

A Primer on the Insolvency and Bankruptcy Code, 2016

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1. Introduction

The insolvency resolution process in India has in the past involved the simultaneous operation of several statutory instruments. These include the Sick Industrial Companies Act, 1985, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, the Recovery of Debt Due to Banks and Financial Institutions Act, 1993, and the Companies Act, 2013.¹ Broadly, these statutes provided for a disparate process of debt restructuring, and asset seizure and realization in order to facilitate the satisfaction of outstanding debts.² As is evident, a plethora of legislation dealing with insolvency and liquidation led to immense confusion in the legal system, and there was a grave necessity to overhaul the insolvency regime. All of these multiple legal avenues, and a hamstrung court system led to India witnessing a huge piling up of non-performing assets, and creditors waiting for years at end to recover their money. The Bankruptcy Code is an effort at a comprehensive reform of the fragmented regime of corporate insolvency framework, in order to allow credit to flow more freely in India and instilling faith in investors for speedy disposal of their claims. The Code consolidates existing laws relating to insolvency of corporate entities and individuals into a single legislation. The Code has unified the law relating to enforcement of statutory rights of creditors and streamlined the manner in which a debtor company can be revived to sustain its debt without extinguishing the rights of creditors.

whose relationship with the debtor is a pure financial contract, where an amount has been provided to the debtor against the consideration of time value of money (“**Financial Creditor**”). Recent reforms have sought to address the concerns of homebuyers by treating them as ‘financial creditors’ for the purposes of the Code. By a recently promulgated ordinance, the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 (“**the Ordinance**”), the amount raised from allottees under a real estate project (a buyer of an under-construction residential or commercial property) is to be treated as a ‘financial debt’ as such amount has the commercial effect of a borrowing.³ The Ordinance does not clarify whether allottees are secured or unsecured financial creditors. Such classification will be subject to the agreement entered into between the homebuyers and the corporate debtor. In the absence of allottees having a clear status, there may be uncertainty about their priority when receiving dues from the insolvency proceedings. An Operational Creditor is a creditor who has provided goods or services to the debtor, including employees, central or state governments (“**Operational Creditor**”).

A debtor company may also, by itself, take recourse to the Code if it wants to avail of the mechanism of revival or liquidation. In the event of inability to pay creditors, a company may choose to go for voluntary insolvency resolution process – a measure by which the company can itself approach the NCLT for the purpose of revival or liquidation.

I. Applicability

The Code provides creditors with a mechanism to initiate an insolvency resolution process in the event a debtor is unable to pay its debts. The Code makes a distinction between Operational Creditors and Financial Creditors. A Financial Creditor is one

II. Institutional Framework

The Code proposes the creation of several new institutions, all of which have specialized roles in the insolvency resolution process. The Code has created a regulatory and supervisory body, the Insolvency and Bankruptcy Board of India (“**IBBI**”), which has the overall responsibility to educate, effectively implement and operationalize the Bankruptcy Code. The IBBI has the added responsibility to

1. The two main statutes dealing with insolvency and associated resolution proceedings among individuals. These are the Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920.

2. It must be noted that creditors having outstanding debts continue to have the right to approach an appropriate forum like civil courts or arbitral tribunals for recovery of debts which would be a contractual right of recovery.

3. Explanation to Section 5(8), Insolvency and Bankruptcy Code, 2016 (As amended by the Insolvency and Bankruptcy (Amendment) Ordinance, 2018)

facilitate the functionality of the Code by studying practical implications and framing rules/regulations to overcome any difficulty or hurdle. The Code envisages the creation of a cadre of professional insolvency practitioners, known as Resolution Professionals (“RP”), who are tasked with overseeing various aspects of the resolution of insolvency. The Code also sets up Insolvency Professional Agencies, which are professional bodies that will regulate the practice of insolvency professionals. Individual practitioners are required to be enrolled with insolvency professional agencies which are empowered to certify professionals, conduct examinations, and lay out a code of conduct.

III. Information utilities

The Code envisages the establishment of information utilities,⁴ which are tasked with the collection, collation, maintenance, provision and supply of financial data to businesses, financial institutions, adjudicating authorities, insolvency professionals and other relevant stakeholders, which will thereby serve as a comprehensive repository of information on corporate debtors that are of a financial nature. It is optional for operational creditors to provide financial information to the information utility. This information, including records of liabilities, defaults, and overall debt, is to be sourced from creditors by the utility service – in what is a positive step forward towards transparency, all security interests created on assets are to be reported to the utilities⁵ by financial creditors.⁶ The records with the utilities has evidentiary value in the initiation of insolvency resolution procedure, and can assist various stakeholders in arriving at an ideal resolution at distressed companies. However, the Code is silent on the networking and interlinking of multiple information utilities. National e-Governance Services Ltd. (NeSL), a government entity, has become the first information utility after receiving the required approvals from the IBBI.

4. These utilities must be registered with the Insolvency and Bankruptcy Board of India, which also oversees them in a regulatory capacity. Section 210, Insolvency and Bankruptcy Code, 2016.

5. Section 215 (2), Insolvency and Bankruptcy Code, 2016.

6. Section 215 (3), Insolvency and Bankruptcy Code, 2016.

IV. Framework of the Code

All proceedings under the Code in respect of corporate insolvency are to be adjudicated by the NCLT, which has been designed as the special one window forum which can tackle all aspects of insolvency resolution. The NCLT is referred to as the Adjudicatory Authority in relation to insolvency of corporate persons under the Code. No other court or tribunal can grant a stay against an action initiated before the NCLT. Appeals from the orders of the NCLT lie before the National Company Law Appellate Tribunal (“NCLAT”).⁷ All appeals from orders of the NCLAT lie to the Supreme Court of India.⁸ The jurisdiction of civil courts is explicitly ousted by the Code with regard to matters addressed by the Code.⁹ Additionally, it is now established that the Limitation Act, 1963 shall be applicable to proceedings under the Code.¹⁰ Thus, time-barred claims are outside the purview of insolvency.

When resolution/restructuring of debts is not viable, the NCLT may direct for dissolution of the company. The Code envisages a two stage process, *first*, revival and *second*, liquidation:

1. *Corporate Insolvency Resolution Process* (“**Insolvency Resolution Process**”)
2. *Fast Track Corporate Insolvency Resolution Process* (“**Fast Track Resolution Process**”)
3. *Liquidation*

Insolvency Resolution Process and Fast Track Resolution Process are measures to help revive a company. The Code attempts to first examine possibilities of a revival of a corporate debtor failing which, the entity will be liquidated.

A brief overview of the Insolvency Resolution Process is set out below.

7. Section 61, Insolvency and Bankruptcy Code, 2016.

8. Section 182, Insolvency and Bankruptcy Code, 2016.

9. Section 231, Insolvency and Bankruptcy Code, 2016.

10. Section 238A, Insolvency and Bankruptcy Code, 2016 (As amended by the Insolvency and Bankruptcy (Amendment) Ordinance, 2018).

2. Insolvency Resolution Process

I. Initiation by Financial Creditor

A Financial Creditor may by itself or jointly with other financial creditors or any other person on behalf of the financial creditor, as may be notified by the Central Government, seek to initiate Insolvency Resolution Process by filing an application before the NCLT, once a default has occurred.¹¹ Interestingly, under the Code, the adjudication process in respect of a Financial Creditor does not require a notice to be served on the debtor. However, the Supreme Court has in its judgement of *Innoventive Industries v IDBI Bank*¹² made it mandatory for a notice to be served on the debtor, as well as to provide the debtor with the right to be heard.¹³

The Code provides that within fourteen days of an application having been filed, NCLT shall ascertain the existence of the debt and default and either admit or reject the application, after which consequences under the Code would follow. Where the application itself is incomplete or suffers from other defects, the application may be rejected.

The Bankruptcy Code does not mention the degree of proof required for the NCLT to ‘ascertain’ default in respect of a debt owed by a debtor. Neither does the Bankruptcy Code provide an indication of the nature of satisfaction that is required by the NCLT with respect to existence of a default. However, the Supreme Court in *Innoventive Industries v IDBI Bank* has stated that the NCLT has to only ascertain the existence of an outstanding debt in respect of which

there has been a default and not deliberate into its extent or composition. From the experience so far, it can be noted that the NCLT would generally admit an application if it is compliant with the provisions of the Bankruptcy Code, despite having the discretion to entertain other considerations.

II. Initiation by an Operational Creditor

The Bankruptcy Code envisages a two-step process for the initiation of insolvency proceedings by an Operational Creditor. An Operational Creditor would upon the occurrence of a default have to demand payment of the unpaid debt (“**Demand**”).¹⁴ The Corporate Debtor may within 10 days of receipt of the Demand either Dispute the debt (as described below) or pay the unpaid debt.¹⁵ In the event the corporate debtor does not reply or repay the debt, an application could be filed by the Operational Creditor before the NCLT to initiate Insolvency Resolution Process.¹⁶ However, the existence of a dispute can act as a barrier to such application. The term “dispute” includes a suit or arbitration proceedings relating to: (a) the existence of the amount of debt; (b) the quality of goods or service; or (c) the breach of a representation or warranty.¹⁷ The extent as to which situation would qualify as a dispute has been discussed in detail below.

