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Insolvency and Bankruptcy Code 2016: The New Resolution Regime

Resurgent Resolution Professionals LLP

PREFACE

The Insolvency and Bankruptcy Code, 2016 that received President's assent on May 28 2016, is a consolidated legislation providing for insolvency resolution process of individuals, partnership firms, Limited Liability Partnerships and Corporates. It proposes to repeal and amend a number of legislations. The Code also introduces new regulator "Insolvency and Bankruptcy Board of India" (The Board). The adjudication process in relation to Corporates and LLPs would be under National Company Law Tribunal and in relation to individuals and partnerships under Debt Recovery Tribunal. The insolvency process will be handled by insolvency professionals who shall be a Member of the Insolvency Professional Agencies and registered with the Board. This publication of the Resurgent India titled "Insolvency and Bankruptcy Code, 2016: The New Resolution Regime" covers basics of corporate insolvency resolution process under "The Insolvency and Bankruptcy Code 2016". It also covers step by step flow charts on insolvency resolution process by financial creditor, operational creditor and corporate debtor, role of insolvency resolution professional (including interim professional), moratorium aspects, recent important judgements, FAQs on Corporate Insolvency Resolution Process and much more.

I am confident that the publication will prove to be of immense benefit to companies, professionals and Financial Institutions.

In any publication, there is always scope for further improvement. I would personally be grateful to users and readers for offering their suggestions/ comments for further refinement.

Place : Gurgaon

(CA Sudhir Chandi)
Insolvency Professional
Partner, Resurgent Resolution Professionals LLP

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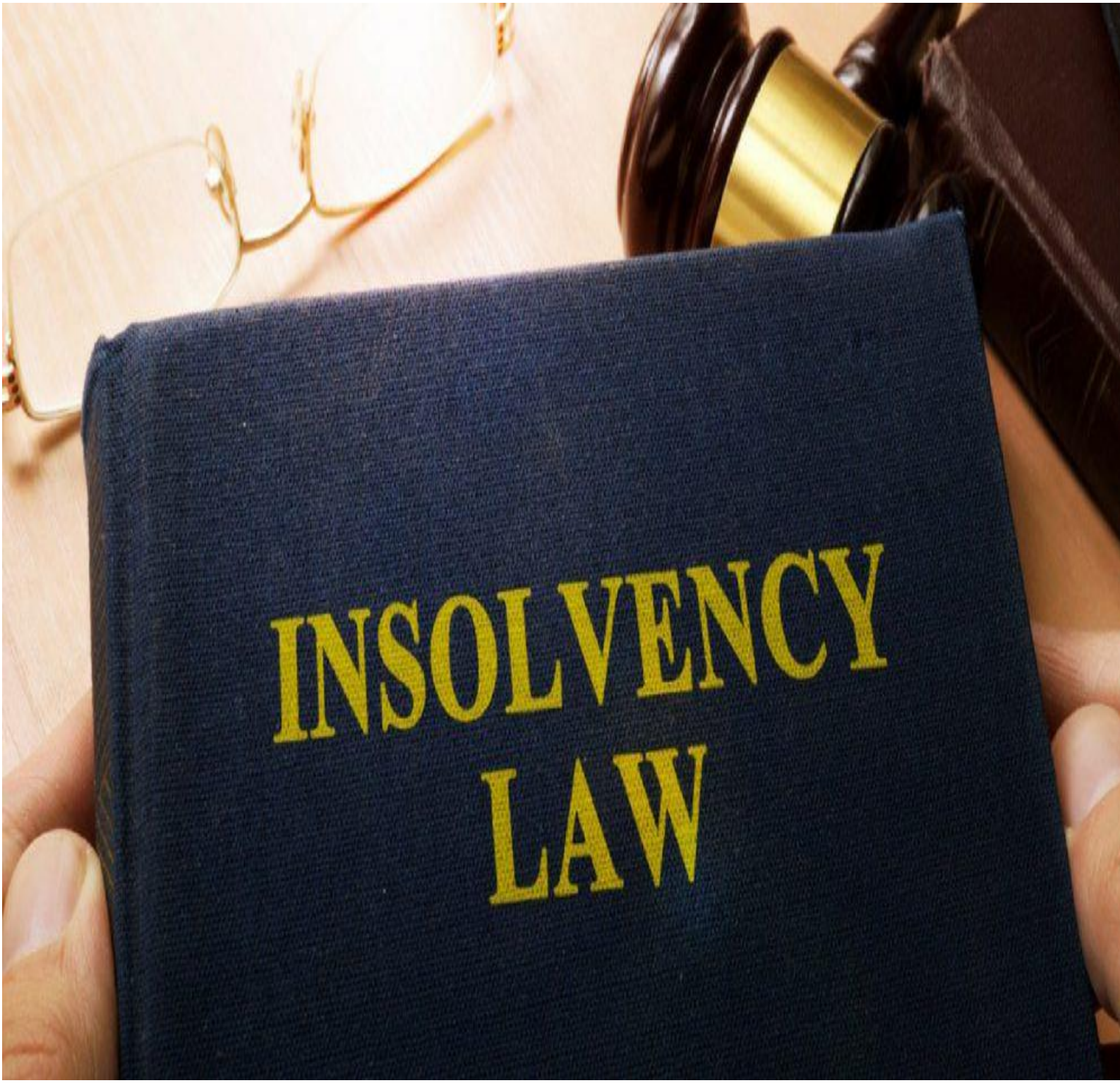


Historical Developments of Insolvency Laws in India

The law of Insolvency in India owes its origin to English law. Before the British came to India there was no law of Insolvency in the country. The earliest insolvency legislation can be traced to sections 23 and 24 of the Government of India Act, 1800 (39 and 40 Geo III c 79), which conferred insolvency jurisdiction on the Supreme Court.

The passing of Statute 9 in 1828 (Geo- IV c 73) was passed, which can be said to be the beginning of the special insolvency legislation in India. Under this Act, the reliefs for insolvent debtors were provided in the Presidency-towns. A further step in the development of Insolvency Law was taken when the Indian Insolvency Act, 1848 was passed. The Provisions of the Indian Insolvency Act, 1848, were, however, found to be inadequate to meet the changing conditions. However, the Act of 1848 was in force in the Presidency-towns until the enactment in 1909 of the present Presidency-towns Insolvency Act, 1909. The Presidency Towns Insolvency Act, 1909 and Provisional Insolvency Act, 1920 are two major enactments that deal with personal insolvency and have parallel provisions and their substantial content is also similar but the two differ in respect of their territorial jurisdiction. While Presidency Towns Insolvency Act, 1909 applies in Presidency towns namely, Kolkata, Mumbai and Chennai, Provincial Insolvency Act, 1920 applies to all provinces of India. These two Acts are applicable to individuals as well as to sole proprietorships and partnership firms.

Under the Constitution of India 'Bankruptcy & Insolvency' is provided in Entry 9 List III - Concurrent List, (Article 246 –Seventh Schedule to the Constitution) i.e. both Center and State Governments make laws relating to this subject.

Some earlier regulatory initiatives

The Genesis

- Industrial sickness had started right from the pre-Independence days
- Government had earlier tried to counter the sickness with some adhocv measures.
- Nationalization of Banks and certain other measures provided some temporary relief
- RBI monitored the industrial sickness.
- A study group, came to be known as Tandon Committee was appointed by RBI in 1975
- In 1976, H.N. Ray committee was appointed
- In 1981, Tiwari Committee was appointed to suggest comprehensive special legislation designed to deal with the problem of sickness laying down its basic objectives and parameters remedies necessary for revival of sick Units
- The Tiwari Committee submitted its report to the Govt. in September 1983 and suggested the following:
    - **(a)** Need for a special legislation
    - **(b)** Need for setting up of exclusive quasi-judicial body.

Thus the SICA came into existence in 1985 and BIFR started functioning from 1987.

Features and Concerns of Different Earlier RBI Restructuring Schemes

Schemes	Features	Concern
Corporate Debt Restructuring (CDR)	(1) Has been widely used earlier and helped many companies in coming out of stress (2) Majority decision making	(1) Lost charm after withdrawal of forbearance benefit by RBI from 1st April, 2015 (2) Not helped much. Too many failures post CDR it was deferment of inevitable
Bilateral Restructuring	(1) Mostly used for individual cases (2) Had worked well earlier	(1) Very few cases considered by lenders now post withdrawal of forbearance benefits
Joint Lender Forum (JLF)	(1) Majority decision making (2) Early decision making through corrective action plan	(1) Guideline has come too late. Damage was already done as timeline are not maintained resulting in slow progress. An account becomes NPA upon restructuring so most lenders prefer rectification or recovery route
5:25 Scheme	(1) Helps realign debt without restructuring tag through longer amortisation period	(1) Available for large cases and a few select industries only – Infrastructure and Core Industries
Strategic Debt Restructuring (SDR)	(1) Helps realign debt without restructuring Tag (2) Weed out efficient management (3) Provides standstill clause for 18 months	(1) For Old cases cannot be forced upon (2) Existing management may continue in disguise (3) Finding new Promoter is always a challenge (4) Banks not comfortable towards steep discount to debt and need for refinancing
Asset Reconstruction Company (ARC) Route	(1) Helps in realign/settle debt at a realistic level (2) Faster decision making as question of accountability doesn't arise	(1) Banks are not able to realise significant portion of their dues (2) Increase in cost as ARC charge management fee (3) ARC's capital base too limited compared to overall magnitude of stressed assets

Scheme for Sustainable Structuring of Stressed Assets (S4A)	(1) Advantage of getting to run the business with a more manageable debt i.e. 50%	(1) Current cash-flow of the company taken as basis to ascertain sustainable debt, so there are not enough companies which can come under its purview (2) Terms and Conditions of the loan cannot be changed
One Time Settlement (OTS)	(1) Based on Bank Internal policies (2) Helpful where security coverage is not adequate	(1) No immediate source of fund available with borrower for OTS (2) Major OTS proposals fail post sanction as repayment was deferred (3) Lenders are very cautious upon decision making which delays the whole process

Evolution of IBC Code, 2016

- The Viswanathan committee brought out interim report in the month of February 2015 and the final report on November 04 2015.
- Ministry of Finance invited comments on Draft Insolvency and Bankruptcy Bill in November 2015 based on the recommendation of report of Vishwanathan Committee.
- The Insolvency and Bankruptcy Code, 2015 was introduced in Loksabha on December 21, 2015
- The bill was referred to Joint committee on The Insolvency and Bankruptcy Code, 2015.
- The report of the joint committee was presented in Loksabha and laid down in Rajyasabha on April 28, 2016.
- The code was passed by Loksabha on May 05, 2016.
- The Code was passed by Rajyasabha on May 11, 2016.
- The Code received president's assent on May 28 2016.

Objectives of the Insolvency and Bankruptcy Code 2016

- To improve and facilitate the business arena in India. People should be easily available to disperse loans to harness the entrepreneurs in the country without being worried about the security of the recovery of their loans.
- This law helps lenders and creditors have fast recovery of the debts as it is time bound unlike other legislative facilities in India which may extend for years without any resolution.

- This was done so that even foreign investors can invest in businesses in India with ease and better credit perspectives are available for the Indian businessmen to increase and expand their business.
- This would also help the country to improve its economic growth and development.

Highlights of the Insolvency and Bankruptcy code 2016:

- Previously the average time to resolve the insolvency was around four years which is cut down to six months by this code.
- This insolvency and bankruptcy code 2016 will attract further foreign investment with proven results of effective and speedy functioning of the insolvency and liquidation process. Hence it will be a key factor to sustain economic growth in the country through foreign investments.
- The code is applicable to companies, limited liability firms, other firms, and individuals.
- This insolvency and bankruptcy code 2016 includes two processes that is Insolvency Resolution and second is liquidation.
- The insolvency and bankruptcy code 2016 has considered the Mallya saga and have attempted to address cross border insolvency as well.
- The properties considered for insolvency resolution and liquidation under the code are money, goods, actionable claims, land. This could be either in India or outside. With help of Central Government, the code can also be re-enforced outside the country.
- This insolvency and bankruptcy code 2016 is mother of all laws as it consolidates and surpasses all the laws of revival, restructuring, winding up and reorganization of any sick or debt oriented industry.
- The insolvency and bankruptcy code 2016 also provides an opportunity for professionals like advocates, lawyers, Chartered Accountants, Company Secretaries, Cost Accountants and Valuers to become Resolution Professionals by obtaining the license under the code and practice.
- The code includes the process to be followed to declare an individual, company or a partnership firm to be insolvent. Under insolvency and bankruptcy code 2016 both debtor and creditor can initiate the recovery procedure of the bad loans.
- Insolvency and bankruptcy board is the regulator for governing the insolvency and bankruptcy code 2016 proceedings. IBBI includes ten members who are from finance ministry and law ministry.
- Insolvency and bankruptcy code 2016 have announced two tribunals who shall be authorized to resolve the insolvency issues and thus will pronounce the judgement. One of them is National Company Law Tribunal which will take care of insolvency and bankruptcy code 2016 proceedings for companies and another is Debt Recovery Tribunal

which will govern the insolvency and bankruptcy code 2016 proceedings for the individuals.

