

Insolvency Professional

2.1 Background

Insolvency Professional is required to play a key role in implementation of Insolvency Code. This profession will be regulated by IBBI through Insolvency Professional Agency (IPA).

2.2 Insolvency Professional Agency (IPA)

Work relating to insolvency resolution is expected to be handled by 'Insolvency Professionals' (IP). These professionals are required to be registered with 'Insolvency Professional Agency' (IPA).

“Insolvency professional agency” means any person registered with the Board (IBBI) under section 201 of Insolvency Code, 2016 as an insolvency professional agency - section 3(20) of Insolvency Code, 2016.

The Insolvency Professional Agencies (IPA) will develop professional standards, code of ethics and be first level regulator for insolvency professionals members. This will lead to development of a competitive industry for such professionals.

2.2-1 Registration of Insolvency Professional Agency

Insolvency and Bankruptcy Board of India (Insolvency Professional Agency) Regulations, 2016 make provision for registration of Insolvency Professional Agency. Such Agency should be incorporated as section 8 company. It should have minimum net worth of Rs. ten crores and paid up capital of Rs. five crores. It should not be a subsidiary of subsidiary.

Functions of Insolvency Professional Agency have been specified in section 204 of Insolvency Code. These cover - (a) granting membership to insolvency professionals (b) lay down standards of professional conduct to its members (c) monitor performance of members (d) safeguard rights, privileges and interests of insolvency professionals (e) suspend member or cancel membership

(f) redress grievances of members and (g) publish information about its functions, list of members, performance of its members.

Application for registration as Insolvency Professional Agency (IPA) should be made to IBBI in prescribed form with fees.

Initially, in-principle approval as Insolvency Professional Agency will be granted for one year. Then during that period, application for registration shall be made with IBBI

2.2-2 Model Bye Laws of Insolvency Professional Agency

Model Bye Laws of Insolvency Professional Agency and provisions relating to Governing Board of Insolvency Professional Agency have been specified in Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agency) Regulations, 2016.

Insolvency Professional must be 'professional member' of such Insolvency Professional Agency.

Duties of Professional Members have been specified in the Regulations.

The Insolvency Professional Agency shall have Grievance Redressal Mechanism.

The Agency can initiate disciplinary proceedings against its professional members.

2.2-3 Control over Insolvency Professional Agency by Board (IBBI)

IBBI will exercise control over Insolvency Professional Agency (IPA) and Insolvency Professional (IP). Complaints can be made to IBBI under section 217 of Insolvency Code.

IBBI can carry out investigation of Insolvency Professional Agency and Insolvency Professional under section 218 of Insolvency Code. Disciplinary action can be taken against Insolvency Professional Agency or Insolvency Professional by appointing disciplinary committee under section 220 of Insolvency Code.

2.2-4 Recognised Insolvency Professional Agencies

Following three Insolvency Professional Agencies (IPA) have been recognized. These have been incorporated as section 8 companies.

- (1) Indian Institute of Insolvency Professionals of ICAI, 1st Floor, ICAI Building, Indraprastha Marg, New Delhi-110002. e-mail - www.iiipicai.in.
- (2) ICSI Insolvency Professionals Agency, 1st Floor, ICSI House, 22, Institutional Area, Lodhi Road, NEW DELHI- 110003, e-mail - www.icsiipa.com.
- (3) Insolvency Professional Agency of Institute of Cost Accountants of India, 4th Floor, CMA Bhawan, 3 Institutional Area, Lodhi Road, New Delhi - 110003, e-mail - www.ipaicmai.in.

These Agencies can admit any person who is not member of that Institute e.g. an Advocate can become member of any of the aforesaid Institute. A CA can become member of institute initiated by ICSI or CMA Institute. *Vice versa* is also permissible.

In fact, changing of membership from one IPA to another is possible with NOC from both IPAs and permission of IBBI.

2.2-5 Annual Compliance Certificate by IPA

IPA are required to submit Annual Compliance Certificate to IBBI. It should be displayed on website of IPA within 45 days of close of financial year- IBBI circular No. IPA/009/2018 dated 19-4-2018.

2.3 Insolvency Professional (IP)

The Insolvency Code, 2016 envisages a very big role for insolvency professionals. It is envisaged that most of work relating to insolvency and bankruptcy will be handled by insolvency professionals.

“Insolvency Professional” (IP) means a person enrolled under section 206 of Insolvency Code, 2016 with an insolvency professional agency as its member and registered with the Board (IBBI) as an insolvency professional under section 207 of Insolvency Code, 2016 - section 3(19) of Insolvency Code, 2016.

Though the word used is ‘person’, really only an individual can be IP. A LLP, partnership firm or a company can only be recognized as ‘Insolvency Professional Entity’ (IPE)

The Insolvency Professional should follow code of conduct as specified in section 208(2) of Insolvency Code and in First Schedule to Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016.

Disciplinary action against insolvency professional agency and insolvency professional can be initiated by Board (IBBI) as per provisions of sections 217 to 220 of Insolvency Code, 2016 and regulation 11 of IBBI (Insolvency Professionals) Regulations, 2016.

2.3-1 Registration as Insolvency Professional

Provisions relating to registration as Insolvency Professional and Insolvency Professional Entity have been made in Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016.

There are two different streams of registration of individuals as Insolvency Professional (IP) as follows [regulation 5 of IBBI (Insolvency Professionals) Regulations, 2016 as amended on 27-3-2018].

CA, CS, CMA or Advocate with ten years experience or graduate with 15 years management experience after graduation - He has to pass Limited Insolvency Examination, enroll with Insolvency Professional Agency as

professional member and undergo pre-registration educational course as required by IBBI, before applying for registration with IBBI. He should register as Insolvency Professional within 12 months of passing Limited Insolvency Examination. After Registration, he is required to undergo continuous professional education (CPE) periodically, as prescribed by IBBI.

See cover pages I-9 onwards for syllabus of examination.

Individuals other than above - An individual (other than CA, CS, CMA, Advocate or person experienced in management as above), has to pass Limited Insolvency Examination, enroll with Insolvency Professional Agency as professional member and undergo pre-registration educational course as required by IBBI. After that he has to successfully complete either National Insolvency Programme or Graduate Insolvency Programme approved by IBBI, before applying for registration with IBBI. He should register as Insolvency Professional within 12 months of passing Limited Insolvency Examination. After Registration, he is required to undergo continuous professional education (CPE) periodically, as prescribed by IBBI.

Who can be registered as IP - The individual should be major, resident of India, has passed examination and has experience and training as prescribed. He should not have been convicted of offence and sentenced for seven years or more. He should not be undischarged insolvent or declared as of unsound mind.

Fit and Proper Person - IP should be 'fit and proper person'. For this, IBBI may take account of any consideration as it deems fit, including but not limited to the following criteria- (i) integrity, reputation and character (ii) absence of convictions and restraint orders, and (iii) competence, including financial solvency and net-worth [regulation 4 of IBBI (Insolvency Professionals) Regulations, 2016].

Procedure for registration of IP with IBBI - Application for registration as Insolvency Professional shall be made through 'Insolvency Professional Agency' in form A with fees. IBBI shall grant certificate of registration in form B. IBBI can refuse registration for valid reasons under regulation 8 of IBBI (Insolvency Professionals) Regulations, 2016, after issuing notice.

Pre-registration educational course - An individual, before registration as Insolvency Professional, should undergo 50 hours pre-registration educational course to be conducted by Insolvency Professional Agency (IPA) after his enrolment as a professional member. [he has to pass online examination also] - IBBI circular No. IPA/011/2018 dated 23-4-2018.

See division 3 for text of circular.

Temporary registration for initial period of six months from 1-1-2017 - Initially, a person was allowed to be registered for temporary period of six months from 1-1-2017, if he was practicing CA/CMA/CS or Advocate for 15 years. This was only a transitory provision.

If the certificate of registration as Insolvency Professional had expired, fresh Insolvency Professional has to be appointed - *Macro Leafin v. Arrow Resources* (2018) 90 taxmann.com 9 (NCLT).

2.3-2 Conditions of registration of IP

The Insolvency Professional should abide by Code, rules, regulations and guidelines of insolvency professional agency. He pay fees of Rs. 10,000 every five years. He should abide by Code of Conduct. He should maintain proper records of assignment at least for three years after assignment is completed. He should not outsource his duties and responsibilities, except those specifically permitted by IBBI. He is required to undergo continuous professional education (CPE) periodically, as prescribed by IBBI - regulation 7(2) of IBBI (Insolvency Professionals) Regulations, 2016 as amended on 27-3-2018.

2.3-3 Conduct of Limited Insolvency Examination or National Insolvency Examination

IBBI will conduct examination through a designated agency. The syllabus, format, qualifying marks and frequency of the Limited Insolvency Examination shall be published on the website of the Board at least three months before the examination [regulation 3 of IBBI (Insolvency Professionals) Regulations, 2016 as amended on 27-3-2018]

The examination will be computer based online and will be conducted at various places in India. The examination consists of objective type questions with 25% negative marking for wrong answers. The syllabus and model question paper is available on website of IBBI i.e. www.ibbi.gov.in.

For syllabus of examination and other details, see **Division 8**.

The Regulation 3 makes provision for National Insolvency Examination but presently that examination is not being conducted.

2.3-4 Code of Conduct of Insolvency Professional

The Code of Conduct of Insolvency Professional prescribes norms of (a) Integrity and objectivity (b) independence and Impartiality (c) Professional Competence (d) Representation of correct facts and correcting misapprehensions (e) Timelines (f) Information Management (g) Confidentiality (h) Occupation, employability and restrictions (i) Remuneration and costs (j) Gifts and Impartiality - First Schedule to Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016.

Fees payable to him and to professionals engaged by him shall be disclosed to IPA of which he is a member and IPA shall publish that information on its website.

Section 208(2) of Insolvency Code also specified Code of Conduct of IP. The requirements are - (a) reasonable care and diligence (b) compliance with bye

laws of Insolvency Professional Agency (IPA), allowing inspection of records by IPA, submit copy of records of every proceedings before Adjudicating Authority to IBBI and IPA of which he is a member and perform functions in specified manner.

