



## INSOLVENCY AND BANKRUPTCY CODE, 2016

### Section 16 to 20 covered in this article

#### Section 16: Appointment & Tenure of Interim Resolution Professional

Section 16 provides for the appointment and term of the interim resolution Professional by the adjudicating authority. The section reads as follows:

1. The Adjudicating Authority shall appoint an interim resolution professional on the insolvency commencement date. [Prior the amendment vide the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019, it read “within fourteen days from the insolvency commencement date”]

*“Insolvency Commencement Date” means the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under sections 7, 9 or section 10, as the case may be [Section 5(12)].*

2. Where the application for corporate insolvency resolution process is made by a financial creditor or the corporate debtor, as the case may be, the resolution professional, as proposed respectively in the application under section 7 or section 10, shall be appointed as the interim resolution professional, if no disciplinary proceedings are pending against him.

3. Where the application for corporate insolvency resolution process is made by an operational creditor and –

(a) no proposal for an interim resolution professional is made, the adjudicating authority shall make a reference to the Board for the recommendation of an insolvency professional who may act as an interim resolution professional;

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(b) a proposal for an interim resolution professional is made under sub-section (4) of section 9, the resolution professional as proposed, shall be appointed as the interim resolution professional, if no disciplinary proceedings are pending against him.

4. The Board shall, within 10 days of the receipt of a reference from the adjudicating authority under sub-section (3), recommend the name of an insolvency professional to the adjudicating authority against whom no disciplinary proceedings are pending.

## **Tenure of Interim Resolution Professional**

Section 16(5) originally provides that the term of the interim resolution professional shall not exceed thirty days from date of his appointment. But this sub-section was amended by **the insolvency and Bankruptcy Code (Second Amendment) Act, 2018**. Now the term of the interim resolution professional continues till the date of appointment of the resolution professional under section 22 of the Code. This ensures that the business and dealings of the corporate debtor is always under the supervision of the IRP/RP appointed under the Code.

## **Section 17: Managing of Affairs of Corporate Debtor by Interim Resolution Professional**

**Section 17(1)** of the Code provides that from the date of appointment of the Interim Resolution Professional,

(a) the management of the affairs of the corporate debtor shall vest in the interim resolution professional;

(b) the powers of the board of directors or the partners of the corporate debtor, as the case may be, shall stand suspended and be exercised by the interim resolution professional;

(c) the officers and managers of the corporate debtor shall report to the interim resolution professional and provide access to such documents and records of the corporate debtor as may be required by the interim resolution professional;

(d) the financial institutions maintaining accounts of the corporate debtor shall act on the instructions of the interim resolution professional in relation to such accounts and furnish all information relating to the corporate debtor available with them to the interim resolution professional.

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**Section 17(2)** of the Code further provides that the interim resolution professional vested with the management of the corporate debtor, shall:

- (a) act and execute in the name and on behalf of the corporate debtor all deeds, receipts, and other documents, if any;
- (b) take such actions, in the manner and subject to such restrictions, as may be specified by the Board;
- (c) have the authority to access the electronic records of corporate debtor from information utility having financial information of the corporate debtor;
- (d) have the authority to access the books of accounts, records and other relevant documents of corporate debtor available with government authorities, statutory auditors, accountants and such other persons as may be specified, and;
- (e) be responsible for complying with the requirements under any law for the time being in force on behalf of the corporate debtor.

Thus, section 17 lists out the various powers that an interim resolution professional shall have, including the power to do all acts and execute documents in the name of the corporate debtor as these powers are important for effective discharge of his responsibilities.

## **Case Reference:**

In the case of **M/s. Subasri Realty Private Limited v. Mr. N. Subramanian & Anr.**, the NCLAT directed that after the appointment of the RP and declaration of moratorium, the Board of directors stands suspended, but that does not amount to a suspension of Managing Director, or any of the directors or officers or employees of the Corporate Debtor ('CD'). To ensure that the CD remains a going concern, all the directors/employees are required to function and to assist the RP who manages the affairs of the CD during the moratorium. If one or other officer or employee had the power to sign a cheque on behalf of the CD prior to the order of moratorium, such power does not stand suspended on suspension of Board of directors nor can it be taken away by the RP. If the person empowered to sign cheque refuses to function on the direction of the RP or misuse the power, it is always open to the RP to take away such power, after issuing notice to the person concerned.

