

ROLE OF CS IN CORPORATE RESCUE & PRACTICAL DIFFICULTIES FACED



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GENESIS OF IBC, 2016

- ◉ The Insolvency and Bankruptcy Code, 2015 was introduced in Lok Sabha on [December 2015](#) and was passed by the Parliament on [11 May 2016](#)
- ◉ Received Presidential assent on [28 May 2016](#) and was notified in the official gazette
- ◉ Prime focus on :-
 - paradigm shift from the existing ‘Debtor in possession’ to a ‘Creditor in control’ regime
 - consolidating insolvency related laws as well as amended multiple legislation
 - resolve insolvencies in a strict time-bound manner
 - defined ‘order of priority’ or the waterfall mechanism
 - Insolvency Professional (IP) as intermediaries to oversee the process



The Road to Being an RP



By Mamta Binani



WHO IS AN RP?

- Insolvency Professional ('IP') appointed to conduct the CIRP and includes an interim resolution professional
- **Regulation for IPs** - Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 which came into force from 29th November, 2016
- **Link to the Regulations** - http://www.ibbi.gov.in/Updated%20IP%20REGULATIONS_2018-04-02%2019_36_06.pdf
- The Indian Law is primarily influenced by the UK Law in terms of IBC, 2016



ELIGIBILITY CRITERIA

PASSED LIMITED
INSOLVENCY EXAM
WITHIN 12 MONTHS
BEFORE THE DATE OF
HIS APPLICATION FOR
ENROLMENT WITH THE
IPA

COMPLETED A **PRE-
REGISTRATION
EDUCATIONAL
COURSE**, FROM AN IPA
AFTER HIS ENROLMENT
AS A PROFESSIONAL
MEMBER

(I) SUCCESSFULLY
COMPLETED THE
**NATIONAL INSOLVENCY
PROGRAMME**;

(II) SUCCESSFULLY
COMPLETED THE
**GRADUATE INSOLVENCY
PROGRAMME**;

(III) **15 YEARS' OF
EXPERIENCE** IN
MANAGEMENT, AFTER
RECEIVING A BACHELOR'S
DEGREE FROM A
UNIVERSITY ESTABLISHED
OR RECOGNISED BY LAW;
OR

10 YEARS' OF EXPERIENCE
AS –

(A) CA REGISTERED AS A
MEMBER OF THE ICAI,

OR

(B) CS REGISTERED AS A
MEMBER OF THE ICSI,

OR

(C) COST ACCOUNTANT
REGISTERED AS A MEMBER
OF THE INSTITUTE OF COST
ACCOUNTANTS OF INDIA,

OR

(D) ADVOCATE ENROLLED
WITH THE BAR COUNCIL.



Disqualifications



DISQUALIFIED



ELIGIBILITY CRITERIA – DISQUALIFICATIONS

Minor

Not a person resident in India

Does not possess qualification required as per Reg 5 or Reg 9

Has been convicted – imprisonment exceeding 6 months or for Moral turpitude and period of 5 years has not lapsed

Undischarged insolvent

Unsound mind

Not fit & proper person



Duties of an RP & Restrictions imposed





DUTIES OF AN RP - 1

- ◉ **Section 25 of the IBC 2016- Duties of resolution professional**
- ◉ Preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor.
- ◉ For the purposes of 25(1), the RP shall undertake the following actions, namely:—
 - *custody and control* of all the assets of the CD,;
 - *represent and act* on behalf of the CD with third parties, *exercise rights for the benefit* of the corporate debtor in judicial, quasi-judicial or arbitration proceedings;
 - *raise interim finances* subject to the approval of the CoC under section 28;
 - *appoint accountants, legal or other professionals* in the manner as specified by Board;
 - *maintain an updated list of claims*;



DUTIES OF AN RP - 2

- *convene and attend all meetings of the CoC;*
- *prepare the **information memorandum** in accordance with section 29;*
- ***invite** prospective lenders, investors, and any other persons to put forward resolution plans;*
- ***present all resolution plans** at the meetings of the CoC;*
- ***file application for avoidance of transactions** in accordance with Chapter III, if any; and such other actions as may be specified by the Board.*



Restrictions on an RP



By Mamta Binani



RESTRICTIONS ON AN RP - 1

◎ Under the Code of Conduct

- Must refrain from **accepting too many assignments**, if he is unlikely to be able to devote adequate time to each of his assignments
- Must **not engage in any employment**, except when he has temporarily surrendered his certificate of membership
- Must **not conduct business** which in the opinion of the Board is **inconsistent** with the reputation of the profession