Guidelines from IBBI in respect of fees to be charged by Insolvency Professional and other expenses – IBBI has issued circular No. IBBI/IP/013/2018 dated 12-6-2018 in respect of fees to be charged by Insolvency Professional and other expenses. The fees should be reasonable. Fees and expenses should be approved by CoC. The fees should be disclosed. The circular also indicates what is includible and what is not in expenses for CIRP.

See division 3 for text of circular.

2.3-5 Confidentiality of Information relating to processes under the Insolvency Code

IBBI vide circular No. IP(CIRP)/007/2018 dated 23-2-2018 has clarified as follows.

As per clause 21 of the Code of Conduct appended to the First Schedule to the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016, the resolution professional is required to maintain confidentiality.

Further, there are specific restrictions on keeping the information confidential or providing information to stakeholders only under confidentiality agreement.

The disclosure of information, except as provided for in the Code, or rules, regulations or circulars issued thereunder, are confidential. Unauthorised access to or leakage of such information has the potential to impact the processes under the Code. An Insolvency Professional, whether acting as Interim Resolution Professional, Resolution Professional or Liquidator, shall- (i) keep every information confidential; and (ii) shall not disclose or provide access to information to unauthorised persons.

Failure to ensure confidentiality will attract action under the provisions of the Code and the regulations made thereunder.

2.3-6 Control over Insolvency Professional (IP) by Board (IBBI)

First tier control over Insolvency Professionals will be of Insolvency Professional Agency (IPA). Final control will be of Board (IBBI).

Complaint can be made to Board (IBBI) against Insolvency Professional under section 217 of Insolvency Code. Disciplinary action can be taken by Board (IBBI) under section 220 of Insolvency Code, after issuing show cause notice under section 219 of the Insolvency Code.

2.3-7 Procedure for inspection, investigation and disciplinary action

IBBI (Inspection and Investigation) Regulations, 2017 make provisions for inspection, investigation and disciplinary action against the Insolvency Professional, insolvency professional agency/entity and information utility (termed as 'service provider').

Inspection can be carried out by Inspecting Authority on direction of IBBI. At least ten days notice will be served on service provider. The Inspecting Authority may submit interim report. Draft of inspection report will be given to service provider for his comments and then final report will be prepared.

IBBI can also order investigation under section 218 of Insolvency Code.

Board of IBBI will consider the inspection report of investigation report and then may issue show cause notice to 'service provider'. The reply of the service provider will be considered by Disciplinary Committee. Personal hearing will be granted and then order will be issued.

If restitution is ordered, Board (IBBI) will endeavor to realise the amount of disgorgement expeditiously.

2.3-8 Insolvency Professional can act as Administrator under SEBI Regulations

Insolvency Professional can be appointed as Administrator to undertake sale of assets for recovering of investors' money. Recovery Officer can appoint an Administrator if entity is not traceable or not complying with SEBI directives – SEBI (Appointment of Administrator and Procedure for Refunding to the Investors) Regulations, 2018.

2.3-9 Resolution Professional does not have adjudication powers

Resolution professional has no adjudication powers. He has administrative powers and no quasi judicial powers - *Swiss Ribbons v. UOI* (2019) 4 SCC 17 = 152 SCL 365 = 101 taxmann.com 389 (SC).

2.3-10 Meaning of 'pending disciplinary proceedings'

Various sections use the words 'disciplinary action pending against Resolution Professional'.

It has been clarified that a disciplinary proceeding is considered as pending from the time of issue of show cause notice to the Resolution Professional till its disposal by the disciplinary committee. During this period, Resolution Professional should not accept any fresh assignment as interim resolution professional, resolution professional, liquidator or bankruptcy under Insolvency Code – IBBI circular No. LA/010/2018 dated 23-4-2018.

2.3-11 Cases of disciplinary action against Insolvency Professional

In *Mukesh Mohan, In Re* [2018] 147 SCL 568 = 92 taxmann.com 362 (IBBI), the insolvency professional had attempted to mislead Committee of Creditors (CoC), the AA, and the Board, outsourced his responsibilities to a third person, acted beyond his authority without approval of CoC and acted for and on behalf of one of creditors. The disciplinary committee held that he has contravened provisions in sections 21(8), 23(1), 25(2)(h), 30(2)(i), 70(2), 235A of the Code and regulation 7(2)(i) of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulation, 2016 and clauses 1, 2, 3, 5, 9, 12, 13 and 14 of the Code of Conduct under First schedule of these regulations. He was debarred from undertaking any new assignment, either as an Interim Resolution Professional, Resolution Professional, Liquidator or otherwise, under the Code.

In *Bhavna Sanjay Ruia, In re* [2018] 95 taxmann.com 193 (IBBI), the IRP quoted fee of Rs 13.75 crores, which was abnormally high and had no justification. It was held that IRP had contravened Code of Conduct for Insolvency Professionals. Registration of IRP was to be suspended for a period of one year.

In *Kapil Goel In re* (2018) 150 SCL 231 = 97 taxmann.com 406 (IBBI), the Insolvency Professional incorporated a LLP with name 'IBBI Insolvency Practitioners LLP'. It was held that this gave misleading impression to stake-holders that the LLP has been incorporated by IBBI. The IP was asked to remove name of LLP from master data and his registration was suspended for three months.

In *Martin S K Golla In re* (2018) 151 SCL 299 = 99 taxmann.com 174 (IBBI), registration of Insolvency Professional was cancelled as he connived with parties to allow One Time Settlement in garb of resolution plan and allowed ineligible Resolution Applicant to submit One Time Settlement plan. He did nothing to run business of corporate debtor or to run CIRP.

In *Sandeep Kumar Gupta, In re* (2018) 151 SCL 101 = 100 taxmann.com 299 (IBBI), the resolution professional did not make efforts to see that CoC takes decision in 180 days, due to which the corporate debtor was pushed into liquidation. Penalty equal to fee was imposed on the resolution professional. He was ordered to undergo pre-registration educational course.

2.4 Panel of Insolvency Professionals to recommend to NCLT as Interim Resolution Professional or Liquidator

As per section 16(3)(a) of Insolvency Code, IBBI is required to recommend name of IP if Operational Creditor has applied for Corporate Insolvency Resolution Process [CIRP] but has not proposed IRP. As per section 34(4) of Insolvency Code, Adjudicating Authority (AA) requires Adjudicating Authority (AA) to replace resolution professional, if plan submitted by him is rejected or IBBI recommends his replacement. In that case, IBBI has to propose name of another IP.

IBBI has issued 'Insolvency Professionals to act as Interim Resolution Professionals or Liquidators (Recommendation) Guidelines, 2018 on 31-5-2018, to be effective from 1-7-2018 for purpose of forming panel [earlier guidelines were issued on 15-12-2017].

IBBI will form panel of IPS for each Bench of NCLT. The NCLT bench may pick up any one. If reference is received, IBBI will invoice express of interest from IP in form A to act as an IRP or Liquidator. Each IP will get score on basis of ongoing assignments with him. An IP with maximum ongoing assignments will get zero score. Panel prepared will be valid for six months. IP which as no ongoing assignment will get 100 score.

2.5 Insolvency Professional Entities

IBBI can recognize an 'Insolvency Professional Entity' (IPE). The Insolvency Professional Entity can be LLP, registered partnership firm or a company.

As per regulation 12(1) of IBBI (Insolvency Professionals) Regulations, 2016 (amended on 27-3-2018), a company, a registered partnership firm or a limited liability partnership may be recognised as an insolvency professional entity, if following conditions are satisfied—

- (a) its sole objective is to provide support services to insolvency professionals, who are its partners or directors, as the case may be;
- (b) it has a net worth of not less than one crore rupees;
- (c) majority of its shares is held by insolvency professionals, who are its directors, in case it is a company;
- (d) majority of capital contribution is made by insolvency professionals, who are its partners, in case it is a limited liability partnership firm or a registered partnership firm;
- (e) majority of its partners or directors, as the case may be, are insolvency professionals;
- (f) majority of its whole time directors are insolvency professionals, in case it is a company; and
- (g) none of its partners or directors is a partner or a director of another insolvency professional entity.

The insolvency professional entities (IPE) recognised as on 1-4-2018 shall comply with the provisions of clauses (a), (b), (c) and (d) on or before 30th September, 2018 and the provisions of clauses (e), (f) and (g) on or before 30th June, 2018.

Responsibility of members of IPE - Members of the Insolvency and Professional Entity would be jointly and severally liable for acts or omissions of its partners or directors during such partnership or directorship.

Procedure for registration - Application for recognition as Insolvency Professional Entity is required to be made in form C with fees. Certificate of Recognition shall be granted by IBBI in form D.

2.6 Adjudicating Authority can change IP if not satisfied

In *Sandeep Kumar Gupta v. Stewarts & Lloyds of India Ltd.* [2018] 146 SCL 591 = 91 taxmann.com 409 (NCLAT), it has been held that if Adjudicating Authority is not satisfied with performance of Insolvency Resolution Professional (IRP), it could engage another person as resolution professional or liquidator.

Conducting corporate insolvency resolution process

4.1 Background

After commencement of corporate insolvency resolution process under section 7, 9 or 10 of Insolvency Code, 2016, further action will commence before Adjudicating Authority (NCLT).

Procedure before NCLT shall be as per rules 20 to 24 and 26 of Part III of NCLT Rules, 2016 [Till rules under Insolvency and Bankruptcy Code are notified] - rule 10 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

A Committee of Creditors (CoC) is required to be constituted to oversee the insolvency resolution process.

The actual work will be done by 'resolution professional' under supervision of Committee of Creditors and Adjudicating Authority (NCLT).

4.1-1 Mandatory upper Time limit of 330 days to complete resolution process

Normally, the Corporate Insolvency Resolution Process (CIRP) is required to be completed within 180 days from date of application by NCLT to initiate the corporate insolvency process - section 12(1) of Insolvency Code, 2016.

