation Act, “as far as may be.” Therefore, where periods of limitation have been laid down in the IBC, they will apply notwithstanding anything to the contrary contained in the Limitation Act.

In *Babulal Vardharji Gurjar Vs. Veer Gurjar Aluminium Industries Private Limited & Another [Civil Appeal No. 6347 of 2019]*, the Supreme Court examined the limitation period for filing section 7 applications and observed:

- The period of limitation for an application to initiate a CIRP under section 7 of the IBC is governed by article 137 of the Limitation Act and is, therefore, three years from the date when the right to apply accrues.
- The right to apply under the IBC accrues on the date when the default occurs. If the default had occurred over three years prior to the date of filing the application, the application would be time-barred, save and except in those cases where, on facts, the delay in filing may be condoned.
- An application under section 7 of the IBC is not for enforcing mortgage liability and article 62 of the Limitation Act does not apply to this application.
- The date of the IBC’s coming into force on 01.12.2016 is irrelevant to the triggering of any limitation period for the purposes of the IBC.

In this case, the court observed that the FC never made any arguments other than stating the date of default as “08.07.2011” in the application. Therefore, no case for extending the period of limitation is available to be examined. In other words, even if section 18 of the Limitation Act – (which allows the period of limitation to be extended if the defaulter had acknowledged the debt) – and the principles thereof were applicable, they would not apply to the application under consideration, looking at the averment made in the application regarding default and for want of any other averment in regard to acknowledgement. The court annulled the insolvency proceedings, holding that because the application of the FC is barred by limitation, no proceedings undertaken after the order of admission could be of any effect.

## 9. Excluded Categories

### 9.1 Persons Other than a Corporate Debtor

A CD is defined in section 3(8) of the IBC as a corporate person who owes a debt to any person. A “corporate person” is defined in section 3(7) to mean a company under the Companies Act, 2013, an LLP under the Limited Liability Partnership Act, 2008, or any other person incorporated with limited liability under any law in force at the time excluding financial service providers. Therefore, a financial service provider is not a CD for the purposes of the IBC and, consequently, a CIRP against a financial service provider cannot be initiated under section 7, 9, or 10 of the IBC.

A “financial service provider” is defined in section 3(17) of the IBC as a person authorized and registered by a financial sector regulator to provide financial services. The terms “financial services” and “financial sector regulator” are defined in section 3(15) and section 3(18) respectively.

Section 227 of the IBC empowers the Central Government, in consultation with the appropriate financial sector regulators, to notify financial service providers or categories of financial service providers about their insolvency and liquidation proceedings, which may be conducted under the IBC with such modifications and in such manner as may be prescribed.

Pursuant to its powers, the MCA introduced and notified the Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019.<sup>[79]</sup>

The Financial Service Provider Rules empower the government to commence the CIRP in terms of the IBC against financial service providers, in consultation with the appropriate financial sector regulator as prescribed by the law. In terms of the notification dated November 18, 2019,<sup>[80]</sup> issued by the MCA, the Financial Service Provider Rules would apply to non-banking finance companies with a prescribed asset size with the RBI as the appropriate financial service regulator. Further, the MCA, in its notification dated January 30, 2020,<sup>[81]</sup> notified the manner of dealing with the third-party assets in custody or possession of such financial service provider.

#### KEY CONSIDERATION

Dewan Housing Financial Corporation is the first financial service provider to come under the ambit of the IBC in the matter of *RBI Vs. Dewan Housing Financial Corporation in C.P. (IB)-4258/MB/2019*. The RBI, in its capacity as appropriate regulator, in terms of rule 5 of the Financial Service Provider Rules, initiated the CIRP against Dewan Housing Financial Corporation. It was admitted by the NCLT, Mumbai bench, on December 3, 2019.<sup>[82]</sup>

In *Hindustan Construction Company Limited & Another Vs. Union of India & Others [WP (Civil) No. 1074/2019 with other Civil Appeals]*, a CIRP was sought to be initiated against the National Highway Authority of India. The Supreme Court held that the National Highway Authority of India is a statutory body that functions as an extended limb of the Central Government and performs

[79] <https://ibbi.gov.in/uploads/legalframework/cb1d53c7fe47f8f22a-b36a40f441db2c.pdf>

[80] <https://ibbi.gov.in/uploads/legalframework/7bcd2585a9f75b9074feb-e216de5a3c1.pdf>

[81] <https://ibbi.gov.in/uploads/legalframework/3878e1c4a2332a3e4398d>

[82] <https://ibbi.gov.in/uploads/order/d9c77ba13d4eea5107ac-79715a8c0402.pdf>

governmental functions that cannot be taken over by an RP under the IBC or by any other corporate body. Nor can such authority ultimately be wound up under the IBC. For all these reasons, it is not possible to either read in or read down the definition of “corporate person” in section 3(7) of the IBC.

In *Duncans Industries Limited Vs. A.J. Agrochem* [(2019) 9 SCC 725], a question arose as to whether approval of the Central Government is required under the Tea Act, 1953, for initiating IBC proceedings against a tea company covered under the act. The Supreme Court observed that section 238 of the IBC, which is a subsequent act to the Tea Act, 1953, shall be applicable and the provisions of the IBC shall override the Tea Act, 1953. The court added that if the submission of the appellant (that before initiation of proceedings under section 9 of the IBC, the consent of the Central Government under section 16G(1)(c) of the Tea Act is to be obtained) is accepted, the main purpose of the IBC, namely, to complete the corporate insolvency resolution process in a time-bound manner, shall be frustrated. Hence, no prior consent of the Central Government before initiating the proceedings under section 7 or 9 of the IBC would be required.

Except for a financial service provider, there is no other category of corporate person that is not covered within the ambit of a corporate debtor.

## 9.2 Bar under Section 11

Section 11 of the IBC states that certain persons are not entitled to make applications for initiating a CIRP. These are:

- (a) a CD already undergoing a CIRP;
- (b) a CD that has completed a CIRP in the 12 months preceding the date of filing the application;
- (c) a CD or an FC which has violated any of the terms of the resolution plan that was approved in the 12 months before the date of filing the application for a CIRP;
- (d) a CD in respect of whom a liquidation order has been made.

The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019 (later replaced by the Insolvency and Bankruptcy Code (Amendment) Act, 2020<sup>[83]</sup>), has added a proviso to the IBC that a CD may initiate insolvency proceedings against another CD for the debts owed to it.

Except in the above cases, and provided the application is not time-barred, there is no restriction or limitation on filing IBC proceedings, given the non-obstante provision in section 238 of the IBC.

### KEY CONSIDERATION

Where a winding-up petition is pending against a CD, both an FC and an OC as well as the corporate applicant are free to file an application to initiate the CIRP even if notice has been given in the winding-up petition by the relevant High Court. As the IBC overrides every other insolvency and bankruptcy law in existence, a CD cannot raise any objection about the effect of a petition filed under section 7 (or 9, see below for an OC) on the grounds that a petition or petitions were already pending against it in a High Court.

[83] <https://ibbi.gov.in/uploads/legalframework/d36301a7973451881e00492419012542.pdf>

In *Forech India Limited Vs. Edelweiss Assets Reconstruction Co. Limited* [2019 SCC Online SC 87], the Supreme Court held that section 11(d) of the IBC is of limited application and only bars a CD in respect of whom a liquidation order has been made from filing an application under section 10 of the IBC. However, an FC application is an independent proceeding that must be decided in accordance with the IBC.

## 10. Timeline for Admission

In all cases where an application to initiate a CIRP is filed, the IBC provides that the AA should admit it within 14 days of receiving the application.

The AA can reject such an application by an FC, an OC, or a corporate applicant if it is incomplete. However, before rejecting it for this reason, the applicant is to be given seven days (from the receipt of notice from the AA) to rectify the application.

### *M/s. Surendra Trading Company Vs. M/s. Juggilal Kambat Jute Mills Company Ltd. and Others* [(2017) 16 SCC 143]

The question for consideration before the Supreme Court was whether the period of seven days to rectify errors was mandatory or a guideline (directory). The appeal arose from an order of the NCLAT that held that the period of 14 days for admitting/rejecting the application under sections 7, 9, and 10 was directory and the period of seven days given to the applicant for rectifying errors was mandatory.

The Supreme Court upheld the NCLAT's view on 14 days for admission/rejection being directory and also held that there was no reason to make the proviso (that is, seven days for rectifying errors) mandatory. It held that the proviso is directory in nature; however, it also considered that there may be cases where:

- (a) applicants or their counsel may not remove the objections in time, or
- (b) frivolous applications may be filed with ulterior/oblique motives and kept pending without any removal of errors.

Hence, the Supreme Court, while interpreting the provisions to be directory in nature, held that the applicant/counsel is required to submit, in writing, why the removal of objections could not be completed within the stated seven days. If the court/tribunal is satisfied with the reasons given, it will entertain the application on merit; if not, the court/tribunal will have the right to dismiss it.

Thus the 14-day period given to the AA to admit or reject an application to initiate a CIRP is not mandatory. The Insolvency and Bankruptcy (Amendment) Act, 2019,<sup>[84]</sup> added a provision in section 7(4) of the IBC,

providing that if the AA does not ascertain the existence of default and pass an order on the application filed by the FC within 14 days, it shall record its reasons in writing for not doing so.

[84] <https://ibbi.gov.in/uploads/legalframework/630af836c9fbbbed047c42dbdfd2aca13.pdf>

## 11. Opportunity of Being Heard

Before admitting a CIRP application in respect of a CD, the CD must be given an opportunity to be heard.

Rules 4(3), 6(2), and 7(2) of the Application to AA Rules mandate that the applicant (FC, OC, and corporate applicant, respectively) shall serve a copy of the application to the registered office of the corporate debtor and to the IBBI, by registered post or speed post or by hand or by electronic means, before filing with the Adjudicating Authority.

In practice, however, a prior service is made to the CD because the relevant registry of the NCLT may not accept filings any other way. Further, once the application is submitted to the AA, the acknowledged copy of it should be served on the CD. The AA then allocates a company petition number to it. Thereafter, the application comes up for hearing before the AA.

The relevant NCLT registry allocates a date and a courtroom number for the matter when it receives the covering letter. The matter is then listed for hearing by the AA. If the AA decides that the matter should be heard, it issues a notice to the CD. The copy of the application is served again on the CD when the AA issues the notice. If the CD does not appear before the AA, the AA may require the filing of a service affidavit before it (showing evidence of service to the CD). Such practices are adopted to ensure that the CD is provided enough opportunity of being heard if it wishes to oppose the application for admission under the IBC.

## 12. Withdrawal from the CIRP

Before an application is admitted under section 7 (and section 9), it is open to an FC or OC to withdraw it. Often this is done if the applicant and CD reach a settlement while the proceedings are pending. This is more common with applications filed by OCs.

If an FC or OC seeks to withdraw an application due to a technical error in it, it may file a new one with the AA's permission.

Once an application for a CIRP is admitted by the AA, it can be withdrawn under section 12A of the IBC with the approval of 90 percent of the voting share of the CoC. Regulation 30A of the CIRP Regulations specifies the manner for such withdrawal after admission.<sup>[85]</sup> It provides that a withdrawal application may be submitted to the AA:

- (a) before the CoC is constituted, through the IRP, or
- (b) after the CoC is constituted, through the IRP or RP.

If the application is made after an invitation for EOIs (see Module 4) has been issued, the applicant must give reasons justifying the withdrawal.

Further:

- (a) Where the withdrawal application is under (a) above, the IRP shall submit it to the AA on behalf of the applicant within three days of receiving it.
- (b) Where the withdrawal application is under (b) above, the CoC shall consider it within seven days of receiving it. Where the CoC approves the application with the requisite 90 percent voting share, the RP shall submit the application, along with the approval of the CoC, to the AA on behalf of the applicant within three days of such approval.

[85] <https://ibbi.gov.in/uploads/legalframework/2020-08-17-234040-pjor6-59a1b2699bbf87423a8afb5f5c2a0a85.pdf>

The withdrawal application should be made on Form FA of the Schedule and submitted along with a bank guarantee toward the estimated cost incurred for initiating the process. If the AA approves the withdrawal, the applicant should deposit the actual expenses incurred under the process in the bank

account of the CD. If the applicant does not do so within three days of the approval, the bank guarantee can be invoked without prejudice to any other action permissible against it under the IBC, as determined by the IRP or RP.

In *Swiss Ribbons Private Limited and Another Vs. Union of India and Others [(2019) 4 SCC 17]*, the Supreme Court held that the provision allowing an application to be withdrawn before an invitation for EOIs is issued is directory and not mandatory. In exceptional cases, withdrawal may also be allowed *after* the invitation for EOIs has been issued. The main precondition for withdrawal is that 90 percent of the CoC members have to agree to it.

In *Sandip Patel Vs. Central Bank of India & Others [Company Appeal (AT) (Insolvency) No. 730 of 2019]*, the NCLAT set aside the order of the AA, where the AA had allowed an application for withdrawal filed under section 12A of the IBC. In this case, the claim of the appellant FC was received by the IRP after the CoC had been constituted. Without considering the claim of the appellant, the CoC took a decision to withdraw the petition in its first meeting itself. The NCLAT observed that having recorded in the minutes of the meeting that the IRP received the claim after the last date and that it was being verified, the meeting of the CoC could have been adjourned to await the verification. However, a decision was taken to withdraw the petition without doing so. The NCLAT held that the decision taken by the CoC and the subsequent filing of an application under section 12A of the IBC to withdraw the petition before the AA was arbitrary and against the conscience of legal jurisprudence. The NCLAT set aside the order of the AA and directed the AA to afford an opportunity to the appellant to be heard before taking any decision on whether or not withdrawal should be allowed.

### 13. CIRP Timelines

Once an application is admitted under section 7, 9, or 10 of the IBC, the IRP appointed by the AA in its admission order takes over the management of the CD. A moratorium is imposed and the IRP (and later RP) is then expected to run the CIRP according to the IBC and CIRP Regulations.

The IBC and the CIRP Regulations detail a timeline for each step to be taken by various participants in the CIRP. As the process involves many parties, including the CoC, prospective resolution applicants (PRAs), the IRP/RP, and the AA, it is essential to spell out the steps required and the timeline for each step.

### 13.1 Overall Timelines

[180]

The CIRP process starts on the date the application is admitted. This is taken as the insolvency commencement date. Section 12(1) states that the CIRP should be completed within 180 days of the commencement date.



[90]

Section 12(2) further states that the RP may file an application with the AA to extend this 180-day period by a further 90 days if instructed to do so through a resolution passed by a vote of 66 percent of the voting shares of the CoC. This extension can be given only once.



[60]

Section 12(3) of the IBC was amended by way of the Insolvency and Bankruptcy (Amendment) Act, 2019,<sup>[86]</sup> and two provisos were added:

Proviso 1 provides that a CIRP must mandatorily be completed within 330 days from the insolvency commencement date, including any extension of the period of the CIRP granted and the time taken in legal proceedings in relation to the resolution process.

Proviso 2 says that when the CIRP of a CD has been pending for over 330 days, it must be completed within 90 days from the date of the amendment.

Thus, the overall timeline for completing a CIRP now stands at 330 days.

#### *CoC of Essar Steel India Limited Vs. Satish Kumar Gupta [(2019) SCC Online SC 1478]*

In this case, the Supreme Court examined the constitutionality of the amendment made in section 12(3) of the IBC (which provided that the CIRP must mandatorily be completed within 330 days). While leaving the provision otherwise intact, it struck down the word “mandatorily” as being manifestly arbitrary under Article 14, as well as placing an excessive and unreasonable restriction on the litigant’s right to carry on business under Article 19(1) (g) of the Constitution. The court held that the effect of this declaration is that ordinarily the corporate resolution process of the CD must be completed within the outer limit of 330 days from the insolvency commencement date, including extensions and the time taken in legal proceedings. However, on the facts of a given case, if it can be shown to the AA and/or the NCLAT that only a short period is needed beyond the 330 days to complete the CIRP; that it would be in the interest of all stakeholders for the CD to be put back on its feet instead of being liquidated; and that the time taken in legal proceedings is largely due to factors that cannot be ascribed to the litigants before the AA and/or the NCLAT, the delay or a large part thereof being attributable to the tardy process of the AA and/or the NCLAT itself, the AA and/or the NCLAT may extend the time beyond 330 days. Likewise, even under the newly added provision to section 12, if for all these factors the grace period of 90 days from the date of commencement of the amending act of 2019 is exceeded, discretion can be exercised by the AA and/or the NCLAT to further extend the time, keeping the aforesaid parameters in mind. It is

[86] <https://ibbi.gov.in/uploads/legalframework/630af836c9fbbed047c42dbdfd2aca13.pdf>

only in such exceptional cases that the time can be extended. The general rule is that 330 days is the outer limit within which resolution of the stressed assets of the CD must take place. Beyond this period, the CD is to be liquidated.

In *ArcelorMittal India Private Limited Vs. Satish Kumar Gupta and Others [2018 (13) SCALE]*, the Supreme Court referred to regulation 40A of the CIRP Regulations and observed that “it is of utmost importance for all authorities concerned to follow this model timeline as closely as possible.”

### 13.2 Timelines within the CIRP

As mentioned, the IBC and the CIRP Regulations detail a timeline for each step to be taken by various participants in the CIRP. Regulation 40A of the CIRP Regulations also sets out the model timeline to be followed for various steps in the CIRP, such that the CIRP can be completed quickly (within 180 days).<sup>[87]</sup>

The timeline is set out below (based on the model timeline), with the date the CIRP process commences labeled “T” in the column for “timeline.” This would also be the date the IRP is appointed.

Section(s)/ Regulation(s)	Description of activity	Timing	Timeline
<b>Sections 7, 9, or 10 (as the case may be) Section 16(1)</b>	Commencement of CIRP and appointment of IRP <b>Module 2</b>		<b>T</b>
<b>Sections 13 and 15 / Regulation 6(1)</b>	Public announcement inviting claims <b>Module 3</b>	Within three days of appointment of IRP	<b>T+3</b>
<b>Section 15(1)(c) / Regulations 6(2)(c) and 12(1)</b>	Submission of claims <b>Module 3</b>	Within 14 days of appointment of IRP	<b>T+14</b>
<b>Regulation 12(2)</b>	Submission of claims <b>Module 3</b>	Up to 90 <sup>th</sup> day of commencement	<b>T+90</b>
<b>Regulation 13(1)</b>	Verification of claims received under regulation 12(1) <b>Module 3</b> Verification of claims received under regulation 12(2) <b>Module 3</b>	Within seven days of receipt of the claim	<b>T+21 or T+97, as the case may be</b>

[87] <https://ibbi.gov.in/uploads/legalframework/2020-08-17-234040-pjor6-59a1b2699bbf87423a8afb5f5c2a0a85.pdf>

Section(s)/ Regulation(s)	Description of activity	Timing	Timeline
<b>Section 21(6A)(b) / Regulation 16A(2)</b>	Application for appointment of authorized representative for a class of FCs <b>Module 3</b>	Within two days from verification of claims received under regulation 12(1)	<b>T+23</b>
<b>Regulation 17(1)</b>	Report certifying constitution of CoC <b>Module 4</b>		<b>T+23</b>
<b>Section 22(1) / Regulation 19(2)</b>	First meeting of CoC <b>Module 4</b>	Within seven days of filing the report certifying constitution of CoC, but with five days' notice	<b>T+30</b>
<b>Section 22(2)</b>	Resolution to appoint RP by CoC <b>Module 4</b>	In the first meeting of CoC	<b>T+30</b>
<b>Section 22(4)</b>	Appointment of RP where IRP does not continue as RP <b>Module 3</b>	On approval by AA, after confirmation from IBBI	
<b>Section 16(5) / Regulation 17(3)</b>	IRP performs the functions of RP until RP is appointed <b>Module 3</b>	If RP is not appointed by 40 <sup>th</sup> day of commencement	<b>T+40</b>
<b>Regulation 27</b>	Appointment of registered valuer <b>Module 4</b>	Within seven days of appointment of RP, but not later than the 47 <sup>th</sup> day of commencement	<b>T+47</b>

Section(s)/ Regulation(s)	Description of activity	Timing	Timeline
<b>Section 12(A) / Regulation 30A</b>	Submission of application for withdrawal of application admitted <b>Module 2</b>	Before issue of expression of interest (EOI)	<b>Withdrawal (W)</b>
	CoC to dispose of the application <b>Module 2</b>	Within seven days of its receipt or seven days of the constitution of CoC, whichever is later	<b>W+7 or T+30, whichever is later</b>
	Filing application of withdrawal, if approved by CoC with 90% majority voting, by RP to AA <b>Module 2</b>	Within three days of approval by CoC	<b>W+10 or T+33, as the case may be</b>
<b>Regulation 35A</b>	RP to form an opinion on preferential and other transactions <b>Module 6</b>	Within 75 days of commencement	<b>T+75</b>
	RP to make determinations on preferential and other transactions, under intimation to IBBI <b>Module 6</b>	Within 115 days of commencement	<b>T+115</b>
	RP to file applications to AA for appropriate relief <b>Module 6</b>	Within 135 days of commencement	<b>T+135</b>
<b>Regulation 36(1)</b>	Submission of information memorandum to CoC <b>Module 4</b>	Within two weeks of appointment of RP, but not later than 54 <sup>th</sup> day after commencement	<b>T+54</b>

Section(s)/ Regulation(s)	Description of activity	Timing	Timeline
<b>Regulation 36A</b>	Publish Form G <b>Module 4</b>	Within 75 days of commencement	<b>T+75</b>
	Invitation of EOI <b>Module 4</b>		
	Submission of EOI by PRAs <b>Module 4</b>	At least 15 days from issue of EOI (assume 15 days)	<b>T+90</b>
	Provisional list of PRAs by RP <b>Module 4</b>	Within 10 days of last day of receipt of EOI	<b>T+100</b>
	Submission of objections to provisional list <b>Module 4</b>	Within five days of date of issue of provisional list	<b>T+105</b>
	Final list of resolution applicants by RP <b>Module 4</b>	Within 10 days of last date of receipt of objections (including contesting PRAs)	<b>T+115</b>
<b>Regulation 36B</b>	Issue of request for resolution plan (RFRP), including evaluation matrix and information memorandum <b>Module 4</b>	Within five days of issue of provisional list	<b>T+105</b>
	Receipt of resolution plans <b>Module 4</b>	At least 30 days from issue of RFRP (assume 30 days)	<b>T+135</b>
<b>Regulation 39(4)</b>	Submission of CoC-approved resolution plan to AA <b>Module 4</b>	As soon as approved by CoC (and endeavor to submit at least 15 days before last date of completion of CIRP)	<b>T+165</b>
<b>Section 31(1)</b>	Approval of resolution plan by AA <b>Module 4</b>	CIRP continues till it yields resolution or entails liquidation of CD	<b>T+180</b>
<b>Section 12</b>	Extension of CIRP <b>Module 2</b>	CIRP is extended to 270 and then 330 days	<b>T+270/330</b>

### 13.3 COVID-19 Exclusion of Timeline

Recognizing the challenges of completing IBC processes as a result of the COVID-19 outbreak, by way of a notification dated April 20, 2020 (w.e.f. March 29, 2020), the IBBI amended the CIRP Regulations<sup>[88]</sup> to insert regulation 40C, which states that subject to provisions of the IBC, the period of lockdown imposed by the Central Government in the wake of the COVID-19 outbreak shall not be counted in the timeline of any CIRP activity that could not be completed due to the lockdown.

A similar amendment was made to the Liquidation Process Regulations by way of a notification dated April 20, 2020 (with effect from April 17, 2020), where regulation 47A was inserted to provide relief in relation to any liquidation process.

Further, by way of an order dated March 30, 2020, passed in Company Appeal (AT) (Insol) No. 1 of 2020,<sup>[89]</sup> the NCLAT has also directed that the period of lockdown, imposed by the Central Government and the state governments, shall be excluded when counting the period of a CIRP under section 12 of the IBC.

#### CASE STUDY: APPLICATION FOR A CIRP BY AN FC

**To assist understanding of how the process works in practice, a real-life case study is set out below.**

An FC filed an application to initiate a CIRP with the AA. The matter of filing an application with the AA, as well as proposing the IRP, was approved at the FC's joint lender forum meeting.

The AA noted the existence of the credit facilities availed by the CD and the acknowledgement of debt by the company. The AA took two weeks from receiving the application to admit it.

The AA raised a question of law and arguments were heard. The principal question was whether the AA could take up a matter for which a winding-up application had already been filed in the Bombay High Court. In this matter, the Bombay High Court did not proceed and both the petitioner and the respondent stated before the bench that they had no objection to the present case pending before the AA being decided on merit.

As both parties consented, the matter was adjudicated and the CIRP application against the CD was admitted. After the admission of the case, the IRP carried out his duties as prescribed under the provisions of the IBC, as specified in section 18. The IRP then appointed two registered valuers, who visited the factory premises to prepare a report.

Thirty-one FCs were represented on the CoC and the IRP had taken over managing the affairs of the CD on a day-to-day basis. No operations or employees existed on the date of the appointment and essential supplies had been suspended.

Some of the banks in the consortium declared the account of the CD to be a "fraud" and filed First Information Reports with various enforcement agencies. The promoter of the CD stated that some of the

[88] <https://www.ibbi.gov.in/uploads/whatsnew/be2e7697e91a349b-c55033b58d249cef.pdf>

[89] <https://ibbi.gov.in/uploads/order/0fd02d6fd104fcdd63936eb4cb23021b.pdf>

agencies had conducted raids on the premises of the company and, as part of their investigation, seized most of the company's files, documents, and hard drives containing information, data, and key records of the CD.

A document evidencing seizure of such information and records by the Central Bureau of Investigation was provided to the IRP, who communicated with the enforcement agencies. Once agreements were reached, limited access was allowed to the information, data, and records stored with them. The IRP was confirmed as the RP at the first meeting of the CoC.

As per the regulations applicable at the time, all of the valid claims received until the approval of the resolution plan were to be considered by the RP. Considering the above, the RP admitted the claims received after the cut-off date (after the last date mentioned in the public announcement, which was 14 days after the date of commencement). In this case, the claims were admitted by the RP on a "good faith basis" based on the documents provided by the creditors, as not a single document was available for corroboration from the CD.

As per the then applicable regulation 36A of the CIRP Regulations (considered in conjunction with section 25(2)(h) of the IBC), the RP invited EOIs from potential resolution applicants by publishing an announcement in two languages (English and a regional language), as well as publishing the same announcement in the local area of the factory. Form G was also published on the IBBI website.

During the process, the RP filed an application under section 12(2) of the IBC for an extension of the CIRP by a further period of 90 days.

After the public announcement, the RP received five EOIs, from which only one resolution applicant provided a comprehensive resolution plan. This was reviewed by the RP for compliance with the IBC and applicable laws before being submitted to the CoC for its consideration. The plan met the requirements of section 30(2) of the IBC and regulation 38 of the CIRP Regulations. The resolution applicant was also found eligible to submit the plan under section 29A of the IBC.

The resolution plan was evaluated by the CoC on the basis of the evaluation matrix approved by the CoC at a meeting. The resolution plan was found to be acceptable and was approved by the CoC. The plan was submitted to the AA for further approval.



## Module 3: Moratorium and IRP

## 1. Introduction

The IBC has shifted the “debtor in possession” regime to a “creditor in control” model for CDs undergoing CIRPs. This control is exercised through an IRP (and later an RP). From the insolvency commencement date (ICD), the powers of the board of directors or the partners of the CD are suspended and are exercised by the IRP. Similarly, the management of the CD vests in the IRP (and later the RP). This continues for the entire CIRP period, that is, from the ICD till the AA passes an order for resolution (that is, an order approving the resolution plan) or liquidation of the CD.

The IRP constitutes the CoC, which can then decide to either continue the IRP as the RP or replace him with another IP as the RP.

On the ICD, a “moratorium” in respect of the CD and its assets is declared, which continues for the entire CIRP period. During this time, the IRP (and later the RP) runs the CD as a going concern and fulfills various duties under the IBC and CIRP Regulations, under the overall supervision of the CoC.

## 2. Moratorium—Definition and Effect

The Oxford Dictionary defines moratorium as “a temporary prohibition of an activity.” The Bankruptcy Law Reforms Committee<sup>[90]</sup> recommends that a provision relating to a “calm period” be introduced in the IBC so that all efforts are focused on resolution. The moratorium provisions are framed in the IBC to ensure that the CD is not burdened with additional stress. The Bankruptcy Law Reforms Committee, in its report, recommended two phases of resolution, upon commencement of the CIRP:

- (a) A serious effort be made to evaluate the viability of the debt during a “calm period” where the creditors’ interests are preserved, without affecting the running of the CD’s business. This is possible only when a moratorium is imposed on all recovery actions against the CD, so that an IP can manage and operate the company effectively.
- (b) If the investigations into the viability of the company do not result in a solution that can be implemented, the CD may be considered unviable and the matter may proceed to a liquidation, which is regarded as the last resort. The CoC and the RP should make every effort to maximize the value of the CD and balance the interest of all stakeholders.

Section 14 of the IBC<sup>[91]</sup> details the moratorium protection given to the CD. The entire period of CIRP is covered under this moratorium, during which all suits, legal proceedings, and recovery actions against the CD are held in abeyance to give time to the CD to resolve its status.

Section 14 (1) provides that on the ICD, the AA shall by order declare moratorium prohibiting certain kinds of actions against the CD and its assets. However, the moratorium shall not be applicable to some transactions, agreements, or other arrangements notified by the Central Government in consultation with any financial sector regulator or other authority. So far, no such transactions, agreements, or arrangement have been notified.

Section 14(2) provides that the supply of essential goods or services to the CD as may be specified shall not be terminated, suspended, or interrupted during the moratorium period.

[90] *The report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design*, November 2015, Insolvency and Bankruptcy Board of India. Available at: [https://ibbi.gov.in/BLRCReport-Vol1\\_04112015.pdf](https://ibbi.gov.in/BLRCReport-Vol1_04112015.pdf)

[91] <https://ibbi.gov.in/uploads/legalframework/bb54a1ddf9a7cd75ab-18b566a83c6370.pdf>

Under section 14(4), the moratorium shall take effect from the date it is ordered until the CIRP is completed.

### KEY CONSIDERATION

The moratorium has to be granted by the AA (which is done, as a matter of course in all cases, in the admission order itself). It continues until the CIRP is completed. Although this is, properly speaking, the insolvency resolution period, it can also be called “the moratorium period”, as the two go hand in hand.

## 2.1 Section 14(1)

Under section 14(1) of the IBC, the following actions are prohibited during the moratorium period:

- (a) the institution of suits or continuation of pending suits or proceedings against the CD including execution of any judgment,

decree, or order in any court of law, tribunal, arbitration panel, or other authority;

- (b) the CD transferring, encumbering, alienating, or disposing of any of its assets or any legal right or beneficial interest therein;
- (c) any action to foreclose, recover, or enforce any security interest created by the CD in respect of its property, including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
- (d) the recovery of any property by an owner or lessor which is occupied by or in the possession of the CD.

Section 14(1)(a) of the IBC provides wide powers to the AA both in purpose and application, in the sense that it bars the commencement or continuation of any legal proceeding against a CD and its property on the declaration of moratorium.

In *Alchemist Asset Reconstruction Company Limited Vs. Hotel Gaudavan Private Limited [(2018) 16 SCC 94]*, the Supreme Court affirmed that once a moratorium is imposed under the IBC, any proceeding initiated against the CD is *non-est* (does not exist) in law.

In *Canara Bank Vs. Deccan Chronicle Holdings Limited [Company Appeal (AT) (Insolvency) No. 147 of 2017]*, the NCLAT held that the moratorium will not affect any proceedings initiated or pending before the Supreme Court under Article 32 of the Constitution of India or where an order is passed under Article 136. Further, it will not affect the powers of any High Court under Article 226 of the Constitution.

In the *Power Grid Corporation of India Limited Vs. Jyoti Structures Limited [246 (2018) DLT 485]*, the Delhi High Court held that the object of the IBC is to ensure that the CD receives relief during the “standstill” period, protecting its assets from being diminished, and alternatively using this period to strengthen its financial position. It also held that the term “proceedings” referred to in section 14 of the IBC does not mean “all proceedings”, but is restricted to debt recovery actions *against* the assets of the CD. It was also held that the use of the term “against the CD” in section 14(1)(a) of the IBC in comparison with “by or against the CD” used in section 33(5) demonstrates that the former has a more restrictive meaning and applicability than the latter.

In *SSMP Industries Ltd Vs. Perkan Food Processors Pvt. Ltd [2019 SCC Online Del 9339]*, the Delhi High Court delved into the issue of whether a counter claim raised against the CD in a suit filed by the CD

would also be barred. The court held that under section 14(1)(a), strictly speaking, a counter claim would be covered by moratorium. However, the counter claim raised in the present case against the CD was considered integral to the recovery sought by the CD and was related to the same transaction. The Court observed that a blinkered approach cannot be followed and the Court cannot blindly stay the counter claim and refer the defendant to the NCLT/RP for filing its claims. The Court further observed that the NCLT/RP cannot be burdened with the task of entertaining claims of the defendant which are undetermined. It held that the plaintiff's and the defendant's claim ought to be adjudicated comprehensively by the same forum. Once the counter claims are adjudicated and the amount to be paid/recovered is determined, at that stage, or in execution proceedings, depending upon the situation prevalent, section 14 could be triggered.

In *Mr. Ajay Kumar Bishnoi Vs. M/s Tap Engineering and Other* [Criminal Original Petition No. 34996 of 2019], the CD underwent insolvency resolution while a complaint was pending under section 138 of the Negotiable Instruments Act, 1881. Further, during this time, a resolution plan for the CD was approved with a change in management and control. The MD of the erstwhile CD sought to quash the prosecution under section 138 in view of the approval of the resolution plan. The High Court confirmed that the moratorium under section 14 of the IBC prohibits proceedings, but such proceedings do not include prosecution.

In the matter of *Varrsana Ispat Limited Vs. Deputy Director, Directorate of Enforcement* [Company Appeal (AT) (Insolvency) No. 493 of 2018], the RP had sought de-attachment of properties attached with the Directorate of Enforcement under the Prevention of Money Laundering Act, 2002, a considerable time prior to the initiation of CIRP. The NCLAT had held that section 14 of the IBC is not applicable to the criminal proceeding or any penal action taken pursuant to the criminal proceeding or any act having the essence of crime or crime proceedings. The Supreme Court also upheld the order passed by the NCLAT [Varrsana Ispat Limited Vs. Deputy Director, Directorate of Enforcement, Civil Appeal No. 5546 of 2019]. While the bar under IBC is automatic, practically the IRPs/RPs may need to file an application before various forums where proceedings against the CD is continuing, bringing to their attention the commencement of CIRP and the moratorium declared by the AA under section 14 of the IBC, and requesting the relevant forums to pass an order staying proceedings.

Section 14(1)(b) bars the CD from transferring, encumbering, alienating, or disposing of any of its assets or any legal right or beneficial interest therein. This is a bar against CD, however, the IRP/RP, while managing the CD as a going concern can sell the assets of the CD in the ordinary course of business or in accordance with regulation 29 of the CIRP Regulations (if not in the ordinary course).<sup>[92]</sup>

Section 14(1)(c) bars any action to foreclose, recover, or enforce any security interest created by the CD in respect of its property. This would include cases where steps may have been taken by a creditor under any law for enforcement of security (for instance, under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act). However, once the moratorium starts, any further steps for enforcement of security would need to be suspended.

[92] <https://ibbi.gov.in/uploads/legalframework/2020-01-29-103354-eni10-24d3a39791e7ed970ddd681a984e5f07.pdf>

In *Anand Rao Korada Vs. M/s Varsha Fabrics (P) Limited and Others [2019 SCC Online SC 1508]*, the RP filed an appeal before the Supreme Court challenging the order of the High Court for auction of assets on the ground that since CIRP had already commenced, the proceedings before the High Court ought to be stayed. The Supreme Court observed that in view of the provisions of the IBC, the High Court ought not to have proceeded with the auction of the property of the CD. It was further noted that if the assets of the Respondent No.4 Company are alienated during the pendency of the proceedings under the IBC, it will seriously jeopardize the interest of all stakeholders.

In *Amira Pure Foods Pvt. Ltd. Vs. Canara Bank and Others [WP(C) No. 5467/2019]*, the Debt Recovery Appellate Tribunal (DRAT) appointed two joint court commissioners to take over the properties of the CD. Soon after CIRP of the CD commenced, the IRP approached DRAT for taking over the properties of the CD. The DRAT took the view that given the moratorium under section 14 of the IBC, the continuation of proceedings against the CD is prohibited and therefore the relief sought by the IRP cannot be granted. The IRP approached the High Court on the same issue. The High Court observed that the DRAT was not powerless to modify its own order whereby the two court commissioners had been appointed to take over control of the assets of the CD. In the facts of the case, the DRAT should have recalled its order so that the IRP/RP could take over the assets of the CD in exercising its mandate under the IBC. The High Court set aside the order of the DRAT, recalled the appointment of two court commissioners, and permitted the IRP/RP to act under the IBC.

Under section 14(1)(b) and (c), the bar is only in respect of the CD and its assets. It follows that property not owned by the CD would not come under the

protective umbrella of section 14 *unless* the property is occupied by or in possession of the CD (in which case, its recovery would be prohibited under section 14(1)(d) of the IBC).

In *Srei Infrastructure Finance Ltd. Vs. Sundresh Bhatt, RP Sterling Biotech Ltd. [Company Appeal (AT) (Insolvency) No. 781 of 2018]*, the NCLAT held that even though the properties did not belong to the CD, in view of section 14(1)(d) of the IBC, the CD could not be ejected or disturbed from the said premises during the moratorium period.

In *M/s Embassy Property Developments Pvt. Ltd. Vs. State of Karnataka and Others [2019 SCC Online SC 1542]*, one of the issues before the Supreme Court was whether the AA had the power under the IBC to review the order passed by the Government of Karnataka during the moratorium period, rejecting the auto-extension of a mining lease granted by it to the CD. The Supreme Court observed, among other things, that the moratorium under section 14 did not impact the right of the government to refuse extension of the lease. It observed that the purpose of section 14 was to preserve the status quo and not to create a new right. Even section 14(1)(d), which prohibits, during the period of moratorium, the recovery of any property by the owner/ lessor will not go to the rescue of the CD since what is prohibited is only right not to be dispossessed, but not the right to have renewal of the lease of such property. It was further observed that this right not to be dispossessed will have nothing to do with the rights conferred by a mining lease especially on government land. It was noted that what was granted to the CD was not an exclusive possession of the land in question so as to enable the RP to invoke section 14(1)(d) of the IBC.

In *Rajendra K. Bhatta Vs. Maharashtra Housing and Area Development Authority and Another* [Civil Appeal No. 12248/2018], the issue before the Supreme Court was whether the CD could be evicted from the land it occupied by Maharashtra Housing and Area Development Authority (MHADA), the authority that had licensed the land to CD under a Joint Development Agreement. After the ICD, MHADA issued a notice to the CD to terminate the agreement and request handover of the land. The RP filed an application with the AA to restrain MHADA contending that such a recovery of possession was in derogation of the moratorium imposed under section 14 of the IBC. The AA dismissed the application and the appeal against the same was also dismissed by the NCLAT, among other reasons because the land did not belong to the CD. An appeal was filed with the Supreme Court.

The Supreme Court held that a bare reading of section 14(1)(d) would make it clear that it does not deal with the assets, legal right, or beneficial interest in such assets of the CD. For this reason, any reference to sections 18 and 36 becomes wholly unnecessary in deciding the scope of section 14(1)(d), which stands on a separate footing. Under section 14(1)(d), what is referred to is the “recovery of any property.” The “property” in this case consists of land together with structures thereon that had to be demolished. “Recovery” necessarily refers to what the CD parted with, and for this one has to go to the next expression.

One thing is clear that “owner or lessor” qua “property” is then to be read with the expression “occupied or in the possession of”. It is clear that when recovery of property is to be made by an owner under section 14(1)(d), such recovery would be of property that is “occupied by” a CD. The expression “occupied by” would mean or be synonymous with being in actual physical possession of or being actually used by, in contra-distinction to the expression “possession”, which would connote possession being either constructive or actual and which, in turn, would include legally being in possession, though factually not being in physical possession. Since it is clear that the JDA has granted a license to the CD to enter upon the property, with a view to do all the things that are mentioned in it, there can be no gain saying that after such entry, the property would be “occupied by” the developer.

When it comes to any clash between the MHADA Act and the IBC, on the plain terms of section 238 of the IBC, the IBC must prevail. This is for the very good reason that when a moratorium is mentioned in section 14 of the IBC, the idea is that, to alleviate corporate sickness, a statutory status quo is pronounced the moment a petition is admitted, so that the insolvency resolution process may proceed unhindered by any of the obstacles that would otherwise be caused and that are dealt with by section 14. The statutory freeze that has thus been made is, unlike its predecessor in the Sick Industrial Companies Act, 1985, only a limited one. It is expressly limited by section 31(3) of the IBC, to the date of admission of an insolvency petition up to the date that the AA either allows a resolution plan to come into effect or states that the CD must go into liquidation. For this temporary period, at least, all the things referred to under section 14 must be strictly observed so that the CD may be put back on its feet albeit with new management.

## 2.2 Bar on Recovery

Section 14 has been interpreted by various AAs as well as NCLAT as prohibiting any action of recovery taken by the creditor against CD or its assets for claims/

dues which relate to a period prior to the ICD (i.e. pre-CIRP dues).

The moratorium applies on recovery of all pre-CIRP dues from the CD by creditors. This also implies that

the IRP/RP need not make payment to any creditor for dues/claims that relate to a period prior to the ICD. Once the CIRP of the CD starts, the moratorium

applies to payment and recovery of all pre-CIRP dues/claims. In respect of such pre-CIRP dues/claims, the creditor is required to file a claim before the IRP (see section 4.3 [p99]).

In *Union of India and Another Vs. Videocon Industries Ltd. and Others [Company Appeal (AT) (Insolvency) No. 408 of 2019]*, during the CIRP of the CD a creditor issued a demand notice asking the CD to allocate 100 percent of the sale proceeds/oil and gas invoices in favour of the government, with immediate effect, towards recovery of the unpaid government share of profit of petroleum. The demand notice was challenged by the RP before the AA, which allowed the application filed by the RP. Observing that after declaration of the moratorium under section 14 of the IBC, there is prohibition on recovery of any amount from the CD, the NCLAT upheld the AA's order staying the demand notice during pendency of CIRP of the CD and restraining various petroleum and natural gas producers from remitting the sale proceeds to the Union of India, which were due to the CD during the CIRP period.

In *Ms. Anju Agarwal, RP (Shree Bhawani Paper Mills Ltd.) Vs. Bombay Stock Exchange and Others [Company Appeal (AT) (Ins) No. 734/2018]*, the AA had held that regulatory authorities are not covered under moratorium under section 14 of the IBC and therefore, SEBI and the Bombay Stock Exchange are not prohibited from taking actions under the SEBI Act and regulations made thereunder against the CD. In appeal, the NCLAT observed that section 28A of the SEBI Act, 1992 is inconsistent with section 14 of the IBC and that the latter will prevail over the former, and "Securities Exchange Board of India" cannot recover any amount including the penalty from the CD. The Bombay Stock Exchange cannot take any coercive steps against the CD nor can it threaten the CD for suspension of trading shares.

Once the moratorium starts, no lien or set-off can be exercised by the banks in discharge/settlement of their pre-CIRP dues as it will be regarded as a "recovery action" by the banks. Hence, in the context of section 14, the AA and NCLAT have held that once a CIRP commences, banks can neither tag bank accounts nor appropriate money lying in accounts maintained by them towards their pre-CIRP dues, even if the banks

did not know about the commencement of the CIRP until after the action was taken. Normally, whenever an IRP takes over the control of the CD, the bank accounts of the company are frozen and a request is made to the bankers to release payments only if these are accompanied by an approval from the IRP. In some cases, the authorized signatories are also changed to ensure that all payments from the bank account are made with the specific approval/signatures of IRP/RP.

In *ICICI Bank Ltd. Vs. IRP for Ruchi Soya Industries [Company Appeal (AT) No. 309 of 2018]*, ICICI Bank had debited a certain amount from the current account of the CD after declaration of moratorium. The NCLAT held that once moratorium is declared, it was not open to the bank to debit any amount from the account of the CD.

This judgment was also held in the *State Bank of India Vs. Debashish Nanda [Company Appeal (AT) (Insolvency) No. 49 of 2018]*, where the NCLAT observed that the bank could not debit any amount from the CD's account after the order of moratorium, as it amounts to recovery of the sum after the temporary prohibition came into force.

### 2.3 Explanation of Section 14(1)

By way of the Insolvency and Bankruptcy Code (Amendment) Act, 2020,<sup>[93]</sup> section 14 of the IBC stands amended. An explanation has been inserted after section 14(1) to clarify that for the purposes of section 14(1), notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearance, or a similar grant or right given by the Central Government, state government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license or a similar grant or right during moratorium period.

This Explanation makes it clear that the fact that the CD is undergoing CIRP cannot be used as a ground by the relevant authority to cancel a license, permit, registration, quota, concession, clearance, or a similar grant or right given by the authority to the CD, provided the CD is paying current dues in respect of the same during moratorium period. While the authority cannot insist on payment of pre-CIRP dues to it by the CD, the dues during moratorium period would need to be paid by the CD to the authority. The explanation does not bar termination of such a license (or similar item) on grounds other than insolvency. Such a safeguard in terms of non-termination of licenses and permits and continued supply of critical goods and services has been provided to protect and preserve the value of the CD and manage its operations as a going concern.<sup>[94]</sup>

In *Tata Consultancy Services Limited Vs. Vishal Ghisulal Jain [Company Appeal (AT) (Insolvency) No. 237 of 2020]*, an appeal was filed challenging an interim order passed by the AA restraining the appellant from terminating a Facilities Agreement on account of the CD's failure to remedy contractual breaches in respect of certain services to be provided to the appellant. It was contended by the appellant that the AA failed to appreciate the arbitration clause in the Facilities Agreement, that a valid notice of termination was issued by the appellant and that the termination notice was not in contravention of section 14 of the IBC. The NCLAT observed that once the CD is admitted into CIRP and moratorium imposed, the IRP/RP is at the helm of affairs of the company in view of the suspension of the CD's board of directors. The IRP/RP is to carry out the business and activities of the CD, ensure smooth running of the company as a going concern, and preserve and protect the CD's assets. Pursuant to these duties and to maintaining the CD as a going concern, which is the main object of the IBC, the application was filed seeking stay of the termination notice and direction to the appellant to continue the Facilities Agreement. The NCLAT did not find any illegality in the AA's order.

### 2.4 Essential Goods and Services

Section 14(2) of the IBC provides that the supply of essential goods or services to the CD as may be specified shall not be terminated, suspended, or interrupted during the moratorium period.

The term "essential goods" is defined in regulation 32 of the CIRP Regulations as electricity, water, telecommunications services, and information technology services, to the extent that these are not

[93] <https://ibbi.gov.in/uploads/legalframework/d36301a7973451881e00492419012542.pdf>

[94] <https://www.prsindia.org/billtrack/insolvency-and-bankruptcy-code-amendment-ordinance-2019>

a direct input to the output produced or supplied by the CD. An example has been given of a case where water supplied to a CD will be regarded as “essential supplies” for drinking and sanitation purposes, but not for the generation of hydro-electricity (because the latter would be a direct input to the CD’s output).<sup>[95]</sup>

Subsection 2A was added after section 14(1)(2) by way of the Insolvency and Bankruptcy Code (Amendment) Act, 2020,<sup>[96]</sup> to the effect that where the IRP or the RP considers the supply of goods or services critical to protect and preserve the value of the CD and manage the operations of such CD as a going concern, then the supply of such goods or services shall not be terminated, suspended, or interrupted during the period of moratorium, except where the CD has

not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.

This is a very significant amendment as it broadens the scope of essential goods and services beyond what is provided in regulation 32 of the CIRP Regulations. Stress has been laid on preserving the value of the CD and maintaining its status as a going concern, and hence, power has been given to the IRP/RP to determine what goods or services are critical to it. The termination of supply of such goods or services are then prohibited under the moratorium provisions, provided CD is paying current dues in respect of the same during the moratorium period.

In *Dakshin Gujarat VIJ Company Ltd. Vs. M/s. ABG Shipyard Ltd. and Another [Company Appeal (AT) (Insolvency) No. 334 of 2017]*, the question that came before the NCLAT was whether the moratorium under section 14 of the IBC will cover the current charges payable by the CD for supply of such services as water and electricity. The NCLAT held that:

- There is no prohibition or bar imposed on the payment of current charges for essential services. Such payment is not covered by the order of the moratorium
- The law does not stipulate that essential goods, including water and electricity, should be supplied free of charge until the moratorium is ended. The amount paid for these services by the RP shall be part of the CIRP cost.

The RP was directed to pay current charges for the supply of electricity during the moratorium.

In *Shyam Pradhan & Another Vs. Ananda Chandra Swain [Company Appeal (AT) (Insolvency) No. 15 of 2020]*, the insurance company through its agent sought to terminate the insurance policy insuring the CD, on account of the CD entering CIRP. The AA, while protecting the insurance cover of the CD, held that the policy could not be terminated since it is essential for the very existence of the CD. The NCLAT, in the appeal, also upheld the view of the AA as during the CIRP, the CD is to continue as a going concern, and directed the appellant to continue with the insurance policy. The NCLAT also directed the IRP to pay the insurer any amount owing as an installment during the CIRP.

[95] <https://ibbi.gov.in/uploads/legalframework/2020-08-17-234040-pjor6-59a1b2699bbf87423a8afb5f5c2a0a85.pdf>

[96] <https://ibbi.gov.in/uploads/legalframework/d36301a7973451881e00492419012542.pdf>

In *Gujarat Urja Vikas Nigam Ltd. Vs. Amit Gupta [Company Appeal (AT) (Insolvency) No. 1045 of 2019]*, the NCLAT upheld the order of the AA, setting aside the termination of the Power Purchase Agreement of the CD by the authority on the sole ground of initiation of CIRP of the CD. The AA held that in light of section 238 of the IBC, any terms of the PPA in direct contravention of the IBC could not be enforced. The NCLAT upheld the decision of the AA while acknowledging that the subsistence of the agreement was imperative to ensure that the CD was kept as a going concern.

## 2.5 Exceptions to Moratorium

Section 14(3) of the IBC provides exceptions to moratorium and states that the following acts shall not be prohibited during moratorium:

- (a) Such transactions, agreements, or other arrangements as may be notified by the Central Government in consultation with any financial regulator or any other authority (no such transactions etc. have been notified so far);

- (b) A surety in a contract of guarantee to a CD. This exception was added by way of Insolvency and Bankruptcy (Amendment) Ordinance 2018 (later replaced with the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018).<sup>[97]</sup>

In *State Bank of India Vs. Ramkrishnan [Civil Appeal Nos. 3595 & 4553 of 2018, (2018) 17 SCC 394]*, the Supreme Court held that section 14 did not apply to the personal guarantor of the CD but only to the CD. The court held that in a contract of guarantee, the liability of surety and that of principal debtor is coextensive and hence, the creditor can proceed against assets of either the principal debtor or the surety, or both, in no particular order. The court also took into consideration the Insolvency and Bankruptcy (Amendment) Ordinance, 2018 which amended the provision of section 14 and held the same to be retrospective (clarificatory in nature).

## 3. Appointment and Tenure of the IRP

### 3.1 Appointment of an IRP

In Module 1, the process for appointment of an IRP was discussed. When the AA commences the CIRP by admitting the application filed under section 7, 9, or 10 of the IBC, it also appoints an IRP. While section 16(1)

of the IBC provided that the IRP shall be appointed within 14 days from the ICD, the IBC Insolvency and Bankruptcy Code (Amendment) Act, 2020<sup>[97]</sup>, amends this provision to provide that AA shall appoint an IRP on the ICD. The amendment was made to ensure that there is no time-lag between the ICD and takeover of the CD by the IRP as this would create practical difficulties and a risk of fund diversion/mismanagement by the promoters during this period.

[97] [https://ibbi.gov.in/webadmin/pdf/legalframework/2018/Aug/The%20Insolvency%20and%20Bankruptcy%20Code%20\(Second%20Amendment\)%20Act,%202018\\_2018-08-18%2018:40:34.pdf](https://ibbi.gov.in/webadmin/pdf/legalframework/2018/Aug/The%20Insolvency%20and%20Bankruptcy%20Code%20(Second%20Amendment)%20Act,%202018_2018-08-18%2018:40:34.pdf)

[98] <https://ibbi.gov.in/uploads/legalframework/d36301a7973451881e00492419012542.pdf>

### 3.2 Tenure of the IRP

The role of the IRP commences from the day he is appointed by an order of the AA. It is a significant role and the IRP has the potential to have a real impact on the entire CIRP.