The Supreme Court in the case of *K. Kishan v. Vijay Nirman Company Pvt. Ltd.*,¹⁸ clarified that operational creditors cannot use IBC either prematurely or for extraneous considerations or as a substitute for debt enforcement procedures. It held that filing a Section 34 petition under Arbitration and Conciliation Act, 1996 (“**Arbitration Act**”) against an arbitral award shows a pre-existing dispute that concludes its first stage in the form of an award, and continues

11. A ‘debt’ has been defined in the Code to mean, “a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt” and a ‘default’ is said to have occurred when there is a “non-payment of debt when whole or any part or instalment 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”, as defined under the Code; Further, see Section 7, Insolvency and Bankruptcy Code, 2016 (As amended by the Insolvency and Bankruptcy (Amendment) Ordinance, 2018).

12. Company Appeal (AT) (Insolvency) No. 1 & 2 of 2017

13. *Sree Metaliks Limited and Another vs Union of India and Anr*, 7 April, 2017 W.P. 7144 (W) OF 2017; *Standard Chartered Bank Ltd. v Essar Steels Ltd*, IA 153/2017 with C.P. (I.B) No. 39/7/NCLT/AHM/2017

14. Section 8, Insolvency and Bankruptcy Code 2016.

15. Section 8(2), Insolvency and Bankruptcy Code 2016.

16. Section 9, Insolvency and Bankruptcy Code 2016.

17. Section 5(6), Insolvency and Bankruptcy Code, 2016.

18. CA No. 21824 of 2017.

thereafter, till final adjudicatory process under Sections 34 and 37 of the Arbitration Act has taken place. Therefore, IBC proceedings cannot be initiated till all available statutory appeal mechanisms have been exhausted by the parties.

III. Initiation by a Corporate Applicant

In case of default by the corporate debtor, the corporate applicant may file an application for initiation of insolvency proceedings.¹⁹ The applicant must furnish information relating to the books of account and the RP to be appointed. Additionally, a special resolution must be passed by the shareholders of the corporate debtor or a resolution by at least three-fourth of the total number of partners must be passed approving the filing of the insolvency resolution application.²⁰

IV. Scope of “dispute” under the Bankruptcy Code

After many conflicting decisions, the Supreme Court in *Mobilox v Kirusa* finally settled the issue regarding the interpretation of the term ‘dispute in existence’ under the Code. This provided much-needed relief and clarity to corporate debtors who may have a genuine dispute regarding the debt under consideration, but may not have yet initiated legal proceedings. The Court acknowledged the fact that situations may exist where a debtor company may have a dispute qua an operational creditor, which it may have chosen not to escalate to a court/arbitral tribunal. The essential elements of a dispute have been crystallized as below:

- The term “dispute” must be interpreted in a wide an inclusive manner to mean any proceeding which had been initiated by the debtor before any competent court of law or authority;

- The dispute should be in respect of (a) existence of the amount of debt; or (b) quality of goods and services; or (c) breach of representation and warranty;
- The dispute should be raised prior to the issuance of a demand notice by the Operational Creditor;
- The debtor would have to particularize and prove the dispute in respect of the existence of the “debt” and the “default”
- The dispute cannot be a *mala fide*, moonshine defense raised to defeat the insolvency proceedings.

Therefore, the NCLT would have to *prima facie* verify the existence of the pending dispute and not judge the adequacy of the same.

A recent amendment in law has incorporated this position of the Supreme Court. The Ordinance lays down that the corporate debtor shall bring to the notice of the operational creditor, existence of a dispute, if any, **or** record of the pendency of the suit or arbitration proceedings, i.e. the word “and” has been replaced by “or”.²¹ The amendment liberalizes the interpretation of the word “dispute”. Hence, the existence of dispute need not be in the form of pendency of suit or arbitration proceedings only.

V. Insolvency Resolution Process

Upon admission of the application preferred by a Financial Creditor/Operational Creditor, a moratorium is declared on the continuation and initiation of all legal proceedings against the debtor and an interim resolution professional (“IRP”) is appointed by the NCLT within fourteen days from the insolvency commencement date. The moratorium continues to be in operation till the completion of the Insolvency Resolution Process which is required to be completed within 180 days of the application being admitted (extendable by a maximum period of 90 days in case of delay). During the continuation of the moratorium the

19. Section 10, Insolvency and Bankruptcy Code, 2016

20. Section 10(3), Insolvency and Bankruptcy Code, 2016 (As amended by the Insolvency and Bankruptcy (Amendment) Ordinance, 2018).

21. Section 8(2), Insolvency and Bankruptcy Code 2016 (As amended by the Insolvency and Bankruptcy Ordinance, 2018).

debtor is not permitted to alienate, encumber or sell any asset with the approval of the Committee of Creditors (“COC”). Once an IRP is appointed, the board of directors is suspended and management vests with the IRP. IRP’s are required to conduct the insolvency resolution process, take over the assets and management of a company, assist creditors in collecting information and manage the Insolvency Resolution Process. The term of the IRP is to continue until an RP is appointed under Section 22.²²

The first step for the IRP is to determine the actual financial position of the debtor by collecting information on assets, finances and operations. Information that may be obtained at this stage include data relating to operations, payments, list of assets and liabilities. The IRP would also have to receive and collate claims submitted by creditors.

In order to have a more workable valuation of stressed assets and bring in transparency in the bidding process, IBBI recently amended²³ its regulations with respect to the Corporate Insolvency Resolution Process. So far, the regulations only required determination of the liquidation value of the insolvent company. This was financially detrimental for the insolvent company, since wide dissemination of liquidation value caused resolution applicants to submit bids which tended to linger near the liquidation value mark which was significantly lower than the market value. As per the amended regulations, a fair value, along with the liquidation value, has to be determined. The amended regulations defines ‘fair value’ to mean the realisable value of assets of the insolvent company, if they were to be sold between a willing buyer and seller as on the date on which insolvency application has been admitted, on an arm’s length basis, after

proper marketing.²⁴ Earlier, the creditors only had the minimalistic liquidation value serving as the benchmark for valuation of an insolvent company before commencing the resolution process. The amended regulations seek to ensure a maximisation of the value of the assets so that the insolvent company fetches an economically sustainable amount for its creditors.

The amended regulations also require the RP to provide an evaluation matrix to prospective applicants before they submit their resolution plans.²⁵ The evaluation matrix refers to a set of parameters and the manner in which these parameters are to be applied while considering a resolution plan.²⁶ While the amended regulations do not indicate what these parameters could be, they have to be approved by the committee of creditors and may be amended and communicated within the prescribed timelines. The committee of creditors evaluates various resolution plans submitted for an insolvent company and, based on their evaluation, determine the appropriate resolution plan. This should ensure that the bid evaluation process is more transparent and provides a layer of procedural fairness to any challenge to the process by unsuccessful bidders.

Additionally, there has been an important amendment to the Code, allowing withdrawal of applications admitted for insolvency resolution subject to an approval of 90% of the voting share of the CoC. This comes as a relief after the judgment of the Supreme Court in the case of *Lokhandwala Kataria Construction Pvt Ltd. V. Nisus Finance and Investment Managers LLP*, wherein it was observed that the power to allow withdrawal after admission of an application seeking initiation of insolvency was not permitted under the Code.

22. Section 16(5), Insolvency and Bankruptcy Code 2016 (As amended by the Insolvency and Bankruptcy Ordinance, 2018). According to Section 22(2) of Insolvency and Bankruptcy Code 2016 (As amended by the Insolvency and Bankruptcy Ordinance, 2018): The committee of creditors, may, in the first meeting, by a majority vote of not less than sixty-six per cent of the voting share of the financial creditors, either resolve to appoint the interim resolution professional as a resolution professional or to replace the interim resolution professional by another resolution professional

23. The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Amendment) Regulations, 2018

24. Section 2(hb), The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Amendment) Regulations, 2016 (As amended by the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Amendment) Regulations, 2018).

25. Section 36A, The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Amendment) Regulations, 2016 (As amended by the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Amendment) Regulations, 2018)B

26. Section 2(ha), The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Amendment) Regulations, 2016 (As amended by the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Amendment) Regulations, 2018)

VI. Committee of Creditors

The RP appointed by the NCLT would constitute a committee of creditors comprising of all the Financial Creditors of the corporate debtor (“**Committee of Creditors**”). This would incentivize a creditor to favour a collective approach towards insolvency resolution rather than proceeding individually.

A decision of the Committee of Creditors would require to be approved by a minimum of 51% of voting share of the Financial Creditors.²⁷ For certain key decisions of the Committee of Creditors, including: (i) appointment of the resolution professional, (ii) approval of the resolution plan, and (iii) increasing the time limit for the insolvency resolution process, the voting threshold is fixed at 66%.²⁸ In contrast to the state of affairs under SICA where the consent of every institutional creditor was required to give effect to a scheme, the Code embraces a more practical approach by reducing the threshold. To ensure that there are no conflicts of interest, a related party²⁹ of the Corporate Debtor to whom a financial debt is owed is not given any representation, participation or voting rights in the Committee of Creditors.³⁰

The Code at this stage of the Insolvency Resolution Process, provides preferential treatment to Financial Creditors since Operational Creditors do not have the right to be a part of the Committee of Creditors.

In case Financial Debts as well as Operational Debts are owed to a person, such person would constitute a Financial Creditor to the extent of the Financial Debt owed.³¹ Similarly, if the right to recover an Operational Debt is transferred or assigned to a Financial Creditor, such transferee or assignee would be an Operational Creditor to the extent of such debt.³²

27. Section 21(8), Insolvency and Bankruptcy Code 2016 (As amended by the Insolvency and Bankruptcy (Amendment) Ordinance 2018).

