AN ANALYSIS OF CORPORATE INSOLVENCY RESOLUTION PROCESS: INTERPRETING PRACTICAL ISSUES AND CONCERNS

DISSERTATION SUBMITTED TO:

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LLM/929/2020

CERTIFICATE

This is to certify that this dissertation titled 'An Analysis of Corporate Insolvency Resolution Process: Interpreting Practical Issues and Concerns' submitted by Ms. Ayushi Jain (LLM/929/2020) in partial fulfillment of the requirements of LL.M. Degree for the academic session (2020-21) at National Law School of India University, Bengaluru, is a bonafide research work carried out by her under my supervision and guidance.

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DECLARATION

I, the undersigned, solemnly declare that this dissertation titled 'An Analysis of Corporate Insolvency Resolution Process: Interpreting Practical Issues and Concerns' submitted to National Law School of India University, Bengaluru for LL.M. Degree (2020-21), is an original and bonafide work carried out by me under the guidance of my supervisor, Prof. (Dr.) O.V. Nandimath. In the event where the contributions of others are involved in this dissertation, every effort has been made to provide due credit to such work through the reference of literature and footnotes. The information and findings contained in this work are true to the best of my knowledge. This dissertation or any part thereof has not been submitted for the award of any degree, diploma, certificate, or fellowship. In addition, this work has not been sent for any form of publication.

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BUSINESS LAWS

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LIST OF ABBREVIATIONS

§	Section
&	And
AA	Adjudicating Authorities
AIR	All India Reporter
BOD	Board of Directors
CIRP	Corporate Insolvency Resolution Process
CoC	Committee of Creditors
IBBI	Insolvency and Bankruptcy Board of India
IBC	Insolvency and Bankruptcy Code
IP	Insolvency Professional
IRP	Interim Resolution Professional
IU	Information Utilities
Ltd.	Limited
NCLAT	National Company Law Appellate Tribunal
NCLT	National Company Law Tribunal
PIA	Provincial Insolvency Act

PITA	Presidency Towns Insolvency Act
Pvt.	Private
RBI	Reserve Bank of India
RP	Resolution Professional
SCC	Supreme Court Cases
SICA	Sick Industrial Companies (Special Provisions) Act
v.	Versus

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3. Anuj Jain Interim Resolution Professional for Jaypee Infratech Limited v. Axis Bank limited Etc., 2020 SCC OnLine SC 237.

4. Arcelor Mittal India Private Limited v. Satish Kumar Gupta and Others, (2019) 2 SCC 1.

5. B.k. Educational Services Private Limited v. Parag Gupta and Associates, (2019) 11 SCC 633.

6. Babulal Vardharji Gurjar v. Veer Gurjar Aluminium Industries Private Limited & Another, 2020 SCC OnLine SC 647.

7. Binani Industries Ltd v. Bank of Baroda & Another, 2018 SCC OnLine NCLAT 521.

8. Chharia Holdings v. Brys International, 2017 SCC OnLine NCLAT 365.

9. Commissioner of Customs, (Preventive) West Bengal v. Ram Swarup Industries Ltd. and Others, 2019 SCC OnLine NCLAT 371.

10. Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta, (2019) 8 SCC 531.

11. Deegee Cotsyn v. Pheonix ARC, 2019 SCC OnLine NCLAT 301.

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13. Innoventive Industries Ltd. v. ICICI Bank & Another, (2018) 1 SCC 407.

14. Ishwar Khandelwal v. Amrapali Infrastructure, 2017 SCC OnLine NCLT 79.

15. Jignesh Shah v. Union of India (2019) 10 SCC 750.

16. K. Kishan v. M/s. Vijay Nirman Company Pvt. Ltd., 2017 SCC OnLine SC 1665;

17. K. Sashidhar v. Indian Overseas Bank & Others, 2019 SCC OnLine SC 257.

18. Kalpraj Dharamshi & Anr. v. Kotak Investment Advisors Ltd. & Anr., 2021 SCC OnLine SC 204.

19. Karad Urban Cooperative Bank Ltd. v. Swwapnil Bhingardevay, (2020) 9 SCC 729.

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39. Vashdeo Bhojwani v. Abhyudaya Co-operative Bank, (2019) 9 SCC 158.

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41. Vineet Khosla v. Edelweiss, 2019 SCC OnLine NCLAT 487.

INTRODUCTION

The Insolvency and Bankruptcy Code, 2016 (IBC/Code) is a comprehensive code for the insolvency resolution process against all the entities, i.e., Corporate persons, individuals, partnerships, and associations. The Code came into force on December 1, 2016, to the extent of application relating to provisions of Insolvency and liquidations against corporate persons. It is enacted to bring transparency and continuity of business operation without damaging the financial liquidity.

The objective of the Code is to incorporate the laws relating to insolvency resolution and reorganization of corporate persons, partnerships, firms, and individuals in a time-bound manner.[1] It aims to maximize the value of assets off debtor, promote entrepreneurship, credit availability, and balance the interest of all stakeholders. IBC is a landmark economic reform that supports distressed businesses, addresses market imperfections, and reduces information asymmetries.

It provides a mechanism that enables corporate persons' Freedom to exit' by resolving the Insolvency in a time-bound manner.[2] It also provides for voluntary liquidation of companies. IBC is enacted by parliament to expedite the insolvency resolution process, improve investment activities, reduce red tape, attract new businesses, and improve India's ranking in ease of doing business.[3]

IBC is umbrella legislation that provides level playing fields for all the stakeholders interested in the outcome of the process.[4] Fundamental key features of IBC include time-bound mechanism, early detection of Insolvency, presence of institutional infrastructure, specialized adjudicatory authorities, moratorium protection or 'calm period' preventing the disposal of assets, and a comprehensive framework for revival, rehabilitation, and resolution or liquidation process.

ESTABLISHMENT OF ROBUST INFRASTRUCTURE

For time-bound completion of the insolvency resolution process, the Code has provided robust institutional infrastructure to support the insolvency ecosystem.[5] It will help in bringing efficiency, preventing unnecessary delays, and reducing transaction costs. Institutional infrastructure under IBC comprises of four pillars as given below:

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[1] VINOD KOTHARI & SIKHA BANSAL, LAW RELATING TO INSOLVENCY & BANKRUPTCY CODE, 2016 (1st ed., 2016).
[2] Understanding the IBC, Key Jurisprudence and Practical Consideration, A Handbook, www.ibbi.gov.in.
[3] Krati Rajoria, *Insolvency and Bankruptcy Code of India: The Past, the Present and the Future*, 2018 INT'L BUS. L.J. 61 (2018).
[4] Sati Mukund, *Insolvency and Bankruptcy Code, 2016 - Level Playing Field for All*, 11 INT'L. IN-HOUSE COUNSEL J. 1 (2018).
[5] Ameya Khandge & Arun Joshi, *India's Insolvency and Bankruptcy Code, 2016 – The Implementation*, 11 INSOLVENCY & RESTRUCTURING INT'L 25 (2017).

- The first pillar is **Insolvency Professionals**; they are responsible for conducting, managing, and overseeing, Corporate Insolvency Resolution Process or liquidation process for the corporate debtor. IPs need to obtain a license, as they are registered professionals regulated by professional insolvency agencies.

- The second pillar is **Information Utilities**; IUs are responsible for collecting, collating, authenticating, and disseminating financial information related to the corporate debtor. IUs are regulated and licensed information repositories that provide information during the Insolvency resolution or liquidation process. It removes information asymmetry by providing authenticated and reliable information of debts/defaults that helps in ascertaining the debtor's financial position.

- The third pillar is **Adjudicating Authorities**; AAs are specialized courts/tribunals that provide judicial oversight to insolvency resolution or liquidation and ensure that IBC and connected regulations are appropriately followed during processes. AAs comprises of National Company Law Tribunal, National Company Law Appellate Tribunal, and Supreme Court. No civil court has jurisdiction on any matter related to IBC, and no court apart from AAs can grant an injunction or pass any orders under the Code.[6]

- The fourth pillar is the **Insolvency and Bankruptcy Board of India**; IBBI is a principal regulatory body. It regulates professionals, professional agencies, information utilities, and other related entities. It has the power to make and enforce rules. The IBBI plays a significant role under IBC as a principal regulator of insolvency and liquidation process.[7]

HISTORICAL BACKGROUND

Before the enactment of the Code, Insolvency and Bankruptcy laws were fragmented into multiple legislations and were not uniform and coherent. In previous regime, creditor's rights were scattered, and numerous adjudicatory bodies were dealing with insolvency issues. There emerge routine delays in implementing those laws, and there was a lack of institutional infrastructure to deal with matters.

Such as, pre-independence legislation, i.e., the Presidency Towns Insolvency Act, 1909, and the Provincial Insolvency Act, 1920, governed insolvency of individuals, partnerships, and associations of individuals.[8] The Code, 2016, repealed both PTIA and PIA.

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[6] ADITYA SHIRALKAR, COMMENTARY ON THE INSOLVENCY AND BANKRUPTCY CODE, 2016 (1st ed., 2021).
[7] Understanding the IBC, Key Jurisprudence and Practical Consideration, A Handbook, www.ibbi.gov.in.
[8] Abhishek Saxena & Akshay Sachthey, *The Insolvency and Bankruptcy Code, 2016 - A Fresh Start for India's Insolvency Regime*, [10] INSOLVENCY & RESTRUCTURING INT'L 22 (2016).

Likewise, the Companies Act, 1956, dealt with winding up or liquidation of companies. Act does not have any provisions for attempting rehabilitation process for companies that cannot pay their Debt. The winding-up of a company is triggered on default in payment of Debt followed by the liquidation process.

After enactment of the IBC, winding up on default or voluntary winding up are not allowed to be initiated under the Companies Act, 1956/ Companies Act, 2013. Nevertheless, involuntary winding-up proceedings relating to non-insolvency matters shall fall under the Companies Act, 2013.

The voluntary rehabilitation process of sick companies in the previous insolvency scheme covered under Sick Industrial Companies (Special Provisions) Act, 1985.[9] The Board for Industrial and Financial Reconstruction rehabilitates and revives sick industrial companies. The Sick Industrial Companies (Special Provisions) Repeal Act, 2003, came into force on December 1, 2016, repealing Board and SICA 1985.

Enactment of IBC also affected enforcement and recovery mechanism provided under debt recovery laws, i.e., the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.[10] These laws are not repealed after the enactment of the Code.

Nevertheless, their application is restricted due to the overriding effect of IBC over other statutes. IBC has an overriding effect over all other statutes or laws in force for matters relating to insolvency and bankruptcy proceedings and wherever inconsistency arises between different acts or proceedings and IBC, IBC will prevail.[11] Other proceedings include DRT Proceedings,[12] SARFAESI Act,[13] Civil Disputes,[14] Criminal Cases,[15] etc.

STATEMENT OF PROBLEM

A robust insolvency regime aims to serve two objectives, i.e., it assists in preserving viable businesses, and it paves the way for the exit of irresolvable defaulting companies. IBC has been modeled to create an effective rescue mechanism that helps defaulting corporate persons get back on their feet.

