

VOLUME 1 | ISSUE 1 2020

INTERNATIONAL JOURNAL OF ADVANCED LEGAL RESEARCH

INSOLVENCY AND BANKRUPTCY CODE: A WORK IN PROGRESS- Dhruv Gupta¹**ABSTRACT:**

The Insolvency and Bankruptcy Code, 2016 was introduced with the aim of merging the scattered legislations that were in existence prior to it. The Code seeks to comprehensively revamp the corporate insolvency framework to reduce pendency of cases, reducing legal ambiguities and to revitalise investor confidence in the modern world. The Code has instituted the Insolvency and Bankruptcy Board of India, which is the statutory and regulatory body governing insolvency in India.

The National Company Law Tribunal is deemed to be the Adjudicating Authority in insolvency proceedings. Appeals from the Tribunal lie to the National Company Law Appellate Tribunal, which is superseded by the Supreme Court. The Code also laid down a Corporate Insolvency Resolution Process, to be followed in insolvency proceedings. Cross-border insolvency is an issue which remains to be tackled in the coming future.

The Code can be credited to India's rise in Ease of Doing Business Index from 137th in 2015 to 63rd in 2019, expediting Insolvency Resolution proceedings and plugging loopholes in the Law. To keep up the fast pace of changes, the Government has been quick to amend the Code four times, as discussed below.

A BRIEF HISTORY:

¹ Student of Gujarat National Law University

For general queries or to submit your research for publication, kindly email us at editorial@ijalr.in

<https://www.ijalr.in/>

The Insolvency and Bankruptcy Code, 2016 (also referred to as ‘the Code’ or ‘IBC’) was enacted to merge existing legal framework related to insolvency and bankruptcy laws already in place before such enactment.

The period before the Act had several scattered legislations:

- 1) Presidency Towns Insolvency Act, 1909.
- 2) Provincial Insolvency Act, 1920.
- 3) Sick Industries Companies Act, 1985.
- 4) Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002, among others.

Multiplicity of laws gave rise to delays and conflicts. Thus, in 2014, the Ministry of Finance established the Bankruptcy Law Reform Committee (“BLRC”). The Committee submitted its report in November, 2015, which was the basis for the Insolvency and Bankruptcy Bill, 2015, which received the President’s assent in May 2016.

The Code seeks to make the Insolvency Resolution procedure economically viable and less cumbersome, promoting entrepreneurship.

LIST OF AMENDMENTS IN IBC, 2016:

1) FIRST AMENDMENT ACT, 2018

- 1.1) IBC (Amendment) Ordinance, 2017-Promulgated in November, 2017, the Ordinance introduced safeguards to restrict undesirable applicants from misusing the Code’s provisions.²However, their stringent nature proved to be counter-productive, which was later rectified in the Amendment Act discussed below.
- 1.2) IBC (Amendment) Act, 2018- Passed in the first month of 2018, it aimed at strengthening the resolution process and laid-down a qualification criterion to be

²PRESS INFORMATION BUREAU, <https://pib.gov.in/newsite/mberel.aspx?relid=173771> (last visited Mar. 25, 2020).

For general queries or to submit your research for publication, kindly email us at editorial@ijalr.in

<https://www.ijalr.in/>

met by people for submitting a resolution plan AND participating in liquidation proceedings.

Comparison between the Ordinance and Act is done below:

CATEGORY	ORDINANCE	AMENDMENT
1) Preventing a set class of individuals from submission of a resolution plan.	<p>Adds Section 29A, which includes the following persons:</p> <p>a) An undischarged solvent.</p> <p>b) Wilful defaulter having his account classified as an NPA by the RBI.</p> <p>c) Anyone not qualified to be a Director under the Companies Act, 2013.</p> <p>d) Anyone restricted by SEBI from buying/selling securities or gaining access to securities markets.</p> <p>e) Anyone held guilty of committing any offence attracting imprisonment for 2 years or more</p>	<p>Though the Ordinance only bars a set class of individuals along with any person acting in consensus, the Amendment also renders those people ineligible that are “acting jointly or in concert” with such unqualified people.</p> <p>SEBI Regulations, 2011 define ‘person acting in concert’ as “persons who have the common objective/purpose of acquisition of shares/ voting rights in/ exercising control over a company pursuant to an agreement or understanding, formal or informal, directly or indirectly co-operate for acquisition of shares/ voting rights in / exercise</p>