RESTRICTIONS ON AN RP – 2

- ⦿ IRPs are debarred from taking fresh assignments for 5 years if they opt out of an ongoing case
- ⦿ Exception for reasons physical incapacitation. [****Recommendatory**]
- ⦿ They may also be excused if they become legally ineligible to pursue a case [****Recommendatory**]
- ❑ Ban on outsourcing of the activities - [Ref link](#)
- ❑ Resolution Professionals can't pick and chose their tasks



Practical Difficulties Faced by the RPs





PRACTICAL DIFFICULTIES FACED BY AN RP - 1

◎ *Devendra Padmachand Jain Vs The State Bank of India*

- Remarks and Complaints against the resolution Professional
- **Issues in the case –**
 - RP was **not appointed** as the Liquidator by the NCLT
 - AA appointed another Liquidator as the **RP did not assist the AA** to the satisfaction
 - **RP appealed** to the Appellate Tribunal where **appeal was dismissed**
 - RP then filed an **appeal before the Hon'ble Supreme Court**
 - RP justified that there was **no record of any dissatisfaction** wrt the assistance rendered by him.
 - **The case was dismissed but a direction was passed to delete the adverse remark**

[Case Link: [Click here](#)]; [Hon'ble Supreme Court Order – [Click here](#)]



PRACTICAL DIFFICULTIES FACED BY AN RP - 2

- ◉ [IBBI Order No. IBBI/Ref- Disc.Comm./02/2018 13thApril , 2018](#)
- ◉ Issue of the case –
 - ❖ The IP did not respond to the email of the Claimant and also did not reply to the IBBI at various instances
 - ❖ IBC 2016 is an evolving law which has numerous teething issues to be addressed.
 - ❖ The IP also needs adequate time to get a grip of the changes which might at times cause some delay
 - ❖ These severe punishments psychologically effect the working of other IPs and many
 - ❖ Penal provisions should not be so severe that it demoralizes the RP
 - ❖ IP has to deal with numerous scenarios in that stringent time frame, which may cause some delays



PRACTICAL DIFFICULTIES FACED BY AN RP - 3

- ◎ **IP to ensure compliance with provisions of the applicable laws**
 - IBBI also mandated through its circular on 3rd January 2018 – [Click here](#)

- ◎ **Compliances under various statutes**
 - On admission of the Insolvency Petition, an IRP is required to take complete control over the management of the CD and take control and custody of its assets, receive, collate verify the creditor claims, constitute the Committee of Creditors (CoC) and comply with such other tasks.
 - **The RP has to take care of routine statutory compliances like filing of Income Returns, TDS, PF, ESI, GST Returns, Roc Filings, SEBI Compliances etc.**
 - Complying with this laws during the Insolvency Process is a very big challenge



PRACTICAL DIFFICULTIES FACED BY AN RP - 4

⦿ **Verification of Resolution Applicant**

- It is the duty of the RP to ensure the eligibility of the Resolution Applicant
- Crucial task to verify whether the resolution plans are submitted/ received only from the eligible persons and as per the criteria laid down in the Law

⦿ **Difficult to find the Market for selling the Stressed Assets**

- It is difficult to find buyers for the distressed assets
- RPs to find it difficult to get buyers as there is no separate market or online trading platform for selling the stressed assets
- It is one of the biggest challenges for the Insolvency professional



PRACTICAL DIFFICULTIES FACED BY AN RP - 5

◎ Cross Border Insolvency issues

- ❑ *Section 234 and Section 235 of the IBC 2016 deals with Cross Border Insolvency*
- ❑ *The regulations relating to cross border insolvencies are yet to be notified*
- ❑ *Challenging task for the IPs to take any evidence or action relating to the CD in their present cases*
- ❑ *At present, there is no system in place to verify whether there is any reciprocal arrangement is entered between foreign country where the foreign assets of the Corporate debtor is located*
- ❑ *It is difficult for RP in applying the provisions of section 234 and 235*



PRACTICAL DIFFICULTIES FACED BY AN RP - 6

◎ *State Bank of India Vs Monnet Ispat & Energy Ltd*

▪ **Creating Consensus among Operational and Financial Creditors**

- Though Liquidation value due to OC as per IBC is NIL , on the Direction of the Hon'ble Bench it was decided to pay Rs.25Crore to OC (other than employees and workmen)
- *Pro Rata basis & Principle of Pari Passu*
- Government dues are not compromised
- It is the duty of the RP to take care of the interest of the all the stakeholders
- Hon'ble NCLT before passing the Order ensured whether RP has operated in time-bound manner