Impact of the IBC Code.2016 on other Legislations

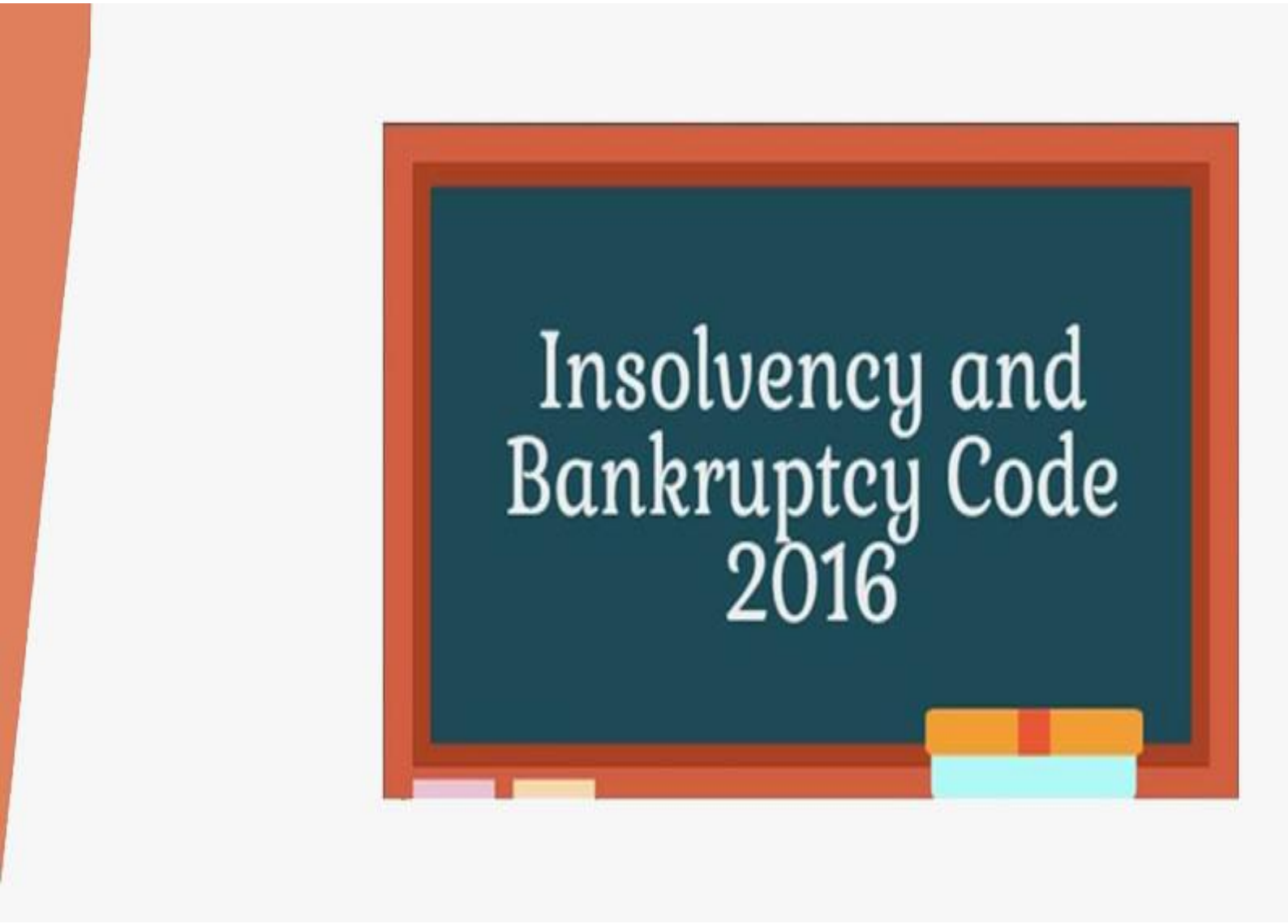
The Code repeals the Presidency Towns Insolvency Act, 1909, and Provincial Insolvency Act, 1920, as well as amends 11 legislations, including:

The impact of IBC will have an overriding effect on other legislations, by amendments of the followings:

i. The Indian Partnership Act 1932
ii. The Central Excise Act 1944
iii. The Income Tax Act 1961
iv. The Customs Act. 1962
v. Recovery of Debts Due to Banks and Financial Institutions Act, 1993
vi. The Finance Act 1994
vii. The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002
viii. Sick Industrial Companies (Special Provisions) Repeal Act, 2003
ix. The payment and Settlement Systems Act 2007
x. The Limited Liability Partnership Act 2008
xi. The Companies Act, 2013

To avoid any further litigation in insolvency proceedings, the Code will have an overriding effect over all other laws. It is specifically provided that civil courts or authority not to have jurisdiction and also cannot grant any injunction. The Code as a new law, replacing over a dozen laws, when implemented post the infrastructure being put in place, will prove to be the most important step in evolving the regimen of recovery of bad debts.

CHAPTER II – UNDERSTANDING IBC CODE.2016



Understanding of Insolvency and Bankruptcy Code, 2016

After the Independence, bankruptcy and insolvency were specified in Entry 9 of the Concurrent List of the Seventh Schedule, under Article 246 of the Constitution. So, now in the present, we had numerous Acts to govern Insolvency and bankruptcy issues and matters such as the Sick Industrial Companies (special provision) Act, 1985 ("SICA"), SARFAESI Act, 2002, the Recovery of Debts due to Banks and financial institutions Act, 1993 ("RDDBFI Act"), Companies Act, 1956 as well as Companies act, 2013. But these regulations have not yielded satisfactory results.

These regimes are high fragmented, borne out of multiple judicial forums resulting in lack of clarity and certainty of jurisdiction. Further, we had various adjudicatory bodies/Tribunals to deal with such issues and matters under different Acts stated above.

As the India will be among the top 50 countries in terms of ease of doing business within three years, IBC is urgently required:

- **Stressed assets in India have grown to US$150 billion.**
- **There is an urgent need of capital infusion since most of the promoters are not in condition to infuse more capital.**
- **It is important not only for stressed assets but for the entire growth.**

Objectives of IBC Act, 2016

- Create a prescribed and clear insolvency and bankruptcy framework.
- A proper solution to commercial problem.
- To revive an insolvent business.
- To increase the comfort and ease among the lenders.

Insolvency is when an individual or organization is unable to meet its outstanding financial debt towards its lender as it become due. Insolvency can be resolved by way of changing the repayment plan of the loans or writing off a part thereof. If it cannot be resolved, then a legal action may lie against the insolvent and its assets will be sold to pay off the outstanding debts. Generally, an official assignee/liquidator appointed by the Government of India, realizes the assets and allocates it among the creditors of the insolvent.

Bankruptcy is a concept slightly different from insolvency, which is rather amicable. A bankruptcy is when a person voluntary declares himself as an insolvent and goes to the court. On declaring him as 'bankrupt', the court is responsible to liquidate the personal property of the insolvent and hand it out to its creditors. It provides a fresh lease of life to the insolvent.

Persons eligible to apply to NCLT

1. Financial Creditor
2. Operational creditor
3. Corporate debtor

"Financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;

"Operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;

"Corporate debtor" means a corporate person who owes a debt to any person;

When Corporate Insolvency Resolution Process can be initiated?

The corporate Insolvency Resolution Process can be initiated where minimum amount of default is one lakh rupees. The Central Government may prescribe higher value for minimum amount of default which shall not be more than one crore rupees.

Default: means non-payment of debt when whole or any part or installment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be.

The Code establishes an Insolvency Regulator (The Insolvency and Bankruptcy Board of India) to exercise regulatory oversight over

- Insolvency Professionals,
- Insolvency Professional Agencies and
- Information Utilities.
- Insolvency and Bankruptcy Board of India

1. **Insolvency Professionals:** conduct the insolvency resolution process, take over the management of a company, assist creditors in the collection of relevant information, and manage the liquidation process. The Code bestows such powers and duties upon the insolvency professional as required to efficiently drive the insolvency and liquidation process.

2. **Insolvency Professional Agency**: accepts registration, examine and certify the insolvency professionals. Such agencies are to be registered with and certified by the Insolvency and Bankruptcy Board of India.

3. **Insolvency Information Utilities**: The Code provides for information utilities which would collect, collate, authenticate and disseminate financial information from listed companies and financial and operational creditors of companies. An individual insolvency database is also proposed to be set up with the goal of providing information on insolvency status of individuals

4. **Insolvency and Bankruptcy Board of India:** This body shall have regulatory over-sight over the Insolvency Professional, Insolvency Professional Agencies and Information Utilities. Under the Board's supervision, these agencies will develop professional standards, codes of ethics and exercise a disciplinary role over errant members leading to the development of a competitive industry for insolvency professionals. The Board is responsible for making guidelines and regulation on matters of insolvency and bankruptcy. The Board shall consist of a Chairperson, three members from the Central Government not below the rank of Joint Secretary or equivalent – one each to represent the Ministry of Finance, the Ministry of Corporate Affairs and Ministry of Law, ex-officio; one member to be nominated by the Reserve Bank of India, ex officio; five other members to be nominated by the Central Government. The Chairperson and the other members shall be persons of ability, integrity and standing, who have shown capacity in dealing with problems relating to insolvency or bankruptcy and have special knowledge and experience in the field of law, finance, economics, accountancy or administration.

The Adjudicating Authorities for Corporate Insolvency Resolution Process

1. National Company law tribunal (NCLT)
2. National Company Law Tribunal Appellate Tribunal

Under Part II, Chapter VI of the Code, National Company Law Tribunal (NCLT) would be adjudicating authority for insolvency resolution and liquidation of Companies, Limited Liability Partnerships (LLPs), any entity with limited liability under any law and bankruptcy of personal guarantors thereof. An appeal can be preferred from orders of NCLT to National Company Law Appellate Tribunal (NCLAT) within 30 days (15 days' extension if there is sufficient ground). Jurisdiction is territorial based on location of registered office of corporate person. Orders of NCLAT are appealable on a question of law to the Supreme Court within 45 days.

Vide its notification dated June 01, 2016, the Central Government has constituted 11 (eleven) Benches of the NCLT in exercise of its powers under sub-section (1) of section 419 of the new Companies Act, 2013. Of the said 11 benches, two shall be situated in New Delhi, and one

each at Ahmedabad, Allahabad, Bengaluru, Chandigarh, Chennai, Guwahati, Hyderabad, Kolkata and Mumbai and one bench recently opened at Jaipur.

Under Part III, Chapter VI of the Code, Debt Recovery Tribunal (DRT) would be the adjudicating authority for insolvency resolution and bankruptcy of individuals, unlimited partnerships and partner/s thereof. Jurisdiction would be based on place of residence or works for gain or carries on business. Appeal can be made to Debt Recovery Appellate Tribunal (DRAT) within 30 days (15 days' extension if there is sufficient ground). Further appeal from DRAT would be within 45 days before the Supreme Court only on question of law. It is specifically provided that Civil courts or authority not to have jurisdiction and also cannot grant any injunction.

Moratorium during CIRP Process

1. One of the most significant features of the Code is the grant of moratorium during which creditor action will be stayed. This is not automatic and has to be granted by the Adjudicating Authority at the time of admission of the corporate insolvency application. Moratorium shall continue till completion of corporate insolvency resolution process.

2. An automatic interim moratorium operates when an application for fresh start process by debtor, or an application for insolvency resolution of partnership firm or individual, or application for bankruptcy is made. Interim moratorium ceases to have effect upon admission of such application by the adjudicating authority. During the period of filing of application for insolvency or liquidation/bankruptcy, an interim-moratorium period shall automatically commence and shall be effective till insolvency or liquidation/bankruptcy commencement date, as the case may be.

3. **The Adjudicating Authority shall declare moratorium for prohibiting the following:**

   i. Any legal action against debtor by way of the institution of suits, continuation of pending suits or proceedings including execution of judgement, decree or order in any court of law, tribunal, arbitration panel or other authority;

   ii. Transferring, encumbering, alienating or disposing debtor's assets;

   iii. Any action to enforce or deal with security interest created by the debtor in respect of its property including under SARFAESI Act, 2002;

   iv. The recovery by an owner or lessor of any property in the possession of the debtor.

   v. The supply of essential goods or services to the debtor shall not be interrupted during moratorium period.

   vi. The order of moratorium shall be effective from the date of such order till the completion of the insolvency resolution process (i.e. maximum 180+90 days). However, if during the insolvency resolution process period, the Adjudicating Authority approves the resolution plan or passes an order for liquidation/bankruptcy, then the moratorium period shall cease.

vii. The period of moratorium shall be excluded for purpose of computing the period of limitation specified for any suit or application by or against a debtor for which an order of moratorium has been made.

I. Insolvency Resolution Process under Insolvency and Bankruptcy Code, 2016

Step I – Application to National Company Law Tribunal (NCLT)

A financial creditor (himself or jointly with other financial creditors), an operational creditor or the corporate debtor (through Corporate applicant i.e. corporate debtor itself; or an authorized member, partner of corporate debtor; or a person who has control and supervision over the financial affairs of the corporate debtor) may initiate corporate insolvency resolution process in case a default is committed by corporate debtor. An application can be made before the National Company Law Tribunal (NCLT) for initiating the resolution process. Operational creditor needs to give demand notice of 10 days to corporate debtor before approaching the NCLT. If corporate debtor fails to repay dues to operational creditor or fails to show any existing dispute or arbitration, then the operational creditor can approach NCLT.

Step II – Admission of Application made to National Company Law Tribunal (NCLT)

Corporate insolvency process shall be completed within 180 days of admission of application by NCLT. Upon admission of application by NCLT, Creditors' claims will be frozen for 180 days, during which time NCLT will hear proposals for revival and decide on the future course of action. And thereupon, no coercive proceedings can be launched against the corporate debtor in any other forum or under any other law, until approval of resolution plan or until initiation of liquidation process.

Step III – Appointment of Interim Insolvency Professional (IP)

NCLT appoints an interim Insolvency Professional (IP) upon confirmation by the Insolvency and Bankruptcy Board (hereinafter, "the Board") within 14 days of acceptance of application. Interim IP holds office till either his confirmation as RP or appointment of another RP. Interim IP takes control of the debtor's assets and company's operations, collect financial information of the debtor from information utilities.

Step IV – Public Announcement and Calls for Submission of Claims

NCLT causes public announcement to be made of the initiation of corporate insolvency process and calls for submission of claims by any other creditors.