For general queries or to submit your research for publication, kindly email us at editorial@ijalr.in

<https://www.ijalr.in/>

	<p>f) Anyone having made an enforceable guarantee to any individual undergoing insolvency or liquidation proceedings under the Code.</p> <p>g) Anyone who has engaged in any fraudulent transaction being subject of an order passed by the National Company Law Tribunal.</p> <p>The Ordinance also prohibits certain ‘connected persons’ from participating in the resolution plan. For e.g. people who are Promoters of either the person who has applied for resolution OR the Corporate Debtor.</p>	<p>of control of the company.³”</p>
2) Definition	of The Code earlier defined	The Amendment did not

³Prashant Saran, *Order under sections 11 and 11B of the Securities and Exchange Board of India Act, 1992 and regulation 32*, Page 9, (2016), https://www.sebi.gov.in/sebi_data/attachdocs/1465299268841.pdf.

For general queries or to submit your research for publication, kindly email us at editorial@ijalr.in

<https://www.ijalr.in/>

<p>Resolution Applicant, and requirement of invitation by Insolvency Resolution Person</p>	<p>the Resolution Applicant as someone “<i>who submits a resolution plan to the resolution professional.</i>”</p> <p>However, the Code has been amended to include only those persons who have been invited by the Insolvency Resolution Person for submitting their resolution plans after fulfilling the eligibility criteria. This was done to ensure that only people with financial credibility are allowed to present it.</p> <p>The Ordinance now allows people to jointly present a resolution proposal, facilitating the resolution of large stressed assets.</p>	<p>introduce any new changes.</p>
<p>3) Whom does the Code apply to</p>	<p>The Allahabad High Court, in <i>Sanjeev Shriya</i></p>	<p>The Amendment did not introduce any new</p>

For general queries or to submit your research for publication, kindly email us at editorial@ijalr.in

<https://www.ijalr.in/>

	<p><i>v. State Bank of India</i>⁴, observed that personal guarantors were not covered under the Code. Further, there was no mention of partnership firms and sole proprietors, which comprise the majority of businesses in the country. To rectify this and to impart clarity on the subject, the Ordinance included personal guarantors, partnership firms and sole proprietors under the ambit of the Code.</p>	changes.
4) Prohibition on selling property to any individual not eligible for being a resolution applicant	The Ordinance amended Section 35 of the Code to only allow sale of distressed assets to those who met eligibility criteria set down in Section 29A [discussed in 1)].	The Amendment safeguards the liquidator and is in line with the Ordinance.
5) Punishment for violation of the Code	The Ordinance added Section 235(A), under	The Amendment did not introduce any new

⁴Sanjeev Shriya v. State Bank of India (2018) 2 All LJ 769.

For general queries or to submit your research for publication, kindly email us at editorial@ijalr.in

<https://www.ijalr.in/>

<p>if no penalty is specified for such violation</p>	<p>which violation of any rule/regulation for which no fine has been explicitly mentioned in the Code may attract a penalty of not less than Rs 1,00,000/- but which may extend to Rs 2,00,00,000/-.</p> <p>The high quantum of the penalty is to act as a deterrent against any violation of the Code arising due to non-mentioning of penalty.</p>	<p>changes.</p>
<p>6) Sanctioning the resolution plan</p>	<p>Post-amendment, Section 30 stated that the Committee of Creditors(CoC) would not be able to approve the Resolution Plan if it were to violate the provisions of Section 29A [(discussed in 1)]. In case of absence of any other plan, a fresh plan will have to formulated.</p>	<p>The Amendment Act also added the proviso that in case the applicant is unqualified for submission of the Resolution Plan, he shall be allowed a 30-day period from the submission date of the Plan to pay off any overdue amount.</p>

For general queries or to submit your research for publication, kindly email us at editorial@ijalr.in

<https://www.ijalr.in/>

The IBC (Amendment) Ordinance, 2017 and Amendment Act of 2018 were aimed at increasing the efficiency of the Corporate Insolvency Resolution Process(CIRP) and guarantee transparency through introduction of the eligibility criteria to ensure that only bona fide persons participate in the Resolution Process.

2) SECOND AMENDMENT ACT, 2018

The IBC(Second Amendment) Act, 2018 was passed in the Upper House in August, 2018.

It was a response to concerns made by homebuyers and Micro, Small and Medium Enterprises (MSME).