[Case link: [Click here](#)]



PRACTICAL DIFFICULTIES FACED BY AN RP - 7

◎ Interim Finance

- Raising Interim Finance to run the Corporate as a going concern
- Banks and Financial Institutions are hesitant to provide interim finance
- Restrictions on the IRP with respect to creating security
- An RP is permitted to raise interim finance after taking charge of a corporate debtor from the IRP under the Code
- In the event that the CoC places a limit on the amount of interim finance, this right of the RP is subject to their approval
- Since interim finance tends to be last-mile financing for financially distressed companies, lenders will charge higher-than-normal rates of interest and earn handsome returns



PRACTICAL DIFFICULTIES FACED BY AN RP - 8

◎ *State Bank of India Vs Bhushan Steel Ltd*

- **Delay in passing the order by the Adjudicating Authorities**
 - During the Insolvency Process the RP is required to get the directions or seek clarifications regarding interpretation of the Code from the AA
 - As lot of cases are filed with NCLT it is very difficult to get the case listed for hearing on time and get the Orders passed
 - Infrastructure of NCLT should also be developed
- **Timeline management of the resolution process**
- **Addressing the issues with the promoters**
 - Promoters and directors of the Corporate Debtor Companies are reluctant to cooperate
- **Working on incomplete/untrue/decorated records which the RP is unaware of**

[Case Link: [Click Here](#)]



PRACTICAL DIFFICULTIES FACED BY AN RP - 9

- ◎ Stressed assets: ‘MSMEs worse-placed than power projects’
 - On February 12, 2018 the RBI had issued a ‘Revised Framework for Resolution of Stressed Assets’
 - Default of **even a single day in payment of interest or principal amount** would trigger a formulation of resolution plan by the CoC
 - MSMEs are at worse situation at this stage “*for a much lesser fault of theirs*”
- According to the amendments in IBC, defaulting promoters of MSMEs will now be **exempted from certain restrictions imposed by Section 29A**
 - Enabling them to bid for their own companies
 - Exemption is **not available to wilful defaulters**
 - Who have been barred from bidding for their own companies



PRACTICAL DIFFICULTIES FACED BY AN RP - 10

The reasons of NPAs in MSMEs – Why is the approach different?

- *include lack of demand,*
- *shortage of working capital,*
- *non-availability of raw materials,*
- *power shortage,*
- *marketing problems,*
- *labour and management problems,*
- *equipment problems,*
- *delayed payments, etc.*



PRACTICAL DIFFICULTIES FACED BY AN RP - 11

◎ Section 29A – A section to watch for

- Bars a number of entities from bidding for companies being put out for resolution including —
 - *wilful defaulters,*
 - *un-discharged insolvent,*
 - *persons banned from trading in securities market, and*
 - *an account classified as NPA for more than one year and failing to pay overdue amount before submission of the bids*
- bit difficult to attract resolution applicants in the case of MSMEs
- a relaxation is being made to ensure that small companies are not headed towards liquidation for comparatively rectifiable faults



PRACTICAL DIFFICULTIES FACED BY AN RP - 12

- ◎ *M/s Winsome Diamonds & Jewellery Ltd. Vs Directorate of Enforcement, Mumbai*
 - Banks have first right over pledged assets, rules Tribunal
 - In a landmark ruling, the PMLA Appellate Tribunal ruled that ED cannot claim rights over assets of people suspected of criminal activity if banks have created prior rights over them through lending
 - The ruling, if upheld, could help banks recover money and clean up their books
 - Bankers to have the first charge on the pledged asset
 - ❖ The order should help see the light of the day for many NCLT cases stuck in litigation process

[Case Order: [Click here](#)]; Reference News-piece Link: [Click Here](#)]



Case Laws and Discussions





IMPORTANT JUDGMENTS - 1

◎ *Jotun India Private Limited Vs.PSL Limited (Hon'ble Bombay HC)*

- The CD, PSL, filed an application with the Hon'ble Bombay High Court, seeking the recall of an earlier order passed on 19 July, 2017,
- Earlier Order prohibited the Hon'ble NCLT, Ahmedabad Bench, from proceeding with an Insolvency Application
- Application under the IBC 2016 would not be permitted, only if a final order of Winding-Up has been passed
- Winding up case filed long ago which cause depreciation in asset value
- Roadblock to find best asset value from buyers

