

**REPORT  
OF  
THE INSOLVENCY  
LAW COMMITTEE**

**MARCH, 2018**



**Ministry of Corporate Affairs  
Government of India**

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REPORT OF THE INSOLVENCY LAW COMMITTEE

New Delhi, the 26 March, 2018

To,

Honourable Union Minister of Finance and Corporate Affairs

Sir,

We have the privilege and honour to present this report of the Insolvency Law Committee, set up on 16<sup>th</sup> November, 2017, to make recommendations to the Government on issues arising from the implementation of the Insolvency and Bankruptcy Code, 2016, as well as on the recommendations received from various stakeholders.

2. The Committee had the benefit of participation by various institutes, industry chambers and experts in various disciplines. It has tried to take a holistic and comprehensive view while suggesting changes in the Code and subordinate legislation keeping in mind the difficulties and challenges expressed by various stakeholders. It has endeavoured to reconcile their competing interests, being mindful of the need for facilitating "ease of resolving insolvency" in India, and maximising value of assets locked up in non-performing assets.

3. We thank you for providing us an opportunity to present our views on the issues arising from implementation of the Insolvency and Bankruptcy Code, 2016 and related matters.

Yours sincerely,

(Shri Injeti Srinivas)  
Chairman

(Dr. M. S. Sahoo)  
Member

(Ms. Vandita Kaul)  
Member Rep.

(Shri T. K. Vishwanathan)  
Member

(Shri Sudarshan Sen)  
Member

(Shri Shardul Shroff)  
Member

(Shri Rashesh Shah)  
Member

(Shri B. Sriram)  
Member

(Shri Bahram Vakil)  
Member

(Shri Sidharth Birla)  
Member

(Dr. Makarand Lele)  
Member

(Shri Sanjay Gupta)  
Member

(CA Naveen ND Gupta)  
Member

Shri Gyaneshwar Kumar Singh, Member Secretary

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## PREFACE

The World Bank Doing Business' Index 2018 recognized the sustained efforts and commitment of the Government of India as this year India became one of the top 10 'improvers' in the rankings released by the World Bank. However, improving on the Doing Business rankings is not an easy task, especially for an economy that is as large and complex as India's. Drafting a new piece of legislation is only the start. The more significant challenge is ensuring that the law is implemented in its true spirit. This can be achieved by periodically evaluating the law, especially when it is in its initial stages and practical challenges in implementation emerge. Towards this end, the Insolvency Law Committee was constituted by the Ministry of Corporate Affairs to conduct a detailed review of the Insolvency and Bankruptcy Code, 2016 in consultation with key stakeholders.

This Report by the Insolvency Law Committee is a sincere attempt to encourage sustainable growth of the credit market in India, while safeguarding interests of various stakeholders. The key recommendations in this Report are as follows:

- (i) in recognition of the importance of Micro, Small and Medium Enterprises (MSMEs) to the Indian economy and the unique challenges faced by them, it has been recommended to allow the Central Government to exempt MSMEs from application of certain provisions of the Code. Illustratively, since usually only promoters of an MSME are likely to be interested in acquiring it, applicability of section 29A has been restricted only to disqualify wilful defaulters from bidding for MSMEs;
- (ii) in order to address the problem of unintended exclusions under section 29A that disqualifies certain persons from submitting resolution plans under the Code, it has been recommended to streamline it so that only those who contributed to defaults of the company or are otherwise undesirable are rendered ineligible. Moreover, being mindful of the Non-Performing Assets (NPA) crisis in the country, the need to encourage the market for NPAs was felt and accordingly several carve-outs from section 29A have been recommended for pure play financial entities. In order to prevent retrospective application of any proposed change, it has been recommended to add a proviso that the amendments shall be applicable to resolution applicants that have not submitted resolution plans as on date of coming into force of the said amendment;
- (iii) it has been recommended that home buyers should be treated as financial creditors owing to the unique nature of financing in real estate projects and the treatment of home buyers by the Hon'ble Supreme Court in ongoing cases.

Notably, classification as financial creditors would enable home buyers to participate equitably in the insolvency resolution process under the Code;

- (iv) 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;
- (v) in order to fulfil the stated objective of the Code i.e. to promote resolution, it has been recommended to re-calibrate voting threshold for various decisions of the committee of creditors;
- (vi) in order to enable the corporate debtor to continue as a going concern while undergoing Corporate Insolvency Resolution Process (CIRP) it has been recommended to empower the NCLT on the application of IRP/RP to allow expansion of the scope of essential goods and services beyond what is specified in CIRP Regulations;
- (vii) in order to cater to exceptional circumstances warranting withdrawal of an application for CIRP post-admission, it has been recommended to allow such exit provided the CoC approves such action by ninety per cent of voting share;
- (viii) in order to prevent misuse of section 10 of the Code, which permits initiation of CIRP by Corporate Applicant, it has been recommended to provide for the requirement of special resolution passed by the shareholders of the Corporate debtor or resolution passed by at least three-fourth of the total number of partners of the corporate debtor as the case may be;
- (ix) in order to facilitate successful implementation of the resolution plan by the successful bidder, it has been proposed to allow one year time to obtain necessary statutory clearances from Central, State and other authorities or such time as specified in the relevant law, whichever is later.

The Committee deliberated on Cross Border Insolvency and noted that the existing two provisions in the Code (S. 234 & S. 235) do not provide a comprehensive framework for cross border insolvency matters. Accordingly, it was decided to attempt a comprehensive framework for this purpose based on UNCITRAL model law on Cross Border Insolvency, which could be made a part of the Code by inserting a separate chapter for this purpose. Given the complexity of the subject matter and the requirement of in-depth research to adapt the model law in the Indian context, the Committee decided to submit its recommendations on Cross Border Insolvency separately.

Since provisions related to Insolvency resolution and bankruptcy for individual and partnership of the Code are yet to be commenced and experience related to it is not available, hence the committee did not deliberate on the processes of it.

I am hopeful that recommendations of the Committee will provide a further impetus to the insolvency resolution framework in India. Needless to add, law making is a consultative process and as further experience emerges, the Government shall closely monitor implementation of the Code.



Injeti Srinivas

Secretary, Ministry of Corporate Affairs &  
Chairman, Insolvency Law Committee  
New Delhi, March 26, 2018

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## ACKNOWLEDGMENTS

The Committee takes this opportunity to thank all stakeholders who provided insightful comments and suggestions through the dedicated facility set up on the MCA21 portal for invitation of comments to the Insolvency and Bankruptcy Code (IBC), 2016. The Committee would also like to thank all the industry chambers, professional institutes, law firms, academicians and other experts who made valuable suggestions for the review of the Code.

The Committee expresses its gratitude to the members of the Drafting Sub-Committee: Sh. Navrang Saini, Whole Time Member, IBBI; Sh. Shashank Saksena, Advisor (FSRL), Department of Economic Affairs; Sh. Bahram Vakil, Partner, AZB & Partners, Sh. Shardul Shroff, Executive Chairman, Shardul Amarchand Mangaldas & Co and the team from Vidhi Centre for Legal Policy, for their valuable contribution in the review process, and for their participation in meeting for deliberation on complex legal issues.

The Committee appreciates the support provided by the team from the Vidhi Centre for Legal Policy comprising of Ms. Shreya Garg, Ms. Aishwarya Satija, Ms. Vedika Mittal and Sh. Param Pandya, in terms of legal research and drafting, which proved to be very useful to the Committee.

The Committee is grateful to Ministry of Corporate Affairs for providing logistical support and would like to make a special mention of the dedicated efforts put in by the team of officers of the Insolvency Division at the MCA comprising Sh. Rakesh Tyagi, Director, Ms. Yogini D. Chauhan, Deputy Director, Sh. Jatinder Kataria, Company Prosecutor and Ms. Sunidhi Misra, STA for collating suggestions, facilitating discussions and providing administrative and technical support for the functioning of the Committee.

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## BACKGROUND

### I. INTRODUCTION

- 1.1 The preamble of the Insolvency and Bankruptcy Code, 2016 (the “Code”) gives a clear indication of the objective that the Code seeks to achieve: to maximise the value of assets, to promote entrepreneurship, to promote availability of credit and to balance the interests of all the stakeholders. Each provision of the Code was drafted keeping these principles in mind, and the introduction of this legislation was done with the aim of replacing the existing framework for insolvency which was visibly inadequate, ineffective and wrought with delays.
- 1.2 The provisions relating to corporate insolvency in the Code came into effect on 1 December, 2016 and has completed a little more than one year in its operation. This one year has witnessed the setting up of the eco-system for the Code to function: the Insolvency and Bankruptcy Board of India (“IBBI”), National Company Law Tribunal (“NCLT”), development of the profession of insolvency professionals and establishment of information utilities (“IU”). As per the Economic Survey 2017-18, 525 applications have been admitted for corporate insolvency resolution within the framework envisaged in the Code. At present, the Code is being utilised extensively which has highlighted several operational and interpretational issues. A new piece of legislation evolves organically, and this may be supplemented by a periodic review process.
- 1.3 Though a few immediate amendments were made by way of an Ordinance in November 2017 which was replaced by the Insolvency and Bankruptcy Code (Amendment) Act, 2018 (“Amendment Act”) in January 2018, the Government deemed it fit to constitute a formal committee to study the major issues in the corporate insolvency process in a systematic manner.
- 1.4 Pursuant to this, the Ministry of Corporate Affairs (the “MCA”) constituted the Insolvency Law Committee (the “Committee”) under the chairmanship of the Sh. Injeti Srinivas, Secretary, Ministry of Corporate Affairs vide an office order dated 16 November 2017. The Committee consisted of Sh. M.S. Sahoo, Chairperson of the IBBI, Ms. Vandita Kaul, Joint Secretary, representative of the Department of Financial Services, Sh. Sudarshan Sen, Executive Director of the Reserve Bank of India (“RBI”), Sh. T. K. Vishwanathan, Former Secretary General of the Lok Sabha and Chairman of the BLRC, Sh. Shardul Shroff, Executive Chairman of Shardul Amarchand Mangaldas & Co.,

Sh. Rashesh Shah, Chairman & CEO, Edelweiss Group, Sh. Sidharth Birla, past President FICCI and Chairman Xpro India Limited, Sh. B. Sriram, MD of Stressed Assets Resolution Group, State Bank of India, Sh. Naveen ND Gupta, President of the Institute of Chartered Accountants of India, Sh. Sanjay Gupta, President of the Institute of Cost Accountants of India and Sh. Makarand Lele, President of the Institute of Company Secretaries of India. Sh. Amardeep Singh Bhatia, Joint Secretary in-charge for the implementation of the Code since its notification was the Member Secretary of the Committee till January, 2018 and pursuant to his transfer, Sh. Gyaneshwar Kumar Singh, Joint Secretary took over the charge of Member Secretary of the Committee. Copy of the constitution order of Committee is at Annexure I. The Committee co-opted Sh. Shashank Saksena, Adviser (FSRL), representative of Department of Economic Affairs, Ministry of Finance; Sh. Amarjeet Singh, Executive Director, representative of Securities and Exchange Board of India (“SEBI”); Sh. Piyush Srivastava, Addl. Development Commissioner, representative from the Ministry of Micro, Small and Medium Enterprises, Sh. Ashwini Kumar, Addl. Economic Advisor, representative from Ministry of Housing and Urban Affairs and Sh. Rajesh Kumar Bhoot, Joint Secretary, TPL-II, representative of Central Board of Direct Taxes.

- 1.5 The Committee was constituted with the mandate of making recommendations on (a) issues arising from the functioning and implementation of the Code, (b) issues that may impact the efficiency of the corporate insolvency resolution and liquidation framework prescribed under the Code, and (c) any other relevant matters as it deems necessary.
- 1.6 In furtherance to its mandate, the Committee consolidated views and recommendations from a gamut of stakeholders. The Committee deliberated upon relevant issues, and considered market practices as well as the legal principles, including international jurisprudence. Based on this detailed study, the Committee prepared a report which recommends and provides several amendments to the Code and subordinate legislations which are imperative for the smooth functioning of the Code.

## **II. WORKING PROCESS OF THE COMMITTEE**

- 2.1 The Committee had its first meeting on 8 December 2017. It had three more meetings between 8 December 2017 and 12 March 2018. The Committee invited suggestions from the public through a dedicated online facility on MCA21 portal which was open from 12 December 2017 to 10 January 2018. Further, the MCA engaged with stakeholders through several other platforms, and various

regulators and ministries, including Competition Commission of India (“CCI”), Ministry of Housing and Urban Affairs, Ministry of Micro, Small and Medium Enterprises to give their suggestions to the Committee.

2.2 From the inputs received pursuant to public comments and stakeholder consultations, the regulatory issues shall be addressed by IBBI, in consultation with the MCA, in due course of time. The IBBI also suggested amendments to the powers and functions provided to IBBI under the Code. However, it was decided that the suggested amendments will be addressed by MCA in consultation with the IBBI at a later stage. Additionally, certain issues were raised by some members of the Committee post the Committee’s last meeting held on 12 March 2018. Since many of these issues require detailed research, these may be addressed in due course of time.

2.3 The Committee noted the need for a comprehensive cross-border insolvency framework. It was discussed that adoption of the UNCITRAL Model Law on Cross-Border Insolvency is a complex exercise and requires detailed research of the manner of such adoption in international jurisdictions, and the approach to be adopted for India. Thus, the recommendations vis-à-vis a cross-border insolvency framework will be provided separately, after such exercise has been undertaken.

2.4 A Drafting Sub-committee was constituted to draft the report (“**Report**”) and the corresponding amendments in the Code and subordinate legislation. The Drafting Sub-committee consisted of Shri Navrang Saini, Whole Time Member, IBBI; Shri Shashank Saxena, Advisor (FSRL), Department of Economic Affairs; Shri Bahram Vakil, Partner, AZB & Partners ; Shri Shardul Shroff, Executive Chairman, Shardul Amarchand Mangaldas & Co. and the Vidhi Centre for Legal Policy.

2.5 The MCA engaged Vidhi Centre for Legal Policy to assist the Committee in reaching informed decisions by carrying out legal research on the principles involved as well as international practices, and for providing drafting assistance.

### **III. STRUCTURE OF THE REPORT**

3.1 The Report deals with the recommendations of the Committee and the rationale for such recommendations, in relation to the Code and the relevant subordinate legislation viz. Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (“**CIRP Rules**”), Insolvency and

Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (“**CIRP Regulations**”), Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (“**Liquidation Regulations**”).

3.2 The Report also contains three annexures: **Annexure I** comprising of the notification dated 16 November 2017 constituting the Committee. **Annexure II** containing comments from the World Bank, Rajya Sabha Subordinate Legislation Committee and the issues raised in the parliamentary debates when the Code and the Amendment Act were passed, along with summary responses to the same. **Annexure III** contains the summary of proposed amendments to the Code and the proposed amendments to the subordinate legislation affected by the amendments to the Code.

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## RECOMMENDATIONS PROPOSING AMENDMENTS TO THE CODE AND RELEVANT SUBORDINATE LEGISLATION

### 1. DEFINITIONS

#### *Financial debt*

1.1 Section 5(8) of the Code defines 'financial debt' to mean a debt along with interest, if any, which is disbursed against the consideration for the time value of money and *inter alia* includes money borrowed against payment of interest, etc. The Committee's attention was drawn to the significant confusion regarding the status of buyers of under-construction apartments ("**home buyers**") as creditors under the Code. Multiple judgments have categorised them as neither fitting within the definition of 'financial' nor 'operational' creditors.<sup>1</sup> In one particular case,<sup>2</sup> they have been classified as 'financial creditors' due to the assured return scheme in the contract, in which there was an arrangement wherein it was agreed that the seller of the apartments would pay 'assured returns' to the home buyers till possession of property was given. It was held that such a transaction was in the nature of a loan and constituted a 'financial debt' within the Code. A similar judgment was given in *Anil Mahindroo & Anr v. Earth Organics Infrastructure*.<sup>3</sup> But it must be noted that these judgments were given considering the terms of the contracts between the home buyers and the seller and are fact specific. Further, the IBBI issued a claim form for "creditors other than financial or operational creditors"<sup>4</sup>, which gave an indication that home buyers are neither financial nor operational creditors.

1.2 Non-inclusion of home buyers within either the definition of 'financial' or 'operational' creditors may be a cause for worry since it deprives them of, first, the right to initiate the corporate insolvency resolution process ("**CIRP**"), second, the right to be on the committee of creditors ("**CoC**") and third, the guarantee of receiving at least the liquidation value under the resolution plan. Recent cases like *Chitra Sharma v. Union of India*<sup>5</sup> and *Bikram Chatterji v. Union of India*<sup>6</sup> have evidenced the stance of the Hon'ble Supreme Court in

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<sup>1</sup> *Col. Vinod Awasthy v. AMR Infrastructure Ltd.*, NCLT, Principal Bench, Delhi, CP No. (IB)-10(PB)/2017, Date of decision – 20 February, 2017.

<sup>2</sup> *Nikhil Mehta v. AMR Infrastructure*, NCLAT, New Delhi, Company Appeal (AT) (Insolvency) No. 07/2017, Date of decision – 21 July, 2017.

<sup>3</sup> NCLAT New Delhi, Company Appeal (AT) (Insolvency) No. 74/2017, Date of decision – 02 September, 2017.

<sup>4</sup> Form F, IBBI (Insolvency Resolution Process for Corporate Persons), Regulations, 2016.

<sup>5</sup> Writ Petition(s) (Civil) No.744 of 2017, Supreme Court of India.

<sup>6</sup> Writ Petition(s) (Civil) No.940 of 2017, Supreme Court of India.



safeguarding the rights of home buyers under the Code due to their current disadvantageous position.

1.3 To completely understand the issue, it is imperative that the peculiarity of the Indian real estate sector is highlighted. Delay in completion of under-construction apartments has become a common phenomenon and the records indicate that out of 782 construction projects in India monitored by the Ministry of Statistics and Programme Implementation, Government of India, a total of 215 projects are delayed with the time over-run ranging from 1 to 261 months.<sup>7</sup> Another study released by the Associated Chambers of Commerce and Industry of India, revealed that 826 housing projects are running behind schedule across 14 states as of December 2016.<sup>8</sup> Further, the Committee agreed that it is well understood that amounts raised under home buyer contracts is a significant amount, which contributes to the financing of construction of an asset in the future.

1.4 The current definition of 'financial debt' under section 5(8) of the Code uses the words "*includes*", thus the kinds of financial debts illustrated are not exhaustive.<sup>9</sup> The phrase "*disbursed against the consideration for the time value of money*" has been the subject of interpretation only in a handful of cases under the Code. The words "*time value*" have been interpreted to mean compensation or the price paid for the length of time for which the money has been disbursed. This may be in the form of interest paid on the money<sup>10</sup>, or factoring of a discount in the payment.

1.5 On a review of various financial terms of agreements between home buyers and builders and the manner of utilisation of the disbursements made by home buyers to the builders, it is evident that the agreement is for disbursement of money by the home buyer for the delivery of a building to be constructed in the future. The disbursement of money is made in relation to a future asset, and the contracts usually span a period of 4-5 years or more. The Committee deliberated that the amounts so raised are used as a means of financing the real

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<sup>7</sup> Khyati Rathod and Niharika Dhall, 'India: Delays in Construction Projects', (Mondaq, 24 January, 2017), <<https://www.khaitanco.com/PublicationsDocs/Mondaq-KCOCoverage24JanKHR.pdf>>, accessed 01 March, 2018.

<sup>8</sup> Lavina Mulchandani, 'Why are housing projects delayed? Industry, buyer groups hope to have answers soon', (Hindustan Times, 06 May, 2017), <<https://www.hindustantimes.com/real-estate/why-are-housing-projects-delayed-industry-buyer-groups-hope-to-have-answers-soon/story-abMs34y2V7h8G92aVur9SJ.html>>, accessed 01 March, 2018.

<sup>9</sup> *B.V.S. Lakshmi v. Geometrix Laser Solutions Private Limited*, NCLAT New Delhi, Company Appeal (AT) (Insolvency) No. 38/2017, Date of decision – 27 December, 2017.

<sup>10</sup> *Nikhil Mehta*, (n.02).

estate project, and are thus in effect a tool for raising finance, and on failure of the project, money is repaid based on time value of money. On a plain reading of section 5(8)(f), it is clear that it is a residuary entry to cover debt transactions not covered under any other entry, and the essence of the entry is that “amount should have been raised under a transaction having the commercial effect of a borrowing.” An example has been mentioned in the entry itself i.e. forward sale or purchase agreement. The interpretation to be accorded to a forward sale or purchase agreement to have the texture of a financial contract may be drawn from an observation made in the case of *Nikhil Mehta and Sons (HUF) v. AMR Infrastructure Ltd.*:<sup>11</sup>

*“A forward contract to sell product at the end of a specified period is not a financial contract. It is essentially a contract for sale of specified goods. It is true that some time financial transactions seemingly restructured as sale and repurchase. Any repurchase and reverse repo transaction are sometimes used as devices for raising money. In a transaction of this nature an entity may require liquidity against an asset and the financier in return sell it back by way of a forward contract. The difference between the two prices would imply the rate of return to the financier.”* (emphasis supplied).

1.6 Thus, not all forward sale or purchase are financial transactions, but if they are structured as a tool or means for raising finance, there is no doubt that the amount raised may be classified as financial debt under section 5(8)(f). Drawing an analogy, **in the case of home buyers, the amounts raised under the contracts of home buyers are in effect for the purposes of raising finance, and are a means of raising finance. Thus, the Committee deemed it prudent to clarify that such amounts raised under a real estate project from a home buyer fall within entry (f) of section 5(8).**

1.7 Further, it may be noted that the amount of money given by home buyers as advances for their purchase is usually very high, and frequent delays in delivery of possession may thus, have a huge impact. For example, in *Chitra Sharma v. Union of India*<sup>12</sup> the amount of debts owed to home buyers, which was paid by them as advances, was claimed to be INR Fifteen Thousand Crore, more than what was due to banks.<sup>13</sup> Despite this, banks are in a more favourable position under the Code since they are financial creditors. Moreover, the general practice is that these contracts are structured unilaterally

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<sup>11</sup> *Ibid*, (n.02).

<sup>12</sup> *Chitra Sharma*, (n.05).

<sup>13</sup> *Samanwaya Rautray and Sanu Sandilya*, ‘Supreme Court lifts stay on insolvency move against Jaypee Infra’, (Economic Times, 12 September, 2017), <<https://economictimes.indiatimes.com/wealth/personal-finance-news/supreme-court-asks-jaypee-infratech-to-deposit-rs-2000-crore/articleshow/60460909.cms>>, accessed 03 March, 2018.

by construction companies with little or no say of the home buyers. A denial of the right of a class of creditors based on technicalities within a contract that such creditor may not have had the power to negotiate, may not be aligned with the spirit of the Code.

1.8 The Committee also discussed that section 30(2)(e) of the Code provides that all proposed resolution plans must not contravene any provisions of law in force, and thus, the provisions of Real Estate (Regulation and Development) Act, 2016 (“**RERA**”) will need to be complied with and resolution plans under the Code should be compliant with the said law.

1.9 **Finally, the Committee concluded that the current definition of ‘financial debt’ is sufficient to include the amounts raised from home buyers/ allottees under a real estate project, and hence, they are to be treated as financial creditors under the Code. However, given the confusion and multiple interpretations being taken, at this stage, it may be prudent to explicitly clarify that such creditors fall within the definition of financial creditor, by inserting an explanation to section 5(8)(f) of the Code. Accordingly, in CIRP, they will be a part of the CoC and will be represented in the manner specified in paragraph 10 of this report, and in the event of liquidation, they will fall within the relevant entry in the liquidation waterfall under section 53. The Committee also agreed that resolution plans under the Code must be compliant with applicable laws, like RERA, which may be interpreted through section 30(2)(e) of the Code. It may be noted that there was majority support in the Committee for the abovementioned treatment of home buyers. However, certain members of the Committee, namely Sh. Shardul Shroff, Sh. Sudarshan Sen and Sh. B. Sriram, differed on this matter.**

#### *Interim Finance*

1.10 Interim finance is defined under section 5(15) of the Code and is termed as any ‘financial debt’ which is raised by the Interim Resolution Professional (“**IRP**”)/ Resolution Professional (“**RP**”) during CIRP to finance the cost of going through CIRP. The definition of ‘financial debt’ under section 5(8) of the Code uses the words “a debt along with interest”, meaning that the definition of ‘interim finance’ includes interest charged on it. Insolvency resolution process costs (“**IRP cost**”) *inter alia* includes interim finance and the costs incurred in raising such finance, and IRP costs are given the highest priority in the liquidation waterfall. Thus, it is clear that interim finance and the interest on it is at the top of the waterfall.

1.11 The highlighted issue was that currently, interest on interim finance is only calculated till the liquidation commencement date as provided in regulation

27 of the Liquidation Regulations. The Committee noted that interim finance is one of the most important aspects of the CIRP and may be essential to cover the costs involved in the process.<sup>14</sup> Even in other countries, finances raised during insolvency processes are given *super priority*, i.e. priority above all other repayments. For example, *debtor-in-possession financing* is used in the reorganisation process in USA and is given priority above all other repayments.<sup>15</sup>

- 1.12 In order to encourage providing of interim finance, the Committee felt that the Liquidation Regulations may be amended to provide that interest on interim finance be calculated for one year after the liquidation commencement date. This amount will also form part of IRP costs and will be paid in priority, as per section 53 of the Code.
- 1.13 Further, it was also submitted to the Committee that certain relaxations may be made for various entities like banks, non-banking financial institutions and asset reconstruction companies (“ARCs”) to encourage them to provide interim finance. For example, ARCs can currently only provide interim finance for cases which are in their portfolio<sup>16</sup> and need to seek specific permission from RBI to provide interim finance to other entities.<sup>17</sup> Relaxation of norms for providing of interim finance may boost the development of a market for stressed assets.
- 1.14 **The Committee unanimously decided that the interest on interim finance shall be calculated for one year after the liquidation commencement date or until repayment, whichever is earlier, and distributed in priority in order to encourage early repayment and preferential treatment of interim finance. To this effect, the definition of interim finance may be clarified under section 5(15) of the Code along with the relevant amendment in the Liquidation Regulations. Further, the Committee also recommended that the guidelines for providing such finance by various entities like banks, non-banking financial companies and ARCs may be provided by the RBI to ensure more flexible norms in this regard.**

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<sup>14</sup> Clause 25, Notes on Clauses of the Code, p. 121.

<sup>15</sup> Interim Report of the BLRC, (February 2015), p. 71, <[https://www.finmin.nic.in/sites/default/files/Interim\\_Report\\_BLRC\\_0.pdf](https://www.finmin.nic.in/sites/default/files/Interim_Report_BLRC_0.pdf)>, accessed 27 February, 2018.