**The Insolvency and Bankruptcy Code (Second Amendment) Act, 2018** has added clause (e) in sub-section 2 of section 17 to provide that the interim resolution professional shall be responsible for complying with the statutory requirements under applicable laws while managing the affairs of the corporate debtor.

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Section 17 has been inserted keeping in mind the experience of a debtor-in-possession regime under **the Sick Industrial Companies (Special Provisions) Act, 1985**. Various committee reports which had analysed the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 had highlighted the debtor- in-possession regime as one of its fatal flaws. A debtor-in-possession regime which allows the existing management to remain in possession during the resolution process gives incentives to the management to propose and implement risky rescue measures, as the costs of failure (leading to liquidation) would largely be borne by creditors.

**The Sick Industrial Companies (Special Provisions) Act, 1985** now stands repealed (with effect from 1st December, 2016) as the Sick Industrial Companies (Special Provisions) Repeal Act, 2003 has been notified by the Government.

## **Section 18: Duties of Interim Resolution professional**

The interim resolution professional shall perform the following duties, namely:-

(a) to collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor, including information relating to:

(i) business operations for the previous two years;

(ii) financial and operational payments for the previous two years;

(iii) list of assets and liabilities as on the initiation date; and

(iv) such other matters as may be specified.

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(b) receive and collate all the claims submitted by creditors to him pursuant to the public announcement made;

(c) constitute a committee of creditors;

(d) monitor the assets of the corporate debtor and manage its operations until a resolution professional is appointed by the committee of creditors;

(e) file the information collected with the information utility, if necessary; and

(f) take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including:

- assets over which the corporate debtor has ownership rights which may be located in a foreign country;
- assets that may or may not be in possession of the corporate debtor;
- tangible assets, whether movable or immovable;
- intangible assets including intellectual property;
- securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies;
- assets subject to the determination of ownership by a court or authority.

(g) to perform such other duties as may be specified by the Board.

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Section 18 also specifies the assets that cannot be taken over under the said section. The explanation appended to section 18 provides that for the purposes of this section, the term “assets” shall not include the following:

- a) assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment;
- b) assets of any Indian or foreign subsidiary of the corporate debtor; and
- c) such other assets as may be notified by the Central Government in consultation with any financial sector regulator.

The RP is not only required to give notice of the meeting to the members of CoC, but also to the members of suspended Board of directors or partners of the corporate person, as the case may be.

The OCs or their representatives are also to be informed to attend the meeting of CoC, if the amount of the aggregate dues is not less than ten percent of the debt.

## Case Reference:



In **M/s. Innoventive Industries Ltd. Vs. ICICI Bank & Anr.**, Supreme Court held that once an insolvency professional is appointed to manage the company undergoing corporate insolvency resolution process, the erstwhile directors who are no longer in management cannot maintain an appeal on behalf of such company.



In **Canara Bank Vs. Ms. Mamta Binani, RP of Aristo Texcon Pvt. Ltd.**, NCLAT (New Delhi) held that Resolution Professional is an officer of the Court and he is obligation to exercise reasonable and responsible care for the company whose property and affairs are entrusted with him during the corporate insolvency resolution process.

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## **Section: 19 Personnel to extend Co-operation to Interim Resolution Professional**

Section 19 imposes an obligation on the personnel, promoters and any other person associated with the management of the corporate debtor to extend all assistance and cooperation required by the Interim Resolution Professional in the management of the affairs of the corporate debtor. Where the personnel of the corporate debtor, promoter or any other person required to co-operate with the interim resolution professional do not extend cooperation or assistance to the interim resolution professional, the interim resolution professional may apply to the Adjudicating Authority for an order. The Adjudicating Authority may, by order, direct the person to comply with the instructions of the interim resolution professional or to provide information to the interim resolution professional.

“Personnel” includes the directors, managers, key managerial personnel, designated partners and employees, if any, of the corporate debtor. [Section 5(23)]

**Personnel, promoters or any other person associated with the management** – The personnel of the corporate debtor, its promoters or any other person associated with the management of the corporate debtor shall extend all assistance and cooperation to the interim resolution professional as may be required by him in managing the affairs of the corporate debtor. [Section 19(1)]

**Application to Adjudicating Authority for necessary directions** – Where any personnel of the corporate debtor, its promoter or any other person required to assist or cooperate with the interim resolution professional does not assist or cooperate, the interim resolution professional may make an application to the Adjudicating Authority for necessary directions. [Section 19(2)]

**Order by Adjudicating Authority** – The Adjudicating Authority, on receiving an application under sub-section (2), shall by an order, direct such personnel or other person to comply with the instructions of the resolution professional and to cooperate with him in collection of information and management of the corporate debtor. [Section 19(3)]

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## **Section:20 Management of Operations of Corporate Debtor as a Going Concern**

**Manage operations of corporate debtor as a going concern** – The Interim Resolution Professional shall make every endeavour to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern. [Section 20(1)].