[Case link: [Click here](#)]



IMPORTANT JUDGMENTS - 2

◎ *K. Sashidhar Vs Kamineni Steel & Power India Private Limited*

- ❖ NCLT Hyderabad *vide* its order dated Nov. 27, 2017 had approved the Resolution Plan which is Approved By 66.67% Of Voting Share of Financial Creditors
- ❖ Section 30(4) - CoC may approve the resolution plan by a vote of not less than **75% of voting shares of the financial creditors [**before amendment]
- ❖ To grant due consideration for the socioeconomic benefit/cause, etc., prescribed percentage of 75 % need not be strictly interpreted
- ❖ Paramount duty is cast upon the AA, while approving a resolution plan
- ❖ Discretion is given to the NCLT to approve the resolution plan

[Case Link: [Click here](#)]



IMPORTANT JUDGMENTS - 3

- ⦿ In the matter of *M/s. Gujarat NRE Coke Limited* [C.P. (I.B.) No. 182/KB/2017]
 - ❖ After failure of resolution, the AA appointed the RP as Liquidator
 - ❖ The Liquidator shall try to dispose off the CD as a going concern
 - ❖ Maximum period applicable for trying the sale of the Corporate Debtor as a going concern will be only 3 months from the date of the order
 - ❖ In case the above is not done, the order of this Court shall stand set aside and CD to be liquidated in the manner as laid down in Chapter III of the Liquidation process provided in IBC 2016

- ❑ *The pressure of finding buyers in tandem to the reserve price within a short span while handling other issues as well*
- ❑ *The major onus lies on the Liquidator of not letting a CD go under Liquidation*

[Case Link: [Click here](#)]

By Mamta Binani



IMPORTANT JUDGMENTS - 4

◎ *Quantum Limited Vs. Indus Finance Corporation Ltd.* [CA (AT) (Ins) No. 35 of 2018]

- Hon'ble NCLAT held that in terms of section 12(2) of the Code, an RP can file an application to AA for extension of the period of CIRP only if instructed to do so by the CoC by a vote of 75% of the voting shares

- ❑ *RP has numerous duties to be complied with*
- ❑ *Some processes may take time*
- ❑ *Co-operation from all related concerned consumes time as well*
- ❑ *RP has to wait for CoC to pass resolution to extend time*
- ❑ *Undue pressure on RP to function within time irrespective of the scale of the case*

[Case Link: [Click here](#)]



IMPORTANT JUDGMENTS - 5

◎ In the case of *Jaypee Infratech Limited*

- Issue of the homebuyers – Homebuyers to be treated as Financial Creditors
- CD did not have much resources to tackle all the homebuyers
- Through Ordinance position of homebuyers has been ascertained
- *RP faces the issue of the various changes in a Law that is at a nascent stage*
- *RP has no previous references to rely on*

[Ref Link: [Click here](#)][Supreme Court Judgment -

◎ In the case of *JK Jute Ltd.*

- Hon'ble NCLAT held that the 14-day timeline for rejecting or admitting a case under the IBC was a directive
- Hinders resolving a case in time bound manner

[Case Link: [Click here](#)]



IMPORTANT JUDGMENTS - 6

◎ In *Jaypee Infratech Limited - Observation*

- *Hon'ble Supreme Court said that Liquidation of Jaypee group firm would serve no purpose*
- *The CoC rejected the proposal*
- *An independent person may be appointed to evaluate financial capability of JAL/JIL to continue executing the ongoing existing projects*
- *If it is stated by an expert body that JAL/JIL do not have the financial capability, consider what future steps to be taken*

- ❖ *Time consuming process*
- ❖ *The RP may face dilemma wrt the course of action*
- ❖ *Uncertain turn of events*
- ❖ *Effects market value*



IMPORTANT JUDGMENTS - 7

◎ *Kannan Thiruvengadam Vs M.K.Shah Exports Ltd &ors* [Company Appeal (AT) (Insolvency) No. 203 of 2018 -NCLAT order dated 26.07.2018]

- IRP against the corporate debtor, *Assam Company India Ltd* was triggered in October 2017.
- RP/CoC laid down that prospective resolution applicants must have a minimum net worth of Rs. 400 crores
- M.K Shah Exports Ltd, one such prospective resolution applicant, challenged this decision of the RP/CoC at the NCLT on several grounds.
- The NCLT found the net worth requirements to be ‘*illogical and unrealistic*’ and the criteria specifying this requirement as ‘arbitrary and unreasonable’.
- An *appeal against the NCLT order was filed by the RP*

