

Restructuring & Insolvency

Monthly Newsletter

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STATUTORY UPDATES

Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) (Second Amendment) Regulations, 2022

- In exercise of the powers conferred by Clause (t) of Sub-Section (1) of Section 196 read with Section 240 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016) (IBC), the Insolvency and Bankruptcy Board of India (IBBI) on October 31, 2022 notified the following amendments into the IBBI (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016 (Principal Regulations):
 - Substitution of the existing Sub-Regulation (3) of Regulation 7 of the Principal Regulations with the following: *'(3) The compliance officer shall submit to the Board, a compliance certificate annually in the format issued by the Board, verifying that the insolvency professional agency has complied with the provisions referred to in Sub-Regulation (1): Provided that the annual compliance certificate shall also be signed by the managing director of the insolvency professional agency.'*
 - Insertion of the following Sub-Clause (3), in Clause 6 (Duties of the Agency) of the Schedule to the Principal Regulations: *'(3) The Agency shall:*
 - Facilitate receipt of relationship disclosures from its professional members in accordance with Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016
 - Disseminate the above-mentioned disclosures on its websites, within three-working days of the receipt of the same
 - Ensuring receipt of confirmation from its professional members to the effect that every other professional has been made at arm's length relationship.'
 - The amendment further provides a table of **Disclosure of Relationship** by an Insolvency Professional, which has to be obtained by the IP Agency under Sub-Clause (3) of Clause 6.
 - An explanation to Clause 23A of the Schedule (**Suspension of authorization for assignment**) has been inserted, the same states that 'A disciplinary proceeding shall be considered as pending against the professional member from the date he has been issued a show cause notice by the Agency or the Board, as the case may be, till its disposal by the Disciplinary Committee of the Agency or the Board, as the case may be.'
 - Further, in Sub-Clause (2) of Clause 24 (**Orders that may be passed by the Agency with regards to its Disciplinary Policy**), under item (d) (**Imposition of monetary penalty**), amendments have been brought to the monetary penalty for contravention of the various procedures laid down by way of the Principal Regulations and subsequent amendments:

#	Contravention	Monetary penalty
1	Failure to submit disclosures, returns, etc. to Agency or submits inadequate or incorrect disclosures, returns, etc., relating to any assignment, as required under the IBC and Regulations made thereunder or bye-laws of the Agency or called upon by the Board or the Agency.	Up to INR 1,00,000 or 25% of fee, whichever is higher, subject to a minimum INR 50,000.
2	Accepts an assignment having conflict of interests with the stakeholders.	Up to INR 2,00,000 or 25% of fee, whichever is higher, subject to a minimum INR 1,00,000.
3	Failure to maintain records properly relating to any of his assignments.	Up to INR 1,00,000 or 25% of fee, whichever is higher, subject to a minimum INR 50,000.
4	Rejection of a claim(s) without giving any proper reason while undertaking an assignment or fails to exercise due diligence in claim verification.	Up to INR 2,00,000 or 25% of fee, whichever is higher, subject to a minimum INR 1,00,000.
5	Failure to comply with directions issued by Adjudicating Authority or the Appellate Authority.	Up to INR 2,00,000 or 25% of fee, whichever is higher, subject to a minimum INR 1,00,000.
6	Outsourcing duties and obligations.	Up to INR 2,00,000 or 25% of fee, whichever is higher, subject to a minimum INR 1,00,000.
7	Failure to appoint registered valuers, wherever required, under the IBC or Regulations made thereunder, for conducting valuation.	Up to INR 2,00,000 or 25% of fee, whichever is higher, subject to a minimum INR 1,00,000.
8	Failure to supply the information called for or to comply with the requirements of information sought by the Agency, IBBI, Adjudicating Authority or the Appellate Authority or does not cooperate with the inspection or investigating authority.	Up to INR 1,00,000 or 25% of fee, whichever is higher, subject to a minimum INR 50,000.
9	Failure to make public announcement in the manner provided for in the relevant Regulations.	Up to INR 2,00,000 or 25% of fee, whichever is higher, subject to a minimum INR 1,00,000.
10	Failure to provide notice regarding meetings of creditors.	Up to INR 1,00,000 or 25% of fee, whichever is higher, subject to a minimum INR 50,000.
11	Failure to reject Resolution Plan from ineligible resolution applicants.	Up to INR 2,00,000 or 25% of fee, whichever is higher, subject to a minimum INR 1,00,000.
12	Failure to take action in respect of preferential, undervalued, fraudulent or extortionate credit transactions.	Up to INR 2,00,000 or 25% of fee, whichever is higher, subject to a minimum INR 1,00,000.
13	Entering into contract or agreement with professionals in an incomplete and improper manner.	Up to INR 1,00,000 or 25% of fee, whichever is higher, subject to a minimum INR 50,000
14	Contravening any provision of the bye-laws, or regulations for which no specific penalty has been provided.	Up to INR 1,00,000 or 25% of fee, whichever is higher, subject to a minimum INR 50,000.

Review of Regulations

- In order to facilitate the Insolvency Professionals (IP) to carry out process under the IBC, the IBBI vide Circular dated November 09 2022, rescinded certain amendments which were notified by the IBBI from time to time in exercise of powers provided under Section 196 of the IBC. The purpose for rescinding the amendments is that these amendments were not required in the first place and were deemed to be understood basis the existing regulations. The particulars of the previous amendments which now stand rescinded by virtue of the present circular are as under.
 - Vide Circular dated January 3, 2018, the IBBI incorporated the Clause 15A of ‘Code of Conduct’ specified in First Schedule to IBBI (Insolvency Professionals) Regulations, 2016 (**IP Regulations**) requiring an IP to prominently state in all his communications, whether by way of public announcement or otherwise to a stakeholder or to an authority, his name, address, email, Registration Number etc.
 - Vide Circular dated January 3, 2018, the IBBI incorporated the Clause 27A and 27B of ‘Code of Conduct’ specified in First Schedule to IP Regulations directing IPs to exercise reasonable care and diligence and take all necessary steps to ensure that the corporate person undergoing any process under the Code complies with the applicable laws. The Circular further clarified that any loss, including penalty, if any, because of non-compliance of applicable laws, shall not form part of IRPC or liquidation process cost under the Code and that IP will be responsible for the non-compliance of applicable laws if it is because of his conduct.

- Vide Circular dated January 3, 2018, the IBBI directed IPs to not outsource any of his duties and responsibilities under the Code as already covered under Regulation 7 (2) (bb) of IP Regulations.
- Vide Circular dated January 16, 2018, the IBBI incorporated the Clause 25B, 25C and 26A of 'Code of Conduct' specified in First Schedule to IP Regulations clarifying that an IP shall render services for a fee which is a reasonable reflection of his work, raise bills/invoices in his name towards such fees, and such fees shall be paid to his bank account and that Any payment of fees for the services of an IP to any person, other than the IP, shall not form part of the IRPC. Also, any other professional (such as registered valuer) appointed by an IP shall raise bills/invoices in his/its name towards such fees, and such fees shall be paid to his/its bank account.
- Vide Circular dated January 16, 2018, the IBBI incorporated the Clause 8A, 8B, 8C and 8D of 'Code of Conduct' specified in First Schedule to IP Regulations directing IPs and every other professional appointed by the IP and Clause 6(3) in the Schedule to the Model Bye Laws Regulations. It directed IPs and every other professional appointed by an IP for a resolution process to make certain disclosures to the IPA of which he is a member within a stipulated timeframe. Further, it requires IPA to facilitate receipt of the disclosures and disseminate such disclosures on its website within stipulated timeframe.
- Vide Circular dated January 16, 2018, the IBBI directed IPs whether acting as IRP , RP or Liquidator, except to the extent provided in the Code and Rules, Regulations or Circulars issued thereunder, (i) to keep every information related to the processes confidential; and (ii)not to disclose or provide access to any such information to any unauthorised person.
- Vide Circular dated May 2, 2019, the IBI declared the issue of temporary surrender to be redundant with the introduction of authorization of agreement advising IPAs to not ordinarily accept temporary surrender of professional membership, where the IP is conducting a process under the Code. Certain forms were stipulated. In this regard, the Board has issued clarification dated April 11, 2022
- Vide Circular dated April 19, 2018, the IBBI issued Stipulations regarding annual compliance certificate to be submitted by IPAs to IBBI. However, the Circular was rescinded and the IBBI issued a revised Circular dated November 2, 2022 containing the format of annual compliance certificate aligning with latest Regulations.
- Vide Circular dated July 28, 2021, the IBBI, in light of amendment to Clause 24(2)(d) of the schedule to the Model Bye-Laws Regulation, issued directions upon IPAs to amend their Bye- laws to provide for the maximum and minimum monetary penalty, in stipulated circumstances.
- Vide Circular dated April 23, 2018, the IBBI inserted explanation to the Clause 23A of the schedule stipulated in the Model Bye-Laws Regulations clarifying that (i) a disciplinary proceeding is considered as pending against an IP from the time he has been issued a show cause notice by IBBI till its disposal by the disciplinary committee; and (ii) an IP who has been issued a show cause notice shall not accept any fresh assignment as IRP, RP, Liquidator, or a bankruptcy trustee under the Code.
- Vide Circular dated September 7, 2019, the IBBI, with respect to amendment to Regulation 21(2)(c)(ii) of IU Regulations, approved the MCA 21 database of the Ministry of Corporate Affairs and the Central Registry of Securitization Asset Reconstruction and Security Interest of India (CERSAI) registry for the purposes of Regulation 21(2)(c)(ii) of IU Regulations.

Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fourth Amendment) Regulations, 2022.

- In exercise of the powers conferred by Clause (t) of Sub-Section (1) of Section 196 read with Section 240 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Insolvency and Bankruptcy Board of India (IBBI) on September 16, 2022, notified the following amendments in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (**Principal Regulations**):
- In order to consolidate the information and communications pertaining to a CIRP of a Corporate Debtor, the IBBI has inserted a new regulation '**Regulation 4C - Process e-mail**', in terms of which the Interim Resolution Professional (IRP) shall open an email account of the Corporate Debtor and use it for all correspondences with stakeholders, and in the event of his replacement by a Resolution Professional, such IRP shall handover the credentials of the email. Further, in case a Resolution Professional is also replaced, the Resolution Professional who is being replaced

shall hand over the credentials of the email to the other Resolution Professional or the Liquidator, as the case may be.

- Regulation 6A is inserted to the Principal Regulations, which makes it mandatory for the IRP to issue a communication along with a copy of public announcement made under Regulation 6, to all the creditors as per the last available books of accounts of the Corporate Debtor through post or electronic means wherever the information for communication is available.
- In Regulation 18, after Sub-Regulation (2) of the Principal Regulations, by way of an explanation, it has been clarified that even after approval of a Resolution Plan by the CoC, a meeting can be convened till the Resolution Plan is approved or an order for liquidation is passed, as long as such meeting does not affect the Resolution Plan which is already submitted to the Adjudicating Authority.
- In Regulation 35A (3) of the Principal Regulations, the timeline for the Resolution Professional to form an opinion and file an avoidance application under the relevant provision before the NCLT, has been reduced from 135 days to 130 days. Further, an additional regulation, Regulation 35 (3A) has been inserted which requires the Resolution Professional to provide a copy of the Application filed by the Resolution Professional for avoidance transactions to the prospective resolution applicants to enable such prospective resolution applicants to consider the same while submitting the Resolution Plan within the time initially stipulated.
- Regulation 36 (Information Memorandum) of the Principal Regulations has been amended as follows:
 - The timeline for submission of the Information Memorandum by the Resolution Professional has been increased from the existing limit of 54 days to 95 days from the Insolvency Commencement date.
 - In Sub-Regulation (2) of the Principal Regulations which mentions the information about the Corporate Debtor to be disclosed in the Information Memorandum, amendments have been made to the following extent:
 - Additional disclosures like key selling propositions, details of the operations of the Corporate Debtor, financial statements etc are required to be disclosed to the prospective resolution applicant. In view of the same, now even Contingent Liabilities and the geographical co-ordinates of the fixed assets of the Corporate Debtor, are required to be disclosed.
 - A new Sub-Clause (j) has been inserted to provide a snapshot of business performance, key contacts, key investments, highlights, and other factors to enhance the value of the Corporate Debtor. It also requires mentioning of critical details such as brought forward losses in the income tax returns, input credit of GST, key employees, key customers, supply chain linkages, utility connections, and other pre-existing facilities.
 - Further, a new Sub-Clause (k) has also been inserted for cases in which the book value of the total assets exceeds INR 100 Crore, to provide details of business evolution, industry overview, and key growth drivers.
 - While these requirements may seem innocuous, they are key for effective price discovery of a Corporate Debtor.
 - In Regulation 36 A (invitation for Expression of Interest in Form G) of the Principal Regulations, the timeline to publish the same has been reduced to 60 days from the existing timeline of 75 days.
 - With the objective to maximize value in resolution, the insertion of Sub-Regulation 6A to Regulation 36 B of the Principal Regulations enables the Resolution Professional and the Committee of Creditors to issue Request for Resolution Plan (RFRP) for the second time for sale of one or more of assets of the Corporate Debtor, in cases where no Resolution Plan has been received for the Corporate Debtor as a whole.
 - Further to improve the value received in the Resolution Plan, the amendment enables marketing of assets of the Corporate Debtor. In this regard, a new regulation, Regulation 36C has been inserted which provides for formulating a strategy for marketing of assets of Corporate Debtor in consultation with the CoC to disseminate information about the asset to a wider and targeted audience of potential resolution applicants. Further, in terms of the said regulation, it is mandatory for the Resolution Professional to prepare the marketing strategy where the total assets as per the last available financial statements exceed one hundred crore rupees.
 - Insertion of Sub-Clause (m) to Regulation 37 of the Principal Regulation enables for a Resolution Plan to include sale of one or more assets of CD to one or more successful resolution applicants submitting Resolution Plans for such assets and providing for appropriate treatment of the remaining assets.

- With the aim to reduce delays in the process and enhance efficiency of available time, the IBBI has inserted Regulation 39BA to the Principal Regulation thereby making it mandatory upon the CoC to examine whether it wants to explore option of compromise or arrangement and file such recommendation with the Adjudicating Authority while applying to Adjudicating Authority for a liquidation order.
- The Model Timelines provided under Regulation 40A of the Principal Regulation has been amended to incorporate all the above-stated changes, which can be accessed [here](#).
- Regulation 40D has been inserted in the Principal Regulations that provides for guiding factors that may be considered by CoC while making an early decision to liquidate the Corporate Debtor. Some illustrative examples have been provided such as non-operational status for preceding three years, goods produced, or service offered or technology employed being obsolete, absence of any assets, lack of any intangible assets or factors which bring value as a going concern over and above the physical assets like brand value, intellectual property, accumulated losses, depreciation, investments that are yet to mature. The format of Form G has been amended and can be accessed [here](#).

Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fifth Amendment) Regulations, 2022

- In exercise of powers conferred by Clause (c) and Clause (t) of Sub-Section (1) of Section 196 read with Section 240 of the IBC, the IBBI on September 20, 2022 notified the following amendments into the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (**Principal Regulations**). The same shall come into force with effect from October 01, 2022.
- In Regulation 31 of the Principal Regulation, after Clause (b), a Sub-Clause (ba) has been inserted, namely, '(ba) fee payable to the Board under regulation 31A'.
- In view of the insertion of Sub-Clause (ba), Regulation 31A has been inserted which shall provide for the calculation of fees payable to the IBBI.

'31A. Regulatory Fee

1) A regulatory fee calculated at the rate of 0.25 per cent of the realizable value to creditors under the Resolution Plan approved under Section 31, shall be payable to the Board, where such realizable value is more than the liquidation value:

Provided that this Sub-Regulation shall be applicable where Resolution Plan is approved under Section 31, on or after 1st October 2022.

(2) A regulatory fee calculated at the rate of one per cent of the cost being booked in insolvency resolution process costs in respect of hiring any professional or other services by the Interim Resolution Professional or Resolution Professional, as the case may be, for assistance in a corporate insolvency resolution process, shall be payable to the Board, in the manner as specified in Clause (cb) of Sub-Regulation (2) of Regulation (7) of Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016.'

Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2022

- The IBBI vide notification dated September 16, 2022 amended the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (**Principal Regulations**). In terms of the said notification, following amendments have been introduced -
- The Committee of Creditors (**CoC**) constituted during Corporate Insolvency Resolution Process (**CIRP**) shall function as Stakeholders Consultation Committee (**SCC**) in the first 60 days. After adjudication of claims and within 60 days of initiation of process, the SCC shall be reconstituted based upon admitted claims.
- In order to incorporate the scheme of arrangement or compromise as introduced in Regulation 39BA of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, a proviso has been added to Regulation 2B of the Principal Regulations which requires the Liquidator to file a proposal within 30 days of the order of liquidation where the recommendation to explore proposal of compromise or arrangement has been made by the committee under Regulation 39BA of the Regulations.
- The scope of mandatory consultation by Liquidator, with the Stakeholder Consultation Committee has been enlarged. Now, in terms of Regulation 4(1A) of the Principal Regulations,

the SCC may even propose replacement of Liquidator to the Adjudicating Authority (AA) and fix the fees of Liquidator, if the same had not been finalized by the CoC during the CIRP.

- In terms of newly inserted Sub-Clause (C) in Sub-Regulation (2) of Regulation 12 of the Principal Regulation, if any claim is not filed during liquidation process, then the amount of claim collated during CIRP shall be verified by the Liquidator.
- Following amendments have been made in Regulation 31A of the Principal Regulations:
 - (i) for Sub-Regulation (1), the following shall be substituted, namely:

‘(1) The Liquidator shall constitute a consultation committee, comprising of all creditors of the Corporate Debtor, within sixty days from the liquidation commencement date, based on the list of stakeholders prepared under Regulation 31, to advise him on matters relating to:

 - Remuneration of professionals appointed under Regulation 7
 - Sale under Regulation 32, including manner of sale, pre-bid qualifications, reserve price, marketing strategy and auction process
 - Fees of the Liquidator
 - Valuation under Sub-Regulation (2) of Regulation 35
 - The manner in which proceedings in respect of preferential transactions, undervalued transaction, extortionate credit transaction or fraudulent or wrongful trading, if any, shall be pursued after closure of liquidation proceedings and the manner in which the proceeds, if any, from these proceedings shall be distributed.’
 - (ii) after Sub-Regulation (1), the following shall be inserted, namely:

‘(1A) The committee of creditors under Section 21 shall function as the consultation committee with same voting rights till constitution of the consultation committee under Sub-Regulation (1)’
 - (iii) for Sub-Regulation (2), the following shall be substituted, namely:

‘(2) The voting share of a member of the consultation committee shall be in proportion to his admitted claim in the total admitted claim:

 - Provided a secured creditor who has not relinquished his security interest under Section 52 shall not be part of the consultation committee.
 - Provided that the promoters, directors, partners or their representatives may attend the meeting of the consultation committee but shall not have any right to vote.
 - Provided further that a Financial Creditor or his representative, if he is a related party of the Corporate Debtor, shall not have right to vote.’
 - (iv) for Sub-Regulation (3), the following shall be substituted, namely:

‘(3) The Liquidator may facilitate the stakeholders of each class namely financial creditors in a class, workmen, employees, government departments, other operational creditors, shareholders, partners, to nominate their representative for participation in the consultation committee.’
 - (v) after Sub-Regulation (4), the following shall be inserted, namely:

‘(4A) the representative under Sub-Regulation (3) or (4) shall vote in proportion to the voting share of the stakeholders it represents.’
 - (vi) for Sub-Regulation (6), the following shall be substituted, namely:

‘(6) The Liquidator shall convene the first meeting of the consultation committee within seven days of the liquidation commencement date and may convene other meetings, if he considers necessary, on a request received from one or more members of the consultation committee:

 - Provided that when a request is received by the Liquidator from members, individually or collectively, having at least thirty three percent of the total voting rights, the Liquidator shall mandatorily convene the meeting.’
 - (vii) in Sub-Regulation (9), for the words ‘present and voting’, the word ‘voting’ shall be substituted.
 - (viii) in Sub-Regulation (10), in the proviso, for the words ‘mention it in the next progress report’, the words ‘Submit the records relating to the said decision, to the Adjudicating Authority and to the Board within five days of the said decision; and include it in the next progress report’ shall be substituted.’
 - (ix) after Sub-Regulation (10), the following shall be inserted, namely:

‘(11) The consultation committee, after recording the reasons, may by a majority vote of not less sixty-six per cent., propose to replace the Liquidator and shall file an application,

after obtaining the written consent of the proposed Liquidator in Form AA of the Schedule II, before the Adjudicating Authority for replacement of the Liquidator :

- Provided that where a Liquidator is proposed to be replaced, he shall continue to work till his replacement; and be suitably remunerated for work performed till his replacement.
- Provided that where a consultation committee under Regulation 31A has been constituted before the commencement of the instant amendment, the Liquidator within thirty days of the commencement of the said Regulations, shall reconstitute the consultation committee as required under the said Regulations and provisions provided under amended Regulation 31A shall come into effect only after such constitution.'
- As regards the timeline for formation of the Asset Memorandum is concerned in terms of Regulation 34 of the Principal Regulations, as per the amendment, the existing Sub-Regulation (1) shall be substituted with the following:
 - '(1) For cases under Sub-Regulation (1) of Regulation 35, the Liquidator shall, within thirty days from the liquidation commencement date, prepare an asset memorandum in accordance with this regulation based on the information memorandum prepared under Section 29, with suitable modifications.'
- Additionally, Sub-Regulation (1A) has been inserted after Sub-Regulation (1), the same is as under:
 - '(1A) For cases covered under Sub-Regulation (2) of Regulation 35, the Liquidator shall prepare an asset memorandum in accordance with this Regulation within seventy-five days from the liquidation commencement date.'
- In terms of the existing Sub-Regulation (5) of Regulation 34 of the Principal Regulations, the Asset Memorandum was not accessible to anybody without the specific permission of the Adjudicating Authority. However, in terms of the present amendment, the Liquidator shall share the asset memorandum with the Board and members of the consultation committee having voting rights after receiving an undertaking from each member that such member shall maintain confidentiality of the information and shall not use such information to cause an undue gain to or undue loss to itself or any other person.
- In terms of the newly inserted Regulation 44A, before filing of an application for dissolution or closure of the process, SCC shall advise the Liquidator, the manner in which proceedings in respect of avoidance transactions or fraudulent or wrongful trading, shall be pursued after closure of liquidation proceedings.
- Lastly, for preservation of records, Regulation 45A has been inserted, the same is under:
 - '(1) The Liquidator shall preserve copies of all such records which give a complete account of the liquidation process.
 - (2) Without prejudice to the generality of the provisions of Sub-Regulation (1), the Liquidator shall preserve copies of records relating to or forming the basis of:
 - His appointment as Liquidator, including the terms of appointment
 - Handing over and taking over of the assignment
 - Admission of corporate debtor into liquidation
 - Public announcement
 - The constitution of consultation committee and minutes of consultation committee meetings during liquidation process
 - Claims, verification of claims, and list of stakeholders
 - Details of relinquishment or otherwise by secured creditors in liquidation process
 - Engagement of professionals, registered valuers, etc. Including work done, reports etc., submitted by them
 - Invitation, consideration and approval of plans / proposals / scheme received, in case of going concern sale in liquidation process or compromise or arrangement under section 230 of the companies act, 2013
 - All filings with the adjudicating authority, appellate authority, high courts, supreme court, whichever applicable and their orders
 - Statutory filings with board and insolvency professional agencies
 - Correspondence during the liquidation process
 - Cost of liquidation process
 - All reports, registers, documents such as preliminary report, asset memorandum, progress reports, asset sale report, annual status report, final report prior to dissolution, various registers and books, etc. Mentioned in regulations 5 and 6 of these regulations