The Amendment has the following features:

- 1) Recognising Home Buyers as Financial Creditors-IBC defines a financial creditor as anyone who has given a loan/financial credit to the debtor. As money received from an applicant in a project related to real estate is for raising finance, he will now be deemed a financial creditor. This allows the home buyer representation in the CoC, making him an important stakeholder in the procedure, and giving him the right to initiate CIRP.
- 2) Provisions for MSMEs- Under the Amendment, the promoter is not prohibited from bidding for his own enterprise unless he is a willing defaulter. Further, leeway has been granted to the Government to make more exemptions in favour of MSMEs in public interest taking into consideration the potential for economic growth and generation of employment in the sector.
- 3) Quorum for decision-making-Before the Amendment, the CoC often came to an impasse due to the 75% voting barrier, leading to lengthy resolution proceedings. In

For general queries or to submit your research for publication, kindly email us at editorial@ijalr.in

<https://www.ijalr.in/>

response, the quorum was reduced to 66% in *Director General of Income Tax v. M/s. Synergies Dooray Automotive Ltd. & Ors*⁵ “for:

- a) Approving the Resolution Plan.
- b) Extension of CIRP.
- c) Appointment of Resolution Person.
- d) Subject matter of Section 28.⁶”

For rest of the matters, the quorum is 51%.

- 4) Withdrawal of Resolution Application- This may occur due to the possibility of settling outside of the court. Accordingly, the proposal to rescind the Application after commencement of proceedings requires favourable vote of at least 90% of the creditors. However, the application must be submitted by the same person who instituted the proceedings in the first place.
- 5) Creditors can be represented by a single person- In case of existence of a homogenous group of creditors, they may, through vote, choose an Insolvency Professional to act as their representative. The representative acts according to the orders of the creditors he represents.
- 6) Application of the Limitation Act, 1963 - IBC was not introduced to allow lenders to enforce time barred claims. Confusion arose in cases like *Black Pearl Hotels Pvt. Ltd. v. Planet M Retail Limited*⁷ as the NCLAT held the period of limitation i.e. three years to **start from 2016, when the Code was enacted**. For brevity, the Amendment incorporated the Limitation Act under Section 238(A), not allowing further renewal of time barred cases by following the original timeline.

⁵ Director General of Income Tax v. M/s. Synergies Dooray Automotive Ltd. & Ors No.205 of 2017 reported in 2019 SCC OnLine NCLAT 691.

⁶ Megha Mittal, *IBC Second Amendment Bill: Salient Features*, Page 5, (2019), <http://vinodkothari.com/wp-content/uploads/2018/08/Article-IBC-Amendment-Bill-2.pdf>.

⁷ Black Pearl Hotels Pvt. Ltd. v. Planet M Retail Limited Company Appeal (AT) (Insolvency) No.91 of 2017 decided on 17.10.2017 reported in 2017 SCC OnLine NCLAT 294.

For general queries or to submit your research for publication, kindly email us at editorial@ijalr.in

<https://www.ijalr.in/>

- 7) Eligibility of Resolution Applicant- Changes were made in Section 30 of the Code under which an Applicant was required to submit an affidavit to the RP stating that he was qualified for being such according to Section 29A of the IBC.

Drawbacks of the Amendment-Financial Creditors, as discussed in 1), can be either secured (having a loan against which there exists any guarantee/security) or unsecured. Although home buyers are being considered as financial creditors, they are classified as “unsecured financial creditors.” As a result, they remain fourth in order of priority of liquidation proceedings in the “Waterfall Mechanism.”

The Amendment was also ambiguous about the procedure to be carried out for verification of the Affidavit mentioned in 7); whether the Affidavit is sufficient or an independent assessment needs to be carried out to check the veracity of the claim.

3) **FIRST AMENDMENT ACT, 2019**

The IBC (Amendment) Bill, 2019 was approved by the Lok Sabha in August, 2019.

The Amendment sought to ensure speedy disposal of cases, along with modifications to:

- 1) Ambit of Resolution Plan- Earlier, Section 5(26) regarded Insolvency Resolution of a “corporate debtor as a **going concern**.”⁸This concept assumes that a business organisation will continue its operations for an indefinite period, without a possibility of winding up. The Section was modified so as to consider for debtors undergoing restructuring through “merger, amalgamation and de-merger.”⁹
- 2) Expediting case disposal-In accordance with Section 7 of the Code, the “Adjudicating Authority” requires conclusive evidence of non-payment within 14 days. The Amendment added a condition that if the “Adjudicating Authority”

⁸INDIA FILINGS, <https://www.indiafilings.com/learn/ibc-amendments-2019/> (Mar. 30, 2020).