[7]

As per section 16(5), the term of the IRP continues till he is confirmed as the RP by the CoC or is replaced by a new RP in accordance with section 22.

[66%]

As per section 22, this decision is to be taken in the very first CoC meeting called by the IRP, which

is normally held by the IRP within seven days of the constitution of the CoC (see section 4.6 [p105]).

At this meeting, the CoC, by a majority vote of not less than 66%, must resolve to either appoint the IRP as the RP or replace the IRP with another such professional. Continuation of the IRP as the RP is subject to the IRP's written consent.

Section 22(3) of the IBC states that where the CoC, subject to written consent from the IRP, resolves to continue with the IRP as the RP, it will communicate this decision to the IRP, the CD, and the AA.

#### *Dharmendra Kumar Vs. IBBI and Others [Company Appeal (AT) (Insolvency) No. 313 of 2018]*

The appellant, who was appointed as the IRP, filed an application seeking discharge from the CIRP. The AA rejected the request, imposed a cost on the appellant, and observed that the attitude of the appellant was unprofessional. In appeal, referring to section 22 of the IBC, the NCLAT observed that if the CoC resolves to appoint the IRP as RP, consent is required from the IRP as to whether he intends to continue as RP or wants to be discharged. Without his consent, the IRP cannot be forced to continue beyond 30 days. It further observed that, given the facts and circumstances and after perusal of the records, the AA's directions to impose a cost and refer the matter to the IBBI for initiating action against the appellant was uncalled for.

If the CoC resolves to replace the IRP with another IP as the RP, it is required to file an application before the AA, together with the written consent of the proposed RP. The AA will then forward the name of the proposed RP to the IBBI and the appointment will be made once confirmation is received from the IBBI. To reduce the administrative time in appointing an IP as an IRP, the IBBI has prepared a panel of IPs. The AAs may refer to this panel for appointing an IRP (where no IP is proposed in the application).

Where the IBBI does not confirm the name of the proposed RP within 10 days of receiving the name, the AA will direct the IRP to continue to function as the RP until the IBBI confirms the appointment of the RP.

[10]

Regulation 17(3) of the CIRP Regulations clarifies that where the appointment of RP is delayed, the IRP shall perform the functions of the RP from the fortieth day of the ICD till a RP is appointed under section 22 of the IBC.

Hence, where the IRP continues as the RP, he/she fulfils the role and responsibilities of the RP from the date of their confirmation as the RP by the CoC. Where he/she is replaced by another IP, he/she is discharged from the date of appointment of the RP by the AA. In terms of section 23(3) of the IBC, in case of such an appointment, the IRP shall provide the RP with all the information, documents, and records pertaining to the CD in his possession and knowledge.

### KEY CONSIDERATION

In many cases, the CoC does not approve the continuation of the IRP as the RP in the first meeting of the CoC, but also does not name another IP as the proposed RP. Often, such a decision is taken in subsequent CoC meetings—the members of the CoC may not have requisite approvals or may take some time to find another IP to replace the IRP. Similarly, time may be taken by the AA to appoint the proposed RP. In such situations, the IRP would continue with all its powers and duties.

The IBC requires that if the IBBI does not confirm the appointment of the RP within 10 days, the AA will direct the IRP to function as the RP till the IBBI confirms the appointment of the RP. However, in practice there may not be a specific order from the AA directing the IRP to continue. As clarified in regulation 17(3) of the CIRP Regulations, where the appointment of RP is delayed, the IRP shall perform the functions of the RP from the fortieth day of the ICD till an RP is appointed under section 22 of the IBC.

## 4. Powers and Duties of the IRP

Powers and duties of the IRP can be gathered from sections 17 to 21 of the IBC. These are further detailed in various provisions of the CIRP Regulations. Broadly, an IRP undertakes the following:

- **Public announcement:** Immediately after his/her appointment, the IRP makes a public announcement announcing the commencement of the CIRP of the CD and invites claims from creditors of the CD.

- **Collecting information about the CD:** The IRP collects information relating to the assets, finances, and operations of the CD to determine its financial position.
- **Collation of claims and constitution of the CoC:** The IRP collates all claims submitted by the creditors to him/her. The IRP verifies each claim as on the ICD and prepares a list of creditors in order to constitute the CoC.
- **Custody and control:** The IRP takes custody and control of the assets over which the CD has ownership rights.
- **Run the CD as a going concern:** The IRP makes every effort to protect and preserve the value of the CD's property and manage its operations as a going concern.
- **Compliance:** The IRP complies with the requirements under any law for the time being in force on behalf of the CD.

### KEY CONSIDERATION

As per section 23(2) of the IBC, the RP shall exercise powers and perform duties as are vested or conferred on the IRP under this Chapter. Hence, the provisions of the IBC relating to powers and duties of the IRP also apply to the RP. The RP also performs additional roles, which are dealt with in Module 4.

### 4.1 Management of Affairs of the CD—Section 17

The IRP is required to manage the affairs of the CD and keep it as a going concern. This role continues if the IRP is confirmed as the RP and, if the CoC resolves to replace the IRP, the role of the IRP continues till an RP is appointed.

As per section 17, from the date of the IRP's appointment:

- the management of the affairs of the CD shall vest in the IRP;
- the powers of the board of directors or the partners of the CD, as the case may be, shall stand suspended and be exercised by the IRP;
- the officers and managers of the CD shall report to the IRP and provide access to such documents and records of the CD as may be required by the IRP;
- the financial institutions maintaining accounts of the CD shall act on the instructions of the IRP in relation to such accounts and furnish all information relating to the CD available with them to the IRP.

For this purpose, the IRP has the authority to act and execute in the name and on behalf of the CD, all deeds, receipts, and other documents and to access financial information of the CD from IUs, from the books of accounts, records, and other relevant documents of the CD available with third parties.

## 4.2 Collecting Information about the CD—Section 18(a) and (e)

Under section 18(a) of the IBC, the IRP is required to collect all information relating to the assets, finances, and operations of the CD to determine its financial position, including information relating to:

- business operations for the previous two years;
- financial and operational payments for the previous two years;

- assets and liabilities as on the date of initiation; and
- other matters as may be specified.

Not only is the information to be collected, but under section 18(e), the IRP has to file it with an IU, if necessary.

## 4.3 Public Announcement of a CIRP and Claim Invitation—Section 18(b)

One of the key functions of the IRP is to collate all the claims submitted by creditors to him. Section 13(1) of the IBC states that the AA, after admission of the application, will declare a moratorium, appoint an IRP, and “cause a public announcement of the initiation of a CIRP and call for the submission of claims.” The public announcement is made by the IRP.

Section 13(2) of the IBC provides that the public announcement shall be done “immediately”, a word explained in regulation 6 under Chapter III of the CIRP Regulations<sup>[99]</sup> as meaning not later than three days from the date of the IRP's appointment.

Thus, one of the first tasks taken by the IRP after his appointment is to make public announcement and invite claims from the creditors of the CD. Section 15 of the IBC and regulation 6 of the CIRP Regulations detail the information the public announcement must contain. This includes:

- the name and address of the CD under the CIRP;
- the name of the authority with which the CD is registered;

[99] <https://ibbi.gov.in/uploads/legalframework/2020-08-17-234040-pjor6-59a1b2699bbf87423a8afb5f5c2a0a85.pdf>

- the last date for submission of claim, which shall be 14 days from the date of appointment of the IRP;
- the details of the IRP;
- the classes of creditors under clause (b) of subsection 6A of section 21 (including with regard to home buyers) and names of IPs (one to be chosen from three nominees) to act as the authorized representatives (ARs) for each class;
- where claim forms can be downloaded or obtained from;
- the penalties for false or misleading claims; and
- the date on which the CIRP will close.

Regulation 6 of the CIRP Regulations also provides that the public announcement should be in Form A of the Schedule appended to the CIRP Regulations and shall be published:

- in one English newspaper and one regional language newspaper with wide circulation at the location of the registered office and principal office of the CD and in any other location which, in the opinion of the IRP, the CD conducts material business operations;
- on the website of the CD (if any); and
- on the website of the IBBI.<sup>[100]</sup>

The cost of the public announcement is to be borne by the applicant who made the application to the AA for initiating the CIRP. Such costs may be reimbursed by the CoC to the extent that they are ratified. To the extent ratified, these costs also form part of the insolvency resolution process costs.

#### 4.4 Appointment of ARs—Section 21(6A)

Section 21(6A) of the IBC states that a “class of creditors” can be represented by an Authorized Representative (AR). The IRP is responsible for ensuring the AR’s appointment. Regulation 2(1)(aa) defines a “class of creditors” as a class with at least 10 FCs under section 21(6A)(b), and the expression “creditors in a class” shall be construed accordingly. The provisions in respect of a class of creditors were introduced primarily to address the issue of representation of home-buyers (of which there were many) in the CoC. While home-buyers are the most common class of creditors in a CD, there may be other creditors in a class, for instance, public deposit holders.

The IRP is to ensure that before the CoC is constituted, an AR is appointed to represent creditors in a class, if any. The process broadly is as follows:

- The IRP should examine the CD’s books of accounts and records to ascertain the classes of creditors.
- If there is any such class, the IRP is required to identify three IPs to act as ARs for FCs in each class.
- In the public announcement, the IRP should mention the classes and the names of the three IPs so identified.
- In their respective claim forms, a creditor in a class should indicate the choice of IP who will be their AR from among the three options mentioned in the public announcement.
- The IRP is then required to select the IP, who is the choice of the highest number of FCs in the class, to act as the AR of that class.
- The IRP shall then make an application to the AA, together with the list of all the FCs,

[100] <https://www.ibbi.gov.in/public-announcement>

containing the name of the selected AR, who shall be appointed by the AA before the CoC's first meeting.

Any delay in the appointment of the AR caused by the above process will not affect the validity of any decision taken by the CoC. The fee for this process, together with the AR's out-of-pocket expenses, will form part of the CIRP costs.

After being appointed, the IRP has to ascertain class of creditors and also obtain the consent of three IPs to be an AR in each class. There is no requirement for the IRP to provide grounds for short listing the IPs mentioned in the public announcement.

## 4.5 Claim Collation and Verification—Section 18(b)

As discussed, the IRP is responsible for inviting claims from various creditors by way of public announcement and collating those it receives.

### 4.5.1 Submission of Claims

CIRP Regulations shed light on the process of submission of claims by different classes of creditors. Regulation 7 deals with submission of claims by OCs, regulation 8 with claims by FCs, regulation 8A with claims by creditors in a class, regulation 9 with claims by workmen/employees, and regulation 9A with claims by creditors not falling under any other category.<sup>[101]</sup>

The claims have to be submitted to IRP in the forms specified in the Schedules of the CIRP Regulations.<sup>[102]</sup> FCs must submit their claims to the IRP electronically, in Form C as set out in the Schedule, whereas OCs can submit them in person, by post, or electronically in Form B set out in the Schedule.

A person claiming to be a creditor in a class can submit a claim electronically in Form CA set out in the Schedule to the CIRP Regulations. This is similar to Form C, except that a creditor in a class may indicate its choice of an IP from among the three choices provided by the IRP in the public announcement to act as its AR.

Workers or employees of the CD can submit their claim in person, by post, or electronically using Form D set out in the Schedule. Where there are dues to numerous workers or employees, an authorised representative of workmen/ employees may submit one claim for all such dues on their behalf in Form E of the Schedule.

A person claiming to be any other creditor, may submit their claim in person, by post, or electronically using Form F. This form is identical to Form C (for FCs), except it mentions any “retention of title” arrangements to which the claim refers.

### Proof of claims

Claims have to be submitted along with “proof of claims.” The existence of claim of the creditor may be proved on the basis of records available with an IU or other relevant documents, including documents specified in the CIRP Regulations. For instance, an FC may submit the following documents to prove his debt:

- a financial contract supported by financial statements;
- a record evidencing that the amounts committed by the FC to the CD under a facility have been drawn by the CD;
- financial statements showing that the debt has not been paid; or
- an order of a court or tribunal that has adjudicated upon the non-payment of a debt.

[101] <https://ibbi.gov.in/uploads/legalframework/2020-08-17-234040-pjor6-59a1b2699bbf87423a8afb5f5c2a0a85.pdf>

[102] Forms may be downloaded from <https://www.ibbi.gov.in/home/downloads>

As per regulation 10 of the CIRP Regulations, the IRP, or the RP who succeeds him, may call for other evidence or clarification to substantiate the whole or part of the claim made by the creditor. Regulation 11 states that a creditor bears the cost of proving the debt due to them.

In *Jet Airways (India) Ltd. (Offshore Regional Hub/Office), Holland Vs. State Bank of India and Another [Company Appeal (AT) (Ins) No. 707/2019]*, the NCLAT held that the IRP is required to collate the claim of all offshore creditors, and take control and custody of the assets of the CD situated outside India (in Holland) or other places. However, for giving it effect, the RP is required to reach an arrangement or agreement with the Administrator appointed pursuant to the proceeding initiated in Holland.

The NCLAT directed use of certain elements of cross-border insolvency in the form of “Cross Border Insolvency Protocol” agreed to between the Administrator of Jet Airways (India) Limited (Offshore Regional Hub) and the RP of Jet Airways (India) Limited. The Protocol recognizes that, the company being an Indian company with its centre of main interest in India, the Indian Proceedings are the main insolvency proceedings and the Dutch Proceedings are the non-main insolvency proceedings. It maintains the independent jurisdiction, sovereignty, and authority of NCLT, NCLAT, and the Dutch Bankruptcy Court. The NCLAT observed that the “Cross Border Insolvency Protocol” shall be treated as its direction. It further directed that the Dutch Trustee shall be invited to participate in the meetings of the CoC as an observer but shall not have a right to vote in such meetings.

### Timelines

Regulation 12(1) states that the creditor shall submit the claim with proof on or before the last date mentioned in the public announcement. As per regulation 6, this is 14 days from the appointment of the IRP. Hence, the initial date for submission of claims by creditors is 14 days from the date of appointment of the IRP.

Regulation 12(2) provides that a creditor who fails to submit claim with proof within the time stipulated in the public announcement, may submit the claim with proof on or before the ninetieth day of the ICD. Hence, the latest date for submission of a claim by a creditor (as per the CIRP Regulations) is the ninetieth day from the ICD.

This is beneficial to prospective resolution applicants who propose to submit resolution plans for the CD as the CD’s liabilities will be known well ahead and the applicants will be aware of all the claims and would consider them when submitting the resolution plan.

If this creditor is an FC, it will be included in the CoC from the date of admission of the claim.

In *Committee of Creditors of Essar Steel India Limited Through Authorised Signatory Vs. Satish Kumar Gupta and Others [2019 SCC Online SC 1478]*, the Supreme Court upheld the decision of the NCLAT whereby claims of certain OCs had been rejected as the claims were filed by the OCs after the CIRP period had ended.

### 4.5.2 Verification of Claims

Regulation 13 of the CIRP Regulations deals with the verification of claims. The IRP or RP should verify the claims within seven days from the last date of the receipt of claims and, based on the evidence collected,

maintain a list of creditors containing their names, along with the amount claimed by them, and the amount admitted and the security interest, if any, in respect of such claims.<sup>[103]</sup>

What is the latest date for receipt of claims? This should be read along with regulation 12. Hence, the initial last date of receipt of claims would be 14 days from the appointment of IRP and thereafter, the ninetieth day from the ICD.

IRP/RP may receive incomplete forms or may need to ask for additional documents from creditors to substantiate their claims. Forms may need to be re-submitted where creditors submit their claims in the wrong form. In such circumstances, the claim verification exercise could go on. However, the IRP or the RP should endeavor to complete this exercise as soon as possible to give certainty to all participants on the claim position.

### KEY CONSIDERATION

The first deadline (verification within seven days of date mentioned in the public announcement) is extremely relevant for constitution of the CoC, as the CoC is to be constituted within two days of the verification of claims received under regulation 12(1) of the CIRP Regulations. In matters where there are many hundreds of creditors, it may be challenging for the IRP to verify all claims within the mandated seven days from the last date of receipt, as the IRP will be simultaneously working on a number of legal processes with pressing deadlines. In such circumstances, the endeavor should be to at least verify the financial claims received till such date so that the CoC can be constituted.

### Claim as on ICD

Regulation 13 refers to claims being verified as on the ICD. The claims relate to the debt payable to creditors before initiation of the CIRP and do not relate to any amount payable during CIRP or thereafter. Hence, liabilities incurred after the ICD should not be considered for the purpose of claim collation by the IRP/RP.

### Determination of a claim which is unliquidated or uncertain

As per regulation 14, where the amount claimed by a creditor is not precise due to any contingency or other reason, the IRP or the RP shall make the best estimate of the amount possible based on the information available with them. The IRP or the RP shall revise the amounts of claims admitted, including estimates of claims made as soon as may be practicable, when he/she comes across additional information warranting such revision.

*Committee of Creditors of Essar Steel India Limited Through Authorized Signatory Vs. Satish Kumar Gupta and Others [2019 SCC Online SC 1478]*, the Supreme Court noticed that the RP admitted the claim of certain OCs notionally at Rs. 1 on the ground that there were disputes pending before various authorities in respect of the said amounts. The AA through its judgment directed the RP to register the entire claim of the said OCs. The NCLAT in the impugned judgment upheld the order passed by the AA as aforesaid and admitted the claim of such OCs. The Supreme Court held that this part of the impugned judgment deserves to be set aside on the ground that the RP was correct in only admitting the claim at a notional value of Rs. 1 due to pending disputes with regard to these claims.

[103] <https://ibbi.gov.in/uploads/legalframework/2020-08-17-234040-pjor6-59a1b2699bbf87423a8afb5f5c2a0a85.pdf>

*Export Import Bank of India Vs. Resolution Professional JEKPL Pvt. Ltd. [Company Appeal (AT) (Insolvency) No. 304 of 2017 and 16 of 2018]* and *Axis Bank Ltd. Vs. Edu Smart Services Pvt. Ltd. [Company Appeal (AT) (Insolvency) No. 302 of 2017]*: JEKPL had given counter corporate guarantee in favor of EXIM Bank, which invoked the guarantee. The RP rejected EXIM Bank as a FC in the CIRP of JEKPL. The AA affirmed the decision of the RP. Axis Bank submitted a claim as FC in the CIRP of Edu Smart in respect of the corporate guarantee. The RP rejected the claim on the ground that the corporate guarantee cannot be invoked during moratorium under CIRP. The AA held that the claim of Axis Bank was contingent on the date of commencement of the CIRP. In appeal, the NCLAT held that default of debt has nothing to do with the claim of a person. It observed that any person who has right to claim payment, as defined under section 3(6), is supposed to file the claim whether matured or unmatured. The question as to whether there is a default or not is not to be seen and that maturity of claim or default of claim or invocation of guarantee for claiming the amount has no nexus with filing of claim pursuant to public announcement.

#### Debt in a foreign currency

As per regulation 15 of the CIRP Regulations, claims denominated in foreign currency shall be valued in Indian currency at the official exchange rate as on the ICD. The “official exchange rate” for this purpose is the reference rate published by the Reserve Bank of India or derived from such reference rates.

#### Inspection of the list of creditors

The list of creditors as prepared by the IRP must be available for inspection by all those who submitted

claims and should also be displayed on the website of the CD. It is also filed with the AA and must be presented at the first meeting of the CoC. Once the amount has been verified by the IRP or RP, a creditor may make an application to the AA, in case they have any objection with respect of the actions taken by RP relating to their claim. This objection is typically taken by filing an application before the AA under section 60(5) of the IBC.

In *Swiss Ribbons Pvt. Ltd. & Another Vs. Union of India and Others [(2019) 4 SCC 17]*, the Supreme Court delved into the role of the RP under the IBC. It held that under the CIRP Regulations, the RP has to vet and verify claims made, and ultimately, determine the amount of each claim as per regulation 10, 12, 13 and 14. It observed that from a reading of these regulations, it is clear that the RP is given administrative as opposed to quasi-judicial powers. The Supreme Court drew a distinction between roles of a RP and a Liquidator under the IBC and observed that as opposed to this, the Liquidator, in liquidation proceedings under the IBC, has to consolidate, verify, and either admit or reject such claims under sections 38 to 40 of the IBC.

It is clear from these sections that when the Liquidator determines the value of claims admitted under section 40, such determination is a decision, which is quasi-judicial in nature, and which can be appealed against to the AA under section 42 of the IBC. Unlike the Liquidator, the RP cannot act in a number of matters without the approval of the CoC under section 28 of the IBC, which can, by a two-thirds majority, replace one RP with another, in case they are unhappy with their performance. Thus, the RP is really a facilitator of the resolution process, whose administrative functions are overseen by the CoC and the AA.

Once verified, the IRP will maintain a list of creditors, comprising their names along with the amount claimed by them, the amount of the claims admitted and the security interest, if any, related to those claims, and update it. After verification of the claims, the IRP will prepare a list of creditors, constitute the CoC, and file a report to the AA along with CoC details.

When additional claims are received (after the initial 14-day period), the IRP/RP will verify and update the list of creditors and update the composition of the CoC.

#### 4.6 Constitution of the CoC

One of the duties of the IRP under section 18(c) of the IBC is to constitute the CoC. Section 21(1) provides that the IRP shall constitute a CoC after collating all claims received against the CD and determining the financial position of the CD.

Regulation 12(1) provides for an initial period for claim submission, which is 14 days from the appointment of IRP. As per regulation 13, the IRP should verify these claims within seven days from the last date of the receipt of claims. Hence, reading the aforesaid provisions together, the CoC should be constituted by the IRP after initial verification of the claims (that is, immediately after the end of the 21-day period from his appointment).

As per section 21(2) of the IBC, the CoC shall comprise all FCs (both secured and unsecured) of the CD. However, any FC (or representative of an FC) who is a “related party” of the CD and to whom a CD owes a financial debt does not have any right to participate in, be represented on, or vote in a meeting of the CoC. This is to ensure that the CD is not able to influence the decision-making process, directly or indirectly.

Related party to a CD is defined in section 5(24) of the IBC. As the definition is very broad, there can be instances where a “pure” FC becomes related to the CD due to a debt to equity conversion or substitution. Hence, section 21(2) of the IBC was amended by way of Insolvency and Bankruptcy (Amendment) Ordinance, 2018 (later replaced with the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018,<sup>[104]</sup> to clarify that this restriction does not apply to FCs who are regulated by a financial sector regulator, if the party is related solely on account of such a conversion, or substitution of debt into equity shares or instruments convertible into equity shares or completion of such transactions as may be prescribed, prior to the ICD.

Section 21(3) of the IBC provides that when the CD owes financial debts to two or more FCs as part of a consortium or agreement, each FC shall be part of the CoC and their voting share shall be determined on the basis of the financial debts owed to them.

As per section 21(4), if any person is an FC as well as an OC, they shall be an FC to the extent of the financial debt owed by the CD and shall be included in the CoC, with a voting share proportionate to the extent of financial debts owed to them. Such person shall be considered to be an OC to the extent of the operational debt owed by the CD to them. If an OC has assigned or legally transferred any operational debt to an FC, the assignee or transferee shall be considered as an OC to the extent of such assignment or legal transfer.

Regulation 16 of the CIRP Regulations<sup>[105]</sup> states that where there is no financial debt (or where all the FCs are related parties of the CD), the CoC shall be constituted with OCs only, comprising the 18 largest

[104] [https://ibbi.gov.in/webadmin/pdf/legalframework/2018/Aug/The%20Insolvency%20and%20Bankruptcy%20Code%20\(Second%20Amendment\)%20Act,%202018\\_2018-08-18%2018:40:34.pdf](https://ibbi.gov.in/webadmin/pdf/legalframework/2018/Aug/The%20Insolvency%20and%20Bankruptcy%20Code%20(Second%20Amendment)%20Act,%202018_2018-08-18%2018:40:34.pdf)

[105] <https://ibbi.gov.in/uploads/legalframework/2020-01-29-103354-eni10-24d3a39791e7ed970ddd681a984e5f07.pdf>

OCs by value. If there are fewer than 18 OCs, the CoC will include all of them. Further, one representative elected by all workers, other than any workers included in the top 18 OCs, will also be included in the CoC. In addition, one representative elected by all employees, other than the employees included in the top 18 OCs, will also be included.

A member of the CoC formed by OCs only will have voting rights in proportion to the debt due to such creditor (or the debt represented by such representative) to the total debt. A CoC formed under this regulation and its members shall have the same rights, powers, duties, and obligations as a CoC comprising FCs and its members.

#### KEY CONSIDERATION

In a CoC with only OCs, representative of both workers and employees of the CD are to be included. Section 2(s) of the Industrial Disputes Act, 1947, may be referred to, which provides the following definition of a worker:

Any person (including an apprentice) employed in any industry to do any handbook, unskilled, skilled, technical, operational, clerical, or supervisory work, for hire or reward; terms of employment may be express or implied; includes any such person who has been dismissed, discharged, or retrenched in connection with, or as a consequence of, dispute. It excludes persons employed in Army, Navy, Air Force, or police and those employed in mainly managerial or administrative, supervisory capacities and drawing wages above a certain threshold. This threshold changes from time to time.

Any person in employment of the CD who is not a worker will be an employee.

## 4.7 Holding First CoC meeting

Regulation 17 of the CIRP Regulations provides that the IRP shall file a report certifying the constitution of the CoC to the AA within two days of the verification of claims received under regulation 12(1). The IRP should hold the first meeting of the CoC within seven days of filing that report.

The CoC may, in the first meeting, by a majority vote of not less than 66% of the voting share, either resolve to appoint the IRP as RP, or replace the IRP by another RP (see section 3.2 [p97]).

#### KEY CONSIDERATION

The tenure of an IRP can be understood as follows:

Day 1: Appointment of IRP (ICD)

Day 14: Initial date for receipt of claims (14 days from the ICD)

Day 21: Initial verification of the claims by the IRP (7 days from receipt of claims)

Day 23: Filing of the report certifying the constitution of the CoC to the AA

Day 30: Holding the first meeting of the CoC — at this meeting IRP is confirmed as RP or may be replaced with a new IP appointed as an RP.

## 4.8 Monitoring the Assets and taking Custody and Control

Under section 18(d) of the IBC, the IRP is to monitor the assets of the CD and manage its operations until a RP is appointed by the CoC. As per section 18(f),

the IRP should take custody and control of assets over which the CD has ownership rights as recorded in the balance sheet of the CD, or with IU or the depository of securities or any other registry that records the ownership of assets including:

- assets over which the CD has ownership rights which may be located in a foreign country;
- assets that may or may not be in possession of the CD;
- tangible assets, whether movable or immovable;
- intangible assets, including intellectual property;
- securities, including shares held in any subsidiary of the CD, financial instruments, and insurance policies;
- assets subject to the determination of ownership by a court or authority.

In *Encore Asset Reconstruction Company Pvt. Ltd. Vs. Charu Sandeep Desai and Others [Company Appeal (AT) (Insolvency) No. 719 of 2018]*, the NCLAT held that in terms of section 18 of the IBC, it is the duty of the IRP to take control and custody of any asset over which the CD has ownership rights. Therefore, if such an asset is not in the possession of the CD, the person in possession of the same is bound to hand over the same to the RP.

The provision clarifies that the term “assets” shall not include:

- assets owned by a third party in possession of the CD held under trust or under contractual arrangements including bailment;

- assets of any Indian or foreign subsidiary of the CD; and
- such other assets as may be notified by the Central Government in consultation with any financial sector regulator.

In *Commissioner of Customs, (Preventive) West Bengal Vs. Ram Swarup Industries Ltd. and Others [Company Appeal (AT) (Ins) No. 563/2018]*, the Commissioner of Customs filed appeal against the order of the AA which allowed removal of certain machineries of the CD which were in the custody of the customs authorities. The NCLAT observed that the ownership rights of the machinery in question are of the CD and not of a third party, and that the explanation below section 18(f) and (g) is not applicable. Therefore, the RP has the right to take control and custody of any asset, though the customs authority is in possession of the same for the present. It held that during the period of moratorium, the assets of the CD cannot be alienated, transferred, or sold to a third party.

### KEY CONSIDERATION

While the shares of the CD in its subsidiary are an asset of the CD (over which custody and control may be taken), the assets of the subsidiary are excluded under section 18(f). Hence, IRP cannot take custody and control over the same under the IBC.

#### 4.9 Run the CD as a Going Concern

Under section 20 of the IBC, the IRP shall make every endeavor to protect and preserve the value of the property of the CD and manage its operations as a going concern. For this purpose, the IRP has been vested with the authority to:

- appoint accountants, legal, or other professionals as may be necessary;
- enter into contracts, or amend or modify contracts or transactions on behalf of the CD;
- raise interim finance;
- issue instructions to personnel of the CD;
- take all such actions as are necessary to keep the CD as a going concern;
- act and execute in the name and on behalf of the CD on all deeds, receipts, and other documents, if any;
- access the electronic records of the CD from relevant IUs, access the books of accounts, records, and other relevant documents of the CD available with government authorities, statutory auditors, accountants, and such other persons as may be specified.

In *Gujarat Urja Vikas Nigam Ltd. Vs. Mr. Amit Gupta [Company Appeal (AT) (Insolvency) No. 1045 of 2019]*, the Gujarat Urja Vikas Nigam Limited (GUVNL) sought to terminate the Power Purchase Agreement between GUVNL and the CD on the grounds of commencement of CIRP of the CD. The AA held that such termination is not possible on account of section 238 of the IBC. In appeal, the NCLAT held that taking into consideration the nature of the case, it is of the view that to keep the CD a going concern, which is generating electricity and supplying only to GUVNL, the AA rightly asked GUVNL not to terminate the Power Purchase Agreement. NCLAT made it clear that GUVNL as purchaser of the electricity cannot terminate the Power Purchase Agreement solely on the ground that the CIRP has been initiated against the CD which is generating electricity and supplying it and there is no default in supplying.

In *M/s Embassy Property Developments Pvt. Ltd. Vs. State of Karnataka and Others [2019 SCC Online SC 1542]*, one of the issues before the Supreme Court was whether the AA had the power under the IBC to review the order passed by the Government of Karnataka during the moratorium period, rejecting the auto-extension of a mining lease granted by it to the CD. One of the arguments raised was that the IRP is entitled to move the AA for appropriate orders, on the basis that lease is a property right and AA has jurisdiction under section 60(5) to entertain any claim by the CD. The Supreme Court observed that the said argument cannot be sustained for the simple reason that the duties of a RP are entirely different from the jurisdiction and powers of the AA. In fact, section 20(1) cannot be read in isolation, but has to be read in conjunction with section 18(f)(vi) of the IBC together with the Explanation thereunder (section 18(f)(vi)) provides for taking take control and custody of any asset over which the CD has ownership rights including assets subject to the determination of ownership by a court or authority and as per the Explanation, the term “assets” shall not include third party assets).

The court held that if the AA has been conferred with jurisdiction to decide all types of claims to property of the CD, section 18(f)(vi) would not have made the task of the IRP in taking control and custody of an asset over which the CD has ownership rights subject to the determination of ownership by a court

or other authority. In fact, an asset owned by a third party but which is in the possession of the CD under contractual arrangements, is specifically kept out of the definition of the term “assets” under the Explanation to section 18. This assumes significance in view of the language used in sections 18 and 25 in contrast to the language employed in section 20. Section 18 mentions the duties of the IRP and section 25 addresses the duties of the RP. These two provisions use the word “assets”, while section 20(1) uses the word “property” together with the word “value.” Sections 18 and 25 do not use the expression “property.”

Another important aspect is that under section 25(2)(b) of the IBC, the RP is obliged to represent and act on behalf of the CD with third parties and exercise rights for the benefit of the CD in judicial, quasi-judicial, and arbitration proceedings. This shows that wherever the CD has to exercise rights in judicial or quasi-judicial proceedings, the RP cannot short-circuit the same and bring a claim before the NCLT taking advantage of section 60(5).

#### 4.10 Raising Interim Finance

The expression “interim finance” is defined in section 5(15) of the IBC as any financial debt raised by an IRP or RP during the CIRP period and such other debt as may be notified. The IBC allows an IRP/RP to raise interim finance in order to protect and preserve the value of the property of the CD and manage its operations as a going concern. Interim finance is a very useful device for the effective reorganization of a CD.

Under section 20(2)(c) of the IBC, the IRP has the power to raise interim finance, provided that no security interest is created over any encumbered property without the prior consent of a relevant secured creditor (unless the value of such property is not less than the amount equivalent to twice the amount of the debt). At this stage, the CoC has not been appointed. With no CoC, the responsibility of the IRP assumes significance and he/she must make a careful assessment of the funds required.

Once the CoC is in place, section 25 of the IBC permits the RP to raise any interim finance, provided that, under section 28 of the IBC, consent is obtained from the CoC for raising any interim finance in excess of the amount decided by the CoC or to create any security interest over the assets of the CD. This means

that the RP has the right to raise interim finance provided that the finance raised is below the monetary threshold set by the CoC, and in case the finance is secured, approval of CoC is taken for the creation of the security interest.

Interim finance and the cost of raising it forms part of insolvency resolution process costs (CIRP Costs). Section 30(2) of the IBC provides that a resolution plan must provide for payment of insolvency resolution process costs in priority to any other creditors. Therefore, payment towards interim finance, including principal and interest and the costs of raising it, gets the highest priority in a resolution plan. Since interim finance forms part of the CIRP costs, its payment is *pari passu* to other such costs; for example, the fees due to the IRP or RP.

Similarly, during liquidation, the distribution waterfall under section 53 of the IBC provides for the highest priority to be given to CIRP costs along with liquidation costs, which must be paid out of the liquidation estate. Regulation 2(1)(ea) defines liquidation costs to include interest on interim finance for a period of 12 months or for the period from the liquidation commencement date till repayment of interim finance, whichever is lower.

In many cases, interim finance may be required by the IRP or the RP to run the business of the CD as a going concern as the available funds may not be sufficient. However, despite the priority given to interim finance by the IBC, existing lenders have been reluctant to provide interim finance. If an external lender is ready to provide interim finance, the arrangement still must be approved by the CoC, and that has not been an easy process.

There can be other practical difficulties in raising interim finance for a CD, as either limited funding is available for stressed companies, or it is available at a very high interest rate which would not be feasible for the CD and may not be approved by the CoC. Further, the new lenders may require security over the CD's assets which may not be approved by the CoC.

The members of the CoC may also hesitate to give interim finance to the CD owing to higher provisioning requirement with respect to the same and a generally prevailing risk-averse approach to lending.

#### 4.11 Ensuring Compliance

In a circular issued on January 3, 2018,<sup>[106]</sup> the IBBI clarified that the IRP/RP shall be responsible for complying with the requirements under any law for the time being in force on behalf of the CD (see Module 1). The IRP/RP should exercise reasonable care and diligence and take all necessary steps to ensure that the CD complies with the applicable laws. If the CD suffers any loss, including penalty during the CIRP on account of any non-compliance, such loss shall not form part of insolvency resolution process cost and the IRP/RP will be responsible for the non-compliance if it is due to their conduct.

This was further reinforced when section 17 of the IBC was amended in June 2018 to provide that the IRP shall

be responsible for complying with the requirements under any law for the time being in force on behalf of the CD.

There may be practical challenges in complying with these provisions, especially where there is lack of cooperation from the erstwhile management of the CD or where documents or information is not available with the IRP/RP. In such a case, IRP/RP may file an application to the AA seeking appropriate directions under section 19(1) of the IBC (see section 6 [p112]).

#### 4.12 Preservation of Records

Regulation 39A of the CIRP Regulations provides that the IRP/RP shall preserve a physical as well as an electronic copy of the records relating to the CIRP of the CD as per the record retention schedule as may be communicated by the IBBI in consultation with IPAs.

### 5. IRP Fee

Often, the CD does not have the funds to even meet the expenses incurred on or by the IRP. Regulation 33 of the CIRP Regulations provides that the applicant (that is, the FC, OC, or corporate applicant who has filed the application for initiation of the CIRP) shall fix the expenses to be incurred on or by the IRP. In case the applicant has not fixed the same, the AA shall fix the expenses. The applicant shall bear the expenses of the IRP, which shall be reimbursed by the CoC, to the extent it ratifies them. The amount ratified by the CoC shall be treated as “insolvency resolution process costs.”

As per the Explanation to regulation 33, “expenses” of the IRP include the fee to be paid to the IRP, the fee to be paid to IPE, if any, and the fee to be paid to professionals, if any, and other expenses incurred by the IRP.

[106] [https://ibbi.gov.in/webadmin/pdf/legalframework/2018/Jan/CIRP%202\\_2018-01-03%2018:42:00.pdf](https://ibbi.gov.in/webadmin/pdf/legalframework/2018/Jan/CIRP%202_2018-01-03%2018:42:00.pdf)

In *State Bank of India Vs. SKC Retails Ltd. Through IRP and Another [Company Appeal (AT) (Insolvency) No. 08 & 43 of 2018]*, the NCLAT held that the applicant who filed the application under sections 7 or 9 of the IBC shall be liable for the expenses of the IRP. Thereafter, the applicant will get the amount reimbursed by the CoC to the extent the amount is ratified by the CoC.

In *S3 Electricals and Electronics Private Limited Vs. Brian Lau and Another [Civil Appeal No. 103/2018 with Civil Appeal No. 835/2018]*, On the matter getting settled between the parties, the NCLAT closed the proceedings and directed that the AA shall fix the fee of the IRP for the period he has worked and that it shall be borne by the CD. While noting the provisions of regulation 33 of the CIRP Regulations, the Supreme Court held that a bare reading of regulation 33(3) indicates that the applicant is to bear expenses incurred by the RP, which shall then be reimbursed by the CoC to the extent such expenses are ratified. In this case, no CoC was ever appointed as the interim resolution process did not reach that stage. In these circumstances, it is clear that whatever the AA fixes as expenses will be borne by the creditor who moved the application.

With respect to the fee and other expenses incurred by an IP, the Code of Conduct for the IPs contained under the First Schedule to the IP Regulations<sup>[107]</sup> states that “the fee quoted by insolvency professionals should be reasonable, commensurate with the work to be handled.” Further, the IBBI has issued the Cost Circular<sup>[108]</sup> stating that the responsibilities of an IP require the highest level of professional excellence, dexterity, and integrity. An IP is obliged under section 208(2)(a) of the IBC to take reasonable care and diligence while performing their duties, including incurring expenses. In view of that, the IP needs to be compensated for their professional services commensurate to their ability, duties, and responsibilities. The IP must, therefore, ensure that not only is the fee payable to him/her reasonable, but that other expenses incurred by him/her are reasonable. What is reasonable is context specific and not amenable to a precise definition.<sup>[109]</sup>

In *Sbri Krishna Rail Engineers Private Limited Vs. Madhucon Projects Limited [CP(IB) SR No. 4322/9/HDB/2017]*, it was held by the AA that the total outstanding debt amount from the CD was only Rs. 4.16 crores. The remuneration for the Managing Director and CEO and two fulltime directors totaled Rs. 1.10 crores per year. The IRP worked for a proposed fee of Rs. 14.00 crore approximately (excluding incidental expenses). The AA observed that remuneration quoted by the IRP in this matter was quite exorbitant. Accordingly, it referred the matter to the IBBI for it to take appropriate action against the proposed IRP, including disciplinary action, as deemed fit.

Regulation 34A of the CIRP Regulations provides, among other things, that the IRP shall disclose itemized CIRP costs in such manner as may be required by the IBBI. The manner of the disclosure is provided in the Cost Circular.

[107] <https://ibbi.gov.in/uploads/legalframework/f3f-8276285c27f2386cd2a4f19cad213.pdf>

[108] [https://www.ibbi.gov.in/webadmin/pdf/whatsnew/2018/Jun/Circular%20on%20Fee%20and%20other%20Expenses%20incurred%20for%20CIRP%20\[June%202018\]\\_2018-06-18%2014:06:58.pdf](https://www.ibbi.gov.in/webadmin/pdf/whatsnew/2018/Jun/Circular%20on%20Fee%20and%20other%20Expenses%20incurred%20for%20CIRP%20[June%202018]_2018-06-18%2014:06:58.pdf)

[109] Ibid.

## 6. Duty to Cooperate — Section 19

In some cases, the promoters and directors of the CD are reluctant to cooperate with the RP and his/her team. Where the former management is influential, such reluctance can filter down to employee and worker groups. On some occasions, IRPs/RPs have not been granted access to the premises of the CD and information has been kept from them. This can create a hostile environment for the IRP/RP to work in.

Section 19 is an important tool in the hands of the IRP and RP in such circumstances. It sets out a statutory mandate for cooperation with the IRP and RP. It states that the personnel of the CD, its promoters, or any other person associated with its management shall extend all assistance and cooperation to the IRP (and RP) as may be required by him/her in managing the affairs of the CD.

If any personnel of the CD, its promoter, or any other person required to assist or cooperate with the IRP or RP does not provide such assistance or cooperation, the IRP or RP can make an application to the AA for necessary directions under section 19(2) of the IBC. The AA can, under section 19(3), by an order, direct the former management (and anyone else associated with the management of the CD) to comply with the instructions of the IRP/RP and cooperate with him/her

in the collection of information and management of the CD. Where a person who does not cooperate with the IRP/RP, the IBBI and the Central Government are empowered under section 236 of the IBC to prosecute them.

Further, under regulation 30 of the CIRP Regulations, the IRP or RP can make an application to the AA for an order seeking the assistance of the local district administration in discharging their duties under the IBC or CIRP Regulations.

In addition, section 429 of the Companies Act, 2013, provides that the NCLT can, in any proceedings under the IBC, in order to take into custody or under its control all property, books of account, or other documents, request, in writing, the Chief Metropolitan Magistrate, Chief Judicial Magistrate, or the District Collector within whose jurisdiction any such property, books of account, or other documents of the corporate person are situated or found, to take possession of them.<sup>[110]</sup> On such a request being made, the Chief Metropolitan Magistrate, Chief Judicial Magistrate, or the District Collector, shall take possession of such property, books of account, or other documents and entrust them to the NCLT or other persons authorized by it. In many cases, the AA has passed orders under this section, directing the relevant authorities to assist the IRP/RP in taking possession of the assets or documents of the CD.

In *Ajay Kumar Vs. Shree Sai Industries Private Limited and Another [Company Appeal (AT) (Insolvency) No. 616 of 2019]*, the RP submitted to the NCLAT that he was unable to take effective control of the CD due to lack of cooperation from the promoters of the CD, due to which an order of liquidation had to be passed against the CD. The NCLAT, while setting aside the liquidation order, held that the CIRP of the CD would proceed from the stage of preparation of the IM. The NCLAT also held that if the promoters continued to not cooperate with the RP in handing over the necessary documents and information, the AA would obtain the assistance of the Superintendent of Police of the concerned area to ensure that the possession of the CD and all necessary records are handed over to the RP.

[110] <http://ebook.mca.gov.in/default.aspx>

In *Syndicate Bank Vs. Him Steel Private Limited [Company Petition (IB) 494 (PB)/2019]*, the RP filed an application under section 19(2) of the IBC as the promoters and directors of the CD were not inclined to provide the records of the CD. The AA, exercising its jurisdiction provided under section 429 of the Companies Act, 2013, directed the police commissioner of the area to provide assistance to the RP in extracting records from the promoters and directors of the CD.

The IBC is an evolving legislation and employees at various levels or in government departments may not fully understand it. Furthermore, some key managerial personnel (KMPs) or promoters may attempt to influence employees. The employees of the CD may not have been paid their salaries or allowances for a significant period of time. Hence, the IRP/RP has to tread cautiously, as any move against the employees or KMPs can lead to, for example, resignations and further non-cooperation, making it tougher for the professional to operate.

The preferred option is to negotiate and open lines of communication with key workers and unions, encouraging them to cooperate. Encouraging employees to act as a team and to work with the IP is a positive and useful approach. Regular mediation, wherever possible, can also help to foster an atmosphere of cooperation.

In any question concerning the extent of cooperation by a director or senior employee, section 19 is one of the most effective solutions, but the IRPs/RPs should be aware of the cost of such actions and the diplomacy of the alternative of negotiation.

## 7. Checklist of Initial Actions

The IRP would be well advised to prepare a checklist of tasks to be completed, including a checklist for Day One of his role as an IRP.

On Day One, after obtaining the certified copy of the order appointing him as the IRP, the IRP along

with his team should visit the premises of the CD. The premises should not only be the registered office but also any other corporate or manufacturing office. Where manufacturing office is not in the same location/region as the IP, the IP should plan to visit it as soon as possible.

The initial actions that should be undertaken by the IRP are:

### 7.1 Contact the management

The IRP should contact the directors and management team of the CD and inform them of the order appointing him as the IRP. The IRP should also inform them and the chief employees of the CD of suspension of powers of the CD's board of directors and vesting of management powers in him. Wherever possible, the IRP should also take the list of assets from the directors of the CD on Day One to ascertain any possible risk or threat to those assets.

### 7.2 Physical Control and Verification of the CD's Assets

The IRP should conduct a physical verification of the assets of the CD and take measures to carry out an inventory count as far as possible. Assets may also be photographed as a documentary proof of possession. While taking physical control, the IRP should also consider the security of books and records, taking all possible steps to safeguard them.

### 7.3 Passwords and Codes

The IRP should obtain all passwords and codes for computer systems, servers, back-up systems, the website, and online security details. Also, back-ups of all information on the computer system should be made.

### 7.4 Public Announcement

IRP should make the public announcement in prescribed form within three days of being appointed, in accordance with the provisions of the IBC and CIRP Regulations (see section 4.3 [p99]). Since the announcement is required to be published at the location of the Registered Office and principal office and any other location where, in the opinion of the IRP, the CD conducts business operations, details of the key places where the where CD operates should be sought. The IRP should also evaluate which newspapers to choose for making an announcement. There may also be a need to negotiate with an appropriate agency and shortlist them for the public announcement. IRP must ensure that a copy of the public announcement is displayed on the website of the CD and the IBBI. The IRP should conspicuously paste a copy of the public announcement at a prominent place on the outdoor of each asset/property of the CD.

### 7.5 Make Disclosures

The IRP should, at the time of appointment and thereafter, make full disclosures under the IBC of his 'relationship' with various stakeholders as well as ensure disclosure to them of the relationship of other professionals appointed by him, in accordance with times prescribed by the Relationship Circular (refer to Module 1).

### 7.6 Initial Understanding of the CD

The IRP is required to run the CD as a going concern. Therefore, it is essential to study the potential risks involved in doing so. This assessment will include an analysis of current finances and cash availability, the employee base, the viability of operations, the order book, and resource planning. As a matter of practice, IRP should obtain and review:

- the CD's audited financial statements;
- pending litigation of the CD;
- income tax and other statutory notices;
- CIBIL report (if available);
- loan documents;
- books and records of the CD, including bank statements and records;
- licenses and permits necessary for the functioning of the operation;
- environmental, health and safety and fire safety documentation.

Most importantly, the IRP should evaluate details of any external professional expertise that may be required by him/her on Day One. For example, an interim Company Operating Officer, legal adviser, or accountant. He/she should also get an understanding of his and his team's traveling requirements for the assignment.

### 7.7 Collecting Information

The IRP should collect information about the CD. The information available to IRPs will vary from case to case, depending on the quality and completeness of the CD's books and records and cooperation of the key

managerial staff. However, as best practice, the IRP, should ensure that the following information about the CD is obtained and considered:

- size and nature of its operations (one site, multi-site, shared premises, etc.);
- size of the business of the CD and its range;
- status of the premises from which CD operates (including access, security, and ownership);
- corporate and group structure of the CD, its promoters and directors, key managerial staff, managers, and those responsible for its governance and business activities;
- outstanding and ongoing litigation issues;
- recent financial performance;
- accounts, seeking the last three years' records and any auditors' reports;
- recent media coverage;
- the CD's brand and reputation;
- stock (ensure it is counted, insured, and secured);
- key suppliers (What amounts are due to them? What is the relationship with them?);
- main customers and contracts (Any deposits held?);
- utility suppliers (Are they paid up to date?);
- IT and website (especially if the business is also being conducted online);
- employees and unions (What is the position regarding wage arrears? Who are the key workers and employees? Is there a union in place? Are there any pending industrial disputes?);
- the whereabouts of CD's books and records in whatever form (ensure that they are secured);
- assets and inventory, including equipment and vehicles;
- download information from the IUs (take steps to create a data room, if required);
- prior transactions and disposals by the officers of the CD, or the conduct of any person involved with it, and assess whether these could give rise to an action for recovery under the relevant legislation.

During the initial investigations, the IRP may come across possible threats to the fundamental principles of the Code of Conduct or uncover information illustrating that the CD has siphoned off assets or entered into preferential or undervalued transactions. If so, the IRP should immediately, after familiarizing themselves with the said facts, notify the CoC and file appropriate applications before the AA.

## 7.8 Meetings with Stakeholders and Devising a Practical Communication Strategy

A suitable communication plan should be drawn up for sharing with key stakeholders based on an initial assessment and discussions, the size and complexity of the operation, and independent research, and in anticipation of any possible disruption in running the CD as a going concern. The plan should include:

- an announcement to the various stakeholders interested and involved in the intervention, including FCs, OCs, employees, directors, trade unions, statutory authorities, customers, regulators.
- different modes of communication (including in written format, delivered on a one-to-one

basis, presented to a group as part of a “Town Hall”).

- the timing of the communication (for example, on the order date or within seven days of the order).
- message content tailored to specific audiences (it may contain, for example, order details, the IBC process, information about the moratorium, suspension of the board of directors, and the role of the insolvency professional, the key contact points during the CIRP, how the process may impact each person).
- specify who will deliver the message (for example, will this be done solely by the IRP or together with the management?).

One of the most important things to be done by the IRP is to announce him/herself and explain their role and the implications of the IBC. This could be achieved by calling meetings with “key players” during the first few days in office. Meetings should be called particularly with:

- directors, promoters, and the senior management team, requiring them to bring with them books, records, and documentation to inform the conversation;
- accountants of the CD and key members of the finance department;
- lawyers of the CD handling its cases prior to CIRP;
- the landlord or his representatives (in case the assets of the CD have been leased);
- other agents who have worked with the CD or its management team, giving advice or lending expertise;

- employee and union representatives;
- key suppliers of the CD;
- representatives of the lead bank, other lenders, and financial institution maintaining accounts of the CD;
- critical OCs.

## 7.9 Changing Bank Accounts Details

The IRP should, as soon as possible after his/her appointment, obtain details of the financial institutions that are maintaining accounts of the CD and inform them of commencement of CIRP of the CD and appointment of the IRP. The IRP should also immediately give instructions for stopping payment from the account without the authority of the IRP and also change the details of the signatories of the accounts so as to take control of the accounts. Where required, a new account may be opened.

## 7.10 Additional Security

An assessment must be made as to whether there is a requirement for additional security or the need to change the existing security on Day One to protect the value of the physical assets of the CD as well as the safety of the IRP and his/her team.

Is there any threat to the stock or other assets of the CD? Has there been a claim that the stock is being reclaimed under a right to retention? Has any company property disappeared in the run-up to the initiation of proceedings? In case the IRP perceives any risk regarding unauthorized movement of goods or unauthorized access to CD’s premises, CCTV cameras may be installed to monitor these.

### 7.11 Social Media Accounts

The IRP should establish whether the CD has any social media accounts, such as Facebook, Twitter, and LinkedIn. Such accounts can offer a valuable insight into the senior management and directors of the company.

### 7.12 Support of the Creditors

The IRP should also understand the relationship the creditors have with the CD to get a sense of the level of support that may be offered. This is especially the case if the OC is a key supplier whose cooperation and understanding may be essential to the survival and potential prosperity of the business.

### 7.13 Obtain Information by Questionnaires

It is important for the IRP to collect as much information as possible about the FCs, the total debt of the CD, any security interest created, a record of defaults, and any recent restructuring conducted by the banks, lenders, and investors.

One of the most important initial objectives of an IRP is to acquire an insight into the reasons for the CD becoming insolvent and entering into a CIRP. Equally, it is essential to quickly understand if there are issues relating to licensing or permits to operate and contact the relevant bodies and authorities as quickly as possible if issues need to be resolved.

They must also consider any environmental, health and safety or fire safety issues. Will the operation of the business be smooth while transitioning from being run by the former board to being managed by the IRP/RP? Are licenses and permits under threat? Does emergency action need to be taken to comply with applicable laws and regulations?

