CHANGING DIMENSIONS OF INSOLVENCY AND BANKRUPTCY CODE, 2016

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Introduction

Insolvency and Bankruptcy Code, 2016 ("**Code**") is a game-changer in facilitating the revival of stressed companies. Despite the Code being at its nascent stage and a transformational piece of legislation, it has had various issues that are being litigated before the different benches of the National Company Law Tribunal ("**NCLT**"), National Company Law Appellate Tribunal ("**NCLAT**") as well as before the Hon'ble Supreme Court. In order to attain the spirit of the Code, the Government has introduced various amendments to address the issues that have arisen since the enactment of the Code. The key changes introduced by the amendments to the Code till date are discussed below.

I. The Insolvency and Bankruptcy Code (Amendment) Act, 2018[1] w.e.f. 18 Jan, 2018

1. Application of the Code (Section 2(e))

By amending Section 2(e), the application of the Code extends to personal guarantors of the corporate debtor and proprietorship firms, who were earlier immune from any liability under the Code. Prior to the amendment, the Allahabad High Court in case of Sanjeev Shriya v. State Bank of India[2], opined that personal guarantors of the corporate debtors were not explicitly covered under the Corporate Insolvency Resolution Process ("**CIRP**") contemplated in the Code. The amendment now brings the much-needed clarity on the initiation of CIRP against the personal guarantors of the corporate debtor. Further, proprietorship firms are also now included under the insolvency regime. This is a welcome move and will ultimately reduce the scope of default by such firms.

2. Invitation to resolution applicants (Section 5)

The term 'Resolution Applicant' was previously defined in the Code as '*any person who submits a resolution plan to the resolution professional*'. However, this definition was a cause of debate, since on one hand, it would mean only a person who is invited by the Resolution Professional could submit his resolution plan and was considered as a Resolution Applicant; whereas on the other hand, it would mean the resolution plan can be submitted by any person

[1] https://ibbi.gov.in/webadmin/pdf/legalframwork/2018/Jan/182066_2018-01-20%2023:35:29.pdf
[2] Sanjeev Shriya v. State Bank of India & Others, 2017 (9) ADJ 723.

irrespective of whether he has been invited to do so by the Resolution Professional. This debate has been put to rest by amending the definition of 'Resolution Applicant' to mean '*a person, who individually or jointly with any other person, submits a resolution plan to the resolution professional pursuant to the invitation...*'. Having said that, the Resolution Professional is now obligated to review and examine each resolution plan that are submitted by only such persons who have been expressly invited by the Resolution Professional to submit a resolution plan.

3. Qualifying criteria for Resolution Applicants (Section 25)

The amendment provides that the Resolution Professional must now determine eligibility criteria, with the approval of the Committee of Creditors ("**CoC**"), for persons who can be invited by the Resolution Professional for presenting the resolution plan, thereby restricting the scope of Resolution Applicant. While determining the qualifying criteria, the Resolution Professional is now obligated to give due regard to the complexity and scale of operations of the business of the corporate debtor.

4. Eligibility of Resolution Applicant (Section 29A)

At the very outset, the Code, as it stood prior to the amendments, allowed any person i.e. creditor, promoter, prospective investor, director, a person connected to them directly or indirectly etc. to submit a resolution plan in respect of a company undergoing CIRP and no specific criteria was assigned as to who could submit a resolution plan. Due to the wide scope permitted by the Code, this became a fatal loophole in the law allowing the defaulting promoters to gain a back-door entry to the management of the corporate debtor. To reduce the chances of likely default brought forth by this loophole, Section 29A was inserted into the Code as a restrictive provision, which specifies the persons not eligible to be Resolution Applicant. Section 29A can be divided into two parts.

The first part of Section 29A i.e. from (a) to (i) essentially enumerates the list of persons who are ineligible to submit a resolution plan. Even if a person is acting jointly or in concert with such person who is disqualified under Section 29A (a) to (i), then such person also stands disqualified from submitting a resolution plan. The expression 'acting jointly' means acting together and if this is made out on the facts, no super added element of 'joint venture' is

required to be seen[3]. Further, since the Code provides that words/expressions not defined under the Code shall have the meaning assigned to them under other acts identified under the Code, including the Securities Exchange Board of India Act, 1992[4], the definition of the term 'acting in concert' will have to be borrowed from the SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 2011[5] since it is not defined under the Code.