⁹Dr. G. Narayana Raju, *IBC (Amendment) Act No 26 of 2019*, The Gazette Of India, Page 2, (2019), <https://ibbi.gov.in/uploads/legalframework/630af836c9fbbcd047c42dbdfd2aca13.pdf>.

For general queries or to submit your research for publication, kindly email us at editorial@ijalr.in

<https://www.ijalr.in/>

failed to gain evidence of such default, the explanation behind the same has to be recorded in writing.

This is in line with the purpose of the IBC-to ensure expeditious judgements.

- 3) Time Ceiling - This is another measure taken to fast track proceedings. Earlier, there was a time cap of 180+90 (270) days for Insolvency Resolution proceedings without any specified time frame for litigation. Parties exploited this by trying to ensure pendency of their case before the courts in order to retain control over their establishment. The 2019 Amendment specified 60 days for litigation, increasing the period to 180+90+60(330) days. This was a response to the excruciating delays in *Arcelormittal India Private Limited v. Satish Kumar Gupta and Others*.¹⁰
- 4) Hierarchy of creditors-The Amendment gives priority to secured and financial creditors over unsecured and operational creditors, respectively. Section describes the “Waterfall Mechanism”, which is the order of stakeholders to be adhered to in the liquidation process. The same will now be applied to the Resolution Process too.

Further, although proceedings are distributed according to majority creditors, the dissenting stakeholders shall now be given at least the minimum value from the proceedings or “the liquidation value of their debt.”¹¹ This provision, which was struck down earlier in *Central Bank of India v. Resolution Professional of the Sirpur Paper Mills Ltd. & Ors*,¹² was re-introduced through this Amendment.

¹⁰ *Arcelormittal India Private Limited v. Satish Kumar Gupta and Others* (2019) 2 SCC 1.

¹¹ L. Viswanathan, Gaurav Gupte & Madhav Kanoria, *2019 IBC Amendment Bill: Swift Action for Course Correction*, CYRILAMARCANDMANGALDAS BLOGS(Apr. 6, 2020, 9:00pm), <https://corporate.cyrilamarchandblogs.com/2019/07/2019-ibc-amendment-bill-insolvency-bankruptcy/>.

¹² *Central Bank of India v. Resolution Professional of the Sirpur Paper Mills Ltd. & Ors* Company Appeal decided on 12.09.2018 reported in 2018 SCC OnLine NCLAT 1034No.526 of 2018.

For general queries or to submit your research for publication, kindly email us at editorial@ijalr.in

<https://www.ijalr.in/>

- 5) Incidence of liquidation- Before being modified, the Code allowed liquidation by order of “Adjudicating Authority”-only prior to approval of Resolution Plan-with approval of 66% of CoC.

To expedite the process, liquidation can now be done after the formation of the CoC, even before the “Information Memorandum”(which describes the value and nature of claims) can be submitted by the IRP.

Giving priority to secured creditors (mainly banks) will boost stakeholders’ confidence. The Finance Minister stated that the purpose of the Code was to ensure survival of companies rather than their liquidation. However, doubts have been raised over the practicality of the 60-day limit for litigation, considering the high pendency of cases.

4) **SECOND AMENDMENT ACT, 2019**

The IBC(Second Amendment) Bill, 2019 was approved by the Rajya Sabha in March, 2020.

It sought to smoothen the insolvency procedure and to give more security to bidders, increasing their trust in the existing legal infrastructure.

Some features of the Amendment are:

- 1) Commencement of Insolvency Proceedings-Prior to the modifications, Section 5(12) stated that CIRP would begin after selection of the Interim Resolution Professional(IRP). A duration of 14 days was allotted for it, leading to delays.Hencenow, CIRP can start immediately after submission of the resolution application, before appointment of IRP.
- 2) Scope of Interim Finance-According to Section 5(15) of the Code,“Interim Finance” is defined as “any financial debt raised by resolution professional during

For general queries or to submit your research for publication, kindly email us at editorial@ijalr.in

<https://www.ijalr.in/>

the insolvency resolution process period.”¹³The Amendment included “and such other debt as may be notified” to the clause, accounting for the capital that may be needed for maintaining the business enterprise as a “going concern”, preventing a decrease in value of the organisation.