<sup>16</sup> Vishwanath Nair, ‘Two ARCs seek RBI nod for priority funding for cases under bankruptcy law’, (Livemint, 23 March, 2017), <<http://www.livemint.com/Industry/j9zD1xIPpxdUbY3ifMDdJM/Two-ARCs-seek-RBI-nod-for-priority-funding-for-cases-under-b.html>>, accessed 27 February, 2018.

<sup>17</sup> Section 10, Securitisation and Asset Reconstruction Financial Assets and Enforcement of Security Interest Act, 2002.

### ***Operational Debt***

1.15 Section 5(21) of the Code defines operational debt to mean “*a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority*”. The definition of ‘operational debt’ is key to determine the scope of ‘operational creditors’ envisaged under the Code. Section 5(20) of the Code defines an operational creditor to mean “*a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred*”. Operational creditors are granted significant rights under the Code, including: (i) the right to initiate CIRP under section 9 of the Code; and (ii) the right to payment of at least the liquidation value under a resolution plan in terms of section 30(2)(b) of the Code.

1.16 It was suggested to the Committee that the definition of ‘operational debt’ under the Code must be widened to include dues payable to regulators. This would ensure that such dues are granted the protection discussed in points (i) and (ii) above.

1.17 With respect to point (i) discussed above, the Committee noted that regulatory dues were intentionally not included in the definition of operational debt. It was discussed that if any claim or obligation arises pursuant to non-payment by a corporate debtor in lieu of any goods or services provided by a regulatory body, it may be interpreted as ‘operational debt’ on a case to case basis. For example, the Committee noted that one of the leading stock exchanges had filed applications for initiation of CIRP against certain companies for non-payment of annual listing fees.<sup>18</sup> The Committee also noted that, regulators generally have wide ranging powers to enforce their orders and recover dues. For example, section 24(2) of the SEBI Act, 1992 states as follows:

*"If any person fails to pay the penalty imposed by the adjudicating officer or fails to comply with any of his directions or orders, he shall be punishable with imprisonment for a term which shall not be less than one month but which may extend to ten years, or with fine, which may extend to twenty-five crore rupees or with both."*

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<sup>18</sup>BSE Media Release, (12 December, 2017), <<https://www.bseindia.com/markets/marketinfo/DispMediaRels.aspx?page=3279ff25-0dfa-46ba-97c7-d0f514b67973>>, accessed 24 February, 2018.

1.18 With respect to point (ii), the Committee noted that prior to the coming into force of the Code, preferential payments in relation to winding up of companies was governed by section 327 of the Companies Act, 2013 (“CA 2013”) (the corresponding provision in the Companies Act, 1956 (“CA 1956”) was section 530). Neither section 327 of the CA 2013 nor section 530 of the CA 1956 provided any preferential treatment to regulatory dues and only covered “all revenues, taxes, cesses and rates due from the company to the Central Government or State Government or to a local authority at a relevant date...”.

1.19 Moreover, the overarching intention of the Code to prioritize debts owed to unsecured financial creditors was sufficiently clear from the Preamble to the Code. In this regard, the Report of the BLRC Volume 1 (2015) (“BLRC Report”) states as follows:<sup>19</sup>

*“The Committee has recommended to keep the right of the Central and State Government in the distribution waterfall in liquidation at a priority below the unsecured financial creditors in addition to all kinds of secured creditors for promoting the availability of credit and developing a market for unsecured financing (including the development of bond markets). In the long run, this would increase the availability of finance, reduce the cost of capital, promote entrepreneurship and lead to faster economic growth. The government also will be the beneficiary of this process as economic growth will increase revenues. Further, efficiency enhancement and consequent greater value capture through the proposed insolvency regime will bring in additional gains to both the economy and the exchequer”.*

1.20 **The Committee after due deliberation, unanimously agreed that regulatory dues need not be included in the definition of "operation debt".**

1.21 The Committee also deliberated on the need to replace the word ‘repayment’ with the word ‘payment’ in the definition of operational debt under section 5(21) of the Code. The word ‘payment’ is a wider term which means “performance of an obligation by the delivery of money or some other valuable thing accepted in partial or full discharge of the obligation”.<sup>20</sup> The term ‘repay’ means “to pay back” or “refund” and the term ‘repayment’ means “the act of repaying”.<sup>21</sup>

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<sup>19</sup>The BLRC Report, (November 2015), Summary, available at <[http://ibbi.gov.in/BLRCReportVol1\\_04112015.pdf](http://ibbi.gov.in/BLRCReportVol1_04112015.pdf)>, accessed 22 February, 2018.

<sup>20</sup> *Black’s Law Dictionary*, (8<sup>th</sup> edn, 2004), p. 3576.

<sup>21</sup> *Advanced Law Lexicon*, (4<sup>th</sup> edn, 2013), p. 4175.



- 1.22 The Committee decided that since the term ‘repayment’ under section 5(21) of the Code may not be suitably construed to include ‘payment’ of taxes or cesses or such other dues arising under any law for the time being in force, it must be replaced with the term ‘payment’ which has a wider and more relevant import. Other sections of the Code such as section 3(12), section 8(2)(b), explanation to section 8, section 9(5)(i)(b), section 9(5)(ii)(b), section 30(2)(a), section 30(2)(b), marginal heading of section 76 and section 76(a) of the Code where the words “repayment”, “repay” or “repaid” have been used, may also be suitably amended. Also, the Form 3 (Form of demand notice) and Form 4 (Form of Notice with which invoice demanding payment is to be attached) under the CIRP Rules may be amended appropriately.

### *Related party*

- 1.23 It was stated to the Committee that at present, several financial creditors such as banks and ARCs fall within the ambit of the definition of ‘related party’ in relation to the corporate debtor as defined in section 5(24) of the Code. As a result, such creditors are debarred from participating, being represented or voting in any meeting of the CoC in accordance with the proviso to section 21(2) of the Code.
- 1.24 The Committee was apprised of cases wherein a financial creditor holding a large portion of financial debt in the corporate debtor was excluded from the CoC on account of equity or preference shares of the corporate debtor held by it pursuant to a previous debt restructuring.<sup>22</sup> Such financial creditors are presently covered within the ambit of related party in terms of clause (j) of section 5(24) of the Code and consequently debarred from the CoC in accordance with the proviso to section 21(2) of the Code. The Committee noted that various debt restructuring schemes had been introduced by the RBI in the past such as the strategic debt restructuring scheme and scheme for sustainable structuring of stressed assets which enabled financial creditors such as banks to convert part of their debt into equity in the borrower. Such schemes were introduced in order to strengthen the lenders’ ability to deal with stressed assets and to put real assets back on track by providing an avenue for reworking the financial structure of entities facing genuine difficulties.<sup>23</sup> Therefore, it would be unfair to deny such pure play financial creditors representation or voting rights in the CoC formed under

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<sup>22</sup> *SREI Infrastructure Finance Limited v. Canara Bank*, NCLT, Hyderabad, Company Appeal (AT) (Insolvency) No. 153/2017, Date of decision - 16 November, 2017.

<sup>23</sup> RBI Press Release, (13 June, 2016), [https://www.rbi.org.in/scripts/BS\\_PressReleaseDisplay.aspx?prid=37210](https://www.rbi.org.in/scripts/BS_PressReleaseDisplay.aspx?prid=37210), accessed 27 February, 2018.

the Code on account of equity held by them pursuant to debt restructuring schemes implemented in the past. The Committee was also informed that the Indian Accounting Standard (Ind AS) 24 which governs related party disclosures in financial statements of certain entities also provides a carve out for providers of finance.<sup>24</sup> **Accordingly, it was felt that it must be clarified in section 21(2) that notwithstanding anything contained in section 5(24), financial creditors which are regulated by financial sector regulators and who become related parties solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares, prior to the insolvency commencement date, shall not be considered related parties for the prohibition in the proviso to section 21(2) of the Code.**

1.25 Conversely to the above, a recent case under the Code was cited to the Committee to demonstrate how promoters of a corporate debtor are indirectly gaining control of the CoC by arranging for the debt of the corporate debtor to be assigned to them.<sup>25</sup> Allegedly, such promoters sabotage the CoC and pass resolution plans that entail a massive haircut to the creditors. **It was suggested to the Committee that creditors who have acquired debt by any assignment of debt within a year prior to commencement of insolvency should be excluded from the CoC. However, the Committee felt that given the limited experience of interpretation of provisions of the Code by practitioners as well as adjudicating authorities, the protection in section 21(2) whereby any related party to whom the corporate debtor owes a financial debt is excluded from the CoC is sufficient to ensure that the CoC is not sabotaged by the promoters and other related parties of the corporate debtor.**

1.26 It was stated to the Committee that certain provisions of the Code used the term 'related party' in a wider context and not just in the context of the corporate debtor. For example, section 28(1) which mandates approval of the CoC for certain transactions undertaken by the IRP/RP during CIRP requires approval for any related party transaction in terms of clause (f). Similarly, the explanation to clause (j) of section 29A which defines 'connected persons' in the context of eligibility of a resolution applicant uses the term 'related party' in the context of entities over and above the corporate

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<sup>24</sup> Indian Accounting Standard (Ind AS) 24, Related Party Disclosures, paragraph 11(c)(i), <<http://mca.gov.in/Ministry/pdf/INDAS24.pdf>>, accessed 27 February, 2018.

<sup>25</sup> Veena Mani and Ishan Bakshi, 'The curious case of Synergies Dooray & its implications on insolvency code' (Business Standard, 20 September, 2017), <[http://www.business-standard.com/article/companies/flaws-in-the-insolvency-code-117091900999\\_1.html](http://www.business-standard.com/article/companies/flaws-in-the-insolvency-code-117091900999_1.html)>, accessed on 20 February, 2018.



debtor.<sup>26</sup> The Committee felt that in all such cases, the term related party would organically be interpreted as per the definition of the term 'related party' in section 2(76) of the CA 2013. This interpretation was in line with section 3(37) of the Code which states that all terms that are not defined in the Code but defined in other statutes stated therein including the CA 2013 shall have the meanings respectively assigned to them in those Acts.

1.27 With respect to persons considered as related party in the context of an individual, the Committee noted that the Code does not expressly define the same. The Committee observed that the term related party was generally used in the context of a corporate debtor or other company under the Code. However, sections 28 and 29A of the Code and regulation 33 of the Liquidation Regulations use the term 'related party' in a manner which may also include related party in the context of individuals such as a promoters or directors or the liquidator. **Accordingly, the Committee felt that the term related party in relation to an individual must be defined in the Code.**

## 2. INSOLVENCY RESOLUTION BY OPERATIONAL CREDITOR

2.1 As per section 8 of the Code, an operational creditor is required to deliver a demand notice on occurrence of a default. Within ten days from the receipt of the demand notice, the corporate debtor shall bring to the notice of the operational creditor the *“existence of a dispute, if any, and record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute”* (emphasis supplied). In this regard, the decision of the Hon'ble Supreme Court in *Mobilox Innovations Private Limited v. Kirusa Software Private Limited*<sup>27</sup> clarifies that the dispute must be existing prior to the receipt of the notice and can be in a form other than a pending suit or arbitration proceeding. The rationale given by the court is that it couldn't have been the intent of the legislature that a dispute be only in the form of a pending suit or arbitration proceeding, and the relevant paragraph is extracted below:

*“We have also seen the notes on clauses annexed to the Insolvency and Bankruptcy Bill of 2015, in which “the existence of a dispute” alone is mentioned. Even otherwise, the word “and” occurring in Section 8(2)(a) must be read as “or” keeping in mind the legislative intent and the fact that an anomalous situation would arise if it is not read as “or”. If read as “and”, disputes would only stave off the bankruptcy process if they are already pending in a suit or arbitration proceedings and not otherwise. This would lead to great hardship; in that a*

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<sup>26</sup> Regulation 38(3) of the CIRP Regulations also contains a similar provision as section 29A of the Code in relation to Mandatory Contents of the Resolution Plan.

<sup>27</sup> Civil Appeal No. 9405 of 2017, Supreme Court of India.

*dispute may arise a few days before triggering of the insolvency process, in which case, though a dispute may exist, there is no time to approach either an arbitral tribunal or a court. Further, given the fact that long limitation periods are allowed, where disputes may arise and do not reach an arbitral tribunal or a court for upto three years, such persons would be outside the purview of Section 8(2) leading to bankruptcy proceedings commencing against them. Such an anomaly cannot possibly have been intended by the legislature nor has it so been intended."*

**2.2 Further, the definition of the term 'dispute' in section 5(6) is an inclusive, and not an exhaustive definition. Thus, it was decided to amend section 8(2)(a) to replace 'and' with 'or', to be in line with the judgement of the Hon'ble Supreme Court discussed above, and the intent of the legislature.**

### **3. REQUIREMENT FOR OPERATIONAL CREDITORS TO SUBMIT A CERTIFICATE FROM FINANCIAL INSTITUTIONS**

3.1 Section 9(3)(c) of the Code provides that an operational creditor shall, along with the application, provide a certificate from a financial institution maintaining the accounts of the operational creditor, confirming that no payment of an operational debt has been received from the corporate debtor. The Committee was apprised of the several problems that have emerged from this requirement which may hinder filing of applications by operational creditors. First, the definition of 'financial institution' under section 3(14) does not include foreign banks and non-scheduled banks, thus creating a void for filing of applications by creditors with bank accounts in foreign or non-scheduled banks.<sup>28</sup> Second, the process of availing such certification may be cumbersome if the creditor has multiple bank accounts, and a certificate from only a few of her bank accounts may not sufficiently prove non-payment of the debt. Third, banks presently do not have a format for providing such certification which may lead to denial of such certification by banks.<sup>29</sup> Last and most important, the certificate is not a conclusive proof of the *relevant* operational debt having been satisfied, as the financial institution may not have the details to map whether the entry in their records is in relation to the payment of the particular debt in question.

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<sup>28</sup> *Macquarie Bank Limited v. Shilpi Cable Technologies Ltd.* 2017 (14) SCALE 509.

<sup>29</sup> Rajesh Panayanthatta, 'Issuance of Certificate by Banks u/s Sec.9 of I&B Code, 2016, An extra impossible task thrust upon banks', (Livelaw, August, 2017), <<http://www.livelaw.in/issuance-certificate-banks-us-sec-9-ib-code-2016-extra-impossible-task-thrust-upon-banks/>>, accessed 23 February, 2018.

3.2 The Hon'ble Supreme Court in *Macquarie Bank Limited v. Shilpi Cable Technologies Ltd.*<sup>30</sup> held that section 9(3)(c) of the Code is an optional requirement and an alternate understanding would make it discriminatory. It was further noted that if it were to be a mandatory requirement, many classes of operational creditors would be barred from being able to apply under the Code which may be violative of Article 14 of the Constitution of India. Through this, the Hon'ble Supreme Court has overruled various other decisions by National Company Law Appellate Tribunal ("NCLAT") such as *Smart Timing Steel Ltd. v. National Steel and Agro Industries Ltd.*<sup>31</sup> and *DF Deutsche Forfait AG v. Uttam Galva Metallics Limited*<sup>32</sup>. It may also be noted that such a condition precedent of providing certification as mentioned in section 9(3)(c) was not envisaged in the BLRC Report.

3.3 Additionally, section 76 of the Code punishes an operational creditor who conceals information in relation to existence of dispute or payment by corporate debtor with imprisonment for one to five years. This may be enough to deter frivolous applications by operational creditors.

3.4 The Committee also deliberated on the other forms of evidence for non-payment of the default amount, such as banker's book evidence and certificate from a chartered accountant. However, these evidences also suffer from the infirmity of the evidencing authority not having details to map whether the entry in their records is in relation to the payment of the particular debt in question. An IU may serve the purpose, and thus, was recommended as a form of proof. However, this form of proof would be subject to availability of IUs owing to the developing regime of IUs. Further, it was decided that the power to notify other forms of evidence should lie with the Central Government, as the evidence is at the stage of filing of an application.

**3.5 In light of the above, the Committee was of the view that the requirement provided in section 9(3)(c) be made optional and other means of proving non-payment of operational debt by corporate debtor, like records with IUs or any other such proof as may be notified by the Central Government, may be provided for.**

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<sup>30</sup> *Macquarie*, (n. 28).

<sup>31</sup> (2017) 204 CompCas 503.

<sup>32</sup> NCLAT Delhi, Company Appeal (AT) No. 266/2017, Date of decision – 30 November, 2017.

#### 4. INITIATION OF CIRP BY THE CORPORATE APPLICANT

4.1 A corporate applicant may file an application with the NCLT to initiate a CIRP against the corporate debtor as per section 10 of the Code. Section 5(5) of the Code defines a 'corporate applicant' as either (a) a corporate debtor; (b) a member or partner of the corporate debtor authorised to make the application under constitutional document of the corporate debtor; (c) an individual in charge of managing operations and resources of the corporate debtor; or (d) a person who has control and supervision over financial affairs of the corporate debtor.

4.2 Form 6 of the CIRP Rules provides that if the application is made by category (c) or (d) within the definition of 'corporate applicant', the authorisation documents may be the relevant extract of an '*employment agreement, constitutional document or filings made to the Registrar of Companies*'. No requirement of approval by shareholders or partners has been provided for any corporate applicant in either the provisions of the Code or in the subordinate legislation.

4.3 On a review of certain cases, it appears that many applications filed on behalf of the corporate debtor under the Code are made without an underlying shareholder approval.<sup>33</sup> In practice, it appears that the Code deviates from the legal requirement under previous laws governing agreements and procedures of companies as it gives no power to shareholders of the company in determining the commencement of insolvency. For instance, under the CA 2013, various provisions which were operational prior to enactment of the Code required actions like approval of amalgamation by the company (other than the sick company in a scheme for revival and rehabilitation),<sup>34</sup> winding up of the company,<sup>35</sup> approval of arrangement by liquidator,<sup>36</sup> etc. to be approved by a special resolution.<sup>37</sup> Even in other countries, if an application for a process related to insolvency laws is filed by the company, a resolution from its board

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<sup>33</sup> For instance, in the matter of *Hind Motors Mohali Pvt. Ltd.*, NCLT Chandigarh, Company Petition (IB) No.03/2017, Date of decision – 20 February, 2017; *Diamond Power Transformers Limited v. Indian Overseas Bank*, NCLT Ahmedabad, Company Petition (IB) No. 28/2017, Date of decision: 06 June, 2017. (Both used resolution passed by the board of directors).

<sup>34</sup> Section 262(2), Companies Act, 2013.

<sup>35</sup> Section 271(1)(a), Companies Act, 2013.

<sup>36</sup> Section 319, Companies Act, 2013.

<sup>37</sup> Special resolution means approval by at least three-fourths in number of the members of a company who are entitled to vote. ordinary resolution (in terms of insolvency procedures) has only been provided for winding up a company as a result of the expiry of the period for its duration, if any, fixed by its articles or on the occurrence of any event in respect of which the articles provide that the company should be dissolved under section 304 of the Companies Act, 2013.

of directors or shareholders is mandated. For example, in Singapore, an order for judicial management may be availed by a company on a resolution from either its board of directors or its members<sup>38</sup> and similarly the company's members may pass a resolution to wind-up the company<sup>39</sup>.

4.4 Similarly, under the Limited Liability Partnership Act, 2008 (“LLP Act”), decisions within a Limited Liability Partnership (“LLP”) are required to be taken by a resolution of majority in number of partners, and decisions regarding change in the number of partners shall be taken by approval of all partners.<sup>40</sup> According to the LLP (Winding-Up and Dissolution) Rules, 2012 (“LLP Rules”), a resolution passed by at least three-fourths of the total number of partners is required for, initiating voluntary winding up,<sup>41</sup> providing declaration of solvency,<sup>42</sup> approving transfer of assets during winding up,<sup>43</sup> and allowing arrangement with creditors during winding up<sup>44</sup>.

4.5 The Committee noted that a requirement for approval by shareholders or partners of the corporate debtor which is a company or an LLP, as the case may be, may be essential as CIRP is a significant event for a corporate debtor which may also lead to its liquidation.

4.6 **The Committee felt that the shareholders or partners, as the case may be, must be given the power to approve initiation of CIRP by a corporate applicant and a provision mandating approval by them may be inserted. Since commencement of CIRP is a major decision for the corporate debtor and may have a huge impact on its functioning or even lead to its liquidation, a special resolution or a resolution passed by at least three-fourth of the total number of partners of the corporate debtor, as the case may be, may be provided in this regard. Thus, the Committee recommended that section 10 of the Code may be suitably amended to provide for the requirement to obtain an approval of shareholders by special resolution or an approval of at least three-fourth of the total number of partners, as the case may be, as a precondition for filing for CIRP.**

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<sup>38</sup> Section 227B Companies Act, 2006.

<sup>39</sup> Section 255 Companies Act, 2006.

<sup>40</sup> Schedule 1, LLP Act. Additionally, voting by value has only been provided for approval of scheme of arrangement or compromise under section 60 of the LLP Act.

<sup>41</sup> Rule 5, LLP Rules.

<sup>42</sup> Rule 7, LLP Rules.

<sup>43</sup> Rule 20, LLP Rules.

<sup>44</sup> Rule 22, LLP Rules.

4.7 One of the grounds for admission or rejection of a CIRP application filed by a financial or operational creditor is the absence or presence of pending disciplinary proceeding against the proposed resolution professional.<sup>45</sup> A similar ground is not mentioned in respect of an application filed by a corporate applicant in section 10. **This appears to be a drafting error and the Committee agreed that the same is required to be corrected.**

4.8 Further, rule 7 of the CIRP Rules requires that an application by a corporate applicant be made as per the format in Form 6 of the CIRP Rules along with relevant documents and prescribed fees. Currently, there is no requirement for the corporate applicant to intimate or serve a notice in relation to the filing of an application for, or for commencement of CIRP, to its shareholders, creditors or any regulators. Since the Committee has recommended a shareholder approval to be taken for filing an application for CIRP by the corporate applicant, to this extent, shareholders will be aware of this action. Representations were received by the Committee that the Code must mandate the corporate applicant to intimate all stakeholders, especially its shareholders and financial creditors regarding filing of CIRP by itself, and commencement of CIRP.

4.9 The Committee noted that the issue of intimation to relevant stakeholders is crucial since the public announcement is made within three days after the appointment of the IRP, which may take upto fourteen days from the date of admission, but the moratorium commences from the admission date.<sup>46</sup> Thus, there lies an information asymmetry between the shareholders and other classes of stakeholders such as creditors who have no information of the fact that the corporate applicant is in CIRP under the Code.

4.10 In this regard, the Committee noted the view highlighted by the BLRC Report that the Code assumes that an insolvency application is a matter of last resort, after the corporate applicant has had negotiations with its creditors. Also, by corollary, such view assumes that majority of creditors would be aware of the financial position of the corporate applicant.<sup>47</sup>

4.11 However, in order to avoid information asymmetry, it was felt that all stakeholders, including financial creditors and operational creditors of the corporate applicant must be informed if the corporate applicant files an application to initiate CIRP under section 10 of the Code, or if a CIRP has

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<sup>45</sup> Section 7(5) and section 8(5) of the Code.

<sup>46</sup> Section 16 of the Code read with regulation 6(1) of the CIRP Regulations.

<sup>47</sup>The BLRC Report, Paragraph 5.2.2, (n.19).



commenced. At the same time, it was noted that such obligation to provide an intimation should not be burdensome on the corporate applicant who is presumably struggling to arrive at resolution. Further, while an intimation may be provided, it must be understood that such intimation shall not amount to or be a basis of, an intervention to the CIRP. Also, since the NCLT is a summary court, it does not have inherent powers, in so far as the adjudication under the Code is concerned to entertain any third-party intervention to the CIRP.<sup>48</sup>

**4.12 Accordingly, the Committee agreed that the notification of the initiation of CIRP by a corporate applicant by way of an application under section 10 of the Code, must be made to all stakeholders by placing a notice on its official website or on the website designated by the IBBI for this purpose, or by using other electronic means. Further, the notice of commencement of the CIRP shall be made by placing a notice on its official website or on the website designated by the IBBI for this purpose. The Committee noted that suitable amendments to rule 7 of the CIRP Rules and regulation 6 of the CIRP Regulations shall be required to facilitate the above.**

## **5. MORATORIUM UNDER SECTION 14**

### *Scope of the moratorium*

5.1 Section 14 of the Code provides for a moratorium from the insolvency commencement date on *inter alia* “the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority”. The scope of the moratorium is broader than the moratorium in the repealed Sick Industrial Companies (Special Provisions) Act, 1986 (“SICA”) in two ways: first, under SICA, the actions barred could be instituted or continued with the consent of the Board for Industrial and Financial Reconstruction, and second, the language used in section 22 of SICA clarified that proceedings which affected the assets of the company or for recovery of money, etc. were barred. Thus, courts<sup>49</sup> had interpreted that criminal proceedings could continue as determination of liability and payment of legally enforceable dues was not barred. On a plain reading, section 14 is wider in its ambit as firstly, any suit or proceedings cannot be instituted or continued with the consent of the NCLT, and second, the bar on “the institution of suits or continuation of pending suits or

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<sup>48</sup> *Lokhandwala Kataria Construction Pvt. Ltd. v. Ninus Finance & Investment Manager LLP*, Civil Appeal No. 9279 of 2017, Supreme Court of India.

<sup>49</sup> *Kusum Ingots & Alloys Limited v. Pennar Peterson Securities Limited and Others* AIR 200 SC 594; *BSI Limited and Another v Gift Holdings Private Limited and Another* AIR 2000 SC 926.

*proceedings against the corporate debtor*” is on first blush, not linked to the assets of the corporate debtor.

5.2 The notes on clauses for section 14, read as follows (emphasis supplied): “*the purposes of the moratorium include keeping the corporate debtor's assets together during the insolvency resolution process and facilitating orderly completion of the processes envisaged during the insolvency resolution process and ensuring that the company may continue as a going concern while the creditors take a view on resolution of default*” and “*the moratorium on initiation and continuation of legal proceedings, including debt enforcement action ensures a stand-still period during which creditors cannot resort to individual enforcement action which may frustrate the object of the corporate insolvency resolution process.*” Thus, the intent does not appear to be to debar only those suits or proceedings which affect the assets of the corporate debtor, as these appear to be only one of the components that is barred.

5.3 Having said that, it is well understood that a proceeding to assess or determine liability, and a proceeding to recover the assessed or determined liability stand at a different footing. The realisation of the dues is a consequence to the determination of liability. Such an amount determined by any court or authority during the moratorium period may not form part of the insolvency resolution process, as the claims by a IRP/RP are verified as “on the insolvency commencement date”<sup>50</sup>. However, for such claims to be filed in liquidation, they should stand determined as on the liquidation commencement date. As per section 33(5) of the Code, in liquidation, no suit or other legal proceedings shall be instituted by or against the corporate debtor without the prior approval of the NCLT. Thus, it appears that suits or proceedings which were barred from being continued under CIRP can be re-started. However, since the claims in liquidation are determined as on the liquidation commencement date, the wider moratorium under section 33(5) may not be useful for a claim which could not be assessed due to the moratorium under CIRP.