However, after the enactment of the Code, practical difficulties arise in implementing the Corporate Insolvency Resolution Process. The Central Government enforced the Code in a phased manner;

[9] *Id.*
[10] *Id.*
[11] ADITYA SHIRALKAR, COMMENTARY ON THE INSOLVENCY AND BANKRUPTCY CODE, 2016 (1st ed., 2021).
[12] Vineet Khosla v. Edelweiss, 2019 SCC OnLine NCLAT 487.
[13] Deegee Cotsyn v. Pheonix ARC, 2019 SCC OnLine NCLAT 301.
[14] Karan Goel v. Pashupati Jewellers, 2019 SCC OnLine NCLAT 934; see also, Steamline Industries v. Tecpro Systems, 2017 SCC OnLine NCLAT 460.
[15] Neeraj Jain v. Yes Bank, 2019 SCC OnLine NCLAT 175.

nevertheless, numerous litigation challenges have grappled the adjudicatory authorities. Adjudicatory bodies are providing comprehensive interpretation and clarification to the operational structure of the Code. Nevertheless, various concerns still require lawmaker's attention. There are certain legal infirmities or gaps in corporate insolvency provisions that required suitable amendments.

IMPORTANCE OF STUDY

IBC provides robust and effective recovery mechanism against defaulting corporate debtors. Even though, after four years of its enforcement, Code has been amended numerous times remedying practical challenges emerging out of its implementation. Judicial authorities are interpreting it liberally to encourage the fulfillment of its goals.

To support an uninterrupted CIRP, there is a need to identify further gaps or challenges that are causing problems in its effective implementation. It is imperative to discover structural issues that arise during CIRP or before its initiation. It is desirable to study the areas that require reforms. IBC is new economic legislation that cannot foresee future difficulties or unpredictable circumstances, therefore, this study will identify the relevant areas of concern under the code that can assist legislative authorities and policymakers to make suitable amendments in the law.

AIMS AND OBJECTIVES

This research aims to discover existing legal lacunas that prevent stakeholders from effectively carrying out CIRP. The following are the objectives of the research project:

- It attempts to identify existing provisions that are causing hindrance in implementation of CIRP provisions and do not support the goals of the Code.
- To analyze practical issues that arises during the corporate insolvency process that affects the corporate person's interests.
- It seeks to analyze whether a homogenous default amount to initiate CIRP is appropriate.
- It attempts to analyze whether a level playing field is available to all the stakeholders during CIRP.
- It examines the role of adjudicatory authorities during CIRP.

HYPOTHESIS

The Code aims to protect the interest of the corporate person and provide level playing field to all the connected or interested stakeholders during corporate insolvency resolution process. An analysis of the Code reflects that various concerns and practical challenges appear during practical implementation of CIRP. Due to these gaps in the existing scheme of CIRP, it is difficult to accomplish the abovementioned goal in a true sense.

RESEARCH QUESTIONS

Based on the above hypothesis, the researcher has framed the following research questions for this project:

- What is the scheme of the Corporate Insolvency Resolution Process under the IBC, 2016?
- Whether homogenous default amount to initiate the CIRP against the corporate debtor in the Code is undesirable?
- Whether the Code creates arbitrary and unreasonable discrimination between financial Creditor and Operational Creditor?
- Whether the role of the Board of directors of the corporate debtor is eliminated during CIRP? Whether their participation during CIRP could preserve the corporate person?
- What is the role of adjudicating authorities during the CIRP? How much interference of the courts is allowed during the CIRP proceedings?

RESEARCH METHODOLOGY

The researcher has used an analytical research method in this project to find solutions to research problems. The researcher has analyzed the database of cases, legal provisions, policy decisions, and amendments collected based on framed research questions.

In addition, the Doctrinal method has been adopted to study substantive laws and to understand legal concepts applied to stated issues. The researcher has used the qualitative approach to contribute observations and to draw interpretations from the analyzed data.

SCOPE AND LIMITATIONS OF THE STUDY

The study in this project is limited to CIRP and does not extend to other provisions of the code. The research project analyses the problems and challenges that arise during insolvency proceedings against corporate persons. This study will exclude issues that do not relate to the insolvency of the corporate debtor and the matters falling under other insolvency legislations.

This project does not include any case study falling under the previous regime of insolvency laws. In preparing the database of authorities, the researcher has used admitted and decided cases of Supreme Court, NCLAT, and NCLT from the year 2017 to 2021. The researcher has obtained information from amendments made by parliament, committee reports, Central government policies relating to IBC, details, and regulations published by IBBI.

MODE OF CITATION

The researcher has used the Bluebook (20th Ed.) - A Uniform System of Citation in this project. The format of citation is uniform throughout the research project.

LITERATURE REVIEW

- The article, ***Insolvency Resolution Plans: Right of Erstwhile Management Corporate Debtor***,[16] authored by Jasper Vikas George, analyzes the implications of the resolution plan, its importance in the insolvency resolution process, the law relating to resolution plans and pointed out anomalies around the approval of resolution plans. The author has discussed the role of the suspended Board of directors, explored the non-participatory role of erstwhile management in CIRP and the associated problems. The author has pointed out critical issues that arise on suspension of the BOD, especially the issue of secrecy about resolution plans maintained by Resolution professionals from corporate debtor's management.

- The article, ***Insolvency and Bankruptcy Code of India: The Past, The Present, and The Future,***[17] authored by Krati Rajoria, provide a historical overview that led to the enactment of the Insolvency

[16] Jasper Vikas George, *Insolvency Resolution Plans: Right of Erstwhile Management, Corporate Debtor,* 6 J. NAT'L L. U. DELHI 39 (2019).
[17] Krati Rajoria, *Insolvency and Bankruptcy Code of India: The Past, the Present and the Future,* 2018 INT'L BUS. L.J. 61 (2018).

and Bankruptcy Code, 2016. The article provides details regarding the evolution of Insolvency and bankruptcy reforms in India, analyzed its impact and reasons for the enactment of the Code, and highlighted its main features. The article points out challenges that are arising in the proper implementation of the Code, discusses the nature of the moratorium, its relevance and analyzed the implications and effectiveness of IBC.

- The article, ***Insolvency and Bankruptcy Code, 2016- Level playing field for all***,[18] authored by Sati Mukund, provides an analysis of the insolvency resolution process against the corporate debtor. The author has explained the overriding effect of IBC over other acts and explored the aspect of a level playing field provided in the Code to all stakeholders who are involved or connected with the corporate debtor. The author has examined the role of creditors versus the role of promoters and pointed out practical issues creating problems in its implementation that need consideration.

- The article, ***India's Insolvency, and Bankruptcy Code, 2016 – The Implementation***,[19] co-authored by Ameya Khandge and Arun Joshi, provided factors that are integral to the performance of the Code. The author has highlighted fundamental principles of the Code along with challenges it is facing against successful implementation. The authors have explained the four pillars of institutional infrastructure and argued that adjudicating authorities should not indulge in excessive judicial intervention.

- The article, ***The Insolvency and Bankruptcy Code, 2016- a fresh start for India's insolvency regime***,[20] co-authored by Abhishek Saxena and Akshay Sachthey, provides an analysis of the existing insolvency regime in India, exploring its structure, issues, practical challenges and need for change. The authors have explained the adjudicatory framework and administrative institutions dealing with insolvency litigation and described the scheme of CIRP, including types of debts and creditors. In addition, it explains the shift of 'debtor in control' principle to the 'creditors in control' model.

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[18] Sati Mukund, *Insolvency and Bankruptcy Code, 2016 - Level Playing Field for All*, 11 INT'L. IN-HOUSE COUNSEL J. 1 (2018).
[19] Ameya Khandge & Arun Joshi, *India's Insolvency and Bankruptcy Code, 2016 – The Implementation*, 11 INSOLVENCY & RESTRUCTURING INT'L 25 (2017).
[20] Abhishek Saxena & Akshay Sachthey, *The Insolvency and Bankruptcy Code, 2016 - A Fresh Start for India's Insolvency Regime*, 10 INSOLVENCY & RESTRUCTURING INT'L 22 (2016).

- The article, ***Differential Treatment Among Creditors under India's Insolvency and Bankruptcy Code, 2016: Issues and Solutions***, co-authored by C. Scott Pryor and Risham Garg,[21] provides a data-identified examination of the implementation of India's Insolvency Code. The article has analyzed the differential treatment provided to different creditors and problem of vesting non-plenary control to the Committee of creditors as made of financial creditors, creating a perception of inequitable distribution of claims between different classes of creditors. Authors have examined provisions of IBC that are lacking standards of procedural fairness and suggested changes to revise existing regulations.

- The working paper, ***India's Sustained Economic Recovery Will Require Changes to Its Bankruptcy Law***,[22] authored by Anirudh Burman, analyzes India's Economic slowdown due to the Covid-19 lockdown and its impact on IBC matters. The author discussed policy measures adopted by the Indian government post lockdown and explored the reasons behind the suspension of IBC provisions. The working paper examines the issues of judicial delay, including a shortfall in the judicial capacity of tribunals in disposing of IBC matters. The author has discussed the lack of sufficient mechanism in the Code to allow debtors to retain control during insolvency proceedings and suggest creating a debtor-friendly IBC.

- The article, ***Corporate Insolvency: Its Operations and Emerging Problems***,[23] authored by Navin K. Pahwa, highlighted the challenges emerging in the implementation and application process of the IBC. The article explores various amendments made to the Code in due course and the development of judicial interpretations related to it. The author has discussed operational and practical problems emerging during the continuation of business operations, limitation period, etc. and has provided suggestions for appropriate modifications.

- The article, ***The Insolvency and Bankruptcy Code – Not a Brittle Framework***,[24] authored by Sourav Sardar, examines that intervention of the government in the Code's working structure. The author has discussed amendments relating to financial institutions, standing committee reports, and related legal

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[21] C. Scott Pryor & Risham Garg, *Differential Treatment among Creditors under India's Insolvency and Bankruptcy Code, 2016: Issues and Solutions*, 94 AM. BANKR. L.J. 123 (2020).

[22] Anirudh Burman, *India's Sustained Economic Recovery Will Require Changes to Its Bankruptcy Law*, C Arnegie Endowment for International Peace, (2021).

[23] Navin K. Pahwa, *Corporate Insolvency: Its Operations and Emerging Problems*, 30 NAT'L L. SCH. INDIA REV. 111 (2018).

[24] Sourav Sardar, *The Insolvency and Bankruptcy Code – Not a Brittle Framework*, ILJ (2020), indialawjournal.org/the-insolvency-and-bankruptcy-code.php.

challenges. The article has discussed steps taken by the government and judiciary to strengthen the Code, issues relating to the commercial wisdom of CoC, the importance of timelines, and the overriding effect of the Code.

- The article, ***IBC 2.0 in the Making: A Relook into the Insolvency Regime in India***,[25] co-authored by Sandeep Parekh and Sudarshana Basu, has highlighted the critical developments in the Code after its enactment. The author has discussed the importance given to CoC by the judiciary and has examined provisions differentiating between financial creditors and operational creditors in the Code. In addition, the author has explored areas such as the withdrawal of the corporate insolvency process and provided a roadmap for future reforms in the IBC.