- 3) Quantum based eligibility criteria for creditors-Earlier, CIRP could be instituted against the Corporate Debtor even by one creditor. To prevent creditors from misusing this rule and instituting the Process maliciously, Section 7 was amended, establishing a minimum requirement of 10% of the total creditors or 100, whichever is lower, to commence CIRP.
- 4) Rights of a Corporate Debtor (CD)- A clarification was added to Section 11 of the Code, specifying that a CD is allowed to commence CIRP against another CD. Although this was widely accepted to be allowed, the clarification was required due to conflicting judgements in *Jai Ambe Enterprise vs. S. N. Plumbings Pvt. Ltd*¹⁴, and *Asian Plumbings and Mandhana Industries Ltd. vs. Instyle Exports Pvt. Ltd*¹⁵.
- 5) Immunity granted to a CD and his property-The most significant facet of this Amendment is the addition of Section 32A. It grants immunity to a CD for offences which may have been committed before the initiation of CIRP and the acceptance of Resolution Plan. This also safeguards the CD’s property from being “attached” by virtue of such offences.

This provision protects new promoters and administration against wrongdoings committed by the former promoters ONLY IF “the management or control of

¹³*Insolvency and Bankruptcy Code, No 13 of 2016, Page 7, (2016), <https://ibbi.gov.in/uploads/legalframework/0360c1887d46d74de3c53b53f3f1a675.pdf>.*

¹⁴*Jai Ambe Enterprise vs. S. N. Plumbings Pvt. Ltd Company MA 78/2018 in CP 1268/I&BC/NCLT/MB/MAH/2017 decided on 06.02.2018.*

¹⁵*Asian Plumbings and Mandhana Industries Ltd. vs. Instyle Exports Pvt. Ltd Company Petition No.(IB)-301 (ND)/2018 decided on 30.08.2018 reported in 2018 SCC OnLine NCLT 25542.*

For general queries or to submit your research for publication, kindly email us at editorial@ijalr.in

<https://www.ijalr.in/>

the CD is not to a person who was the erstwhile promoter¹⁶ or related anyhow to the previous management of the Company.

The Amendment aims to ensure survival of enterprises rather than liquidation by providing for “last mile funding” in interim finance. It seeks to revitalise investor confidence by insulating them from crimes of previous management. However, the eligibility criteria for creditors was met with criticism from homebuyers as it reduced their power to initiate CIRP.

CONCLUSION:

The World Bank's *Ease of Doing Business Index 2015* ranked India 137 out of 189 countries on the “ease of resolving insolvencies”¹⁷, which has jumped to 63rd in 2019.

“Recovery rate has increased from 26.5% in 2018 to 71.6% in 2019 and time taken in recovery improved from 4.3 years in 2018 to 1.6 years in 2019.”¹⁸The Code can be credited with salvaging many companies from the brink of liquidation.

However, the immediate need is to counter the rising pendency of cases. As of September, 2019, 10,860 IBC-related cases are pending before the NCLT¹⁹. Recently, an NCLAT was established in Chennai, which, although a welcome move, is delayed. The issue of cross-border insolvency also needs to be addressed in the coming future.

¹⁶LIVE LAW, <https://www.livewlaw.in/know-the-law/insolvency-and-bankruptcy-code-amendment-act-2020-a-primer-154353> (last visited Apr. 3, 2020).

¹⁷MONDAQ, <https://www.mondaq.com/india/InsolvencyBankruptcyRe-structuring/627706/Insolvency-And-Bankruptcy-Code> (last visited Apr. 2, 2020).

¹⁸MONDAQ, <https://www.mondaq.com/india/insolvencybankruptcy/903124/the-insolvency-and-bankruptcy-code-in-2019-recent-amendments-and-key-judgments>(last visited Apr. 2, 2020).

¹⁹HINDUBUSINESS LINE, <https://www.thehindubusinessline.com/economy/10860-cases-under-ibc-pending-before-nclt-till-sept-minister/article30149134.ece> (last visited Apr. 5, 2020).

For general queries or to submit your research for publication, kindly email us at editorial@ijalr.in

<https://www.ijalr.in/>