

BOOKLET ON

# THE INSOLVENCY AND BANKRUPTCY CODE, 2016



## Preface

The Insolvency and Bankruptcy Code, 2016 (IBC) marked a watershed moment in India's financial and legal landscape. Enacted to address the mounting challenge of non-performing assets in the banking sector and to streamline corporate insolvency resolution, this landmark legislation has profoundly impacted India's business environment in the few years since its implementation.

This Booklet aims to provide a comprehensive analysis of the IBC, its evolution, implementation, and impact. Drawing from extensive research and analysis of case law, we examine the Code's key provisions, the roles of various stakeholders, and the procedural aspects of its implementation. Our exploration begins with the historical context that necessitated the IBC, tracing the development of insolvency laws in India. We then delve into a detailed examination of the Code's central tenets, including the corporate insolvency resolution process, liquidation procedures, and the rights and responsibilities of creditors, debtors, and insolvency professionals.

A significant portion of this work is dedicated to analyzing landmark judicial decisions that have interpreted and shaped the application of the IBC. Through this lens, we aim to provide readers with insights into how the Code has been applied in practice and how it continues to evolve through judicial interpretation.

Importantly, this Booklet does not shy away from addressing the criticisms and controversies surrounding the IBC. We examine concerns about the potential for arbitrary use of powers, the impact on various stakeholders, and the challenges faced in balancing the interests of creditors and debtors. Through this critical analysis, we aim to provide a balanced perspective on the Code's strengths and limitations.

The Booklet concludes with a forward-looking analysis, offering recommendations for potential amendments and improvements to the Code. These suggestions are aimed at enhancing its effectiveness while addressing some of the key concerns raised by various stakeholders.

This work is intended to serve as a comprehensive resource for legal practitioners, bankers, policymakers, researchers, and students interested in understanding the nuances of the IBC and its implications for India's financial and legal systems. We hope that it will contribute to ongoing discussions about the future of insolvency laws in India and inspire further research and policy initiatives in this crucial area.

As we present this analysis, we are mindful that the landscape of insolvency regulations is ever-evolving. The insights and recommendations offered here are based on the current state of the law and its implementation, but we encourage readers to view this as part of an ongoing dialogue about how best to balance the needs of financial stability with the rights and protections of various stakeholders in the insolvency process. We extend our gratitude to the numerous scholars, legal experts, and practitioners whose work has informed and enriched this analysis. Their contributions to the understanding and interpretation of the IBC have been invaluable in shaping this comprehensive overview.

Bhatt & Joshi Associates

Ahmedabad, 2024

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## About this Booklet

Welcome to the IBC Booklet from Bhatt & Joshi Associates!

In this booklet, we will explore the Insolvency and Bankruptcy Code (IBC) 2016 and the ways in which it can help you or your business. We will discuss the various provisions of the IBC, the process of insolvency resolution, and the rights and remedies available to creditors and debtors under the IBC.

At Bhatt & Joshi Associates, we are committed to providing our clients with the best legal advice and support. Our team of experienced lawyers is well-versed in IBC law and can help you understand the legal implications of the IBC, as well as the best course of action for you or your business.

We hope this booklet will help you gain a better understanding of the IBC and the ways in which it can help you or your business. If you have any further questions, please do not hesitate to contact us.

While the situation was sufficiently grave, political strong will was required for such a major economic reform which was missing. Several committees in the past had recommended various reforms of the insolvency law. The agenda was on the backburner for over 50 years, considering that the 26th Law Commission in 1964 had recommended rewriting of insolvency laws.

The Interim Report submitted by the Bankruptcy Law Reforms Committee in February, 2015 set the stage for IBC, followed by its final report. Finally, IBC was given the Hon'ble President's assent on 28.05.2016, and hence, was ready to take the centre stage in the Indian economic scenario.

Consequently, the age-old and highly discredited SICA was given a farewell. Regarded as one of the biggest economic reforms in the country, IBC claims to have provided a robust roadmap for dealing with insolvency in India. At the point of writing this, only the provisions about corporate

insolvency have been enforced; there are indications that the rule-making and infrastructure development for personal insolvency are also in rapid progress.

On 28th May, 2022, IBC turned 6, at least on the statute book. Its performance in numbers may not be very satisfactory, given the high percentage of liquidations that it has resulted into.

The biggest impact of IBC is that provisions like section 29A have contributed in developing a well behaved “credit-culture” in the corporate arena. It must have been a serious cultural shock to defaulters who, over the years, had framed the firm belief that it is possible to run a sick business, but pink-healthy promoters. Section 29A, uniquely so in the world, disqualifies defaulters from either submitting resolution plans or even buying the assets of the company in liquidation. So, every defaulter knows that if one does not pay what one has committed to pay, one will lose the reins of control over business forever. This has resulted into a new cult of healthy borrowing – where borrowers shun over-leveraging, over-capitalisation, and borrow only what they may service with reasonable certainty.

The 6 years of IBC have also seen several potential challenges – from challenges to Constitutionality of the law, to infrastructural issues (inadequate Benches, even more inadequate Appellate Benches, etc), bulging number of pending cases before NCLTs, even in the midst of stringent hard timelines of the law. However, the infrastructural machinery of the Code currently has all elements needed – IBBI, IPAs, IPs, IU, AA, and the appellate authority.

Thus, the law has evolved a lot over a short time span of 3 years with active contribution from professionals, corporate participants, and of course, the judiciary – the adjudicating authorities, the appellate authority and the Apex Court. As would be apparent, the law was/is sketchy at places and was/is open to multiple interpretations – the judiciary in an array of legal cases has delved into the intent and provisions of IBC to enable smoother implementation.

Hope you find the Booklet relevant and useful. Happy reading!

# CHAPTER I

## Introduction

In general use, the terms ‘insolvency’ and ‘bankruptcy’ are sometimes used interchangeably, however, there is a significant difference between the two. Bankruptcy and insolvency are not the same though similar concepts. The term “insolvency” refers to a situation in which a person's assets are insufficient to cover his debts, or a person's inability to pay his debts in general. In a limited sense, insolvency refers to a party's inability to pay his debts when they become due in the ordinary course of business.<sup>1</sup>

The term “bankruptcy” is a condition for insolvency. It is the legal state of a human or non-human entity (such as a company or government body) that is unable to repay its creditors. It is usually started by the debtor and imposed by a court. The term comes from the Italian term *Banca rottta*, which means “broken bank.”<sup>2</sup> The Insolvency and Bankruptcy Code, 2016 (‘IBC’) is the newly enacted bankruptcy law of India which seeks to consolidate the existing framework for debt recovery by creating a single law for insolvency and bankruptcy. The Insolvency and Bankruptcy Code, 2015 was introduced in Lok Sabha in December 2015. It became effective in December 2016.

‘When a person, company, association, or any other institution does not fulfil the money-related obligation it is known as Insolvency. Whereas, bankruptcy is nothing but a ground that makes a company or an organisation capable of filing a petition in a court of law in the situation when it fails to fulfil any financial obligation or repay the owed amount to the creditors’<sup>3</sup> It is a one-stop solution for resolving insolvencies which is a long process and does not offer an economically viable arrangement. It provides a strong insolvency framework where the cost and time incurred

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<sup>1</sup> [Insolvency and Bankruptcy Law In Various Countries \(taxguru.in\)](https://taxguru.in/insolvency-and-bankruptcy-law-in-various-countries/)

<sup>2</sup> [Bankruptcy - Learn All About Bankruptcies in Different Countries \(corporatefinanceinstitute.com\)](https://corporatefinanceinstitute.com/resources/knowledge/insolvency/bankruptcy/)

<sup>3</sup> Hritika Sharma, *Evolution of the Insolvency and Bankruptcy Laws in India*, 5, (2021), <https://ibclaw.in/wp-content/uploads/2021/05/EVOLUTION-OF-INSOLVENCY-AND-BANKRUPTCY.pdf>

is minimised in attaining liquidation. IBC is a comprehensive law that establishes a time-bound procedure for resolving corporate and individual insolvency-related issues. The Insolvency and Bankruptcy Code (IBC) was enacted to consolidate and to amend laws pertaining to corporate, partnership, and individual bankruptcy. The Indian bankruptcy code (IBC) has revolutionised the bankruptcy and insolvency resolution process. It has made it possible for creditors, banks, and other stakeholders to quickly and effectively resolve insolvency cases. Because it has made it possible for businesses to restructure their debt and continue operating, the IBC has also provided the Indian economy with the much-needed boost.

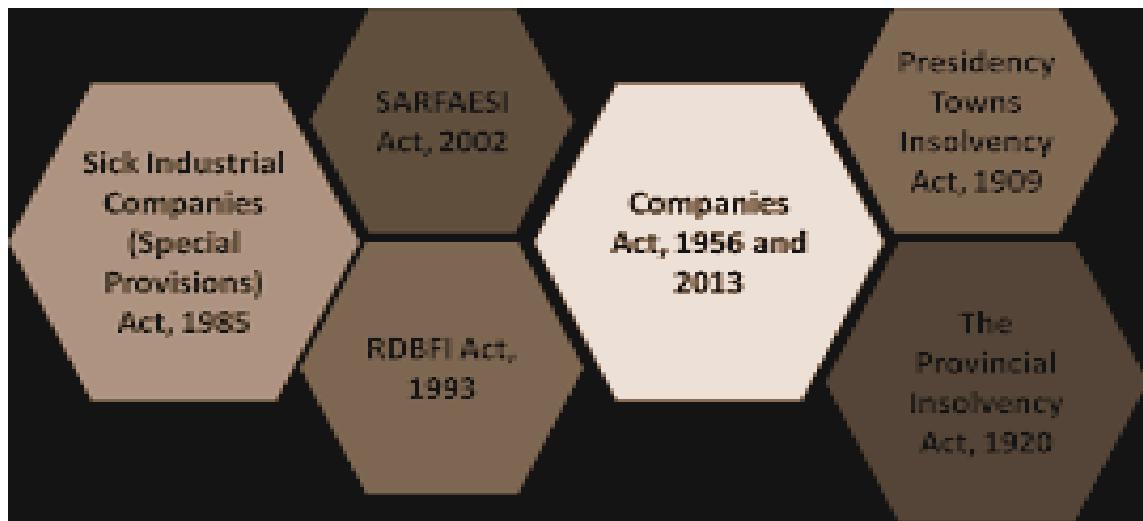
Since its debut in 2016, the IBC has undergone significant development. The insolvency and bankruptcy resolution process has been strengthened by a number of landmark IBC judgments and amendments. We will examine the IBC's journey since its inception and the numerous landmark decisions and amendments that have been made along the way in this article.

## History

Before IBC could come into effect, the act which was working was SICA( Sick Industrial Company). The fundamental goal of SICA was to decide disorder and facilitate the recovery of potentially practical units or conclusion of unviable (Units in this refers to a Sick Industrial Company). The SICA, 1985 was established with the end goal of getting the opportune discovery of sick companies which may have industrial undertakings. The major constraint of the SICA was that it was applicable only to sick industrial companies keeping away from other companies that are in trading, service, or other activities. However, it had drawbacks and one of those was its non-applicability to non-industrial companies and small/ancillary companies. In view of this, the Insolvency and Bankruptcy Code, 2016 was notified on May 28, 2016. The Companies Act, of 1956 provided a process for the liquidation and winding up of all types of corporate entities.

Between the early 2000s and 2008, the Indian economy was in the boom phase. During this period banks especially public sector banks lent extensively to corporates. However, because of

the slowdown in the global economy, the profits of various organisations swindled away. This in turn negatively impacted the ability of these companies to pay back their loans.



The bad loan recovery mechanism was governed by the following legislations prior to the enactment of Code<sup>4</sup>:

1. SARFAESI Act, 2002
2. The Presidency Towns Insolvency Act, 1909, and The Provincial Insolvency Act, 1920
3. Companies Act, 2013
4. The Recovery of Debts due to Banks and Financial Institutions Act, 1993
5. The Sick Industrial Companies (Special Provisions) Act, 1985
6. CDR/SDR/S4A.

<sup>4</sup> Pooja Kumari , DECODING THE INSOLVENCY LAWS IN INDIA , 25 , Vol-22-Issue-22-December-2019 , <https://www.readcube.com/articles/10.2139%2Fssrn.3604190>

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### Arun Jaitley on the upbringing of IBC<sup>5</sup>;



Given the rate of urbanisation in India, the size of the aspirational class there, and the type of public investment that is going to rural India, a lot of aspiring individuals are going to be added to this large population over the next one or two decades. A middle-class Indian slab; These people belong to

the middle class, which has considerable purchasing power due to which Its size will increase. Considering those facts, Our Former Finance Minister Arun Jaitley brought IBC into the nation for the betterment of the economy and to reduce the downfall of businesses.

Arun Jaitley's speech on the Introduction of IBC, "India struggled literally for decades to find a response to this downfall. We had a regime that was fairly scattered, not focussed, which continued, and continued without really being able to produce any results. We had a provision for commercial insolvency conventionally under our Companies' law. We had about three decades ago, a prime law with relation to certain stressed assets, which was SICA law, but really it did not produce any significant results. The central bank and the Government had in the earlier decades come out with various schemes of restructuring the debt which was owed to the State sector banks in particular. It did produce subtle, marginal results but not very significant. Coupled with this, one regrettable phenomenon which we witnessed for decades in India, was that many were unwilling to service debt owed to banks and financial institutions. This debt along with other corporate debts has been mounting and, therefore, we needed a radical solution. We had a small group of experts working on the subject and with the extensive support of parliamentary institutions, we were able to enact the Insolvency and Bankruptcy Code for India at a very fast pace."

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<sup>5</sup>FM\_Speech\_In\_Newyork,page1,(2018), [https://ibbi.gov.in/uploads/resources/ FM\\_speech\\_in\\_New\\_York.pdf](https://ibbi.gov.in/uploads/resources/ FM_speech_in_New_York.pdf)

He also added that<sup>6</sup>, “ I do anticipate a situation where anybody who invests in these assets, which are now available through a bidding process at very attractive prices, is going to invest in a market that is going to be one of the world’s largest markets and, therefore, given the future potential of the Indian economy, given the fair manner in which the IBC now is proceeding, it is a great opportunity as far as investors are concerned and, therefore, those seriously thinking about investment in India, there cannot be a better opportunity than the present one which is being offered through the IBC process.”

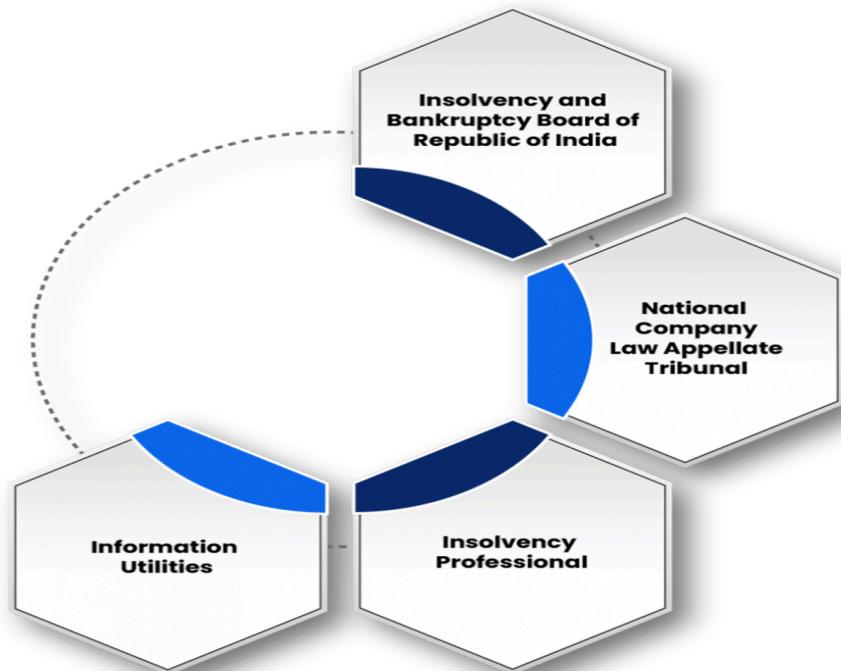
## **Recent Developments**

The Insolvency and Bankruptcy Code, 2015 was introduced in Lok Sabha in December 2015. It became effective in December 2016. A Notification of the national company law tribunal under the SICA (special provisions) repeal act 2003 was passed Therefore, the SICA was repealed with

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<sup>6</sup> FM\_Speech\_In\_Newyork ,page4 , (2018),  
[https://ibbi.gov.in/uploads/resources/ FM\\_speech\\_in\\_New\\_York.pdf](https://ibbi.gov.in/uploads/resources/ FM_speech_in_New_York.pdf)

effect from 1 December 2016. Because of this, the Government notified that all



The proceedings pending before the BIFR (Board for Industrial and Financial Reconstruction) and AAIFR (Appellate Authority for Industrial & Financial Reconstruction) shall stand abated and will come to an end.

However, it shall be open to the company whose appeal, reference, or inquiry has abated to initiate fresh proceedings before the National Company Law Tribunal (NCLT). In accordance with the provision of the insolvency code, within 180 days of the commencement of the insolvency code and to get protection under section 14 of IBC 2016.

The four pillars of supporting institutional infrastructure, to make the Insolvency and Bankruptcy Process work efficiently are<sup>7</sup>:

<sup>7</sup> IBBI, Understanding the IBC KEY JURISPRUDENCE AND PRACTICAL CONSIDERATIONS, Page 18, <https://ibbi.gov.in/uploads/whatsnew/e42fddce80e99d28b683a7e21c81110e.pdf>

- A. The regulator – The Insolvency and Bankruptcy Board of India (IBBI)
- B. Adjudicating Authority (AA): It consists of National Company Law Tribunal (NCLT), National Company Law Appellate Tribunal (NCLAT), Debt Recovery Tribunal (DRT)
- C. A private industry of Insolvency Professionals (IPs) with oversight by private Insolvency Professional Agencies (IPAs)
- D. A private industry of Information Utilities (Ius)

Corporate Insolvency Resolution Process can only be initiated when the minimum amount of default rupees is one lakh or a such higher amount as may be notified by the Central Government which shall not exceed one crore rupees. The Corporate Insolvency Process can also be started by Financial Creditor, Operational Creditor, and Corporate Debtor. The corporate debtor itself or any of its creditors may submit an application for insolvency resolution under the IBC. A payment default, which is defined as failing to make a debt payment by the due date, must involve a sum of at least INR 100,000 before an application must be made. The minimum default amount is capped at INR 1,000 for both individuals and partnership firms. If there is a financial debt, a financial creditor, such as a bank, non-banking financial institution, or debenture trustee, may submit an application right away after a default occurs if the applicant can show other sufficient evidence of non-payment or the default is documented in the records of an information utility. To further strengthen the Code's goals, the Insolvency and Bankruptcy Code (Amendment) Act, 2019, was introduced. This amendment provides for the timely conclusion of cases and specifies minimum pay-outs to operational creditors in any resolution plan. The Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019 were issued on November 15, 2019, which provide a generic framework for insolvency and liquidation proceedings of Financial Service Providers. Further amendments were made to the Code by way of the Insolvency and Bankruptcy Amendment Ordinance, 2019 passed on December 28, 2019.

## Legislative journey



### How IBC works

India has multiple laws to deal with insolvency, which leads to significant delays in winding up a company. The Bankruptcy Code has consolidated the existing framework and created a new institutional structure. The new

law created a new class of Insolvency Professionals who will help sick companies and banks with a smooth takeover of the insolvent company and manage the liquidation process. The Code proposed the setting up of an entity, the Insolvency, and Bankruptcy Board of India (IBBI), which regulates insolvency professionals and information companies – those which will store all the credit information of corporations. The Bankruptcy Code provided two authorities to deal with insolvency. The National Company Law Tribunal will adjudicate cases for companies and limited liability partnerships, while the Debt Recovery Tribunal will do the same for individual and partnership firms.

## The Process<sup>8</sup>

When a corporate debtor (CD), or a company that has taken loans to run its business, defaults on its loan repayment, either the creditor or the debtor can apply for the initiation of a Corporate Insolvency Resolution Process (CIRP) under Section 6 of the IBC.
Under the IBC, one must go to a designated adjudicating authority (AA) to file for insolvency. The designated AAs are the various NCLT (National Company Law Tribunal) benches located throughout India.
The Tribunal has 14 days to admit or reject the application or has to provide a reason if the admission is delayed.
As soon as the AA approves an application, the CIRP or resolution process gets started. The new required deadline of 330 days has been set for finishing the settlement procedure.
Once the application is admitted, the AA appoints an interim resolution professional (IRP), registered with an insolvency professional agency (IPA). IRPs could be qualified and licensed solicitors, corporate secretaries, chartered accountants, and more.
Once appointed by the Tribunal, the IRP takes control of the defaulter's assets and operations and collects information about the company's state from Information Utilities. And then finally coordinates the constitution of a Committee of Creditors or a CoC.
The IP solicits and reviews suggestions for resolution plans for businesses, which may involve debt restructuring, mergers, or demergers. It sends the CoC eligible plans, which the CoC can accept if it receives 66% of the votes cast by committee members. If the CoC rejects any settlement proposal, the business would be liquidated.
If a plan is approved, the CoC submits it to the Tribunal before the maximum 330-day deadline, which then approves the plan which the debtor is bound to implement. The AA can also reject a plan

<sup>8</sup> Tavaga , Insolvency And Bankruptcy Code (IBC) In India And How It Works? ,1, 2020, <https://tavaga.com/blog/insolvency-and-bankruptcy-code-ibc-in-india-and-how-it-works/#:~:text=How%20does%20IBC%20work%3F,the%20assets%20of%20the%20debtor>.

## Some Important news and case laws about IBC 2016

The IBBI has recently set up a working group under former SEBI Chairman Mr. U.K. Sinha to recommend a complete regulatory framework to facilitate insolvency resolution and liquidation of debtors in a corporate group.

Recognizing the complexities involved, a Working Group under the chairmanship of Mr. P.K. Malhotra, former law secretary, has been set up by the IBBI to recommend the strategy and approach for implementation of the provisions of IBC dealing with insolvency and bankruptcy of individuals.

In *Jk Jute Mill Mazdoor Morcha vs Juggilal Kamlapat Jute Mills, 2019*<sup>9</sup> The case revolves around the question of whether trade unions would be considered operational creditors for the purpose of IBC or not.

*Section 5(20)* of the Code defines an operational creditor as follows:

“5. Definitions.—In this Part, unless the context otherwise requires, “operational creditor” means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;

*Section 5(21)* defines operational debt as follows:

“5. Definitions.—In this Part, unless the context otherwise requires, “operational debt” means a claim in respect of the provision of goods or services including employment, or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;

*Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016* states as follows:

“6. Application by operational creditor.—(1) An operational creditor, shall make an application for initiating the corporate insolvency resolution process against a corporate debtor under Section 9 of the Code in Form 5, accompanied by documents and records required therein and as specified in the Insolvency and Bankruptcy

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<sup>9</sup> *Jk Jute Mill Mazdoor Morcha v. Juggilal Kamlapat Jute Mills, C.A. No. 020978 - / 2017*

Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

## Transition

The name Sick Industrial Companies Act itself connotes the reason for its existence. In the 1980s, India saw a wave of widespread industrial sickness, prompting the government to pass important legislation to address the problem. The SICA was adopted in 1985 with the goal of ensuring the timely detection of sick and potentially sick firms that own industrial undertakings, as well as the quick assessment by a panel of experts of the preventative, corrective, and other measures that must be done in their case. This was an action to free up investment in such industrial facilities that had been locked up and put to better use.

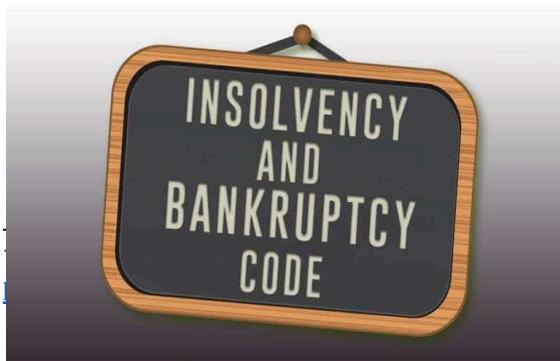
### **Relation between Industrial Sickness and the Economy;**

Multiple ways that widespread industrial illness affects the economy. It may lead to a loss of tax income for the government, the concentration of limited resources in failing areas, an increase in the amount of non-performing assets held by banks and other financial institutions, an increase in unemployment, a loss of output, and low productivity. SICA was put into place to address these unfavourable socioeconomic effects.

### **BIFR - Board for Industrial and Financial Reconstruction, 1987.**

The Board of experts named the Board for Industrial and Financial Reconstruction (BIFR) was set up in January 1987 and functional with effect from 15th May 1987. The Appellate Authority for Industrial and Financial Reconstruction (AAIRFR) was constituted in April 1987<sup>10</sup>.

### **IBC - The Insolvency and Bankruptcy Code, 2016.**



The Insolvency and Bankruptcy Code of 2016 is a legislation that consolidates and modifies the legislation governing reorganisation and

Historical Analysis , (2018),

insolvency resolution of Corporate Persons, Partnership Firms, Limited Liability Partnership, and Individuals in a time-bound manner, for the purpose of maximising the value of such person's assets, promoting entrepreneurship, increasing credit availability, and balancing the interests of all stakeholders, including changing the order of priority of payment of Government dues, and establishing an insolvency and Bankruptcy Board of India, and for matters connected with or incidental thereto.

### SICA vs. IBC

POINT OF DIFFERENCE	SICA	IBC
TIME	References of Sick companies under SICA take around one or two years to get admitted for further investigation. While the IBC is still new, there is a barrage of cases surrounding it which may lead to a delay in the completion of the insolvency process within the prescribed limit of one hundred and eighty days.	The IBC presents a time-bound resolution process. The NCLAT ruled that the time limits prescribed under sections 7, 9, and 10 of the Code are merely directory and not mandatory, however, there was a mandatory limit of a one hundred-eighty day timeline, extendable to two hundred and seventy days, for the dissolution of the case.
TRIGGER POINT	SICA is only triggered when there is a loss of fifty percent of a company's worth. Therefore, it's already too late, because half of the company's worth is already eroded by the time they decide to revive or liquidate it. However, the trigger, ironically, for liquidating a sick company is only a default of five hundred rupees.	The trigger point under the IBC is one lakh rupees which can be increased up to one crore rupees, by way of a notification of the government.
PRACTICE	The SICA and High Courts are reluctant in liquidating a sick company due to fear of loss of jobs, labor unrest, etc. SICA was also misused by	This is not a possibility under IBC, since the resolution plan so voted by the credit committee, ensures the creditors' control over the

	the debtor company to protect itself from creditors' claims.	functioning of the company. The corporate debtor cannot circumvent the process to keep themselves safe in the presence of an insolvency professional and a resolution plan.
DISTRIBUTION OF ASSETS	SICA, however, did not prescribe a waterfall mechanism. The distribution was based on the provisions of the Companies Act, of 1956.	The IBC provides for a waterfall mechanism for the distribution of assets on the liquidation of a sick company. This provides for a stronger corporate governance mechanism, wherein creditors' rights are enhanced. The priority starts from securing the rights of secured creditors and workmen to payment of equity, which by its very nature is high risk return.

## Constitutional Validity of IBC

Like any fresh legislation, issues pertaining to the constitutional validity of the Code have been raised by various stakeholders time and again. It has been alleged that the Code violates Article 14 of the Constitution of India and is discriminatory in nature. In several applications made to various National Company Law Tribunals and High Courts, the operational creditors have claimed that the classification of creditors as operational creditors and financial creditors is manifestly arbitrary and there is no intelligible differentia applied by the legislators in making such a demarcation. Furthermore, in the aftermath of the 2017 Amendment of the Code which was subsequently amended by 2018 Amendment of the Code, another provision that led to massive hue and cry was the bar put on promoters from bidding for their own company under Section 29A. The Code forced the sale of the Company to new bidders and was argued to be against the fundamental right of the promoters. Additionally, another claim pertaining to the

inequitable nature of Section 29A was raised and it was argued that the exclusion of the relative of an ineligible person, who is otherwise qualified to be the resolution applicant is extremely capricious.

## **Insolvency and Bankruptcy law in different countries**

### **Insolvency Legislation in the United Kingdom**

The United Kingdom's insolvency system is governed by the Insolvency Act of 1986 and the Insolvency Rules of 1986. On the advice of the Cork Review Committee Report on Insolvency Law and Practice, the Insolvency Act of 1986 was adopted (1982). The law dealing with insolvency in the UK was fragmented before the enactment of the Insolvency Act, of 1986, and was contained in the Bankruptcy Act, of 1914, the Deeds of Arrangement Act, of 1914, the Companies Act, of 1948, and elements of the Country Code Act, 1959. They were reinforced by common law and equity concepts. The main components of the Act included-

1. Enactments relating to Insolvency and Bankruptcy of individuals
2. Enactments relating to Company Insolvency and Winding Up
3. All other enactments pertaining to these two subjects, including the role and qualification of insolvency practitioners, the public administration of insolvency, the penalty and redress of malpractice and wrongdoing, and the avoidance of certain undervalued transactions.

### **Insolvency Legislation in the United States of America**

In the USA, the “Bankruptcy Code” is the legislation that governs the insolvency process. It is a federal law that applies to all bankruptcy cases in the United States. Section 101 of the Bankruptcy Reform Act of 1978 enacted the Bankruptcy Code, which is codified as title 11 of the United States Code. The Federal Rules of Bankruptcy Procedure control the procedural components of the bankruptcy process (Bankruptcy Rules). There are six basic types of bankruptcy cases provided for under the Bankruptcy Code in chapters 7, 9, 11, 12, 13, and 15.

## Insolvency Legislation in China

China legalized bankruptcy in 1986 and enacted a revised law in 2007, which was more thorough and extensive. The Bankruptcy Law, which is divided into 12 chapters and has 136 articles, covers all sorts of bankrupt firms, whether state-owned or privately owned, as well as foreign investment firms and financial institutions. Individual natural persons are not covered.<sup>11</sup> The law solely applies to Republic of China entities, although it extends beyond China's borders in terms of a debtor's abroad assets. Certain international proceedings that attempt to secure assets in China are also recognized by the regime. China recently passed an Enterprise Bankruptcy Law, which gives both firms and lenders more protection. It contains a restructuring provision that allows failed enterprises to rearrange their operations.

## Insolvency Legislation in Canada

In Canada, bankruptcy, and insolvency is managed by the country's Bankruptcy and Insolvency Act, enacted in 1985.<sup>12</sup> This act is often informally referred to as "the Bankruptcy Act". The act defines the roles and protects the rights of everybody involved in a bankruptcy or proposal proceeding, including the Superintendent of Bankruptcy, his or her representatives, the court, trustees, creditors, and debtors.<sup>13</sup>

Along with this, the Companies' Creditors Arrangement Act (CCAA), is also a federal law that helps in regulating insolvency. It was passed in 1933, at a period of worldwide economic depression, when a firm going bankrupt meant that owners' investments were lost, creditors received only a small portion of the debt owed to them, and the "social evil of devastating levels of unemployment" was aggravated.

The Superintendent of Bankruptcy is in charge of ensuring that bankruptcies are handled in a fair and orderly manner across the country. Bankruptcies in Canada are governed at both the federal and provincial levels.<sup>14</sup> Property exemptions, court order enforcement, and debt collection are all

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<sup>11</sup> [Flyer-Enterprise-Bankruptcy-law-in-China-October-2018.pdf \(bakermckenzie.com\)](https://www.bakermckenzie.com/-/media/assets/asia-pacific/china/white-papers/flyer-enterprise-bankruptcy-law-in-china-october-2018.pdf)

<sup>12</sup> [Bankruptcy and Insolvency Act \(justice.gc.ca\)](https://laws.justice.gc.ca/en/B-5.1/)

<sup>13</sup> [Canadian Bankruptcy Laws - Bankruptcy & Insolvency Act | MNP LTD \(mnpdebt.ca\)](https://www.mnpdebt.ca/)

<sup>14</sup> *Id.*

governed by provincial and territorial regulations. When you file for bankruptcy, provincial rules are frequently used to determine what property you are allowed to preserve.

### **Insolvency Legislation in Australia**

In Australia, bankruptcy is controlled under the Federal Bankruptcy Act of 1966. A creditor can seek a sequestration order from the Federal Circuit Court if an individual falls bankrupt. A debtor's petition can also be filed with the Official Receiver to seek protection. For a creditor to file a petition, the debtor must owe at least \$5,000. The purpose of the act is twofold: *firstly*, To give a debtor who is in a difficult or hopeless financial position a fresh start by wiping most of their debts; and *secondly*, to fairly distribute the debtor's assets among creditors.<sup>15</sup>

In the Bankruptcy Act, a person can become bankrupt in three ways-

1. Voluntary Bankruptcy as per Part IV, Division 3 of the Bankruptcy Act.
2. Forced Bankruptcy as per Part IV, Division 2a and 3 of the Bankruptcy Act.
3. Deceased Bankruptcy as per Part XI of the Bankruptcy Act.

As the Bankruptcy Act is a Commonwealth Act, it covers all states and territories. The Federal Court (General Division) and the Federal Circuit Court are the applicable courts. When the trustee is a party to family law property or spousal maintenance proceedings, the Family Court of Australia has jurisdiction under the Bankruptcy Act. Furthermore, under the Bankruptcy Act, both the Federal Court and the Federal Circuit Court have the authority to transfer cases to the Family Court as per 35 and 35A of the Bankruptcy Act.<sup>16</sup>

### **Insolvency Legislation in Poland (Europe)**

Poland has a thorough piece of legislation namely, the Bankruptcy Act 2003. It covers all insolvency proceedings, including bankruptcy, and can be started by either the creditor or the debtor, as in India.<sup>17</sup> In Poland, however, unlike India, where specific courts deal with certain issues, the district court handles them. Another distinguishing element of Polish law is that businesses can initiate preemptive bankruptcy proceedings. They might also go to court to start certain rehabilitative procedures. The court's decision is published in the District Commercial

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<sup>15</sup> [WhatIsBankruptcy | ACTLawHbk | AustLII Communities](#)

<sup>16</sup> *Id.*

<sup>17</sup> [Insolvency and Bankruptcy in India and other countries \(h2life.in\)](#)

Gazette. However; from May 15, 2015, the primary legislation governing insolvency-related restructuring proceedings is the Restructuring Act, which governs four types of pre-insolvency restructuring proceedings.<sup>18</sup>

In most cases, a judge must initiate reorganization and bankruptcy proceedings. Restructuring proceedings are usually initiated exclusively on the debtor's motion, with the exception of corrective processes. Remedial and bankruptcy proceedings, on the other hand, can be initiated by either the debtor or the creditor. Simplified arrangement proceedings, on the other hand, require the debtor to engage into a restructuring agreement with the restructuring advisor and then post a notice announcing the start of simplified arrangement proceedings.<sup>19</sup>

### **Current Policy of European Union (EU)**

The European Union stands on a separate footing as of now. Companies and people are increasingly establishing operations in member countries other than their own. Their insolvency causes issues on both sides of the border. To address these issues, the European Commission established an Experts Group to help in the preparation of a legislative proposal to consolidate restructuring and insolvency law. A symposium was also convened in Brussels in July 2016 to further concretize the topics. The common law that will prevail over the whole of the EU is yet to be implemented.<sup>20</sup>

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<sup>18</sup> [Restructuring and insolvency law in Poland | CMS Expert Guides](#)

<sup>19</sup> *Id.*

<sup>20</sup> *Supra* 13.

