ROLE OF INSOLVENCY PROFESSIONALS IN CORPORATE INSOLVENCY RESOLUTION PROCESS

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Editor's Note: *The Code brings, for the first time in India, a regulated profession of insolvency practitioners. Such insolvency practitioner acts as resolution professional (RP) in corporate and non-corporate insolvency resolution, liquidator in case of corporate liquidation, and bankruptcy trustee in case of individual bankruptcy.*

In corporate insolvency, the RP performs various functions, though under the control of the committee of creditors. The RP takes over the management of the business of the company, while the board of directors remains in suspended animation. The RP has to ensure that the business goes uninterrupted. One of the major tasks of the RP is to bring the creditors on table, and have a feasible resolution plan prepared and acceded to by everyone.

The RP acts as a catalyst in the entire negotiation process, even though several tasks are performed by various specialized agencies. The RP has to perform the tough task of balancing several objectives, even though working under very stringent timelines.

This article examines the role of IPs in the process of corporate insolvency resolution. While an insolvent company essentially comes under the creditors' discretion, the IP becomes the nodal agency that brings the creditors together, ensures the going-concern nature of the insolvent during the resolution process, preserves assets and, where needed, enhances the value of assets by challenging questionable transfers of assets or creation of obligations, and above all, plays an enabling role in the framing of the resolution plan. While it may be intuitive to think of the IP as an agency imposed by some or other creditors, and therefore, have the upfront risk of being taken as anti-debtor, it is important to understand that the IP plays the significant role of cementing together the interests of the corporate debtor and the creditors.

Role of IPs: Historical Perspective

Laws pertaining to insolvency have, historically, in India as well as in the UK, been developed in context of individuals, and later extended to companies. US law, which developed largely out of the UK law, took a pro-reorganisation stance, and therefore, are known more because of the so-called Chapter 11 (in lines of which our own Sick Industrial Companies Act was drawn) rather than the liquidation provisions. Irrespective of the jurisdiction or the subject matter of the law, an insolvency resolution process has always needed an agency to execute the process, the primary difference being whether such agency was an officer of the court, or an appointee of the creditors:

1. The Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920 provided for appointment of official assignees/official receivers for the purpose of carrying out relevant procedures under the Acts – *see* section 17 of the PTIA, 1909 and section 57 of the PIA, 1920.

2. In case of companies, section 448 of the Companies Act, 1956 provided for appointment of official liquidators attached to High Court for carrying out liquidation of those companies which are ordered to be wound up by the High Court. The Companies (Second Amendment) Act, 2002 extended the eligibility [which never came into force] to be appointed as official liquidator, by permitting the appointment of a professional, from a panel chartered accountants, advocates, company secretaries, costs and works accountants, or firms, or bodies corporate consisting of such professionals, as empanelled with the Central Government, The Companies Act, 2013, however, brought this change vide section 275. A "company liquidator", whether in case of winding up by NCLT or voluntary winding up, has to be appointed from a panel of professionals maintained by the Central Government. With the amendments made by the Code, this section will now be relevant only in case of compulsory winding other than on grounds of inability to pay.

3. Under the provisions of the SICA, 1985, an "operating agency" would aid in preparation of scheme for rehabilitation of the sick company. "Operating agency", as defined under section 2, meant any public financial institution, State level institution, scheduled bank or any other person as may be specified by general or special order as its agency by the BIFR. It may be relevant to mention, inasmuch as the Companies (Second Amendment) Act 2002 sought to merge revival provisions into the Companies Act, the said amending Act defined the term "operating agency" as any group of experts consisting of persons having special knowledge of business or industry in which the sick industrial company is engaged and included public financial institution, State level institution, scheduled bank or any other person as may be specified by the NCLT.