[25] Sandeep Parekh & Sudarshana Basu, *IBC 2.0 in the Making: A Relook into the Insolvency Regime in India*, 45(2), The Journal for Decision Makers 115 (2020).

The Code does not provide for direct liquidation, except for a voluntary liquidation scheme, of the corporate person in case of failure of paying the Debt. A corporate person means[26] a company as defined under Section of 2(20) of the Companies Act, 2013; a limited liability partnership as defined under Section 2(1)(n) of the Limited Liability Partnership Act, 2008; or any other person incorporated with limited liability under any law.

The Code provides for insolvency resolution of the corporate debtor if Debt becomes due and payable, and corporate debtor made default in paying the same to the creditors. For IBC, corporate debtor means a corporate person who owes a debt to any person.[27] Every attempt is made to rehabilitate the corporate person before it goes into liquidation under IBC.

The Supreme Court upheld the constitutional validity of the Insolvency and Bankruptcy Code, 2016 in ***Swiss Ribbons Private Limited and another v. Union of India and Others***,[28] and observed that the paramount principle of the IBC is the reorganization of insolvency resolution of the corporate debtor in a time-bound manner.

NCLAT, in one of its judgments,[29] noticed a sacrosanct order in which the objectives fall. The first objective is Resolution, the second is the maximization of the value of assets of the corporate debtor, and the third includes promoting entrepreneurship, credit availability, balancing stakeholder's interests.

CORPORATE INSOLVENCY

A Company becomes insolvent when it makes default in payment or it is unable to pay its debts.[30] Corporate Insolvency Resolution Process (CIRP) is a process by which the Insolvency of the corporate debtor is resolved as per the provisions of the Insolvency and Bankruptcy Code, 2016.

An application can be made to the jurisdictional adjudicating authority to initiate CIRP. The consequence of such an attempt may get the corporate debtor resolved, or if CIRP fails, the corporate debtor goes into the liquidation process.

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[26] The Insolvency and Bankruptcy Code, 2016, § 3(7), No. 31, Acts of Parliament, 2016 [hereinafter IBC, 2016].
[27] IBC, 2016, *supra* note 26, § 3(8).
[28] Swiss Ribbons Private Limited and Another v. Union of India and Others, (2019) 4 SCC 17 [hereinafter Swiss Ribbons Case].
[29] Binani Industries Ltd v. Bank of Baroda & Another, 2018 SCC OnLine NCLAT 521.
[30] KRISTIN VAN ZWIETEN, GOODE ON THE PRINCIPLES OF CORPORATE INSOLVENCY LAW (5th ed., Sweet & Maxwell) (2018).

The Central Government and IBBI have issued rules, the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, and the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, respectively, for the conduct of CIRP.

WHO CAN INITIATE IT?

Financial Creditors, Operational Creditors, and the corporate debtor may initiate CIRP when a corporate person commits the default.[31] An insolvency application is restricted to a single corporate person.[32] For initiating CIRP, Default means non-payment of Debt when the whole, part, or instalment of the amount becomes due and payable, and the corporate debtor does not pay that.[33] Debt means a liability or obligation regarding a claim that is due from any person, including financial and operational Debt.[34]

The corporate insolvency resolution process shall commence from the date of admission of the application when the adjudicating authority is satisfied that default has occurred and admits the application to initiate CIRP.[35]

DEFAULT THRESHOLD

IBC requires Creditors to establish clear evidence of default to trigger the Insolvency Resolution Process.[36] The minimum amount of the default is one lakh rupees for triggering CIRP. However, the central government may notify the minimum amount of higher value that shall not be more than one crore rupee.[37] On March 24, 2020, the Central Government, Ministry of Corporate Affairs issued a notification while exercising powers under Section 4 of IBC, that has increased the minimum default amount to one crore rupees from one lakh.[38]

National Company Law Tribunal having territorial jurisdiction over the place where the registered office of the corporate person is located shall be the adjudicating authority for insolvency resolution of corporate persons, including corporate debtors and personal guarantors.[39]

[31] IBC, 2016, *supra* note 26, § 6.
[32] Ishwar Khandelwal v. Amrapali Infrastructure, 2017 SCC OnLine NCLT 79.
[33] IBC, 2016, *supra* note 26, § 3(12).
[34] IBC, 2016, *supra* note 26, § 3(11).
[35] IBC, 2016, *supra* note 26, § 7.
[36] Ministry of Finance, *The Report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design* (Nov 4, 2015).
[37] IBC, 2016, *supra* note 26, § 4.
[38] Ministry of Corporate Affairs, S.O. 1205(E), F. No. 30/9/2020- Insolvency, (Notified on March 24, 2020).
[39] IBC, 2016, *supra* note 26, § 60.

Financial Creditor for CIRP means any person to whom a financial debt is owed and includes a person to whom such financial Debt has been legally assigned or transferred.[40] Financial Debt means a debt along with the interest that is disbursed against the consideration for the time value of money.[41] It includes money borrowed against payment of interest, any amount raised by accepting credit facility, the amount raised in pursuance of issue of bonds, debentures, note purchase facility, loan stock, etc.

It includes amount raised during any transaction that has the commercial effect of borrowing. Homebuyers/ Allottees in real estate development projects are also financial Creditors because the amount raised from them under a real estate project has a commercial effect of a borrowing.[42] The Supreme Court also upheld the constitutional validity of the status of homebuyers as financial creditors.[43]

Initiation of CIRP by Financial Creditor

A financial creditor by itself, jointly with other financial Creditors, or by any other person on behalf of the financial Creditor may initiate the insolvency process by applying the adjudicating authority when default in payment of Debt has occurred.[44] Financial Creditors can be secured or unsecured for starting CIRP. A financial creditor can initiate CIRP under section 7(1) of the IBC for the default of financial Debt owed by the corporate debtor to any financial creditor. Debt doesn't need to be owed to the applicant (the financial Creditor).[45]

Financial Creditor shall submit the documents along with the application as per section 7(3) of the Code and rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 and shall furnish following along with the application, i.e., a record of the default recorded with the information utility, or other evidence of default as specified; the name of the Interim Resolution Professional and additional information as prescribed by IBBI.

After receiving the required information, adjudicating authorities ascertain the following requirements i.e., the existence of a default of debt payment from the record of IU and other evidence, application satisfying all the prescribed information and any disciplinary proceedings pending against the proposed IRP. AA shall

[40] IBC, 2016, *supra* note 26, § 5(7); see also, ASHISH MAKHIJA, INSOLVENCY AND BANKRUPTCY CODE OF INDIA (1st ed., 2018).
[41] IBC, 2016, *supra* note 26, § 5(8); see also, Anuj Jain Interim Resolution Professional for Jaypee Infratech Limited v. Axis Bank limited Etc., 2020 SCC OnLine SC 237.
[42] The Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, No. 26, Acts of Parliament, 2018.
[43] Pioneer Urban Land and Infrastructure Limited and Another v. Union of India & Others, (2019) 8 SCC 416.
[44] IBC, 2016, *supra* note 26, § 7; see also, ADITYA SHIRALKAR, COMMENTARY ON THE INSOLVENCY AND BANKRUPTCY CODE, 2016 (1st ed., 2021).
[45] Innoventive Industries Ltd. v. ICICI Bank & Another, (2018) 1 SCC 407.

accept or reject the CIRP application within 14 days of receiving it.[46] AA will allow the applicant to rectify the errors by giving notice of the incomplete application within seven days.

OPERATIONAL CREDITOR

Operational creditor means any person to whom an operational owed and includes a person to whom such Debt has been legally assigned or transferred.[47] An operational debt is a claim regarding goods and services, including workmen's dues,[48] employment dues, payment arising under any law including taxes,[49] payable to the central government, any state government, or any local authority.[50]

Initiation of CIRP by Operational Creditor

Operational Creditor may initiate CIRP under section 9 of the Code. However, before initiating CIRP, an operational Creditor must send a demand notice to the corporate debtor on the occurrence of default, demanding the unpaid amount involved in the default.[51]

A corporate debtor shall within ten days of receiving demand notice, bring to the attention of the operational debtor, the existence of any pre-existing dispute or suit or arbitration proceedings relating to the dispute, including the challenge to the arbitration award,[52] before the notice is received, or evidence that unpaid amount has been settled.

After the expiry of 10 days, if the corporate debtor fails to make a payment or does not provide notice of the pre-existing dispute, the operational Creditor can proceed with the insolvency application before adjudicating authority.

Operation creditor shall submit the documents along with the application as per section 9(3) of the Code and rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 and shall furnish the following documents, i.e., demand notice delivered to demand payment, an affidavit to the effect that no notice given by the corporate debtor relating to the existence of a dispute.

In addition, a copy of the certificate from the financial institutions confirms that no payment of unpaid Debt by corporate debtor to operational Creditors is available. The debtor provides a copy of any record from the information utility confirming no payment. However, furnishing a certificate from a financial institution

[46] IBC, 2016, *supra* note 26, § 7; see also, Rajinder Kapoor v. Anil Kumar, 2017 SCC OnLine NCLAT 263.
[47] IBC, 2016, *supra* note 26, § 5(20).
[48] Mazdoor Morcha v. Juggilal Kamlapat Jute Mills Co. Ltd., (2019) 11 SCC 332.
[49] RMS Employees Welfare Trust v. Anil Goel, 2019 SCC OnLine NCLAT 300.
[50] IBC, 2016, *supra* note 26, § 5(21).
[51] IBC, 2016, *supra* note 26, § 8.
[52] K. Kishan v. M/s. Vijay Nirman Company Pvt. Ltd., 2017 SCC OnLine SC 1665; see also Navin K. Pahwa, *Corporate Insolvency: Its Operations and Emerging Problems*, 30 NAT'L L. SCH. INDIA REV. 111 (2018).

maintaining the accounts of operational Creditors for proving default in debt payment is not a mandatory requirement for triggering a CIRP against a corporate debtor.[53]

After furnishing the prescribed information to AA, it shall either admit the application or reject it. If the following conditions are met, AA shall admit it, i.e., the application is complete, the demand notice has been delivered, and there is no payment of unpaid operational Debt, no notice of dispute has been received, or no record of dispute available in IU and if there is no pending disciplinary proceeding against the proposed IRP. AA will give the applicant the notice to rectify the incomplete application errors within seven days of receiving notice. If the previously mentioned conditions are not satisfied, then AA shall reject the application of an operational Creditor.[54]

CORPORATE APPLICANT

Corporate applicant means[55] a corporate debtor or a member or partner of the corporate debtor who is authorized to make an application for CIRP under the constitutional document of the corporate debtor or an individual who is in charge of managing the operations and resources of the corporate debtor, or a person who has the control and supervision over the financial affairs of the corporate debtor.

A Corporate applicant may initiate the CIRP by applying adjudicating authority if the corporate debtor commits a default.[56] A corporate debtor undergoing the CIRP can also apply for initiating CIRP against its own corporate debtors.[57] Adjudicating authority shall admit the application or reject it within 14 days of receiving the application.