## CHAPTER II

### Creditors under the Code

Financial Creditors, as defined under Section 5(7) of the Code are financial lenders of the Corporate Debtors i.e., they have provided funds to the entity, and their relationship is strictly a financial contract such as a loan or debt security. On the other hand, Operational Creditor as defined under Section 5(20) of the Code refers to an entity that has provided inputs or other materials in the form of goods or services to the Corporate Debtor, the payments for which have been defaulted by the Corporate Debtor.



### Difference between Financial Creditor and Operational Creditor<sup>21</sup>

Particulars	Financial Creditor	Operational Creditor
Meaning	Any person to whom the Corporate Debtor owes a financial debt, eg. Loan, Debt Security	Any person to whom the Corporate Debtor owes an operational debt i.e., money for a good or service provided by the creditor

<sup>21</sup> Parmar, Niddhi. "DIFFERENCE BETWEEN OPERATIONAL AND FINANCIAL CREDITORS." <http://vinodkothari.com/>, June 2019. <http://vinodkothari.com/wp-content/uploads/2019/06/Difference-between-OC-FC.pdf>.

Meaning of Debt	Debt here refers to the money including interest that is payable by the Corporate Debtor to the creditor under the financial contract	Debt here refers to the amount payable by the Corporate Debtor to the Creditor for the goods or service (also includes employment) provided.
Voting Share at Committee of Creditors	The voting share of a Financial Creditor in a CoC is in proportion to the financial debt owed to the Creditor. A minimum of 75 percent of voting shares is essential	The Operational Debtor has no voting share at the meeting of Creditors
Initiation of Insolvency Resolution Process	Under Section 7(1) of the Code, the Financial Creditor, jointly with the other Financial Creditors or individually may file an application for initiating the Insolvency Process before the Adjudicating Authority	Under Section 8(1) of the Code, the Operational Creditor may deliver a demand notice to the Corporate Debtor demanding the repayment, and may file an application with the Adjudicating Authority after the expiry of 10 days from the day of serving of notice if the Operational Creditor does not receive the payment or a notice of Dispute under Section 8(2)
Appointment of Resolution Professional	As per Section 7(3) of the Code, the Financial Creditor SHALL along with the application filed furnish the name of a Resolution Professional who will act as the interim resolution professional	As per Section 9(4) of the Code, an Operational Creditor MAY propose a resolution professional who shall act as the interim resolution professional
Committee of Creditors	All Financial Creditors are a part of the committee	Operational Creditors do not form a part of the committee

Submission of Financial Information	As per Section 215(2) of the Code, it is compulsory for a Financial Creditor to furnish the financial records of the transaction between the Creditor and the Corporate Debtor	As per Section 215(3) of the Code, it is not compulsory for an Operational Creditor to furnish the Financial Information regarding the transaction that took place between the Creditor and the Corporate Debtor
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## **Rights of Creditors**

1. Right to Initiate Insolvency Proceedings: At the outset, it can be noted that both financial as well as operational creditors have the right to file an application with the Adjudicating Authority to initiate the Insolvency Resolution Proceedings against the Corporate Debtor, but the situation for both the category of creditors is different. On one hand, where the Financial Creditor can directly file an application with the Authority to begin the proceedings, an Operational Creditor has to first serve a demand notice or invoice to the Corporate Debtor demanding the clearance of the dues, and if the Corporate Debtor does not reply within 10 days from the date of delivery of the notice or he does not serve a notice of the dispute to the Creditor, then only can the Operational Creditor proceed to file an application with the Adjudicating Authority.<sup>22</sup>
2. Right to Vote in the Committee of Creditors: The Committee of Creditors is the body that represents the creditors of the Corporate Debtors and takes decisions on behalf of the creditors in the resolution process. The Code provides that only the Financial Creditors will constitute the Committee. A resolution plan will be implemented only if it is passed in the CoC by a majority of a minimum of 66%. Only those Operational Creditors whose dues amount to at least 10% of the total dues are invited to the meeting of the Committee.

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<sup>22</sup> Gursale, Aarohee, and Sana Khan. "Financial Creditor And Operational Creditor Under The Insolvency And Bankruptcy Code, 2016." Mondaq, July 4, 2017.

<https://www.mondaq.com/india/insolvencybankruptcy/607738/financial-creditor-and-operational-creditor-under-the-insolvency-and-bankruptcy-code-2016>.

It is to be noted that these Operational Creditors shall not have any voting power in the matters of the committee. Therefore, those Operational Creditors who fulfill the threshold limit are allowed to sit in the meeting, but the voting power lies completely with the Financial Creditors.

3. Right to Higher Remuneration: Through the third amendment in the Insolvency and Bankruptcy Code 2019, the power to determine the manner of distribution of the proceeds from the resolution plan lies in the hands of the Committee of Creditors, and the Committee consists only of the Financial Creditors, therefore it can be deduced that the Financial Creditors have priority in the case of the distribution of the proceeds from the resolution process of a Corporate Debtor.
4. Rights in the Case of Liquidation of the Corporate Debtor: In case the CoC fails to approve a resolution plan within the stipulated time period or it calls for the liquidation of the Corporate Debtor, the Adjudicating Authority will appoint a Liquidator who will sell the assets of the Corporate Debtor. The money so procured will be distributed among all the creditors. The right of the Operational Creditors to remuneration is equal to that of the Unsecured Financial Creditors, but the right of both these creditors is less than the right of the Secured Financial Creditor to recover his debt.

## **Insolvency of Corporate Groups**

A corporate group is a cluster of companies existing in various structure formats. A corporate group structure may have several operational advantages over isolated entities, such as greater efficiency, better management control and tax incentives. Corporate groups operate through a variety of forms, which may include: operational links such as a dependency on the supply of essential goods; and financial links, which include inter-corporate guarantees or inter-corporate loans and advances. From an economic perspective, these corporate groups are ‘one organism.’ But, from a legal perspective, the principle set forth by *Salmon v. Salmon* of a separate legal entity is still followed. When one entity of a corporate group enters insolvency, it may make the

operations of the entire group difficult. However, the Insolvency and Bankruptcy Code 2016 (IBC) does not provide for the insolvency resolution of corporate group entities. Group insolvency resolution is said to be a complex subject and it was decided by the lawmakers in our country that the new Insolvency Law i.e IBC, being new to India, it may be too soon to introduce such a complex subject like the group insolvency. The rationale being that group insolvency could involve lifting of the corporate veil which could affect the corporate debtor significantly and hence could be taken up after the present system is well established. While the Code is silent about group insolvency, the courts are attempting to fill in this gap through legal professions. The courts had to deal with prayers for consolidation of cases of group companies, notwithstanding the fact that there are no provisions in IBC at present for the same. At the point when the Videocon Group went insolvent, fifteen distinctive resolution applications were filed against its fifteen diverse group companies. The case was State Bank of India Vs Videocon Industries Limited (VIL) & Ors<sup>23</sup>, Mumbai Bench. The court stated that, " *considering the high stakes of the stakeholders and the lengthy arguments raised by various parties demanding a verdict urgently on the issue of 'Consolidation', no choice is left but to take the call, although with due care that not to exceed the jurisdiction enshrined in the Insolvency Code.*"



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<sup>23</sup> (MA/2385/2019 in C.P.(IB)-02/MB/2018 dated 12.02.2020 of NCLT

## **'Dispute' under IBC**

In India, debt recovery has been difficult due to legal disputes between creditors and debtors over rights and responsibilities under a variety of applicable laws, which has made the process time-consuming and costly. The Insolvency and Bankruptcy Code, 2016 (the "Code" or "IBC") was enacted on May 28, 2016, with the intention of, among other things, addressing and resolving these issues as well as establishing a procedure for insolvency and bankruptcy cases in India.

The IBC under clause (6) of section 5 provides for definition of the term Dispute which is as follows: -

*“ "Dispute" includes a suit or arbitration proceedings relating to —*

1. *the existence of the amount of debt;*
2. *the quality of goods or service; or*
3. *the breach of a representation or warranty; ”*

According to principles of statutory interpretation, the word "includes" carries both the extended statutory meaning and its meaning in its ordinary, popular, and natural sense, whichever is appropriate. Suits or arbitrations are examples of disputes, according to the definition of the term. However, as stipulated in section 5(6) of the code, these suits or arbitrations should be specifically related.

Section 8 specifies the prerequisites for submitting an application in accordance with Section 9 of the "I & B Code." According to Section 8, a demand to repay the debt must be made prior to the filing of the NCLT application. Within ten days of receiving notice, the corporate debtor must either repay the operational debt or provide evidence of a dispute, such as a record of the pending suit or arbitration proceedings filed prior to receiving notice, or an invoice related to a dispute. The rights to apply for the start of the corporate insolvency resolution process after ten days have

passed since the delivery of the demand notice is enshrined in Section 9<sup>24</sup>. For the purpose of maintainability of each application submitted in accordance with Section 9 of the IB Code, the term "Dispute" is vital. It would be correct to state that to check whether there is any dispute or otherwise the primary criterion needs to be fulfilled for admitting an application under Section 9. It is fundamental to refer to section 9 when the interpretation of term dispute is disputed.

Section 9 (5) clause (d) of Insolvency and Bankruptcy Code, 2016 provides as:-

"The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order—

(d) Notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or"

That is to say; in other words, under the IB Code, the adjudicating authority may reject the application if there is a dispute between the Corporate Debtor and the Operational Creditor.

### **Evaluation of term Dispute and The Judiciary's interpretations**

Since the definition of term dispute is not exhaustive and rather inclusive it is always subjected to various different interpretations. On the meaning of the term "dispute," several benches of the NCLT have held opposing viewpoints.

The Delhi Bench of the NCLT concluded in the case of *One Coat Plaster, Shivam Construction Company v. Ambience Private Limited*<sup>25</sup> that the term 'dispute' needs to have a broad and inclusive definition." In addition, the Delhi bench ruled that the debtor need not have filed a lawsuit or arbitrated an arbitration agreement before receiving a demand notice to prove the existence of a dispute. It will suffice to respond to the demand notice by demonstrating the existence of a genuine dispute. In addition, the adjudicating authority stated that, despite the fact

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<sup>24</sup> Senguttuvan K. and kshitija Prakashan, Interpretation of term Dispute in IBC, 2016, (March 11, 2021), [http://sapaa.in/resource-center/interpretation-of-the-term-dispute-under-ibc-2016/#\\_ftn5](http://sapaa.in/resource-center/interpretation-of-the-term-dispute-under-ibc-2016/#_ftn5)

<sup>25</sup> *One Coat Plaster, Shivam Construction Company v. Ambience Private Limited*, [2017] 138 CLA 104 (NCLT)

that a cursory reading of the section reveals that the dispute could be demonstrated by demonstrating that a suit has been filed or that arbitration is pending, the definition of the term "dispute" is not exclusive but rather encompasses all of the relevant facts.<sup>26</sup>

Another example is the case of *Ahluwalia Contracts Ltd. v. Raheja Developers*<sup>27</sup>, The NCLT observed that the "dispute existed prior to the issuance of demand notice to the Corporate Debtor and held that the claim raised by the Operational Creditor fell within the ambit of a disputed claim and therefore, rejected the application in accordance with Section 9(5)(ii)(d) of the I&B Code."

The Operational Creditor preferred an Appeal before the NCLAT from the order of the NCLT. A Three-judge Bench of the NCLAT set aside the decision of the NCLT while observing that, "the dispute must be pre-existing. On the date of issuance of the demand notice, no arbitration proceeding was initiated or pending, and the arbitration notice was filed after receipt of the demand notice under Section 8 of the IBC. Therefore, the Corporate Debtor cannot rely on arbitration notice to suggest a pre-existing dispute."

#### **Can operational debt be seen as a factor for determining the Existence of any Dispute:**



The IBC is a relatively new piece of legislation, and applications for the initiation of CIRP almost always go unanswered u/s. 8 and 9: IBC has not been accepted because of a pre-existing

<sup>26</sup> Ramit Chitkara, getting a fix on the term dispute under Insolvency and Bankruptcy Code, 2016, (Nov. 17, 2017), <https://www.moneycontrol.com/news/trends/expert-columns-2/getting-a-fix-on-the-term-dispute-under-the-insolvency-and-bankruptcy-code-2431387.html>

<sup>27</sup> Ahluwalia Contracts (India) Limited vs. Raheja Developers Limited (23.07.2019 - NCLAT) : MANU/NL/0318/2019

dispute about what is meant by the term "operational debt." For the purpose of determining the "existence of a dispute" u/s, it is relevant to consider what constitutes "operational debt." because a dispute can only arise over an 'operational debt,' as stated in IBC 8(2). The definition of "operational debt" is essential to determining whether CIRP should be initiated by the Adjudicating Authority because a Debtor can only challenge the initiation of CIRP by asserting that a disagreement/dispute exists in the case brought by the parties.

The NCLT (Delhi)'s decision in Jindal Steel & Power Ltd. v. DCM International Ltd.<sup>28</sup>, in which it was stated that "operational debt" was referred u/s. 5(21) of the IBC ought to be a debt u/s. 3(6) be indebted because of direct input or output produced or supplied by the Corporate Debtor. Neeraj Jain Ltd. Cloudwalker Streaming Technologies Pvt. Ltd<sup>29</sup>., the NCLAT acknowledged that "operational debt" could result from damages claimed in place of customs and excise duties. However, excess customs duties in Neeraj Jain do not relate to the direct input or output of goods or services, which is a requirement for satisfying the criteria of "Operational Debt" u/s. 5(21) of the IBC, as determined by the Jindal Steel decision.<sup>30</sup> Inconsistent judgments regarding the "existence of disputes" result from uncertainty regarding the definition of "Operational Debt." In cases that are not associated with "Operational Debt," CIRP cannot be initiated. As a result, in order to provide clarity regarding the "disputes" that could be brought before an Adjudicating Authority in accordance with the statute, either amendment to the IBC or clarifications must be issued to clarify the definition of "operational debt." 8(2) to prevent the beginning of CIRP u/ss. sections 8 and 9 of IBC.

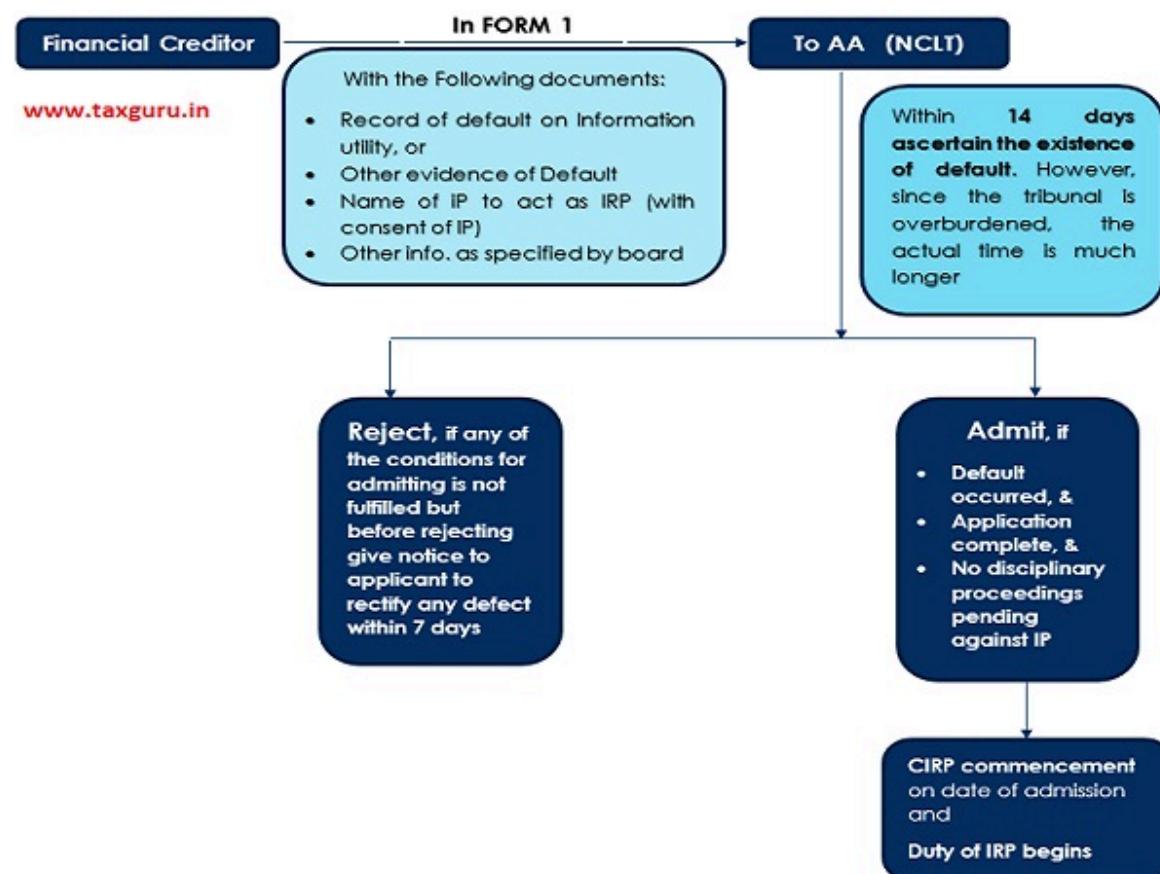
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<sup>28</sup> Jindal Steel & Power Ltd. v. DCM International Ltd , 2017 SCC NCLAT 441 [10]

<sup>29</sup> Neeraj Jain Ltd. Cloudwalker Streaming Technologies Pvt. Ltd,2020 SCC NCLAT 445 [51]

<sup>30</sup> Satvik Chaudhary, What Is The Dilemma Around The 'The Existing Dispute' Under IBC, 2016, (Aug. 4, 2022), [https://taxguru.in/corporate-law/dilemma-meaning-existence-dispute-ibc.html#\\_ftn11](https://taxguru.in/corporate-law/dilemma-meaning-existence-dispute-ibc.html#_ftn11)

## Section 7 and Section 9



### Process of filing an application by financial creditor under section 7

A financial creditor may initiate the CIRP against a corporate debtor if the corporate debtor is unable or has become incapable of paying the financial debt owed to the financial creditor, according to Section 7 of the IBC. Following are the prerequisites for a financial creditor that need to be fulfilled beforehand:

#### Financial debt

The term "financial debt" is defined in Section 5(8) of the Code as a debt, plus interest that is dispensed to the debtor against the time value of money. The types of debts that will be covered

in the definition are also listed in this section. The following are the components that make up a financial debt: (a) There should be a disbursement of the debt (b) The disbursement should be on the time value of money. It means that there should be some return for the debt over a period of time.

### 1. Default

The corporate debtor must have defaulted on the financial creditor's payment, which is the next and most crucial prerequisite for a financial creditor to submit an application with the Adjudicating Authority. The term "default" is defined in Section 3(12) of the Code as the failure to pay all or any part of a debt that has become due but has not been paid by the Corporate Debtor. As a result, default occurs when any installment of the principal amount, as well as any accrued interest, is not paid.

### Process of filing an application by an operational creditor under Sec 9

If the corporate debtor is unable or becomes incapable of repaying the operational creditor's dues, an operational creditor can file an application to commence the CIRP of the corporate debtor under Section 9 of the Code. Following are the prerequisites for an operational creditor that need to be fulfilled beforehand:

### 2. Operational debt

An operational debt, according to Section 5(21) of the Code, is a demand for the provision of products or services. Employment or a debt for the repayment of dues arising under any law currently in force and owed to the Central Government, any State Government, or any municipal body are also included.

### 3. Default

According to Section 4 of the Code, the minimum amount of default for triggering the CIRP is one lakh rupees, with the exception that the Central Government may set a greater minimum

amount of default not exceeding one crore rupees. As a result, the Union Government upped the IBC default threshold to one crore rupees in a notification dated March 24, 2020.

#### 4. Dispute

The non-existence of a dispute between the parties to the application is the third need that the operational creditor must meet before submitting an application. It's important to remember that this isn't a fictitious dispute, but a real one.

#### 5. Demand notice

The communication of a demand notice is one of the most fundamental prerequisites for an operational creditor to launch an application against a corporate debtor. Section 8 of the Code contains the aforementioned provision. Before submitting an application under Section 9, an operational creditor must serve the corporate debtor with a demand notice in Form 3 of the Adjudicating Authority Rules, 2016, asking the corporate debtor to pay back the dues within 10 days, according to Section 8(1).

#### Admission or Rejection of the Application

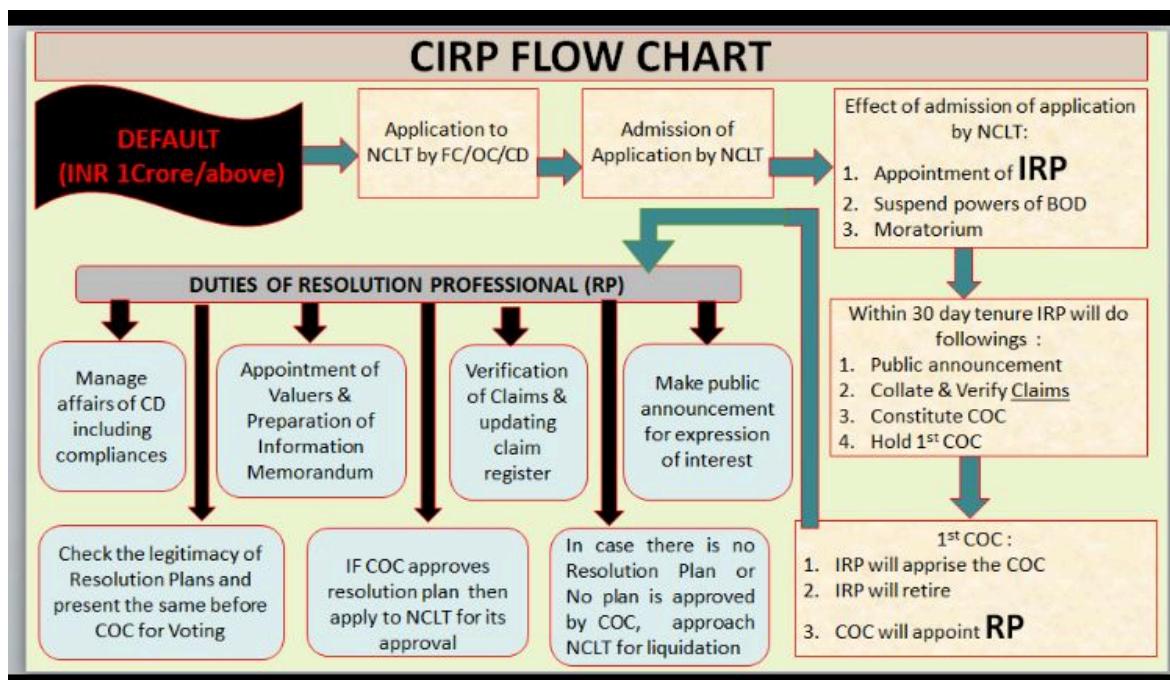
The Adjudicating Authority shall, within 14 days of the receipt of the application, by an order:

1. Admit the application and communicate such decision to the operational creditor and the corporate debtor if:
  - A. The application is complete;
  - B. There is no payment of the unpaid operational debt;
  - C. The invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;
  - D. No notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and

E. There is no disciplinary proceeding pending against any proposed resolution professional if any.

2. Reject the application and communicate such a decision to the operational creditor and the corporate debtor, if

- The application is incomplete;
- There has been payment of the unpaid operational debt;
- The creditor has not delivered the invoice or notice for payment to the corporate debtor;
- Notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or
- Any disciplinary proceeding is pending against any proposed resolution professional



## **CIRP**

Chapter 2, section 6 of IBC, 2016[1] states that “where any corporate debtor commits a default, a financial creditor, an operational creditor or the corporate debtor itself may initiate corporate insolvency resolution process in respect of a such corporate debtor in the manner as provided under the act”.

### **Steps for CIRP (Process)**

Stages:

Stage 1 – Petition to the NCLT
Stage 2 – Appointment of Interim Resolution Professional (hereinafter referred to as “IRP”)
Stage 3 – Moratorium
Stage 4 – Collation and analysis of facts
Stage 5 – Resolution Plan
Stage 6 – Decision

## **Submission of Application**

1. When a default has occurred, a financial creditor may apply with the Adjudicating Authority to begin the corporate insolvency resolution procedure against a corporate debtor, either individually or collectively with other financial creditors. Adjudicating Authority for this act means National Company Law Tribunal constituted under section 408 of the Companies Act, 2013.
2. The financial creditor shall make an application in such form and manner and accompanied with such fee as may be prescribed.
3. The financial creditor shall, along with the application furnish -
  - a. record of the default recorded with the information utility or such other record or evidence of default as may be specified,
  - b. the name of the resolution professional proposed to act as an interim resolution professional,
  - c. any other information as may be specified by the Board.
4. The Adjudicating Authority shall, within 14 days of the receipt of the application, ascertain the existence of a default from the records of information or based on other evidence furnished by the financial creditor.
5. The adjudicating authority must be satisfied that the application is proper and complete, that a default has occurred, and that no disciplinary proceeding against the proposed resolution professional is pending. If the adjudicating authority is not satisfied, the application may be rejected. If the application is not complete then, adjudicating authority shall give the applicant the timeline of 7 days to amend the application.
6. The corporate insolvency resolution process shall commence from the date of admission of the application.
7. The Adjudicating Authority shall communicate the order to the financial creditor and the corporate debtor within 7 days of admission or rejection of the such application, as the case may be.

## **Earnest Money Deposit (EMD)**

When demonstrating your intent to purchase a high-value asset, making an Earnest Money deposit is common. In real estate and commercial transactions all over the world, it is common practice to pay a small amount because of this. Simply put, an Earnest Money deposit is the amount a buyer pays to demonstrate his genuine interest in a particular property. After an offer has been verbally accepted, the money is frequently paid. Binder, token money, and good-faith deposits are other names for the Earnest Money deposit. A token can be paid by a buyer for one percent of the property's value. The verbal agreement must be carried out by both parties following the payment of the token amount. Similar practice is adopted in the process of corporate insolvency resolution which is governed by the IBC, 2016.



The Resolution Professional (RP) is authorised by the Insolvency and Bankruptcy Code of 2016 (the "Code") to significantly initiate the Corporate Creditor's corporate resolution process. By publishing the request for the resolution process (the "RFRP"), the Resolution Professional, on the advice of the Committee of Creditors (the "CoC"), initiates the process of determining the resolution applicant(s) for the corporate debtor.

On the basis of this request for the resolution process, the RP invites investors or resolution applicants with sufficient financial resources to submit a resolution plan for the corporate debtor. In general, the Request for the resolution process consists of:

1. requisites to be eligible;
2. Process of bidding;

- 3. a contract outlining the requirements for bidding;
- 4. Matrix for evaluating bids;
- 5. Form-G and the time frame for which the EOI could still be submitted;

The earnest money deposit, or "EMD," is one of the most important requirements outlined in the RFRP for the resolution applicants. CoC may request additional terms. A bank guarantee of contract fulfillment is analogous to an Earnest Money Deposit.

**The purpose is to essentially:**

Eliminate the non-serious resolution applicant(s) from the pool of prospective resolution applicant(s); and ensure that the corporate debtor is resolved in a timely way.

"In general, the earnest money deposit is essentially a buyer's deposit on a property discussed in the transaction. During the exchange of earnest money, a contract outlining the conditions for refunding the amount is written. A buyer could lose their earnest money deposit if they violate the terms of the contract. However, there are a number of potential agreed-upon contingencies that could prevent the buyer from withdrawing from a contract but still receiving their full earnest money. "

**Legal Framework for EMD**

The following are highlights of the EMD-governing regulatory framework:

Section 25(2)(h) of the Code grants the RP the authority to invite potential resolution applicants to submit resolution plans once the CoC has approved the eligibility criteria, including EMD.

The EOI is covered by Regulation 36(A)2 of the 2016 "CIRP Regulations" of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person). Form G of the IBBI Regulations' Schedule contains the EOI's specifics. The corporate debtor's business operations' complexity and scale determine the EMD amount, which is fixed.

After the resolution applicant is determined to be the successful applicant, a performance security may be deposited in accordance with Regulation 36(4A)3 of the CIRP Regulations. This

has been included to make sure that once the plan for a successful resolution has been approved, it doesn't stop working and cause the resolution process to fail.

The EMD and its forfeiture have also been contemplated by the Insolvency and Bankruptcy Board of India. These enabling clauses are also included in the IBBI's draft Resolution.

### **Liability of the person paying Earnest Money**

In the bidding process during the CIRP earnest money plays an important role and binds the party in the transaction.<sup>31</sup> The tribunals in various cases have dealt in the matter such an instance is seen in the case of Visisth Services Limited v. Mr. S. V. Ramani and Others [Company Appeal (AT) (Insolvency) No.896 of 2020], the National Company Law Appellate Tribunal (NCLAT) held in its judgment dated January 11, 2022 (the "Judgement") that a "Successful Bidder" cannot wriggle out of the contractual obligations and withdraw the bid after payment of earnest money deposit on the grounds that the offer

The NCLAT came to the conclusion that, when a company is sold as a "going concern," it is selling both its assets and its liabilities "as is where it is." The NCLAT was of the opinion that the appellant cannot be entitled to the EMD amount and the amount paid toward the Bid Document if he does not comply with the terms of the contract on the grounds that the offer made was a "conditional offer," as the appellant is the "Successful Bidder" and cannot wriggle out of the contractual obligations. In addition, the NCLAT was of the opinion that the appellant cannot be entitled to the EMD amount and the amount paid. Therefore, concludingly we can say that Earnest Money Deposit (EMD) refers to the sum that each Bidder must deposit with Authority in line with Clause 2.19 of this RFP.

### **Resolution Plan**

The responsibility of assessing and choosing the resolution plan is left to the CoC's judgement because it is of crucial relevance to CD stakeholders. The CoC then examines the "feasibility and

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<sup>31</sup> Mondaq.com, Available at: [mondaq.com/pdf/1162660.pdf](https://mondaq.com/pdf/1162660.pdf), last visited (Jan. 7, 2023).

viability" of the plan in addition to how the money will be distributed among the various classes of creditors. When designing a resolution plan, the following considerations must be made:

Informational material:



Details of the Resolution Applicant with the Information and disclosure indicating the applicant is qualified to submit a Resolution Plan under Section 29A. Executive summary summarising the key components of the plans, such as the treatment of creditors' claims and the schedule for

resolution plan execution. Financial creditors, operating creditors, and other creditors are also highlighted.

### **Essentials of Resolution Plan**

Authorities should identify potential resolution strategies and examine the essential preconditions and operational needs for their implementation, including cross-border cooperation arrangements. In addition to the overall resolution strategy and the underlying strategic analysis, authorities should identify regulatory thresholds and legal conditions that provide grounds for the initiation of official actions (including thresholds for entry into resolution), as well as the scope for authorities' discretion (for example, the extent to which authorities can refrain from taking actions or avoid acting under certain conditions); and essential interdependencies and the impact of resolution activities; financial contracts; markets and other firms with similar business lines; and a comparative assessment of losses to be incurred by creditors, as well as any premium associated with various resolution options. The variety of funding options for resolutions; How deposit insurance funds and other insurance programmes make payments; The processes for maintaining continuous access to trading platforms, exchanges, and payment, clearing, and

settlement systems; the internal systems and processes required to support the continued operation of the firm's critical functions; the processes for implementing them internationally; and the appropriate communication tactics and procedures to coordinate communication with foreign authorities.

### **Appointment of Resolution Professional**

The appointment of a Resolution Professional for that Company is one of the first steps in the procedure when a company declares insolvency. The RP will be in charge of managing the corporate debtor's operations and working through the entire Corporate Insolvency Resolution (CIR) procedure. Only the RP should send out notices and preside over all meetings occurring after his appointment.

The Resolution Professional welcomes potential Resolution Applicants to submit Expressions of Interest. The Resolution Professional develops an Information Memorandum to be submitted to possible Resolution Applicants in order to formulate a Resolution Plan. The Resolution Professional additionally creates a Request for Resolution Plan / Process Memorandum that outlines how the entire CIRP will operate.

## **Insolvency Professional in CIRP**

A petition for bankruptcy is filed with the adjudicating body (the NCLT in the case of corporate debtors) by either the financial or operational lenders, or by the debtor itself. After the petition, the maximum duration to accept or reject the plea is fourteen days. If the plea is accepted, the MORATORIUM period begins where the tribunal appoints an Insolvency Resolution Professional (IRP) to develop a resolution plan within 180 days, which could be stretched up to 90 days, after which the court would institute the Corporate Insolvency Resolution Process. For this duration, while the process is ongoing, the board of Directors is silent, and the promoters have no say in the company's management. If necessary, the Insolvency Resolution Professionals might seek the cooperation of the company's management for their day-to-day activities. After the completion of the above procedure, the tribunal is unable to reclaim the corporation, and the process of liquidation will commence.

### **Execution of the Insolvency Resolution Process for Corporations**

According to Section 23, the Resolution Professional controls the whole Corporate Insolvency Resolution Process and administers the corporate debtor's activities mostly during the CIR Process. However, even after the expiry of the corporate insolvency resolution procedure, the Insolvency Professional continues to monitor the operation till the decision approving the resolution plan or appointing the liquidator is passed. He also has the authority to use power and carry out the tasks of the Interim Resolution Professional.

### **Taking control of the corporate debtor's assets**

The insolvency professional, based on Section 18(f), assumes possession and custody of the debtor's assets at the time of the resolution. In *Goa Auto Accessories v. Suresh Saluja*<sup>32</sup>, The

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<sup>32</sup> *Goa Auto Accessories vs. Suresh Saluja* (20.08.2019 - NCLT - Mumbai), MANU/NC/4579/2019

NCLT's Mumbai Bench found that the Insolvency Professional may take custody of the corporate debtor's assets to aid the Corporate Insolvency Resolution Process.