Now, coming to the second part as mentioned in Section 29A (j), it deals with 'connected persons'. It means: -

i) Any person who is the promoter or in the management or control of the resolution applicant; or

ii) Any person who shall be the promoter or in management or control of the business of the corporate debtor during the implementation of the resolution plan; or

iii) The holding company, subsidiary company, associate company or related party of a person referred to in clauses (i) and (ii).

In the context of Section 29A, the Supreme Court specifically observed in the Essar Steel judgment[6] that the expression 'management' would only include persons such as manager, managing director and officer of a company and the expression 'control' denotes only positive control, which means that the mere power to block special resolutions of a company cannot amount to control.

In this context, the insolvency proceedings of Essar Steel[7] is a noteworthy example showcasing the wide ambit of ineligibility. The peculiarity of this case is that the resolution professional, after analyzing the resolution plans submitted by Numetal and ArcelorMittal, disqualified both by declaring them to be ineligible in view of Section 29A of the Code. One of the shareholders in the case of Numetal was Rewant Ruia whose father, Ravi Ruia was a promoter of Essar Steel. It is pertinent to note that the account of Essar Steel was classified as a non-performing

[3] ArcelorMittal India Private Limited v. Satish Kumar Gupta, Civil Appeal Nos. 9402 – 9405 of 2018 (Supreme Court, 04/10/2018).
[4] Section 3(37), The Insolvency and Bankruptcy Code, 2016.
[5] Regulation 2(1)(q) of SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 2011 defines persons acting in concert as "*persons who, with a common objective or purpose of acquisition of shares or voting rights in, or exercising control over a target company, pursuant to an agreement or understanding, formal or informal, directly or indirectly co-operate for acquisition of shares or voting rights in, or exercise of control over the target company*".
[6] Supra 3.
[7] Ibid.

asset for a period of more than 1 year prior to the commencement of the insolvency resolution process of Essar Steel. On the other hand, ArcelorMittal was held to be ineligible under Section 29A since it was found to have been the promoter or exercised control over two companies whose accounts were classified as a Non-Performing Asset for more than 1 year prior to the commencement of the insolvency resolution process of Essar Steel. Here, the Supreme Court held that while determining whether a company is eligible, considering the parameters in Section 29A, the corporate veil of the company has to be lifted to see the persons behind it. It went on to observe that Section 29A was "*typical of instances of a 'see though provision' so that one is able to arrive at persons who are actually in 'control' whether jointly or in concert, with other persons.*"

In this background, it is relevant to note that this amendment cannot be applied retrospectively to the rights of the parties in the absence of express language to that effect[8]. Keeping this in mind, the intention behind inserting Section 29A is to restrict those persons from submitting a resolution plan who could have an adverse effect on the entire CIRP.

5. Punishment where no specific punishment or penalty is provided (Section 235A)

The amendment introduces a new provision in form of Section 235A, prescribing a fine of not less than one lakh rupees which can be extended up to two crore rupees, if any person contravenes any provision of the Code or rules and regulations made under it, if no penalty is prescribed for such contravention specifically.

II. The Insolvency and Bankruptcy Code (Second Amendment) Act, 2018[9] w.e.f. 17 Aug, 2018

1. Scope of 'Dispute' (Section 5(6) and Section 8(2)(a))

Under the Code, an operational creditor can initiate the CIRP under Section 9, if there is no dispute in relation to the default on the part of corporate debtor. This Section is preceded by Section 8, which allows the corporate debtor to bring to the notice of operational creditor, existence of a dispute, if any, ***and*** record of the pendency of the suit or arbitration proceedings, before receipt of demand notice. The word 'and' here suggests that a dispute between the

[8] Wig Associates Private Limited, C.P.No.1214/I&BC/NCLT/MB/MAH/2017 (National Company Law Tribunal Mumbai Bench, 24/08/2017).

[9] https://ibbi.gov.in//webadmin/pdf/legalframwork/2018/Aug/The%20Insolvency%20and%20Bankruptcy%20Code%20(Second%20Amendment)%20Act,%202018_2018-08-18%2018:40:34.pdf

operational creditor and the corporate debtor will be in existence only if a suit or an arbitration proceeding on the dispute is pending. This caused a lot of hardship since it meant that the CIRP could be avoided only in cases where a corporate debtor initiated litigation/arbitration for a perceived default.

The word 'and' has now been replaced by 'or'. This amendment clarifies that the existence of dispute need not particularly be in the form of pendency of suit or arbitration proceedings only.