### **Authority of Interim Resolution Professional –**

For the purposes of sub-section (1), the interim resolution professional shall have the authority:

- (a) to appoint accountants, legal or other professionals as may be necessary
- (b) 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
- (c) to raise interim finance provided that no security interest shall be created over any encumbered property of the corporate debtor without the prior consent of the creditors whose debt is secured over such encumbered property Provided that no prior consent of the creditor shall be required where the value of such property is not less than the amount equivalent to twice the amount of the debt
- (d) to issue instructions to personnel of the corporate debtor as may be necessary for keeping the corporate debtor as going concern
- (e) to take all such actions as are necessary to keep the corporate debtor as a going concern



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**“Interim finance”** means any financial debt raised by the resolution professional during the insolvency resolution process period and such other debt as may be notified [Section 5(15)] [The term “and such other debt as may be notified” was included vide The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019 which had widened the term of interim finance by including other debts within its ambit].

Amount of any interim finance and the costs incurred in raising such finance is included in the “insolvency resolution process costs” [Section 5(13)].

In case the corporate debtor goes into liquidation, the insolvency resolution process costs which includes interim finance and the costs incurred in raising such finance are paid from the sale of the liquidation assets in priority during the distribution of assets [Section 53].

**Interim Finance** – The Interim Resolution Professional has the power to raise interim finance as well as to enter into, amend or modify contracts on behalf of the corporate debtor. Clause (c) of sub-section (2) to section 20 provides that the Interim Resolution Professional shall have the authority to raise interim finance provided that no security interest shall be created over any encumbered property of the corporate debtor without the prior consent of the creditors whose debt is secured over such encumbered property. Thus, any interim finance raised by providing security of an encumbered property of the corporate debtor will require prior permission of the concerned creditor.

The proviso appended to clause (c) of sub-section (2) to section 20 clarifies that no prior consent of the creditor shall be required where the value of such property is not less than the amount equivalent to twice the amount of the debt.

Section 20 of the Code makes provision for raising interim finance while managing the operations of the corporate debtor as a going concern. A company which enters the insolvency resolution proceedings finds it extremely difficult to obtain credit, as lenders are often hesitant to lend to a troubled debtor. In order to address this issue, such interim finance is treated as a part of the insolvency resolution costs and is repaid in priority to other debt as part of resolution plan. Such priority also applies in distribution of assets in case the corporate debtor goes into liquidation.

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## Case Reference:

In **Sunil Kumar Jain and others vs. Sundaresh Bhatt and others**, the Supreme Court ruled that in order for wages or salaries of workmen or employees for the CIRP period to be included in CIRP costs, it must be proven that the Resolution Professional managed the Corporate Debtor's operations as a Going Concern during the CIRP and that the relevant workmen or employees actually worked during the CIRP.

## Conclusion:

**The primary focus of the IBC is to ensure the revival and continuation of the corporate debtor:**

In the matter of Gujarat Urja Vikas Nigam Limited Vs. Mr. Amit Gupta & Ors. [Civil Appeal No. 9241 of 2019 Judgment dated 8th March, 2021], the Hon'ble Supreme Court of India observed that the primary focus of the IBC is to ensure the revival and continuation of the corporate debtor. The interests of the corporate debtor have been bifurcated and separated from the interests of persons in management.

The timelines which are prescribed in the IBC are intended to ensure the resuscitation of the corporate debtor. The enactment of the IBC is in significant senses a break from the past. While interpreting the provisions of the IBC, care must be taken to ensure that the regime which Parliament found deficient and which was the basic reason for the enactment of the new legislation is not brought in through the back door by a process of disingenuous legal interpretation. However, this is not to say that the interpretation given to the statutory provisions that existed prior to the enactment IBC is to be rejected. The interpretation given to such statutory provisions that are textually similar to Section 60(5) (c) may be relevant, provided that such interpretation is in tandem with the objective of enacting the IBC, that is, inter alia, avoidance of multiplicity of fora and a timely resolution of the insolvency process.