### **Moratorium Enforcement**

According to section 14 of the Code, the Adjudicating Authority (AA) declares a moratorium on the commencement of insolvency, forbidding any new litigation or continuation of existing litigation against the Corporate Debtor. This clause would allow for the termination of pending proceedings 'against' the Corporate Debtor. Nonetheless, it permits the Insolvency Professional to pursue concerns begun by the Corporate Debtor, as a successful settlement may benefit the Corporate Debtor.

Unavoidably, a Corporate Debtor with continuous activities and a wide reach will have several litigations. Additionally, it's also been noted that, notwithstanding the moratorium, fresh actions and lawsuits against the Corporate Debtor are being brought in different categories of forums. One difficulty the Insolvency Professional confronts is that the moratorium is not automatically imposed. Individual regulatory bodies and courts must be notified of the need to impose a moratorium in each case. While enforcing the moratorium is a purely administrative matter, it asks for labor and expenses on the side of the RP that may be avoided. Having to make representations also increases the possibility of such litigations being pursued indefinitely. In a number of instances, the court having the jurisdiction can determine that the moratorium may not apply to the particular case.

### **Information Memorandum**

The Insolvency Professional is responsible for preparing and submitting an information memorandum in order to develop a resolution plan. He is also expected to supply the resolution applicant with all factual details. Regulation 36(2) specifies the information that must be included in the information memorandum. The explanation to Section 29 defines the word 'information memorandum' as information that the resolution applicant needs in order to prepare

a resolution plan for a corporate debtor. It consists of information about a corporate debtor's financial status, litigation, and any other problem.

### **Constituting committee of creditors**

After gathering claims and determining the corporate debtor's situation, the interim professional establishes the committee of creditors (CoC). The creditors' committee then decides whether the company should be restructured or put into liquidation. The CoC gets to appoint the insolvency professional during its first meeting, who would then assemble the creditors and conduct the committee's sessions. Additionally, pursuant to Section 24(2), the insolvency professional presides over all Committee of Creditors meetings.

### **Examination of Resolution plan**

The insolvency professional assists in the implementation of the resolution strategy. According to Section 30, the resolution applicant must submit the resolution plan to the resolution professional based on the information memorandum generated by the resolution professional. The RP is obligated to analyse each resolution plan presented to him in order to verify that it includes, in the manner stipulated by the Board, the following:

1. Has prioritised the payment of bankruptcy resolution process charges over the payment of the corporate debtor's other debts.
2. Has not less than provided again for payment of the operating creditor's debts.

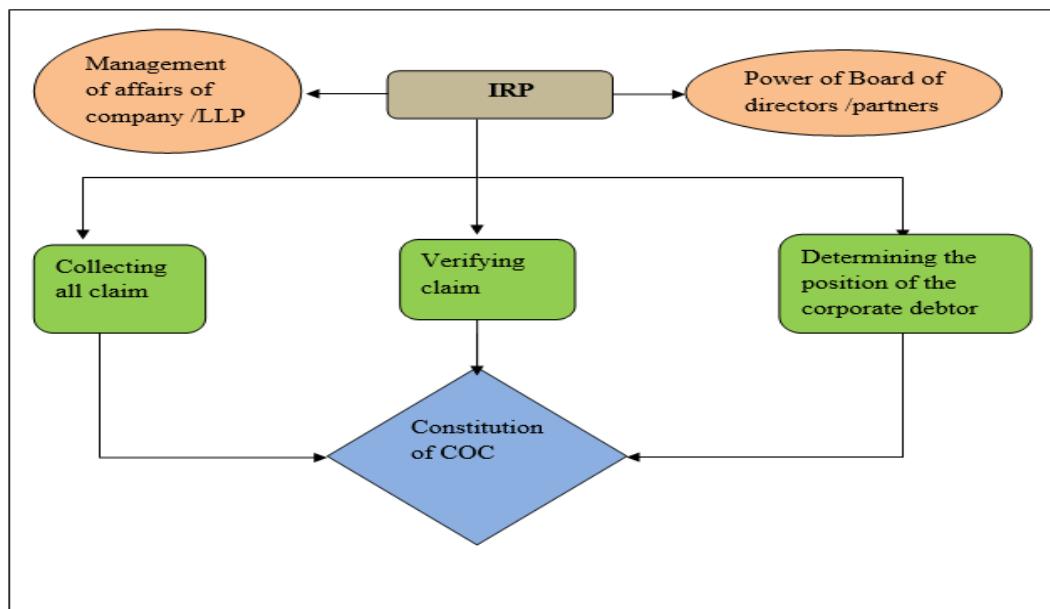
The amount payable to the such creditor in the case of liquidation in accordance with Section 53 (1). Amount paid to such creditor if indeed the amount is now to be distributed in accordance with the order of priority established under section 53(1) - Has provided for the payment of the financial creditor's debts (not voting in favour of the resolution plan) in an amount equal to or greater than the money paid to such creditors of the company of the corporate debtor's liquidation pursuant to section 53 (1).

If the resolution verifies the preceding criterion, the resolution professional subsequently proposes the resolution plan to the committee of creditors for approval. If the committee adopts

the proposal, it must do so by a vote of not less than 60% of financial creditors with voting rights. The resolution expert next submits the agreed resolution plan to the Adjudicating Authority. If satisfied, the Adjudicating Authority accepts the resolution plan by order, which is binding on the corporate debtor, its workers, members, creditors, guarantors, and all parties participating in the resolution plan. If the Adjudicating Authority is not convinced, it may, pursuant to Section 31, reject the settlement plan by order.

## Appointment of IRP and IP

### Interim Resolution Professional



An Interim Resolution Professional (IRP) is an independent neutral individual appointed by the Honourable National Company Law Tribunal (NCLT) for an corporate entity against whom insolvency proceedings are initiated, within 14 days of the admission of the application (Section 16(3), IBC). As per Section 16(2) of the Code, when a financial creditor files of Corporate Insolvency Resolution Process (CIRP) under Section 7 of the IBC, he also provides for the name of the insolvency professional he wants to appoint as the IRP for the financial debtor, and that person is appointed as the IRP if he/she fulfils all the eligibility criteria.<sup>33</sup> The Insolvency and Bankruptcy Code (IBC) postulates a shift from the “debtor in control” apparatus to the “creditor in control” apparatus when the Corporate Insolvency Resolution Process (CIRP) under Chapter II of Part II of the IBC is initiated.<sup>34</sup>

<sup>33</sup> Anuj Pandey (2019) *Know all about interim resolution professional under IBC*, TaxGuru. Available at: <https://taxguru.in/corporate-law/interim-resolution-professional-ibc.html> (Accessed: January 7, 2023).

<sup>34</sup> Dasgupta, A. (2020) *Independence of Resolution Professionals - insolvency/bankruptcy - India, Independence Of Resolution Professionals - Insolvency/Bankruptcy - India*. HSA Advocates. Available at:

The IRP appointed must be registered under Section 206 of the IBC with any insolvency professional agency as a member and must be registered with the Insolvency & Bankruptcy Board of India (IBBI) as an insolvency professional under section 207 of Insolvency Code, 2016.<sup>35</sup> Further, to be eligible for appointment as an IRP, an individual must fulfil the following criterias<sup>36</sup>:

- a. He/She must a resident of India
- b. He/She is not a minor
- c. He/She is solvent (i.e., he / she is not an undischarged insolvent or he / she has not applied to be adjudicated as an insolvent)
- d. He/She is of sound mind,
- e. He/She has the qualification and experience as specified by the Board,
- f. He/She has not been convicted by any competent court, for an offence punishable with imprisonment for a term exceeding six months, or for an offence involving moral turpitude, and a period of five years has not elapsed from the date of expiry of the sentence
- g. He/She is a fit and proper person.

As the term ‘interim’ suggests, the appointment of an IRP is temporary, for a period of 30 days. The IRP has the primary duty to constitute a committee of creditors (CoC), who would then vote to appoint the IRP as the Resolution Professional, and if the majority votes against the existing

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<https://www.mondaq.com/india/insolvencybankruptcy/964100/independence-of-resolution-professionals?login=true&debug-domain=mondaq.com> (Accessed: January 7, 2023).

<sup>35</sup> Banerjee, S. (2018) *Who and what is interim resolution professional?*, Centrik. Available at: <https://www.centrik.in/blogs/who-and-what-is-interim-resolution-professional/> (Accessed: January 7, 2023).

<sup>36</sup> *Insolvency and Bankruptcy Board of India*. Available at: <https://ibbi.gov.in/> (Accessed: January 7, 2023).

IRP, the CoC appoints a new RP. Further, section 18 of the IBC provides for the duties to be carried out by an IRP. The duties are as follows:

1. Collate information pertaining to the operations, assets and finances of the corporate debtor to understand its financial position;
2. Gather all the claims made by the creditors against the corporate debtor;
3. Form the COC;
4. Manage finances and govern the operations of the corporate debtor as a going concern until an RP is appointed by the COC;
5. Take custody of all the assets, tangible or intangible, in the name of the corporate debtor until such process is in motion;
6. Any other duties as directed by the Insolvency and Bankruptcy Board of India (IBBI).

Section 17(1) of the Code provides for the management of affairs of the corporate debtor by the IRP. Upon appointment of an IRP, the affairs of the corporate debtors are conducted as follows<sup>37</sup>:

1. the management of the affairs of the corporate debtor shall vest in the interim resolution professional;
2. 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;
3. 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;

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<sup>37</sup> Anuj Pandey (2019) *Know all about interim resolution professional under IBC*, TaxGuru. Available at: <https://taxguru.in/corporate-law/interim-resolution-professional-ibc.html> (Accessed: January 7, 2023).

4. 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.

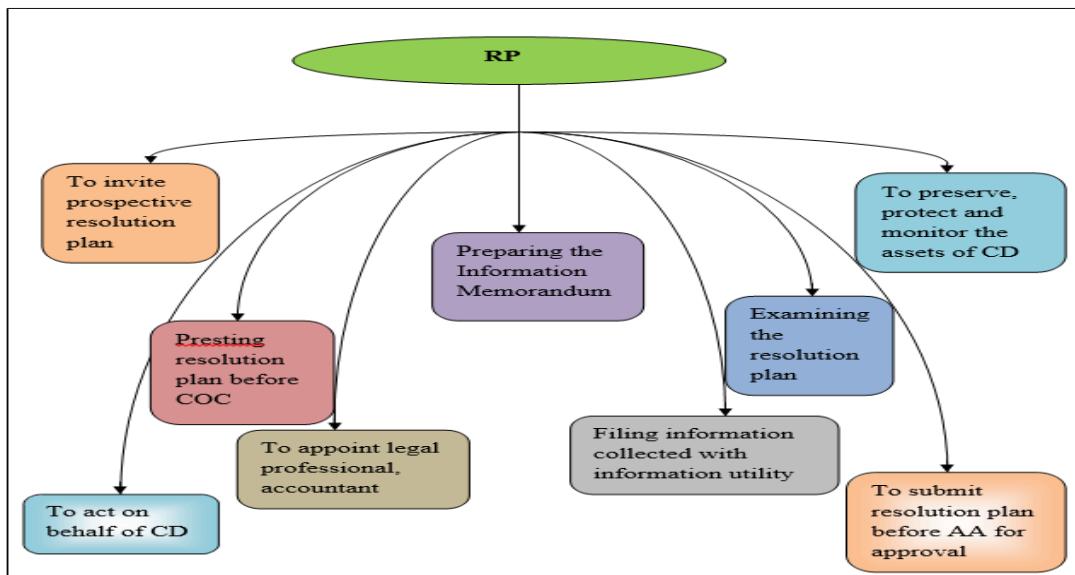
Further, the Code in Section 17(2) states the rule of the IRP with regard to the matters of the corporate debtor as follows<sup>38</sup>:

1. act and execute in the name and on behalf of the corporate debtor all deeds, receipts, and other documents, if any;
2. take such actions, in the manner and subject to such restrictions, as may be specified by the Board;
3. have the authority to access the electronic records of corporate debtor from information utility having financial information of the corporate debtor;
4. 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;
5. be responsible for complying with the requirements under any law for the time being in force on behalf of the corporate debtor.

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<sup>38</sup> Anuj Pandey (2019) *Know all about interim resolution professional under IBC*, TaxGuru. Available at: <https://taxguru.in/corporate-law/interim-resolution-professional-ibc.html> (Accessed: January 7, 2023).

## Resolution Professional



A Resolution Professional is appointed by the Committee of Creditors appointed by the IRP. The CoC, within 7 days of its constitution, as per section 22 of the Code, holds its first meeting wherein the primary agenda is to decide whether to appoint a new RP or to appoint the IRP himself/herself as their RP, by way of a vote. Once appointed, a RP has the responsibility with regard to the business of the corporate debtor. RPs play a vital role in the insolvency proceedings, which was highlighted The Bankruptcy Law Reforms Committee (BLRC), as follows:

“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.”

Section 25 of the Code lays down the duties of a RP, as follows<sup>39</sup>:

1. Appointment of valuers – The RP shall appoint two valuers within seven days of his appointment to determine the fair value and the liquidation value of the corporate debtor. After the receipt of resolution plans, the RP shall provide the fair value and the

<sup>39</sup> Pandey, A. (2019) *Know all about resolution professional under IBC, 2016*, TaxGuru. Available at: <https://taxguru.in/corporate-law/resolution-professional-ibc-2016.htm> (Accessed: January 7, 2023).

liquidation value to every member of the committee in electronic form, on receiving an undertaking from the member to the effect that such member shall maintain confidentiality of the fair value and the liquidation value and shall not use such values to cause an undue gain or undue loss to itself or any other person.

2. Preparation of information memorandum – the RP shall submit the information memorandum in electronic form to each member of the committee within two weeks of his appointment, but not later than fifty-fourth day from the insolvency commencement date, whichever is earlier. The RP shall share the information memorandum only after receiving an undertaking from a member of the committee to the effect that such member shall maintain confidentiality of the information and shall not use such information to cause an undue gain or undue loss to itself or any other person.
3. Invite prospective Resolution Applicants – The RP shall invite the prospective resolution applicants to submit the resolution plan, by publishing brief particulars of the invitation for expression of interest in Form G of the Schedule at the earliest and not later than seventy-fifth day from the insolvency commencement date. Where the RP did not invite prospective applicants for the resolution plan and no reason was given by RP for the same and accordingly, the committee of creditors jumped into liquidation even though one month was left in the completion of the initial period of 180 days. The NCLT held that the RP is violating his duties as specified in 25(2)(h) of the Code and declined the liquidation application and directed the RP to invite the expression of interest.
4. Due Diligence – The RP shall conduct due diligence based on the material on record in order to satisfy that the prospective resolution applicant: fulfils such criteria as may be laid down by him with the approval of committee of creditors, having regard to the complexity and scale of operations of the business of the corporate debtor and such other conditions as may be specified by the Board; complies with the applicable provisions of section 29A; and complies with other requirements, as specified in the invitation for expression of interest.

5. Preparation of Provisional List of Resolution Applicants – The RP shall issue a provisional list of eligible prospective resolution applicants within ten days of the last date for submission of expression of interest to the committee and to all prospective resolution applicants who submitted the expression of interest.

6. Request for Resolution Plan – The RP shall issue the information memorandum, evaluation matrix and a request for resolution plans, within five days of the date of issue of the provisional list to – every prospective resolution applicant in the provisional list; and every prospective resolution applicant who has contested the decision of the RP against its non-inclusion in the provisional list. The request for resolution plans shall allow prospective resolution applicants a minimum of thirty days to submit the resolution plan(s).

7. Submission to the Committee of creditors – The RP shall submit to the committee all the resolution plans which comply with the requirements of the Code and regulations made thereunder along with the details of:- (a) preferential transactions under section 43; (b) undervalued transactions under section 45; (c) extortionate credit transactions under section 50; and (d) fraudulent transactions under section 66, if any, observed, found or determined by him and the orders, if any, of the adjudicating authority in respect of such transactions.

8. Submission of approved Resolution Plan – The RP must endeavour to submit the resolution plan approved by the committee to the Adjudicating Authority at least fifteen days before the maximum period for completion of corporate insolvency resolution process under section 12, along with a compliance certificate in Form H of the Schedule. Rejection or approval of a resolution plan is a right of the committee of creditors and resolution professionals cannot reject any plan without a decision of the Committee of Creditors.

9. File Application for avoidance of transactions – Regulation 35A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution process for Corporate Persons)

Regulations, 2016 provides for the timeline within which an application for avoidance of preferential, undervalued and extortionate transactions must be made. On or before the seventy-fifth day of the insolvency commencement date the RP must form an opinion whether the corporate debtor has been subjected to any of the aforesaid transactions. Where the RP is of the opinion that a corporate debtor has been subjected to any transactions, he must make a determination thereof on or before the one hundred and fifteenth day of the insolvency commencement date and shall be intimated to the Board. Where the RP makes a determination as aforesaid, the RP must apply to the adjudicating authority for appropriate relief on or before the one hundred and thirty fifth day of the insolvency commencement date.

### **Expression of interest for invitation of resolution plan**

According to Regulation 36A(1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the resolution professional must publish brief details of the invitation of expression of not later than 75 days from the insolvency commencement date, from interested and eligible resolution applicants to submit resolution plan. According to Regulation 36A(2) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the resolution professional must publish Form G in publications and online publications. Regulation 36A(3) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 states that Form G will state where a detailed invitation for expression of interest can be downloaded and the deadline for submitting the detailed invitation (which must be given at least 15 days' notice).

Regulation 36A(6) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, states that any expression of interest submitted after the due date would be rejected. Publication of specified information - In accordance with Regulation 36A(2) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the resolution professional shall publish brief particulars of the invitation in Form G as follows: (a) in

newspapers (b) on the corporate debtor's website, if one exists; (c) on a website designated by the Board for the purpose; and (d) in any other manner decided by the Committee.

A resolution expert will compile a final list of possible applicants for resolution. The RP will investigate the applications thoroughly. He has the option to clarify, or further details. He will create a preliminary list of qualified potential applicants to present to the committee. Prospective resolution seekers have five days to raise an objection. According to Regulations 36A(8) to 36A(12) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the RP will then prepare the final list of prospective resolution applicants within 10 days for submission to the committee.

**Request for resolution plan** - Within five days of the release of the provisional list, the resolution professional must provide an information memo, an evaluation matrix, and a request for resolution plans. Prospective resolution applicants will have a minimum of 30 days to present their resolution plan. No non-refundable down payment will be required. Resolution professionals must follow the detailed method as specified by Regulation 36B of the 2016 IBBI (Insolvency Resolution Process for Corporate Persons) Regulations.

Successful Resolution applicant must provide performance security. If the resolution plan is not carried out, the performance security may be forfeited. IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Regulation 36B(4A). Regulation 2(1)(ha) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, defines "Evaluation Matrix" as the parameters to be utilised and the method of applying them for consideration of resolution plans for its approval.

## **Approval of Resolution Plan**

The Resolution Professional gathers documentation pertaining to the Corporate Debtor in order for the possible Resolution Applicant to conduct due diligence. In addition, upon receipt of Resolution Plans, the Resolution Professional shall present them to the Committee of Creditors

(CoC) for approval. The Resolution Plan is then authorized and delivered to the Adjudicating Authority for final approval.

**Approval:** The CoC is in charge of approving resolution plans, and it must receive at least 66 percent of the vote in order to pass one.

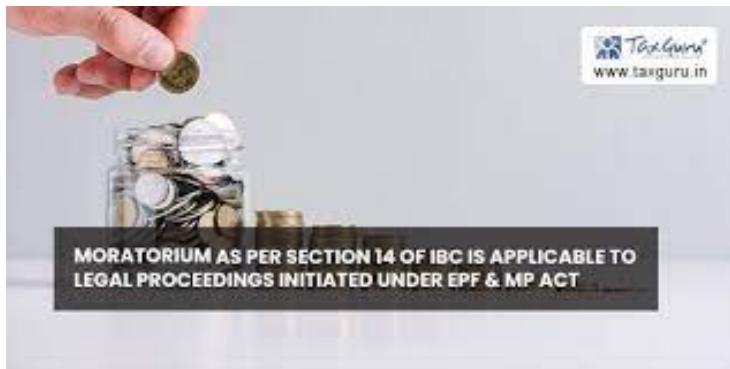
**Effects of Approval:** If the Adjudicating Authority is satisfied that the resolution plan approved by the committee of creditors under subsection (4) of section 30, it shall by order approve the resolution plan, which shall be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government, or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force is owed [Sec 31(1)]

### **Rejection of Resolution Plan**

The Adjudicating Authority is required by Section 33(1) of the I&B Code to initiate the liquidation procedure after receiving a settlement plan that has been "rejected." The legislature has not granted the Adjudicating Competence with the authority or jurisdiction to review or assess the CoC's commercial decision, much less to consider whether the dissenting financial creditors' rejection of the resolution plan was justified.

## CHAPTER III

### **Moratorium S. 14**



Moratorium refers to the ad-interim suspension or delay of an activity or law in order to allow a legal case to be carried out. In terms of the Indian Bankruptcy and Insolvency Code (IBC), a moratorium can be understood as a temporary relief that is provided to a Corporate Debtor which immunises the Corporate Debtor against any recovery proceedings in the court, sale or transfer of assets, enforcement of security interest or termination of essential contracts till the time Corporate Insolvency Resolution Process are pending against such Corporate Debtor. Section 14(1) of the IBC, 2016 states that the Adjudicating Authority upon the date of commencement of the insolvency process by an order prohibits the following:

- A. Institution of a fresh suit or the conduction of a pending trial against the Corporate Debtor
- B. Transferring, alienating, or disposing of any asset or any legal right of the Corporate Debtor
- C. Any act of the corporate debtor to enforce, foreclose or recover any security interest in his property

D. Recovery of the property by the owner or the lessor which is occupied by or in possession of the Corporate Debtor.

Any licence, permission, quota, concession, or any similar government-issued benefit granted to the corporate debtor should not be revoked or terminated due to insolvency, provided that there is no unpaid charge in this regard.

No actions may be brought or continued against the Corporate Debtor while the CIRP is ongoing due to the absolute prohibition put upon these actions under Section 14(1). In the case of *Haravtar Singh Arora v. Punjab National Bank & Ors.*<sup>40</sup> (Company Appeal (AT) (Insolvency) No. 567 Of 2018), it was held by the NCLAT that the Resolution Professional need not take steps to stop each and every proceeding pending before the court of law as under Section 14, all proceedings come to a halt automatically and the Resolution Professional is not required to take any further steps.

*“The idea of the moratorium is that it facilitates the continued operation of the business of the corporate debtor to allow it breathing space to organize its affairs so that a new management may ultimately take over and bring the corporate debtor out of financial sickness, thus benefiting all stakeholders, which would include workmen of the corporate debtor”*<sup>41</sup>

### **Case laws**

It is to be noted that in the case of *Axis Bank Limited v. Alok Infrastructure Limited*<sup>42</sup> the NCLT held that any subsidiary of the Corporate Debtor is not covered under Section 14(1)(a) of the Insolvency Code as in the eyes of law, the subsidiary is a distinct legal entity just like a holding company is a distinct legal entity, and the moratorium brought in place for the holding company does not mean that the moratorium will apply to the subsidiary too.

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<sup>40</sup> *Haravtar Singh Arora v. Punjab National Bank & Ors.*, (2018) NCLAT 749

<sup>41</sup> Report of the Insolvency Law Committee of February, 2020 para 8.2 & 8.11

<sup>42</sup> *Axis Bank Limited v. Alok Infrastructure Limited*, MANU/ND/9224/2018

In the case of Power Grid Corporation of India Ltd Vs. Jyoti Structures Ltd<sup>43</sup>, the Delhi High Court has held that those proceedings that are in favor of the Corporate Debtor will not be suspended by Section 14(1)(a) of the IBC i.e., a moratorium is not placed on those proceedings that benefit the Corporate Debtor as a moratorium on such proceedings will further hamper the effort of the debtor to recover his money.

Section 14(1)(d) of the Insolvency and Bankruptcy Code, 2016 prohibits the recovery of any assets in the possession of the Corporate Debtor by the lessor or the owner till the CIRP is completed. This raises the question of what would happen to the property that the Corporate Debtor leases or rents, i.e., the properties that are in his possession but not his own. The decision rendered by the NCLAT in the instance of M/s. Navbharat Castings LLP. Vs. M/s. Moser Baer India Ltd. & Anr.<sup>44</sup> provides the answer to this question, since it denied the appellant's request to have the Corporate Debtor evacuate the property in lieu of the moratorium that was passed, quoting Section 14(1)(d) of IBC which prohibits such activities till the moratorium is in place.

There are certain activities that are considered to be out of the purview of the Moratorium, as stated in Section 14 subsections (2), (2A), and (3) of the Insolvency and Bankruptcy Code, 2016. The provision in Section 14(2) states that the Moratorium cannot be used to stop or halt the delivery of essential goods or services to the corporate debtor. In accordance with Regulation 32 of the CIRP Regulations, 2016, essential supplies include electricity, water, telecommunications services, and information technology services, to the extent that they are not the primary input and output of the activity performed by the corporate debtor, i.e., that their provision is not his main business activity. Section 14(2A) states that where the Resolution Professional feels that the supply of a good or service is critical to protect and preserve the value of the corporate debtor and manage its operations as a going on concern, then the supply of such good or service will not be interrupted, terminated or suspended during the period of moratorium, with the exception of those cases where the corporate debtor has not paid the dues arising out of such supply during the moratorium period or in circumstances as may be specified. Section 14(3) of the IBC, 2016

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<sup>43</sup> Power Grid Corporation of India Ltd Vs. Jyoti Structures Ltd, MANU/DE/5162/2017

<sup>44</sup> M/s. Navbharat Castings LLP. Vs. M/s. Moser Baer India Ltd. & Anr, (2018) ibclaw.in 148 NCLAT

states that the provisions of section 14(1) shall not apply to transactions, agreements, or arrangements as may be notified by the Central Government in consultation with a financial sector regulator and to a surety in a contract of guarantee to a Corporate Debtor. In the case of Sandip Kumar Bajaj & Anr. Vs. State Bank of India & Anr.<sup>45</sup>, the High Court of Calcutta held that it is clear from Section 14(3)(b) of the IBC, 2016 that the prohibition on the institution of the cases against the corporate debtor does not extend to the surety.

It should be noted that even though the creditor can enforce the guarantee during the moratorium period, the creditor will not be able to enforce the principal debt during the period, as iterated by the Supreme Court of India in the case of State Bank of India v. V. Ramakrishnan<sup>46</sup>.

P. Mohanraj V. Shah Brothers Ispat Pvt. Ltd. <sup>47</sup>

One specific issue raised in the aforementioned judgment concerned whether Section 14 of the Insolvency and Bankruptcy Code, 2016 ("IB Code") would have the same impact as the Negotiable Instruments Act of 1881. ("NI Act"). Additionally, the issue of whether it is legal to begin the NI Act's check bounce proceeding or to continue it against the debtor company and its directors while the debtor company is about to resolve its bankruptcy issue or in the middle of a corporate insolvency resolution process has been brought up (CIRP). In the given case, the Supreme Court of India ruled that the NI Act's procedures are covered by the general moratorium granted under section 14 of the IB Code.

The Court also considered the purpose of the moratorium established by IB Code Section 14. By emphasising the justification for the moratorium, it keeps the corporate debtors' assets protected and their numbers from declining throughout the CIRP bankruptcy settlement procedure. In view of "Quasi-Criminal" Proceedings under the NI Act, the court noted that although this liability is of a civil nature, it is nonetheless regarded as a criminal offence because it is punishable by law.

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<sup>45</sup> Sandip Kumar Bajaj & Anr. Vs. State Bank of India & Anr, 2020 SCC OnLine Cal 1659

<sup>46</sup> State Bank of India v. V. Ramakrishnan 2018 (17) SCC 394

<sup>47</sup> (Company Appeal(AT)(Insolvency) No. 306 of 2018)

Therefore, it was concluded that the moratorium basic principles would apply to the proceedings brought under the NI Act's score against corporate debtors. Regarding the personal culpability of the directors, the court decided that even if the actions against the corporate debtor were followed by an ongoing moratorium period, the proceedings against the directors would still go forward.

## **Constitutional powers immune from a moratorium**

Since the Code was put into effect, the corporate world has been talking about how it overrides the moratorium. The legality of prohibiting any actions against the corporate debtor during the moratorium was still up for debate. The goal of the Code was to revive the entity at its core and not to be considered as another recovery tool, it was formed as cases began to pour in and judgements began to be handed down.

While the cases started flowing in and came with a few judgments, it was established that the objective of the Code was to revive the entity at its core and not to be seen as another recovery tool. Under the light of such understanding, it was observed that the moratorium period was very much necessary for the corporate debtor to evaluate the possible options and ways for the revival of the stressed entity also. The moratorium gives the corporate debtor a defence by putting a stop to several parallel actions and enabling the corporate debtor to maximise the value of the company free from new obligations.

However, this write-up focuses on the recent judgment pronounced by the National Company Law Appellate Tribunal (NCLAT) in the matter of Canara Bank vs. Deccan Chronicle Holdings Limited.

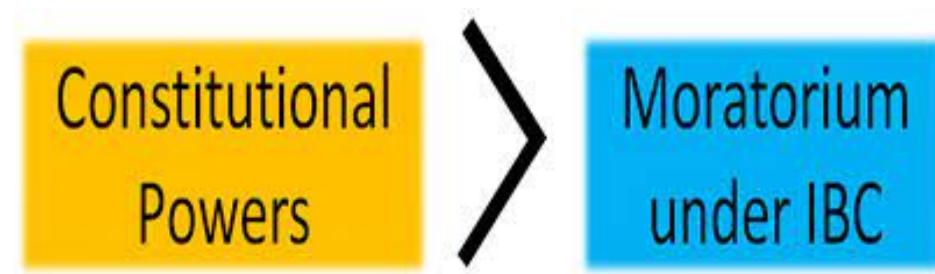
Canara Bank (hereafter referred to as the "Appellant" in this case) filed an application under Section 7 of the Code against Deccan Chronicle Holdings Limited (hereafter referred to as "the Corporate Debtor"). On July 19, 2017, the Honourable Hyderabad bench of NCLT admitted the application and declared a moratorium under Section 14 of the Code. The order of moratorium, however, did not satisfy the appellant because it clearly stated that proceedings before the High Court and Supreme Court were not covered by the moratorium.

Declared moratoriums fall under the Code's constitutional purview. The Parliament of India passed the Code as a Central Act by using the authority assigned to it by the Indian Constitution. The Indian Constitution gives the Supreme Court of India and the High Courts of India certain

authority. These authorities with the corresponding judicial bodies are exempt from any provisions of national law, whether it be central law or state law.

Even though the Moratorium as declared in this case does not apply to lawsuits or proceedings before High Courts, this exclusion does not apply to lawsuits or proceedings before a High Court with original jurisdiction when those lawsuits are related to money recovery and will therefore be impacted by the Moratorium's duration. The right to a moratorium allows the court, the corporate debtor, the creditor, and other parties to temporarily halt all other proceedings in order to focus solely on the current case. However, the right was granted by a Central Act. Few of the powers granted to the two highest judicial bodies in the nation by the supreme law are unaffected by any other rights under any other statute.

The term "moratorium" refers to a halt to all legal actions against the Corporate Debtor. The decision brings further clarity to Section 14 of the Code's provisions while also clarifying the Supreme Court and High Courts' supreme powers. As made clear by the ruling in the particular case, it is interesting to note that Section 14's provisions do not list any exceptions to the moratorium. The NCLT, a quasi-judicial body established by an Act of Parliament, is unable to supersede the Apex judiciary's constitutional authority.



## Section 29A of IBC

The most contentious portion of the IBC is Article 29A. It was revised several times to correct the inaccuracies. Section 29A discusses the circumstances under which a person is disqualified to apply for a resolution.

Here's how section 29A is interpreted in its entirety:

"A person shall not be qualified to submit a resolution plan if such person, or any other person acting jointly or in concert with such person"—

Here, the word 'acting jointly or in concert' indicates two or more individuals working together as a group," according to Section 29. In the prominent case ARCELOR MITTAL INDIA (P.) LTD. v. SATISH KUMAR GUPTA<sup>48</sup> The Supreme Court ruled that the phrase "acting jointly" in wordings of Section 29A in the first line should not be confused with "joint venture agreements." It does not imply that a group of people have clubbed together and are acting "jointly" in the sense of collaborating.

- a. is an undischarged insolvent;

An undischarged Insolvent is a person or company who has filed a bankruptcy petition with the court of law and is still undergoing insolvency proceedings.

- b. is a willful defaulter under the Reserve Bank of India's recommendations provided under the Banking Regulation Act, 1949 (10 of 1949);

According to the RBI's Master Circular (under the Banking Regulation Act, 1949), a Willful Defaulter is a borrower who does not meet his obligations even when he has the ability to do so, does not use the funds for the specific purpose for which they were borrowed, redistributes the funds neither for the purpose for which they were borrowed nor in another form of assets, and

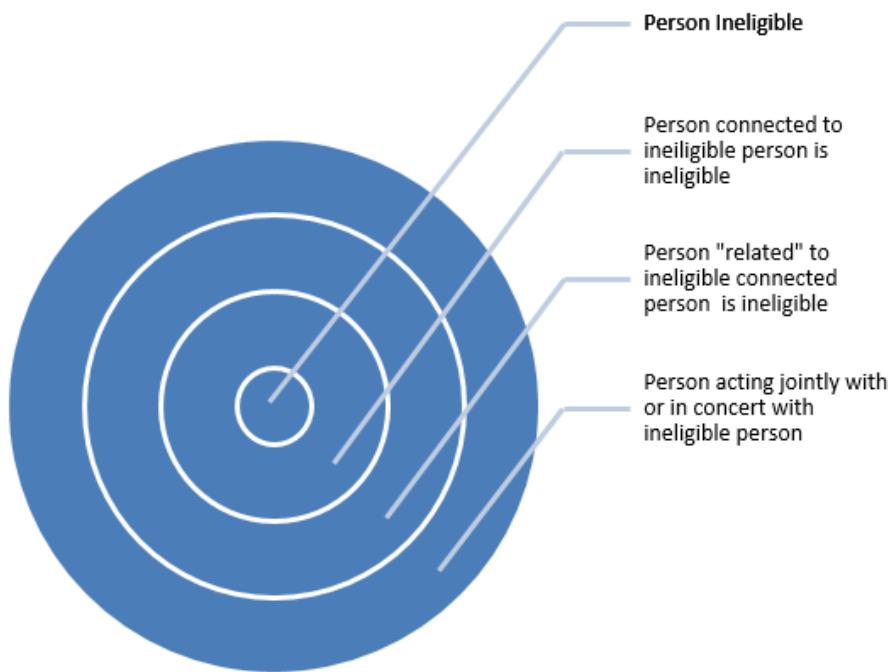
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<sup>48</sup> Committee of Creditors of Essar Steel India Limited v Satish Kumar Gupta & Ors., MANU/SC/1577/2019

disposes of the property or assets which were provided for fraudulent transactions and fabrication of reports, and securing the loan without the lender's knowledge.