5.4 Thus, if a purposive interpretation is given to section 14, a moratorium on the mere determination of the amount (and not its enforcement) may not have been the intent of the Code. **However, the same was deliberated in the Committee and in light of absence of concrete empirical evidence of any hardship being faced by any authority or court in this regard, the Committee agreed that it may not be prudent to provide explicit carve-outs from section 14 without on-ground evidence, at this stage.** The power of the Central Government under section 14(3) to notify transactions which may be exempt from the

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<sup>50</sup> Regulation 13(1), CIRP Regulations.



moratorium may be explored to address this issue on the basis of demonstrated hardship in the future.

*Moratorium on proceedings against surety to corporate debtor*

5.5 Section 14 provides for a moratorium or a stay on institution or continuation of proceedings, suits, etc. against the corporate debtor and its assets. There have been contradicting views on the scope of moratorium regarding its application to third parties affected by the debt of the corporate debtor, like guarantors or sureties. While some courts have taken the view that section 14 may be interpreted literally to mean that it only restricts actions against the assets of the corporate debtor, a few others have taken an interpretation that the stay applies on enforcement of guarantee as well, if a CIRP is going on against the corporate debtor.

5.6 In *Alpha and Omega Diagnostics (India) Ltd. v. Asset Reconstruction Company of India*<sup>51</sup>, the personal properties of the promoters were given as security to the banks. The issue was whether properties that are not owned by the corporate debtor would come within the scope of moratorium under section 14 of the Code. The NCLAT held that section 14 only applies to assets of the corporate debtor and would not bar proceedings or actions against assets of third parties. A literal interpretation of section 14 was undertaken, and it was noted that the word “its” in section 14(1)(b) and (c) is used in relation to the corporate debtor only. A similar issue came up in *Schweitzer Systemtek India Private Limited v. Phoenix ARC Private Limited*<sup>52</sup>, and following its previous decision, the NCLAT noted that moratorium in Section 14 has no application on the properties beyond the ownership of the corporate debtor. It held as under:

*“The outcome of this discussion is that the Moratorium shall prohibit the action against the properties reflected in the Balance Sheet of the Corporate Debtor. The Moratorium has no application on the properties beyond the ownership of the Corporate Debtor. As a result, the Order of the Hon’ble Court directing the Court Commissioner to take over the possession shall not fall within the clutches of Moratorium... Before I part with it is necessary to clarify my humble view that The SARFAESI Act may come within the ambits of Moratorium if an action is to foreclose or to recover or to create any interest in respect of the property belonged to or owned by a Corporate Debtor, otherwise not.”*  
(emphasis supplied)

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<sup>51</sup> NCLAT, New Delhi, Company Appeal (AT) (Insolvency) No. 116/2017, Date of decision – 31 July, 2017.

<sup>52</sup> NCLAT, New Delhi, Company Appeal (AT) (Insolvency) No. 129/2017, Date of decision – 09 August, 2017.

5.7 The Allahabad High Court subsequently took a differing view in *Sanjeev Shriya v. State Bank of India*<sup>53</sup> by applying moratorium to enforcement of guarantee against personal guarantor to the debt. The rationale being that if a CIRP is going on against the corporate debtor, then the debt owed by the corporate debtor is not final till the resolution plan is approved, and thus the liability of the surety would also be unclear. The Court took the view that until debt of the corporate debtor is crystallised, the guarantor's liability may not be triggered. The Committee deliberated and noted that this would mean that surety's liabilities are put on hold if a CIRP is going on against the corporate debtor, and such an interpretation may lead to the contracts of guarantee being infructuous, and not serving the purpose for which they have been entered into.

5.8 In *State Bank of India v. V. Ramakrishnan and Veeson Energy Systems*<sup>54</sup>, the NCLAT took a broad interpretation of section 14 and held that it would bar proceedings or actions against sureties. While doing so, it did not refer to any of the above judgments but instead held that proceedings against guarantors would affect the CIRP and may thus be barred by moratorium. The Committee felt that such a broad interpretation of the moratorium may curtail significant rights of the creditor which are intrinsic to a contract of guarantee.

5.9 A contract of guarantee is between the creditor, the principal debtor and the surety, where under the creditor has a remedy in relation to his debt against both the principal debtor and the surety<sup>55</sup>. The surety here may be a corporate or a natural person and the liability of such person goes as far the liability of the principal debtor. As per section 128 of the Indian Contract Act, 1872, the liability of the surety is co-extensive with that of the principal debtor and the creditor may go against either the principal debtor, or the surety, or both, in no particular sequence<sup>56</sup>. Though this may be limited by the terms of the contract of guarantee, the general principle of such contracts is that the liability of the principal debtor and the surety is co-extensive and is joint and several<sup>57</sup>. The Committee noted that this characteristic of such contracts i.e. of having remedy against both the surety and the corporate debtor, without the obligation to exhaust the remedy against one of the parties before proceeding against the other, is of utmost important for the creditor and is the hallmark of a guarantee

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<sup>53</sup> 2017 (9) ADJ 723.

<sup>54</sup> NCLAT, New Delhi, Company Appeal (AT) (Insolvency) No. 213/2017, Date of decision – 28 February, 2018.

<sup>55</sup> *National Project Construction Corporation Limited v. Sandhu and Co.*, AIR 1990 P&H 300.

<sup>56</sup> *Chokalinga Chettiar v. Dandayunthapani Chattiar*, AIR 1928 Mad 1262.

<sup>57</sup> *Bank of Bihar v. Damodar Prasad*, AIR 1969 SC 297.

contract, and the availability of such remedy is in most cases the basis on which the loan may have been extended.

5.10 The Committee further noted that a literal interpretation of Section 14 is prudent, and a broader interpretation may not be necessary in the above context. The assets of the surety are separate from those of the corporate debtor, and proceedings against the corporate debtor may not be seriously impacted by the actions against assets of third parties like sureties. Additionally, enforcement of guarantee may not have a significant impact on the debt of the corporate debtor as the right of the creditor against the principal debtor is merely shifted to the surety, to the extent of payment by the surety<sup>58</sup>. Thus, contractual principles of guarantee require being respected even during a moratorium and an alternate interpretation may not have been the intention of the Code, as is clear from a plain reading of section 14.

5.11 Further, since many guarantees for loans of corporates are given by its promoters in the form of personal guarantees, if there is a stay on actions against their assets during a CIRP, such promoters (who are also corporate applicants) may file frivolous applications to merely take advantage of the stay and guard their assets. In the judgments analysed in this relation, many have been filed by the corporate applicant under section 10 of the Code<sup>59</sup> and this may corroborate the above apprehension of abuse of the moratorium provision. **The Committee concluded that section 14 does not intend to bar actions against assets of guarantors to the debts of the corporate debtor and recommended that an explanation to clarify this may be inserted in section 14 of the Code. The scope of the moratorium may be restricted to the assets of the corporate debtor only.**

#### *Exemption from moratorium*

5.12 Under section 14(3) of the Code, the Central Government in consultation with any financial sector regulator can notify transactions to which the moratorium may not apply. SEBI highlighted that transactions in respect of monies held separately for the purpose of any transaction carried out on the exchange and required to be settled on the clearing corporation may be excluded. Under section 23 of the Payment and Settlement Systems Act, 2007, it is clear that a

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<sup>58</sup> Section 140, The Indian Contract Act, 1872.

<sup>59</sup> *Alpha and Omega Diagnostics (India) Ltd. v. Asset Reconstruction Company of India*, NCLAT New Delhi, Company Appeal (AT) (Insolvency) No. 116/2017, Date of decision – 31 July, 2017; *Schweitzer Systemtek India Private Limited v. Phoenix ARC Private Limited*, NCLAT, New Delhi, Company Appeal (AT) (Insolvency) No. 129/2017, Date of decision – 09 August, 2017; *State Bank of India v. V. Ramakrishnan and Veeson Energy Systems*, NCLAT, New Delhi, Company Appeal (AT) (Insolvency) No. 213/2017, Date of decision – 28 February, 2018.

settlement completed as per the procedure under the said act is final and irrevocable. **Thus, the Committee unanimously agreed that monies held separately for the purpose of any transaction carried out on the exchange and required to be settled on the clearing corporation shall be excluded from the ambit of the moratorium under section 14, and a requisite notification in this regard shall be issued by the Central Government.**

5.13 On the other hand, with respect to trading of securities, **the Committee was clear that suspension or prohibition of trading of securities is a power utilised by the SEBI and stock exchanges. Thus, the intent of the Code was not to suspend or prohibit such trading during CIRP, and such trading may in fact result in better price discovery and continuation of the entity as a going concern.** Further, under section 28, the Committee deliberated that it is clear that suspension or prohibition of trading of securities is not contemplated to be a power residing with the CoC. Thus, it was decided that an explicit amendment is not required at this stage.

*Supply of essential goods and services*

5.14 Section 14(2) of the Code requires the continuation of supply of essential goods or services to the corporate debtor during the moratorium period. section 30(2)(a) read with regulation 31(a) and regulation 38(1)(a) makes it clear that dues to suppliers for essential goods and services supplied during the moratorium period are a part of the IRP costs and are required to be paid back in priority to any other creditor as a part of the resolution plan.

5.15 It was deliberated by the Committee that the ambit of the definition of “essential goods and services” in regulation 32 is limited to supplies which are essential for any corporate debtor, irrespective of the business it is carrying on. Thus, the Committee was of the view that for determining goods and services essential for a particular business, there should be some flexibility in the Code. **The Committee decided that this flexibility may be infused by adding a proviso to section 14(2), which states that for continuation of supply of essential goods or services other than as specified by IBBI, the IRP/ RP shall make an application to the NCLT and the NCLT will make a decision in this respect based on the facts and circumstances of each case.**

## 6. LAST DATE FOR SUBMISSION OF CLAIMS

6.1 As per section 15(1)(c) of the Code, the public announcement is required to contain the last date for the submission of claims. However, regulation 6(2)(c) provides that the last date for submission of proof of claims is fourteen days from the date of appointment of the IRP, and regulation 12(2) provides additional time till the approval of the plan. Since the nuances regarding submission of claims, constitution of the CoC, verification of claims, etc. are captured in the CIRP Regulations, **the Committee deemed it fit to explicitly provide in the Code that the IBBI has the power to specify the last date for submission of claims, to provide for further flexibility in streamlining the timelines within the CIRP in relation to submission of claims.**

## 7. TENURE OF THE IRP

7.1 As per section 16(5) of the Code, the term of the IRP shall not exceed thirty days from the date of his appointment and section 22(1) requires the first meeting to be held within seven days of the constitution of CoC, where the RP for the CIRP is appointed. However, regulation 17(1) of CIRP Regulations states that the IRP is required to file a report certifying the constitution of CoC on or before the expiry of thirty days from the date of his appointment. Sub-regulation (2) requires a meeting of the CoC to be convened within seven days of filing the report. **This had led to an anomaly whereby the term of the IRP ends on the thirtieth day from the date of his appointment and the meeting may not be called till the thirty-seventh day, leading to a period during the CIRP where a professional is absent. The Committee sought it fit to address this through amendment of section 16(5) to define the term of the IRP to be until the appointment of the RP.**

## 8. RESPONSIBILITY OF STATUTORY COMPLIANCES AT VARIOUS STAGES OF CIRP

8.1 The provisions of the Code entrust the responsibility of managing the affairs of the corporate debtor as a going concern on the IRP and the RP.<sup>60</sup> This involves meeting various statutory compliance requirements for which the management of the corporate debtor was responsible prior to commencement of the CIRP such as filing of financial statements<sup>61</sup>, maintaining board's reports<sup>62</sup>, appointment of auditor<sup>63</sup>, etc. It may also involve informing the Registrar of Companies that a corporate debtor is going through a CIRP. The phrase "*as a*

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<sup>60</sup> Sections 17, 20 and 23, Code.

<sup>61</sup> Section 137, Companies Act, 2013.

<sup>62</sup> Section 137, Companies Act, 2013.

<sup>63</sup> Section 139, Companies Act, 2013.

*going concern*” imply that the corporate debtor would be functional as it would have been prior to initiation of CIRP, other than the restrictions put by the Code.

8.2 After approval of the resolution plan, the management of the corporate debtor would be as per the terms of the resolution plan. Usually, the RP will be responsible for the management of the corporate debtor till the new management takes over. According to section 30(2) of the Code, the implementation of the plan and management of the corporate debtor are mandatory contents of the resolution plan and will thus need to be provided for. It was discussed that there is a lack of clarity regarding the responsibility of compliances during and after CIRP since this has not been explicitly provided for in the Code and is relevant as it keeps the company running.

8.3 The Committee felt that the following clarifications may be made in the Code: first, that the IRP/RP will be responsible for the statutory compliances while managing the affairs of the corporate debtor during CIRP. Second, specific power may be given to the NCLT to give directions regarding implementation of the resolution plan while approving it to ensure that a proper implementation strategy has been included in the resolution plan, for example, a provision for management of the corporate debtor in various scenarios like on appeal of the resolution plan, or the event triggering transfer of management, etc. may be essential. Third, it was discussed that post approval of a resolution plan by the NCLT, the resolution applicant is required to execute the required documents and undertake any other formalities to commence implementation of the resolution plan. A period of thirty days was envisaged to be given, by which time the resolution applicant should complete the formalities, to be able to implement the resolution plan.

8.4 **The Committee agreed that the first clarification, discussed above, may be inserted in section 17 which relates to the management of affairs of corporate debtor by the IRP. Since the duties of the IRP are also the duties conferred on the RP once appointed,<sup>64</sup> an amendment to only section 17 may suffice. Further, the power to the NCLT may be given by adding a proviso to section 31(1), and the thirty-day timeline may be inserted in regulation 39 of the CIRP Regulations.** Further, a minor drafting error in the explanation to section 18 was noted and may be rectified appropriately.

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<sup>64</sup> Section 23(2), Code.



## 9. TRIGGER OF CIRP BY FINANCIAL CREDITORS

9.1 The Code defines a “financial creditor” to mean a *person to whom a financial debt is owed* and includes a person to whom debt has been legally assigned or transferred. The highlighted issue was whether a guardian, administrator, executor, or debenture trustee<sup>65</sup> of a financial creditor are permitted to file for insolvency of the corporate debtor under the Code.

9.2 In this regard, the following are important to note: first, section 60(5) of the Code clarifies the jurisdiction of the NCLT and states it to be able to entertain or dispose of *inter alia* any application or proceeding by or against the corporate debtor or corporate person. It may be noted that the jurisdiction of the NCLT is not restricted to deal with insolvency of corporate debtors only on application of the financial creditor, and not their authorised representatives. This is in contrast to the jurisprudence<sup>66</sup> in relation to section 17 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (“**RDDBI Act**”) which explicitly restricts the jurisdiction of the Debt Recovery Tribunal (“**DRT**”) to applications filed *by banks and institutions for debts due to such banks and institutions*, thus, diverting all applications filed by debenture trustees appointed by a company (prior to the amendment in 2016) to civil courts, as debt is not due to a debenture trustee.<sup>67</sup> Second, the particulars<sup>68</sup> of financial debt in the form to be filed by financial creditor under the CIRP Rules contains a column for disclosure of “*details of succession certificate, or probate of a will or letter of administration, or court decree under the Indian Succession Act, 1925*”, evidencing the intent to provide for an administrator or executor of a financial creditor to be able to trigger CIRP. Third, explanation to section 7(1) states that a financial creditor can initiate CIRP for a default owed to itself and also owed to any other financial creditor as well. Thus, the Code indicates the possibility of a trigger by a person (though a financial creditor) for a financial debt owed to someone else.

**9.3 Therefore, the Committee, on deliberating the distinct jurisprudence under RDDBI Act, and the intent of the Code, reached a consensus that the intent**

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<sup>65</sup> Alternate Investment Funds, Mutual Funds, Real Estate Investment trusts, Infrastructure Investment Trusts may file for CIRP through their trustee, asset management company, etc. Please refer to Payaswini Upadhyay, ‘Why are Mutual Funds marching to the National Company Law Tribunal’, (Bloomberg Quint, 09 June, 2017), <https://www.bloombergquint.com/business/2017/06/09/why-are-mutual-funds-marching-to-the-national-company-law-tribunal>, accessed 16 March, 2018.

<sup>66</sup> *ICICI Bank Limited v Unimers India Limited & Others*, (2016) 4 CompLJ 247(Bom).

<sup>67</sup> The legal position stands amended post the amendment in 2016, which added “debenture trustee registered with the Board and appointed for secured debt securities” to the definition of “financial institution”.

<sup>68</sup> Entry 4, Part V of Form 1, CIRP Rules.

of the Code was not to bar a guardian of a financial creditor, administrator or executor of estate of a financial creditor or debenture trustee and the like to trigger insolvency of a corporate debtor, and be a part of the CoC. Thus, it was agreed that an explicit amendment to the *definition* of financial creditor may not be required as the above-mentioned entities are not financial creditors *per se*, however, relevant amendments to the sections relating to CoC in the Code and CIRP Rules may be made such that the authorised representatives may be permitted to (i) file application on behalf of the financial creditor, and (ii) may attend and vote in the meetings to the extent of the voting share of the financial creditor and as per their instructions. Further, an enabling provision to notify other entities who may file an application on behalf of financial creditors may be provided for in the Code.

## 10. MANNER OF REPRESENTATION OF LARGE NUMBER OF CREDITORS IN THE CoC

10.1 Companies may have a large number of creditors to whom certain debts may be owed, for instance debenture holders or fixed deposit holders. Such creditors being financial creditors are entitled to attend and vote at the meetings of the CoC as per the current provisions of the Code. In practice, the number of such creditors may be huge in case of large companies and it may be inefficient, unmanageable and expensive to hold meetings of the CoC with all such creditors present. Under CA 2013, debenture trustees were considered to be creditors for the purposes of representation of the debenture holders in certain meetings during winding up which was operative prior to the enactment of the Code.<sup>69</sup> A plain reading of the Code suggests that only financial creditors i.e. persons to whom a financial debt *is owed* will be a part of the CoC. However, as discussed in the previous issue, a guardian of a financial creditor, administrator or executor of estate of a financial creditor or debenture trustee and the like can trigger insolvency of a corporate debtor and be a part of the CoC.

10.2 Further, on a perusal of section 21(6) of the Code, the Committee notes that it provides that creditors in respect of certain debts, like those extended as syndicate facilities, consortium arrangements, and issued as securities, may choose to be present in the meetings themselves or *appoint a single trustee, agent, or insolvency professional to act and vote on their behalf*. Thus, this provision allows for certain persons other than the financial creditors to be a part of the CoC for the purposes of representation and voting. It was noted by the Committee that

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<sup>69</sup> Section 272(1)(b), Companies Act, 2013.



this sub-section allows appointment of a representative for certain creditors but does not mandate it. Further, though the definition of 'security' is wide enough to include debts issued through instruments like debentures<sup>70</sup>, it may not allow all creditors who are not security holders but are beyond a certain number, as a class, to jointly appoint a representative to act and vote on their behalf. Thus, section 21(6) as it currently stands may not completely solve the problem of managing a large number of creditors in the CoC.

10.3 In large CoCs, compliance with the provisions of the Code and the CIRP Regulations could have various challenges:

- (a) Logistical challenges: While the Code aims at ensuring increased participation of all the members of the CoC in the decision-making process in the meetings, large CoCs pose significant logistical challenges. The first challenge is that notices have to be issued to a huge number of persons for the CoC meeting and arrangement has to be made for a venue which can accommodate them, which may be a huge logistical challenge and drain resources of the corporate debtor. In terms of the participation in the meeting, it is difficult to have a constructive decision-oriented discussion with a large number of participants with varying interests and too large a forum may significantly jeopardise the constructive discussion and decision-making ability of the CoC in such meetings. Further, if too many participants join in through audio or video conference, then it would be difficult to have a coherent discussion. Further, if the CoC comprises of a large number of creditors, then the likelihood of abstinence by individual financial creditors is very high, leading to disruption of decision making ability of the CoC. This defeats the very objective of creditor participation as envisaged under the Code.
- (b) Technical problems - In large CoCs, it may be a technical challenge to have a large number of voters registered on the e-voting portal and then to ensure that each one of them has access to it. It is often observed that due to technical glitches, some of the financial creditors are not able to exercise their right to vote on the e-voting portal and request for taking note of their vote through email.

10.4 In light of the logistical and technical difficulties in ensuring participation by all members of the CoC in large CoCs, the Committee deliberated on the need for a provision for representation of retail creditors, public depositors or any

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<sup>70</sup> Section 2(h), Securities Contract Regulation Act, 1956.

other individual financial creditors above a certain threshold in terms of number through an authorised representative. Such authorised representative may attend and vote on behalf of such financial creditors in the said meeting, express the concerns of the creditors being represented by it in the meeting, obtain clarity on issues and communicate any important concerns to the represented creditors. This shall further ensure *inter se* coordination among the creditors by having a common representative as well as effective participation in the meetings of the CoC. Participation by a single person representing many creditors is not only cost and time effective but also helps in smooth functioning of the meeting. However, suitable safeguards are necessary to ensure that the authorised representative protects the interests and acts in the best interest of the creditors that it represents.

10.5 It was discussed by the Committee that it may be prudent to mandate a representative to act and vote on behalf of such classes of creditors that exceed a certain *high number*, since an optional mechanism for representation may not guarantee efficiency in meetings. Instead of categorising creditors who will have such a mandated requirement on value of debt, categorisation based on number of creditors may be prudent since the problem is of a large number of creditors irrespective of their debt ratio to other creditors. It may be noted that since consortium and syndicate arrangements may not usually involve a large number of parties, the requirement of a representative may be kept optional for such creditors.

10.6 For certain securities, a trustee or an agent may already be appointed as per the terms of the security instrument. For example, a debenture trustee would be appointed if debentures exceeding 500 have been issued<sup>71</sup> or if secured debentures are issued<sup>72</sup>. Such creditors may be represented through such pre-appointed trustees or agents. For other classes of creditors which exceed a certain threshold in number, like home buyers or security holders for whom no trustee or agent has already been appointed under a debt instrument or otherwise, an insolvency professional (other than the IRP) shall be appointed by the NCLT on the request of the IRP. It is to be noted that as the agent or trustee or insolvency professional, i.e. the authorised representative for the creditors discussed above and executors, guarantors, etc. as discussed in paragraph 9 of this Report, shall be a part of the CoC, they cannot be related parties to the corporate debtor in line with the spirit of proviso to section 21(2).

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<sup>71</sup> Section 71(5), Companies Act, 2013.

<sup>72</sup> Rule 18(1)(c), Companies (Share Capital and Debenture) Rules, 2014.

10.7 Section 71(6) of the CA 2013 obliges the debenture trustee to take steps to protect the interests of the debenture holders and redress their grievances. The provisions regarding meetings of the debenture trustee and debenture holders is as per the trust deed.<sup>73</sup> The Companies (Acceptance of Deposit) Rules, 2014 (“**Deposit Rules**”) provide that the deposit trustee may call a meeting of the deposit holders as and when required<sup>74</sup> and provides specific power to call a meeting on the happening of any event of default<sup>75</sup>. Though broad powers are already given to trustees, the respective rules for debentures and deposits under CA 2013 may need to be modified corresponding to the amendments in the Code and CIRP Rules / CIRP Regulations to provide clarity on empowering debenture trustees to file for initiation of CIRP on behalf of the creditors and vote on their behalf.

10.8 **In light of the deliberation above, the Committee felt that a mechanism requires to be provided in the Code to mandate representation in meetings of security holders, deposit holders, and all other classes of financial creditors which exceed a certain number, through an authorised representative. This can be done by adding a new provision to section 21 of the Code. Such a representative may either be a trustee or an agent appointed under the terms of the debt agreement of such creditors, otherwise an insolvency professional may be appointed by the NCLT for each such class of financial creditors. Additionally, the representative shall act and attend the meetings on behalf of the respective class of financial creditors and shall vote on behalf of each of the financial creditor to the extent of the voting share of each such creditor, and as per their instructions. To ensure adequate representation by the authorised representative of the financial creditors, a specific provision laying down the rights and duties of such authorised representatives may be inserted. Further, the requisite threshold for the number of creditors and manner of voting may be specified by IBBI through regulations to enable efficient voting by the representative. Also, regulation 25 may also be amended to enable voting through electronic means such as e-mail, to address any technical issues which may arise due to a large number of creditors voting at the same time.**

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<sup>73</sup> Clause 6(d) of Form No. SH. 12 of The Companies (Share Capital and Debenture) Rules, 2014 read with section 71(13), Companies Act, 2013.

<sup>74</sup> Rule 8, Deposit Rules.

<sup>75</sup> Rule 9, Deposit Rules.

## 11. VOTING SHARE THRESHOLD FOR DECISIONS OF THE COC

11.1 Section 21(8) of the Code provides that all decisions of the CoC shall be taken by a vote of not less than 75 percent of the voting share of the financial creditors. Regulation 25(5) read with regulation 26 of the CIRP Regulations provides that if all members of the CoC are not present, an option to vote through electronic means must be provided.

11.2 It was represented to the Committee that the high threshold of 75 percent of voting share of financial creditors for decisions of the CoC was proving to be a road-block in the resolution process. Effectively, as a result of the high threshold, blocking the resolution plan and other decisions of the CoC, was easier than approving these.

11.3 The Committee considered the fact that, so far, various benches of the NCLT have passed liquidation orders in 30 cases.<sup>76</sup> Out of these 30 cases, only nine cases went into liquidation on account of rejection by the CoC. Further, only in one case, a liquidation order was passed owing to lack of consensus of 75 percent financial creditors for approval of the resolution plan.<sup>77</sup> In respect of the remaining eight cases, the plan was rejected by an overwhelming majority of voting share above 80 percent. Thus, empirical evidence suggests that the apprehension that companies are being put into liquidation by minority creditors is pre-mature. The Committee reiterated that the objective of the Code is to respect the commercial wisdom of the CoC.

11.4 The Committee noted the voting thresholds across other statutes and guidelines that deal/have dealt with rehabilitation of companies as follows:

- (a) Section 230(6) of the CA 2013 which deals with power to compromise or make arrangements with creditors and members provides that any compromise or arrangement must be approved by 75 percent in value of creditors or class of creditors or members or class of members, as the case maybe.
- (b) Section 262 of the CA 2013<sup>78</sup> provided for a scheme of rehabilitation which required approval by (i) secured creditors representing 75 percent in value of the debts owed by the company to such creditors; and (ii)

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<sup>76</sup> Based on the data available on the website of IBBI as on 23 January, 2018.

<sup>77</sup> *Mr. R. Venkatakrishnan v. Auro Mira Energy Co. Private Limited*, NCLT Chennai, CP/473(IB)/CB/2017, Date of decision – 01 January, 2018.