- Preferential, undervalued, extortionate credit transactions or fraudulent or wrongful trading
- Any other records, which is required to give a complete account of the process
- (3) The Liquidator shall preserve:
 - electronic copy of all records (physical and electronic) for a minimum period of eight years; and
 - a physical copy of records for a minimum period of three years;
 from the date of dissolution of the Corporate Debtor or closure of the liquidation process or the conclusion of any proceeding relating to the liquidation process, before the Board, the Adjudicating Authority, Appellate Authority or any Court, whichever is later.
- (4) In case of replacement of Liquidator, the outgoing Liquidator shall handover the records under Sub-Regulation (1) and (2) to the new Liquidator and be responsible for preserving the records not handed over, for any reason, to the new Liquidator.
- (5) Where the Corporate Debtor has been sold as a going concern under Clause (e) of Regulation 32, the general records of the Corporate Debtor shall be handed over to the successful buyer.
- (6) The records of the Corporate Debtor shall be preserved by the Liquidator as per the applicable laws.
- (7) The Liquidator shall preserve the records at a secure place and shall be obliged to produce records as may be required under the IBC and the Regulations made thereunder'
- In order to incorporate the aforementioned changes, following amendments have been made in Schedule I of the Principal Regulations:
 - After Clause (1), the following shall be inserted, namely:
 - (1A) Subject to provisions of Regulation 2B, the Liquidator shall issue a public notice of an auction for sale under Regulation 32 within forty-five days from the liquidation commencement date unless the consultation committee advises to extend the timeline.
 - (1B) The Liquidator shall issue public notice for the next auction, in case of failure of the auction, within fifteen days from the last failed auction unless the consultation committee advises to deviate from the specified time period.
 - (1C) Notwithstanding anything contained in this Schedule, the Liquidator shall complete an auction process within thirty-five days from the issue of public notice for auction.
 - (1D) The Liquidator shall provide at least fourteen days from issue of public notice for submission of eligibility documents by prospective bidder.
 - (1E) The Liquidator shall provide to qualified bidder at least seven days, for inspection or due diligence of assets under auction, from the date of declaration of qualified bidder.
 - (1F) A prospective bidder in an auction process shall deposit earnest money deposit at least up to two days before the date of auction.
 - for the Clause (7), the following shall be substituted, namely: -
 - (7) From a date to be notified through circular by the Board, the Liquidator shall sell the assets only through an electronic auction platform empanelled by the Board.

Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) (Second Amendment) Regulations, 2022

- The IBBI vide notification dated September 16, 2022 amended the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017 (Principal Regulations). In terms of the said notification, focus has been placed upon amending the Regulations to regularise the procedure to preserve the records of a Corporate Person after the process of liquidation is finished. Following amendments have been introduced:
 - In Regulation 3, after Sub-Regulation (4), the following Sub-Regulation shall be inserted, namely:
 - '(5) The declaration under Sub-Regulation (1)(a) or under Section 59(3)(a) shall provide that the corporate person has made provision for preservation of its records after its dissolution.'
 - The existing Regulation 41 has been substituted with the following:
 - '41. Preservation of records.
 - (1) The Liquidator shall preserve copies of all such records which are required to give a complete account of the voluntary liquidation process.

(2) Without prejudice to the generality of the obligations under Sub-Regulation (1), the Liquidator shall preserve copies of records relating to or forming the basis of:

- His appointment as Liquidator, including the terms of appointment
- Handing over / taking over of the assignment
- Initiation of voluntary liquidation process
- Public announcement
- Claims, verification of claims, and list of stakeholders
- Engagement of professionals, registered valuers, etc. Including work done, reports etc., submitted by them
- All filings with the Adjudicating Authority, Appellate Authority, High Courts, Supreme Court, whichever applicable and their orders
- Statutory filings with Board and insolvency professional agencies
- Correspondence during the voluntary liquidation process
- Cost of voluntary liquidation process
- All reports, registers, documents such as preliminary report, annual status report, final report prior to dissolution, various registers and books, etc. Mentioned in Regulation 8 and 10 of principal Regulations
- Any other records, which is required to give a complete account of the process

(3) The Liquidator shall preserve:

- Electronic copy of all records (physical and electronic) for a minimum period of eight years, and
- A physical copy of records for a minimum period of three years

from the date of dissolution of the corporate person, before the Board, the Adjudicating Authority, Appellate Authority or any Court, whichever is later.

(4) In case of replacement of Liquidator during the process, the outgoing Liquidator shall handover the records under Sub-Regulation (1) and (2) to the new Liquidator.

(5) The Liquidator shall preserve the records at a secure place and shall be obliged to produce records as may be required under the IBC and the principal Regulations.

(6) The Liquidator shall, along with the application filed under Sub-Section (7) of Section 59 to the Adjudicating Authority, provide the details and manner of preservation of records under Sub-Regulation (1) and (2).'

Insolvency and Bankruptcy Board of India (Information Utilities) (Second Amendment) Regulations, 2022

- The IBBI vide notification dated September 16, 2022 amended Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017 (b). The same have been in operation from 1st October 2022. Emphasis has been specific laid upon the fee applicable for registration of an Information Utility. The amendments are as under:
 - The fee for Application for registration or renewal thereof, as provided in Sub-Regulations (1) and (2) has been increased from Five Lakh Rupees to Ten Lakh Rupees.
 - In terms of Clause (d) of Sub-Regulation (2) of Regulation 6 of the Principal Regulations, the certificate of registration shall be subject to the conditions that the information utility inter alia shall pay a fee of INR One Crore instead of the existing fee of INR fifty lakh rupees to the IBBI, within fifteen days of receipt of intimation of registration or renewal from the IBBI.
 - Further, Clause (e) of Sub-Regulation (2) of Regulation 6 of the Principal Regulations has been substituted with the following:
 - '(e) pay to the Board, a fee calculated at the rate of ten per cent. of the turnover from the services as an information utility rendered in the preceding financial year, on or before 30th April every year:
 - Provided that without prejudice to any other action which the Board may take as it deems fit, any delay in payment of fee by an information utility shall attract simple interest at the rate of twelve percent per annum.'

Insolvency and Bankruptcy Board of India (Insolvency Professionals) (Fourth Amendment) Regulations, 2022

- The IBBI vide notification dated September 28, 2022 amended Insolvency and Bankruptcy Board of India (Insolvency Professionals) (Fourth Amendment) Regulations, 2022 (**Principal Regulations**). The following amendments have been introduced:

- Considering the limitations on the part of an Insolvency Professional (IP), being an individual, in dealing with processes under the IBC requiring concurrent efforts, and multi-disciplinary expertise, IBBI decided to institutionalize the profession of IP. In this regard, in Regulation 2, in Sub-Regulation (1), in Clause (g), for the words '*an individual*', the words '*an individual or an insolvency professional entity recognized by the Board under Regulation 13*'. The same will enable the Insolvency Professional Entity (IPE) recognized by IBBI to carry on the activities of an IP.
- In order to incorporate the aforementioned inclusion of an Insolvency Professional agency, an additional Clause 1A has been inserted after Sub-Regulation (1) of Regulation 6 the Principal Regulation, the same requires an insolvency professional entity eligible for registration as an insolvency professional under Sub-Regulation (2) of Regulation 4 to make an application to IBBI in Form AA of Second Schedule along with a non-refundable application fee of two lakh rupees.
- Additionally, the following amendments have been made to the Principal Regulations:
 - In the Principal Regulations, in Regulation 7, in Sub-Regulation (2) [**In-principle approval**]
 - After Clause (h), the following Clauses shall be inserted, namely:
'(ha) in case an insolvency professional entity is an insolvency professional, it shall allow only a partner or director, as the case may be, who is an insolvency professional and holds a valid authorisation for assignment to sign and act on behalf of it;'
 - After Clause (i), the following Proviso shall be inserted, namely:
'Provided that Clause (ba) and Clause (d) shall not be applicable to an insolvency professional which is insolvency professional entity.'
 - In the Principal Regulations, in Regulation 13, in Sub-Regulation (2) [**Technical Standards**],
 - In Clause (b), after second proviso, the following proviso shall be inserted, namely:
 - 'Provided further that in case the insolvency professional entity is enrolled with an insolvency professional agency, the intimation under this Clause shall also be made to such insolvency professional agency to update its register of professional members.'
 - In Clause (c), after second proviso, the following proviso shall be inserted, namely:
 - 'Provided further that in case the insolvency professional entity is enrolled with an insolvency professional agency, the intimation under this Clause shall also be made to such insolvency professional agency to update its register of professional members.'