The amendment, in effect, incorporates the Supreme Court's decision in Mobilox Innovations Private Limited v. Kirusa Software Private Limited[10], wherein it was conclusively held that the pendency of suit/proceeding is not the only evidence of existence of a valid dispute. The Court emphasized that the definition of 'dispute' has to be read as an inclusive, and not an exhaustive definition[11]. The same has to be given wide meaning, provided it is relatable to the existence of the amount of debt, the quality of goods or services or breach of a representation or warranty[12]. For instance, challenge to an arbitral award under Section 34 of the Arbitration and Conciliation Act, 1996 constitutes 'dispute' under the Code[13]; whereas merely showing an arbitration notice is not considered as a 'dispute'[14]. The Supreme Court further laid down that while determining 'existence of a dispute', all that an adjudicating authority must see is whether there is "*a plausible contention which requires further investigation, and that the dispute is not a patently feeble legal argument or based on an assertion of facts unsupported by evidence*". *(Plausible Contentions Test)*

Additionally, the parameters to ascertain as to whether there is a 'dispute' are: -

[10] Mobilox Innovations Private Limited v. Kirusa Software Private Limited., (2018) 1 SCC 353.
[11] One Coat Plaster, Shivam Construction Company v. Ambience Private Limited, Company Application No. (I.B.) 07/PB/2017 (National Company Law Tribunal Principal Bench, 01/03/2017).
[12] Section 5(6), The Insolvency and Bankruptcy Code, 2016.
[13] K. Kishan v. M/s Vijay Nirman Company Pvt. Ltd., Civil Appeal Nos. 21824 and 21825 of 2017 (Supreme Court, 14/08/2018).
[14] Ahluwalia Contracts ltd. v. Raheja Developers, Company Appeal (AT) (Insolvency) No. 703 of 2019 (National Company Law Appellate Tribunal, 23/07/2019).

a. the dispute must be bona fide and truly exist in fact;
b. the dispute should be natural and not a made to believe dispute;
c. the grounds for alleging the existence of a dispute are real and not spurious, hypothetical, illusory or misconceived; and
d. the dispute must be 'pre-existing' i.e. it must exist before the receipt of the demand notice.

It is relevant to state that the term 'dispute' cannot be held to mean mere assertion or denial of claims by the corporate debtor as it would frustrate the objective of the Code and deny the remedy available to the operational creditor[15].

2. Inclusion of home-buyers in the category of financial creditors[16] (Section 5(8)(f))

'Financial creditor' has been defined as any person to whom a financial debt, a debt disbursed against the consideration for the time value of money, is owed[17]. The term 'financial debt' includes money borrowed against payment of interest, amounts raised under a credit facility and any other transaction having the commercial effect of a borrowing[18].

Initially, the homebuyers were not specifically included under the definition of 'financial creditor'. This led to some chaos with respect to their position under the Code. The clarity on the position of law came with the order of NCLAT in the case of Nikhil Mehta and Sons (HUF) v. AMR Infrastructure[19], wherein it was held that amounts raised by developers under assured return schemes had the 'commercial effect of a borrowing', which became clear from the developer's annual returns in which the amount raised was shown as 'commitment charges' under the head of 'financial costs'. As a result of this, it was conclusively decided that such allottees were held to be 'financial creditors' within the meaning of Section 5(7) of the Code and hence, were eligible to apply for commencement of the process of CIRP for the corporate debtor. This was the first instance where the NCLAT recognized the status of homebuyers as a financial creditor. Interestingly, thereafter, the Supreme Court upheld the right of homebuyers in the case of Chitra Sharma v. Union of India[20] and in Bikram Chatterji v. Union of India[21].

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[15] Essar Projects India Ltd. v. MCL Global Street Private Ltd., Company Application No. 20/I & BP/ NCLT/MAH/2017 (National Company Law Tribunal Mumbai Bench, 06/03/2017); DF Deutsche Forfait AG & Anr v. Uttam Galva Steel Ltd., Company Application No. 45/I & BP/ NCLT/MAH/2017 (National Company Law Tribunal Mumbai Bench, 10/04/2017).
[16] Vide Insolvency and Bankruptcy Code (Amendment) Act, 2018, w.e.f .06.06.2018
[17] Section 5(7), The Insolvency and Bankruptcy Code, 2016.
[18] Section 5(8), The Insolvency and Bankruptcy Code, 2016.
[19] Nikhil Mehta & Sons v. AMR Infrastructures Ltd., 2017 Indlaw NCLAT 60.
[20] Chitra Sharma & Ors. v. Union of India & Ors., (2017) 143 SCL 680 (SC).
[21] Bikram Chatterji & Ors. v. Union of India & Ors., MANU/SCOR/17045/2018.