4. The Companies Act, 2013 contained provisions for revival and rehabilitation of sick companies under Chapter XIX. Section 259 provided for appointment of "administrators" by the NCLT from a databank maintained by the Central Government or any institute or agency authorised by the Central Government in a manner as may be prescribed consisting of the names of company secretaries, chartered accountants, cost accountants and such other professionals as may, by notification, be specified by the Central Government. These provisions now stand deleted by the IBC.

The above would make it evident that while a nodal agency has always been present in resolution or liquidation process, there has been a gradual tendency to enhance professional involvement in the corporate insolvency procedures. However, the need of a specialized line of profession focused solely on the areas of insolvency law and practice was always felt, alongwith the necessity of revamping the old laws. The IBC, 2016 addresses this need by introducing IPs in the individual and corporate insolvency resolution processes, individual bankruptcy process and corporate liquidation process as well.

Need for specialized insolvency professionals

The need of specialized professionals to conduct the resolution and liquidation processes has been emphasized unequivocally. The UNCITRAL Legislative Guide on Insolvency Law recognizes the role of an "insolvency representative" as follows:

> "However appointed, the insolvency representative plays a central role in the effective and efficient implementation of an insolvency law, with certain powers over debtors and their assets and a duty to protect those assets and their value, as well as the interests of creditors and employees, and to ensure that the law is applied effectively and impartially. Accordingly, it is essential that the insolvency representative be appropriately qualified and possess the knowledge, experience and personal qualities that will ensure not only the effective and efficient conduct of the proceedings and but also that there is confidence in the insolvency regime."

In **"Orderly and Effective Insolvency Procedures"** by International Monetary Fund, the role of a liquidator or an administrator has been appropriately described, however, with a suitable caution –

> "The liquidator and the administrator play a central role in the effective implementation of the law. Although their respective roles differ substantially, they are similar in one important respect. As court-appointed officials, they have an obligation to ensure that the law is applied effectively and impartially. Moreover, since they normally have the most information regarding the circumstances of the debtor, they are in the best position to make informed decisions. That does not mean, however, that they are a substitute for the court: due process requires that a dispute between the liquidator and an interested party be adjudicated by a court of competent jurisdiction. Even in countries where there are serious problems with the capacity of the judiciary, there is a limit to the amount of authority that the law can confer upon these officers."

The BLRC, the recommendations of which has led to the enactment of the Code, in its Final Report, emphasises the role of an insolvency professional as follows –

> "In an insolvency and bankruptcy resolution process driven by the law there are judicial decisions being taken by the adjudicator. But there are also checks and accounting as well as conduct of due process that are carried out by the IPs. Insolvency professionals form a crucial pillar upon which rests the effective, timely functioning as well as credibility of the entire edifice of the insolvency and bankruptcy resolution process.
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> In administering the resolution outcomes, the role of the IP encompasses a wide range of functions, which include adhering to procedure of the law, as well as accounting and finance related functions. The latter include the identification of the assets and liabilities of the defaulting debtor, its management during the insolvency proceedings if it is an enterprise, preparation of the resolution proposal, implementation of the solution for individual resolution, the construction, negotiation and mediation of deals as well as distribution of the realisation proceeds under bankruptcy resolution. In performing these tasks, an IP acts as an agent of the adjudicator. In a way the adjudicator depends on the specialized skills and expertise of the IPs to carry out these tasks in an efficient and professional manner.
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> The role of the IPs is thus vital to the efficient operation of the insolvency and bankruptcy resolution process. A well functioning system of resolution driven by IPs enables the adjudicator to delegate more and more powers and duties to the professionals. This creates

> the positive externality of better utilisation of judicial time. The worse the performance of IPs, the more the adjudicator may need to personally supervise the process, which in turn my cause inordinate delays. Consumers in a well functioning market for IPs are likely to have greater trust in the overall insolvency resolution system. On the other hand, poor quality services, and recurring instances of malpractice and fraud, erode consumer trust."