RECENT JUDGMENTS

Punjab National Bank v. Supriyo Kumar Chaudhuri & Ors

National Company Law Appellate Tribunal Principal Bench, New Delhi | Judgment dated September 16, 2022 | Company Appeal (AT) (Insolvency) No. 657 of 2020

Background facts

- The Corporate Insolvency Resolution Process of JVL Agro Industries Ltd (**Corporate Debtor**) was initiated vide Order dated July 25, 2018. Mr. Supriyo Kumar Chaudhuri, the Resolution Professional of the Corporate Debtor filed certain applications before the NCLT, seeking directions against the Punjab National Bank (**PNB/Respondent Bank**) to reverse the transaction pertaining to the appropriation of the margin money of the Corporate Debtor on the ground that the amounts to breach of the Moratorium imposed under Section 14 of the Insolvency and Bankruptcy Code, 2016 (IBC).
- The NCLT vide order dated February 06, 2020 (**Impugned Order**) allowed the aforementioned applications filed by the Resolution Professional and observed that the margin money which was in form of security was appropriated by the financial creditors (i.e. PNB and the other Banks) from the accounts of the Corporate Debtor after the CIRP had been initiated and all these transactions were done during the Moratorium period, which is against the purpose of which the Moratorium. The NCLT further observed that if the amount of margin money which is appropriated by the Respondents Bank is treated as an adjustment with the amount of bill, which was paid by the Bank on behalf of Corporate Debtor and not as an appropriation of Corporate Debtor's fund towards the dues of the Bank then the same should not have been done during the CIRP, while the Moratorium is in operation. In view of the same, the NCLT directed the Respondent Bank to reverse the transactions of appropriating the margin money against the Letter of Credit and credit the amount of the margin money back into the current accounts of the Corporate Debtor.
- Aggrieved by the Impugned Order, PNB challenged the same before the National Company Law Appellate Tribunal on the ground that that margin money is not a security for a Letter of Credit and that it becomes payable the moment default occurs on the part of the customer and that margin money falls outside the ambit of Security Interest in respect of properties of the 'Corporate Debtor'. It was further contended that a Letter of Credit is a contract exclusively between the Creditor and the Bank and is strictly governed by the terms and conditions of the Letter of Credit only. Hence, the Letter of Credit is basically a contract of performance guarantee and is a contingent liability of the 'Corporate Debtor' which crystallizes on happening of an uncertain future event.

Issues at hand?

- Whether margin money deposited by way of Fixed Deposit Receipts (FDR) against an LC is an asset of the Corporate Debtor?
- Whether margin money construes, a 'Security' as provided for under the IBC?

- Whether margin money can be appropriated during the period of Moratorium on the ground that it does not form a part of the asset of the Corporate Debtor?

Decision of the Tribunal

- The NCLAT allowed the Appeal preferred by the Appellant and observed that that margin money has the character of a Trust for the benefit of the beneficiary and as long as the Letter of Credit is alive, the same cannot amount to an asset of the 'Corporate Debtor'.
- The NCLAT while arriving the said conclusion deliberated on the scope of 'earnest money' and 'margin money' and observed that margin money is construed as a substratum of a Trust created to pay to the beneficiary to whom a Bank Guarantee is given. Once any asset goes into trust by documentation for the benefit of beneficiary, the original owner will not have any right over the said asset unless it is free from the Trust. In this regard, since both Sections 18 & 36(4) of the IBC provide that asset held under Trust cannot be considered as an asset of the 'Corporate Debtor' and since the margin money has the character of Trust for the benefit of the beneficiary, it cannot be said to be an asset of the 'Corporate Debtor'.
- The NCLAT also observed that a Performance Guarantee and a Letter of Credit are similar, and since Section 14(3)(b) of the IBC explicitly excludes the application of moratorium to a 'Surety' in a contract of Guarantee to a Corporate Debtor. Hence, the security provided by way of Letter of Credit is not protected by the moratorium operating in terms of Section 14 of the IBC.
- In view of the above, the NCLAT allowed the Appeal and set aside the Impugned Order passed by the NCLT directing the reversal of the amounts back into the account of the Corporate Debtor.

HSA Viewpoint

The issue of margin money as a security interest, and its treatment during insolvency has been a contentious issue, with several contradictory orders by various NCLTs. With this judgment, the law has been discussed threadbare, and this issue has been finally decided conclusively.

Small Industries Development Bank of India (SIDBI) v. Vivek Raheja & Ors

National Company Law Appellate Tribunal | Judgment dated September 16, 2022 | Company Appeal (AT) (Insolvency) No. 570 of 2022

Background facts

- Oriental Bank of Commerce filed an Application under Section 7 of IBC before the NCLT for initiation of CIRP against Gupta Exim (India) Pvt Ltd (**Corporate Debtor**). Vide Order dated October 29, 2019, NCLT admitted the said Application. Thereafter, in the 16th meeting of the CoC, the Resolution Plan of Lotus Textiles and Mr. Vijayant Mittal was approved by a majority vote of 97.97% (**CoC Approved Resolution Plan**).
- Small Industries Development Bank of India (**SIDBI/Appellant**) sent an objection vide its letter dated August 16, 2021 to the distribution to the Appellant under the CoC Approved Resolution Plan. Pursuant to which, the Appellant filed an Interlocutory Application bearing No. 581 of 2021 seeking modification to the proceeds of the Resolution Plan to the Appellant for an amount of INR 5,64,97,893 in priority and grant of an interim stay on distribution of the Resolution Plan amount by the RP until the said Application is decided. The Appellant's case in the said Application was that it is entitled to 6.93 % i.e., the amount of INR 5,64,97,893 and as per voting share as approved by the CoC, the Appellant is entitled to 2.03% i.e., INR 1,65,47,078 on the basis of value of the security interest of the Appellant. The RP strongly objected to the said Application filed by the Appellant.
- Vide Order dated March 17, 2022 (**Impugned Order**), NCLT, Chandigarh Bench rejected the said Application of the Appellant, thereby upholding the decision of the CoC for distribution of proceeds of the Resolution Plan as per the voting share.
- Being aggrieved by the Impugned Order passed by the NCLT, the Appellant has filed an Appeal before the NCLAT.

Issue at hand?

- Whether the Appellant being a dissenting Financial Creditor is entitled to claim distribution of proceeds of the Resolution Plan as per value of the security interest of the Appellant or as per the debt of the Appellant i.e., voting share?

Decision of the Tribunal

- At the outset, NCLAT opined the law laid down by the SC in the case of *Jaypee Kensington Boulevard Apartments Welfare Association & Ors v. NBCC (India) Ltd & Ors*¹ is very clear, that in the event the Resolution Plan does not conform to Section 30(2)(b) of IBC, the judicial review to the limited extent, i.e., to the extent the plan is in violation of the statutory provision is permissible.

¹ (2021) 1 SCC 401

- NCLAT then examined Section 53(1) of IBC which deals with the distribution waterfall and held that Section 53(1)(b)(ii) of IBC which uses the expression 'debts owed to a secured creditor' is a debt which is relatable to his claim as admitted in CIRP Process and is not the value of security of a secured creditor.
- Thereafter, NCLAT placed reliance on the case of ***Union Bank of India v. Resolution Professional of Kudos Chemie Ltd & Ors***², wherein the NCLT held that the distribution of Resolution Plan amount shall be as per the per voting share and the commercial wisdom of CoC lies in the amount to be paid to different classes or sub-classes of creditors in accordance with provisions of IBC and its Regulations, and thus a dissenting secured creditor cannot suggest a higher amount to be paid to it with reference to the value of the security interest.
- NCLAT further placed reliance on the judgement of the SC in ***India Resurgence Arc. Pvt Ltd v. Amit Metaliks Ltd & Anr***³, wherein SC after referring to Section 30(2) rejected the submissions of the appellant therein that the distribution ought to have been as per value of security interest held by the financial creditor.
- NCLAT examined the statement of objects and reasons of IBC and clarified that the entitlement of dissenting Financial Creditor is to receive liquidation value of their debt and not the distribution as per their security value. NCLAT further perused the Report of Insolvency Law Committee (February, 2020) specifically the paragraph wherein the Committee opined that 53(1)(b)(ii) does not necessitate any further amendment to the provisions of the IBC and thus, held that the conclusion of the committee was that the priority under Section 53(1)(b)(ii) shall be only to the extent of security interest of the secured creditor and the secured creditor cannot claim priority under Section 53(1)(b)(ii) of the whole debt where only part of the debt is secured.
- NCLAT referred to the judgement of ***Oriental Bank of Commerce v. Anil Ancharia & Anr***⁴ wherein it was held that dissenting Financial Creditor is entitled for distribution as per Section 53(1) of IBC and does not support the case of the Appellant herein.
- In view of the above, NCLAT arrived at the conclusion that there is no error in the Impugned Order and thus, dismissed the Appeal.