This period can be extended if resolution professional files application to Adjudicating Authority, if instructed by resolution passed at a meeting of the Committee of Creditors (CoC) by a vote of sixty-six per cent (66%) of the voting shares – section 12(2) of Insolvency Code, 2016 [Till 6-6-2018, the resolution was required to be passed by seventy-five per cent (75%) of voting shares of CoC].

“Voting share” means the share of the voting rights of a single financial creditor in the committee of creditors which is based on the proportion of the financial

debt owed to such financial creditor in relation to the financial debt owed by the corporate debtor - Section 5(28) of Insolvency Code, 2016.

On receipt of such approval, resolution professional shall make application to adjudicating authority (NCLT) - Regulation 40 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

On receipt of such application, Adjudicating Authority (NCLT) can grant only one extension up to maximum 90 days - section 12(3) of Insolvency Code, 2016.

If initially 30 days extension was granted, further 60 days extension can be granted - *Brasher Boot Co v. Forward Shoes* (2018) 146 SCL 1- 90 taxmann.com 41 (NCLT).

Such application should be filed before expiry of 180 days. If not so filed, the moratorium will not be extended - *Anshuman Chatruvedi v. IDBI Bank* (2018) 145 SCL 507 = 89 taxmann.com 175 (NCLT).

Mandatory period for completion of CIRP is 330 days even including time of appeal, stay etc. - The corporate insolvency resolution process (CIRP) shall mandatorily be completed within a period of 330 days from the insolvency commencement date, including any extension of the period of corporate insolvency resolution process granted under section 12 of Insolvency Code ***and*** the time taken in legal proceedings in relation to such resolution process of the corporate debtor - second *proviso* to section 12(3) of Insolvency Code, inserted *vide* Insolvency and Bankruptcy Code (Amendment) Act, 2019 to be effective from date to be notified.

Further period of 90 days allowed in case of CIRP pending as on date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019 - Where the insolvency resolution process of a corporate debtor is pending and has not been completed within the period referred to in the second proviso to section 12(3), such resolution process shall be completed within a period of ninety days from the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019 - third *proviso* to section 12(3) of Insolvency Code, inserted *vide* Insolvency and Bankruptcy Code (Amendment) Act, 2019 to be effective from date to be notified.

Period gets extended, if stay was granted by Appellate Tribunal - The statutory period as specified in section 12 gets extended, if stay was granted by Appellate Tribunal - *RBL Bank Ltd. In re* (2018) 147 SCL 393 = 93 taxmann.com 253 (NCLT) [Now, even if stay was granted, the period cannot extend beyond 330 days].

Order of liquidation if process not completed in 330 days - In *ICICI Bank Ltd. v. Innoventive Industries Ltd.* (2018) 145 SCL 463 = 88 taxmann.com 230 (NCLT), the insolvency resolution process of 270 days was over and hence order of liquidation of corporate debtor was made (now upper limit is 330 days)- similar order in *Raman Ispat P Ltd. In re* (2018) 146 SCL 583 = 91 taxmann.com 408 (NCLT) - similar order in *Punjab National Bank v. Ajmer Singh Bhullar* (2018)

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150 SCL 345 = 99 taxmann.com 63 (SC) * *S C Sekaran v. Amit Gupta* (2019) 152 SCL 536 = 103 taxmann.com 222 (NCLAT) * *Namdhari Food International P Ltd. In re* (2019) 153 SCL 155 = 104 taxmann.com 329 (NCLT).

In Hero Steels Ltd. v. Rolex Cycles (P) Ltd. [2018] 146 SCL 302 = 91 taxmann.com 45 (NCLT), no resolution plan was submitted by RP and even extension was not asked for. Hence, liquidation was ordered but with different liquidator/RP.

Resolution applicant can file resolution plan if time period is extended - In *Punjab National Bank v. Bhushan Power* (2018) 147 SCL 475 = 92 taxmann.com 369 (NCLT), Applicant (Liberty House) had filed resolution plan to participate in Corporate Insolvency Resolution Process 30 days before expiry of maximum period provided under section 12, which was extended. Hence, it was held that resolution plan of Applicant (Liberty House) should be considered - affirmed in *Tata Steel v. Liberty House Group Pte Ltd.* (2019) 152 SCL 575 = 102 taxmann.com 103 (NCLAT).

Speed is essence - time limit of 270 days (now 330 days) is mandatory, but Tribunal to take practical view - Speed is essence - time limit of 330 days is mandatory (but tribunal has to take practical view also) - *Arcelormittal India P Ltd. v. Satish Kumar Gupta* (2019) 2 SCC 1 = 150 SCL 354 = 98 taxmann.com 99 (SC).

Delay in taking over by IRP - In *Velamur Varadan Anand v. Union Bank of India* [2018] 94 taxmann.com 58 (NCLAT), Adjudicating Authority admitted application to initiate corporate insolvency resolution process and same was informed to Resolution Professional, but he took over charges after 30 days of admission of such application - This period of 30 days was to be excluded for purpose of counting period of 180 days for completing CIRP [In any case, the period cannot go beyond 330 days including time spent in legal process].

4.2 Moratorium and public announcement

After admission of application, Adjudicating Authority shall pass following orders [section 13(1) of Insolvency Code, 2016].

- (a) declare a moratorium for the purposes referred to in section 14 of Insolvency Code, 2016.
- (b) cause a public announcement of the initiation of corporate insolvency resolution process and call for the submission of claims under section 15 of Insolvency Code, 2016, and
- (c) appoint an interim resolution professional in the manner as laid down in section 16 of Insolvency Code, 2016.

The public announcement referred to above shall be made immediately after the appointment of the interim resolution professional – section 13(2) of Insolvency Code, 2016.

Meaning of Moratorium - A “moratorium” is a delay or suspension of an activity or a law. In a legal context, it may refer to the temporary suspension of a law to allow a legal challenge to be carried out. It is legal authorisation to debtors to delay payments due.

No recovery proceedings after moratorium granted under Insolvency Code - Once NCLT has issued moratorium under section 14 of Insolvency Code in respect of company in liquidation, Bank cannot pursue proceedings under section 19 of RDDBFI Act for recovery of loan - *Sanjeev Shriya v. State Bank of India* (2017) 144 SCL 545 = 87 taxmann.com 309 (All HC).

Financial creditor cannot recover any amount from account of Corporate Debtor after moratorium is declared - *Indian Overseas Bank v. Dinkar T Venkatsubramaniam Resolution Professional for Amtek Auto Ltd.* (2018) 145 SCL 138 = 88 taxmann.com 132 (NCLAT).

Corporate guarantee cannot be invoked after application is admitted and moratorium orders - *Axis Bank Ltd. v. Edu Smart Services P. Ltd.* (2017) 87 taxmann.com 99 (NCLT).

No arbitration proceedings after moratorium - Once petition under Insolvency Code is admitted by NCLT, moratorium comes into effect and arbitration proceedings cannot continue - *Alchemist Asset Reconstruction Co. Ltd. v. Hotel Gaudavan P. Ltd.* (2017) 88 taxmann.com 202 (SC) – followed in *K S Oils v. State Trading Corporation of India* (2018) 146 SCL 588 = 91 taxmann.com 423 (NCLAT).

Electricity connection cannot be cut after moratorium - Section 14(2) of Insolvency Code prevails over section 56 of Electricity Act, since electricity is ‘essential goods’ to corporate debtor. Hence, power supply to corporate debtor cannot be cut during moratorium period - *ABG Shipyard v. ICICI Bank* (2018) 145 SCL 430 = 88 taxmann.com 196 (NCLT) * *Nitin Hasmukhlal Parikh v. Madhya Gujarat Vij Company Ltd.* [2018] 90 taxmann.com 398 (NCLT) * *Citi Bank NA v. Cosmic Ferro Alloys* (2018) 146 SCL 727 = 92 taxmann.com 32 (NCLT).

In *Dakshin Gujarat Vij Co. Ltd. v. Jitendra Kumar Yadav* (2019) 102 taxmann.com 149 (NCLT), it was held that current dues of electricity supply should be paid as insolvency resolution process cost as electricity was essential supply to run business as a going concern. In respect of past dues, the electricity company can lodge claim of electricity charges with Resolution Professional.

Performance guarantees given to customs by corporate debtor can be encashed during moratorium - Performance guarantees given to customs by corporate debtor can be encashed during moratorium, as section 3(31) of Insolvency Code clearly says that performance guarantee are not included in security interest - *Nitin Hasmukhlal Parikh v. Madhya Gujarat Vij Company Ltd.* [2018] 90 taxmann.com 398 (NCLT).

Goods in custody of customs authorities cannot be taken possession by Corporate Debtor during moratorium - Even if moratorium is ordered, goods in customs warehouse in custody of customs authorities cannot be taken possession by Corporate Debtor during moratorium, without clearance from customs authorities (on payment of customs duty due) – *Bharati Defence and Infrastructure Ltd. v. Mannu Carrier*(2018) 147 SCL 43 = 91 taxmann.com 367 (NCLT).

Company cannot file appeal after CIRP is admitted? - In *Shree Ganesh Jewellery House (I) Ltd. v. Abhishek Stock Broking Services (P) Ltd.* [2018] 93 taxmann.com 46 (NCLAT), it was held that Once CIRP (Corporate Insolvency Resolution Process) is admitted and IRP(Interim Resolution Professional) is appointed, appeal by corporate debtor through its suspended Board of Directors was not maintainable [Then the provision of appeal against order would be meaningless].

Writ powers of High Court and Supreme Court not affected by moratorium - A person can approach High Court or Supreme Court under Articles 32 and 226 as Writ powers of High Court and Supreme Court not affected by moratorium - *Power Grid Corporation v. Jyoti Structures* (2018) 145 SCL 449 = 88 taxmann.com 124 (Del HC).

However, if alternate remedy of appeal against order of NCLT are available, writ petition should be dismissed – *SEL Manufacturing Co. v. UOI*– (2018) 147 SCL 426 = 93 taxmann.com 103 (P&H HC DB).

4.2-1 Order declaring Moratorium

On the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following [section 14(1) of Insolvency Code, 2016]

- (a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, Tribunal, arbitration panel or other authority.
- (b) transferring, encumbering, alienating or disposing of by the corporate debtor 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 corporate debtor 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 less or where such property is occupied by or in the possession of the corporate debtor.