In view of the aforementioned judgments, an Insolvency Law Committee was constituted by the Ministry of Corporate Affairs with the purpose of suggesting modifications required to the Code, which also considered the issue of homebuyers *inter alia* discussing whether the amounts advanced by them fall under the definition of financial debt[22]. Thereafter, accepting the recommendations of the Committee, an Ordinance was passed, which inserted an explanation under clause (f) of Section 5 (8), i.e. definition of 'financial debt', so as to include amount paid by allottees under a real estate project as deemed to be having commercial effect of borrowing and thus, includible in the definition of 'financial debt'. However, it is pertinent to highlight that the amendment uses words 'deemed to be', which may imply that the amounts raised from the allottees under a real estate project may not be, in substance, a financial debt.

Distressed real estate developers raised objections against the inclusion of homebuyers as financial creditors since there was no clarity on when a 'default' occurred; additionally, it was also argued on whether they are secured or unsecured financial creditors. The constitutional validity of this amendment was challenged before the Supreme Court in Pioneer Urban Land and Infrastructure Limited & Anr. v. Union of India & Ors.[23] After a detailed analysis, the Supreme Court observed that the sale agreement between developer and homebuyer would have the commercial effect of a borrowing, which means that money is paid in advance for temporary use so that a flat/apartment is given back to the homebuyer. Thus, the Court upheld the validity of the clarification that homebuyers are financial creditors and rendered an observation that they should have representation in the CoC; though not that each of the homebuyers should have direct position in the CoC. It was further clarified that speculative investors and those not genuinely interested in purchasing the flat could be excluded from the definition of financial creditor.

Further, the striking part of the amendment is that it borrows definitions of allottees and real estate projects from the Real Estate (Regulation and Development) Act, 2016. The provisions of RERA are in addition to and not in derogation of the provisions of Code and these laws

[22] Report of the Insolvency Law Committee, March 2018, available at http://www.mca.gov.in/Ministry/pdf/ReportInsolvencyLawCommittee_12042019.pdf
[23] Pioneer Urban Land and Infrastructure Limited & Anr. v. Union of India & Ors., (2019) 8 SCC 416.

provide parallel remedies to allottees. Moreover, RERA has to be read harmoniously with the Code and in the event of a conflict, the Code will prevail over the RERA[24].

3. Related party of an Individual (Section 5(24A))

As a consequence of inclusion of Section 29A in the Code, persons who are a 'related party' to another defaulting party, are prevented from gaining control of the corporate debtor by being declared ineligible to submit a resolution plan under the Code. By way of this amendment, the related party *in relation to an individual* (like promoters or others running a stressed firm) has been defined under Section 5(24A) as one who is a relative of the individual concerned or his spouse; one who is a partner at a partnership firm in which the individual concerned is associated with; a trustee of a trust in which the beneficiary of the trust includes the individual; a private company in which the individual is a director and holds with his relatives over 2% of share capital, among others.

It is relevant to consider that the Code defines 'related party in relation to corporate debtor' and the Companies Act, 2013 defines 'related party in relation to a company'. Prior to this amendment, there was a gap in deciphering 'related party of an individual'.

Further, 'related party' is a much wider term than 'relative'. The definition includes not only relatives, but also entities to which the individual might be 'related'. 'Relatives' has been defined as anyone who is related to another, if they are members of a Hindu undivided family or if they are husband and wife, covering relatives leading up to fourth generation of an individual.

Furthermore, the Supreme Court in the matter of Chitra Sharma & Ors. v. Union of India[25] disqualified Jaiprakash Associates Ltd. (JAL) under Section 29A, as it had an account which was classified as a non-performing asset for a period of over one year from the date of commencement of the CIRP of Jaypee Infratech Ltd. (JIL) and was also a person who had been a promoter or in the management or control of the corporate debtor, who had engaged in a fraudulent transaction. Accordingly, the Court ruled that strict adherence to Section 29A is mandatory and that wilful defaulters shall not be permitted to participate in the CIRP.

[24] Ibid.
[25] Chitra Sharma & Ors. v. Union of India & Ors., (2017) 144 SCL 1 (SC).

4. Withdrawal of CIRP applications (Section 12A)

In case of any disputes between the parties, there are probabilities that parties might compromise and settle the matter prior to admittance of petition for CIRP or during the pendency of the case before the Court. In order to facilitate the withdrawal of application admitted under Sections 7, 9 or 10, Section 12A was inserted in the Code.