HSA

Viewpoint

This judgment clarifies that the distribution of proceeds under Section 53(1) of IBC shall be on the basis of debt owed to a Secured Creditor and not on the value of security of dissenting Financial Creditor. However, the larger issue of how proceeds are to be distributed in liquidation amongst inter se secured creditors is pending before the Supreme Court in *Kotak Mahindra Bank v. Technology Development Board*.

Axis Bank Ltd v. Vidarbha Industries Power Ltd

Supreme Court of India | Judgment dated September 22, 2022 | Review Petition (Civil) No. 1043 of 2022 in Civil Appeal No. 4633 of 2021

Background facts

- Vidarbha Industries Power Ltd (**Vidarbha**) was supplying power to Reliance Industries Ltd pursuant to a Power Purchase Agreement (**PPA**) approved by Maharashtra Electricity Regulatory Commission (**MERC**).
- Vidarbha filed an application before the MERC for truing up the Aggregate Revenue Requirement and for determining tariff in terms of MERC (Multi Year Tariff) Regulation 2011. The same was disposed of vide order dated June 20, 2016 wherein a significant portion of the actual fuel costs claimed, was disallowed for the FYs 2014-15 and 2015-16 and tariff was capped for FYs 2016-17 to 2019-20.
- Vidarbha then filed an Appeal before the Appellate Tribunal for Electricity (**APTEL**) challenging disallowance of the actual fuel cost for the FYs 2014-15 and 2015-16. APTEL allowed the Appeal vide order dated November 3, 2016. MERC filed an Appeal before the Supreme Court challenging the APTEL order which is pending.
- Axis Bank Ltd (**Petitioner**) filed an application under Section 7(2) of IBC before NCLT for initiation of CIRP against the appellant on January 15, 2020. Vidarbha filed a Miscellaneous Application (**MA**) in February 2020 seeking stay of proceedings under Section 7 of IBC till MERC's civil Appeal was pending.
- The NCLT dismissed the MA vide order dated January 29, 2021 and refused to stay the CIRP proceedings. The NCLT admitted the Company Petition filed by the Petitioner and observed that '...no other extraneous matter should come in the way of expeditiously deciding a Petition either under Section 7 or under Section 9 of the Code.'
- Aggrieved, Vidarbha filed an Appeal before the NCLAT against the Admission Order. However, the NCLAT dismissed it vide order dated March 2, 2021 and upheld the Impugned Order of the NCLT.
- Consequently, Vidarbha filed an Appeal before the Supreme Court (SC) against the NCLAT judgment upholding the Admission Order of NCLT. The Supreme Court vide judgment dated July 12, 2022 allowed the Appeal filed by Vidarbha and observed that NCLAT has erred in holding

² Company Appeal (AT) Ins. No. 665 of 2022

³ Civil Appeal No. 1700 of 2021

⁴ Company Appeal (AT) Ins. No. 547 of 2022

that the NCLT is only required to see if there is a debt and the CD has defaulted in making repayments to initiate CIRP. It further observed that the presence of the two factors only give a Financial Creditor (FC) the right to apply for initiating CIRP. However, the NCLT is required to apply its mind to 'relevant factors' before admitting an application. The SC also dealt with the expression 'may admit' and observed that it confers 'discretion to admit' as opposed to 'shall' which advances a 'mandatory requirement'. In light of the same, the SC held that the NCLT may examine the 'expediency' of initiating CIRP by taking into account all relevant factors including the 'financial health and viability' of the CD and it has discretion to not admit the application under Section 7.

- Aggrieved by the judgment of the Supreme Court, Axis Bank filed a Review Petition before the Supreme Court.

Issue at hand?

- Whether the observations of the Supreme Court in the judgment dated July 12, 2022 suffer from any error apparent on the face of the record, and whether its findings amount to ratio decidendi?

Decision of the Court

- The SC dismissed the Review Petition on the ground that there are no grounds for review of the judgment and order. While arriving at the said decision, the SC examined its decision in E.S. Krishnamurthy & Ors v. Bharath Hi-Tech Builders Pvt Ltd [(2022) 3 SCC 161] where the extent of the word 'may' as mentioned under Section 7 was discussed. The SC thereafter differentiated the issue involved in E.S. Krishnamurthy & Ors v. Bharath Hi-Tech Builders Pvt Ltd and the present case and observed that issue in Krishnamurthy's case was whether the adjudicating authority could foist a settlement on unwilling parties.
- To the submissions made on behalf of the Petition pertaining to the decision in the judgment under review being contrary to the aims and object of the IBC, the Supreme Court observed that judgments and observations in judgments are not to be read as provisions of statute. Judicial utterances and/or pronouncements are in the setting of the facts of a particular case. In view of the same, the Review Petition was dismissed.

KV Jayaprakash v. State Bank of India & Ors

National Company Law Appellate Tribunal Principal Bench, New Delhi | Judgment dated September 30, 2022 | Company Appeal (AT) (Insolvency) No. 362 of 2022

Background facts

- Mr. K.V. Jayaprakash (**Appellant**; one of the Personal Guarantors of the Corporate Debtor), filed an Application before the National Company Law Tribunal, Cuttack with a request to restrain State Bank of India, the Respondent No. 1 from proceedings with the public auction of properties belonging to the Appellant in furtherance to the Liquidation Order passed for the Corporate Debtor. The instant Appeal is a challenge against the order of the NCLT dismissing the plea of the Appellant.
- The Corporate Debtor availed a loan of Rs. 774.12 Crore from respondent No.1 bank to which the appellant stood as a guarantor for the Corporate Debtor and the Appellant's Property was taken as collateral security. Thereafter, vide order dated 05.01.2018 passed by NCLT, Kolkata Bench, the CIRP of the Corporate Debtor was initiated. Due to unsuccessful CIRP, the Corporate Debtor was admitted into liquidation vide Liquidation order on 06.12.2018. Consequently, the Respondent No. 1 submitted its claim to the Liquidator in response to the public announcement under Section 33 (1) (b) (ii) of the IBC for liquidation of the Corporate Debtor.
- Simultaneously, the Respondent filed an application under Section 14 of the SARFAESI Act against the Corporate Debtor and its guarantors for taking possession of the Property without disclosing that the Corporate Debtor was undergoing liquidation. The Additional Chief Metropolitan Magistrate allowed the said Application allowing the Respondent No. 1 to take the possession of the properties. The Appellant challenged same under Section 17 of the SARFAESI. The Challenge before the DRT was dismissed and therefore, the Appellant filed an IA before the NCLT. During pendency of the said Appeal, Respondent No. 1 on the strength of the order passed under Section 14 of SARFAESI Act, issued notice dated 29.09.2021 under Rule 8(6) of the Security Interest (Enforcement) Rules, 2002 to conduct public auction of the Property. The said notice was followed by a sale notice dated 06.10.2021 published on the public platforms. In the meantime, the Appeal of the appellant before the DRT was dismissed on 04.10.2021, confirming the order passed under Section 14 of SARFAESI Act.
- Consequently, the Appellant approached the NCLT on the ground that since the Corporate Debtor is undergoing Liquidation, any action such as possession or sale of the property would be in violation of the moratorium imposed under Section 33. The NCLT dismissed the Application filed by the Appellant on the ground that the Application filed by the Appellant was neither

HSA Viewpoint

The instant judgment may appear to be a ray of hope to the debtors against whom lenders have filed applications for initiation of the CIRP, while such debtors hold the capacity to repay their outstanding amounts and are only unable to do so due to certain outstanding amounts that remain pending from a third party. On the contrary, this decision might cause great prejudice to creditors as they will now be faced with this argument in every other case, and the admission of each case will be contingent on receipt of monies from third parties. Having said that, by way of this Review Order, the supreme court has clarified that the findings in this judgment are to be read in the facts and context of this case, and not as a general rule.

maintainable nor sustainable as the Appellant is a personal guarantor of the Corporate Debtor and a stranger to the insolvency and bankruptcy proceedings. Hence, the Financial Creditor i.e.. The Respondent No. 1 was not prohibited from proceeding against the personal guarantor of a Corporate Debtor by instituting recovery proceedings permissible under any other existing and applicable law, such as the SARFAESI Act.

Issue at hand?