After receiving claims pursuant to public announcement, interim IP constitutes the creditors' committee. All financial creditors shall be part of creditors' committee and if any financial creditor is related party of corporate debtor, then such financial creditor will not have any right of representation, participation or voting. Operational creditors should be part of Creditors' Committee (without voting right) if their aggregate dues are not less than 10% of the debt.

Step V – Constitution of First Committee of Creditors

Creditors' committee shall meet first within seven days of its constitution and decide by 66% of votes either to replace or confirm interim IP as Resolution Professional. Thereupon, Resolution Professional is appointed by the NCLT upon confirmation by the Board. The creditors' committee, with a majority of 66% votes, can change Resolution Professional any time.

The creditors' committee has to then take decisions regarding insolvency resolution by a 66% majority voting. If 66% by voting share of the financial creditors consider the case complex and require extension of time beyond 180 days, the NCLT can grant a one-time extension of up to 90 days. Resolution Professional to conduct entire corporate insolvency resolution process and manage the corporate debtor during the period.

Step VI – Preparation of Information Memorandum & Inviting EOI's from Resolution Applicant

Resolution Professional shall prepare information memorandum for the purpose of enabling resolution applicant to prepare resolution plan. A resolution applicant means any person who submits resolution plan to the resolution professional. And upon receipt of resolution plans, Resolution Professional shall place it before the creditors' committee for its approval.

Step VII – Approval of Resolution Plan

Once a resolution is passed, the creditors' committee has to decide on the restructuring process that could either be a revised repayment plan for the company, or liquidation of the assets of the company. If no decision is made during the resolution process, the debtor's assets will be liquidated to repay the debt. The resolution plan will be sent to NCLT for final approval, and implemented once approved.

II. Model Time-Line For Corporate Insolvency Resolution Process

The following Table presents a model timeline of corporate insolvency resolution process on the assumption that the interim resolution professional is appointed on the date of commencement of the process and the time available is hundred and eighty days:

Section/ Regulation	Description of Activity	Norm	Timeline
Section 16(1)	Commencement of CIRP and appointment of IRP	….	T
Regulation 6(1)	Public announcement inviting claims	Within 3 Days of Appointment of IRP	T+3
Section 15(1) (c)/ Regulation 6(2) (c) and 12(1)	Submission of claims	For 14 Days from Appointment of IRP	T+14
Regulation 12(2)	Submission of claims	Up to 90th day of commencement	T+90

Section/ Regulation	Description of Activity	Norm	Timeline
Regulation 13(1)	Verification of claims received under regulation 12(1)	Within 7 days from the receipt of the claim	T+21
Regulation 13(2)	Verification of claims received under regulation 12(2)		T+97
Section 21(6A) (b) / Regulation 16A	Application for appointment of AR	Within 2 days from verification of claims received under regulation 12(1)	T+23
Regulation 17(1)	Report certifying constitution of CoC		T+23
Section 22(1) / Regulation 19(1)	1 st meeting of the CoC	Within 7 days of the constitution of the CoC, but with seven days' notice	T+30
Section 22(2)	Resolution to appoint RP by the CoC	In the first meeting of the CoC	T+30
Section 16(5)	Appointment of RP	On approval by the AA	……
Regulation 17(3)	IRP performs the functions of RP till the RP is appointed.	If RP is not appointed by 40th day of commencement	T+40
Regulation 27	Appointment of valuer	Within 7 days of appointment of RP, but not later than 40th day of commencement	T+47
Section 12(A) / Regulation 30A	Submission of application for withdrawal of application admitted	Before issue of EoI	W
	CoC to dispose of the application	Within 7 days of its receipt or 7 days of constitution of CoC, whichever is later	W+7
	Filing application of withdrawal, if approved by CoC with 90% majority voting, by RP to AA	Within 3 days of approval by CoC	W+10
Regulation 35A	RP to form an opinion on preferential and other transactions	Within 75 days of the commencement	T+75
	RP to make a determination on preferential and other transactions	Within 115 days of the commencement	T+115
	RP to file applications to AA for appropriate relief	Within 135 days of the commencement	T+135
Regulation 36 (1)	Submission of IM to CoC	Within 2 weeks of appointment of RP,	T+54

Section/ Regulation	Description of Activity	Norm	Timeline
		but not later than 54th day of commencement	
Regulation 36A	Publish Form G	Within 75 days of commencement	T+75
	Invitation of EoI		
	Submission of EoI	At least 15 days from issue of EoI (Assume 15 days)	T+90
	Provisional List of RAs by RP	Within 10 days from the last day of receipt of EoI	T+100
	Submission of objections to provisional list	For 5 days from the date of provisional list	T+105
	Final List of RAs by RP	Within 10 days of the receipt of objections	T+115
Regulation 36B	Issue of RFRP, including Evaluation Matrix and IM	Within 5 days of the issue of the provisional list	T+105
	Receipt of Resolution Plans	At least 30 days from issue of RFRP (Assume 30 days)	T+135
Regulation 39(4)	Submission of CoC approved Resolution Plan to AA	As soon as approved by the CoC	T+165
Section 31(1)	Approval of resolution plan by AA		T=180

What is Resolution Plan?

As per Section 30, the Insolvency Resolution Professional (IRP) within the prescribed time i.e. 180 days or in case of extension 270 days, where Fast Track Resolution within 90 days or in case of extension 135 days, is required to submit his Resolution Plan to Adjudicating Authority (NCLT) prepared by him on the basis of information memorandum. The Resolution Plan should provide for:

i. Payment of insolvency resolution Costs;
ii. Repayment of the debts to operational creditors;
iii. Management of affairs of the Company after approval of the resolution plan;
iv. Implementation and supervision of the resolution plan;
v. Does not contravene provisions of the law for the time being in force;
vi. Conforms to such other requirement as may be specified by the Board.

Liquidation Process under Insolvency and Bankruptcy Code, 2016

Liquidation order will be passed if:

- CIRP ends
- Plan not submitted to NCLT
- Plan not approved
- Decided by CoC
- Plan not properly implemented

Liquidation Steps

- Appointment of liquidator
- Formation of liquidation estate
- No legal proceeding by or against the debtor
- Consolidation of claims
- Distribution of assets
- Dissolution of debtors (to be completed within 2 years

Liquidation Process

The commencement of liquidation process takes place on account of failure to submit the resolution plan to the NCLT within the prescribed period, or rejection of resolution plan for non-compliance with the requirements of the Code, or decision of creditors' committee based on vote of majority, or contravention of resolution plan by the debtor.

- During liquidation, no suit or other proceedings shall be instituted by or against the corporate debtor; except through the liquidator on behalf of corporate debtor with permission of the NCLT.
- The Resolution Professional shall act as liquidator unless replaced.
- The liquidator shall form an estate of all assets of corporate debtor called the liquidation estate.
- Liquidator shall receive, verify and admit or reject, as the case may be, the claims of creditors within the prescribed time. Creditor may appeal to the adjudicator within 14 days.
- A secured creditor may either relinquish its security interest to the liquidation estate and receive on first priority, the proceeds of the sale by the liquidator or realise its security

interest by enforcing, realising, settling, compromising or dealing with the secured asset in accordance with such law as applicable to the secured interest. Any surplus amount so realized shall be tendered to the liquidator. In case of any shortfall in recovery, the secured creditors will be paid by the liquidator out of the assets of the corporate debtor. However, his claim will be junior to the unsecured creditors to the extent of the shortfall.

- Assets will be distributed by the liquidator in the manner of priorities of debts laid in the Code. Individual claimants or those claiming to have any special rights on assets of the debtor will form part of the liquidation process.

- All sums due to any workman or employee from the provident fund, the pension fund and the gratuity fund will be considered as priority dues and is not to be included in the liquidation estate and estate of bankrupt.

- Upon the assets of corporate debtor completely liquidated and the liquidator making an application, the NCLT shall pass an order dissolving the corporate debtor.

Fast Track Insolvency Resolution Process

The Code has provided for a fast track insolvency resolution process in respect of corporate debtors, qualification to be notified by the Government. The process shall be completed in 90 days (extendable by maximum 45 days). Provisions of insolvency process apply to fast track insolvency. This will be an enabler for start-ups and small and medium enterprises to complete the resolution process quickly and move on.

Voluntary Liquidation of Corporate Person

The Code provides for voluntary liquidation proceedings by corporate person who intends to liquidate itself and has not committed any default and can pay off its debts fully from proceeds of liquidation of its assets. The law requires a declaration to that effect from majority of directors of the company also stating that the company is not being liquidated to defraud any person. A resolution passed to this effect shall be approved by creditors representing two-thirds value of the company's debts. Voluntary liquidation commences when such resolution is passed by the creditors as above. Provisions of liquidation process apply to voluntary liquidation. Once the debtor is completely wound up and assets liquidated, the NCLT passes an order for its dissolution.

II. Insolvency Resolution & Bankruptcy for Individuals & Partnership Firms

For insolvency resolution of individuals and partnerships, there is no specific mandatory period within which the resolution decision has to be taken. Reason attributable is that individual businesses are varied and vastly different, with no standardized information about their activities. Moreover, a corporate person can be liquidated but an individual cannot. He has to be declared bankrupt.

If the default is above Rs.1000, the Code applies to such individuals and partnerships. The Code envisages following distinct processes in case of insolvencies:

Automatic fresh start process– wherein, the Code allows discharge of qualifying debts thereby facilitating the debtor to start afresh.

Insolvency resolution process– during which the creditors assess whether the debtor's business is viable to continue and the options for its rescue and resurrection

Bankruptcy–it is similar to liquidation proceeding. When insolvency process fails, creditors may apply to distribute debtor's estate to repay the debts.

Fresh Start Process

Under the automatic fresh start process, eligible debtors (on basis of minimum threshold specified of gross income, value of assets, qualifying debt etc.) can apply to the Debt Recovery Tribunal (DRT) for discharge from certain debts not exceeding a specified threshold, allowing them to start afresh. The fresh start process is only available to individual insolvency (under Part III, Chapter II, of the Code) and not available for corporate persons. A resolution professional appointed by the DRT examines the application, receives claims from creditors, accepts or rejects the application and submits a report with reasons to the DRT. On the basis of the said report, the DRT accepts or rejects the application.

Insolvency Resolution Process

The insolvency resolution process consists of preparation of a repayment plan by the debtor, for approval of creditors. If approved, the DRT passes an order binding the debtor and creditors to the repayment plan. If the plan is rejected or fails, the debtor or creditors may apply for a bankruptcy order.

- A debtor (majority of partners if applying for a firm), creditor (himself or jointly with other creditors), individually or through resolution professional may apply to DRT.
- DRT shall appoint resolution professional upon confirmation received from the Board. Resolution professional may be replaced at any time, with a majority voting of the creditors, through an application to DRT. Board shall confirm and the DRT shall appoint the creditors' nominated person or Board's recommended person as resolution professional.
- The resolution professional shall examine insolvency application and submit his report to DRT with his recommendation to admit or reject it.
- DRT shall within 14 days admit or reject the application. Upon admission, DRT may on the request of resolution professional, issue directions for conducting negotiations between debtor and creditors for arriving at a repayment plan.
- DRT shall issue public notice inviting claims from all creditors within 21 days of such notice. Creditors shall register claims with resolution professional. Resolution professional shall prepare a list of creditors. The resolution professional shall determine the voting share to be assigned to each creditor.

- The debtor shall prepare a repayment plan containing a proposal to the creditors for restructuring his debts. The resolution professional shall submit the repayment plan along with his report on the resolution plan to DRT within 21 days of last day of submission of claims.

- The resolution professional shall summon a meeting of creditors to approve, modify or reject the repayment plan by a majority of more than 66% votes. Debtor's consent to every modification shall be taken.

- Secured creditor is entitled to participate and vote in creditor's meeting if he forfeits right to enforce the security. If the secured creditor does not forfeit his right to enforce security, then his right to vote is only in respect of the unsecured part of his debt. Secured and unsecured parts of the debt are treated as separate debts.

- The resolution professional prepares a report of the meeting and submits to DRT. DRT may approve or reject the repayment plan on the basis of the report. Approved repayment plan shall be binding on creditors and debtor. If the DRT rejects the repayment plan, then bankruptcy proceeding can be initiated.

Bankruptcy

The process is similar to liquidation of corporate person.

- When application for insolvency is rejected by the DRT or the repayment plan is not submitted in time or the repayment plan fails or does not fulfil requirements of the Code, or the repayment plan is contravened, the creditor (individually or jointly with other creditors) or the debtor himself may apply to DRT for bankruptcy of the debtor. The application cannot be withdrawn except with the leave of the tribunal. The DRT will pass an order, thereby indicating commencement of bankruptcy proceeding (date of such order is the bankruptcy commencement date).

- A secured part of the creditor's debt may at his discretion be made part of bankruptcy trust. He may choose to make an application for bankruptcy only in terms of unsecured part of his debt. A bankruptcy order does not affect his right to realise his security interest. However, he may do so only within 30 days from bankruptcy commencement date.

- A bankruptcy trustee is appointed by the DRT on the basis of Board's confirmation of nominated person by applicant or Board's recommendation of another person. A bankruptcy trustee may be replaced by 66% voting of committee of creditors or he may resign himself.

- Estate of bankrupt vests in the bankruptcy trustee and he shall divide it among creditors.

- The DRT shall send notice to creditors of commencement of bankruptcy proceeding and shall issue a public notice calling for claims from creditors.