Prior to this amendment, under rule 8 of the CIRP Rules, the NCLT permitted withdrawal of the application on a request by the applicant before its admission. This amendment provides for withdrawal post admission, if the CoC approves of such action by a voting share of 90%. In the case of Brilliant Alloys Private Limited v. Mr. S. Rajagopal & Ors.[26], the Supreme Court took the view that Section 12A contains no time stipulation and allowed the settlement, even after issue of invitation for expression of interest (EoI), thereby annulling the CIRP proceedings.

5. Voting threshold

The Code, as enacted in 2016, stipulated approval by financial creditor having more than 75% of voting share in the CoC for even the minutest of the decisions. While the provision was well intentioned to ensure acceptability of action and reduce resultant litigation in a time bound process, in effect, it led to derailing the entire process in cases where CoC comprised of ARCs, NBFCs, individual money lenders etc.

Having witnessed this issue, the Government stepped in and passed an amendment bringing down the threshold of 75% to 66% for critical decisions like appointment of RP, approval of resolution plan, extension of CIRP beyond 180 days, passing a resolution for liquidation and, for routine decisions which require approval of CoC, the threshold has been set at 51%, thereby easing out the processes for the resolution professional.

6. Initiation of corporate insolvency resolution process by authorized representatives of financial creditors

In order to represent the financial creditors in a simplified manner, amended Section 7 allows "*any other financial person, on behalf of the financial creditor, as may be notified by the*

[26] Brilliant Alloys Private Limited v. Mr. S. Rajagopal & Ors., 2018 SCC Online SC 3154.

Central Government" to make application to NCLT for initiation of CIRP. This amendment incorporates the recommendation of the Insolvency Law Committee, which was of the view that the intent of the Code was not to bar a guardian of a financial creditor, administrator or executor of estate of a financial creditor or debenture trustee and the like, to trigger insolvency of a corporate debtor, and be a part of the CoC[27].

Such authorized representative may be chosen by the interim resolution professional amongst three insolvency professionals and appointed to represent concerns of 'class of creditors' to the CoC for the insolvency resolution[28]. The authorised representatives have been given the right to participate and vote in the meetings of CoC in respect of each financial creditor, in extent of voting shares held by them[29]. This provision has enabled the homebuyers, who were recently categorised as financial creditors to have an insolvency professional as their representative in the proceedings.

7. Application of Limitation Act on insolvency proceedings (Section 238A)

The amendment introduced a new Section 238A to the Code, which states that provision of Limitation Act would be applicable to proceedings before the NCLT, NCLAT, DRT or DRAT, as the case may be.

Initially, various benches of NCLT differed while deciding upon applicability of Limitation Act to proceedings under the Code. The question first came up for interpretation before the NCLAT in the case of Neelkanth Township and Construction Pvt. Ltd. v. Urban Infrastructure Trustee Ltd.[30], where it was categorically held that the Limitation Act is not applicable to the Code. The reasoning given by the NCLAT was that the Code is not an act for recovery of money claim, but it relates to initiation of CIRP. Hence, so long as debt is due including interest, the Code can be invoked even after the expiry of limitation period. Thereafter, the NCLAT reaffirmed this view in Black Pearl Hotels Pvt. Ltd v. Planet M Retail Ltd.[31] and in Speculum Plast Private Limited v. PTC Techno Private Limited[32].

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[27] Supra 22.
[28] amended Section 21(6A)(b), The Insolvency and Bankruptcy Code, 2016.
[29] amended Section 25A, The Insolvency and Bankruptcy Code, 2016.
[30] Neelkanth Township and Construction Pvt. Ltd. v. Urban Infrastructure Trustee Ltd., Company Appeal (AT) (Insolvency) No. 44 of 2017 (National Company Law Appellate Tribunal, 11/08/2017).
[31] Black Pearl Hotels Pvt. Ltd v. Planet M Retail Ltd., Company Appeal (AT) (Insolvency) No. 91 of 2017 (National Company Law Appellate Tribunal, 17/10/2017).
[32] Speculum Plast Private Limited v. PTC Techno Private Limited, Company Appeal (AT) (Insolvency) No. 47 of 2017 (National Company Law Appellate Tribunal, 07/11/2017).

However, the Hon'ble Supreme Court in its landmark judgment in the matter of Innoventive Industries Ltd. v. ICICI Bank Limited[33] held that *"a debt may not be due if it is not payable in law or in fact",* from which, one can imply indication towards applicability of limitation law for ascertaining the validity of an application filed under the Code.