### 7.14 Industry-Specific Data

The IRP must become familiar with the issues relating to the sector or industry in which the CD operates. Talking with the staff at all levels in the business, answering their questions, and conducting a ‘walk around’ the site can be invaluable. The relationship of the IRP with the staff is one of the most important aspects of their role. Time spent with them will be well rewarded.

Talking to the creditors will help the IRP gain an insight into the CD’s operations and the sector in which it does business, as will opening conversations with similar business owners, associations, and bodies.

### 7.15 Manpower and Resources Requirements

The IRP should assess the organizational structure of the CD, identifying the key positions and those responsible for taking up these positions during the CIRP. The IRP assumes the role of the board of directors and can hire and fire any employee. It is wise to take time to assimilate the important positions within the business and assess who occupies them. In particular, the IRP should assess:

- existing organizational structure of the CD, the relationship of management team and key personnel with promoters and the need for maintaining relationships with management;
- the kind of support to be expected from the executive management, senior employees, and other support services, like security, operations, and human resources;
- the complexity and size of the company, particularly if it is a multi-site organisation;

- any gaps in manpower that need to be reassessed;
- the need for a domain expert;
- the need for a financial team;
- the requirement, if any, for administrative and operations staff (based on language, competence, skill base, experience, and location);
- existing key personnel (Are they being paid regularly? Will they agree to stay with the CD? Is it a question of negotiating new terms of employment?).

The IRP should also be aware of the aptitude of the management of the company, choosing to recruit new talent where necessary and employ people to fill gaps.

## 7.16 The Management Structure and Approval Matrix

The IRP must draw up a revised organisation chart, clarifying the reporting structure and approval matrix for various functions across the CD. This should be clear enough to demarcate reporting lines and the revised hierarchical structure. The IRP may consider issuing instructions to heads of departments, making clear the day-to-day functions each of them have and on which matters they need to seek the consent of the IRP.

## 7.17 Running the CD as a Going Concern

The IRP should understand who the key suppliers of the CD are and what needs to be done to ensure they maintain their relationship with the CD. At the beginning of the CIRP, the IRP should review and evaluate leases, transactions entered into by the CD

before the process began, and the CD's key commercial contracts.

The IRP should also appoint experts, including technical experts or other professionals who can work with them to ensure the smooth functioning of the CD. On appointment, and for the first two weeks or so in office, the IRP should evaluate and assess the cash flow of the CD. This will assist in the decision-making process about raising potential interim finance.

## 7.18 Monitor Compliances

Since the IRP would be responsible for ensuring compliance with applicable laws on behalf of the CD, from Day One he/she should bear in mind the requirement for legal compliance.

The IRP should identify the key officers (such as a Compliance Officer, a Company Secretary, or In-house Counsels) who would typically be responsible for undertaking and monitoring compliances for the CD and have a discussion with them. The IRP should immediately investigate any compliances, permits, licenses, and authorities that need to be complied with or any permits or licenses which need to be renewed. When investigating the position relating to the CD's compliances, the IRP should make enquiries from the promoters, directors, and senior employees, statutory auditors and legal advisers by sending questionnaires and/or interviewing them, as appropriate.

Appropriate steps must be taken to assess all compliances required to be made and, if necessary, appoint professionals, including legal advisers, the company secretary, or chartered accountants to ensure this happens. Adequate steps should be taken to document all assessments and investigations, including any conclusion that no further investigations are required regarding the compliances of the CD.<sup>[111]</sup>

[111] [www.insolindia.com/uploads\\_insol/draft\\_best\\_practices/files/-1009.pdf](http://www.insolindia.com/uploads_insol/draft_best_practices/files/-1009.pdf)

### 7.19 Monitor Legal Proceedings

The IRP/RP should assess various suits/legal/arbitral proceedings pending against the CD and seek assistance of the In-house Counsel of the CD (if any) as well as legal advisors who were advising CD in these suits/legal proceedings. The relevant courts/tribunals should be notified about the CIRP and appointment of the IRP and the IRP should take appropriate steps to ensure that all suits/legal proceedings against the CD are stayed under the moratorium. However, an evaluation should be undertaken regarding continuation of suits/legal/arbitral proceedings that have been filed by the CD or that are for the benefit of the CD.

### 7.20 Crisis Management

Crisis management is the process by which an organisation deals with a disruptive and unexpected event that threatens to harm it, its stakeholders, or the general public. An IP should have an effective crisis response plan ready to deal with all eventualities. The plan should have the following elements:

- It should represent a broad range of potential situations that the organisation could face. Examples include infrastructure failure (such as power grid outage coupled with extreme heat, loss of Internet connection or telephone lines, disruption of water supply).
- A flexible set of response modules. This is important because, in reality, the crisis rarely matches planning scenarios. If response options are not flexible and modularized, novel events or combinations of such can yield ineffective or “brittle” responses.

- A designated chain of command is extremely important as an emerging crisis demands a rapid centralized response and requires an absolutely clear line of command. It also means that a core crisis response team should be working with the IRP.
- Back-up resources. There should be stock that can be used, if necessary.
- The IRP should negotiate agreements with external parties to provide specific resources in times of crisis; for example, augmented private security.

### 7.21 Maintain Records

The IRP is advised to maintain a record of all the decisions taken by him/her during the course of his/her tenure, including steps taken during the CIRP, the legal and other advice obtained, the inventory of assets prepared, conclusions reached and the reasons for the same.

In addition, memorandum of takeover of records should be compiled. Any visits to the premises should also be clearly documented. All takeover of documents should be indexed and properly identified.

**DAY ONE CHECKLIST**

- (1) Obtain the certified copy of the order passed by the AA.
- (2) Contact the management and inform them about the admission order, including provisions of section 17.
- (3) Check the CD's website and download the financial and other information of the CD from the website of the Ministry of Corporate Affairs, Government of India.
- (4) Visit the Registered Office of the CD, as well as any other offices where CD carries on business.
- (5) Obtain details of the CD's bank accounts and inform the relevant banks not to allow any debit till further instructions are given.
- (6) Prepare structured questionnaires and circulate to stakeholders, such as members of the suspended board, creditors, and auditors.
- (7) Understand where the books and records of the CD are maintained and take these into his/her possession.
- (8) Inform banks, the Registrar of Companies, other statutory authorities and departments about initiation of the CIRP of the CD.
- (9) In case the CD is a listed company, inform the relevant stock exchanges in accordance with the SEBI's Listing of Obligations and Disclosure Requirements Regulations.
- (10) Prepare a timeline chart as per the model timelines in Regulation 40A of the CIRP Regulations and chart the action plan for the next few days.



## Module 4: Committee of Creditors and the Resolution Professional

## 1. Introduction

The CoC is the most important business decision-making body in every CIRP. It exercises its commercial wisdom and plays a fundamental role in the turnaround and restructuring of the CD within the timelines set down by the IBC. Most importantly, the CoC is vested with the responsibility to assess the viability of the CD and determine the manner in which its distress is to be resolved.

The CoC is uniquely positioned to support and facilitate the discharge of duties by the RP. Members of the CoC support and help the RP in maximizing the value of the assets of the CD by discharging their own duties with alacrity.

As provided in section 21(1) of the IBC,<sup>[112]</sup> the IRP shall, after collating claims received against the CD

and determining its financial position, constitute a CoC. Once the CoC is constituted, it may, in its first meeting, either resolve to let the IRP continue as the RP or appoint another IP as the RP.

The role and functions of the RP are also elaborated in the IBC and CIRP Regulations.<sup>[113]</sup> Section 23(2) of the IBC states that the RP shall exercise powers and perform duties vested in or conferred on the IRP under the IBC. The RP is also tasked with additional functions under the IBC and CIRP Regulations. One of the most important tasks of the RP is to oversee the process of receipt, approval, and submission of the resolution plan for the CD. However, the ultimate authority to approve or reject the resolution plan is the CoC. Hence, the RP primarily discharges administrative functions and works in accordance with the provisions of the IBC and the applicable regulations made by the IBBI, for the overall benefit of every stakeholder, including the CoC.

In *Municipal Corporation of Greater Mumbai (MCGM) Vs. Abhilash Lal and Others [(2019) SCC Online SC 1479]*, the Supreme Court observed that:

On admission of an insolvency application filed by a financial creditor/operational creditor, a moratorium is declared on the continuation and initiation of all legal proceedings against the debtor. The NCLT appoints an IRP. The moratorium operates till the completion of the insolvency resolution process, which, by law, should be completed within a mandated time frame. During the moratorium period, the debtor cannot transfer, encumber, or sell any asset. On appointment of an IRP, the board of directors is suspended and management vests with the IRP. These professionals (IRPs) have to conduct the insolvency resolution process, take over the assets and management of the company, assist creditors in collecting information, and manage the insolvency resolution process. The term of the IRP continues until an RP is appointed under section 22. The IRP has to first determine the debtor's financial position by collecting information on assets, finances, and operations. Information may include data relating to operations, payments, assets, and liabilities. The IRP also has to receive and collate claims submitted by creditors.

The IRP selected by the NCLT has to constitute a CoC comprising all the financial creditors of the corporate debtor. This provision is aimed at creditors adopting a collective approach toward insolvency resolution

[112] <https://ibbi.gov.in/uploads/legalframework/bb54a1ddf9a7cd75ab-18b566a83c6370.pdf>

[113] <https://ibbi.gov.in/uploads/legalframework/2020-08-17-234040-pjor6-59a1b2699bbf87423a8afb5f5c2a0a85.pdf>

instead of proceeding individually. Key decisions of the process and the resolution plan are approved by the CoC if it is satisfied that the provisions of the most acceptable plan would ensure that their dues are cleared.

The IBC is principally aimed at aiding a CD in the resolution of its insolvency condition without approaching liquidation. The key to this process is the finalization of an insolvency resolution plan. A suitably structured plan would provide for the repayment of the debtor's outstanding liabilities after evaluating its financial worth, while ensuring its survival as a going concern. The resolution plan must necessarily provide for the repayment of the debt of operational creditors in a manner such that it shall not be less than the amounts that would be due should the debtor be liquidated per section 30(2) of the IBC. In addition, the plan should identify the manner of repaying insolvency resolution costs, as well as implementing and supervising the strategy, and should be in compliance with the law. If the terms (including the terms of repayment) under the resolution plan are approved by the CoC, it has to be further approved by the NCLT, which is the Adjudicating Authority.

## 2. Composition of the CoC

As discussed in Module 3, per section 21 of the IBC, the CoC shall comprise all FCs (both secured and unsecured) of the CD. However, any FC (or a representative of the FC) who is a “related party” of the CD and to whom a CD owes a financial debt does not have any right to participate in, be represented on, or vote in a meeting of the CoC.

Where the CD owes financial debts to two or more FCs as part of a consortium or agreement, each FC shall be part of the CoC and their voting share is determined on the basis of the financial debts owed to them.

Where there is no financial debt (or where all FCs are related parties of the CD), the CoC consists of OCs only, comprising: the 18 largest OCs by value, one representative elected by all workmen and one representative of employees.

Regulation 16B provides that where the CD has only creditors in a class and no other FC eligible to join the CoC, the CoC shall consist of only the ARs (discussed below).

## 3. Representation of the FC

### 3.1 Consortium: Section 21(6)

Where the financial debt is extended as part of a consortium arrangement or syndicated facility and the terms provide for a single trustee or agent to act on behalf of all FCs, each FC may:

- Authorize the trustee/agent to act on its behalf to the extent of its voting share;
- Represent it on the CoC to the extent of its voting share;
- Appoint an IP (other than the RP) at its own cost to represent it on the CoC to the extent of its voting share; or
- Exercise its right to vote to the extent of its voting share with one or more FCs jointly or severally.

### 3.2 Class of Creditors: Section 21(6A)

This section was inserted by way of the Insolvency and Bankruptcy (Amendment) Ordinance, 2018 (later replaced by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018<sup>[114]</sup>), to address the challenges of representing certain types of FCs. The section envisages three types of representatives for FCs:

- Where a financial debt is in the form of securities or deposits and the terms of the debt provide for the appointment of a trustee/agent to act as an authorized representative (AR) for all the FCs, this trustee/agent can act for them.
- If a financial debt is owed to a class of creditors exceeding a specified number (other than that described above, or covered under section 21(6)), an AR is appointed by the AA to represent the class. In Module 3, the process to appoint an AR for a class of creditors was discussed. This appointment is made by the AA, on application by the IRP, prior to the first CoC meeting.
- Where the financial debt is represented by a guardian, executor, or administrator, that person will be their representative.

Such AR shall attend the meetings of the CoC and vote on behalf of each FC to the extent of his voting share.

### 3.3 Individual Creditor: Section 24(5)

This subsection of the IBC stipulates that any creditor who is a member of the CoC may appoint an IP other than the RP to represent them at a meeting of the CoC. The fees payable to an IP representing an individual creditor will be borne by such creditor.

[114] [https://ibbi.gov.in/webadmin/pdf/legalframework/2018/Aug/The%20Insolvency%20and%20Bankruptcy%20Code%20\(Second%20Amendment\)%20Act,%202018\\_2018-08-18%2018:40:34.pdf](https://ibbi.gov.in/webadmin/pdf/legalframework/2018/Aug/The%20Insolvency%20and%20Bankruptcy%20Code%20(Second%20Amendment)%20Act,%202018_2018-08-18%2018:40:34.pdf)

### 3.4 Role and Responsibilities of ARs

ARs are the agents/trustees of the creditors/class of creditors they represent and must act in accordance with their instructions.

The role, responsibilities, and rights of the AR (under section 21(6), section 21(6A), or section 24(5)) are set out in section 25A of the IBC, which was inserted by way of the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018<sup>[115]</sup>.

These are:

- the right to participate and vote in meetings of the CoC on behalf of the FCs he represents in accordance with the prior voting instructions of such FCs obtained through physical or electronic means;
- the duty to circulate the agenda and minutes of the CoC meeting to the FCs he represents;
- the duty to not act against the interests of the FCs he represents and always act in accordance with their prior instructions;
- the duty to file with the CoC any voting instructions received by way of physical or electronic means from the FCs he represents
- the duty to ensure that the appropriate voting instructions of the FCs he represents are correctly recorded by the IRP or RP.

As far as voting by an AR is concerned, section 25A(3) provides that if the AR represents several FCs, he shall cast his vote on behalf of each FC in accordance with instructions received from each FC, to the extent of his voting share. If any FC does not give prior instructions through physical or electronic means, the AR shall abstain from voting on behalf of these creditors.

[115] [https://ibbi.gov.in/webadmin/pdf/legalframework/2018/Aug/The%20Insolvency%20and%20Bankruptcy%20Code%20\(Second%20Amendment\)%20Act,%202018\\_2018-08-18%2018:40:34.pdf](https://ibbi.gov.in/webadmin/pdf/legalframework/2018/Aug/The%20Insolvency%20and%20Bankruptcy%20Code%20(Second%20Amendment)%20Act,%202018_2018-08-18%2018:40:34.pdf)

However, the voting provision of creditors in a class is different from voting by other FCs. By the Insolvency and Bankruptcy Code (Amendment) Act, 2019<sup>[116]</sup>, sub-clause 3A was inserted in section 25A to overcome a peculiar situation where the CoC comprised a substantial number (or only) of creditors in a class (primarily home buyers). It was noticed that in these cases, the total voting share being polled by home buyers was very small (since they were scattered all over the country and not organized), thereby creating a deadlock in decision making as the requisite voting majorities were not being obtained.

Hence, the newly inserted provision provides that an AR under section 21(6A) (that is, an AR of creditors in a class) shall cast his vote on behalf of all the FCs he represents in accordance with the decision taken by a vote of more than 50 percent of the voting share of the FCs he represents who have cast their vote. Further, it is provided that for a vote to be cast in respect of a withdrawal application under section 12A of the IBC, the AR shall cast his vote in accordance with the provisions of section 25A(3) of the IBC.

### 3.5 Duties of an IRP/RP as an AR

Regulation 16A details the provisions for appointing an AR of any class of creditors. It also provides that any delay in the appointment of an AR shall not affect the validity of any decision taken by the CoC.

Under the regulation, the IRP and the RP are mandated to provide a list of creditors/updated list of creditors to the AR. It has been clarified that the AR shall have no role in receiving or verifying claims of creditors of the class he represents.

The IRP/RP is also mandated to provide electronic means of communication between the AR and the creditors in the class. The AR is required to circulate

the agenda to the creditors in a class and announce the voting window at least 24 hours before the window opens for voting instructions, and keep that window open for at least 12 hours.

Regulation 16A also clarifies that the voting share of a creditor in a class shall be in proportion to the financial debt, which includes interest at the rate of 8 percent per year unless a different rate has been agreed to between the parties.

For his functioning, the AR of creditors in a class is entitled to receive a fee for every CoC meeting attended by him in the manner specified in regulation 16A(8).

## 4. Meetings of the Committee

Section 24 of the IBC deals with meetings of the CoC. The CoC members may meet in person or by electronic means. The meetings of the CoC are required to be conducted in the manner specified by the IBBI under the CIRP Regulations.

### 4.1 First Meeting

Regulation 17(1) of the CIRP Regulations states that the IRP shall file a report certifying the constitution of the CoC with the AA within two days of receiving the verification of claims under regulation 12(1). As per regulation 17(2), the first CoC must be convened within seven days of filing the report. By way of amendment<sup>[117]</sup>, it has been clarified that where the appointment of the RP is delayed, the IRP shall perform the RP's functions from the 40<sup>th</sup> day of the insolvency commencement date till an RP is appointed under section 22 of the IBC.

[116] <https://ibbi.gov.in/uploads/legalframework/630af836c9fbbcd047c42dbdfd2aca13.pdf>

[117] Notification No. IBBI/2018-19/GN/REG031, dated July 3, 2018 (with effect from 04-07-2018)

## 4.2 When to Convene CoC Meetings

**[33%]** Regulation 18 of the CIRP Regulations states that an RP may convene a meeting of the CoC as and when the RP considers necessary.

However, the RP must convene a meeting if a request to that effect is made by members of the committee representing 33 percent of the voting rights.

## 4.3 Notice for Meetings

### 4.3.1 Notice Period

**[5 or Less]** As per regulation 19 of the CIRP Regulations, a meeting of the CoC can be called by giving at least five days' notice in writing to every participant, both by hand delivery or post, and by electronic means (see below).

This notice period can be reduced from five days to such other period of not less than 24 hours (and not less than 48 hours if the CoC has any ARs), if approved by the CoC.

### 4.3.2 Electronic Notice

Regulation 20 of the CIRP Regulations states that the notice can be sent via email as a text, as an attachment to an email, or as a notification providing an electronic link, or a uniform resource locator to access it.

The subject line must state the name of the CD, as well as the place, time, and date on which the meeting is scheduled.

If the notice is sent in the form of a non-editable

attachment to an email, it shall be in a portable document format or some other non-editable format, together with a link or instructions for the recipient to download a relevant version of the software.

The RP must use a system that produces confirmation of the total number of recipients emailed and a record of each of them, as well as a record of any failed transmissions.

This is, effectively, "proof of sending." The obligation of the RP shall be satisfied when he transmits the email and he shall not be held responsible for a failure in transmission beyond his control.

The notice must be readable, and the recipient should be able to retain copies.

### 4.3.3 People Notified

Section 24 (3) of the IBC states that the RP shall send notice of each meeting of the CoC to:

- members of the CoC, including the ARs;
- members of the suspended board of directors, or the partners of the corporate persons;
- OCs or their representatives, if the amount of their total dues is not less than 10 percent of the debt.

Section 24(4) provides that while the directors, partners, and one representative of the OC, as referred to in subsection (3), may attend the meetings of the CoC, they shall not have any right to vote in such meetings. In addition, their absence shall not invalidate the proceedings of the meetings.

In *Vijay Kumar Jain Vs. Standard Chartered Bank & Others [(2019) SCC Online SC 103]*, the Supreme Court held that resolution plans need to be provided to members of the suspended board of directors of the CD, as they have a right to participate in the meetings of the CoC. It was observed that a combined reading of the IBC and the CIRP Regulations leads to the conclusion that members of the suspended board of directors, being vitally interested in resolution plans that may be discussed at meetings of the CoC, must be given a copy of such plans as part of the documents that have to be furnished along with the notice of such meetings.

In *Consolidated Engineering Company & Another Vs. Golden Jubilee Hotels Pvt. Ltd. [Company Appeal (AT) (Insolvency) No. 501 of 2018]*, the NCLAT held that the AA has rightly held that 10 percent of total debt for the purpose of representation in the CoC is to be calculated on the basis of the claim as collated and noticed by the RP. It cannot be based on the amount claimed by all the OCs until it is verified and compared. If the claim of OCs on verification is found to be less than 10 percent, the OCs have no right to claim representation in the meeting of the CoC.

#### 4.3.4 Contents of the Notice

Regulation 21 of the CIRP Regulations states that the notice should inform participants of the venue, time, and date of the meeting.

It should also specify the option to attend by way of video conferencing or other audio and visual means, with all necessary contact and access details. This information should include the process and manner for electronic voting and the time schedule, including the time period during which votes may be cast, the login details, details of a facility for generating a password and for ensuring that votes are cast securely, and the contact details for the person to whom to address any queries regarding electronic voting.

The notice should indicate that a participant may attend and vote in person or through an AR, after the RP has been informed of this in advance by the participant.

The notice must contain a list of all matters to be discussed at the meeting and a list of issues to be voted

on at the meeting, as well as copies of all documentation relevant to these matters and voting issues.

It is advisable to keep the notice details to enable FCs to make an informed decision and be prepared at the meeting.

## 4.4 Quorum

Regulation 22 of the CIRP Regulations states that a minimum of 33 percent of voting rights is required to be present for the meeting to have a quorum. Members may be present either in person or by video conferencing, or by any audio-visual means. The CoC may modify the percentage of voting rights required for a quorum for future meetings.

Where a meeting could not be held for want of quorum, it shall automatically be adjourned and reconvene at the same time and place the next day. The adjourned meeting shall be quorate with the members of the CoC attending the meeting.

**[33%]**

## 4.5 Video Participation

Members of the CoC can participate in the meeting through video conferencing. Regulation 23 of the CIRP Regulations deals with participation at a meeting via video conferencing or other audio-visual means. It mandates the RP to make all necessary arrangements to ensure an uninterrupted and clear audio and/or visual connection.

In this regard, the RP must ensure:

- integrity of the meeting, by ensuring sufficient security of the meeting and identification procedures;
- availability of proper audio-visual equipment;
- proper recording and preparation of minutes of the proceedings;
- clearly marked and safe storage of recordings for safekeeping;
- attendance or access to the meeting is limited to people authorized to participate;
- proceedings be seen and heard clearly by all attendees.

People who are differently abled may ask the RP to allow a person to accompany them to the meeting.

Where a meeting is conducted through video conferencing or other audio and visual means, the scheduled venue of the meeting as set forth in the notice convening the meeting, which shall be in India, shall be deemed to be the place of the meeting and all recordings of the proceedings at the meeting shall be deemed to be made at such place.

## 4.6 Conduct of the Meetings

Regulation 24 of the CIRP Regulations states that the RP shall act as the chairperson of the CoC meeting. At the beginning of the meeting, the RP is required to take a roll call, asking all participants to state the following for the record:

- their names;
- whether they are attending as a member of the CoC or as any other participant;
- whether they are representing a member or group of members;
- the location from which they are participating;
- that the agenda has been received, together with all relevant material;
- that no one else is attending or has access to the proceedings of the meeting at their location.

After the roll call, the RP is required to inform all participants of the names of all those present at the meeting and confirm if the required quorum is complete. The RP shall ensure that the required quorum is present throughout the meeting.

As per regulation 22(2), if no quorum is present, the meeting will automatically adjourn and reconvene at the same time and place the next day.

From the start of the CoC meeting till its conclusion, no person other than the participants and any other person whose presence is required by the RP is allowed access to the place where the meeting is held or to the video conferencing or other audio and visual facility without the permission of the RP.

## 4.7 Minutes of the Meetings

Regulation 24(6) of the CIRP Regulations states that the minutes of meetings of the CoC must be taken and prepared by the IRP/RP, and should include details of those attending in person, by video conferencing, or by other audio and visual means. The minutes are required to be circulated electronically by the IRP/RP within 48 hours of the meeting to all participants.

## 5. Voting by the CoC

The CoC as a collective body takes decisions by members voting on a particular item/matter. Each member of the CoC has a voting share in the CoC. “Voting share” is defined in section 5(28) of the IBC as the share of the voting rights of a single FC in the CoC. It is based on the proportion of the financial debt owed to such FC in relation to the financial debt owed by the CD.

As per section 24(6) and (7) of the IBC, each creditor is required to vote in accordance with the voting share assigned to it based on the financial debts owed to such creditor. The voting share assigned to each creditor is determined by the RP in the manner specified by the IBBI under the CIRP Regulations.

### 5.1 Voting Procedures

The voting procedures for the CoC are detailed in regulation 25 of the CIRP Regulations which provides that:

- The RP shall take a vote of the members present at the meeting on any item listed for voting after discussion.
- At the conclusion of voting, the RP shall announce the decision on items, along with

the names of the members of the CoC who voted for or against, or abstained from voting.

- The RP shall circulate the minutes of the meeting by electronic means to all members of the CoC and the AR, if any, within 48 hours of the conclusion of the meeting.
- The RP shall seek a vote of the members who did not vote at the meeting on the matters listed on the electronic voting system (e-voting) in accordance with regulation 26. Hence, the RP conducting the meeting has to provide an e-voting facility to all such members.
- E-voting should be kept open for at least 24 hours from circulation of the minutes of the meeting.

Regulation 26 deals with e-voting, stating that each member of the CoC will be provided with the means to exercise his vote, either through electronic means or through an electronic voting system that accords with the CIRP Regulations.

At the conclusion of a vote, the RP is required to announce the result and make a written record of the summary of the decision taken on a relevant agenda item, along with the names of the members of the CoC who voted for or against the decision, or abstained from voting.

Further, the RP shall circulate a copy of the record to all participants by electronic means within 24 hours of the conclusion of voting.

For voting by the AR, the CIRP Regulations provide that:

- The AR shall circulate the minutes of the meeting received from the RP to creditors in a

class and announce the voting window at least 24 hours before the window opens for voting instructions and keep the voting window open for at least 12 hours (regulation 25(6)).

- The AR shall cast his vote in respect of each FC or on behalf of all FCs he represents in accordance with the provisions of section 25A(3) and (3A).

## 5.2 Approval of the CoC for Certain Actions

Section 28 of the IBC details certain actions during the conduct of the CIRP for which the prior approval of the CoC must be obtained by the RP. These actions are set out below:

- Raise any interim finance in excess of the amount as may be decided by the CoC at its meeting.
- Create any security interest over the assets of the CD.
- Change the capital structure of the CD, including by issuing additional securities, creating a new class of securities, or buying back or redeeming issued securities if the CD is a company.
- Record any change in the ownership interest of the CD.
- Give instructions to financial institutions maintaining accounts of the CD for a debit transaction from any such accounts in excess of the amount as may be decided by the CoC in its meeting.
- Undertake any related party transaction.
- Amend any constitutional documents of the CD.

- Delegate its authority to any other person.
- Dispose of or permit the disposal of shares of any shareholder of the CD or their nominees to third parties.
- Make any change in the management of the CD or its subsidiary.
- Transfer rights or financial debts or operational debts under material contracts other than in the ordinary course of business.
- Make changes in the appointment or terms of contract of such personnel as specified by the CoC.
- Make changes in the appointment or terms of contract of statutory auditors or internal auditors of the CD.

Before taking any of these actions, the RP shall convene a meeting of the CoC and seek a vote of the creditors. They should be approved by a vote of 66 percent of the voting share. If any of the actions are taken by the RP without the approval of the CoC, they shall be void and the RP may be reported to the IBBI by the CoC for necessary action(s) against him.

In addition to section 28 matters, certain other issues also require approval of the CoC with 66 percent of the voting share. These are:

- extension of a CIRP from 180 to 270 days under section 12 of the IBC,
- disposal of unencumbered assets of the CD outside the ordinary course under regulation 29 of the CIRP Regulations;
- change from IRP to RP under section 22 of the IBC or replacement of RP under section 27 of the IBC;

- approval of the resolution plan under section 30 of the IBC.

Withdrawal under section 12A of the IBC of any application admitted under sections 7, 9, or 10 of the IBC can be undertaken only with approval of the CoC with a 90 percent voting share.

Under section 21(8) of the IBC, any other item that requires the CoC's approval under the IBC or the regulations can be taken with 51 percent voting share (for instance, approval of eligibility criteria for resolution applicants by the CoC under section 25(2) (h) of the IBC).

## 6. The Resolution Professional

Section 5(27) of the IBC defines the term “resolution professional” as an insolvency professional appointed to conduct the CIRP and includes an IRP.

**[66%]**

Module 3 of this handbook covers the appointment of the IRP.

### 6.1 Appointment of the Resolution Professional

As discussed in Module 3, the term of the IRP continues until he is confirmed as the RP or is replaced by a new RP under section 22 of the IBC. Section 22 provides that the IRP should convene the first CoC meeting within seven days of the constitution of the CoC. At this meeting, the CoC, by a majority vote of at least 66 percent of the total voting share, must resolve to either appoint the IRP as the RP or replace the IRP with another professional.

If the CoC, subject to written consent from the IRP, resolves to continue with the IRP as the RP, it is required to communicate this decision to the IRP, the CD, and the AA. If the CoC resolves to replace the IRP, it is required to file an application with the AA to appoint the proposed RP, together with the written consent of the proposed RP. The AA is then required to forward the name of the proposed RP to the IBBI, and the appointment is made from a panel of IPs maintained by the IBBI.

#### *Punjab National Bank Vs. Mr. Kirab Shah, IRP of ORG Informatics Ltd. [CA (AT) (Ins) No. 749/2019]*

In the impugned order, the AA noted that the application does not explain why the IRP was replaced. Immediately after the first meeting of the CoC, it is supposed to prefer an application under section 22, which was not done in this case. On appeal, the NCLAT held that the CoC is not required to record any reason for replacing the RP that may otherwise call for proceedings against such RP. Having decided to remove the RP with 88 percent of the voting share, the CoC was not open to the AA interfering with such decision, till it is shown that the decision of the CoC is perverse or without jurisdiction.

#### *Bank of India Vs. M/s Nithin Nutritions Pvt. Ltd. [Company Appeal (AT) (Insolvency) No. 497 of 2020 (with connected appeals)]*

In the third CoC meeting, the IRP was replaced by another person as the RP. The appellant had filed an application before the AA for confirmation of the RP's appointment. The AA rejected the application on the basis that the CoC's decision was taken in its third meeting (and not the first meeting, as prescribed in the IBC) and no reasons were given for not adopting the resolution to replace the IRP in the first meeting. In the appeal against the AA's order, the NCLAT observed that neither section 22 nor section 27 of the

IBC requires the CoC to give any reasons. The reason is that the relationship between the RP and the CoC is that of confidence. If there is loss of confidence and the RP continues in the role, the CD would be put to loss because of the bad relationship between the IRP/RP and the CoC. The NCLAT further noted that initially section 16 of the IBC specified a 30-day term for the IRP. This provision was substituted with effect from June 6, 2018, and now the term of the IRP shall continue till the date of appointment of the RP under section 22. It also referred to regulation 17 of the CIRP Regulations and observed that the IRP continues as such by performing the functions of an RP from day 40. Considering these provisions, the NCLAT held that the CoC has the requisite powers to propose changing the IRP even in meeting/s subsequent to the first one and there is no requirement that they should give particular reasons for the change.

## 6.2 Replacement of the RP

Section 27 of the IBC provides for the replacement of an RP by the CoC. It states that where, at any time during the CIRP, the CoC is of the opinion that the RP should be replaced, it may replace him with another IP. This would require a vote of 66 percent of the voting shares and is subject to a written consent form from the proposed RP. The CoC shall then forward the name of the RP proposed by them to the AA. The AA shall forward the name of the proposed RP to the IBBI for its confirmation, following which the RP shall be appointed in the manner outlined in section 16.

## 6.3 Eligibility

Only a registered IP who has the authorization for appointment can be appointed as the RP. Further, as per regulation 3 of the CIRP Regulations, an IP shall be eligible to be appointed as an RP of a CD only if he, and all partners and directors of the IPE of which he is a partner or director, are independent of the CD. This has been explained in Module 3. Hence, even where the IRP is being replaced by another IP as the RP, the eligibility conditions would still apply.

Further, where the CoC decides to appoint the IRP as the RP, replace the IRP under section 22, or replace the RP under section 27, it is required to obtain the written consent of the proposed RP on Form AA of the Schedule to the CIRP Regulations.

## 6.4 Role and Responsibilities

The RP holds a central position in conducting the CIRP and his role is vital to the efficient operation of the resolution process. The RP acts as a bridge between the debtor and the creditor and plays a significant role in aligning the interests of the CD with those of the creditors.

The RP is appointed as an officer of the AA to conduct the resolution process and is vested with various statutory duties and powers (discussed below). While discharging his duties and exercising his powers, it is crucial that the RP abides by the IBC and the underlying rules, regulations, and guidelines at all times. The RP is required to maintain transparency in the process, ensuring that all stakeholders are appropriately informed. He also has to perform a balancing act of conducting the resolution process while taking care of the interests of all stakeholders of the CD. For this reason, the need for specialized professionals to conduct CIRPs is critical.

Section 23(1) of the IBC provides that, subject to section 27, the RP shall conduct the entire CIRP and manage the operations of the CD during the CIRP. It further provides that the RP shall continue to manage the operations of the CD after the expiry of the CIRP period until an order approving the resolution plan under section 31(1) or appointing a liquidator under section 34 is passed by the AA.

Section 23(2) of the IBC states that the RP shall exercise powers and perform duties vested in or conferred on the IRP under Chapter II of the IBC.

Thus:

- Under section 17 of the IBC, the management of the affairs of the CD would vest in the RP, who would exercise the powers of the board of directors or the partners of the CD (as the case may be). The RP would also have other powers, duties, and authority as specified in section 17. Where an IRP continues as the RP, such vesting of management/exercising of powers would continue seamlessly. Where the IRP is replaced by another IP as the RP, the management of the affairs of the CD would vest in the new RP, who would exercise the powers of the board/partners of the CD from the date of his appointment under section 22. Vested with such powers, the new RP would be able to undertake all actions that the IRP would have been able to undertake.
- The duties of the IRP under section 18 (to the extent that they have not already been performed by the IRP) will have to be completed by the RP; for example, taking control and custody of any asset of which the CD has ownership rights and continuing to collate claims.
- The benefit of section 19 of the IBC—that is, cooperation with the IRP would also be available to the RP.
- The RP would have to manage the operations of the CD as a going concern in the manner specified in section 20 of the IBC.

In addition, section 25 of the IBC contains specific duties of the RP. Like the IRP, it shall be the duty of the RP to preserve and protect the assets of the CD,

including the continued business operations of the CD. As per section 25(2) of the IBC, for these purposes, the RP shall undertake the following actions:

- Take immediate custody and control of all the assets of the CD, including its business records.
- Represent and act on behalf of the CD with third parties and exercise rights for the benefit of the CD in judicial, quasi-judicial, or arbitration proceedings.
- Raise interim finances subject to the approval of the CoC under section 28 of the IBC.
- Appoint accountants, legal, or other professionals in the manner as specified by the IBBI.
- Maintain an updated list of claims.
- Convene and attend all meetings of the CoC.
- Prepare the information memorandum in accordance with section 29 of the IBC.
- Invite prospective resolution applicants (PRAs), who fulfil such criteria as may be laid down by him with the approval of the CoC, having regard to the complexity and scale of operations of the business of the CD and such other conditions as may be specified by the IBBI, to submit a resolution plan or plans for the CD;
- Present all resolution plans at the meetings of the CoC.
- File any applications for avoidance of transactions in accordance with Chapter III of the IBC.
- Such other actions that may be specified by the IBBI.

As stated in the list above, the RP is allowed to appoint any professionals, including management professionals, to assist with a CIRP. The final call on

the appointment remains with the RP, making their role similar to that of a CEO, managing director, or chairperson/head of a company.

### KEY CONSIDERATION

IPs and the CoC constitute key institutions of public faith under the IBC. The IBC, read with its regulations, has demarcated the responsibilities of an IP and of the CoC in the CIRP and also assigned certain responsibilities to them jointly. An IP, when acting as an IRP or RP, is vested with various statutory and legal duties and powers. He exercises the powers of the board of directors of the CD undergoing resolution, manages the operations of the CD as a going concern, protects the value of its property, and complies with applicable laws on its behalf. In fact, he conducts the entire CIRP. The stakeholders are required to cooperate with him in the discharge of his functions.

The IBC shifts the control of a CD, when it is admitted into the CIRP on its failure to service a debt, to creditors represented by a CoC for resolving its insolvency. The CoC holds the key to the fate of the CD and its stakeholders. Several actions under the IBC require approval of the CoC. It may approve a resolution plan after considering its feasibility and viability. The commercial wisdom of the CoC in approving or rejecting a resolution plan has been given primacy by the Supreme Court in various cases.

There are certain matters where both the IP and the CoC have defined roles. Various actions under section 28 are taken by the RP only with the prior approval of the CoC. The CoC is called on to consider the resolution plan under section 30(4) after it is vetted and verified by the RP as being compliant under section 30(2).

While specifying their roles, the IBC does not envisage one assuming the role of the other. The RP is not required to express his opinion on matters within the domain of the FCs, or to approve or reject the resolution plan under section 30(4) under the IBC.

A charter of the respective roles and responsibilities of the IP and the CoC has been prepared by the IBBI to educate stakeholders, in consultation with the three IPAs. It can be found at <https://ibbi.gov.in/uploads/legalframework/58b3837f3e594c5ed43f5ffa54c7c270.pdf>.

## 6.5 The Information Memorandum

Section 29 states that the RP must prepare an information memorandum (IM) in such form and manner, and containing such relevant information as may be specified by the IBBI for formulating a resolution plan.

The IM is provided by the RP to:

- each member of the CoC, in electronic form, within two weeks of the RP's appointment, but not later than the 54<sup>th</sup> day from the insolvency commencement date, whichever is earlier (regulation 36(1) of the CIRP Regulations);

- PRAs who may be interested in submitting a resolution plan for the CD.

Hence, the information collected about the CD is used by the RP to compile an IM, based on which PRAs prepare resolution plans to resolve the insolvency of the CD. It may be noted that section 30(1) of the IBC provides that the resolution applicant may submit a resolution plan to the RP on the basis of the IM.

The IM is also given to CoC members to make them fully aware of the financial and commercial position of the company and to enable them to take appropriate decisions in respect of the CIRP of the CD.

### 6.5.1 Contents of the IM

The IM must contain “relevant information” as specified by the IBBI. The expression “relevant information” means the information required by the resolution applicant to make the resolution plan for the CD, including its financial position, all information related to disputes by or against the CD, and any other matter pertaining to the CD as may be specified.

Regulation 36(2) of the CIRP Regulations lists the information that needs to be included in the IM:

- assets and liabilities with such “description”, as on the insolvency commencement date, as are generally necessary to ascertain their values. “Description” includes details such as date and cost of acquisition, remaining useful life, identification number, depreciation charged, book value, and any other relevant details;
- the latest annual financial statements;
- audited financial statements for the last two financial years and provisional statements for the current financial year up to not earlier

than 14 days from the date of the application;

- a list of creditors containing the names of creditors, the amounts claimed by them, and the amount of their admitted claims and the security interest, if any;
- particulars of a debt due from or to the CD from related parties;
- details of guarantees that have been given in relation to the debts of the CD, specifying which of the guarantors, if any, are related parties;
- the names and addresses of the members or partners holding a stake of at least 1 percent in the CD, along with the size of that stake;
- details of all material litigation and ongoing investigations by the government or statutory authorities;
- the number of workers and employees of the CD, along with the amounts due to them;
- any other information the RP deems relevant to the CoC.

A member of the CoC may ask the RP for further information of the nature described above and the RP is required to provide such information to all members within a reasonable time if such information has a bearing on the resolution plan.

### 6.5.2 Confidentiality of IM

Regulation 36(4) of the CIRP Regulations provides that the RP shall share the IM with the members of the CoC after receiving an undertaking from a member or PRA to maintain the confidentiality of the information, not use it to cause an undue gain or undue loss to itself or any other person, and comply with the requirements under section 29(2) of the IBC.

This is fitting as the IM contains confidential information and financial details pertaining to the CD that are not meant for public consumption.

Section 29(2) states that the RP shall provide to the PRA access to all relevant information in physical and electronic form, provided the PRA gives an undertaking to the RP that it will:

- Comply with the provisions of law in force at the time relating to confidentiality and insider trading.
- Protect any intellectual property of the CD it may have access to.
- Not share relevant information with third parties unless the above clauses are complied with.

Under regulation 36A(7)(g) of the CIRP Regulations, an EOI submitted by a PRA should, among other things, be accompanied by a confidentiality undertaking that it shall not use the information provided to cause undue gain or undue loss to itself or any other person and comply with the requirements under section 29(2) of the IBC. Thus, practically, at the stage of submitting an EOI, the PRA will give such an undertaking, and only after that, the PRA will be given access to relevant information and the IM.

## 6.6 Appointment of Registered Valuers

The RP is required to appoint registered valuers under regulation 27 of the CIRP Regulations to determine the “fair value” and “liquidation value” of the assets of the CD in accordance with regulation 35. As per regulation 2(1)(m), “registered valuer” means a

**[7]** person registered as such in accordance with the Companies Act, 2013, and rules made thereunder.

Regulation 27 provides that the RP shall appoint two registered valuers within seven days of his appointment, but not later than the 47<sup>th</sup> day from the insolvency commencement date.

It may be noted that regulation 17(3) of the CIRP Regulations provides that where the appointment of the RP is delayed, the IRP shall perform the functions of the RP from the 40<sup>th</sup> day of the ICD until an RP is appointed under section 22 of the IBC.

Regulation 35 provides for determining the fair value and liquidation value of the CD. As per regulation 2(1)(hb), “fair value” means the estimated realizable value of the assets of the CD, if they were to be exchanged on the ICD between a willing buyer and a willing seller in an arm’s length transaction, after proper marketing and where the parties had acted knowledgeably, prudently, and without compulsion. As per Regulation 2(1)(k), “liquidation value” means the estimated realizable value of the assets of the CD, if the CD were to be liquidated on the ICD.

To determine the fair value and liquidation value of the CD, the two appointed registered valuers shall submit to the RP an estimate of the fair value and of the liquidation value calculated in accordance with internationally accepted valuation standards, after physical verification of the inventory and fixed assets of the CD. If in the opinion of the RP, the two estimates of a value are significantly different, he may appoint another registered valuer who shall submit an estimate of the value calculated in the same manner. The average of the two closest estimates of a value shall be considered the fair value or the liquidation value, as the case may be.

The RP is required to provide the fair value and the liquidation value to the members of the CoC in electronic form after receiving resolution plans in

accordance with the IBC and CIRP Regulations. Further, to maintain confidentiality of the values, the RP should provide these values only on receiving an undertaking from all members to the effect that they shall maintain confidentiality of the fair value and the

liquidation value, shall not use such values to cause an undue gain or undue loss to themselves or any other person, and shall comply with the requirements under section 29(2). The RP and registered valuers are also required to maintain confidentiality of the values.

### KEY CONSIDERATION

A key objective of the IBC is maximization of the value of assets of the CD and consequently value for its stakeholders. A critical element toward achieving this objective is transparent and credible determination of the value of the assets to facilitate comparison and informed decision making by the CoC.

In *Maharashtra Seamless Limited Vs. Padmanabhan Venkatesh and Others* [Civil Appeal No. 4242 of 2019, 2020 SCC Online SC 67], the Supreme Court observed that it appears that the aim of prescribing such valuation process is to help the CoC make a decision on a resolution plan properly.

The CIRP Regulations assign the valuation responsibility to registered valuers.

By way of a circular dated October 17, 2018, the IBBI has directed that every valuation required under the IBC or any of the regulations made thereunder is required to be conducted by a registered valuer, that is, a valuer registered with the IBBI under the Companies (Registered Valuers and Valuation) Rules, 2017. Further, with effect from February 1, 2019, no IP shall appoint a person other than a registered valuer to conduct any such valuation. By way of another circular, dated August 13, 2019, the IBBI has reiterated that appointing any person, other than a registered valuer, on or after February 1, 2019, to conduct such valuation is illegal and payment, whether as a fee or otherwise, to such person shall not form part of the insolvency resolution process costs or liquidation cost.<sup>[118]</sup>

## 6.7 Sale of Assets Outside the Ordinary Course of Business

As per regulation 29 of the CIRP Regulations, the RP, with the approval of the CoC (by a vote of 66 percent of the voting share of the members), may sell unencumbered asset(s) of the CD other than in the ordinary course of business, if he is of the opinion that such a sale is necessary for a better realization of value in the facts and circumstances of the case, provided that the total book value of all assets sold during the CIRP period under this subregulation should not exceed 10 percent of the total claims admitted by the IRP.

## 6.8 The Process of Inviting, Submitting, and Approving Resolution Plans

A key duty of the RP under section 25(2)(h) of the IBC is to invite PRAs who fulfill such criteria as may be laid down by RP with the approval of the CoC to submit a resolution plan for the CD. The criteria should take into consideration the complexity and scale of operations of the business of the CD and such other conditions as may be specified by the IBBI.

[118] <https://www.ibbi.gov.in/uploads/legalframework/148100a687e1999f77ce625ec22a82c1.pdf>

A resolution plan is defined in section 5(26) of the IBC as a plan proposed by a resolution applicant for an insolvency resolution of the CD as a going concern in accordance with Part II of the IBC. An explanation to this was added by way of the Insolvency and

Bankruptcy (Amendment) Act, 2019, which provides that a resolution plan may include provisions for the restructuring of the CD, including by way of merger, amalgamation, or demerger.

In *Swiss Ribbons Pvt. Ltd. & Another Vs. Uol & Others* [WP (Civil) No. 99/2018 with connected matters], the Supreme Court observed that the purpose of the IBC is the reorganization and insolvency resolution of the CD in a time-bound manner. It ensures the revival and continuation of the CD by protecting it from its own management and from liquidation. It also observed that the preamble does not refer to liquidation, which is only pursued as a last resort if there is either no resolution plan or the resolution plans submitted are not up to the mark. Even during liquidation, the liquidator can sell the business of the CD as a going concern.

In *Binani Industries Limited Vs. Bank of Baroda, Company Appeal (AT) (Insolvency) No. 82 of 2018*, the NCLAT observed that the objective of the IBC is Resolution. The Purpose of Resolution is for maximization of value of assets of the CD and thereby for all creditors. It is not maximization of value for a 'stakeholder' or 'a set of stakeholders' such as Creditors and to promote entrepreneurship, availability of credit and balance the interests. The first order objective is "resolution". The second order objective is "maximization of value of assets" of the CD and the third order objective is "promoting entrepreneurship, availability of credit and balancing the interests". This order of objectives is sacrosanct.

In *Industrial Services Vs. Burn Standard Company Ltd. & Another* [Company Appeal (AT) (Ins) No. 141, 142, 179, and 208/2018], the appellants challenged the order passed by the AA approving a resolution plan submitted by the corporate applicant. The plan did not provide for the revival of the CD but its closure and retrenchment of all the workers. The NCLAT held that the resolution plan is against the objective of the IBC and the application under section 10 was filed with the intent of closing the CD for a purpose other than for the resolution of insolvency or liquidation. It held that the part of the resolution plan that relates to the closure of the CD/corporate applicant is against the scope and intent of the IBC and in violation of section 30(2)(e) of the IBC. It directed the CD to ensure that the company remains a going concern and employees are not retrenched. The first step in inviting the resolution plan is for the RP to prepare an IM and draft eligibility criteria, with the approval of the CoC, for PRAs to submit resolution plans. The criteria is drafted with the operations and business of the CD in mind. Typically, the eligibility criteria would prescribe a minimum net worth or turnover or other financial parameter to be met by the PRAs to be eligible to submit the resolution plan.

Once the PRA is eligible to submit the resolution plan, the IBC envisages the RP giving an IM and other relevant information to the PRA to help it prepare a resolution plan.

The details pertaining to the steps for inviting, submitting, evaluating, and approving the resolution plan (and timelines in relation to them) are detailed in the CIRP Regulations.

Below is a summary of the timelines for a resolution plan as provided in the CIRP Regulations, all of which are explained in detail thereafter.

Action	Timeline
Inviting an EOI and publishing Form G	Within 75 days of the insolvency commencement date
Last date for submission of EOIs	This cannot be less than 15 days from the date of issue of invitations for EOIs
Provisional list of eligible PRAs	Within 10 days of the last date to submit an EOI
Any objection to inclusion or exclusion of a PRA on the provisional list	Within five days of the date of issue of the provisional list
The final list of PRAs	Within 10 days of the last date for receiving objections
Issue of the information memorandum, evaluation matrix, and request for resolution plans to the PRAs	Within five days of the date of issue of the provisional list
Submission of resolution plans to the RP	Minimum of 30 days from the date of issue of the request for resolution plans
Approval of the resolution plan by the CoC and its submission to the AA	As soon as approved by the CoC, but in any event before expiration of time periods specified in section 12. The RP should endeavor to submit the approved resolution plan at least 15 days before expiry of CIRP period

### KEY CONSIDERATION

As per section 33(1)(a) of the IBC, the AA shall pass an order for liquidation if before the expiry of the CIRP period or the maximum period permitted for completing the CIRP under section 12, it does not receive a resolution plan approved by the CoC under section 30(6). Hence, the IBC envisages that the entire process of invitation, submission, evaluation, and approval of the plan and its filing with the AA should be completed within the overall CIRP timeline (of 180/270/330 days, unless the timelines are extended by the AA).

### 6.8.1 Expression of Interest

An EOI is not a resolution plan but a statement by a PRA indicating its interest in presenting a resolution plan for the CD.

The CIRP Regulations envisage that a PRA should first submit an EOI for the CD. Only after it fulfills certain prescribed conditions and provides certain undertakings, is it given access to the IM and relevant information. Based on the information, it can submit the resolution plan for the CD.

The process for inviting and submitting the EOIs is detailed in regulation 36A of the CIRP Regulations. Broadly, the process is as follows:

#### Form G

The RP should publish brief particulars of the invitation for EOIs in Form G of the Schedule to the CIRP Regulations not later than the 75<sup>th</sup> day from the ICD, from interested and eligible PRAs. Hence, even before the issuance of Form G, the eligibility criteria should have been drafted by the RP.

Form G must be published in one English and one regional-language newspaper with wide circulation at the location of the registered office and principal office, if any, of the CD and any other location where, in the opinion of the RP, the CD conducts material business operations; on the websites of the CD (if any) and the IBBI; or in any manner as decided by the CoC.

Form G contains basic information about the CD, timelines for submitting the EOI, eligibility criteria, and timelines for the CIRP starting from the submission of the EOI, details of the RP, and other relevant information.

Form G should also state where the detailed invitation for EOIs can be downloaded or obtained from, and should provide the last date for submitting an EOI, which shall not be less than 15 days from the date of issue of the detailed invitation.

#### Detailed invitation for EOIs

In addition to Form G, there should be a detailed invitation for EOIs, which should specify:

- the eligibility criteria for PRAs, as approved by the CoC;
- the ineligibility norms under section 29A to the extent applicable for PRAs;
- Basic information about the CD as may be required by a PRA for the EOI.

#### Submission of EoI

Pursuant to the said invitation, an EoI is submitted by a PRA. An EoI submitted by PRAs must be unconditional. As per the Regulations 36A (6), any EoI received after the deadline provided in the invitation shall be rejected. The deadline for submission of EoI should not be less than 15 days from the date of issue of a detailed IEOI.

#### No Fee or Non-Refundable Deposit

The detailed EOI shall not require payment of any fee or non-refundable deposit for submission of any EoI. Previously, many EoIs were issued with the requirement of paying a fee or a deposit (probably with the effect of limiting their number). However, now the IBBI has clarified that such non-refundable fees or deposits should not be demanded.

### Accompanying documents

The PRA should provide the following documents along with the EOI:

- undertaking that it meets the eligibility criteria approved by the CoC and relevant records providing evidence of this;
- undertaking that it is not disqualified under section 29A of the IBC and relevant information and records to enable such an assessment;
- undertaking that it will notify the RP if it becomes ineligible at any time during the CIRP;
- undertaking that all information and records provided in the EOI are true and correct, and discovery of any false information or record at any time will render the applicant ineligible to submit the resolution plan, forfeit any refundable deposit, and attract penal action under the IBC;
- confidentiality undertaking (see section 6.5.2 [p135]).

### Due diligence by the RP

Once the RP receives an EOI by a PRA, he is required to conduct due diligence based on the material on record and issue a provisional list of PRAs within 10 days of the last date to submit the EOI.