- The claims of creditors shall be registered with the bankruptcy trustee. The trustee shall prepare a list of creditors and summon a meeting of creditors. A committee of creditors shall be formed in the meeting. Creditors are entitled to a vote in accordance with the voting share assigned to them by the resolution professional.
- Creditors shall submit proof of debt within 14 days of preparing list of creditors. The creditor shall give full particulars (along with proof) of claim and/or security interest. If a creditor does not file a proof of security within 30 days of notice to that effect sent by the trustee, then with DRT's leave the bankruptcy trustee may sell or dispose of any property that was subject to a security charge, free of that security charge.
- Bankruptcy trustee shall conduct the administration and distribution of bankrupt's estate.
- Once the administration is complete or on expiry of one year from date of bankruptcy commencement, the bankrupt may be discharged by an order of the DRT.
- The DRT may recall its bankruptcy order or modify it on an application from creditor/s or suo moto, whether or not the bankrupt is discharged, if satisfied that there exists an error apparent on face of order or bankruptcy debts are paid for or secured to the authority's satisfaction.
- The Code provides for a list of priority of debts with regard to distribution of proceeds following bankruptcy of the partnership firm or individual.
- Administration and distribution of estate: The Bankruptcy trustee shall realise the estate and distribute the proceeds or the assets itself to the creditors in installments or in totality as per the list of priority of debts and availability of funds.
- A creditor who has not proved his debt before declaration of installment/dividend is not entitled to intervene by reason that he has not participated in the distribution of dividend before his debt was proved. But when he proves it he shall be paid on priority, amount to the extent of his share of dividend that is paid to other creditors.
- Bankruptcy proceedings shall continue even if the bankrupt dies. Claims of legal representatives shall be entertained.

III. Order of priority of payment of debts

The Code provides for priority with regard to distribution of proceeds following liquidation of the company or bankruptcy of individual or partnership as below:

i. Insolvency resolution cost and liquidation cost

ii. Workmen's dues (for 24 months before commencement) and debts to secured creditor (who have relinquished their security interest)

iii. Wages and unpaid dues to employees (other than workmen) (for 12 months before commencement)

iv. Financial debts to unsecured creditors and workmen's dues for earlier period

v. Crown debts and debts to secured creditor following enforcement of security interest

vi. Remaining debts

vii. Preference shareholders

viii. Equity Shareholders or partners

Any surplus remaining after payment of debts shall be applied in payment of interest accrued since commencement date.

CHAPTER III – IBC CODE (AMENDMENT) ORDINANCE, 2018

President Approves Promulgation of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018.

Features of the Ordinance:

The Ordinance made the following major changes to the Code:

1. **Homebuyers – A New Class of 'Financial Creditors' in respect of a real estate project and be represented in the CoC by an 'authorized representative' to be appointed by the National Company Law Tribunal (NCLT).**

2. **Definition of Resolution Applicant**

   Earlier, the Code defined resolution applicant as a person who could submit a resolution plan to the insolvency professional. The ordinance amended this provision to add that a resolution applicant will be someone who submits a resolution plan after receiving an invite by the insolvency professional to do the same. This was done to ensure that only people who are eligible as per the ordinance are invited by Insolvency Professionals to submit resolution plans.

3. **Eligibility**

   Clause h of Section 25 (Duties of Resolution Professional) which provided for the duty of the resolution professional to call for resolution plans was also amended. The amendment provided that the insolvency professionals will only invite those applicants to submit a resolution plan who meet the criteria decided by him along with the creditors committee or by the Insolvency and Bankruptcy Board of India.

4. **Barring of Certain Persons**

   The ordinance inserted Section 29A to the Code which prohibited certain persons from submitting a resolution plan and buying assets of the corporate debtor during liquidation. The words of the Section were as follows:

   "29A. A person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly with such person, or any person who is a promoter or in the management or control of such person."

   The above-mentioned main clause was followed by the list of persons barred from submitting such plans, which were:

   i. an undischarged insolvent,
   ii. a willful defaulter,
   iii. account has been identified as a non-performing asset for more than a year
   iv. has been convicted of an offence punishable with two or more years of imprisonment,

v. has been disqualified as a director under the Companies Act, 2013,

vi. has been prohibited from trading in securities by SEBI,

vii. has indulged in undervalued, preferential, or fraudulent transactions,

viii. he has given guarantee on a liability of the defaulting company undergoing resolution or liquidation,

ix. is connected to any person mentioned above (including promoters, management, or any person related to them), or

5. Retrospective Operation of the Ordinance

Section 30 provided for retrospective operation. It provided that the Committee of Creditors shall not accept the plans submitted prior to the Ordinance if the resolution applicant is ineligible after the coming in of Ordinance and in the absence of other plans, the resolution professional shall be required to invite fresh resolution plans.

6. Analysis of the Ordinance

The ordinance faced a lot of flak from the industry stakeholders. There were three main provisions that were found to be contentious: first, barring of persons holding NPA accounts for more than one year; second, barring of persons who had given guarantee to a creditor of defaulter undergoing insolvency or liquidation and third, barring of "connected parties".

Classified as NPA accounts for more than one year.

This was based on the fact that the distressed assets market in India is not very developed and by disqualifying the promoters, there will be a further reduction in the number of bidders and consequently, depressed prices of assets. This will specially impact the small and medium enterprises (SMEs) as they do not have many buyers except the promoter in most cases.

Further, the provision inserted to bar holders of NPA accounts was not clear and suffered from drafting lapses as the amendment didn't provide the cut-off date for counting of lapse of 1 year as NPA classification

Barring guarantors of debtors undergoing insolvency or liquidation proceedings

The Ordinance had put a bar on submitting resolution plans for persons who had given guarantee on a liability of the defaulting corporate debtor undergoing resolution or liquidation. This was seen as problematic by various stakeholders as the language even disqualified guarantors in cases where they had honoured the guarantee but the insolvency process was initiated by some other creditor against the corporate debtor

Connected Party Clause

Besides this, another ordinance was that it might end up barring global private equity funds and participants in the stressed asset market from being resolution applicants. This is so because the ordinance applies to bidders under any law in a jurisdiction outside India and the connected party definition is very broad. Connected party includes within its fold:(a) person who is a

promoter or in the management or control of the resolution applicant, (b) person who shall be promoter or in management or control of the business of the corporate debtor during the implementation of the resolution plan, or (c) holding company, subsidiary company, associate company and related party of such person

Changes made through the Bill

1. The Bill clarifies that disqualification from the resolution process will be limited to the period when the ineligibility is in force. This means, that if the ineligibility was in the past, the person will be allowed to submit plans once he becomes eligible. This change was made to the language of the provisions barring willful defaulters, disqualified directors and persons prohibited by SEBI (Section 29A (a), (b),(e) and (f))

2. The Bill also clarifies the cut-off date of one year for the NPA accounts. It specifies that one year period for NPA account holders will be measured from the date of the classification as NPA to the date of commencement of the corporate insolvency resolution process. (Section 29A ©)

3. Exemption has been provided to Schedule Banks, Alternate Investment funds (which include Private Equity funds) and ARCs (Proviso to Section 29(j))

4. In case of resolution plans submitted before the ordinance came into force, persons who are rendered ineligible due to being holders of NPA accounts for more than one year can become eligible if they pay off all their dues within a thirty days period prescribed by the Committee of Creditors (CoC) (Second proviso to Section 30(4))

5. The provision barring guarantors was also amended to clarify that the guarantor will only be prohibited from being a resolution applicant in cases where a guarantee was executed in favour of creditor in respect of a corporate creditor and that creditor has filed for insolvency or resolution against the said corporate debtor. Hence, in a way, it provides relief in cases where the guarantor has honoured the guarantee (Section 29(a)(h))

6. **Micro, Small and Medium Enterprise:** Section 240A has been introduced to allow the promoters of Micro, Small and Medium Enterprise **("MSME")** to participate in the bidding process and further empower the government to exclude MSME from the purview of certain sections of IBC.

7. **Withdrawal of Application:** The new Section 12A states that the Adjudicating Authority may allow the withdrawal of application as submitted under the IBC on an application made by the applicant with the approval of 90% of the voting share of the Committee of Creditors, in the manner prescribed. However, such an application shall only be allowed till the commercial process of the bidding begins

8. **Linking proceedings of the Corporate Guarantor and the Corporate Debtor:** Section 60 of the IBC has been amended to entrust the National Company Law Tribunal with the power to deal with the insolvency resolution or liquidation processes of the corporate debtor together

with the corporate guarantor in relation to the same debt. Corporate Guarantor has also been defined under the IBC as a corporate person who is surety in a contract for a corporate debtor.

9. **Approvals/Resolutions:** Voting threshold prescribed for obtaining the approval of the Committee of Creditors for extension of Corporate Insolvency Resolution Process ("**CIRP**") has been reduced to 66% from 75% and for obtaining the approval of the Committee of Creditors for appointment of Resolution Professional or replacement of the Resolution Professional from 75% per cent to 66%. Further, specific consent is now to be obtained from Interim Resolution before his appointment as a Resolution Professional. The voting threshold for the specific actions specified in Section 28 of the IBC has also been revised from 75% to 66%. If the resolution professional intimates the Adjudicating Authority of the decision of the committee of creditors to liquidate the corporate debtor, the same shall now be approved by a majority of only 66%. For routine decisions, voting thresholds have also been reduced to 51%.

10. **Applicability of the Limitation Act**: Section 238A has been inserted which now specifically states that the Limitation Act, 1963 shall apply to proceedings or appeals made under IBC before the National Company Law Tribunal or the National Company Law Appellate Tribunal.

11. **Transfer of Pending Applications:** There was a huge confusion in relation to time-barred debts which came to surface time and again in landmark cases such as, Black Pearl Hotels Pvt. Ld. v. Planet M Retail Limited. Time-barred claims were filed since the National Company Law Appellate Tribunal and the court had held that limitation would apply only from 2016 i.e. when IBC came into force. Section 434 of the Companies Act, 2013 has now been amended in line with Paragraph 34 of Schedule XI of the IBC to state any party or parties to any proceedings relating to the winding up of companies pending before any court immediately before the commencement of the Ordinance, may file an application for transfer of such proceedings and the court may order for the transfer such proceedings. Such proceedings will be dealt with the National Company Law Tribunal as an application for initiation of the corporate insolvency resolution process.

12. **Moratorium Not to Apply to Guarantors** - The 2018 Ordinance has clarified that the moratorium imposed by the NCLT under Section 14(1) (at the time of admission of an insolvency application) will not apply to guarantee contracts in relation to the corporate debtor's debt.

    Additionally, Section 61(3) of the IBC has been amended to ensure that the NCLT (which has jurisdiction over the insolvency resolution of the corporate debtor) will also have jurisdiction over the insolvency resolution of the corporate guarantor (irrespective of the jurisdiction (within India) where the corporate guarantor may have been incorporated in). This provision previously only covered personal guarantors.

CHAPTER IV - RECENT NOTIFICATIONS BY IBBI & OTHER REGULATORY BODIES

Appointment of Authorized Representative for Classes of Creditors under section 21 (6A) (b) of the Insolvency and Bankruptcy Code, 2016 dated 13th July'2018

Section 21 (6A) (b) of the Insolvency and Bankruptcy Code, 2016 (Code) read with regulation 16A (1) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (Regulations) provide that where the corporate debtor has at least ten financial creditors in a class, the interim resolution professional shall offer a choice of three insolvency professionals and a creditor in the class may indicate its choice of an insolvency professional, from amongst the three, to act as its authorized representative. The insolvency professional, who is the choice of the highest number of creditors in the class, is appointed as the authorized representative of the creditors of the respective class. The authorized representative collects voting instructions from the respective class of creditors, attends the meetings of the committee of creditors (CoC) and casts vote in respect of the said class in accordance with the instructions he receives from the creditors.

It is, accordingly, clarified that wherever the approval of resolution plan under regulation 39 (3) of the Regulations is at least 15 days away, the resolution professional shall expeditiously obtain, by electronic means, the choice of the insolvency professional from creditors in a class to act as the authorized representative of the class and proceed further in the manner as specified in regulation 16A of the Regulations.

The Ordinance also provides for a mechanism to allow participation of security holders, deposit holders and all other classes of financial creditors that exceed a certain number, in meetings of the Committee of Creditors, through the authorized representation.

Securities Contracts (Regulation) (Amendment) Rules, 2018 dated 24th July'2018

In the Securities Contracts (Regulation) Rules, 1957, in rule 19A, after sub-rule (4), the following sub-rule shall be inserted, namely:–

"Where the public shareholding in a listed company falls below twenty-five per cent, as a result of implementation of the resolution plan approved under section 31 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), such company shall bring the public shareholding to twenty-five per cent within a maximum period of three years from the date of such fall, in the manner specified by the Securities and Exchange Board of India:

Provided that, if the public shareholding falls below ten per cent, the same shall be increased to at least ten per cent, within a maximum period of eighteen months from the date of such fall, in the manner specified by the Securities and Exchange Board of India.

Securities and Exchange Board of India (Issue of Capital and Disclosure requirement) (Second Amendment) Regulations, 2018 dated 31st May'2018

In regulation 70, after sub-regulation (1) and before sub-regulation (2), the following sub-regulation shall be inserted, namely,-

"(1A) The provisions of this Chapter, except the lock-in provisions, shall not apply where the preferential issue of specified securities is made in terms of the rehabilitation scheme approved by the Board of Industrial and Financial Reconstruction under the Sick Industrial Companies (Special Provisions) Act, 1985 [1 of 1986] or the resolution plan approved under section 31 of the Insolvency and Bankruptcy Code, 2016 [No. 31 of 2016] whichever applicable."

Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) (Amendment) Regulations, 2018 dated 31st May'2018

In regulation 3, in sub-regulation (2), after the proviso and before the explanation to sub-regulation (2), the following proviso shall be inserted, namely,-

"Provided further that, acquisition pursuant to a resolution plan approved under section 31 of the Insolvency and Bankruptcy Code, 2016 [No. 31 of 2016] shall be exempt from the obligation under the proviso to the sub regulation (2) of regulation 3"

Securities and Exchange Board of India (Delisting of Equity Shares) (Amendment) Regulations, 2018 dated 31st May'2018

In regulation 3, after sub-regulation (2), the following sub-regulation shall be inserted, namely,

"(3) Nothing in these regulations shall apply to any delisting of equity shares of a listed entity made pursuant to a resolution plan approved under section 31 of the Insolvency and Bankruptcy Code, 2016 [No. 31 of 2016], if such plan, –

(a) Lays down any specific procedure to complete the delisting of such share; or

(b) Provides an exit option to the existing public shareholders at a price specified in the resolution plan:

Provided that, exit to the shareholders should be at a price which shall not be less than the liquidation value as determined under regulation 35 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 after paying off dues in the order of priority as defined under section 53 of the Insolvency and Bankruptcy Code, 2016[No. 31 of 2016]:

Provided further that, if the existing promoters or any other shareholders are proposed to be provided an opportunity to exit under the resolution plan at a price higher than the price determined in terms of the above proviso, the existing public shareholders shall also be provided an exit opportunity at a price which shall not be less than the price, by whatever name called, at which such promoters or other shareholders, directly or indirectly, are provided exit:

Provided also that, the details of delisting of such shares along with the justification for exit price in respect of delisting proposed shall be disclosed to the recognized stock exchanges within one day of resolution plan being approved under section 31 of the Insolvency and Bankruptcy Code, 2016 [No. 31 of 2016]."

II. In regulation 30, after sub-regulation (2) and before sub-regulation (3), the following sub-regulation shall be inserted, namely, -

"(2A) Notwithstanding anything contained in sub-regulation (1), an application for listing of delisted equity shares may be made in respect of a company which has undergone corporate insolvency resolution process under the Insolvency and Bankruptcy Code, 2016[No. 31 of 2016]."

Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) (Third Amendment) Regulations, 2018 dated 31st May'2018

I. In regulation 15, after sub-regulation (2) and before sub-regulation (3), the following sub-regulations shall be inserted, namely,-

"(2A) The provisions as specified in regulation 17 shall not be applicable during the insolvency resolution process period in respect of a listed entity which is undergoing corporate insolvency resolution process under the Insolvency Code:

Provided that the role and responsibilities of the board of directors as specified under regulation 17 shall be fulfilled by the interim resolution professional or resolution professional in accordance with sections 17 and 23 of the Insolvency Code.

(2B) the provisions as specified in regulations 18, 19, 20 and 21 shall not be applicable during the insolvency resolution process period in respect of a listed entity which is undergoing corporate insolvency resolution process under the Insolvency Code:

Provided that the roles and responsibilities of the committees specified in the respective regulations shall be fulfilled by the interim resolution professional or resolution professional."

In regulation 23, in sub-regulation (4), the following proviso shall be inserted, namely,-

"Provided that the requirements specified under this sub-regulation shall not apply in respect of a resolution plan approved under section 31 of the Insolvency Code, subject to the event being disclosed to the recognized stock exchanges within one day of the resolution plan being approved;"

In regulation 24, in sub-regulation (5), after the word, "court/Tribunal" and before the symbol ".", the following words shall be added, namely,-

Or under a resolution plan duly approved under section 31 of the Insolvency Code and such an event is disclosed to the recognized stock exchanges within one day of the resolution plan being approved"

II. In regulation 24, in sub-regulation (6), after the word, "court/Tribunal" and before the symbol ".", the following words shall be added, namely,- or under a resolution plan duly approved under section 31 of the Insolvency Code and such an event is disclosed to the recognized stock exchanges within one day of the resolution plan being approved"

III. in regulation 31A, after sub-regulation (8), the following sub-regulation shall be inserted, namely,-

"(9) The provisions of sub-regulations (5), (6) and clause (b) of sub regulation (7) of this regulation shall not apply, if re-classification of existing promoter or promoter group of the listed entity is as per the resolution plan approved under section 31 of the Insolvency Code, subject to the following conditions:

(i) The existing promoter and promoter group seeking re-classification shall not remain in control of the listed entity; and

(ii) (ii) Such re-classification along with the underlying rationale shall be disclosed to the stock exchanges within one day of the resolution plan being approved."

IV. In regulation 37, after sub-regulation (6), the following sub-regulation shall be inserted, namely,-

"(7) The requirements as specified under this regulation and under regulation 94 of these regulations shall not apply to a restructuring proposal approved as part of a resolution plan by the Tribunal under section 31 of the Insolvency Code, subject to the details being disclosed to the recognized stock exchanges within one day of the resolution plan being approved."

V. In schedule III, in part A, in clause A, after sub-clause 15, the following sub-clause shall be inserted, namely,-

"16. The following events in relation to the corporate insolvency resolution process (CIRP) of a listed corporate debtor under the Insolvency Code:

a) Filing of application by the corporate applicant for initiation of CIRP, also specifying the amount of default;

b) Filing of application by financial creditors for initiation of CIRP against the corporate debtor, also specifying the amount of default;

c) Admission of application by the Tribunal, along with amount of default or rejection or withdrawal, as applicable ;

d) Public announcement made pursuant to order passed by the Tribunal under section 13 of Insolvency Code;

e) List of creditors as required to be displayed by the corporate debtor under regulation 13(2)(c) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016;

f) Appointment/ Replacement of the Resolution Professional;

g) Prior or post-facto intimation of the meetings of Committee of Creditors;

h) Brief particulars of invitation of resolution plans under section 25(2)(h) of Insolvency Code in the Form specified under regulation 36A(5) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016;

i) Number of resolution plans received by Resolution Professional;

j) Filing of resolution plan with the Tribunal;

k) Approval of resolution plan by the Tribunal or rejection, if applicable;

l) Salient features, not involving commercial secrets, of the resolution plan approved by the Tribunal, in such form as may be specified;

m) Any other material information not involving commercial secrets." AJAY TYA

Disclosures by Insolvency Professionals and other Professionals appointed by Insolvency Professionals conducting Resolution Processes dated 16th January'2018

The Insolvency and Bankruptcy Code, 2016 read with regulations made there under provide for appointment of an insolvency professional [(Interim Resolution Professional (IRP) / Resolution Professional (RP)] to conduct the resolution process (Corporate Insolvency Resolution Process and the Fast Track Process) and discharge other duties. These authorize the Insolvency Professional to appoint registered valuers, accountants, legal and other professionals to assist him in discharge of his duties in resolution process. In the interest of transparency, it has been decided that an insolvency professional and every other professional appointed by the insolvency professional for a resolution process shall make disclosures

An insolvency professional shall disclose his relationship, if any, with (i) the Corporate Debtor, (ii) other Professional(s) engaged by him, (iii) Financial Creditor(s), (iv) Interim Finance Provider(s), and (v) Prospective Resolution Applicant(s) to the Insolvency Professional Agency of which he is a member within 3 (three) days.

For the purpose of Para 3 and 4 above, 'relationship' shall mean any one or more of the four kinds of relationships at any time or during the three years preceding the appointment:

A. Where the Insolvency Professional or the Other Professional, as the case may be, has derived 5% or more of his / its gross revenue in a year from professional services to the related party.

B. Where the Insolvency Professional or the Other Professional, as the case may be, is a Shareholder, Director, Key Managerial Personnel or Partner of the related party.

C. Where a relative (Spouse, Parents, Parents of Spouse, Sibling of Self and Spouse, and Children) of the Insolvency Professional or the Other Professional, as the case may be, has a relationship of kind A or B with the related party.

D. Where the Insolvency Professional or the Other Professional, as the case may be, is a partner or director of a company, firm or LLP, such as, an Insolvency Professional Entity or Registered Valuer, the relationship of kind A, B or C of every partner or director of such company, firm or LLP with the related party.

The Insolvency Professional shall provide a confirmation to the Insolvency Professional Agency to the effect that the appointment of every other professional has been made at arms' length relationship.

The Insolvency Professional shall ensure timely and correct disclosures by him and the other Professionals appointed by him. Any wrong disclosure and delayed disclosure shall attract action against the Insolvency Professional and the other Professional as per the provisions of the law

Levy of Minimum Alternate Tax ('MAT') under Section 115JB of the IT Act for the FY 2018-19

As per the circular issued by the Central Board of Direct Taxes (CBDT), companies under IBC will be allowed to set off losses brought forward, including unabsorbed depreciation, from the book profit for levy of MAT under Section 115JB of the IT Act. This is no doubt a relief from the earlier tax provisions where MAT is levied on book profit after deducting the amount of loss brought forward or unabsorbed depreciation, whichever is less.

For Example "If there is a corporate borrower with a debt outstanding of, say, ₹45,000 crore. Let us say that a buyer bids for ₹25,000 crore. As per the earlier MAT provisions, the difference (extinguishing of liability) ₹20,000 crore would have been treated as notional profit and the buyer would have to pay MAT on it. This would have depressed the value of bids." Under the recent amendment by CBDT, if the company has carry forward losses to the tune of ₹20,000 crore, then this can be set off against the notional profit, in effect providing relief under MAT provisions.

Carry forward of losses:

Previously, Section 79 of the Income-tax Act, 1961 (Act) provides that losses cannot be carried forward if ownership of majority shareholding in a company changes hands. For losses to be allowed to be carried forward there must be continuity of ownership (more than 50% of the voting power) between the year in which loss was incurred and the year in which loss is being allowed to be carried forward and/or set-off.

This comes with a hardship that since companies in bankruptcy have significantly brought forward losses, in the event of a change of ownership as part of the plan of revival under the IBC, they stand to lose out by not being able to set-off these losses against future profits. Tax losses are considered deferred tax asset.

The Finance Bill, 2018 amended Section 79 to provide for the exclusion of companies whose resolution plans have been approved under the IBC from its ambit. However, the amendment also provides for a curious rider that the approval of the resolution plan should be given after

providing a reasonable opportunity to the Income Tax Department. This is an interesting proposal because it effectively gives the Income Tax Department legal standing in the resolution process of companies that are covered by Section 79. All companies are not covered by this section and its applicability is limited to companies that are closely held (in which public are not substantially interested).

It would be worthwhile to bear in mind that the Income Tax Department has been classified as an operational creditor by the IBC and it does not have any standing in the resolution plan or process allowing it object or veto a resolution plan that provides for a write-off of outstanding income tax demand.

By way of this amendment, in cases of closely held distressed companies undergoing resolution within the IBC framework, Income Tax Department will have the standing to present its view before the NCLT. However, this amendment does not give any ability to the Income Tax Department to object or veto the resolution plan. The rationale of this pre-condition is not entirely clear and may act as an irritant in the resolution process.

It is also important to consider that in respect of closely held companies, the Income Tax Department can recover outstanding tax dues from the directors who are guilty of gross neglect, misfeasance or breach of duty. The IBC casts a duty on the Insolvency Resolution Process to determine any syphoning-off of funds or misfeasance on the part of the directors/promoters.

Income Tax Return to be signed by Resolution Professional

The Return of Income of companies under IBC code 2016 can be signed by the Resolution Professional appointed under IBC 2016 since the powers of the Board of Directors of the Corporate Debtor are suspended.

Approval of Competition Commission of India (CCI) must before Lender's finalize resolution plan

Committee of Financial Creditors will need to seek prior approval of the competition regulator before finalizing resolution plans, according to amendments to the Insolvency and Bankruptcy Code (IBC) that were duly approved by the cabinet. The measure seeks to prevent litigation that can derail the resolution process at a later stage

Competition Commission of India (CCI) assent will be needed before the committee of creditors (COC) finalizes a resolution plan. Currently, the winning bidder approaches CCI for clearance before formally taking over the asset.

CHAPTER V - SICA Vs IBC

Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) Vs the Insolvency and Bankruptcy Code, 2016 (IBC)

S. No.	Particulars	SICA	IBC
1	**Objects**	SICA was an enacted in public Interest for timely detection of sick and potential sick industrial companies' speedy determination of preventive, ameliorative, remedial measures.	IBC is an act to, inter alia, consolidate and amend law relating to reorganization and insolvency resolution of corporate and persons, in time bound manner for maximization of value of assets of such persons.
2	**Applicability**	SICA applies only to sick industrial company (as defined under SICA)	IBC applicable to all corporate debtors in default (as defined under IBC)
3	**Trigger Point**	Reference is filed for Rehabilitation when the net-worth of the sick industrial company is fully eroded.	The insolvency resolution process may be triggered where there is a default of whole or any part or instalment of the amount due and payable is not repaid by the corporate debtor (Default thresholds are specified under the IBC).
4	**Persons entitled to file reference/Application**	Reference may be filed by sick industrial company or scheduled banks/financial institutions/Central Government/Reserve Bank/State Level Financial Institution.	Application for insolvency resolution process may be made by (a) financial creditor, (b) operational creditor and (c) Corporate Debtor.
5	**Case of suo-moto rehabilitation**	BIFR may determine under Section 17 (2) whether it would be practicable for the company to make its net worth exceed the	Corporate Debtor

S. No.	Particulars	SICA	IBC
		accumulated losses within a reasonable time. Here it is a case of suomoto efforts by a sick industrial company to make its net worth positive without involving BIFR. If it is practicable, the Bench would by an Order in writing give time to the company to make its net worth positive. If the conditions attached Order of BIFR are not complied within the time specified, then, BIFR review it's Order and pass a fresh order in respect of such company under sub-section (3) of Section 17.	
6	**Agency Appointed for Rehabilitation/insolvency resolution**	Operating Agency is appointed by BIFR for formulating rehabilitation scheme after the sick industrial company is declared sick. Operating Agency are the banks or financial institutions.	Interim insolvency professional is appointed by the NCLT within fourteen days from insolvency commencement date (i.e. when the application for insolvency resolution process is accepted). Insolvency Professional is appointed by the committee of creditors.
7	**Suspension of Legal Proceedings**	No suit or winding up petition etc. can lie against the sick industrial company in term of Section 22 of SICA without the consent of BIFR.	NCLT grants moratorium period from the date of insolvency commencement date and end with the date of approval of resolution plan by NCLT.