Having said that, another issue was the date from which such limitation period was to be determined. This question appears to have been put to rest by the Supreme Court in the matter of B.K. Educational Services Private Limited v. Parag Gupta & Associates[34], where it was held that the Limitation Act is applicable to applications filed under Sections 7 and 9 of the Code from the inception of the Code and that Article 137 of the Limitation Act gets attracted. It was further observed that '*the right to sue*', therefore, accrues when a default occurs and if the default has occurred *over three years prior to the date of filing of the application*, the application would be barred under Article 137 of the Limitation Act.

8. Liability of guarantor (Section 14(3))

The amendment specifically states that the moratorium will not apply to guarantors of the corporate debtor. In the absence of a specific provision to the contrary, the guarantors of the corporate debtor sought to seek benefit of the moratorium applied under Section 14 of the Code, when the insolvency petition was admitted against the corporate debtor.

III. The Insolvency and Bankruptcy Code (Amendment) Act, 2019[35] w.e.f. 06 Aug, 2019

1. Time limit for completion of CIRP (Section 12)

One of the main objectives of the Code is to provide timely resolution and preservation of value. In practice, however, there have been multiple instances of delay in completion of CIRP. Considering this issue, the Government amended Section 12 of the Code and provided that the CIRP must be completed within the outer limit of 330 days from the insolvency commencement date, including extensions and the time taken in legal proceedings[36].

[33] Innoventive Industries Ltd. v. ICICI Bank Ltd., (2018) 1 SCC 407.
[34] B.K. Educational Services Private Limited v. Parag Gupta & Associates, Civil Appeal No. 23988/2017 (Supreme Court, 11/10/2018).
[35] https://ibbi.gov.in//uploads/legalframwork/630af836c9fbbed047c42dbdfd2aca13.pdf
[36] Prior to the amendment, the Code provided that the CIRP should be completed within 180 days or within the extended period of 90 days (outer limit of 270 days).

In the matter of Committee of Creditors of Essar Steel India Limited vs. Satish Kumar Gupta & Ors.[37], where there was a delay by the NCLAT to complete the CIRP without any fault of the litigant, the Supreme Court chose to strike down the term 'mandatorily' as being violative of Article 14 of the Constitution of India and held that it should be read as 'ordinarily'. The effect of this judgment is that, ordinarily, CIRP should be concluded within 330 days and it is only in exceptional cases that the time can be extended.

Nonetheless, certain exclusions for counting of the total period of resolution process have been carved out in the matter of Quinn Logistics India Pvt. Ltd. v. Mack Soft Tech Pvt. Ltd.[38], as here under: -

a. If the CIRP is stayed by a court of law/Adjudicating Authority/Appellate Tribunal/the Hon'ble Supreme Court;
b. If no Resolution Professional is functioning for one or other reason during the CIRP;
c. There is a gap between the date of order of admission and the actual date on which the Resolution Professional takes charge for completing the CIRP;
d. If the CIRP is set aside by the Appellate Tribunal; or
e. Any other circumstances which justifies exclusion of certain period.

2. Time-bound disposal of the resolution application

The Code provides a period of 14 days for the NCLT to '*ascertain the existence of default*' and admit or reject a resolution application for initiating insolvency proceedings. The amendment introduces judicial discipline in this respect by making it mandatory for the NCLT to pass an order admitting or rejecting a resolution application within 14 days from the date of its receipt. In the event of a failure to do so, the NCLT is now required to record the reasons in writing for the delay in determination of default. This amendment, therefore, seeks to ensure that the 14 day period is only extended in exceptional cases and not as a matter of routine. This move will prevent inordinate delays in admission and push for speedier disposal of applications.

3. Powers of the CoC

[37] Essar Steel India Limited v. Satish Kumar Gupta & Ors., 2019 SCC OnLine SC 1478.
[38] Quinn Logistics India Pvt. Ltd. v. Mack Soft Tech Pvt. Ltd., Company Appeal (AT) (Insolvency) No.185 of 2018 (National Company Law Appellate Tribunal, 08/05/2018).

The amendment clarifies the scope of power of the CoC and its role during the CIRP. The Essar Order[39] had held that the CoC can only approve or reject a resolution plan and cannot negotiate it with a resolution applicant to bargain for better terms. Thus, it severely curtailed the powers of the CoC vis-à-vis consultation and negotiation with bidders while evaluating any resolution plan.

However, the amendment seeks to change that and in clear words, has empowered the CoC to commercially consider the manner of distribution proposed in the resolution plan while deciding its feasibility and viability. The CoC can evaluate such manner of distribution by taking into account the order of priority amongst creditors as per the liquidation waterfall, stipulated in Section 53 of the Code. Thus, the CoC are the experts to find out the viability and the feasibility of a plan and the matrix[40]. Further, in the case of K. Shashidhar v. Indian Overseas Bank & Ors.[41], the Apex Court stated, "*The commercial wisdom of CoC has been given paramount status without any judicial intervention, for ensuring completion of the stated processes within the timelines prescribed by IBC*".