In tune with the proposal of the BLRC, the Code requires an IP to play a catalytic role in corporate insolvency process (as RP), corporate liquidation process (as Liquidator), individual insolvency resolution (as RP) and individual bankruptcy process (as Bankruptcy Trustee). This article focuses solely on the role of an insolvency professional as "resolution professional" in CIRP. However, before getting into the provisions of the Code, 2016, it would be interesting to have a look at the provisions of US and UK laws regarding the roles expected from an insolvency representative; notably, the two laws are different in their approach – the US law follows "debtor-in-possession" approach, while the UK law has creditor-in-possession theme.

Role of an Insolvency Professional – Difference under the UK and the US Insolvency Laws

1. The Insolvency Act, 1986 – UK

In UK, the concept of the licensed insolvency practitioner was first introduced in the mid 1980s and formalised in statutory provisions which now form Part XIII of the UK Insolvency Act, 1986[21]. The administration (equivalent of insolvency resolution under Indian law) under the UK Insolvency Act, 1986 is conducted by an administrator. The administrator, as Schedule B1 to the Act states, is an officer of the Court, whether or not appointed by the Court. Schedule B1 specifies that the administrator of a company must perform his functions with the objective of "rescuing the company as a going concern", unless he thinks that it is not reasonably practicable to achieve that objective or that achieving a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration) would be preferable. Where the administrator thinks that it is not reasonably practicable to achieve either of the objectives, he may proceed to realise property in order to make a distribution to one or more secured or preferential creditors, provided that it does not unnecessarily harm the interests of the creditors of the company as a whole.

Paragraph 49 of Schedule B1 requires that the administrator shall make a statement setting out proposals for achieving the purpose of administration; and the proposal may include a voluntary arrangement (popularly called CVA) under the Act, or a proposal for a compromise or arrangement to be sanctioned under the Companies Act, 2006. The administrator has been vested with the power to do anything necessary or expedient for the management of the affairs, business and property of the company.The administrator of a company may call a meeting of members or creditors of the company. The administrator of a company shall on his appointment take custody or control of all the property to which he thinks the company is entitled.

2. US Code: Title 11 – Bankruptcy

[21] Technical Manual of Insolvency Service

Chapter 11 of the US Bankruptcy Code deals with reorganization (equivalent to insolvency resolution in India and administration in UK law). The reorganisation framework envisaged under the US Bankruptcy Code follows "debtor-in-possession" approach; hence the nature of duties which a Court-appointed trustee has to perform is different in this case. Section 1106 specifies the duties of a trustee appointed by the Court. He is required to perform the duties of a trustee in a liquidation case specified in section 704 (2), (4), (6), (7), (8), and (9). These include – to be accountable for all property received, to investigate the financial affairs of the debtor, to furnish such information concerning the estate and the estate's administration as is requested by a party in interest (unless the Court orders otherwise), and to file with the Court periodic reports and summaries of the operation of the business of the debtor. The section also casts certain investigative duties on the trustee – to investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business, and the desirability of the continuance of the business, and any other matter relevant to the case or to the formulation of a plan. Section 1107 places a debtor-in-possession in the shoes of a trustee in every way. The debtor is given the rights and powers of a Chapter 11 trustee. He is required to perform the functions and duties of a Chapter 11 trustee, except the investigative duties.

Role of Insolvency Professional in Corporate Insolvency Resolution Process under the Code, 2016

The corporate insolvency resolution process envisaged under the Code, 2016 is prominently a creditor-driven process, whereby the decision to let the debtor survive or to liquidate the same rests on a collective body of the creditors, i.e. the committee of creditors. Since the RP is an appointee of the creditors, and the IP takes over the management and supervision of the company in insolvency, the business of the company may be said to be in creditors' possession during the resolution process. While, unlike during the liquidation process, there is no vesting of assets and property in the RP, but the RP takes over the management of the business. Hence, the approach is similar to that under the UK Insolvency Act, 1986. The assets of the corporate debtor are taken into custody by the RP chosen by the committee of creditors and the management of the affairs of the corporate debtor too, vests in the RP. Note that prior to appointment of a RP, an IRP is appointed to perform the aforesaid functions till the committee of creditors is constituted and the RP is appointed. The role played by the RP (including an interim resolution professional) has been explained in the following paragraphs.

