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An exhaustive study on CIRP proceedings under the insolvency and bankruptcy code, 2016

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Abstract
The research paper attempts to analyze and conduct an exhaustive study on the Corporate Insolvency Resolution process under the Insolvency & Bankruptcy Code, 2016. The paper resolves around the rules and practical implications of the Code and how with the judicial intervention the law has evolved incorporating various amendments & now what are the challenges that the legislation is facing in the time of the Covid-19 pandemic, after the latest 2020 amendment made to the Code.

Keywords: CIRP process, resolution professional, amendments, procedures, judicial intervention

1. Introduction

Insolvency and Bankruptcy are two different situations under the Insolvency and Bankruptcy Code, 2016 [1]. Insolvency refers to a situation or the inability of the body corporate to meet his financial obligations against its creditors and hence is termed as insolvent. While on the other bankrupt is a state where the body corporate cannot payoff (unable) its debts.

As we all know that IBC is a very comprehensive legislation and has given the right to the companies to exit the market. The process of CIRP is a very quick and time-bound method. IBC is a diverse law. The Appellate Authority of IBC has also proven that the CIRP process is the USP of the Code. The Insolvency and Bankruptcy Code was introduced by the government on 28th May 2016 as a measure for the companies to leave the market place in a much easier way [2]. It is a consolidated code that is covered by our constitution under Entry 9 List III of the Seventh Schedule [3]. The purpose of creating IBC was to make a law that will help a company to revive or liquidate in the best possible manner if it goes insolvent.

Thus, if we study the Indian economy we can safely say that in 1991 when globalization came the foreign companies got an opportunity/right to enter the Indian market, in 2009 when the Competition Commission of India was formed these companies got the right to compete and now these companies have been granted the right to exit (in 2016) with the implementation of the IBC.

Research Methodology

1. **What is corporate insolvency resolution process [4]? Who can file for cirp proceedings?**

The Corporate Insolvency Resolution Process (CIRP) is a way by which a corporate debtor is revived who has become insolvent. The CIRP is a recovery mechanism that is provided under the IBC for the revival of companies and paying off the Creditors of the company. The CIRP process can be initiated by the Creditors of the company (Operational and Financial) or the Corporate debtor himself. The CIRP process can initiate under section(u/s) 7, 9 &10 of the Code by Financial Creditor, Operational Creditor & Corporate Debtor respectively, when the body corporate commits a default and breaks its financial commitments or inability to meet its obligations on time. After which CIRP proceedings are initiated against the body corporate and an Interim Resolution Professional is appointed to take control of the company. After which a Resolution Professional (RP) is appointed by the Committee of Creditors (COC) so that he can gather relevant information based on which the resolution applicant can find a resolution plan to revive the company and in case he is not able to find a resolution to the problem, then the company will go under Liquidation (to sell off all its asset) to pay off all the creditor's liability. The Insolvency process is filed before the Adjudicatory Authority which is the National Company Law Tribunal [5]. One of the important facts of the CIRP is the Interim Finance which is defined u/s 5(15) of the Code which is financial debt raised by the Interim Resolution Professional during the CIRP process which is used to cover the costs of the process [6]. Under the Insolvency and Bankruptcy code the CIRP process can be initiated mainly by three individual which are as follows:

a. **Operational Creditors**

Operational Creditors have been defined u/s 5 (20) of the IBC which states "operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred [7]. These creditors are those which have provided goods or services to the company for performing their daily activities. The Operational creditors can file for the CIRP process under section 8 of the Code. The Operational creditor is bound u/s 8(2) of the Code to give notice of a minimum of 10 days to the corporate debtor before filing for an application before the NCLT. After which the corporate debtor has to bring in the notice of the creditor if any default is there.

The Honorable Supreme Court in the case of Mobilox

[1] Also referred to as "Code" or "IBC"
[2] https://www.mca.gov.in/Ministry/pdf/TheInsolvencyandBankruptcyofIndia.pdf
[3] https://www.mea.gov.in/Images/pdf1/S7.pdf (Pg.326)
[4] Also referred to as "CIRP"
[5] Also referred to as "NCLT"
[6] Report of Insolvency Law Committee (Pg. 18)
[7] Section 5(20) of Code (Pg.7)

Innovations Private Ltd. vs Kirusa Software Private Ltd [8] stated that the dispute as referred to u/s 5 of the Code should exist prior to the receipt of notice in any form other than a pending suit or arbitration proceedings. In case the default is caused due to the fault of Operational Creditor either by way of concealment of facts or otherwise, then he may attract liability u/s 76 of the Code.

Example: Government, Vendors, and Suppliers.

b. Financial Creditors:

Financial Creditors have been defined u/s 5(7) of the Insolvency and Bankruptcy Code, 2016 which states "any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to" [9]. Financial Creditors are mainly referred to as the people who have lent mainly money or money's worth to the company. After the IBC Amendment Act of 2018, the preview of Financial Creditors had been extended and in the interest of justice Homebuyers [10] have also been included under the provision as financial creditors. A financial Creditor can initiate the Corporate Insolvency Resolution Proceeding by filing an application u/s 7 of the Code before the NCLT either himself alone or jointly with other financial creditors of the company. The Amendment Act of 2019, has added another proviso to the section 5 after which now for financial creditors to initiate the CIRP process, the application shall be filed by 100 of such creditors in the same class or not less than 10% of the total no of creditors in the same class whichever is less [11]. With this amendment, the scope for initiating the CIRP process by financial creditors has been broadened.