- c. Or a corporate debtor account under such person's supervision or control, or of which such person is a promoter, designated as a non-performing asset in accordance with Reserve Bank of India recommendations issued under the Banking Regulation Act, 1949 (10 of 1949) [or the instructions of a financial sector regulator issued under any other law now in force,] and a period of at least one year has elapsed between the date of such categorization and the start of the corporate debtor's insolvency resolution process:

This simply means that an insolvent entity whose accounts are classified as Non-Performing Assets is ineligible to be a resolution applicant if it has been unable to settle overdue amounts including interest and charges relating to the account for one or more years prior to the submission of the resolution plan.



“Section 29A(c) is a see-through provision,” Justice Nariman continued, “and considerable care must be taken to ensure that those in command of the corporate debtor do not return in some other form to recover control of the firm without first paying off its debts.”

Provided, however, that a person is qualified to submit a resolution plan provided he or she pays all past-due sums, including interest and penalties, and charges pertaining to non-performing asset accounts before submitting a resolution plan. Furthermore, nothing in this article applies to a resolution applicant who is a financial company and is not a linked party to the corporate debtor.

- d. Has been convicted of any crime that carries a term of imprisonment –
  - i. for a period of two years or more under any Act listed in the Twelfth Schedule; or
  - (ii) for a period of two years or more under any Act listed in the Twelfth Schedule

ii. For a period of seven years or longer under any current law:

The ineligibility does not apply to "connected people," which includes the prospective acquirer's holding company, subsidiary company, associate business, or any associated party, the acquirer's promoters, the acquirer's board, and the corporate debtor's proposed management or promoters. On the other hand, this criterion would not apply to a resolution applicant who is a financial company and not a connected party of the corporate debtor.

e. is barred from serving as a director under the Companies Act of 2013 (18 of 2013):

His/her case is pending in court on insolvency or unsoundness of mind or he/she has been sentenced to 6 months in prison for an offence involving moral turpitude or an order has been issued by the court/tribunal declaring him disqualified or he/she has been convicted of offences involving related party transactions (under section 188 of the Companies Act, 2013).

f. is forbidden from dealing in securities or accessing the securities markets by the Securities and Exchange Board of India;

Every person is forbidden from buying, selling, or dealing in securities in a dishonest way under sections 3 and 4 of the Prohibition of Fraudulent and Unfair Trade Practices related to Securities Markets) Regulations, 2003<sup>49</sup>. Defrauding on the issuance of securities that are listed or intended to be listed on a recognized stock market, trading in securities fraudulently or via an unfair trading practice, and so on

g. has been a promoter or in the management or control of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place and in respect of which an order has been made by the Adjudicating Authority under this Code:

<sup>49</sup> Sebi.gov.in, Available at: [\(Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Markets\) Regulations, 2003](#)

This ineligibility kicks in when a corporate debtor's promoter (or someone in charge of them) engages in preferential deals, undervalued transactions, extortionate credit transactions, or fraudulent transactions. This sub-clause refers to a person who has positive control over a corporate debtor; only that person has the authority to make the dynamic decisions outlined in the sub-clause (g).

- h. has executed a guarantee in favor of a creditor in respect of a corporate debtor against which an application for insolvency resolution made by such creditor has been admitted under this Code <sup>5</sup> and such guarantee has been invoked by the creditor and remains unpaid in full or part

When an individual signs a guarantee for an insolvent corporate debtor they become ineligible. This provision was considered in the various cases, and it was decided that the guarantee should not be restricted in circumstances where a creditor has not invoked the guarantee or filed a claim.

- i. [is] subject to any handicap under any legislation in a jurisdiction outside India, similar to paragraphs (a) to (h); or

Any ineligibility resulting from the above-mentioned phrase shall be enforceable under any Indian or international law.

- j. Has a related individual who is not eligible under sections (a) to (i).

The Ordinance extends the advantage of these exemptions to MSMEs applying under the Pre-Packaged insolvency resolution process. Now these advantages of exemptions is in stark contrast to the stance taken by the majority of the Sub-Committee of the Insolvency Law Committee on the Pre-packaged Insolvency Resolution Process<sup>50</sup> wherein it was recommended that the immunity under Section 29A to promoters with NPAs must not be given. The majority

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<sup>50</sup> Report of the Sub-Committee of the Insolvency Law Committee on Pre-packaged Insolvency Resolution Process (October 2020). Available at: "<https://ibclaw.in/reports-on-ibc/>"

reasoned that granting such an exception to the promoters would undermine the purpose of Section 29A. Allowing promoters with NPA accounts to submit resolution plans would undermine the aim of the corporate debtor's resurrection.

The Ordinance, however, continued to grant this exception to MSMEs filing for the Pre-Packaged Resolution Process, allowing promoters with NPAs to participate in the resolution process as well.

### **Applicability of Pre-packs**

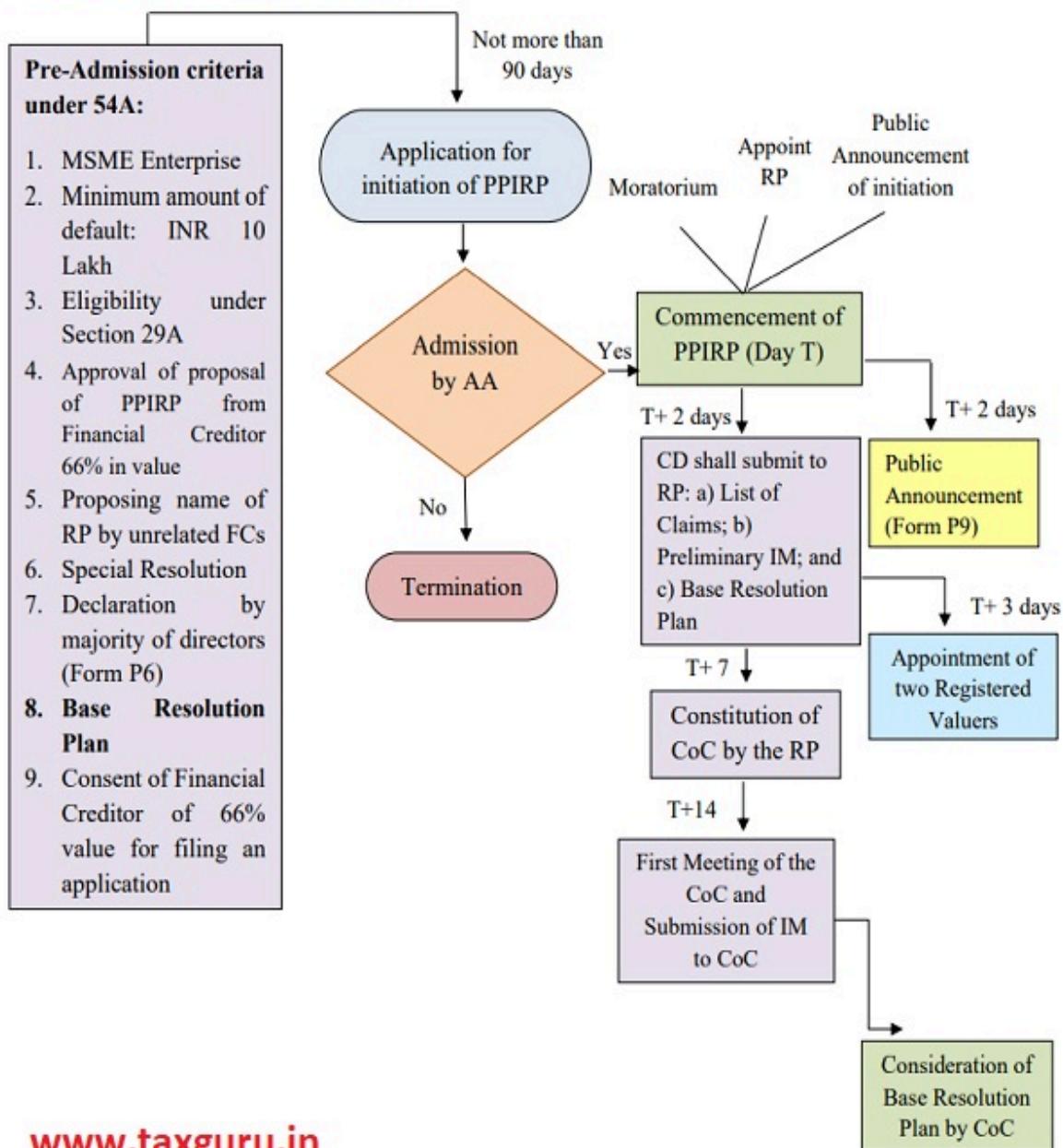
1. MSMEs only, as per the definition under MSMED Act
2. Actual Default by MSME Corporate Debtor (CD)
3. Minimum Threshold Default of Rs. 10 Lacs by MSME (CD)

When and by whom should pre-packs be used?

A pre-pack can be launched if members of the MSME have accepted the idea by a special resolution. In addition, 66 percent of unrelated financial creditors 66 percent of unrelated financial creditors must have agreed to a pre-pack settlement by value.

There are penalties if a pre-pack phase is begun with the aim to deceive or if MSME manages the affairs in such a manner that the creditors are deceived.

### Procedure of Pre-Packaged Insolvency:



[www.taxguru.in](http://www.taxguru.in)

How Does the Procedure Work?

There will be a moratorium while the pre-pack phase is ongoing. The treatment must be finished within 120 days. Throughout the process, the MSME's promoters and directors will continue to oversee and supervise the firm. The resolution specialist will keep an eye on the company's management of affairs.

With a Sixty Six percent majority, the committee of creditors will entrust the administration with the resolution professional after getting judicial clearance. If the MSME meets the requirements of Section 29A, it must submit a base resolution plan to the resolution expert.

#### Resolution Plan Approval

If the MSME's plan is rejected by the Committee of Creditors (CoC) or if operational creditors' dues are impacted, the resolution expert will ask potential applicants to submit a competing proposal. Sixty six percent of financial creditors by value will accept the proposal after analysing its feasibility and profitability. The CoC must also evaluate the proposed mode of distribution, taking into consideration the precedence of creditors and the priority and significance of a secured creditor's security interest. The CoC has the authority to order the corporate debtor's promoter to decrease their shareholdings, voting rights, or control rights. There is a commercial rationale for relaxing the Section 29A pre-package obligation. The insolvency procedure has been particularly contentious due to the confrontation between promoters' and creditors' interests.

## Can the GST department edit or reduce the GST amount by a Resolution Professional?

Powers of Resolution Professional of the GST department stays hand-tied and is considered powerless to amend the prices of GST. Access to the power to alter GST prices stays in limited hands to maintain the integrity of the functions performed by the GST. Hence, limited powers assigned to the specific bodies in the GST support its good functionality and support the authenticity of the responsibilities and duties performed by each department. In this article, all the relevant sections will be covered at the beginning and then concluded with a case based on the topic.

Resolution Professional is the first person appointed and the last person to be relieved on. The primary role of the Resolution Professional is to ensure the revival of the corporate debtor. However, more critical for the Resolution Professional is to keep the process transparent and fair

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<sup>51</sup> Drishti Saxena, Responsibilities and Duties of Resolution Professional, <https://www.indiafilings.com/learn/resolution-professional-role-responsibilities-and-duties-under-ibc/#:~:text=Resolution%20Professional%20is%20the%20first,the%20process%20transparent%20and%20fair>.

Under the GST Act 2017<sup>52</sup>, the term ‘assessment’ means a determination of tax liability mentioned in Sec.2(11) of CGST<sup>53</sup> which includes self-assessment, re-assessment, provisional assessment, summary assessment, and best judgment assessment.

“Section 2(11) of CGST<sup>54</sup> “assessment” means a determination of tax liability under this Act and includes self-assessment, re-assessment, provisional assessment, summary assessment, and best judgement assessment;”

The main object of assessment procedures is to collect revenue accurately, effectively, and efficiently. Normally, persons having GST registration file GST returns and pay GST every month based on self-assessment of GST liability. However, the Government can re-assess or perform an assessment by itself and determine if there is a short payment of GST.

### **Types of assessment under GST Act**



<sup>52</sup> THE CENTRAL GOODS AND SERVICES TAX ACT, 2017, NO. 12 OF 2017,  
<https://www.cbic.gov.in/resources/htdocs-cbec/gst/cgst-act.pdf>

<sup>53</sup> THE CENTRAL GOODS AND SERVICES TAX ACT, 2017, NO. 12 OF 2017, ch I, s 2(11),  
<https://www.cbic.gov.in/resources/htdocs-cbec/gst/cgst-act.pdf>

<sup>54</sup> ibid

1. Self-assessment of taxes (Sec. 59).<sup>55</sup>
2. Provisional assessment (Sec. 60).<sup>56</sup>
3. Scrutiny of tax returns filed by registered taxable persons (Sec. 61).<sup>57</sup>
4. Assessment of nonfilers of returns (Sec. 62).<sup>58</sup>
5. Assessment of unregistered persons (Sec. 63).<sup>59</sup>
6. Summary assessment in certain special cases (Sec. 64).<sup>60</sup>

## **Self Assessment**

The taxable person is required to pay tax on the basis of self-assessment done by himself. Hence, all GST return filings are based on self-assessment by the taxpayer.

Sec. 59 of Act<sup>61</sup> states - “ Every registered person shall self-assess the taxes payable under this Act and furnish a return for each tax period as specified under section 39<sup>62</sup>.”

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<sup>55</sup> THE CENTRAL GOODS AND SERVICES TAX ACT, 2017, NO. 12 OF 2017, ch XII, s 59, <https://www.cbic.gov.in/resources/htdocs-cbec/gst/cgst-act.pdf>

<sup>56</sup> THE CENTRAL GOODS AND SERVICES TAX ACT, 2017, NO. 12 OF 2017, ch XII, s 60, <https://www.cbic.gov.in/resources/htdocs-cbec/gst/cgst-act.pdf>

<sup>57</sup> THE CENTRAL GOODS AND SERVICES TAX ACT, 2017, NO. 12 OF 2017, ch XII, s 61, <https://www.cbic.gov.in/resources/htdocs-cbec/gst/cgst-act.pdf>

<sup>58</sup> THE CENTRAL GOODS AND SERVICES TAX ACT, 2017 NO. 12 OF 2017, ch XII, s 62, <https://www.cbic.gov.in/resources/htdocs-cbec/gst/cgst-act.pdf>

<sup>59</sup> THE CENTRAL GOODS AND SERVICES TAX ACT, 2017 NO. 12 OF 2017, ch XII, s 63, <https://www.cbic.gov.in/resources/htdocs-cbec/gst/cgst-act.pdf>

<sup>60</sup> THE CENTRAL GOODS AND SERVICES TAX ACT, 2017 NO. 12 OF 2017, ch XII, s 64, <https://www.cbic.gov.in/resources/htdocs-cbec/gst/cgst-act.pdf>

<sup>61</sup> *Supra* at 4

<sup>62</sup> THE CENTRAL GOODS AND SERVICES TAX ACT, 2017 NO. 12 OF 2017, ch VIII, s 39, <https://www.cbic.gov.in/resources/htdocs-cbec/gst/cgst-act.pdf>

## **Provisional Assessment**

When the assessee is unable to find actual Value, Rate, and liability then the assessee can approach the Assessing officer with a written application and AO to pass an order on a provisional and conditional basis, assessee deposit tax liability as specified in the order on a provisional basis.

Procedure:

1. The taxable person has to give a request for provisional assessment in writing to the GST officer.
2. On reviewing the application, the GST officer will pass an order within a period not later than ninety days from the date of receipt of the request, allowing payment of tax on a provisional basis or at a GST rate or on such value as specified by him.
3. The taxable person, paying on a provisional basis, has to issue a bond with security promising to pay the difference between a provisionally assessed tax and the final assessed tax.
4. The GST officer will pass a final assessment, with a period not exceeding six months from the date of communication of the order of provisional payment.

### **Interest Payable for Provisional Assessment**

After the final assessment, suppose, the taxable person is liable to pay more tax than the tax paid at the time of provisional assessment, then the taxable person should pay the interest on such tax payment. Interest would be calculated from the actual due date of tax till the date of actual payment of tax. The interest calculation position will remain the same, even if the payment of tax is made before or after the final assessment.

Sec. 60 of the Act states<sup>63</sup> -

“(1) Subject to the provisions of sub-section (2), where the taxable person is unable to determine the value of goods or services or both or determine the rate of tax applicable to it, he may request the proper officer in writing giving reasons for payment of tax on a provisional basis and the proper officer shall pass an order, within a period not later than ninety days from the date of receipt of such request, allowing payment of tax on a provisional basis at such rate or on such value as may be specified by him.

(2) The payment of tax on a provisional basis may be allowed if the taxable person executes a bond in such form as may be prescribed, and with such surety or security as the proper officer may deem fit, binding the taxable person for payment of the difference between the amount of tax as may be finally assessed and the amount of tax provisionally assessed.

(3) The proper officer shall, within a period not exceeding six months from the date of the communication of the order issued under sub-section (1), pass the final assessment order after taking into account such information as may be required for finalizing the assessment:

Provided that the period specified in this subsection may, on sufficient cause being shown and for reasons to be recorded in writing, be extended by the Joint Commissioner or Additional Commissioner for a further period not exceeding six months and by the Commissioner for a such further period not exceeding four years.

(4) The registered person shall be liable to pay interest on any tax payable on the supply of goods or services or both under provisional assessment but not paid on the due date specified under sub-section (7) of section 39<sup>64</sup> or the rules made thereunder, at the rate specified under sub-section (1) of section 50<sup>65</sup>, from the first day after the due date of payment of tax in respect of the said supply of goods or services or both till the date of actual Consumer Welfare Fund.

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<sup>63</sup> *supra* at 5

<sup>64</sup> *supra* at 11 (7)

<sup>65</sup> THE CENTRAL GOODS AND SERVICES TAX ACT, 2017 NO. 12 OF 2017, ch VIII, s 50,  
<https://www.cbic.gov.in/resources/htdocs-cbec/gst/cgst-act.pdf>

The utilisation of Fund. Self-assessment. Provisional assessment payment, whether such amount is paid before or after the issuance of an order for final assessment.

(5) Where the registered person is entitled to a refund consequent to the order of final assessment under sub-section (3)<sup>66</sup>, subject to the provisions of sub-section (8) of section 54<sup>67</sup>, interest shall be paid on such refund as provided in section 56.<sup>68</sup>“

### **Scrutiny Assessment**

Scrutiny means a crosscheck and verification. In the process of scrutiny if any discrepancies are found in return, then the officer initiates the scrutiny process and crosscheck and then verify whether the registered person has followed the process defined under this act or not also ensure that the assessee submitted correct information in a proper manner or not.

The officer then serves a notice to submit correct particulars and rectify discrepancies, if a satisfactory reply and corrective action are not taken by the registered person in a specified time period then appropriate action may be taken by the assessing officer.

Sec. 61 of the Act<sup>69</sup> states-

“ (1) the proper officer may scrutinise the return and related particulars furnished by the registered person to verify the correctness of the return and inform him of the discrepancies noticed, if any, in such manner as may be prescribed and seek his explanation thereto.

(2) In case the explanation is found acceptable, the registered person shall be informed accordingly and no further action shall be taken in this regard.

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<sup>66</sup> THE CENTRAL GOODS AND SERVICES TAX ACT, 2017 NO. 12 OF 2017, ch XI, s 54 (3),  
<https://www.cbic.gov.in/resources/htdocs-cbec/gst/cgst-act.pdf>

<sup>67</sup> Ibid (8)

<sup>68</sup> THE CENTRAL GOODS AND SERVICES TAX ACT, 2017 NO. 12 OF 2017, ch XI, s 56,  
<https://www.cbic.gov.in/resources/htdocs-cbec/gst/cgst-act.pdf>

<sup>69</sup> supra at 6

(3) In case no satisfactory explanation is furnished within a period of thirty days of being informed by the proper officer or such further period as may be permitted by him or where the registered person, after accepting the discrepancies, fails to take the corrective measure in his return for the month in which the discrepancy is accepted, the proper officer may initiate appropriate action including those under section 65<sup>70</sup> or section 66<sup>71</sup> or section 67<sup>72</sup>, or proceed to determine the tax and other dues under section 73<sup>73</sup> or section 74.<sup>74</sup>

### **Best Judgement Assessment Failure to file Return**

Types of Best Judgement Assessment;

Compulsory Best Judgement Assessment

Best judgement assessment is performed when the assessee is not cooperating with the assessing officer or withholds necessary information.

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<sup>70</sup> THE CENTRAL GOODS AND SERVICES TAX ACT, 2017 NO. 12 OF 2017, ch XIV, s 65, <https://www.cbic.gov.in/resources/htdocs-cbec/gst/cgst-act.pdf>

<sup>71</sup> THE CENTRAL GOODS AND SERVICES TAX ACT, 2017 NO. 12 OF 2017, ch XIV, s 66, <https://www.cbic.gov.in/resources/htdocs-cbec/gst/cgst-act.pdf>

<sup>72</sup> THE CENTRAL GOODS AND SERVICES TAX ACT, 2017 NO. 12 OF 2017, ch XIV, s 67, <https://www.cbic.gov.in/resources/htdocs-cbec/gst/cgst-act.pdf>

<sup>73</sup> THE CENTRAL GOODS AND SERVICES TAX ACT, 2017 NO. 12 OF 2017, ch XV, s 73, <https://www.cbic.gov.in/resources/htdocs-cbec/gst/cgst-act.pdf>

<sup>74</sup> THE CENTRAL GOODS AND SERVICES TAX ACT, 2017 NO. 12 OF 2017, ch XV, s 74, <https://www.cbic.gov.in/resources/htdocs-cbec/gst/cgst-act.pdf>

## Discretionary Best Judgement Assessment

This is performed if the assessing officer feels any inconsistency in the method of accounting or feels the account was not conclusive or doubts its authenticity<sup>75</sup>.

Every registered person is liable to file the return, when a registered person has not to furnish a return under section 39<sup>76</sup> or section 45<sup>77</sup> even after service of notice then

1. the officer shall pass an order in their best judgment and
2. If the registered person furnishes a valid return then the proper officer drops the assessment only if all tax and any sum payable have been deposited in full.

## Failure to File GST Returns



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<sup>75</sup> Sreeram Viswanath, Best Judgement Assessment,  
<https://www.indiafilings.com/learn/best-judgement-assessment/>

<sup>76</sup> *supra* at 11

<sup>77</sup> THE CENTRAL GOODS AND SERVICES TAX ACT, 2017 NO. 12 OF 2017, ch IX, s 45,  
<https://www.cbic.gov.in/resources/htdocs-cbec/gst/cgst-act.pdf>

When a registered person fails to furnish the required returns, even after service of notice under Section 46<sup>78</sup>, the GST officer would proceed to assess the tax liability of the taxpayer to the best of his judgment taking into account all the relevant material which is available or gathered and issue an assessment order within a period of five years from the date for furnishing of the annual return for the financial year to which the tax not paid relates.

If the registered person furnishes a valid return within a period of 30 days from the date of issuance of the assessment order, then the assessment order would be deemed to have been withdrawn. However, the registered person will be liable to pay interest under Section 50 (1)<sup>79</sup> and/or liable to pay a late fee under Section 47<sup>80</sup>.

Sec. 62 of the Act states<sup>81</sup> -

“(1) Notwithstanding anything to the contrary contained in section 73<sup>82</sup> or section 74<sup>83</sup>, where a registered person fails to furnish the return under section 39 or section 45, even after the service of a notice under section 46, the proper officer may proceed to assess the tax liability of the said person to the best of his judgment taking into account all the relevant material which is available or which he has gathered and issue an assessment order within a period of five years from the date specified under section 44 for furnishing of the annual return for the financial year to which the tax not paid relates.

(2) Where the registered person furnishes a valid return within thirty days of the service of the assessment order under sub-section (1), the said assessment order shall be deemed to have been withdrawn but the liability for payment of interest under sub-section (1) of section 50 or for payment of late fee under section 47 shall continue.”

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<sup>78</sup> THE CENTRAL GOODS AND SERVICES TAX ACT, 2017 NO. 12 OF 2017, ch IX, s 46,  
<https://www.cbic.gov.in/resources/htdocs-cbec/gst/cgst-act.pdf>

<sup>79</sup> THE CENTRAL GOODS AND SERVICES TAX ACT, 2017 NO. 12 OF 2017, ch IX, s 47,  
<https://www.cbic.gov.in/resources/htdocs-cbec/gst/cgst-act.pdf>

<sup>80</sup> *supra* at 14 (1)

<sup>81</sup> *supra* at 7

<sup>82</sup> *supra* at 22

<sup>83</sup> *supra* at 23

## **Assessment of Unregistered Person**

The assessment proper officer assesses in the case where a taxable person is liable to obtain registration but he fails to obtain or whose registration has been canceled but is liable to pay tax, then the proper officer may initiate *Suo moto* proceedings on the basis of information obtained, during inspection or survey, through any information available intelligence unit, or any other means.

Sec. 63 of the Act<sup>84</sup> states -

“Notwithstanding anything to the contrary contained in section 73<sup>85</sup> or section 74<sup>86</sup>, where a taxable person fails to obtain registration even though liable to do so or whose registration has been canceled under sub-section (2) of section 29<sup>87</sup> but who was liable to pay tax, the proper officer may proceed to assess the tax liability of the such taxable person to the best of his judgment for the relevant tax periods and issue an assessment order within a period of five years from the date specified under section 44 for furnishing of the annual return for the financial year to which the tax not paid relates:

Provided that no such assessment order shall be passed without giving the person an opportunity of being heard.”

## **Summary Assessment**

Whenever the proper officer has come to know and also has reason to believe that an assessment order must be passed to a taxable person to protect the interest of revenue then with the prior permission of an additional commissioner and joint commissioner, he shall assess the tax liability of the such person and issue an assessment order,

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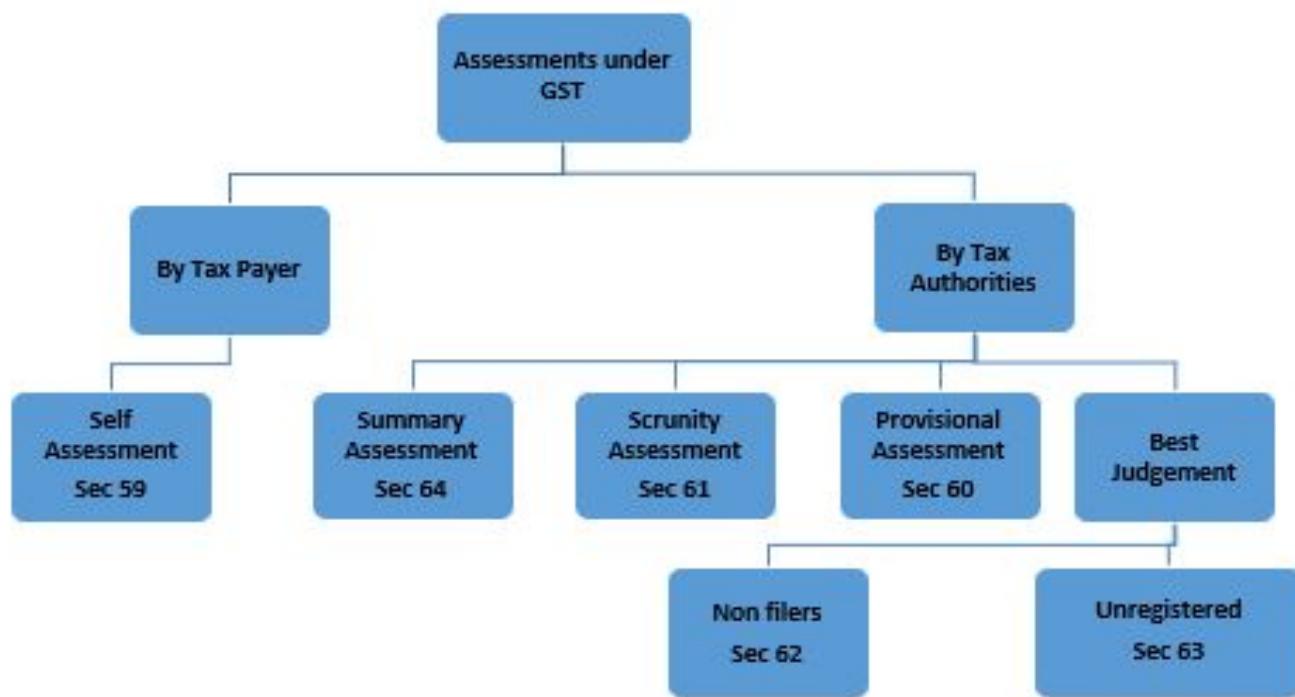
<sup>84</sup> supra at 8

<sup>85</sup> supra at 22

<sup>86</sup> supra at 23

<sup>87</sup> THE CENTRAL GOODS AND SERVICES TAX ACT, 2017 NO. 12 OF 2017, ch VI, s 29 (2), <https://www.cbic.gov.in/resources/htdocs-cbec/gst/cgst-act.pdf>

Also, if the taxable person is not ascertainable then the person in charge of such goods shall be deemed to be the taxable person and liable to be assessed and paid.



Sec. 64 of the Act<sup>88</sup> states -

“(1) The proper officer may, on any evidence showing a tax liability of a person coming to his notice, with the previous permission of Additional Commissioner or Joint Commissioner, proceed to assess the tax liability of such person to protect the interest of revenue and issue an assessment order, if he has sufficient grounds to believe that any delay in doing so may adversely affect the interest of revenue:

Provided that where the taxable person to whom the liability pertains is not ascertainable and such liability pertains to supply of goods, the person in charge of such goods shall be deemed to

<sup>88</sup> Supra at 9

be the taxable person liable to be assessed and liable to pay tax and any other amount due under this section.

(2) On an application made by the taxable person within thirty days from the date of receipt of the order passed under sub-section (1) or on his own motion, if the Additional Commissioner or Joint Commissioner considers that such order is erroneous, he may withdraw such order and follow the procedure laid down in section 73 or section 74.

### **Case law**

BIJOY PRABHAKARAN PULIPRA VS STATE TAX OFFICER, SGST (NCLAT), 7th October 2021 (NCLAT)

Appeal No- Company Appeal (AT) (CH)(Insolvency) No. 42 of 2021<sup>89</sup>

1. Bijoy Pulipra i.e the Appellant filed an appeal against an Order passed by the National Company Law Tribunal (NCLT), Kochi Bench in MA/205/KOB/2020 in MA/140/KOB/2020 in TIBA/11/KOB/2019.
2. In that order, the NCLT under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 (IBC) held that there is no error in the Order in MA/140/KOB/2020.
3. The Appellant, therefore, filed an appeal which seeks clarification about assessment of GST amount payable by Corporate Debtors in the National Company Law Appellate Tribunal (“NCLAT”), Chennai.
4. The appeal was dismissed by the NCLAT and held that the Resolution Professional (“RP”) who committed an error in exercising their power and exercised the powers of

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<sup>89</sup> BIJOY PRABHAKARAN PULIPRA V. STATE TAX OFFICER, Company Appeal (AT) (CH)(Insolvency) No. 42 of 2021,  
<https://taxguru.in/goods-and-service-tax/nclat-revision-gst-assessment-jurisdiction-rp-sustainable-law.html>

GST Authorities, under Regulation 14 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (“CIRP Regulations”), which was not held to be sustainable.

5. After verification of the GST claims with Corporate Debtor’s books, the NCLAT noted that the Appellant revised the admitted claim of GST dues filed by The State Tax Officer, SGST (“the Respondent”).
6. Moreover, the NCLAT stated that the revision of the GST assessment order was beyond the jurisdiction of the RP.
7. Regulation 14 of the CIRP Regulations only authorizes the RP to exercise power where the claim is not precise due to any contingency or other reasons.
8. Observations were made by the NCLAT that the GST amount is an amount of tax levied under the assessment order as per GST Law and the same cannot be edited or reduced by RP.
9. If the RP was aggrieved by the said order, they should have filed the appeal under Central Goods and Services Tax Act, 2017 (“CGST Act”)/State Goods and Services Tax Act, 2017 (“SGST Act”).
10. The NCLAT further stated that any revision of assessment orders also could not be made under Section 238 of IBC.
11. In addition, the NCLAT stated that the Committee of Creditors (“COC”) cannot exercise judicial power under commercial wisdom and has no role in the acceptance or rejection of a claim and considered the statutory provision and suggested filing an Appeal before NCLAT.
12. Lastly, the NCLAT concluded that the said act of the RP is without jurisdiction and not sustainable in law.

Therefore, the above case BIJOY PRABHAKARAN PULIPRA VS STATE TAX OFFICER, SGST (NCLAT), 7th October 2021, has made a clear picture of the powers and limitations of the GST Department. In addition, it is evident that the Act neither confers any power or role in changing or reducing the GST amount nor has a part in accepting or rejecting a claim. **Sec 243**

The Presidency Towns Insolvency Act, 1909 has been enacted to cover the insolvency of individuals, partnerships, and associations of the individuals in the presidency town. The law commission of India in its report of February 1964 recommended combining the two acts to form a single code on insolvency.<sup>90</sup> However, the recommendation was never implemented. The Presidency Towns Insolvency Act, 1909, continues to be one of the imperative laws for insolvency regimes covering individuals. While the insolvency resolution process is well defined in the Code now, the rules pertaining to individual bankruptcy are yet to be notified. Although, the presidency towns insolvency act, has been repealed under Section 243(1) of IBC<sup>91</sup> which reads as follows-

## **Individual Insolvency**

Personal Insolvency has evolved over several decades in response to an environment that has weak creditor rights on recovery and weaker debtor rights on stalling creditor enforcement. Sometimes the credit market is also politicized in areas of agricultural lending and loan waivers. For debtors to fully utilize the provisions of IBC, two facets are essential, first, if there is a social stigma associated with the insolvency process then it is unlikely that debtors will take recourse even when it is in their economic interest. Second, if the process is highly costly and cumbersome, or it does not provide a reasonable mechanism for dealing with creditors, moreover is seen to be “creditor friendly”, then the debtors might not find it worthwhile to pursue this

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<sup>90</sup> [Law Commission of India, 26th Report on Insolvency Reports.](#)

<sup>91</sup> Insolvency and Bankruptcy Code, 2016, §243 (1), No. 31, Acts of Parliament, 2016(India).

process in the first place. Therefore, for a meaningful implementation of the law, governance of the regulatory environment and institutional infrastructure is of primary concern to the government.