3. Management of the affairs of the corporate debtor

Section 17 of the Code, 2016 provides for vesting of the management of the affairs of the corporate debtor in the hands of interim resolution professional, which is natural consequence of a a creditor-in-possession regime. The concept of 'debtor-possession' implies that the debtor continues to remain in possession of the management of the entity during the resolution process. This was the approach under SICA, as SICA was evidently drawn on the basis of the US Bankruptcy Code. The N L Mitra Committee advocated a deviation from the approach as follows:

> "The most critical provision in the SICA is that the promoter/management bringing the entity to the BIFR remains in possession and creates incentives for stripping off assets. Therefore,

> creditors are against most restructuring proposals. It is therefore recommended that if the owner/promoter/existing management files the petition for the bankruptcy of a company, the possession of the company with its entire assets and liabilities must be vested with the Trustee immediately without any loss of time. That ensures the first principle of maximisation of asset value. If a creditor files the petition the possession of the company's assets and liabilities shall vest on the Trustee as soon as the petition is allowed."

The Code adopted the theme of "creditor-in-possession", and therefore, vests the RP with the management of the affairs of the corporate debtor, starting from the date of appointment itself. Further, the powers of the board of the directors of the corporate debtor shall stand suspended, and the same shall be exercised by the interim resolution professional. However, it is important to note that the powers of the interim resolution professional in such capacity is not unfettered – the powers of the interim resolution professional/resolution professional is subject to the authority of the committee of creditors, as discussed in later paragraphs.

The authors, in their *"Law Relating to Insolvency and Bankruptcy Code 2016"*[22], discuss that the corporate boards in India are more often supervisory boards while the day-to-day functioning of the entity is the responsibility of the executive management. Section 17 though provides for suspension of the powers of the board of directors, yet clearly says that all officers and employees will report to the interim resolution professional. Hence, the suspension of the powers of the board of directors must have no bearing on the executive machinery. Note that the executive machinery may typically be headed by the managing director. Therefore, the managing director, who works under the supervision of the board of directors, will now work under the supervision of the IRP. Likewise, executive directors will cease to have the powers of "directors" but will continue their respective functional roles, under the supervision of the interim resolution professional.

That it is not the administrator who starts managing the company, but the existing management starts working under the supervision of the administrator, is clear from reading of Item 64 of Schedule B1 to the UK Insolvency Code, reading as follows:

> "64. (1) A company in administration or an officer of a company in administration may notexercise a management power without the consent of the administrator.
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> (2) For the purpose of sub-paragraph (1)—
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> (a) "management power" means a power which could be exercised so as tointerfere with the exercise of the administrator's powers,
> (b) it is immaterial whether the power is conferred by an enactment or aninstrument, and
> (c) consent may be general or specific."

It will be impractical for the RP or the administrator to start managing the day-to-day operations of the entity. Neither does the RP have the technical expertise to do so, nor is the replacement of existing management at all conducive to the idea of preserving or maximising the going concern value of the entity. Of course, the RP has wide powers, but the issue is that the power must be exercised in the interest of the entity, and not as a matter of power play. In rulings like *RAB Capital*

[22] *Vinod Kothari*&*Sikha Bansal,* Taxmann, 2016

plc vs Lehman Brothers (International) Europe (2008) EWHC 2335 (Ch), courts have taken very liberal view on the powers of the administrator; however, it is a consistent position in the UK that the administrator does not dismiss the existing management[23].

Sections 18, 20 and 25 of the Code talk about duties and functions of the RP. These may seem to suggest that the actual day-to-day operations of the entity will be carried out by the RP. However, the RP has to preserve the existing management. The RP has powers to appoint agencies to carry out his management function. The idea behind the law is to put the RP effectively in the steering position, so that the going concern is in the creditors' control.