<sup>78</sup> Section 262, Companies Act, 2013 has been repealed *vide* the Code w.e.f. 15 November, 2016.

unsecured creditors representing 25 percent in value of the amount of debt owed to them. Further, in case of voluntary winding up, section 311 of the CA 2013 provided for replacement of the company liquidator by approval of 75 percent of creditors or 75 percent of members of the company.<sup>79</sup>

- (c) The Joint Lender's Forum ("JLF") framework formulated by the RBI (which has now been replaced) to enable creditors to identify and deal with stressed assets at an early stage prescribed a voting threshold of 60 percent (reduced from 75 percent) of creditors by value and 50 percent (reduced from 60 percent) of creditors by number in the JLF, for proceeding with the restructuring of the account.<sup>80</sup>
- (d) Section 13(9) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 provided that in the case of financing of a financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, no secured creditor would be entitled to exercise any or all of the rights conferred on her under the relevant law (such as taking possession of the secured asset or takeover the management of the borrower) unless exercise of such right was agreed upon by secured creditors representing not less than 60 percent (reduced from 75 percent)<sup>81</sup> in value of the amount outstanding as on a record date and such action was binding on all the secured creditors.

11.5 The Committee also noted that globally, bankruptcy laws prescribe different voting thresholds for decisions of the CoC. In USA, approval of a plan requires 66 percent or more voting share in value and 50 percent or more voting share in number for each class of creditors.<sup>82</sup> The position is similar in Canada, however, such requirement applies to each class of unsecured creditors.<sup>83</sup> In the UK, approval of a plan under administration requires a simple majority in value of the creditors present and voting. While such threshold is higher in

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<sup>79</sup> Section 311, Companies Act, 2013 has been repealed *vide* the Code w.e.f. 15 November, 2016.

<sup>80</sup> Circular on Framework for Revitalising Distressed Assets in the Economy – Guidelines on Joint Lenders' Forum (JLF) and Corrective Action Plan (CAP) dated 26 February, 2014 issued by the RBI, <<https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=8754&Mode=0>>, accessed 28 February, 2018. The voting thresholds were reduced by the RBI by the Notification dated 05 May, 2017, <https://rbi.org.in/Scripts/NotificationUser.aspx?Id=10957&Mode=0>, accessed 01 March, 2018.

<sup>81</sup> The voting threshold were reduced by section 5(c) of the Enforcement of Security Interest and Recovery of Debt Laws (Amendment) Act, 2012.

<sup>82</sup> 11 US Code § 1126(c). Also stated in the Interim BLRC Report, p. 68, (n.15).

<sup>83</sup> Section 54, Bankruptcy and Insolvency Act, 1985 (Canada).

Singapore as the requirement therein is to obtain 75 percent or more of voting share by value and more than 50 percent voting share in number of creditors present and voting, for approval of the plan.<sup>84</sup> The Committee was of the view a higher threshold with the present and voting requirement, or a lower threshold sans the present and voting requirement, may be adopted.

**11.6 After due deliberation and factoring in the experience of past restructuring laws in India and international best practices, the Committee agreed that to further the stated object of the Code i.e. to promote resolution, the voting share for approval of resolution plan and other critical decisions may be reduced from 75 percent to 66 percent or more of the voting share of the financial creditors. In addition to approval of the resolution plan under section 30(4), other critical decisions are extension of the CIRP beyond 180 days under section 12(2), replacement or appointment of RP under sections 22(2) and 27(2), and passing a resolution for liquidation under section 33(2) of the Code. Further, for approval of the other routine decisions for continuing the corporate debtor as going concern by the IRP/RP, the voting share threshold may be reduced to 51 percent or more of the voting share of the financial creditors.**

## **12. CONSENT OF INSOLVENCY PROFESSIONAL FOR APPOINTMENT**

12.1 Rule 9 of the CIRP Rules provides that a written communication shall be obtained from a proposed IRP in Form 2 which shall be given along with an application under sections 7, 9 or 10 of the Code. The requisite form provides that the proposed IRP give her consent on appointment and give disclosures regarding eligibility to be an RP, code of conduct and number of proceedings that she is currently working on.<sup>85</sup> The Committee noted that such requirement of consent is present only at one milestone of the CIRP i.e. at the time of filing of application of CIRP.

12.2 Other jurisdictions like UK and Singapore have provisions requiring consent of an insolvency practitioner on appointment. For instance, an administrator in UK is appointed on written consent given by her.<sup>86</sup> Such consent is required even at the time of replacement when a new administrator is appointed.<sup>87</sup> In

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<sup>84</sup> Section 268(3)(b), Singapore Companies Act, 2006 (Singapore).

<sup>85</sup> Form 2, CIRP Rules.

<sup>86</sup> Para 18(3) Schedule B1, Insolvency Act, 1986.

<sup>87</sup> Para 97(3) Schedule B1, Insolvency Act, 1986.



Singapore, a person appointed as a bankruptcy trustee<sup>88</sup> or as a liquidator<sup>89</sup> has to provide consent on appointment. Providing such consent may give autonomy to insolvency professionals and may also keep a check on them being overburdened. Additionally, the code of conduct for insolvency professionals given under the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 (“**IP Regulations**”) provides that an insolvency professional must refrain from accepting too many assignments if it will result in her devoting inadequate time to each assignment.

**12.3 On a review of the Code, the Committee felt that the consent of the IRP or RP or liquidator, as the case may be, may be obtained at the following milestones of the CIRP or liquidation process in a form specified in consultation with IBBI:**

- (a) Appointment of the RP under section 22 in the first meeting of CoC;**
- (b) Appointment of a new RP on replacement of the existing RP in section 27;**
- (c) Appointment of the existing RP in CIRP as the liquidator under section 34(1);**
- (d) Appointment of new RP as the liquidator under section 34(4).**

12.4 The Committee considered if provisions for resignation of an insolvency professional appointed as an IRP, RP, or liquidator may be provided in the Code, similar to section 146 of the Code which provides for resignation of a bankruptcy trustee. Similar provisions for resignation have been provided in other jurisdictions too.<sup>90</sup> The Committee noted that in practice, it is unlikely that that an insolvency professional is prohibited from resigning in extenuating circumstances. For example, during the CIRP, a person appointed as an RP may request the CoC for her replacement by utilising section 27.

**12.5 Therefore, the Committee decided that no change may be required under the Code to explicitly provide for resignation by an insolvency professional, and it shall be dependent on the facts of each case.**

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<sup>88</sup> Section 34 and 41(3A), Bankruptcy Act, 1995.

<sup>89</sup> Section 11(4), Companies Act, 1967.

<sup>90</sup> UNCITRAL, ‘Legislative Guide on Insolvency Law’, (2005), [https://www.uncitral.org/pdf/english/texts/insolven/05-80722\\_Ebook.pdf](https://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf), accessed 01 March, 2018, p. 187.



### 13. RUNNING THE CORPORATE DEBTOR

13.1 The management of the affairs of the corporate debtor is the responsibility of the IRP and RP as per sections 17, 20 and 23 of the Code. The issue highlighted was regarding the onus of responsibility of the management of the corporate debtor in the time-period between the submission of the resolution plan under section 30(6) and an order approving or rejecting the resolution plan by the NCLT under section 31 of the Code. Section 23 provides that the RP is responsible for the management of operation of the corporate debtor during 'corporate insolvency resolution process period', which is 180 days as per section 5(14), and thus does not cover the period mentioned above.

13.2 Currently, there is no guidance in the Code regarding the responsibility of such management, and thus, **the Committee recommended that this anomaly may be corrected. It was agreed that a proviso to section 23 may be added that the management of the corporate debtor by the RP will continue if a resolution plan has been submitted under section 30(6) but an order has not been passed under section 31, until such order has been passed.**

### 14. ELIGIBILITY TO SUBMIT A RESOLUTION PLAN

14.1 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.<sup>91</sup> 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.<sup>92</sup>

14.2 The scope of persons to be tested for the disqualification criteria can be determined by reading the first line of section 29A with clause (j). They read as follows: "*A person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly or in concert with such person suffers from any of the infirmities stated in clauses (a) to (i) or has a connected person not eligible under clauses (a) to (i).*"

14.3 The term 'person acting jointly or in concert' has not been defined in the Code and using the definition provided in the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 results in inclusion of an extremely

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<sup>91</sup> Statement of Objects and Reasons of the Insolvency and Bankruptcy Code (Amendment) Bill, 2018.

<sup>92</sup> *Ibid.*

wide gamut of person within the scope of section 29A. In practice, it is unclear whether the term 'connected person' in clause (j) applies to only the resolution applicant or even 'persons acting jointly or in concert with such person'. If the latter interpretation is taken, this provision would be applicable to multiple layers of persons who are related to the resolution applicant even remotely. Further, ARCs, banks and alternate investment funds which are specifically excluded from the definition of 'connected person' provided in section 29A may be caught by the term 'person acting jointly or in concert with such person'. The Committee felt that section 29A was introduced to disqualify only those who had contributed in the downfall of the corporate debtor or were unsuitable to run the company because of their antecedents whether directly or indirectly. **Therefore, extending the disqualification to a resolution application owing to infirmities in persons remotely related may have adverse consequences. Such interpretation of this provision may shrink the pool of resolution applicants. Accordingly, the Committee felt that the words, "..., if such person, or any other person acting jointly or in concert with such person" in the first line of section 29A must be deleted. This would clarify that section 29A is applicable to the resolution applicant and its connected person only. Further, in order to ensure that anyone who acts with a common objective along with the resolution applicant to acquire shares, voting rights or control of the corporate debtor is required to pass the test laid down in section 29A, the Committee felt that the following clause must be added as clause (iv) to the definition of connected person in the explanation to clause (j), "(iv) any persons who along with the resolution applicant, with a common objective or purpose of acquisition of shares or voting rights in, or exercising control over a corporate debtor, pursuant to an agreement or understanding, formal or informal, directly or indirectly cooperate for acquisition of shares or voting rights in, or exercise of control over the corporate debtor."**

14.4 It was brought to the Committee's attention that given the nature of business undertaken by ARCs, scheduled banks and Alternate Investment Funds, overseas financial institutions, and entities such as Investment Vehicles, registered Foreign Institutional Investors, Registered Foreign Portfolio Investors and Foreign Venture Capital Investors ("**Financial Entities**"), they are likely to be related to companies that are classified as non-performing assets ("NPA") and consequently be disqualified under section 29A. **The Committee agreed that such pure play Financial Entities must be exempt from the disqualification in clause (c) of section 29A of the Code which debars persons who have an NPA account or control or are promoters or in the management of a corporate debtor that is classified as an NPA account from being resolution applicants. It was noted that the term 'Financial Entities' may be defined in the Code to clarify the scope of the exemption.**

The Committee also agreed that this exemption must not be applicable to financial entities if they are related parties of the corporate debtor. It was also suggested to the Committee 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. In this regard, after deliberations, the Committee concluded that three years would be a sufficient time period for suspending the disqualification under section 29A(c). **Accordingly, the Committee agreed that a proviso must be added to section 29A(c) to state that if an NPA account is held only because of acquisition of a corporate debtor under the CIRP process laid down in the Code, then the disqualification in section 29A(c) shall not be applicable for a period of three years from the date of approval of the prior resolution plan by the NCLT.**

14.5 Further, the definition of the term “connected person” in the explanation to section 29A(j) provides a carve out for Financial Entities from clause (iii) of the definition which covers related parties. It was stated to the Committee that the exemption for Financial Entities must extend to the entire definition of 'connected person' and not clause (iii) only. Doing so would essentially mean that the disqualifications mentioned in section 29A would be applicable only to the immediate resolution applicant in case of Financial Entities and not to a second layer of the resolution applicant such as its directors, promoters or those who will be directors or promoters of the corporate debtor during implementation of the CIRP. The Committee felt that this may result in failure to verify the bona fide and merits of key persons who will be responsible for the resolution applicant. Moreover, Financial Entities have already been granted exemption from section 29A(c) which deals with holding NPA accounts. **In this context, the current exemption from clause (iii) (related parties) was thought to be sufficient and no need was felt to extend the exemption to promoters, directors or those in control of the resolution applicant or to those who will be responsible for implementing the CIRP. The Committee also noted that in terms of paragraph 14.3 the exemption to Financial Entities must be extended to the proposed new clause (iv) in order to restrict the disqualification only to the resolution applicant and those in immediate control of Financial Entities.**

14.6 The Committee while analysing various disqualification criteria in section 29A noted that the criteria mentioned in clauses (d) (conviction for offence punishable with imprisonment of two years or more) and (e) (disqualification to act as director under the CA 2013) were personal in nature and need not be extended to related parties of the resolution applicant. **Therefore, the**

Committee felt that a proviso may be inserted in the definition of 'connected person' to state that the scope of the term connected person for the purpose of interpretation of these two clauses would be limited to clause (i) and (ii) of the definition only.

14.7 Clause (c) of section 29A disqualifies a person who has an account or an account of a corporate debtor under its management or control or of whom it is a promoter if the account is classified as an NPA under guidelines issued by the RBI under the Banking Regulation Act, 1949 (“BR Act”) and a period of one year has lapsed from such classification till the date of commencement of corporate insolvency. It was stated to the Committee that clause (c) of section 29A, was limited in scope by recognising only those NPAs that are declared in accordance with guidelines issued by the RBI under the BR Act. For example, entities such as Housing Finance Companies which declare accounts as NPAs under guidelines<sup>93</sup> issued by the Housing Finance Bank were outside the purview of this clause. **Hence, the Committee felt that clause (c) must include as a disqualification criterion, accounts that are declared NPA in accordance with guidelines issued under any applicable statute issued by a financial sector regulator in India.**

14.8 In regards to the disqualification under clause (c) for having an NPA account, it was also stated to the Committee that the time period for existence of the NPA account must be increased from one year to three years. The reason provided was that a downturn in a typical business cycle was most likely to extend over a year. However, in the absence of any concrete data, the Committee felt that there is no conclusive way to determine what the ideal time period for existence of an NPA should be for the disqualification to apply. **The Committee felt that the Code was a relatively new legislation and therefore, it would be prudent to wait and allow industry experience to emerge for a few years before any amendment is made to the NPA holding period under section 29A(c). In relation to applicability of section 29A(c), the Committee also discussed that it must be clarified that the disqualification pursuant to section 29A(c) shall be applicable if such NPA accounts are held by the resolution applicant or its connected persons at the time of submission of the resolution plan to the RP.**

14.9 Clause (d) of section 29A disqualifies persons who have been convicted of any offence punishable with imprisonment for two years or more. This was stated to be a very wide disqualification criterion which may cast within its net offences which have no nexus with the ability to run a corporate debtor successfully. Further, keeping in mind that the disqualification based on this

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<sup>93</sup> Master Circular - The Housing Finance Companies (NHB) Directions, 2010.

criterion also extends to connected persons of the resolution applicant, a need was felt to narrow down the scope of this clause. **The Committee felt that this could be achieved by providing a schedule of offences, similar to schedule V of the CA 2013, conviction under which would disqualify a resolution applicant. Schedule V of the CA 2013 will need to be suitably amended, for example, the Central Goods and Services Tax Act, 2017 may be added. Further, it was felt necessary to provide power to the Central Government to update the schedule by adding statutes to it by means of a notification as may be required.**

14.10 The Committee noted that the Representation of the People Act, 1951 (“**RP Act**”) also contained a similar disqualification provision for persons who have been convicted of certain offences from becoming a member of either House of Parliament or of the Legislative Assembly or Legislative Council of a State.<sup>94</sup> However, the RP Act extended the disqualification period only from the date of conviction to six years from the date of release.<sup>95</sup> **The Committee felt the ambit of disqualification under clause (d) of section 29A must also be similarly narrowed down by limiting the disqualification period to six years from the date of release from imprisonment.**

14.11 The Committee was apprised of judgments of the Hon'ble Supreme Court in *Ravikant Patil v. Sarvabhouna Bagali*<sup>96</sup> wherein it has been held that "*where the conviction itself is stayed, the effect is that the conviction will not be operative from the date of stay.*" This judgement has been quoted and upheld in several cases thereafter by the Hon'ble Supreme Court.<sup>97</sup> Hence, the Committee noted that in situations where the order of conviction is stayed by a higher court of law, the disqualification under clause (d) may not be appropriate. **In order to clarify this position, the Committee recommended that a proviso must be added to state that the disqualification under clause (d) shall not be applicable if a stay of the conviction order has been granted by an appropriate court of law in India. In this regard, it was also stated to the Committee that a proviso must be provided to exclude the disqualification in case of classification as a wilful defaulter (section 29A(b)), conviction for certain offences (section 29A(c)), disqualification to act as director under the CA 2013 (section 29A(e)), prohibition by SEBI (section 29A(f)) and so on if an appeal has been preferred against the**

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<sup>94</sup> Section 7(b) read with section 8, RP Act.

<sup>95</sup> Section 8(1) and 8(3), RP Act.

<sup>96</sup> (2007) 1 SCC 673, ¶¶ 15.

<sup>97</sup> *Lalsai Khunte v. Nirmal Sinha & Ors.*, (2007) 9 SCC 330, ¶¶ 9 and 11 and *Lily Thomas v. Union of India*, (2013) 7 SCC 653, ¶¶ 34 - 35.

concerned order within the statutory period prescribed for filing an appeal. However, the Committee was mindful of the probability of misuse of such exemption and decided that till the time such conviction or disqualification or classification or prohibition orders were in force the disqualification must continue to apply.

14.12 Clause (g) of section 29A which seeks to disqualify promoters or those in the management or control of a corporate debtor in which a preferential, undervalue, fraudulent or extortionate credit transaction has taken place was also stated to be very wide and a representation was made to the Committee to narrow down this provision. The Committee was of the view 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, undervalue, fraudulent or extortionate credit transaction. **Accordingly, the Committee felt that clause (g) must be amended to carve out from its ambit persons who acquired a corporate debtor pursuant to the CIRP process under the Code or a scheme or plan approved by a financial sector regulator or a court of law and preferential, undervalue, fraudulent or extortionate credit transactions had taken place in the corporate debtor prior to such acquisition. Further, it must be ensured that such resolution applicant has not in any way contributed to the preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction.**

14.13 In terms of clause (h) of section 29A it was stated to the Committee that it was unclear whether the provision seeks to disqualify a guarantor only if the guarantee provided by it has been invoked and dishonoured or even in cases where the guarantee has not been invoked at all. The Committee was informed that cases had been brought before the NCLT and the NCLAT where interpretation of clause (h) was in question<sup>98</sup>. The Committee noted that the provision in its current form was certainly leading to ambiguity in its interpretation.<sup>99</sup>

14.14 In this regard, strictly speaking, commencement of a guarantors liability depends on the terms of contract.<sup>100</sup> However, a notice to the surety is

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<sup>98</sup> *RBL Bank Limited v. MBL Infrastructures Limited*, NCLT, Kolkata, Company Petition (IB)/170/2017, Date of decision – 18 December, 2017.

<sup>99</sup> Veena Mani, 'Appellate tribunal stays NCLT order allowing promoter to bid for firm', (Business Standard, , 23 December, 2017) [http://www.business-standard.com/article/economy-policy/appellate-tribunal-stays-nclt-order-on-mbl-infrastructure-117122200633\\_1.html](http://www.business-standard.com/article/economy-policy/appellate-tribunal-stays-nclt-order-on-mbl-infrastructure-117122200633_1.html), accessed 23 February, 2018.

<sup>100</sup> *Syndicate Bank v. Channaveerappa Beleri & Ors.* (2006) 11 SCC 506, ¶¶ 9; Pollock and Mulla, *The Indian Contract and Specific Relief Acts* (14th edn, LexisNexis 2013), p. 1384.



generally necessary.<sup>101</sup> The Committee felt that the intent of the provision could not have been to disqualify every guarantor only for the reason of issuing an enforceable guarantee as that would be discriminatory. In order to clarify the position, the Committee felt that words "an enforceable" must be deleted from clause (h) and the words "and such guarantee has been invoked by the creditor and remains unpaid in full or part by the guarantor" must be added at the end of the clause.

14.15 Clause (i) of section 29A disqualifies a person if she has been subject to any of the disabilities stated in clauses (a) to (h) of section 29A in any jurisdiction outside India. **The Committee felt that the words "has been" in this clause must be replaced with "is" so as to clarify that the applicability of the provision is during the currency of the disability. This view is better aligned to the intent of the said section and streamlines the disqualification appropriately.**

14.16 It was stated to the Committee that ensuring that every resolution applicant was in compliance with section 29A was extremely onerous and time consuming for the CoC as well as the RP since they were expected to check whether every resolution applicant suffered from any of the disqualification mentioned in any of the clauses from (a) to (j) in India as well as overseas. Moreover, this section was made retrospectively applicable. In this regard, it was suggested that the present timeline for resolution under the Code be extended beyond 270 days in order to enable compliance with section 29A. **Given the wide array of disqualification criteria stated in section 29A and its broad-based applicability to the resolution applicant and connected persons, the Committee felt that in the interest of timely resolution, the resolution applicant may be required to give an affidavit stating that it is eligible to submit a resolution plan under section 29A. The affidavit must be submitted along with the resolution plan. Accordingly, the Committee along with IBBI felt that regulation 38(3) of the CIRP Regulations may be deleted as details sought to be captured in the resolution plan by this provision will be covered in the affidavit to be submitted by resolution applicants pursuant to section 29A of the Code.**

14.17 Section 30(2) of the Code states the mandatory requirements of each resolution plan. The RP is required to examine each resolution plan to ensure it is in compliance with section 30(2). **The Committee noted that section 30(2)(e) which states that the resolution plan must not contravene any provisions of law for the time being in force will adequately ensure**

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<sup>101</sup> Pollock and Mulla, *The Indian Contract and Specific Relief Acts* (14th edn, LexisNexis 2013), p. 1362 and p. 1384.



compliance with section 29A of the Code. Further, the Committee felt that it must be clarified that the amendments recommended to section 29A will be applicable to all cases where the resolution plan has not been submitted at the time of coming to force of the amendments. This is essential in order to ensure that the CIRP of corporate debtors that are at an advanced stage does not get unsettled and prolonged beyond the statutory timeline prescribed in the Code on account of the proposed amendments.

## 15. ACCELERATION OF DEBT

15.1 A financial creditor is permitted to trigger CIRP under the Code on default of an amount of INR one lakh or above. The Committee understands that the general market practice is to include trigger-based acceleration clauses in loan agreements which make the whole debt amount due on a trigger event such as default or initiation of CIRP. Further, the Code does not bar the acceleration of debt prior to filing of application of CIRP as it is based on the terms of the contract between the corporate debtor and the creditors, and such terms are respected during the CIRP.

15.2 However, the issue in relation to acceleration of debt becomes relevant in interpreting the term 'overdue amounts' in section 29A(c) and if such amount would mean the accelerated debt amount. As per section 29A(c) of the Code, if an account of a resolution applicant or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, is classified as an NPA under the relevant guidelines and a period of one year has lapsed, then such person is ineligible to be a resolution applicant until she pays off the overdue amounts with interest.<sup>102</sup>

15.3 **The Committee was of the view that no clarification may be needed in this regard, as it is settled that 'overdue amounts' in the context of section 29A does not mean accelerated debt amounts.** The Committee observed that though contractual integrity is to be respected for acceleration of loan amounts for filing of an application, this principle is separate from clearing of 'overdue amounts' for NPAs.

## 16. RESOLUTION PLANS REQUIRING APPROVAL FROM REGULATORS OR AUTHORITIES

16.1 Regulation 37(l) of the CIRP Regulations states that a resolution plan shall provide for obtaining necessary approvals from the Central and State Governments and other authorities. However, the timeline within which such

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<sup>102</sup> Section 29A(c), Code.

approvals are required to be obtained, once a resolution plan has been approved by the NCLT, has not been provided in the Code or the CIRP Regulations. The Committee deliberated that as the onus to obtain the final approval would be on the successful resolution applicant as per the resolution plan itself, **the Code should specify that the timeline will be as specified in the relevant law, and if the timeline for approval under the relevant law is less than one year from the approval of the resolution plan, then a maximum of one year will be provided for obtaining the relevant approvals, and section 31 shall be amended to reflect this.**

16.2 Further, the Committee noted that there is no provision in the Code on the requirement to obtain an indication on the stance of the concerned regulators or authorities, if required, on the resolution plan prior to the resolution plan being approved by the NCLT. It was brought to the attention of the Committee that this was resulting in several conditional resolution plans being approved by the NCLT, and that the approval by the NCLT was being regarded as a 'single window approval.' This not being the intent of the Code, the Committee deliberated on introduction of a mechanism for obtaining preliminary observations from the concerned regulators and authorities in relation to a resolution plan approved by the CoC and submitted to the NCLT for its approval, but prior to the NCLT's approval.

16.3 The Committee examined section 230(5), CA 2013 which gives a thirty-day window to the concerned regulators and authorities to give their representation or objections to a proposed scheme of compromise or arrangement between a company and its creditors or members. In the event of non-receipt of any representation or objection, it is presumed that the concerned regulators and authorities do not have objection to the proposed scheme, post which it is approved by the creditors and the NCLT. However, it was noted by the Committee that in term of timelines, the CA 2013 did not have a timeline within which the scheme of compromise or arrangement requires being approved by the creditors and the NCLT, as opposed to a strict timeline of one hundred eighty days in the Code within which the CoC has to approve a resolution plan, failing which the corporate debtor goes into liquidation. The Committee apprehended that introducing a thirty-day window within the CIRP period of one hundred eighty days may result in practical difficulties. For instance, if an objection is received from a regulator or authority on the thirtieth day which will coincide with the last ten days of the CIRP period, the CoC may not have time to obtain an extension of the CIRP period (such an extension may not even be possible if one extension has already been obtained) to align the resolution plan as per the objections received. A resolution plan not amended to account for the objection of the

regulator or authority may not be approved by the NCLT, resulting in grave consequences for the corporate debtor. **Thus, as the CIRP period is sacrosanct, the Committee, keeping in mind the practicalities of the issue, deemed it fit to provide for a period for obtaining the necessary approvals as mentioned in paragraph 16.1 above, after the approval of the plan by the NCLT.**

16.4 However, the Committee was of the opinion that approval from CCI may be dealt through specific regulations for fast tracking the approval process in consultation with the CCI. **The Committee was informed that pursuant to discussions with CCI, it has been agreed that CCI will have a period of 30 working days for approval of combinations arising out of the Code, from the date of filing of the combination notice to the CCI. Further, this timeline of 30 days may be extended by another 30 days, only in exceptional cases. In the event that no approval or rejection is provided by the CCI within the aforementioned timelines, the said combination would be deemed to have been approved. Detailed forms and relevant regulations in this regard may be provided by CCI in due course of time.**

## **17. EXEMPTION FROM SHAREHOLDER APPROVAL**

17.1 Under section 30(2)(e) of the Code, the RP is required to examine each resolution plan received to confirm that *inter alia* that it does not contravene any of the provisions of the law for the time being in force. **The MCA vide a circular<sup>103</sup> clarified that a shareholder approval required under the CA 2013 and other law for the time being in force shall be deemed to have been given, in relation to any action required to be done under the resolution plan. The Committee decided that since this clarification is substantive in nature, it should be incorporated into the Code.**

## **18. VALUE GUARANTEED TO OPERATIONAL CREDITORS UNDER A RESOLUTION PLAN**

18.1 Section 30(2)(b) of the Code requires the RP to ensure that every resolution plan provides for payment of at least the liquidation value to all operational creditors. Regulation 38(1)(b) of the CIRP Regulations provides that liquidation value must be paid to operational creditors prior in time to all financial creditors and within thirty days of approval of resolution plan by the NCLT. The BLRC Report states that the guarantee of liquidation value has

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<sup>103</sup> MCA General Circular No. IBC / 01 / 2017 dated 25 October, 2017.

been provided to operational creditors since they are not allowed to be part of the CoC which determines the fate of the corporate debtor.<sup>104</sup>

18.2 However, certain public comments received by the Committee stated that, in practice, the liquidation value which is guaranteed to the operational creditors may be negligible as they fall under the residual category of creditors under section 53 of the Code. Particularly, in the case of unsecured operational creditors, it was argued that they will have no incentive to continue supplying goods or services to the corporate debtor for it to remain a 'going concern' given that their chances of recovery are abysmally low.