28. Section 22, Insolvency and Bankruptcy Code 2016 (As amended by the Insolvency and Bankruptcy (Amendment) Ordinance 2018)

29. “related party” in relation to individual has been defined to include a person who is a relative of the individual or a relative of the spouse of the individual. An Explanation has also been added to this clause pertaining to the meaning of relative as mentioned in the clause. Section 5(24A), Insolvency and Bankruptcy Code 2016 (As amended by the Insolvency and Bankruptcy Ordinance 2018)

30. Section 21(2), Insolvency and Bankruptcy Code 2016.

31. Section 21(4), Insolvency and Bankruptcy Code 2016.

32. Section 21(4), Insolvency and Bankruptcy Code 2016.

In case of consortium based lending, every Financial Creditor is eligible to be a part Committee of Creditors. The voting is such a situation would be based share of the financial debts owed to such Financial Creditors.³³ Similarly, in case a trustee has been appointed under a consortium/syndicated lending agreement- the lenders may elect to be represented by a trustee or may represent themselves.³⁴ The Committee of Creditors may also replace the Resolution Professional at any point of time.

During the pendency of the CIRP, the RP would have to seek prior approval of the Committee of Creditors by convening a meeting prior to taking actions such as raising any interim finance, creation of any security interest, debiting any amounts, amendment of rights creditors etc.³⁵

VII. Information Memorandum

The RP is also mandated to prepare an information memorandum that would assist in the formulation of a resolution plan.³⁶ The Board will determine the information to be specified in the resolution plan.³⁷

VIII. Resolution Plan

A primary objective of the enactment of the Code is to aid a debtor in resolving an insolvency situation without approaching liquidation, by finalizing an insolvency resolution plan (“**Resolution Plan**”).³⁸ In an ideal scenario, a properly structured Resolution Plan would provide a strategy for repayment of the debts of the debtor after an evaluation of the debtor’s worth, while allowing for the survival of the debtor as a going concern. Specifically, the Resolution Plan must provide for repayment of the debt of operational creditors in a manner such that it shall not be lesser than the amounts that would be due should the

33. Section 21(6), Insolvency and Bankruptcy Code 2016.

34. Id.

35. Section 28, Insolvency and Bankruptcy Code 2016.

36. Section 29, Insolvency and Bankruptcy Code 2016.

37. Id.

38. Section 30, Insolvency and Bankruptcy Code 2016.

debtor be liquidated.³⁹ Additionally, it should identify the manner of repayment of insolvency resolution costs, the implementation and supervision of the strategy, and should be in compliance with the law. If the terms (including the terms of repayment) under the Resolution Plan are approved by the committee of creditors,⁴⁰ and subsequently by the NCLT,⁴¹ the Resolution Plan would be implemented, and the debtor may emerge from the debt crisis with a fresh chance for business and lessened liabilities.

Initially, under the Code, the Resolution Plan could be presented before the committee of creditors by any person, without any restrictions or stipulations on eligibility (“**Resolution Applicant**”), based on the information available in the information memorandum. However, an amendment to the Code in December 2017 (vide the Insolvency and Bankruptcy Code (Amendment) Act, 2017), put in place certain eligibility criteria to be satisfied for a person to qualify as a Resolution Applicant. Specifically, the amendment introduced Section 29A of the Code, whereby certain categories of persons were ineligible to submit a Resolution Plan. While these included objective categories such as undischarged insolvents, wilful defaulters, persons convicted of offences, etc., it also extended to persons who controlled an account classified as non-performing assets, persons who were promoters of a corporate debtor in which a preferential or fraudulent transaction has taken place, persons who have executed an enforceable guarantee in favour of a creditor of the debtor, etc. The width and subjectivity in the criteria led to widespread debates on who could be an eligible Resolution Applicant, subsequently landing several debtors and bidders in litigation to determine the bidders’ eligibility and delaying the insolvency resolution. In the process, the ultimate objective of speedy resolution / restructuring of insolvent companies to ensure maximization of returns for creditors and survival of the business of the debtors was obstructed.

Considering the possible adverse impact of the eligibility criteria, the legislature introduced an Amendment in 2018, further amending Section 29A in an attempt to bring about clarity in the confusion. For instance, the erstwhile Section 29A made ineligible those persons who were ‘connected persons’ to applicants who failed to satisfy the eligibility criteria prescribed therein, consequently including banks and financial institutions within its ambit. The Amendment has tried to provide a wide and all-encompassing definition of financial institutions who are provided crucial exemptions for compliance with these eligibility norms.

In a similar fashion, exemptions have been provided to companies who acquire stressed assets under the Bankruptcy Code, to further participate in future bidding processes without being struck down by the restrictions for holding non-performing assets. Also, financial institutions have been exempted from being treated as a related party on account of holding equity in the corporate debtor undergoing insolvency if the equity has been obtained through conversion of a debt instrument.⁴² Guarantors would only be ineligible where the guarantee furnished by them is invoked and remains unpaid; holders of non-performing assets may submit Resolution Plans after making all payments in relation to such NPA prior to such submission. A detailed analysis of the amendments introduced to Section 29A can be found in **Annexure A**.

Once a person meets all the eligibility criteria and submits a Resolution Plan, in the event the same is not approved by the committee of creditors or by the NCLT, the NCLT may direct the debtor to be liquidated. A debtor may even be directed to liquidation if the Resolution Plan is implemented

irregularly, upon receipt of a compliant from a person affected by such irregular implementation.⁴³

39. Section 30(2), Insolvency and Bankruptcy Code 2016.

40. Section 30(3), Insolvency and Bankruptcy Code 2016.

41. Section 30 (6), Insolvency and Bankruptcy Code 2016.

42. Section 5(24A), Insolvency and Bankruptcy Code 2016 (As amended by the Insolvency and Bankruptcy Ordinance 2018).

43. Section 33(3), Insolvency and Bankruptcy Code 2016

However, we had a situation, where resolution applicants were not abiding by the terms of implementation of a resolution plan which had been approved by the NCLT. There was no provision in the Code acting as a tangible financial deterrent. Therefore, the CIRP Regulations were amended to state that the request inviting resolution plans would require a resolution applicant to provide a performance security in case its resolution plan is approved by the CoC. Thereafter, if the same resolution plan is approved by the NCLT but the applicant either doesn't implement the plan or contributes towards the failure of the implementation of that plan, then the said performance security shall stand forfeited.⁴⁴

The amendment also stated that the creditor, who is aggrieved by non-implementation of a resolution plan approved by the NCLT, can apply to the NCLT

for appropriate directions. One of the most significant consequences of a resolution applicant not complying with the terms of an approved resolution plan is the untimely demise of a corporate debtor. More often than not, the entire period available to complete the CIR Process is exhausted by the time the NCLT approves a resolution plan. Therefore, if the resolution applicant fails to implement the resolution plan, then there would be no time to consider any other plans and the corporate debtor would be forced to be liquidated. This would be an unfair situation for the corporate debtor as well as stakeholders involved in the process. Now with the introduction of this amendment, the CoC can explore the possibility of approaching the NCLT and seeking a further extension for

the CIR Process or an exclusion of the period spent in negotiating with the unwilling resolution applicant.

44. Regulation 36B(4A) Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016

3. Fast Track Insolvency Resolution Process (“Fast Track Resolution”)

The criterion for invoking Fast Track Resolution depends on the corporate debtor’s assets, income and nature of creditors or quantum of debt. The standards/ thresholds for invoking Fast Track Resolution have been provided in the Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017. The Regulations cover the process from initiation of insolvency till the approval of resolution by the NCLT, which concludes the process. The entire process is completed within 90 days. However, the NCLT may, if satisfied, extend the period of 90 days by another 45 days.

A creditor or a debtor may file an application, along with the proof of existence of default, to the NCLT for initiating Fast Track Resolution. After the application is admitted and the RP is appointed, if the IRP is of the opinion, based on the records of debtor, that the Fast Track Resolution is not applicable to the debtor, he shall file an application to the NCLT to convert the fast track process into a normal Insolvency Resolution Process.

The Ministry of Corporate Affairs has notified the sections 55 to 58 of the Bankruptcy Code pertaining to the Fast Track Process and that the Fast Track Process shall apply to the following categories of debtors:

- a. a small company, as defined under clause (85) of section 2 of the Companies Act, 2013; or
- b. a startup (other than the partnership firm), as defined in the notification dated May 23, 2017 of the Ministry of Commerce and Industry; or
- c. an unlisted company with total assets, as reported in the financial statement of the immediately preceding financial year, not exceeding Rs.1 crore.

4. Liquidation

Under the Code, the liquidator shall create an estate, i.e. a corpus, of all assets of the corporate debtor which can be utilized and distributed subsequent to liquidation. The liquidator is then required to receive or collect all claims from the creditors within a period of thirty days from the date of commencement of the liquidation process. Pursuant to a recent amendment, the liquidator has been empowered to adopt a new methodology for the realisation of assets, namely, “to sell the corporate debtor as a going concern.”⁴⁵ Subject to verification, the liquidator may admit or reject claims and such a decision can be appealed by creditors. The Code also mandates that the liquidator carry out effective valuation of all claims and assets, and states that such valuation be carried out as per parameters laid down by the Insolvency Board. If the creditors committee does not get a resolution plan approved, then liquidation of the company’s assets will have to be undertaken in order to satisfying outstanding debts. The Code establishes an ordered of priority among creditors, which will determine the sequence in which outstanding debts will be repaid:

- First, the dues towards the insolvency professional including fees and other costs incurred in the insolvency resolution process;
- Second, secured creditors who chose to not enforce the security they hold and the dues owed to workmen;
- Third, employee wages;
- Fourth, unsecured creditors;
- Fifth, dues owed to the government and residual debts to creditors even after the enforcement of security;
- Sixthly, any other outstanding debt;
- Finally, shareholders, with preference shareholders’ rights taking precedence.