Provision of moratorium not applicable to notified transactions – The provisions of section 14(1) of Insolvency Code shall not apply to such transaction as may be notified by the Central Government in consultation

with any financial regulator – section 14(3)(a) of Insolvency Code inserted w.e.f. 6-6-2018.

At present (as on July 2019), no transaction has been notified for this purpose. This is only an enabling provision to avoid possible misuse of provision of moratorium.

Provision of moratorium not applicable to guarantor - The provisions of section 14(1) of Insolvency Code shall not apply to a surety in a contract of guarantee to a corporate debtor – section 14(3)(b) of Insolvency Code inserted w.e.f. 6-6-2018.

Thus, recovery proceedings, insolvency resolution process or bankruptcy proceedings against surety (guarantor) can be initiated even if moratorium is granted to corporate debtor.

No moratorium on essential supplies - The supply of essential goods or services to the corporate debtor as may be specified under Regulations shall not be terminated or suspended or interrupted during moratorium period – section 14(2) of Insolvency Code, 2016.

Essential supplies have been defined in regulation 32 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. These cover electricity, water, telecommunication services and information technology services.

In *Innoventive Industries v. Maharashtra State Electricity Distribution Co.* (2017) 144 SCL 446 = 87 taxmann.com 59 (NCLAT), the Appellate Tribunal allowed the resolution professional to pay electricity dues for period during moratorium and asked electricity company to restore electricity within 49 hours. However, it was made clear that dues prior to period of moratorium can be considered only at the time of payment of dues to creditors (resolution plan).

Provision of moratorium not applicable to criminal proceedings - Provision of moratorium not applicable to criminal proceedings. Thus, there is no moratorium on action under section 138 of Negotiable Instruments Act for dishonour of cheque - *Shah Bro. Ispat v. B Mohanraj* (2018) (NCLAT) * *Tayal Cotton v. State of Maharashtra* (2018) 149 SCL 453 = 97 taxmann.com 12 (Bom HC).

Property - “Property” includes money, goods, actionable claims, land and every description of property situated in India or outside India and every description of interest including present or future or vested or contingent interest arising out of, or incidental to, property - section 3(17) of Insolvency Code, 2016.

Duration of order of moratorium - The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process. However, if resolution plan is approved under section 31(1) or order of liquidation or corporate debtor is passed, the moratorium shall cease to have effect from the date of such approval or liquidation order - section 14(4) of Insolvency Code, 2016.

Para 4.2 CONDUCTING CORPORATE INSOLVENCY RESOLUTION PROCESS **1.80**

As per section 12(1) of Insolvency Code, 2016, the process of resolution is required to be completed within 180 days from date of application by NCLT to initiate the corporate insolvency process.

Section 12(2) of Insolvency Code, 2016 provides that this period of 180 days can be extended if resolution professional files application to Adjudicating Authority, if instructed by resolution passed at a meeting of the Committee of Creditors (CoC) by a vote of 66% of the voting shares [till 6-6-2018, 75% voting was required].

Such application should be filed before expiry of 180 days. If not so filed, the moratorium will not be extended – *Anshuman Chatruvedi v. IDBI Bank* (2018) 145 SCL 507 = 89 taxmann.com 175 (NCLT).

Powers of NCLT during insolvency resolution of Corporate Persons - The National Company Law Tribunal shall have jurisdiction to entertain or dispose of following applications and claims while exercising jurisdiction. These are overriding provision, even if contrary to any other law – section 60(5) of Insolvency Code, 2016.

- (a) any application or proceeding by or against the corporate debtor or corporate person;
- (b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and
- (c) 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 corporate debtor or corporate person under this Code.

Period of moratorium excluded for purpose of limitation - In computing the period of limitation specified for any suit or application by or against a corporate debtor for which an order of moratorium has been made under this Part, the period during which such moratorium is in place shall be excluded. This provision overrides provision of Limitation Act or any other law - section 60(6) of Insolvency Code, 2016.

Insolvency commencement date - “Insolvency commencement date” means the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under section 7, 9 or section 10 of Insolvency Code, 2016, as the case may be - Section 5(12) of Insolvency Code, 2016.

However, if the IRP (Interim Resolution Professional) has not been appointed in the order admitting application under section 7, 9 or 10, the insolvency commencement date shall be the date on which such interim resolution professional is appointed by the Adjudicating Authority – proviso to section 5(12) of Insolvency Code inserted w.e.f. 6-6-2018.

Moratorium under Insolvency Code applies to actions under SARFAESI Act - Moratorium ordered by NCLT under Insolvency Code applies to actions under SARFAESI Act also. Hence, if any action on enforcement of security interest

created by Corporate Debtor is pending, that has to be suspended during moratorium period - *J M Financial Asset Reconstruction Co. v. Indus Finance Ltd.* (2017) 144 SCL 426 = 87 taxmann.com 66 (NCLT).

4.2-2 No moratorium on property of surety (guarantor)

On admission of application for insolvency resolution, moratorium is granted to corporate debtor under section 14 of Insolvency Code. There were conflicting judgments of NCLT and NCLAT whether the moratorium applies to guarantors or corporate debtor also.

Now, it is made clear that the moratorium will *not* apply to surety (guarantors) of Corporate Debtors – section 14(3)(b) of Insolvency Code inserted w.e.f. 6-6-2018.

In *State Bank of India v. V. Ramakrishnan* [2018] 149 SCL 107 = 96 taxmann.com 271 (SC), it was held that this amendment is clarificatory in nature and has retrospective effect.

Thus, recovery proceedings, insolvency resolution process or bankruptcy proceedings against surety (guarantor) can be initiated even if moratorium is granted to corporate debtor.

Even for earlier period, it has been held that moratorium for limited period mentioned in Code, on admission of an insolvency petition, would not apply to a personal guarantor of a corporate debtor - *State Bank of India v. V. Ramakrishnan* [2018] 149 SCL 107 = 96 taxmann.com 271 (SC).

However, in case of personal guarantors of corporate debtors, recovery action has to be under either Presidency Towns Insolvency Act or Provincial Insolvency Act and not under Insolvency Code (as part III of Insolvency Code which applies to individuals has not yet been notified) – *L&T Infrastructure Finance Co. Ltd. v. Dineshchand Surana* (2018) 150 SCL 670 = 100 taxmann.com 87 (NCLT) [In my view, this decision applies to individual guarantors *other than* directors of the corporate debtor].

Insolvency Resolution Plan binding on guarantors also - The Insolvency Plan once approved is bonding on company, employees, debtors and also on guarantors - *State Bank of India v. V. Ramakrishnan* [2018] 91 taxmann.com 68 (NCLAT)

4.3 Public announcement of corporate insolvency resolution process

The public announcement of the corporate insolvency resolution process under the order referred to in section 13 of Insolvency Code shall contain the following information, namely:—

- (a) name and address of the corporate debtor under the corporate insolvency resolution process;
- (b) name of the authority with which the corporate debtor is incorporated or registered;

- (c) the last date for submission of claims, *as may be specified*; [the words in italics inserted w.e.f. 6-6-2018]
- (d) details of the interim resolution professional who shall be vested with the management of the corporate debtor and be responsible for receiving claims;
- (e) penalties for false or misleading claims; and
- (f) the date on which the corporate insolvency resolution process shall close, which shall be the one hundred and eightieth day from the date of the admission of the application under sections 7, 9 or section 10, as the case may be – section 15(1) of Insolvency Code.

Manner of public announcement - The public announcement will be made in manner prescribed – section 15(2) of Insolvency Code.

The requirements of public announcement are specified in Regulation 6 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. The public announcement shall be in form A as specified in IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

It should be published in one English and one regional language newspaper. It should also be put on website of corporate debtor and Board (IBBI).

IBBI has designated the website www.ibbi.gov.in for this purpose. The details of the manner of publishing the public announcement on the designated website are described in IBBI circular No. IP(CIRP)/006/2018 dated 23-2-2018.

The information shall be sent in pdf form to IBBI on public.ann@ibbi.gov.in by the Resolution Professional. This will be published by IBBI on designated website.

4.4 Appointment and tenure of interim resolution professional

The Adjudicating Authority (NCLT) shall appoint an interim resolution professional within fourteen days from the insolvency commencement date - section 16(1) of Insolvency Code, 2016.

'Specified' means specified by IBBI by making regulations – section 3(32) of Insolvency Code, 2016.

His appointment shall continue till the date of appointment of the resolution professional under section 22 of Insolvency Code – section 16(5) of Insolvency Code, 2016 as amended w.e.f. 6-6-2018 [Till 6-6-2018, his appoint could not be for more than 30 days, which was creating many practical difficulties].

Interim Resolution Professional can continue beyond 30 days if corporate debtor and financial creditors (Banks) do not cooperate - In *Anil Kumar v. Rolex Cycles P Ltd.* (2017) 86 taxmann.com 33 (NCLT), the interim resolution professional tried to take possession of premises and accounts of Corporate Debtor but he did not cooperate. Even Banks did not cooperate and did not hold meeting of Committee of Creditors (CoC) as required. All the machinery

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and material was removed from the plant. In such situation, it was held that Interim Resolution Professional can continue beyond 30 days if corporate debtor and financial creditors (Banks) do not cooperate. Notices were issued to Chief Managers of Banks and to Director of Corporate Debtor to personally appear before Tribunal.

4.4-1 Management of affairs of corporate debtor by interim resolution professional

From the date of appointment of the interim resolution professional, the management of the affairs of the corporate debtor shall vest in the interim resolution professional.

The powers of the Board (IBBI) of directors or the partners of the corporate debtor, as the case may be, shall stand suspended and be exercised by the interim resolution professional.

The officers and managers of the corporate debtor shall report to the interim resolution professional and provide access to such documents and records of the corporate debtor as may be required by the interim resolution professional.

The financial institutions maintaining accounts of the corporate debtor shall act on the instructions of the interim resolution professional in relation to such accounts and furnish all information relating to the corporate debtor available with them to the interim resolution professional [section 17(1) of Insolvency Code, 2016.]