In order to facilitate the IRP/ RP in fulfilling his responsibility of managing the affairs of the corporate debtor, sections 20 and 25 provide authority to interim resolution professional/resolution professional to do necessary acts, including the following –

(i) to enter into contracts on behalf of the corporate debtor or to amend or modify the contracts or transactions which were entered into before the commencement of corporate insolvency resolution process;
(ii) to raise interim finance, subject to certain conditions;
(iii) to issue instructions to personnel of the corporate debtor as may be necessary for keeping the corporate debtor as a "going concern" (*see* discussion under the next heading);
(iv) to appoint accountants, legal or other professionals as may be necessary; etc.

However, section 28 acts as a limit to the authority of the interim resolution professional/resolution professional – it lists out certain acts which shall not be undertaken without the prior approval of the committee of creditors. The acts include – raising interim finance in excess of limits approved by the committee of creditors, creating security interest on the assets of the corporate debtor, changing the capital structure of the corporate debtor, undertaking related party transactions, amending constitutional documents of the corporate debtor, amongst others.

4. Management of the entity as "going concern"

The Code emphasises that the interim resolution professional shall manage the operations of the corporate debtor as a "going concern" – section 20. "Going concern" refers to an enterprise continuing in operation for the foreseeable future. It is assumed that the enterprise has neither the

[23] Note the following comment from a Jones Day publication:
"*Opinion diverges over who is best placed to run the company (presuming there is not mismanagement or dishonesty). It is arguable that many insolvency cases are caused by some weakness in management. Moreover, the historical link between the insolvency to the displacement of management is very strong. …. Ironically, the UK has not really had experience with substantive stand alone reorganizations and perhaps the new legislation will highlight whether an insolvency practitioner can manage a business back to health and reorganization. However, the alternative is to identify the management weakness and intervene with expert advisors or help which in many ways mirror the skills of the insolvency practitioner."*
[http://www.jonesday.com/files/Publication/b0c886bd-6721-4c66-9213db7f01ddb55f/Presentation/PublicationAttachment/96b1ebf1-2203-4577-bff4-8baf89f4e0d1/Comparison%20of%20Chapter%2011.pdf.]

intention nor the necessity of liquidation or of curtailing materially the scale of the operations[24]. The provision sets out the guiding principle for the interim resolution professional or the resolution professional managing the corporate debtor during the resolution process. The interim resolution professional/resolution professional, therefore, shall administer the company "as is", without making any material alterations in the scale of operations of the company or selling off material value of its assets which may endanger any possibility of the revival of the corporate debtor.

5. Custody of the assets of the corporate debtor

Section 18 requires the interim resolution professional to take control and custody of any asset over which the corporate debtor has ownership rights and section 20 obliges the interim resolution professional to make every endeavour to protect and preserve the value of the property of the corporate debtor. Again, section 25 states that it shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor. The Code has also amended section 429 (1) of the Companies Act, 2013 empowering the NCLT to pass instructions to executory authorities for taking control and custody of assets, in case the RP is facing difficulties in doing so.

Here, the words "take control and custody" shall not be misinterpreted to mean taking control and custody of the assets for the purpose of disposal thereof – the objective of the provision is to move the custody and control of the assets from the directors to the interim resolution professional for the purpose of adequate monitoring and not as a pre-disposal measure. The view transpires from the very fact that the corporate debtor is presently at the stage of "resolution" and not "liquidation" – this also brings out the distinction between the roles played by an administrator and a liquidator.

6. Bringing the creditors together

The interim resolution professional shall constitute the committee of creditors after collation of all claims received against the corporate debtor and determination of the financial position of the corporate debtor – section 21. The committee of creditors is the collective body of financial creditors of the corporate debtor which, by way of majority vote, decides on the ultimate fate of the corporate debtor, i.e. whether to resolve the insolvency or to liquidate the entity. The committee of creditors appoints resolution professional in its first meeting. The resolution professional is then entrusted with the task of convening and conducting the meetings of the committee of creditors during the resolution process – section 24.