Once the creditors committee chooses to liquidate

the company’s assets, there are two paths available to the secured creditor – they may choose to opt out of the resolution process and enforce their security to recover debts owed to them; or they may participate in the resolution process, thereby giving up all rights over the collateral. The latter option will prioritise the secured creditor ahead of all except the dues owed to workmen.

Another unique feature of the Code is the low priority accorded to government dues, unlike the Companies Act, 2013 where they are paid alongside employees and unsecured financial creditors. Now, they are paid after secured creditors, unsecured creditors, employees, and workmen. This undoubtedly signals the *business-first* principle that is guiding the Code, where the government is viewed only as a facilitator and regulator, and not an active participant in the affairs of commercial entities. This is a positive step, as government agencies have unrivalled resources at their disposal to collect their dues, and do not need to burden the insolvency resolution process, especially in its early stages.

After an order for liquidation has been passed, suits/legal proceeding cannot be instituted by/ against the corporate debtor. For the purpose of liquidation, the liquidator ordinarily sells the assets of a corporate debtor by way of an auction. However, such sale may be by way of a private sale, in cases where (i) the asset is perishable; (ii) the asset is capable of deterioration of value if not sold immediately; (iii) the asset is sold at a higher price than the reserve price of a failed auction as well as; (iv) when prior permission of the Adjudicating Authority for a private sale has been obtained. Additionally, private sale of assets to a related party of the corporate debtor, a related party of the liquidator or any professional appointed by him may not be permitted unless a prior permission is taken by the Adjudicating Authority. Furthermore, the liquidator has the liberty to stop the sale if he has reason to believe that there is collusion between the buyers; or the corporate debtor’s related party and the buyer; or the creditor and the buyer.⁴⁶

45. Regulation 32, Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (As amended by the Insolvency and Bankruptcy Board Of India (Liquidation Process) (Amendment) Regulations, 2018.

46. Regulation 33, Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016

5. Voluntary Winding Up

The Code also provides for voluntary winding up by a corporate person who has not committed any default, provided certain conditions as laid down in the Code are fulfilled. The RP must verify claims raised by stakeholders against the corporate person and wind up the affairs of the corporate company within one year from the date of commencement of the voluntary liquidation.

After the sale of the assets of the debtor, the Liquidator would make an application to the NCLT for its dissolution. The NCLT would then make an order for dissolution of the debtor and an order of the same would be communicated to the authority with which the corporate debtor is registered.

6. Liability of Individuals

The Code also provides for resolution of liabilities on individuals. Some of these liabilities have been set out below:

- i. In case the operations of the debtor have been carried on with intent to defraud creditors, persons who were knowingly parties to the same shall be liable to make contributions to the assets of the corporate debtor.
- ii. Where the director/ partner knew or ought to have known that there was no reasonable prospect of avoiding the commencement of insolvency resolution process, the directors/ partners of the corporate debtor shall be liable to make such contribution to the assets.
- iii. In case an Officer has made or caused to be made any gift/ transfer of/ charge on the property of the corporate debtor, the Officer may be liable to be punished with imprisonment for a term not be less than one year and with fine which shall not be less than one lakh rupees but which may extend to one crore rupees.

7. Conclusion

It is evident that the Indian government is leaving no stone unturned in its aim to improve the Ease of Doing Business in India. The legislature, RBI, SEBI, and the judiciary have presented a unified front, unprecedented in India so far. Any apparent loopholes are being plugged at the earliest and the law is evolving rapidly. It comes as no surprise, then, that as in 2019, India had already secured its position in the top 30 developing countries for retail investment worldwide and that insolvency resolution in India has become a more streamlined, consolidated and expeditious affair.

What needs to be seen is whether these measures can successfully be used to reduce the burden of stressed assets on the banking system and whether India can come on par with other developed nations in respect of insolvency resolution.

8. Analysing 2018 through the lens of the Insolvency Code

I. Introduction

With almost two years since the introduction of the Insolvency and Bankruptcy Code, 2016 (“IBC” and “Code”), there have been various challenges in the effective implementation of the Code. However, constructive interpretation by the judiciary coupled with effective amendments to the Code have helped in eliminating many of these teething issues. The Insolvency and Bankruptcy Board of India (“IBBI”) which is the regulatory and supervisory body in charge of the IBC, has done a commendable job in proactively spreading awareness and regulating the space. Many important judgments were pronounced throughout the year, including certain landmark cases, where the Supreme Court has tried to ensure that the spirit of the Code is given primacy over procedural requirements. With multiple assets on sale, strategic investors have been first off the mark, with billion dollar conglomerates trying to outbid each other and add coveted companies to their inventories. The interest shown by corporate India in turning around loss making industries is extremely

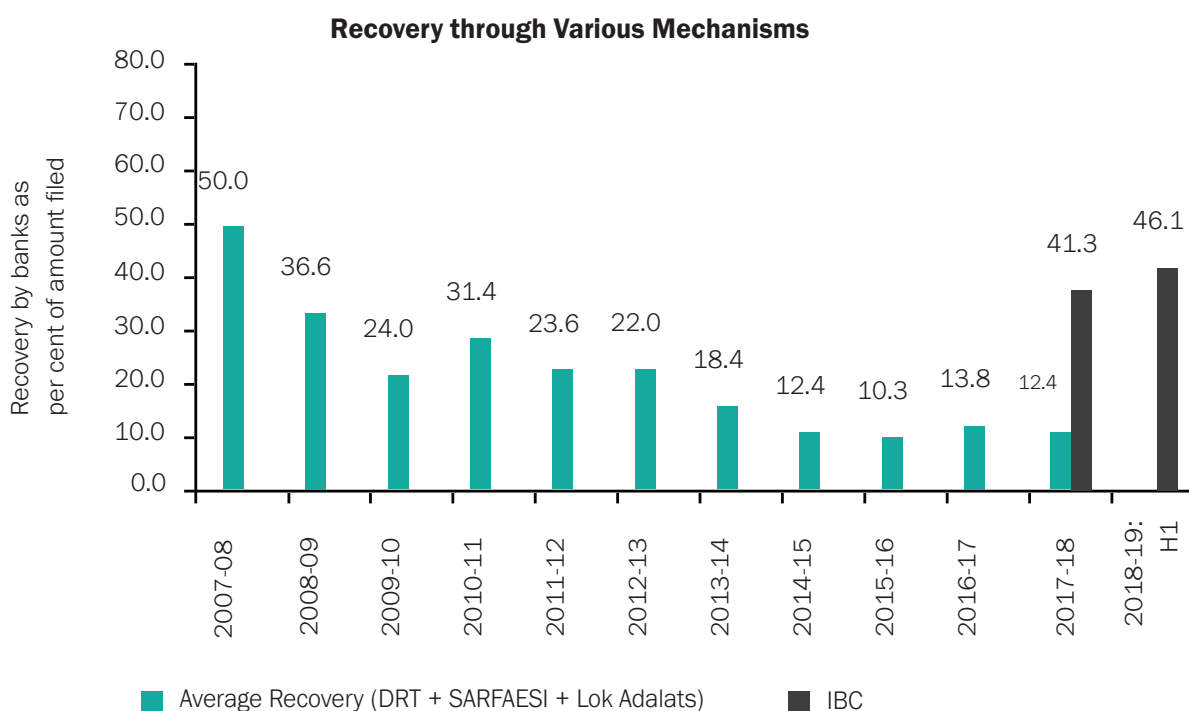
encouraging for the economy as well as the NPA laden banking system.

With so many important developments during the course of the year, we have tried to capture them all in the following sections, which will primarily deal with (i) Impact on Creditors and Investors, (ii) Statutory and Regulatory Developments and (iii) Judicial Developments.

II. Impact On Creditors And Investors

A. Empirical Data – Better Realization Through IBC!

A recent report by the Reserve Bank of India on the trends and progress of banking in India 2017-18, has shown an interesting comparison on the efficacy of the IBC in improving the recovery rate and in providing the lenders with a better realization in comparison to the erstwhile regime of recovery.



Note: Data on average recovery (DRT + SARFAESI + Lok Adalats) is not available for 2018-19:H1

Source: RBI and IBBI.

The above indicates that the IBC is an evolving legislation, which has shown results in 2 years, especially in comparison to the erstwhile recovery and distress resolution framework. The realization proceeds under the corporate resolution framework of the IBC has also proven to be higher in comparison to the realization value under the previous framework (the graph above shows that the recovery percentage under the previous framework for the year 2017-18 was 12.4 % approx. whilst it has been at approx. 41.3% under the IBC).

Out of the “*Dirty Dozens*”,⁴⁷ Jyoti Structures and Lanco Infratech did not receive the approval of its committee of creditors for a resolution plan and consequently, have faced liquidation (though the order against Jyoti Structures has been temporarily stayed). Whilst lenders in such cases have refused to take steep haircuts, we have seen cases such as the bid by Reliance Industries – JM Financial for Alok Industries where the lenders have agreed to take more than 80% haircut.

Name of the Corporate Debtor	Percentage of the amounts realized by Financial Creditors vis a vis the amounts claimed	Realization by Financial Creditors as a percentage of the liquidation value
Electrosteel Steels Limited	40.38	183.45
Bhushan Steel Limited	63.50	252.88
Monnet Ispat & Energy Limited	26.26	123.35
Amtek Auto Limited	34.38	106.20

However, the rate of recovery for those accounts which have been resolved is encouraging. As on September 30, 2018, out of 1198 corporates undergoing insolvency resolution process, 52 corporates had received approval for their resolution plans under the IBC. The percentage of the amounts realized by the lenders vis a vis the total admitted claims (claims accepted by the resolution professional under the IBC post the submission of proof of claims of outstanding debt by the financial creditors) range from 100% (Concord Hospitality Pvt. Ltd.) to 0.28% (Zion Steel Limited) whereas the percentage of amounts realized vis a vis

the liquidation value⁴⁸ ranged from 29.58% (Rajpur Hydro Power Private Limited) to 375.83% (Dooteriah & Kalej Valley Tea Estate Pvt. Ltd.).