Example: Banks, Financial Institutions, etc.

c. Corporate Debtor:

The corporate debtor itself on committing a default can file an application for CIRP proceedings u/10 of the Code. A corporate debtor can also file for a fast-track CIRP u/s 55(Chapter IV) of the Code for quick relief. For filing the application for fast-track CIRP there should be evidence of default available as specified by the Insolvency and Bankruptcy Board of India [12]. The process of fast-track is very quick as it is to be completed within 90 days [13] and a maximum extension can be granted for a period of 45 days [14]. The provisions of CIRP apply in the same manner to the fast-track. With the help of fast-track, small enterprises can benefit a lot and get a quick resolution. The Report of the Insolvency Law Committee has stated in his report that the shareholders of the company cannot file for insolvency without the approval of the Shareholders or Partners [15]. Since the initiation of CIRP by a corporate debtor has a huge impact on the functioning of the company by a special resolution or by three-fourth majority of the Total No of partners.

2. What are the Steps in Cirp Proceedings?

As mentioned above the Corporate Insolvency Resolution Process can be initiated by Creditors or the Corporate Debtor himself. The steps involved in the process are as follows:

Step 1: Filing an Application Before the Adjudicatory Authority (NCLT)

First, an application is filed by either the Operational Creditor, Financial Creditor, or Corporate Debtor himself when the corporate debtor commits default in payment for its financial obligations. The application is filed before the adjudicatory authority which is the NCLT to admit the body corporate into the Corporate Insolvency Resolution Process. According to the Code, the application for CIRP can be initiated only when the default committed by the company is more than rupees 1 lakh [16]. Due to the Covid-19 pandemic, there has been a lot of distress in the economy because of which the Ministry of Corporate Affairs has released a notification whereby Section 4 of the Code is amended and the minimum amount of default for initiating CIRP has been increased from 1 lakh rupees to 1 crore rupees [17]. Once the application is filed before the Adjudicatory authority it has the power either to accept or reject the application within a period of 14 days from the date of filing of the application. NCLT has to decide upon the application within 14 days but it is not mandatory in nature as clarified by the National Company Law Appellate Tribunal [18] that the 14 days period is totally directory in nature and while the 7 days period to rectify the application is mandatory in nature [19].

Step 2: Initiation of Cirp and Appointment of Interim Resolution Professional (IRP)

After the application of CIRP is accepted by the Adjudicating Authority the CIRP proceedings are initiated which are required to be completed within a period of 180 days. The time period can be extended by the permission of the authority for a maximum of 150 days which means that the CIRP proceedings cannot go beyond 330 [20] days.

The Insolvency Professionals are members of the Insolvency Professional Agency which is registered with the IBBI. An Interim Resolution Professional (IRP) is appointed by the NCLT from the approval of the Insolvency and Bankruptcy Board of India (IBBI). Once the application before the NCLT is accepted an Interim Resolution Professional is to be appointed with in a period of 14 days. The IRP takes over the control of operations and management of the company for the time being the company is under CIRP. The term of the IRP according to Section 16(5) of the Code is not more than 30 days for the date of his appointment by the NCLT. Section 20 of the Insolvency and Bankruptcy Code mandates the IRP to protect and preserve the business operation and property of the corporate debtor.

In a recent matter before the NCLAT the authority stated that when all the creditors are satisfied and there is no default, the formality of submission of the resolution plan under section 30 of the Code is to be expedited. The

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[8] Civil Appeal No. 9405 of 2017(Pg.24)
[9] Supra Note.7
[10] Chitra Sharma v. Union of India Writ Petition(s) (Civil) No.744 of 2017, Supreme Court of India
[11] https://ibbi.gov.in/uploads/legalframwork/d36301a7973451881e00492419012542.pdf (page 2)
[12] Also referred as to "IBBI"
[13] Section 56 (1) of IBC, 2016 (Pg.32)
[14] Ibid
[15] http://www.mca.gov.in/Ministry/pdf/ReportInsolvencyLawCommittee_12042019.pdf (Pg.28)
[16] Section 4 of IBC, 2016 (pg.5)
[17] http://www.mca.gov.in/Ministry/pdf/Notification_28032020.pdf
[18] Also referred as to NCLAT
[19] Surendra Trading Company vs. Juggilal Kamlapat Jute Mills Company Ltd. and Ors. (19.09.2017 - SC): MANU/SC/1248/2017
[20] IBC (Amendment) Act 2019 has extended the maximum threshold from 270 days to 330 days

NCLAT can approve the plan u/s 31 without waiting for the completion of the 180 days of the process when all the creditors are paid off [21].

Step 3: Moratorium Period

The moratorium period under section 14 of the code also starts with the CIRP which prohibits judicial proceedings against the company. The Moratorium period is one of the essential features of the Insolvency and Bankruptcy Code, 2016 as it acts as a shield for the company and protects it from the pending and new judicial proceedings. During the course of the Moratorium period, the NCLT assess the pros and cons of the situation take necessary steps towards the revival of the company. The Moratorium is not an automatic procedure as it has to implemented by the Adjudicatory Authority which shall exist until the CIRP does not end according to the Code. It is important to understand that once the CIRP proceedings have been initiated against the company no other proceedings under any law can be started against the company until the resolution plan is approved.

Exception

The Honorable National Company Law Appellate Tribunal in the case of Canara Bank vs Deccan Chronicle Holdings Ltd [22] gave an exception to the moratorium period in favor of the corporate debtor. The Appellate Authority said that the moratorium would not affect any suit or case pending before the Supreme Court under Article 32 or order under Article 136 or under article 226 before the High Court under the Constitution of India.

Step 4: Public Announcement [23] and Submission of Claims [24]

Once the NCLT accepts the application for CIRP it makes a public announcement for the Initiation of the CIRP Proceedings against the company so that all the creditors can come forward and submit their claims to the NCLT. All the claims are to be submitted according to section 15 of the Code & regulation 6(2) of the IBBI regulations. All the claims are to be verified within 7 days of their receipt under regulation 12(1). The relevant information is then forwarded to the IRP regarding all the claims of the creditors All the financial creditors submit their claims by electronic means only while the other creditors can submit their claims by way of electronic means or in person [25].