The selection of debtors into a fresh start process or an RP depends on the definition of assets and income of the debtor. In the current scenario, the threshold for eligibility into a Fresh Start is hard-coded into the law. It is important to re-examine the relevance of the threshold from the aspect of making it more “debtor friendly” and increasing the thresholds so that a larger number of people may be qualified. Individual debtors will always be prone to bias on whether to file for insolvency, the guidance on filing, and the process of resolution. The government will have to step up to the challenge of protecting customer interests and the intermediaries mainly, the insolvency professionals and credit counselors.

The IBC allows for discharge as well as complete debt relief for those eligible for a fresh start. These decisions come at some cost for debtors to decrease the possibility of moral hazard. This can be done via a system of records where all these choices of debtors are stored, providing creditors with this information on whether to extend credit and at what price. The process of maintaining and integrating these records with the credit bureaus needs to be designed.

## **Guarantor to corporate debtors**

The Code allows a corporate debtor to initiate the resolution process, as well as a financial creditor or an operational creditor. A time limit of 180 days must be met to resolve difficulties relating to the entity (in the case of firms referred to as corporate debtors), and if no adequate resolution plan is approved, the company must be wound up. There are a number of procedures to follow, and the IBC has been well-crafted as an emerging new policy that is very much in line with global laws of a similar sort.

But it is to be thought, what if the corporate debtor's business is revived under an approved resolution strategy after getting concessions from all creditors, then what happens? Primarily, the goal of enacting the IBC code shall be fulfilled. And the immediate result of implementing the

resolution plan is that the company will be turned into a new entity, with liabilities lowered and losses stopped by the new arriving promoter, who once again controls the business via his skills. However, in India it is well understood that banks are the primary source of funds for any business, large or small and that they use their own specifications for extending loan/bank credit, often requiring a personal guarantee as added security for the loans (in case of a default, apart from charges on all assets owned by the business). Due to the corporate debtor's infirmity, the guarantor becomes more susceptible and becomes completely exposed and becomes nearly another target like the corporate debtor for the banks lining up to pursue him under the same IBC code.

Thus, including the guarantor as well as individuals or personal guarantors within the purview of adjudicating authority under IBC was required and therefore, the notification was sought.

### **Tax Liability of Corporate Debtor:**

Section 32 provides immunity to the corporate debtor from all the past offences but does not provide any immunity when it comes to taxation. The Corporate Debtor will be required to write back any debts it owes to creditors or loans following the NCLT's order in accordance with the Companies Act's accounting guidelines. According to section 41(1) of the Income Tax Act, such write-back, if it is in the revenue account and was claimed as a deduction in the previous year, would be profit. The corporate debtor would be subject to income tax under section 115JB of the Income Tax Act on the write-back, even if the business does not have any taxable income under the normal provisions of the Act. The government, however, provided relief to these businesses (Corporate Debtors) by adding that they will be able to deduct the total of carried forward loss and unabsorbed depreciation from the Book Profit by amending the provisions of Section 115JB. The readers may recall that only the lower of the two, depreciation or loss, is deductible in the case of other companies (Non CRIP).

## Notification from the Central Government for the Year 2019

It made personal guarantors available to businesses facing insolvency procedures under the Insolvency and Bankruptcy Code (IBC). The federal government can publish certain parts of the IBC code at separate dates under Section 1(3) of the IB Code, allowing it to be implemented gradually. These rules and regulations outline the procedure for filing insolvency and bankruptcy petitions against personal guarantors of corporate debtors, asking creditors to file claims, withdrawing such petitions, and so on. Thus, lenders can proceed with a suit against personal guarantors of corporations; this was upheld in a recent Supreme Court Judgement in May 2021 as well. So, lenders can recover the debt as per the Corporate Insolvency Resolution Process (CIRP) which is the recovery mechanism available to them.

Creditors will be able to sue both the major borrower, i.e. the company, and the personal guarantor before the National Company Law Tribunal under the new norms and regulations (NCLT). As up until now the IBC code only dealt with corporate debtor insolvency and liquidation cases.

### Case laws

It was necessary as when this notification was challenged in the Supreme Court it was stated that the right to equality of such personal guarantors is infringed as they are only being targeted. So, the Supreme Court in its judgment in Lalit Kumar Jain v. UOI<sup>92</sup> recently elaborated on the intrinsic connection between personal guarantors and their corporate debtors. Also, referring to section 60(2) of IBC, it states for proceedings against corporate debtors and their personal guarantors to be conducted together in front of NCLT.

Thus, to make the resolution process more open and applicable to all, this was stated by the court. As someone has to be made liable, there must be enough resources for getting a resolution. As was mentioned by NCLT in Alok Industries Ltd. Case<sup>93</sup> In 2019, when IBC's goals are

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<sup>92</sup> Lalit Kumar Jain v. Union of India and Ors., Transfer Case (Civil) No. 245/2020.

<sup>93</sup> DCIT Central Circle 6(2), Mumbai v. M/s Alok Industries Limited, ITA NOS. 900 TO 906/MUM/2019

considered as well as the legislative intent, it's evident that the Resolution is the rule and the Liquidation is the exception. As liquidation marks the end of a company's existence. It depletes organizational capital and idles resources until they are reallocated to other users. As a result, the IBC prohibits the immediate liquidation of a corporate debtor. It only allows for liquidation if the corporate settlement process fails. In many ways, it supports and encourages resolution.<sup>94</sup> So, bringing Personal Guarantors under liability will thus expand the scope for resolution. There are many advantageous aspects of this change and a few as mentioned below:

- 1.1. Personal guarantors are more likely to "arrange" for the payment of the debt to the creditor bank in order to achieve a rapid discharge if insolvency proceedings are filed against them.
- 1.2. To ensure a fair resolution of the corporate debt as well as the personal guarantor's debt, the creditor bank would be willing to take a reduction or waive some part of the interest amounts.
- 1.3. As a result, net assets would be maximized, and entrepreneurship would indeed be encouraged as this was the aim of IBC 2016 as well.

## **Fraudulent Initiation Of Insolvency Proceedings**

To protect Indian creditors and their funds from an ever-growing list of defaulting borrowers, the Indian Bankruptcy Code was introduced. As time goes on, we learn of significant fraud instances that nearly caused the economy to collapse and tipped the scales out of balance, which prompted the creation of the CIRP (Corporate Insolvency Resolution Process) to work with creditors. Most frequently, such fraudulent CIRP commencement is done with the goal of weakening the creditors' right to recover, which forces them to participate in the CIRP. This is instead of using other recovery methods, which, given the circumstances of a particular situation, may produce

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<sup>94</sup> CA S.Ramanujan, '*Double Whammy for Personal Guarantors to Corporate Debtors*' (LawStreetIndia, June 2021)

superior outcomes. As a result, Section 65 was added to the code to prevent anyone from abusing the IBC's provisions. It was discussed in the following case:

### **Shobhnath v. Prism Industrial Complex Ltd<sup>95</sup>**

A significant topic was argued in NCLT Allahabad: Can an insolvency petition be considered where there has been financial fraud? Being a financial creditor, the petitioner argued that the petition was completed in every way and in accordance with Section 7 of the Code. Existence of the obligation, which the corporate debtor officially acknowledged, and continuation of the default, which duly satisfied the requirements set forth in Sections 3 (11) and 3 (12).

Moreover, the petitioner filed an affidavit noting that the procedures will be in the best interests of all parties involved, including the corporate debtor and the holders of the debentures in the current case. The corporate debtor also filed a similar affidavit, stating that the insolvency proceedings will be in the best interests of the corporate debtor as well as its stakeholders because the only way to satisfy the claims of different classes of creditors is to sell the corporate debtor's assets. However, given the negative market position, the value derived from the asset may not be enough to pay off all of the debts.

### **Issues Involved**

1. Report of Amicus Curiae: The Bench relied on the report of the Amicus Curiae, appointed in a different case (against the same corporate debtor), and considered the possibility of money being diverted to group companies, directors, or associates. The Bench also raised suspicions that all of the corporate debtor's properties and assets may have been sold or disposed of illegally.
2. Review of the corporate debtor's financial statements: The NCLT made many decisions based on the balance sheet of the corporate debtor.

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<sup>95</sup> MANU/NL/0353/2019

- a. The recently updated balance sheet of the corporate debtor was not available, hence, it was difficult to ascertain the current state of affairs of the corporate debtor and its properties.
  - b. A review of the most recent balance sheet disclosed that the corporate debtor's only tangible asset was land, which was tragically insufficient to satisfy all claims.
  - c. It was noted that there was no information provided about the worth of land, location and area covered
  - d. Odds of diversion/ siphoning of funds: The analysis of the balance sheet also made it clear that the promoters and directors had diverted funds raised from multiple investors to a number of connected firms.
- 3. Although there were many retail investors with interests at stake in the current case, none of them appeared to be acting in the corporate debtor's best interests by considering resolution or revival.
- 4. The effects of the petition's admission are: Analysis of the consequences of the start of insolvency proceedings:
  - a. The beginning of the moratorium signifies that the corporate debtor will no longer be subject to legal action from its creditors.
  - b. The so-called resolution plan may upset the interests of such investors because the corporate debtor may have created high value creditors who may care least about the interests of retail investors from whom money has been raised, and this possibility cannot be ruled out by the constitution of the committee of creditors or the voting method of the majority by value under NCLT

## **Analysis**

The corporate debtor's actions were seen as dishonest, malicious attempts to divert the Tribunal's focus from the core problem and extend the proceedings. The Tribunal continued by stating that

it appears the corporate debtor has committed a financial deception after reading the Amicus Curiae's report.

Considering the object for which the Code was formulated, the public interest involved, and meeting ends of justice, it was held that the petition cannot be admitted only on the ground that the corporate debtor has not opposed the petition. Issues considered by Hon'ble NCLT:

Amicus Curiae Report Financial Reports for the CD Probabilities of financial fraud Effect of the admissions moratorium on the CoC fraudulently starting insolvency cases Although Section 65 only provides for punishment for the fraudulent and malicious initiation of insolvency proceedings, NCLT believed that the intent was very clear in that if a petition was filed under the Code fraudulently and with the intent to initiate insolvency proceedings, the petition should not be admitted in that situation. As a result, the petition was denied, and the petitioner and the corporate debtor were each served with a show cause notice pursuant to Section 65 of the Code.

### **Eligibility of the proprietor of a Firm to file an application under IBC**



There are clashing perspectives on different NCLT Seats on the topic whether a sole ownership concern goes under the meaning of Functional Leaser and Monetary Loan boss. Prior to going into Legal Translations, let us view the definitions recommended under the Code. According to Section 5(7) Monetary Loan boss means any individual to whom a

monetary obligation is owed and according to section 5(20) Functional Bank implies an individual to whom a Functional obligation is owed. As per Section 3(23) Individual Incorporates (a) an individual (b) a Hindu Unified Family (c) an Organization (d) a trust (e) an association (f) a restricted risk organisation and (g) some other substance laid out under a resolution. Uncovered perusing of meaning of Individual shows that "Sole Ownership" is

excluded, however according to sub-clause(g) of Section 3(23) individual incorporates elements laid out under a rule. There are various rules that can be applied to a sole owner business and enrolling under them can give legitimate evidence of presence. Such arrangements are as per the following:

1. Shop and Foundation Permit given under Shops and Foundations Act.
2. GST Enlistment Authentication given by the Public authority of India under GST Act.
3. MSME Enrollment Endorsement given by the Public authority of India under MSME Act.
4. Ledger opened under the name of Exclusive Concern.
5. Skillet given under the Personal Assessment Act.

The Sole Exclusive Concern is enrolled under any Rule, then, at that point, the Firm is said to have been laid out under a resolution. A similar view is taken by the Hon'ble NCLT, Hyderabad Seat in CP (IB) No. 123/9/HDB/2018. The Hon'ble Mediating Authority held that the Functional Loan boss documented GST Enrollment Testament and the Authentication was given under the arrangements of a Demonstration. Thus a Functional Loan boss must be treated as an Individual under provision (g) of Section 3(23). As per 2(f) of Code,2016 the arrangements of the Code will apply to Ownership Firms. Further the meaning of Individual in 3(23) is a comprehensive definition, yet at the same not thorough one. At the point when Section 2(f) and Section 3(23) are perused together it may very well be securely said that the Sole Ownership Firm goes under the meaning of Individual. A similar view has been taken by the Hon'ble NCLAT in the issue of Neeta Saha versus Mr. Smash Niwas Gupta 191(IBC)156/2020. The Hon'ble NCLAT over-managed the Request for Hon'ble NCLT, New Delhi Seat in "R.G. Prepares Versus Berry Auto Ancillaries (P) Ltd", where in the Settling Authority dismissed the appeal on the ground that Sole Ownership concern is excluded from the meaning of Individual.

The suppositions communicated thus are those of the patrons (which will, for these reasons, incorporate visitors) in their own ability and don't, in any capacity or way, mirror the perspectives on the associations that the givers are as of now connected with, or that have recently utilised or held the benefactors. Postings on this blog are for enlightening purposes as it were. Nothing in this will be considered or understood to comprise lawful or venture exhortation.

Conversations on, or emerging out of this, blog among givers and different people will not make any lawyer client Relationship.

## **Threshold limit under IBC**

Threshold limit refers to the minimum value that needs to be crossed in order to enable the action arising out of a provision. Section 4 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the “Code”) sets the threshold limit of the defaulted debt at Rs.1,00,000 i.e., in order for a creditor to be eligible to make an application to the Adjudicating Authority to initiate Insolvency and Resolution Proceedings against a Corporate Debtor, the minimum value of the defaulted debt should be Rs. 1,00,000.

Due to the Covid-19 Pandemic, the Government of India through circular S.O 1205(E) dated 24/03/2020 raised the threshold limit set by the Code from 1 Lakh to 1 Crore Rupees. This was to ensure that the businesses that were already suffering due to the pandemic are not further burdened by the weight of insolvency proceedings for a small amount (from a commercial point of view). Keeping aside the changes necessitated due to the pandemic, it was long coming that a change was to be brought in the threshold limit set as the limit of 1 Lakh by the Code is Creditor Friendly and the provision is exploited by the creditors time and again dragging the debtor to court for frivolous amounts of money. On the other hand, the limit now set by the notification is at the other extreme end of the scale, and is disadvantageous for creditors, especially operational creditors. As per Section 7 of the code, the financial creditors can file an application to initiate Insolvency proceedings for individual debts as well as on behalf of other financial creditors of the Corporate Debtor, which means that a financial creditor can still easily file an application if he is able to incorporate total debts to reach the threshold limit of Rs. 1 Crore owed by the Corporate Debtor, but on the other hand when the provision governing the right of the Operational Creditor to file an application to begin insolvency proceedings is read along with the Notification passed by the GoI, we can see that the operational creditors are now in a disadvantageous position as an operational creditor has to meet the threshold limit individually, and looking at the nature of the debt arrangement, it is highly improbable for a Corporate Debtor

to be under the debt of a single Operational Creditor for an amount of Rs. 1 Crore. The notification seems to be in contravention to the motive behind passing the Code which is to protect the interest of the creditors because of such a high threshold limit.

Another significant issue that arises before us is whether the notification passed by the GoI would be applicable in a prospective or retrospective manner?

### **Case laws**

The NCLT of Chennai in the case of M/s Arrowline Organic Products Pvt. Ltd. v. M/s Rockwell Industries Limited<sup>96</sup> answered this question. The facts of this case dealt around the appeal by the Corporate Debtor that since the threshold limit has been increased vide Notification S.O. 1205(E) dated March 24, 2020, the order passed to initiate the CIRP against the Corporate Debtor under petition IBA/1031/2019 should be quashed. The Tribunal relied on the following judgements to come to find out a definitive answer to the question:

Bakul Cashew Co. vs. Sales Tax Officer Quilon<sup>97</sup>:

In this case, the Supreme Court of India observed that only the legislature in India has the power to make and amend the laws, and whenever this power is conferred upon any other authority, the scope of the power is limited and the applicability can not be applicable retrospectively. Applying this precedent to the case at hand, we can observe that the notification increasing the threshold from 1 lakh to 1 crore has been passed by the Central Government and not the Legislature, therefore the notification will not be applicable retrospectively.

Kirti Kapoor v. Union of India<sup>98</sup>:

In this case, the Division Bench of the Hon'ble Rajasthan High Court did not expressly term the notification passed increasing the threshold limit for filing a case under Section 1(4) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 to be prospective in nature,

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<sup>96</sup> (MANU/NC/6868/2020)

<sup>97</sup> ([1986] 2 SCC 365)

<sup>98</sup> (Civil Writ Petition No. 21860/2018)

but relied on the notion of conditional legislation, and stated that the notification shall be applicable only on the future applicants.

In the case of *Indramaniyarelal Gupta v.W. R. Nath*<sup>99</sup>, the Supreme Court of India stated that the legislature has the power to act retrospectively except in those cases where it is expressly provided against. But, the Government at the same time exercising the delegated legislative power cannot at its own discretion decide upon the retrospective or prospective applicability of the legislation passed by it. The Legislature has the powers to confer retrospective or prospective nature of applicability on an enactment or statute, but the Government exercises delegated legislative powers and cannot make laws that are applicable retrospectively unless expressly mentioned. In the present case, the notification increasing the threshold limit under the Code was issued by the Central Government, and the provisions under which the notification was issued does not confer powers on them to enable the notification to be applicable retrospectively, therefore the NCLT ruled that the notification passed on the 24<sup>th</sup> of March, 2020 concerning the threshold limit under IBC is applicable prospectively and therefore the applications that were made before the notification was issued will not be quashed and will be dealt with in the manner in place before the notification was issued.

The increase in the threshold limit has been a long coming change in the Insolvency and Bankruptcy Code, 2016 as the minimum amount of Rs. 1 Lakh set is too low, and it is often seen that there are multiple complaints filed against a Corporate Debtor to initiate Insolvency proceedings against him, for amounts that are frivolous if seen from a commercial perspective. But the minimum limit that has been defined now, i.e., of Rs. 1 Crore is too high as most operational creditors will fail to reach the limit because it is a rare sight that the operational debt of a company exceeds 1 crore, therefore a middle ground should be reached and a more balanced minimum threshold amount should be decided upon that will neither lead to frivolous applications be made against the Corporate Debtor that overburden him, as well as the limit is

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<sup>99</sup> (1963 SC 274)

not too high so that the Creditors are able to rightfully file an application to recover their dues and their right is not disabled by an unreasonably high limit value.

## CHAPTER IV

### Liquidation under the Code

# Liquidation



Liquidation is the procedure of shutting down an organisation and the promoting of belongings i.e. the assets, to distribute them relying on whether or not the commercial enterprise is solvent or insolvent. Liquidation generally happens whilst a confined organisation has reached a factor where, for one cause or another, it's been determined that the commercial enterprise will now no longer continue. In this case, you may consider liquidating your organisation; which essentially means turning the belongings/assets of the company into cash. Turning belongings into cash is generally achieved so that an organisation which is going for liquidation can repay a whole lot of debts, relying on investments made into the commercial enterprise with the aid of using creditors, or loans taken out in developing the commercial enterprise, for example liquidation

leads you dissolving the company, and bringing all activities to close. It is a way for the business that has run out of funds to cover any remaining debts.

### **Effects of liquidation**

In the case of Compulsory Liquidation, a creditor has usually been chasing the company for payment of a significant amount, and on finding themselves unable to collect what is owed, the creditors approach the courts for the company's liquidation by way of petitions and other legal modes.

While liquidation is never the ideal situation for directors of a limited company to find themselves in, for some it is the most appropriate way of dealing with company insolvency and minimising the losses to outstanding creditors.

Here are a few more advantages of Creditors' Voluntary Liquidation (CVL) for insolvent companies.

- a. Debts that remain are forgiven: A stressful situation for any director is not being able to pay off existing debts and not having a way to turn the company around. A CVL provides a means of dealing with these outstanding obligations in a manner that aims to maximise returns for creditors. If you are insolvent, you cannot continue trading.
- b. The case has been dropped: When a company goes into liquidation, all legal action against it stops. Again, creditors will not be able to take any action against you as long as you are not personally responsible for a company debt.
- c. If staff members meet the vendor's requirement that they perform repetitive tasks, they can file a claim for repetition pay and other statutory privileges. If the funds determined from the deal of company resources are insufficient to cover subsequent instalments, employees have the option of

claiming what is owed. The National Protections Finance reimburses the company for excess, unpaid compensation, and occasion pay if the business is unable to do so using its own reserves.

- d. The following leases will end: At the time of liquidation, lease and hire purchase agreements typically expire, necessitating no further payments on the part of the parties. The company leasing the products may be able to collect any outstanding payments from insolvency practitioners and other creditors.
- e. Avoid going to court: You can avoid petitioning the courts and demonstrate to the public that liquidation was a company decision rather than the result of hostile creditor action by voluntarily choosing to liquidate the business.

### **Scope and Effect of Liquidation**

Scope of Work undertaken by the Liquidator as given under Section 35 of The Insolvency & Bankruptcy Code is as follows -

- a. To affirm the claims of all the banks.
- b. To require into his guardianship or control all the assets, property, impacts, and significant claims of the corporate indebted person.
- c. To survey the assets and property of the corporate obligated individual in the way as may be demonstrated by the Board and get ready a report of the survey. Further, to require such measures to guarantee and secure the assets and properties of the corporate obligated individual as he considers crucial.

- d. To obtain any professional assistance from any person or appoint any professional, in the discharge of his duties, obligations and responsibilities.
- e. To carry on the business of the corporate debtor for its beneficial liquidation as he considers necessary.
- f. To sell the corporate debtor's immovable and movable property, as well as actionable claims, in liquidation by public auction or private contract, with the authority to transfer such property to any person or body corporate, or to sell it in parcels in a manner as may be specified, subject to section 52.
- g. To institute or defend any suit, prosecution or other legal proceedings, civil or criminal, on behalf of the corporate debtor.
- h. To take all such actions, steps, or to sign, execute and affirm any paper, deed, receipt document, application, petition, affidavit, bond or tool and for such motive to apply the not unusual place seal, if any, as can be essential for liquidation, distribution of belongings and in discharge of his obligations and responsibilities and functions as liquidator.
- i. To follow the Adjudicating Authority for such orders or guidelines as can be essential for the liquidation of the company debtor and to file the development of the liquidation method in a way that can be unique via means of the Board.
- j. To perform such other functions as may be specified by the Board.

## Process of Liquidation<sup>100</sup>



### Appointment of a liquidator

Following the beginning of the liquidation, a liquidator will be appointed to manage the corporate debtor's other affairs and carry out the liquidation process. Unless the NCLT replaces the Resolution Professional in accordance with Section 34(4), the Resolution Professional appointed for the CIRP shall, subject to the submission of written consent to the NCLT, act as a liquidator for the purposes of liquidation. The eligibility requirements for an insolvency professional to be appointed as a liquidator are mentioned in Regulation 3 of the Liquidation Regulations. The NCLT may direct IBBI to propose the name of another insolvency professional to be appointed as a liquidator for the purposes of Section 34(4)(a) and (c). IBBI must propose the name within ten days with the written consent of the insolvency professional.

<sup>100</sup> Madhu Ayachit, *Liquidation under the Insolvency and Bankruptcy Code, 2016 with special focus upon the priority of claims*, (April 12, 2021), [https://blog.ipleaders.in/liquidation-insolvency-bankruptcy-code-2016-special-focus-upon-priority-claims/#Process\\_of\\_liquidation](https://blog.ipleaders.in/liquidation-insolvency-bankruptcy-code-2016-special-focus-upon-priority-claims/#Process_of_liquidation), carajput.com, *Liquidation Process for corporate debtor under IBC, 2016*, <https://carajput.com/blog/liquidation-process-for-cd-under-ibc/>

Section 35 of the IBC specifies the liquidator's powers and responsibilities. It includes checking the claims made by creditors, evaluating the corporate debtor's assets, running the corporate debtor's business, taking control of the corporate debtor's assets, etc.

### **Public announcement by the liquidator**

Following the appointment, the liquidator is required to issue a public announcement in Form B of Schedule II of the Liquidation Regulations within five days. The format for making a public announcement is set by Form B of Schedule II. The public announcement aims to encourage creditors and other similar parties to submit claims regarding the corporate debtor.

It should be published in one English-language and one regional-language newspaper with a large circulation at the corporate debtor's registered office and, if any, principal office, as well as any other location where the liquidator believes the corporate debtor engages in significant business activities; on the corporate debtor's website, if any; and, if applicable, on the website designated by the Board for this purpose.

### **Claims consolidation and verification**

The corporate debtor's creditors must submit their claims within thirty days of the beginning of the liquidation process. The claims that have been submitted by creditors must be checked by the liquidator after they have been received. In order to verify the creditors' claims, the liquidators may also request any supporting documentation.

Within seven days of accepting or rejecting claims, the liquidator is required to notify the corporate debtor and creditor of his decision.

### **Admission, rejection, and valuation of claims**

The claims can be accepted or rejected by the liquidator based on the verification he or she provides. Within seven days of making a decision, the liquidator must notify both the creditor and the corporate debtor of any rejection or admission of a claim. After every one of the necessary cases have been conceded by the outlet, the person in question needs to decide the

worth of the cases with the end goal of circulation of the resources of the corporate account holder.

### **Reports that must be prepared by the liquidator**

Following the acceptance of claims The liquidator is required to submit an asset report in order to evaluate the corporate debtor's assets and property in accordance with the Board's instructions and prepare a report.

liquidator, to provide a Progress report detailing the progress of the liquidation process in the manner that the board may specify. further he/she has to Prepare in accordance with Regulation 15, the quarterly report after each asset has been sold, the sales report should be attached to the Progress report.

Additionally, the liquidator must submit the final report before providing stakeholders with electronic or hard copies of the reports and minutes: upon request from a stakeholder; receipt of the cost of recording minutes or reports; receipt of the confidentiality pledge.

### **Limitation on liquidation proceedings**

In accordance with Regulation 47 of the Liquidation Regulations, liquidation proceedings must be completed within one year of the date of initiation, as opposed to the 330-day resolution process's extendable deadline. The model liquidation process timeline is outlined in Regulation 47 of the Liquidation Regulations.

### **Dissolution of the corporate debtor**

The Adjudicating Authority shall dissolve the corporate debtor upon the application of the liquidator and following the distribution of the corporate debtor's assets in accordance with the priority of claims. The provision of the IBC states: Any corporate debtor's liquidation process under the IBC Code must be completed within one year of its start, regardless of whether applications for avoidance transactions have been filed. The liquidator must distribute the proceeds from realisation to stakeholders within 90 days (or earlier six months) of receiving the amount.

## Appeal against the liquidator

In accordance with Section 42 of the IBC, a creditor who is dissatisfied with the liquidator's decision may appeal it to the Adjudicating Authority within fourteen days of receiving notification of the decision.

## Arrangement in Liquidation - Schemes

A Scheme of Arrangement is a process used by a company in financial difficulty to reach a binding agreement with its creditors to pay back all, or part, of its debts over an agreed timeline.

### Who should consider a Scheme of Arrangement?

1. Companies with large debts,
2. Companies in need of restructure,
3. Companies experiencing difficulties in doing trade,
4. Companies under pressure from their creditors,
5. Companies wanting to avoid liquidation<sup>101</sup>.

### Relevant laws under consideration

1. Section 29A of the Insolvency and Bankruptcy Code, 2016 :-

“Persons not eligible to be resolution applicant:- A person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly or in concert with such person—

- a. is an undischarged insolvent;
- b. is a wilful defaulter in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 (10 of 1949);

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<sup>101</sup> Deloitte.com, Schemes of Arrangement,  
<https://www2.deloitte.com/ie/en/pages/finance/solutions/schemes-of-arrangement.html>

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- c. [at the time of submission of the resolution plan has an account,] or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 (10 of 1949) [or the guidelines of a financial sector regulator issued under any other law for the time being in force,] and at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor: Provided that the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to non performing asset accounts before submission of resolution plan:

[Provided further that nothing in this clause shall apply to a resolution applicant where such applicant is a financial entity and is not a related party to the corporate debtor.]”

## 2. Section 230 of the Companies Act, 2013

### 230. “Power to compromise or make arrangements with creditors and members-

- 1. Where a compromise or arrangement is proposed— (a) between a company and its creditors or any class of them; or (b) between a company and its members or any class of them, the Tribunal may, on the application of the company or of any creditor or member of the company, or in the case of a company which is being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Tribunal directs.”

### **Analysis**

Pursuant to Section 230 of the Companies Act, 2013, a scheme of arrangement can be proposed by a creditor , a member, or a liquidator including one appointed under the IBC. It is pertinent to state here that, Section 230 of the Companies Act, 2013 does not restrict promoters from

proposing a scheme of arrangement. However, it shall be noted that an outsider shall have no right to propose a scheme of arrangement under Section 230 of CA, 2013.

Considering Section 29A of IBC, promoters cannot propose the scheme of arrangement as Section 29A disqualifies promoters from proposing the resolution plans. In the case of Arun Kumar Jagatramka v. Jindal Steel and Power Ltd. & Anr.<sup>102</sup> & Gujarat NRE Coke Limited<sup>103</sup> The NCLAT has held that when a scheme of arrangement is maintainable as per Section 230 of the Companies Act, 2013 for the companies which are undergoing liquidation, the same shall not be maintainable when proposed by a person ineligible under Section 29A of IBC. It is, therefore, settled now that any member/creditor who is ineligible under Section 29A shall not be qualified to propose a scheme of arrangement under Section 230 of the Companies Act, 2013, during the liquidation process before NCLT<sup>104</sup>.

The Supreme Court in the case of Arun Kumar Jagatramka v. Jindal Steel and Power Ltd. & Anr.<sup>105</sup> relying upon the judgments Chitra Sharma v. Union of India<sup>106</sup> and Arcelormittal India Private Limited v. Satish Kumar Gupta & Ors.<sup>107</sup>, observed that Section 29A of the IBC has been enacted keeping in mind the larger public interest and to facilitate effective corporate governance. Section 29A rectifies a loophole in the IBC, which allowed backdoor entry to the erstwhile management of corporate debtors into the corporate insolvency resolution process<sup>108</sup>.

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<sup>102</sup> Arun Kumar Jagatramka vs. Jindal Steel and Power Ltd. and Ors. (15.03.2021 - SC) : MANU/SC/0182/2021

<sup>103</sup> Basavaraj Koujalagi and Ors. vs. Sumit Binani, Liquidator of Gujarat NRE Coke Limited (03.05.2021 - NCLT - Kolkata) : MANU/NC/1084/2021

<sup>104</sup> Prasant, Anita dugar and Kriti Sanghi, Scheme of Arrangement during Liquidation under Companies Act, 2013, (Oct. 31<sup>st</sup>, 2020), <https://samistilegal.in/scheme-of-arrangement-during-liquidation-under-companies-act-2013/>, <https://www.reedlaw.in/post/supreme-court-denies-back-door-entry-of-defaulting-promoters-in-cirp-under-section-29a-of-ibc>

<sup>105</sup> Arun Kumar Jagatramka vs. Jindal Steel and Power Ltd. and Ors. (15.03.2021 - SC) : MANU/SC/0182/2021

<sup>106</sup> IDBI Bank Ltd. and Ors. vs. Anuj Jain and Ors. (10.12.2018 - NCLT - Allahabad) : MANU/NC/9483/2018

<sup>107</sup> *ibid*

<sup>108</sup> Gautam Bhatikar , Sanjeev Sambasivan and Madhavi Doshi, India: Supreme Court Clarifies The Restrictions Under Section 29A IBC To Schemes Of Compromise Or Arrangement, (April 16<sup>th</sup>, 2021), <https://www.mondaq.com/india/insolvencybankruptcy/1058488/supreme-court-clarifies-the-restrictions-under-section-29a-ibc-to-schemes-of-compromise-or-arrangement>, Shakshi shairwal, Deciphering the liquidation proceedings under Indian law, <https://www.lexology.com/library/detail.aspx?g=33acc833-e902-40e7-b1b9-33b6613af89f>

## Voluntary Liquidation regulations under Code



Voluntary Liquidation or Voluntary Winding Up of a Company in India is governed by the Insolvency and Bankruptcy Code, 2016 and applies to 'a corporate person'. The process of liquidating a firm with the approval of its members is known as voluntary liquidation. When its members opt not to continue the company's operations, it usually enters into voluntary liquidation. The primary goal is to cease operations and disperse its assets while also paying its debts.

### Voluntary Liquidation of Company Procedure

- 1.** The Company's Directors must issue a Declaration of Solvency in the form of an Affidavit confirming the following:
  1. The company has not committed any debt repayment default;
  2. The company is solvent; and the company will be able to pay its debts in full from the proceeds of assets to be sold in the voluntary liquidation;
  3. And the company is not being liquidated to defraud anyone.
- 2.** Board Meeting

The Board must appoint an insolvency professional registered with the Insolvency and Bankruptcy Board of India (IBBI) to act as Liquidator during the voluntary liquidation procedure.

3. Convene a meeting of Board of Directors to decide the following:
  - a. approving the company's voluntary liquidation
  - b. Appointing an Insolvency Professional as the Company's Liquidator
  - c. Choosing a day, date, and time for the company's annual meeting and
  - d. Send out an EGM notification with the proposed resolution and an explanatory statement.
4. Convene a General Meeting of shareholders within 4 weeks of Declaration of Solvency and pass the following resolutions:
  - a. Special resolution in general meeting for voluntary liquidation of the company or regular resolution in general meeting for liquidation as a result of the expiration of any defined period of its existence in the articles of incorporation
  - b. Resolution naming the company's liquidator
5. The liquidator must submit the resolutions to the Registrar of Companies and the IBBI.
6. The liquidator will now take over the company and proceed with following proceedings, which will include realising the company's assets, settling outstanding debts, and distributing the money to stakeholders. The liquidator has the authority to speak with any stakeholders who are entitled to a distribution of the proceeds.
7. Within 5 days of his appointment, the liquidator shall issue a public announcement in Form A of Schedule I requesting stakeholders to submit claims within 30 days of the liquidation's commencement date.
8. Within 45 days of the commencement of liquidation, the liquidator shall submit to the company a preliminary report stating:
  - a. the capital structure of the corporate person;

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- b. the estimates of its assets and liabilities as of the liquidation commencement date based on the corporate person's books;
- c. and whether he intends to make any further inquiry into any matter relating to the promotion, formation, or failure of the corporate person or the conduct of its business.

9. The liquidator must open a bank account in the company's name, followed by the words "in voluntary liquidation," in order to receive all money due and realized to satisfy liquidation costs.

10. The liquidator must get a No-Objection Letter from the Tax Authorities in the jurisdiction where the company's registered office is situated.

11. The liquidator must recover and realise the company's assets in a timely way while maximising the value of the stakeholders. The proceeds will be put in the bank account established for this purpose.