A majority of the cases have seen more than 100% of the liquidation value being realized by the creditors. Since the liquidation process typically involves the sale of assets on a stand alone basis, the liquidation value provides the estimated realizable value of each asset of the corporate debtor.

In respect of the Dirty Dozens, only four of the accounts have seen resolution providing us with the following numbers:

The above mentioned data indicates that the corporate insolvency resolution process has led to a better rate of recovery in comparison to (1) the erstwhile regime of recovery and (2) the amounts that would have been realized in case of a potential liquidation or a standalone sale of such assets through enforcement of security interest by individual creditors outside the IBC process.

B. Way Forward

The Committee of Creditors (“CoC”) of Essar Steel has recently petitioned in the NCLAT to expeditiously dispose of the objections filed against the resolution plan of Arcelor Mittal that has been approved by its CoC. The resolution of Essar Steel has been pending for nearly 500 days now,⁴⁹ thereby going well beyond the prescribed statutory timeline of 180 days (or 270 days if the timelines are extended in accordance with IBC). A recent report has stated that the delay in completion of the resolution for the Dirty Dozens,

47. Dirty Dozens refer to the top 12 accounts constituting 25% of the total non-performing assets, as identified by the Reserve Bank of India for immediate resolution under the IBC. These include: Bhushan Steel Limited; Electrosteels Steel; Monnet Ispat & Energy; Amtek Auto; Bhushan Steel and Power; Essar Steel; Alok Industries; Jaypee Infratech; Jyoti Structures; Lanco Infratech; ABG Shipyard; Era Infra Engg.

48. The liquidation value is the estimated realizable value of the assets of the corporate debtor if the corporate debtor were to be liquidated on the date of admission of the petition for corporate resolution under the IBC.

49. https://www.business-standard.com/article/companies/essar-steel-insolvency-case-nclat-asks-nclt-to-expedite-decision-119010400043_1.html

beyond the statutory period, has cost the banks to bear a loss of INR 4000 crores in interest.⁵⁰ Similarly, we have seen cases wherein the successful bidder has not complied with its payment obligations under the approved resolution plan, such as failure by Ingen Capital to infuse funds for Orchid Pharma or failure to meet payment deadlines by Liberty House in case of Adhunik Metals and Amtek Auto.⁵¹

It is imperative that we have more examples of efficient resolution (which includes successful implementation of the resolution plans) such as the resolution of Bhushan Steel by Tata Steel, since the time value of money is an important consideration to ensure the efficacy of the IBC framework.

Whilst steep haircuts still remain an important issue, a strong market for the growing investor appetite in the corporate resolution space should help in lowering the haircuts that the lenders are currently bearing. An important example would be the case of Binani Cements (which saw a stiff competition between Ultratech and the Dalmia Group with the winning bid providing for a 100% recovery for the creditors) and Essar Steel (where the promoters are offering a bid which provides 100% recovery for the creditors even after the bid submitted by Arcelor Mittal has been accepted), where competitive bidding has assured high realization value of the distressed account for the lenders.

The IBC has reinvigorated the stressed asset space with both strategic as well as financial investors being bullish about the prospects of investment. In order to ensure continued momentum, it is important to constantly invest in capacity building. We need to have more officers assigned to NCLT as well as more benches of the NCLT and NCLAT. The IBC should not be used as a method to recover outstanding dues, however, with the low threshold for filing cases and the limited scope of review, it has become the favorite method for small operational creditors to recover their dues, thereby clogging the

system. A holistic view of the situation augers well for the creditors as well as investors, with many more recoveries and resolutions on the anvil.

III. Statutory and Regulatory Developments

Like any other nascent legislation, the IBC also has its own deficiencies, however, the IBBI and the government have been constantly trying to plug the gaps and introduce practical amendments which reduce the possibility of litigation and make the entire process fairer to each participating stakeholder.

Some of the key amendments introduced during the course of the year have been discussed below:

A. Second Amendment Act

The IBC was amended by the IBC (Second Amendment) Act, 2018 (“**Second Amendment Act**”) introducing the following changes:

- Reduction in the voting threshold of the CoC from 75% to 66% for certain key decisions such as appointment⁵² or replacement⁵³ of resolution professionals, extension of insolvency resolution process,⁵⁴ approval of resolution plan⁵⁵ etc.
- Section 12A was introduced, which provides for withdrawal of an application seeking initiation of insolvency resolution after the same is admitted by the NCLT. The applicant can withdraw its application if at least 90% of the CoC provides its approval.⁵⁶
- It has been clarified that the provisions of the Limitations Act, 1963 have been applicable to all proceedings and appeals made under IBC since the inception of the IBC.⁵⁷

50. <https://timesofindia.indiatimes.com/business/india-business/delays-beyond-270-days-at-nclt-cost-banks-rs-4000-crore/article-show/66598888.cms>

51. The statutory penalty under IBC in this regard being imprisonment of upto 5 years, or a fine of upto INR 1 crore rupees, or with both.

52. Section 22 (2) of the Insolvency and Bankruptcy Code, 2016.

53. Section 27 (2) of the Insolvency and Bankruptcy Code, 2016.

54. Section 12 (2) of the Insolvency and Bankruptcy Code, 2016.

55. Section 30 (4) of the Insolvency and Bankruptcy Code, 2016.

56. Section 12 A of the Insolvency and Bankruptcy Code, 2016.

57. Section 238A of the Insolvency and Bankruptcy Code, 2016.

- An explanation to the definition of ‘financial debt’ was added, whereby any amount raised from allottees under a real estate project (including home buyers) will be considered as a financial debt. This implies that home buyers who were earlier put under the bracket of “*other creditors*”, will now be considered as financial creditors and can now be a part of the CoC.

Changes to Disqualification Criteria of Resolution Applicants

The Second Amendment Act also brought in certain key changes in Section 29A of IBC which discusses the eligibility criteria for resolution applicants. One of the most important changes being the clarification on the timeline for disqualification of those resolution applicants which hold NPA’s. The provision now states that a resolution applicant should not hold an NPA at the time of submission of the resolution plan.⁵⁸ This amendment was brought in to provide prospective resolution applicants the ability to part ways with their NPAs prior to submission of a resolution plan, however, this position has been interpreted narrowly by the Supreme Court in the *Essar Steel* case.⁵⁹ The disqualification under sub-section (d) based on conviction of a person for an offense punishable with imprisonment for over two years has now been narrowed down to 25 Acts mentioned under the newly inserted Twelfth Schedule.⁶⁰ The language in sub-section (i) has been amended to clarify that any disability corresponding to sub-sections (a) to (h) under any law in a jurisdiction outside India must be present and subsisting. This language has been inserted to ensure that a resolution applicant is not held ineligible for any disability suffered in the past and is not subsisting at the time of submission of the resolution plan.⁶¹

The Second Amendment Act has further exempted some of the categories of resolution applicants from certain disqualifications under Section 29A to widen the pool of potential bidders. The Amendment has widened the definition of ‘financial entities’ which

now also includes AIFs.⁶² As per the amendment any financial entity which becomes a related party solely by way of conversion of debt or subscription to equity linked instruments before the insolvency commencement date will not be considered as a related party and will not be disqualified. Further, any entity which has acquired an NPA through the insolvency resolution process under the IBC will not be disqualified from making another acquisition under the IBC for the next three years.

B. Third Amendment Act:

The IBBI (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2018 (“**Third Amendment Act**”),⁶³ provided for the following changes

- Model timeline to streamline the Corporate Insolvency Resolution Process (“**CIRP**”) and clarify certain ambiguities and overlapping timelines under the unamended CIRP.⁶⁴
- Procedure and time limit for withdrawal of the CIRP under Section 12A of the IBC.⁶⁵
- Process and format for invitation of Expression of Interest (“**EoI**”) to participate in the CIRP and timeline for submission of the EoI.⁶⁶
- Statutory backing for automatic rejection of EoIs⁶⁷ and resolution plans⁶⁸ submitted beyond the prescribed timeline. This deemed rejection of submissions can ensure a fairer process by restricting resolution applicants from revising

62. Explanation II, Section 29A of the Insolvency and Bankruptcy Code, 2016.

63. The Third Amendment Act notified on July 3, 2018 makes changes to the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

64. For a detailed analysis of the revised timeline in accordance with the Third Amendment, please refer to our article, “New Timelines Under CIRP Regulations: Hits And Misses” at <http://www.nishith-desai.com/information/news-storage/news-details/article/new-timelines-under-cirp-regulations-hits-and-misses.html>

65. Regulation 30A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

66. Regulation 36A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

67. Regulation 36A(6) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

68. Regulation 39(1A) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

58. Section 29A (c) of the Insolvency and Bankruptcy Code, 2016.

59. The case has been discussed in detail under section IV.

60. Section 29A (d) of the Insolvency and Bankruptcy Code, 2016.

61. Section 29A (i) of the Insolvency and Bankruptcy Code, 2016.

their plans after analyzing bids submitted by their competitors and also ensure a timely completion of the CIRP.