18.3 The Committee deliberated on the status of operational creditors and their role in the CIRP. It considered the viability of using 'fair value' as the floor to determine the value to be given to operational creditors. Fair value is defined under regulation 2(1)(hb) of the CIRP Regulations to mean "*the estimated realizable value of the assets of the corporate debtor, if they were to be exchanged on the insolvency commencement date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had acted knowledgeably, prudently and without compulsion.*" However, it was felt that assessment and payment of the fair value upfront, may be difficult. The Committee also discussed the possibility of using 'resolution value' or 'bid value' as the floor to be guaranteed to operational creditors but neither of these were deemed suitable.

18.4 It was stated to the Committee that liquidation value has been provided as a floor and in practice, many operational creditors may get payments above this value. The Committee appreciated the need to protect interests of operational creditors and particularly Micro, Small and Medium Enterprises ("MSMEs"). In this regard, the Committee observed that in practice most of the operational creditors that are critical to the business of the corporate debtor are paid out as part of the resolution plan as they have the power to choke the corporate debtor by cutting off supplies. Illustratively, in the case of *Synergies-Dooray Automotive Ltd.*<sup>105</sup>, the original resolution plan provided for payment to operational creditors above the liquidation value but contemplated that it would be made in a staggered manner after payment to financial creditors, easing the burden of the 30-day mandate provided under regulation 38 of the CIRP Regulations. However, the same was modified by the NCLT and operational creditors were required to be paid prior in time, due to the

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<sup>104</sup>The BLRC Report, (n. 19).

<sup>105</sup> Company Appeal. No. 123/2017, NCLT Hyderabad, Date of decision – 02 August, 2017.

quantum of debt and nature of the creditors. Similarly, the approved resolution plan in the case of *Hotel Gaudavan Pvt. Ltd.*<sup>106</sup> provided for payment of all existing dues of the operational creditors without any write-off. The Committee felt that the interests of operational creditors must be protected, not by tinkering with what minimum must be guaranteed to them statutorily, but by improving the quality of resolution plans overall. This could be achieved by dedicated efforts of regulatory bodies including the IBBI and Indian Banks' Association.

**18.5 Finally, the Committee agreed that presently, most of the resolution plans are in the process of submission and there is no empirical evidence to further the argument that operational creditors do not receive a fair share in the resolution process under the current scheme of the Code. Hence, the Committee decided to continue with the present arrangement without making any amendments to the Code.**

## **19. APPEAL FROM ACCEPTANCE OF CLAIMS IN LIQUIDATION**

19.1 Section 42 of the Code provides that claims rejected by the liquidator may be appealed to the NCLT. But this does not include challenges regarding acceptance of claims. Accepted claims may be disputed by the creditor herself in terms of valuation or by other creditors whose claims have been rejected and are similarly placed to a claim that has been accepted. Providing a right to a creditor to challenge such accepted claims may be essential, especially since liquidation may be the last resort for recovery of debt. Further, section 60(5)(b) provides that NCLT will have the power to entertain or dispose of any disputes relating to claims by or against the corporate debtor and does not make any distinction based on acceptance or rejection of the claim disputed. Section 60 applies to both CIRP and liquidation and thus, a conjoint reading of sections 42 and 60 presents an anomaly as section 42 is narrower as it does not cover accepted claims. **The Committee felt this anomaly may be addressed by amending section 42 to include appeals from accepted claims.**

## **20. AVOIDANCE OF UNDERVALUED TRANSACTIONS**

20.1 Section 45(1) provides for the RP or the liquidator to make an application for undervalued transactions, for declaration as void transactions. However, the reference to section 43 in section 45(1) of the Code appears to be a drafting error

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<sup>106</sup> Company Appeal. No. 37/2017, NCLT Principal Bench, Date of decision – 13 December, 2017.

as the definition of undervalued transactions is in sub-section (2) of section 45 and not 43, the latter referring to preferential transactions. **Thus, it was decided to address this drafting error suitably.**

## 21. TREATMENT OF SUBORDINATION AGREEMENTS WITHIN THE LIQUIDATION WATERFALL

21.1 Section 53 of the Code provides the order of priority to be followed for payment of dues pursuant to liquidation of a corporate debtor under the Code. It was stated to the Committee that it was not clear whether inter-creditor or subordination agreements entered into between creditors will be respected in the payment waterfall provided in section 53 of the Code in the event a secured creditor relinquishes its security and chooses to receive proceeds from sale of assets under liquidation. Section 53(1)(b) states as follows:

*“(b) the following debts which shall rank equally between and among the following: -*

*(i) workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and*

*(ii) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;*

*(c)....”*

21.2 It was suggested that the possibility of the phrase “shall rank equally between and among” in section 53(1)(b) to be interpreted to mean that debts inter-se secured creditors in clause (ii) of section 53(1)(b) would also rank equally cannot be excluded. Such an interpretation would imply that priority of charges agreed upon between creditors in inter-creditor or subordination agreements would lose meaning once a creditor relinquished its security and came within the liquidation waterfall in section 53.

21.3 However, it was stated to the Committee that in practice, subordination agreements inter-se creditors were respected in winding up proceedings.<sup>107</sup> This was also stated to be the position in other developed countries. Specifically, it was also brought to the Committee's attention that in USA, the Bankruptcy Code states that in case of liquidation, “a subordination agreement is enforceable in a case under this title to the same extent that such agreement is

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<sup>107</sup> A Ramaiya, *Guide to the Companies Act* (17th edn, LexisNexis 2010) 5297.



enforceable under applicable non bankruptcy law.”<sup>108</sup> Further, the Committee was appraised of the case of *ICICI Bank Limited v. SIDCO Leathers Limited & Ors.*<sup>109</sup> wherein the Hon'ble Supreme Court interpreted sections 529 and 529A of the CA 1956 which deal with ranking of claims on liquidation. It was held in this case that, “Only because the dues of workmen and debts due to the secured creditors are treated pari passu with each other, the same by itself, in our considered view, would not lead to the conclusion that the concept of inter se priorities amongst the secured creditors had thereby been intended to be given a total go-by.”<sup>110</sup> Certain other relevant principles that emerge from this case are as follows:

- (a) Right to property was a constitutional right and right to recover money lent by enforcing a mortgage was also a right to enforce an interest in the property. Had the Parliament intended to take away such a valuable right of the first-charge holder, there was no reason for it to not state so explicitly.<sup>111</sup>
- (b) Section 48 of the Transfer of Property Act, 1882 (“TOPA”) clearly provides that claim of a first charge holder shall prevail over the claim of a second charge holder.<sup>112</sup>
- (c) Merely because the relevant section did not specifically provide for the rights of priorities over mortgaged assets, it would not mean that the provisions of section 48 of TOPA shall stand obliterated in relation to a company that has undergone liquidation.<sup>113</sup>
- (d) Deprivation of a legal right existing in favour of a person cannot be presumed in construing a statute and it is in fact the other way round and thus, a contrary presumption shall have to be raised.<sup>114</sup>
- (e) Companies Act may be a special statute but if the special statute does not contain any provisions dealing with contractual and other statutory

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<sup>108</sup> 11 US Code § 510 read with 11 US Code § 726.

<sup>109</sup> (2006) 10 SCC 452.

<sup>110</sup> *Ibid*, ¶¶ 36.

<sup>111</sup> *Ibid*, ¶¶ 41.

<sup>112</sup> *Ibid*, ¶¶ 39 and 41.

<sup>113</sup> *Ibid*, ¶¶ 44.

<sup>114</sup> *Ibid*, ¶¶ 43.



rights between different secured creditors, the specific provisions contained in the general statute shall prevail.<sup>115</sup>

- (f) Section 529(1)(c) used the phrase "the respective rights of secured and unsecured creditors." This was to be interpreted as rights of secured creditors *vis-à-vis* unsecured creditors. It does not envisage respective rights amongst secured creditors.<sup>116</sup>

21.4 The Committee felt that the principles stated above that emerge from the *ICICI* case are also applicable to the issue at hand under section 53 of the Code. Moreover, although this was a case where creditors had not relinquished their security, the principles hold good under the Code even when creditors have relinquished their security as the Code unlike the CA 1956 expressly recognises secured creditors who have relinquished their security as a separate category in section 53(1)(b)(ii) and distinguishes them from unsecured creditors. The Code in a bid to encourage relinquishment, also specifically places secured creditors who have relinquished security higher than unsecured creditors.<sup>117</sup>

21.5 Lastly, it was deliberated whether inter-creditor agreements if not disregarded for the liquidation waterfall in section 53 of the Code, may result in secured creditors, especially those holding a first charge to prefer liquidation over resolution. It was suggested to the Committee to clarify whether inter-creditor agreements hold good for distribution of proceeds on liquidation under section 53 in order to promote resolution over liquidation. The Committee, as discussed in the context of the *ICICI* case above, noted that it may not be prudent to take away a valuable property right vested with creditors. The Committee felt that generally all secured financial creditors whether first charge or secondary charge holders are sophisticated entities which grant loans after exercising due-diligence and are presumed to be able to evaluate their interests and risks sufficiently. Moreover, this may negatively impact the credit market and discourage banks and other financial creditors to grant big loans which are more often than not granted against property or other valuable collateral as they shall have no protection in case the corporate debtor becomes insolvent. Accordingly, the Committee disregarded this suggestion.

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<sup>115</sup> *Ibid*, ¶¶ 46.

<sup>116</sup> *Ibid*, ¶¶ 44.

<sup>117</sup> Unsecured creditors are included in section 53(1)(d) of the Code.

21.6 To conclude, the Committee was of the opinion that it is sufficiently clear from a plain reading of section 53(1)(b) that it intended to rank workmen's dues equally with debts owed to secured creditors who have relinquished their security. Section 53(1)(b) does not talk about priority inter-se secured creditors. Thus, valid inter-creditor/subordination agreements would continue to govern their relationship. Further sub-section (2) of section 53 must also be interpreted accordingly. For instance, applying section 53(2) in the context of section 53(1)(b), any agreements between workmen and secured creditors which disrupts their *pari passu* rights will be disregarded by the liquidator. However, agreements inter-se secured creditors do not disturb the equal ranking sought to be provided by section 53(1)(b) and therefore do not fall within the ambit of section 53(2). **The Committee felt that there was no requirement for an amendment to the Code required since a plain reading of section 53 was sufficient to establish that valid inter-creditor and subordination provisions are required to be respected in the liquidation waterfall under section 53 of the Code.**

## 22. FAST-TRACK CIRP

22.1 Chapter IV, Part II of the Code envisages a fast track corporate insolvency resolution process (“F-CIRP”) for corporate debtors notified<sup>118</sup> by the Central Government under section 55(2). The entities notified are small companies,<sup>119</sup> start-ups,<sup>120</sup> and unlisted companies with total assets below INR one crore. The creditors or the corporate debtor itself have an option to either trigger the F-CIRP or CIRP, and as per regulation 17(3) of the Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017 (“F-CIRP Regulations”), a F-CIRP can be converted to a regular CIRP if the debtor is not an eligible corporate debtor as per the above-mentioned notification and a *vice-versa* scenario is not contemplated.

22.2 From the BLRC Report,<sup>121</sup> the notes on clauses for Chapter IV, and the relevant regulations, the primary intent of the F-CIRP appears to be to only provide a process which is faster in terms of timelines while keeping the process flow

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<sup>118</sup> MCA Notification S.O. 1911(E) dated 14 June, 2017.

<sup>119</sup> As defined under section 2(85), Companies Act, 2013.

<sup>120</sup> As defined in the Notification No. G.S.R. 501(E) dated the 23 May, 2017 of the Ministry of Commerce and Industry, Government of India.

<sup>121</sup> Paragraph 5.4, *BLRC Report*, (n.19).

the same. The notes on clauses<sup>122</sup> in respect of section 58 clarifies that the fast-track CIRP will be the same as CIRP. It states “*Clause 58 provides that the fast track corporate insolvency resolution process shall be conducted in the same manner as the corporate insolvency resolution process under Chapter II. The provisions relating to offences and penalties under Chapter VII shall apply in the same manner to the fast track corporate insolvency resolution process.*” Further, as per F-CIRP Regulations, other than timelines, the only variation appears to be reduction in the number of registered valuers to be appointed and permission to vote at a meeting even if all the creditors are not present, which are minor procedural deviations.

22.3As per Chapter 3 of the Economic Survey<sup>123</sup>, only one F-CIRP has been initiated. **It is clear that substantively, the F-CIRP does not offer deviation from the CIRP other than timelines and is not serving the purpose of simplification of CIRP for small debtors. The dismal statistics on its utilisation echo a similar sentiment, and thus, the Committee reached a consensus that Chapter IV of the Code may be deleted.**

## **23. LINKING PROCEEDINGS OF CORPORATE GUARANTOR WITH CORPORATE DEBTOR**

23.1Section 60 of the Code requires that the Adjudicating Authority for the corporate debtor and personal guarantors should be the NCLT which has territorial jurisdiction over the place where the registered office of the corporate debtor is located. This creates a link between the insolvency resolution or bankruptcy processes of the corporate debtor and the personal guarantor such that the matters relating to the same debt are dealt in the same tribunal. However, no such link is present between the insolvency resolution or liquidation processes of the corporate debtor and the corporate guarantor. **It was decided that section 60 may be suitably amended to provide for the same NCLT to deal with the insolvency resolution or liquidation processes of the corporate debtor and its corporate guarantor. For this purpose, the term “corporate guarantor” will also be defined.**

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<sup>122</sup> Clause 58, (n. 14).

<sup>123</sup> Monetary Management and Financial Intermediation, Economic Survey 2017-18, available at [http://mofapp.nic.in:8080/economicsurvey/pdf/044-055\\_Chapter\\_03\\_Economic\\_Survey\\_2017-18.pdf](http://mofapp.nic.in:8080/economicsurvey/pdf/044-055_Chapter_03_Economic_Survey_2017-18.pdf), accessed 26 February, 2018.

## 24. PUNISHMENT FOR TRANSACTIONS DEFRAUDING CREDITORS

24.1 Section 69 of the Code provides for punishment for transactions defrauding creditors by the corporate debtor or its officers “on or after the insolvency commencement date”. However, as per sub-section (a), if the transaction results in a gift or transfer or creation of a charge or the accused has caused or connived in execution of a decree or order against the property of the corporate debtor, the accused shall not be punishable if such act was committed five years before the insolvency commencement date or if she proves that she had not intended to defraud the creditors. In this respect, the pre-fixing of the offence with “on or after the insolvency commencement date” is erroneous. Further, pre-fixing the same phrase in sub-section (b) is also erroneous, as the transaction involves concealment or removal of any property within two months from the date of any unsatisfied judgement or order for payment of money. **Thus, the Committee decided that the phrase “on or after the insolvency commencement date” be deleted from section 69.**

## 25. TREATMENT OF WINDING UP PROCEEDINGS INITIATED UNDER CA 1956/ CA 2013 VIS-À-VIS PROVISIONS OF THE CODE

25.1 It was stated to the Committee that there was ambiguity as to whether a remedy under the Code was available with respect to corporate debtors against whom a winding up petition under the CA 1956/ CA 2013 had been admitted by a Company Court.

25.2 The Committee observed that in this regard the Central Government had notified the Companies (Transfer of Pending Proceedings) Rules, 2016 (“**Transfer Rules**”)<sup>124</sup> to *inter alia* provide for transfer of pending winding proceedings to the NCLT. Rule 5 of the Transfer Rules, provides for transfer of all petitions relating to winding up of a company on the ground of inability to pay debts under section 433(e) of the CA 1956, before a High Court, and, where the petition has not been served on the respondent under rule 26 of the Companies (Court) Rules, 1959 to an NCLT bench based on territorial jurisdiction. The Transfer Rules provide that any party or parties to the petitions shall be eligible to file fresh applications under sections 7 or 8 or 9 of the Code, as the case may be. The Transfer Rules also provide that a petition

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<sup>124</sup>The Transfer Rules were notified in exercise of the powers conferred under section 434(1) and (2) of the Companies Act, 2013 read with section 239(1) of the Code.

relating to winding up of a company which is not transferred to the NCLT under the said rule and which remains in the High Court and where there is another petition under section 433(e) of the CA 1956 for winding up against the same company pending as on 15 December 2016, such other petition shall not be transferred to the NCLT, even if the petition has not been served on the respondent. The Committee noted that winding up proceedings that are covered by rule 5 of the Transfer Rules evidently need to be transferred to relevant benches of the NCLT and dealt with under the Code. However, ambiguity exists with respect to applicability of the Code and transferability of pending winding up proceedings not covered by rule 5 of the Transfer Rules, and which are retained.

25.3 In this back drop the Committee deliberated, whether CIRP can be initiated under the Code during the pendency of a winding-up petition before a High Court. While doing so, the Committee considered a catena of pronouncements by NCLT benches, NCLAT and various High Courts.<sup>125</sup>

25.4 Finally, the Committee agreed with the rationale provided by the Hon'ble Bombay High Court in the recent case of *Jotun India Pvt. Ltd. v. PSL Ltd*<sup>126</sup> while hearing an application against an order of the Company Court to stay proceedings initiated by the corporate debtor before the NCLT when a winding-up petition was pending against the corporate debtor in the said Company Court. The Hon'ble Bombay High Court decided on (i) whether an application under the Code can be made even in cases where a winding up petition has been admitted and is pending before a Company Court? and (ii) whether such an admission of a winding petition allows the Company Court to stay proceedings before the NCLT?

25.5 For the sake of clarity, the key paragraphs of the Hon'ble Bombay High Court judgment have been extracted below (emphasis supplied):

*“The order of admission or the order of appointment of Provisional Liquidator, will not create any bar on filing of petition and passing of orders by NCLT as*

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<sup>125</sup>The Committee considered various judgements including *Nikhil Mehta* (n.02); *Forech India Pvt. Ltd. v. Edelweiss Asset Reconstruction Company Ltd.*, NCLAT, New Delhi, Company Appeal No. 202/ 2017, Date of decision – 23 November, 2017; *Unigreen Global Pvt Ltd v. Punjab National Bank*, NCLAT, New Delhi, Company Appeal No. 81/2017, Date of decision – 01 December, 2017; *Nowfloats Technologies Pvt Ltd v. Getit Infoservices Pvt Ltd*, NCLT, New Delhi, Special Bench, Company Application No. (IB)45/(PB)/2017, Date of decision – 11 April, 2017; *Ashok Commercial Enterprises v. Parekh Aluminex*, (2017) 3 CompLJ 482(Bom); *Alcon Laboratories (India) Pvt Ltd v. Vasan Health Care Ltd*, NCLT, Chennai, Company Application No. 1/2017, Date of decision – 21 April, 2017; *Nauvata Engineering Pvt Ltd v. Punj Llyods Ltd*, NCLT Principal Bench, New Delhi, Company Petition No. (IB)-217(PB)/2017, Date of decision – 19 July, 2017.

<sup>126</sup> MANU/MH/0005/2018, High Court of Bombay, Date of decision – 05 January, 2018

*the order of admission is merely commencement of proceedings and not final order of winding up which is passed under Section 481 of the Companies Act, 1956. Till the company is ordered to be wound up, i.e., the final order is passed, NCLT can entertain a petition or an application".<sup>127</sup>*

*"It is also clear from the Companies (Removal of Difficulties) Fourth Order that in fact what is saved are only the proceedings of winding up pending before the jurisdictional High Court and not the Company itself in relation to which such proceedings are saved. That is to say, such a Company is still subject to the provisions of IBC, if invoked and only the post notice winding up proceedings, which are retained by the High Court, are saved. This does not mean that IBC is inapplicable to the said Company, if it is invoked".<sup>128</sup>*

*"Further, Section 446 of the Companies Act, 1956 is not applicable to the present petition and therefore, no leave, as stipulated thereunder has to be obtained. This position has been settled by the Supreme Court in the case of Allahabad Bank v. Canara Bank and Ors. AIR 2000 SC 1535 wherein the issue of the impact of the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ("RDB Act") on the provisions of the Companies Act, 1956 arose. The Supreme Court has held that leave of the Company Court is not required in order to commence proceedings under RDB Act, for the reason that RDB Act is a special law which would prevail over the Companies Act, 1956 being the general law and even assuming that both the statutes are special enactments, the latter one would prevail over the former, if the latter law contains a provision giving an overriding effect. In the case at hand, in view of Section 34 of RDB Act, it was held that the said Act overrides the Companies Act, to the extent of any inconsistency between the two enactments. Therefore, applying the ratio of this judgment to the present case, in view of Section 238 of IBC, provisions of IBC shall supersede and prevail over the Companies Act, to the extent of any inconsistency between the two. This judgment has been approved by a larger bench of the Supreme Court in the case of Rajasthan State Financial Corporation v. Official Liquidator (2005) 8 SCC 190."<sup>129</sup>*

*"winding up petitions retained by the High Court are being decided under the Companies Act, 1956 only as a transitional provision."<sup>130</sup>*

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<sup>127</sup> Ibid, ¶¶ 22.

<sup>128</sup> Ibid, ¶¶ 69.

<sup>129</sup> Ibid, ¶¶ 21.

<sup>130</sup> Ibid, ¶¶ 70.



"Furthermore, this transitional provision cannot in any way affect the remedies available to a person under IBC vis-à-vis the company against whom a petition is filed and retained in the High Court, as the same would amount to treating IBC as if it did not exist on the statute book and would deprive persons of the benefit of the new legislation. This is contrary to the plain language of IBC. If the contentions of petitioner were to be accepted, it would mean that in respect of companies, where a post notice winding up petition is admitted or a provisional liquidator appointed, provisions of IBC can never apply to such companies for all times to come." <sup>131</sup>

"Since the IBC is admittedly a successor statute to SICA, and Section 64 (2) of IBC being pari-materia to Section 22 of SICA, the argument that the Company Court has the power to injunct proceedings before under NCLT in cases of pending winding up petitions is entirely misplaced and contrary to legislative intent."<sup>132</sup>

25.6 The Committee also took note of the fact that a similar issue in *Union Bank v. Era Infra Engineering Limited*<sup>133</sup> had been referred to a special bench of NCLT, New Delhi which held that there is no bar on NCLT to trigger a CIRP on an application filed under section 7, 9 and 10 if a winding up petition is pending unless an official liquidator has been appointed and a winding up order has been passed. **On a conjoint reading of the Code along with the Transfer Rules and the CA 1956/ CA 2013 and after deliberating on available jurisprudence, the Committee felt that there was no bar on the application of the Code to winding up petitions pending under prior legislations before any court of law.**

25.7 However, the Committee underscored the need to avoid multiple and possibly conflicting orders in winding up/liquidation proceedings of the same corporate debtor whether under the CA 1956/ CA 2013 or the Code. The Committee was also mindful of the underlying principle with regards to existence of a moratorium once winding up/ CIRP is initiated whether under the CA 1956 (section 446), CA 2013 (section 279) or under the Code (section 14 during CIRP, section 33 during liquidation). The Committee noted that under the CA 1956 and CA 2013, during the moratorium, legal proceedings could be initiated or continued with the leave of the Court/NCLT. Accordingly, for cases which were not expressly transferred to the NCLT pursuant to the Transfer Rules, the Committee felt that the assumption was that the case was

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<sup>131</sup> *Ibid*, ¶¶ 71.

<sup>132</sup> *Ibid*, ¶¶ 85.

<sup>133</sup> NCLT, Principal Bench, CA No. (IB)-190(PB)/2017, Date of decision – 16 February, 2018.



at an advanced stage and therefore, the Court hearing the matter was best suited to grant or deny leave to initiate insolvency proceedings under the Code. **Finally, based on the available jurisprudence, the Committee felt that the leave of the High Court or NCLT, if applicable, under section 446 of the CA 1956 or section 279 of the CA 2013, must be obtained, for initiating CIRP under the Code, if any petition for winding up is pending in any High Court or NCLT against the corporate debtor. The Committee agreed that necessary amendments be made to schedule XI of the Code (which will result in amendment of the CA 2013) to ensure that the leave of the High Court or the NCLT, may be obtained, if applicable, where such winding-up petition is pending for initiation of CIRP against such corporate debtor, under the provisions of the Code. Corresponding amendments may also be made to the Transfer Rules.**

## **26. ENABLING THE CENTRAL GOVERNMENT TO EXEMPT OR VARY THE CODE FOR CERTAIN CLASSES OF COMPANIES**

26.1 To fill the void created by deletion of the F-CIRP from the Code, the Committee discussed the merits of introducing a section similar to section 462 of the CA 2013, in the Code. The said section empowers the Central Government to exempt the application of any of the provisions of the CA 2013, or apply them with such exceptions, modifications and adaptations, as may be specified by the government, to a class or classes of companies. The in-built safeguards in the section are that such power can be exercised only in 'public interest' and all notifications are required to be laid before each house of the Parliament for a period of thirty days within which both houses can suggest modifications or disapprove the notification.

26.2 The Central Government has utilised section 462 to issue certain relaxations / modifications to private companies, government companies, section 8 companies and Nidhi companies. For instance, for section 8 companies<sup>134</sup> which are charitable companies, limit on the number of directorships does not apply, relaxation in holding board meetings is given, requirement of maintaining a register recording related party transactions is only for transactions above INR one lakh, minimum paid up share capital requirement is not required to be met, etc. For private companies,<sup>135</sup> exceptions have been built in to preserve the decision-making powers of the board and thus certain restrictions on the board's powers are not applicable, exemption from filing board resolutions with the Registrar of Companies has been given, etc. It

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<sup>134</sup> MCA Notification GSR 466(E) dated 05 June, 2015 and 13 June, 2017.

<sup>135</sup> *Ibid.*

appears that the power has been used to make the functioning of the companies easier.