This due diligence check is to ensure that the PRA is in compliance with the eligibility criteria drafted by the CoC under section 25(2)(h) of the IBC and other requirements as specified in the invitation for EOIs, as well as ensure that the PRA is not disqualified under section 29A of the IBC. Only the applicants who qualify are to be included in the provisional list. The

RP may seek any clarification, additional information, or document from the PRA while conducting such due diligence.

### Objections to inclusion on/exclusion from provisional list

The provisional list is then given by the RP to the CoC and all PRAs who submitted an EOI. Any objection to the inclusion or exclusion of a PRA may be made with supporting documents within five days of the date of the list being issued.

### Final list

Having considered objections to the provisional list, the RP shall issue the final list of PRAs to the CoC within 10 days of the last date for receiving objections.

### KEY CONSIDERATION

While an RP will generally be able to determine whether a PRA falls within the eligibility criteria under section 25(2)(h), practically the RP may not be able to complete all due diligence checks on the PRA, especially section 29A checks, within this short duration (10 days). Hence, at this stage, only a preliminary due diligence would be undertaken and the RP would rely on the section 29A undertaking given by the PRA along with its EOI.

In addition, the requirement of lodging an objection to the inclusion or exclusion of any PRA from the provisional list (within five days of its issuance) seems to have been added to curb last-minute challenges by one PRA regarding the eligibility of another PRA. In many cases, PRAs have filed cases questioning the eligibility of an applicant and this can cause a delay in the process.

## 6.8.2 Request for Resolution Plan

Once the process of receiving and considering EOIs is complete, the RP needs to start the process of requesting resolution plans. This process is detailed in regulation 36B of the CIRP Regulations, which deals with the request for resolution plans (RFRP) and other incidental matters.

The RFRP (sometimes referred as a process note) is a document issued by the RP, whereby PRAs are requested to submit their resolution plans for the CD. It should detail each step in the process and the manner and purposes of interaction between the RP and the PRA, along with corresponding timelines.

Regulation 36B(1) of the CIRP Regulations states that the RP shall issue the IM, the evaluation matrix, and the RFRP within five days of the provisional list being issued to the PRAs. These documents are to be provided to every PRA on the provisional list as well as to every PRA who has contested the decision of the RP against its exclusion from the provisional list.

### Timeline for submission of a resolution plan

The RFRP should contain the timeline for submitting the resolution plans by the PRAs. However, the RFRP must allow PRAs at least 30 days for submission of the resolution plan. Subject to this, the RP may, with the approval of the CoC, extend the timeline for submission of resolution plans (from what is provided in the RFRP).

Any modification to the RFRP or the evaluation matrix is deemed to be a new issue, meaning that the submission of the resolution plan following the modified request or changed evaluation matrix will be subject to a new 30-day timeline.

### No fee or non-refundable deposit

Like the invitation for EOIs, the RFRP shall not require any non-refundable deposit to submit a resolution plan. Note that both the EOI and the RFRP provisions refer to a “non-refundable deposit.” In practice, especially at the stage of submitting the resolution plan, the RFRP would require a refundable bank guarantee or deposit to ensure that only serious contenders who have the ability to implement the resolution plan submit one and participate in the negotiation process.

### Re-issuance of RFRP

The RP may, with the CoC’s approval, re-issue the RFRP if the resolution plans received in response to an earlier request are not satisfactory. This revised request must be made to all PRAs in the final list and in this case, the 30-day minimum timeline (to submit the resolution plan) will not apply.

### Performance security

The RFRP shall require the resolution applicant, if its resolution plan is approved under section 30(4) of the IBC, to provide a performance security within the time specified in the RFRP. The performance security shall stand forfeited if the resolution applicant of the plan, after its approval by the AA, fails to implement or contributes to the failure of the implementation of the plan in accordance with its terms and implementation schedule.

The requirement to have a performance security was added to regulation 36B and regulation 39 of the CIRP Regulations by way of an amendment on January 24, 2019,<sup>[119]</sup> to discourage people other than genuine, capable, and credible PRAs from participating in the resolution process of the CD.

[119] [https://ibbi.gov.in/webadmin/pdf/legalframework/2019/Jan/CIRP%20Amendment%20Regulations%202019\\_2019-01-29%2009:42:48.pdf](https://ibbi.gov.in/webadmin/pdf/legalframework/2019/Jan/CIRP%20Amendment%20Regulations%202019_2019-01-29%2009:42:48.pdf)

Performance security has been defined to mean security of such nature, value, duration, and source, as may be specified in the RFRP with the approval of the CoC. It should consider the nature of the resolution plan and the business of the CD. A performance security may be specified in absolute terms such as a guarantee from a bank for an amount over a certain period or in relation to one or more variables such as the term of the resolution plan, or the amount payable to creditors under the resolution plan.

***Tata Steel Limited Vs. Liberty House Group Pte Ltd. & Others [Company Appeal (AT) (Insolvency) No. 198/2018]***

The CoC gave equal opportunity to all three RAs to submit improved financial offer. Instead of filing an improved financial offer, the appellant filed an application before the NCLAT for restraining the RP and the CoC from considering improved financial offer. The NCLAT noted that the process document does not curtail the powers of the CoC to maximise value and as per the process document, the CoC has absolute discretion, but without being under any obligation, to update, amend or supplement the information, assessment or assumptions and right to change, update, amend, supplement, modify, add to, delay or otherwise annul or cease the resolution process at any point in time. It observed that granting more opportunity to all the eligible resolution applicants to revise their financial offers, even by giving more opportunity, is permissible in law. However, all such process should be complete within the time frame.

### 6.8.3 Eligibility Criteria and Qualifications for a Resolution Applicant

A resolution applicant is defined in section 5(25) of the IBC as a person who individually or jointly with any other person submits a resolution plan to the RP in response to the invitation made under section 25(2)(h).

As stated above, resolution plans can be invited only from PRAs who fulfill the eligibility criteria as laid down by the RP with the approval of the CoC. The criteria should take into consideration the complexity and scale of operations of the business of the CD and such other conditions as may be specified by the IBBI.

In addition to meeting the eligibility criteria, the resolution applicant should not be disqualified under section 29A of the IBC. Section 29A was introduced in the IBC by way of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017,<sup>[120]</sup> issued on November 23, 2018.

Before the 2017 ordinance, any person could present a resolution plan for a CD that was subject to a CIRP, irrespective of whether they were an original promoter, a director, or any person connected to them directly or indirectly.

Concerns, however, were raised about the misconduct of certain people who had contributed to the default of a company and that such persons should not become resolution applicants. They could misuse the IBC to participate in the resolution or liquidation process and gain or regain control of the CD. The government considered that such unscrupulous people could undermine the processes laid down in the IBC, appearing to be rewarded at the expense of creditors.

Thus, section 29A was introduced to disqualify those who had contributed to the downfall of the CD or who

[120] [https://ibbi.gov.in/webadmin/pdf/legalframework/2017/Nov/180404\\_2017-11-24%2007:16:09.pdf](https://ibbi.gov.in/webadmin/pdf/legalframework/2017/Nov/180404_2017-11-24%2007:16:09.pdf)

were otherwise unsuitable to run the company because of their antecedents, whether directly or indirectly.

### Disqualifications under section 29A

Section 29A has seen multiple amendments since its insertion by way of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017. The ordinance was replaced by the Insolvency and Bankruptcy Code (Amendment) Act, 2018,<sup>[121]</sup> on January 18, 2018, with effect from November 23, 2018. Subsequently, the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 (later replaced by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018<sup>[122]</sup>), was promulgated on June 6, 2018, making certain other amendments to section 29A. Some further changes were introduced by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019, which was promulgated on December 28, 2019, and later replaced by the Insolvency and Bankruptcy Code (Amendment) Act, 2020.<sup>[123]</sup>

Under section 29A, a person shall not be eligible to submit a resolution plan if he/she or any other person acting jointly or in concert with him/her:

- Section 29A(a): Is an undischarged insolvent.
- Section 29A(b): Is a willful defaulter in accordance with the guidelines of the RBI, issued under the Banking Regulation Act, 1949.
- Section 29A(c): At the time of submitting the resolution plan has an account, has an account—or an account of a CD under his/her management or control, or of which he/

she is a promoter—that is classified as a non-performing asset in accordance with the guidelines of the RBI issued under the Banking Regulation Act, 1949, or the guidelines of a financial sector regulator issued under any other law in force at the time, and at least one year has lapsed from the date of such classification till the date of commencement of the CIRP of the CD.

The person shall be eligible to submit a resolution plan if they pay all overdue amounts with interest thereon and charges relating to non-performing asset accounts before submitting a resolution plan.

It has been clarified that this disqualification shall not apply to a resolution applicant that is a financial entity and is not a related party to the CD. For this purpose, the expression “related party” shall not include a financial entity, regulated by a financial sector regulator, if it is an FC of the CD and is a related party of the CD solely due to the conversion or substitution of debt or instruments into equity shares or the completion of such transactions as may be prescribed, prior to the insolvency commencement date.

It has also been clarified that where a resolution applicant has an account, or an account of a CD under the management or control of such person or of whom such person is a promoter, classified as NPA, and such account was acquired pursuant to a prior resolution plan approved under the IBC then, the provisions of this clause shall not apply to such resolution applicant for a period of three years from the date of approval of such resolution plan by the AA.

- Section 29A(d): Has been convicted of any offence punishable with imprisonment for two years or more under any Act specified

[121] [https://ibbi.gov.in/webadmin/pdf/legalframework/2018/Jan/182066\\_2018-01-20%2023:35:29.pdf](https://ibbi.gov.in/webadmin/pdf/legalframework/2018/Jan/182066_2018-01-20%2023:35:29.pdf)

[122] [https://ibbi.gov.in/webadmin/pdf/legalframework/2018/Aug/The%20Insolvency%20and%20Bankruptcy%20Code%20\(Second%20Amendment\)%20Act,%202018\\_2018-08-18%2018:40:34.pdf](https://ibbi.gov.in/webadmin/pdf/legalframework/2018/Aug/The%20Insolvency%20and%20Bankruptcy%20Code%20(Second%20Amendment)%20Act,%202018_2018-08-18%2018:40:34.pdf)

[123] <https://ibbi.gov.in/uploads/legalframework/d36301a7973451881e00492419012542.pdf>

under the Twelfth Schedule of the IBC or for seven years or more under any law in force at the time. It has been clarified that this clause shall not apply to a person after the expiry of a period of two years from the date of his release from imprisonment. It shall also not apply to a connected person referred to in clause (iii) of Explanation I of section 29A (see below).

- Section 29A(e): Is disqualified to act as a director under the Companies Act, 2013. It has been clarified that this clause shall not apply to a connected person referred to in clause (iii) of Explanation I of section 29A (see below).
- Section 29A(f): Is prohibited by the SEBI from trading in securities or accessing the securities markets.
- Section 29A(g): Has been a promoter or in the management or control of a CD in which a preferential transaction, undervalued transaction, extortionate credit transaction, or fraudulent transaction has taken place and in respect of which an order has been made by the AA under the IBC. It has been clarified that this clause shall not apply if any of these transactions have taken place prior to the acquisition of the CD by the resolution applicant pursuant to a resolution plan approved under the IBC or pursuant to a plan approved by a financial sector regulator or a court, and such resolution applicant has not otherwise contributed to the transaction.
- Section 29A(h): A person who has executed a guarantee in favour of a creditor in respect of a CD against which an application for insolvency resolution made by such creditor has been admitted under the IBC and such

guarantee has been invoked by the creditor and remains unpaid in full or part.

- Section 29A(i): Is subject to any disability corresponding to any of the disqualifications in section 29A (a) to (h) under any law in a jurisdiction outside India.
- Section 29A(j): Has a “connected person” who is not eligible under any of the above provisions.

Section 29A was inserted to restrict both people directly falling within the disqualifications and their “connected persons” from submitting a resolution plan. The term “connected person” has been defined in Explanation I of section 29A to mean:

- any person who is the promoter or in the management or control of the resolution applicant;
- any person who shall be the promoter or in the management or control of the business of the CD during the implementation of the resolution plan;
- the holding company, subsidiary company, associate company or related party of a person referred to above. This does not apply to a resolution applicant where such applicant is a “financial entity” and is not a related party of the CD. It has been clarified that “related party” shall not include a financial entity, regulated by a financial sector regulator, if it is a FC of the CD and is a related party of the CD solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares or completion of such transactions as may be prescribed, prior to the insolvency commencement date.

The term “financial entity” has been defined under Explanation II.

In *Arcelormittal India Private Limited Vs. Satish Kumar Gupta & Others [(2019) 2 SCC 1]*, the Supreme Court delved into the interpretation of section 29A of the IBC and held:

- (a) Section 29A is de facto as opposed to de jure position of persons mentioned therein. This is a ‘typical see through provision’ so that one can see persons who are actually in ‘control’, whether jointly or in concert with other persons. A purposeful and contextual interpretation of section 29A is imperative to find out the real individuals or entities who are acting jointly or in concert with for submission of a resolution plan.
- (b) Basis definition in the SEBI (Substantial Acquisition of Shares and Takeovers), Regulations 1994, any understanding, even if it is informal, and even if it is to indirectly cooperate to exercise control over the target company is included (in persons acting in concert).
- (c) The disqualification under section 29 A(c) attaches if the person submitting the plan either itself has an account or is a promoter of or is in the management of or is in the control of a CD which has an account classified as NPA for at least 1 year from date of classification till ICD.
- (d) The term “management” (as mentioned in section 29A) would refer to the **de jure** management which would ordinarily vest in a board of directors and would include “manager,” “managing director,” and “officer” as per the Companies Act, 2013.
- (e) The term “control” is defined in the Companies Act, 2013, in two parts: **de jure** control—which includes the right to appoint the majority of directors, and **de facto** control—person or persons acting in concert, directly or indirectly, being able to positively influence, in any manner, management or policy decisions of the company. A management decision is a decision to be taken on the running of the corporation’s day-to-day affairs and a policy decision would be a decision that would be beyond running day-to-day affairs (that is, long-term decisions). So long as management or policy decisions can be, or are, taken by virtue of shareholding, management rights, a shareholders’ agreement, voting agreements, or otherwise, control can be said to exist. For section 29A(c) and (g), control denotes only “positive control” or “proactive control” as opposed to negative or reactive control. Hence, mere power to block special resolutions cannot amount to control.
- (f) “Promoter” could be a **de jure** position, where the person is expressly named in a prospectus or identified in an annual return as a promoter, or a **de facto** position, where a person has control over the affairs of the company or advises, directs, or instructs the board to act (other than the person acting in a professional capacity).
- (g) The stage at which ineligibility in section 29A(c) attaches is when the resolution plan is submitted by a resolution applicant and not from the ICD (or any other anterior point in time). The ineligibility

under section 29A(c) can only be removed if the person submitting the plan pays all overdue amounts with interest thereon and charges relating to the non-performing asset in question before submitting a resolution plan. On the other hand, the ineligibility under section 29A(g) cannot be cured by paying off the debts of the corporate debtor. Persons in erstwhile management or control of the corporate debtor can become eligible to submit a resolution plan for the corporate debtor by paying off the debts of the company only if they are not disqualified under section 29A(g).

- (h) While ineligibility under section 29A(c) attracts at the time of submission of the plan, antecedent facts reasonably proximate to this point in time can always be seen to determine whether disqualified persons are in substance seeking to avoid the consequences of the proviso to section 29A(c) before submitting a resolution plan. If it is shown on facts that at a reasonably proximate point in time before submission of the plan, the affairs of the applicant are so arranged as to avoid paying non-performing asset debts, such person must be held to be ineligible.

In *Swiss Ribbons Pvt. Ltd. & Another Vs. Union of India & Others* [(2019) 4 SCC 17], a constitutional challenge was raised against section 29A(j) (connected parties) read with the definition of related party under the IBC.

The Supreme Court examined the definition of “related party” and observed that persons who act jointly or in concert with others are connected with the business activity of the resolution applicant. Similarly, all the categories of persons mentioned in section 5(24A) (definition of related party to an individual) show that such persons must be “connected” with the resolution applicant within the meaning of section 29A(j). This being the case, the categories of persons who are collectively mentioned as a “relative” need to have a connection with the business activity of the resolution applicant. If this cannot be shown such person cannot be disqualified under section 29A(j). All the categories in this subsection deal with persons, natural as well as artificial, who are connected with the business activity of the resolution applicant. The expressions “related party” and “relative” contained in the definition sections must be read **noscitur a sociis** (the meaning of an unclear word or phrase should be interpreted within the context it is being used) with the categories of persons mentioned in Explanation I. So read, they would include only persons who are connected with the business activity of the resolution applicant.

The Supreme Court found that Explanation I makes it clear that if a person is otherwise covered as a “connected person,” this provision also covers a person who is in management or control of the business of the CD during the implementation of a resolution plan. Therefore, any such person is not indeterminate at all, but is someone who is in the saddle of the business of the CD, either at an anterior point in time or during implementation of the resolution plan.

With this, the constitutionality of section 29A(j) was upheld.

### MSME exemptions

When section 29A was inserted, concerns were raised about whether there would be non-promoter resolution applicants interested in the resolution of micro, small, and medium enterprises (MSMEs). Note that while section 29A is not limited to promoter disqualification, in practice, since the majority of companies undergoing the CIRP would have non-performing assets more than a year old or the promoters would have given a guarantee to the lenders, most promoters of the CD would end up being disqualified under section 29A(c) (the non-performing asset disqualification) or section 29A(h) (the guarantee disqualification).

Given the importance of MSMEs and recognizing that promoters of an MSME are likely to be interested in acquiring it, the government restricted the applicability of section 29A by way of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 (later replaced by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018<sup>[124]</sup>), which introduced section 240A to the IBC. The provision excludes MSMEs from the operation of section 29A(c) and section 29A(h). This means that promoters of MSMEs can be the resolution applicants for MSMEs undergoing the CIRP, even if these promoters are otherwise disqualified under section 29A(c) or section 29A(h) (and assuming they are not disqualified under any other provision of section 29A).

As per a notification dated June 26, 2020, issued by the Ministry of Micro, Small, and Medium Enterprises,<sup>[125]</sup> effective July 1, 2020, an enterprise shall be classified as a micro enterprise, where the investment in plant and machinery or equipment does not exceed one crore rupees and turnover does not exceed five crore rupees; a small enterprise, where the investment in plant and

machinery or equipment does not exceed 10 crore rupees and turnover does not exceed 50 crore rupees; and a medium enterprise, where the investment in plant and machinery or equipment does not exceed 50 crore rupees and turnover does not exceed 250 crore rupees.

#### *Saravana Global Holdings Ltd. & Another Vs. Bafna Pharmaceuticals Ltd. & Others [Civil Appeal No(s). 5344/2019]*

The Supreme Court upheld the order of the NCLAT, which had held that the CD is an MSME and the promoters are not ineligible in terms of section 29A of the IBC. Therefore, it is not necessary for the CoC to find out whether the resolution applicant is ineligible in terms of section 29A or not.

### 6.8.4 The Evaluation Matrix

The evaluation matrix is defined in the CIRP Regulations (regulation 2(1)(ha)) as such parameters to be applied and the manner of applying such parameters, as approved by the CoC, for consideration of resolution plans for its approval. The evaluation matrix is required to be shared with the PRAs along with the RFRP.

This matrix lists the criteria on which the resolution plans will be evaluated by the CoC. The matrix sets out the parameters to be applied (and the manner of applying them), as laid down by the CoC, for resolution plans being considered for approval. This enables the CoC to use the criteria stated in the matrix to compare one resolution plan with another. This ensures more transparency in the evaluation process, reducing the possibilities of challenges to the process. The CoC should think carefully about the contents of the evaluation matrix, avoiding generic statements that may be subjective and difficult to follow.

[124] [https://ibbi.gov.in/webadmin/pdf/whatsnew/2018/Aug/The%20Insolvency%20and%20Bankruptcy%20Code%20\(Second%20Amendment\)%20Act,%202018\\_2018-08-18%2018:42:09.pdf](https://ibbi.gov.in/webadmin/pdf/whatsnew/2018/Aug/The%20Insolvency%20and%20Bankruptcy%20Code%20(Second%20Amendment)%20Act,%202018_2018-08-18%2018:42:09.pdf)

[125] [http://www.dcmsme.gov.in/IndianGazzate\\_0.pdf](http://www.dcmsme.gov.in/IndianGazzate_0.pdf)

## 6.9 Submission of the Resolution Plan

Once the RFRP, IM, and evaluation matrix are provided to the PRAs, they undertake diligence of the CD and submit the resolution plan to the RP as per the provisions of the IBC, CIRP Regulations, and RFRP.

As per section 30(1) of the IBC, a resolution applicant may submit to the RP a resolution plan, along with an affidavit stating that he is eligible under section 29A, prepared on the basis of the IM.

As per regulation 39 (1) of the CIRP Regulations, a PRA in the Final List may submit resolution plan or plans prepared in accordance with the IBC and CIRP Regulations to the RP electronically within the time given in the RFRP along with section 29A affidavit as well as an undertaking that every information and records provided in connection with or in the resolution plan is true and correct and discovery of false information and record at any time will render the applicant ineligible to continue in the CIRP, forfeit any refundable deposit, and attract penal action under the IBC. As per regulation 39 (1A), a resolution plan which does not comply with these requirements shall be rejected.

## 7. Approval of the Resolution Plan

Once resolution plans are received, the RP shall examine each one to confirm compliance with the requirements of section 30(2) of the IBC and the CIRP Regulations. Thereafter, as per section 30(3) of the IBC, the RP shall present to the CoC for its approval the resolution plans that conform with the conditions referred to in section 30(1).

As per regulation 39(2) of the CIRP Regulations, all complying resolution plans should be placed by the RP before the CoC for its consideration, along with the

details of any avoidance transactions observed, found, or determined by him and the orders, if any, of the AA in respect of such transactions. These avoidance transactions are preferential transactions, undervalued transactions, extortionate credit transactions, and fraudulent transactions.

### 7.1 Section 30(2)

Only the resolution plans that comply with section 30(2) of the IBC can be considered by the CoC. Section 30(2) states that the RP shall examine each resolution plan to confirm the following:

- Section 30(2)(a): That the plan provides for payment of the CIRP Costs in a manner specified by the IBBI in priority to the payment of all other debts of the CD.
- Section 30(2)(b): That the plan provides for the payment of the debts of OCs in such manner as may be specified by the IBBI, which shall not be less than:
  - i. the amount to be paid to the OCs if the CD were liquidated under section 53 of the IBC (note: section 53 provides for how the amounts are to be distributed to the stakeholders if the CD is liquidated), or
  - ii. the amount that would have been paid to the OCs, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in section 53(1) of the IBC (note: this requirement was included in the IBC by way of the Insolvency and Bankruptcy Code (Amendment) Act, 2019),<sup>[126]</sup> whichever is higher.

[126] <https://ibbi.gov.in/uploads/legalframework/630af836c9fbbbed047c42dbdfd2aca13.pdf>

The plan should also provide for the payment of debts of FCs, who do not vote in favor of the resolution plan, in such manner as may be specified by the IBBI, which shall not be less than the amount to be paid to such creditors in accordance with section 53(1) in the event of the liquidation of the CD. (Note: This requirement was also added by way of the IBC Amendment 2019.)

The IBC Amendment 2019 clarifies that the distribution as per the above provisions shall be fair and equitable to such creditors. It also explains that from the date of commencement of the IBC Amendment 2019 (August 16, 2019), the above provisions shall also apply to the CIRP of a CD where a resolution plan has not been approved or rejected by the AA, or where an appeal has been preferred under section 61 or 62 or such an appeal is not time barred under any provision of law in force at the time, or where a legal proceeding has been initiated in any court against the decision of the AA regarding a resolution plan.

*In Committee of Creditors of Essar Steel India Limited Through Authorised Signatory Vs. Satish Kumar Gupta & Others [Civil Appeal No. 8766-67/2019 Diary No. 24417/2019 with other Civil Appeals and WP(C)s],* the Supreme Court upheld the constitutional validity of the Insolvency and Bankruptcy Code (Amendment) Act, 2019, and emphasized that the legislature must have free play in economic legislation and the courts must give a certain degree of deference to the legislative judgment in economic choices.

- Section 30(2)(c): That the plan provides for the management of the affairs of the CD after approval of the resolution plan.
  - Section 30(2)(d): That the plan provides for the implementation and supervision of the resolution plan.
  - Section 30(2)(e): That the plan does not contravene any provisions of the law in force at the time. There is a proviso that if any approval of shareholders is required under the Companies Act, 2013, or any other law in force at the time for the implementation of actions under the resolution plan, such approval shall be deemed to have been given and it shall not be a contravention of that act or law.
  - Section 30(2)(f): That the plan confirms to other requirements as may be specified by the IBBI.
- The other requirements are specified by the IBBI in Regulation 38 and 39 of the CIRP Regulations.
- Regulation 38 sets out the mandatory contents of the resolution plan. These are:
- The amount payable under a resolution plan to the OCs shall be given priority over FCs and the amount payable to the FCs who have a right to vote under section 21 (2) and did not vote in favour of the resolution plan, shall be paid in priority over FCs who voted in favour of the plan.
  - A resolution plan shall include a statement as to how it has dealt with the interests of all stakeholders, including FCs and OCs of the CD.
  - A resolution plan shall include a statement giving details if the resolution applicant or any of its related parties has failed to implement or

contributed to the failure of implementation of any other resolution plan approved by the AA at any time in the past.

- A resolution plan shall provide:
  - the term of the plan and its implementation schedule;
  - the management and control of the business of the CD during its term; and
  - adequate means for supervising its implementation.
- The resolution plan should demonstrate that:
  - it addresses the cause of default;
  - it is feasible and viable;
  - it has provisions for its effective implementation;
  - it has provisions for approvals required and timelines for them; and
  - the resolution applicant has the capability to implement the plan.

In *Arcelormittal India Private Limited Vs. Satish Kumar Gupta & Others [(2019) 2 SCC 1]*, the Supreme Court delved into the role of the RP while evaluating a resolution plan. On the role of the RP, the Supreme Court made it clear that the RP must only “examine” and “confirm” that a resolution plan conforms to the parameters of section 30(2) before presenting the plan to the CoC under section 25(2)(i) read with section 30(3).

The Supreme Court noted that the RP is only required to conduct due diligence, examine each resolution plan, and determine whether or not it is complete in all respects before placing it before each CoC. It held that if an RP forms an opinion that a resolution plan contravenes any provisions of the law, including section 29A of the IBC, he/she is only expected to present an opinion before the CoC and not render a decision regarding the validity of a resolution plan.

The Supreme Court also observed that while each CoC is vested with the duty of either approving or rejecting a resolution plan, in light of section 29A and as per the parameters of section 30 of the IBC, this is not final. It is the AA, a quasi-judicial body under section 31, that determines if a plan is in consonance with section 30 and its requirements (including that of section 29A). Section 61 provides another avenue for appealing against both approvals and rejections of plans.

## 7.2 Measures in the Resolution Plan

Regulation 37 of the CIRP Regulations provides that a resolution plan shall provide for the measures, as may be necessary, for insolvency resolution of the CD for maximization of value of its assets. These may include (but are not limited to) the following:

- the transfer of all or part of the CD’s assets to one or more persons;
- the sale of all or part of the assets of the CD, whether they are subject to any security interest or not;

- the restructuring of the CD, by way of merger, amalgamation, or demerger;
- the substantial acquisition of shares of the CD, or the merger or consolidation of the CD with one or more persons;
- the curing or waiving of any breach of the terms of any debt due from the CD;
- the reduction in the amount payable to creditors;
- the extension of a maturity rate or change in the interest rate or other terms due from the CD;
- the amendment of the constitutional documents of the CD;
- the issuance of securities of the CD for cash, property, or securities, or in exchange for claims or interests, or for other appropriate purposes;
- the obtaining of necessary approvals from the central and state governments or other authorities;
- satisfaction or modification of any security interest;
- cancellation or delisting of any shares of the CD, if required;
- the change in portfolio of goods and services produced or rendered by the CD;
- the change in technology used by the CD;
- obtaining necessary approvals from the Central and State Governments and other authorities.

*Edelweiss Asset Reconstruction Company Ltd. Vs. Synergies Dooray Automotive Ltd. & Others [Company Appeal (AT) (Insolvency) No. 169 to 173 of 2017]*

The AA's order dated August 2, 2017, approving a resolution plan was challenged on the basis that the resolution plan provided for merger and amalgamation, which is not permissible as it violates section 30(2)(e) of the IBC. It was noted that a resolution plan may provide for merger or consolidation of the CD with one or more persons in terms of regulation 37(1)(c) of the CIRP Regulations. The NCLAT held: **“The I&B Code is a code by itself and section 238 provides overriding effect of it over the provisions of the other Acts, if any of the provisions of an Act is in conflict with the provisions of the I&B Code.”**

In *JSW Steel Ltd. Vs. Mahender Kumar Khandelwal & Others Company Appeal (AT) (Insolvency) No. 957, 1034, 1035, 1055, 1074, 1126, 1461 of 2019*, differential treatment was given in the resolution plan in respect of payment to OCs whose claims were contingent (as opposed to OCs whose claims were not). The NCLAT held that the Appellant who claims to be OC but his claim has not been crystallized which made him ‘contingent creditor’ and as such cannot claim equitable treatment with all other creditors.

### 7.3 CoC to Approve the Resolution Plan

As mentioned, the RP is required to present all plans compliant with the mandatory provisions of the IBC and the CIRP Regulations to the CoC for approval.

As per section 30(4) of the IBC, the CoC may approve a resolution plan with a vote of **[66%]** at least 66 percent of the voting share of FCs after considering its feasibility and viability. A significant amendment to section 30(4) was by way of the Insolvency and Bankruptcy Code Amendment 2019,<sup>[127]</sup> providing that the CoC may also consider the manner of distribution proposed in the resolution plan, which may take into account the order of priority among creditors as laid down in section 53(1), including the priority and value of the security interest of a secured creditor.

Hence, the CoC can also consider the distribution of amounts provided in the resolution plan among various types of stakeholders.

As per section 30(5), the resolution applicant may attend the CoC meeting in which its resolution plan is being considered, but such resolution applicant shall not have any right to vote (unless it is an FC).

#### Voting process

Regulation 39(3) of the CIRP Regulations provides voting on the resolution plan by the CoC. Prior to its amendment, it provided that the CoC must evaluate all resolution plans strictly as per the evaluation matrix to identify the best plan and may approve it with such modifications as it deems fit. Further, the CoC must record its deliberations on the feasibility and viability of the resolution plans.

By way of notification No. IBBI/2020-21/GN/REG064, issued on August 7, 2020, the IBBI notified the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fourth Amendment) Regulations, 2020.<sup>[128]</sup>

Among other amendments, regulation 39(3) has been amended to provide that the CoC shall:

- (a) evaluate the resolution plans received from the RP as per the evaluation matrix;
- (b) record its deliberations on the feasibility and viability of each resolution plan; and
- (c) vote on all such resolution plans simultaneously.

The amendments have also introduced subregulations (3A) and (3B) under regulation 39, which provide that:

- (a) where only one resolution plan is put to the vote, it shall be considered approved if it receives the requisite votes (at least 66 percent of the voting share); and
- (b) where two or more resolution plans are put to the vote simultaneously, the resolution plan that receives the highest votes, but not less than the requisite votes, shall be considered approved. It has further been provided that where two or more resolution plans receive equal votes, but not less than the requisite votes, the CoC shall approve any one of them, as per the tie-breaker formula announced before voting. If none of the resolution plans receive the requisite votes, the CoC shall again vote on the resolution plan that received the highest votes, subject to the timelines under the IBC.

Thus, as per the amended CIRP Regulations, the CoC is required to evaluate all compliant resolution

[127] <https://ibbi.gov.in/uploads/legalframework/630af836c9fbbbed047c42dbdfd2aca13.pdf>

[128] <https://www.ibbi.gov.in/uploads/legalframework/691983ad021bf2a65a708f57d17595b8.pdf>

plans against the evaluation matrix to identify the best ones, after which the CoC shall vote on all compliant resolution plans simultaneously. The resolution plan that receives the most votes, but not less than 66 percent of the voting share, shall be considered approved.

## 7.4 Section 32A

By way of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019 (replaced by the Insolvency and Bankruptcy Code (Amendment) Act, 2020),<sup>[129]</sup> section 32A was inserted in the IBC to protect CDs resolved under the IBC from prosecution, and to prevent action against the property of such CDs and the successful resolution applicant subject to the fulfillment of certain conditions.

Section 32A(1) provides that the liability of a CD for an offence committed prior to the commencement of the CIRP shall cease, and the CD shall not be prosecuted for such an offence from the date the resolution plan has been approved by the AA, if the resolution plan results in the change in the management or control of the CD to a person who was not:

- (a) a promoter or in the management or control of the CD or a related party of such a person; or
- (b) to a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe had abetted or conspired to commit the offence, and has submitted a report or a complaint to the relevant statutory authority or court.

The section clarifies that if a prosecution is instituted during the CIRP against such CD, it shall stand discharged from the date of approval of the resolution plan subject to these specified requirements being fulfilled.

The section further provides that every person who was a “designated partner” (as defined in the Limited Liability Partnership Act, 2008) or an “officer who is in default” (as defined in the Companies Act, 2013), or was in any manner in charge of or responsible to the CD for the conduct of its business, or was associated with the CD in any manner, and who was directly or indirectly involved in committing such offence as per the report submitted or complaint filed by the investigating authority, shall continue to be liable to be prosecuted and punished for such offence committed by the CD, notwithstanding that the CD’s liability has ceased under this provision.

Similarly, section 32A(2) provides that no action shall be taken against the property of the CD in relation to an offence committed prior to the commencement of the CIRP of the CD, where such property is covered under a resolution plan approved by the AA, that results in a change in control of the CD or the sale of liquidation assets to a person who was not

- (a) a promoter or in the management or control of the CD or a related party of such a person; or
- (b) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe had abetted or conspired to commit the offence, and has submitted a report or a complaint to the relevant statutory authority or court.

The section clarifies that an action against the property of the CD shall include the attachment, seizure, retention or confiscation of such property under applicable law. Further, the section shall not bar an action against the property of any person, other than the CD or a person who has acquired such property through CIRP or liquidation process under the IBC and fulfils the specified requirements.

[129] <https://ibbi.gov.in/uploads/legalframework/d6b171ec-9b9ea5c54f7423bc36f92977.pdf>

These provisions are subject to the CD or any person who may be required to provide assistance under applicable law extending their full assistance and cooperation to any authority investigating the offence committed prior to the commencement of the CIRP.

Section 32A would encourage prospective resolution

applicants to submit resolution plans undeterred by uncertainties surrounding the offences committed by the CD prior to the CIRP. Further, while the section absolves the CD and protects its property, it does not absolve the persons who were responsible for the offence committed by the CD and does not bar any action against their property.

In *JSW Steel Ltd. Vs. Mahender Kumar Khandelwal & Others [Company Appeal (AT) (Insolvency) No. 957, 1034, 1035, 1055, 1074, 1126, 1461 of 2019]*, the NCLAT examined the applicability of section 32A to a resolution plan of JSW Steel Limited (the successful resolution applicant) for Bhushan Power Steel Limited.

In this case, the resolution plan was approved by the AA. After the approval, the Directorate of Enforcement attached the assets of the CD under the Prevention of Money Laundering Act, 2002, and a question arose as to whether the successful resolution applicant can get the benefit of section 32A of the IBC. The Directorate of Enforcement argued that section 32A will not be applicable because it is prospective; a self-declaration needs to be made by the successful resolution applicant that it fulfills the conditions of section 32A; and the successful resolution applicant is a related party to the CD.

The NCLAT rejected these contentions and held that:

- (a) There is no mandate under section 32A that the successful resolution applicant, after approval of the plan, is required to give any such declaration as to whether the benefit of section 32A will be applicable to them or not. Only the competent authority can decide this if an allegation is leveled.
- (b) On a review of section 32A(1)(a) of the IBC read with the definition of the related party, it is evident that the successful resolution applicant is not an associate company/related party of the CD. Although Rohne Coal Company Private Limited is an associate company of the CD and of the successful resolution applicant because they are both invested in this downstream joint venture company, this does not make Rohne Coal Company Private Limited, the successful resolution applicant, and the CD related parties of each other.
- (c) The interpretation that section 32A is prospective in nature and the benefit of such provision cannot be claimed by the appellant is wrong and misplaced. A plain reading of section 32A(1) and (2) clearly suggests that the Directorate of Enforcement/other investigating agencies do not have the power to attach assets of a CD, once the resolution plan is approved and the criminal investigations against the CD stand abated. Section 32A does not in any manner suggest that the benefit provided thereunder is only for such resolution plans that are yet to be approved. Further, there is no basis to make a distinction between a resolution applicant whose plan has been approved before or after the promulgation of the ordinance. It is clear that subsequent promulgation of the ordinance is merely a clarification in this respect and must be made applicable retrospectively.

- (d) The following persons/authorities are empowered to decide whether a resolution applicant is ineligible, being a related party in terms of section 29A or not:
- (e) The RP in terms of section 30(1) is to find out whether such statement has been made or not.
- (f) The CoC is empowered to decide whether the resolution applicant is ineligible in terms of section 29A; therefore, the CoC is also required to decide whether it is a related party to the CD or not.
- (g) The AA, while passing an order under section 31, can find out whether the resolution applicant fulfills the conditions under section 30(2), which includes section 30(2)(e) and, in terms of section 29A, can decide whether the resolution applicant is a related party to the CD.

The Directorate of Enforcement has not been empowered under the IBC to decide the question.

## 7.5 Submission of the Plan and Its Approval by the AA

Section 30(6) states that the RP shall submit the resolution plan, as approved by the CoC, to the AA.

As per regulation 39(4) of CIRP Regulations, if the plan is approved by the CoC, the RP shall endeavor to submit it to the AA at least 15 days before the maximum period for completing a CIRP, along with a compliance certificate (Form H of the Schedule) and the evidence of receipt of performance security required under regulation 36B(4A). Form H is a comprehensive compliance certificate that sets out the key timelines in the CIRP, the liquidation and the fair value, the distribution of the resolution plan amount among various stakeholders, the compliance of the resolution plan with various provisions of the IBC and

CIRP Regulations, the contingencies and approvals required under the plan, and a certification by the RP that the resolution plan is in compliance with the IBC and CIRP Regulations.

Section 31 states that if the AA is satisfied that the resolution plan, as approved by the CoC, meets the requirements of section 30(2), it shall, by order, approve the plan, which will then be binding on the CD and its employees, members, creditors including the Central Government, any state government, or any local authority to whom a debt in respect of the payment of dues arising under any law in force at the time, such as authorities to whom statutory dues are owed, guarantors, and other stakeholders involved in the resolution plan. The part that the plan shall be binding on the Central Government, any state government, or any local authority was added by the Insolvency and Bankruptcy Code (Amendment) Act 2019,<sup>[130]</sup> as it was noticed that these authorities were not accepting the treatment of debts due to them in the resolution plan.

[130] <https://ibbi.gov.in/uploads/legalframework/630af836c9fbbed047c42dbdfd2aca13.pdf>

In *Pr. Director General of Income Tax & Anr. Vs. M/s Synergies Dooray Automotive Ltd. & Ors. Company Appeal (AT) (Insolvency) No. 205/2017* and connected matters, the NCLAT considered whether the ‘Income Tax’, ‘Value Added Tax’ or other statutory dues, such as ‘Municipal Tax’, ‘Excise Duty’, etc., come within the meaning of ‘Operational Debt’ and whether the Central Government, the State Government or the legal authority having statutory claim, come within the meaning of OC. It held that operational debt in normal course means a debt arising during the operation of a CD. Only when the CD is operational and remains a going concern, the statutory liability, such as payment of Income Tax, Value Added Tax etc., will arise. As the ‘Income Tax’, ‘Value Added Tax’ and other statutory dues arising out of the existing law, arises when the CD is operational, such statutory dues have direct nexus with operation of the CD. Therefore, all statutory dues, including ‘Income Tax’, ‘Value Added Tax’ etc. come within the meaning of operational debt. Consequently, ‘Income Tax Department of the Central Government’ and the ‘Sales Tax Department(s) of the State Government’ and ‘local authority’, who are entitled to dues arising out of the existing laws, are OCs.

The section further provides that the AA shall, before passing an order for approval of the resolution plan under this subsection, satisfy that the resolution plan has provisions for its effective implementation.

On approval of the resolution plan by the AA, the moratorium ceases to have effect and the RP is required to forward all records relating to the conduct

of the CIRP and the resolution plan to the IBBI to be recorded on its database.

The AA can reject the resolution plan if it is satisfied that it does not conform to the requirements of section 30(2), or does not have provisions for its effective implementation.

In *K. Sashidhar Vs. Indian Overseas Bank & Others [2019 SCC Online SC 257]*, the Supreme Court laid down the role of the CoC in accepting or rejecting the resolution plan as well as the role of the AA while considering the application for approval of the resolution plan or liquidation of the CD (due to rejecting the plan). The Supreme Court held that the legislature has not endowed the AA with the jurisdiction or authority to analyze or evaluate the commercial decision of the CoC much less to enquire into the justness of the rejection of the resolution plan by the dissenting financial creditors.

There is an intrinsic assumption that the FCs are fully informed about the viability of the CD and the feasibility of the proposed resolution plan. They act on the basis of a thorough examination of the proposed resolution plan and an assessment made by their team of experts. The opinion on the subject matter expressed by them after due deliberations in the CoC meeting through voting, as per voting shares, is a collective business decision. The legislature, consciously, has not provided any grounds to challenge the “commercial wisdom” of the individual financial creditors or their collective decision before the AA—that is made non-justiciable.

The court further observed that the discretion of the AA is circumscribed by section 31 as being limited to scrutiny of the resolution plan “as approved” by the requisite percent of the voting share of FCs. Even

in that scrutiny, the grounds on which the AA can reject the resolution plan relate to matters specified in section 30(2), when the resolution plan does not conform to the stated requirements.

None of the specified functions of the IBBI pertain to regulating the manner in which the FCs ought to or ought not to exercise their commercial wisdom during the voting on the resolution plan under section 30(4) of the IBC.

Even the jurisdiction of the NCLAT being in continuation of the proceedings would be circumscribed in that regard and more particularly on account of section 32 of the IBC, which envisages that any appeal against an order approving the resolution plan shall be in the manner and on the grounds specified in section 61(3) of the IBC. Significantly, the matters or grounds, be it under section 30(2) or under section 61(3), are regarding testing the validity of the resolution plan approved by the CoC and not for approving the resolution plan that has been rejected by the CoC. The enquiry in such an appeal would be limited to the power exercisable by the RP under section 30(2) of the IBC or, at best, by the AA under section 31(2) read with section 31(1). No other enquiry would be permissible. The NCLAT can examine the challenge only in relation to the grounds specified in section 61(3), which are limited to matters other than enquiry into the autonomy or commercial wisdom of the dissenting financial creditors.

Neither the AA nor the NCLAT has been endowed with the jurisdiction to reverse the commercial wisdom of the dissenting FCs and that too on the specious ground that it is only an opinion of the minority FCs.

*Municipal Corporation of Greater Mumbai (MCGM) Vs. Abhilash Lal and Others [2019 SCC Online SC 1479]*

By way of a contract, MCGM had given land owned by it to the CD (Seven Hills) to build a hospital, subject to certain conditions. The lease deed was not completed and there were certain defaults in meeting conditions. A show-cause notice was issued by MCGM proposing to terminate the contract with the CD. In the meantime, the CD was admitted to insolvency and a resolution plan for the CD (submitted by SNMC) was approved. The resolution plan for the CD was opposed by MCGM, arguing that being a public body as well as a planning authority, it had to comply with the provisions of the Mumbai Municipal Corporation Act, 1888, and the plan required the approval of the Improvement Committee of the corporation. Further, it was argued that a show-cause notice had already been issued prior to the ICD, proposing to terminate the contract. The resolution plan was approved by the AA and upheld by the NCLAT. On appeal, the Supreme Court observed that in this case, it is not the provisions of the IBC that this court has to primarily deal with; it is rather whether the process adopted by the NCLT and later the NCLAT, in overruling MCGM's concerns and objections with regard to the treatment of its property (the land), is in accordance with law.

The Supreme Court held that the AA could not have approved the plan, which implicates the assets of MCGM, especially when the CD had not fulfilled its obligations under the contract. The court observed that one of the modes spelt out in the plan for securing capital was mortgaging the land. Initially, no doubt, SNMC stepped into the shoes of Seven Hills and assumed its control. What is important to note is that the corporate restructuring was a way of taking over the company's liquidation by SNMC as it was not only Seven Hills' project with shares and liquidation of debts, but also the restructuring of the company's liabilities by creating new debts and mortgaging the land that directly affected MCGM. It also noticed that the Mumbai Municipal Corporation Act prescribes for prior permission of the corporation if MCGM's properties are being dealt with through leasing or by creating any other interest. It is a matter of record that in the present case, the resolution plan was never approved by the corporation and that it was put to a vote. The proposal could be approved only to the extent that it did not result in encumbering the land belonging to MCGM.

Regarding the argument that the provisions of the IBC override all other laws and, hence, that the resolution plan approved by the NCLT acquires primacy over all other legal provisions, the court observed that, on the face of it, this argument appears to have merit. However, section 238 of the IBC cannot be read as overriding MCGM's right—indeed, its public duty—to control and regulate how its properties are to be dealt with—that exists in the Mumbai Municipal Corporation Act. The court was of the opinion that section 238 could be of importance when the properties and assets are of a debtor and not when a third party like MCGM is involved. Therefore, in the absence of approval in terms of the Mumbai Municipal Corporation Act, the AA could not have overridden MCGM's objections and enabled the creation of new interest in respect of its properties and land. The authorities under the IBC could not have precluded the control that MCGM undoubtedly has, under law, to deal with its properties and the land in question which undeniably are public properties. The resolution plan, therefore, would be a serious impediment to MCGM's independent plans to ensure that public health amenities are developed in the manner it chooses, and for which fresh approval under the Mumbai Municipal Corporation Act may be forthcoming for a separate scheme formulated by MCGM.

## 7.6 Appeals

Any appeal against an order approving the resolution plan can be made under section 61(3) of the IBC on the following grounds:

- The approved resolution plan is in contravention with the provisions of any law in force at the time.
- There is material irregularity in the powers exercised by the RP during the CIRP period.
- The debts owed to the OC have not been provided for in the plan in the manner as specified by the IBBI.
- The CIRP costs have not been provided for repayment in priority to all other debts
- The plan does not comply with any other criteria specified by the IBBI.

In *Committee of Creditors of Essar Steel India Limited Through Authorised Signatory Vs. Satish Kumar Gupta & Others* [Civil Appeal No. 8766-67/2019 Diary No. 24417/2019 with other Civil Appeals and WP(C)s], the Supreme Court provided clarity on the roles of various stakeholders, namely the RP, the resolution applicant, the CoC, and the AA and the NCLAT, regarding the resolution plan in a CIRP and settled several issues:

- (a) **Supremacy of CoC:** The CoC is supreme in commercial matters relating to a CIRP. It must decide whether to rehabilitate the CD by accepting a resolution plan, and the manner of resolution. What is left to the majority decision of the CoC is the feasibility and viability of a resolution plan, which obviously takes into account all aspects of the plan, including the manner of distribution of realizations under a resolution plan among the various classes and subclasses of creditors. Its decisions, however, must reflect that it has taken into account maximizing the value of assets of the CD and that it has adequately balanced the interests of all the stakeholders. It cannot delegate its responsibility. It does not act in any fiduciary capacity to any group of creditors. On the contrary, it is to take a business decision based upon ground realities by a majority, which then binds all stakeholders, including dissenting creditors.
- (b) **Jurisdiction of AA:** The limited judicial review available to AA can in no circumstance trespass upon a business decision of the majority of the CoC. The residual jurisdiction of the AA under section 60(5)(c) cannot, in any manner, whittle down section 31(1) of the IBC, by the investment of some discretionary or equity jurisdiction in the AA outside section 30(2) of the IBC, while adjudicating a resolution plan. The AA is to decide on whether a resolution plan passes muster under the IBC and there is no residual jurisdiction not to approve a resolution plan on the ground that it is unfair or unjust to a class of creditors, so long as the interest of each class has been looked into and taken care of.
- (c) **Fair and equitable:** Protecting creditors in general is, no doubt, an important objective. Protecting creditors from each other is also important. If an “equality for all” approach recognizing the rights of different classes of creditors as part of a CIRP is adopted, secured FCs will, in many cases, be incentivized to vote for liquidation rather than resolution, as they would have better rights if the CD is liquidated. This would defeat the objective of the IBC which is resolution of distressed assets. The amended regulation 38 does not lead to the conclusion that FCs and OCs, or secured and unsecured creditors, must be paid the same amounts, percentage wise, under the resolution plan before it can pass muster. Fair and equitable dealing of OCs rights under regulation 38 of the CIRP Regulations involves the resolution plan stating as to how it has dealt with the interests of OCs, which is not the same thing as saying that they must be paid the same amount of their debt proportionately. So long as the provisions of the IBC and the Regulations have been met, it is the commercial wisdom of the requisite majority of the CoC which is to negotiate and accept a resolution plan, which may involve differential payment to different classes of creditors, together with negotiating with a prospective resolution applicant for better or different terms which may also involve differences in distribution of amounts between different classes of creditors. The IBC and the Regulations, read as a whole,

together with the observations of expert bodies and the SC's judgment, all lead to the conclusion that the equality principle cannot be stretched to treating un-equals equally, as that will destroy the very objective of the IBC to resolve stressed assets. Equitable treatment is to be accorded to each creditor depending upon the class to which it belongs: secured or unsecured, financial or operational.

- (d) **Subrogation:** Section 31(1) makes it clear that once a resolution plan is approved by the CoC, it shall be binding on all stakeholders, including guarantors. This provision ensures that the successful resolution applicant starts running the business of the CD on a fresh slate as it were. It is difficult to accept the argument that, the part of the resolution plan which states that the claims of the guarantor on account of subrogation shall be extinguished, cannot be applied to the guarantees furnished by the erstwhile directors of the CD. Claims: All claims must be submitted to and decided by the RP so that a prospective resolution applicant knows exactly what must be paid in order that it may then take over and run the business of the CD. A successful resolution applicant cannot suddenly be faced with “undecided” claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by it.
- (e) **Profit during the CIRP:** The request for resolution plans had provided that profits made during the CIRP would not go toward paying the debts of any creditor and, therefore, this amount cannot be given to creditors.
- (f) **Priority of Payment:** Section 30(2)(b) is a beneficial provision in favour of OCs and dissenting FCs as they are now to be paid a certain minimum amount, the minimum in the case of OCs being the higher of the two figures calculated under sub-clauses (i) and (ii) of clause (b), and the minimum in the case of dissenting FC being a minimum amount that was not earlier payable. Prior to the amendment, secured FCs could cram down unsecured FCs who were dissenting. But after the amendment, such FCs are now to be paid the minimum amount mentioned. The order of priority of payment of creditors mentioned in section 53 is not engrafted in sub-section (2)(b) of the said section, as amended. Section 53 is only referred to in order that a certain minimum amount be paid to different classes of OCs and FCs.

In *Maharashtra Seamless Limited Vs. Padmanabhan Venkatesh and Others* [Civil Appeal No. 4242 of 2019, 2020 SCC Online SC 67], an appeal was preferred against an order passed by the NCLAT wherein it had directed the successful resolution applicant to modify its resolution plan because the value of the resolution plan was lower than the liquidation value of the CD. The Supreme Court observed that the IBC and its underlying provisions do not provide that the resolution applicant has to match the liquidation value and that the object behind the valuation process is to assist the CoC to take a decision on the resolution plan. Relying on the Essar judgment, the Supreme Court held that the court ought to cede ground to the commercial wisdom of the creditors rather than assess the resolution plan on the basis of quantitative analysis.

## 7.7 Implementation of the Resolution Plan

In the IBC and the CIRP Regulations much emphasis is placed on ensuring that the resolution plan has an effective means of implementation. A peculiar situation has arisen in some cases where the successful resolution applicants were seeking to withdraw from the resolution plan after its approval by the CoC and/or were not willing to implement the resolution plan after approval by the AA.

To mitigate these risks; to ensure that only genuine, capable, and credible resolution applicants submit resolution plans; and to discourage resolution applicants from walking away from the resolution plan, the IBBI amended the CIRP Regulations on January 24, 2019,<sup>[131]</sup> to provide for submission of performance security by successful resolution applicants. As per the amended regulation 39(4), the application by the RP to the AA for approval of the resolution plan is to be made along with evidence of such security.