S. No.	Particulars	SICA	IBC
8	**Submission Rehabilitation proposal/resolution plan**	Normally provided by the Company, which is approved by operating agency and later by BIFR.	Resolution plan is based on the information memorandum provided by the resolution professional. The Resolution Applicant prepares the Resolution Plan. The resolution applicant may be a financial creditor or operational creditor or corporate debtor.
9	**Time period for preparation of scheme of Rehabilitation**	SICA provided 90 days from the date of Order appointing the Operating Agency, a scheme with respect to sick industrial company, which may provide for one or more of the measures specified in the said Section.	No specific time for preparation of resolution plan given but the entire process of approval of resolution plan should be completed within 180 days from the date of admission of application (date of insolvency commencement).
10	**Examination of the scheme/Resolution plan**	Scheme prepared by the Operating Agency is required to be examined by the BIFR and the latter has power to modify the scheme.	The resolution professional examines each resolution plan NCLT should be satisfied with the Resolution plan.
11	**Publishing of Draft Scheme**	Draft Rehabilitation Scheme is required to be published inviting suggestions within such time as may be mentioned in the notification from the shareholders, creditors, and employees of sick industrial company as well as transferee company (in case of scheme envisaging amalgamation) as well as any other company	Subject to the Rules to be prescribed, there is no such requirement of publishing of draft scheme of Resolution plan for inviting suggestions.

S. No.	Particulars	SICA	IBC
		concerned (reverse merger cases) in the amalgamation	
12	Consent to the scheme	If the scheme provides for financial assistance to the sick industrial company, the BIFR should cause the same to be circulated to the persons providing such financial assistance by giving their consent within a period 60 days or within further period of not exceeding 60 days for the consent.	The Committee of Creditors may approve a resolution plan by a vote of not less than 75 % of the voting shares of the financial creditors.
13	Binding Effect of Scheme Sanctioned/Resolution plan	It is binding on all concerned on and from the dated of sanction.	Resolution plan shall be binding on Corporate Debtor and its employees, members, Creditors, Guarantors and other stakeholders involved in the resolution plan.
14	Management of the Operations.	It is vested with the sick industrial company.	It is vested with resolution professionals.

CHAPTER VI –IBC WITHOUT CROSS BORDER RECOGNITION – A TASK HALF DONE ?

The Insolvency and Bankruptcy Code, 2016 (**Insolvency Code**) has been one of the biggest Indian reform of recent times, which has moved the regime away from one that was highly uncertain for foreign investors. Among other important changes, the Insolvency Code contemplates change in control of the company during the insolvency resolution process to an insolvency professional (**IP**). The Insolvency Code comes in an environment where many Indian companies have gone global and have made acquisitions outside India.

India has not adopted the United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency (**UNCITRAL Model Law**). It is notable that only a few countries that have adopted the UNCITRAL Model Law have specified a 'reciprocity' requirement for recognition of insolvency proceedings. Therefore, even if India has not adopted the UNCITRAL Model Law, Indian insolvency proceedings may be recognized in a jurisdiction that does not have a reciprocity requirement (this remains untested for Indian insolvency judgements). Also, Section 234 of the Insolvency Code provides for the Indian Government to enter into bilateral treaties with other countries for application of the Insolvency Code to assets or property outside India of the insolvent entities. However, to date, no such bilateral treaty has been signed.

Absent avenues for recognition abroad of insolvency proceedings opened in India, the proceedings and approved revival plans (and moratoriums granted under the Insolvency Code) may prove to be of limited effect and expensive for the insolvent companies. For example, while admission of an application under the Insolvency Code leads to a moratorium on all suits and proceedings against the company in India during the insolvency resolution period, a creditor or contract counterparty will be able to initiate proceedings outside India against the company and the IP appointed for the company will be forced to incur costs for such litigation.

Of course, execution of decrees / orders obtained in such proceedings will also be prohibited in India during the insolvency resolution period but given the number of Indian companies that have made overseas direct investments, possibility of execution of such decrees / orders against assets outside India cannot be ruled out. Equally, the IP will not be able to control the company's assets abroad without first obtaining recognition of the Indian insolvency proceedings.

On the other hand, Indian courts have no provisions for recognizing international restructuring plans. Therefore, if a parent company of an Indian company undergoes restructuring in a foreign jurisdiction (say a Chapter 11 or English insolvency proceedings), implementing such a plan in India will be cumbersome as Indian courts will refuse to give effect to such a plan. There does not appear to be a case where an insolvency order (interim or final) has been sought

to be recognized as a judgment of a foreign court enforceable as a foreign judgment under the Indian Code of Civil Procedure.

It must be added, however, that these problems are not new or peculiar to the Indian insolvency regime. Recognition and enforcement of insolvency proceedings internationally have firmly divided scholars and courts alike in two schools: territorialism (i.e. limiting the effect of insolvency to the jurisdiction where it has been opened); and universalism (i.e. recognizing a single insolvency proceedings in all relevant countries). 'Modified universalism' (i.e. a regime where one 'main' court takes the lead in insolvency, and other courts provide co-operation and assistance as is required for reciprocity and procedural fairness in treatment of creditors) has been considered a compromise between these two schools of thought and the UNCITRAL Model Law as well as the European Union's Regulations on Insolvency proceedings now embody this principle.

Complexities that arise in cross-border insolvencies do not end there. Among other contemporary topics in cross-border insolvency, common law jurisdictions have been debating the impact of an age-old rule laid out by English courts in *Antony Gibbs & Sons v. La Societe Industrielle et Commerciale des Metaux* ((1890) 25 QBD 399). As per the *Gibbs* rule, a full discharge of a debtor's obligations towards a certain creditor granted by a foreign court may not be readily accepted by an English court, where the debt in question pertains to an English law governed contract.

The *Gibbs* rule has been criticized academically but has been followed somewhat grudgingly by English courts. Recently, a Singapore court in *Pacific Andes* case (*In Re Pacific Andes Resources Development Limited and Ors*., [2016] SGHC 210) highlighted the need to do away with the *Gibbs* rule.

Given that many Indian companies have foreign currency denominated debt and the documentation in relation to which is governed by English law, *Gibbs* rule acquires significance when the debt of such company is sought to be restructured in corporate insolvency resolution process under the Insolvency Code. While a 'resolution plan' approved by the National Company Law Tribunal (**NCLT**) under the Insolvency Code is stated is to bind all creditors of the company, the creditors who are governed by English law documentation will still be able to seek relief from an English court for the entire amount of their claim, effectively disregarding the resolution plan approved by the NCLT. Depending on the debt profile of the company, this may be a vital factor to consider while implementing a restructuring plan.

It is possible that if such creditors have submitted *in personam* to the jurisdiction of the NCLT (by way of submission of 'proof of claim' or otherwise), the English courts may take a view that the creditor is also bound by the restructuring plan approved under the Insolvency Code. *Gibbs* therefore leaves the insolvent company with the unfortunate dilemma of having to choose between remaining at the mercy of some creditors or bearing the costs of attaining a discharge in multiple jurisdictions that abide by *Gibbs*.

Both the Bankruptcy Law Reforms Committee and the Joint Parliamentary Committee that reviewed the draft of the Insolvency Code recognized the implications of cross-border insolvency on corporate transactions and businesses. With the growing pace of insolvency proceedings under the Insolvency Code, cross-border insolvency is the idea whose time has come.

CHAPTER VII – EXTRACT OF IMPORTANT JUDGEMENTS UNDER IBC CODE,2016

Extracts of Important Judgements under IBC Code 2016

1. **M/s. Super Multicolor Printers (P) Ltd. and Prakash Dev Sharma Vs. Senior Executive Engineer, Himachal Pradesh Electricity Board and Punjab National Bank [CA No.72/2017 IN CP (IB) NO. 08/Chd/CHD/2017]**

   Outcome – Stoppage of transaction recovery amount post commencement of CIRP Process

   Prior to commencement of the CIRP, there existed an arrangement between the CD and Punjab National Bank (PNB) allowing the latter to recover 5% from sales of the CD through a transaction recovery account. A prayer was made by the RP for a direction to PNB for stopping 5% recovery from the sales during moratorium period and refunding the amount already recovered by PNB from sales after commencement of CIRP. The AA allowed the prayer of RP

2. **The Central Bank of India and the State Bank of India Vs. M/S. Ashok Magnetics Ltd. [CP/551 (1B)/CB/2017]**

   Outcome – Resistance from the CD during CIRP Process, Police protection to IRP/RP

   The IRP made efforts to take charge of the assets of the CD, but there was stout resistance from the CD. He, therefore, prayed for police assistance to discharge his functions as IRP. The AA observed: " … we direct the Superintendent of Police in whose jurisdiction the Registered Office of the Corporate Debtor viz., M/S. Ashok Magnetics Ltd., is situated, i.e. at B, 73, SIPCOT Industrial Complex, Gummidipoondi, 601 201; the Commissioner of Police, Chennai, having jurisdiction over Royapettah/Teynampet Police Station where Corporate Office of the Corporate Debtor is situated and the Superintendent of Police, Puducherry having jurisdiction over Erripakkam Village, Nettapakkam Commune, Pondicherry where the Factory of the Corporate Debtor is situated, to give proper Police assistance and personal security to the IRP so that he can take charge of the assets of the Corporate Debtor and perform the functions as per the provisions of I&B code, 2016….. The Director of the Corporate Debtor are also directed to furnish the books of accounts, list of assets, list of Financial and Operational Creditors, list of documents and other relevant particulars as envisaged in the I&B Code, 2016 and extend all co-operation to the IRP…"

3. **M/s Alchemist Asset Reconstruction Co. Ltd Vs. M/s Hotel Gaudavan Pvt. Ltd. [CP/CA. No. (IB)-23(PB)/2017]**

   Outcome – IRP/RP Protected for all acts done in Good Faith

   The IRP prayed for protection for all acts done by him in good faith and to save him from the frivolous allegations made in a FIR. The AA observed: "If, there is any complaint against the Insolvency Professional then the IBBI is competent to constitute a disciplinary committee and have the same investigated from an Investigating Authority as per the provision of section 220 of the Code. If, after investigation 'IBBI' finds that a criminal case has been made out against the Insolvency Resolution Professional then the 'IBBI' has to file a complaint in respect of the offences committed by him. It is with the aforesaid object that protection to action taken by the IRP in good faith has been accorded by section 233 of the Code. There is also complete bar of trial of offences in the absence of filing of a complaint by the 'IBBI' as is evident from a perusal of section 236(1) (2) of the code. Therefore, a complaint by Harenda Singh Rathore, a former director with the SHO, Police Station would not be maintainable and competent as the complaint is not lodged by the IBBI. ..the jurisdiction would vest with Investigation Officer only when a complaint is filed by 'IBBI'."

4. **Sunrise 14 A/S, Denmark Vs. Muskaan Power Infrastructure Ltd. [CA No. 150/2017 in CP (IB) NO. 39/Chd/Pb/2017]**

   Outcome – Non Cooperation from CD, NCLT issues warrant against CD

   The RP prayed for a direction under sections 19(2) and 19(3) of the Code. Since two respondents did not comply with directions of RP and refused to accept the notice, the AA issued bailable warrants to secure their presence. It directed the RP to collect the bailable warrants from the registry and deliver to Commissioner of Police, Ludhiana to get the same executed. At the next hearing, the AA allowed a weeks' time to the respondents for handing over the original record of the company and to produce list of assets of the company.

5. **RP (in the matter of ORCHID PHARMA) Vs. Lakshmi Vilas Bank & ORCHID PHARMA Ltd. [CA No. CA/26/IB/2018 in CP/540/(IB)/2017]**

   Outcome – Professional Fee from Professionals shall be treated as Operational Creditor

   The CIRP of Orchid Pharma Limited commenced on 17th August, 2017. The shareholders passed a resolution for appointment of M/s. CNGSN & Associates LLP as the statutory auditor for a period of five years commencing on 1st April, 2017. However, the erstwhile auditor was not willing to give NOC unless the RP cleared 50% of its outstanding dues. The RP took up the matter with the AA, which directed: "The earlier auditor, M/s SNB Associates, is directed to issue NoC as well as transfer the necessary papers to the newly appointed auditor of the corporate debtor, M/s. CNGSN & Associates. It has been noted by this tribunal that the dues of the earlier audit has been admitted to the extent of Rs.1,23,69,272 and it has been included as the operational credit with respect to the corporate debtor.".

6. **Union Bank of India Vs. Paramshakti Steel Ltd. [MA 243/2018 in C.P. No. (IB) 727 (MB)/2017]**

   Outcome – Action against Sundry Debtors possible with consent of COC and Approval of NCLT

   The resolution plan did not have mention of Rs.180 crores receivable by the CD in resolution. On instructions from the AA, the RP found that most of the debtors are not in existence. The AA advised the RP "to initiate all steps which is available under the IB Code to proceed against the promoter/director of this Corporate Debtor by the next date of hearing. Moreover, the RP, in case, require any police assistance or protection, this Bench suggests the respective police authority to assist this RP in unravelling this fraud that has happened in this company."

7. **Shailen Shah V/s. Tahsildar Akole District Ahmednagar & Ors. [IA 153 of 2018 in MA 6 of 2018 in C.P. (I.B) No. 14/7/NCLT/AHM/2018]**

   Outcome - Status quo in respect of execution of warrant of attachment issued by Tehsildar for recovery of non-agriculture tax of CD

   The RP prayed for a necessary restraint order in respect of the execution of attachment warrant issued by Tehsildar. In view of the moratorium granted under section 14 of the Code, the AA directed status quo in respect of further execution of warrant of attachment issued by Tehsildar for recovery of non-agriculture tax of CD amounting to Rs.1.51 crores.