12. The proceeds must be delivered to stakeholders within 6 months of the amount being received, after subtracting the liquidation fee. If an asset cannot be realized because of its nature or other reasons, the liquidator may distribute it as such with the company's agreement.

13. The liquidator must finish the liquidation procedure within 12 months of the start date of the liquidation.

14. If the liquidation lasts more than 12 months, the liquidator must conduct a meeting of contributors within 15 days of the end of the 12-month term and every 12 months thereafter until the company is finally liquidated.

15. Once the liquidation procedure is concluded, the liquidator must prepare the Final Report, which includes the liquidation's audited accounts. A statement indicating that assets have been disposed of, debts have been discharged, and no litigation is pending; and a sale statement of assets indicating realised value, cost, manner and mode of sale, any deficit, to whom it is sold, and so on.

16. The Final report must then be filed with the Registrar and the IBBI by the Liquidator.

17. When the company's affairs are entirely wound up, the liquidator must apply to the NCLT for the company's dissolution.
18. The NCLT will then issue an order dissolving the firm as of the date of the order.
19. A copy of the order must then be sent to the registrar where the firm is registered.
20. The liquidator must keep the reports, registers, and books of accounts for at least 8 years after the firm is dissolved.

## **Liquidation process completed**

The liquidator must complete the liquidation process and submit the final report within 270 days from the commencement date of the liquidation (approval of liquidation by members via special resolution) when creditors have approved the resolution under section 59(3)(c) or Regulation 3(1) (c). In all other circumstances, 90 days from the start date of the liquidation (permission of liquidation by members by special resolution).

## **Information Utility**



IUs are entities that would act as data repositories of financial information which would receive, authenticate, maintain and deliver financial information pertaining to a debtor with a view to facilitating the insolvency resolution process in a time-bound

manner. IU maintains an information network that would store financial data like borrowings, default, and security interests among others of debtors for providing such information to businesses, financial institutions, adjudicating authorities, insolvency professionals, and other stakeholders.<sup>109</sup>

<sup>109</sup> Indulia, B., Editor and Deepa (2020) *Concept, utility and working of Information Utilities under the Insolvency & Bankruptcy Code, 2016* , SCC Blog. Available at: <https://www.scconline.com/blog/post/2020/10/11/concept-utility-and-working-of-information-utilities-under-the-insolvency-bankruptcy-code-2016/> (Accessed: January 7, 2023).

As per Section 3(21) of IBC, ‘Information Utility’ is defined as a person registered with the IBBI[viii] under Section 210. Furthermore, as per Section 209 of IBC, a person shall be eligible to carry on business as IU only if a certificate of registration is obtained from the IBBI. As per Section 210 of IBC, a certificate of registration shall be issued to an entity to function as IU if all the technical formalities are completed as prescribed by the IBBI.

### **Functions of Information Utility**

As per Section 213 of IBC, IUs shall provide services that include core services to any person, if such person complies with the terms and conditions of the IU Regulations. Furthermore, as per Section 3(9) of IBC, “core services” means - (a) accepting electronic submission of financial information; (b) safe and accurate recording of financial information; (c) authenticating and verifying financial information submitted by the person; and (d) providing access to information stored with IUs to persons as may be specified.

As per Section 3(13) of IBC, “*financial information*”, *in relation to a person, means one or more of the following categories of information, namely:* (a) records of the debt of the person; (b) records of liabilities when the person is solvent; (c) records of assets of a person over which security interest has been created; (d) records, if any, of instances of default by the person against any debt; (e) records of the balance sheet and cash-flow statements of the person; and (f) such other information as may be specified.

Section 214 of the IBC elaborates on the functions to be performed by IUs for the purpose of providing core services. The major obligations of IUs as per Section 214 can be summarised as follows:<sup>110</sup>

1. Acceptance of financial information in electronic form from persons who are under obligation to submit the same under IBC and also from other persons who intend to submit the same. This acceptance is to be in such form and manner as specified under the IU Regulations.

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<sup>110</sup> Dubey, V. *First Information Utility set up under IBC*, Vinod Kothari Consultants. Available at: <https://vinodkothari.com/2017/09/first-information-utility-set-up-under-ibc/> (Accessed: January 7, 2023).

- 2. Authentication of the financial information so received by all the parties concerned.
- 3. Storage of the financial information received as aforesaid in a universally accessible format after the same is duly authentication by all the parties concerned.
- 4. Providing the financial information stored by it as aforesaid to any person who intends to access such information in such manner as may be specified by the IU Regulations.
- 5. Publication of such statistical information as may be specified by the IU Regulations.

While performing aforesaid obligations, IUs are required to meet such minimum service quality standards as may be specified by IBBI and they are also required to ensure systems to facilitate interoperability with other IUs. As per Section 215 of IBC, while it is mandatory for the financial creditors to submit financial information and information relating to assets in relation to which any security interest has been created; submission of information is optional for the operational creditors. Insolvency professionals also may submit reports, registers, and minutes in respect of any insolvency resolution, liquidation, or bankruptcy proceedings to an IU for storage.

### **Significance of Information Utility**

As per the scheme of IBC, a CIRP can be triggered by the corporate debtor itself or by the financial or operational creditors of the such corporate debtor. Application for CIRP by a financial creditor is governed by Section 7 of the IBC read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. The application is to be filed as per Form 1 of the said Rules along with the record of the default recorded with the IU or such other record or evidence of default as may be specified. As per Part V of the said Form 1, a record of default with IU is listed among the documents acceptable as evidence of default. Upon submission of the application, NCLT is required to ascertain the existence of a default from the records of an IU or on the basis of other evidence furnished by the financial creditor. It is significant to note that this activity is to be completed by NCLT within fourteen days of the receipt of the application. This timeline can be met only if such ascertainment can be done from the records of an IU. Furthermore, upon initiation of CIRP when public announcement is made by the IRP calling for claims, financial creditors may submit their claims along with sufficient

proof of such claims. In this regard, it may be noted that the records available with an IU are accepted as proof of the existence of debt due.<sup>111</sup>

Whereas, application for CIRP by operational creditors is governed by Section 9 of the IBC read with Rules 5 & 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016[xvi]. On the occurrence of a default, operational creditors are required to deliver either a demand notice of the unpaid debt to the debtor as per Form 3 of the said Rules or a copy of an invoice attached with a notice in Form 4. On receipt of the notice, the debtor may, within 10 days, bring to the notice of the creditor about any pre-existing dispute on such debt and get out of the clutches of IBC. On the expiry of 10 days from the said notice, if the payment is not done by the defaulter, the operational creditor can file an application for CIRP in Form 5 of the aforesaid Rules. As per the aforesaid Forms 3 and 5, a record of default with IU is listed as one of the documents to prove the debt. Furthermore, upon initiation of CIRP when the public announcement is made by the IRP calling for claims, operational creditors may submit their claims along with records available with IU which are acceptable as proof for the debt.

Similarly, in an application for CIRP by corporate applicants and in the claims submitted by the other categories of claimants/creditors including workmen, records with IU are accepted as proof of such debt/default. Furthermore, as per IBC and the Rules, the records with IUs can be accessed and relied on by the adjudicating authority as evidence for the default/debt in their proceedings. Hence, IUs play a very significant role in enabling the timely completion of the processes under IBC.

## **Operating Procedure of Information Utility**

IBC provides little guidance on how IUs are to function, leaving the details to subordinate regulation. Section 240 of the IBC empowers the IBBI to make regulations by notification with regard to the registration of IUs, their functioning and on matters connected thereto. The IU

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<sup>111</sup> Gandhi, S. (2018) *A brief about the information utility under IBC*, TaxGuru. Available at: <https://taxguru.in/corporate-law/information-utility-ibc.html> (Accessed: January 7, 2023).

Regulations were notified in the exercise of this power in order to prescribe the details on how IUs shall operate to meet their objectives as contemplated under IBC.<sup>112</sup>

As per the IU Regulations, a person shall register itself with an IU for submitting information to; or for accessing information stored with any of the IUs. Upon such registration, IU shall verify the identity of the applicant and assign him with a unique identifier and intimate the same to him. A person registered once with an IU shall not register itself with any IU again. A registered user may submit information to any IU and not only to the IU with which he is registered. Different parties to the same transaction may use different IUs to submit, or access information in respect of the same transaction, and a user may access information stored with an IU through any IU.

IUs are required to store the information received by it in their facilities located in India and they shall allow the following persons to access the information stored with it- (a) the user which has submitted the information; (b) all the parties to the debt and the host bank, if any, if the information is regarding the record of debts or assets or instances of default by a person against any debt; (c) the corporate person and its auditor, if the information is of liabilities of a person during solvency or balance sheet and cash-flow statements of the person; (d) the insolvency professional; (e) the adjudicating authority; (f) the IBBI; (g) any person authorised to access the information under any other law; and (h) any other person who the persons referred to in (a), (b) or (c) have consented to share the information.

### **Provisions to ensure the protection of the data with Information Utilities**

As per the provisions of IBC, data entrusted with the IUs by the users are to be held as a custodian and hence they shall not have ownership over the data available with them. As such, it is one of the most important duties of the IUs to ensure the safety of the data and its protection from unauthorised interferences and data theft.

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<sup>112</sup> Dubey, V. (no date) *First Information Utility set up under IBC*, Vinod Kothari Consultants. Available at: <https://vinodkothari.com/2017/09/first-information-utility-set-up-under-ibc/> (Accessed: January 7, 2023).

To ensure the safety of the data, the IU Regulations prescribe the following to be complied with by the IUs<sup>113</sup>:

1. Establish adequate procedures and facilities to ensure that its records are protected against loss or destruction and adopt secure systems for information flows.
2. Storage of all information in a facility located in India shall be governed by the laws of India.
3. Not to outsource the provision of core services to a third-party service provider.
4. Not to use the information stored with it for any purpose other than providing services under these Regulations, without the prior approval of the Board.
5. Not to seek data/details of users except as required for the provision of services under IBC.
6. Adequate arrangements, including insurance, is to be made for indemnifying the users for losses that may be caused to them by any wrongful act, negligence, or default of the IU, its employees, or any other person whose services are used for the services.
7. Appoint an external auditor having relevant qualifications to audit its information technology framework, interface, and data processing systems every year. The auditor's report along with the comments of the Governing Board of IU is to be submitted to the IBBI within one month from the receipt of the same.
8. Establish an appropriate risk management framework in line with the Technical Standards.
9. Declare a Preservation Policy providing for the form, manner and duration of preservation of information stored with it; and details of the transactions of the IU with each user in respect of the information stored with it.

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<sup>113</sup> Indulia, B., Editor and Deepa (2020) *Concept, utility and working of Information Utilities under the Insolvency & Bankruptcy Code, 2016* , SCC Blog. Available at: <https://www.scconline.com/blog/post/2020/10/11/concept-utility-and-working-of-information-utilities-under-the-insolvency-bankruptcy-code-2016/> (Accessed: January 7, 2023).

10. Inspection by the IBBI with such periodicity as may be considered necessary. Disciplinary actions can be taken by IBBI including imposition of penalty under Section 220(3) of IBC.

## Non-Obstante Clause of Code



To begin with we should know the meaning of non-obstante, it means notwithstanding anything. The clauses under IBC that are applicable non-obstante are those whose applicability is not hindered by any other clause or Act.

The non-obstante clause also called the overriding clause of IBC is stated under section 238 of IBC 2016. It states that, the provisions of this Code obviously apply despite anything inconsistent with them in any other law currently in force or any act having effect by virtue of any such law. That is, this clause empowers the provisions included within it to override the effects of any other legal provisions contained within the same or other laws that clash with it. The Supreme Court had to resolve the legal position of the Code's relationship with other statutes. The Apex Court has held that the Code is "a complete code in itself" that clearly overrides statutes or provisions in statutes that conflict with it<sup>114</sup>.

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<sup>114</sup> Embassy Property Development Pvt. Ltd. v. State of Karnataka, MANU/SC/1661/2019

## Important Judgements

### The overriding effect

The issue of the beginning of the insolvency resolution procedure against the appellant under the IBC was raised in the case of Innovative Industries Ltd v ICICI Bank and Ors<sup>115</sup> In response, the appellant filed an interim application, claiming that no debt was legally due under the Maharashtra Relief Undertakings (Special Provisions Act), 1958 ('Maharashtra Act,') and that all the appellant's liabilities were temporarily postponed for a period of one year. The Maharashtra Act will not hinder the IBC's corporate insolvency resolution process, the Supreme Court held, and the subsequent non-obstante clause of the IBC would take precedence over the restricted non-obstante clause of Section 4 of the Maharashtra Act. The Supreme Court rejected the notion that a notification issued under the Maharashtra Act merely made the debt repayable for a set period of time and that it would become due after the notification's effects ceased.

### Non-Obstante Clause and the Limitation Act

In the case of B. K. Educational Services<sup>116</sup>, the Supreme Court stated that interpreting Section 238 of the Code to override the Limitation Act of 1963 would be preposterous. In view of Section 238-A, the Apex Court ruled that the Limitation Act would apply to IBC proceedings. Furthermore, the Supreme Court stated in Seven Hills<sup>117</sup> that Section 238 of the Code cannot be interpreted as overriding the public body's authority but rather it is the public responsibility to manage and regulate how the properties are dealt with.

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<sup>115</sup> Innovative Industries Ltd v ICICI Bank and Ors., (2018) 1 SCC 407

<sup>116</sup> B. K. Educational Services Pvt Ltd vs Parag Gupta And Associates, MANU/SC/1160/2018

<sup>117</sup> Municipal Corporation of Greater Mumbai v. Abhilash Lal & Ors, MANU/SC/1580/2019

## Dispute of non-obstante clause of IBC and that of PMLA

Previously, several authorities made judgments in which IBC was found to be superior to the Prevention of Money Laundering Act, 2002 (PMLA). In some circumstances both were awarded the same rank. Nonetheless, these types of issues frequently generate problems for potential bidders and operate as a stumbling block in the resolution of insolvency cases. Furthermore, PMLA offences should be handled with the company's actual promoters rather than the company itself, so that bidders are aware that any such violations, if discovered, will not affect their ownership rights after takeover and will have no impact on the company's operations after they have taken over. Section 32A of the Code also added a non-obstante provision, which shields corporate debtors and acquirers of assets under the Code from any criminal or asset forfeiture proceedings initiated under the Act.



### **Solidaire India Ltd. v. Fairgrowth Financial Services Ltd. & Ors.<sup>118</sup>**

Where two non-obstante clauses exist in two separate special acts, the statute passed later in time will prevail, according to the Supreme Court. The issue in this case was not based on the IBC's non-obstante clause, but rather on the Sick Industrial Companies (Special Provisions) Act of 1985 and the Special Court (Trial of Offences Relating to Securities Transactions) Act of 1992.

### **KSL and Industries Limited v Arihant Threads Limited<sup>119</sup>**

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<sup>118</sup> Solidaire India Ltd. v. Fairgrowth Financial Services Ltd. & Ors., (2001) 3 SCC 71

<sup>119</sup> KSL and Industries Limited v Arihant Threads Limited, (2008) 9 SCC 763 [70]

The Supreme Court ruled in this case that where a non obstante provision in a later legislation is subordinate to an earlier enactment, the latter may be regarded to prevail over the former. In this instance, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ('RDDB') superseded the Sick Industrial Companies (Special Provisions) Act, 1985 ('SICA').

**In some cases, the purpose behind the legislation is also considered to decide non-obstante clause of which legislation shall prevail. Like in,**

The Supreme Court decided in *Swaran Singh v Kasturi Lal*<sup>120</sup> that the objective and intent of RERA is to protect the interests of consumers purchasing real estate, whereas the IBC was enacted to strengthen and amend the laws relating to insolvency resolution and to create employment through the recovery of funds for credit. So, in any case the requirements of RERA will take precedence over the rules of the IBC where it is tailored to the scenario of protecting residents' rights in connection with construction projects.

If a special enactment conflicts with a general enactment, the special enactment will take precedence this was stated in the case of *Jain Ink Manufacturing Company v Life Insurance Corporation*<sup>121</sup>. As a result, when two competing laws with non-obstante clauses that encompass any other law in effect at the moment operate in different sectors, a harmonic construction of both laws should be utilised. If an earlier act is essential, the question of whether it supersedes later legislation will not be raised<sup>122</sup>.

When considering the practicality of a law in connection with other important pieces of legislation, a non-obstante or validation provision has a negative impact on its adoption. When interpreting a non-obstante clause, the court must assess whether the legislature intended it to have precedence over other provisions. Therefore, including a non-obstante language in any legislation without first considering whether such a punitive measure is suitable is not

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<sup>120</sup> *Swaran Singh v Kasturi Lal*, MANU / SC / 0071 / 1976

<sup>121</sup> *Jain Ink Manufacturing Company v Life Insurance Corporation*, AIR 1981 SC 670

<sup>122</sup> *Jay Engineering Works Ltd. v Industry Facilitation Council*, (2006) 8 SCC 677

recommended. Laws created after careful and critical research and examination of a comprehensive strategy will be justifiable and advantageous for efficient law enforcement.

## **Section 243<sup>123</sup>: Repeal of certain enactments and savings.**

### **243. (1) The Presidency Towns Insolvency Act, 1909 (3 of 1909) and therefore the Provincial Insolvency Act, 1920 (5 of 1920) are hereby repealed.**

The rules of IBC, haven't framed for insolvency of people except for personal guarantors to corporate debtors, therefore there are not any notified rules for individual insolvency despite the provision of Section 243 when reading with Section 1, which has inherent force from the date of commencement of code.<sup>124</sup> As a result, on harmonious interpretation, it is often said until and unless rules are framed, Section 243 is ineffective, and individual insolvency laws still subsist.

### **Applicability of the Section**

On several occasions, the government and the concerned ministry have clarified their stance regarding the applicability of section 243 of the Code which provides for the repeal of said enactments. Despite provisions related to insolvency resolution and bankruptcy for individuals and partnerships as incorporated in Part III of the Code, they are yet to be notified. Therefore, the stakeholders who intend to pursue their insolvency cases may approach appropriate authority/court under the existing enactments, instead of approaching the Debt Recovery Tribunals.

### **Relevant judgement**

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<sup>123</sup> Insolvency and Bankruptcy Code, 2016, §243, No. 31, Acts of Parliament, 2016(India).

<sup>124</sup> [Devansh Sharma, What if you go broke like Vijay Mallya? Personal bankruptcy decoded. Economic Times](#)

In the case **SBI v. V Ramakrishnan**,<sup>125</sup> the court took the stance on the enforcement of section 243 of the Code. The Court stated that Section 243, which contemplates the repealing of all the personal insolvency laws, has not come into force but it would not be necessary due to the presence of Section 238, which gives the Code an overriding effect over all other laws in cases of conflict as has been settled in an earlier judgement. Whereas, in the recent case **Lalit Kumar Jain vs. Union of India and Ors.**,<sup>126</sup> the court emphasised on the applicability of the said section, by reiterating, as far as individual personal guarantors are concerned, they will continue to be proceeded against under the aforesaid two Insolvency Acts and not under the Code. Indeed, by a Press Release dated 28-8-2017, the Government of India, through the Ministry of Finance, cautioned that Section 243 of the Code, which provides for the repeal of the said enactments, has not been notified till date, and further, that the provisions relating to insolvency resolution and bankruptcy for individuals and partnerships as contained in Part III of the Code are yet to be notified. While Rules & Regulations with respect to Personal Guarantors of Corporate Debtors are anticipated to be notified soon, It might take still longer to come. A key official involved in framing it, says: “While insolvency provisions for companies would not create a direct social impact, individual bankruptcy provisions will directly have social fallouts

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<sup>125</sup> SBI v. V Ramakrishnan, AIR 2018 SC 3876

<sup>126</sup> Lalit Kumar Jain vs. Union of India and Ors., MANU/SC/0352/2021

## CHAPTER V

### Admiralty and IBC



Admiralty (Jurisdiction and Settlement of Maritime Claims) Bill, 2016 (*hereinafter*, The Admiralty), was introduced with the intent to consolidate the existing laws on civil matters of admiralty jurisdiction of courts, admiralty proceedings on maritime claims, and arrest of ships. In simple terms, an admiralty proceeding is usually a lawsuit brought against another party over an event that occurred on the high seas, in front of Admiralty court. On the other hand, The IBC was introduced with the main aim to facilitate a corporate faltering in its debt obligations and to protect the interests of all the stakeholders with equity.<sup>127</sup>

It may appear that there is little chance of a dispute between the two statutes because they cover completely different areas of law with little overlap. That, however, is not the case. The conflict arises when the ship owner is subject to the jurisdiction of both the Admiralty Court as well as the National Company Law Tribunal under the IBC. The vessel is the subject matter under both

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<sup>127</sup> Insolvency and Bankruptcy Code: Why creditors panel must act in best interest of all stakeholders (2017) The Financial Express. Available at: <https://www.financialexpress.com/opinion/insolvency-and-bankruptcy-code-why-creditors-panel-must-act-in-best-interest-of-all-stakeholders/914659/> (Accessed: January 6, 2023).

the proceedings, as an offender under the Admiralty Act and as an asset under the IBC. In such a case, the question arises of jurisdiction where such an issue must go. Similar circumstances have been dealt by Bombay High Court on May 19, 2020 in the case of *Raj Shipping Pvt. Ltd. V. Barge Madhva and Anr.*<sup>128</sup>

In the Raj Shipping case, the court has passed arrest orders for the owners of the vessels, who were insolvent. This raised two primary questions that had to be dealt by the Bombay High Court-

- I. *Is there a conflict between actions in rem filed under the Admiralty Act and the provisions of the IBC and if so, how is the conflict to be resolved?*
- II. *Whether leave under Section 446(1) of the Companies Act is required for the commencement or continuation of an Admiralty Action in rem where a winding up order has been made or the Official Liquidator has been appointed as Provisional Liquidator of the company that owned the vessel*<sup>129</sup>

### **Judgement analysis**

**Doctrine of Harmonious Construction:** It is a well-established rule of interpretation that if one construction results in a dispute, but two legislations may be understood harmoniously on another, the latter must be adopted.<sup>130</sup> In case of liquidation of a ship owner, the result would vary based on the nature of the claim, that is to say, the yardstick for a maritime lien in insolvency proceedings is distinct from that of a mere maritime claim.

The **maritime lien** holder enjoys the advantage of choice when a corporate debtor goes into liquidation, as provided by Section 52 of the IBC. It can choose to either, opt out of the liquidation estate in accordance with Section 52 of the IBC and enforce the security under

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<sup>128</sup> *Raj Shipping Pvt. Ltd. V. Barge Madhva and Anr*, *Raj Shipping Pvt. Ltd. V. Barge Madhva and Anr*, 2020 SCC OnLine Bom 651.

<sup>129</sup> *Id.*

<sup>130</sup> *KSL & Industries Ltd. vs. Arihant Threads Ltd.* (2015) 1 SCC 166.

Admiralty Act<sup>131</sup> or, relinquish the security. Furthermore, an *in rem* action against a vessel for the execution of a maritime lien cannot be compared to proceedings against a corporate debtor hence; the bar under Section 33(5) of the IBC will not apply.

The Court noted that a **maritime claim** is enforced by an action in rem against the vessel (or its sale proceeds) and thus the vessel is liable to pay the claim. In such proceedings the owner is not a necessary or proper party. This action in rem continues as an action in rem notwithstanding that the owner may have entered appearance, if security is not furnished for release of the vessel. The proceedings against the vessel may commence and continue without the corporate debtor or company even though they may be undergoing winding up proceedings. *Thus, the Admiralty Act can be harmoniously interpreted, and no conflict arises with the Insolvency and Bankruptcy Code.*

### **Effect of Moratorium**

It was decided by the Court that in the event a moratorium is established under Section 14 of the IBC, then an action *in rem*, if instituted prior to the declaration of the moratorium, will not be continued during the CIRP, as this would negate the fundamental objective of bankruptcy resolution under the IBC. Furthermore, because the action *in rem* is not against the corporate debtor, the institution of an action in rem even after the declaration of a moratorium would be permitted, provided that such an action would not be allowed to proceed after the arrest of the ship, so that the resolution process could be effective.

When it comes to the bar imposed by Section 33(5) of the IBC when a ship owner becomes bankrupt, it was determined that such a restriction would not apply because the action *in rem* is brought against the ship,

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<sup>131</sup>Hero Fincorp Limited vs. Liquidator of Tag Offshore



not the corporate debtor. Whereas, on proceeding with admiralty action, the determination of priorities will be in accordance with the Admiralty Act. The High Court also clarified that the interpretation in the case is only applicable to *in rem* actions against the vessel and not to *in personam* action.

Furthermore on the *maintenance of the vessel*, the obligation to maintain is on Resolution Professional.<sup>132</sup> This involves the responsibility to crew, equip, and maintain the vessel, as well as pay all fees associated with it, such as port fees, bunker fees, and so on. This is in addition to the responsibility of ensuring that the ship does not create a navigational hazard. The Court reiterated that it would be open to the Admiralty Court to consider an application for sale of the vessel at any stage during the CIRP if the above is not being done. In order to safeguard the maker of the payment, the payment will be treated as 'Sheriff's Expenses' in Admiralty and 'Resolution Process Costs' under the IBC. The same would be paid out in priority from the sale proceeds of the vessel.

### **Leave Requirement under Section 446(1)**

According to Section 2(1)(e) of the Admiralty Act, admiralty courts have exclusive jurisdiction. As a result, the Company Court was found to lack authority to hear and decide any matter that the High Court with admiralty jurisdiction is authorised to resolve or determine under the Admiralty Act. As a result, no leave under Section 446(1) of the Companies Act, 1956 is necessary. It was also decided that because the Admiralty Act is a special act, it takes precedence over the Companies Act, which is a general act. The Court also held that where a winding up order has been issued or if the Official Liquidator is appointed as Provisional Liquidator of the company that owns the vessel, leave under Section 446(1) is not required for the commencement of an action *in rem* or continuation of an action against the vessel. Section 529A of the Companies Act and Section 10 of the Admiralty Act do not conflict, and the scheme of priorities

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<sup>132</sup> Hero Fincorp Limited vs. Liquidator of Tag Offshore Private Limited, MANU/ND/9432/2020

under Section 10 of the Admiralty Act takes care of payments due to workmen under Section 529A of the Companies Act.

The Admiralty Act and the IBC have been thoroughly examined and interpreted by the Honourable Bombay High Court. Because the laws were new, there was a lot of overlap and disagreement over their applicability and extent, as well as the jurisdiction of Admiralty courts and insolvency tribunals. The Court has considered the legislature's aim in enacting the Admiralty Act and the IBC, and has attempted to interpret and construct their provisions in a way that is consistent with that goal. As a result, the provisions' sanctity will be preserved, and the rights of both maritime claimants and corporate debtors will be unaffected.

However, the jurisprudence relating to the connection and interplay of admiralty and insolvency law is far from complete, and certain questions, such as the start of admiralty action in the event of cross-border insolvency, remain unresolved. In an admiralty action, jurisdiction may be exercised regardless of the ship's or its owners' nationality, or the owners' place of business, domicile, or residence, or the location where the cause of action originated in whole or in part.<sup>133</sup> In such a case, the ship owner of a vessel may be incorporated outside of India and may be liable to insolvency procedures in that nation. Because the IBC has not yet adopted the United Nations Commission on International Trade Law Model Law on cross-border bankruptcy, initiating admiralty actions in the event of cross-border insolvency is still a topic that has to be discussed further.

## **SARFAESI and IBC**

Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (hereinafter will be referred to as 'SARFAESI Act') was enacted to allow the financial institutions to determine the asset quality in different ways or we can say it enables financial institutions to find out and solve the issue of non-performing assets through various mechanisms. Securitization is a process in which financial assets are grouped together into marketable securities and thereafter they are sold to investors.

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<sup>133</sup> M.V. Elisabeth and Ors. vs. Harwan Investment and Trading Pvt. Ltd. and Ors., AIR 1993 SC 1014



This whole process is controlled by the Reserve bank of India (hereinafter will be referred to as 'RBI'). As both IBC and SARFAESI Act has a recovery of bad debt, by the way of identifying the assets of a debtor, which can be consequently used to fill in the default in the form of bad debt.<sup>134</sup> Therefore, it is not possible to avoid a clash between these two enactments.<sup>135</sup>

## MSME and IBC

According to the explicit goals and objectives of the Code, it was created to, among other things, consolidate laws governing the reorganisation and insolvency resolution of corporations, partnership firms, and individuals in a timely manner in order to maximise the value of those individuals' assets. A Resolution plan pursuant to Section 5(26) of the Code has been designated as the "way-out" for insolvent entities coming under the Code for this purpose. Under the leadership of Sh. Injeti Srinivas, the Insolvency Law Committee was established by the Ministry of Corporate Affairs (MCA) with the purpose of making recommendations for the Code's improved operation while keeping in mind the goals outlined in the Code and the state of developing judicial jurisprudence.

On March 26, 2018, the Ministry of Corporate Affairs received the Insolvency Law Committee Report, which contained a number of suggestions to protect the interests of MSME (s). The committee understood the need of safeguarding MSMEs because they are the backbone of the

<sup>134</sup> Bajpai, J. (2019, June 16). Battle for Claiming Secured Assets: Insolvency Code vs SARFAESI Act. *IndiaCorpLaw*. <https://indiacorplaw.in/2019/06/battle-claiming-secured-assets-insolvency-code-vs-sarfaesi-act.html>.

<sup>135</sup> Nayar, D. (2020, June 6). Interplay between the IBC and SARFAESI for recovery of dues. *The ICLRAP Blog*. [Interplay between IBC and SARFAESI](#)

Indian economy, and it was made clear that doing so would not damage the lives of these businesses' employees.



essential need for eligibility to submit a Resolution Plan is set forth in Section 29A of the Code, which lists the individuals who are ineligible to be Resolution Applicant(s). The committee deemed it appropriate to give exemptions to corporate debtors that are MSME(s) by allowing a promoter to compete for the Resolution Plan of an MSME who is neither a wilful defaulter or covered under any other specific disqualification as allowed under Section 29A. In order to specifically exempt resolution applicants from the scope of Section 29-A and allow them to submit Resolution Plans for MSME(s) that are undergoing restructuring, a new section, referred to as Section 240-A, was recommended regarding the exemption of MSMEs from Section 29-A. (CIRP). As a result, Section 240A of the Insolvency and Bankruptcy Code was added by the Ministry of Law and Justice through the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018. According to Section 240A, the resolution applicant for a CIRP of any MSME is exempt from the application of clauses (c) and (h) of Section 29A. Only the following types of people are excluded under Section 29A, and as a result, they are qualified to submit a resolution plan in the case of MSME(s), in accordance with the aforementioned amendment:

1. A person whose account, or an account of a corporate debtor under their management or control, or of whom they are a promoter, at the time the resolution plan is submitted, is classified by the RBI as a non-performing asset, and at least a year has passed between

the date of such classification and the date the corporate debtor's CIRP began.[Section (c)]

2. A person who has signed a guarantee in favor of a creditor for a corporate debtor for which the creditor's application for bankruptcy resolution has been approved under the Code, and the guaranteee has been used by the creditor but has not yet been fully or partially paid. (H) clause)

The justification for this exemption was that, typically, only the promoters of MSME(s) are likely to be interested in purchasing an MSME-affiliated business, which may not be of interest to other resolution seekers.

#### **Persons who are barred by the Code's Scheme from submitting a Resolution Plan**

It is important to note that MSME promoters may attempt to unfairly benefit from the aforementioned changes made possible by the addition of Section 240A to the Code by seeking a broad exemption from all the restrictions mentioned in Section 29-A. This is true even though Section 240A only exempts the individuals listed under clauses (c) and (h) of Section 29A.

Whether or whether the corporate organisation is an MSME, Section 29A lists a number of additional kinds of people who are not permitted to submit a resolution plan. Both the NCLAT and the Supreme Court have ruled that Section 29-A reflects one of the Code's most significant goals, which is to ensure that undesirable individuals are disqualified from submitting resolution plans so that they cannot manage stressed corporate debtors.

As a result, in accordance with Section 29A, the following individuals are barred from and ineligible to submit a Resolution Application on behalf of any Corporate Debtor, including MSME(s):

1. Any person who has been declared insolvent in accordance with subsection (a).
2. Any person who violates the RBI Guidelines published under the Banking Regulation Act, 1949 is considered a wilful defaulter under paragraph (b).

3. Clause (d) states that anyone who has been convicted of an offense that carries a sentence of two years or more in prison under certain Acts or seven years or more under any currently in effect law.
4. Any individual who is prohibited from acting as a director under the 2013 Companies Act is described in section (e).
5. If a person has held a position of management, control, or promotion within a Corporate Debtor where a preferential transaction, undervalued transaction, extortionate credit transaction, or fraudulent transaction has occurred and for which an order has been made by the Adjudicating Authority under the Code.
6. If any individual falls under the definition of a related person, clause (j) applies to them.

As stated in the phrase itself, "Connected Person" includes the following:

1. Any individual who promotes, manages, or controls the resolution application; any individual who will promote, manage, or control the corporate debtor's business throughout the implementation of the resolution plan;
2. a person mentioned in sections I and (ii) and their holding company, subsidiary company, associate company, or linked party (ii). Consequently, in order to be qualified to submit a resolution plan, a person must meet the requirements established by the resolution professional with the committee of creditors' approval; shall not be subject to any of the disqualifications listed in section 29A, unless exemptions are expressly provided for by law.

The Code is a helpful piece of law that helps the corporate debtor get back on its feet and is not just a means of creditor recovery. Therefore, the interests of the corporate debtor have been divided and set apart from those of its promoters or management. Thus, despite any exemptions provided by Section 240A, the aforementioned prohibitions nevertheless apply to individuals, including promoters.

## **Promoters of MSME can submit Resolution Plan**

Despite the fact that Section 240A only exempts persons specified under clauses (c) and (h) of Section 29A, MSME promoters may try to take advantage of the aforementioned changes brought about by the insertion of Section 240A in the Code by seeking blanket protection against all prohibitions mentioned in Section 29-A. Several other types of people are unable to submit a resolution plan under Section 29A, regardless of whether the corporate entity is an MSME or not. The NCLAT and the Supreme Court have stated that Section 29-A reflects a key goal of the Code, which is to ensure that unsavoury characters are barred from submitting resolution plans, preventing them from being involved in the administration of distressed corporate debtors. The following individuals are barred and ineligible to be a Resolution Applicant for any Corporate Debtor, including MSME(s) under Section 29A:

1. Any person who has been declared insolvent, according to subsection (a).
2. Any person who is a willful defaulter in terms of the RBI Guidelines issued under the Banking Regulation Act, 1949, according to clause (b).
3. Any individual who has been convicted of an offense punishable by imprisonment for two years or more under specified Acts; or for seven years or more under any law currently in force, according to clause (d).
4. Any individual who is disqualified to function as a director under the Companies Act, 2013 is subject to section (e).
5. Similarly, under paragraph (f), any individual who is forbidden from trading in securities or accessing the securities market by the Securities and Exchange Board of India.
6. If a person was in the management, control, or promoter of a Corporate Debtor in which a preferential deal, undervalued transaction, extortionate credit transaction, or fraudulent transaction occurred, and an order was made by the Adjudicating Authority under the Code, subsection (g) applies.
7. If any person falls under the jurisdiction of a linked person, clause (j) applies.