4.4-2 Authority of interim resolution professional

The interim resolution professional vested with the management of the corporate debtor shall have all the powers of management as specified in section 17(2) of Insolvency Code, 2016. These powers are as follows :-

- (a) He can act and execute in the name and on behalf of the corporate debtor all deeds, receipts, and other documents, if any.
- (b) He can take such actions, in the manner and subject to such restrictions, as may be specified by the Board (IBBI).
- (c) He has the authority to access the electronic records of corporate debtor from information utility having financial information of the corporate debtor.
- (d) He has the authority to access the books of account, records and other relevant documents of corporate debtor available with government authorities, statutory auditors, accountants and such other persons as may be specified.
- (e) *He will be responsible for complying with the requirements under any law for the time being in force on behalf of the corporate debtor* – section 17(2)(e) of Insolvency Code – words in italics inserted w.e.f. 6-6-2018.

4.4-3 Duties of interim resolution professional

The interim resolution professional shall perform the following duties - section 18(1) of Insolvency Code, 2016.

- (a) collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor, including information relating to—(i) business operations for the previous two years (ii) financial and operational payments for the previous two years (iii) list of assets and liabilities as on the initiation date; and (iv) such other matters as may be specified.
- (b) receive and collate all the claims submitted by creditors to him, pursuant to the public announcement made under sections 13 and 15 of Insolvency Code.
- (c) constitute a committee of creditors.
- (d) monitor the assets of the corporate debtor and manage its operations until a resolution professional is appointed by the committee of creditors.
- (e) file information collected with the information utility, if necessary.
- (f) take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets and
- (g) perform such other duties as may be specified by the Board (IBBI).

Meaning of 'assets' for purpose of section 18 - For the purposes of section 18, the term “assets” shall not include the following, namely - (a) assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment (b) assets of any Indian or foreign subsidiary of the corporate debtor; and (c) such other assets as may be notified by the Central Government in consultation with any financial sector regulator.

Creditor - “Creditor” means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder - section 3(10) of Insolvency Code, 2016.

IRP can ask for information even prior to two years - Section 18(1) of Insolvency Code requires that IRP should collect information for last two years. In *Oasis Agro Infra, In re* (2018) 148 SCL 32 = 84 taxmann.com 28 (NCLT), it has been held that he cannot ask for information prior to two years. Even otherwise, as per section 19 of Insolvency Code, the RP has to complete resolution process expeditiously, the information for period prior to two years cannot be denied.

IRP cannot remove tenant himself for non-payment of rent, but can apply to appropriate forum - IRP cannot remove tenant himself for non-payment of rent. However, he can move appropriate forum for possession of assets of

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corporate debtor. He can collect rent from tenants – *Devendra Padmachand Jain v. Sandhya Prakash* (2018) 148 SCL 243 = 94 taxmann.com 236 (NCLAT).

4.4-4 Personnel to extend cooperation to interim resolution professional

The personnel of the corporate debtor, its promoters or any other person associated with the management of the corporate debtor shall extend all assistance and cooperation to the interim resolution professional as may be required by him in managing the affairs of the corporate debtor - section 19(1) of Insolvency Code, 2016.

If they do not cooperate, application can be made by interim resolution professional to the Adjudicating Authority (NCLT) for necessary directions. NCLT will issue suitable orders - section 19(3) of Insolvency Code, 2016.

4.4-5 Management of operations of corporate debtor as going concern

The interim resolution professional shall make every endeavour to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern [section 20(1) of Insolvency Code, 2016].

For this purpose, he can take any of the actions specified in section 20(2) of Insolvency Code, 2016. This includes appointments of professionals, entering into contracts, raise interim finance etc.

“Interim finance” means any financial debt raised by the resolution professional during the insolvency resolution process period - Section 5(15) of Insolvency Code, 2016.

4.5 Submission of proof of claims to interim resolution professional

Proof of claims shall be submitted to interim resolution professional as follows—

- (a) Operational Creditor - Operational Creditor shall submit proof of claims in form B as contained in IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, with details specified in Regulation 7.
- (b) Financial Creditor - Financial Creditor shall submit proof of claims in form C as contained in IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, with details specified in Regulation 8.
- (c) Workmen and employees - Workmen and employees shall submit proof of claims in form D as contained in IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, with details specified in Regulation 9.

The claim should contain declaration in specified form and verified [Affidavit not required w.e.f. 27-3-2018 - ease of doing business].

The claim can be filed by Trade Union on behalf of workmen.

(d) Other Creditors - Creditors (other than above) shall submit proof of claim in form F with details specified in Regulation 9A.

Claim should be as on date of commencement of resolution proceedings -

The claim should be as on date of commencement of resolution proceedings. In *Axis Bank Ltd. v. Edu Smart Services P. Ltd.* (2017) 87 taxmann.com 99 (NCLT), insolvency resolution proceedings commenced on 27-6-2017 and order of moratorium was passed. Appellant Bank had given guarantee to corporate debtor and Bank issued notice to corporate debtor on 21-7-2017 asking for payment of amount guaranteed. The Insolvency Professional refused to accept the claim. It was held that since this claim was not existing on 27-6-2017, it cannot be accepted.

Consolidated proof of claim - An authorized representative of workmen and employees may submit a consolidated proof of claim for all such dues in form E as contained in IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

4.5-1 Substantiation of claims

Provisions are contained in regulations 10 to 15 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

The proofs should be submitted before last date as specified in public announcement. However, it can be submitted later anytime before approval of resolution plan by the Committee.

The interim resolution of professional shall verify claims and make list of creditors. Debts in foreign currency shall be valued in Indian currency at official rate notified by RBI.

Cost of proof shall be on creditor of proving debt due to him - Regulation 11 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

4.6 Committee of Creditors (CoC)

The interim resolution professional shall after collation of all claims received against the corporate debtor and determination of the financial position of the corporate debtor, constitute a Committee of Creditors (CoC) – section 21(1) of Insolvency Code, 2016.

Formation of Committee and Submission of report to NCLT within 37 days

– The interim resolution professional shall submit report certifying constitution of committee within 30 days and report of first meeting of committee within further seven days - Regulation 17 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

All financial creditors to be members of CoC - The Committee of Creditors (CoC) shall comprise all financial creditors of the corporate debtor.

“Financial creditor” means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to - Section 5(7) of Insolvency Code, 2016.

No voting power if financial creditor is related party - *Financial creditor or the authorised representative of the financial creditor referred to in section 21(6), 21(6A) or 24(5), if it is a related party of the corporate debtor, shall not have any right of representation, participation or voting in a meeting of the Committee of Creditors (CoC) – first proviso to section 21(2) of Insolvency Code. The words in italics have been substituted w.e.f. 6-6-2018 [Till 6-6-2018, the words in italics were – ‘related party to whom a corporate debtor owes a financial debt’]*

The first *proviso* to section 21(2) shall not apply to a financial creditor, regulated by a financial sector regulator, if it is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares, prior to the insolvency commencement date second *proviso* to section 21(2) of Insolvency Code inserted w.e.f. 6-6-2018.

All members of consortium will be members of CoC – *Subject to section 21(6) and 21(5A) of Insolvency Code, where the corporate debtor owes financial debts to two or more financial creditors as part of a consortium or agreement, each such financial creditor shall be part of the Committee of Creditors (CoC) and their voting share shall be determined on the basis of the financial debts owed to them – section 21(3) of Insolvency Code [words in italics inserted w.e.f. 6-6-2018].*

If a person is both financial creditor and operational creditor – Where any person is a financial creditor as well as an operational creditor – (a) such person shall be a financial creditor to the extent of the financial debt owed by the corporate debtor, and shall be included in the committee of creditors, with voting share proportionate to the extent of financial debts owed to such creditor (b) such person shall be considered to be an operational creditor to the extent of the operational debt owed by the corporate debtor to such creditor – section 21(4) of Insolvency Code.

If operational debt has been assigned to financial creditor - Where an operational creditor has assigned or legally transferred any operational debt to a financial creditor, the assignee or transferee shall be considered as an operational creditor to the extent of such assignment or legal transfer – section 21(5) of Insolvency Code.

If there is single trustee or agent for consortium - Where the terms of the financial debt extended as part of a consortium arrangement or syndicated facility provide for a single trustee or agent to act for all financial creditors, each financial creditor may—

- (a) authorise the trustee or agent to act on his behalf in the committee of creditors to the extent of his voting share;

- (b) represent himself in the committee of creditors to the extent of his voting share;
- (c) appoint an insolvency professional (other than the resolution professional) at his own cost to represent himself in the committee of creditors to the extent of his voting share; or
- (d) exercise his right to vote to the extent of his voting share with one or more financial creditors jointly or severally – section 21(6) of Insolvency Code as amended on 6-6-2018.

Trustee or authorized representative can attend meeting and vote where debt is in form of securities - Where a financial debt—(a) is in the form of securities or deposits and the terms of the financial debt provide for appointment of a trustee or agent to act as authorised representative for all the financial creditors, such trustee or agent shall act on behalf of such financial creditors (b) is owed to a class of creditors exceeding the number as may be specified, other than the creditors covered under clause (a) or section 21(6), the interim resolution professional shall make an application to the Adjudicating Authority along with the list of all financial creditors, containing the name of an insolvency professional, other than the interim resolution professional, to act as their authorised representative who shall be appointed by the Adjudicating Authority prior to the first meeting of the committee of creditors (c) is represented by a guardian, executor or administrator, such person shall act as authorised representative on behalf of such financial creditors, and such authorised representative under clause (a) or clause (b) or clause (c) shall attend the meetings of the committee of creditors, and vote on behalf of each financial creditor to the extent of his voting share – section 21(6A) of Insolvency Code as inserted w.e.f. 6-6-2018.

Remuneration to Authorised Representative - The remuneration payable to the authorised representative—(i) under clauses (a) and (c) of section 21(6A), if any, shall be as per the terms of the financial debt or the relevant documentation; and (ii) under clause (b) of section 21(6A) shall be as specified which shall *form part of the Insolvency Resolution Process Costs* – section 21(6B) of Insolvency Code as inserted w.e.f. 6-6-2018 [The words in italics changed while converting Ordinance into Act].