7. Conducting the Corporate Insolvency Resolution Process

Section 23 states that the resolution professional shall conduct the entire corporate insolvency resolution process and manage the operations of the corporate debtor during the corporate insolvency resolution process period. During the corporate insolvency resolution process period, the interim resolution professional/resolution professional has to undertake the following activities –

[24] *See* Para 10 of the Accounting Standard (AS) 1 (Disclosure of Accounting Policies), issued by the Institute of Chartered Accountants of India.

(i) making public announcement of the insolvency resolution process in respect of the corporate debtor;
(ii) collection of all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor, including information relating to business operations, financial and operational payments, list of assets and liabilities;
(iii) receipt and collation of claims of creditors submitted pursuant to the public announcement;
(iv) constitution of the committee of creditors;
(v) convening and conducting the meetings of the committee of creditors;
(vi) filing necessary information with information utility;
(vii) preparation of information memorandum for facilitating the formulation of a resolution plan;
(viii) inviting prospective resolution applicants to put forward their resolution plans;
(ix) examining each resolution plan received so as to see whether the resolution plan meets the criteria enlisted under section 30 (2) and presenting the eligible resolution plans at the meetings of the committee of creditors;
(x) submission of the resolution plan approved by the committee of creditors to the adjudicating authority for approval of the latter;
(xi) making applications for avoidance of preference, undervalued, fraudulent transactions; etc.

8. Preparation of Information Memorandum

Section 29 requires that the resolution professional shall prepare an information memorandum in such form and manner containing such relevant information as may be specified by the Board for formulating a resolution plan. The CIRP Regulations, however, require that certain minimum information shall be provided to each member of the committee of creditors and any potential resolution application before the first meeting of the committee of creditors. This calls for preliminary preparation of information memorandum by the IRP. The information memorandum shall contain details on the basis of which a resolution plan may be formulated. Regulation 36 (2) of the CIRP Regulations lists out the contents of the information memorandum.

9. Facilitating Resolution Plan

As mentioned in the preceding paragraph, the resolution professional prepares the information memorandum which serves as an input for the formulation of the resolution plan. The task of the RP in respect of the resolution plan does not end here – section 30 of the Code, 2016 read with regulation 38 of the CIRP Regulations mandates that a resolution plan must confirm to certain minimum requirements. The resolution professional must examine each resolution plan received by him to confirm that each resolution plan –

(i) provides for the payment of insolvency resolution process costs in priority to the repayment of other debts of the corporate debtor and identifies specific sources of funds to pay the same;
(ii) provides for the repayment of the debts of operational creditors which shall not be less than the liquidation value due to operational creditors in priority to any financial creditor and

before the expiry of thirty days after the approval of a resolution plan by the adjudicating authority;

(iii) provides for the repayment of the liquidation value due to dissenting financial creditors before any recoveries are made by the financial creditors who voted in favour of the resolution plan.[25]

(iv) provides for the management and control of the affairs of the corporate debtor after approval of the resolution plan;

(v) the implementation and supervision of the resolution plan;

(vi) does not contravene any of the provisions of the law for the time being in force.

The RP shall present to the committee of creditors for its approval such resolution plans which confirm the conditions as referred hereinabove. The resolution plan which is approved by the committee of creditors shall then be submitted by the resolution professional to the adjudicating authority. Where the resolution plan is approved by the adjudicating authority, the resolution professional shall forward all records relating to the conduct of the corporate insolvency resolution process and the resolution plan to the Insolvency and Bankruptcy Board of India to be recorded on its database.