26.3 Such enabling powers are not restricted only to the CA 2013 but are present in other statutes such as Competition Act, 2002, BR Act, Customs Act, 1962, Urban Land (Ceiling and Regulation) Act, 1976, to name a few. On a perusal of case laws, the exercise of power under such a provision is required to fall within the following parameters:

- (a) in consonance with the objective of the parent act;<sup>136</sup>
- (b) within the limits of constitutional provisions;<sup>137</sup>
- (c) within the scope of the power of exemption provided;<sup>138</sup>
- (d) provide relief from burdensome provisions, and not deprivation of right or privilege;<sup>139</sup> and
- (e) judiciary can penetrate behind 'public interest' in the absence of material leading to inference of public interest, mala fides, non-application of mind, etc.<sup>140</sup>

**26.4 The Committee unanimously agreed that introduction of such a section will be beneficial for relaxing the procedure under the Code for certain classes of companies, including for MSMEs, under the aegis of public interest while preserving the scheme and objective of the Code.**

## 27. TREATMENT OF MSMEs

27.1 MSMEs form the foundation of the Indian economy, and are key drivers of employment, production, economic growth, entrepreneurship and financial inclusion. As per the Annual Report of Ministry of MSMEs, there are 512 lakh

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<sup>136</sup>*T.R. Thandur v. Union of India (UOI) and Ors.*, AIR 1996 SC 1643.

<sup>137</sup>*K.N. Agarwala v. State of Uttar Pradesh and Ors.*, AIR 1965 All 175.

<sup>138</sup>*S. Vasudeva and D.P. Sharma and C. Kannan v. State of Karnataka*, ILR 1989 KARNATAKA 39.

<sup>139</sup>*Fazaluddin Haque, A. v. The State of Kerala and Ors.*, O.P. Nos. 16559 and 16672 of 1992, Date of decision – 06 April, 1993.

<sup>140</sup>*Barium Chemicals Limited and Anr. v. Co. Law Board and Ors.*, A.I.R. 1967 S.C. 295 as cited in *Fazaluddin Haque, Ibid.*

MSMEs<sup>141</sup> and their contribution amounts to 37.33 percent of the country's GDP.<sup>142</sup> Thus, the importance that MSMEs hold in the Indian economy cannot be underestimated, as they are the one of the best vehicles for job creation and economic growth.

27.2 The Committee was apprised that as per the World Bank Report on the Treatment of MSME Insolvency<sup>143</sup> ("**World Bank Report**"), the suggested approach to provide relief to MSMEs is to exempt or relax certain provisions from the regular insolvency process, in their application to MSMEs. The World Bank Report states that a separate regime altogether may not be practical in developing economies due to lack of resources and infrastructure necessary for implementation. Further, the World Bank Report discusses exemptions and relaxations given to smaller companies and companies in the nature of MSMEs in other jurisdictions<sup>144</sup>:

- (a) UK:<sup>145</sup> (i) exemptions from providing proof of small debts; (ii) exemption from requirement of physical meetings, (iii) deemed approval of certain routine decisions by creditors during insolvency;
- (b) Germany: for debtor or creditor-initiated insolvency, debtor must submit a certificate issued by a suitable person or authority that within the last six months before filing for insolvency, an unsuccessful attempt has been made to settle out of court with the creditors;
- (c) Argentina: (i) requirement to form a CoC is not mandatory (ii) RP's functions extend beyond approval of plan;
- (d) Organisation for the Harmonisation of Business Laws in Africa (17 west African states): (i) reduced documentation as compared to the regular insolvency process, for instance, comprehensive financial statements or audited statements not required, (ii) court can convert regular proceeding to a shorter process in terms of timelines (iii) in liquidation private sale preferred to sale by public auction;

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<sup>141</sup> MSME Annual Report 2015-16,  
<http://msme.gov.in/sites/default/files/MEME%20ANNUAL%20REPORT%202015-16%20ENG.pdf>,  
accessed on 28 February, 2018

<sup>142</sup> *Ibid.*

<sup>143</sup> The World Bank Report, May 2017,  
<http://documents.worldbank.org/curated/en/973331494264489956/pdf/114823-REVISED-PUBLIC-MSME-Insolvency-report-low-res-final.pdf>, accessed 05 March, 2018.

<sup>144</sup> The World Bank Report discussed exemptions in all mentioned jurisdictions, except in the UK.

<sup>145</sup> Small Business, Enterprise and Employment Act, 2015 (UK).

- (e) USA: (i) simplified voting requirement, (ii) shorter deadlines;
- (f) Korea: voting procedure simplified to make it harder for one major creditor to block the plan. Three quarters of secured claims, and either two thirds of secured claims or one half of unsecured claims and one half of number of creditors is required for approving small business rehabilitation procedure.

27.3 The Committee was apprised by several stakeholders that due to large businesses being taken into insolvency under the Code, MSMEs which are usually operational creditors to such large businesses are suffering in two ways: first, the temporary credit disruption created by the large businesses being in CIRP is leading the affected MSMEs to be dragged into insolvency, which may potentially lead to liquidation and second, in a CIRP where MSMEs are operational creditors, the liquidation value guaranteed to them is negligible.

27.4 Regarding the first issue, the Code is clear that default of INR one lakh or above triggers the right of a financial creditor or an operational creditor to file for insolvency. Thus, the financial creditor or operational creditors of MSMEs may take it to insolvency under the Code. **However, given that MSMEs are the bedrock of the Indian economy, and the intent is not to push them into liquidation and affect the livelihood of employees and workers of MSMEs, the Committee sought it fit to explicitly grant exemptions to corporate debtors which are MSMEs by permitting a promoter who is not a wilful defaulter, to bid for the MSME in insolvency. The rationale for this relaxation is that a business of an MSME attracts interest primarily from a promoter of an MSME and may not be of interest to other resolution applicants.**

27.5 The Committee also noted that the power of the Central Government under the proposed section in paragraph 26 above may be used for granting relaxations to not only corporate MSMEs but MSMEs in the form of sole proprietorships, partnerships, etc. covered under Part III of the Code<sup>146</sup> from time to time, albeit cautiously. The power should be used to make limited exemptions and modifications for MSMEs (or any other class of entities), and the guiding factor will be public interest *coupled* with the preservation of the objective of the Code.

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<sup>146</sup> Please note that Part III of the Code has not yet been notified.

27.6 Regarding the second issue, it was unanimously agreed that important operational creditors which include the important MSMEs usually get paid above the liquidation value, due to their indispensability in the operations of the corporate debtor undergoing CIRP. Therefore, at this juncture, it may not be prudent to re-consider the minimum amount guaranteed to operational creditors, as also discussed in paragraph 18 above.

## 28. APPLICATION OF LIMITATION ACT, 1963

28.1 The question of applicability of the Limitation Act, 1963 (“**Limitation Act**”) to the Code has been deliberated upon in several judgments of the NCLT and the NCLAT. The existing jurisprudence on this subject indicates that if a law is a complete code, then an express or necessary exclusion of the Limitation Act should be respected.<sup>147</sup> In light of the confusion in this regard, the Committee deliberated on the issue and unanimously agreed that the intent of the Code could not have been to give a new lease of life to debts which are time-barred. It is settled law that when a debt is barred by time, the right to a remedy is time-barred.<sup>148</sup> This requires being read with the definition of ‘debt’ and ‘claim’ in the Code. Further, debts in winding up proceedings cannot be time-barred,<sup>149</sup> and there appears to be no rationale to exclude the extension of this principle of law to the Code.

28.2 Further, non-application of the law on limitation creates the following problems: first, it re-opens the right of financial and operational creditors holding time-barred debts under the Limitation Act to file for CIRP, the trigger for which is default on a debt above INR one lakh. The purpose of the law of limitation is “to prevent disturbance or deprivation of what may have been acquired in equity and justice by long enjoyment or what may have been lost by a party's own inaction, negligence or laches”<sup>150</sup>. Though the Code is not a debt recovery law, the trigger being ‘default in payment of debt’ renders the exclusion of the law of limitation counter-intuitive. Second, it re-opens the right of claimants (pursuant to issuance of a public notice) to file time-barred claims with the IRP/RP, which may potentially be a part of the resolution plan. Such a resolution plan restructuring time-barred debts and claims may not be in compliance with the existing laws for the time being in force as per section 30(4) of the Code.

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<sup>147</sup> *Ravula Subba Rao and another v. The Commissioner of Income Tax, Madras*, (1956) S.C.R. 577.

<sup>148</sup> *Punjab National Bank and others v. Surendra Prasad Sinha* AIR 1992 SC 1815.

<sup>149</sup> *Interactive Media and Communication Solution Private Limited v Go Airlines*, 199 (2013) DLT267.

<sup>150</sup> *Rajinder Singh v. Santa Singh*, AIR 1973 SC 2537.

28.3 Given that the intent was not to package the Code as a fresh opportunity for creditors and claimants who did not exercise their remedy under existing laws within the prescribed limitation period, the Committee thought it fit to insert a specific section applying the Limitation Act to the Code. The relevant entry under the Limitation Act may be on a case to case basis. It was further noted that the Limitation Act may not apply to applications of corporate applicants, as these are initiated by the applicant for its own debts for the purpose of CIRP and are not in the form of a creditor's remedy.

## 29. WITHDRAWAL OF CIRP PROCEEDINGS PURSUANT TO SETTLEMENT

29.1 Under rule 8 of the CIRP Rules, the NCLT may permit withdrawal of the application on a request by the applicant before its admission. However, there is no provision in the Code or the CIRP Rules in relation to permissibility of withdrawal post admission of a CIRP application. It was observed by the Committee that there have been instances where on account of settlement between the applicant creditor and the corporate debtor, judicial permission for withdrawal of CIRP was granted.<sup>151</sup> This practice was deliberated in light of the objective of the Code as encapsulated in the BLRC Report, that the design of the Code is based on ensuring that *“all key stakeholders will participate to collectively assess viability. The law must ensure that all creditors who have the capability and the willingness to restructure their liabilities must be part of the negotiation process. The liabilities of all creditors who are not part of the negotiation process must also be met in any negotiated solution.”* Thus, it was agreed that once the CIRP is initiated, it is no longer a proceeding only between the applicant creditor and the corporate debtor but is envisaged to be a proceeding involving all creditors of the debtor. The intent of the Code is to discourage individual actions for enforcement and settlement to the exclusion of the general benefit of all creditors.

29.2 On a review of the multiple NCLT and NCLAT judgments in this regard, the consistent pattern that emerged was that a settlement may be reached amongst *all* creditors and the debtor, for the purpose of a withdrawal to be granted, and not only the applicant creditor and the debtor. On this basis read with the intent of the Code, **the Committee unanimously agreed that the relevant rules may be amended to provide for withdrawal post admission if the CoC approves of such action by a voting share of ninety per cent.** It was specifically discussed that rule 11 of the National Company Law Tribunal

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<sup>151</sup> *Lokhandwala* (n. 48); *Mothers Pride Dairy India Private Limited v. Portrait Advertising and Marketing Private Limited*, Civil Appeal No. 9286/2017, Date of decision – 28 July, 2017; *Uttara Foods and Feeds Private Limited v. Mona Pharmaceam*, Civil Appeal No. 18520/2017, Date of decision – 13 November, 2017.



Rules, 2016 may not be adopted for this aspect of CIRP at this stage (as observed by the Hon'ble Supreme Court in the case of *Uttara Foods and Feeds Private Limited v. Mona Pharmaceem*)<sup>152</sup> and even otherwise, as the issue can be specifically addressed by amending rule 8 of the CIRP Rules.

### 30. VALUE GUARANTEED TO DISSENTING FINANCIAL CREDITORS

30.1 'Dissenting financial creditors' are financial creditors who have either abstained from voting or voted against the resolution plan approved by the CoC.<sup>153</sup> According to regulation 38(1)(c) of CIRP Regulations, the resolution plan requires that dissenting financial creditors are paid at least the liquidation value in priority to all other financial creditors who voted in favour of the resolution plan. It was suggested that payment to such creditors in such priority may not be prudent as it may encourage financial creditors to vote against the plan and may consequently hinder resolution. It may be noted that operational creditors are to be paid in priority to all financial creditors, within thirty days of approval of resolution plan under section 31.<sup>154</sup> This thirty-day timeline for repayment has not been provided for dissenting financial creditors.

30.2 While discussing the need for a change in this regard, the Committee felt that dissenting financial creditors are placed in a disadvantageous position vis-à-vis the operational creditors, as the latter are given priority in payment not only ahead of other financial creditors but also in terms of time i.e. within thirty days from approval of the plan. Thus, the right to be paid prior to assenting financial creditors may not be diluted. Further, other measures such as reducing the voting threshold for approval of resolution plans may assist in preventing dissenting creditors from blocking its approval. Additionally, it was discussed that the prudent way to resolve this issue may not be by tinkering with what minimum must be guaranteed to such creditors statutorily, but by sustained efforts of regulatory bodies at improving the quality of resolution plans overall. Based on the above, **the Committee concluded that no change may be required in the CIRP Regulations regarding payment in priority to dissenting financial creditors.**

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<sup>152</sup> *Uttara, Ibid.*

<sup>153</sup> Regulation 2(1)(f), CIRP Regulations.

<sup>154</sup> Regulation 38(1)(b), CIRP Regulations.



### 31. DEFAULT AMOUNT FOR TRIGGERING INSOLVENCY RESOLUTION PROCESS

31.1 Section 4 of the Code provides that the minimum amount of default is INR one lakh which may be increased to INR one crore by notification by the Central Government. Only such default which is greater or equal to this prescribed threshold of INR one lakh can become a basis for initiation of CIRP under the Code. Similarly, Section 78 gives threshold of INR one thousand for initiating processes under Part III of the Code, which by notification can be revised upto INR one lakh.

31.2 It was stated to the Committee that pursuant to the introduction of the Code in 2016, it has seen around 2,400 applications so far, out of these, a large number have been filed by operational creditors — such as vendors, suppliers, and employees — who can potentially lead the company into liquidation for a default of as low as INR one lakh.<sup>155</sup> Data from the IBBI pertaining to the period January - December, 2017 also supports this trend. The data suggests that out of 540 cases admitted for corporate insolvency resolution process under the Code, as many as 234 cases were filed by operational creditors.<sup>156</sup> The Committee recognized that the Code must not be permitted to be used as tool to exert undue pressure on the corporate debtor by operational creditors by making frivolous claims. In light of the above, the Committee deliberated on the suggestion that the amount for initiating insolvency resolution process must be revisited.

31.3 The Committee considered various suggestions including providing a threshold in proportion to the total value of the corporate debtor. However, the Committee found it inappropriate to provide a threshold which may fluctuate. Further, computation of the total value of the corporate debtor may be complicated and might open floodgates of litigation.

**31.4 Based on the premise that the Code is not meant to solely be a debt recovery tool and given the initial experience of the working of the Code, the Committee decided that in order to keep frivolous applications at bay, the threshold for initiating CIRP be increased from INR one lakh to INR ten lakh and for personal insolvency resolution process, from INR one thousand to INR 10,000. The Committee recommended that notifications under Sections 4 and 78 of the Code<sup>157</sup> be issued.**

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<sup>155</sup> Shivani Saxena, *Insolvency Code being used as a Debt Recovery Tool*, Bloomberg Quint, December 27, 2017, available at <https://www.bloomberquint.com/insolvency/2017/12/27/insolvency-code-being-used-as-a-debt-recovery-tool>, (last accessed on February 26, 2018).

<sup>156</sup> IBBI Newsletter, October – December, 2017, Volume 5, pp. 10, available at [http://www.ibbi.gov.in/news\\_letter\\_Oct-Dec17.pdf](http://www.ibbi.gov.in/news_letter_Oct-Dec17.pdf), (last accessed on February 26, 2018).

<sup>157</sup> Section 78 of the Code has not been enforced as Part III has not been notified. Once it is enforced, a notification to increase the default threshold may be issued.

ANNEXURE I

No. 35/14/2017-Insolvency Section  
Government of India  
Ministry of Corporate Affairs

5<sup>th</sup> Floor, A wing  
Shastri Bhawan, New Delhi  
Dated: 16.11.2017

ORDER

Subject: - Constitution of Insolvency Law Committee

The provisions related to corporate insolvency resolution and liquidation of the Insolvency and Bankruptcy Code, 2016 (the Code) were commenced in the month of December, 2016. As on date, more than 300 cases have been admitted for resolution by the Adjudicating Authority i.e., National Company Law Tribunal. References/suggestions from various stakeholders have also been received for further improvement in the processes prescribed in the Code.

2. With a view to examine the suggestions received and related matters, the Government hereby constitutes an Insolvency Law Committee consisting of the following members:-

- |                                                                                 |                  |
|---------------------------------------------------------------------------------|------------------|
| 1. Secretary, Ministry of Corporate Affairs                                     | Chairperson      |
| 2. Chairperson, IBBI                                                            | Member           |
| 3. Additional Secretary (Banking), Department of Financial Services             | Member           |
| 4. Shri Sudarshan Sen, Executive Director, RBI                                  | Member           |
| 5. Sh. T.K. Viswanathan, Former Secretary General, Lok Sabha and Chairman, BLRC | Member           |
| 6. Sh. Shardul Shroff, Executive Chairman, Shardul Amarchand Mangaldas & Co.    | Member           |
| 7. Sh. Rashesh Shah, Chairman & CEO, Edelweiss Group                            | Member           |
| 8. Shri Sidharth Birla, past President FICCI and Chairman Xpro India Limited    | Member           |
| 9. Shri Bahram Vakil, Partner, AZB & Partners                                   | Member           |
| 10. Sh. B Sriram, MD, Stressed Assets Resolution Group, State Bank of India     | Member           |
| 11. President, Institute of Chartered Accountants of India                      | Member           |
| 12. President, Institute of Cost Accountants of India                           | Member           |
| 13. President, Institute of Company Secretaries of India                        | Member           |
| 14. Joint Secretary (Policy/Insolvency), Ministry of Corporate Affairs          | Member Secretary |

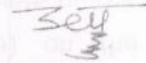
3. The Committee shall take stock of the functioning and implementation of the Code, identify the issues that may impact the efficiency of the corporate insolvency resolution and liquidation framework prescribed under the Code, and make suitable recommendations to address such issues, enhance efficiency of the processes prescribed and for effective implementation of the Code. The Committee may also make any other relevant recommendation as it may deem necessary.

4. The Committee may also invite or co-opt practitioners, experts or individuals who have knowledge or experience in insolvency, law or economics and representatives from other Regulators or Ministries. The Committee may also consult other stakeholders as part of its deliberations.

5. The non-official members of the Committee shall be eligible for travelling, conveyance and other allowances as per extant government instructions, wherever the sponsoring agency is unable to bear their expenditure. Secretarial support to the Committee will be arranged by Ministry of Corporate Affairs/Insolvency and Bankruptcy Board of India.

6. The Committee shall submit its recommendations within two months from its first meeting.

7. This issues with the approval of competent authority.



(Ashish Kushwaha)  
Director

To

All members

Copy to:-

- i. PS to CAM
- ii. Sr. PPS to Secretary, MCA
- iii. Governor, Reserve Bank of India
- iv. Secretary, Department of Financial Services, Ministry of Finance,
- v. PS to AS
- vi. PS to JS(B)

## ANNEXURE II - SUMMARY RESPONSE TO COMMENTS

S. No.	Comment/Suggestion received	Source	Summary Response
1.	Under the Code, if a debtor has entered into liquidation proceedings, the secured creditor would be paid after payment of IRP costs together with workmen dues of more than 24 months. However, the provision should allow secured creditor to be paid first (i.e. before employee claims) when a business is liquidated.	World Bank Doing Business Report (DGR) under the head Getting Credit	The current provision in the Code i.e. section 53(1)(b) provides for <i>pari passu</i> payment to workmen for their dues for a period of twenty-four months preceding the liquidation commencement date and to secured creditors who have relinquished their security. The above-mentioned position of secured creditors is a significant improvement in relation to the priority given to them in the CA 2013. Thus, the Code marks a shift towards holding secured creditors in higher priority during liquidation. However, given that workmen of a corporate debtor are the nerve centre thereof, and lose jobs and their livelihood as a result of the liquidation, it was deemed fit to retain <i>pari passu</i> priority for workmen. The Joint Parliamentary Committee increased the share of employees' due from twelve months to twenty-four months, and thus, the legislative intent has always been to give workmen due priority.
2.	Section 21(2) of the Code be amended to include operational creditors into the CoC and all other provisions related to decision making in CoC be amended accordingly.	World Bank Doing Business Report (DGR) under the head Resolving Insolvency	<p>The BLRC made a conscious decision of including only financial creditors in the CoC, and the rationale is recorded as follows:</p> <p><i>"The Committee deliberated on who should be on the creditors committee, given the power of the creditors committee to ultimately keep the entity as a going concern or liquidate it. The Committee reasoned that members of the creditors committee have to be creditors both with the capability to assess viability, as well as to be willing to modify terms of existing liabilities in negotiations. Typically, operational creditors are neither able to decide on matters regarding the insolvency of the entity, nor willing to take the risk of postponing payments for better future prospects for the entity."</i></p> <p>This rationale still holds true, and thus it was deemed fit not to amend the constitution of the CoC. Further, operational creditors whose aggregate dues are not less than ten percent of the debt have a right to attend the meetings of the CoC. Also, under the resolution plan, they are guaranteed at least the liquidation value.</p>
3.	A new section be inserted after section 24 of the Code to provide for restricting participation in the CoC to creditors whose rights are actually affected by the decision.	World Bank Doing Business Report (DGR) under the head Resolving Insolvency	<p>Following may be reasons for non-inclusion of such a provision:</p> <p>(i) The current provisions of the Code allow financial creditors to vote in the CoC for decisions to be taken by the CoC, including approval or rejection of resolution plan.</p>



			<p>According to the UNCITRAL Legislative Guide on Insolvency Law, many jurisdictions do not mandate unaffected creditors to vote as they can realise their security outside the plan.<sup>158</sup> Thus, the remedy outside the plan takes care of their interest. However, the Code does not permit creditors to stand outside the resolution plan to enforce their security during CIRP, and thus, it is imperative that all creditors' rights are dealt under the plan. Hence, a vote by all creditors, irrespective of them being affected, is considered sufficient for approval of a resolution plan.</p> <p>(ii) The U.S. Chapter 11 reorganisation provides for voting on plans only by 'impaired classes' of creditors<sup>159</sup>, which includes creditors whose debts have been altered or modified by the plan.<sup>160</sup> But this practice is substantially different from the process envisaged under the Code. First, the distinction between creditors under the Code is based on the kind debt owed to them, and not their treatment under the resolution plan. If only impaired creditors may be allowed to vote then this should include all creditors whose rights have been impaired and not just impaired financial creditors. Otherwise, a resolution plan would not form 'collective resolution. It may also be noted that the distinction between 'financial' and 'operational' creditors has been made keeping in mind the Indian ecosystem and sophistication of creditors. Second, the Code does not have class based treatment of creditors as this had proven to be unsuccessful in the prior restructuring and winding up procedures in India. Thus, assessing individual claims of all creditors and their impairment may be time consuming and may lead to frivolous challenges.</p> <p>Due to the above factors, it was discussed that the suggested change may not be made at present.</p>
4.	Section 33 of the Code be amended to introduce clause (c) in sub-section (1) to allow for direct reference by creditors for winding up of the company.	World Bank Doing Business Report (DGR) under the head Resolving Insolvency	A provision for direct reference to winding up goes against the objective of the Code of providing a linear mechanism, to mandatorily attempt resolution prior to liquidation. However, section 33(2) provides in clear terms that where the resolution professional any time during the CIRP but before confirmation of a resolution plan, intimates to the NCLT the decision of the CoC to put a company into liquidation by the

<sup>158</sup> UNCITRAL, 'Legislative Guide on Insolvency Law', (2005), [https://www.uncitral.org/pdf/english/texts/insolven/05-80722\\_Ebook.pdf](https://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf), accessed on 01 March, 2018, p. 193.

<sup>159</sup> 11 US Code § 1126 (f).

<sup>160</sup> 11 US Code § 1124.

			requisite majority, a company may be put into the liquidation process. Thus, the creditors have the power to place a company in liquidation by taking a decision during CIRP. Such a decision has been taken in several cases before the NCLT. For instance, in <i>VIP Finvest Consultancy Private Limited v Bhupen Electronics</i> <sup>161</sup> , as the company was not a going concern, and did not have employees, the CoC approved a liquidation resolution. In another case, the corporate debtor was liquidated as there was lack of business opportunity, and the creditors felt there was no point putting good money to recover bad money. <sup>162</sup> In the case of <i>Best Deal TV Pvt. Ltd.</i> , the CoC recommended liquidation since the business activities were already closed down and all employees had left the corporate debtor. <sup>163</sup> In one case where a liquidation order was passed by the NCLT, Mumbai, the ex-chairman of the corporate debtor i.e. <i>Esskay Motors Pvt. Ltd.</i> contended that the resolution professional did not invite bids from interested parties, however, the CoC noted that inviting bids would only prolong the process of resolution and will not yield any result as the corporate debtor was not a going concern. <sup>164</sup>
5.	In section 42 of the Code after the words “Against the decision of the Liquidator” the words “rejecting the claims” should be substituted by “rejecting or accepting any claim.”	World Bank Doing Business Report (DGR) under the head Resolving Insolvency	The suggested change has been recommended in Paragraph 19.1.
6.	Regulation 32 of the CIRP Regulations be omitted to allow the NCLT to decide on goods and services which are essential for the continuation of the corporate debtor’s business.	World Bank Doing Business Report (DGR) under the head Resolving Insolvency	The suggested change has been recommended in Paragraph 5.14 and 5.15.
7.	The concept of an IRP taking over the management of the corporate debtor would create an alarming situation as the normal business of the company will be stopped.	Committee on Subordinate Legislation, Rajya Sabha	Once an IRP is appointed, the management of the affairs of the corporate debtor vests in him. However, the concept of debtor in possession was done away with in the Code as it was being misused under the SICA regime. Further, the purpose of the CIRP is that debts can be repaid to the creditors as per a structured plan, and thus, will in effect benefit the whole system. The IRP is responsible for running the corporate debtor as a going concern, and the normal functions of the corporate debtor continue as far as they are permitted under the Code.

<sup>161</sup> CP No. 03 I&BP/2017, NCLT Mumbai, Date of decision – 31 July, 2017.

<sup>162</sup> *Chivas Trading Private Limited v Abhayam Trading Limited*, CP/491(IB)/CB/2017, NCLT Chennai, Date of decision - 17 November, 2017.

<sup>163</sup> CP No. 852 I&BP/2017, NCLT Mumbai, Date of decision - 02 February, 2018.

<sup>164</sup> CP No. 1076 I&BP/2017, NCLT Mumbai, Date of decision - 08 January, 2018.