C. Fourth Amendment Act

The IBBI (Insolvency Resolution Process for Corporate Persons) (Fourth Amendment) Regulations, 2018 (“**Fourth Amendment Act**”) provide that operational creditors would have to be paid on priority over financial creditors under a resolution plan. This pay out mechanism replaced the previous waterfall which provided for payment of (a) resolution professional costs and (b) liquidation value due to operational creditors and dissenting financial creditors in priority to financial creditors. Therefore, the Fourth Amendment has effectively done away with the requirement to pay the liquidation value due to dissenting financial creditors in priority.⁶⁹ Consequently, dissenting financial creditors can be paid the same amount and in the same manner as approving financial creditors.

D. Liquidation Amendment Act

The IBBI (Liquidation Process) (Second Amendment) Regulations, 2016 (“**Liquidation Amendment Act**”)⁷⁰ clarified that assets subject to security interest cannot be sold in liquidation proceedings unless the same have been relinquished to the liquidation estate.⁷¹ Section 52 of the IBC, provides every secured creditor the right to relinquish its security interest over assets and participate in the liquidation proceedings, or realize the secured assets as provided under law. As per the Liquidation Amendment, if a secured creditor does not relinquish its assets then such assets cannot be sold during the liquidation process. Therefore, it is possible that even a single lender holding a *pari passu* charge over assets might be able to scuttle attempts to sell entire verticals of the business or the corporate debtor as a whole.

69. Regulation 38 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

70. This Amendment made changes to the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 on October 22, 2018.

71. Regulation 32 of IBBI (Liquidation Process) (Second Amendment) Regulations, 2016.

E. Introduction of the Insolvency Law Committee’s Second Report on Cross-Border Insolvency

The Insolvency Law Committee (“**ILC**”) has submitted its second report to the Government, recommending amendments to the IBC to include provisions on cross border insolvency (“**Proposed Amendment**”) based on the UNCITRAL Model Law.⁷² The Proposed Amendment seeks to incorporate the four major tenets from the UNCITRAL Model Law, namely, (a) direct access to foreign insolvency professionals and foreign creditors to participate in or commence domestic insolvency proceedings against a defaulting debtor; (b) recognition of foreign proceedings & provision of remedies; (c) cooperation between domestic and foreign courts & domestic and foreign insolvency practitioners; and (d) coordination between two or more concurrent insolvency proceedings in different countries. The Proposed Amendment would increase the access of Indian creditors to foreign assets and proceedings and vice versa, thereby strengthening the IBC regime and increasing investor confidence. However, there can be some challenges in the implementation and enforcement due to certain procedural gaps (dealt with in detail in our write up on the Proposed Amendment).

IV. Judicial Developments

The year saw a lot of interesting judicial pronouncements which contributed to the development of the IBC regime. The central theme for most of these judgments is (a) effective implementation of the Code (b) maximization of value for all stakeholders, i.e. creditors, investors and shareholders (c) fair and equitable treatment of all creditors irrespective of categorization and (d) defending against subversion of the spirit of the Code through innovative measures.

Some of the key judicial pronouncements are discussed below.

72. See report at, http://www.mca.gov.in/Ministry/pdf/CrossBorderInsolvencyReport_22102018.pdf.

A. Eligibility of bidders under the IBC

The eligibility criteria as specified under Section 29A of the IBC applies to a resolution applicant and any person/entity acting jointly or in concert with such resolution applicant fulfilling certain requirements. In the case of *ArcelorMittal India Private Limited & Others v. Satish Kumar Gupta & Others*,⁷³ the Supreme Court explored the provision set out under Section 29A of the IBC and found that Section 29A requires the lifting of the corporate veil. Accordingly, the Supreme Court held that basis the facts of the case, it can be deduced that if certain persons were acting jointly in a manner so as impute that such persons were acting together then such persons will fall under the expression of “*persons acting jointly*”. In addition, while the phrase “*persons acting in concert*” has not been specifically defined under the IBC, the Supreme Court, while taking into consideration precedents and existing laws, held that the phrase shall have the same meaning as assigned under the SEBI Takeover Code. The Supreme Court also discussed the meaning of the terms “management” and “control” under Section 29A where it held that management refers to *de jure* management of the corporate debtor and “control” will only cover positive or proactive control and not any sort of negative or reactive control. In addition, the Supreme Court also examined the issue of whether a resolution applicant may avoid falling within the ineligibility criteria as per Section 29A, accordingly, the Supreme Court applied a look back approach and held that while the credentials of a resolution applicant as on the date of submission of the resolution plan may be considered, past actions which may be proximate and relevant to the current resolution plan may also be considered.

B. Invalidation of preferential, extortionate or fraudulent transactions

IBC devolves certain powers on the Adjudicating Authority to nullify or reverse the effect of certain transactions carried out for the purpose of undermining or circumventing any of the provisions

of the Code. The NCLT, Allahabad in the case of *IDBI Bank Ltd. v. Jaypee Infratech Ltd.*,⁷⁴ held that mortgages created by Jaypee Infratech Ltd. (“JIL”) in favour of the lenders of its holding company Jaiprakash Associates Ltd. (“JAL”) amounted to preferential, undervalued and fraudulent transactions. Upon finding that the transactions were fraudulent, undervalued and preferential, the NCLT ordered the release of the encumbered lands from JAL’s lenders, and directed that they be vested back in JIL.

In reaching the above conclusion the NCLT took note of the following factors:

- a. Creation of a mortgage in favor of JAL’s lenders had the effect of putting JAL in a beneficial interest vis-à-vis the position it would have been in if JIL’s assets were distributed as per the distribution waterfall under Section 53 of IBC;
- b. Creation of mortgage in favor of JAL’s lender was not in the ordinary course of business of JIL;
- c. JIL did not benefit from creation of mortgage in any manner;
- d. JIL mortgaged its land without any consideration or counter-guarantee from JAL.

The above judgment has been stayed by NCLAT while it is seized of the appeal.

C. IBC is a special law with an overriding effect

The NCLAT in the case of *Jagmohan Bajaj v. Shivam Fragrances Pvt. Ltd & Anr.*,⁷⁵ held that triggering of CIRP cannot be defeated by taking resort to pendency of internal dispute between Directors of Corporate Debtor on allegations of oppression and mismanagement. IBC is a special law having an overriding effect on any other law as mandated under Section 238 of IBC. The statutory rights of financial creditors therefore, cannot be made subservient to pending proceedings under Section 241 and 242 of the Companies Act, 2013 (Oppression and Mismanagement).

73. CA No. 9402 – 9405 of 2018.

74. CA No.26/2018 in Company Petition No.(IB)77/AD/2017.

75. CA (AT) (Insolvency) No. 428 of 2018.

D. Challenge to Arbitral Award is continuation of a ‘pre-existing dispute’ under IBC

The Supreme Court in the case of *K. Kishan v. Vijay Nirman Company Pvt. Ltd.*,⁷⁶ clarified that operational creditors cannot use IBC either prematurely or for extraneous considerations or as a substitute for debt enforcement procedures. It held that filing a Section 34 petition under Arbitration and Conciliation Act, 1996 (“**Arbitration Act**”) against an arbitral award shows a pre-existing dispute that concludes its first stage in the form of an award, and continues thereafter, till final adjudicatory process under Sections 34 and 37 of the Arbitration Act has taken place. Therefore, IBC proceedings cannot be initiated till all available statutory appeal mechanisms have been exhausted by the parties.

E. The provisions of the IBC shall prevail over the Income Tax Act, 1961 (“IT Act”)

In the case of *Leo Edibles & Fats Limited and The Tax Recovery Officer (Central), Income Tax Department, Hyderabad and other*,⁷⁷ the High Court of Telangana dealt with the issue of settling the dues of the Income Tax authority during liquidation of the company. The High Court held that in the event that the assessee company is undergoing the liquidation process under the IBC, the Income Tax authority can no longer claim a priority in respect of clearance of tax dues under the IT Act. The High Court further held that assets that are under attachment (though encumbered) will not create any interest in favour of the Income Tax authority as a secured creditor under the IBC. Additionally, the High Court further set out that the moratorium in terms of proceedings as set out under the IBC ensures that any pending litigation initiated prior to commencement of the insolvency proceeding are suspended. Accordingly, assets under

an order of attachment issued prior to liquidation commencement shall be sold along with the other unencumbered assets of the assessee company.

F. Claim which is not matured can still be accepted by Resolution Professional

The NCLAT in the case of *Andhra Bank v. M/s. F.M. Hammerle Textile Ltd.*⁷⁸, held that it is not necessary that all the claims submitted by the creditor should be a claim matured on the date of initiation of CIRP. Even in respect of debt, which is due in future on its maturity, the ‘Financial Creditor’ or ‘Operational Creditor’ or ‘Secured Creditor’ or ‘Unsecured Creditor’ can file such claim. The ‘Resolution Professional’ cannot reject a claim on the ground that only claims that have matured can be looked into and others cannot be entertained.

Therefore, unmatured claims including uninvoked guarantees can be included in the total liabilities of the corporate debtor.⁷⁹

G. The moratorium imposed under Section 14 would also apply to personal guarantor

The Supreme Court in the case of *State Bank of India v. V. Ramakrishnan & Anr.*⁸⁰ held that, moratorium under Section 14 of the IBC does not intend to bar actions against assets of guarantors in respect of recovery of the debts of the corporate debtor. The scope of the moratorium may be restricted to the assets of the corporate debtor only. Enforcement of guarantee entails a shift of the right of the creditor against the principal debtor to the surety. Thus, contractual principles of guarantee require being respected even during a moratorium.