Manner and determination of voting power - IBBI may specify the manner of voting and the determining of the voting share in respect of financial debts covered under section 21(6) and 21(6A) – section 21(7) of Insolvency Code as amended w.e.f. 6-6-2018.

If there are no financial creditors - Where a corporate debtor does not have any financial creditors, the committee of creditors shall be constituted and shall comprise of such persons to exercise such functions in such manner as may be specified – proviso to section 21(8) of Insolvency Code.

If there is only one financial creditor and no operational creditor, Committee of Creditors (CoC) will be constituted by Board (IBBI) and not by resolution

professional – *Kailash T Shah, RP v. Pooja Tax-Prints* (2018) 145 SCL 149 = 88 taxmann.com 144 (NCLT).

If all financial creditors are related parties of corporate debtor - If all financial creditors are related parties of corporate debtor, the committee shall be appointed as specified in Regulation 16 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

Voting share of creditors - Committee of Creditors (CoC) which is based on the proportion of the financial debt owed to such financial creditor in relation to the financial debt owed by the corporate debtor - Section 5(28) of Insolvency Code, 2016.

Passing of resolution by majority but with 66% voting in specified cases - Save as otherwise provided in Insolvency Code, all decisions of the Committee of Creditors (CoC) shall be taken by a vote of not less than *fifty one* per cent of voting share of the financial creditors – section 21(8) of Insolvency Code, 2016 as amended w.e.f. 6-6-2018.

The words in italics are inserted w.e.f. 6-6-2018. Earlier, the voting required was 75% in all cases. Now, voting by more than 50% voting powers is sufficient, except where the Insolvency Code required 66% voting.

Rights of CoC to call for information from RP - The Committee of Creditors (CoC) shall have the right to require the resolution professional to furnish any financial information in relation to the corporate debtor at any time during the corporate insolvency resolution process – section 21(9) of Insolvency Code, 2016.

The resolution professional shall make available any financial information so required by the Committee of Creditors (CoC) within a period of seven days of such requisition – section 21(10) of Insolvency Code, 2016.

4.6-1 Rights and duties of authorised representative of financial creditors

The authorised representative under section 21(6) or 21(6A) or 24(5) shall have the right to participate and vote in meetings of the committee of creditors on behalf of the financial creditor he represents in accordance with the prior voting instructions of such creditors obtained through physical or electronic means – section 25A(1) of Insolvency Code, 2016 inserted w.e.f. 6-6-2018.

It shall be the duty of the authorised representative to circulate the agenda and minutes of the meeting of the committee of creditors to the financial creditor he represents – section 25A(2) of Insolvency Code, 2016 inserted w.e.f. 6-6-2018.

The authorised representative shall not act against the interest of the financial creditor he represents and shall always act in accordance with their prior instructions – section 25A(3) of Insolvency Code, 2016 inserted w.e.f. 6-6-2018.

If the authorised representative represents several financial creditors, then he shall cast his vote in respect of each financial creditor in accordance with

instructions received from each financial creditor, to the extent of his voting share – first *proviso* to section 25A(3) of Insolvency Code, 2016 inserted w.e.f. 6-6-2018.

If any financial creditor does not give prior instructions through physical or electronic means, the authorised representative shall abstain from voting on behalf of such creditor – second *proviso* to section 25A(3) of Insolvency Code, 2016 inserted w.e.f. 6-6-2018.

The authorised representative shall file with the committee of creditors any instructions received by way of physical or electronic means, from the financial creditor he represents, for voting in accordance therewith, to ensure that the appropriate voting instructions of the financial creditor he represents is correctly recorded by the interim resolution professional or resolution professional, as the case may be – section 25A(4) of Insolvency Code, 2016 inserted w.e.f. 6-6-2018.

For the purposes of section 25A of Insolvency Code, the “electronic means” shall be such as may be specified – *Explanation* to section 25A of Insolvency Code, 2016 inserted w.e.f. 6-6-2018.

Voting by authorised representative when financial creditors give conflicting instructions - It is possible that different financial creditors may give different instructions. In that case, the authorised representative is required to follow instructions of each financial creditor, as per first proviso to section 25A(3) of Insolvency Code.

Now, it is provided *vide* section 25A(3A) of Insolvency and Bankruptcy Code (Amendment) Act, 2019 to be effective from date to be notified, that the authorised representative shall cast all votes in accordance with decision taken by vote of more than 51% of voting shares, (except voting under section 12A for withdrawal of application for CIRP admitted by adjudicating authority). For example, if 52% of financial creditors give instructions in favour of resolution and 48% against, his entire 100% voting will be in favour of resolution.

However, in case of voting under section 12A of Insolvency Code (for withdrawal of application for CIRP admitted by adjudicating authority), the voting of authorised representative will be in ratio of 52:48.

The statutory wording is as follows.

Notwithstanding anything to the contrary contained in section 25A(3) of Insolvency Code, the authorised representative under section 21(6A) of Insolvency Code shall cast his vote on behalf of all the financial creditors he represents in accordance with the decision taken by a vote of more than fifty per cent of the voting share of the financial creditors he represents, who have cast their vote - Section 25A(3A) of Insolvency Code inserted *vide* Insolvency and Bankruptcy Code (Amendment) Act, 2019 to be effective from date to be notified.

However, for a vote to be cast in respect of an application under section 12A of Insolvency Code (withdrawal of application for CIRP admitted by Adjudicating

Authority), the authorised representative shall cast his vote in accordance with the provisions of section 12(3) of Insolvency Code - *proviso* to section 25A(3A) of Insolvency Code inserted *vide* Insolvency and Bankruptcy Code (Amendment) Act, 2019 to be effective from date to be notified.

4.6-2 Related Party in case of corporate debtor

Definition of 'related party' is relevant in following provisions of Insolvency code.

- ◆ Related party to whom a corporate debtor owes a financial debt shall not have any right of representation, participation or voting in a meeting of the Committee of Creditors (CoC), as per first *proviso* to section 21(2) of Insolvency Code.
- ◆ In case of related party transactions, resolution professional can enter into transaction only with prior approval of Committee of Creditors (CoC), with 66% voting in favour [section 28(1) read with section 28(3) of Insolvency Code, 2016].
- ◆ The definition of 'related party' is relevant to determine ineligible resolution application under section 29A of Insolvency Code.
- ◆ The definition is relevant in case of preferential transactions under section 43 of Insolvency Code and avoidance of undervalued transaction under section 46 of Insolvency Code.

The definition 'related party in relation to corporate debtor' is defined in section 24 of Insolvency Code. Definition relating to Related party in relation to an individual is defined in section 24 of Insolvency Code.

Related party in relation to corporate debtor - The definition in section 5(24) of Insolvency Code, 2016 is very wide. It covers director, partners, LLP or firm having even one common partner or director, relative of director or partner, KMP, private company where a director holds more than 2% of share capital, holding and subsidiary, person controlling more than 20% of voting rights, company having more than two directors common and even person on whose advise or directions a director or partner is accustomed to act.

"Related party", in relation to a corporate debtor, means any of the following - Section 5(24) of Insolvency Code, 2016.

- (a) a director or partner of the corporate debtor or a relative of a director or partner of the corporate debtor.
- (b) a key managerial personnel of the corporate debtor or a relative of a key managerial personnel of the corporate debtor.
- (c) a limited liability partnership or a partnership firm in which a director, partner, or manager of the corporate debtor or his relative is a partner.
- (d) a private company in which a director, partner or manager of the corporate debtor is a director and holds along with his relatives, more than two per cent of its share capital.

- (e) a public company in which a director, partner or manager of the corporate debtor is a director and holds along with relatives, more than two per cent of its paid-up share capital.
- (f) anybody corporate whose board of directors, managing director or manager, in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor.
- (g) any limited liability partnership or a partnership firm whose partners or employees in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor.
- (h) any person on whose advice, directions or instructions, a director, partner or manager of the corporate debtor is accustomed to act.
- (i) a body corporate which is a holding, subsidiary or an associate company of the corporate debtor, or a subsidiary of a holding company to which the corporate debtor is a subsidiary.
- (j) any person who controls more than twenty per cent of voting rights in the corporate debtor on account of ownership or a voting agreement.
- (k) any person in whom the corporate debtor controls more than twenty per cent of voting rights on account of ownership or a voting agreement.
- (l) any person who can control the composition of the board of directors or corresponding governing body of the corporate debtor.
- (m) any person who is associated with the corporate debtor on account of—
 - (i) participation in policy making processes of the corporate debtor; or
 - (ii) having more than two directors in common between the corporate debtor and such person; or
 - (iii) interchange of managerial personnel between the corporate debtor and such person; or
 - (iv) provision of essential technical information to, or from, the corporate debtor.

‘Related party’ in relation to an individual - “Related party”, in relation to an individual, means— (a) a person who is a relative of the individual or a relative of the spouse of the individual (b) a partner of a limited liability partnership, or a limited liability partnership or a partnership firm, in which the individual is a partner (c) a person who is a trustee of a trust in which the beneficiary of the trust includes the individual, or the terms of the trust confers a power on the trustee which may be exercised for the benefit of the individual (d) a private company in which the individual is a director and holds along with his relatives, more than two per cent, of its share capital (e) a public company in which the individual is a director and holds along with relatives, more than two per cent, of its paid-up share capital (f) a body corporate whose board of directors, managing director or manager, in the ordinary course of business, acts on the advice, directions or instructions of the individual (g) a limited liability partnership or a partnership firm whose partners or employees in the ordinary course of business, act on the advice, directions or instructions

of the individual (h) a person on whose advice, directions or instructions, the individual is accustomed to act (i) a company, where the individual or the individual along with its related party, own more than fifty per cent, of the share capital of the company or controls the appointment of the board of directors of the company.