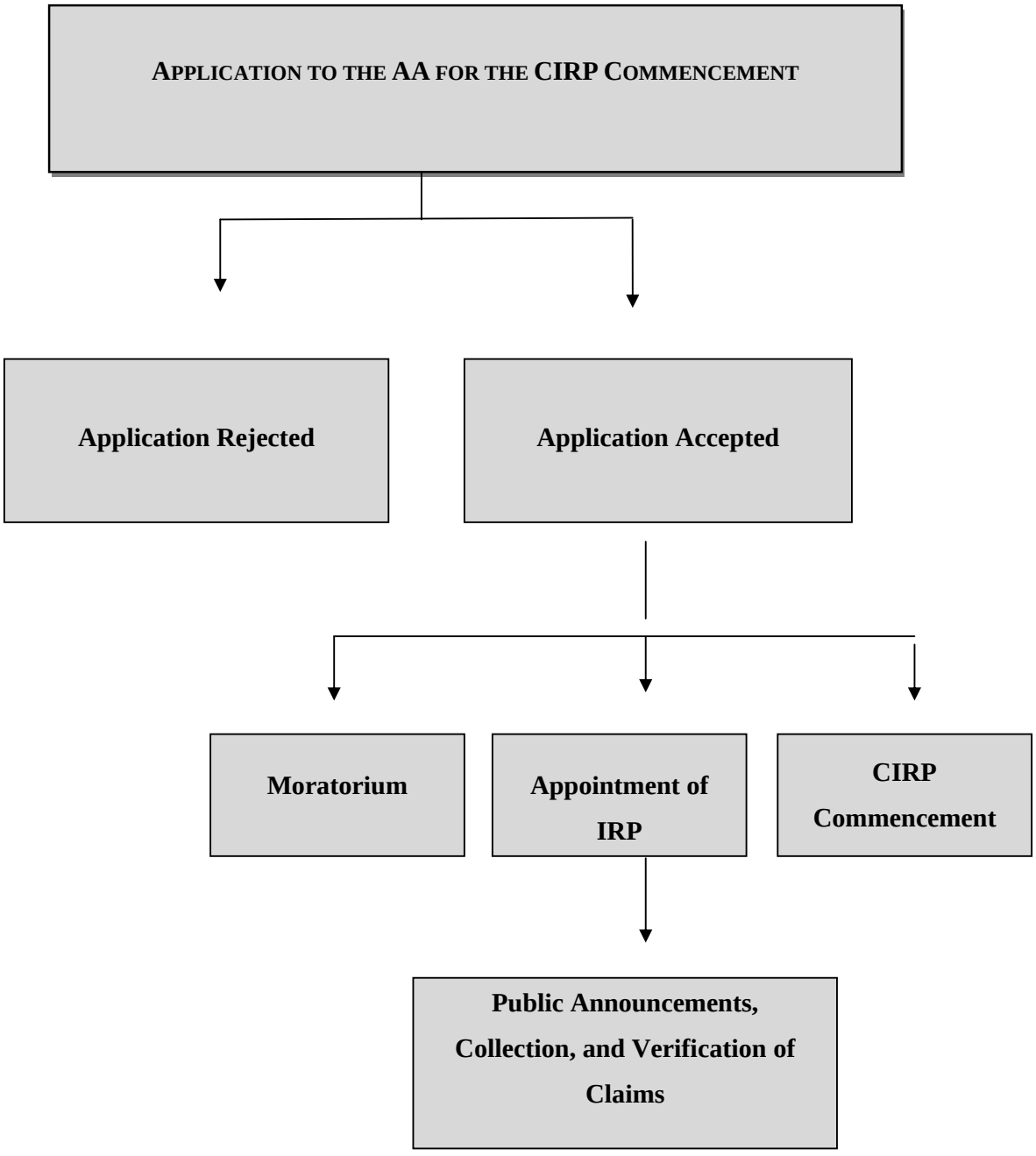
APPLICATION OF LIMITATION ACT

CIPR applications under sections 7, 9, or 10 cannot admit by adjudicating authorities for time-barred debts. Section 238-A provides for limitation, which says that the Limitation Act, 1963 shall apply to the proceedings or appeals before the adjudicating authorities, including NCLT and NCLAT.[58] Article 137 of the Limitation Act is relevant for the CIRP applications.[59] A CIRP application must be filed within three

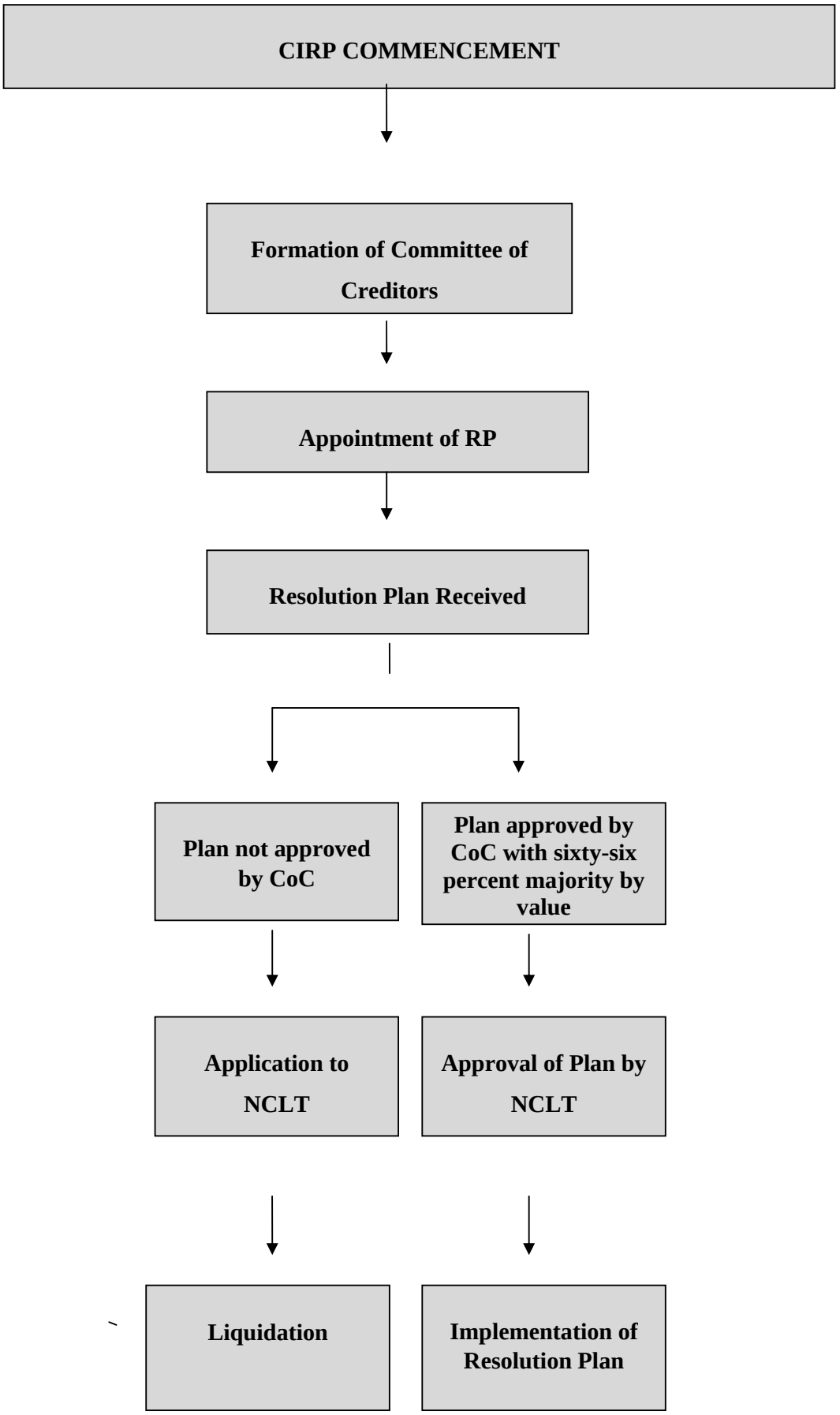
[53] Macquarie Bank Limited v. Shilpi Cable Technologies Ltd., (2018) 2 SCC 674.
[54] Mobilox Innovations Pvt. Ltd. v. Kirusa Software Pvt. Limited, (2018) 1 SCC 353.
[55] IBC, 2016, *supra* note 26, § 5(5).
[56] IBC, 2016, *supra* note 26, § 10.
[57] IBC, 2016, *supra* note 26, § 11.
[58] The Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, No. 26, Acts of Parliament, 2018.
[59] B.k. Educational Services Private Limited v. Parag Gupta and Associates, (2019) 11 SCC 633; see also, Vashdeo Bhojwani v. Abhyudaya Co-operative Bank, (2019) 9 SCC 158.

years after the right to sue accrues, and it accrues on the date when the default occurs.[60] If an application is filed after three years, Article 137 will bar it unless condoned under section 5 of the Limitation Act.[61]

FLOWCHART OF CORPORATE INSOLVENCY RESOLUTION PROCESS UNDER INSOLVENCY AND BANKRUPTCY CODE 2016



[60] Babulal Vardharji Gurjar v. Veer Gurjar Aluminium Industries Private Limited & Another, 2020 SCC OnLine SC 647.
[61] Jignesh Shah v. Union of India (2019) 10 SCC 750.


CIRP COMMENCEMENT
Formation of Committee of Creditors
Appointment of RP
Resolution Plan Received
Plan not approved by CoC
Plan approved by CoC with sixty-six percent majority by value
Application to NCLT
Approval of Plan by NCLT
Liquidation
Implementation of Resolution Plan

The AA's admission or rejection of CIRP applications shall be completed within 14 days of receiving the same. If it fails to do so within such time, it shall record its reasons in writing for not doing so. The Supreme Court held that 14 days period for admission/rejection is a directory provision, and it is not mandatory.[62] Financial Creditor or operational Creditor may withdraw the application of CIRP before its admission by the AA. Once the application is admitted, it cannot be withdrawn except following section 12A of the Code.

TIMINGS	Tasks to be Performed
180 Days	CIRP process commenced from the date the AA admits the application. The CIRP shall be completed within one hundred and eighty days from the date of admission of the application to initiate such a process.[63]
90 Days	An application shall be filed to the adjudicating authority by the Resolution Professional (RP) for the extension of the time of the CIRP beyond 180 days if the instruction is provided by passing a resolution at a meeting of the Committee of creditors by a vote of sixty-six percent of the voting shares. AA, receiving an application for extension, may extend the duration for such a further period not exceeding 90 days. This extension shall not be granted more than once.

[62] Surendra Trading Company v. Juggilal Kampat Jute Mills Company Ltd. and Others, (2017) 16 SCC 143.
[63] IBC, 2016, *supra* note 26, § 12.

60 Days	CIRP shall mandatorily be completed within 330 days from the commencement date of Insolvency.[64] This period shall include the extension period granted by the court and time taken in legal proceedings relating to CIRP. It means that to complete the CIRP grants, only 60 days left after the extension.
330 Days	The period for completing CIRP under the Code is 330 days. The general rule is 330 days, it must be followed, and only in exceptional cases, the court can extend such time.[65] This model timeline must be closely followed by all the authorities concerned in the CIRP.[66]

[64] The Insolvency and Bankruptcy Code (Amendment) Act, 2019, No. 26, Acts of Parliament, 2019.
[65] Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta, (2019) 8 SCC 531 [hereinafter Essar Steel Case].
[66] Arcelor Mittal India Private Limited v. Satish Kumar Gupta and Others, (2019) 2 SCC 1.