As a result, in order to be eligible to submit a resolution plan, a person must meet the resolution professional's criteria, which must be approved by the committee of creditors, and must not be subject to any of the disqualifications listed in section 29A, unless the legislation expressly states otherwise.

The Code is a helpful piece of legislation that helps the corporate debtor get back on its feet, rather than just a collection tool for creditors. The corporate debtor's interests have been separated from those of the company's promoters or management. Thus, despite the exemption(s) given under Section 240A prohibitions continue to apply to individuals, including promoters.

### **Relaxations for MSMEs**

The President's signature of the IBC Amendment Ordinance 2018 has resulted in significant improvements for homebuyers and small businesses. MSMEs, according to a government statement, are the backbone of the Indian economy, employing more people than the agriculture sector. Recognizing the importance of the MSME sector in terms of job creation and economic growth, the Ordinance gives the government the authority to grant them a specific exemption from the Code. The immediate benefit is that it does not prevent the promoter from bidding for his company that is going through the Corporate Insolvency Resolution Process (CIRP), as long as he is not a willful defaulter and there are no other disqualifications that aren't related to default. It also gives the Central Government the authority to grant additional exemptions or adjustments to the MSME Sector if necessary in the public interest. The IBBI's proposed MSMEs resolution process has been forwarded to the Ministry of Corporate Affairs, which will make the final decision. The regulator has also advised that the promoter and founder be allowed to stay on as directors even after the resolution procedure has begun. The concept of a "debtor in saddle" differs from current practice, which calls for the National Company Law Tribunal (NCLT) to appoint a resolution specialist to oversee the company's business during the resolution process. To make critical choices, the resolution professional collaborates with a committee of creditors. Under the planned MSMEs system, the creditors' committee will collaborate with the promoter or founder. Unlike the suspension of IBC provisions for up to 12 months in the case of

large enterprises, the IBBI proposes that MSME owners or promoters be allowed to initiate voluntary insolvency resolution proceedings. The move is intended to ensure that small enterprises, which are considered the most vulnerable during a crisis, are not subjected to undue stress.

## Limitation Act and IBC

The law of limitation is an essential component of public policy aimed at suppressing any acts of the past that are redundant and old in the eyes of the law. Such rules prohibit the use of civil remedies after a specified period of time in order to prevent fraudulent litigants from exploiting delaying tactics. The Limitation Act of 1963 ("Limitation Act") is a statute of repose that establishes a stringent time limit within which legal rights must be exercised, subject to certain exceptions. The Supreme Court of India ("Supreme Court") has also held that limitations were imposed to guarantee that a person's right to remedy be exercised as possible and without resorting to dilatory methods. The Supreme Court has addressed the connection between the Limitation Act and other statutes on several occasions in order to determine the time limits for exercising legal remedies afforded by different statutes. The Insolvency and Bankruptcy Code 2016 is one such statute.

In August 2020, the Supreme Court gave two distinct rulings in insolvency appeals from the National Company Law Appellate Tribunal ("NCLAT"). Despite the fact that the facts varied, both appeals included old claims that NCLAT accepted without properly addressing the question of limitations. The law regarding the Limitation Act of 1963's applicability to proceedings under the 2016 Insolvency and Bankruptcy Code ("Code") is established. This established legal principle is reiterated in both judgements, which also come to the same conclusion that NCLAT admitted time-barred claims in error. It is necessary to review the legislation on limitation in relation to the Code and the NCLAT's response in light of these rulings.



## **IBC and Limitation:**

In order to maximise the value of assets under resolution and to strike a balance between the interests of stakeholders in resolution, the Code was developed to streamline and reorganise the nation's bankruptcy laws. Despite being a "full code," it did not have any restriction provisions in its original form, with the exception of Sections 60(6) and 179(3), which just disregarded the length of the ordered moratorium when calculating the limitation. That is, the Code moratorium may be omitted in deciding its restrictions in any future conflicts involving the corporate debtor. The Limitation Act was initially interpreted by a number of benches of the National Company Law Tribunal as applying to Code actions since its application had not been specifically excluded.

In contrast, the NCLAT determined in *Speculum Plast Pvt. Ltd.* that the Code was a "self-contained statute" and a "full code" and that the Limitation Act could not be applied unless it was specifically mentioned in the Code. It stipulated that applicants must be requested to verify the grounds of delay and that stale claims "generally should not be entertained" unless they adequately explain the reason for the delay, even though it permitted time-barred debts to be decided under the Code.

Naturally, the Insolvency Law Committee ("Committee") disassociated itself from this justification of reviving zombified claims in its March 2018 Report. The Code's intent was emphasized as not being "to act as a fresh opportunity for creditors and claimants who did not exercise their remedy under existing laws within the prescribed limitation period," and it was suggested that the Code be changed to apply the Limitation Act to insolvency proceedings. As a result, Section 238A was added to the statute in August 2018. An immediate challenge to Section 238A was rejected by the Supreme Court in *B. K. Educational Service Pvt. Ltd. v. Parag Gupta*<sup>136</sup>. The Court concluded that the Code's status as a "complete code" cannot, by itself, bar the use of limitations. Second, even though the Code is not a law on debt recovery, it is "debt due and payable," which is the condition that makes it apply. Applying the Limitation Act would be "counter-intuitive" because time-barred debts are excluded from this. In light of this, the Committee's aforementioned remarks were valid, and the Limitation Act was applicable to all

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<sup>136</sup> *B. K. Educational Service Pvt. Ltd. v. Parag Gupta*, AIR 2018 SC 5601

legal actions brought in connection with the Code. Therefore, Section 238A was clarifying in nature, and unless it was implemented retrospectively, its purpose would be defeated. There are two restrictions on this application of limitation law. As the Court explained in *Thirumalai Chemicals Ltd. v. Union of India*<sup>137</sup>, it would be applicable to all legal proceedings brought to enforce pre-enactment causes of action, but it cannot (a) revive claims which are already time-barred; nor (b) extinguish claims that are subsisting on the date of enactment. Apart from these two exceptions, the Limitation Act applies to the Code. Applications under the Code are not covered by the Limitation Act's Schedule, so Article 137 would apply, establishing a three-year limitation term beginning "when the right to apply accrues." It is time-barred unless and until the relevant "default has occurred" within three years of "the date of submitting the application."

This decision in B. K. Educational Services has been reiterated and confirmed by subsequent decisions. The Code is not intended to revive barred claims, Section 238A is merely informative and retrospectively applies to all Code proceedings, and only the residual Article 137 of the Limitation Act applies to those proceedings. These are the established legal principles for applying limitation law to the Code.

Even though there have been series of cases that have been decided on the aspect of limitation, the Supreme Court, has once again, clarified the applicability of the Limitation Act to the provisions of IBC in the matter of *Babulal Vardharji Gurjar v. Veer Gurjar Aluminium Industries Pvt. Ltd*<sup>138</sup>. The Judgment was rendered while deciding a situation which involves acknowledgement of a debt liability with such debt being secured by way of a mortgage.

The Supreme Court in the case of *Laxmi Pat Surana vs Union Bank of India & Anr.*<sup>139</sup> has settled the issue of the applicability of Section 18 of the Limitation Act, 1963 to applications for initiation of insolvency proceedings under the Insolvency and Bankruptcy Code, 2016. The Apex Court has held that Section 18 of the Limitation Act applies to extend the period of limitation for

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<sup>137</sup> *Thirumalai Chemicals Ltd. v. Union of India*, MANU/SC/0427/2011

<sup>138</sup> *Babulal Vardharji Gurjar v. Veer Gurjar Aluminium Industries Pvt. Ltd*, MANU/SC/0589/2020

<sup>139</sup> *Laxmi Pat Surana vs Union Bank of India & Anr*, MANU/SC/0221/2021

filings an application under Section 7 of the IBC. The Laxmi Pat judgment has provided much-needed clarity on whether provisions for extension of limitation periods under the Limitation Act are applicable to proceedings under the IBC. According to the Supreme Court's interpretation of Section 238A, all applicable provisions of the Limitation Act are available to actions under the IBC. The Limitation Act's Article 137 (which states that the period of limitation runs for a period of three years from "when the right to apply accrues") is applicable for calculating the limitation period for starting proceedings under the Code, and the Supreme Court found no reason to exclude its applicability.

All of the fundamental limitations theories that apply to the IBC rules were covered in the Supreme Court's consideration of judicial precedents. By way of the Laxmi Pat Judgment, the Supreme Court further made it clear that Article 18 of the Limitation Act only applies to suits, leaving insolvency processes conducted under the IBC outside of its scope.

## Applicability of the Code on NBFCs

Bankruptcy law entered a new era with the implementation of a codified law on insolvency and bankruptcy procedures. While the IBC legislation focuses on helping distressed businesses recover and change, it excludes financial service providers (FSPs) like insurance companies and non-banking financing companies (NBFCs) from its purview.



One of the main justifications provided for banning FSPs from the Insolvency and Bankruptcy Code, 2016 framework was that they contain public

funds, and any insolvency in this sector could possibly result in economic unreliability (IBC).

The corporate insolvency resolution procedure (CIRP) cannot be started against any FSPs because the IBC's concept of corporate people completely excludes any type of FSPs, according to the National Company Law Tribunal (NCLT) and the National Company Law Appellate Tribunal. In light of the unstable state of the economy, the liquidity problem caused by FSPs like DHFL, and the inadequate restructuring procedures implemented by regulators for some FSPs, the IBC has been changed to provide a framework for restructuring FSPs.

The two major judgments which changed the situation of IBC & NBFC are:

In the case of HDFC vs RHC <sup>140</sup>

The appellant argued that the NCLT decision overlooked the legislature's intent when it exempted financial service companies. It argued that all entities, with the exception of those who are exclusively engaged in the business of providing "financial services" as mentioned in Section 3, are subject to the IBC (16). Furthermore, it was asserted that in order to qualify as a "financial service provider," a company must be "actively" engaged in the provision of financial services, which the Respondent was not since it was, as it admitted, merely a holding company. This assertion was based on the definition of "financial service provider" covered under Section 3(17).

The respondent supported its argument by citing *Randhir Thakur v. M/s Jindal Saxena Financial Services*<sup>141</sup> and stated that in the mentioned case it qualified as a 'financial service provider' further it was held in the case that. A corporation that the Reserve Bank of India ("RBI") had given the designation of NBFC was not subject to a maintainable application for the start of the insolvency resolution process. The RBI had issued the Respondent in this case a Certificate of Registration allowing it to start or operate a "non-banking financial services" firm. It was not permitted to accept public deposits, nevertheless.

The COURT's ruling was dependent on the Respondent's NBFC registration. It was highlighted that any "financial service provider" is excluded from Section 3(7)'s definition of a "corporate

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<sup>140</sup> *Housing Development Finance Corporation Ltd v. RHC Holding Private Ltd*, Company Appeal (AT)(Insolvency) No.26 Of 2019.

<sup>141</sup> *Randhir Thakur v. M/s Jindal Saxena Financial Services*, Company Appeal (AT)(Insolvency) No.32 and 50 of 2018.

person" (and as a result, is not included in the definition of a "corporate debtor"). A person must be "involved in the business of providing financial services in terms of authorization issued or registration granted by a financial sector regulator" in order to be considered a "financial service provider." A non-exhaustive list of "financial services" is provided in Section 3(16). It was decided that "financial service providers" are not required to accept deposits. The definition of "financial service provider" would be sufficiently satisfied if any of the services listed in Section 3(16) were being offered, as the list supplied in The Reserve Bank of India Act, 1934 (the "RBI Act"), which includes in its ambit any non-banking institution that carries on as its business or part of its business the "acquisition of shares, stock, bonds, debentures, or securities issued by a Government or local authority, or other marketable securities of a like nature," is also taken into consideration by the NCLAT. Using this definition as a foundation, the NCLAT determined that the Respondent meets the requirements for "financial institution" status under the RBI Act and hence also meets the requirements for "financial service provider" status under the IBC.

### **International Perspective**

The UK Insolvency Act was heavily referenced when creating the Indian Insolvency Code, which was subsequently modified to fit the Indian context. Under the UK Insolvency Act of 1986, procedures that apply to all insolvent firms would apply, with a few amendments to safeguard the protection of the policyholders, if an insurance company (an FSP as per the Code) were to collapse. According to the UK's Financial Services and Markets Act 2000 (FSMA), insurance companies cannot voluntarily dissolve themselves but may be wound up under the UK Insolvency Act in the case of failure. No exception is made for insurance companies or any other systemically important industry in Section 122 of the UK Insolvency Act, which lays out the circumstances under which a company may be wound up by the court.

If the court does decide to wind up the insurer, the Insurers (Reorganisation and Winding Up) Regulations 2004 (the Reorganisation Regulations) of the UK will apply due to the significant impact on the admission of an insurance company for winding up. Therefore, the bankruptcy laws of other economies have established identical mechanisms to deal with the insolvency of

financial businesses of systemic importance as for other companies, despite the possible impact of FSP failure being in multiples as compared to the Indian economy. Therefore, it does not appear fair to exclude NBFCs from the Code since businesses of significant economic importance are likewise covered by insolvency law.

## **Analysis**

When issuing this ruling, the NCLAT strictly followed the letter of the law. The appellant's arguments tried to demonstrate the legislative body's motivation for excluding financial service companies from the scope of the IBC and the ensuing insolvency proceedings. This exclusion's justification would logically be to protect these financial service providers, who would otherwise be important to the economy. A financial crisis that might devastate the economy could emerge from the demise of a systemically important financial institution. Furthermore, the public's interests should be protected above all else as these financial institutions' stakeholders.

Therefore, it would be essential to safeguard NBFCs from an economic aspect in the interest of the general public, especially those that accept deposits or are systemically significant. However, there doesn't seem to be much justification for extending this protection to NBFCs, whose insolvency would ordinarily not affect the broader public. Additionally, the NCLAT relied on the definitions included in the RBI Act, whose terminology is generally larger to encompass a greater variety of entities under the jurisdiction of the RBI and the regulations it issues. The provisions of the IBC are only intended to exclude applicability to entities where there is a significant effect on public interest, notwithstanding the fact that section 45-I(c) of the RBI Act's general objective is to cast a wider net.

However, the NCLAT decision did not examine the statutory intent; it merely looked at the letter of the law. It is quite improbable that the legislature intended to exclude NBFCs from the restructuring process under IBC just because they have registered with the RBI, without taking into account the full degree of the impact, if any, that such a transaction may have on the general

public. In this case, it doesn't appear like there's any justification for not pursuing IBC action against an NBFC that doesn't accept deposits and isn't systemically important.

## CHAPTER VI

### Forms under the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016

#### FORM A

##### Public Announcement

*(Under Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016)*

*FOR THE ATTENTION OF THE CREDITORS OF [NAME OF CORPORATE DEBTOR]*

Relevant Particulars		
1.	Name of corporate debtor	
2.	Date of incorporation of corporate debtor	
3.	Authority under which corporate debtor is incorporated / registered	
4.	Corporate Identity No. / Limited Liability Identification No. of corporate debtor	
5.	Address of the registered office and principal office (if any) of corporate debtor	
6.	Insolvency commencement date in respect of corporate debtor	
7.	Estimated date of closure of insolvency resolution process	
8.	Name and registration number of the insolvency professional acting as interim resolution professional	

9.	Address and e-mail of the interim resolution professional, as registered with the Board	
10.	Address and e-mail to be used for correspondence with the interim resolution professional	
11.	Last date for submission of claims	
12.	Classes of creditors, if any, under clause (b) of sub-section (6A) of section 21, ascertained by the interim resolution professional	Name the class(es)
13.	Names of Insolvency Professionals identified to act as Authorised Representative of creditors in a class (Three names for each class)	1. 2. 3.
14.	(a) Relevant Forms and (b) Details of authorized representatives are available at:	Web link:..... Physical Address:.....

*Notice is hereby given that the National Company Law Tribunal has ordered the commencement of a corporate insolvency resolution process of the [name of the corporate debtor] on [insolvency commencement date].*

*The creditors of [name of the corporate debtor], are hereby called upon to submit their claims with proof on or before [insert the date falling fourteen days from the appointment of the interim resolution professional] to the interim resolution professional at the address mentioned against entry No. 10.*

*The financial creditors shall submit their claims with proof by electronic means only. All other creditors may submit the claims with proof in person, by post or by electronic means.*

*A financial creditor belonging to a class, as listed against the entry No. 12, shall indicate its choice of authorised representative from among the three insolvency professionals listed against entry No.13 to act as authorised representative of the class [specify class] in Form CA.*

*Submission of false or misleading proofs of claim shall attract penalties.*

*Name and Signature of Interim Resolution Professional : \_\_\_\_\_*

*Date and Place : \_\_\_\_\_*

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## FORM AA

### *WRITTEN CONSENT TO ACT AS RESOLUTION PROFESSIONAL*

*(Under Regulation 3(1A) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016)*

*[Date]*

*From*

*[Name of the insolvency professional]*

*[Registration number of the insolvency professional]*

*[Address of the insolvency professional registered with the Board]*

*To*

*The Committee of Creditors*

*[name of corporate debtor]*

*Subject: Written Consent to act as resolution professional.*

1. I, [name], an insolvency professional enrolled with [name of insolvency professional agency] and registered with the Board, note that the committee proposes to appoint me as resolution professional under section 22(3)(a) / 22(3)(b) / 27(2) of the Code for corporate insolvency resolution process of [name of the corporate debtor].

2. In accordance with regulation 3(1A) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, I hereby give consent to the proposed appointment.

3. I declare and affirm as under: -

- I am registered with the Board as an insolvency professional.
- I am not subject to any disciplinary proceedings initiated by the Board or the Insolvency Professional Agency.
- I do not suffer from any disability to act as a resolution professional.
- I am eligible to be appointed as resolution professional of the corporate debtor under regulation 3 and other applicable provisions of the Code and regulations.

4. I shall make the disclosures in accordance with the code of conduct for insolvency professionals as set out in the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016;

5. I am having the following processes in hand:

Sl. No.	Role as	No. of Processes on the date of Consent
1.	Interim Resolution Professional	
2.	Resolution Professional of a. Corporate Debtors b. Individuals	
3.	Liquidator of a. Liquidation Processes b. Voluntary Liquidation Processes	
4.	Bankruptcy Trustee	

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5.	Authorised Representative	
6.	Any other (Please state)	

*Date:*

*(Signature of the insolvency professional)*

*Place:*

*Registration No. ....*

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## FORM AB

### *WRITTEN CONSENT TO ACT AS AUTHORISED REPRESENTATIVE*

*(Under Regulation 4A (3) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016)*

*[Date]*

*From*

*[Name of the insolvency professional]*

*[Registration number of the insolvency professional]*

*[Registered address of the insolvency professional]*

*To*

*The Interim Resolution Professional*

*[name of corporate debtor]*

*Subject: Written Consent to act as authorized representative.*

1. *I, [name], an insolvency professional enrolled with [name of insolvency professional agency] and registered with the Board, note that you have proposed to appoint me as the authorized representative of financial creditors in a class [specify class] in the corporate insolvency resolution process of [name of the corporate debtor].*
2. *In accordance with regulation 4(A) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, I hereby give my consent to the proposed appointment.*
3. *I declare and affirm as under: -*
  - a. *I am registered with the Board as an insolvency professional.*

**b. I am not subject to any disciplinary proceedings initiated by the Board or the Insolvency Professional Agency.**

**c. I do not suffer from any disability to act as an authorized representative.**

**d. I shall not canvass with the creditors to indicate their choice in my favour in Form CA.**

**e. I am having the following processes in hand:**

Sl. No.	Role as	No. of Processes on the date of Consent
1	Interim Resolution Professional	
2	Resolution Professional of a. Corporate Debtors b. Individuals	
3	Liquidator of a. Liquidation Processes b. Voluntary Liquidation Processes	
4	Bankruptcy Trustee	
5	Authorised Representative	
6	Any other (Please state)	

*Date:*

*(Signature of the insolvency professional)*

*Place:*

*Registration No. .....*

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## FORM B

*Proof Of Claim By Operational Creditors Except Workmen And Employees*

*(Under Regulation 7 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016)*

[Date]

*To*

*The Interim Resolution Professional / Resolution Professional*

*[Name of the Insolvency Resolution Professional / Resolution Professional]*

*[Address as set out in public announcement]*

*From*

*[Name and address of the operational creditor]*

*Subject: Submission of proof of claim.*

*Madam/Sir,*

*[Name of the operational creditor], hereby submits this proof of claim in respect of the corporate insolvency resolution process in the case of [name of corporate debtor]. The details for the same are set out below:*

Particulars	
1.	Name of operational creditor
2.	<p>Identification number of operational creditor</p> <p>(If an incorporated body provide identification number and proof of incorporation. If a partnership or individual provide identification records* of all the partners or the individual)</p>
3.	<p>Address and email address of operational creditor for correspondence</p>
4.	<p>Total amount of claim</p> <p>(Including any interest as at the insolvency commencement date)</p>
5.	<p>Details of documents by reference to which the debt can be substantiated.</p>

6.	Details of any dispute as well as the record of pendency or order of suit or arbitration proceedings	
7.	Details of how and when debt incurred	
8.	Details of any mutual credit, mutual debts, or other mutual dealings between the corporate debtor and the creditor which may be set-off against the claim	
9.	DETAILS OF: <ol style="list-style-type: none"> <li>any security held, the value of security and its date, or</li> <li>any retention of title arrangement in respect of goods or properties to which the claim refers</li> </ol>	
10.	Details of the bank account to which the amount of the claim or any part thereof can be transferred pursuant to a resolution plan	
11.	List of documents attached to this proof of claim in order to prove the existence and non-payment of claim due to the operational creditor	

*Signature of operational creditor or person authorised to act on his behalf*

*[Please enclose the authority if this is being submitted on behalf of an operational creditor]*

Name in BLOCK LETTERS

Position with or in relation to creditor

Address of person signing

*\*PAN number, passport, AADHAAR Card or the identity card issued by the Election Commission of India*

**DECLARATION**

*I, [Name of claimant], currently residing at [insert address], hereby declare and state as follows:-*

- 1. [Name of corporate debtor], the corporate debtor was, at the insolvency commencement date, being the.....day of.....20....., actually indebted to me in the sum of Rs. [insert amount of claim].*
  
- 2. In respect of my claim of the said sum or any part thereof, I have relied on the documents specified below: [Please list the documents relied on as evidence of claim].*

3. *The said documents are true, valid and genuine to the best of my knowledge, information and belief and no material facts have been concealed therefrom.*

4. *In respect of the said sum or any part thereof, neither I nor any person, by my order, to my knowledge or belief, for my use, had or received any manner of satisfaction or security whatsoever, save and except the following:*

*[Please state details of any mutual credit, mutual debts, or other mutual dealings between the corporate debtor and the creditor which may be set-off against the claim].*

*Date:*

*Place:*

*(Signature of the claimant)*

#### *VERIFICATION*

*I, [Name] the claimant hereinabove, do hereby verify that the contents of this proof of claim are true and correct to my knowledge and belief and no material fact has been concealed therefrom.*

*Verified at ... on this ..... day of ..... 20...*

*(Signature of the claimant)*

*[Note: In the case of company or limited liability partnership, the declaration and verification shall be made by the director/manager/secretary and in the case of other entities, an officer authorised for the purpose by the entity].*

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## FORM C

### **Submission Of Claim By Financial Creditors**

*(Under Regulation 8 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016)*

*[Date]*

*From*

*[Name and address of the financial creditor, including address of its registered office and principal office]*

*To*

*The Interim Resolution Professional / Resolution Professional*

*[Name of the Insolvency Resolution Professional / Resolution Professional]*

*[Address as set out in public announcement]*

***Subject: Submission of claim and proof of claim.***

*Madam/Sir,*

*[Name of the financial creditor], hereby submits this claim in respect of the corporate insolvency resolution process of [name of corporate debtor]. The details for the same are set out below:*

Relevant Particulars		
(1)	(2)	(3)

1.	Name of the financial creditor	
2.	Identification number of the financial creditor (If an incorporated body, provide identification number and proof of incorporation. If a partnership or individual provide identification records* of all the partners or the individual)	
3.	Address and email address of the financial creditor for correspondence	
4.	Details of claim, if it is made against corporate debtor as principal borrower: (i) Amount of claim (ii) Amount of claim covered by security interest, if any (Please provide details of security interest, the value of the security, and the date it was given) (iii) Amount of claim covered by guarantee, if any (Please provide details of guarantee held, the value of the guarantee, and the date it was given) (iv) Name and address of the guarantor(s)	
5.	Details of claim, if it is made against corporate debtor as guarantor: (i) Amount of claim (ii) Amount of claim covered by security interest, if any (Please provide details of security interest, the value of the security, and the date it was given) (iii) Amount of claim covered by guarantee, if any (Please provide details of guarantee held, the value of the guarantee, and the date it was given) (iv) Name and address of the principal borrower	
6.	Details of claim, if it is made in respect of financial debt covered under clauses (h) and (i) of sub-section (8) of section 5 of the Code, extended by the creditor: (i) Amount of claim (ii) Name and address of the beneficiary	

7.	Details of how and when debt incurred	
8.	Details of any mutual credit, mutual debts, or other mutual dealings between the corporate debtor and the creditor which may be set-off against the claim	
9.	Details of the bank account to which the amount of the claim or any part thereof can be transferred pursuant to a resolution plan	
<p>(Signature of financial creditor or person authorised to act on its behalf)            [Please enclose the authority if this is being submitted on behalf of the financial creditor]</p>		
<p>Name in BLOCK LETTERS</p>		
<p>Position with or in relation to creditor</p>		
<p>Address of person signing</p>		

\*PAN, passport, AADHAAR Card or the identity card issued by the Election Commission of India.

### **DECLARATION**

I, [Name of claimant], currently residing at [insert address], do hereby declare and state as follows: -

1. [Name of corporate debtor], the corporate debtor was, at the insolvency commencement date, being the ..... day of ..... 20....., actually indebted to me for a sum of Rs. [insert amount of claim].
2. In respect of my claim of the said sum or any part thereof, I have relied on the documents specified below: [Please list the documents relied on as evidence of claim].
3. The said documents are true, valid and genuine to the best of my knowledge, information and belief and no material facts have been concealed therefrom.

4. *In respect of the said sum or any part thereof, neither I, nor any person, by my order, to my knowledge or belief, for my use, had or received any manner of satisfaction or security whatsoever, save and except the following:*

*[Please state details of any mutual credit, mutual debts, or other mutual dealings between the corporate debtor and the creditor which may be set-off against the claim].*

5. *I undertake to update my claim as and when the claim is satisfied, partly or fully, from any source in any manner, after the insolvency commencement date.*
6. *I am / I am not a related party of the corporate debtor, as defined under section 5 (24) of the Code.*
7. *I am eligible to join committee of creditors by virtue of proviso to section 21 (2) of the Code even though I am a related party of the corporate debtor.*

*Date:*

*Place:*

*(Signature of the claimant)*

**VERIFICATION**

*I, [Name] the claimant hereinabove, do hereby verify that the contents of this proof of claim are true and correct to my knowledge and belief and no material fact has been concealed therefrom.*

*Verified at ... on this ..... day of ..... 20....*

*(Signature of claimant)*

*[Note: In the case of company or limited liability partnership, the declaration and verification shall be made by the director/manager/secretary/designated partner and in the case of other entities, an officer authorised for the purpose by the entity.]*

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## FORM CA

### *SUBMISSION OF CLAIM BY FINANCIAL CREDITORS IN A CLASS*

*(Under Regulation 8A of the Insolvency and Bankruptcy (Insolvency Resolution Process for Corporate Persons) Regulations, 2016)*

*[Date]*

*From*

*[Name and address of the financial creditor, including address of its registered office and principal office]*

*To*

*The Interim Resolution Professional / Resolution Professional*

*[Name of the Insolvency Resolution Professional / Resolution Professional]*

*[Address as set out in public announcement]*

*Subject: Submission of claim and proof of claim.*

*Madam/Sir,*

*[Name of the financial creditor], hereby submits this claim in respect of the corporate insolvency resolution process of [name of corporate debtor]. The details for the same are set out below:*

<b>RELEVANT PARTICULARS</b>
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1.	Name of the financial creditor	
2.	<p>Identification number of the financial creditor</p> <p>(If an incorporated body, provide identification number and proof of incorporation. If a partnership or individual, provide identification records of all the partners or the individual)</p>	
3.	Address and e-mail address of the financial creditor for correspondence.	
4.	Total amount of claim (in Rs.)	
5.	Details of documents by reference to which the debt can be substantiated	
6.	Details of how and when debt incurred	
7.	Details of any mutual credit, mutual debts, or other mutual dealings between the corporate debtor and the creditor which may be set-off against the claim	
8.	Details of any security held, the value of the security, and the date it was given	
9.	Details of the bank account to which the amount of the claim or any part thereof can be transferred pursuant to a resolution plan	
10.	List of documents attached to this claim in order to prove the existence and non-payment of claim due	

11.	Name of the insolvency professional who will act as the Authorised representative of creditors of the class	
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<p style="text-align: center;">Signature of financial creditor or person authorised to act on its behalf [Please enclose the authority if this is being submitted on behalf of the financial creditor]</p>
<p style="text-align: center;">Name in BLOCK LETTERS</p>
<p style="text-align: center;">Position with or in relation to creditor</p>
<p style="text-align: center;">Address of person signing</p>

\*PAN number, passport, AADHAAR Card or the identity card issued by the Election Commission of India.

#### *DECLARATION*

*I, [Name of claimant], currently residing at [insert address], do hereby declare and state as follows: -*

1. *[Name of corporate debtor], the corporate debtor was, at the insolvency commencement date, being the ..... day of ..... 20....., actually indebted to me for a sum of Rs. [insert amount of claim].*
2. *In respect of my claim of the said sum or any part thereof, I have relied on the documents specified below: [Please list the documents relied on as evidence of claim].*

3. The said documents are true, valid and genuine to the best of my knowledge, information and belief and no material facts have been concealed therefrom.

4. In respect of the said sum or any part thereof, neither I, nor any person, by my order, to my knowledge or belief, for my use, had or received any manner of satisfaction or security whatsoever, save and except the following:

*[Please state details of any mutual credit, mutual debts, or other mutual dealings between the corporate debtor and the creditor which may be set-off against the claim].*

5. I am / I am not a related party of the corporate debtor, as defined under section 5 (24) of the Code.

6. I am eligible to give voting instruction to the authorized representative by virtue of proviso to section 21 (2) of the Code even though I am a related party of the corporate debtor.

Date:

Place:

*(Signature of the claimant)*

**VERIFICATION**

I, [Name] the claimant hereinabove, do hereby verify that the contents of this proof of claim are true and correct to my knowledge and belief and no material fact has been concealed therefrom.

Verified at ... on this ..... day of ..... 20...

*(Signature of claimant)*

*[Note: In the case of company or limited liability partnership, the declaration and verification shall be made by the director/manager/secretary/designated partner and in the case of other entities, an officer authorized for the purpose by the entity.]*

## FORM D

### **Proof Of Claim by a Workman or an Employee**

*(Under Regulation 9 of the Insolvency and Bankruptcy (Insolvency Resolution Process for Corporate Persons) Regulations, 2016)*

*[Date]*

*To*

*The Interim Resolution Professional / Resolution Professional*

*[Name of the Insolvency Resolution Professional / Resolution Professional]*

*[Address as set out in public announcement]*

*From*

*[Name and address of the workman / employee]*

*Subject: Submission of proof of claim.*

*Madam/Sir;*

*[Name of the workman / employee], hereby submits this proof of claim in respect of the corporate insolvency resolution process in the case of [name of corporate debtor]. The details for the same are set out below:*

Particulars

1.	Name of workman / employee	
2.	Pan Number, Passport, the identity card issued by the Election Commission of India or Aadhaar Card of workman / employee	
3.	Address and email address (if any) of workman / employee for correspondence	
4.	Total amount of claim  (Including any interest as at the insolvency commencement date)	
5.	Details of documents by reference to which the claim can be substantiated.	
6.	Details of any dispute as well as the record of pendency or order of suit or arbitration proceedings	
7.	Details of how and when claim arose	

8.	Details of any mutual credit, mutual debts, or other mutual dealings between the corporate debtor and the creditor which may be set-off against the claim	
9.	Details of the bank account to which the amount of the claim or any part thereof can be transferred pursuant to a resolution plan	
10.	List of documents attached to this proof of claim in order to prove the existence and non-payment of claim due to the operational creditor	

Signature of workman / employee or person authorised to act on his behalf [Please enclose the authority if this is being submitted on behalf of an operational creditor]
Name in BLOCK LETTERS
Position with or in relation to creditor

Address of person signing

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## DECLARATION

*I, [Name of claimant], currently residing at [insert address], do hereby declare and state as follows: -*

- 1. [Name of corporate debtor], the corporate debtor was, at the insolvency commencement date, being the ..... day of ..... 20....., actually indebted to me in the sum of Rs. [insert amount of claim].*
- 2. In respect of my claim of the said sum or any part thereof, I have relied on the documents specified below: [Please list the documents relied on as evidence of claim].*
- 3. The said documents are true, valid and genuine to the best of my knowledge, information and belief and no material facts have been concealed.*
- 4. In respect of the said sum or any part thereof, neither I, nor any person, by my order, to my knowledge or belief, for my use, had or received any manner of satisfaction or security whatsoever, save and except the following:*

*[Please state details of any mutual credit, mutual debts, or other mutual dealings between the corporate debtor and the creditor which may be set-off against the claim].*

*Date:*

*Place:*

*(Signature of the claimant)*

## VERIFICATION

*I, [Name] the claimant hereinabove, do hereby verify that the contents of this proof of claim are true and correct to my knowledge and belief and no material fact has been concealed therefrom.*

*Verified at ... on this ..... day of ..... 20...*

*(Signature of claimant).*

## **FORM E**

### ***Proof Of Claim Submitted By Authorised Representative of Workmen and Employees***

***(Under Regulation 9 of the Insolvency and Bankruptcy (Insolvency Resolution Process for Corporate Persons) Regulations, 2016)***

*Date*

*To*

*The Interim Resolution Professional / Resolution Professional,*

*[Name of the Insolvency Resolution Professional / Resolution Professional]*

*[Address as set out in public announcement]*

*From*

*[Name and address of the duly authorised representative of the workmen / employees]*

*Subject: Submission of proofs of claim.*

*Madam/Sir,*

*I, [name of authorised representative of the workmen / employees], currently residing at [address of authorised representative of the workmen / employees], on behalf of the workmen and employees employed by the above named corporate debtor and listed in Annexure A, solemnly affirm and say:*

1. *That the above named corporate debtor was, at the insolvency commencement date, being the \_\_\_\_\_ day of \_\_\_\_\_ 20 \_\_, justly truly indebted to the several persons whose names, addresses, and descriptions appear in the Annexure A below in amounts severally set against their names in such Annexure A for wages, remuneration and other amounts due to them respectively as workmen or/ and employees in the employment of the corporate debtor in respect of services rendered by them respectively to the corporate debtor during such periods as are set out against their respective names in the said Annexure A.*

2. *That for which said sums or any part thereof, they have not, nor has any of them, had or received any manner of satisfaction or security whatsoever, save and except the following:*

*[Please state details of any mutual credit, mutual debts, or other mutual dealings between the corporate debtor and the creditor which may be set-off against the claim.]*

*Deponent*

### **Annexure**

#### 1. Details of Employees/ Workmen

S No.	Name of Employee/ WorkmAn	Identification number (pan number, passport or aadhaar card)	Total amount due (Rs.)	Period over which amount due

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2. Particulars of how debt was incurred by the corporate debtor, including particulars of any dispute as well as the record of pendency of suit or arbitration proceedings (if any).
3. Particulars of any mutual credit, mutual debts, or other mutual dealings between the corporate debtor and the creditor which may be set-off against the claim.