.....contd. on next slide



IMPORTANT JUDGMENTS - 8

- The NCLAT held that it is **not NCLT's job** to interference in commercial matters of the CD
- **Not in the domain of the AA** to decide the requirement of the minimum tangible net worth
- Matter for experts like CoC to decide & that the NCLT has no jurisdiction to sit in appeal over the decision of expert bodies relating to eligibility criteria
- Accordingly, the NCLT order **was set aside**

- *“It is expected that all the steps will be taken to ensure that the Resolution Process is successful within the prescribed period”*

- ❖ **Affects the time taken in the process**
- ❖ **Unnecessary delay**
- ❖ **Timely intervention by RP was seen here**

[Case link: [Click here](#)]



IMPORTANT JUDGMENTS - 9

○ *Shah Brothers Ispat Pvt. Ltd Vs P. Mohanraj & Ors* - Hon'ble NCLAT, New Delhi in its order dated 31.07.2018 held that

- As Section 138 of the NI Act, 1881 is a penal provision
- Empowers the court of competent jurisdiction to pass order of imprisonment or fine
- Cannot be held to be proceeding or any judgment or decree of money claim
- Imposition of fine cannot be held to be a money claim or recovery against the CD nor order of imprisonment, if passed by the court of competent jurisdiction on the Directors

- *No criminal proceeding is covered under Section 14 of IBC*
- *The court of competent jurisdiction may proceed with the proceeding under Section 138 of NI Act, even during the period of moratorium*

[Case Link: [Click here](#)]



IMPORTANT JUDGMENTS - 10

◉ *Reliance Commercial Finance Limited Vs. Anil Nutrients Limited*

- The Associate Company of the CD had borrowed money from the Financial Creditor which was not paid by both the Principal Borrower or the Guarantor
- The Financial Creditor filed a case against the Guarantor and not against the Borrower
- The Court concluded that, since the default of Corporate Guarantee amounts to the default of Financial Debt
- CIRP should be initiated

- *Difficult for the RP to convince the Corporate Guarantor to be in default*

[Case Link: [Click here](#)]



IMPORTANT JUDGMENTS - 11

© *Palogix Infrastructure Private Limited Vs ICICI Bank Ltd*

- The Hon'ble NCLAT in its order dated 20.09.2017 held that
 - PoA holder is not empowered to file an application
 - Only an authorized persons as provided in the IBC as distinct from a PoA holder can make an application
- *Determining whether the applicant is an Authorised Person under IBC is a major task*

[Case Link: [Click Here](#)]



IMPORTANT JUDGMENTS - 12

◎ *Jindal Steel & Power Ltd. Vs. DCM International Ltd.*

- Held that Appellant tenant do not come within the meaning of ‘Operational Creditor’ as defined under sub-section (20) read with sub-Section (21) of Section 5 of the IBC for triggering Insolvency and Bankruptcy Process under Section 9 of the ‘I&B Code’

[*Case Link: [Click Here](#)*]



IMPORTANT JUDGMENTS - 13

- ◉ Hon'ble Supreme Court said in its order in *Alchemist Asset Reconstruction Company Ltd. Vs M/S. Hotel Gaudavan Pvt. Ltd. & Ors.*
 - When an insolvency petition is admitted, the moratorium that comes into effect under Section 14(1)(a) **expressly interdicts institution or continuation of pending suits or proceedings**
 - Arbitration proceeding has been purported to be started after the imposition of the said moratorium and appeals under Section 37 of the Arbitration Act are being entertained
 - **Set aside the Order** of the District Judge dated 06.07.2017
 - Arbitration instituted after the aforesaid moratorium is *nonest* in law

[Case Link: [Click here](#)]



IMPORTANT JUDGMENTS - 14

◎ Hon'ble Supreme Court of India in *Sunrise 14 A/S Denmark Vs Ravi Mahajan* [Order dated 03.08.2018]

- An application filed by an advocate would be maintainable under Section 7(3)(a) of the IBC
- The Bench referred to recent judgment in *Macquarie Bank Limited Vs Shilpi Cable Technologies Ltd*
- Wherein it was held that a lawyer on behalf of the operational creditor can issue a demand notice of an unpaid operational debt
- The court also held that the provision contained in Section 9(3)(c) of the Code is not mandatory for initiating insolvency proceedings.

[Case Link: [Click here](#)]



*Thank
you*



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