Step 5: Formation of Committee of Creditors and Resolution Professional

A committee of Creditors is formulated within 2 days of the verification of claims under regulation 12 [26]. Based on all the information received by the NCLT a Committee of Creditors [27] is formed which includes all the financial creditors if there is any financial debt [28] and in case there is no financial debt then the COC will be formed with only Operational Creditors [29]. Operational Creditors are not included in the COC but if their claim is more than 10% of the Total Debt then they have only a right of representation in the meeting but no right of voting. All the members of the COC whether Financial or Operational Creditors share voting rights in proportion to their debt owed to the corporate debtor [30]. Once the COC is constituted it has to conduct its 1st meeting within 7 days of incorporation under Section 22(1) read with regulation 9(1) of IBBI regulations. Another important aspect for COC is that related parties of the corporate debtor are not allowed to become a member of the COC even if they are financial creditors.

Step 6: Appointment of Resolution Professional (RP)

After the Incorporation of the Committee of Creditors, the first meeting of the COC is to be held within seven days of its constitution [31] to decide whether to continue with Interim Insolvency Resolution Professional as the Resolution Professional or to replace him. The Code mandates that in either of the cases to be carry forward there should be a majority of 66% of creditors voting [32] in the meeting. Also, if at any time the COC is not satisfied with the conduct and management related to any aspect by the Resolution Professional (RP) he can be replaced with 66% votes in the meeting of the COC. The Resolution Professional is appointed to conduct the CIRP proceedings and his term ends with the completion of the CIRP process. In case the RP is not appointed within the 40 days of commencement of CIRP then the IRP will perform all the functions of the RP till the RP is appointed.

Step 7: Resolution Professional to Perform Necessary Tasks

The main work of an RP is to take over the company's operation and gather information for making the resolution plan and run the company as a going concern for which he needs to maintain the Interim Finance [33] which is used for the costs of the CIRP proceedings and paying of such expenses. He is required to prepare all the necessary documents and memorandum for the COC for the restructuring of the company and ascertaining the plan by the resolution applicant. (A resolution applicant is a person who makes the resolution plans) and after receiving the plans the RP presents it before the COC. If the applicant wants, he can with 90% of votes by COC can withdraw the application of CIRP u/s 12 A read with regulation 30A before the Issue of the Expression of Interest. After that under regulation 36B the receipt of resolution plans are made and before the COC if approved will go for final approval to the Adjudicatory Authority as per Section 31(1) of the Code which the future proceedings will be decided.

Step 8: Initiation of Liquidation

Section 33 of the Code, talks about the initiation of liquidation against the corporate debtor to be liquidated in the specified manner as laid down in Chapter -III of the Code. The reasons why the corporate debtor can go into liquidation after CIRP can be on the following grounds:

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[21] Parker Hannifin India Pvt Ltd vs. Prowess International Pvt.ltd (12.09.2017 - NCLT - Kolkata): MANU/NC/5780/2017
[22] Company Appeal (AT) (Insolvency) No. 147 of 2017 (Para 7)
[23] Regulation 6(1) of IBBI regulations, 2016
[24] Section 15(1) (c) of the Code
[25] Regulation 7 of IBBI Regulations (Pg. 7)
[26] Regulation 17 of Insolvency Resolution Process for corporate person regulations, 2016 (Pg. 14)
[27] Also referred as to "COC"
[28] Section 21 (2) of IBC, 2016 (Pg. 15)
[29] Regulation 16 of Insolvency Resolution Process for corporate person regulations, 2016 (Pg.12)
[30] Section 21(4) of IBC, 2016 (Pg. 15)
[31] Section 22 of IBC, 2016 (Pg. 16)
[32] Second Amendment Act of 2018 (Pg.7) (Amendment No.20)
[33] Section 20(2)(c) of the Code

- If due to reasons like failure to submit the plan before the NCLT within the time limit under section 30(6) of the Code,
- Rejection of resolution plan by the Adjudicating Authority for non-compliance u/s 31 of the Code,
- Rejection by COC seeing that the company cannot be revived by majority the company will then go under Liquidation [34].
- The corporate debtor will go into liquidation if the resolution plan is in contravention with the interest of any other person except the corporate debtor.
- Once the NCLT is satisfied that the resolution plan is in contravention it will pass an Liquidation Order against the Corporate Debtor. The Process of CIRP will end and commencement of liquidation will take place.
- Once the Liquidation starts the Committee of Creditors further have no duties and they have just certain claims before the liquidator and cannot have the liquidator removed in absence of any provisions under the law [35].
- Also, after the initiation of Liquidation process is initiated it is a deemed notice of discharge of all the employees in the company [36].

Thus, as stated above is the process of the CIRP proceedings.

3. Landmarks Case Laws with Respect to Corporate Insolvency Resolution Process

a. In the case of Alchemist asset reconstruction Co. Ltd vs Hotel Gaudavan P. Ltd (2017) [37] the supreme court held that once an application is admitted before the NCLT the moratorium period under section 14 is started after which the parties cannot go for arbitration proceedings. This means that the parties have an option for Alternate Dispute Resolution before the proceedings of CIRP start only.

b. In the case of Satyanarayan Malu vs SBM Paper Mills Limited [38] where the question before the honorable NCLT was whether a person who had filed an application for CIRP proceedings under section 10 of the code has the right to withdraw the same. The court after interpreting section 12A of the Code as well as taking into consideration regulation 30A of the IBC rules and regulations stated that yes, the corporate debtor has the right and can withdraw the application under section 12A of the code. Further, the court clarified that the regulations do not govern the Code rather it is the Code and its provisions which govern the IBC regulations.

c. The NCLAT in the case of Edelweiss Finvest Private Limited vs. Ramswarup Industries Limited [39] decided on the matter before it as to whether Insolvency proceedings can be initiated against the corporate debtor while winding up proceedings have already been intiated by the High Court u/s 433 &434 of the Companies Act, 2013. The NCLAT relied on the Judgment of M/s. Unigreen Global Private Limited v. Punjab National Bank & Anr [40] and held that in view of the section 11(d) of the Insolvency and Bankruptcy Code, where a winding up proceeding has already been initiated under the Companies Act, 1956/2013 by the Hon'ble High Court such cases have not been transferred to National Company Law Tribunal, pursuant to "Companies (Transfer of Pending Proceedings) Rules, 2016", framed by the Central Government.