- Whether Personal Guarantor is entitled to include himself as a Secured Creditor in the list of creditors prepared under Section 36 of IBC enforcing the right of subrogation under Section 140 of the Contract Act?

Decision of the Tribunal

- The Appellate Tribunal relied upon the decision of *Gujarat Urja Vikas Niqam Ltd v. Amit Gupta*⁵ to examine the scope of the jurisdiction of the NCLT under Section 60(5) of the IBC and concluded that in view of the aforementioned judgment, the Apex Court cautioned NCLT and the Appellate Tribunal to ensure that they do not usurp the legitimate jurisdiction of other courts, tribunals and fora when the dispute is one which does not arise solely from or relate to the insolvency of the Corporate Debtor. In view of the same, the Appellate Tribunal concluded that since the proceedings under SARFAESI Act are independent against the personal guarantor of Corporate Debtor and they are purely recovery proceedings, the NCLT was right in dismissing the application on the ground that it did not have the jurisdiction.
- As regards the contention raised by the Appellant to be included as a Secured Creditor of the Corporate Debtor in the list of creditors, the NCLAT discussed Section 128 and 140 of the Indian Contract Act, Sections 5(5A), 3(30), 3(31) of the IBC and observed that on conjoint reading of the words 'corporate guarantor', 'security interest' and secured creditor to claim that he is a secured guarantor as defined under Section 3(30), he must satisfy that he has got a security interest as defined under Section 3(31) of I.B.C. The word 'secured creditor' is also defined under Section 3(30) of IBC, which means a creditor in favour of whom security interest is created. However since in the present case, no security interest, as defined under Section 3(31) was created by the Corporate Debtor, in any of the specified modes, therefore the Appellant cannot claim to be a secured creditor even on account of the right to subrogation.
- After discussing the judgments of the Supreme Court in *Lalit Kumar Jain v. Union of India*⁶ and *State Bank of India v. V.Ramakrishnan*⁷, the NCLAT observed that if the Appellant being a Personal Guarantor discharged part of the loan payable by the Corporate Debtor, he is entitled to recover the amount under Section 140 of the Indian Contract Act, as if he is a creditor, but not a 'Secured Creditor' as defined under Section 3(30) of the I.B.C., since no security interest was created in favor of the creditor. He may not have any chance of recovery of the amount proceeding against the 'Corporate Debtor', but there are different modes of recovery in the general law. Therefore, he cannot be included in the list of secured creditors, as no security interest was created in favor of the guarantor and he would not fall within the definition of 'Secured Debtor'. However, the Appellant who stepped into the shoes of creditor in terms of Section 140 of the Indian Contract Act, is entitled to recover the debt irrespective of sale of assets of Corporate Debtor in liquidation process in any of the recognized modes.

HSA

Viewpoint

The findings of the NCLAT that the personal guarantor exercising the right of subrogation will not be a secured creditor to the Corporate Debtor provide much needed clarity. However, to consider such Guarantor as a Creditor itself can lead to several questions pertaining to logistics and enforceability of such claim.

⁵ Civil Appeal No. 9241 of 2019

⁶ (Civil) No. 245/2020

⁷ Civil Appeal No. 3595 of 2018



RECENT DEALS

Resolution of Flora Dyeing House Pvt Ltd

- The NCLT, Mumbai Bench, vide an order dated October 07, 2022 approved the Resolution Plan submitted by consortium of Viraki Brothers, Dipen Shah and Anish Shah (Viraki Consortium), the Successful Resolution Applicant, in the CIRP of Himadri Foods Ltd, the Corporate Debtor.
- Vide order dated December 09, 2020, the NCLT, Mumbai Bench admitted the Company Petition filed by Pentaaleon Packaging LLP under Section 9 of the IBC and ordered for initiation of the CIRP of the Corporate Debtor.
- After issuance of Form G, five Prospective Resolution Applicant submitted the Resolution Plans. After due discussion and deliberation, the Resolution Plan received from the Successful Resolution Applicant was approved with 87.15% Voting share by the CoC.
- A perusal of the order of approval of Resolution Plan shows that the Resolution Plan provides for a total payment of INR 35.61 Crores. Additionally, the Plan proposes to continue the operation of the Corporate Debtor as a going concern. Hence, in terms of the law laid down in Ghanshyam Mishra and Sons vs Edelweiss Asset Reconstruction Company Ltd, all the subsisting rights, consents, licenses, entitlements etc granted to the Corporate Debtor notwithstanding any provision to the contrary in their terms, be deemed to continue without disruption for the benefit of the Corporate Debtor.

NCLT, Hyderabad gives nod to sale of Lanco Infratech Ltd as a going concern

- The Liquidator of Lanco Infratech Ltd filed an application under Section 60(5) of the IBC read with Regulation 32 and 33 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations 2016, seeking approval of the acquisition plan (**Acquisition Plan**) submitted by KRS Erectors Pvt Ltd (**referred to as the Successful Bidder**) for acquiring Lanco as a going concern on as is where is basis in the liquidation process of Lanco or in the alternative for passing appropriate directions in relation to the distribution of the assets/properties amongst the stakeholders of Lanco that could not be sold in the liquidation process of Lanco and allowing for the dissolution of Lanco under Section 54 (1) and (2) of the IBC read with Regulation 45 and Regulation 38 of the Liquidation Regulations.
- An application under Section 7 of the IBC by IDBI Bank Ltd against Lanco and appointed a Resolution Professional. Since no Resolution Plan was considered by the Committee of Creditors of Lanco, pursuant to an application filed under Section 33(1) of the IBC, the NCLT ordered the initiation of the liquidation process of Lanco.
- After rounds of e-auctions and a round of Pvt Sale, the Liquidator in consonance with the decision of the Stakeholders Consultation Committee floated another round of bidding,

whereafter, 11 parties expressed their interest in acquiring Lanco Infra either as a going concern or acquiring as an entire block of assets.

- Consequently, KRS Erectors Pvt Ltd emerged as the Successful Bidder. The NCLT after a detailed deliberation was of the opinion that the present proposal is first of its kind wherein the Liquidator at the first place having successfully sold a part of the assets of the Corporate Debtor during liquidation, has approached the NCLT craving for approval of sale of the remaining assets including receivables of the Corporate Debtor as a going concern. In view of the same, vide order dated September 26, 2022 approved the proposed acquisition plan.
- A bare perusal of the Acquisition Plan suggests that:
 - An Upfront Payment Amount of INR 4 crore towards the acquisition of the assets of the Corporate Debtor identified in the Process Document. An Upfront Commitment Amount of INR 1 crore is provided to prosecute actionable claims comprising legal cases as identified in the process document. Total expenses as a percentage of proceeds to be realized from sale of assets and actionable Claims are limited to maximum cap of 9.50%, beyond which they will be borne by the Corporate Debtor.
 - As regards the distribution of any recovery from the Avoidance Applications filed during the CIRP, any recovery pursuant to any application filed by the Resolution Professional or the Liquidator in relation to transactions covered under Section 43, 45, 50 and 66 of IBC, shall pass through from Lanco to the stakeholders of Lanco, and shall not be available to the bidder.
 - Lastly, as the relief of granting the concessions and reliefs is concerned, the NCLT directed the successful bidder, to approach the Authorities concerned as per the procedure and the concerned Authorities concerned may consider the same as per the provisions of the relevant law.