Explanation.—For the purposes of this clause—

- (a) “relative”, with reference to any person, means anyone who is related to another, in the following manner, namely—(i) members of a Hindu Undivided Family (ii) husband (iii) wife (iv) father (v) mother (vi) son (vii) daughter (viii) son’s daughter and son (ix) daughter’s daughter and son (x) grandson’s daughter and son (xi) granddaughter’s daughter and son (xii) brother (xiii) sister (xiv) brother’s son and daughter (xv) sister’s son and daughter (xvi) father’s father and mother (xvii) mother’s father and mother (xviii) father’s brother and sister (xix) mother’s brother and sister; and
- (b) wherever the relation is that of a son, daughter, sister or brother, their spouses shall also be included - Section 5(24A) of Insolvency Code, 2016 inserted w.e.f. 6-6-2018.

4.7 Appointment of resolution professional in first meeting of CoC

The first meeting of the Committee of Creditors (CoC) shall be held within seven days of the constitution of the Committee of Creditors (CoC) – section 22(1) of Insolvency Code, 2016.

Notice of such meeting will be given to (a) members of Committee of Creditors (CoC), *including the authorised representatives referred to in section 21(6) and 21(6A) and section 24(5)* (b) members of the suspended Board of Directors or the partners of the corporate persons, as the case may be (c) operational creditors or their representatives if the amount of their aggregate dues is not less than ten per cent of the debt– section 24(3) of Insolvency Code, 2016. The words in italics have been substituted w.e.f. 6-6-2018.

See Division 2 for text of Insolvency Code.

The Committee of Creditors (CoC), may, in the first meeting, by a majority vote of not less than *sixty six* per cent of the voting share of the financial creditors, either resolve to appoint the interim resolution professional as a resolution professional or to replace the interim resolution professional by another resolution professional – section 22(2) of Insolvency Code, 2016 as amended w.e.f. 6-6-2018 [Till 6-6-2018, voting required was 75% of voting shares].

If they decide to continue interim resolution professional, *subject to a written consent from the interim resolution professional in the specified form* they will inform its decision to the interim resolution professional, the corporate debtor and the Adjudicating Authority [section 22(3)(a) of Insolvency Code,

2016. The words in italics have been inserted w.e.f. 6-6-2018]. [What happens if the interim resolution professional does not give consent?]

However, if they decide to replace the interim resolution professional, the CoC shall file application before the Adjudicating Authority for the appointment of Resolution Professional, *along with a written consent from the proposed resolution professional in the specified form* - [section 22(3)(b) of Insolvency Code, 2016. The words in italics have been inserted w.e.f. 6-6-2018].

The Adjudicating Authority (NCLT) shall inform name of proposed new Resolution Professional to IBBI. The resolution professional can be appointed only with approval of Board (IBBI). Till then, the interim resolution professional will continue – section 22(5) of Insolvency Code, 2016.

Now, IBBI has devised a system of preparing panel of Resolution Professionals (RP). The Adjudicating Authority (NCLT) can choose any one of RP from the panel.

Procedure for meeting of Committee of Creditors – Provisions relating to notice of meeting of Committee, service of notice, contents of notice, meeting by video conferencing and conduct of meeting of CoC have been specified in Regulation 18 to Regulation 24 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (as amended on 5-10-2018).

See Division 4 for text of Regulations.

Duty of IRP if another Resolution Professional is appointed - If another resolution professional is appointed as per section 22(4) of Insolvency Code, 2016, the interim resolution professional shall provide all the information, documents and records pertaining to the corporate debtor in his possession and knowledge to the resolution professional – section 23(3) of Insolvency Code, 2016.

Resolution Professional has no adjudicatory powers to decide claims - Resolution Professional has no adjudicatory powers to decide claims. He only has to collate and verify claims and place before CoC – *Reliance Industries v. Satish Kumar Gupta* (2019) 152 CSL 637 = 103 taxmann.com 371 (NCLT).

4.7-1 Resolution professional to conduct corporate insolvency resolution process

The resolution professional shall conduct the entire corporate insolvency resolution process and manage the operations of the corporate debtor during the corporate insolvency resolution process period - section 23(1) of Insolvency Code, 2016.

If the resolution plan under section 30(6) has been submitted, the resolution professional shall continue to manage the operations of the corporate debtor after the expiry of the corporate insolvency resolution process period until an order is passed by the Adjudicating Authority under section 31 of Insolvency

Code (approval of resolution plan) – *proviso* to section 23(1) of Insolvency Code, 2016 inserted w.e.f. 6-6-2018.

This is to ensure that the RP keeps the unit as a going concern till resolution plan is approved by Adjudicating Authority (NCLT).

The resolution professional shall exercise powers and perform duties as are vested or conferred on the interim resolution professional - section 23(2) of Insolvency Code, 2016.

4.8 Powers and functions of Committee of Creditors (CoC)

CoC (Committee of Creditors) is the kingpin in the Corporate Insolvency Resolution Process. It has vast powers in case of CIRP.

The resolution plan cannot be presented to NCLT for approval unless it is cleared in the meeting of CoC.

CoC can decide any time (before confirmation of resolution plan by NCLT) that the corporate debtor cannot be continued as a going concern and should be liquidated - *Explanation* to section 33(2) of Insolvency Code inserted vide Insolvency and Bankruptcy Code (Amendment) Act, 2019 to be effective from date to be notified.

4.8-1 Meeting of Committee of Creditors

The members of the committee of (financial) creditors may meet in person or by such electronic means as may be specified - section 24(2) of Insolvency Code, 2016.

All meetings of the committee of creditors shall be conducted by the resolution professional - section 24(3) of Insolvency Code, 2016.

Notice of such meeting will be given to (a) members of Committee of Creditors (CoC), *including the authorised representatives referred to in section 21(6) and 21(6A) and section 24(5)(b)* members of the suspended Board of Directors or the partners of the corporate persons, as the case may be (c) operational creditors or their representatives if the amount of their aggregate dues is not less than ten per cent of the debt – section 24(3) of Insolvency Code, 2016. The words in italics have been substituted w.e.f. 6-6-2018.

The directors, partners and one representative of operational creditors, as referred above, may attend the meetings of Committee of Creditors (CoC), but shall not have any right to vote in such meetings – section 24(4) of Insolvency Code, 2016.

Since erstwhile Directors can attend the meeting of CoC, they should be given copy of resolution plan, as they are virtually interested in resolution plan. They can participate in discussions though cannot vote – *Vijay Kumar Jain v. Standard Chartered Bank* (2019) 152 SCL 56 = 102 taxmann.com 14 (SC).

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Subject to sub-section 21(6), 21(6A) and 21(6B) of Insolvency Code, any creditor who is a member of the Committee of Creditors (CoC) may appoint an insolvency professional other than the resolution professional to represent such creditor in a meeting of the Committee of Creditors (CoC). The fees payable to such insolvency professional representing any individual creditor will be borne by such creditor – section 24(5) of Insolvency Code, 2016. The words in italics have been substituted w.e.f. 6-6-2018.

Section 21(6), 21(6A) and 21(6B) make provisions for appointment of trustee or authorised representative of financial creditors as member of CoC.

Each creditor shall vote in accordance with the voting share assigned to him based on the financial debts owed to such creditor - section 24(6) of Insolvency Code, 2016.

The resolution professional shall determine the voting share to be assigned to each creditor in the manner specified by the Board (IBBI) - section 24(7) of Insolvency Code, 2016.

The meetings of the committee of creditors shall be conducted in such manner as may be specified.

Any resolution at meeting of secured creditors should be passed with 51% majority (except where 66% majority is prescribed).

If 75% majority (now 66% or 51% as applicable) is not achieved for appointment of Insolvency Professional, preference should be given to voting by largest shareholders – *Raj Oil Mills Ltd., In re* (2017) 144 SCL 114 = 86 taxmann.com 145 (NCLT) [really doubtful, as then provisions of voting power become meaningless].

Procedure for meeting of Committee of Creditors – Provisions relating to notice of meeting of Committee, service of notice, contents of notice, meeting by video conferencing and conduct of meeting of CoC have been specified in Regulation 18 to Regulation 24 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (as amended on 5-10-2018).

Notice of meeting should indicate that meeting of CoC should be attended by those who are competent and authorised - Notice of CoC meeting should indicate that meeting should be attended by those who are competent and authorised to take decisions on the spot – IBBI circular No. IBBI/CIRP/016/2018 dated 10-8-2018.

4.8-2 Voting rights of creditors in meeting

Voting rights of each financial creditor will be in proportion to debt due to each creditor to 'total debt'.

Total debt will be equal to debts due to creditors, workmen and employees, as defined in Regulation 16(3) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

The voting will be by electronic means or through electronic voting - Regulation 26(1A) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (inserted on 5-10-2018).

Prescription of voting requirements at meeting of CoC and calculation of voting power – IBBI has given following guidelines – (a) IRP should constitute CoC comprising of financial creditors whose claims have been admitted, as members (b) Voting power is based on amount admitted (c) If claim of financial creditor is not admitted, he will be admitted when his claim is admitted. However, this will not affect decisions of earlier meetings (d) A person who is not member of CoC cannot vote – IBBI circular No. IBBI/CIRP/018/2018 dated 14-9-2018.

4.8-3 First meeting of financial creditors

First meeting of creditors will be convened within seven days from constitution of committee of creditors. The Committee shall be constituted within 30 days from date of appointment of resolution professional Regulation 17 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

4.8-4 Procedure for meeting of financial creditors

Provisions relating to notice of meeting, serving of notice, contents of meeting, quorum, participation at meeting through video conferencing and voting at meeting are specified in Regulations 18 to 26 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

Meeting of creditors will be convened as and when necessary. Meeting must be convened if members having 33% of voting rights demand a meeting. At least seven days' notice of meeting is required. Short notice can be given if members agree.

Notice can be sent electronically. Proof of sending shall be retained. Contents of notice shall be as specified in Regulations. Quorum of meeting is members having at least 33% voting rights. Quorum should be present throughout the meeting.

A member can attend meeting through video conferencing.

The meeting of committee shall be chaired by resolution professional.

Voting shall be taken on each resolution. Voting through electronic means shall be provided to each member.

Minutes of meeting shall be circulated.