The assessment of the fair values of assets, and a preparation of the liquidation value assessment is one of the key tasks at this stage. Resolution is the preferred alternative; liquidation is the ultimate. Therefore, a resolution plan has to offer to the stakeholders something better than what they would get in liquidation. There is a well-known "vertical test" used by UK Courts [for example, see *T & N Limited,* (2005) 2 BCLC 488] that in a resolution, a stakeholder cannot be put to prejudice *apropos* what he would get in liquidation. So, a creditor either votes on the resolution plan, and therefore, hopes to get a better deal out of a healthier borrower, or votes against (which includes not voting) the resolution plan, in which case, he gets an exit based on what would have been liquidation value of his claim, going by the priority order of distribution and the estimated fair value of the assets.

While the RP acts as the catalyst of the entire process, he is not the one who actually prepares the resolution plan. The plan is prepared by a "resolution applicant", who may either one of the lenders themselves, or an external consultant. A resolution plan is a rescue strategy. Turnaround strategy is always a bespoke solution to the case; it involves close scrutiny of assets, liabilities, incomes and expenses. In terms of assets, the plan may provide for sale of non-core assets, or replacing owned assets by leased assets. In respect of liabilities, the plan may provide for conversion of the unsustainable debt into equity, or sacrifice of interest. The plan may involve curtailing expenditure, redirecting operations, etc. Very often, a restructuring plan may also involve alteration of product mix, product markets, etc.

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[25] *A dissenting financial creditor meant a financial creditor who voted against the resolution plan or abstained from voting for the resolution plan, approved by the committee; and Regulation 38(1) of the CIRP Regulations required all resolution applicants to provide liquidation value to dissenting financial creditors in priority. The Hon'ble National Company Law Tribunal, in the matter of* Central Bank of India vs. Resolution Professional of Sirpur Paper Mills Limited & Ors, *observed that Regulation 38 (1) of the CIRP Regulations was inconsistent with the Code and ought to be removed and as such the instant ruling set the ball rolling for the amendment dated 5th October, 2018, by virtue of which the concept of dissenting financial creditors was done away with.*

Preparation of rescue plan may include rescue financing as well. Note that the Code gives uppermost priority in the liquidation waterfall to interest and principal on rescue financing. However, it is hoped that resolution applicants do not go ambitiously in restructuring plans for further capital infusion. This strategy has not worked in past SICA revivals or CDR cases. Instead, resolution applicants may provide for interim financing largely for paying off dissenting creditors, and therefore, reducing the burden of liability on the entity.

Conclusion

The following statement[26] sums up the importance of the role with insolvency professionals play in reorganisation or resolution of an entity:

"It is conceivable for an insolvency system to function with minimal interventions by courts or government agencies. It is not conceivable for such a system to function effectively without specialists, especially for reorganization. "The probability of effective reorganization increases when agents of reorganization have the capacity to (a) decide whether rescuing business is feasible and to advise on alternative courses of action (liquidation, reorganization, creative combinations of these); and (b) to reorganize the company itself . . . ." Such capacities depend on a sufficient supply of expert labor. Public policy must therefore (a) find means to bring the best and brightest into the debt restructuring area, (b) regulate competition to constrain costs and reduce conflicts of interest, (c) remove financial and reputational barriers to insolvency professions, and (d) develop a regulatory system that delivers competency and integrity."

Beyond the Lines . . .

Recently, NCLT, Mumbai in an application filed by RP of Bharati Defence, in the matter of Edelweiss Asset Reconstruction Company Limited v. Bharati Defence and Infrastructure Limited, made adverse observations against the RP and thereby removed him from the role and appointed another person as the liquidator, citing conflict of interest of the RP.

Consequently, in an appeal filed by the RP against the adverse observations placed by the AA, the Hon'ble NCLAT in its order dated 29.03.2019, set aside the observations made by the AA against Mr. Dhinal Shah and held that, no individual notice was served to him. It was further stated that any misconduct on the part of the RP shall be reported to IBBI, the appropriate authority in such circumstances.

[26] Institutional Lessons from Insolvency Reforms in East Asia, Terence C. Halliday and Bruce G. Carruthers, available here: http://siteresources.worldbank.org/GILD/Resources/Halliday4.pdf;