- Clause (d) of Section 11 refers to "liquidation order", against a Corporate Debtor. The word 'winding up' has not been mentioned therein. For the said reason by Section 255 read with Schedule 11 of the I & B Code, in Section 2 of the Companies Act, 2013 for clause (23), the following clause has been substituted:
- In section 2,

a. for clause (23), the following clause shall be substituted, namely:

- "(23) "Company Liquidator" means a person appointed by the Tribunal as the Company Liquidator in accordance with the provisions of section 275 for the winding up of a company under this Act"; (b) after clause (94), the following clause shall be inserted, namely:
- "(94A) "winding up" means winding up under this Act or liquidation under the Insolvency and Bankruptcy Code, 2016, as applicable."

The Court amended the provision and stated that

"*By aforesaid amendment, the legislatures have made it clear that the word "winding up" mentioned in the Companies Act, 2013 is synonymous to the word "liquidation" as mentioned in the I & B Code. The NCLAT also stated that if any winding up proceeding has been initiated against the Corporate Debtor by the Hon'ble High Court or Tribunal or liquidation order has been passed, in such case the application under Section 10 is not maintainable. However, mere pendency of a petition for winding up, where no order of winding up or order of liquidation has been passed, cannot be ground to reject the application under Section 10"* [41].

Thus, the CIRP proceedings are independent from the Winding up procedure under the Companies Act, 2013. Further the Appellate Authority added- we hold that the application under Section 10 of the 'I&B Code' filed by the 'Corporate Applicant'/'Corporate Debtor' was not barred by Section 11 of the 'I&B Code' and was maintainable [42].

d. In the case of Sree Metaliks Limited and Ors. vs Union of India and Ors [43]. the question before the honorable court was whether the corporate debtor has a right of hearing under the principles of natural justice when the CIRP proceedings are initiated as the IBC is silent as to the grant of hearing by the NCLT. The Honorable Calcutta high court after taking into account all the facts and circumstances of the case said that since the IBC is silent on the right of hearing in the CIRP application we will have to rely upon:

"Section 424 of the companies act, 2013(Procedure before Tribunal and Appellate Tribunal)-requires the NCLT and

[34] Section 21(1) of the Code
[35] Punjab National Bank vs Mr. Kiran Shah Liquidator of ORG Informatics Ltd. (CA(AT)(Ins) No. 102/2020)
[36] Section 33(7) of the Code
[37] (MANU/SCOR/45736/)
[38] (MANU/NC/9359/2018)
[39] MANU/NL/0330/2018
[40] Company Appeal (AT) (Insolvency) No. 81 of 2017
[41] Supra Note. 39 (Para. 8)
[42] Supra Note. 39 (Para. 12)
[43] (MANU/WB/0236/2017)

NCLAT to adhere to the principles of the natural justice above anything else. It also allows the NCLT and NCLAT the power to regulate their own procedure. Fretters of the Code of Civil Procedure, 1908 does not bind it. However, it is required to apply its principles. Principles of natural justice require an authority to hear the other party. In an application under Section 7 of the Code of 2016, the financial creditor is the applicant while the corporate debtor is the respondent. A proceeding for declaration of insolvency of a company has drastic consequences for a company. Such proceeding may end up in its liquidation. A person cannot be condemned unheard. Where a statute is silent on the right of hearing and it does not in express terms, oust the principles of natural justice, the same can and should be read into in. When the NCLT receives an application under Section 7 of the Code of 2016, therefore, it must afford a reasonable opportunity of hearing to the corporate debtor as Section 424 of the Companies Act, 2013 mandates it to ascertain the existence of default as claimed by the financial creditor in the application.

The NCLT is, therefore, obliged to afford a reasonable opportunity to the financial debtor to contest such claim of default by filing a written objection or any other written document as the NCLT may direct and provide a reasonable opportunity of hearing to the corporate debtor prior to admitting the petition filed under Section 7 of the Code of 2016. Section 7(4) of the Code of 2016 requires the NCLT to ascertain the default of the corporate debtor. Such ascertainment of default must necessarily involve the consideration of the documentary claim of the financial creditor. This statutory requirement of ascertainment of default brings within its wake the extension of a reasonable opportunity to the corporate debtor to substantiate by document or otherwise, that there does not exist a default as claimed against it. The proceedings before the NCLT are adversarial in nature. Both the sides are, therefore, entitled to a reasonable opportunity of hearing [44].