8.	Concerns in relation to how a chartered accountant / insolvency professional who may not have the necessary management credentials, could run a highly technical company.	Committee on Subordinate Legislation, Rajya Sabha	The qualifications and experience of the insolvency professionals are encapsulated in the IP Regulations, which includes the requirement to pass an examination. This examination tests the competence of a person to be able to abide by the Code including managing a company. Further, in terms of section 20 read with section 23 of the Code, the IRP or RP, as the case may be, can appoint other professionals to assist her in running the company, in areas which are technical. Thus, the concerns are pre-mature, as any professional takes time to develop and evolve.
9.	The trigger amount of default in relation to operational creditors is INR one lakh which is very meagre and functioning of big companies can be stalled for default of a small amount. This amount should be raised to at least ten percent of the total value of the corporate debtor.	Committee on Subordinate Legislation, Rajya Sabha	The Committee has recommended that the minimum default amount required in order to make an application under the Code be raised to INR ten lakh for all creditors, and not only operational creditors. It was deemed fit to keep the default amount a fixed number, rather than a variable based on the value of the corporate debtor, as otherwise the calculation of value itself may be susceptible to challenge.
10.	Even one creditor can trigger insolvency, and this will prejudice other creditors as the original board will no longer be in place. There is scope of misuse of such provisions in the Code which should be modified suitably.	Committee on Subordinate Legislation, Rajya Sabha	<p>The objective of the Code is that of collective resolution. Thus, once CIRP is commenced, a CoC is required to be formed which is a body representing the interests of all financial creditors. Further, the Code requires that the resolution plan guarantees payments to operational and dissenting creditors. Thus, the protection of interest of all creditors is provided for in the Code.</p> <p>The scope of misuse is hedged by section 65 of the Code which punishes fraudulent or malicious initiation of CIRP. Further, section 11 lays down a list of persons not entitled to initiate CIRP which includes corporate debtors or financial creditors who violate the terms of the resolution plan. Further, the NCLT supervises the process with the assistance of the insolvency professional at each step. Thus, the scope of misuse is mitigated by the provisions of the Code.</p>
11.	<p>Concerns regarding the working mechanism of IUs, as given under Chapter V of the Code, were brought up. Various doubts regarding efficiency of such mechanism were raised, including the following:</p> <ul style="list-style-type: none"> <li>(i) Efficiency of IUs may be affected if reporting information to such IUs is not mandated;</li> <li>(ii) Multiplicity of IUs may prove to make</li> </ul>	Parliamentary Debates on the Code in the Sixteenth Lok Sabha Session	<p>The Committee considered issues relating to functioning of IUs and it was noted that the industry will grow over time. Due to lack of empirical evidence at such an early stage, it may be reasonable to review the mechanism of functioning of IUs at a later date once the infrastructure and market is more developed. Further, with reference to the points stated in the comment herein the following may be noted:</p> <ul style="list-style-type: none"> <li>(i) Section 215 of the Code provides that financial creditors shall submit information relating to assets in respect of</li> </ul>



	<p>information less authentic;</p> <p>(iii) Lack of clarity on the need and purpose of IUs.</p>		<p>which security is created and operational creditors may submit financial information relating to their debts. As per the BLRC Report, this will encourage operational creditors to file information with such IUs and impose an obligation to do so on the financial creditors. The requirement is kept optional for operational creditors considering the level of sophistication of such creditors. The Committee concluded that presently, there may not be enough evidence to establish a lack of efficiency, in this regard;</p> <p>(ii) The intention of allowing multiple IUs to function is to create a competitive market for such entities and documentation used for reporting of financial information may be enough to establish authenticity;</p> <p>(iii) The BLRC Report has noted that the intention behind creation of IUs is to have an effective system of filing and authenticating financial information. This may reduce disputes related to existence of transactions or details thereof and may enable easy access to information.</p>
12.	<p>Lack of accessibility to 'Adjudicating Authorities' under the Code may prove to be a significant hindrance to implementation of the Code. It has been pointed out that the number of NCLTs and DRTs and their respective appellate tribunals is very limited, and the existing ones have a huge backlog of cases.</p>	<p>Parliamentary Debates on the Code in the Sixteenth Lok Sabha Session</p>	<p>The Code focuses on timely resolution and this may be achieved only if there is proper access to the infrastructure created by the Code. The number of tribunals that constitute 'Adjudicating Authorities' is limited, and it was noted that this may be a genuine concern in relation to implementation of the Code. But this may be beyond the scope of the present Committee and may be more effectively dealt with in the long-term.</p>
13.	<p>The purpose of the establishment of the Insolvency and Bankruptcy Fund and its utilisation is unclear.</p>	<p>Parliamentary Debates on the Code in the Sixteenth Lok Sabha Session</p>	<p>The Committee discussed that the Insolvency and Bankruptcy Fund has been created to allow provision of additional funds in cases of insolvency when there are no assets for conduct of insolvency proceedings and for any other reasons mentioned in section 224(3) of the Code. Utilisation and effective allocation of this fund may be developed over time.</p>
14.	<p>It was suggested that the Code must make some distinction between debtors who have wilfully defaulted and debtors who have defaulted on payments due to business failure. The Code</p>	<p>Parliamentary Debates on the Code in the Sixteenth Lok Sabha Session</p>	<p>The Code does not make a distinction between debtor's intentions behind default. The intention of the Code is to have an objective criterion for default to trigger insolvency. It may defeat the purpose of 'easy trigger of insolvency' if the initiation of insolvency is made subjective. Thus, the Committee felt that such a distinction may not be made.</p>

	does not make any such distinction.		
15.	Concerns were raised about the low priority given to amounts due to State and Central Governments in distribution during liquidation, under section 53 of the Code. It has been pointed out that it is taxpayer's money and should be given a higher priority during liquidation.	Parliamentary Debates on the Code in the Sixteenth Lok Sabha Session	The present priority given to debts owed to Central and State Governments in section 53 is in line with the recommendation provided in the BLRC Report and has been stated to be in line with the global best practices. Further, the UNCITRAL Legislative Guide on Insolvency Law <sup>165</sup> also provides that many jurisdictions give low priority to state dues. The intention behind this is to give benefit of payment to other creditors who have taken risks while giving loans or providing debts.
16.	It was highlighted that there is a lack of clarity regarding the efficiency of the cross-border insolvency system provided in sections 234 and 235 of the Code. These provisions establish the mechanism for insolvency with respect to other countries through separate agreements with such countries.	Parliamentary Debates on the Code in the Sixteenth Lok Sabha Session	The Committee discussed that there is a need for an effective cross-border insolvency law to enable coordinated and efficient insolvency proceedings. The current provisions of the Code do not provide an overarching framework for insolvency involving assets, creditors or parallel proceedings in foreign jurisdictions and since this requires a detailed analysis, recommendations will be submitted separately.
17.	There is no mechanism in the Code for combining proceedings against entities which are related through business, like associate or holding companies. Since assets of one company in a group may be substantially different from the actual debtor company, such a mechanism may enable more effective realisation for creditors. It was highlighted that such a mechanism for insolvency of group companies may be considered.	Parliamentary Debates on the Code in the Sixteenth Lok Sabha Session	It was noted that the treatment of group companies within insolvency laws is a complicated subject. The current system of insolvency law is new, and it may be too soon to introduce a complex subject, like the present issue. The UNCITRAL Legislative Guide on Insolvency Law <sup>166</sup> also provides that the treatment of group companies is a very complex subject in relation to insolvency law and has multiple different approaches in different jurisdictions. Since lifting of the corporate veil in insolvency may affect corporate debtor entities significantly, this issue may be dealt with in the long-term once the present system is well established.
18.	It was questioned if special dispensation should be made in the Code to relax procedures for various companies like public sector units and MSMEs or other such small-scale companies.	Parliamentary Debates on the Code in the Sixteenth Lok Sabha Session	The Code, in its original form, provided for a fast-track CIRP for certain companies, which was meant to provide a shorter mechanism for the CIRP. But this has now proposed to be deleted and an overarching power to provide exemption/modification with respect to application of some provisions of the Code to certain entities including MSMEs has been proposed to be inserted in Code. This may enable

<sup>165</sup> UNCITRAL, (n. 90).

<sup>166</sup> UNCITRAL, (n. 90).

			the Central Government to make special dispensation for certain classes of entities including MSMEs.
19.	It was enquired whether some provisions of laws like SICA should continue to be applicable for all or certain kind of debtor entities.	Parliamentary Debates on the Code in the Sixteenth Lok Sabha Session	The present comment was made before enactment of the Code and repeal of previous insolvency laws like SICA along with other laws mentioned in Part V of the Code. The Code was meant to substitute insolvency laws operative prior to its enactment and was intended to be a consolidated legislation. Existence of fragmented insolvency laws, as was in existence prior to the Code, may defeat the purpose of the Code and the present comment may thus be answered to in the negative.
20.	It was suggested that a debtor may be given a right of first refusal for bids presented by ARCs (not being a creditor in that case) if the debtor is willing to provide better terms than the proposed resolution plan, in order to prevent transfer of business of the debtor.	Parliamentary Debates on the Code in the Sixteenth Lok Sabha Session	The scheme of the Code gives the power to accept or reject the resolution plan to the CoC and not the debtor. The intent may be that the CoC views all the proposed resolution plans and objectively decides which is the most suitable. Shifting this decision to the debtor may go against the intention of the Code, as it meant to give control of resolution to creditors. The present suggestion may thus be discounted.
21.	The Code will result in gross abuse, massive corruption, favouritism and nepotism and it may help to generate black money also.	Parliamentary Debates on the Amendment Act in the Sixteenth Lok Sabha Session	As stated in the Preamble to the Code, it seeks to <i>inter-alia</i> facilitate insolvency resolution in a time bound manner so that value of the assets of debtors is maximised, availability of credit in the market is enhanced and entrepreneurship is encouraged. Notably, enactment of the Code has resulted in a marked improvement in India's ranking in the latest Ease of Doing Business Rankings released by the World Bank. <sup>167</sup> As discussed above, the Code contains various checks and balances in order to prevent abuse of its provisions. Moreover, as experience from implementation of the Code emerges, suitable safeguards are being built into it. For example, section 29A was added to the Code by the Amendment Act in order to ensure that those who contributed to defaults of a corporate debtor or are otherwise undesirable do not gain or regain control of the corporate debtor at the cost of the creditors.  Moreover, significant powers have been granted to the CoC in order to ensure that management of the corporate debtor by the RP during CIRP is subject to adequate supervision. For example,

<sup>167</sup> Ease of Doing Business Rankings - World Bank, 2017, <http://www.doingbusiness.org/rankings>, accessed 08 March, 2018; Joe C. Mathew, 'Ease of Doing Business 2018 rankings: India jumps 30 points to reach top-100 club', (Business Today, 01 November, 2017), <https://www.businesstoday.in/current/economy-politics/ease-of-doing-business-ranking-2018-india-rank-world-bank/story/263003.html>, accessed 08 March, 2018.

			<p>section 28 requires approval of the CoC if certain actions in relation to the corporate debtor are to be taken by the RP. The Code in section 53 also prioritizes the interests of vulnerable stakeholders such as workmen and employees in the event of liquidation. Further, as stated earlier, the NCLT supervises the processes prescribed under the Code with the assistance of the insolvency professional at each step.</p> <p>The Committee concluded that there is no concrete evidence to substantiate the apprehension that the Code will results in gross abuse, massive corruption, favouritism, nepotism or help in generating black money.</p>
22.	<p>Even a minor default will lead to the company being placed in the hands of insolvency experts and it will be dissolved unless 75 per cent of the creditors agree to continue the operations of the company. Here, in this case, 26 per cent of the creditors can move for an insolvency resolution. This means, they may hold the company to ransom.</p>	<p>Parliamentary Debates on the Amendment Act in the in the Sixteenth Lok Sabha Session</p>	<p>After due deliberation and factoring in the experience of past restructuring laws in India and international best practices, the Committee has recommended that to further the stated object of the Code i.e. to promote resolution, the voting share for approval of resolution plan and other critical decisions may be reduced from 75 % to 66 % or more of the voting share of the financial creditors. The Committee also recommended that for approval of the other routine decisions for continuing the corporate debtor as going concern by the IRP/RP, the voting share threshold may be reduced to 51% or more of the voting share of the financial creditors. Please see paragraph 11 of the Report for a detailed discussion in this regard.</p>
23.	<p>NCLT has no jurisdiction to look into the larger interest of the majority shareholders or the creditors, the government revenue and workmen. That will be determined by the minority creditors.</p>	<p>Parliamentary Debates on the Amendment Act in the in the Sixteenth Lok Sabha Session</p>	<p>The Code has various provisions that ensure that interests of all stakeholders are adequately taken into account in any resolution plan approved as part of the CIRP as well as in case of liquidation of the corporate debtor. Some of the protections enshrined in the Code are as follows:</p> <ul style="list-style-type: none"> <li>▪ Regulation 38 (1)(b), CIRP Regulations- the resolution plan must mandatorily provide that operational creditors are granted a minimum of the liquidation value and are paid in priority to financial creditors and within 30 days of approval of the resolution plan by the NCLT</li> <li>▪ Regulation 38 (1A), CIRP Regulations - the resolution plan must include a statement as to how it has dealt with the interests of all stakeholders</li> <li>▪ Section 53 (1)(b) - dues of workmen for 24 months preceding the liquidation commencement date are given equal priority as dues of secured creditors in the payment waterfall in case of liquidation</li> <li>▪ Section 53(1)(e) - Government dues have been placed after dues payable towards</li> </ul>

			<p>insolvency costs, dues payable to workmen, employees, secured creditors, and unsecured creditors in the payment waterfall in case of liquidation</p> <ul style="list-style-type: none"> <li>▪ Voting threshold for decisions of the CoC - as stated above, the Committee has recommended that the voting threshold for voting by the CoC be decreased appropriately in order to encourage resolution and disable minority creditors from blocking resolution plans and other approvals</li> <li>▪ Section 31 and 30(2) - The NCLT can approve resolution plans only if it is satisfied that the requirements stated in section 30(2) have been met in the resolution plan approved by the CoC.</li> </ul>
24.	<p>As soon as a petition of insolvency resolution is admitted, the company is handed over to the insolvency professional and thereby generate an automatic stay on all the assets of the company. This is not meant for the revival of the company but for the insolvency resolution, the final result of which will be liquidation.</p>	<p>Parliamentary Debates on the Amendment Act in the in the Sixteenth Lok Sabha Session</p>	<p>A moratorium is imposed under section 14 of the Code from the insolvency commencement date. As stated in the BLRC Report the underlying objective for the moratorium is as follows:</p> <p>"In order to ensure that the resolution can proceed in an orderly manner, it is important for the Adjudicator to put in place an environment of a "calm period" with a definite time of closure, that will assure both the debtor and creditors of a time-bound and level field in their negotiations to assess viability....</p> <p>The motivation behind the moratorium is that it is value maximising for the entity to continue operations even as viability is being assessed during the IRP. There should be no additional stress on the business after the public announcement of the IRP."</p> <p>Notably, section 14(2) provides that supply of essential goods or services to the corporate debtor shall not be suspended during the moratorium period. Moreover, section 20 read with section 23 categorically states that the IRP and RP, as the case maybe, are required to protect and preserve value of the corporate debtor and manage its operations as a 'going concern'.</p> <p>Further, the Code provides strict timelines for various actions to be undertaken as part of the CIRP in order to ensure value maximisation and preservation of the assets of the corporate debtor.</p> <p>In the absence of any concrete evidence to establish that the Code has failed to encourage revival and its provisions are pro-liquidation, the Committee did not deliberate further on the point.</p>

25.	Qualifications of an insolvency professional are not mentioned anywhere in the Code. Questions were raised as to how an insolvency professional, that is, a third party, can manage a company better than the existing management of the company? It was highlighted that the insolvency professional has no stake in the company. The result will be siphoning off the money and winding up of the company rather than the reviving of the company. It was suggested that eligibility criteria of the insolvency professional must be prescribed in the Code itself.	Parliamentary Debates on the Amendment Act in the in the Sixteenth Lok Sabha Session	Specifying qualifications of an insolvency professional was deemed to be a purely regulatory matter. Hence the Committee felt that the IBBI in its capacity as the regulator established under the Code, is better placed to specify the eligibility criteria and minimum qualification requirements for resolution professionals, as may be required, in the IP Regulations or other suitable regulations..
26.	It was alleged that for priority in realisation, the Code places unsecured and secured creditors on the same footing which will be a serious disadvantage to the public sector banks and secured creditors. The priority of clearing the liability of workers, secured creditors, revenue, tax, etc. provided in the Code was questioned. It was suggested that this is against the economic interests of Indian business, Indian public sector banks and Indian workmen. It was also alleged that there is no protection in the Code as far as workmen are concerned.	Parliamentary Debates on the Amendment Act in the in the Sixteenth Lok Sabha Session	Section 53 of the Code places secured creditors who have relinquished their security above unsecured financial creditors. Thus, clear distinction has been drawn between unsecured and secured creditors who join the liquidation proceedings for the purpose of the payment waterfall in case of liquidation. Unsecured creditors are ranked above secured creditors who have unpaid debts following enforcement of securities as it is presumed that such secured creditors have recovered most of their dues by enforcement of their security outside the liquidation proceedings. Moreover, as stated in the BLRC Report, protection of dues of unsecured creditors is intentional in order to encourage the market for corporate bonds and other unsecured debt.  With respect to dues of workmen, they have been placed at the highest priority along with secured creditors who have relinquished their security, second only to IRP costs under the payment waterfall provided in section 53 of the Code.
27.	It was suggested that the criteria for persons debarred under section 29A of the Code is too broad and will hamper competitive bidding.	Parliamentary Debates on the Amendment Act in the in the Sixteenth Lok Sabha Session	The Committee considered various representations received in this regard and has recommended certain amendments to section 29A of the Code which seek to clarify and streamline the scope of this provision. At the same time the Committee also underscored the importance of ensuring that persons who contributed to the defaults of the company or are otherwise undesirable do not misuse the Code to gain or regain control of the corporate debtor at the expense of the creditors.
28.	It was suggested that the one year time frame for NPA under section 29A(c) of the Code must be increased to three years.	Parliamentary Debates on the Amendment Act in	In regards to the disqualification under section 29A(c) for having an NPA account, the Committee deliberated whether the time period for existence of the NPA account must be



		the in the Sixteenth Lok Sabha Session	increased from one year to three years. It was stated to the Committee that a downturn in a typical business cycle was most likely to extend over a year. However, in the absence of any concrete data, the Committee felt that there is no conclusive way to determine what the ideal time period for existence of an NPA should be for the disqualification to apply. The Committee felt that the Code was a relatively new legislation and therefore, it would be prudent to wait and allow industry experience to emerge for a few years before any amendment is made to the NPA holding period under section 29A(c).
29.	It was stated that section 29A of the Code is particularly onerous for small companies.	Parliamentary Debates on the Amendment Act in the in the Sixteenth Lok Sabha Session	The Committee has recommended that a provision in addition to section 240 of the Code, must be provided in order to enable the Government to, by way of a notification, exempt or modify application of certain provisions of the Code to MSMEs as defined in the Micro, Small and Medium Enterprises Development Act, 2006.
30.	The power to impose penalty between INR one lakh to INR two crore for contravention of provisions of the Code was stated to be excessive.	Parliamentary Debates on the Amendment Act in the in the Sixteenth Lok Sabha Session	<p>The Committee considered the penalties applicable for contravention of various other statutes that deal with corporate entities and concluded that the penalty provided in section 235A of the Code is reasonable given the severity of repercussions on a large number of stakeholders in case of contravention of provisions of the Code.</p> <p>For example, in case of insider trading, SEBI is empowered under section 15G of the SEBI Act, 1992 to impose a penalty ranging between INR ten lakhs to INR twenty-five crore or three times the amount of profits made out of insider trading, whichever is higher. Similarly, the CCI is empowered under section 42 of the Competition Act, 2002 to impose a penalty ranging between INR one lakh per day to INR ten crore in case of contravention of certain orders or directions of the CCI.</p>
31.	Identification of a wilful defaulter has been left to the banks but within the guidelines of the RBI. It was suggested that this might lead to arbitrariness and such punitive or restrictive measures should be enshrined in the Code, rather than being left to an interested party such as a lender or a bank.	Parliamentary Debates on the Amendment Act in the in the Sixteenth Lok Sabha Session	The Committee noted that section 29A(b) of the Code purports to disqualify a person who is a wilful defaulter in accordance with the guidelines of the RBI issued under the BR Act from submitting a resolution plan. In the absence of concrete evidence of allegations of arbitrariness in classification of persons as wilful defaulters, the Committee decided that an amendment to the provision may not be needed.
32.	It was suggested that if a promoter challenges his identification as wilful defaulter in court and seeks a stay on the insolvency proceedings till the	Parliamentary Debates on the Amendment Act in the in the Sixteenth Lok Sabha Session	The Committee noted that the Hon'ble Supreme Court in the <i>Ravikant Patil</i> case <sup>168</sup> , held that " <i>where the conviction itself is stayed, the effect is that the conviction will not be operative from the date of stay.</i> " Hence, in accordance with applicable

<sup>168</sup> *Ravikant Patil* (n. 96).



	challenge is decided, this may further causes delay and losses to the already stressed assets.		<p>jurisprudence, the disqualification mentioned in section 29A(b) shall not apply if a stay of the conviction order is granted by a court of law.</p> <p>However, in order to prevent unnecessary stalling of the CIRP, the Committee did not recommend any grace period from applicability of the disqualification during pendency of any appeal made in this regard.</p> <p>The Committee was apprehensive of the possibility of misuse of the provision by filing of frivolous appeals as a delay tactic by promoters as well as other resolution applicants.</p>
33.	It was alleged that SEBI bars a particular person from accessing the security markets over a trivial or small issue. Accordingly, a resolution applicant should not be barred because of small issues.	Parliamentary Debates on the Amendment Act in the in the Sixteenth Lok Sabha Session	<p>The Committee discussed that the intent to disqualify certain undesirable persons from proposing resolution plans was evident from the Statement of Objects and Reasons of the Amendment Act which introduced section 29A in the Code. Hence, so long as a person is prohibited by SEBI from trading in securities or accessing the securities markets, the disqualification in section 29A(f) shall be applicable. If experience of implementation of this provision suggests in the future that innocent persons are being disqualified pursuant to this provision, it may be reworked at a later date.</p>
34.	An example was cited of a case in which the creditor had to take a 94% haircut. It was stated that if such resolution plans are approved, public sector banks will not get their money back. It was also stated that as per the report issued by the World Bank, on one dollar India's recovery rate is just 26 cents.	Parliamentary Debates on the Amendment Act in the in the Sixteenth Lok Sabha Session	<p>The Committee underscored the intent of the Code to rely on the collective resolution by creditors in the CoC once CIRP commences. The Committee noted that the proviso to section 21(2) bars financial creditors who are related parties to the corporate debtor from representation, participation or voting in the CoC. The Committee felt that presently the protection provided in this provision is sufficient to ensure that decisions of the CoC are not influenced by the corporate debtor. It was discussed that should concrete evidence of the lack of improvement in the recovery rate in India emerge even after implementation of the Code for a reasonable time period, amendments to the Code may be considered at such future date.</p>

## ANNEXURE III - SUMMARY OF PROPOSED AMENDMENTS

### PART I - RECOMMENDATIONS PROPOSING AMENDMENTS TO THE CODE

PROVISION	NATURE OF AMENDMENT
<b>PART I</b>	
<b>CHAPTER I - PRELIMINARY</b>	
Section 3(12) Default	To replace the word “repaid” with the word “paid” in Section 3(12). ( <i>Para 1.22</i> )
<b>PART II</b>	
<b>CHAPTER I - PRELIMINARY</b>	
Insertion of Section 5(5A)  Corporate guarantor	New definition to be inserted. ( <i>Para 23.1</i> )
Section 5(8)  Financial debt	To insert an explanation after section 5(8)(f) to state that any amount raised under a real estate project from an allottee shall be deemed to be an amount having the commercial effect of borrowing where the terms “real estate project” and “allottee” shall have the meaning assigned to them under the Real Estate (Regulation and Development) Act, 2016. ( <i>Para 1.9</i> )
Section 5(15)  Interim finance	To amend the definition of “interim finance” to include interest on interim finance up to a specified date. ( <i>Para 1.14</i> )
Section 5(21)  Operational debt	To replace the word “repayment” with the word “payment” in section 5(21). ( <i>Para 1.22</i> )
Section 5(24A)  Related party in relation to an individual	New definition to be inserted. ( <i>Para 1.27</i> )
<b>CHAPTER II - CORPORATE INSOLVENCY RESOLUTION PROCESS</b>	
Section 7  Initiation of corporate insolvency resolution process by financial creditors	To insert sub-section (8) in section 7 to empower the Central Government to notify persons who may file an application under section 7 on behalf of the financial creditor. ( <i>Para 9.3</i> )

<p>Section 8</p> <p>Insolvency resolution by operational creditor</p>	<p>a. To replace the word “and” with the word “or” in section 8(2)(a) in line with the judgement of the Hon’ble Supreme Court in <i>Mobilox Innovations Private Limited v. Kirusa Software Private Limited</i> and the intention of the legislature. <b>(Para 2.2)</b></p> <p>b. To replace the word “repayment” in section 8(2)(b) and in the explanation to section 8 with the word “payment”. <b>(Para 1.22)</b></p>
<p>Section 9</p> <p>Application for initiation of corporate insolvency resolution process by operational creditor</p>	<p>a. To amend section 9(3)(c) in line with the judgment of the Hon’ble Supreme Court in <i>Macquarie Bank Limited v. Shilpi Cable technologies Limited</i> by making the requirement for operational creditors to submit a certificate from a financial institution under section 9(3)(c) optional. <b>(Para 3.5)</b></p> <p>b. To omit the existing clause (d) in section 9(3) and insert new clauses (d) and (e) to provide flexibility for an operational creditor to submit as proof of its debt, records with an IU or such other proof confirming that there is no payment of an unpaid operational debt by the corporate debtor and to empower the Central Government to prescribe other information that may be submitted by an operational creditor. <b>(Para 3.5)</b></p> <p>c. To replace the word “repayment” in section 9(5)(i)(b) and 9(5)(ii)(b) with the word “payment”. <b>(Para 1.22)</b></p>
<p>Section 10</p> <p>Initiation of corporate insolvency resolution process by corporate applicant</p>	<p>a. To insert in section 10(3), a new clause (c) to provide for the requirement of obtaining a special resolution passed by the shareholders of the corporate debtor or a resolution passed by at least three-fourth of the total number of partners of the corporate debtor, as the case may be, approving filing of the application. <b>(Para 4.6)</b></p> <p>b. To provide in section 10(4), that the presence or absence of a pending disciplinary proceedings against the proposed RP to be a ground for acceptance or rejection of application for CIRP filed by the corporate applicant. <b>(Para 4.7)</b></p>
<p>Section 12</p> <p>Time-limit for completion of insolvency resolution process</p>	<p>To reduce the voting threshold prescribed in section 12(2) for obtaining the approval of the CoC for extension of CIRP period from seventy-five per cent to sixty-six per cent. <b>(Para 11.6)</b></p>