'CREDITOR IN CONTROL' MODEL

IBC has shifted the power to control the corporate person from the debtor to Creditor, i.e., 'debtor in possession' to 'creditor in control.'[67] From the date of commencement of CIRP, the powers vested in the BOD or partners of corporate debtor or management control shall stand suspended, and Resolution Professional exercises such powers (until his appointment, exercised by Interim Resolution Professional). Resolution Professional exercises such power till the completion of CIRP.

MORATORIUM - 'CALM PERIOD'

The adjudicating authority shall declare a moratorium by an order prohibiting specific prescribed actions against the corporate debtor and its assets on the insolvency commencement date.[68] During the moratorium period, protection is provided to the corporate debtor by keeping all the suits, legal actions, recovery proceedings against the corporate debtor in suspension mode and once moratorium is imposed, any proceedings initiated against the corporate debtor are non-est in law (means do not exist).[69]

The purpose was to preserve the status quo and not to create a new right relating to the corporate debtor.[70] It preserves the debtor's assets for the creditors and helps in maximization of the value of assets of the corporate debtor. The moratorium remains in effect for the entire duration of CIRP. Nevertheless, the moratorium order is not applicable on the following matters.

- Firstly, the moratorium shall not suspend/terminate/ interrupt the supply of essential goods and services to the corporate debtor. It includes the supply of electricity, water, telecommunication services, information technology services, etc. However, this situation can only prevail if the corporate debtor pays dues for the supply of goods or services during the moratorium.[71]

- Secondly, the moratorium shall not be applicable on transactions, agreements, or other arrangements as notified by the central government consulting with authorities, including the financial sector.

- Thirdly, to a surety to the corporate debtor in a contract of guarantee.

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[67] M S Sahoo, *Here's How IBC 2016 Has Taken Corporate Governance to New Heights*, Financial Express, Feb. 30, 2020, www.financialexpress.com/opinion/heres-how-ibc-2016-has-taken-corporate-governance-to-new-heights/1866199/.
[68] IBC, 2016, *supra* note 26, § 14.
[69] Alchemist Asset Reconstruction Company Limited v. Hotel Gaudavan Private Limited, (2018) 16 SCC 94.
[70] M/s Embassy Property Developments Pvt. Ltd. v. State of Karnataka and Others, 2019 SCC OnLine SC 1542.
[71] The Insolvency and Bankruptcy Code (Amendment) Act, 2020, No. 1, Acts of Parliament, 2020.

The moratorium shall cease to have effect from the date when the adjudicating authority approves the resolution plan or when it passes an order for liquidation of the corporate debtor.[72]

RESOLUTION PROFESSIONAL /INTERIM RESOLUTION PROFESSIONAL

Adjudicating authority on the commencement date of Insolvency shall appoint the Interim Resolution Professional as proposed in the CIRP application.[73] Committee of Creditors appoint the IRP as Resolution Professional or replace the IRP with another RP by a majority vote of not less than sixty-six percent.

POWERS, FUNCTIONS, AND DUTIES

Interim Resolution professionals, as well as Resolution professionals, are given administrative powers rather than judicial powers.[74] Affairs of the corporate debtor are managed by IRP and subsequently by RP upon his appointment.

IRP shall perform functions such as making public announcements of commencement of CIRP and inviting claims from creditors of corporate debtors; collecting information relating to assets, financial position and operations of the debtor; collecting claims of Creditor; constitution of Committee of creditors; takes custody and control of the assets of the corporate debtor as well manages it, etc. The corporate debtor's assets cannot be alienated, transferred, or sold to a third party during the moratorium period.[75]

RP shall oversee the entire insolvency process, including submission and approval, of the resolution plan for the corporate debtor. One of the most significant duties of IRP is the constitution of the Committee of Creditors (CoC). IRP shall constitute CoC after collating all claims received against the corporate debtor and determining its financial position.[76]

CONSTITUTION OF COMMITTEE OF CREDITORS

The CoC shall comprise all the financial creditors (including both secured as well unsecured) of the corporate debtors. However, any related party of the corporate debtor is not allowed to participate, represent

[72] Rajendra K. Bhutta v. Maharashtra Housing and Area Development Authority and Another, 2020 SCC OnLine SC 292.
[73] IBC, 2016, *supra* note 26, § 16.
[74] Swiss Ribbons Case, *supra* note 28.
[75] Commissioner of Customs, (Preventive) West Bengal v. Ram Swarup Industries Ltd. and Others, 2019 SCC OnLine NCLAT 371.
[76] IBC, 2016, *supra* note 26, § 21.

or have voting powers in the CoC. The objective behind the inclusion of all the financial creditors is to adopt a collective approach instead of proceedings individually towards the insolvency resolution.[77]

The voting share of financial creditors shall be determined as per their financial debts owed to the corporate debtor. If the corporate debtors do not have any financial creditors, CoC shall consist of operational creditors as per regulation 16 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. CoC is the decision-making body for the corporate person during CIRP. Commercial Wisdom of CoC plays a significant role in restructuring the corporate debtor and managing its assets. CoC facilitates the functioning of RP and helps in discharging its duties towards the corporate debtor.

Hence, Resolution Professional predominantly exercises administrative functions as per the regulations and provisions under the Code to benefit every stakeholder interested in the insolvency process. Insolvency Professionals and the Committee of creditors are the officers of the court, and both of them are institutions of public faith.[78]

RESOLUTION PLAN: INDISPENSABLE COMPONENT

Resolution Plan means a plan proposed by the resolution applicant for insolvency resolution of the corporate debtor.[79] Resolution applicant means a person who individually or jointly submits a resolution plan to the Resolution professional in response to the invitation made by Resolution Professional.[80]

Certain persons are not eligible to submit a resolution plan either individually or jointly.[81] Such persons include an undischarged insolvent, a wilful defaulter as per the guidelines issued by Reserve Bank of India, and an account classified as a non-performing asset as per RBI guidelines at least one year lapsed from such classification till commencement date of CIRP.

In addition, an ineligible person includes those who are convicted of certain offenses, disqualified to act as director of a company, or prohibited from trading in securities markets or invoked guarantee that remains unpaid and those connected persons having similar ineligibilities, etc.

The RP shall prepare an information memorandum for providing relevant information to the resolution applicant.[82] Such memorandum contains relevant information such as the financial position, information

[77] Municipal Corporation of Greater Mumbai (MCGM) v. Abhilash Lal and Others, 2019 SCC OnLine SC 1479.
[78] Jasper Vikas George, *Insolvency Resolution Plans: Right of Erstwhile Management, Corporate Debtor*, 6 J. NAT'L L. U. DELHI 39 (2019).
[79] IBC, 2016, *supra* note 26, § 5(26).
[80] IBC, 2016, *supra* note 26, § 5(25).
[81] IBC, 2016, *supra* note 26, § 29A.
[82] C. Scott Pryor & Risham Garg, *Differential Treatment among Creditors under India's Insolvency and Bankruptcy Code, 2016: Issues and Solutions*, 94 AM. BANKR. L.J. 123 (2020)

related to disputes by or against the corporate debtor, and any other information required by the resolution applicant to prepare a resolution plan.[83]

A resolution applicant prepares a resolution plan for the corporate debtor based on the information provided in the information memorandum. A resolution applicant shall submit a resolution plan to Resolution Professional. The Resolution professional shall examine the Resolution plan to determine whether it is complying with the requirements prescribed under the Code.[84] Resolution Professional cannot render a decision regarding the validity of a resolution plan; only CoC can approve or reject the resolution plan.[85]

The resolution plan shall consist of the following requirements[86]:

- It should provide for payment of insolvency resolution process costs in priority to payment of other debts.
- It should provide for payment of the debts of operational creditors in the manner specified by IBBI, which shall not be less than the amount paid at the time of liquidation to Operational Creditors, or the amount paid to operational creditors as distributed with an order of priority from the proceeds of the sale of liquidation assets, whichever is higher.
- It should provide for payment of debts of those financial creditors who do not vote in favor of Resolution, and such amount shall not be less than paid to them during the liquidation process.
- It should also provide adequate means for implementation and supervision of the resolution plan, including its term and implementation schedule.
- It should also provide for management and control of the business of the corporate debtor.
- It shall not contravene any provision of the law.

Determining Feasibility and Viability of Resolution Plan

After examining the legal compliance, the Resolution Professional shall present such a plan to the Committee of creditors for its approval by a vote of not less than sixty-six percent of the voting share of the financial creditors. The Committee shall consider the feasibility and viability of the resolution plan before approving it.

The Committee shall consider the manner of the distribution of the amount proposed in the resolution plan for various types of stakeholders. Subsequently, the Resolution professional submits the resolution plan as

[83] IBC, 2016, *supra* note 26, § 29.
[84] IBC, 2016, *supra* note 26, § 30.
[85] Arcelormittal India Private Limited v. Satish Kumar Gupta & Other, (2019) 2 SCC 1.
[86] Kalpraj Dharamshi & Anr. v. Kotak Investment Advisors Ltd. & Anr., 2021 SCC OnLine SC 204.

approved by the Committee of creditors to the adjudicating authority for final approval. If the adjudicating authority is satisfied that the legal requirements met by the approved resolution plan and plan have provisions for effective implementation, it shall approve the resolution plan.

TERMINATION OF INSOLVENCY PROCEEDINGS

After the adjudicating authority has given the final approval to the resolution plan, it shall be binding on the corporate debtor, its employees, members, creditors, including central government, state government, or any local authority, guarantors, and other stakeholders. After the approval of the plan by AA, the moratorium shall cease to have an effect, and the Resolution professional shall forward the records relating to the conduct of the insolvency process to IBBI for recording purposes.

The AA has limited scope for judicial review while approving the resolution plan and cannot analyze or evaluate the commercial decision of CoC apart from the legal compliance provided under the Code.[87] In the case where AA is satisfied that the resolution plan does not fulfill the legal requirements or does not have provision for effective implementation, it may reject the resolution plan. If the resolution process fails against the corporate debtor, liquidation is the next stage against the corporate debtor in the Code.

[87] K. Sashidhar v. Indian Overseas Bank & Others, (2019) SCC Online SC 257.

Initially, at the time of its enactment, the Code specified a minimum amount of default of one lakh rupees in debt payment for initiation of insolvency process against the corporate debtor. Because of the lower threshold of default amount, a large number of CIRP applications filed that have increased the burden of adjudicating authorities or the judicial infrastructure.[88] Moreover, the likelihood of filing a frivolous insolvency application for a mere recovery process was a persistent concern due to the low threshold of one lakh.[89]

MODIFICATION LACKING REASONS

Insolvency Law Committee suggested that there is a need to review the minimum threshold amount. Henceforth, the Ministry of Corporate Affairs released a notification dated 24th March 2020. By which, the Central Government has increased the minimum amount of default to one crore rupees from one lakh for initiating CIRP.[90] This notification was introduced by the central government while exercising powers conferred by the proviso to Section 4 of the Code.