e. In the case of Hemang phophalia vs Greater Bombat Co-operative Bank Limited and Ors [45]. the question arose for consideration is whether an application u/s 7 or 9 for initiating CIRP is maintainable against a company/corporate Debtor, if the name of the company is struck off from the register of the companies (ROC) [46]. The Appellate authority held that it is empowered to restore the name of the company and all other persons under Section 252(3) of the Companies Act, 2013 in their respective position for the purpose of CIRP u/s 7 & 9 if the Creditor has filed the application within 20 years from the date the name was struck out from the ROC [47]. The NCLAT has clarified that in order to initiate the Corporate Insolvency Resolution Process the creditor should have proper evidence to back up his contention and any circular or notice is irrelevant for creditor to initiate the CIRP process [48].
f. The NCLAT in the case of Jet Airways (India) Ltd vs State Bank of India & Anr [49] the question before the appellate authority was whether CIRP Proceedings against the same corporate debtor can be held in twice in different jurisdiction at the same time. The Appellate Authority after taking all the facts and matters into consideration said that The Dutch Trustee' is equivalent to the 'Resolution Professional' of India, therefore, as per law, he has a right to attend the meeting of the 'Committee of Creditors'. However, as we do not want to overlap the power between one and other, we are of the view that the suggestion given by the 'Dutch Trustee' (Administrator) as shown in its 'Clause 6.1.2' [50] should be part of the Agreement - 'Cross Border Insolvency Protocol' [51].
g. IBC has an overriding effect over other laws as per section 238 of the Code. This was upheld by the NCLAT in the matter of Jagmohan Bajaj vs Shivam Fragrances Private Limited and Ors [52] it was held that the triggering of Insolvency Resolution Process cannot be defeated by taking resort to the pendency of internal dispute between Directors of Corporate Debtor on allegations of oppression and mismanagement. The statutory right of a Financial Creditor satisfying the requirements of Section 7 of the I&B Code to trigger the Insolvency Resolution Process cannot be made subservient to adjudication of an application under Section 241 and 242 of the Companies Act, 2013. I&B Code is supreme so far as triggering of Insolvency Resolution Process is concerned and the same cannot be eclipsed by taking resort to remedies available under ordinary law of the land [53].
h. In the case of "Pioneer Urban Land and Infrastructure Limited & Anr. v. Union of India & Ors [54], the Hon'ble Supreme Court upheld the Explanation below Section 5(8)(f) to hold that allottees (Homebuyers) of Infrastructure Company are 'Financial Creditors'. It further observed that RERA is in addition to and not in derogation of the provisions of any other law for the time being in force, also makes it clear that the remedies under RERA to allottees were intended to be additional and not exclusive remedies. Therefore, provisions of the Code would apply in addition to RERA [55].
i. In "Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta & Ors. [56], the Hon'ble Supreme Court made a distinction between the 'Secured' and 'Unsecured Creditors' and observed that protecting creditors in general is, no doubt, an important objective. Protecting creditors from each other is also important. If an "equality for all" approach recognizing the rights of different classes of creditors as part of an insolvency resolution process is adopted, secured financial creditors will, in many cases, be incentivized to vote for liquidation rather than resolution, as they would have better rights if the Corporate Debtor is liquidated. This would defeat the objective of the Code which is resolution of distressed assets and only if the same is not possible, should liquidation follow.

[44] Ibid (Para. 14 & 15)
[45] MANU/NL/0420/2019
[46] Ibid (Para. 6)
[47] Ibid (Para. 23)
[48] State Bank of India vs. Rohit Ferro Tech Limited (20.09.2019 - NCLAT): MANU/NL/0455/ (Para. 11)
[49] MANU/NL/0466/2019
[50] The Dutch Trustee shall be invited to participate in the meetings of the CoC as an observer but shall not have a right to vote in such meetings.
[51] Supra Note.34(Para. 5)
[52] CA (AT) (Insolvency) No. 428 of 2018
[53] MANU/NL/0197/2018 (Para.6)
[54] MANU/SC/1071/2019
[55] Ibid (Para.6)
[56] MANU/SC/1577/2019

The amended Regulation 38 does not lead to the conclusion that 'Financial Creditors' and 'Operational Creditors', or secured and unsecured creditors, must be paid the same amounts, percentage wise, under the resolution plan before it can pass muster. Fair and equitable dealing of Operational Creditors rights under the Regulation 38 involves the resolution plan stating as to how it has dealt with the interests of Operational Creditors, which is not the same thing as saying that they must be paid the same amount of their debt proportionately.
So long as the provisions of the Code and the Regulations have been met, it is the commercial wisdom of the requisite majority of the Committee of Creditors which is to negotiate and accept a resolution plan, which may involve differential payment to different classes of creditors, together with negotiating with a prospective resolution applicant for better or different terms which may also involve differences in distribution of amounts between different classes of creditors [57]. The Parliament made amendment of Section 30(2) & (4) of the 'I&B Code' to give weightage to the 'Secured Creditors' which came into force on 16th August, 2019 [58].

j. The Honorable NCLAT observed that Corporate Insolvency Resolution Process should be project basis, as per approved plan by the Competent Authority. Any other allottees (financial creditors) or financial institutions/banks (other financial creditors) or operational creditors of other project cannot file a claim before the Interim Resolution Professional of other project and such claim cannot be entertained [59].
k. Thus, the Appellate Authority concluded that Corporate Insolvency Resolution Process against a real estate company (Corporate Debtor) is limited to a project as per approved plan by the Competent Authority and not to other projects which are separate at other places for which separate plans approved. For example - in this case the Winter Hill - 77 Gurgaon Project of the 'Corporate Debtor' has been place of Corporate Insolvency Resolution Process. If the same real estate company (Corporate Debtor herein) has any other project in another town such as Delhi or Kerala or Mumbai, they cannot be clubbed together nor the asset of the Corporate Debtor (Company) for such other projects can be maximized [60].