*Attachments:*

*Documents relied as evidence as proof of debt and as proofs of non-payment of debt.*

#### *DECLARATION*

*I, [Name of claimant], currently residing at [insert address], do hereby declare and state as follows: -*

1. *[Name of corporate debtor], the corporate debtor was, at the insolvency commencement date, being the.....day of.....20....., actually indebted to me in the sum of Rs. [insert amount of claim].*
2. *In respect of my claim of the said sum or any part thereof, I have relied on the documents specified below: [Please list the documents relied on as evidence of claim].*
3. *The said documents are true, valid and genuine to the best of my knowledge, information and belief and no material facts have been concealed therefrom.*
4. *In respect of the said sum or any part thereof, neither I, nor any person, by my order, to my knowledge or belief, for my use, had or received any manner of satisfaction or security whatsoever, save and except the following:*

*[Please state details of any mutual credit, mutual debts, or other mutual dealings between the corporate debtor and the creditor which may be set-off against the claim].*

*Date:*

\_\_\_\_\_

*Place:*

*(Signature of the claimant)*

#### VERIFICATION

*I, [Name] the claimant hereinabove, do hereby verify that the contents of this proof of claim are true and correct to my knowledge and belief and no material fact has been concealed therefrom.*

*Verified at ... on this ..... day of ..... 20...*

*(Signature of the claimant)*

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## FORM FA

### APPLICATION FOR WITHDRAWAL OF CORPORATE INSOLVENCY RESOLUTION PROCESS

*[Under Regulation 30A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016]*

*[Date]*

*To*

*The Adjudicating Authority*

*[Through the Interim Resolution Professional / Resolution Professional]*

*[name of corporate debtor]*

*Subject: Withdrawal of Application admitted for corporate insolvency resolution process of [name of corporate debtor]*

1. *I, [Name of applicant], had filed an application bearing [particulars of application, i.e, diary number/ case number] on [Date of filing] before the Adjudicating Authority under [Section 7 / Section 9/ Section 10] of the Insolvency and Bankruptcy Code, 2016. The said application was admitted by the Adjudicating Authority on [date] bearing [case number].*
2. *I hereby withdraw the application bearing [particulars of application, i.e, diary number/ case number] filed by me before the Adjudicating Authority under [Section 7 / Section 9/Section 10] of the Insolvency and Bankruptcy Code, 2016.*
3. *I attach the required bank guarantee as per sub-regulation (2) of regulation 30A.*

*(Signature of the applicant)*

  
*Date:*

*Place: [Note: In the case of company or limited liability partnership, the declaration and verification shall be made by the director/manager/secretary/designated partner and in the case of other entities, an officer authorised for the purpose by the entity]*

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## FORM F

*Proof Of Claim By Creditors (Other than Financial creditors and operational Creditors)*

*[Under Regulation 9A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016]*

Date .....

*To*

*The Interim Resolution Professional / Resolution Professional*

*[Name of the Insolvency Resolution Professional / Resolution Professional]*

*[Address as set out in public announcement]*

*From*

*[Name and address of the creditor]*

*Subject: Submission of proof of claim.*

*Madam / Sir,*

*I, [Name of the creditor], hereby submit the following proof of claim in respect of the corporate insolvency resolution process in the case of [name of corporate debtor]. The details of the same are set out below:*

## PARTICULARS

1.	Name of the creditor	
2.	Identification number of the creditor (If an incorporated body corporate, provide identification number and proof of incorporation. If a partnership or individual, provide identification record* of all partners or the individuals)	
3.	Address and email address of the creditor for correspondence	
4.	Description of the claim (Including the amount of the claim as at the insolvency commencement date)	
5.	Details of documents by reference to which claim can be substantiated	
6.	Details of how and when the claim arose	
7.	Details of any mutual credit, mutual debts, or other mutual dealings between the corporate debtor and the creditor which may be set-off against the claim	

8.	<p>Details of:</p> <p>a. any security held, the value of security and its date, or</p> <p>b. retention title arrangement in respect of goods or properties to which the claim refers</p>	
9.	Details of bank account to which the amount of the claim or any part thereof can be transferred pursuant to a resolution plan	
10.	List of documents attached to this claim in order to prove the existence and non-satisfaction of claim due to the creditor	
<p>Signature of the creditor or any person authorised to act on his behalf            (Please enclose the authority if this is being submitted signed on behalf of the creditor)</p>		
<p>Name in BLOCK LETTERS</p>		
<p>Position with or in relation to the creditor</p>		
<p>Address of the person signing</p>		

\* PAN, Passport, AADHAAR or the identity card issued by the Election Commission of India.

*DECLARATION*

I, [Name of claimant], currently residing at [insert address], do hereby declare and state as follows: -

1. [Name of corporate debtor], the corporate debtor was, at the insolvency commencement date, being the.....day of.....20....., actually indebted to me in the sum of Rs. [insert amount of claim].
2. In respect of my claim of the said sum or any part thereof, I have relied on the documents specified below: [Please list the documents relied on as evidence of claim].
3. The said documents are true, valid and genuine to the best of my knowledge, information and belief and no material facts have been concealed therefrom.
4. In respect of the said sum or any part thereof, neither I, nor any person, by my order, to my knowledge or belief, for my use, had or received any manner of satisfaction or security whatsoever, save and except the following:

[Please state details of any mutual credit, mutual debts, or other mutual dealings between the corporate debtor and the creditor which may be set-off against the claim].

Date:

Place:

(Signature of the claimant)

---

### *VERIFICATION*

*I, [Name] the claimant hereinabove, do hereby verify that the contents of this proof of claim are true and correct to my knowledge and belief and no material fact has been concealed therefrom.*

*Verified at ... on this ..... day of ..... 20...*

*(Signature of the claimant)*

*[Note: In the case of company or limited liability partnership, the declaration and verification shall be made by the director/manager/secretary and in the case of other entities, an officer authorised for the purpose by the entity].*

## FORM G

### ***INVITATION FOR EXPRESSION OF INTEREST FOR***

***[NAME OF CORPORATE DEBTOR] OPERATING IN [INDUSTRY TYPE] AT  
[LOCATION(S)]***

*(Under Regulation 36A(1) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016)*

<b>RELEVANT PARTICULARS</b>		
1.	Name of the corporate debtor along with PAN/ CIN/ LLP No.	
2.	Address of the registered office	
3.	URL of website	
4.	Details of place where majority of fixed assets are located	
5.	Installed capacity of main products/ services	
6.	Quantity and value of main products/ services sold in last financial year	
7.	Number of employees/ workmen	
8.	Further details including last available financial statements (with schedules) of two years, lists of creditors, relevant dates for subsequent events of the process are available at:	
9.	Eligibility for resolution applicants under section 25(2)(h) of the Code is available at:	

10.	Last date for receipt of expression of interest	
11.	Date of issue of provisional list of prospective resolution applicants	
12.	Last date for submission of objections to provisional list	
13.	Process email id to submit EOI	

*Signature of the Resolution Professional  
 Registration Number of the Resolution Professional  
 Registered Address of the Resolution Professional*

*For (Name of the Corporate Debtor)*

*(Date and Place)*

**FORM H**  
**COMPLIANCE CERTIFICATE**

*(Under Regulation 39(4) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016*

1. I, [Name of the resolution professional], an insolvency professional enrolled with [name of insolvency professional agency] and registered with the Board with registration number [registration number], am the resolution professional for the corporate insolvency resolution process (CIRP) of [name of the corporate debtor (CD)].
2. The details of the CIRP are as under:

<b>Sl. No.</b>	<b>Particulars</b>	<b>Description</b>
1	Name of the CD	
2	Date of Initiation of CIRP	
3	Date of Appointment of IRP	
4	Date of Publication of Public Announcement	
5	Date of Constitution of CoC	
6	Date of First Meeting of CoC	
7	Date of Appointment of RP	
8	Date of Appointment of Registered Valuers	

9	Date of Issue of Invitation for EoI	
10	Date of Final List of Eligible Prospective Resolution Applicants	
11	Date of Invitation of Resolution Plan	
12	Last Date of Submission of Resolution Plan	
13	Date of Approval of Resolution Plan by CoC	
14	Date of Filing of Resolution Plan with Adjudicating Authority	
15	Date of Expiry of 180 days of CIRP	
16	Date of Order extending the period of CIRP	
17	Date of Expiry of Extended Period of CIRP	
18	Fair Value	
19	Liquidation value	
20	Number of Meetings of CoC held	

3. I have examined the Resolution Plan received from Resolution Applicant (.....) and approved by Committee of Creditors (CoC) of [Name of the corporate debtor].

4. I hereby certify that-

- i. the said Resolution Plan complies with all the provisions of the Insolvency and Bankruptcy Code 2016 (Code), the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations) and does not contravene any of the provisions of the law for the time being in force.
- ii. the Resolution Applicant (.....) has submitted an affidavit pursuant to section 30(1) of the Code confirming its eligibility under section 29A of the Code to submit resolution plan. The contents of the said affidavit are in order.
- iii. the said Resolution Plan has been approved by the CoC in accordance with the provisions of the Code and the CIRP Regulations made thereunder. The Resolution Plan has been approved by [state the number of votes by which Resolution Plan was approved by CoC] % of voting share of financial creditors after considering its feasibility and viability and other requirements specified by the CIRP Regulations.
- iv. The voting was held in the meeting of the CoC on [state the date of meeting] where all the members of the CoC were present.

or

*I sought vote of members of the CoC by electronic voting system which was kept open at least for 24 hours as per the regulation 26.*

*[strike off the part that is not relevant]*

5. The list of financial creditors of the CD [state the name of CD] being members of the CoC and distribution of voting share among them is as under:

Sl. No.	Name of Creditor	Voting Share (%)	Voting for Resolution Plan (Voted for / Dissented / Abstained)

6. The Resolution Plan includes a statement under regulation 38(1A) of the CIRP Regulations as to how it has dealt with the interests of all stakeholders in compliance with the Code and regulations made thereunder.

7. The amounts provided for the stakeholders under the Resolution Plan is as under:

(Amount in Rs. lakh)

Sl. No.	Category of Stakeholder*	Sub-Category of Stakeholder	Amount Claimed	Amount Admitted	Amount Provided under the Plan#	Amount Provided to the Amount Claimed (%)
(1)	(2)	(3)	(4)	(5)	(6)	(7)

1	Secured Financial Creditors	(a) Creditors not having a right to vote under sub-section (2) of section 21				
		(b) Other than (a) above:				
		(i) who did not vote in favour of the resolution Plan				
		(ii) who voted in favour of the resolution plan				
		Total[(a) + (b)]				
2	Unsecured Financial Creditors	(a) Creditors not having a right to vote under sub-section (2) of section 21				

		<p>(b) Other than (a) above:</p> <p>(i) who did not vote in favour of the resolution Plan</p> <p>(ii) who voted in favour of the resolution plan</p>			
		Total[(a) + (b)]			
3	Operational Creditors	<p>(a) Related Party of Corporate Debtor</p>			
		<p>(b) Other than (a) above:</p> <p>(i) Government</p> <p>(ii) Workmen</p> <p>(iii) Employees</p> <p>(iv) .....</p>			

		Total[(a) + (b)]				
4	Other debts and dues					
	Grand Total					

\*If there are sub-categories in a category, please add rows for each sub-category.

# Amount provided over time under the Resolution Plan and includes estimated value of non-cash components. It is not NPV.]

8. The interests of existing shareholders have been altered by the Resolution plan as under:

Sl. No	Category of Share Holder	No. of Shares held before CIRP	No. of Shares held after the CIRP	Voting Share (%) held before CIRP	Voting Share (%) held after CIRP
1	Equity				
2	Preference				
3					

9. The compliance of the Resolution Plan is as under:

Section of the Code / Regulation No.	Requirement with respect to Resolution Plan	Clause of Resolution Plan	Compliance (Yes / No)

25(2)(h)	Whether the Resolution Applicant meets the criteria approved by the CoC having regard to the complexity and scale of operations of business of the CD?		
Section 29A	Whether the Resolution Applicant is eligible to submit resolution plan as per final list of Resolution Professional or Order, if any, of the Adjudicating Authority?		
Section 30(1)	Whether the Resolution Applicant has submitted an affidavit stating that it is eligible?		
Section 30(2)	<p>Whether the Resolution Plan-</p> <p>(a) provides for the payment of insolvency resolution process costs?</p> <p>(b) provides for the payment to the operational creditors?</p> <p>(c) provides for the payment to the financial creditors who did not vote in favour of the resolution plan?</p> <p>(d) provides for the management of the affairs of the corporate debtor?</p> <p>(e) provides for the implementation and supervision of the resolution plan?</p> <p>(f) contravenes any of the provisions of the law for the time being in force?]</p>		
Section 30(4)	<p>Whether the Resolution Plan</p> <p>(a) is feasible and viable, according to the CoC?</p>		

	(b) has been approved by the CoC with 66% voting share?		
Section 31(1)	Whether the Resolution Plan has provisions for its effective implementation plan, according to the CoC?		
Regulation 38(1)	Whether the amount due to the operational creditors under the resolution plan has been given priority in payment over financial creditors?]		
Regulation 38(1A)	Whether the resolution plan includes a statement as to how it has dealt with the interests of all stakeholders?		
Regulation 38(1B)	(i) Whether the Resolution Applicant or any of its related parties has failed to implement or contributed to the failure of implementation of any resolution plan approved under the Code. (ii) If so, whether the Resolution Applicant has submitted the statement giving details of such non-implementation?]		
Regulation 38(2)	a) Whether the Resolution Plan provides: a) the term of the plan and its implementation schedule? b) for the management and control of the business of the corporate debtor during its term? c) adequate means for supervising its implementation?		

38(3)	Whether the resolution plan demonstrates that  (a) it addresses the cause of default?  (b) it is feasible and viable?  (c) it has provisions for its effective implementation?  (d) it has provisions for approvals required and the timeline for the same?  (e) the resolution applicant has the capability to implement the resolution plan?		
39(2)	b) Whether the RP has filed applications in respect of transactions observed, found or determined by him?		
Regulation 39(4)	c) Provide details of performance security received, as referred to in sub-regulation (4A) of regulation 36B.]		

10. The CIRP has been conducted as per the timeline indicated as under:

Section of the Code / Regulation No.	Description of Activity	Latest Timeline under regulation 40A	Actual Date
Section 16(1)	Commencement of CIRP and Appointment of IRP	T	T
Regulation 6(1)	Publication of Public Announcement	T+3	
Section 15(1)(c) /Regulation 12 (1)	Submission of Claims	T+14	

Regulation 13(1)	Verification of Claims	T+21	
Section 26(6A) / Regulation 15A	Application for Appointment of Authorised Representative, if necessary	T+23	
Regulation 17(1)	Filing of Report Certifying Constitution of CoC	T+23	
Section 22(1) and regulation 17(2)	First Meeting of the CoC	T+30	
Regulation 35A	Determination of fraudulent and other transactions	T+115	
Regulation 27	Appointment of two Registered Valuers	T+47	
Regulation 36 (1)	Submission of Information Memorandum to CoC	T+54]	
Regulation 36A	Invitation of EoI	T+75	
	Publication of Form G	T+75	
	Provisional List of Resolution Applicants	T+100	
	Final List of Resolution Applicants	T+115	
Regulation 36B	Issue of Request for Resolution Plan, which includes Evaluation Matrix and Information Memorandum to Resolution Applicants	T+105	
Section 30(6) / Regulation 39(4)	Submission of CoC approved Resolution Plan	T+165	

Section 31(1)	Approval of Resolution Plan	T=180	
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11. The time frame proposed for obtaining relevant approvals is as under:

Sl. No.	Nature of Approval	Name of applicable Law	Name of Authority who will grant Approval	When to be obtained

12. The Resolution Plan is not subject to any contingency.

or

The Resolution Plan is subject to the following contingencies (Elaborate the contingencies):

i.....

ii.....

13. Following are the deviations / non-compliances of the provisions of the Insolvency and Bankruptcy Code, 2016, regulations made or circulars issued thereunder (If any deviation/ non-compliances were observed, please state the details and reasons for the same):

Sl. No.	Deviation/Non-compliance observed	Section of the Code / Regulation No. / Circular No.	Reasons	Whether rectified or not
1				
2				
3				

14. The Resolution Plan is being filed ..... days before the expiry of the period of CIRP provided in section 12 of the Code.

14A. Whether the resolution professional has, in accordance with regulation 35A,-

a. applied to the Adjudicating Authority on or before the one hundred and thirty-fifth day of the insolvency commencement

date:

Yes / No

b. filed Form CIRP 8 with the Board on or before the one hundred and fortieth day of the insolvency commencement

date:

Yes / No

15. Provide details of section 66 or avoidance application filed / pending.

Sl. No.	Type of Transaction	Date of Filing with Adjudicating Authority	Date of Order of the Adjudicating Authority	Brief of the Order
1.	Preferential transactions under section 43			
2.	Undervalued transactions under section 45			
3.	Extortionate credit transactions under section 50			
4.	Fraudulent transactions under section 66			

15A. The committee has approved a plan providing for contribution under regulation 39B as under:

1. *Estimated liquidation cost:* Rs.....
2. *Estimated liquid assets available:* Rs.....
3. *Contributions required to be made:* Rs.....
4. *Financial creditor wise contribution is as under:*

Sl. No.	Name of financial creditor	Amount to be contributed (Rs.)
1		
2		
..		
Total		

15B. The committee has recommended under regulation 39C as under:

- a. Sale of corporate debtor as a going concern: Yes / No
- b. Sale of business of corporate debtor as a going concern: Yes / No

The details of recommendation are available with the resolution professional.

15C. The committee has fixed, in consultation with the resolution professional, the fee payable to the liquidator during the liquidation period under regulation 39D.]

16. I (Name of Resolution Professional) hereby certify that the contents of this certificate are true and correct to the best of my knowledge and belief, and nothing material has been concealed therefrom.

(Signature)

Name of the Resolution Professional:

IP Registration No.:

Address as registered with the Board:

 *Email id as registered with the Board:*

*Date:*

*Place:*

## **Regulatory developments in Insolvency and bankruptcy law in 2022**

IBC has undergone numerous changes in a relatively short period of time. The Code did not change in 2022, but practically every rule was altered. The majority of the changes attempted to shorten the timescales. A few further revisions clarified the law and filled in any remaining gaps.

The most significant changes to the 2016 IBBI (Insolvency Resolution Process For Corporate Persons) Regulations In Notifications dated 9 February 2022, 14 June 2022, 13 September 2022, 16 September 2022, and 20 September 2022, IBBI made a number of amendments to the IRPCP Regulations. The majority of the revisions were aimed at speeding up the resolution of corporate insolvency cases, clarifying ambiguities, and simplifying IPs to increase value and realisation for stakeholders.

If no resolution plan for CD is received within the specified timeframe, Resolution Professionals have been given the authority to invite EOI for resolution plans for one or more CD assets with the agreement of CoC. The resolution plan must also outline how avoidance transactions will be applied and, if any, how any proceeds would be distributed. Timelines for some CIRP initiatives have been shortened.

Additionally, the regulations now provide for the Board to be paid a regulatory charge at the rate of 0.25 percent of the realisable value under the authorised resolution plan starting on October 1, 2022, which will be included in the cost of the CIRP.

**IBBI (Liquidation Process) Regulations, 2016: Significant Changes** A number of amendments to the Liquidation Regulations have been made by IBBI via notifications dated 28 April 2022 and 16 September 2022. The following are some of the significant adjustments made in 2022. Based on their voting share of the total acknowledged claim, SCC has been rebuilt to enable involvement from a larger variety of stakeholders.

While the SCC's role is still advisory, it has been expanded to include advice regarding the liquidator's fee, conducting valuations, and how to proceed with avoidance transaction actions after the corporate debtor has been dissolved.

Additionally, the legislation also requires the liquidator to document the basis for the deviation and file it with the NCLT and IBBI if the liquidator makes a decision that is against the advice of the SCC.

Some changes are made with the goal of saving time; for example, liquidators are now only allowed to try going-concern sales during the first auction. The subsequent auctions shall be held for the remaining modes permitted under regulation 32, however GCS may also be one of the alternatives, if the liquidator is unable to sell the corporate debtor as a continuing concern in the first auction. The regulations have tightened deadlines for a number of sub-processes. The regulator also provided much-needed clarity about how avoidance transaction proceedings should be handled after the CD has been dissolved and the liquidation process has been completed.

The SCC will now decide how to proceed with these actions, and the liquidator will incorporate that decision in the final report and application. This would make it easier to conclude liquidation procedures, which the adjudicating authorities in certain circumstances refused to do since avoidance proceedings were still pending. 2017 IBBI (Voluntary Liquidation) Regulations Overview of Changes Regulations for VL have been changed as of Notification from September 16, 2022, stating that enterprises with no creditors may complete voluntary liquidations within 90 days. In addition, the regulations now call for the liquidator to include a compliance certificate with information about compliances with the established timetables and the justification for any deviations from them, if any.

The majority of the corporate person's directors are also required by the regulation to make plans for the preservation of the corporate person's records after dissolution and to make a declaration in this regard prior to the start of the liquidation process, or at the time of providing a declaration of solvency. Important updates to the 2017 IBBI (Insolvency Professional) Regulations Three

amendment notifications were released this year, but they mostly served to consolidate earlier circulars on the same topics, such as the one requiring IPs to reimburse me for losses and fines I incurred due to my failure to comply with any laws applicable to corporate persons while carrying out processes under the IBC.

Humbly speaking, this year also saw a few judicial decisions that were unexpected since they went against accepted wisdom. For instance, the Supreme Court held in State Tax Officer v. Rainbow Papers Limited that the State is a "secured creditor" under the definition in the IBC because of the "security interest" created in its favour under GVAT. As a result, the State's debts should be treated equally with those owed to workers under the provisions of section 53(1)(b)(ii).

Additionally, the Hon'ble SC ruled in Vidarbha Industries Power Limited v. Axis Bank Limited that the provisions of section 7 (5) (a) of the IBC are of a discretionary nature. As a result, a corporate debtor cannot be subject to insolvency procedures just because they are now unable to satisfy their financial obligations. The Hon'ble SC ruled in Sunil Kumar Jain and others vs. Sudarshan Bhatt and others that salaries and wages due to employees for the CIRP period should only be included in the costs of the CIRP if it can be demonstrated that the corporate debtor was a going concern during the CIRP period and that the workers or employees requesting payment for the CIRP period actually put in time working during the CIRP while the CD was a going concern.

In contrast, the Hon'ble SC thoroughly reviewed the law on promises and explained the rights of the parties in the context of pledges created on dematerialized shares in PTC India Financial Services Limited vs. Venkateswarlu Kari and others. The court's decisions seem to be the final word, but it will be interesting to see how the law develops. The goal of the revisions may also be to alleviate the delays in IBC processes, however it's crucial to recognise that one of the main negatives of IBC is a delay in the adjudication process. The NCLT Benches are overworked with routine, non-adjudicatory proceedings, vexatious litigation without fear of penalties or fees, etc.

Therefore, rather than reducing the duration of the CIRP and Liquidation process, reforms are required to free up the NCLTs and allow the Benches to concentrate on Core matters by preventing the presentation of non-adjudicative matters to the Benches.

## **Rules Regarding IBC as given by IBBI**

### **Insolvency and Bankruptcy (Application to Adjudicating Authority) Amendment Rules, 2019, 14th March, 2019**

The Central Government notified rules in exercise of the powers conferred by clauses (c), (d), (e) and (f) of sub-section (1) of section 239 read with sections 7, 8, 9 and 10 of the Insolvency and Bankruptcy Code, 2016, as amended by the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016.

Rules be called the Insolvency and Bankruptcy (Application to Adjudicating Authority) Amendment Rules, 2019 and shall come into force on the date of their publication in the Official Gazette. It provides the format of forms for application by financial creditors/ operational creditors to initiate a corporate insolvency resolution process and for application by corporate applicant to initiate a corporate insolvency resolution process.

### **The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 19th March, 2019**

**Application.**—These Rules shall apply to matters relating to the corporate insolvency resolution process

In order to start the corporate insolvency resolution process against the corporate debtor under **Section 7** of the Code, a financial creditor must submit an application in **Form 1** along with the necessary documents and other items as specified in the Code.

A demand notice under **Forms 3 and 4** must be delivered to the corporate debtor for the operational creditor.

Additionally, a corporate applicant must submit an application against the corporate debtor pursuant to **Section 10 of the Code in Form 6** with the required papers as specified in the Code and a copy to the adjudicating body.

Before being admitted for the same, the adjudicating body should accept any withdrawals from applicants.

If the applicant ever feels the need to appoint an interim resolution professional, they must request a written message in **FORM 2** from the insolvency professional, together with a certificate attesting to the proposed insolvency professional's eligibility.

The application should be filled out according to the **NCLT rules 2016** together with the necessary fee, and any additional papers should be sent electronically unless otherwise specified to the adjudicating body.

**Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019, 15th November, 2019**

## **ADJUDICATING AUTHORITY FOR INDIVIDUALS & PARTNERSHIP FIRMS**



1. The Central Government hereby promulgates the following rules in accordance with the authority granted by sub-section (1), clauses (g), (h), I (m), (n), and (o) of sub-section (2) of section 239 read together with clause (e) of section 2 and sub-section (2), clauses (c)

and (e) of sub-section (14) and clause (e) of sub-section (15) of section 79 of the Insolvency and Bankruptcy Code,

2. These regulations, which will apply to the insolvency process of personal guarantors to corporate debtors, may be known as the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019.
3. The individual who is a personal guarantor to a corporate debtor and whose guarantee has been invoked by the creditor and is still owed money in full or in part is referred to as the guarantor in this context;
4. The application by the guarantor, which must be submitted in FORM A with the application free of charge in addition, is discussed in Rule 6 of this notification. Every financial creditor and the corporate debtor for whom the guarantor is a personal guarantor must immediately receive a copy of the application referred to in sub-rule (1) from the guarantor.
5. The creditor must submit an application in accordance with rule 7 of this notification, which mandates that a demand notice under section (b) of subsection (4) of section 95 must be served on the guarantor and demand payment of the defaulted amount in Form B. Additionally, the application under subsection 1 of section 95 must be submitted in Form C and be accompanied by a fee of two thousand rupees. The creditor must also serve the guarantor with a copy of the application
6. In the event of a joint application, the creditors may choose one of them to represent the creditors.
7. Additionally, in order to nominate an insolvency professional, the board may periodically share the insolvency professional's database, which includes details about any disciplinary actions taken against them, with the adjudicating authority pursuant to subsection (2) of section 97 and subsection (5) of section 98. For the purposes of

subsections (4) of section 97 and subsection (3) of section 98, the Board may collaborate with the adjudicating authority through a panel of insolvency specialists who may be appointed as resolution professionals.

8. A copy of the application must be given to the resolution professional within three days of his appointment under section 97's subsection (5), and it must also be given to the board for its records.
9. It outlines the application and document filing procedures for Rules 6 and 7, and it discusses how the adjudicating body will handle them.
10. The notification specifies the terms for withdrawing an application made in accordance with Rule 6 or 7.

#### **The Insolvency and Bankruptcy (Application to Adjudicating Authority for Bankruptcy Process for Personal Guarantors to Corporate Debtors) Rules, 2019, 15th November, 2019**

Application: These rules apply to matters relating to bankruptcy of personal guarantors to corporate debtors.

Date of coming into force: 1<sup>st</sup> December 2019

These rules were notified with the objective of notifying the applicability of the IBC to personal guarantor to corporate debtors and laying down the due process to be followed for applying to the adjudicating authority for initiating bankruptcy process for personal guarantors to corporate debtors. The Ministry of Corporate Affairs brought into force the provisions of insolvency of personal guarantors of the corporate debtor vide this notification. This move by the Central Government came to the detriment of many promoters and directors who had provided personal guarantees for credit facilities availed by their companies. And thus, under this notification banks

and FIs served notices to businessmen & promoters who had given personal guarantee for the debts of their companies.

Further, the notification lays down rules regarding:

1. Application to initiate bankruptcy of an individual or partnership firm which should be submitted in Form-A by debtor/guarantor and in Form-B by creditor
2. Formats of public notice, which should be in Form-C and notice to creditors in Form-D
3. Intimation of bankruptcy process to any commercial or financial transaction of value of INR 1 (one) Lakh and above by the individual/partnership-firm undergoing bankruptcy

**Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019, 15th November, 2019**

In exercise of the powers conferred under section 227 read with clause (zk) of sub-section (2) of section 239 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Central Government can make certain rules. By this notification the MoC has brought these rules; called the Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019.

The main purpose of bringing the notification is to make rules for the financial service providers and categories of such financial service providers which by virtue of section 227 are notified by the central government; and to undertake the insolvency and liquidation proceedings of such financial service providers from time to time.

By way of general changes and modifications by this notification for the sole purpose of these rules; corporate debtor is equated to financial service provider wherever the term corporate debtor is mentioned in the code and RP, IRP and IP are referred as administrator.

The notification by its rules have made the clarifications regarding the Corporate Insolvency Resolution Process for the Financial Service Providers and states that the Corporate Insolvency

Resolution Process for corporate debtors is applied to the financial service providers with certain changes as mentioned under the rules of this notification. Further the provisions and procedure regarding the Liquidation Process and Voluntary Liquidation Process of the Financial service providers are mentioned in the rules; with certain changes in both the procedures. The Liquidation Process and Voluntary Liquidation Process for Financial Service Providers will be the same as that of Corporate Debtor under the IBC, 2016.

### **The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, 24th September, 2020**

The Central Government hereby makes certain rules in exercise of the powers granted by clauses (c), (d), (e), and (f) of sub-section (1) of Section 239, in conjunction with Sections 7, 8, 9, and 10 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016). The rules made by the central government here referred as The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 are another name for these regulations.

The main aim of these rules are to govern the matters related to the Corporate Insolvency Resolution Procedure. Additionally, the rules state that a corporate debtor may initiate a CIRP on its own. Further, The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules of 2016 were written to outline the specific steps that must be taken when a financial creditor files an application to start the CIRP. The required forms for such an application and the method for filing a demand notice by operational creditors with the corporate debtor are also outlined in these Rules. Furthermore, application by the corporate applicant is also mentioned under these rules i.e. in order to begin the corporate insolvency resolution process against a corporate debtor, a corporate applicant must submit an application.

### **Insolvency and Bankruptcy (Application to Adjudicating Authority) (Amendment) Rules, 2020, 24th September, 2020**

The Central Government notified rules in exercise of the powers conferred by clauses (c), (d), (e) and (f) of sub-section (2) of section 239 read with sections 7, 8, 9 and 10 of the Insolvency and

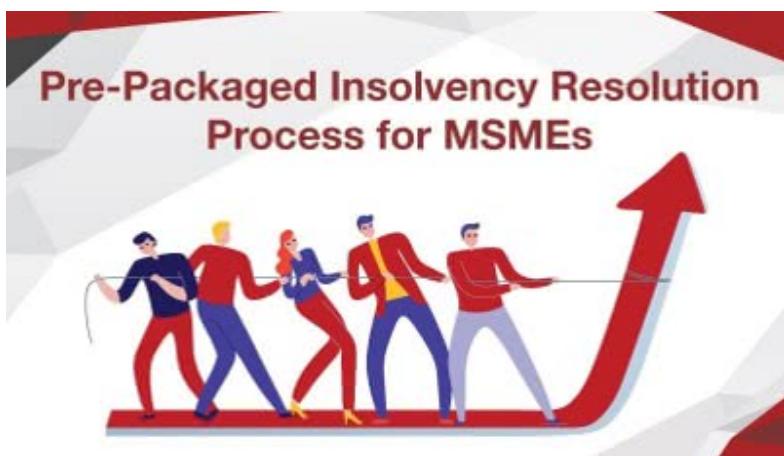
Bankruptcy Code, 2016, as amended by the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016.

Rules be called the Insolvency and Bankruptcy (Application to Adjudicating Authority) (Amendment) Rules, 2020 and shall come into force on the date of their publication in the Official Gazette. It substitutes the rule 4, sub-rule (3), rule 6 sub-rule (2) and rule 7, sub-rule (2) in the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. It gives instructions for the Form 1, Form 2, Form 5, Form 5A and Form 6.

### **Insolvency and Bankruptcy (pre-packaged insolvency resolution process) Rules, 2021, 9th April, 2021**

The Central Government notified rules related to powers conferred by sub-section (1) and clause (fd) of sub-section (2) of section 239 read with sub-section (2) of section 54C of the Insolvency and Bankruptcy Code, 2016, as amended by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021.

Rules be called Insolvency and Bankruptcy (pre-packaged insolvency resolution process) Rules, 2021 and shall come into force on the date of their publication in the Official Gazette. It will apply to the matters of pre-packaged insolvency resolution processes.



In these rules; “Code” means the Insolvency and Bankruptcy Code, 2016 (31 of 2016). “pre-packaged insolvency resolution process” means the insolvency resolution process for corporate persons under Chapter III-A of Part II of the Code; “Form” means a Form appended to these rules; and “identification number” means the limited liability partnership

identification number or the corporate identity number, as the case may be, of the corporate person. It gives the process for filing of the application to initiate pre-packaged insolvency resolution process and notifies the format of forms, affidavit and gives instructions to attach mentioned things with the application.

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