Furthermore, the amendment also clarifies that the CoC may take the decision to liquidate the corporate debtor any time after the CoC is constituted and before the confirmation of the resolution plan, including at any time before the preparation of the information memorandum.

4. Binding nature of resolution plan (Section 31(1))

As per Section 31(1) of the Code, the resolution plan shall be binding 'on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders', even on the Central Government, State Governments or any local authority to whom a debt in respect of payment of dues is owed, thus aiming to capture the spirit of the Code. Though the Code contemplates the existence of two kinds of creditors- financial and operational, it does not create a separate category in the name of government creditors.

IV. The Insolvency and Bankruptcy Code (Amendment) Act, 2020[42] w.e.f. 13 Mar, 2020

[39] Supra 38.
[40] M/s Bhaskara Agro Agencies v. M/s. Super Agri Seeds Pvt. Ltd., Company Appeal (AT) (Insolvency) No. 380 of 2018 (National Company Law Appellate Tribunal, 23/07/2018).
[41] K. Sashidhar v. Indian Overseas Bank and Ors., 2019 12 SCC 150.
[42] https://ibbi.gov.in//uploads/legalframwork/d36301a7973451881e00492419012542.pdf

1. Homebuyers (Section 7(1))

The inclusion of homebuyers in the category of financial creditors empowered even a single homebuyer to initiate CIRP and turned the Code as a redressal mechanism. In order to tackle this issue, it was recommended that there should be a requirement for a minimum threshold number of certain financial creditors in a class for initiation of CIRP.

The Parliament in December, 2019 amended the Code, providing that atleast 100 homebuyers/allottees or 10% of the total number of homebuyers/allottees (whichever is less) of a real estate project must jointly file application under Section 7 of the Code. However, various homebuyers have approached the Supreme Court contending that the restriction is unreasonable, irrational and creates a class within a class, to which the Supreme Court shall adjudicate the matter this year.

2. Liability for prior offences (Section 32A)

The introduction of the sweeping Section 32A provides immunity to a corporate debtor for any offence committed prior to the commencement of the CIRP and its assets from any prosecution, action, attachment, seizure, retention or confiscation upon approval of a resolution plan, on the condition that there is a change in the management or control of the corporate debtor. The intent behind the introduction of legislature in promulgation of Section 32A through application of the Mischief Rule of Interpretation was to ring-fence the successful resolution applicant from the transgressions committed by the erstwhile management.

Prior to the amendment, there was no provision in the Code or the laws before the enactment of the Code, prescribing immunity explicitly against prosecution of the corporate debtor. Section 32A has a direct bearing on Section 14 (Moratorium). The position was made clear in the case of Shah Brothers Ispat Pvt. Ltd. v. P. Mohanraj[43],wherein the NCLAT held that Section 14 of the Code is not applicable to pending criminal matters against the corporate debtor. The NCLAT, thereafter reiterated the said position of law in the case of Varrsana Ispat Limited v. Deputy Director, Directorate of Enforcement[44] and in Rotomac Global Private Limited v.

[43] Shah Brothers Ispat Pvt. Ltd. v. P. Mohanraj, Company Appeal (AT) (Insolvency) No. 306 of 2018 (National Company Law Appellate Tribunal, 31/07/2018).

[44] Varrsana Ispat Limited v. Deputy Director, Directorate of Enforcement, Company Appeal (AT) (Insolvency) No. 493 of 2018 (National Company Law Appellate Tribunal, 02/05/2019).

Deputy Director, Directorate of Enforcement[45].

V. The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020[46] w.e.f. 05 Jun, 2020

1. Introduction of Section 10A – The Exclusion

In the wake of the COVID-19 pandemic, the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020 was promulgated on 5th June, 2020. The objective of the Ordinance is to protect the corporate debtors who are experiencing distress on account of the pandemic and consequent nation-wide lockdown, from being dragged into insolvency proceedings under the Code. The Ordinance envisages insertion of Section 10A in the Code, which stipulates suspension of applications for initiation of CIRP of a corporate debtor, on account of any payment defaults that occur on or after 25th March, 2020, for a period of six months (which can be extended up to one year) ("**Suspension Period**").[47] The proviso to Section 10A further clarifies that no application can 'ever' be filed for any default occurring during such Suspension Period.[48]

For abundant clarity, the Ordinance specifically provides that Section 10A will not be applicable in respect of defaults committed by the corporate debtor prior to 25th March, 2020. In other words, creditors/ corporate applicants are still entitled to file appropriate applications to initiate the CIRP, for any default which may have occurred prior to 25th March, 2020.