The amended regulation 38(1B) requires that the resolution plan include a statement as to whether the

resolution applicant, or any of its related parties, has previously failed to implement or contributed to the failure of the implementation of any plan approved by the AA under the IBC.

Under section 33(3) of the IBC, where the resolution plan approved by the AA is contravened by the concerned CD, any person other than the CD, whose interests are prejudicially affected by such contravention, may make an application to the AA for a liquidation order.

Regulation 39(9) (added by way of the above mentioned amendment) provides that a creditor, who is aggrieved by the non-implementation of a resolution plan approved under section 31(1), may apply to the AA for directions. Hence, the creditors may apply to the AA for appropriate directions (and not just liquidation of the CD) if the plan is not implemented.

In some cases of non-implementation, the AA may approve an extension of the timeline to enable creditors to find a new resolution applicant for resolution of the CD. In cases where the AA does not provide such relief, the CD would be liquidated.

In *Committee of Creditors of Amtek Vs. Dinkar T. Venkatsubramanian, Civil Appeal No. 6707 of 2019*, a resolution plan was prepared that had failed owing to non-fulfilment of the commitment by the Successful Resolution Applicant. The SC noticed the amended provisions of section 12 of the IBC (by virtue of the Insolvency and Bankruptcy Code (Amendment) Act, 2019 (with effect from 16.08.2019), by which the resolution process may be permitted to be completed within 90 days from the date of the commencement of the Amendment Act. The said period is available up to November 15, 2019. Without deciding the issue finally, the SC permitted the RP to invite fresh offers within a prescribed time frame and allowed CoC to take a final call in the matter and the place the decision before the SC.

After the aforesaid order, a resolution plan for the CD was approved by the CoC. The successful resolution applicant sought to withdraw his resolution plan. The Supreme Court in the same matter, rejected the resolution applicant's withdrawal application with the observation that in case it indulges in such kind of practice, it will be treated as contempt of Court.

[131] [https://ibbi.gov.in/webadmin/pdf/legalframework/2019/Jan/CIRP%20Amendment%20Regulations%202019\\_2019-01-29%2009:42:48.pdf](https://ibbi.gov.in/webadmin/pdf/legalframework/2019/Jan/CIRP%20Amendment%20Regulations%202019_2019-01-29%2009:42:48.pdf)

In *Committee of Creditors of Educomp Solutions Limited Vs. Ebix Singapore Pte. Ltd. & Anr., Company Appeal (AT) (Insolvency) No. 203 of 2020*, an appeal was filed against the order of the AA permitting the resolution applicant to withdraw its resolution plan, which had been approved by the CoC. The resolution applicant in this case had sought withdrawal on the ground, inter alia, that its resolution plan was rendered commercially unviable on account of lapse of substantial time and severe and inordinate delays in the CIRP and that the financial position and profile of the CD may have altered and / or deteriorated significantly. Rejecting these contentions, the NCLAT held that after approval of the resolution plan by the CoC, the AA has no jurisdiction to entertain or to permit the withdrawal application filed by the resolution applicant. Notwithstanding the fact that only upon the approval of the AA, the resolution plan would be binding on all parties and that the application for withdrawal was filed by the resolution applicant earlier to the stage of such approval, it was held that the AA cannot enter into the arena of the majority decision of the CoC.

## 8. CIRP Costs

Section 14 of the IBC prevents the payment of any pre-CIRP dues of a creditor during the moratorium period. The moratorium does not affect the payment of dues/costs arising in the course of the CIRP of the CD. These dues/costs are categorized as “insolvency resolution process costs” (CIRP costs), and to the extent unpaid, are to be given priority for payment under the resolution plan (section 30(2)(a)).

CIRP costs are defined in section 5(13) of the IBC to mean the following:

- the amount of any interim finance and the costs incurred in raising such finance;
  - the fees payable to any person acting as a resolution professional (this would include both the IRP and RP);
  - any costs incurred by the resolution professional (IRP/RP) in running the business of the CD as a going concern;
  - any costs incurred at the expense of the government to facilitate the insolvency resolution process; and
  - any other costs as may be specified by the IBBI.
- As per regulation 31 of the CIRP Regulations, these costs mean the following:
- amounts due to suppliers of essential goods and services under regulation 32;
  - the fee payable to the AR under regulation 16A(8);
  - out-of-pocket expenses of the AR for discharging his functions under section 25A;
  - amounts due to a person whose rights are prejudicially affected by the moratorium imposed under section 14(1)(d);
  - expenses incurred on or by the IRP to the extent ratified under regulation 33
  - expenses incurred on or by the RP fixed under regulation 34
  - other costs directly relating to CIRP and approved by the CoC

The Cost Circular<sup>[132]</sup> issued by the IBBI explains these costs further and provides clarity on what can or cannot be included as CIRP Costs. Regulation 34 A of the CIRP Regulations provides that the IRP/RP shall disclose item wise CIRP Costs in such manner as may be required by the IBBI. The manner of the disclosure of these costs to IBBI is provided in the Cost Circular.

The fees/costs incurred by the RP are included as part of the CIRP costs. As per regulation 34 of the CIRP Regulations, it is the CoC that shall fix the expenses to be incurred on or by the RP and the expenses shall constitute CIRP costs. The expenses include the fee to be paid to the RP, the IPE, and professionals, and other expenses to be incurred by the RP.

The RP should ensure that not only fee payable to him is reasonable, but also other expenses incurred

by him are reasonable. What is reasonable is context specific and it is not amenable to a precise definition.<sup>[133]</sup>

Where the CD has cash flows or where interim finance has been raised, the CIRP costs can be paid during the CIRP as well. Since CIRP costs include costs incurred in running the business of the CD as a going concern, all regular course payments for liabilities arising during CIRP, such as payments to vendors for supply made during the CIRP or payment of wages and salaries to employees during CIRP period is paid out as CIRP costs during the CIRP. In case the CD does not have funds to make these payments, the resolution plan provides for payment of the same in priority to all creditors. It may be noted that the CIRP costs also get priority in payment (along with liquidation costs) in the distribution waterfall under section 53 (1) of the IBC, in case the CD goes into liquidation.

In *Sunil Jain Vs. Punjab National Bank & Others [Company Appeal (AT) (Ins) No. 156/2018]*, the NCLAT held that if goods have been supplied during the CIRP period to keep the CD as a going concern, it is the duty of the RP to include the costs of such goods in the insolvency resolution process cost. If it is not included, the resolution plan in question can be held to be in violation of section 30(2)(a) of the IBC.

In *Edelweiss Asset Reconstruction Company Limited Vs. Sai Regency Power Corporation Pvt. Ltd. and Another, 2019 SCC Online NCLAT 921*, an appeal was filed by one of the unsecured FC challenging the decision of the AA in directing the appellant to pay their share towards interim finance by issuing a letter of comfort. The CD was engaged in the business of generation and sale of electricity. In order to generate electricity, the CD was procuring gas from Oil and Natural Gas Corporation and GAIL India Limited. The gas supply agreement between the CD and GAIL was due to expire and therefore GAIL asked the CD to open/renew and submit a Standby Irrevocable Resolving Letter of Credit. The CoC passed a resolution to raise interim finance however certain creditors were reluctant to release the letter of comfort to the lead bank which was willing to disburse interim finance. The main plea taken by the appellant was that the CIRP costs which includes interim finance can only be recovered from secured creditors and not from unsecured FCs like appellant. The NCLAT held that when the CoC in a meeting of the FCs by requisite majority takes a decision with regard to CIRP costs, which includes execution of responsibility put by law on the IRP/RP to keep the company as a going concern, the same cannot be treated as forcing on the

[132] [https://www.ibbi.gov.in/webadmin/pdf/whatsnew/2018/Jun/Circular%20on%20Fee%20and%20other%20Expenses%20incurred%20for%20CIRP%20\[June%202018\]\\_2018-06-18%2014:06:58.pdf](https://www.ibbi.gov.in/webadmin/pdf/whatsnew/2018/Jun/Circular%20on%20Fee%20and%20other%20Expenses%20incurred%20for%20CIRP%20[June%202018]_2018-06-18%2014:06:58.pdf)

[133] Ibid.

appellant to part with property or forcing to incur liability. If the appellant is a part of the CoC and wants to remain the part of the CoC, then the Appellant cannot expect to only claim benefits from the process and claim that it would not take any of the liabilities and responsibilities. In the meeting of the CoC, the appellant has the right to dissent but if the decision is still taken by majority provided under the statute, all the members of the CoC are duty bound to abide the decision.

In the matter of *Mr. Vijay Kumar Garg, Insolvency Professional (IP), No. IBBI/DC/26/2020 dated June 8, 2020*,<sup>[134]</sup> the Disciplinary Committee of the IBBI observed that within the first few months of the CIRP, the RP had become aware of the fact that the CD had no cash flow and all the assets of the CD 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. Paying CIRP costs and expenses does not entitle them to continue at an exorbitant fee.

## 9. Personal Guarantors

Part III of the IBC provides for matters relating to the fresh start, insolvency, and bankruptcy of individuals and partnership firms. The IBC debtor (himself or through an RP), under section 94, and the creditor (himself, or jointly with other creditors, or through an RP), under section 95 of the IBC, may apply to the AA to initiate the insolvency resolution process of the debtor. On filing of the application, an interim moratorium under section 96 of the IBC sets in.

Except for personal guarantors to CDs, the IBC provisions relating to insolvency resolution and bankruptcy of partnership firms and individuals are not in force yet. By way of a notification dated November

15, 2019,<sup>[135]</sup> the Central Government appointed December 1, 2019, as the date on which certain provisions of the IBC, only in so far as they relate to personal guarantors to CDs, would come into force. The Central Government has issued the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019<sup>[136]</sup> and the Insolvency and Bankruptcy (Application to Adjudicating Authority for Bankruptcy Process for Personal Guarantors to Corporate Debtors) Rules, 2019<sup>[137]</sup> detailing the process of initiating insolvency and bankruptcy processes against personal guarantors.

On November 20, 2018, the IBBI issued the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Personal Guarantors to

[134] <https://ibbi.gov.in/uploads/order/2edd5a8a324c763b8e5ba42b354278aa.pdf>

[135] <https://ibbi.gov.in/uploads/legalframework/1fb8c2b785f35a5126c58a2e567be921.pdf>

[136] <https://ibbi.gov.in/uploads/legalframework/8e0ab9331455200b402d91257113805c.pdf>

[137] <https://ibbi.gov.in/uploads/legalframework/17662452f16d75fe4c221f39e303033f.pdf>

Corporate Debtors) Regulations, 2019,<sup>[138]</sup> detailing the insolvency resolution process, and the Insolvency and Bankruptcy Board of India (Bankruptcy Process for Personal Guarantors to Corporate Debtors) Regulations, 2019,<sup>[139]</sup> detailing the bankruptcy process for personal guarantors of the CD.

Since its notification, various applications have been filed by creditors seeking insolvency resolution of personal guarantors of a CD undergoing a CIRP.

On August 20, 2020, in the matter of *State Bank of India Vs. Anil Dhirajlal Ambani [IA No. 1009 of 2020 in CP (IB) 916 (MB) of 2020 and IA No. 1010 of 2020 in CP (IB) 917(MB) of 2020]*, the Mumbai bench of the NCLT allowed an application filed by the FC against a personal guarantor of the CD seeking necessary orders under section 97(3) of the IBC. This section provides that where an application under section 94 or 95 is filed by the debtor or the creditor himself, and not through the RP, the AA shall direct the IBBI, within seven days of the filing of such application, to nominate an RP for the insolvency resolution process of the debtor.

In this case, during the pendency of the resolution plans for the CDs, an application was filed by the FC seeking initiation of the insolvency resolution process against the CD's personal guarantor. The AA allowed the application and appointed an RP for the CD.

Against the order, a writ petition was filed before the High Court of Delhi: *Anil Dhirajlal Ambani Vs. State Bank of India [W.P.(C) 5712/2020]*. While issuing notice, the High Court directed that the proceedings would continue in relation to the CD and, while dealing with those proceedings, the liability of the petitioner may also be examined by the IRP. The High Court further stayed the proceedings against the petitioner under Part III of the IBC and restrained the petitioner from transferring, alienating, encumbering, dealing with, or disposing of any of his assets, or his rights, or beneficial interest therein in the interim.

[138] <https://ibbi.gov.in/uploads/legalframework/2019-11-22-171205-h10bx-8573c02ee31bba941201afff84b95ae4.pdf>

[139] <https://ibbi.gov.in/uploads/legalframework/2019-11-22-172331-pdm3h-40c64dd41380b7d710b874a8d1152fe6.pdf>



## Module 5: Liquidation

## 1. Introduction

Businesses need swift and efficient procedures for closure or dissolution when they become insolvent. The law must, therefore, provide for the orderly market exit of unviable businesses. Insolvency procedures should help entrepreneurs close down unviable businesses and start viable ones as efficiently as possible. This ensures that human and productive economic resources can be continuously rechanneled, creating a dynamic environment that strengthens the overall productivity of the economy and supports entrepreneurship.

For corporate persons, two kinds of liquidation process are envisaged under the IBC. Where a CD has committed a “default,” an FC, OC, or the corporate applicant itself can initiate a CIRP of the CD. If the CIRP fails, the CD enters the liquidation phase. Further, a corporate person can choose to voluntarily initiate liquidation proceedings when there is no default—that is, solvent liquidation—under section 59 of the IBC.<sup>[140]</sup>

Prior to the IBC, the Companies Act, 1956, dealt with the winding up and liquidation of companies. Section 433(e) of the Companies Act, 1956, dealt with the winding up of a company on the grounds of the company’s inability to pay its debts. Upon passing of an order under section 433(e), an official liquidator was to be appointed to take over the company for winding up its affairs. Pertinently, there was no provision for resolution or reorganization, and liquidation was the only consequence for companies undergoing winding-up procedures under the said Act. The processes of winding up and liquidation under the Companies Act, 1956, resulted in extraordinary delays, which often led to almost complete erosion of the asset value of the debtor company. It also failed to provide a balanced or effective framework addressing all levels of financial distress.

Under the IBC, in cases of default, a company must first necessarily enter the CIRP phase before it can be liquidated. The IBC provides for a market mechanism for the revival of failing but viable CDs and for the closure of failing unviable CDs. It seeks to strike a balance between revival and closure of companies by providing for a two-stage process to deal with the insolvency of a corporate person. In Stage I, the CD undergoes a CIRP (which has been discussed in detail in Module 3), where the creditors of the CD attempt to resolve the insolvency of the CD in a time-bound manner. If the CIRP fails, the CD enters Stage II for its liquidation.

In essence, liquidation is a process that is triggered following failure of a procedure for resolution. The IBC mandates that time-bound efforts should be made during the calm (moratorium) period to take stock and, if possible, revive a business—and if the efforts fail, the business should be liquidated, again in a time-bound manner. The objective is to give a potentially viable business a fair chance of revival with the consensus of stakeholders, and proceed to close the business only when its turnaround or rehabilitation is demonstrably unfeasible.

It has also been left to the CoC to take the appropriate decision to liquidate the CD at any time after its constitution, under section 21(1), and before the confirmation of the resolution plan (including at any time before the preparation of the IM), to ensure the early exit of unviable businesses.

## 2. Liquidation

The entire procedure of bringing a lawful end to the life of a company can be divided into the liquidation process (liquidation) followed by the dissolution of the CD. Liquidation is defined as a process by which the life of a company is brought to an end in legal terms, after which it will be properly administered by a liquidator for the benefit of its creditors, members, and other stakeholders.

[140] <https://ibbi.gov.in/uploads/legalframework/bb54a1ddf9a7cd75ab-18b566a83c6370.pdf>

For a corporate entity to cease to exist as a separate legal entity, it must be formally dissolved, at which time it will be struck from the register and will become incapable of owning property in its own name, litigating under contracts, and being sued. The legal status of the corporate entity continues to exist during the period of liquidation, until it is finally and formally dissolved in this manner.

## 2.1 Grounds for Initiating Liquidation

### Section 33

Section 33 of the IBC provides grounds for liquidation of a CD that had defaulted and hence undergone a CIRP. These grounds are as follows:

- (a) where the AA, before the expiry of the CIRP period (or maximum period permitted for completion of the CIRP under section 12 of the IBC), does not receive a resolution plan under section 30(6) of the IBC (section 33(1)(a));
- (b) where the AA rejects the resolution plan under section 31 of the IBC for non-compliance of the requirements specified therein (section 33(1)(b));
- (c) where the RP, at any time during the CIRP, but before approval of the resolution plan by the CoC, lets the AA know of the decision of the CoC to liquidate the CD, approved by not less than 66 percent of the voting share. By way of the Insolvency and Bankruptcy (Amendment) Act, 2019 (with effect from August 16, 2019),<sup>[141]</sup> an explanation was added to this subsection clarifying that the CoC may decide to liquidate the CD at any time after

its constitution and before the confirmation of the resolution plan, including at any time before the preparation of the information memorandum (section 33(2));

- (d) where there has been a contravention in the implementation of the resolution plan as approved by the AA. In such a case, any person other than the CD whose interests are prejudicially affected by such a contravention may file an application before the AA to liquidate the CD. On receipt of such an application, if the AA determines that the CD has contravened the provisions of the resolution plan, it shall pass a liquidation order (section 33(3) and (4)).

### Section 59

Under section 59 of the IBC, a corporate person can initiate voluntary liquidation proceedings with the approval of the board of directors, shareholders, and creditors, provided it has not committed a “default,” as defined under section 3(12) of the IBC.

Except as specified, this module will primarily deal with insolvent liquidation—that is, liquidation following a CIRP.

## 2.2 Primary Objective of the IBC with regard to the Liquidation Process

According to the World Bank Group report *Doing Business 2014: Understanding Regulations for Small and Medium-Size Enterprises*,<sup>[142]</sup> published before the implementation of the IBC, creditors typically had to write off three-quarters of debts in Indian insolvency cases, which took an average of over four years to resolve, although the process took less

[141] <https://ibbi.gov.in/uploads/legalframework/630af836c9fbbbed047c42dbdfd2aca13.pdf>

[142] <https://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB14-Full-Report.pdf>

than a year in the best-performing jurisdictions. Promoters (owners) could take shelter under multiple laws, and the creditors had very little enforcement capability. By the time winding up was sought in India, companies might have been in distress for 10 or even 15 years in some cases. However, implementation of the IBC changed this scenario, and the average time taken for resolution has since been reduced to 415 days.<sup>[143]</sup>

The primary objective of the IBC is to provide a market mechanism to turn around and rescue failing but viable CDs while liquidating the failing unviable ones. Hence, the IBC does not enable a stakeholder to file an application for liquidation of the CD that has committed a default. Stakeholders can only file an application for initiating a CIRP. If the resolution process fails to yield a resolution plan, or if the CoC finds that the CD has no viable business for resolution, liquidation is ordered.

The IBC has introduced an element of adherence to timelines while conducting CIRPs or liquidation processes. The expectation is that stakeholders will be encouraged to work together constructively to pursue resolution and avoid liquidation. The term “stakeholder” is defined in regulation 2(1) (k) of the Liquidation Process Regulations<sup>[144]</sup> as the stakeholders entitled to the distribution of proceeds under section 53 of the IBC. The present timeline prescribed under the Liquidation Process Regulations is one year for completion of the liquidation process. This is unlike the winding-up provisions in the Companies Act, 1956 (the previous law that dealt with liquidation), where no such timelines were prescribed.

## 2.3 Liquidation vs. Winding Up under the Companies Act, 2013

The IBC uses the expression “liquidation” and defines “winding up” in Schedule XI, which contains the amendments to the Companies Act, 2013. Under clause 94A of section 2 of the Companies Act, 2013, “winding up” has been defined as “*winding up under this Act or liquidation under the Insolvency and Bankruptcy Code, 2016, as applicable.*”

Winding up as a concept was used in the Companies Act, 1956 (and the Companies Act, 2013). When the IBC came into force, the Companies Act, 2013, was amended to define “winding up” as also inclusive of a liquidation under the IBC.

The concept of winding up is still covered in the Companies Act, 2013. However, it is now limited to situations where the reasons for winding up are different from the reasons for which a CIRP can be initiated under the IBC. This means that winding up proceedings cannot be initiated under the Companies Act, 2013, for inability to pay or non-payment of debt or dues (that is, debt and default). On such grounds, proceedings for insolvency can only be initiated under the IBC. Section 434 of the Companies Act, 2013, provides that any party or parties to any proceedings relating to winding up of the company, which may be pending before any court, may file an application for transfer of such proceedings to the AA, and such an application shall be dealt with as an application for initiation of a CIRP under the IBC.

On the other hand, the proceedings for the winding up of a company that can still be dealt with under the Companies Act, 2013, apply *inter alia*, if:

- (a) the company has acted against the interests of the sovereignty, integrity, security, etc., of India;

[143] <https://ibbi.gov.in/uploads/publication/3a3e6013ea3e0b73d5a3575d5c38b9c5.pdf>

[144] <https://ibbi.gov.in/uploads/legalframework/96336966a318bbeff79f7dc0c115f08e.pdf>

- (b) on an application made by the Registrar of Companies, the NCLT is of the opinion that the affairs of the company have been conducted in a fraudulent manner, and also if it is proper that the company be wound up;
- (c) the company has made a default in filing its financial statements or annual returns with the Registrar of Companies for the immediately preceding five consecutive financial years; or
- (d) the NCLT is of the opinion that it is just and equitable that the company be wound up.<sup>[145]</sup>

In *Forech India Ltd. Vs. Edelweiss Assets Reconstruction Co. Ltd.* [2019 SCC Online SC 87], while considering whether the CIRP could continue while winding up a petition under section 433(e) of the Companies Act, 2013, which was pending before the High Court, the Supreme Court held that the CIRP is an independent proceeding that must be decided in accordance with the IBC. It observed that they would not interfere with the order passed by the NCLAT dismissing the appeal and granted liberty to the appellant to apply under the proviso to section 434 of the Companies Act, 2013, to transfer the winding-up proceeding pending before the High Court of Delhi to the AA, which could then be treated as a proceeding under section 9 of the IBC.

In *Action Ispat & Power Private Limited Vs. Shyam Metallics & Energy Limited* [2019 SCC Online Del 10424], the Delhi High Court held that applications seeking transfer of winding-up proceedings from the High Court to the AA are maintainable under law and would be encouraged. The Delhi High Court held that the court not only has the power to recall an order of winding up but can also transfer such proceedings, even if a winding-up order has been passed.

In *Jotun India Private Limited Vs. PSL Limited* [2018 SCC Online Bom 1952], it was held by the High Court of Bombay that the proceedings under the IBC are not barred, even if notice has been issued for winding-up proceedings. It further observed that if such a bar is created, it would amount to treating the IBC as if it did not exist on the statute book, and would deprive persons of the benefits of the new legislation.

## 3. The Liquidation Order

### 3.1 Commencement of Liquidation

Section 33 of the IBC sets out the grounds on which liquidation can be ordered by the AA (see section 2.1 [p169]).

Where such grounds for liquidation exist, the AA shall, under section 31(2) of the IBC:

- (a) pass an order requiring the CD to be liquidated as per the provisions of Chapter III of the IBC (a “**liquidation order**”);
- (b) issue a public announcement stating that the CD is in liquidation; and
- (c) require such an order to be sent to the authority with which the CD is registered.

[145] Section 271 available at <http://ebook.mca.gov.in/default.aspx>

### 3.2 Consequences of the Liquidation Order

The date of the liquidation order is the liquidation commencement date (“LCD”), and from that date, the process of liquidation starts.

#### No suit or legal proceedings

As per section 33(5) of the IBC, subject to section 52, when a liquidation order has been passed, no suit or legal proceeding can be instituted by or against the

CD. Hence, a limited moratorium is also available in the liquidation process.

However, it may be noted that a suit or legal proceeding can be instituted by a liquidator on behalf of the CD, if prior approval of the AA has been obtained.

The exception to the limited moratorium is legal proceedings relating to such transactions as may be notified by the Central Government in consultation with any financial regulator. No such transactions have been notified so far.

In *Reliance India Power Fund, Reliance Capital Vs. Mr. Raj Kumar Ralhan [CA(AT)(Ins) No. 318/2020]*, the appellant wanted to proceed with the arbitration proceedings against the CD. It submitted that, in terms of section 35(1)(k), it is the duty of the liquidator to defend any suit, prosecution, or other legal proceedings against the CD, and that the liquidator was thus bound to defend the arbitration proceedings. The NCLAT held that the duty cast on the liquidator is to institute or defend any suit, prosecution, or other legal proceedings, and this would include the conscious decision that a liquidator may take as to whether or not, in the given set of circumstances, he needs to defend any proceedings. If the liquidator had taken a decision for reasons stated, the appellant did not have any right to force the liquidator to defend and surrender to the action which the appellant claimed to have initiated.

#### Discharge of officers, employees or workers

The liquidation order operates as a notice of discharge to the CD’s officers, employees, and workers, except when the CD’s business is continued during the liquidation process by the liquidator. Hence, with

the liquidation order being passed, the CD’s business would end — except where such business is continued during the liquidation process.

#### KEY CONSIDERATION

Increasingly, keeping the objects of the IBC in mind, the business of the CD is being continued as a going concern to preserve value and protect employment, even in liquidation. Further, revival of the CD in liquidation is being encouraged, either through a scheme of arrangement or compromise or sale of the CD or its business as a going concern (as opposed to a piecemeal sale of assets). The CoC is also required to give its view on the sale of the CD as a going concern in case of liquidation (see section 9.2.1 [p197] of this module). Hence, in such cases, the liquidation order would not operate as an automatic discharge of the CD’s employees and workers.

In *Milind Dixit & Another v M/s Elecon Engineering Company Ltd. & Others [Company Appeal (AT) (Insolvency) No. 500 of 2019]*, the NCLAT held that when the CD is liquidated as a going concern, the liquidation order shall not operate as a notice of discharge to the CD's employees. The NCLAT held that the AA had erred in directing that the liquidation order should be deemed as a notice of discharge to the CD's officers, employees, and workers, as it conflicted with the recommendation of the CoC for liquidation of the CD as a going concern.

### 3.3 Appointment of the Liquidator

Section 34 of the IBC provides that where the AA passes the liquidation order under Section 33 of the IBC, the RP appointed under a CIRP shall thereafter act as the liquidator (subject to the RP giving written consent to the AA in the specified form).

However, section 34(4) of the Code requires the AA to replace the RP if:

- (a) the resolution plan submitted by the RP was rejected for failure to meet the mandatory requirements stipulated in section 30(2) of the IBC;
- (b) the IBBI recommends to the AA that the RP should be replaced (for reasons to be recorded in writing); or
- (c) the RP fails to submit his written consent to act as a liquidator under section 34(1) of the IBC.

If replacement of the RP is required under (a) or (c) above, the AA may direct the IBBI to propose the name of another IP to be appointed as liquidator and the board shall propose it, along with the written consent from the proposed IP, within 10 days of the direction issued by the AA. On receipt of the proposal of the IBBI, the AA shall appoint the proposed IP as the liquidator.

To facilitate and make the process of appointment easier and swifter, the IBBI has issued guidelines for preparing a panel of IPs. The IBBI has also prepared a common panel of IPs for appointment as IRP, liquidator, RP, and bankruptcy trustee, and has shared the same with the AAs in accordance with the guidelines.

In *Punjab National Bank Vs. Mr. Kirah Shah, Liquidator of ORG Informatics Ltd. [Company Appeal (AT)(Insol.) No. 102 of 2020]*, the lead bank in the CoC challenged the appointment of the liquidator after the AA passed the liquidation order. The NCLAT held that after a liquidation order is passed, the CoC has no role to play, and that they are simply claimants whose matters are to be determined by the liquidator and hence cannot move an application for his removal.

#### 3.3.1 Eligibility

Regulation 3 of the Liquidation Process Regulations sets out the eligibility criteria for a liquidator. An IP will be eligible to be appointed as liquidator if he, and all partners or directors of the IPE of which he is a member, are independent of the CD. They will be regarded as independent if:

- (a) they are eligible to be appointed as an independent director of the CD under section 149 of the Companies Act, 2013 (which sets out the provisions relating to a company's board of directors);

- (b) they are not a related party of the CD;
- (c) they have not been an employee, proprietor, or partner of a firm of auditors or secretarial auditors or cost auditors of the CD, or of a legal or consulting firm that has had any transaction with the CD contributing ten percent or more of the gross turnover of such a firm, in the last three financial years.

### 3.3.2 Disclosure by the Liquidator

Regulation 3 further provides that the liquidator must disclose the existence of any pecuniary or personal relationship with the CD, or any of its stakeholders, to the IBBI and the AA, as soon as he becomes aware of it. Further, an IP cannot continue as a liquidator if the IPE of which they are a director or partner, or any other partner or director of such IPE, represents any other stakeholder in the same liquidation process.

### 3.3.3 Directors' Powers Cease

Section 34(2) of the IBC provides that upon appointment of the liquidator, all powers of the CD's board of directors, KMPs, and partners shall cease to have effect and such powers shall be vested in the liquidator.

As in a CIRP (see section 19 of the IBC), the CD's personnel must extend all assistance and cooperation to the liquidator, as required in managing the CD's affairs (see regulation 9 of the Liquidation Process Regulations, discussed later). This is provided under section 34(3) of the IBC. This subsection also states that the provisions of section 19 shall apply in relation to a voluntary liquidation process as they apply in relation to a liquidation process, with the substitution of references to the liquidator for references to the IRP.

## 3.4 Remuneration of the Liquidator

Section 34(8) of the IBC provides that the liquidator shall charge a fee for the conduct of the liquidation proceedings in proportion to the value of the liquidation estate assets, as may be specified by the IBBI. Further, as per section 34(9), such fees shall be paid to the liquidator from the proceeds of the liquidation estate under section 53 of the IBC.

Regulation 4 of the Liquidation Process Regulations (as amended by way of notification dated July 25, 2019 (Liquidation Amendment Regulations)<sup>[146]</sup>) sets out the fee to be paid to the liquidator.

It states that the fee payable to the liquidator shall be in accordance with the decision taken by the CoC under regulation 39D of the CIRP Regulations.<sup>[147]</sup> As per this regulation, while approving a resolution plan or deciding to liquidate the CD, the CoC *may*, in consultation with the RP, fix the fee payable to the liquidator, if an order for liquidation is passed under section 33, for:

- (a) the period, if any, used for compromise or arrangement under section 230 of the Companies Act, 2013 (a “**section 230 scheme**”);
- (b) the period, if any, used for sale of the CD or its business as a going concern;
- (c) the balance period of liquidation.

Hence, the CoC may fix the liquidator's fee during the CIRP itself. If not decided by the CoC, the liquidator is entitled to the following:

- (a) a fee at the same rate as the RP was entitled to during the CIRP, for the period of the section 230 scheme; and

[146] [https://ibbi.gov.in/uploads/legalframework/2019-07-29-232506\\_liquidation\\_208648.pdf](https://ibbi.gov.in/uploads/legalframework/2019-07-29-232506_liquidation_208648.pdf)

[147] <https://ibbi.gov.in/uploads/legalframework/2020-04-27-114849-uqs43-ca9a1f1f849a43f3290c4b9512d0c863.pdf>

(b) a fee equal to a percentage of the amount realized, net of other liquidation costs, and of the amount distributed for the balance period of liquidation as per a prescribed table. Note that the liquidator is entitled to receive half the fee payable on realization, only after such realized amount is distributed.

Paragraph (b) applies after the period of 90 days given for a section 230 scheme under the Liquidation Process Regulations. During this period, when the

liquidator starts liquidating the CD's assets and making distribution to the stakeholders, the fee payable to him is linked to a percentage of the amount realized (net of other liquidation costs) and a percentage of the amount distributed. Such percentage is further linked to the time period during which any realization or distribution takes place (that is, the percentage decreases with time). This fee structure incentivizes early realization and distribution by the liquidator. The table below shows the percentage amount the liquidator is entitled to receive upon realization and distribution of proceeds:

Amount of realization/ distribution (Rs)	Percentage of fee on the amount realized/distributed		
	First 6 months	Next 6 months	Thereafter
Amount of realization (exclusive of liquidation costs)			
On the first 1 crore	5.00	3.75	1.88
On the next 9 crore	3.75	2.80	1.41
On the next 40 crore	2.50	1.88	0.94
On the next 50 crore	1.25	0.94	0.51
On the further sums realized	0.25	0.19	0.10
Amount distributed to stakeholders			
On the first 1 crore	2.50	1.88	0.94
On the next 9 crore	1.88	1.40	0.71
On the next 40 crore	1.25	0.94	0.47
On next 50 crore	0.63	0.48	0.25
On the further sums distributed	0.13	0.10	0.05

The Liquidation Amendment Regulations amended the table provided under regulation 4 by deleting the column for percentage amount in case of realization/distribution “in the next one year.” This was done in light of the overall reduction of the liquidation time period from two years to one year. It has been clarified that, for liquidation processes already commenced before the coming into force of the said amendment regulations, that is, before July 25, 2019, the earlier table (pre-amendment) will apply.

Further amendments to the Liquidation Amendment Regulations on August 5, 2020, clarified that where a liquidator realizes any amount, but does not distribute the same, he is entitled to a fee corresponding to the amount realized by him. Where a liquidator distributes any amount, which is not realized by him, he is entitled to a fee corresponding to the amount distributed by him.<sup>[148]</sup>

[148] <https://ibbi.gov.in/uploads/legalframework/99821042db3990a40cd7082f06019911.pdf>

## 4. Power and Duties of a Liquidator

### Section 35

Section 35 of the IBC, along with Chapter III of the Liquidation Process Regulations, 2016, deals with the powers and duties of a liquidator.

Section 35(1) states that subject to the directions of the AA, the liquidator shall have the power and duty to, *inter alia*, verify claims of all the creditors, take into custody and control all the assets, property, and actionable claims of the CD, evaluate the assets and property of the CD in the manner as may be specified by the IBBI, and prepare a report in this regard. The liquidator would be required to take measures to protect and preserve the assets and properties of the CD, carry on the business of the CD for its beneficial liquidation as he considers necessary, and conduct sale

of the immovable and movable property and actionable claims of the CD by public auction or private contract (subject to section 52). The liquidator also has the power to transfer such property to any person or body corporate, or to sell the same in parcels in the manner specified. Further, in the name of, or on behalf of the CD, the liquidator can institute suits and defend the CD in any suit, prosecution, or other legal proceedings. The liquidator is also empowered to investigate the financial affairs of the CD to determine undervalued or preferential transactions.

Significantly, when section 29A was introduced in the IBC, section 34 was also amended to provide that the liquidator shall not sell immovable and movable property or actionable claims of the CD in liquidation to any person who is not eligible to be a PRA. In other words, the disqualifications specified in section 29A of the IBC with respect to a PRA shall equally apply to prospective buyers of liquidation assets.

In *Rajive Kaul Vs. Vinod Kumar Kothari & Others [Company Appeal (AT) (Ins) No. 44 of 2020 (with connected appeals)]*, the NCLAT held that the liquidator has the power to remove the nominee directors of the CD on the board of another company. The liquidator sought to remove the appellants as nominees of the CD on the board of NICCO Parks and Resorts Limited (NPRL), because of non-cooperation and the unresponsive attitude of the appellants and certain other factors. The appellants refused to step down, *inter alia*, contending that they were no longer nominee directors, having been re-appointed as directors in their individual capacity by the shareholders. The appellants also questioned the authority of the liquidator to assert any right to manage or interfere with the management and business of a company other than the CD. The liquidator approached the AA, which directed the appellants to vacate their offices as nominee directors.

In various appeals filed against the impugned order, the NCLAT upheld the AA's order. While doing so, it observed that a company in liquidation acts through the liquidator and the liquidator steps into the shoes of the board of directors of such a company, for the purpose of discharging statutory duties. The property of the company in liquidation still remains vested in the company. The appellants were appointed as nominees of the CD on the board of NPRL and they refused to vacate their offices. Due to ineligibility as per section 29A of the IBC, the appellants were not to be permitted to derive any benefit or gain any advantage at the liquidation stage of the CD or to benefit from the CD's assets. The NCLAT rejected the contention that the appellants were subsequently appointed on the board of NPRL in their individual

capacity. The NCLAT expressed dismay at the failure of the appellants to lend unstinted assistance and cooperation to the liquidator. It held that without the liquidator's permission, the appellants did not have any right to continue as nominee directors. The NCLAT also held that the Articles of Association of the CD did not impose any restraint relating to the transfer of shares held in NPRL along with attendant rights. The shares held by the CD in NPRL, together with class rights, could be assigned by the liquidator, subject to the limitation mentioned in the Articles of Association regarding the right of first refusal of the state-owned corporations (other shareholders in NPRL). Referring to section 238 of the IBC, the NCLAT held that maximization of value of the liquidation estate can only be certain if the shares of NPRL held by the CD together with the class rights are held to be forming part of the liquidation estate and assignable. A counter view would have a damaging effect on the value of said shares and also a catastrophic effect on the liquidation estate of the CD. The NCLAT held that the liquidator was armed with the requisite powers to remove the appellants as nominee directors and was entitled to nominate new directors.

### KEY CONSIDERATION

There have been instances where liquidators have faced resistance while taking charge of the CD or the assets of the CD. The AA has been coming to the aid of the liquidators and passing orders for their safety and security. For instance:

In *S. Muthuraju Vs. Commissioner of Police and Another [MA No. 504 of 2019 in CP/288/IB/2018]*, a group of unknown persons made threats with weapons and did not allow the liquidator to enter the premises of the CD to carry out his functions. The AA directed the Superintendent of Police to give adequate police protection to the liquidator to enable him to perform his duties.

In *Alchemist Asset Reconstruction Company Limited Vs. Precision Fasteners Ltd. [MA 1007/2018, MA 751/2019 in CP No. (IB)1339(MB)/2017]*, the liquidator filed an application seeking possession of the property occupied by the respondents. The respondents claimed that they had possession of the property, based on a letter issued by the CD. The AA noted that the said letter could not be treated as a valid document for transferring the property to the respondents. It ordered the respondents to vacate the property and to hand it over to the liquidator, failing which the liquidator would be entitled to take possession in accordance with the law, with the help of police.

### Appointment of professionals

Section 35(1)(i) of the IBC permits the liquidator to obtain professional assistance from any person or to appoint any professional required in discharge of his duties, obligations, and responsibilities.

Under regulation 7 of the Liquidation Process Regulations, the appointment is to be made for a

reasonable remuneration, which shall also form part of the liquidation cost.

Any appointed professional should be independent. Hence, regulation 7 provides that the professional should not be a relative of the liquidator or related to the CD, and should not have served as an auditor to the CD in the five years preceding the LCD. Further,

the professional shall disclose the existence of any pecuniary or personal relationship with any of the stakeholders or the CD to the liquidator as soon as they become aware of it.

### Stakeholder consultation

In addition to appointment of professionals for professional assistance, section 35(2) allows the liquidator to consult any of the stakeholders entitled to distribution of proceeds under section 53. Such consultation shall not be binding on the liquidator. Further, the records of any such consultation made under section 35(2) shall be made available to all the stakeholders not consulted, in a manner specified by the IBBI.

Regulation 8 of the Liquidation Process Regulations

states that such stakeholders must extend every assistance and cooperation to the liquidator for successful conduct and completion of liquidation. Note that the liquidator is required to maintain the particulars of any such consultation made with the stakeholders, in a specified form, that is, in Form A of Schedule II of the Liquidation Process Regulations.

### Stakeholder consultation committee

The Liquidation Amendment Regulations inserted a new regulation 31A in the Liquidation Process Regulations to provide for mandatory formation of a stakeholder consultation committee (SCC) by the liquidator. The liquidator is required to form an SCC within 60 days of the LCD, based on the list of stakeholders prepared under regulation 31, to advise him on the matters relating to sale under regulation 32.

The composition of the SCC shall be as follows:

Class of stakeholders	Description	Number of representatives
Secured FCs who have relinquished their security interests under section 52	Where claims of such creditors admitted during the liquidation process are less than 50 percent of liquidation value	Number of creditors in the category, subject to a maximum of two
	Where claims of such creditors admitted during the liquidation process are at least 50 percent of liquidation value	Number of creditors in the category, subject to a maximum of four
Unsecured FCs	Where claims of such creditors admitted during the liquidation process are less than 25 percent of liquidation value	Number of creditors in the category, subject to a maximum of one
	Where claims of such creditors admitted during the liquidation process are at least 25 percent of liquidation value	Number of creditors in the category, subject to a maximum of two
Workers and employees	1	1
Governments	1	1

Class of stakeholders	Description	Number of representatives
OC other than workers, employees and government	Where claims of such creditors admitted during the liquidation process are less than 25 percent of liquidation value	Number of creditors in the category, subject to a maximum of one
	Where claims of such creditors admitted during the liquidation process are at least 25 percent of liquidation value	Number of creditors in the category, subject to a maximum of two
Shareholders or partners, if any		One

While forming this committee, the liquidator may require the stakeholders of each class to nominate their representatives for inclusion in the SCC. If the stakeholders of any class fail to nominate their representatives, the required number of stakeholders with the highest claim amount in that class shall be included in the SCC.

The representatives in the SCC shall have access to all relevant records and information as may be required to advise the liquidator, subject to the provisions of the IBC and the Liquidation Process Regulations.

The liquidator is to convene a meeting of the SCC either when he considers it necessary or when a request is received from at least 51 percent of representatives in the SCC. The liquidator shall chair the meetings of the SCC and record the deliberations and observations made in the meeting.

The liquidator shall place the recommendation of the CoC made under subregulation (1) of regulation 39C of the CIRP Regulations (assessment by CoC of sale as a going concern), before the SCC for its information.

The SCC shall advise the liquidator, by a vote of not less than 66 percent of the representatives present and voting. The advice of the SCC shall not be binding on the liquidator. However, where the liquidator makes a decision different from the advice given by the SCC, he shall record the reasons in writing.

## 5. Liquidation Estate

The primary role of the liquidator is to take into his custody or control all the assets, property, effects, and actionable claims of the CD.

Section 36 of the IBC deals with formation of the “liquidation estate” for the purposes of liquidation. It states that the liquidator shall form an “estate” of the assets of the CD (as specified) to be called the “liquidation estate” in relation to the CD. The liquidation estate shall be held by the liquidator as a fiduciary for the benefit (acting in the best interests) of all the creditors.

The liquidation estate comprises of all the liquidation estate assets, including the following:

- (a) assets over which the CD has ownership rights, including all rights and interests evidenced in the company’s balance sheet, or an IU, or records in the registry or any depository recording securities of the CD, or by any other means that may be specified by the IBBI, including shares held in any subsidiary of the CD;
- (b) assets that may, or may not, be in possession of the CD, including but not limited to encumbered assets;

- (c) tangible assets, whether movable or immovable (that is, assets in physical form or fixed assets such as plants, machinery, and land);
- (d) intangible assets (those without form), including but not limited to intellectual property, securities (including shares held in a subsidiary of the CD), and financial instruments, insurance policies, contractual rights, and so on;
- (e) assets subject to determination of ownership by the court or another authority;
- (f) any assets, or their value, recovered through proceedings for avoidance of transactions (such as a preferential or undervalued transaction—see Module 6 for details);
- (g) any asset of the CD in respect of which a secured creditor has relinquished its security interest;
- (h) any other property belonging to or vested in the CD on the insolvency commencement date; and
- (i) all proceeds of liquidation as and when realized.

The following are *not* to be included in the assets of the liquidation estate:

- (a) assets owned by a third party that are in possession of the CD, including assets held in trust for any third party; bailment contracts; all sums due to any worker or employee from the provident fund, the pension fund, and

the gratuity fund; contractual arrangements that do not allow for transfer of title to the company but only use of the assets; and any other assets as notified by the Central Government in consultation with any financial sector regulator;

- (b) assets in security collateral held by financial services providers and subject to netting and set-off in multilateral trading or clearing transactions;
- (c) personal assets of any shareholder or partner of a CD, provided such assets are not held on account of avoidance transactions that may be avoided under the relevant Chapter;
- (d) assets of any Indian or foreign subsidiary of the CD; or
- (e) any other assets that may be specified by the IBBI, including those that could be subject to set-off due to mutual dealings between the CD and any creditor.

Hence, “liquidation estate” refers to all assets and property of the CD, in whatever form, whether in its possession or not, and includes future proceeds. The assets that are not owned by the CD (such as assets of shareholders or subsidiaries, or assets held in trust) are not included within the estate. It is the liquidation estate that is realized, with the proceeds being distributed to the stakeholders as per section 53 of the IBC. What does not form part of the liquidation estate cannot be appropriated or sold by the liquidator and cannot be distributed to the stakeholders of the CD as per section 53 of the IBC.

In *State Bank of India Vs. Moser Baer Karamchari Union & Another [Company Appeal (AT) (Insolvency) No. 396 of 2019]*, the issue arose as to whether the amount due to workmen of the CD (in liquidation) towards their provident fund, pension fund and gratuity trust fund should be paid to the workers by the liquidator (outside the distribution mechanism) or whether such assets formed part of the liquidation estate under section 53 of the IBC (in which case it would be distributed as per section 53). It was argued by the workmen that these amounts did not form part of the liquidation estate. The AA held that provident fund dues, pension fund dues, and gratuity fund dues cannot be part of the estate as per section 53 of the IBC. An FC filed an appeal against the order of the AA. The NCLAT examined the meaning of “liquidation estate” under section 36 of the IBC and held that in terms of subsection (4)(a)(iii), all sums due to any workmen or employees from the provident fund, the pension fund, and the gratuity fund should not be included in the liquidation estate assets and could not be used for recovery in the liquidation. Since they do not form part of the liquidation estate assets of the CD, the question of distribution of the provident fund, pension fund, or gratuity fund does not arise. As the liquidation estate assets of the CD under section 36(1), read with section 36(3), do not include any sum due to any workman or employee from the provident fund, the pension fund, or the gratuity fund, for the purpose of distribution of assets, these funds cannot be included. An appeal against the order has been filed by the FC and as of this writing, the matter is pending in the Supreme Court.

In the case of *Mr. Savan Godiawala Vs. Mr. Apalla Siva Kumar [Company Appeal (AT) (Insolvency) No. 1229 of 2019]*, the NCLAT, based on its judgment in the *Moser Baer* case, observed that in terms of section 36(4)(a)(iii) of the IBC, sums due to any workman or employee from the provident fund, pension fund, or gratuity fund do not form part of the liquidation estate assets of the CD. Therefore, the question of distribution of these funds does not arise. The NCLAT observed that in the impugned order, the AA had held that the liquidator cannot avoid liability to pay gratuity to employees on the grounds that the CD did not maintain separate funds, and that, even if no fund has been maintained, the liquidator must make sufficient provision for payment of gratuity to the appellants according to their eligibility. However, noting that no gratuity fund was created by the CD, the NCLAT held that the liquidator should not have been directed to make provision for the payment of gratuity to the workmen as per their entitlement.

In *Leo Edibles & Fats Limited Vs. Tax Recovery Officer (Central) [High Court of Hyderabad Writ Petition No. 8560 of 2018]*, the petitioner had purchased an immovable property in the liquidation proceeding of VNR Infrastructures Limited. The sub-registrar refused to register the property in the name of the petitioner at the behest of the Income Tax Department, which claimed a charge over the immovable property pursuant to attachment proceedings against which the writ petition was filed. The High Court held that the tax dues, being an input to the Consolidated Fund of India and of the states, clearly come within the ambit of section 53(1)(e) of the IBC. It further held that the Income Tax Department cannot claim any priority merely because the order of attachment was long prior to the initiation of liquidation proceedings under the IBC against VNR Infrastructures Limited. Further, section 36(3)(b) of the IBC indicates in no uncertain terms that the liquidation assets may or may not be in possession of the CD, including but not limited to encumbered assets. Therefore, even if the order of attachment constitutes an encumbrance on the property, it still does not have the effect of taking it out of the purview of section

36(3)(b) of the IBC. The said order of attachment, therefore, cannot be taken to be a bar for completion of the sale under a liquidation proceeding under the IBC. The Income Tax Department needs to submit its claim to the liquidator for consideration as and when the distribution of the assets in terms of section 53(1) of the IBC is taken up.

In *Anil Goel, Liquidator Vs. Deputy Director, Directorate of Enforcement in the matter of REI Agro Limited [CA (IB) No. 453/KB/2018 in CP (IB) No.73/KB/ 2017]*, the liquidator filed an application under section 35(1)(n) of the IBC seeking orders against the Directorate of Enforcement to release the attachment of assets of the CD. The AA observed that the court established under the Prevention of Money Laundering Act, 2002, being a criminal court, can *only* decide whether the properties of the CD attached during investigation were acquired by the CD *using proceeds of crime*. It is for the AA to decide as to *how* the properties and assets of the CD under liquidation can be appropriated. It held that the liquidator must take possession of those properties attached by the Directorate of Enforcement.

In *Om Prakash Agarwal Vs. Tax Recovery Officer & Another [IA No. 992/2020 in CP/294/2018]*, the liquidator filed an application to unfreeze the accounts of the CD that were attached by the Tax Recovery Officer. The Income Tax Department submitted that the income tax proceedings have an overriding effect against other enactments and money attached by it is no longer an asset of the CD. The liquidator submitted that the Income Tax Department had filed its claim against the CD and the same would be considered for distribution under section 53 of the IBC. The AA held that the monies of the CD in its bank accounts should be construed as an asset of the CD even if an attachment order had been passed against them. It noted that section 178 of the Income-tax Act, 1961, has been amended to allow the IBC to have an overriding effect. It directed the bank to unfreeze the accounts and release the amounts of the CD within 30 days.

## 6. Powers of the Liquidator to Access Information

Information is power in liquidation. Information is required for the purposes of admission and proof of claims and identification of the liquidation estate assets of the CD. Further, it is required to evaluate whether the CD has been subject to any avoidance transactions and to understand the correct financial position of the CD.

Liquidators have statutory powers to access information. Under section 19 of the IBC, the IRP/RP has the right to apply to the AA to direct the personnel of the CD, its promoters, or any other person associated

with the company to comply with their instructions. Section 37—read together with regulation 9 of the Liquidation Process Regulations—provides the same support to liquidators.

### Section 37

Under section 37 of the IBC, the liquidator has the power to access any information system(s) for the purpose of submission and admission of proof of claims and identification of the liquidation estate assets relating to the CD from a variety of sources, namely, *inter alia*, an IU, credit information systems, any agency of the central, state, or local government, including any registration authorities, any regulated

information systems for financial and non-financial liabilities, any regulated information systems for securities and assets posted as security interest, and any database maintained by—or any source specified by—the IBBI. The creditors may require the liquidator to provide them with any financial information relating to the CD in such manner as may be specified and he shall provide the same within seven days of the date of such request (or give reasons for not doing so).

#### Regulation 9

For the collection of information necessary for the conduct of liquidation, the liquidator can apply to the AA to direct any of the following people to extend cooperation:

- (a) a person who is or has been an officer, auditor, employee, promoter, or partner of the CD;
- (b) a person who was the IRP, RP, or former liquidator of the CD; or
- (c) a person who is in possession of any property of the CD.

The liquidator, however, should bear in mind that such an application can be made only after reasonable efforts to obtain the information from the person concerned have failed.

## 7. Claim Submission, Verification, and Appeal

One of the first duties of the liquidator, upon his appointment, is to collect, consolidate, and verify the claims of stakeholders of the CD. Sections 38 to 41 (both inclusive) of the IBC contain provisions governing, respectively, consolidation, verification, admission or rejection, and valuation of claims by the liquidator. These provisions should be read along with regulation 12 and Chapter V of the Liquidation Process Regulations.

### 7.1 Public Announcement

Regulation 12 of the Liquidation Process Regulations deals with the public announcement to be made by the liquidator to call for claims against the CD. The announcement is to be made using Form B of Schedule II, within five days of his appointment.

The Liquidation Amendment Regulations amended regulation 12 to provide that the liquidator will call upon stakeholders to *either* submit their claims or update their claims submitted during the CIRP, as on the LCD. Hence, any stakeholders who submitted their claims previously in a CIRP only need to update that claim (rather than submitting a fresh claim).

The public announcement is required to provide the last date for submission or updating of claims by the stakeholders, which shall be within thirty days of the LCD. The public announcement is required to be published via all three of the following:

- in one English and one regional language newspaper with wide circulation at the location of the registered office and principal office, if any, of the CD, and any other location where in the opinion of the liquidator, the CD conducts material business operations;
- on the website, if any, of the CD; and
- on the IBBI website.