As no date for enforcement of the said notification was mentioned, several courts have clarified that notification is prospective.[91] Even so, some uncertainty exists relating to the admission of the claims where default arises before the notification was issued or an insolvency application filed after the notification or a case where the application was pending in the tribunal for admission before notification.

Amendment to default amount will undoubtedly lead to the reduction in the filing of CIRP applications; consequently, lessening the burden of the tribunals and will increase the efficiency and speedy disposal rate, as time is the essence of the Code.[92] However, it does not appear viable to accept that burden on judicial infrastructure is the sole reason to increase the threshold, as improvement in infrastructure can be made anytime.

[88] Ministry of Corporate Affairs, *Report of the Insolvency Law Committee*, (Feb 4, 2020).
[89] Megha Mittal & Shreya Jain, *IBC Threshold Raised in Coronatic Disruption: Analysis and Implications*, Vinodkothari.Com/2020/03/Ibc-Threshold-Raised-Analysis-And-Implications.
[90] Ministry of Corporate Affairs, S.O. 1205(E), F. No. 30/9/2020-Insolvency, (Notified on March 24, 2020).
[91] Madhusudan Tantia v. Amit Choraria and Another, 2020 SCC OnLine NCLAT 713.
[92] Surendra Trading Company v. Juggilal Kamlapat Jute Mills, (2017) 16 SCC 143.

The central government has passed this amendment in the backdrop of the Covid-19 pandemic situation, and it alleged to protect the Micro, Small & Medium Enterprises (MSMEs) from falling in insolvency situations amidst the economic slowdown caused due to Covid-19 lockdown.

However, it does not appear from reading out the notification that the increase in default amount is only for a short duration or a temporary purpose.[93] As notification lacks any such statement or reasons for its pronouncement, it eventually reflects that the government aims to keep the increased default amount evermore. Consequently, increased amounts will affect the rights of different stakeholders under the Code.

For example, the notification greatly affects the MSME sector as they have given the status of operational creditors under the IBC for dragging corporate debtors to the tribunal for recovery of dues. Operational creditors primarily chose the insolvency process of the Code in comparison to other the available alternative remedies in the law due to its simplified and summary nature of proceedings, time-bound disposal of cases, and expeditious recovery mechanism.

Moreover, the notification considerably affects the operational creditors, as the Debt owed to them is of a minor amount. It is generally an unsecured Debt and comparatively lower than the Debt owed to the financial creditors. It will prevent the operational creditors from initiating insolvency proceedings against the corporate debtor. They will have to move towards the options available during pre-existing Insolvency that were ineffective and caused prolonged delay.

Moreover, if other creditors initiate the corporate insolvency process, the moratorium will prevent the recovery mechanism initiated under different laws. Operational creditors are also companies in themselves, and for this reason, operational creditors will become insolvent debtors, as they will be unable to recover their dues. This situation will ultimately lead to counterproductive implications under the Code.

PRE-PACKAGED INSOLVENCY RESOLUTION MECHANISM

A pre-packaged insolvency process is an opportunity that is provided to the troubled or distressed corporate person and its creditors to conclude an advance agreement before initiation of the statutory administrative procedure, so that it allows expeditious implementation of such statutory procedure.[94]

[93] Payaswini Upadhyay, *IBC: Increase In Threshold To Trigger Insolvency May Not Be A Temporary Measure, Experts Say*, (2020), www.bloombergquint.com/law-and-policy/ibc-increase-in-threshold-to-trigger-insolvency-may-not-be-a-temporary-measure-experts-say.

[94] VANESSA FINCH, CORPORATE INSOLVENCY LAW PERSPECTIVES AND PRINCIPLES 453 (2nd ed. Cambridge University Press) (2009).

The concept of 'pre-pack insolvency' has been announced to help corporate debtors in finding a resolution plan by taking the help of the investors before approaching the adjudicating authorities under the Code.[95] It will provide an opportunity to the solvent debtor to resolve the issue before it enters into the CIRP stage.

Recently, a pre-packs insolvency resolution mechanism has been introduced by the parliament for restructuring the liabilities of the MSMEs sector.[96] The minimum default amount for initiating the pre-packaged resolution process is ten lakh rupees, and it can settle the liabilities up to the number of one crore rupees.[97]

The pre-packaged insolvency process is the right step taken by the policymakers in the right direction. It can help the MSMEs sector to revive its distressed financial assets in a pre-insolvency stage. Pre-packaged insolvency plans may also bring into effect for other creditors as well.[98]

HETEROGENEOUS THRESHOLD AMOUNT FOR DIFFERENT CREDITORS

Universal application of defaulting amount for initiating insolvency process will not help the Code to achieve its objectives. The government may introduce different threshold amounts for different types of creditors, i.e., for financial and operational creditors, to trigger the Code's application. As the Supreme Court identified the intelligible differentia while upholding differential treatment between operational and financial creditors,[99] changes can be introduced while categorizing different types of creditors who owe a debt to the corporate debtor for various purposes.

Another method for providing different threshold amounts is the classification of companies to initiate the insolvency process. Threshold amount as per types of companies, for example, a different threshold for the MSME sector, or based on paid-up capital of a company, annual turnover, etc.

Furthermore, the central government can revise and modify the threshold amount over time by making moderate changes at a time. At the same time, the government should also consider that the lower threshold amount does not push the solvent and bonafide debtor into the insolvency process.

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95 Vinson Kurian, *IBC Threshold Limit Raise May Leave Some Creditors Stranded*, The Hindu, Business Line, March 26, 2021, www.thehindubusinessline.com/news/national/ibc-threshold-limit-raise-may-leave-some-creditors-stranded/article34169213.ece.

96 Karunjit Singh, *How Resolution 'Pre-Packs' For MSME Can Speed Up Insolvency Cases*, The Indian Express, July 29, 2021, indianexpress.com/article/explained/explained-pre-packaged-insolvency-resolution-process-of-msmes-7426810.

97 RP Vats & Srijal Sinha, *Pre-Packaged Insolvency Resolution Process Under The Insolvency And Bankruptcy Code*, (2021), www.mondaq.com/india/insolvencybankruptcy 1067642/pre-packaged-insolvency-resolution-process-under-the-insolvency-and-bankruptcy-code.

98 Anirudh Burman, *India's Sustained Economic Recovery Will Require Changes to Its Bankruptcy Law*, C Arnegie Endowment for International Peace, (2021).

99 Swiss Ribbons Case, *supra* note 28.

Proper analysis of admitted cases and evaluating the difficulties faced by various stakeholders can be taken into account while making policy decisions affecting the rights of creditors under the Code. The government should provide reasons for making changes as it helps stakeholders in making informed decisions and it maintains financial discipline in the economy.

A creditor means any person to whom a debt is owed.[100] It comprises a financial creditor, an operational creditor, a secured or unsecured creditor, and a decree-holder. IBC creates a distinction between financial creditors and operational creditors.[101] There exists a fundamental difference, not merely a superficial one, between both types of creditors under the Code.

Financial Creditors are creditors who have a contractual relationship with the corporate person based on the purely financial aspect, for example, loan or debt security. Operational Creditors means creditors whose liability arises concerning corporate persons from operational transactions. A creditor can be both a financial and operational creditor based on the transaction entered with the corporate debtor.

The Code differentiates between financial Creditors and operational Creditors in the following manner.

- Regarding voting rights in the Committee of creditors, financial creditors have voting rights proportionate to the financial Debt owed to such financial creditors. In contrast, operational creditors shall not have any such voting rights under the Code.[102]

- In respect of initiation of CIRP, financial creditors, either by themselves or jointly with other financial creditors, shall file an application for Insolvency on the occurrence of a default. However, the operational Creditor cannot initiate an insolvency process on the occurrence of a default. It has to deliver demand notice for such Debt to the corporate debtor first. After the expiry of 10 days and not receiving the payment or notice of dispute, it can file an insolvency application. The Code discriminates here by providing a pre-condition to the right of an operational creditor to initiate CIRP.

- At the time of filing an insolvency application to the tribunal, the financial Creditor shall furnish the name of the proposed interim Resolution professional. In contrast, the operational Creditor may propose the name of the interim Resolution professional. It is mandatory for the financial Creditor and optional for the Operational Creditor.[103]

[100] IBC, 2016, *supra* note 26, § 3(10).
[101] Ministry of Finance, *The Report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design* (Nov 4, 2015).
[102] Niddhi Parmar, *Difference between Operational Creditors and Financial Creditors, (2019)*, vinodkothari.com/wp-content/uploads/2019/06/Difference-between-OC-FC.pdf.
[103] Chharia Holdings v. Brys International, 2017 SCC OnLine NCLAT 365.

- In respect of the constitution of the Committee of creditors, the Committee shall consist solely of all the financial creditors of the corporate debtor.[104] However, operational creditors shall not be included and have no say in the working of Committee of creditors.[105]

- Regarding submission of financial information, the financial Creditor shall submit financial information to Information Utility relating to the assets for which any security interest has been created.[106] However, it is optional for an operational creditor to submit information to Information Utility.

EQUITABLE CLASSIFICATION AND INTELLIGIBLE DIFFERENTIA

The Supreme Court has dealt with the issue of classification between financial Creditors and operational Creditors under the Code.[107] While upholding the constitutionality of the Insolvency and Bankruptcy Code, 2016, Supreme Court also held that classification between financial Creditors and the operational Creditor is neither discriminatory, nor arbitrary, nor violative of Article 14 of the Constitution of India.

The court identifies the following distinctions between financial and operational creditors while upholding the intelligible differentia between the two creditors and that have rational nexus between classifying them to achieve the intended object of the Code.

- ***Nature of Debt is different***: Financial Debt is a debt together with the interest that is disbursed against the consideration for the time value of money, whereas operational Debt includes a claim regarding goods and services, employment, Debt that arises to be paid under any law in force or payable to the government or any local authority.[108] It observed that financial creditors are primarily comprises secured creditors including banks, and financial institutions.

  In contrast, operational creditors are unsecured creditors, as their payments regarding goods and services or workers are not secured like financial creditors. Moreover, financial creditors lend financial Debt or loans for the working capital that enables the corporate debtor to set up/operate, or run its business and includes a large amount of money. Whereas the operational creditors supply goods and services that help in operating the business regularly, it generally includes a small amount of money or finances compared to financial creditors.

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[104] IBC, 2016, *supra* note 26, § 21(2).
[105] Akshay Jhunjhunwala & Anr. v. Union of India through the Ministry of Corporate Affairs & Ors., AIR 2018 Cal 139.
[106] IBC, 2016, *supra* note 26, § 215.
[107] Swiss Ribbons Case, *supra* note 28.
[108] *Id.*

- ***Procedure for Initiating CIRP is different***: The procedure for initiating insolvency process under the Code for the financial Creditor and operational Creditor is different because operational debts tend to include a small amount of money as it involves payment for wages, salaries, trade debts, goods, services, etc. in comparison to financial Debt. Moreover, financial creditors have an electronic record of liabilities stored and filed with Information Utilities, and it can be easily verified by accessing those records.[109]

  Whereas the records of operational debts in terms of liability of corporate debtor may be available in the electronic record or physical form and hence it may not be verified from records of Information Utilities. In addition, to ensure that operational creditors do not initiate insolvency resolution process against the corporate debtor for extraneous consideration involving debt claims of a small amount of money. Therefore, Operational creditors have been provided an opportunity under the Code to settle their dues, if possible, outside the formal insolvency proceedings.