8. **Takkshill Enterprises Vs. IAP Company Private Ltd. [C.A. No. 522 (PB)/2018 in (IB)-446(ND)/2017]**

   Outcome – Show Cause notice to Police for not taking action against the complaint filed by IRP/RP

   A complaint filed by the IRP was not taken cognisance. The AA directed: "In the meanwhile, the Deputy Commissioner of Police is directed to issue instructions to Station House Officer of Police Station Palam Vihar, Gurgaon to take cognizance of the complaint filed by the Interim Resolution Professional namely Mr. Dharmendra Kumar. It is appropriate to mention that the Interim Resolution Professional has to perform onerous statutory functions under the provisions of Insolvency and Bankruptcy Code, 2016 and Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. In cases the complaint discloses commission of a cognizable offence the In-charge Police Station i.e. Station House Officer is under legal obligation to take cognizance of the complaint as is mandated by Section 190 of Criminal Procedure Code, 1973. The officers to whom the notice is issued shall show cause why no action was taken on the complaint filed by the Interim Resolution Professional on 30.05.2018. It is well settled that if the complaint discloses the commission of a cognizable offence then the case is required to be registered and investigation needs to be carried out."

9. The National Company Law Tribunal (NCLT), Allahabad, in the case of ICICI Bank Limited v. Mr. Anuj Jain (Resolution Professional of Jaypee Infratech Limited)

Outcome - Third-party mortgagee is not a financial creditor

There was no financial debt owed to lender by the corporate debtor, and so it could not be considered a financial creditor of the corporate debtor.

Whilst the judgment holds that a third-party mortgagee is not a financial creditor, we still consider that the third-party mortgagee would be entitled to the rights of a secured creditor upon a liquidation of the corporate debtor. Under Section 53 of the IBC, a secured creditor is entitled to a distribution in liquidation and under Section 52; a secured creditor has the option to enforce its security separately.

Since a secured creditor will be entitled to enforce security once the moratorium ceases and will be entitled to proceeds in liquidation under Section 53, a third-party mortgagee would also be treated as a stakeholder on whom the resolution plan is binding under Section 31 (1) of the IBC, given that a "stakeholder" as defined in the Liquidation Regulations is a person who is entitled to distribution of proceeds under Section 53 of the IBC.

As a result, the judgement creates an anomaly in not allowing such third-party mortgagees a say in the resolution plan. If a resolution plan provides for the modification or extinguishment of a third-party mortgagee's security interests, it will leave such a resolution plan vulnerable to attack on the ground that it cannot take away the property that is secured in favour of a third-party mortgagee without allowing them participation in the committee of creditors.

Applying the judgment, the resolution plan cannot modify or extinguish the third-party security interest created in favour of a third-party mortgagee. Therefore, resolution applicants would have to acquire the corporate debtor subject to the third-party mortgage, and at the risk of losing such secured assets on enforcement by the third-party mortgagee. This will add uncertainty to the resolution efforts.

The NCLT should have considered an alternative: to admit the claim of the third-party mortgagees as financial creditors of the corporate debtor, with its attendant protection that the third-party mortgagee is then bound by the resolution plan, and is entitled to dissenting creditor or approving creditor status, as the case may be.

10. The Supreme Court says: Do not examine constitutional validity

Outcome – High court not to examine constitutional validity of IBC Code, 2016

Interestingly, the Supreme Court, apprehending the large scale consequences of such challenges, advised the High Court of Gujarat in its order dated January 25, 2018 passed in *Shivam Water Treaters Private Limited Vs Union of India & Ors*, not to enter into the debate around the constitutional validity of the IBC. The Supreme Court observed that, "*The High Court is requested not to enter into the debate pertaining to the validity of the Insolvency and Bankruptcy Code, 2016 or the constitutional validity of the National Company Law Tribunal.*"

11. Innoventive Industries Limited v. ICICI Bank Limited, the NCLAT has held that the National Company Law Tribunal (NCLT**) is bound to issue only a limited notice to the corporate debtor before admitting a case under Section 7 of the Insolvency and Bankruptcy Code, 2016 (Insolvency Code).**

Outcome - Principles of natural justice would not mean that in every situation the NCLT is required to afford reasonable opportunity of hearing to the corporate debtor before passing its order

Whilst dismissing the appeal filed by Innoventive Industries Limited against an order passed by NCLT, Mumbai admitting the insolvency petition filed by ICICI Bank Limited, the NCLAT has clarified that adherence to principles of natural justice would not mean that in every situation the NCLT is required to afford reasonable opportunity of hearing to the corporate debtor before passing its order.

The controversy arose in the background of an insolvency application filed by ICICI Bank Limited, which incidentally was the very first application filed under Section 7 of the Insolvency Code against Innoventive Industries Limited (**Company**) (**Insolvency Application**). At the stage of admission of the Insolvency Application, various issues were raised by the Company before the NCLT including that: (i) the NCLT is bound to issue notice to and hear the corporate debtor on whether there is a default; (ii) the Company is notified as a "*Relief Undertaking*" under the provisions of Maharashtra Relief Undertaking Act (**MRU Act**) and hence the Insolvency Application is maintainable; and (iii) ICICI Bank had not taken the consent of the Joint Lenders Forum (**JLF**) before filing the Insolvency Application. After hearing the parties, the NCLT, *vide* its Order dated 17 January, 2017 as modified by the order dated 23 January, 2017 (collectively called **NCLT Order**), was pleased to admit the Insolvency Application and rejected all the contentions raised by the Company.

The Judgment makes it clear that:

- Under Section 7(5) of the Insolvency Code, the NCLT is only required to be satisfied on whether:
    - The corporate debtor has defaulted.
    - An application filed by the financial creditor is complete.
    - Disciplinary proceeding is pending against the insolvency resolution professional, proposed by the financial creditor.
- Beyond the abovementioned issues, the NCLT is not required to look into any other factor, including the question of whether permission or consent has been obtained from one or other authority, including the JLF. The corporate debtor cannot insist on a trial and/or an adjudication of debt by the NCLT before an insolvency application is admitted.
- If the NCLT is satisfied that it is required to admit the application but the application is incomplete, the financial creditor should be granted seven days' time to complete the

application. However, in a case where there is no default or the defects in the application cannot be rectified or the record enclosed by the financial creditor is misleading, the application should be rejected.

- As an order of admission of the insolvency application has serious civil consequences for the corporate debtor, its directors and shareholders, the NCLT is bound to issue a limited notice to the corporate debtor before admitting a case for: (i) ascertaining whether a default has occurred based on material submitted by the financial creditor; and (ii) to find out whether the application is complete and/or there is any other defect required to be removed.

Applying the aforesaid legal findings to the facts of the case before the NCLAT, although no notice was issued by the NCLT to the Company before admitting the case, the Company had intervened before the admission of the case and all the objections raised by the Company were noticed, discussed and considered by the NCLT before passing the NCLT Order. In light of the above, the NCLT Order was not illegal.

As regards the question of whether the MRU Act would prevail over the provisions of the Insolvency Code, the NCLAT held that the non-obstante provision contained in the Insolvency Code (which is a subsequent Union Law) shall prevail over the provisions of the MRU Act and any instrument issued under the MRU Act. This would include the notification issued therein bringing the Company within its fold.

Lastly, the NCLAT rejected the Company's contention that ICICI Bank's insolvency application is liable to be rejected as ICICI Bank had not obtained permission or consent of JLF before filing the insolvency application by holding that the NCLT is not required to look into this factor before admitting the application.

The judgment provides much needed clarity with regard to the scope and extent of the corporate debtor's right to contest admission of insolvency applications filed by financial creditors and will provide guidance to the NCLTs across the country in deciding insolvency applications filed by financial creditors.

12. Macquarie Bank Limited vs Shilpi Cable Technologies Limited (Supreme Court), Civil Appeal No. 15135 of 2017, decided on December 15, 2017

The said appeal raised two imperative questions:

Whether in relation to an operational debt, the provision contained in Section 9(3) (c) of the Code is mandatory?

A fair construction of Section 9(3) (c), in consonance with the object sought to be achieved by the Code, would lead to the conclusion that it cannot be construed as a threshold bar or a condition precedent.

"A copy of the certificate from the financial institution maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate

debtor is certainly not a condition precedent to triggering the insolvency process under the Code. The expression "confirming" makes it clear that this is only a piece of evidence, albeit a very important piece of evidence, which only "confirms" that there is no payment of an unpaid operational debt. Further, annexure III in the Form also speaks of copies of relevant accounts kept by banks/financial institutions maintaining accounts of the operational creditor, confirming that there is no payment of the unpaid operational debt, only "if available". This would show that such accounts are not a pre-condition to trigger the Code, and that if such accounts are not available, a certificate based on such accounts cannot be given,"

Whether a demand notice of an unpaid operational debt can be issued by a lawyer on behalf of the operational creditor?

A conjoint reading of Section 30 of the Advocates Act and Sections 8 and 9 of the Code together with the Adjudicatory Authority Rules and Forms there under would yield the result that a notice sent on behalf of an operational creditor by a lawyer would be in order."

13. **Innoventive Industries Ltd. vs ICICI Bank & Anr. (Supreme Court), Civil Appeal Nos. 8337-8338 of 2017 decided on August 31, 2017**

The difference between Section 7 and Section 9 of the Code:

The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in subsection (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing – i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.

On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise."

14. **Surendra Trading Company vs Juggilal Kamlapat Jute Mills Company Limited and Others (Supreme Court), Civil Appeal No. 8400 of 2017 decided on September 19, 2017**

The question of law framed by the NCLAT for its decision was whether the time limit prescribed for admitting or rejecting a petition for initiation of the insolvency resolution process is mandatory.

The NCLAT had held that the 7 day period was sacrosanct and could not be extended, whereas, insofar as the adjudicating authority is concerned, the decision to either admit or reject the application within the period of 14 days was held to be directory.

This judgment also lends support to the argument for the appellant in that it is well settled that procedure is the handmaid of justice and a procedural provision cannot be stretched and considered as mandatory, when it causes serious general inconvenience.

15. **Alchemist Asset Reconstruction Company Limited vs M/s Hotel Gaudavan Private Limited & Ors. (Supreme Court), Civil Appeal No. 16929 of 2017, decided on October 23, 2017**

An arbitration proceeding cannot be started after imposition of moratorium and that that the effect of Section 14(1) (a) is that the arbitration that has been instituted after the aforesaid moratorium is non est in law.

16. **Black Pearl Hotels Pvt. Ltd. vs Planet M. Retail Ltd. (Supreme Court), Civil Appeal 2973-2974 of 2017, decided on February 17, 2017**

The duty of determination of an instrument or, to explicate, to determine when there is a contest a particular document to be of specific nature, the adjudication has to be done by the judge after hearing the counsel for the parties. It is a part of judicial function and hence, the same cannot be delegated.

17. **Nikhil Mehta & Sons (HUF) & Ors. vs M/s AMR Infrastructures Ltd. (NCLT Delhi), C.P NO. (ISB)-03(PB)/2017, decided on 23.01.2017**

The NCLAT has ruled that a purchaser of real estate, under an 'Assured-return' plan, would be considered as a 'Financial Creditor' for the purposes of IBC and is, therefore, entitled to initiate corporate insolvency process against the builder, in case of non-payment of such 'Assured/Committed return' and non-delivery of unit.

18. **State Bank of India vs Ram Dev International Ltd. (Through Resolution Professional) NCLAT New Delhi, Company Appeal (AT) (Insolvency) No. 302 of 2018**

A Resolution Professional if empanelled as an Advocate or Company Secretary or Chartered Accountant with one or other 'Financial Creditor' that cannot be a ground to reject the Company Appeal (AT) (Insolvency) No. 302 of 2018 -6- proposal, if otherwise there is no disciplinary proceeding is pending or it is shown that the person is an interested person being employee or in the payroll of the 'Financial Creditor.

CHAPTER VIII – CHALLENGES IN IBC CODE, 2016

CHALLENGES IN INSOLVENCY AND BANKRUPTCY CODE, 2016

No Timeline for Disposal of Appeals

While section 12 provides a period of 180 days for the corporate resolution insolvency process there are no timelines prescribed within which the NCLT is required to approve or reject a resolution plan. Similarly there are no timelines prescribed for disposal of appeals. Therefore, the ultimate resolution could still be a long drawn process.

Absence of active participation of Information Utilities

The absence of active participation of Information Utilities can also cause inordinate delays especially if the NCLT gets involved in evaluating whether a default has indeed taken place.

Shortage of NCLT benches and its member's

The NCLT has only 12 benches and limited judicial and technical members, which is highly inadequate compared to the huge number of cases already pending at BIFR and DRT which are expected to be transferred to NCLT. A report states that the total number of insolvency and bankruptcy cases pending would be more than 25,000 and the NCLT even with an increased number of judicial members and technical members of up to 26 would take more than 10 years to adjudicate upon 25,000 pending cases, assuming all of them moved to NCLT. Furthermore the NCLTs are also required to adjudicate compromises and mergers and oppression mismanagement cases. Unless there are dedicated benches to hear insolvency cases, the numbers of benches are significantly increased and are well equipped, and the transition is better managed, effective and expeditious disposal may be a distant dream.