However, the Ordinance suffers from some inherent defects and leaves some glaring ambiguities, which need to be addressed:

a. The Ordinance essentially puts a perpetual blanket ban on filing of applications to initiate CIRP for the defaults occurring during the Suspension Period. This may prove to be detrimental to the interests of the creditors, as the distress will eventually phase out.

b. No criteria has been provided under Section 10A for determining whether default by a corporate debtor has been caused on account of the pandemic. This may harm the financial interests of corporate debtors who made defaults before 25th March, 2020, but

[45] Rotomac Global Private Limited v. Deputy Director, Directorate of Enforcement, Company Appeal (AT) (Insolvency) No. 140 of 2019 (National Company Law Appellate Tribunal, 02/07/2019).
[46] https://ibbi.gov.in//uploads/legalframwork/741059f0d8777f311ec76332ced1e9cf.pdf
[47] Clause 2, The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020.
[48] Ibid.

such defaults were caused due to financial distress caused by the pandemic itself. Thus, the same is only a semi-baked attempt and hence, still leaves many lacunae hampering effective implementation of this Ordinance.

c. The Ordinance is silent on the treatment of applications that have been filed between 25th March, 2020 and 5th June, 2020 – whether the application of the Ordinance is retrospective or prospective in nature.

d. The threshold limit for default by corporate debtors is affixed at ₹ 1 lakh,[49]. However, in view of the Covid-19 outbreak and subsequent lockdown, the above threshold has been extended to ₹ 1 crore[50]. The increased threshold of minimum amount of default shall operate prospectively, i.e., it shall not apply to the applications filed under Sections 7, 9 or 10 of the Code before 24th March, 2020.[51] It is envisaged that default may have been caused by the corporate debtors partly before 25th March, 2020 and partly after that. However, the Ordinance does not make it clear whether such amount of default, which has been caused in part after 25th March 2020, shall be included or excluded for calculating minimum amount of default under Section 4 of the Code for the purpose of initiation of CIRP for the default caused in part before 25th March, 2020.

e. Another facet of concern that arises from the reading of Section 10A is that it does not consider the plights of on-going CIRPs. In cases where the CIRPs were initiated before the pandemic, the resolution plan for the corporate debtors may not have been proposed, as the companies may not bid for the corporate debtors on account of financial distress caused by the pandemic. In such a situation, the corporate debtors would be unnecessarily pushed into liquidation under the Code.

f. While the Ordinance suspends initiation of CIRP for the defaults as specifically stated under Section 10A[52], the creditors of the corporate debtors can still go behind the personal guarantors of the corporate debtors to recover the money associated with defaults caused by the corporate debtors, as the Ordinance does not suspend the initiation of proceedings against the personal guarantors of the corporate debtors.

[49] Section 4, The Insolvency and Bankruptcy Code, 2016.
[50] Notification under Section 4 of the IBC, 2016, MCA Notification S.O. 1205(E) (24/03/2020) available at https://ibbi.gov.in//uploads/legalframwork/48bf32150f5d6b30477b74f652964edc.pdf, last seen on 10/07/2020.
[51] Foseco India Ltd. v. Om Boseco Rail Products Ltd., Case No. CP(IB) No.1735/KB/2019 (National Company Law Tribunal Kolkata Bench, 20/05/2020); M/s. Arrowline Organic Products Pvt. Ltd. v. M/s. Rockwell Industries Ltd., Case No. IA/341/2020 in IBA/1031/2019 (National Company Law Tribunal Chennai Bench, 02/06/2020).
[52] Supra 35.

Conclusion

The enforcement of the Code marked the commencement of a new era of insolvency regulation in India. The Code brought in a paradigm shift from the 'debtor-in-possession' regime to a 'creditor-in-control' regime[53]. In order to accomplish this transformation and ensure the smooth functioning of the Code, the legislature brought in the above-mentioned amendments. Considering these reforms, the Code has already proved to be an ace for creating a secured business friendly environment and has acted as a catalyst for enhancing investment amongst the investors through its resolution mechanism. It is however, a relatively new legislation that is still evolving and is surrounded by corresponding ambiguities and leaves room for clarification, adjudication and interpretation.

[53] Supra 20.