- ***The interest of financial creditors is different from operational creditors***: It is observed by the court that financial creditors are involved in assessing the viability of the corporate debtor from the beginning. Financial Creditor engages in restructuring the corporate debtor loans. It also helps in reorganizing corporate debtor's business in the distressed financial situation. Operational creditors have no role to play during financial stress. Financial creditors have a clear role in achieving, as per the Code, in preserving the corporate debtor's business as a going concern and ensure that all creditors receive the maximum recovery of their dues.

INSIGNIFICANT REPRESENTATION OF OPERATIONAL CREDITORS IN COMMITTEE OF CREDITORS

As per the scheme of the Code, the Committee of creditors comprised of all the financial creditors. Operational creditors are given representation in Committee in the situation only where the corporate debtor does not have any financial creditors.[110] An operational creditor does not have the right to vote in the meeting. Furthermore, operational Creditor's rights in respect of attending a meeting of the Committee of creditors have limited scope under the Code.

Operational creditors or their representative may attend the meetings of the Committee of creditors if the amount of their aggregate dues is not less than ten percent of the Debt of the corporate debtor.[111] Hence, it is apparent that the operational creditors neither have representation in the Committee nor have a say in the

[109] Ministry of Corporate Affairs, Report of the Working Group on Information Utilities, (Jan 10, 2017).
[110] Sudip Mahapatra, Pooja Singhania & Misha Chandna, *Operational Creditors In Insolvency: A Tale of Disenfranchisement*, (2020), www.snrlaw.in/operational-creditors-in-insolvency-a-tale-of-disenfranchisement.
[111] IBC, 2016, *supra* note 26, § 24.

decision-making process. Therefore, the question of their protection becomes more crucial while analyzing the Code.

OBJECTIVE DISTRIBUTION OF OUTSTANDING DEBT

Regarding payment to operational creditors during the approval of the Resolution plan, differential treatment has been provided under the Code. The Code initially prescribed that payment of the debts of operational creditors shall not be less than the amount paid in case of liquidation process against the corporate debtor. It means that the resolution plan will provide minimum payment to the Operational Creditor that is not less than the liquidation value.

However, this provision attracts practical limitations while its execution, i.e., due to the involvement of the large sum of outstanding amount against corporate debtors, the resulting liquidation will almost be minimal.[112] To remove this difficulty, parliament enacted an Amendment Act of 2019, with retrospective effect.[113]

Section 30(2)(b)[114] is substituted, as it now provides for higher liquidation value to operational creditors and dissenting financial creditors of the corporate debtor as per the order of priority given under section 53(1). It provides that while approving distribution claims under the resolution plan, distribution of payment shall be fair and equitable to the creditors and priority is given to the operational creditors over other creditors.

EQUALITY FOR ALL: APPLICABLE OR NOT?

The Supreme Court also upheld that the 'equality for all' principle cannot be applied to the rights of all classes of financial creditors and operational creditors.[115] It observed that the Code does not allow equal treatment of differently situated creditors and it only mandates and recognized the equitable treatment within different classes of creditors.

[112] Sudip Mahapatra, Pooja Singhania & Misha Chandna, *Operational Creditors In Insolvency: A Tale Of Disenfranchisement*, (2020), www.snrlaw.in/operational-creditors-in-insolvency-a-tale-of-disenfranchisement.
[113] ADITYA SHIRALKAR, COMMENTARY ON THE INSOLVENCY AND BANKRUPTCY CODE, 2016 (1st ed., 2021); see also Sourav Sardar, *The Insolvency and Bankruptcy Code – Not a Brittle Framework*, ILJ (2020), https://indialawjournal.org/the-insolvency-and-bankruptcy-code.php.
[114] The Insolvency and Bankruptcy Code (Amendment) Act, 2019, § 6, No. 26, Acts of Parliament, 2019.
[115] Essar Steel Case, *supra* note 65; see also, Sandeep Parekh & Sudarshana Basu, *IBC 2.0 in the Making: A Relook into the Insolvency Regime in India*, 45(2) The Journal for Decision Makers 115 (2020).

The objective of equitable treatment reflects creditors who are similarly situated and having identical rights should be treated fairly in the collective proceedings relating to the distribution of claims and interest.[116] The reason behind preventing all the creditors from being treated similarly in the Code when they have entered into different bargains of Debt with the corporate debtor.

Supreme Court recognized the importance of operational creditors under the Code as it helps the corporate debtor to run the business as a going concern. Therefore, if the Code allows equality principle for all, it will encourage creditors, especially secured financial creditors, to vote for liquidation rather than going for Resolution. This would defeat the entire object of the Code, which is to ensure the Resolution of distressed assets, and only if it fails, then proceed towards liquidation.

Nevertheless, the question regarding the representation of operational creditors, differential treatment against operational creditors while initiating insolvency process, including the issue of disputed claims, and their participatory rights in the decision-making process inside the Committee of creditors remains unanswered. Parliament has tried to provide equitable rights to operational creditors under the Code. However, those modifications are not enough to support the rights of operational creditors as per the objective of the Code.

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[116] Legislative Guide on Insolvency Law, United Nations Commission on International Trade Law, United Nations Publication, 10 (2005).

The Committee of creditors is a significant part of the corporate insolvency resolution process. It is the decision-making body for the corporate debtor and plays a fundamental role in its rehabilitation and restructuring process. CoC helps Resolution professional to discharge his duties under the Code.

Interim Resolution professional constitutes CoC to bring a collective approach towards resolving the Insolvency of the corporate debtor. CoC has enormous powers under the Code that plays a significant role in completing the resolution process and approval of the resolution plan. The scope of powers exercised by the CoC of the corporate debtor under the Code is challenged in the Supreme Court.[117]

FEATURES OF COMMITTEE OF CREDITORS

The features of the Committee of creditors under the Insolvency and Bankruptcy Code are given as follows:

- It is the commercial wisdom of the CoC that decides whether to rehabilitate the corporate debtor or not by way of approving a particular resolution plan.[118] CoC is bound by the Code's provisions and regulations made under it for carrying out the insolvency process.

- CoC takes decision relating to the management of the corporate debtor with prior approval of not less than sixty-six percent of votes of Committee, which helps the Resolution professional run the business of the corporate debtor.[119] Resolution professionals cannot take major decisions relating to corporate debtor management without CoC's prior approval; otherwise, such actions shall be void.

- CoC approves resolution plan after considering its viability, feasibility, and evaluating other requirements prescribed by the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, by voting share of not less than sixty-six percent. The Committee shall evaluate the resolution plan to identify the best resolution plan and may approve it with such modifications it deems fit.[120]

[117] Essar Steel Case, *supra* note 65.
[118] *Id.*
[119] IBC, 2016, *supra* note 26, § 28.
[120] Insolvency and Bankruptcy Board of India (Insolvency Resolution Process For Corporate Persons) Regulations, 2016, Reg. 39(3).

Supreme Court observed that corporate Insolvency is ultimately residing in the hands of the majority vote of the CoC.[121] It has been observed that adjudicating tribunals, i.e., NCLT and NCLAT, have limited powers relating to judicial review pertaining to the decisions taken by the CoC during the insolvency process. Role of adjudicating authorizes while considering the application relating to acceptance or rejection of the resolution plan for the corporate debtor is limited.

The legislative authorities have not equipped the adjudicating authorities with the jurisdiction or authority to evaluate or analyze the commercial decisions of the CoC. They cannot enquire about the justness of the rejection or approval of the resolution plan by the financial creditors.[122]

JUDICIAL HANDS-OFF AGAINST COMMERCIAL WISDOM

The commercial wisdom of the CoC has been given paramount importance without any judicial intervention or limited scope of judicial review by the Insolvency and Bankruptcy Code for ensuring that the insolvency proceedings are completed within given timelines.[123] It is assumed that financial creditors are fully informed about the viability and feasibility of the resolution plan, and they perform a thorough assessment and examination of the plan.

Legislature consciously has not provided scope for challenging the collective business decision of the CoC. The decision of the Committee of creditors is non-justiciable.[124] Thus, adjudicating authority cannot interfere with commercial decisions of CoC on merits or ought not to analyze the resolution plan based on quantitative analysis;[125] only limited judicial review is available for observing compliance of following conditions.[126]

- It is required to see whether the CoC has taken into account the needs of business of the corporate debtor and keep it going during insolvency proceedings.
- It is required to ascertain if there is any need to maximize the value of assets of the corporate debtor.

[121] Essar Steel Case, *supra* note 65.
[122] K. Sashidhar vs. Indian Overseas Bank & Others, 2019 SCC OnLine SC 257.
[123] Ghanashyam Mishra and Sons Private Limited through the Authorized Signatory v. Edelweiss Asset Reconstruction Company Limited through the Director & Ors., 2021 SCC OnLine SC 313; see also, Maruti Ferrous v. Sunil Ispat, 2019 SCC OnLine NCLAT 217.
[124] Karad Urban Cooperative Bank Ltd. v. Swwapnil Bhingardevay, (2020) 9 SCC 729.
[125] Maharashtra Seamless Limited v. Padmanabhan Venkatesh and Others, 2020 SCC OnLine SC 67.
[126] Essar Steel Case, *supra* note 65.

- It can inquire whether the interests of all the stakeholders, including operational creditors and dissenting financial creditors, have been taken care of by the Committee.

If the adjudicating authorities find out that the abovementioned parameters are not fulfilled, or that approval of the resolution plan is unfair and discriminatory. In that case, it can send the resolution plan back to the CoC for re-submitting it after complying with all such requirements. Once all the requirements are complied by the approved resolution plan of the CoC, then adjudicating authority must pass the resolution plan.

ISSUE FOR CONSIDERATION

The issue for consideration is that what will happen when the Committee of creditors does not exercise its commercial wisdom while approving or rejecting the resolution plan? Whether adjudicating authorities are authorized to interfere in the situations where the CoC has neglected their duties under the Code and provides an illogical, unreasonable, unsound decision on a resolution plan.

In one of the cases, the tribunal has determined upon the above-mentioned situation and held that the tribunal could reverse the findings of the CoC if the approved resolution plan does not include any element of commercial wisdom or ordinary prudence.[127]

It means once it is established that commercial wisdom does not exist, no question of extraneous interference can arise in such a situation. However, to deal with this type of situation, there is a need for a judicial precedent of the Supreme Court or any legislative amendment.

[127] State Bank of India v. Ushdev International Limited, 2018 SCC OnLine NCLT 173.

IBC provides an opportunity to explore the possibility of restoration of the corporate debtor. Its main goal is to maximize the value of the corporate debtor's assets and attempt to balance the interest of all the stakeholders by the support of the collective approach of creditors and other interested persons. Since the enactment of the Code, there exists some uncertainty regarding the role of the management, including the Board of directors of the corporate debtor, during the corporate insolvency resolution process.