### 7.2 Claim Submission and Proof

Section 38 provides that the liquidator shall receive or collect the claims of creditors within a period of 30 days from the date of the LCD. As per regulation 16 of the Liquidation Process Regulations, the claims, including interest if any, are to be submitted by the stakeholders by the last day specified in the public announcement (which is to be within a period of 30

days from the LCD). The claim needs to be proved as on the LCD.

The form and manner of claim submission by creditors is provided in the Liquidation Process Regulations.

Regulation 17 provides for submission of a claim by an OC (other than a workman or employee) in person, by post, or by electronic means using Form C of Schedule II. Regulation 18 provides for submission of a claim by an FC by electronic means using Form D of Schedule II. Regulation 19 provides for submission of a claim by a workman or employee in person, by post, or by electronic means using Form E of Schedule II. Regulation 20 provides for submission of a claim by any other stakeholder in person, by post, or by electronic means using Form G of Schedule II. In the case of workmen and employees, they may submit the claim directly, or an authorized representative may submit one proof of claim on behalf of the workmen or employees using Form F of Schedule II. Importantly, even where a workman or employee does not make a claim, the liquidator may admit their claims on the basis of the CD's books of accounts.

The claims are to be accompanied by documents and records substantiating the claim. For this, the creditor or other stakeholder may rely on records from IUs (if available), or any other evidence of debt, such as an order of a court or tribunal adjudicating on the non-payment of a claim. In addition, OCs may provide a supply contract, invoices demanding payment, and financial accounts. FCs may submit financial contracts, financial statements, records showing that the amounts committed by the FC to the CD under a facility were drawn by the CD, and financial accounts. For workers and employees, employment contracts, notices of demand, and any proofs of payment not being made can be submitted. Any other stakeholder can submit documentary evidence of notices of demand or their

bank statements showing that a claim has not been paid, along with an affidavit that the documentary evidence and bank statements are true, valid, and genuine and documentary or electronic evidence of its shareholding.

As per section 38, a creditor who is partly an FC and partly an OC shall submit claims to the liquidator showing the extent of his financial and operational debt in the form and manner required for the submission of claims by FCs and OCs, respectively.

Creditors may withdraw or vary their claims within 14 days of such submission.

In addition to proving its claim, a secured creditor would also need to prove the existence of security in its favor. As per regulation 21 of the Liquidation Process Regulations, this may be proved on the basis of records available in an IU (if any), or a certificate of registration of charge issued by the Registrar of Companies, or proof of registration of charge with the Central Registry of Securitisation Asset Reconstruction and Security Interest of India.

Regulation 22 of the Liquidation Process Regulations provides that, where a person seeks to prove a debt in respect of a bill of exchange, promissory note, or other negotiable instrument or security of a like nature for which the CD is liable, such bill of exchange, note, instrument, or security, as the case may be, shall be shown to the liquidator before the claim is admitted.

### 7.3 Verification of Claims

Once the claims are submitted, the next step is verification of the claims by the liquidator. The liquidator shall verify the claims submitted within thirty days of the last date for receipt of claims and may either admit or reject the claim, in whole or in part (regulation 30).

The liquidator may require any creditor or the CD or any other person to produce any other document or evidence or provide clarifications considered necessary for the purpose of verifying or substantiating the whole or part of the claim (section 39(2) read with regulation 23).

Regulation 24 of the Liquidation Process Regulations provides that the claimant shall bear the cost of proving its claim. Further, the costs incurred by the liquidator for verification and determination of a claim shall form part of the liquidation costs. Provided that if a claim or part of the claim is found to be false, the liquidator shall endeavor to recover such costs from the claimant, and shall provide the details of the claimant to the IBBI.

#### Contingent claims

Under regulation 25, where the amount claimed by a claimant is not precise due to any contingency or any other reason, the liquidator shall make the best estimate of the amount of the claim based on the information available to him.

Hence, even contingent claims can be admitted by the liquidator, making the best estimate of the claim amount.

#### Debt in foreign currency

Regulation 26 provides that the claims denominated in foreign currency shall be valued in Indian currency at the official exchange rate as on the LCD. “The official exchange rate” is the reference rate published by the RBI or derived from such reference rates.

#### Periodical payments

Regulation 27 states that in the case of rent, interest, and other such payments of a periodic nature, a person may claim only for amounts due and unpaid up until the LCD.

#### Debt payable at a future date

The liquidator verifies claims as of the LCD. However, under regulation 28, a person who submits proof of a claim for which payment was not yet due as of the LCD will be entitled to distribution in the same manner as any other stakeholder. Where a stakeholder has proved such a claim, and the debt has not fallen due before distribution, he is entitled to distribution of the admitted claim, reduced as follows:

$$X/(1+r)^n$$

where X is the value of the admitted claim; “r” is the closing yield rate (percent) of government securities of the maturity of “n” on the date of distribution as published by the Reserve Bank of India; and “n” is the period beginning with the date of distribution and ending with the date on which the payment of the debt would otherwise be due, expressing years and months in a decimalized form.

#### KEY CONSIDERATION

An example of a “debt payable at a future time” is the unexpired portion of a lease. For example, if, on the date of liquidation, a lease exists with 10 years left, the landlord cannot put in a claim for the entire future term because:

- He could rent out the property soon after the liquidation, and it would be inequitable to effectively receive rent twice.
- A deduction should be made for “accelerated receipt,” as the landlord can only claim for a reasonable amount that would have been received and interest could be earned on a lump sum pertaining to the unexpired term.
- He is under a duty to “mitigate the loss.” The formula thus reduces the future rent due.

### Mutual credits and set-off

Under regulation 29, if there are mutual dealings between the CD and another party, the sums due from one party shall be set off against those due from the other to arrive at the net amount payable. So, for instance, if X owes 100 Indian rupees to the CD and the CD owes 70 Indian rupees to X, after setting off, X shall pay 30 Indian rupees to the CD.

## 7.4 Admission or Rejection of Claims

Section 40 of the IBC provides that the liquidator may, after verification of claims, either admit or reject

the claim, in whole or in part. Where he rejects a claim, the reasons for such a rejection must be recorded in writing. The liquidator is required to communicate his decision of admission or rejection of claims to the creditor and the CD within seven days.

Section 41 of the IBC requires the liquidator to determine the value of admitted claims in such manner as may be specified by the IBBI.

### Appeal

Under section 42 of the IBC, a creditor may appeal to the AA against the liquidator's decision to accept or reject a claim within 14 days of receiving the decision.

In *Swiss Ribbons Private Limited & Another Vs. Union of India & Others [(2019) 4 SCC 17]*, the Supreme Court drew a distinction between the roles of an RP and a liquidator under the IBC, especially in respect of claim verification and determination. The court held that the RP has to vet and verify claims made, and ultimately determine the amount of each claim. As opposed to this, the liquidator has to consolidate and verify the claims, and either admit or reject such claims under sections 38 to 40 of the IBC. Referring to sections 41 and 42, the Supreme Court held that when the liquidator determines the value of claims admitted under section 40, such determination is a decision that is quasi-judicial in nature, and it can be appealed against before the AA under section 42 of the IBC.

In *Indian Oil Corporation Ltd. Vs. Mr. Ashish Arjun Kumar Rath, Liquidator of SBQ Steels Pvt. Ltd. [Company Appeal (AT)(Insol.) No.1116/2019]*, the AA upheld the decision of the liquidator to reject the claims of the appellant, while noting that though the liquidator had not clearly mentioned why he rejected those two claims, he had mentioned that there was no binding agreement between the parties obligating the CD to pay interest, and that reason was more than sufficient for rejecting the claim. While admitting an appeal, the NCLAT observed that ascribing reasons is the “heart and soul” of a reasoned order or judgment. Not assigning reasons in a rejection order relating to a claim is not a “prudent and reasonable course of action.” It further observed that as per section 40 of the IBC, a liquidator, being an authority, decides the matter in a quasi-judicial manner and his decision is open to challenge under section 42 of the Code. In terms of section 40, reasons must be spelt out for rejecting claims, which was not done by the liquidator. A liquidator is an officer of the AA and is expected to perform his duties fairly, justly, and honorably in dealing with the claims of persons.

### List of stakeholders

Under regulation 31 of the Liquidation Process Regulations, the liquidator is required to prepare a list of stakeholders, categorized on the basis of proofs of claims submitted and accepted under the regulations. The list of stakeholders must specify the following details:

- (a) the amounts of claim admitted, if applicable;
- (b) the extent to which the debts or dues are secured or unsecured, if applicable;
- (c) the details of the stakeholders; and
- (d) the proofs admitted or rejected in part, and the proofs wholly rejected.

The list of stakeholders is to be filed with the AA by the liquidator within 45 days of the last date for receipt of claims, and the filing of the list must be announced to the public in a manner specified in regulation 12(3).

If any entry in the filed list of stakeholders needs to be modified, upon the liquidator coming across additional information warranting such modification, he may apply to the AA and shall modify the entry in the manner directed by the AA. The liquidator is required to modify an entry in the list of stakeholders filed with the AA, in the manner directed by the AA, while disposing of an appeal referred under section 42.

The list of stakeholders, as modified from time to time, must be:

- (a) available for inspection to the people who submitted claims with proofs;
- (b) available for inspection to members, partners, directors, and guarantors of the CD; and
- (c) displayed on the website, if any, of the CD.

## 8. Secured Creditors in Liquidation Proceedings

Secured credit drives the economy and creates wealth, generates employment, and encourages entrepreneurship. If a secured creditor's rights to priority over other claims and taxation dues are recognized under the secured transactions law as well as insolvency law, it will promote secured lending.

The IBC protects the secured creditor's rights in liquidation by permitting it to enforce its security, by staying outside the liquidation process. Hence, the secured creditor need not give up its security to the liquidation estate and can enforce it on its own. This right is provided under section 52 of the IBC.

Upon commencement of the liquidation process, secured creditors have two options for the recovery of money owed to them—either to relinquish their security interest to the liquidation estate and receive proceeds from the sale of assets by the liquidator, or to stay outside the liquidation process and recover the debt owed to them by enforcement of their security interest in accordance with section 52 of the IBC.

### Section 52

Section 52 of the IBC details the rights and position of secured creditors as follows:

- (a) A secured creditor in liquidation proceedings may:
  - relinquish its security interest to the liquidation estate and receive proceeds from the sale of assets by the liquidator in the manner specified in section 53, or
  - realize its security interest in the manner specified in this section.

- (b) If secured creditors relinquish their security interests to the liquidation estate and join the liquidation proceedings, then, as per the liquidation waterfall under section 53 of the IBC, their claims fall within section 53(1)(b)(ii) of the IBC—that is, they rank *pari passu* (equally) with workers' dues for 24 months (preceding the LCD) and are given priority over all other claims, after full payment of the resolution process and liquidation process costs.
- (c) In case of secured creditors who choose to realize their security interest under section 52, their debts, if any remain after enforcement of security interest, will fall within section 53(1)(e)(ii) of the IBC—that is, ranking equally with government dues (in respect of two years preceding the insolvency commencement date), and ranking just above any remaining debts and dues and payments to shareholders.
- (d) Secured creditors are allowed to realize their security interest only after verification by the liquidator. To this end, secured creditors are required to inform the liquidator of such security interest and identify the asset that is subject to the security interest to be realized. Secured creditors are only permitted to realize security interests that can be proved to exist by either (a) the records of such security interest maintained by an IU or (b) such other means as may be specified by the IBBI.
- (e) Secured creditors may enforce, realize, settle, compromise, or deal with the secured assets in accordance with law as applicable to the security interest being realized and recover their debts from the proceeds of such realization.
- (f) If, in the process of realizing a secured asset, the secured creditor encounters resistance from the CD or any person connected with the taking of possession, selling or otherwise disposing of the security, they can make an application to the AA to facilitate the process. On receipt of such an application, the AA can then pass any order deemed necessary to permit a secured creditor to realize the security interest in accordance with the applicable law.
- (g) Where enforcement of security interest yields proceeds to a secured creditor in excess of the debts due to it, the secured creditor is required to account to the liquidator for such a surplus and tender to the liquidator any such surplus funds received.
- (h) When a secured creditor recovers its dues through enforcement, it is required to transfer the amount of the CIRP costs due from itself to the liquidator to be included in the liquidation estate.

In *JM Financial Asset Reconstruction Company Limited Vs. Finquest Financial Solutions Private Limited [Company Appeal (AT) (Insolvency) No. 593 of 2019]*, a secured FC filed an application under section 60(5) (read with section 52 of the IBC and regulation 37 of the Liquidation Process Regulations) to sell off its secured assets to realize its security interest in the liquidation proceeding. The AA directed the liquidator to hand over symbolic possession of the assets to the secured FC. The NCLAT held that only one secured creditor can enforce its right for realization of its debt out of the secured assets as per section 52. It also held that the AA has no jurisdiction to entertain the application under section 52(6) in absence of any cause of action as per section 52(5). It noted that for realization of secured assets by a secured creditor, it must inform the liquidator, who is required to verify such security interest and permit the secured creditor to realize it. If a secured creditor applies directly to the AA for realization of secured assets under section 52(6), such an application is not maintainable. It remitted the matter to the liquidator to proceed in accordance with section 53 (read with section 52) of the IBC.

In *Mr. Srikanth Dwarakanath, Liquidator of Surana Power Limited Vs. Bharat Heavy Electricals Limited [Company Appeal (AT) (Insolvency) No. 1510 of 2019]*, an appeal was filed against the AA's order dismissing the application for permission for sale of assets of the CD based on the consent of a majority of the secured creditors. The respondent had succeeded in arbitration proceedings against the CD and an *ex parte* award was passed in its favor. Based on such award, the respondent had been granted lien over certain assets of the CD. These secured assets were already hypothecated to other secured creditors. While other secured creditors relinquished their security to the liquidation estate, the respondent expressed its unwillingness to relinquish its security interest, as a result of which the liquidator was unable to proceed with the sale of the liquidation assets. Thus, the liquidator filed an application seeking permission to proceed with sale of the assets based on majority consent (of 73.76 percent) of the secured creditors, which was dismissed by the AA.

The NCLAT observed that the respondent is also a secured creditor on par with the remaining ten secured creditors. Enforcement of security interest is governed by section 13 of the SARFAESI Act. As per section 13(9) of the SARFAESI Act, any steps for realization of assets by the secured creditors would require confirmation from the creditors having at least 60 percent of the value of total debt. In this case, 73.76 percent of the secured creditors had already relinquished the security interest to the liquidation estate. Thus, it would be prejudicial to stall the liquidation process at the instance of a single creditor having only 26.24 percent share (in value) in the secured assets. The respondent did not hold a superior charge from the rest of the secured FCs. The NCLAT applied section 13(9) of the SARFAESI Act to end the deadlock, and held that the decision of 73.76 percent of the secured creditors, who had relinquished their security interest, shall be binding on the dissenting secured creditors.

In the case of *Bank of Baroda Vs. Mrs. Deepa Venkat Ramani & Another [Company Appeal (AT) (Insolvency) No. 632 of 2019]*, the appellant bank, a secured creditor of the CD, challenged the AA's order directing the liquidator to collect a certain amount from the Debt Recovery Tribunal (DRT-2 Chennai) for being dealt with under section 53 of Code. The appellant bank submitted that it had never relinquished its security interest to the liquidation estate and that if the DRT amount was released in its favor towards satisfaction of its claim, the appellant bank should move out of the liquidation process without claiming any further amount from the CD. On perusal of records, the NCLAT observed that the CD gave, as security to the appellant bank, the sums that it had to receive from Southern Railways for certain projects. The CD's submission—that the sums deposited by Southern Railways into the credit of the account in the Original Application before DRT were all receivables from projects for which no loans were taken from the appellant—was found to be untenable. Therefore, the NCLAT set aside the impugned order and remanded the matter to the AA to decide the security interest of the appellant before the liquidator could be given the assets of the CD to be dealt with under section 53 of the Code.

In the matter of *Clutch Auto Ltd. [CA-1432(PB)/2019 & CA-1433(PB)/2019 in (IB)- 15(PB)/2017]*, the liquidator filed an application seeking directions for relinquishment of security interest by the secured creditor under section 52 of the Code. The AA held that if the liquidator concludes that a creditor has security interest over the assets of the CD, he shall permit the creditor to utilize its right under section 52 of the Code. It concluded that directing a creditor to relinquish its security interest is not supported by the IBC.

#### **How and when will the creditor communicate its intention?**

The secured creditor has a right to either relinquish security to the liquidation estate or realize the same on its own. Regulation 32 of the Liquidation Process Regulations prohibits the liquidator from selling an asset that is subject to security interest, unless the security interest therein has been relinquished to the liquidation estate. The IBC, however, does not provide any timelines for opting to relinquish or exercise security interest.

As there was no timeline provided for a secured creditor to convey its decision to relinquish its security interest or enforce security outside of the liquidation process, it created uncertainty, particularly

in considering a going concern sale of the CD. It has been reported that at times, secured creditors neither confirm their relinquishment nor proceed to sell the asset outside liquidation. Until the secured lenders communicate their decision to the liquidator, it is difficult for the liquidator to prepare the asset memorandum (see below). Delays in communicating the decision would also lead to delays in forming the liquidation estate.

Hence, to bring certainty, the new regulation 21A was added to the Liquidation Process Regulations by way of the Liquidation Amendment Regulations. This new regulation makes it mandatory for a secured creditor to inform the liquidator of its decision to relinquish its security interest to the liquidation estate, or realize its security interest, as the case may be, using

Form C or Form D of Schedule II. If a secured creditor fails to communicate its decision within thirty days of the LCD, the assets covered under the security interest shall be *presumed* to be part of the liquidation estate.

Thus, as per regulation 21A, if the secured creditor fails to inform the liquidator of its intent to realize its security interest within thirty days of the LCD, there would be a presumption of relinquishment of security interest by the secured creditor.

#### **Sharing of costs, workmen dues, and excess amounts by the secured creditor**

As per the liquidation waterfall in section 53 of the IBC, a secured creditor who relinquishes its security interests ranks *pari passu* with the workmen's dues for 24 months (preceding the LCD) and is given priority over all other claims, after full payment of the CIRP and liquidation process costs.

As per section 52 of the IBC, a secured creditor that enforces its security shall transfer the amount of the CIRP costs due from him to the liquidator to be included in the liquidation estate. Hence, the secured creditor shares his part of the CIRP costs. Section 52 does not provide for sharing of any other costs or dues by the secured creditor (that enforces security).

Hence, due to no specific mention in section 52, a concern was raised that where the secured creditors decide to realize their security interest, the workmen would recover a lesser amount (or nothing), depending on the realization during the liquidation process. It was also felt that if a secured creditor proceeds to realize his security, he should be liable to pay his share of the expenses incurred by the liquidator for the preservation of the security before its realization. Similarly, concerns were expressed that if a CD has only secured assets, and all security holders decide to realize their security

interests outside the liquidation assets, there will be no liquidation proceeds, and hence there will be no resource to meet the liquidation costs.

To address these concerns and ambiguities, regulation 21A(2) was added to the Liquidation Process Regulations by the Liquidation Amendment Regulations. The new regulation provides that, where a secured creditor proceeds to realize its security interest, it shall pay as much towards the amount payable under section 53(1)(a) (that is, resolution and liquidation costs) and 53(1)(b)(i) (workmen's dues for the period of 24 months preceding the LCD) as it would have paid in case it had relinquished its security interest. Hence, a secured creditor who relinquishes its security has been put at par with the secured creditor who realizes security outside the liquidation process, in respect of sharing of costs (liquidation and CIRP) and workmen dues.

To provide further clarity on timing of payment by the secured creditor, regulation 21A(2) was further amended by way of the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2020,<sup>[149]</sup> to provide that the payment of such costs and dues by the secured creditor who proceeds to realize its security interest shall be made to the liquidator within ninety days of the LCD. Further, it was provided that the secured creditor will hand over the excess of the realized value of the secured asset over the amount of his claims admitted, to the liquidator within 180 days of the LCD.

It is possible that by the 90<sup>th</sup> day of the LCD, the resolution and liquidation costs and the workmen dues for 24 months have not been ascertained. Further, by the 180<sup>th</sup> day, the secured creditor may not have realized its security interest (and hence would not be able to hand over the excess to the liquidator). Hence,

[149] <https://ibbi.gov.in/uploads/legalframework/6eda1d32cfc69cf3fbf91fff9116078.pdf>

the amendment to regulation 21A also clarifies that where the amount is not certain by such payment dates, the secured creditor shall pay the amount, as estimated by the liquidator. Any difference between the amount payable under regulation 21A(2) and the amount actually paid to the liquidator by the secured creditor shall be made good by the secured creditor or the liquidator, as the case may be, as soon as the amount payable becomes certain and the creditor is so informed by the liquidator.

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

#### **Process of security enforcement**

Regulation 37 of the Liquidation Process Regulations lays down the procedure to be followed by the secured creditor and the liquidator for realization of security interest under section 52 of the IBC. The process involves a secured creditor informing the liquidator of the price at which it proposes to realize its secured asset. The liquidator shall inform the secured creditor within 21 days of the receipt of the intimation if a person is willing to buy the secured asset at a higher price (all within prescribed timelines).

In case the liquidator is able to find a buyer for the secured asset, the secured creditor shall sell the secured asset to such buyer. However, in case the liquidator fails to find a buyer or the buyer fails to buy the secured asset, the secured creditor may realize the secured asset in the manner it deems fit, but at least at the pre-intimated price.

Pertinently, this process does not apply to the secured creditor enforcing its security interest under SARFAESI Act, 2002, or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993.

### **KEY CONSIDERATION**

Where a secured creditor enforces security on its own, it is required to hand over the balance to the liquidator to be included in the liquidation estate. To the extent of shortfall, the creditor ranks equally with government dues (for two years preceding the insolvency commencement date) and above any remaining debts and dues and payments to shareholders.

Hence, the process under regulation 37 has been prescribed to ensure that the asset being enforced by the secured creditor is not sold by the creditor at an undervalue and fetches maximum realizable value. This is achieved by giving the liquidator an opportunity to find a buyer willing to purchase at a price higher than the buyer found by the creditor.

However, if a creditor is enforcing security under SARFAESI Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, such procedure is not required to be followed. These acts are specialized legislation providing for recovery of dues and enforcement of security interest by banks and certain financial institutions. These statutes prescribe their own procedures and processes for security enforcement by a creditor.

#### **Section 29A**

Section 35(1)(f) of the IBC gives the power to the liquidator to sell the property and actionable claims of the CD, subject to section 52, provided that the liquidator is not permitted to sell the same to any person who is not eligible to be a resolution applicant. Hence, the disqualifications specified in section 29A of the IBC apply equally to prospective buyers of

liquidation assets. These currently are, to name some, (a) an undischarged insolvent; (b) a wilful defaulter in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949; (c) at the time of submission of the resolution plan has an account, or an account of a CD under the management of control of such person or of whom such person is a promoter, classified as non-performing asset.<sup>[150]</sup>

***State Bank of India Vs. Anuj Bajpai (Liquidator) [Company Appeal (AT) (Insolvency) No. 509 of 2019]***

In the context of sale by a secured creditor outside the liquidation process, the NCLAT held that even if section 52(4) of the IBC is silent relating to the sale of secured assets to one or other persons, the explanation below section 35(1)(f) makes it clear that the assets cannot be sold to persons who are ineligible under section 29A, and that the said provision is applicable not only to the liquidator but also to the secured creditor, who can opt out of section 53 to realize the claim in terms of section 52(1)(b) (read with section 52(4)) of the IBC. If it comes to the notice of the liquidator that a secured creditor intends to sell the assets to persons who are ineligible in terms of section 29A, it is always possible to reject the application under section 52(1)(b) (read with section 52(2) and (3) of the Code).

Regulation 37 was amended by way of the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2020,<sup>[151]</sup> to provide that a secured creditor shall not sell or transfer an asset that is subject to security interest to any person who is not

eligible under the IBC to submit a resolution plan for insolvency resolution of the CD.

Hence, the secured creditor cannot sell the secured asset outside of the liquidation process to a person who is disqualified under section 29A of the IBC.

## 9. Realization and Sale of Assets

Under section 35 of the IBC, the liquidator has the power and duty to carry on the business of the CD for its beneficial liquidation as he considers necessary, and also to sell the immovable and movable property and actionable claims of the CD by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels in such manner as may be specified. The mode and manner of such realization and sale are specified in the Liquidation Process Regulations.

### Rescuing the CD and its business—some more attempts

Closing a viable CD is of grave concern as it impacts the daily income of its stakeholders and it cannot be reversed. The IBC, therefore, has adopted a very cautious approach and envisages that the market should first endeavor to rescue the CD and only liquidate it after rescue efforts fail. It also envisages course correction if the market wrongly proceeds to liquidate a viable CD. The law does not envisage the state to intervene in wrong identification but provides flexibility for the market to make course corrections if it so wishes.

In the context of the IBC, the Supreme Court in the *Swiss Ribbons* case observed that the preamble does not, in any manner, refer to liquidation, which is only used as a last resort if there is either no resolution plan or the resolution plans submitted are not viable. Even in liquidation, the liquidator can sell the business of the CD as a going concern.

[150] <https://ibbi.gov.in/uploads/legalframework/2020-09-23-232605-8ld-hg-e942e8ee824aa2c4ba4767b93aad0e5d.pdf>

[151] <https://ibbi.gov.in/uploads/legalframework/6eda1d32cfc69cf3fbf91fef9116078.pdf>

In the *Binani* case, the NCLAT observed that the first order objective of the IBC is resolution. The second order objective is maximization of value of assets of the CD, and the third order objective is promoting entrepreneurship, availability of credit and balancing interests. This order of objective is sacrosanct.

Rescuing the CD or its business—even after a liquidation order has been passed—has certain advantages, and is the preferred choice of the law, the authorities, and the stakeholders. It helps in realization of higher value, value preservation, and rescuing a viable business. It minimizes disruption to business and prevents loss of employment. Recognizing this, many decisions of the NCLAT and the AA have directed the liquidators to make efforts to sell the CD as a going concern.

Taking cognizance of the same, IBBI issued a discussion paper on April 27, 2019,<sup>[152]</sup> seeking comments on proposed changes to the Liquidation Process Regulations, to discuss preservation of CDs during liquidation. It was discussed that the law broadly provides two options in this regard: the section 230 scheme, and a going concern sale under regulation 32 of the regulations. Following the comments received, amendments were made to the Liquidation Process Regulations by way of Liquidation Amendment Regulations (with effect from July 25, 2019).

## 9.1 Section 230 of the Companies Act, 2013

In the erstwhile winding-up regime under the Companies Act, 1956, there were instances where creditors or members of a company in winding up or liquidation filed applications for compromise or arrangement under section 391 of the Companies Act, 1956, and successfully managed to revive the company. Section 391 of the Companies Act, 1956, corresponds to section 230 of the Companies Act, 2013 (section 230 scheme).

In the context of a company undergoing liquidation under the Companies Act, 1956, the Supreme Court has held that an attempt must be made to ensure that, rather than dissolving a company, it is allowed to revive. Section 391(1)(b) of the Act gives the liquidator the right to propose a compromise or arrangement with creditors and members indicating that the provision for revival would apply even in a case where an order of winding up has been made and a liquidator had been appointed.<sup>[153]</sup>

Like the Companies Act, 1956, there is no provision in the IBC that explicitly provides for any scheme of compromise or arrangement for a CD in liquidation.

Recognizing the Supreme Court rulings in respect of schemes under section 391 of the Companies Act, 1956, in liquidation, and the object of the IBC being revival as opposed to liquidation, the NCLAT has in various cases directed the liquidator to explore a scheme of compromise and arrangement for CDs in liquidation under section 230 of the Companies Act, 2013.

[152] <https://ibbi.gov.in/Discussion%20paper%20LIQUIDATION.pdf>

[153] See *Meghal Homes Pvt. Ltd. Vs. Shree Niwas Girmi K.K. Samiti & Others* [(2007) 7 SCC 753].

In *S.C. Sekaran Vs. Amit Gupta and Others [Company Appeal (AT) (Insolvency) No. 495 & 496 of 2018]*, appeals were filed by the management of the CD against the liquidation order passed by the AA, following the failure of resolution. It was stated that the liquidator is supposed to keep the CD as a “going concern” even during the period of liquidation and can take steps to do so under section 230 of the Companies Act, 2013. The NCLAT directed the liquidator to proceed in accordance with law. It was directed that the liquidator would verify the claims of all the creditors; take custody and control of all the assets, property, effects, and actionable claims of the CD, carry on its business for its beneficial liquidation, and so on, as prescribed under section 35 of the IBC. Before taking steps to sell the assets of the CD, the liquidator was directed to take steps in terms of section 230 of the Companies Act, 2013. The AA was also directed to pass an appropriate order, if required. It was further directed that only on failure of revival, the AA and the liquidator would first proceed with the sale of the company’s assets wholly and, if this was not possible, to sell the company in part and in accordance with law. The liquidator was also directed to complete the process within 90 days under section 230 of the Companies Act, 2013.

In *Y. Shivram Prasad Vs. S. Dhanapal & Others. [Company Appeal (AT) (Insolvency) No. 224 & 286 of 2018]*, the AA passed the impugned order of liquidation as the CoC did not find any resolution plan viable and feasible. The promoters submitted that they should have been given an opportunity to settle the dues. While rejecting the said submission, the NCLAT clarified that settlement can be made only at three stages, namely, (i) before admission, (ii) after settlement if reached by Promoters / shareholders with the applicant but before the constitution of the CoC; and (iii) in terms of section 12A of the IBC. In absence of any settlement, if no withdrawal is made at these three stages then CIRP continues and if any resolution plan is approved by the CoC, the AA may pass order approving the resolution plan. The NCLAT observed that the three stages of settlement were over in this matter. It observed that during the liquidation process, it is necessary to take steps for revival and continuance of the CD by protecting it from its management and from a death by liquidation. It held that the liquidator is required to act in terms of the aforesaid directions of the Appellate Tribunal and to take steps under section 230 of the Companies Act. If the members of the CD or the CD or creditors of the CD such as FCs or OCs approach the company through the liquidator for a compromise or arrangement by making a proposal of payment to all the creditor(s), the liquidator would move an application before the AA on behalf of the company under section 230 of the Companies Act, 2013. Further, it was directed that on failure of the above, steps should be taken for outright sale of the CD to enable the employees to continue working.

In *Rasiklal S. Mardia Vs. Amar Dye Chem Limited [Company Appeal (AT) (Insolvency) No. 337 of 2018]*, in the impugned order the AA held that the liquidator alone was authorized to file a petition for compromise or arrangement in respect of the company. While setting aside the impugned order, the NCLAT observed that the judgment in the matter of *National Steel & General Mills Vs. Official Liquidator* makes it quite clear that the liquidator is only an additional person and not an exclusive person who can move an application under section 391 of the old Act when the company is in liquidation.

Subsequently, a new regulation 2B was inserted by way of the Liquidation Amendment Regulations (with effect from July 25, 2019) to provide for a mechanism to give stakeholders a reasonable opportunity to reach a compromise or arrangement in a time-bound manner under section 230 of the Companies Act, 2013.

Regulation 2B provides that where a compromise or arrangement is proposed under section 230 of the Companies Act, 2013, it shall be completed within 90 days of the order of liquidation. The time taken for the compromise or arrangement, not exceeding 90 days, shall not be included in the liquidation period provided for under the IBC. Furthermore, any costs incurred by the liquidator in relation to the compromise or arrangement (if sanctioned by the AA) shall be borne by the CD. However, if the compromise or arrangement is not sanctioned by the AA, such costs shall be borne by the parties who proposed the compromise or arrangement.

***Jindal Steel and Power Limited Vs. Arun Kumar Jagatramka & Another [CA(AT) No. 221/ 2018]***

An unsecured creditor of the CD lodged an appeal (under section 421 of the Companies Act, 2013) against the AA's order to take steps for a financial scheme of compromise and arrangement between the promoter and the CD through the liquidator. The issue was whether the promoter was eligible to file an application for compromise and arrangement for the CD in liquidation, even though he was ineligible to submit a resolution plan for the CD under section 29A of the Code. The NCLAT, relying on the Supreme Court ruling in the *Swiss Ribbons* case held that the promoter, if ineligible under section 29A, cannot make an application for compromise and arrangement for taking back the immovable and movable property or actionable claims of the CD.

The Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2020,<sup>[154]</sup> amended regulation 2B to provide that a person who is not eligible to submit a resolution plan for insolvency resolution of the CD under the IBC, shall not be a party in any manner to a compromise or arrangement of the CD under section 230 of the Companies Act, 2013.

## 9.2 Regulation 32

Chapter VI of the Liquidation Process Regulations contains detailed provisions regarding the realization of assets of the CD by the liquidator. This would apply if no section 230 scheme is proposed. In such a case, the liquidator must sell the CD, its business, or its assets in a manner specified by regulation 32 of the Liquidation Process Regulations.

Regulation 32 contains provisions regarding “Sale of Assets, etc.” and provides that the liquidator may sell the following:

- (a) an asset on a standalone basis;
- (b) the assets in a slump sale;
- (c) a set of assets collectively;
- (d) the assets in parcels;
- (e) the CD as a going concern; or
- (f) the business(es) of the CD as a going concern.

It has been clarified that assets subject to any security shall not be sold under any of the aforesaid clauses, unless the security interest therein has been relinquished to the liquidation estate.

[154] <https://ibbi.gov.in/uploads/legalframework/6eda1d32cfc69cf3fbf91feff9116078.pdf>

### 9.2.1 Sale as a Going Concern

The sale of the CD or the business(es) of the CD as a going concern is one of the “manners of sale” under regulation 32(e) and (f).

It is recognized that, like revival of the company under section 230 of the Companies Act, 2013, the

sale of the CD or its business as a going concern would protect the livelihood of the employees and workers and also result in better realization of value of the CD’s assets. Hence, in various cases, the AA has ordered the sale of a company as a going concern (rather than a piecemeal sale of its assets).

In *Edelweiss Asset Reconstruction Company Ltd. Vs. Bharati Defence and Infrastructure Ltd.* [MA 170/2018 in CP 292/I&B/NCLT/MAH/2017], the RP filed an application seeking approval of the resolution plan submitted by a resolution applicant, who was an FC with 82.7 percent voting share in the CoC. The plan provided that the resolution applicant would sell the CD within two years. It noted that the plan did not give due consideration to the interest of all stakeholders, was seeking several exemptions, and contained a lot of uncertainties and speculations. It provided for generation of income from ongoing operations, with no upfront money being brought in by the resolution applicant. The AA also noted that the resolution applicant had proposed to hold majority equity in the CD, run its operations, enhance its value, and endeavor to find a suitable investor/buyer for the same. Relying on the judgment in the matter of Binani Industries Limited, the AA observed that a resolution plan is for insolvency resolution of the CD as a going concern and not for the addition of value, and is intended to sell the CD. It observed that the resolution applicant was essentially extending the CIRP period to find an investor, which is not the intention of the IBC. It further observed that if the ultimate object in the resolution plan was to sell the company, then it could be achieved by sale as a going concern during the liquidation process. Accordingly, the AA rejected the resolution plan and ordered for liquidation of the CD with the direction that the liquidator should endeavor to sell the CD as a going concern.

In the matter of *M/s. Gujarat NRE Coke Limited [C.P. (IB) No. 182/KB/2017]*, after failure of resolution during the extended period, the AA appointed the RP as liquidator. An affidavit filed by workers and employees emphasized that the liquidation regulations provide for slump sale of assets and therefore permit the sale of the business of the CD, including all its assets and properties, as a going concern, and that the Supreme Court and High Courts have often directed sale of assets of the company as a going concern to preserve employment, particularly when the CD is a going concern. Accordingly, the AA directed that the liquidator should try to sell the CD as a going concern, and if this failed, the process of selling the company’s assets should be according to regulation 33 of the Liquidation Process Regulations.

To encourage the sale of companies as a going concern, the Liquidation Process Regulations and the CIRP Regulations were amended,<sup>[155]</sup> with effect from July 25, 2019.

#### Amendment to CIRP Regulations

The CIRP Regulations were amended to insert regulation 39C, which provides for assessment of sale as a going concern. It states that the CoC may, while approving a resolution plan or deciding to liquidate

[155] [https://ibbi.gov.in/uploads/legalframework/2019-07-28-190702\\_CIPR208565.pdf](https://ibbi.gov.in/uploads/legalframework/2019-07-28-190702_CIPR208565.pdf)

the CD, recommend that the liquidator first explores the sale of the CD as a going concern under regulation 32(e) of the Liquidation Process Regulations, or sells the business of the CD as a going concern under clause (f) thereof, if an order for liquidation is passed under section 33 of the IBC. If the CoC recommends sale as a going concern, it shall identify and group the assets and liabilities which, according to its commercial considerations, ought to be sold as a going concern under regulation 32(e) or (f). The RP shall submit the recommendation of the CoC to the AA while filing an application under either section 30 or 33.

#### **Amendment to Liquidation Regulations**

As previously stated, along with the amendment to the CIRP Regulations, the Liquidation Process Regulations were amended and regulation 32A was inserted. It provides that if the CoC has recommended sale under clause (e) or (f) of regulation 32, or the liquidator is of the opinion that selling the CD or its business as a going concern will maximize the value of the CD, the liquidator shall endeavor to first sell the same as a going concern, as provided under regulation 32(e) and (f). The group of assets and liabilities of the CD, as identified by the CoC under regulation 39C(2) of the CIRP Regulations, shall be sold as a going concern. Where the CoC has not identified the assets, the liquidator should identify and group the assets and liabilities to be sold as a going concern, in consultation with the SCC.

The regulations clarify that if the liquidator is unable to sell the CD or its business as a going concern within 90 days of the LCD, he shall proceed to sell the assets of the CD on a standalone basis, in a slump sale, in parcels, or as a set of assets collectively.

### **9.2.2 Mode of Sale**

The mode of sale refers to the method by which the sale will be carried out. Regulation 33 states that the liquidator will ordinarily sell the assets of a CD by auction. However, the liquidator may sell the assets of the CD by way of a private sale if:

- (a) they are perishable;
- (b) they are likely to deteriorate in value significantly if not sold immediately;
- (c) they are sold at a higher price than the reserve price at a failed auction; or
- (d) prior permission of the AA has been obtained for the sale.

Note that without the prior permission of the AA, the liquidator cannot sell the assets by way of private sale to:

- (a) a related party of the CD;
- (b) the liquidator's own related party; or
- (c) any professional appointed by the liquidator.

Schedule I of the Liquidation Process Regulations sets out the procedural details of auctions and private sale of assets.

#### **Auction of assets**

The liquidator shall prepare a marketing strategy with the help of marketing professionals, if required. The strategy can include releasing advertisements, preparing information sheets on the assets, preparing a notice of sale, and liaising with agents.

The liquidator should prepare terms and conditions of the sale, including a reserve price, earnest money deposits, and pre-bid qualifications. If a sale was not achieved at that price, the liquidator could previously reduce the price by up to 75 percent at subsequent auctions. However, the Liquidation Amendment Regulations amended this provision to provide that where an auction fails at the reserve price, the liquidator may reduce the reserve price by up to 25 percent to conduct subsequent auctions. Where an auction fails at the reduced price, the reserve price in subsequent auctions may be further reduced by not more than ten percent at a time.

The reserve price (at least for the first auction) is the value of the asset arrived at in accordance with regulation 35 of the Liquidation Process Regulations. Regulation 35 provides that where the valuation has been conducted under CIRP Regulations, the liquidator shall consider the average of the estimated values arrived at for the purposes of valuations under the Liquidation Process Regulations. For cases not covered under this, or where the liquidator is of the opinion that a fresh valuation is required under the circumstances, he shall (within seven days of the LCD) appoint two registered valuers to determine the realizable value of the CD's assets or businesses and take the average of the two estimates as the value. The valuers appointed should be independent (of the liquidator and the CD) and shall independently submit to the liquidator the estimates computed in accordance with the Companies (Registered Valuers and Valuation) Rules, 2017, after physical verification of the CD's assets.

The liquidator shall make a public announcement of an auction in the specified manner. However, keeping in view the value of the asset intended to be sold, the liquidator can apply to the AA to dispense with the requirement of newspaper publication.

The liquidator is required to provide all necessary assistance for due diligence by interested buyers.

The liquidator is required to sell the assets through an electronic auction on an online portal, if any, designated by IBBI, where interested buyers can register, bid, and receive confirmation of the acceptance of their bid.

If the liquidator is of the opinion that a better result can be achieved at a physical auction, prior permission must be obtained from the AA. The liquidator can then employ the services of qualified and specialized professional auctioneers to assist with the auction.

The auction should be transparent, in the sense that the highest rival bid should be visible to other bidders—unless the liquidator believes that a better realization could be achieved if the bid amounts were not visible, and obtains prior permission from the AA to conduct the auction in such a manner. The liquidator may conduct multiple rounds of auctions to maximize the realization from the sale of assets and to promote the best interests of the creditors.

In the case of *State Bank of India Vs. Maithan Alloys Limited & Others* [CA(AT)(Ins) No.1245-1247/2019], the Respondent No. 1 was the successful bidder in the second round of e-auctions for purchase of the CD as a going concern, and had paid 25 percent of the bid amount of 68 crore Indian rupees. Respondents No. 2 to 4, who did not participate in the e-auction, offered a higher amount of 70 crore Indian rupees. Considering the higher bid to be in tune with the objectives of the IBC, the AA ordered the liquidator to accept their offer and also directed the liquidator to return the amount paid by the first respondent with interest (on its request). On appeal by one of the FCs, the NCLAT observed that there was no need for the AA to direct the liquidator to consider the proposal of the other respondents, who had approached the AA after the finalization of the auction. The NCLAT directed the first respondent to complete the sale transaction, and imposed a cost of 10 lakh Indian rupees on each of the other respondents for hampering and derailing the liquidation process.

In *Mr. S. S. Chockalingam Vs. Mr. CA Mahalingam Suresh Kumar* [MA/661/2018 in TCP/431/2017], in an e-auction of the assets of the CD in liquidation, the applicant was the highest bidder. He was required to deposit 25 percent of the bid amount within 24 hours and the remaining 75 percent within 15 days. He deposited 25 percent after 3 days and sought time for payment of the rest of the amount. The liquidator granted extensions of time twice. Thereafter, the liquidator cancelled the sale, negotiated with the second-highest bidder, and sold the assets to it. The applicant filed an application under rule 11 of the NCLT Rules, 2016, to direct the liquidator to extend the last date of payments, as he had already paid 57% of the bid amount and claimed that the liquidator had no authority to forfeit the said amount. The AA observed that there is no provision in the IBC to give extensions of time as far as the bidding process is concerned. Moreover, the liquidator had already negotiated with the second-highest bidder, who had already made payment equivalent to the amount offered by the applicant. In other words, the second bidder, being in a position to make the payment of the same amount, had become the successful bidder, and had made the payment in good time. In these circumstances, the application was dismissed on the grounds of being infructuous.

Previously, at the close of the auction, the highest bidder was invited to provide the balance sale consideration within 15 days from the date of the invitation. However, as per the Liquidation Amendment Regulations, the timeline has been amended to 90 days from the date of such invitation. Further, the amendment also provides that amounts outstanding after 30 days shall attract interest at the rate of 12 percent, and the sale shall be cancelled if the payment is not received within 90 days.

The sale is considered complete on payment of the full amount, and the liquidator shall execute a certificate of sale or sale deed for the transfer of assets,

which will be delivered to the buyer in the manner set out in the terms of sale.

#### **Private sale of assets**

The liquidator should prepare a strategy to approach interested buyers, and the sale may be conducted by liaising directly with the potential buyers or their agents, through retail outlets, or by any other means likely to achieve maximum realization.

The sale will be considered complete in accordance with the terms of sale. On receipt of full consideration, the assets will be delivered to the purchaser.

### 9.2.3 Section 32A of the IBC

By way of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019 (replaced with the Insolvency and Bankruptcy Code (Amendment) Act, 2020),<sup>[156]</sup> section 32A was inserted in the IBC to, *inter alia*, provide immunity against prosecution of CDs resolved under the IBC, to prevent action against the property of such CDs, and to provide for the successful resolution of the applicant subject to fulfillment of certain conditions.

Section 32A(2) provides that no action shall be taken against the property of the CD in relation to an offence committed prior to the commencement of the CIRP of the CD, where such property is covered under a resolution plan approved by the AA, which results in change in control of the CD to a person, or sale of liquidation assets (under the provisions of the IBC) to a person who was not (a) a promoter or in the management or control of the CD or a related party of such a person; or (b) the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or

filed a report or a complaint to the relevant statutory authority or Court.

It has been clarified that an action against the property of the CD in relation to an offence shall include the attachment, seizure, retention, or confiscation of such property under such law as may be applicable to the CD.

Further, these provisions bar an action against the property of any person, other than the CD or a person who has acquired such property through a CIRP or liquidation process, and fulfill the requirements specified in the section against whom such an action may be taken under applicable law.

These provisions are subject to the CD or any person required to provide assistance under applicable law, extending all assistance and cooperation to any authority investigating the offence committed prior to the commencement of the CIRP.

Section 32A(2) would encourage sale of liquidation assets of the CD that are subject to attachment, seizure, retention, or confiscation under applicable law.

In *Mr. Anil Goel, the Liquidator appointed in respect of Varrsana Ispat Limited Vs. Deputy Director, Directorate of Enforcement, Delhi and SBER Bank Vs. Varrsana Ispat Limited [IA (IB) No. /KB/2020 in CP (IB) No. 543/KB/2017]*, the liquidator filed an application under sections 60(5) and 32A of the IBC, seeking permission to sell the assets of the CD that were attached by the Directorate of Enforcement. The Directorate of Enforcement objected to the application on three grounds: (a) an application under section 32A can be made only after the liquidation process is over or a resolution plan is approved; (b) an application under section 32A can be filed only by the successful resolution applicant and not the liquidator; and (c) the rights of the parties had already been crystallized through proceedings before the PMLA Appellate Authority (constituted under the Prevention of Money Laundering Act, 2002) and hence subsequent changes in law (insertion of section 32A) would not take away such rights, which had attained finality. The AA observed that section 32A specifically deals with preventing insolvency where a

[156] <https://ibbi.gov.in/uploads/legalframework/d36301a7973451881e00492419012542.pdf>

company goes into a CIRP or liquidation process. It held that section 32A is also applicable to the assets of the CD undergoing liquidation, and that a liquidator can file an application like the one in hand. It further held that a liquidator can proceed with the sale of the assets even if they are under attachment by the Directorate of Enforcement, to continue the time-bound process of liquidation under the IBC, and, upon completion of the sale proceedings, the buyer can take appropriate steps to release the attachment.

## 10. Disclaimer of Contracts

Regulation 10 of the Liquidation Process Regulations allows the liquidator to disclaim an onerous property (such as land, unsalable property, and onerous contracts). Notably, there is no such similar provision allowing IRP or RP to disclaim onerous property.

For such a purpose, the liquidator is required to make an application to the AA within six months of the LCD or such extended period as may be allowed by the AA, to disclaim the property or contract if any part of the property of a CD consists of:

- (a) land of any tenure that is burdened with onerous covenants;
- (b) shares or stocks in companies;
- (c) any other property which is not salable, or is not readily salable by reason of the possessor thereof being bound either to the performance of any onerous act or to the payment of any sum of money; or
- (d) unprofitable contracts.

The liquidator may make such an application even if he has endeavored to sell or take possession of or exercised any act of ownership in relation to the property, or has done anything in pursuance of the contract sought to be disclaimed.

The liquidator is required to serve a notice to persons interested in the onerous property or contract at least seven days before making the application for a disclaimer to the AA. A person is considered interested in the onerous property or contract if he is entitled to the benefit or subject to the burden of the contract, or claims an interest in the disclaimed property, or is under a liability not discharged in respect of the disclaimed property.

### Loss of right to disclaim

The liquidator shall not make an application for a disclaimer if a person interested in the property or contract has inquired in writing whether he would make such an application, and the liquidator did not communicate his intention to do so within one month of receipt of the inquiry. In such a case, the right to disclaim under regulation 10 would be lost. Otherwise, the liquidator has six months (or such extended period as allowed by the AA) to apply to the AA to disclaim the onerous asset.

### Effect of disclaimer

Subject to the order of the AA approving the disclaimer, the disclaimer shall operate to determine, from the date of the disclaimer, the rights, interests, and liabilities of the CD in respect of the disclaimed property or contract. The disclaimer shall not, except so far as is necessary for the purpose of releasing the CD and the property of the CD from liability, affect the rights, interests, or liabilities of any other person.

Notably, not only the liabilities but the rights and interests of the CD also come to an end with the disclaimer. Hence, once disclaimed, that property cannot be sold for the benefit of liquidation, and no profit can be reaped due to any increase in value or sudden salability of an asset that was previously unsalable or “onerous.”

#### **Claim for compensation and damages**

Subject to the order of the AA approving the disclaimer, once disclaimed, the liquidator is no longer liable for that asset or any liabilities attached to the asset. However, the disclaimer may result in breach of contract by the CD or in termination payments under the contract.

Due to the limited moratorium in section 33(5), no proceeding in consequence of such a breach can be taken against the liquidator by the counterparty if the property or contract was disclaimed. However, the counterparty may have a claim against the CD for breach of contract or termination payments.

Hence, regulation 10 also provides that a person affected by the disclaimer under this regulation shall be deemed a creditor of the CD for the amount of the compensation or damages payable, and may accordingly be payable as a debt during liquidation under section 53(1)(f) of the IBC.

Note that such a claim for compensation or damages against the liquidator may not be crystallized or easily ascertained. Hence, since the claim against the estate may be not be precise, the liquidator shall make the best estimate of the amount of the claim under regulation 25, based on the information available to him.

## **11. Distribution of Assets by the Liquidator**

The principal duty of the liquidator is to invite and settle the claims of creditors and claimants and to distribute proceeds according to the provisions of the IBC. Hence, once claims are consolidated, unless the CD is subject to a section 230 scheme, the liquidator proceeds to form the liquidation estate and sell the CD or its assets as per the Liquidation Process Regulations. The liquidation estate, including the proceeds of any sale, is then to be distributed to the stakeholders, before bringing the life of the CD to an end by way of dissolution.

### **11.1 Proceeds in the Bank Account**

Regulation 41 sets out the provisions governing receipts and payments of money by the liquidator through a bank account (before distribution). As per regulation 41(1), the liquidator will open a bank account in the name of the CD, followed by the words “In Liquidation,” in a scheduled bank, for the receipt of all the money due to the CD.

#### **Deposit each day**

Regulation 41(2) of the Liquidation Process Regulations stipulates that the liquidator must deposit into the bank account, all money including cheques and demand drafts received by him as the liquidator of the CD, and the realizations of each day shall be deposited into the bank account without deductions, and not later than the next working day after realization.

The liquidator may keep on hand a cash amount of up to one lakh Indian rupees, or a larger amount that may be permitted by the AA, to meet liquidation costs.

### Amounts over 5,000 Indian rupees

Regulation 41(4) states that all payments by the liquidator above 5,000 Indian rupees shall be made by cheque or through online banking transactions against the bank account.

## 11.2 Commencing Distribution

Regulation 42 of the Liquidation Process Regulations states that the liquidator shall not commence distribution before the list of stakeholders and the asset memorandum (see below) has been filed with the AA.

Previously, the liquidator could distribute the proceeds from realization to the stakeholders within six months of receiving the amount. The Liquidation Amendment Regulations have amended this timeline to 90 days.

Regulation 42(3) states that the insolvency resolution process costs (if any) and the liquidation costs shall be deducted before any such distribution is made.

## 11.3 The Waterfall Mechanism

Section 53 of the IBC provides for a waterfall mechanism detailing the order and priority of distribution of proceeds from the sale of liquidation assets among the stakeholders of a corporate person. By virtue of the “non-obstante clause” at the opening of section 53, the waterfall mechanism under the IBC has an overriding effect over any other central or state government statutes.

Under section 53 of the IBC, the proceeds from the sale of the liquidation assets are to be distributed in the following order of priority:

- (a) the Insolvency Resolution Process costs and the liquidation costs paid in full;
- (b) the debts which shall rank equally between and among the following:
  - i. workmen’s dues for the period of 24 months preceding the liquidation commencement date, and
  - ii. debts owed to a secured creditor in the event of him having relinquished security in the manner mentioned in section 52;
- (a) wages and any unpaid dues owed to employees, other than workmen, for a period of 12 months preceding the liquidation commencement date;
- (b) financial debts owed to unsecured creditors;
- (c) the following dues shall rank equally between and among the following:
  - i. government dues in respect of the whole or any part of the period of two years preceding the liquidation commencement date, and
  - ii. debts owed to a secured creditor for any amount unpaid following the enforcement of security interest
- (a) any remaining debts and dues;
- (b) preference shareholders, if any; and
- (c) equity shareholders or partners, as the case may be.