4. What are the Latest Amendments Done with Respect to Cirp Under IBC?

The Insolvency and Bankruptcy Code has been amended from time to time in relation to the CIRP proceedings. Since it is a new law that had been implemented in 2016 necessary amendments are done for its proper functioning. Up till now, the Code has been amended many times and some of which are Amendments Acts of 2017 [61], 2018 [62], 2019, 2020 & Ordinance Act of 2020.
The amendments have been made with respect to the Code by the government. The important amendments which have been done with respect to CIRP proceedings are as follows:

1. The latest amendment was added by the IBBI by way of Ordinance Act of 2020 [63] where Section 10A has been inserted in the Code wherein the government has suspended the Initiation of CIRP for a period of 6 months. According to the IBC Amendment Act of 2019, the timeline for the completion of the Insolvency process is to be completed within a period of 330days instead of the earlier provision where time limit was 270 days (180 + 90 days extension).
2. Due to the Covid-19 pandemic, another important amendment made to the CIRP regulations was made on 29 March, 2020 where a new regulation 40C was inserted into the IBBI regulations, 2016 for the exclusion of the lockdown period imposed by the Central Government from computation of timelines for completion of activities under the CIRP [64]. Also, the timeline under regulation 40B of the IBBI regulation, 2016 has also been extended to 30th October, 2020. Thus, the ordinance has clarified the terms for the calculation of the Time-period for CIRP that to exclude the period when lockdown is imposed and continue after the lockdown is over from the same place where they had left before lockdown. Thus, the govt. imposed a way so that the companies do not suffer and go into liquidation if they have a chance to revive.
3. According to the Press release by the MCA [65] it is stated that the period during which the lockdown is implemented will not be counted for the purposes of the time-line for any activity that could not be completed in relation to the CIRP Process.
4. Section 29A was added to the Code by the Amendment Act. Owing to this provision, persons, who by their misconduct contributed to the defaults of the corporate debtor or are otherwise undesirable, are prevented from gaining or regaining control of the corporate debtor. This provision protects creditors of the company by preventing unscrupulous persons from rewarding themselves at the expense of creditors and undermining the processes laid down in the Code [66].
5. In the Second Amendment Act of 2018 the various important changes have been done which are as follows:

- The threshold limit for the Committee of Creditors for key decisions during the CIRP process for resolution plan, Appointment of Resolution Professional was reduced under section 27 from 75% to 66% [67].
- Section 12A was added in the Code for the purpose of withdrawal of application filed u/ 7, 9 or 10 before the NCLT after being approved. The application can be withdrawn only if 90% of the Committee of Creditors vote in favor [68].
- In the case of Andhra Bank and Ors.vs Respondent: Sterling Biotech Ltd. and Ors [69] the COC with 90.52% passed a resolution for the withdrawal of the CIRP

[57] MANU/NL/0077/2020
[58] Ibid (Para.3)
[59] Ibid (Para.21)
[60] Ibid (Para. 22)
[61] https://ibbi.gov.in/webadmin/pdf/whatsnew/2018/Jan/182066_2018-01-20%2023:35:02.pdf
[62] https://www.ibbi.gov.in/webadmin/pdf/whatsnew/2018/Aug/The%20Insolvency%20and%20Bankruptcy%20Code%20(Second%20Amendment)%20Act,%202018_2018-08-18%2018:42:09.pdf
[63] https://ibbi.gov.in/uploads/legalframwork/d36301a7973451881e00492419012542.pdf
[64] Regulation 40C inserted via third amendment regulations, 2020
[65] https://pib.gov.in/Pressreleaseshare.aspx?PRID=1609290
[66] Amendment Act of 2018 (Pg.8) (Amendment No. 22)
[67] Supra Note. 22
[68] Supra Note. 32 (Pg.4) (Amendment No. 9)
[69] (MANU/NL/0408/2019)

application u/s 12A of the Code and intimated the NCLAT. This resolution was passed subsequent to a one-time settlement that was offered to the lenders by the promoters [70]. The NCLAT after interpreting all the facts of the case stated that the Section 12A withdrawal of insolvency Application is not a mandatory provision [71]. The Tribunal in its verdict laid down that the final discretion to accept or reject the withdrawal application is with the NCLAT and the NCLAT is not bound to accept the withdrawal application. The NCLAT gave a new dimension to Section 12A and its understanding that if application is allowed the promoters will regain the control and management of the company u/s 12 A as "Allowing the application of willful defaulters u/s 12A will be an act in violation of Section 29A of the IBC Code. The court said that Section 29A is not applicable for considering an application u/s 12 A are not entitled to file application u/s 29A as resolution applicant [72].

- The definition of Financial Debt u/s 5 of the Code was amended including any amount raised by the allottees under any real-estate project (including home buyers) will be considered as financial debt. Thus, homebuyers are also included under the perview of financial creditors [73].

6. Another important amendment has been made with respect to the Insolvency and Bankruptcy Regulations (For corporate persons) where in the current regulation 36A was replaced by a new regulation under which the resolution professional is required to publish an invitation for submitting and Expression of Interest (EOI) in Form G by the 75th day if the CIRP proceedings incorporating information about the corporate debtor with the approval from COC u/s 25 of the Code [74]. The Principal bench of the NCLT in the case of Vedika Nut Crafts [75] has stated that the Committee of Creditors cannot jump into liquidation without inviting Expression of Interest (EOL) u/s 25 (2) (h) of the Code by the resolution applicant. The NCLT stated that the RP is duty bound to invite EOL and in case he does not do so it will fall under arbitrary proceedings. Thus, inviting for EOL is must before proceeding into liquidation.
7. The government via notification have inserted a new provision after which IBC will be applicable to the personal guarantor of the corporate debtor as well [76].

Thus, above mentioned are some of the important amendments made with respect to CIRP proceedings under IBC.

5. What is guarantee contract? Can application for cirp be filed against two guarantors for the same claim?

According to Black law Dictionary guarantee means the assurance of a legal contract will be duly enforced [77]. Indian Contract Act, 1872 governs the contract of guarantee where in case of default the liability of the guarantor is as same as the principal debtor in accordance with section 128 of the Indian Contract Act, 1872. These are contracts where a person is the guarantor who assures the creditor of the principal debtor that the person is trustworthy and in case of any default in payment, he shall be liable to pay to the creditor. It is a type of invisible contract between three parties. In relation to the Insolvency and bankruptcy Code, 2016 guarantee contracts have evolved in terms its application for CIRP. Guarantee Contracts under the IBC are such that the Guarantor can be held liable for all the claims and proceedings can be initiated by the person who has given the loan to the principal borrower in case of any default.