There is a need to examine the issue of the suspended BOD during the continuation of insolvency proceedings. The insolvency process provides for the rehabilitation of the corporate debtors where the role of the corporate debtor or its management is excluded from the insolvency process. If mere participatory rights are provided to management or secrecy is maintained during the approval of resolution plan by the CoC for the revival of corporate debtor. Then the Code will not be able to achieve its objectives to the fullest extent possible.

Excluding corporate debtor and its management from the insolvency process will not be a viable measure as their involvement in the process is crucial and necessary for recovery and rehabilitation purposes.

RESOLUTION PROFESSIONAL V. BOARD OF DIRECTORS

The responsibility of managing the affairs of the corporate debtor shall vest in the interim Resolution professional from the date of its appointment.[128] In addition, powers of the BOD or partners of the corporate debtor shall stand suspended for the duration of the insolvency process, and the IRP shall exercise such powers.[129]

The officers and managers of the corporate debtor shall provide access to documents, records of the debtor as required to the Resolution professional, and financial institutions shall act as per directions given by the Resolution professional while maintaining the account of the corporate debtor.

[128] IBC, 2016, *supra* note 26, § 17.
[129] Municipal Corporation of Greater Mumbai (MCGM) v. Abhilash Lal and Others, 2019 SCC OnLine SC 1479.

The responsibility of the directors, any personnel of the corporate debtor including its promoter or any other person associated with the management of the corporate debtor, under the Code, is to provide extend all the assistance and cooperation to the IRP in managing the affairs of the corporate debtor.[130]

In respect of participation in the Committee of creditors, members of the suspended BOD or the partners of the corporate persons may attend the meeting of the Committee of creditors, but they shall not have any voting rights in that meeting.[131] Their right is merely participatory.

As Supreme Court held that if entrenched management cannot pay their debts, they may no longer continue in management affairs.[132] Thus, once the resolution process starts, the Resolution will take over corporate setup, and directors, including other stakeholders, become non-functional.

After such suspension, it shall be the duty of resolution professionals to carry out the activities related to business and preserve, protect and continue the business operations of the corporate debtor, ensuring the smooth running of the company.[133]

NON-PARTICIPATION OF ERSTWHILE MANAGEMENT

There exist crucial issues pertaining to the non-participatory rights of erstwhile management of the corporate debtors in the insolvency process. One of the key issues in this process is the role of the BOD and their right to say in the whole process of formulating and approving the Resolution. If the suspended directors were given only participatory rights in respect of the resolution plan, it would defeat the purpose of the Code.

The primary reason for the same is that the BOD is responsible for running the corporate entity. They should not be ousted from the scheme of insolvency process against such corporate entity as they can contribute significantly in the process because of their experience and know-how about the company.[134]

Management of a company is also interested in the maximization of the value of assets of the corporate debtor. Moreover, their knowledge regarding the tangible and intangible assets of the corporate debtor can provide a valuable addition to the rehabilitation process.

The adjudicating authorities should not give strict interpretation to the provisions regarding the suspension of the BOD and vesting all the managerial functions in the hands of IRP during the insolvency process.[135] If a strict interpretation is given to those provisions, it will negate the true intent of the Code.

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[130] IBC, 2016, *supra* note 26, § 19.
[131] IBC, 2016, *supra* note 26, § 24.
[132] Innoventive Industries Ltd. v. ICICI Bank & Another, (2018) 1 SCC 407.
[133] Tata Consultancy Services Limited vs. Vishal Ghisulal Jain, 2020 SCC OnLine NCLAT 484.
[134] Jasper Vikas George, *Insolvency Resolution Plans: Right of Erstwhile Management, Corporate Debtor,* 6 J. NAT'L L. U. DELHI 39 (2019).

In addition, the members of the suspended Board of directors of the corporate debtor being primarily interested in the affairs of the corporate debtor must be given notice of meetings of the Committee of creditors and a copy of the resolution plans along with relevant documents that are going to be discussed in such meetings.[136]

NEED FOR A DEBTOR-FRIENDLY MECHANISM

The objective behind transferring the control of the corporate debtor to the Resolution professional is to protect any malfeasance activity on the part of directors of the corporate debtor.[137]

Suspension of directors is provided under the Code not to reduce the wealth of corporate debtors that can ultimately force the creditors to go empty-hand after the Insolvency. However, it is valid to assume that, a resolution professional cannot be expected to be absolutely equipped with the knowledge of running a particular business in its best interest. Thus, persons taking care of the company for a long time or whose interests are involved with the particular company are in a better place to run it.

Therefore, it is required that lawmakers look into the aspect of non-suspension of the directors' general powers for securing the directors' survival for managing the affairs of the corporate debtor during the insolvency process. The Resolution should only facilitate the survival of the business of the corporate debtor. It should not interfere with core business activities that need to be dealt with effectively by the corporate person or with the help of other stakeholders, including the BOD.

Suppose the powers of the BOD are suspended from performing their functions. In that case, there may be serious concerns that can arise in the corporate governance structure of such a corporate person. Such as provisions of the Companies Act relating to decision-making powers of directors, or functioning of different committees, e.g., audit or Board committees, or responsibilities or duties of Board of directors, etc., will become insubstantial.

Hence, there is a need for legislative authority to look into these matters, the participatory role of erstwhile management of directors of the corporate debtor in the corporate insolvency resolution process. It is imperative to create a debtor friendly model to deal with the insolvency matters, as the core objective of the Code is the rehabilitation of the corporate debtor.

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[135] Kushagra Srivastava, *The (Active) Involvement of Directors During Insolvency Proceedings*, (2020), indiacorplaw.in/2020/03/the-active-involvement-of-directors-during-insolvency-proceedings.

[136] Vijay Kumar Jain vs. Standard Chartered Bank & Others, 2019 SCC OnLine SC 103.

[137] Shikha Bansal, *Resolution Professional Vis-À-Vis Board Of Directors: Governance Of Insolvent Companies*, (2018), vinodkothari.com/2018/03/resolution-professional-vis-a-vis-board-of-directors.

CONCLUSION AND SUGGESTIONS

Insolvency and Bankruptcy Code, 2016 is comprehensive economic legislation. It is one of the most significant reforms in the regime of insolvency laws. Corporate Insolvency Resolution is a rehabilitation process for the corporate debtor to eliminate unpaid and distressed financial Debt. The primary aim of the Code is the restoration of the debtors from financial distress. Its goal is to support and restructure viable businesses and facilitates the exit procedure to unworkable firms.

CIRP is a time-bound recovery mechanism for creditors that allows the free flow of credit in the market. The Code has attracted a large amount of recovery litigation in a very short time. The practical challenges prevent the Code from achieving its objectives, especially the goal of providing efficient, impartial, and timely Resolution to viable corporate persons.

The Supreme Court and other adjudicating authorities have shown judicial restraint when it comes to deciding the validity of the provisions under the Code, including amendments, policy decisions, regulations, etc. Higher Courts in India have constraints themselves in examining economic policy matters related to the interpretation of the provisions of the Code and left them to the wisdom of the legislature.

The Code is a significant contribution to the insolvency laws as matters relating to Insolvency are consolidated into a single legal framework. However, since the commencement of the Code, the corporate insolvency process has attracted various practical challenges in its performance and implementation.

The challenges such as common default amount for initiating insolvency process for all types of creditors or corporate persons or some of the provisions appear to be favoring financial creditors more than operational creditors in the Code. There is a lack of clarity with the role of management, including the BOD of the corporate debtor, during insolvency proceedings.

There is a requirement to demarcate the role of the debtor in insolvency proceedings as they have the best interest to protect the company. In addition to these challenges, the scope of judicial intervention by the adjudicatory authorities has become a debatable matter during the application of insolvency laws. Adjudicating authorities in numerous legal precedents explicitly allows the paramount importance to the commercial wisdom of the creditors' Committee in the insolvency process, especially while approving resolution plans.

These practical challenges have attracted an enormous amount of litigation exposure. Although the judiciary is providing momentary solutions to such difficulties while interpreting the provisions of the Code, despite

that, there is a need that law-making authorities look at those limitations by themselves, as they are at a better place to bring long-term determination.

The following are the suggestion that may be taken into consideration by the policymakers or legislative authorities for bringing suitable amendments to the existing law.

- The existence of only one defaulting amount to initiate insolvency proceedings against all types of the corporate debtor is a matter that requires re-consideration. The legislature may introduce different threshold amounts for different kinds of creditors or corporate persons to initiate a recovery mechanism and to trigger the application of the Code. Considering all types of creditors are not identically situated in the Code, hence, they required differential treatment while triggering insolvency proceedings under the Code.

  In addition, the legislature may introduce a system of pre-packaged insolvency process for all types of creditors, as it will allow ‘outside the court settlement’ along with the involvement of debtor in forming resolution plans. This solution will be more viable in the current scenario as the legislature has increased the minimum defaulting amount for initiating insolvency litigation proceedings.

- The representation of the operational Creditor is absent in the Code. Differential treatment to operational creditors while triggering the application of insolvency process against the corporate debtor is explicitly given as per the provisions of the Code. Considering the recent changes made to the minimum defaulting amount for triggering the Code's application, it is essential to make requisite amendments in the law. Revision of law in favor of operational creditors will help reduce the challenges that can arise due to differential treatment and the increased defaulting amount.

  A pre-packaged insolvency process may be allowed for all type of operational creditors for the time being. Lawmakers may include participatory rights, including voting rights in favor of operational creditors, to give them more say in formulating and approving the Resolution. Instead of providing equitable treatment to operational creditors during the distribution of claims in resolution plan, their involvement in the Committee of creditors may bring diverse perspectives in insolvency proceedings that may result in making decisions that are more favorable to corporate debtor.

- The limited scope of judicial review allows adjudicating authorities to uphold the commercial wisdom of the Committee of creditors in the decision-making process for rehabilitating corporate debtors. Judicial Authorities support the commercial decisions made by the Committee of creditors and prevent themselves from going into the merits of the case, especially the approval of the resolution plan.

Adjudicating authority cannot look into the justness of approved Resolution until it is discriminatory and unfair to involved/connected stakeholders of the corporate debtor. However, there is no clarity on the situation where the Committee of creditors does not exercise commercial wisdom while approving the resolution plan. Alternatively, it has exercised its wisdom in a mala fide manner or by considering irrelevant, extraneous factors. This can be resolved if either legislature enacts suitable amendments or Higher Courts by establishing judicial precedent may make this situation transparent.

- Suspension of the Board of Directors on the appointment of Interim Resolution Professional led to the absolute exclusion of the managing authority of corporate debtor from an insolvency process. The 'Creditor in Control' model excludes the role of management in formulating and approving the healthy resolution plan for the corporate debtor. As Resolution Professional may not know the peculiarities involved in the business of the corporate debtor, may not perform its duties in favor of corporate debtor as management may perform because of their experience and knowledge about the company.

  Moreover, the mere participatory role to corporate debtor's stakeholders while approving the Resolution may also go against the objective of the Code. Therefore, it is suggested that management of the corporate debtor should not be excluded entirely from the insolvency process, as they are more concerned about saving the corporate debtor. Policymakers may make participatory rights of the corporate debtor's management more active to preserve the interest of the corporate debtor in the true sense. However, this suggestion does not include those corporate debtors in its ambit who are acting in a mala fide manner or intentionally defrauding creditors.

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