Under the liquidation system that preceded the IBC, government dues were previously given a high priority

in relation to all of the outstanding debts of the CD, whereas under the IBC, the payment of government dues has a much lower priority.

In *ICICI Bank Limited Vs. SIDCO Leathers Limited* [(2006) 10 SCC 452], the Supreme Court had held that a creditor having a superior charge that did not relinquish the right to enforce the security will continue to possess rights of priority in accordance with section 48 of the Transfer of Property Act, 1882. It was further noted that only because the dues of workers and debts due to the secured creditors are treated *pari passu* with each other, the same by itself, would not lead to the conclusion that the concept of *inter-se* priorities amongst the secured creditors had thereby been intended to be given a total go-by. Hence in this case, *inter-se* priorities amongst secured creditors was recognized where the creditors were enforcing security in liquidation.

It is notable that all secured FCs (whether having superior or subservient rights over secured assets) are treated equally in the liquidation waterfall under the IBC. In the event that such creditors relinquish their right to enforce their security in accordance with section 52 of the IBC, they will rank *pari passu* (equally) with workers' dues for a period of 24 months preceding the LCD, and are placed second in order of priority for the payment of all their dues after payment of the CIRP costs.

As noticed, the reference to “secured creditor” in section 52 of the IBC does not refer to priority of

charges amongst secured creditors. This leaves room for a conflict between the secured creditors with superior charge over the assets and those with a second or “subservient” charge. This issue was discussed by the Insolvency Law Committee constituted by the Ministry of Corporate Affairs to conduct a detailed review of the IBC in consultation with the key stakeholders.

The Insolvency Law Committee Report (March 2018)<sup>[157]</sup> noted that the principles emerging from the *ICICI Vs. SIDCO* case (referred to above) are also applicable to the issue at hand under section 53 of the IBC. The Committee added that, although this was a case where creditors had not relinquished their security, the principles still hold under the IBC even when creditors have relinquished their security, as the IBC, unlike the Companies Act, 1956, expressly recognizes secured creditors who have relinquished their security as a separate category in section 53(1)(b)(ii) and distinguishes them from unsecured creditors. In a bid to encourage relinquishment, the IBC also specifically places secured creditors who have relinquished security higher than unsecured creditors.<sup>[158]</sup>

With the enactment of the IBC, secured creditors will have a tough choice to make—either to relinquish their security and enjoy higher priority, or to realize their security and choose lower priority in the liquidation waterfall.

Regulation 43 mandates that the stakeholders shall immediately return any money received in distribution to which they were not entitled or to which they lost their entitlement.

[157] [http://www.mca.gov.in/Ministry/pdf/ReportInsolvencyLawCommittee\\_12042019.pdf](http://www.mca.gov.in/Ministry/pdf/ReportInsolvencyLawCommittee_12042019.pdf)

[158] [http://mca.gov.in/Ministry/pdf/ReportInsolvencyLawCommittee\\_12042019.pdf](http://mca.gov.in/Ministry/pdf/ReportInsolvencyLawCommittee_12042019.pdf)

In *Ms. Pooja Babry, Liquidator and Another Vs. Gee Ispat Pvt. Ltd.* [CA No. 666/2019 in CP(IB) No. 250(ND)/2017], the liquidator sold certain properties relinquished by the secured creditors. Before proceeding to distribute the proceeds, she filed an application with the AA seeking guidance on whether she would be required to deposit capital gains from the sale of secured assets and include it in the liquidation cost to be defrayed first and distribute the balance amongst the claimants. The AA opined that upon realization of the liquidation estate of the CD, it must be distributed in accordance with the waterfall mechanism under section 53. The dues towards government, whether tax on income or on sale of properties, would qualify as operational debt and must be dealt with accordingly. It noted that a secured creditor is entitled to effect a sale under the SARFAESI Act and to appropriate the entire amount towards its dues, without any liability to first pay capital gain. If the capital gain is first to be provided for, and then be included as a liquidation cost, it would create an anomalous situation, with the secured creditor getting a lesser remittance than it could have realized had it not released the security into the common corpus. It is for this purpose that the provision of section 178 of the Income-tax Act, 1961, has been amended, giving priority to the waterfall mechanism over government dues. The AA held that the tax liability arising out of the sale shall be distributed in accordance with the provision of Section 53 of the IBC, and the applicability of section 178 or 194 IA of the Income-tax Act will not have an overriding effect on the waterfall mechanism of the IBC, which is a complete code in itself, and the capital gain shall not be taken into consideration as a liquidation cost.

In *Om Prakash Agarwal Vs. Chief Commissioner of Income Tax (TDS) & Another* [CP/294/2018], the liquidator filed an application seeking direction against the successful bidder and the Income Tax Authority not to deduct tax deducted at source (income tax) from the sale of assets made in favor of the bidder, on the grounds that tax dues cannot be collected by the government in priority to the waterfall mechanism under section 53, and section 238 has an overriding effect upon other enactments. The AA observed that the overriding effect under section 238 is applicable to the issues between the creditor and the debtor but not to tax deducted at source deductions. When the government comes before the liquidator as creditor, it is bound by sections 53 and 238 of the IBC. In this case, the government is not making any claim as an OC. While directing the purchaser to pay the tax deducted at source amount, it held that deduction of tax at source is not tantamount to payment of government dues in priority to other creditors, since it is not a tax demand for realization of tax dues. It observed that the liquidator is not asked to pay tax deducted at source; it is the duty of the purchaser to credit this to the Income Tax Department.

## 11.4 Liquidation Costs

The liquidation costs are to be excluded while making distributions to the stakeholders. Such costs have the highest priority in the distribution waterfall, along with CIRP costs.

Liquidation costs are the following costs incurred by the liquidator during the period of liquidation (regulation 2(ea) read with section 5(16) of the IBC):

- (a) liquidator's fee;
- (b) remuneration payable by the liquidator to professionals appointed by him;
- (c) costs incurred by the liquidator for verification and determination of a claim;
- (d) costs incurred by the liquidator for preserving and protecting the assets, properties, effects and actionable claims, including secured assets, of the CD;
- (e) costs incurred by the liquidator in carrying on the business of the CD as a going concern;
- (f) interest on interim finance for a period of twelve months, or for the period of the LCD till repayment of interim finance (whichever is lower);
- (g) the amount repayable to contributories (the FCs who contribute towards bearing or paying of liquidation costs);
- (h) any other cost incurred by the liquidator that is essential for completing the liquidation process.

It has been clarified that cost, if any, incurred by the liquidator in relation to the section 230 scheme shall not form part of liquidation costs. Such costs shall

be borne by the CD (where a section 230 scheme is sanctioned by the AA) and by parties proposing the section 230 scheme (if not sanctioned).

Many challenges have been faced by liquidators during the liquidation process due to lack of funds to meet liquidation costs. This leads to delays in the process and value deterioration and also discourages liquidators from running the CD as a going concern.

Hence, amendments have been made by the IBBI to both CIRP Regulations and Liquidation Process Regulations to ensure that the liquidator has sufficient funds to meet liquidation costs.

Regulation 39B was inserted in the CIRP Regulations by way of the CIRP Amendment Regulations.<sup>[159]</sup> As per regulation 39B, while approving a resolution plan or deciding to liquidate the CD, the CoC may make a best estimate of the amount required to meet liquidation costs, in consultation with the RP, in the event that an order for liquidation is passed. The CoC shall make its best estimate of the value of the liquid assets available to meet the liquidation costs, and where the estimated value of the liquid assets is less than the estimated liquidation costs, the CoC shall approve a plan detailing the contributions to be made to provide for the remainder amount of liquidation costs.

Such a plan, when approved by the CoC, is required to be submitted by the RP to the AA while filing the approval or decision of the CoC under section 30 or 33, as the case may be.

Regulation 2A was inserted in the Liquidation Process Regulations by the Liquidation Amendment Regulations to provide that where the CoC did not approve such a plan, the liquidator shall call upon the FCs, being financial institutions, to finance the excess

[159] Inserted by Notification No. IBBI/2019-20/GN/REG048 dated 25<sup>th</sup> July, 2019 (with effect from 25-07-2019) [https://ibbi.gov.in/uploads/legalframework/2019-07-28-190702\\_CIPR208565.pdf](https://ibbi.gov.in/uploads/legalframework/2019-07-28-190702_CIPR208565.pdf)

liquidation costs, as estimated by him, in proportion to the financial debts owed to them by the CD.

By virtue of these amendments, the IBBI has attempted to address the situation where the liquid assets of the CD are not enough to cover the liquidation costs, which could pose a challenge for liquidators dealing with the liquidation process. Either the CoC may propose a plan for contribution, or the FCs (being financial institutions) can be forced to contribute.

### 11.5 Distribution of Unsold Assets

Regulation 38 of the Liquidation Process Regulations states that the liquidator may, with the permission of the AA, distribute among the stakeholders an asset that cannot readily or advantageously be sold due to its peculiar nature or for other special circumstances. When applying to the AA under this regulation, the liquidator should:

- (a) identify the asset;
- (b) provide a value for the asset;
- (c) detail the efforts made to sell the asset, if any; and
- (d) provide reasons for such a distribution.

#### KEY CONSIDERATION

This regulation will apply in practice where an asset is effectively worth more than its cash equivalent at the time of distribution.

For instance, if the CD owned a parcel of land that was in an area not currently being developed, but which is due for development in the next five years, it would be appropriate to distribute the asset (the parcel of land) to the stakeholder(s), who could then take advantage of selling it at a later date once the development of the area took place.

Also, if the company was involved in “seasonal goods” worth less at one time of the year than another, it makes financial sense to pass the asset to the stakeholder, who could then sell it at a time when it would be more valuable.

### 11.6 Realization of Uncalled Capital or Unpaid Capital Contribution

In terms of regulation 40, the liquidator shall realize any amount due from any contributory to the CD. Notwithstanding any charge or encumbrance on the uncalled capital of the CD, the liquidator shall be entitled to call and realize the uncalled capital of the CD and to collect the arrears, if any, due on calls made prior to liquidation, by providing a notice to the contributory to make the payments within 15 days of the receipt of the notice. The liquidator shall hold all the money so realized, subject to the rights, if any, of the holder of any such charge or encumbrance.

The regulation also states that no distribution shall be made to a contributory, unless they make their contribution to the uncalled or unpaid capital as required in the constitutional documents of the CD.

#### KEY CONSIDERATION

A “contributory” is defined in section 2(1) (c) of the Liquidation Process Regulations as a member of a company (a shareholder) or a partner of the limited liability partnership (LLP), and any other person liable to contribute to the assets of the CD in the event of its liquidation.

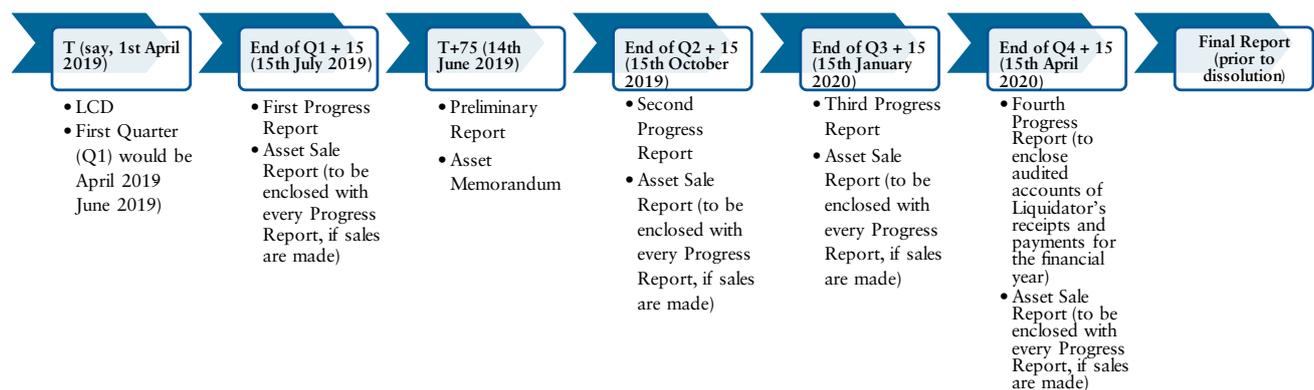
For instance, if a shareholder has only partly paid for the shares held in the CD, such a contributory is liable to contribute the unpaid amount towards the liquidation estate. The unpaid amount would need to be paid within 15 days of the notice issued by the liquidator.

## 11.7 Return of Money

Regulation 43 provides that a stakeholder shall immediately return any monies received by him in distribution, which he was not entitled to at the time of distribution, or subsequently lost entitlement to.

## 12. Reporting and Record-Keeping Duties

Under section 35(n) of the IBC, it is the power and the duty of the liquidator to, *inter alia*, report the progress of the liquidation process in a manner specified by the IBBI.



The provisions of section 35 should be read with regulation 5 of the Liquidation Process Regulations, which sets out the reporting duties of the liquidator. The diagram above and the paragraph below cover the same.

### 12.1 Preliminary Report

As per regulation 13 of the Liquidation Process Regulations, the liquidator must submit a preliminary report to the AA within 75 days of the LCD. The preliminary report should include:

- the capital structure of the CD;

- estimates of assets and liabilities as of the LCD (if the liquidator has reason to believe, that the records of the company are unreliable, these should be recorded in writing, and estimates should be provided based upon reliable records and data otherwise available to him);
- whether there will be further enquiry into the promotion, formation, or failure of the CD or conduct of the business thereof; and
- the proposed plan of action to carry out the liquidation, including the timeline to do so and the estimated costs.

### 12.2 Asset Memorandum

In terms of regulation 34 of the Liquidation Process Regulations, on forming the liquidation estate under section 36 of the IBC and within 75 days of the date of the LCD, the liquidator must prepare an asset memorandum, which should contain the following details about the assets that are intended to be realized by way of sale:

- the values of the assets, valued in accordance with regulation 35;
- the values of the assets or business(es) under clauses (b) to (f) of regulation 32, valued in

- accordance with regulation 35, if intended to be sold under those clauses;
- (c) the intended manner of sale in accordance with regulation 32, along with the reasons for the same;
  - (d) the intended mode of sale in accordance with regulation 33, along with the reasons for the same;
  - (e) the expected amount of realizations from the sale; and
  - (f) any other relevant information regarding the sale of the asset.

Regarding assets that do not fall within the above-mentioned category, the asset memorandum must provide the following details:

- (a) the value of each asset;
- (b) the intended manner and mode of realization and reasons for the same;
- (c) the expected amount of realization; and
- (d) any other information relevant for asset realization.

The liquidator should file the asset memorandum, along with the preliminary report, with the AA. No person should have access to the asset memorandum during the course of liquidation, unless permitted by the AA.

### 12.3 Progress Reports

Under regulation 15, the liquidator shall submit progress reports to the AA as below:

- (a) First progress report—within 15 days after the end of the quarter in which the liquidator is appointed;
- (b) Subsequent progress reports—within 15 days after the end of every quarter in which the liquidator functions as such.

If an IP ceases to act as the liquidator during the liquidation process, he shall file a progress report for the quarter up to the date of cessation, within 15 days of such cessation.

The progress reports should contain all information relevant to the liquidation for the quarter, including:

- (a) the appointment, tenure of appointment, and cessation of appointment of professionals;
- (b) a statement about the progress of the liquidation, including the settlement of a list of stakeholders, details of any property remaining to be sold and realized, any distributions made to stakeholders, and the distribution of unsold property made to the stakeholders;
- (c) the details of fees or remunerations, including the fees due to and received by the liquidator (together with a statement of activities carried out by the liquidator), as well as any fees or remuneration paid to professionals appointed by the liquidator (together with a description of activities carried out by them), and any expenses incurred by the liquidator (whether they have been paid or not);
- (d) developments in any material litigation, by or against the CD;
- (e) any filings and/or developments in applications for avoidance of transactions; and

(f) any changes in the estimated liquidation costs.

The progress report must be accompanied by an account maintained by the liquidator showing:

- (a) the liquidator's receipts and payments during the quarter, and
- (b) the cumulative amount of receipts and payments since the LCD.

The progress report should also contain a statement indicating any material change in expected realizations of any property proposed to be sold, along with the reasons for such changes. It is essential that no one has access to the statement during the course of the liquidation, unless permitted by the AA.

The progress report for the fourth quarter of the financial year should enclose audited accounts for the liquidator's receipts and payments for the financial year.

In a case where an IP ceases to act as a liquidator, the audited accounts of all receipts and payments made during that part of the financial year (where the IP acted as a liquidator) shall be enclosed with the progress report filed after cessation of the appointment.

## 12.4 Asset Sale Report

Under regulation 36, this report must be prepared upon the sale of an asset from the estate and should be enclosed with the progress report. It must include the following information about the asset sold:

- (a) the realized value of an asset;
- (b) the cost of realization, if any;

(c) the manner and mode of sale;

(d) if realized for less than the value mentioned in the asset memorandum, reasons for the same;

(e) the person to whom the sale is made; and

(f) any other details of the sale.

## 12.5 Minutes of Stakeholder Consultation Meetings

The liquidator is also to maintain minutes of any consultation with stakeholders. Under regulation 8(2), the liquidator shall maintain the particulars of any consultation with the stakeholders, as specified in Form A of Schedule II.

## 12.6 Final Report

Under regulation 45, the final report is issued by the liquidator prior to dissolution.

- (a) When the liquidation is complete, the liquidator is required to make an account explaining the process used for conducting the liquidation, and giving details on how the CD's assets have been liquidated.
- (b) If the liquidation costs exceed the estimate given in the preliminary report, the liquidator should explain the reasons for this.
- (c) The liquidator shall submit an application along with the final report and the compliance certificate in Form H to the AA for:
  - closure of the liquidation process of the CD where the CD is sold as a going concern, or

- dissolution of the CD, in cases not covered under the clause above.

The requirement of having Form H was added by way of the Liquidation Amendment Regulations (with effect from July 25, 2019).

## 12.7 Preservation and Disclosure of Reports and Minutes

Regulation 5 also requires preservation of both a physical and electronic copy of all reports and minutes by the liquidator for eight years after the dissolution of the CD.

Further, subject to other provisions of the Liquidation Process Regulations (for example, relating to the confidentiality of the asset memorandum), the liquidator is required to make the above referred reports and minutes available to a stakeholder in either electronic or physical form, on receipt of:

- an application in writing;
- the costs of making such reports and minutes available; and
- an undertaking from the stakeholder that they shall maintain confidentiality of such reports and minutes and shall not use these to cause an undue gain or loss to themselves or any other person.

## 12.8 Registers and Books of Accounts

Regulation 6 of the Liquidation Process Regulations casts a duty on the liquidator to complete and update any books of account of the CD that are incomplete on the LCD, as quickly as possible, as soon as the liquidation order is passed.

Further, the liquidator is required to maintain the registers and books as are specified in regulation 6(2). Such registers and books may be maintained in the forms indicated in Schedule III, with modifications as the liquidator may deem fit according to the facts and circumstances of the liquidation process, and these are to be preserved for a period of eight years after the dissolution of the CD.

The liquidator is also required to keep receipts for all payments made or expenses incurred by him.

## 13. Completion of Liquidation and Dissolution

### 13.1 Timeline

Before the Liquidation Amendment Regulations came into force, the liquidator could take up to two years to liquidate the CD (starting from the LCD). The Liquidation Amendment Regulations amended this timeline in regulation 44 to one year from the LCD. Where a going concern sale is attempted, the liquidation process may take an additional period of up to ninety days. As stated earlier, the amendments apply to liquidations commencing after July 25, 2019.

If the liquidator fails to liquidate the CD within one year, an application can be made to the AA to continue the liquidation, specifying the additional time required, along with a report explaining why it has not been completed yet.

### 13.2 Application to the AA for Dissolution or Closure

As per regulation 45, when a CD is liquidated, the liquidator will make an account of the liquidation,

showing how it has been conducted and how its assets have been liquidated. This is the final report. If the liquidation cost exceeds the estimated cost provided in the preliminary report, then the liquidator must explain the reason(s) why.

Except in a case of a section 230 scheme or the sale of the CD as a going concern, the liquidation process would be completed by way of dissolution of the CD. Under section 54 of the IBC, where the assets of the CD have been completely liquidated, the liquidator shall make an application to the AA for the dissolution of such a CD. As per regulation 45(3), the liquidator is required to make such an application to the AA along with the final report and the compliance certificate in Form H.

On receipt of such application, under section 54(2) of the IBC, the AA shall order the CD to be dissolved from the date of that order, and the CD shall be dissolved accordingly. A copy of the dissolution order must be forwarded to the authority with which the CD is registered within seven days from the passing of the order.

In case of the sale of the CD as a going concern, as per regulation 45(3), the liquidator is required to make an application for closure of the liquidation process to the AA along with the final report and a completed Form H.

### 13.3 Corporate Liquidation Account

Regulation 46, as amended by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2020<sup>[160]</sup>, provides that the IBBI shall operate and maintain an account to be called the Corporate Liquidation Account in the Public Accounts of India. Until the Corporate Liquidation

Account is operated as part of the Public Accounts of India, the IBBI is required to open a separate bank account with a scheduled bank for the purposes of this Regulation.

A liquidator must deposit any unclaimed dividends and undistributed proceeds from the liquidation process, along with any income earned thereon till the date of deposit, into the Corporate Liquidation Account, before he submits an application for dissolution or the closure of the liquidation process of the CD under regulation 45(3). A liquidator who fails to deposit any amount into the Corporate Liquidation Account under this regulation is required to deposit the same along with interest thereon at the rate of twelve percent per annum from the due date of deposit till the date of deposit.

A stakeholder who claims to be entitled to any amount deposited into the Corporate Liquidation Account may apply to the IBBI (using Form J) for an order for withdrawal of the amount. If any person other than a stakeholder claims to be entitled to any amount deposited into the Corporate Liquidation Account, he is required to submit evidence to satisfy the IBBI that he is so entitled. If the IBBI is satisfied that the stakeholder or person is entitled to the withdrawal, the IBBI shall make an order for the same in favor of the stakeholder or person.

Any amount deposited into the Corporate Liquidation Account in pursuance of regulation 46, which remains unclaimed or undistributed for a period of fifteen years from the date of order of dissolution of the CD and any amount of income or interest received or earned in the Corporate Liquidation Account shall be transferred to the Consolidated Fund of India.

[160] <https://ibbi.gov.in/uploads/legalframework/6eda1d32cfc69cf3fbf91feff9116078.pdf>

In terms of proviso to regulation 46(1), the IBBI has opened a separate bank account for deposit of unclaimed dividends and/or undistributed proceeds of liquidation processes, details of which were published in a circular dated January 6, 2020.<sup>[161]</sup> According to this circular, the liquidators have been advised to deposit any unclaimed dividends and/or undistributed proceeds of liquidation processes into the specified account in accordance with regulation 46. They have been further advised to provide the particulars of the amount deposited into the account using Form I of Schedule II to the Regulations, and to send a scanned signed copy of the form electronically to liq.cirp@ibbi.gov.in.

## 14. Timelines under the Liquidation Regulations

The Liquidation Process Regulations were amended by the Liquidation Amendment Regulations<sup>[162]</sup> to reduce the timeline for conducting the liquidation process (as provided under regulation 44 of the Liquidation Process Regulation) from two years to one year. The amended regulation 44 provides that if the liquidator fails to liquidate the CD within a period of one year, an application shall be made to the AA to seek an extension in the timeline, along with a report explaining why it has not been completed and specifying the additional time required for completion of the liquidation process.

In this regard, it has been clarified by the IBBI that the amendments to the Liquidation Process Regulations will not have a retrospective effect; that is, they will apply only to the liquidations commencing after July 25, 2019.<sup>[163]</sup> In effect, for the liquidation proceedings that commenced before July 25, 2019, the two-year

timeline is applicable, while for those liquidation proceedings that started after July 25, 2019, a one-year timeline is applicable.

Regulation 47 of the Liquidation Process Regulations also provide for a model time line for completing the liquidation process, starting from the LCD, assuming that the process does not include compromise or arrangement under section 230 of the Companies Act, 2013, or sale under regulation 32A.

By way of an amendment dated April 20, 2020, the IBBI has amended the Liquidation Process Regulations to insert section 47A, which provides that, subject to the provisions of the IBC, the period of lockdown imposed by the Central Government in the wake of the COVID-19 outbreak shall not be counted for the purposes of computation of the timeline for any task in relation to any liquidation process that could not be completed due to the lockdown.<sup>[164]</sup>

## 15. Voluntary Liquidation of a Corporate Person

The winding-up process by creditors and the voluntary winding up by members of a company have been shifted from the Companies Act, 1956, and the Companies Act, 2013, to the IBC, and these are regarded as “Liquidation Process” and “Voluntary Liquidation Process” under it.

Section 255 of the IBC, notified with effect from November 15, 2016, amended the Companies Act, 2013, in accordance with Schedule XI of the IBC, which now defines the term “winding up.” A new section was added to the Companies Act, 2013, namely section 2(94A), which defines the expression “winding up” as “winding up under this Act or liquidation under the IBC.”

[161] [https://www.ibbi.gov.in/webadmin/pdf/whatsnew/2020/Jan/Liq-circular27\\_2020-01-09%2023:56:57.pdf](https://www.ibbi.gov.in/webadmin/pdf/whatsnew/2020/Jan/Liq-circular27_2020-01-09%2023:56:57.pdf)

[162] [https://ibbi.gov.in/uploads/legalframework/2019-07-29-232506\\_liq-uidation\\_208648.pdf](https://ibbi.gov.in/uploads/legalframework/2019-07-29-232506_liq-uidation_208648.pdf)

[163] <https://ibbi.gov.in/uploads/legalframework/01b8d1e3005e6a99db299685ba318bde.pdf>

[164] <https://ibbi.gov.in/uploads/legalframework/51250311f7791102b612ff9c9810b997.pdf>

It is also relevant that the enactment of the IBC triggered the removal of provisions of “voluntary winding up” and winding up on the grounds of “inability to pay debts” from the Companies Act, 2013. The proceedings relating to these are now under the ambit of the IBC.

Liquidation in cases of default in payment or repayment of any debt is not directly possible. For such entities, the emphasis is on resolution, and if the resolution process does not result in an approved resolution plan, a liquidation order is passed by the AA under section 33 of the IBC.

As opposed to this, in a case of “no default,” or in other words, in case there is no “insolvency,” a corporate person can initiate voluntary liquidation directly under section 59 of the IBC.

The IBC sets out a clear procedure for the voluntary liquidation of a corporate person. Section 59(1) of the IBC states that a corporate person who intends to liquidate voluntarily and has not committed any default, may initiate voluntary liquidation proceedings under the provisions of Chapter V of the IBC.

Section 59(2) states that voluntary liquidation in the case of a corporate person under subsection (1) shall follow the procedural requirements and meet the conditions as may be prescribed by IBBI.

The Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017 (Voluntary Liquidation Regulations),<sup>[165]</sup> details the process to be followed in the voluntary liquidation of corporate persons. There are seven chapters in these regulations, detailing the process from the commencement of liquidation to the distribution of liquidation proceeds.

## 15.1 Initiation of Voluntary Liquidation

Section 59 sets out the process of initiation of voluntary liquidation of a company. This process has been adapted in regulation 3 of the Voluntary Liquidation Regulations for corporate persons other than a company. The process for a company is as follows:

### 15.1.1 Declaration of Solvency

There should be a declaration from a majority of the directors verified by an affidavit stating that:

- (a) they have made a full inquiry into the affairs of the company and formed an opinion that it has no debt, or in case it has, it will be able to pay its debts completely from the value obtained from the assets to be sold in the voluntary liquidation proceedings; and
- (b) the company is not being liquidated to defraud any person.

The said declaration should be accompanied by:

- (a) audited financial statements and record(s) of business operations of the company for the previous two years, or for the period since its incorporation, whichever is most recent;
- (b) a report of valuation of the assets of the company, in case it is prepared by a registered valuer.

### 15.1.2 Shareholder Approval

Once this directors’ declaration is obtained, the members of the company are required to approve the voluntary liquidation. Hence, within four weeks of the declaration there shall be:

[165] <https://ibbi.gov.in/uploads/legalframework/a63c8886dfffb354dfd07833426574463.pdf>

- (a) a special resolution of the members of the company in a general meeting requiring the company to be liquidated voluntarily; or
- (b) a resolution of the members of the company in a general meeting requiring the company to be liquidated voluntarily as a result of expiry of the period of its duration, if any, fixed by its constitutional documents or on the occurrence of any event in respect of which the constitutional documents provide that the company shall be dissolved.

In either case, the resolution should also appoint an IP to act as a liquidator for the company.

### 15.1.3 Approval of the Creditors

If the company owes any debt to any person, creditors representing two-thirds in value of the debts of the company shall approve the resolution passed, as aforesaid, within seven days of such resolution.

### 15.1.4 Intimation to Other Regulatory Authorities

The company shall inform the Registrar of Companies and IBBI about the resolution passed to liquidate the company, within seven days of such a resolution or the subsequent approval by the creditors.

## 15.2 Voluntary Liquidation Commencement Date and Its Effect

Subject to approval of the creditors, the voluntary liquidation proceedings in respect of a company or other corporate person shall be deemed to have commenced from the date of passing of the resolution by the members, partners or contributories.

As per regulation 4 of the Voluntary Liquidation Regulations, the corporate person shall cease to carry on its business from the LCD, except as far as required for the beneficial winding up of its business. However, the corporate person shall continue to exist until it is dissolved under section 59(8) of the IBC.

## 15.3 Appointment of Liquidator

The resolution passed by the members, partners, or contributories shall contain the terms and conditions for appointment of the liquidator, including the remuneration payable to him. Regulation 6 sets out the eligibility requirement, which is similar to the eligibility requirement for appointment of a liquidator under the Liquidation Process Regulations. Primarily, it deals with the requirement of a liquidator to be “independent.”

## 15.4 Application of Sections 35 to 53 of the IBC

Section 59(6) states that sections 35 to 53 of Chapters III and VII shall apply to voluntary liquidation proceedings of corporate persons.

Chapter III deals with the liquidation process of a corporate person in case of failure of the insolvency resolution process to receive a resolution plan and the subsequent order by the AA for liquidation of corporate persons. Chapter VII deals with offences and penalties.

Hence, provisions in the IBC relating to the powers and duties of the liquidator, claim verifications, the conduct of the liquidation process, and offences and penalties that apply to a post-CIRP liquidation also apply to voluntary liquidation.

Further, the power of the liquidator to appoint professionals and disclaim onerous property is also provided in the Voluntary Liquidation Regulations (and is similar to the provisions of the Liquidation Process Regulations).

## 15.5 Public Announcements and Claims

Regulation 14 of the Voluntary Liquidation Regulations deals with public announcements and claims in voluntary liquidation. The liquidator shall make a public announcement in Form A of Schedule I, within five days of his appointment, and invite stakeholders to submit their claims as of the LCD. The announcement shall also provide the last date for the submission of claims, that is, 30 days from the LCD.

Chapter V of the Voluntary Liquidation Regulations details the process of submission of claims by various stakeholders and their verification and admission by the liquidator. This is similar to claim submission, verification, and admission provisions in the Liquidation Process Regulations.

## 15.6 Realization of Assets

Chapter VI of the Voluntary Liquidation Regulations deals with the realization of assets under regulations 31 to 33.

Regulation 31 stipulates the manner of sale of the assets of the corporate person under liquidation. It states that the liquidator may value the property of the corporate person and sell it in any manner and through any mode approved by the corporate person. In adherence to the objectives of the IBC, the liquidator should endeavor to recover and realize all assets of, and dues to, the corporate person in a time-bound manner for maximization of value for all the stakeholders.

Chapter VII deals with the proceeds of voluntary liquidation and distribution of proceeds under regulations 34, 35, and 36.

For the receipt of all moneys due to the corporate person, including checks and demand drafts received, the IBC mandates that the liquidator should open a bank account in a scheduled bank in the name of the corporate person.

The liquidator shall then distribute the proceeds to the stakeholders within six months of the receipt of such amount. The liquidation costs shall be deducted before any such distribution is made.

## 15.7 Registers and Books of Accounts

Regulation 10 of the Voluntary Liquidation Regulations details the registers and books of accounts of the corporate person that should be completed and maintained by the liquidator.

## 15.8 Completion and Dissolution

### 15.8.1 Timeline

Regulation 37 of the Voluntary Liquidation Regulations provides that the liquidator shall aim to wind up the affairs of the corporate person within one year from the LCD. If the liquidation proceedings continue for more than a year, he shall proceed as follows:

- (a) The liquidator shall hold a meeting of contributories of the corporate person within 15 days from the end of one year from the LCD and also at the end of each succeeding year till its dissolution.

- (b) The liquidator shall present an annual status report(s) indicating the progress of the liquidation. This should include the settlement list of stakeholders, details of any property that remains to be sold and realized, the distributions made to the stakeholders, development in any material litigation, and so on.
- (c) The annual status report shall be enclosed with an audited account of the voluntary liquidation and must show the receipts and payments relating to liquidation from the LCD.

### 15.8.2 Final Report

Regulation 38 of the Voluntary Liquidation Regulations deals with the preparation and submission of a final report prior to dissolution.

On completion of the liquidation process, the liquidator shall prepare a final report consisting of an audited account of the liquidation showing the receipts and payments relating to the liquidation from the LCD. It should also include a statement demonstrating that the assets of the corporate person have been disposed of, the debts of the corporate person have been discharged to satisfy the creditors, and that no litigation is pending against the corporate person.

### 15.8.3 Sale Statement

Along with this, the liquidator shall also give a final report regarding a sale statement in respect of all the assets containing the realized value, cost of realization, if any, the manner and mode of sale, the person to whom the sale is made and any other details of the sale.

The sale statement shall also include a report if the value realized is less than that assigned by the Registered Valuer in the report of valuation of assets prepared in accordance with section 59(3)(b)(ii) of the IBC or regulation 3(1)(b)(ii) of the Voluntary Liquidation Regulations.

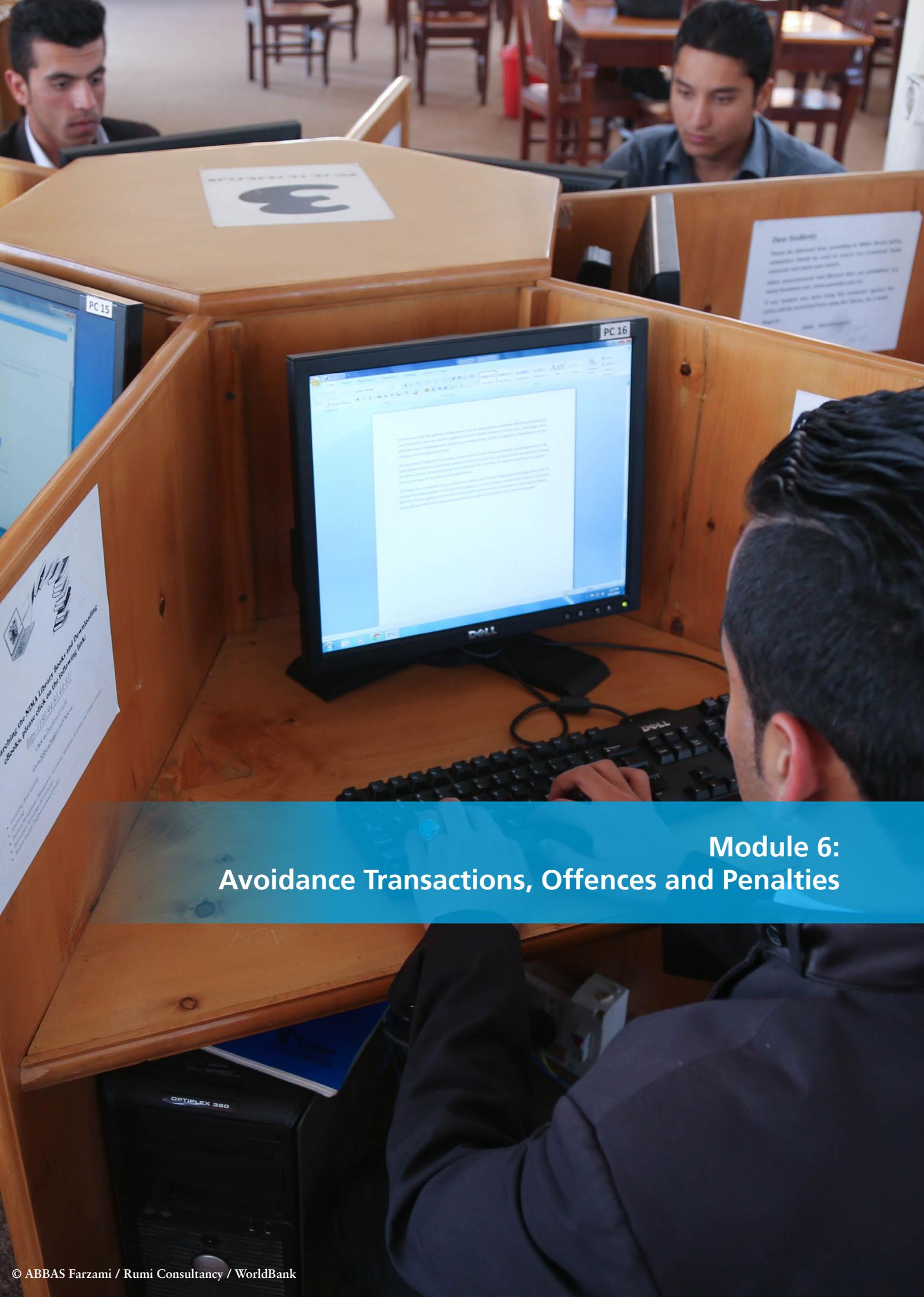
The liquidator shall send the final report to the Registrar of Companies and the IBBI. The liquidator shall also submit the final report to the AA along with the application under section 59(7).

### 15.8.4 Application to the AA

Section 59(7) explains that where the affairs of the company have been completely wound up and its assets are completely liquidated, then the liquidator shall make an application to the AA for the dissolution of such a corporate person.

Section 59(8) states that the AA, on an application filed by the liquidator under section 59(7), shall pass an order that the CD shall be dissolved from the date of the issuance of the order in accordance with the directions given in such order.

A copy of the order issued by the AA under section 59(7), within 14 days from the date of such order, shall be forwarded to the authority with which the corporate person is registered.



## Module 6: Avoidance Transactions, Offences and Penalties

## 1. Introduction

The IBC recognizes the pre-insolvency rights of the stakeholders as well as transactions concluded by the CD prior to the ICD. However, in certain circumstances, these pre-insolvency transactions can be tested, questioned, and also “avoided.” There are certain types of avoidance transactions that can be investigated by the RP and the liquidator, and an application can be made to the AA by the RP, the liquidator, and by the creditors, members, or partners of the CD (where the RP or liquidator has not reported it to the AA) for the reversal of (the effects of) such transactions. This is based on the doctrine of restitution, specifically the avoidance of unjust enrichment. It involves the interplay between two fundamental principles of insolvency law: (1) the *pari passu* principle of distribution, which establishes that unsecured creditors are entitled to equal treatment in a CIRP, and (2) what falls within the purview of the property of the estate of the CD.

Further, recognizing the duty of the directors and officers of the CD towards its creditors and other stakeholders, where the CD has indulged in improper (fraudulent or wrongful) trading, contributions can be sought from the CD’s directors and officers to compensate for the losses caused to the creditors through such actions.

In addition, to ensure smooth functioning of the insolvency and liquidation process, the IBC classifies certain actions undertaken by creditors, directors, and officers of the CD as “offences,” with corresponding penalties.

This module discusses the avoidance transactions (also called vulnerable, irregular or avoidable transactions) that can be questioned during the CIRP and liquidation process; the duties of the directors qua the creditors of the CD; and the transactions that are “offences” under the IBC.

## 2. Avoidance Transactions

The UNCITRAL Legislative Guide on Insolvency Law defined avoidance provisions as “*provisions of the insolvency law that permit transactions for the transfer of assets or the undertaking of obligations prior to insolvency proceedings to be cancelled or otherwise rendered ineffective and any assets transferred, or their value, to be recovered in the collective interest of creditors.*”<sup>[166]</sup>

Avoidance provisions are one of the key tools in insolvency law to maximize the assets of the CD and to prevent opportunistic and value-destroying actions indulged by the CD or even certain creditors prior to the ICD. It is aimed at preservation of the CD’s asset pool for the collective benefit of all the stakeholders. While the conditions of avoidance may vary depending on the type of action undertaken, in general, the transactions that can be avoided are ones where, prior to the initiation of the CIRP, there has been an asset dilution by the CD, or an unfair advantage or unjust enrichment given to any creditor(s).

The principle behind avoiding these transactions is to protect the general body of creditors (as a whole), to prevent unfair advantage being given to certain creditors at the expense of others, and also to maximize the general pool of assets available to the creditors in the insolvency resolution and liquidation process.

These transactions may be “avoided” by the AA on an application made by the RP or the liquidator. Note that under section 36(3)(f) of the IBC, any assets or their value recovered through proceedings for avoidance of transactions forms part of the liquidation estate of the CD. Section 36(4) clarifies that the personal assets of any shareholder or partner of a CD are excluded from the liquidation estate, provided such assets are not

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[166] [https://www.uncitral.org/pdf/english/texts/insolven/05-80722\\_Ebook.pdf](https://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf)

held on account of avoidance transactions that may be avoided under the IBC. Hence, avoidance transactions act as an important tool to maximize the liquidation estate of the CD.

Under section 25(2)(j) of the IBC,<sup>[167]</sup> it is a duty of the RP to file an application for avoidance of transactions in accordance with Chapter III, if any. Similarly, under section 35(1)(l) of the IBC, it is a power and duty of the liquidator to investigate the financial affairs of the CD to determine undervalued or preferential transactions. Apart from this, the specific provisions of the IBC dealing with avoidance transactions (in sections 43, 45, 50, and 66) require the RP or the liquidator, as the case may be, to file an appropriate application before the AA in respect of such transactions.

The following types of avoidance transaction are recognized by the IBC. These are collectively referred to as the PUFÉ transactions in the scheme of the IBC.

- Preferential transactions
- Undervalued transactions
- Fraudulent transactions
- Extortionate transactions

## 2.1 Preferential Transactions

Sections 43 and 44 of the IBC deal with preferential transactions.

Section 43 of the IBC states that where the liquidator or the RP is of the opinion that the CD has, at the “relevant time” given “preference” in any transaction to any person, then he shall apply to the AA for one or more orders set out in section 44 of the IBC.

### 2.1.1 What Is a “Preference”?

As per section 43(2), a CD shall be deemed to have given a preference if the following two conditions are satisfied:

- There is a transfer of property (or an interest thereof) of the CD for the benefit of a creditor, surety, or guarantor, for or on account of an antecedent financial debt or operational debt or other liabilities owed by the CD.
- This transfer has the effect of putting such creditor, surety, or guarantor in a more beneficial position than they would have been in the event of a distribution of assets being made in accordance with section 53 of the IBC.

Hence, any transfer for the benefit of a creditor, surety or guarantor, which is done for and on account of an antecedent liability owed by the CD, which improves the position of such creditor, surety or a guarantor in the liquidation waterfall set out in the section 53 of the IBC would be a preference.

To give an example, financial debts owed to unsecured creditors rank under paragraph (d) of the section 53(1) waterfall mechanism. If a security is given by the CD to its unsecured creditor for securing a financial debt that was taken from the unsecured creditor in the past (that is, for or on account of antecedent financial debt), such unsecured creditor would become secured and then fall under paragraph (b)(ii) of the section 53(1) waterfall mechanism. Since the transaction (that is, grant of security) would place the creditor in a better position in case of distribution under section 53, such a transaction would amount to a preference being given by the CD to the creditor.

[167] <https://ibbi.gov.in/uploads/legalframework/bb54a1ddf9a7cd75ab-18b566a83c6370.pdf>

### 2.1.2 What Is “Relevant Time”/the Look-Back Period?

For a preference to be avoided, it should have been given at the relevant time. As per section 43(4) of the IBC, a preference shall be deemed to be given at a relevant time if:

- it is given to a related party (other than by reason only of being an employee), during the period of two years preceding the ICD;
- a preference is given to a person other than a related party during the period of one year preceding the ICD.

The “relevant time” is the “look-back period.” Only preference given during such period can be avoided.

The rationale for avoiding preference transaction is to prevent a creditor, surety, or guarantor from taking an unfair advantage over other creditors during the twilight period preceding the ICD. The twilight period is the period when the CD is already facing financial stress, or is already insolvent or is about to become insolvent. It is critical that during this period, the priority of creditors is preserved and there is no race to collect debts by the creditors. The IBC sets objective criteria for determining this twilight period in case of preference transactions. The period is one year preceding the ICD. However, since related parties are insiders who are usually more aware of the CD’s financial state and condition, where preference is given to such a related party, the period has been extended to two years preceding the ICD.

#### *Tirumala Balaji Alloys Private Limited Vs. Sumit Binani [CA(AT)(Ins) No. 600/2018 & CA(AT)(Ins) No. 601/2018]*

The AA directed the appellants to restore the entire transferred amount along with 12 percent interest till date of realization on an application of the RP in respect of preferential transactions. While rejecting an appeal against the said direction, the NCLAT held: “...as it is not in dispute that the promoters of the ‘Corporate Debtor’ hold 99.4% shareholding in ‘Excello Fin Lea Limited’ and 50% shareholding in ‘Tirumala Balaji Alloys Pvt. Ltd.’ and rest of the 50% shareholding of the ‘Tirumala Balaji Alloys Pvt. Ltd.’ is with the relatives of the promoters of the ‘Corporate Debtor’ i.e. ‘Rungta Family’, we are of the view that all the transactions made during the period of two years preceding date of Insolvency Commencement Date i.e., 18<sup>th</sup> July, 2017 come within the meaning of ‘preferential transactions’.”

### 2.1.3 Exceptions

There are two exceptions to “preference” recognized in the IBC. Under section 43(3) of the IBC, a preference does not include the following:

- a transfer made in the ordinary course of the business or financial affairs of the CD;
- any transfer creating a security interest in property acquired by the CD to the extent that:
  - such security interest secures new value and was given at the time of or after the signing of a security agreement that contains a description of such property as security interest, and was used by the CD to acquire such property; and

- such transfer was registered with an IU on or before 30 days after the CD receives possession of such property.

“New value” means money, or its worth in goods, services, or new credit, or a release by the transferee of property that was previously transferred to such transferee in a transaction that is neither void nor voidable by the liquidator or the RP under the IBC, including proceeds of such property, but does not include a financial debt or operational debt substituted for existing financial debt or operational debt.

Notably, any transfer made in pursuance of a court order will not preclude such transfer to be deemed as giving of preference by the CD.

The rationale for having an exception for transactions in ordinary course is so that routine and regular payments and routine and ordinary transactions during the relevant period, which are undertaken by the CD in regular course to keep the company running, are not affected. For instance, regular rent payments to landlords or routine payments to trade creditors are instances of transactions undertaken in the ordinary course of business.

***Mrs. Dipti Mehta, Resolution Professional, Prag Distillery Private Limited Vs. Shivani Amit Dahanukar & Others [MA 267 of 2018 In CP (I&B) 1067/NCLT/MB/2017]***

An application was filed by the RP under sections 43, 49, 60(5), and 66 of the IBC, and was being pursued by the liquidator of the CD. The application was filed against five directors of the CD and its holding company. The holding company was the creditor of the CD and was also a corporate guarantor to a loan advanced by a bank to the CD.

The RP contended, *inter alia*, that the change in business model of the CD from manufacturer of Indian-made foreign liquor to bottling work appeared to be preferential in nature as it resulted in the transfer of a certain surplus amount to the holding company. As per the RP, this transaction caused prejudice to the interest of other creditors, as it affected the ability of the CD to service its debt, and resulted in transfer of revenues to only one creditor, excluding all other creditors. The AA held that the change in business model, and the subsequent act of the CD of raising invoices in its own name, booking and receiving sales revenue from the sale of brands owned by its holding company, and transfer of surplus under the bottling arrangement, were in the ordinary course of business and financial affairs of the CD, and hence not covered as a preference transaction under section 43 of the IBC. The AA also held that as the change in business model was beyond the look-back period, it could not be challenged under section 43 of the IBC.

#### 2.1.4 Orders That Can Be Passed for Preferential Transactions

Section 44 of the IBC sets the kinds of orders that the AA can pass in case an application for preferential transactions is made. The order may be made, *inter alia*, for vesting of the property transferred in connection with the preference; vesting of property (if it represents the application of the proceeds of sale

of property) so transferred, or of money so transferred; discharge of any security created in preference; payment of sums in respect of benefits received by the transferee from the CD; directing any guarantor whose debts were released or discharged by the preference to be under such new or revived debts to that person as the AA deems appropriate; etc.

To protect persons who have received any benefit from preference in good faith and for value, it has been clarified that an order under section 44 shall not:

- (a) affect any interest in property acquired from a person other than the CD, or any interest derived from such interest, acquired in good faith and for value;
- (b) require a person who received a benefit from the preferential transaction in good faith and for value to pay a sum to the liquidator or the RP.

The explanations to section 44 further clarify that unless the contrary is shown, it shall be presumed that the interest was acquired or the benefit was received *otherwise* than in good faith if such person:

- (a) had sufficient information of the initiation or commencement of the CIRP of the CD (and a person shall be deemed to have sufficient information or opportunity to avail such information if a public announcement regarding the CIRP has been made under section 13 of the IBC);
- (b) is a related party.

***Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited Vs. Axis Bank Limited etc. [Civil Appeal No. 8512-8527 of 2019 before the Supreme Court]***

In this matter, Jaypee Infratech Limited (JIL) had mortgaged some land owned by it in favor of the lenders of its holding company, Jaiprakash Associates Limited (JAL). The IRP filed an application for reversal of the mortgages, claiming that the said transaction is a preference, undervalued, and fraudulent transaction. The AA allowed the application, directing the lenders of JAL to transfer the land back to JIL. The order of the AA was set aside by the NCLAT. The RP of JIL filed an appeal before the Supreme Court. The Supreme Court allowed the appeal, holding that the mortgage transaction was a preferential transaction. The Supreme Court held as follows:

- (a) *Orders under section 44:* Under section 44, the AA may pass orders to reverse the effect of an offending preferential transaction. Amongst others, the AA may require any property transferred in connection with giving of preference to be vested in the CD; it may also release or discharge (wholly or in part) any security interest created by the CD. The consequences of offending preferential transactions are, obviously, drastic and practically operate towards annulling the effect of such transactions.
- (b) *Look-back period:* If twin conditions specified in subsection (2) of section 43 are satisfied, the transaction would be deemed to be of preference. However, merely giving of the preference and putting the beneficiary in a better position is not enough. For a preference to become an offending one for the purpose of section 43 of the IBC, another essential and prime requirement is that the event of giving preference happened within and during the specified time, referred to as the “relevant time.” In respect of the argument that section 43 would come into operation at least one year after the enactment of the IBC, else it would be giving retrospective effect to these provisions, the Supreme Court held that after the coming into force of the provisions, if a look-back period is provided for the purpose of any particular enquiry, it cannot be said that the operation of the provision itself would remain in hibernation until such look-back period from the date of commencement of the provision comes to an end.

- (c) *Deeming provision:* Any transaction that answers to the descriptions contained in subsections (4) and (2) of section 43 is presumed to be a preferential transaction at a relevant time, even though it may not be so in reality. In other words, since subsections (4) and (2) are deeming provisions, upon existence of the ingredients stated therein, the legal fiction would come into play, and such transaction entered into by a CD would be regarded as a preferential transaction with the attendant consequences as per section 44 of the IBC, irrespective of whether the transaction was intended or even anticipated to be so.
- (d) *Exclusions:* Even when the indicting parts of section 43 in subsections (4) and (2) are satisfied and the CD is deemed to have given preference at a relevant time, such deemed preference may yet not be an offending preference, if it falls into any or both of the exclusions provided by subsection (3), that is, having been entered into during the ordinary course of business of the CD or transferee, or resulting in acquisition of new value for the CD. In respect of the ordinary course exception, the Supreme Court held that what is to be examined is the conduct and affairs of the CD. The contents of clause (a) of subsection 43 call for purposive interpretation to ensure that the provision operates in sync with the intention of legislature and achieves the avowed objectives. Therefore, the expression “or” appearing as disjunctive between the expressions “corporate debtor” and “transferee”, ought to be read as “and”, so as to be conjunctive of the two expressions “corporate debtor” and “transferee.” Thus read, clause (a) of subsection (3) of section 43 shall mean that, for the purposes of subsection (2), a preference shall not include the “*transfer made in the ordinary course of the business or financial affairs of the corporate debtor and the transferee.*”
- (e) *Questions to be examined:* In order to find as to whether a transaction of transfer of property or an interest thereof of the corporate debtor, falls squarely within the ambit of section 43 of the IBC, ordinarily, the following questions shall be examined in a given case:
- i. as to whether such transfer is for the benefit of a creditor or a surety or a guarantor?
  - ii. as to whether such transfer is for or on account of an antecedent financial debt or operational debt or other liabilities owed by the CD?
  - iii. as to whether such transfer has the effect of putting such creditor or surety or guarantor in a beneficial position than it would have been in the event of distribution of assets being made in accordance with Section 53?
  - iv. if such transfer had been for the benefit of a related party (other than an employee), as to whether the same was made during the period of two years preceding the ICD; and if such transfer had been for the benefit of an unrelated party, as to whether the same was made during the period of one year preceding the ICD?