In the case of Vishnu Kumar Agarwal vs Piramal Enterprises Ltd [78]. there were 2 questions before the Appellate Authority:

1. If once an application for initiation of CIRP process has been filed by the lender against the corporate debtor has been admitted then can the lender file an application for CIRP against the guarantor on the basis of the same debt and vice-versa. In other words, can two CIRP proceedings be initiated against two or more guarantors by the lender based on the same claim.
2. Whether the 'Corporate Insolvency Resolution Process' can be initiated against a 'Corporate Guarantor', if the 'Principal Borrower' is not a 'Corporate Debtor' or 'Corporate Person'?

The NCLAT after taking into consideration all the facts of the case stated that it is not necessary to initiate 'Corporate Insolvency Resolution Process' against the 'Principal Borrower' before initiating 'Corporate Insolvency Resolution Process' against the 'Corporate Guarantors'. Without initiating any 'Corporate Insolvency Resolution Process' against the 'Principal Borrower', it is always open to the 'Financial Creditor' to initiate 'Corporate Insolvency Resolution Process' under Section 7 against the 'Corporate Guarantors', as the creditor is also the 'Financial Creditor' qua 'Corporate Guarantor' [79].

Secondly, the Appellate Authority stated that once for same claim the 'Corporate Insolvency Resolution Process' is initiated against one of the 'Corporate Debtor' after such initiation, the 'Financial Creditor' cannot trigger 'Corporate Insolvency Resolution Process' against the other 'Corporate Debtor(s)', for the same claim amount (debt) [80].

The NCLAT clarified on the issue whether two applications for CIRP can be initiated under section 7 on different person involves in the same case and against same person involved in different cases of default. The NCLAT in its verdict stated that:

"There is no bar in the 'I & B Code' for filing simultaneously two applications under Section 7 against the 'Principal Borrower' as well as the 'Corporate Guarantor(s)' or against both the 'Guarantors'. However, once for same set of claim application under Section 7 filed by the 'Financial Creditor' is admitted against one of the 'Corporate Debtor'

70 Ibid (Para. 14)
71 Ibid (Para. 18)
72 Ibid (Para.13)
73 Supra Note. 32 (Pg. 2) (Amendment No. 3)
74 Notification No. IBBI/2018-19/GN/REG031
75 (IB)-40(PB)/2017 (12.01.2018)
76 http://www.mca.gov.in/Ministry/pdf/BankruptcyRulesPGCD_15112019.pdf
77 https://blog.ipleaders.in/contract-of-guarantee/
78 MANU/NL/0003/2019
79 Ibid (Para.25)
80 Ibid (Para. 31)

('Principal Borrower' or 'Corporate Guarantor(s)'), second application by the same 'Financial Creditor' for same set of claim and default cannot be admitted against the other 'Corporate Debtor' (the 'Corporate Guarantor(s)' or the 'Principal Borrower'). Further, though there is a provision to file joint application under Section 7 by the 'Financial Creditors', no application can be filed by the 'Financial Creditor' against two or more 'Corporate Debtors' on the ground of joint liability ('Principal Borrower' and one 'Corporate Guarantor', or 'Principal Borrower' or two 'Corporate Guarantors' or one 'Corporate Guarantor' and other 'Corporate Guarantor'), till it is shown that the 'Corporate Debtors' combinedly are joint venture company" [81].

Also with respect to the issue of whether the assets of the guarantor can be attached while recovering he amount was clarified by the Insolvency Law Committee Report in 2018 where it stated that to clear the confusion regarding treatment of assets of guarantors of the corporate debtor vis-à-vis the moratorium on the assets of the corporate debtor, it has been recommended to clarify by way of an explanation that all assets of such guarantors to the corporate debtor shall be outside scope of moratorium imposed under the Code [82].

While Piramal Judgment has agreed on the principle of coextensive liability of surety and principal debtor, it has disregarded the reading of this principle in consonance with the IBC. It may be pertinent to note the Supreme Court's decision in Industrial Investment Bank of India Ltd. v. Biswanath Jhunjhunwala [83], in which it had settled the law on a guarantee in the following words, "The very object of the guarantee is defeated if the creditor is asked to postpone his remedies against the surety. In the present case the creditor is a banking company. A guarantee is a collateral security usually taken by a banker. The security will become useless if his rights against the surety can be so easily cut down [84]. On the other hand, it missed out on the opportunity of entrenching the principle of 'double dip' used in the English insolvency law and in the Indian insolvency law framework. The rule of double dip has its origin in equity which has managed to survive the brunt of age [85].

In State Bank of India vs V. Ramakrishnan ('Ramakrishnan') [86], the court affirmed that the object of IBC was not to allow guarantors "to escape from an independent and coextensive liability to pay off the entire outstanding debt". The court went on to say that, "Section 31(1), in fact, makes it clear that the guarantor cannot escape payment as the Resolution Plan, which has been approved, may well include provisions as to payments to be made by such guarantor"[87] which was re-emphasized again in Committee of Creditors of Essar Steel Ltd vs Satish Kumar Gupta and Satish Kumar Gupta and Ors [88].