76. CA No. 21824 of 2017.

77. Writ Petition No. 8650 of 2018.

78. CA (AT) (Insolvency) No. 61 of 2018.

79. See Also, *Export Import Bank of India v. Resolution Professional, Company Appeal (AT) (Insolvency) No. 304 of 2017* (NCLAT).

80. CA No. 3595 of 2018.

H.No disparity in making payments to financial creditors

The NCLAT in the case of *Binani Industries Limited v. Bank of Baroda & Another*,⁸¹ held that the resolution plan submitted by Dalmia was discriminatory in nature due to the disparity in treatment of similarly placed financial and operational creditors. Additionally, the NCLAT also held the importance of maximisation of assets over procedural compliance. Therefore, the NCLAT ruled that unintelligible discrimination between similarly placed creditors would result in a resolution plan being invalidated by the Adjudicatory Authority.

J.Legality of a foreign decree cannot be examined by NCLT under IBC

NCLAT in the case of *Usha Holdings LLC. & Anr. v. Francorp Advisors Pvt. Ltd.*,⁸³ held that the Adjudicating Authority under IBC is not a 'Court' or 'Tribunal' and 'Insolvency Resolution Process' is not a litigation. Accordingly, NCLT has no jurisdiction to decide whether a foreign decree is legal or proper. In this case, the appeal was filed against refusal of NCLT to admit a petition filed under Section 9 of IBC. The appellant's claim of being an operational creditor was founded on default of the respondent company in complying with a money decree passed by a US Court.

I. CoC cannot jump to liquidation without inviting EoI

The NCLT, Principal Bench, in the case of *Vedika Nut Crafts Pvt. Ltd.*⁸², held that the CoC cannot jump to seeking liquidation without inviting EoI by the prospective resolution applicant. Such a decision would be arbitrary and fall foul of legal provisions and fair play. It is the duty of Resolution Professionals to invite an EoI. In absence of an EoI there would be no possibility of any resolution applicant to come forward and make an offer.

81. CA (AT) (Insolvency) No. 82 of 2018.

82. (IB)-40(PB)/2017.

83. Civil Appeal (AT) (Insolvency) No. 44 of 2018.

Annexure A

Comparative Analysis of the Eligibility Criteria Under Section 29A

Section	Original Position	Amendment by the Bill	Comment
Opening language of Section 29A	The 2016 Code states that the disqualifications under Section 29A for submission of a resolution plan shall be applicable to a person or any other person acting jointly or in concert with such person.	No changes have been made by the Bill.	Interestingly, the Committee Report had recommended doing away with the phrase " <i>person acting jointly or in concert</i> " ⁸⁴ but this has not been reflected in the Bill.
Amendment of Section 29A(c)	Under the 2016 Code, the disqualification under Section 29A(c) applied to a person (or a person acting jointly or in concert with such person) who has an account which has been declared as non-performing asset (" NPA ") in accordance with the guidelines of the Reserve Bank of India issued under the <u>Banking Regulation Act, 1949</u> . Further, a person was eligible to submit a resolution plan if he made all the payments with regard to the NPA prior to submitting the resolution plan.	The Bill has inserted language at the outset of Section 29A(c) recording that the disqualification would apply at the <u>time of submission of the resolution plan</u> . Further, the Bill expands the classification of an NPA. It is now to be ascertained in accordance with guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 or the <u>guidelines of a financial sector regulator issued under any law for the time being in force</u> .	[For our analysis on the implication of the term "in concert", please refer to our analysis here] ⁸⁵ 1. To be disqualified under this provision, it has been clarified that the NPA must be held at the time of submission of the resolution plan. 2. In the Essar Steel case, the reason Arcelor Mittal's bid was deemed to be disqualified was because it was in management/control of a company which had Non Performing Assets. Arcelor Mittal was in a position to pay off these outstanding debts or hive off its stake in the errant company, however, if the date for determination of disqualification for a potential bidder started from the insolvency commencement date then no such measure would be of any help, thereby deeming the world's largest steel maker incapable of bidding for Essar.

84. Para 1.4.3 of the Committee Report.

85. http://www.nishithdesai.com/information/research-and-articles/nda-hotline-single-view/article/bankruptcy-code-ghost-of-retrospectivity-returns-to-haunt-r.html?no_cache=1&cHash=8518f7224dec331f9dcb743b595be66

3. In order to avoid such situations, the amendment has sought to provide a bidder with the opportunity to regularize its outstanding liabilities and make itself compliant with the requirements under the Code. Once a company has been put under insolvency and prospective bidders have had the opportunity to go through relevant information and take a decision on participation in the process they will have the ability to regularize their outstanding liabilities before submission of their bids.
4. However, it may now be that bidders could instead of paying off the dues, simply remove the connection to the entity holding an NPA account. This could be done by hive off the stake in the entity as attempted by Arcelor Mittal who sold its stake in Uttam Galva.
5. The NPA classification criteria has been extended beyond the Banking Regulation Act, 1949. The Committee Report had noted that several NPAs are declared under other guidelines, like the guidelines issued by the Housing Finance Bank⁸⁶ and thus these must be incorporated within the ambit of disqualification as well. The amendments are in line with the suggestions of the Committee Report. This will help harmonize the effect of the eligibility criteria across all sectors and will avoid any further litigation to determine the applicability of this section to such previously excluded sectors.

86. Para 1.4.7 of the Committee Report.

<p>Amendment of 29A(d)</p>	<p>The 2016 Code provided that a person, or a person who is acting jointly or in concert with such person is disqualified from submitting a resolution plan if he/she has been convicted for an offence punishable with imprisonment for over two years.</p>	<p>The Bill amended the provisions of Section 29A(d) by disqualifying a person (and a person acting jointly or in concert with such person) from submitting a resolution plan if such person has been convicted for an offence punishable with imprisonment for two years or more under the Acts specified in the Twelfth Schedule.</p> <p>Further, if such person has been convicted for an offence punishable with imprisonment for over seven years under any other law, he/she will be disqualified from submitting a resolution plan.</p> <p>The Bill has also inserted a proviso explaining that the exclusion under this clause will not apply to a person after the expiry of two years from the date of release from imprisonment.</p>	<p>The Committee Report had noted that the original language of this provision provided a very wide disqualification criterion which may also include in its ambit offences which have no nexus with the ability to run a corporate debtor successfully.⁸⁷</p> <p>The disqualification has now become applicable for persons who are convicted for offences that are punishable with imprisonment of two years or more only under the 25 Acts mentioned in the newly inserted Twelfth Schedule.</p> <p>Further, the Central Government has been given the power of amending the Twelfth Schedule by notification. Most of these legislations are also found in the Fifth Schedule of the Companies Act which provide for disqualification of directors.</p> <p>For imprisonment under laws not identified in the Twelfth Schedule, the resolution applicant will be disqualified only if the offence was punishable with imprisonment for over seven years, thus potentially reducing the number of persons who may have suffered disqualifications for frivolous offences.</p> <p>The disqualification criteria are further narrowed by stating that it will not apply after a period of two years has passed since the release of the individual from imprisonment. The Committee Report had recommended that this ought to have been six years in tune with the criteria laid out in the Representation of People's Act 1951⁸⁸ but</p>
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87. Para 14.9 of the Committee Report.

88. Para 14.10 of the Committee Report.

<p>Insertion of a proviso to Section 29A(g)</p>	<p>Under the 2016 Code, Section 29A(g) read that a person (or a person acting jointly or in concert with such person) would be disqualified from submitting a resolution plan if such person was:</p> <ul style="list-style-type: none"> i. The promoter or in the management and control of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place; and 	<p>The Bill has inserted a proviso to Section 29A(g), stating that the clause will not apply if a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has:</p> <ul style="list-style-type: none"> i. taken place prior to the acquisition of the corporate debtor by the resolution applicant or 	<p>this recommendation appears only have been partially accepted. The Committee Report had further suggested that if the decision of imprisonment it itself stayed, then this section would not apply⁸⁹ But this suggestion has not been specifically reflected in the Bill. However the wording “has been convicted of an offence punishable with imprisonment” might be interpreted to mean that a stay on conviction would not mean discharge from disqualification. It is unclear, whether in case of an offence punishable with fine or imprisonment or both.</p> <p>If only fine is imposed, then automatically upon payment of fine will the bidder become eligible, or will it have to wait for two years to become eligible. Ideally it should be immediately upon payment of fine, however, this is still unclear.</p>
			<p>This will ensure that potential bidders are not being disqualified for a sentence of imprisonment which has no economic implication or nexus with the bid.</p> <p>The Committee Report had recorded that a person must not be punished for acts of its predecessors if she had no nexus with such past acts that led to the preferential, undervalued, fraudulent or extortionate credit transaction.⁹⁰</p> <p>Therefore, the amendment codifies the basic tenet that an entity must not be penalized for an act that it had no control over.</p>