- v. as to whether such transfer is not an excluded transaction in terms of sub-section (3) of Section 43?
- (f) *Duties and responsibilities of RP*: The RP shall
- i. sift through all transactions relating to the property or interest of the CD backwards from the ICD and up to the preceding two years;
  - ii. identify persons involved in the transactions and put them in two categories: (1) **any** related party under section 5(24), and (2) remaining persons;
  - iii. identify in which of the said transactions in the preceding two years, the beneficiary is a related party of the CD and in which the beneficiary is not a related party. The sub-set relating to unrelated parties shall be trimmed to include only the transactions preceding one year from the ICD;
  - iv. examine every transaction in each of these sub-sets to find out whether (1) the transaction is of transfer of property of the CD or its interest in it; and (2) the beneficiary involved in the transaction stands in the capacity of creditor, surety or guarantor;
  - v. scrutinize the shortlisted transactions to find if the transfer is for or on account of antecedent financial debt, operational debt, or other liability of the CD;
  - vi. examine the scanned and scrutinized transactions to find if the transfer has the effect of putting such creditor, surety, or guarantor in a more beneficial position than it would have been in the event of distribution of assets under section 53. If yes, the transaction shall be deemed preferential, provided it does not fall within the exclusion under section 43(3); and then
  - vii. apply to the AA for necessary orders, after carrying out the aforesaid volumetric and gravimetric analysis of the transactions.

Applying the principles to the facts of the case, the Supreme Court held that:

- (a) *Section 43(2)(a)*: The transactions in question, putting the concerned properties under mortgage with the lenders (JAL's lenders), carry the ultimate effect of working towards the benefit and advantage of the borrower JAL, who obtained loans and finances by virtue of such transactions. It is true that there had not been any creditor-debtor relationship between the lender banks and the CD, but that does not decide the question of the ultimate beneficiary of these transactions. The mortgage deeds in question, entered by the CD (JIL) to secure the debts of JAL, obviously, amount to creation of security interest for the benefit of JAL. Based on the facts of the case, the Supreme Court noted that JAL is a related party and a creditor and surety of JIL, and that the CD JIL owed antecedent financial debts, operational debts, and other liabilities to JAL. In the scenario, the Supreme Court held that there is nothing to doubt that the CD JIL has given preference, by way of the mortgage transactions in question, for the benefit of its related person JAL for and on account of antecedent financial debts, operational debts, and other liabilities owed to JAL. In the given situation, it is plain and clear that the transactions in question meet with all the requirements of clause (a) of subsection (2) of section 43.
- (b) *Section 43(2)(b)*: The requirements of clause (b) of subsection (2) of section 43 are also met fair and square. With the transactions in question, JAL has been put in an advantageous position with regard

to other creditors, on the counts that JAL received a huge amount of working capital from the lenders; and by way of the transactions in question, JAL's liability towards its own creditors would be reduced, to the extent that the value of the mortgaged properties is concerned. As a necessary corollary of the beneficial and advantageous position of the related party (JAL) with the creation of such security interest over the properties of JIL, in the eventuality of distribution of assets under section 53, the other creditors and stakeholders of JIL would have to bear the brunt of the corresponding disadvantage because such heavily encumbered assets would not form the part of available estate of the CD. Thus, JAL benefited and derived such benefits at the cost, and in exclusion, of the other creditors and stakeholders of the CD JIL.

- (c) *Relevant time*: As noted, the preference is given to JAL, a related party of JIL. Hence, the look-back period is two years preceding ICD. The Supreme Court noticed that the mortgage transactions fell within this period. In respect of the submissions that these were not fresh mortgages but re-mortgages, the Supreme Court held that on release by the mortgagee, the mortgage ceases to exist and it is difficult to countenance the concept of a so-called re-mortgage. The so-called re-mortgage, on all its legal effects and connotations, could only be regarded as a fresh mortgage; and it obviously falls on the mortgagor to consider at the time of creating any fresh mortgage whether such a transaction is expedient and whether it should be entered into at all.
- (d) *Ordinary course exception*: The Supreme Court observed that though it may be assumed that the transactions in question were entered in the ordinary course of business of the bankers and financial institutions but on the given set of facts, there was not an iota of doubt that the impugned transactions do not fall within the ordinary course of business of the CD. Ordinary course of business or financial affairs of the CD cannot be taken to be that of providing mortgages to secure the loans and facilities obtained by its holding company; and that too at the cost of its own financial health.

***ICICI Bank Ltd. Vs. Mr. Shailendra Ajmera & Another [Company Appeal (AT) (Ins) No. 370 of 2019]***

In this case, the RP filed an application under section 43(1) of the IBC seeking reversal of the amounts debited before the ICD from the account of the CD maintained with the appellant bank, which were alleged to have been utilized towards the payment of dues of the bank in respect of a letter of credit. The AA allowed the application, holding that the amount debited by the appellant bank for the payment of its dues was a preference transaction in view of section 43(1) of the IBC. The AA's order was challenged by the appellant bank before the NCLAT.

The NCLAT allowed the appeal and set aside the impugned order on the ground that all the transactions in question were made in the ordinary course of business of the bank, as per the request of the CD. The NCLAT further held that as all the transactions in question had taken place either on or after the ICD, they could not be challenged as preferential transactions in view of section 43(4) of the IBC.

## 2.2 Undervalued Transactions

Sections 45 to 48 of the IBC deal with undervalued transactions. As per section 45, if the liquidator or the RP determines that certain transactions made during the “relevant time” were “undervalued,” then he shall make an application to the AA to declare such transaction as void and reverse the effects of the transactions.

### 2.2.1 What Is an “Undervalued” Transaction?

Section 45(2) of the IBC states that a transaction can be considered as an undervalued transaction if the CD:

- (a) has given a gift to a person; or
- (b) has entered into a transaction with a person that involves the transfer of one or more assets by the CD for a consideration the value of which is significantly less than the value of consideration provided by the CD;

and such transaction has not taken place in the ordinary course of business of the CD.

Hence, any transaction undertaken by a CD for transferring any asset, at no or significantly less value, is an undervalued transaction. As per section 46(2), the AA may require an independent expert to assess evidence relating to the value of the transactions.

### 2.2.2 What Is “Relevant Time”?

For an application to be made to the AA, the undervalued transaction should have taken place at the relevant time. The relevant time is defined in section 46(1) of the IBC and is the same look-back period as that of a preference transaction (that is, two years from

the ICD in case of transaction with a related party and one year from the ICD in other cases).

The avoidance of undervalued transactions is aimed at preventing improper reductions or diminutions of the net asset value of the CD during the twilight period when the creditors of the CD have the primary interest in the proper application of the CD’s assets. It also prevents improper disposition or siphoning off of the CD’s assets during the twilight period. It is critical that during this period, the net asset value of the CD is protected for the general benefit of the creditors. This twilight period is the same for preference and undervalued transactions.

### 2.2.3 Exceptions

The only exception recognized is a transaction which has taken place in the ordinary course of business of the CD.

### 2.2.4 Application by the Creditor

Apart from the liquidator or the RP, section 47 of the IBC empowers a creditor, member, or partner of a CD to report the undervalued transaction to the AA in case the liquidator or the RP has failed to report it.

Importantly, if the AA, after examination of the application made by the creditor, member or a partner of the CD, is satisfied that undervalued transactions had occurred; and the liquidator or the RP, as the case may be, after having sufficient information or opportunity to avail information of such transactions did not report such transaction to the AA, then other than an order for avoidance of the transaction, the AA can also require IBBI to initiate disciplinary proceedings against the liquidator or the RP as the case may be.

### 2.2.5 Order in Cases of Undervalued Transactions

The AA may declare an undervalued transaction as void and reverse the effect of such transaction. Under section 48 of the IBC, such an order can provide for the following:

- (a) vesting of the property transferred as part of the transaction in the CD;
- (b) release or discharge (in whole or in part) of any security interest granted by the CD;
- (c) payment of such sums by a person, in respect of benefits received by such person, to the liquidator or the RP (as the case may be), as the AA may direct;
- (d) payment of such consideration for the transaction as may be determined by an independent expert.

***Mrs. Dipti Mehta, Resolution Professional, Prag Distillery Private Limited Vs. Shivani Amit Dabanukar & Others [MA 267 of 2018 In CP (I&B) 1067/NCLT/MB/2017]***

In the case of Prag Distillery (discussed earlier), the RP/liquidator contended that the CD had indulged in an undervalued transaction to the benefit of the holding company. It was contended that after the change in business model, the CD had started acting as a bottling job-worker for its holding company, and was charging them a lower amount compared to another job-worker (which was charging a much higher amount). The respondents contended that the liquidator had not made any pleading concerning the relief sought and had not identified the transferee or counterparty of the alleged undervalued transaction. It was

further contended that the liquidator had not compared the market value with the actual valuation of the alleged transaction and that no opportunity was provided to the respondents to respond to the allegations in this regard. The AA held that the impugned transaction took place in the ordinary course of business of the CD and was, therefore, exempted from being an undervalued transaction.

### 2.3 Transactions Defrauding Creditors

Section 49 of the IBC deals with the provisions related to an undervalued transaction undertaken by the CD under section 45 of the IBC for the purpose of defrauding any creditor. Note that this is different from section 66 of the IBC, which provides for fraudulent and wrongful trading.

This section provides that, where the CD has deliberately entered the undervalued transaction to keep the assets of the CD beyond the reach of any person who is entitled to make a claim against the CD, or in order to adversely affect the interests of such a person in relation to the claim, then the AA may pass the following orders:

- (a) restoring the position as it existed before such transaction, as if the transaction had not been entered into;
- (b) protecting the interests of persons who are victims of such transactions.

The order passed by the AA under this section cannot affect any interest in the property acquired from a person other than the CD that was acquired in good faith, for value, and without notice of the relevant circumstances. Further, such an order cannot require a

person who received a benefit from the transaction in good faith, for value, and without notice of the relevant

circumstances, to pay any sum, unless the person was a party to the transaction.

***Mrs. Dipti Mehta, Resolution Professional, Prag Distillery Private Limited Vs. Shivani Amit Dahanukar & Others [MA 267 of 2018 In CP (I&B) 1067/NCLT/MB/2017]***

In the case of Prag Distillery (discussed earlier), the RP/liquidator alleged that a sub-lease agreement entered into between the CD and another entity, to sub-lease the CD's production facility and licensed capacity, was an exercise to defraud the creditors as it impacted the profitability of the CD, prejudiced the interests of the creditors, and was not approved by the creditors. Rejecting these contentions, the AA held that, *"In such circumstances, where the company is facing a financial crunch, the management of the company, in their commercial wisdom, would make all possible efforts to generate funds from whatever resources the company possess. The Corporate Debtor had a license to operate its unit at an enhanced capacity but lacked the required funds to operate and utilize its resource optimally. In such a scenario, if the management of the company decides to sub-lease its extra and idle resource, which the company is neither utilizing or can utilize in future due to the paucity of funds, it cannot be said as a transaction to defraud the creditors. It is a transaction in the ordinary course of business of the Corporate Debtor and cannot be held as undervalued, preferential or a transaction defrauding creditors."*

## 2.4 Extortionate Credit Transactions

Section 50 and section 51 of the IBC deal with extortionate credit transactions. As per section 50 of the IBC, the liquidator or the RP may make an application to the AA for avoidance of an extortionate credit transaction.

### 2.4.1 What Is an "Extortionate Credit Transaction"?

An extortionate credit transaction involves receipt of financial or operational debt by the CD, where the terms of such transaction required exorbitant payments to be made by the CD. Section 50 provides that the IBBI may specify the circumstances in which a transaction which shall be covered under the section. This has been done so under regulation 5 of the CIRP

Regulations which states that a transaction shall be considered extortionate under section 50(2) of the IBC where the terms:

- (a) require the CD to make exorbitant payments in respect of the credit provided; or
- (b) are unconscionable under the principles of law relating to contracts.

Hence, extortionate credit transactions are not just limited to interest rates, but also include other exorbitant payments and unconscionable terms in respect of a financial or operational debt. However, any debt extended by any person providing financial services under any law in force at the time shall not be regarded as extortionate credit transactions.

### 2.4.2 Look-Back Period

For an application to be made to the AA, the extortionate credit transaction should have taken place within the two years preceding the ICD.

The avoidance of extortionate credit transaction is aimed at preventing operational and financial creditors from taking an unfair advantage of the CD's financial position during the "twilight period" by imposing unconscionable terms for grant of such debt. It also prevents diminution of value of the CD during this period. No separate period for a related party has been prescribed.

### 2.4.3 Exceptions

An Explanation to section 50 clarifies that any debt extended by any person providing financial services which is in compliance with any law for the time being in force in relation to such debt shall not be considered as an extortionate credit transaction.

### 2.4.4 Order in Cases of Extortionate Credit Transactions

Under section 51 of the IBC, the AA may pass the following orders in cases of extortionate credit transaction:

- (a) Restore the position as it existed prior to such transaction.
- (b) Set aside the whole or part of the debt created on account of the extortionate credit transaction.
- (c) Modify the terms of the transaction.
- (d) Require any person who is, or was, a party to the transaction to repay any amount received by such person.
- (e) Require any security interest that was created as part of the extortionate credit transaction to be relinquished in favor of the liquidator or the RP.

#### *Anamika Singh and Others. Vs. Shinhan Bank and Others [Company Appeal (AT) (Insolvency) No. 912-913 of 2019]*

An appeal was filed against the AA's order holding, *inter alia*, that the loans advanced by the appellants to the CD were extortionate credit transactions under section 50 of the IBC. The NCLAT noted that the rate of interest charged by the appellants was between 40 and 60 percent per annum, and there was no evidence to show that the CD required the loans or that the loans were approved by the board of directors of the CD. It further observed that in the normal course of business, a company takes loans from banks at certain rates of interest, but in the present case, the CD had accepted loans from individuals at exorbitant rates of interest and there appeared to be collusion. It was contended by the appellants that the transactions in question were prior to the two years period preceding the ICD and therefore outside the ambit of section 50 of the IBC. The NCLAT rejected this contention, holding that appellants No. 2, 3, 4, 6, 7, and 9 had advanced loans to the CD at exorbitant rates of interest on dates within the period of two years preceding the ICD. The transactions with the appellants No. 1, 5, and 8 occurred prior to two years preceding the ICD. However, taking into consideration the exorbitant rates of interest charged by the appellants, the said transactions were held to be unconscionable.

### 3. Fraudulent or Wrongful Trading

In addition to the above transactions, the IBC also provides for contributions to be made in case of fraudulent or wrongful trading by the CD. The provision relating to fraudulent or wrongful trading is divided into two parts. Section 66(1) of the IBC deals with fraudulent trading and section 66(2) of the IBC deals with wrongful trading.

#### 3.1 Fraudulent Trading

If during a CIRP or a Liquidation process, it is found that any business of the CD has been carried on with the intent to defraud creditors of the CD, or for any fraudulent purpose, the AA may, on the application of the RP, pass an order that people, who were knowingly party to business being conducted in such a manner, shall be liable to make such contributions to the assets of the CD as it may deem fit.

The intention to defraud is critical under section 66(1) of the IBC. The only avoidance provision that provides for an element of fraud is section 49, which deals with undervalued transactions deliberately undertaken by the CD with an intent to keep the CD's beyond the reach of any person entitled to make a claim against the CD or in order to adversely affect the interests of such a person in relation to the claim.

There is no look-back period provided in section 66(1) of the IBC.

The contributions for fraudulent trading can be sought from any person who is knowingly party to the fraud. Hence, such contributions can also be sought from directors of the CD (as they would typically be aware of such fraudulent trading).

#### 3.2 Wrongful Trading

For the first time in the context of insolvency of a company, wrongful trading provisions are inserted to make directors or partners of the CD (as relevant) personally liable to make contributions to the assets of the CD.

The liability arises if before the ICD, the director or partner knew or ought to have known that there was no reasonable prospect of avoiding the commencement of a CIRP in respect of the CD, and such director or partner did not exercise due diligence in minimizing the potential loss to the creditors of the CD.

Hence, while there is no objective look-back period prescribed, the twilight period in this case is the period when the director or partner knew or ought to have known that there was no reasonable prospect of avoiding a CIRP (in other words, when the CD was facing financial stress, and it was not possible to revive the CD).

The wrongful trading provision does not prohibit a CD from continuing to trade or incur debts during this twilight period. The liability arises only when during this period, the directors or partners did not exercise due diligence in minimizing the potential loss to the CD's creditors.

As per the Explanation to section 66(2), the director or partner shall be deemed to have exercised due diligence if such diligence was reasonably expected of a person carrying out the same functions that are carried out by such director or partner, as the case may be, in relation to the CD.

The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020, has introduced subsection (3) in section 66, which provides that (notwithstanding anything contained in this section) no application shall be filed by the RP under subsection (2) in respect

of such default against which initiation of a CIRP is suspended as per section 10A of the IBC. Thus, in cases where default has arisen in the specified period on

or after March 25, 2020, the RP cannot file any application against wrongful trading under section 66(2) of the IBC.

### KEY CONSIDERATION

Section 66 provides a mechanism where IRP/RP can on one hand maximize realizations to the creditors of the CD, and on the other hand sharpen the sword against those who ran the company prior to the insolvency process and may have personally gained from their actions. Therefore, for the latter part, the extension of liability of a director for the acts committed for and on behalf of the company indicates a legislative intent to permit piercing of the corporate veil and holding individuals liable for the acts or omissions undertaken in the guise of acting for the corporate entity.

Hence, not only do these provisions protect the general body of creditors and maximize the value of the CD (in the form of contributions to the assets of the CD), they also act as a strong deterrence measure to prevent directors and promoters from causing loss of value to the company in the run up to insolvency.

Under section 66(1) of the IBC, the AA can pass an order directing “any” person that is knowingly party to fraudulent trading to make a contribution to the assets of the CD. However, under section 66(2) of the IBC, the AA can only direct the director or the partner of the CD to make the contribution. Accordingly, the RP can seek remedy or contribution under section 66(1) of the IBC from third parties (which may be related or non-related), rather than going behind the directors or partners of the CD.

#### 3.2.1 Orders That May Be Passed by the AA

Under section 66, the AA can direct contribution by persons who are knowingly parties to fraudulent trading in case of fraudulent trading, and by directors or partners in case of wrongful trading. Section 67 of the IBC provides that the AA may give further directions to give effect to the order passed by the AA under section 66.

In particular, the AA may provide for the liability of any person under such order to be a charge on any debt or obligation due from the CD to him or on any mortgage/ charge or any interest in a mortgage/ charge on assets of the CD held by or vested in him, or any person on his behalf, or any person claiming as assignee from or through the person liable or any person acting on his behalf. The AA may also, from time to time, make such further directions that may be necessary for enforcing any such charge imposed. In

this case, the “assignee” will not include an assignee for valuable consideration given in good faith and without notice of any of the grounds on which the directions have been made.

Further, where an order has been passed under section 66 in relation to a person who is a creditor of the CD, the AA may direct that the whole or any part of any debt owed by the CD to such person and any interest thereon shall rank in the order of priority of payment under section 53 after all other debts owed by the CD.

For instance, where a director is held liable for wrongful trading, and if the CD owes any debt to the director, to give effect to the contribution order under section 66(2), the AA may direct that the debt owed to the director will rank last under section 53.

## 4. Duties of the RP

Section 25(2)(j) of the IBC obligates the RP to file application for avoidance of transactions in accordance with Chapter III. Similarly, under section 35(1)(l), the

liquidator has the power and duty to investigate the financial affairs of the CD to determine undervalued or preferential transactions.

### *Mr. Ram Ratan Kanoongo Applicant Vs. Mr. Sunil Kathuria & Others [MA 436/2018 in CP No.172/IBC/NCLT/MB/MAH/2017]*

During the CIRP of Sanaa Syntex Pvt. Ltd., the RP found certain transactions that appeared to be fraudulent or preferential in nature and filed an application under sections 19, 45, and 66 of the IBC. The CD could not be revived and, therefore, liquidation commenced. The AA observed that if there is a siphoning of funds of the CD, it is important that the same be brought back for the completion of liquidation proceedings. It held that as sections 43 and 45 start with the phrase, “Where the liquidator or the RP...,” it can be understood that avoidance, preferential, or undervalued transactions can be handled at the liquidation stage. It is important for the RP (and liquidator) to investigate the affairs of the CD and its books and records, and to examine if the CD had entered into any avoidant, fraudulent, or wrongful transactions. In many cases, the RP appoints an expert (commonly referred as the transaction auditor) to examine the books and records of the CD and to assist with examination of these transactions. Once such determination is made by the RP/liquidator, an application must be filed with the AA.

The IBBI has provided guidance on the role of RP/liquidator in respect of avoidance transactions, for the purpose of educating the IPs and other stakeholders of CIRPs and liquidation processes.<sup>[168]</sup>

To help achieve the objectives of the IBC, the IBBI has facilitated the preparation of a “Red Flag Document” for IPs to help them understand and identify red flags that may point to the need for a review of avoidance transactions, covered under sections 43, 45, 50, and 66 of the IBC. The “Red Flag Document” is intended to help IPs to identify situations that would merit a review of avoidance transactions and result in application to the AA.<sup>[169]</sup>

### KEY CONSIDERATION

It has been clarified in section 26 of the IBC that filing an avoidance application by the RP shall not affect the proceedings of the CIRP. Hence, the CIRP proceedings can continue simultaneously with the application for avoidance.

Regulation 35A of the CIRP Regulations<sup>[170]</sup> details the timeline with respect to filing an avoidance transaction by the RP.

[168] <https://ibbi.gov.in/uploads/legalframework/6a4d5536291cfbb3d665d147981738cf.pdf>

[169] <https://ibbi.gov.in/uploads/legalframework/72438989cca02508e20db38d5f18958e.pdf>

[170] <https://ibbi.gov.in/uploads/legalframework/2020-04-27-114849-uqs43-ca9a1f1f849a43f3290c4b9512d0c863.pdf>

## 4.1 Forming an Opinion: 75 Days

It is the duty of the RP to form an opinion on or before the 75<sup>th</sup> day of the ICD as to whether the CD has been subjected to any transactions covered under sections 43, 45, 50, or 66 of the IBC.

## 4.2 Determining an Action: 115 Days

Where the RP is of the opinion that the CD has been subjected to any transactions covered under sections 43, 45, 50, or 66 of the IBC, then, he shall make a

determination whether action should be taken in respect of the antecedent transactions, on or before the 115<sup>th</sup> day from the ICD.

## 4.3 Application to the AA: 135 Days

After making a determination, the RP shall apply to the AA for appropriate relief on or before the 135<sup>th</sup> day of the ICD.

### *Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited Vs. Axis Bank Limited etc. etc. [Civil Appeal No. 8512-8527 of 2019]*

The Supreme Court observed that although the provisions relating to “preferential transactions and relevant time” (in section 43 of the IBC) occur in Chapter III of Part II of the IBC, relating to the liquidation process, such provisions for avoidance of certain transactions have bearing on the resolution process too, by their very nature, and operate equally over the CIRP. Hence, the RP is obligated (by virtue of clause (j) of subsection (2) of section 25 of the IBC) to file an application for avoidance of the stated transactions in accordance with Chapter III. That being the position, section 43 of the IBC comes into full effect in a CIRP too.

The Supreme Court also detailed the steps the RP should take to determine whether a transaction is preferential or not. As regards the application made by the RP, it noticed that in the matter, the IRP moved one composite application purportedly under sections 43, 45, and 66 of the IBC while alleging that the transactions in question were preferential, undervalued, and fraudulent. The Supreme Court observed that in the scheme of the IBC, the parameters and the requisite enquiries and the consequences in relation to these aspects are different, and this difference is explicit in the related provisions. The question of intent is not involved in section 43, and by virtue of legal fiction, upon existence of the given ingredients, a transaction is deemed to be giving preference at a relevant time. However, whether a transaction is undervalued requires a different enquiry as per sections 45 and 46 of the IBC, and significantly, such application can also be made by the creditor under section 47 of the IBC. The consequences of undervaluation are contained in sections 48 and 49. Per section 49, if the undervalued transaction is referable to subsection (2) of section 45, the AA may look at the intent to examine if the undervaluation was meant to defraud the creditors. On the other hand, the provisions of section 66 related to fraudulent trading and wrongful trading entail the liabilities on the persons responsible. While the Supreme Court did not elaborate on all these aspects, as the transactions were already held as preferential, it observed that the arena and scope of the requisite enquiries (to find if the transaction is undervalued or is intended to defraud the creditors or had been of wrongful/fraudulent trading) are entirely different. Specific material facts are required to be pleaded if a transaction is sought to be remedied by sections 45/46/47 or section 66 of the IBC. The scope of enquiry in relation to the question of whether a transaction is giving preference at a relevant time, is entirely different. Hence, it would be expected of any RP to keep such requirements in view while making a motion to the AA.

## 5. Offences and Penalties

Chapter VII of Part II of the IBC deals with the offences committed by various parties before or during a CIRP and the penalties for these, which may involve imprisonment, fines, or both.

### 5.1 Concealment of Property

Under section 68 of the IBC, if an officer of a CD conceals any property or state of affairs of the CD (in terms of the section), before or after the ICD, such an officer is punishable with imprisonment of three to five years, or with a fine of one lakh to one crore Indian rupees, or with both imprisonment and a fine. The officer will not be liable if he proves that he had no intent to defraud or to conceal the state of affairs of the CD.

#### Concealment before ICD

The following actions by an officer committed within the period of 12 months immediately preceding the ICD are covered under section 68:

- (a) willfully concealing any property (or its part) of the CD or concealing any debt due to, or from, the CD, worth 10,000 Indian rupees or more;
- (b) fraudulently removing any part of the property of the CD worth 10,000 Indian rupees or more;
- (c) willfully concealing, destroying, mutilating, or falsifying any book or paper affecting or relating to the property of the CD or its affairs;
- (d) willfully making any false entry in any book or paper affecting or relating to the property of the CD or its affairs;
- (e) fraudulently parting with, altering, or making any omission in any document affecting or

relating to the property of the CD or its affairs;

- (f) willfully creating any security interest over, transferring, or disposing of any property of the CD that has been obtained on credit and has not been paid for, unless such creation, transfer, or disposal was in the ordinary course of the business of the CD;
- (g) willfully concealing the knowledge that others had committed any of the acts mentioned in clauses (c), (d), or (e).

#### Concealment after ICD

The officer is also liable where, at any time after the ICD, the officer has committed any of the acts mentioned in (a) to (f) above, or has knowledge of others committing any of the acts mentioned in (c) to (e) above.

Further, the officer is also liable if after the ICD, he has received the property in pawn, pledge, or otherwise, knowing it to be so secured, transferred, or disposed of.

### 5.2 Transactions Defrauding Creditors

Section 69 of the IBC provides for punishment to the officer of the CD or the CD for certain actions defrauding the creditors.

The prescribed punishment is imprisonment for one to five years, or with a fine of one lakh to one crore Indian rupees, or both.

The following actions are covered under this section:

- (a) if any officer of the CD (or the CD) has made or caused any gift or transfer of, or charge on the CD's property, or has caused or connived in the execution of a decree or order against the CD's property;

- (b) if any officer of the CD (or the CD) has concealed or removed any part of the property of the CD within two months before the date of any unsatisfied judgment, decree, or order for payment of money obtained against the CD.

The person is not liable for punishment if such acts were committed more than five years before the ICD *or* if it is proved that, at the time of committing those acts, he had no intent to defraud the creditors of the CD.

### 5.3 Punishment for Misconduct in the Course of a CIRP

Section 70 of the IBC provides for punishment of the officer of a CD for misconduct in the course of a CIRP.

The prescribed punishment is imprisonment for a term of three to five years, or a fine of one lakh to one crore Indian rupees, or both.

Following acts by the officer of the CD, *on or after the ICD*, are covered under this section:

- (a) does not disclose to the RP all the details of property of the CD, and details of transactions thereof, or any other such information as the RP may require;
- (b) does not deliver to the RP all or part of the property of the CD in his control or custody that he is required to deliver;
- (c) does not deliver to the RP all books and papers in his control or custody belonging to the CD that he is required to deliver;
- (d) fails to inform the RP of his knowledge that a debt had been falsely proved by any person during the CIRP;
- (e) prevents the production of any book or paper affecting or relating to the property or affairs

of the CD; or

- (f) accounts for any part of the property of the CD by fictitious losses or expenses, or if he has so attempted at any meeting of the creditors of the CD within the 12 months immediately preceding the ICD.

The person is not liable for punishment if he proves that he had no intent to commit fraud or misconduct in relation to the state of affairs of the CD.

An IP who deliberately contravenes the provisions of this section is punishable with imprisonment for up to six months, or with a fine of one lakh five lakh Indian rupees, or both.

#### KEY CONSIDERATION

Note that while section 19 gives the IRP/RP power to apply to the AA for any directions against the officers of the CD for cooperation (which would include giving information, documents, and so on to the IRP/RP), section 70 identifies offences for which an officer can be punished.

### 5.4 Punishment for Falsification of Books of the CD

Section 71 of the IBC provides for punishment for any person falsifying a CD's books after the ICD.

It states that on and after the ICD, where any person destroys, mutilates, alters, or falsifies any books, papers, or securities, or makes (or has knowledge of making) any false or fraudulent entry in any register, books of account, or document belonging to the CD, with intent to defraud or deceive any person, he shall be punishable with imprisonment for three to five years, or with a fine of one lakh to one crore Indian rupees, or both.

## 5.5 Punishment for Willful and Material Omissions from Statements Relating to the Affairs of the CD

Section 72 of the IBC provides for punishment of the officer of a CD for willful and material omissions from statements relating to affairs of the CD. It states that where an officer of the CD makes any material and willful omission in any statement relating to its affairs, he shall be punishable with imprisonment for of three to five years, or a fine of one lakh to one crore Indian rupees, or both.

## 5.6 Punishment for False Representations to Creditors

Section 73 of the IBC provides for punishment to the officer of the CD for false representation to the creditors.

The prescribed punishment is imprisonment for a term of three years to five years, or a fine of one lakh to one crore Indian rupees, or both.

The actions covered are where any officer of the CD:

- (a) on or after the ICD, makes a false representation or commits any fraud for the purpose of obtaining the consent or agreement of any of the creditors of the CD with reference to its affairs, during the CIRP or liquidation process; or
- (b) prior to the ICD, has made any false representation, or committed any fraud, for that purpose.

## 5.7 Punishment for Contravention of Moratorium or the Resolution Plan

Section 74 of the IBC provides for punishment of the officer of a CD (or the CD) for contravention of the moratorium or the resolution plan.

### **Breach of moratorium**

In case the CD or any of its officers violates section 14 of the IBC (that is, moratorium provisions), any such officer who knowingly or willfully committed or authorized or permitted such contravention shall be punishable with imprisonment of three to five years, or a fine of one lakh to three lakh Indian rupees, or both.

Where any creditor violates section 14, any person who knowingly and willfully authorized or permitted such contravention by a creditor shall be punishable with imprisonment for a term of one to five years, or a fine of one lakh to one crore Indian rupees, or both.

### **Breach of resolution plan**

Where the CD, any of its officers or creditors, or any person on whom the approved resolution plan is binding under section 31, knowingly and willfully contravenes any of the terms of such resolution plan or abets such contravention, such CD, officer, creditor, or person shall be punishable with imprisonment of one to five years, or with a fine of one lakh to one crore Indian rupees, or both.

### KEY CONSIDERATION

Section 33(3) of the IBC provides that where the resolution plan approved by the AA is contravened by the concerned CD, any person other than the CD, whose interests are prejudicially affected by such contravention, may make an application to the AA for a liquidation order. Regulation 39(9) of the CIRP Regulations provides that a creditor, who is aggrieved by non-implementation of a resolution plan approved by the AA may apply to the AA for directions. Hence, applications under section 33(3) of the IBC and regulation 39(9) of the CIRP Regulations can be made to the AA in case of breach of the resolution plan.

As opposed to this, section 74(3) is a penal provision for which persons liable for contravention (or abetment of contravention) of the resolution plan can be punished.

## 5.8 Punishment for Providing False Information in an Application for Initiation of the CIRP

Section 7 of the IBC enables an FC—and section 9 enables an OC—to make an application to the AA for initiating the CIRP of a CD in case of a debt and default. Section 10 of the IBC enables a corporate applicant (including the CD) to make such an application.

An applicant who furnishes false information in such an application for initiation of CIRP of the CD can be made liable under sections 75, 76, and 77 of the IBC.

Section 75 of the IBC provides that where any person furnishes information in the application made under Section 7, which is false in material particulars, knowing it to be false or omits any material fact, knowing it to be material, such person shall be punishable with fine which shall not be less than one lakh rupees, but may extend to one crore rupees.

Section 76 of the IBC provides that where an OC has willfully or knowingly concealed (in an application under section 9) the fact that the CD had notified him of a dispute in respect of the unpaid operational debt or the full and final payment of the unpaid operational debt or if any person has knowingly and willfully authorized or permitted such concealment, such OC or person is punishable with imprisonment for one to five years or with fine of one lakh one crore Indian rupees, or both.

Section 77 of the IBC provides for punishment for providing false information in an application made by CD. Where a CD provides information in such application which is false in material particulars, knowing it to be false and omits any material fact, knowing it to be material or if any person knowingly and willfully authorises or permits the furnishing of such information, such CD or person shall be punishable with imprisonment for a term not less than three years, but which may extend to five years or with fine which shall not be less than one lakh rupees, but may extend to one crore rupees, or with both.

For the purposes of sections 75, 76, and 77 of the IBC, an application shall be deemed false in material particulars if the facts falsified or omitted would have been sufficient to determine the existence of a default under the IBC.

**Summary Table: Offences and Penalties**

Detail of offences	Liability	Punishment & penalty
<p><b>Section 68</b> Willfully concealed any property or any debt valued at 10,000 Indian rupees or more within 12 months immediately preceding insolvency commencement date. Fraudulently removed any part of the property of the value of 10,000 Indian rupees or more. Willfully concealed, destroyed, mutilated or falsified any books, papers, etc. Willfully created any security interest over or disposed of any property.</p>	Any officer of the CD	Imprisonment of three to five years; or Fine of one lakh to one crore Indian rupees; or Both (minimum of three years imprisonment and one lakh Indian rupees fine if found guilty)
<p><b>Section 69</b> Transaction defrauding creditors (on or after commencement of insolvency)</p>	CD and officer	Imprisonment of one to five years; or Fine of one lakh to one crore Indian rupees; or Both (minimum of one year imprisonment and one lakh Indian rupees fine if found guilty)
<p><b>Section 70</b> Misconduct in the course of CIRP Non-disclosure of information to the RP Not giving custody and control to the RP Not providing books of accounts to the RP</p>	Any officer of the CD	Imprisonment of three to five years; or Fine of one lakh to one crore Indian rupees; or Both (minimum of three years imprisonment and one lakh Indian rupees fine if found guilty)
<p><b>Section 71</b> Destruction, mutilation, alteration, or falsification of books of accounts</p>	Any relevant person	Imprisonment of three to five years; or Fine of one lakh to one crore Indian rupees, or Both (minimum of three years imprisonment and one lakh Indian rupees fine if found guilty)

Detail of offences	Liability	Punishment & penalty
<b>Section 72</b> Punishment for willful and material omissions from statements relating to affairs of the CD	Officer of the CD	Imprisonment of three to five years; or Fine of one lakh to one crore Indian rupees; or Both (minimum of three years imprisonment and one lakh Indian rupees fine if found guilty)
<b>Section 73</b> Punishment for false representation to creditors	Officer of the CD	Imprisonment of three to five years; or Fine of one lakh to one crore Indian rupees; or Both (minimum of three years imprisonment and one lakh Indian rupees fine if found guilty)
<b>Section 74(1)</b> Punishment for contravention of moratorium	CD or its officers	Imprisonment of three to five years; or Fine of one lakh to three lakh Indian rupees; or Both (minimum of three years imprisonment and one lakh Indian rupees fine if found guilty)
<b>Section 74(2)</b> Punishment for contravention of moratorium by a creditor	Person authorizing or permitting contravention of section 14 by a creditor	Imprisonment of one to five years; or Fine of one lakh to one crore Indian rupees; or Both (minimum of one year imprisonment and one lakh Indian rupees fine if found guilty)

Detail of offences	Liability	Punishment & penalty
<p><b>Section 74(3)</b> Punishment for contravention of approved resolution plan</p>	CD or its officers or creditor, or any person on whom the approved resolution plan is binding	Imprisonment of one to five years; or Fine of one lakh to one crore Indian rupees; or Both (minimum of one year imprisonment and one lakh Indian rupees fine if found guilty)
<p><b>Section 75</b> Punishment for false information in section 7 application</p>	Any relevant person	Fine of one lakh to one crore Indian rupees (Minimum one lakh fine if found guilty)
<p><b>Section 76</b> Punishment for non-disclosure of dispute or payment of debt by the OC</p>	Operational Creditor or any other relevant person	Imprisonment of one to five years; or Fine of one lakh to one crore Indian rupees; or Both (minimum one year imprisonment and one lakh Indian rupees fine if found guilty)
<p><b>Section 77</b> Punishment for providing false information in application made by the CD</p>	CD or any other relevant person	Imprisonment of three to five years; or Fine of one lakh to one crore Indian rupees; or Both (minimum of three years imprisonment and one lakh Indian rupees fine if found guilty)

## 6. Special Courts under the Companies Act to Try Offences under the IBC

As per section 236 of the IBC, offences under the IBC shall be tried by the Special Court established under Chapter XXVIII of the Companies Act, 2013.<sup>[171]</sup> It further states that no court shall take cognizance of any offence punishable under this Act, except on a complaint made by the IBBI or the Central Government or any person authorized by the Central Government under section 236(2) of the IBC. The proceedings before the Special Court shall be governed by the provision of the Code of Criminal Procedure, 1973, and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Session, and the person conducting a prosecution before a Special Court shall be deemed to be a Public Prosecutor.

In case of a complaint filed by the IBBI or Central Government, the presence of the person authorized by the Central Government or IBBI before the court trying the offences shall not be necessary unless the court requires his personal attendance at the trial.

Hence, offences under the IBC are dealt with by the Special Courts established under the Companies Act, 2013. Many such courts are in operation, and the IBBI has filed various complaints before the Special Court for trial of offences under the IBC. In many such cases, cognizance has already been taken by the Special Courts and the accused have also filed petitions before the respective High Courts under section 482 of the Code of Criminal Procedure, 1972, to overturn the criminal proceedings instituted against them.

### *Committee of Creditors of Amtek Auto Ltd. through Corporation Bank Vs. Mr. Dinkar T. Venkatasubramanian & Others [Company Appeal (AT) (Insolvency) No. 219 of 2019 (with connected appeals)]*

The NCLAT observed that the IBC does not say if the AA has any jurisdiction to pass any order referring a matter to the Central Government or IBBI for action under section 74(3) of the IBC or under any of the provisions for punishment. It further observed that normally, the IBBI or the Central Government are not made a party to any CIRP. Therefore, they cannot know whether any offence has been committed by any CD or its members, including the successful resolution applicant, under section 74(3) or any of the provisions of Chapter VII of Part II of the IBC. It held that “*it is the Adjudicating Authority who is required to refer such matter to the Insolvency and Bankruptcy Board of India or the Central Government to take up the matter to the Special Court if on investigation, if any case of offence under Chapter VII, including Section 74(3) is made out*” and further that “*...we are of the opinion that before referring any matter to the Insolvency and Bankruptcy Board of India or the Central Government, the Adjudicating Authority/ Tribunal is required to provide reasonable opportunity of hearing to the parties concerned/alleged offenders of provisions of Chapter VII of Part II and if satisfied may request the Central Government to investigate the matter by an Inspector or Inspectors and then to decide on such opinion whether to refer and lodge any case before the Special Judge for trial under Section 236 of the ‘I&B Code’ for alleged offence under Section 74(3) or any other provision under Chapter VII of Part II of the ‘I&B*”

[171] <https://www.mca.gov.in/Ministry/pdf/CompaniesAct2013.pdf>

*Code' and for punishment under Section 447 of the Companies Act, 2013". Note that the IBBI was not made a party to this case and thus was not heard before the NCLAT.*

The NCLAT order has been challenged by the IBBI in appeal before the Supreme Court. By order dated September 24, 2019, the Supreme Court stayed the NCLAT order as well as the criminal proceedings against Liberty House Group before the Special Court, Gurugram. Further, the Supreme Court made it clear that all other criminal proceedings instituted by the IBBI would continue, and the stay order in the Liberty House Group case before the Special Court, Gurugram, would have no effect on those cases.

Subsequently, in the case of *Commune Properties Vs. Mrs. Ramanathan Bhuvaneshwari [Company Appeal (AT) (Insolvency) No. 592 of 2019]*, and *Vijay Kumar Choudhary Vs. Educomp Infrastructure & School Limited [Company Appeal (AT) (Insolvency) No. 766 of 2019]*, the NCLAT passed orders similar to its order in the Amtek case. The IBBI has filed appeals before the Supreme Court, which have stayed the operation of the NCLAT orders and tagged the appeals with the Amtek appeal.

## 7. Reference by the AA under the Companies Act, 2013

Section 66 of the IBC contains provisions relating to the investigation—by the RP and the liquidator—of fraudulent conduct by a CD and its promoters or directors prior to an ICD. Section 66 provides for contribution to the assets of the CD by the persons party to the fraud (or directors). There is no penal punishment prescribed. Penal punishment is provided for “offences,” some of which also involve fraudulent conduct by the officers or directors of the CD. These offences are tried by Special Courts.

The Companies Act, 2013, also contains various provisions for investigation and punishment of fraud by companies. Since CDs are typically companies, the provisions of the Companies Act, 2013, may also be applicable to such CDs (in addition to the provisions of the IBC).

### 7.1 Meaning and Punishment of Fraud under the Companies Act, 2013

Under Section 447 of the Companies Act, 2013 any person found to be guilty of fraud, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to ten years and shall also be liable to fine which shall not be less than the amount involved in the fraud, but which may extend to three times the amount involved in the fraud. Where the fraud in question involves public interest, the term of imprisonment shall not be less than three years. Where the fraud involves an amount less than ten lakh Indian rupees or one per cent. of the turnover of the company, whichever is lower, and does not involve public interest, any person guilty of such fraud shall be punishable with imprisonment for a term which may extend to five years or with fine which may extend to fifty lakh Indian rupees or with both.

Fraud in relation to affairs of a company or any body corporate is defined in the Section to include any act,

omission, concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss. Hence, the Companies Act, 2013, provides for punishment for fraud on the creditors of the company.

## 7.2 Investigation of Fraud under the Companies Act, 2013

Chapter XIV of the Companies Act, 2013, also provides for investigation of fraud by the companies.

Sections 206 and 207 of the Companies Act, 2013, empower the Registrar of Companies to call for information, inspect books, and conduct inquiries and inspection. Such an inquiry can also be carried out if the Registrar of Companies is satisfied that the business of a company is being carried on for a fraudulent or unlawful purpose, or does not comply with the provisions of the Companies Act, 2013, or if the grievances of investors are not being addressed. The Central Government may also direct the Registrar of Companies, or an inspector appointed by it, to carry out such inquiry under this section.

Under section 208, upon such inquiry, the Registrar of Companies or inspector shall submit a report in writing to the Central Government, including a recommendation as to whether further investigation into the affairs of the company is necessary, with reasons in support.

Under section 210(1) of the Companies Act, 2013, the Central Government may order an investigation into the affairs of the company, on the basis of the following:

- (a) on the receipt of a report of the Registrar of Companies or inspector under section 208;
- (b) on intimation of a special resolution passed by a company that the affairs of the company ought to be investigated; or
- (c) in the public interest.

Under section 210(2) of the Companies Act, 2013, where an order is passed by a court or the NCLT in any proceedings before it that the affairs of a company ought to be investigated, the Central Government shall order an investigation into the affairs of that company.

Under section 211, the Central Government has established the Serious Fraud Investigation Office (SFIO) to investigate frauds relating to a company, and under section 212, the Central Government may assign the investigation to the SFIO.

Section 213(b) of the Companies Act, 2013, provides that the NCLT may pass an order, after giving a reasonable opportunity of being heard to the parties concerned, for investigation into the affairs of the company by inspector(s) appointed by the Central Government. Such an order can be made by the NCLT on an application made to it by any other person or otherwise, if it is satisfied that there are circumstances suggesting that:

- i. the business of the company is being conducted with intent to defraud its creditors, members, or any other person, or otherwise for a fraudulent or unlawful purpose, or in a manner oppressive to any of its members, or that the company was formed for any fraudulent or unlawful purpose;
- ii. persons concerned in the formation of the company or the management of its affairs have in connection therewith been guilty of fraud,

misfeasance, or other misconduct towards the company or towards any of its members; or

- iii. the members of the company have not been given all the information with respect to its affairs that they might reasonably expect, including information relating to the calculation of the commission payable to a managing or other director, or the manager, of the company.

If, after investigation, the fraud in terms of the above is proved, penalty under section 447 would follow.

Hence, under the Companies Act, 2013, the NCLT also has the power to refer the investigation of fraud to the Central Government in case of an application made to it.

***Union of India, Through Serious Fraud Investigation Office (SFIO) Vs. Maharashtra Tourism Development Corporation & Another [CA(AT)(Ins) No. 964- 965/2019]***

The NCLAT considered whether the AA has jurisdiction to direct the SFIO to investigate the fraud or siphoning of funds, if any, committed by the CD. The NCLAT held that section 212 of the Companies Act, 2013, does not empower the NCLT or the AA to refer the matter to the Central Government for investigation by the SFIO even if it notices the company defrauding creditors and others. However, in terms of section 213(b) of the Companies Act, 2013, it can direct the Central Government to investigate through inspectors, and after investigation, if a case for fraud is made out, it may decide that the matter should be investigated by the SFIO. It held that the AA is not competent to immediately direct any investigation to be conducted by the SFIO.

***Mr. M. Srinivas Vs. Ramanathan Bhuvaneshwari & Others [CA (AT) (Ins) No. 498/2019]***

The RP brought to the notice of the AA that the promoters of the CD and its company had defrauded many creditors. The AA issued certain directions, including a direction to the Central Government to refer the matter to the SFIO for further investigation into the affairs of the CD, in exercise of its powers under section 213 of the Companies Act, 2013. The question for consideration was whether the AA has jurisdiction under section 213 of the Companies Act, 2013. The NCLAT held that the AA, which is the NCLT, has a dual and interwoven role and the power to pass an order under section 213 of the Companies Act, 2013 (read with Rule 11 of the National Company Law Tribunal Rules, 2016). It observed that if the AA is satisfied that there are circumstances suggesting that the business of a company is being conducted with intent to defraud its creditors, members or any other person or otherwise for a fraudulent or unlawful purpose or in a manner oppressive to any of its members, and that the affairs of the company ought to be investigated, after giving the parties concerned a reasonable opportunity to be heard, it may refer the matter to the Central Government for investigation.

### *Vijay Pal Garg & Others Vs. Pooja Babry [CA(AT)(Ins) No. 949/2019]*

On an application filed by the RP, *inter alia*, for fraudulent trading by the promoter directors under section 66 of the IBC, the AA noted that voluminous documents and vouchers had been filed by the parties. Because the proceedings before the AA are summary in nature, and it is not possible for it to conduct an in-depth investigation or to examine the veracity of the documents and averments, it is not possible to arrive at a correct appraisal of the state of affairs of the CD and to adjudicate upon the allegations made by the RP. The AA took recourse to section 210(2) of the Companies Act, 2013, and directed the Central Government to order an investigation into the affairs of the CD.

An appeal was filed against the order of the AA by the suspended promoter directors. The NCLAT observed that the AA is not empowered to order an investigation to be carried out directly by the Central Government. The AA (NCLT), as a competent authority under section 213 of the Companies Act, 2013, has an option to issue notice as to charges or allegations leveled after following the due procedure described in that section. Where a *prima facie* case is made out, the AA may refer the matter to the Central Government for investigation by an inspector, based on which, if any action is required, the Central Government, through the SFIO, may proceed in accordance with law. After completing an investigation, if the investigating authority concludes that there has been any offence punishable in terms of section 213 (read with section 447 of the Companies Act or sections 68 to 73 of the IBC), then the Central Government may refer the matter to the Special Court, or may require the IBBI or authorize any person, as per section 236(2) of the IBC, to file a complaint.

Viewed in that perspective, the NCLAT varied the order of the AA and referred the matter to the Central Government for investigation through any inspector. Accordingly, NCLAT referred the matter to the Secretary, Ministry of Corporate Affairs, and Government of India in carrying out an investigation by the Inspector or Inspectors by following the due procedure as per Section 213 of the Companies Act, 2013 etc. It added that if the matter needs to be examined by SFIO, the Central Government may do so, if the case of fraud is made out and proceed further in accordance with law.



One of the primary objectives of an effective insolvency law is to provide a range of tools to help enterprises address different stages of financial distress. In particular, an insolvency law should aim to restructure viable businesses and facilitate the exit of non-viable businesses. The IBC provides such a framework with a time-bound mechanism for restructuring companies through a CIRP or exiting the market through a liquidation process. It has been an important legislative reform that has strengthened India's insolvency regime, helped address non-performing loans and increased overall recovery for creditors.

The IBC introduced four pillars that underpin the operationalization of the insolvency legislation:

- i. IBBI which has regulatory oversight over the IPs, IPAs, IPEs and IUs;
- ii. regulated and qualified IPs;
- iii. IUs and
- iv. AAs.

This Handbook provides further detail and information in relation to each of these four key pillars, including the core regulatory framework governing the powers, activities and responsibilities of each one.

There is a strong focus to resolve and reorganize the CD during the CIRP. The CIRP is a “creditor in control” model of restructuring the CD. This control is exercised through the IRP (and later the RP). The Handbook sets out the core CIRP time-frames and procedural steps, as well as the key features of the restructuring process, including (but not limited to)

the moratorium, the constitution and approval vote of the CoC, the claims verification process, the raising of interim financing, running the CD as a going concern, CIRP costs and the role, ethical duties and functions of the IRP and RP.

Two kinds of liquidation processes are envisaged for corporate persons under the IBC. Where a CD has committed a ‘default’, an FC, OC or the Corporate Applicant itself can initiate a CIRP of the CD. When the restructuring fails, the CD enters the liquidation phase. Once the AA passes the Liquidation Order, the RP may give consent to be appointed as Liquidator. Secondly, a corporate person can choose to voluntarily initiate liquidation proceedings when there is no default – i.e. solvent liquidation. The Handbook sets out the core liquidation time-frames and procedural steps as well as the key features of the liquidation process, including (but not limited to) liquidator remuneration, powers and duties of a liquidator, taking control of the liquidation estate, the verification of claims, the protection of secured creditors’ rights in liquidation, the realization and sale of assets and distribution of assets by the liquidator.

In particular, this Handbook aims to provide IPs and all other stakeholders with practical skills and knowledge to better understand the IBC and implementation in practice. Strong professionals and institutions are critical to an insolvency regime’s success, in particular ensuring their integrity and commercial minded approach. Standards of transparency and accountability have been incorporated into the IBC to help ensure this success.

This publication comes at a time of great challenges for many economies. The COVID-19 pandemic is expected to have far-reaching and destabilizing effects on businesses. Forecasts predict large numbers of business failures globally, particularly small businesses, and insolvency regimes need to be equipped to rapidly restructure viable businesses and liquidate non-viable ones.

In a very short time, the IBC has made great strides in providing a predictable framework that aims to provide timely, efficient and impartial resolution of viable businesses and a transparent liquidation process, which recognizes existing creditor rights and respects the priority of claims. It is hoped that this publication provides one additional piece of literature in the insolvency and restructuring field that will aid stakeholders in ensuring that India's insolvency regime continues to achieve and surpass its objectives, assist in strengthening India's credit environment, and further entrepreneurship in the country.

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