[81] Ibid (Para.32)

[82] http://www.mca.gov.in/Ministry/pdf/ReportInsolvencyLawCommittee_12042019.pdf (Pg.5)

[83] MANU/SC/1475/2009

[84] Ibid(Para.19)

[85] https://indialawjournal.org/a-critique-of-nclat-decision-in-piramal.php

[86] MANU/SC/0849/2018

[87] Ibid (Para. 22)

[88] MANU/SC/1577/2019 (Para. 66)

6. What are the Challenges in the Cirp Process?

Since the incorporation of the Insolvency and Bankruptcy Code the CIRP proceedings have faced any issues in its implementation because of which it has also been amended various times. Due to the dynamic nature of the law amendments have been made and necessary changes have been done. There are certain flaws in the CIRP proceedings which are hampering the whole structure. The Resolution applicant(who has filed for the CIRP process) are the people who are required to comply with all the laws while the company is in resolution stage and obtain all the regulatory permissions at different stages of the process from various central and state institutions like the Competition Commission of India(CCI) or Reserve Bank of India (RBI). The resolution applicant is bound to get all the necessary permissions in addition to the Code as the Code does not specify any procedure or rules in this aspect. While interpreting the Code we come across various situations that could be seen as flaws in the CIRP process. Some of the challenges are as follows:

a. According to the Code, the main purpose of the CIRP process is to make a proper plan to revive the corporate debtor so that all debts are covered and the body corporate survives instead of being liquidated to pay off the creditors. The code strictly stated that the CIRP process should be completed within 180 days which may be extended by another 150 days [89].

Under Regulation 39(1) of the IBBI Regulations 2016, the Resolution Professional is bound to submit its report (resolution plan) with approval of the COC to the NCLT 15 days before the completion of the CIRP proceedings. Now, if the NCLT rejects the resolution plan then there is no other way to revive the corporate debtor under the preview of the Code although there may be bidders who could have helped in reviving the company since the code is silent on it the company will go into liquidation which defeats the whole purpose of reviving the company by CIRP process.

b. Another challenge is that there is no uniformity to the practice of the Code. The Code is silent on the regulatory approvals to be taken from different authorities leaving it on the will of the COC. This has created a lot of disruptions in the code as there have been instances where the regulatory approval in some cases has been taken before the submission of Resolution Plan to the NCLT or before the adjudication by the NCLT and in some cases after the approval of the NCLT. Thus, there is no uniformity in the practice due to which the whole process gets hampered as in some cases the approval is rejected even after the acceptance of the resolution plan and in vice-versa.

c. In the case of NUI Pulp and Paper Industries Pvt. Ltd. vs Roxcel Trading [90] the NCLAT held that there is no restriction upon the power of NCLT under rule 11 to pass any order related to the incorporation of moratorium period before the CIRP proceedings. The NCLAT clarified in its order that if anything is done concerning abuse of power and justice under the Code by the Corporate Debtor, then NCLT it can impose necessary restrictions and pass any interim relief as it

[89] Section 12(3) of IBC, 2016

[90] MANU/NL/0300/2019

may deem fit [91]. The NCLAT stated that the NCLT has power to impose Pre-CIRP Moratorium period if the tribunal seems that injustice could be done. Thus, the NCLAT gave a new interpretation to Rule 11 of NCLT Rules, 2016 for shift of Post CIRP Moratorium to Pre-Moratorium Period.

d. In another case of Usha Holdings LL.C and Ors. vs. Francorp Advisors Pvt. Ltd [92]. the NCLAT held that under the Code it is not a Court or Tribunal and the CIRP process is not litigation. Thus, the NCLT has no jurisdiction to decide whether a foreign decree is legal or proper. Whatever findings the NCLAT has given about legality and propriety of the foreign decree in question being without jurisdiction is a nullity in the eye of law [93].
e. The Code is enacted so that there can be a speedy resolution of the Insolvency proceedings as compared to the earlier laws. but according to the statistics of the Economic survey of India as many as 14000 applications were filed before the authorities after the implementation of the act [94].

Due to the large number of applications and cases pending before the NCLT, the timeline is generally not followed. There is a lack of infrastructure as there is only one appellate board situated in Delhi and with the number of cases are rising in the country, it is a need to establish such other authorities to dispose of the pending cases and admit new cases within the period as per the regulations.

f. In certain legislations prior approval is a prerequisite to the acquisition of control, the Code provides for mandatory timelines for making payments to certain classes of creditors. To elucidate, the Competition Act, 2002 provides that any acquisition, merger or amalgamation that is notifiable to CCI cannot be consummated without the approval of CCI or until 210 days of notifying CCI, whichever is earlier [95]. As against this, the Code requires the successful bidder to make the payments towards the insolvency resolution process costs and liquidation value due to operational creditors within 30 days of approval of the resolution plan by NCLT [96]. In such a scenario, if CCI approval is not received within 30 days of obtaining the approval of NCLT, the resolution applicant may still be required to make the mandatory payment under the Code resulting in gun-jumping [97]. To worsen the situation for the resolution applicant, if CCI rejects the application after such mandatory payments have already been made by the resolution applicant, the resolution applicant steps in the shoes of a financial creditor/operational creditor while the corporate debtor goes into liquidation. The monies therefore paid by the resolution applicant take the nature of debt thereby running a major business risk for the resolution applicant. The solution could be a clarification by CCI that such payments under the Code will not amount to gun jumping. The Code should also be amended to provide that such payments towards CIRP Costs and liquidation value to operational creditors will get priority of payment over all other dues should the application be rejected by the CCI [98].

Conclusion

As the IBBI has suspended the Insolvency and Bankruptcy Code for six months form 05.06.2020 [99] it will give relief to certain Body Corporates during this pandemic that are willing to stay in the market. The Liquidity crisis and disruption of demand and supply chain have put the companies in a very tricky (difficult) situation. During the pandemic, it is expected that the defaults in payment will be on the rise, which will lead various company into insolvency. The firms which are under insolvency process that could have restructured and come out of Insolvency will now be pushed into liquidation. As far as other companies are concerned who will face the consequences of the pandemic at a later stage, there will be deterioration in their value and it will harder to make it viable. With the suspended IBC and no other alternative mechanism for the resolution of distress, it might lead to depletion in the value of assets and negative repercussions on the stakeholders of companies.

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[91] Ibid (Para.9)
[92] MANU/NL/0304/2018
[93] Ibid (Para.7)
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