89. Para 14.11 of the Committee Report.

90. Para 14.12, Committee Report.

<p>Insertion to Section 29A(h)</p>	<p>ii. and an order has been made in this regard by the Adjudicating Authority under the Code;</p>	<p>ii. pursuant to a scheme or plan approved by a financial sector regulator or a court; or iii. and such resolution applicant has not otherwise contributed to the preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction.</p>	<p>This will help ensure that potential bidders do not carry out prolonged due diligence activities before an acquisition or request for forensic analysis of the target company's financials and books of accounts.</p>
<p>Amendment to Section 29A(i)</p>	<p>Under the 2016 Code, an applicant was disqualified from submitting a resolution plan if it had executed an enforceable guarantee in favour of a creditor for a corporate debtor against which an insolvency resolution application was made by the creditor and admitted under the 2016 Code.</p>	<p>The Bill changed the language of this sub-section by stating that the disqualification will apply only if such a guarantee has been invoked by the creditor and remains unpaid in full or in part.</p>	<p>The provision as it originally stood may have been interpreted in a manner to disqualify every guarantor only by virtue of issuing an enforceable guarantee for a corporate debtor in favour of a creditor.</p> <p>Therefore, this amendment has clarified that the disqualification is only applicable if the guarantee has been invoked by the creditor and dishonored by the guarantor in full or in part. The objective seems to be to disallow a defaulter from using its resources in acquiring assets when it fails to honour its existing obligations.</p>
<p>Amendment to Section 29A(i)</p>	<p>Under the 2016 Code, a person could be disqualified if he has been subject to any disability, corresponding to clauses 29A (a) to (h) under any law in a jurisdiction outside India.</p>	<p>The Bill modified the language to read that such disqualification applies if the person is subject to any disability, corresponding to clauses 29A (a) to (h), under any law in a jurisdiction outside India.</p>	<p>The "has been" requirement under the previous position of law, being in the past continuous tense, did not clarify as to how far in the past the disqualification would stretch. Therefore, it was possible to make a case that any disability under this section ever accrued in the past could have led to a disqualification of that entity from submitting a resolution plan.</p> <p>This amendment has now clarified that the disqualification must be a present and subsisting.</p>

<p>Insertion of Proviso, Explanation I and Explanation II under Section 29A(c);</p>	<p>The 2016 Code states that if an applicant has a connected person not eligible under clauses (a) to (i), then such an applicant would be disqualified from submitting a resolution plan.</p> <p>Connected person was defined as:</p> <ul style="list-style-type: none"> i. any person who is the promoter or in the management or control of the resolution applicant; or ii. any person who will 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); <p>A proviso explained that the disqualification in sub-clause (iii) above will not apply to:</p> <ul style="list-style-type: none"> (A) a scheduled bank; or (B) an asset reconstruction company registered with the Reserve Bank of India under section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; or (C) an Alternate Investment Fund registered with the Securities and Exchange Board of India. 	<p>The Bill has replaced a proviso and inserted an "Explanation II" after Section 29A (j).</p> <p>In the proviso replaced after Explanation I, it is explained that nothing in Clause (iii) to Explanation I will apply to a resolution applicant where such applicant is a financial entity and is not a related party of the corporate debtor.</p> <p>In the second part of the proviso, it is explained that a <u>financial entity which becomes a related party solely by way of conversion or subscription to equity linked instruments before the insolvency commencement date, will not be considered as a related party.</u></p> <p>The Bill has inserted Explanation II which provides a wide definition of a financial entity, which includes (a) a scheduled bank; (b) any entity regulated by a foreign central bank or a securities market regulator or other financial sector regulator (c) any investment vehicle, registered foreign institutional investor, foreign portfolio investor or a foreign venture capital investor, (d) an asset reconstruction company (e) an Alternate Investment Fund (f) such categories of persons as may be notified by the Central Government.</p>	<p>The Code was introduced with the objective to ensure resolution of distressed companies and maximization of asset realization.</p> <p>Amongst other reasons, Section 29A was added to the Code in order to disqualify certain persons who would have been responsible for the company's poor financial situation from submitting a resolution plan and benefitting from their own mistakes and retaining control over the company. However, the language of Section 29A stretched the umbrella of disqualifications a bit too far, extending from promoters and those in the management of the company on one hand to banks and financial institutions on the other hand who had no actual control over the financial performance of the company.</p> <p>In order to facilitate resolution, it is necessary to have a competitive pool of resolution applicants. However, the erstwhile language of Section 29A disqualified an extremely broad range of persons and entities from submitting a resolution plan – including investors and banks. If there is a dearth of eligible resolution applicants to submit a resolution plan, the entire purpose of the Code is defeated, as companies would be forced into liquidation. The Bill has narrowed down the bucket of persons that could be deemed ineligible from submitting a resolution plan:</p> <p><u>1. Three tier scope of disqualification.</u></p> <p>Under the un-amended Code, a resolution applicant would stand disqualified in the following circumstances</p> <ul style="list-style-type: none"> (a) If the resolution applicant itself was ineligible (b) If any person acting jointly or in concert with the resolution applicant was ineligible (c) If a connected person of the resolution applicant was ineligible
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The following Sections have been specifically amended to state that they would not apply to a financial entity that is not a related party to the corporate debtor:

i. Section 29(A)(c), which disqualifies persons for holding non-performing assets.

The following Sections have been specifically amended to state that a related party will not include a financial entity who is a related party solely for conversion of debt to equity in the corporate debtor:

i. Section 29(A)(c), which disqualifies persons for holding non-performing assets.

The following Sections have been specifically amended to state that they do not apply to connected persons referred to in clause (iii) Explanation 1, as described above:

i. Section 29A(d), which disqualifies persons for conviction for an offense punishable with imprisonment.

ii. Section 29A(e) which disqualifies persons who are disqualified from acting as a director under the Companies Act, 2013.

The definition of "connected person" was wide enough to encompass not only the promoter/ownership/controlling entities of the applicant but also the holding company, subsidiary company, associate company or related party of the promoter/ownership/controlling entities (**Clause III**).

The definition of connected persons and especially Clause III is so wide that it ensnares unintended entities within its grasp, thereby disqualifying the applicant.

Instead of amending the text of disqualification criteria, the Bill has exempted certain categories of applicants from the ambit of the disqualifications. Thereby increasing the pool of potential bidders. The categories are discussed below.

2. Financial Entity

Financial entities, which are not otherwise related parties to the corporate debtor, are excluded from the disqualification criteria provided for under Clause III. Therefore, even if the holding company, subsidiary company, associate company or related party of the promoter/ownership/controlling entities of the applicant financial entity is not qualified to bid, still that **would not automatically disqualify the financial entity** to participate in the bidding process.

Therefore, financial entities that would have otherwise fallen within the ambit of the definition of 'connected persons' have been explicitly excluded from being disqualified from submission of a resolution plan. This is a welcome move as financial entities may have been disqualified from submitting a resolution plan merely because of the nature of the business they undertake and for reasons beyond their control.

Explanation II also brings a larger breadth of entities within the definition of financial entity, including entities which were regulated by institutions outside the jurisdiction of India. Therefore, the amended position significantly reduces the number of financial entities that could have been disqualified under the erstwhile regime. Further, the Government has been given the power to notify entities as 'financial entities' in the future.

This will significantly increase the ability of financial entities to participate in the bidding process without diluting the ultimate objective of Section 29A, i.e. to disallow errant promoters/willful defaulters from participating in the proceedings.

3. Related Party

The Bill has added a further proviso stating that a financial entity which becomes a related party solely by way of conversion or subscription to equity linked instruments will not be considered a related party.

This specific carve out has been provided for entities from being subjected to certain disqualifications such as holding NPAs or being disqualified as a 'connected person', if the financial entity is considered a 'related party' solely for conversion of debt into equity before the insolvency commencement date. This insertion provides necessary relief to financial institutions and creditors who may have converted their outstanding debts into equity - and may not have had any other interest or role in the functioning of the corporate debtor. Thus, such entities are not considered ineligible from submitting a resolution plan.

4. Entity Acquiring assets under the Code.

The Committee Report had noted that in order to ensure that the underlying objective of the Code to promote resolution is furthered, resolution applicants who hold NPA accounts solely due to acquisition of corporate debtors under the CIRP process of the Code, must be given some time to revive the corporate debtor without being disqualified from bidding for other corporate debtors if they fulfil all other criteria.⁵³

The Bill follows the Committee Report's suggestions by insertion of Explanation II to Section 29A(c), which provides that an entity holding NPAs that were acquired through the insolvency resolution process under the Code must be carved out from the ambit of disqualification from submission of a resolution plan. A period of three years from the date of the previous resolution plan being approved has been provided as a leeway period. This is a welcome and necessary amendment as it does not disqualify those who have acquired NPAs under the four corners of the Code.

The specific exclusions and carve outs provided to financial entities and also the expansive definition of a financial entity have effectively provided a much better platform for investors, lenders and institutions to enter the secondary debt market and back buy-out of stressed assets as a going concern.

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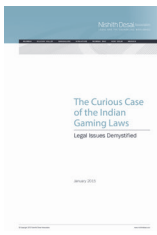






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Our dedication to research has been instrumental in creating thought leadership in various areas of law and public policy. Through research, we develop intellectual capital and leverage it actively for both our clients and the development of our associates. We use research to discover new thinking, approaches, skills and reflections on jurisprudence, and ultimately deliver superior value to our clients. Over time, we have embedded a culture and built processes of learning through research that give us a robust edge in providing best quality advices and services to our clients, to our fraternity and to the community at large.

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As the first step, they would conduct a capsule research, which involves a quick analysis of readily available secondary data. Often such basic research provides valuable insights and creates broader understanding of the issue for the involved associates, who in turn would disseminate it to other associates through tacit and explicit knowledge exchange processes. For us, knowledge sharing is as important an attribute as knowledge acquisition.

When the issue requires further investigation, we develop an extensive research paper. Often we collect our own primary data when we feel the issue demands going deep to the root or when we find gaps in secondary data. In some cases, we have even taken up multi-year research projects to investigate every aspect of the topic and build unparalleled mastery. Our TMT practice, IP practice, Pharma & Healthcare/Med-Tech and Medical Device, practice and energy sector practice have emerged from such projects. Research in essence graduates to Knowledge, and finally to *Intellectual Property*.

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