<p>Section 14</p> <p>Moratorium</p>	<p>a. To insert an explanation to section 14(1) to clarify that the moratorium shall not be applicable to a surety in a contract of guarantee to a corporate debtor. (<i>Para 5.11</i>)</p> <p>b. To insert a new proviso to section 14(2) empowering the IRP/ RP to make an application to the NCLT for continuation of supply of essential goods or services other than those which are specified in the CIRP Regulations. (<i>Para 5.15</i>)</p>
<p>Section 15</p> <p>Public announcement of corporate insolvency resolution process</p>	<p>To provide IBBI the power to specify the last date for submission of claims by inserting, in section 15 (1)(c), the words “as may be specified;” after the word “claims;”. (<i>Para 6.1</i>)</p>
<p>Section 16</p> <p>Appointment and tenure of interim resolution professional</p>	<p>To amend section 16(5) to provide that the term of the IRP shall continue till the appointment of the RP. (<i>Para 7.1</i>)</p>
<p>Section 17</p> <p>Management of the affairs of the corporate debtor by interim resolution professional</p>	<p>To insert clause (e) to section 17(2) to provide that the IRP will be responsible for complying with the statutory requirements under applicable laws while managing the affairs of the corporate debtor during CIRP. (<i>Para 8.4</i>)</p>
<p>Section 18</p> <p>Duties of the interim resolution professional</p>	<p>To replace in the explanation to section 18, the word “sub-section” with the word “section”. (<i>Para 8.4</i>)</p>
<p>Section 21</p> <p>Committee of creditors</p>	<p>a. To extend the disqualification in the first proviso of section 21(2) for financial creditors who are related parties to the corporate debtor from participating in the CoC to authorised representatives of financial creditors mentioned in sections 21(6), 21(6A) and section 24(5). (<i>Para 10.8</i>)</p> <p>b. To provide a carve out from the first proviso of section 21(2) for financial creditors that are regulated by a financial sector regulator and have become a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares of the corporate debtor, prior to the insolvency commencement date. (<i>Para 1.24</i>)</p>

	<p>c. To clarify that section 21(3) should be subject to section 21(6) and (6A). <b>(Para 10)</b></p> <p>d. To exclude financial debt issued as securities from section 21(6). <b>(Para 10.8)</b></p> <p>e. To insert a new sub-section (6A) to provide the manner of participation and voting in the CoC where the financial debt (i) is in the form of securities and deposits; (ii) is owed to a class of creditors exceeding the number as may be specified and such creditors are not covered in 21(6) and point (i) above; (iii) is represented by a guardian, executor or administrator. <b>(Para 10.8)</b></p> <p>f. To substitute section 21(7), to empower IBBI to specify the manner of voting and determine the voting share in respect of financial debts covered in the section 21(6) and the newly inserted section 21(6A). <b>(Para 10.8)</b></p> <p>g. To be amend the threshold for voting by the CoC on routine decisions in section 21(8) from seventy-five per cent to fifty-one per cent, unless otherwise provided in the Code. <b>(Para 11.6)</b></p>
Section 22 Appointment of resolution professional	<p>a. To reduce the voting threshold prescribed in section 22(2) for obtaining the approval of the CoC for appointment of RP from seventy-five per cent to sixty-six per cent. <b>(Para 11.6)</b></p> <p>b. To provide for the requirement to obtain consent of an IRP to continue as RP by amending section 21(3)(a). <b>(Para 12.3)</b></p> <p>c. To provide for the requirement to obtain consent of an RP to be appointed as an RP by amending section 21(3)(b). <b>(Para 12.3)</b></p>
Section 23 Resolution professional to conduct the corporate insolvency resolution process	<p>To insert a proviso to section 23(1) to state that the RP shall continue to manage the operations of the corporate debtor after the expiry of the CIRP period post submission of the resolution plan under section 30(6), until an order is passed by the NCLT under section 31. <b>(Para 13.2)</b></p>
Section 24	<p>a. To include authorised representatives of financial creditors among the CoC members to whom notice of meetings of the CoC must be sent by replacing the words “Committee of creditors;” with the words “Committee of creditors, including</p>

Meeting of committee of creditors	<p>the authorised representatives mentioned in sub-section (6) and (6A) of section 21 and sub-section (5) of this section” in section 24(3)(a). (<i>Para 10.8</i>)</p> <p>b. To replace the word “Any” with the words “Subject to sub-section (6) and (6A) of section 21, any” in section 24(5). (<i>Para 10.8</i>)</p>
<p>Section 25A</p> <p>Rights and duties of authorised representative of financial creditors</p>	<p>To insert section 25A to provide the rights and duties of the authorised representatives of financial creditors appointed under section 21(6), (6A) or section 24(5). Few salient features of the provision are as follows:</p> <ul style="list-style-type: none"> <li>▪ The authorised representative shall have the right to participate and vote in the meeting of the CoC on behalf of the financial creditors it represents, in accordance with the prior voting instructions of such creditors obtained through physical or electronic means.</li> <li>▪ It shall be the duty of the authorised representative to circulate the agenda and minutes of the meeting of the CoC to the financial creditors it represents.</li> <li>▪ She shall be duty bound to not act against the interest of the financial creditors she represents and shall always act as per prior instructions from each such financial creditor as per their voting share, if she represents several financial creditors.</li> <li>▪ In the absence of any prior instructions through physical or electronic means, the authorised representative shall abstain from voting.</li> <li>▪ Any instructions received by the authorised representative from the financial creditors will be required to be filed with the CoC. (<i>Para 10.8</i>)</li> </ul>
<p>Section 27</p> <p>Replacement of resolution professional by the committee of creditors</p>	<p>To substitute section 27(2) to state that the CoC may, at a meeting, by a vote of not less than sixty-six per cent of voting shares, propose to replace the RP appointed under section 22 with another RP, subject to a written communication from the latter in the specified form. (<i>Para 11.6, Para 12.3</i>)</p>
<p>Section 28</p> <p>Approval of committee of creditors for certain actions</p>	<p>To amend section 28(3) to provide that the threshold for voting for all actions stated in section 28(1) shall be fifty-one per cent. (<i>Para 11.6</i>)</p>
<p>Section 29A</p> <p>Persons not be eligible to be resolution applicant</p>	<p>a. To limit the scope of applicability of the disqualifications in section 29A by deleting reference to "person acting jointly or in concert". (<i>Para 14.3</i>)</p>

	<p>b. In section 29A(c):</p> <ul style="list-style-type: none"><li>(i) to clarify that the NPA must be held at the time of submission of the resolution plan by inserting at the beginning to the clause the words “at the time of submission of the resolution plan has an account,”; (<i>Para 14.8</i>)</li><li>(ii) to extend the NPA classification criteria by adding after the words “the Banking Regulation Act, 1949”, the words “or in accordance with guidelines issued under any other applicable statute by a financial sector regulator in India”; (<i>Para 14.7</i>)</li><li>(iii) to insert a second proviso exempting a resolution applicant that is a financial entity and is not a related party to the corporate debtor from disqualification on account of holding NPAs. The term financial entity is defined in the proposed explanation II to section 29A.  Further, to clarify by inserting an explanation to the proposed second proviso stating that a financial creditor, of the corporate debtor, that is regulated by a financial sector regulator and is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares, prior to the insolvency commencement date shall not be considered a related party for the second proviso; (<i>Para 14.4</i>)</li><li>(iv) to insert a third proviso, to exempt from disqualification under section 29A(c), resolution applicants with an NPA account if such account was acquired pursuant to a prior resolution plan approved under this Code for a period of three years from the date of approval of such prior resolution plan by the NCLT. (<i>Para 14.4</i>)</li></ul> <p>c. In section 29A(d):</p> <ul style="list-style-type: none"><li>(i) to restrict disqualification for conviction as provided in section 29A(d) to only to those offences that are listed in the proposed schedule XII. In the proposed schedule XII, flexibility to be provided to the Central Government to update the schedule by adding statutes to it by means of a notification; (<i>Para 14.9</i>)</li></ul>
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	<p>(ii) to limit the disqualification period by inserting a proviso stating that the disqualification shall extend from the date of conviction and shall continue for a period of six years from the date of conviction or from the date of release from imprisonment, whichever is later; (<i>Para 14.10</i>)</p> <p>(iii) to clarify position of law that the disqualification shall not be applicable if a stay on the conviction order has been granted by a court of law in India. (<i>Para 14.11</i>)</p> <p>d. To insert a proviso after section 29A(g) to exempt from disqualification, a resolution applicant who has acquired a corporate debtor in which a preferential, undervalued, extortionate credit transaction or fraudulent transaction has taken place prior to the acquisition of the corporate debtor pursuant to a resolution plan approved under the Code or pursuant to a scheme or plan approved by a financial sector regulator or a court of law and has not otherwise contributed to the preferential, undervalued, extortionate credit transaction or fraudulent transaction. (<i>Para 14.12</i>)</p> <p>e. To clarify that the disqualification in section 29A(h) is applicable only if the guarantee has been invoked by the creditor and dishonoured by the guarantor. (<i>Para 14.14</i>)</p> <p>f. To substitute the words “has been” with the word “is” in section 29A(i) in order to clarify that the disqualification is applicable during the currency of the disability stated in this provision. (<i>Para 14.15</i>)</p> <p>g. To renumber the explanation to section 29A(j) as explanation I. In such renumbered explanation I, to add a new clause (iv) that includes as a "connected person", any persons who along with the resolution applicant, with a common objective or purpose of acquisition of shares or voting rights in, or exercising control over a corporate debtor, pursuant to an agreement or understanding, formal or informal, directly or indirectly cooperate for acquisition of shares or voting rights in, or exercise of control over the corporate debtor. (<i>Para 14.3</i>)</p> <p>h. To substitute the proviso to the explanation I in order to limit the scope of the term “connected person” for financial entities that are not related parties to the corporate debtor. Further, an explanation to this proviso to be inserted to state that a financial creditor, of the corporate debtor, that is regulated by a financial</p>
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	<p>sector regulator and is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares, prior to the insolvency commencement date shall not be considered a related party for this proviso. <b>(Para 14.5)</b></p> <p>i. To rationalise applicability of the term “connected person” in explanation I by inserting a second proviso which states that for section 29A(d) and (e) and the corresponding provisions in clause (i) of the section 29A, the term “connected person” shall mean only those persons stated in clause (i) and (ii) of the explanation I. <b>(Para 14.6)</b></p> <p>j. To insert a new definition as an explanation after the renumbered explanation I, which defines the term financial entity for the purposes of the section 29A. To provide flexibility to the Central Government to add categories of persons to the definition of "financial entities" by way of a notification and to enable to the Central Government to notify criteria in consultation with a financial sector regulator which a person must meet in order to be classified as a financial entity. <b>(Para 14.4)</b></p> <p>k. To insert a new sub-section 29A(2) which mandates every resolution applicant to submit an affidavit stating that it is eligible to submit a resolution plan in terms of section 29A (1) along with the resolution plan to the RP. <b>(Para 14.16)</b></p>
<p>Section 30</p> <p>Submission of resolution plan</p>	<p>a. To replace the word “repayment” in section 30(2)(a) and 30(2)(b) with the word “payment”. <b>(Para 1.22)</b></p> <p>b. To insert an explanation after section 30(2), to give effect to the MCA Circular dated 25 October 2017 stating that for the purposes of section 30(2)(e), any shareholder approval required under the Companies Act, 2013 or any other law for the time being in force for the implementation of actions under the resolution plan shall be deemed to have been given. <b>(Para 17.1)</b></p> <p>c. To reduce the voting threshold prescribed in section 30(4) for approving the resolution plan from seventy-five per cent to sixty-six per cent. <b>(Para 11.6)</b></p> <p>d. To insert a new proviso after the last proviso to section 30(4), to clarify that the eligibility criteria in section 29A as amended by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 shall be applicable to resolution applicants that have not submitted resolution plans on the date of coming into force</p>

	of the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018. <i>(Para 14.17)</i>
Section 31  Approval of the resolution plan	<p>a. To insert a proviso to section 31(1) to state that the NCLT shall, before passing an order of approval of resolution plan, ensure that the resolution plan has a satisfactory implementation plan. <i>(Para 8.4)</i></p> <p>b. To insert section 31(4) to state that the necessary approvals from the Central and State Governments and other authorities may be obtained within a period of one year from the date of approval of the resolution plan by the NCLT or such time as is specified in the relevant law for obtaining such approvals, whichever is later. <i>(Para 16.1)</i></p>
<b>CHAPTER III - LIQUIDATION PROCESS</b>	
Section 33  Initiation of liquidation	<p>a. To delete reference to the fast track corporate insolvency process in section 33(1)(a). <i>(Para 22)</i></p> <p>b. To reduce the voting threshold prescribed in section 33(2) for obtaining the approval of the CoC for making an application to the NCLT to pass a liquidation order from seventy-five per cent to sixty-six per cent. <i>(Para 11.6)</i></p>
Section 34  Appointment of liquidator and fee to be paid	<p>a. To provide for the requirement to obtain consent of an RP to continue as a liquidator by amending section 34(1). <i>(Para 12.3)</i></p> <p>b. To insert a new clause (c), after clause (b) in section 34(4) to state that the NCLT shall by order replace the RP if the RP fails to submit written communication under section 34(1). <i>(Para 12)</i></p> <p>c. To provide the NCLT the power to direct IBBI to propose another liquidator if an RP does not consent to continue as the liquidator by amending section 34(5). <i>(Para 12)</i></p> <p>d. To provide for the requirement to obtain consent of an RP to act as the liquidator by amending section 34(6). <i>(Para 12.3)</i></p>
Section 42  Appeal against the decision of Liquidator	To amend section 42, in order to enable appeals from acceptance of claims by the liquidator. <i>(Para 19)</i>
Section 45  Avoidance of undervalued transactions	To rectify a cross-referencing error in section 45(1) of the Code with regards to the definition of undervalued transactions contained in section 45(2). <i>(Para 20)</i>

<b>CHAPTER IV - FAST TRACK CORPORATE INSOLVENCY RESOLUTION PROCESS</b>	
Section 55 - Section 58	To omit Chapter IV that deals with Fast Track Corporate Insolvency Resolution Process ( <i>Para 22.3</i> )
<b>CHAPTER VI - ADJUDICATING AUTHORITY FOR CORPORATE PERSONS</b>	
Section 60  Adjudicating Authority for corporate persons	<p>a. To substitute sub-section (2) of section 60 to provide that if an application for CIRP or liquidation of a corporate debtor is pending before an NCLT, then an application for insolvency resolution or liquidation or bankruptcy, as the case may be, of a corporate guarantor or personal guarantor of such corporate debtor must be filed before the same NCLT. (<i>Para 23.1</i>)</p> <p>b. To substitute sub-section (3) of section 60 to provide that a proceeding for insolvency resolution, liquidation or bankruptcy, as the case may be, of a corporate guarantor or personal guarantor of a corporate debtor pending in any court or tribunal shall stand transferred to the NCLT bench dealing with the insolvency resolution process or liquidation proceeding of such corporate debtor. (<i>Para 23.1</i>)</p>
<b>CHAPTER VII - OFFENSES AND PENALTIES</b>	
Section 69  Punishment for transactions defrauding creditors	To replace the words "On or after the insolvency commencement date, if", for the word "If" in order to align the intent of the offence prescribed in the section. ( <i>Para 24.1</i> )
Section 76  Punishment for non-disclosure of dispute or repayment of debt by operational creditor	To replace the word "repayment" appearing in the marginal heading of section 76 and in section 76(a) with the word "payment". ( <i>Para 1.22</i> )
<b>PART V - MISCELLANEOUS</b>	
Insertion of section 238A  Limitation	To insert a new section 238A to state that the provisions of the Limitation Act, 1963 shall, as far as may be, apply to proceedings or appeals under the Code before the NCLT or the NCLAT, as the case may be. ( <i>Para 28.3</i> )
Section 239  Power to make rules	To insert a new clause (ea) in section 239(2) to empower the Central Government to make rules with regard to other proof confirming that there is no payment of an unpaid operational debt by the corporate debtor or such other information under section 9(3)(e) of the Code.

<p>Section 240</p> <p>Power to make regulations</p>	<p>a. To omit section 240(2)(g).</p> <p>b. To insert, after section 240(2)(j), the power of IBBI to make regulations specifying the last date for submission of claims under section 15(1)(c).</p> <p>c. To insert, after section 240(2)(n), the following clauses to empower the IBBI to make regulations in relation to:</p> <ul style="list-style-type: none"> <li>i. Clause (na) - the number of creditors within a class of creditors under section 21(6A)(b);</li> <li>ii. Clause (nb) - the manner of determining remuneration of insolvency professional appointed under section 21(6A)(b);</li> <li>iii. Clause (nc) - the manner of voting and determining the voting share in respect of financial debts covered under section 21 sub-section (6), (6A) and (7).</li> </ul> <p>b. To insert, after section 240(2)(w), a clause (wa) to empower the IBBI to make regulations in relation to the other information to be sent by the RP along with the approved plan under section 30(7).</p>
<p>Insertion of section 240A</p> <p>Power to exempt or modify.</p>	<p>To empower the Central Government to exempt or vary application of provisions of the Code by way of a notification for a certain class or classes of companies, including for MSMEs as defined in section 7 of the Micro, Small and Medium Enterprises Development Act, 2006. <i>(Para 26.4)</i></p>
<p>Insertion of section 240B</p> <p>Exemption from certain provisions for Micro, Small and Medium Enterprises</p>	<p>To provide relief to MSMEs from the provision of the Code by inserting section 240B which specifically exempts resolution applicants for MSMEs that are undergoing CIRP from all eligibility criteria stated in section 29A except the requirement that they should not be classified as wilful defaulters. Further, to clarify that provisions of the Code shall apply to MSMEs in such modified form as the Central Government may notify in terms of section 240A. <i>(Para 27.4)</i></p>
<p>Schedule XI - paragraph 34</p> <p>Transfer of certain pending proceedings</p>	<p>To amend section 434 of the Companies Act, 2013 by amending paragraph 34 of schedule XI of the Code to state that if a petition for winding up on the grounds of inability to pay debts is pending and an order for winding up of the company has been made or a provisional liquidator has been appointed, the leave of the court hearing the winding up proceeding, must be obtained, if applicable, for initiation of the CIRP proceedings against such corporate debtor under the Code. Consequential changes to the Transfer Rules may also be made. <i>(Para 25.6, Para 25.7)</i></p>
<p>Schedule XII -</p>	<p>To insert a schedule XII, enlisting statutes, conviction under which for any offence punishable with imprisonment for two years or more shall disqualify resolution applicants under section 29A(d). Apart from the</p>

Acts under clause (d) of sub-section (1) of section 29A	statutes listed in paragraph 1 of the schedule, conviction for any offence punishable with imprisonment exceeding seven years under any law in force in India shall also disqualify resolution applicants under section 29A(d). Further, power has been provided to the Central Government to modify the list of statutes in the schedule by way of a notification. <i>(Para 14.9)</i>
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**PART II - RECOMMENDATIONS PROPOSING AMENDMENTS TO THE CIRP RULES**

PROVISION	NATURE OF AMENDMENT
Rule 4 Application by financial creditor	To insert a new sub-rule (2A) to state that where the applicant under rule 4(1) is an authorized representative of financial creditors under section 21(6) or section 21(6A) (a) or (c), the application shall be accompanied with a copy of the relevant document demonstrating such authority. <i>(Para 10.8)</i>
Rule 7 Application by corporate applicant	<p>a. To insert a new rule 7 (3) to require that a notification of initiation of CIRP by a corporate applicant be made to all its stakeholders by placing a notice on its official website or on a website designated by the IBBI for this purpose or by using other electronic means. <i>(Para 4.12)</i></p> <p>b. To insert an explanation defining the term “electronic means”. <i>(Para 4.12)</i></p>
Rule 8 Withdrawal of application	To substitute rule 8 to provide for withdrawal of application for CIRP pre-admission by a request made by the applicant and post admission, if the CoC approves such action by ninety per cent of voting share. <i>(Para 29.2)</i>
Form 1 Application by financial creditor(s) to initiate corporate insolvency resolution process under the Code	To insert the following points in Form 1, in Part V: <p>a. Details of financial debt instrument providing for appointment of trustee or agent for the purposes of section 21(6) or (6A) (if applicable); <i>(Para 10.8)</i></p> <p>b. Details of appointment or declaration as guardian by court order, or appointment by will or any other instrument, along with details of the ward (if applicable). <i>(Para 10.8)</i></p>
Form 3 Form of demand notice /invoice demanding payment under the Code	To replace the words “repayment”, “repay”, and “repaid” with the words “payment”, “pay” and “paid”, respectively. <i>(Para 1.22)</i>
Form 4 Form of notice with which invoice	To replace the words “repayment” and “repay” with the words “payment” and “pay” respectively. <i>(Para 1.22)</i>



demanding payment is to be attached	
Form 5 Application by operational creditor to initiate corporate insolvency resolution process under the Code	To insert after Annex VI, an Annex VII requiring a copy of record with an IU or any other proof confirming that there is no payment of an unpaid operational debt by the corporate debtor to be provided, if available. ( <i>Para 3.5</i> )
Form 6 Application by corporate applicant to initiate corporate insolvency resolution process under the Code	To insert in Annex VII, the requirement to provide the relevant extract of the special resolution passed by the shareholders of the corporate debtor or resolution passed by at least three-fourth of the total number of partners of the corporate debtor, as the case may be, for filing application for CIRP by the corporate applicant. ( <i>Para 4.6</i> )

**PART III - RECOMMENDATIONS PROPOSING AMENDMENTS TO THE REGULATIONS**

PROVISION	NATURE OF AMENDMENT
<b>CIRP REGULATIONS</b>	
Regulation 6 Public announcement	To insert a new sub-regulation 6(4) stating that on the commencement of a CIRP, and prior to the public announcement being made, the corporate debtor shall place a notice regarding commencement on its official website or on the website designated by the IBBI for this purpose. ( <i>Para 4.12</i> )
Regulation 8 Claims by financial creditors	The word “repaid” provided under regulation 8(2)(iii) of the CIRP Regulations to be replaced with the word “paid”. ( <i>Para 1.22</i> )
Regulation 25 Voting by the committee	To insert a new sub-regulation 25(6) to enable a member of the CoC who is unable to exercise its vote in accordance with regulation 26(1), to exercise its vote by way of electronic means supported by specific reasons for being unable to vote in the manner specified in regulation 26(1). ( <i>Para 10.8</i> )
Regulation 38 Mandatory contents of the resolution plan	To delete the sub-regulation (3) of regulation 38 as the details sought to be captured in the resolution plan by the said provision will be covered in the affidavit to be submitted by resolution applicants pursuant to section 29A of the Code. ( <i>Para 14.16</i> )
Regulation 39 Approval of resolution plan	To amend regulation 39(8) to read that a person in charge of the management or control of the business and operations of the corporate debtor after a resolution plan is approved by the

	NCLT shall complete the formalities required for commencing implementation of the resolution plan within thirty days from the date of approval of plan by the NCLT. ( <i>Para 8.4</i> )
Form B Proof of claim by operational creditors except workmen and employees	To amend the Affidavit in Form B, to include a requirement to affirm that the claim is not time-barred under the Limitation Act, 1963. ( <i>Para 28.3</i> )
Form C Proof of claim by financial creditors	To amend the Affidavit in Form C, to include a requirement to affirm that the claim is not time-barred under the Limitation Act, 1963. ( <i>Para 28.3</i> )
Form D Proof of claim by workman or an employee	To amend the Affidavit in Form D, to include a requirement to affirm that the claim is not time-barred under the Limitation Act, 1963. ( <i>Para 28.3</i> )
Form E Proof of claim submitted by authorised representative of workmen and employees	To amend the Affidavit in Form E, to include a requirement to affirm that the claim of the employee or the workmen is not time-barred under the Limitation Act, 1963. ( <i>Para 28.3</i> )
Form F Proof of claim by creditors (other than financial creditors and operational creditors)	To amend the Affidavit in Form F, to include a requirement to affirm that the claim is not time-barred under the Limitation Act, 1963. ( <i>Para 28.3</i> )
<b>LIQUIDATION REGULATIONS</b>	
Regulation 27 Periodical payments	To insert a proviso to regulation 27 stating that interest on interim finance may be claimed on the amount due and unpaid until repayment of the interim finance or until a year after the liquidation commencement date, whichever is earlier. ( <i>Para 1.14</i> )

**LIST OF DEFINED TERMS**

<b>Amendment Act</b>	Insolvency and Bankruptcy (Amendment) Act, 2018
<b>ARCs</b>	Asset Reconstruction Companies
<b>BLRC Report</b>	Report of the BLRC Volume 1 (2015)
<b>BR Act</b>	Banking Regulation Act, 1949
<b>CA 1956</b>	Companies Act, 1956
<b>CA 2013</b>	Companies Act, 2013
<b>CCI</b>	Competition Commission of India
<b>CIRP</b>	Corporate Insolvency Resolution Process
<b>CIRP Regulations</b>	Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016
<b>CIRP Rules</b>	Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016
<b>CoC</b>	Committee of Creditors
<b>Code</b>	Insolvency and Bankruptcy Code, 2016
<b>Deposit Rules</b>	Companies (Acceptance of Deposit) Rules, 2014
<b>DRT</b>	Debt Recovery Tribunal
<b>F-CIRP</b>	Fast Track Corporate Insolvency Resolution Process
<b>F-CIRP Regulations</b>	Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017
<b>Home buyers</b>	Purchasers of under-construction apartments
<b>IBBI</b>	Insolvency and Bankruptcy Board of India
<b>IP Regulations</b>	Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016
<b>IRP</b>	Interim Resolution Professional
<b>IRP costs</b>	Insolvency resolution process costs
<b>IU</b>	Information Utilities
<b>JLF</b>	Joint Lender's Forum
<b>Limitation Act</b>	Limitation Act, 1963
<b>Liquidation Regulations</b>	Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016
<b>LLP</b>	Limited Liability Partnership
<b>LLP Act</b>	Limited Liability Partnership Act, 2008
<b>LLP Rules</b>	LLP (Winding-Up and Dissolution) Rules, 2012
<b>MCA</b>	Ministry of Corporate Affairs, Government of India
<b>MSMEs</b>	Micro, Small and Medium Enterprises
<b>NCLAT</b>	National Company Law Appellate Tribunal
<b>NCLT</b>	National Company Law Tribunal
<b>NPA</b>	Non-Performing Asset
<b>RBI</b>	Reserve Bank of India
<b>RDDBI Act</b>	Recovery of Debts Due to Banks and Financial Institutions Act, 1993
<b>Report</b>	Report of the Committee

<b>RERA</b>	Real Estate (Regulation and Development) Act, 2016
<b>RP</b>	Resolution Professional
<b>RP Act</b>	Representation of the People Act, 1951
<b>SEBI</b>	Securities and Exchange Board of India
<b>SICA</b>	Sick Industrial Companies (Special Provisions) Act, 1986
<b>TOPA</b>	Transfer of Property Act, 1882
<b>Transfer Rules</b>	Companies (Transfer of Pending Proceedings) Rules, 2016
<b>UK</b>	United Kingdom
<b>USA</b>	United States of America
<b>World Bank Report</b>	World Bank Report on the Treatment of MSME Insolvency (May 2017)