COMPANIES ADMITTED TO INSOLVENCY IN SEP-OCT 2022

Companies admitted to insolvency

#	Name of Corporate Debtor	NCLT Bench	Industry
1	Jeph Bev Pvt Ltd	Jaipur	Packaged mineral water industry (mainly manufacturer of packaged water bottle)
2	Altech Infrastructure Pvt Ltd	New Delhi	Designing, manufacturing and supply of deaerators and feed water heaters in India
3	Jawan Construction Pvt Ltd	Jaipur	Construction business
4	Jaatvedas Construction Pvt Ltd	Mumbai	Construction business
5	Agarwal Polysacks Ltd	Mumbai	Manufacturing of industrial packaging products in India
6	Dhingra Jardine Infrastructure Pvt Ltd	New Delhi	Construction business
7	Navayuga Infotech Pvt Ltd	Hyderabad	Development of software applications
8	G R Multi Flex Packaging Pvt Ltd	Kolkata	Manufacturing of scrap, polyester film, metallized film, etc.
9	Kelvin Buildcon Pvt Ltd	New Delhi	Construction and completion of buildings
10	Easun Products of India Pvt Ltd Company	Chennai	Production and supply of conductors made of aluminum, copper, etc.
11	Sinnar Thermal Power Pvt Ltd Company	New Delhi	Production, transmission and distribution of power
12	M.K Printech Pvt Ltd	New Delhi	Hologram manufacturing, news printing, etc. along with their delivery
13	Fastlane Information Technologies Pvt Ltd	Mangalagiri (Andhra Pradesh)	The company is involved in the business of software publishing, consulting and supply.
14	Max Granito Pvt Ltd	Ahmedabad	Manufacturing of non-metallic mineral products (tiles, ceramic products, marble tiles, etc)
15	Kashish Developers Ltd Company	Kolkata	Real estate business
16	Pushpa Builders Ltd	New Delhi	Civil engineering services
17	Dhingra Jardine Infrastructure	New Delhi	Real estate business (civil construction, commercial construction, etc.)
18	Nandini Impex Pvt Ltd Company	Kolkata	Services pertaining to civil engineering and contracting work (especially in oil pipeline construction)
19	Starlite Builders Pvt Ltd	New Delhi	Buying, selling, renting of real estate
20	EZHIL Chemical Pvt Ltd Company	Chennai	Manufacturing of photochemical products like photographic plates, films, sensitized papers, manufacture of unrecorded media for sound recording (ex-disk, floppies, etc.)
21	Apeksha Housing Pvt Ltd	Jaipur	Development of property
22	Govind Electrical Pvt Ltd Company	Chandigarh	Wholesale and trading business of electrical goods
23	Shakti Bhog Foods Ltd Company	New Delhi	Supply and manufacture of prepacked rice, pulses, wheat, etc.
24	Deneb Automotives Pvt Ltd Company	Chandigarh	Manufacturing of special purpose machinery especially in automobiles segment and with other products in the non-automotive sector
25	Metro Concrete Pvt Ltd	New Delhi	Construction business

26	D B Group India Pvt Ltd Company	Mumbai	Transportation, export, import, customs consulting and clearance, warehousing and hazardous goods handling
27	Ravi Cranes and Movers Ltd Company	Hyderabad	Supply of crane related services
28	Shree Maheshwar Hydel Power Corporation Ltd Company	Kolkata	Production, supply and distribution of hydro electricity
29	Sai Shraddha Vivek Projects Developers Pvt Ltd Company	Mumbai	Developing real estate
30	S K S Textiles Ltd Company(28.09.2022)	Bombay	Textile business of supplying fabrics and yarns
31	SND Ltd Company(29.09.2022)	Mumbai	Online electricity bill payment services
32	Kalra Overseas & Precision Engineering Ltd Company	Mumbai	Manufacturing of machined components
33	ENN Tee International Ltd	New Delhi	Manufacturing polypropylene yarn, multifilament yarn and polyester yarn, etc.
34	Perfect Engineering Products Ltd	Mumbai	Manufacturing engine valves, valve seat inserts and valve guides for automotive industry, Captive power segment, Locomotive and Marine engine, etc.
35	Auro Gold Jewellery Pvt Ltd	Mumbai	Gold jewellery manufacturing
36	Ansal Properties And Infrastructure Ltd	New Delhi	Real estate promotion, construction and development activities; the company executes contracts for building residential complexes, commercial complexes, etc.
37	Velnik India Pvt Ltd	Jaipur	Manufacturer and supplier of hair care, cosmetics and personal care products
38	Indian Mega Agro Anaj Ltd	Mumbai	Manufacturer of flourmill, animal food & flour
39	Gayatri Projects Ltd	Hyderabad	Development of infrastructure and providing hospitality services
40	Lokmangal Agro Industries Ltd	Mumbai	Manufacturer of sugar
41	DK Realty (India) Pvt Ltd	Mumbai	Construction and renting of real estate
	Globalone Technologies Pvt Ltd	Mumbai	Manufacturing video conferencing equipments & other products
42	Hacienda Projects Pvt Ltd	New Delhi	Construction and renting of real estate
43	At&F India Fabrication Pvt Ltd	Mumbai	Manufacturing and retail of heavy metal fabrications
44	Bilcare Ltd	Mumbai	Packaging material solutions to pharmaceutical industry
45	CS Infra Construction Ltd	Allahabad	Road construction
46	Euro Multivision Ltd	Mumbai	Manufacturing Compact Disc Recordables (cdrs) and Digital Versatile Disc Recordables (dvdrrs)
47	Varadharaja Food Pvt Ltd	Chennai	Producing and processing fruit pulps
48	Orbitol Intelligence Pvt. Ltd	New Delhi	Manufacturing of machinery & equipments
49	Khadyota Kishan Foundation (Kishan Research and Development Centre)	Chennai	Growing of crops, market gardening and horticulture businesses
50	Tung Builders Pvt Ltd	Chandigarh	Construction business
51	Shri Vishnu Overseas Pvt. Ltd	Chandigarh	Export, distribution and trade of rice
52	Prathvi Coal Pvt. Ltd	New Delhi	Mining & quarrying business
53	Nik-San Engineering Company Ltd	Mumbai	Manufacturing of power transformers
54	Western Hill Foods Ltd	Mumbai	Processing frozen fruits and vegetables
55	Bard Roy Infotech Pvt Ltd	Kolkata	Providing, software support, networking support, security systems and ecommerce services
56	Ultramine Pipetech Pvt Ltd	Kolkata	Manufacturing PVC pipes
57	Kilburn Office Automation Ltd	Kolkata	Manufacturing office equipments
58	Prithvi Energy Ltd	Kolkata	Supplying electricity and gas
59	Sahil Spintex Ltd	Chandigarh	Manufacturing of textiles
60	Titagarh Wagons Ltd	Kolkata	Manufacturing of railway wagon
61	Maa Manasha Devi Alloys Pvt Ltd	Cuttack	Manufacturing of ferrous alloy, cast of iron scraps & iron waste

Companies directed to be liquidated

#	Name of Corporate Debtor	NCLT Bench	Industry
1	Abhiraami Chemicals Ltd	Chennai	Manufacturing of chemicals
2	Vijai Spinners (RJPM) Pvt Ltd	Chennai	Manufacturing of textiles
3	Cauvery Power Generation Pvt Ltd	Chennai	Generation and distribution of electricity
4	Aryavrat Trading Pvt Ltd	Kolkata	Real estate and renting business

5	Max Flex & Imaging Systems Ltd Company	Mumbai	Production of motion pictures, radio, television and other entertainment activities
6	Noveus (India) Infotech Ltd	Mumbai	Accounting and computing machinery
7	Adi Ispat Pvt Ltd	Kolkata	Manufacturing of steel products (mainly bright steel bars)
8	Patwa Automotive Pvt Ltd	Indore	Sale of automotives
9	Shift India Pvt Ltd	Mumbai	Business services
10	Kotak Urja Pvt Ltd	Mumbai	Production, collection and distribution of electricity
11	Koyenco Autos Pvt Ltd	Kochi	Trading auto spare parts
12	JK Coil Coatings Pvt Ltd	Mumbai	Manufacturer and supplier of paint and coil coating
13	Pallavi Marketing Pvt Ltd	Kolkata	Supply and distribution of Cement
14	Ashmore Investment Advisors (India) Pvt Ltd	Mumbai	Managing services pertaining to markets investment
15	SM Ramcoal Importers Pvt Ltd	Chennai	Coal importer and provides services pertaining to transport, customs clearance and local distribution into one integrated logistics solutions
16	Male Square Retails Pvt Ltd	Ahmedabad	Retail of men's readymade garments
17	Axiomata Elevators Pvt Ltd	Kochi	Manufacturing and trading of comprehensive range of commercial elevators and goods elevators.
18	United India Shoe Corporation Pvt Ltd	Chennai	Manufacturing and distribution of leather shoes
19	Saptarishi Hotels Pvt Ltd	Hyderabad	Hospitality services
20	Nascent Communication Pvt. Ltd	New Delhi	Operates in the telecommunication industry and provides services pertaining to developing messaging systems
21	Deltronix India Ltd	New Delhi	Leading exporter, manufacturer, supplier of alloy wheels, ignition wire sets and rubber components
22	Ingrey Travel and Tourism (India) Pvt Ltd	Mumbai	Travel and tourism services

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