4.8-5 Replacement of resolution professional by committee of creditors

Committee of Creditors (CoC) can change the resolution professional with 66% voting, *subject to a written consent from the proposed resolution professional in the specified form*. They have to forward new name to

Adjudicating Authority who will appoint another resolution professional after getting approval from Board (IBBI) – section 27 of Insolvency Code, 2016. The words in italics inserted w.e.f. 6-6-2018.

The Adjudicating Authority (NCLT) can select a Resolution Professional from panel approved by IBBI.

4.9 Duties of resolution professional

It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor - section 25(1) of Insolvency Code, 2016.

He can take any or all the actions specified in section 25(2) of Insolvency Code, 2016 for this purpose.

However, action as specified in section 28 of Insolvency Code, 2016 cannot be taken without prior approval of Committee of Creditors (CoC) with 66% voting in favour – section 28(3) of Insolvency Code as amended w.e.f. 6-6-2018. [Till 6-6-2018, 75% voting in favour was required].

Resolution Professional has no adjudicatory powers to decide claims - Resolution Professional has no adjudicatory powers to decide claims. He only has to collate and verify claims and place before CoC – *Reliance Industries v. Satish Kumar Gupta* (2019) 152 CSL 637 = 103 taxmann.com 371 (NCLT).

4.9-1 Filing of Application for avoidance of transactions

The resolution professional can file application for avoidance of transactions as specified in sections 43 to 51 of Insolvency Code, 2016 - section 25(2)(j) of Insolvency Code, 2016.

Filing of such avoidance application by the resolution professional shall not affect the proceedings of the corporate insolvency resolution process - section 26 of Insolvency Code, 2016.

4.9-2 Appointment of valuers to determine fair value and liquidation value

The interim resolution professional shall, within seven days of his appointment, appoint two registered valuers to determine the fair value and liquidation value - Regulation 27 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 as amended w.e.f. 6-2-2018.

Following persons cannot be appointed as registered valuers - (a) a relative of the resolution professional (b) a related party of the corporate debtor (c) an auditor of the corporate debtor at any time during the five years preceding the insolvency commencement date; or (d) a partner or director of the insolvency professional entity in which the resolution professional is a partner or director- *proviso* to Regulation 27 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 as amended w.e.f. 6-2-2018.

4.9-3 Determination of 'Fair value', 'liquidation value' and intimation to Committee members

The registered valuers will estimate fair value and liquidation value on basis of internationally accepted valuation standards after physical verification of inventory and fixed assets of corporate debtor - Regulation 35(1) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 as amended w.e.f. 6-2-2018.

If their estimates of liquidation value and fair value are significantly, third registered valuer will be appointed. Average of two closest estimates shall be considered as the liquidation value - Regulation 35(1)(b) and 35(1)(c) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 inserted w.e.f. 6-2-2018.

Liquidation value will be communicated to committee electronically. Following definitions are relevant.

Liquidation Value - 'Liquidation value' means the estimated realizable value of assets of corporate debtor, if the corporate debtor were to be liquidated on the insolvency commencement date - Regulation 2(1)(k) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 as amended w.e.f. 6-2-2018.

Fair Value - "Fair value" means the estimated realizable value of the assets of the corporate debtor, if they were to be exchanged on the insolvency commencement date 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 - Regulation 2(1)(hb) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 inserted w.e.f. 6-2-2018.

Supply of information of liquidation value and fair value to every member of Committee of Creditors on receipt of undertaking - The Resolution Professional shall provide liquidation value and fair value to every member of Committee of Creditors, on receiving an undertaking that they will keep the information of liquidation value and fair value confidential and will not use it to cause undue gains or undue losses to itself and others and that they will comply with requirements of section 29(2) of Insolvency Code - Regulation 35(2) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, inserted w.e.f. 6-2-2018 [earlier regulation 35(3)].

Information about liquidation value and fair value to be kept confidential by resolution professional and registered valuers - Information about liquidation value and fair value shall be kept confidential by Resolution Professional and registered valuers - Regulation 35(3) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, inserted w.e.f. 6-2-2018.

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4.9-4 Transfer of debt due to creditor to another person

If a creditor assigns or transfers the debt due to such creditor to any other person during the insolvency resolution process period, both parties shall provide the interim resolution professional or the resolution professional the terms of such assignment or transfer and the identity of the assignee or transferee.

The resolution professional shall notify each participant and the Adjudicating Authority of any resultant change in the committee within two days of such change - Regulation 28 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

4.9-5 Sale of assets outside the ordinary course of business with approval of committee

The resolution professional may sell unencumbered asset(s) of the corporate debtor, other than in the ordinary course of business, if he is of the opinion that such a sale is necessary for a better realisation of value under the facts and circumstances of the case.

The book value of all assets sold during corporate insolvency resolution process period in aggregate under this sub-regulation shall not exceed ten per cent of the total claims admitted by the interim resolution professional.

A sale of assets under this Regulation shall require the approval of the committee.

Protection to bona fide purchaser - A *bona fide* purchaser of assets sold under this Regulation shall have a free and marketable title to such assets notwithstanding the terms of the constitutional documents of the corporate debtor, shareholders' agreement, joint venture agreement or other document of a similar nature - Regulation 29(3) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

4.9-6 Assistance of local district administration by resolution professional

The interim resolution professional or the resolution professional, as the case may be, may make an application to the Adjudicating Authority for an order seeking the assistance of the local district administration in discharging his duties under the Code or these Regulations - Regulation 30 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

4.10 Prior approval of committee of creditors for certain actions by resolution professional

In following cases, resolution professional can take action only with prior approval of Committee of Creditors (CoC), with 66% voting in favour [section 28(1) read with section 28(3) of Insolvency Code, 2016]. [Till 6-6-2018, 75% voting in favour was required].

- (a) raise any interim finance in excess of the amount as may be decided by the committee of creditors in their meeting.
- (b) create any security interest over the assets of the corporate debtor.
- (c) change the capital structure of the corporate debtor, including by way of issuance of additional securities, creating a new class of securities or buying back or redemption of issued securities in case the corporate debtor is a company.
- (d) record any change in the ownership interest of the corporate debtor.
- (e) give instructions to financial institutions maintaining accounts of the corporate debtor for a debit transaction from any such accounts in excess of the amount as may be decided by the committee of creditors in their meeting.
- (f) undertake any related party transaction.
- (g) amend any constitutional documents of the corporate debtor.
- (h) delegate its authority to any other person.
- (i) dispose of or permit the disposal of shares of any shareholder of the corporate debtor or their nominees to third parties.
- (j) make any change in the management of the corporate debtor or its subsidiary.
- (k) transfer rights or financial debts or operational debts under material contracts otherwise than in the ordinary course of business.
- (l) make changes in the appointment or terms of contract of such personnel as specified by the committee of creditors; or
- (m) make changes in the appointment or terms of contract of statutory auditors or internal auditors of the corporate debtor.

“Constitutional document”, in relation to a corporate person, includes articles of association, memorandum of association of a company and incorporation document of a Limited Liability Partnership - Section 5(4) of Insolvency Code, 2016.

Security Interest - “Security interest” means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person. - - However, that security interest shall not include a performance guarantee - section 3(31) of Insolvency Code, 2016.

Transaction - “Transaction” includes an agreement or arrangement in writing for the transfer of assets, or funds, goods or services, from or to the corporate debtor - section 3(33) of Insolvency Code, 2016.

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Transfer - "Transfer" includes sale, purchase, exchange, mortgage, pledge, gift, loan or any other form of transfer of right, title, possession or lien - section 3(34) of Insolvency Code, 2016.

Action void if taken without approval - Where any action under section 28(1) is taken by the resolution professional without seeking the approval of the committee of creditors in the manner as required in this section, such action shall be void - section 28(4) of Insolvency Code, 2016.

The committee of creditors may report the actions of the resolution professional under section 28(4) to the Board (IBBI) for taking necessary actions against him under the Insolvency and Bankruptcy Code - section 28(5) of Insolvency Code, 2016.

4.10-1 Sale of assets outside the ordinary course of business

Resolution professional can sale unencumbered assets not in ordinary course of business with approval of committee - Regulation 29 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

4.11 Preparation of information memorandum

First step is to prepare information memorandum.

The resolution professional shall prepare an information memorandum in such form and manner containing such relevant information as may be specified by the Board (IBBI) for formulating a resolution plan - section 29(1) of Insolvency Code, 2016.

Contents of information memorandum - Contents of Information Memorandum are specified in Regulation 36(2) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 as amended w.e.f. 6-2-2018.

The information memorandum contains details of assets and liabilities, latest annual financial statements, list of creditors and debtors, guarantees, litigation, workmen, employees, other relevant information etc. (but not fair value and liquidation value).

The information memorandum should be prepared electronically. Confidentiality should be maintained.

Submission of information memorandum - Subject to regulation 36(4) (about confidentiality), the resolution professional shall submit the information memorandum in electronic form to - (a) each member of the committee within two weeks of his appointment as resolution professional; and (b) to each prospective resolution applicant latest by the date of invitation of resolution plan under of section 25(2)(h) of the Insolvency Code - Regulation 36(1) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 inserted w.e.f. 6-2-2018.

Member of committee can ask for additional information - A member of the committee may request the resolution professional for further information of

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the nature described in this Regulation and the resolution professional shall provide such information to all members within reasonable time if such information has a bearing on the resolution plan - Regulation 36(3) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 inserted w.e.f. 6-2-2018.

Confidentiality of information - The resolution professional shall share the information memorandum after receiving an undertaking from a member of the committee or a prospective resolution applicant to the effect that such member or resolution applicant shall maintain confidentiality of the information and shall not use such information to cause an undue gain or undue loss to itself or any other person and comply with the requirements under section 29(2) of Insolvency Code - - Regulation 36(4) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 inserted w.e.f. 6-2-2018.

4.12 Protection to insolvency resolution professional in respect of earlier transactions

No proceedings shall be initiated against the interim resolution professional or the resolution professional, as the case may be, for any actions of the corporate debtor, prior to the insolvency commencement date - Regulation 39(7) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.