Shortage of Skilled Professionals

The Code departs from the erstwhile framework of debtor in possession to the new framework of Creditor in possession. Whilst this shift may be recommended, a lot would depend on the efficiency of the IPs as managers especially since the management is transferred to their hands. At present three agencies i.e. chartered accountants, cost accountants and company secretaries are recognized as IPA and in excess of 1,850 individuals enrolled with these agencies, have been licensed and are able to take on appointments as insolvency professionals. These professional will have a challenging task ahead; they have very limited knowledge and experience in running the businesses (as the promoters will be forced to step back), in setting up independent management, assessing the financial viability and preparing a resolution plan or evaluating the resolution plans. Until an efficient infrastructure of insolvency professionals who are efficient managers is put in place, effective implementation of the Code would seriously be prejudiced.

Non Co-operative Management

The formulation of a resolution plan would depend on the quality and sufficiency of information contained in the information memorandum (IM); the ability of the IRP/RP to prepare a detailed IM would depend on the co-operation of the management as they would alone be privy to the management and operations of the company. Whilst the Code contains provisions whereby the IRP may seek the assistance of the adjudicating authority in instances where the management is non-co-operative, any such action would only reduce the time available for the preparation of the IM and hence may affect the quality and sufficiency of information provided and the restructuring process. However, this may not be an issue in cases of pre-pack arrangements i.e. where a restructuring plan is agreed in advance of a company declaring its insolvency. Generally, such pre-pack arrangements are popular abroad.

Lack of Consensus among Lenders

A resolution plan submitted by the RP to the CoC needs to approve by a vote of 66% of the financial creditors. If no resolution plan is approved and submitted to the NCLT within the period of 180 days (or 270 days if extended), the NCLT shall order the liquidation of the corporate borrower. The Code therefore vests a lot of power on the lenders. Past experience demonstrates lack of willingness and consensus on the part of banks at arriving at a consensus in such matters. The implementation of the Code is therefore dependent on the lenders acting in a timely manner and adopting a holistic approach of turnaround and revival rather than focusing merely on minimizing provisioning

High Cost of Bankruptcy Resolution Process

The IBC adopts the UK bankruptcy regime. Studies conducted in the UK on their bankruptcy regime reveal that while adoption of the IRP model resulted in higher realizations, they also correspondingly increased costs of bankruptcy and may not materially improve creditor recoveries.

Dilution of rights of Secured Creditors

In so far as a constitution of creditors committee is concerned, the Code does not distinguish between a secured and an unsecured creditor as voting rights are only dependent on the amount owed to the creditor. Thus an unsecured financial creditor with same levels of exposure as a secured financial creditor in a company will have same voting rights in the CoC, though the position of the unsecured creditor to recover dues at the time of liquidation is at a much weaker footing. This dilutes the position of a secured creditor. Further it is not clear if the CoC/resolution plan can be challenged if all the financial creditors however insignificant, do not constitute a part of the committee.

Disadvantageous to Trade Creditors

Trade creditors will receive their dues after the unsecured financial creditors during liquidation in order of priority. It may be contended that the financial creditors extend credit after higher level of risk assessment whereas the same opportunity may not be available to trade creditors

considering the exigencies of business. The suggested therefore prejudicially affects the interest of the trade creditors.

Need for better Monitoring of IP's

Further, the IBBI also needs to ensure adequate mechanism to monitor the IPs is in place so as to ensure transparency and avoid unethical practices. This would entail significant capacity building both in terms of human resources and IT capabilities.

Synchronization of Current Restructuring Schemes with the Code

In terms of the applicable RBI regulations, the restructuring schemes such as JLF, SDR and S4A and sale of distressed assets do not require the involvement of the foreign lenders as they are not RBI regulated, hence not part of those processes. This would be an unsatisfactory situation vis-à-vis the foreign lender as these restructuring processes may not resolve the issues of the foreign debt. Under IBC, if the conditions are met, the offshore creditor can bring everyone to the table, and undermine any ongoing onshore process. The RBI needs to suitably align these restructuring schemes with the Code.

Potential Higher Provisioning for Banking Sector

Further, under the applicable restructuring guidelines, the domestic creditors have incentive to undergo the processes of JLF, SDR or S4A and take benefit of the reduced provisioning norms for the NPAs on their books. However, the triggering of a resolution process under the Code would undermine that approach in that the debtor is now subject to a clearly defined resolution process with a hard end date that may result in liquidation if consensus cannot be reached on the restructuring proposal. Such provisioning norms under the existing restructuring schemes needs to be reconsidered by RBI, as the same shall be subject to the IBC resolution process.

CHAPTER IX – FREQUENTLY ASKED QUESTIONS ON CIRP UNDER IBC CODE, 2016

1. What is the applicability of IBC?

The provisions of IBC shall apply to –

i. Any company incorporated under the Companies Act, 2013 or under any previous company law;

ii. Any other company governed by any special Act for the time being in force, except in so far as the said provisions are inconsistent with the provisions of such special Act;

iii. Any Limited Liability Partnership incorporated under the Limited Liability Partnership Act, 2008;

iv. Such other body incorporated under any law for the time being in force, as the Central Government may, by notification, specify in this behalf; and

v. Partnership firms and individuals, in relation to their insolvency, liquidation, voluntary liquidation or bankruptcy, as the case may be.

2. Who can initiate corporate Insolvency Resolution Process (CIRP)?

The CIRP can be initiated by Financial Creditor (under Section 7), operational Creditor(under Section 9) and Corporate Debtor(under Section 10)

3. When CIRP can be initiated?

The CIRP can only be initiated when the minimum amount of default is rupees is one lakh or such higher amount as may be notified by the Central Government which shall not exceed one crore rupees.

4. What is default?

Section 3(12) of the IBC states that "default" means non-payment of debt when whole or any part or installment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be; For the purposes of section 7(1) (i.e., Corporate Insolvency Resolution by financial creditor) of the IBC states that, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor.

5. What is debt?

As per section 3 (11) "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt.

6. Who is Financial Creditor?

As per section 5(7) of the IBC "financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to.

7. What is financial debt?

As per section 5(8) of the IBC states that "financial debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes –

i. Money borrowed against the payment of interest;

ii. Any amount raised by acceptance under any acceptance credit facility or its de-materialized equivalent;

iii. Any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;

iv. The amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;

v. Receivables sold or discounted other than any receivables sold on nonrecourse basis;

vi. Any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

vii. Any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

viii. Any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

ix. The amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;

8. Who is operational Creditor?

As per section 5(20) of the IBC "operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred.

9. What is operational debt?

As per section 5(21) of the IBC "operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority.

10. Whether an operational creditor can assign or legally transfer any operational debt to a financial creditor?

Yes. However, as per section 21(5) where an operational creditor has assigned or legally transferred any operational debt to a financial creditor, the assignee or transferee shall be considered as an operational creditor to the extent of such assignment or legal transfer.

11. Does financial creditor include Secured creditor?

Yes, financial creditor includes secured creditor, since the definition of financial debt ccovers security interest also.

12. Are all unsecured creditors operational creditors?

All unsecured creditors are not operational creditors. However, all operational creditors are unsecured creditors

13. Whether workmen/ employees come under operational creditor?

Yes the workmen and employees whose past payments are due comes under definition of operational creditor.

14. Who is a Corporate Debtor?

As per section 3(8) of the IBC "corporate debtor" means a corporate person who owe a debt to any person.

15. Who are corporate persons?

As per section 3(7) of the IBC "corporate person" means a company as defined in clause (20) of section 2 of the Companies Act, 2013, a limited liability partnership, as defined in clause (n) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008, or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider

16. Whether IBC is applicable to person resident outside India?

As per sub-section 23 of section 3 "person" includes – (a) an individual; (b) a Hindu Undivided Family; (c) a company; (d) a trust; (e) a partnership; (f) a limited liability partnership; and (g) any other entity established under a statute, and includes a person resident outside India. Hence, as per definition a person includes a resident outside India.

17. Who is the Regulator under IBC?

The Insolvency and Bankruptcy Board of India is the Regulator under IBC.

18. To whom the application for CIRP has to be made?

The application for CIRP has to be made to NCLT.

19. What is the difference between initiation date and insolvency commencement date?

Section 3(12) states that "insolvency commencement date" means the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority (i.e. NCLT) Whereas Section 3(11) states that "initiation date" is the date on which financial creditor (under sections 7), operational Creditor (under Section 9) or Corporate Debtor (under section 10), as the case may be makes an application to the NCLT for initiating corporate insolvency resolution process (CIRP).

20. What is Resolution Plan?

As per section 5(26) of the IBC states that "resolution plan" means a plan proposed by any person for insolvency resolution of the corporate debtor as a going concern in accordance with Part II

21. Who prepares the Resolution Plan?

As per section 30 (1) of the IBC a resolution applicant may submit a resolution plan to the resolution professional prepared on the basis of the information memorandum, given by the resolution professionals.

22. Who approves the Resolution Plan?

As per section 30(4) of the IBC sates that the committee of creditors may approve a resolution plan by a vote of not less than sixty six per cent of voting share of the financial creditors.

23. Who constitutes committee of creditors?

As per section 21 (1) of the IBC states that the interim resolution professional shall after collation of all claims received against the corporate debtor and determination of the financial position of the corporate debtor, constitute a committee of creditors.

24. What should be the Composition of Committee of Creditors?

As per section 21(2) of IBC states that the committee of creditors shall comprise all financial creditors of the corporate debtor. However a related party to whom a corporate debtor owes a financial debt shall not have any right of representation, participation or voting in a meeting of the committee of creditors.

25. What is the difference between 'Interim Resolution Professional' and 'Resolution Professional'?

The name of Interim Resolution Professional is proposed by applicant of Insolvency process and appointed by NCLT. The Resolution Professional is appointed by the committee of creditors (with 66% of voting share of financial creditor). The committee of creditors may appoint Interim Resolution Professional as resolution professional or any other resolution professional. NCLT appoints resolution professional on confirmation by Insolvency and Bankruptcy Board of India.

26. Whether any creditor who is a member of committee of creditor can appoint an insolvency professional other than the resolution professional to represent his interest?

Section 24(5) of the IBC states that any creditor who is a member of the committee of creditors may appoint an insolvency professional other than the resolution professional to represent such creditor in a meeting of the committee of creditors. Provided that the fees payable to such insolvency professional representing any individual creditor will be borne by such creditor.

27. Whether operational creditor can attend and vote at the committee of creditors?

As per section 24(4) of the IBC state that the directors, partners and one representative of operational creditors, as referred to in sub-section (3), may attend the meetings of committee of creditors, but shall not have any right to vote in such meeting. Provided that the absence of any such director, partner or representative of operational creditors, as the case may be, shall not invalidate proceedings of such meeting.

28. Is a director or KMP of corporate debtor who has given loan to Corporate Debtor eligible to vote at the meeting of committee of creditors?

As per section 21 of the IBC which states that a related party to whom a corporate debtor owes a financial debt shall not have any right of representation, participation or voting in a meeting of the committee of creditors

29. What if a person is both operational Creditor and financial creditor?

As per section 21(4) of the IBC states that where any person is a financial creditor as well as an operational creditor (a) such person shall be a financial creditor to the extent of the financial debt owed by the corporate debtor, and shall be included in the committee of creditors, with voting share proportionate to the extent of financial debts owed to such creditor; (b) such person shall be considered to be an operational creditor to the extent of the operational debt owed by the corporate debtor to such creditor.

30. What if corporate persons do not have any financial creditor?

As per section 21(8) of the IBC states that where a corporate debtor does not have any financial creditors, the committee of creditors shall be constituted and comprise of such persons to exercise such functions in such manner as may be specified by the Insolvency and Bankruptcy Board of India.

31. When the financial creditor is related to corporate debtor is there any restriction with respect to his representation at the meeting of committee of creditors or voting?

As per section 21 of the IBC which provides that a related party to whom a corporate debtor owes a financial debt shall not have any right of representation, participation or voting in a meeting of the committee of creditors. Therefore the related financial creditor of the corporate debtor shall be restricted with respect to his representation at the meeting of committee of creditors and voting.

32. On whom the Resolution plan approved by NCLT, shall be binding on?

As per section31 (1) if the NCLT is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan.

33. To whom an appeal is made if the resolution plan is rejected by NCLT?

If the resolution plan is rejected by NCLT then an appeal can be made to National Company Law Appellate Tribunal (NCLAT).

CHAPTER X – DISCLAIMER

DISCLAMER

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Our Contact Details

Gurgaon
Unit No. 903-906,
9th Floor Tower C,
Unitech Business Zone Nirvana
Country Sector 50 Gurgaon,
Haryana – 122018
Tel. No.: +91 124 4754550
Fax No.: +91 124 4754584
info@resurgentindia.com

Mumbai
303, Central Plaza
166 CST Road, Kalina
Mumbai, Maharashtra – 400098
Tel. No.: +91 22 33040667

Kolkata
CFB F-1, 1st Floor
Paridhan Garment Park
19 Canal South Road
Kolkata, West Bengal – 700 015
Tel. No.: +91 33 6452 5594
Fax No.: +91 33 2323 2086

Hyderabad
Flat 502, Himabindu
Residency, 6-1-132/131
Skandagiri, Secunderabad
Telangana – 500061
Tel. No.: +91 94400 48916

Bengaluru
Sree Laxmi Plaza, 3rd Floor
No. 61, 24th Main, 7th Cross
Marenahalli, J.P. Nagar
2nd Phase, Bengaluru
Karnataka – 560 078
Tel. No.: +91 80 2657 0757

Chennai
Building No. 1, 2nd Floor
1st Street, Balaji Nagar
Ekkaduthangal, Chennai
Tamil Nadu – 600032
Tel. No.: +91 90940 02280

Jaipur
197, 1st Floor, Lakshmi Nath
Bhawan, Church Road, MI
Road, Jaipur,
Rajasthan - 302001

Dubai
P.O. Box – 5000009, 14th Floor
Boulevard Plaza Tower 1
Downtown Dubai
Tel. No.: +971 4556 1952
info@resurgentuae.com
www.resurgentuae.com