Application for Corporate Insolvency Resolution Process

Lesson 15

KEY CONCEPTS

■ Corporate Debtor ■ Financial Creditor ■ Operational Debt ■ Moratorium ■ Resolution Plan ■ Corporate Insolvency Resolution Process ■ Insolvency Professional

Learning Objectives

To understand:

- Concept of initiating CIRP
- Objective of CIRP
- Recommendations of BLRC Report
- Commencement of CIRP
- Sections, Regulations and Rules applicable in making application to initiate CIRP
- Withdrawal of application after admission
- Significance of Moratorium
- Judgements related to the provisions discussed

Lesson Outline

- Historical Background of CIRP
- Introduction
- Persons who may Initiate Corporate Insolvency Resolution Process
- Initiation of corporate insolvency resolution process by financial creditor
- Demand notice and initiation of Insolvency resolution by operational creditor
- Initiation of corporate insolvency resolution process by corporate applicant
- Corporate Debtors against which CIRP cannot be initiated
- Persons not entitled to make application to initiate CIRP
- Withdrawal of application admitted under section 7, 9 or 10 of IBC
- Time-limit for completion of insolvency resolution process
- Declaration of moratorium and public announcement
- Moratorium
- Rules 20, 21, 22, 23, 24 and 26 of Part III of the NCLT Rules, 2016
- Lesson Round-Up
- Test Yourself
- Other References

REGULATORY FRAMEWORK

- The Insolvency and Bankruptcy Code,2016 (Section 6 to section 14 with applicable provisions from other sections)
- The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016
- The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016

HISTORICAL BACKGROUND OF CORPORATE INSOLVENCY RESOLUTION PROCESS

The Banking Law Reform Committee (BLRC) constituted under the chairmanship of Dr TK Viswnathan presented it's report in two Volume- Volume 1, which is a committee report showing rationale and arguments, and Volume 2 which is a draft law on the Insolvency and Bankruptcy Code.

While laying down framework of the Corporate Insolvency Resolution Process in draft Insolvency and Bankruptcy Code,2016, the report of the Bankruptcy Law Reform Committee (BLRC) Volume I in Rationale and Design of the Insolvency and Bankruptcy Code, 2016 has worded following:

"For some firms, the right answer after default is to take the firm into liquidation. But there may be many situations in which a viable mechanism can be found through which the firm is protected as a going concern. To the extent that this can be done, the costs imposed upon society go down, as liquidation involves the destruction of the organisational capital of the firm."

The Committee proposed following recommendations for advocating rationale of Corporate Insolvency Resolution Process (CIRP):

(i) *Any creditor, whether financial or operational, could initiate CIRP:* Under the Companies Act 2013, the following parties could file an application before NCLT for a declaration that company is sick- (a) the company, (b) any secured creditor, (c) the Central Government, (d) the Reserve Bank of India, (e) State Government, (f) public financial institution, (g) a State level institution, (h) a scheduled bank. Even under the SARFAESI, 2002, debt enforcement rights are available for secured creditors only. However, the Committee proposes that any creditor, whether financial or operational, should be able to initiate the insolvency resolution process (IRP) under the proposed code. It may be noted that operational creditors will include workmen and employees whose past payments are due.

(ii) *Protection for operational creditors in Resolution Plan:* The Committee also recommends that a resolution plan must necessarily provide for certain protections for operational creditors. This will empower the workmen and employees to initiate insolvency proceedings, settle their dues fast and move on to some other job instead of waiting for their dues for years together as is the case under the existing regime.

(iii) *Strategy for CIRP:* The strategy proposed by the Committee runs as follows, when default takes place an Insolvency Resolution Process (IRP) can be initiated and run for as long as 180 days.

(iv) *Role of IRP:* The IRP is overseen by an "Insolvency Professional" (IP) who is given substantial powers. The IP makes sure that assets are not stolen from the company, and initiates a careful check of the transactions of the company for the last two years, to look for illegal diversion of assets. Such diversion of assets would induce criminal charges.

(v) *Applicability of Calm Period:* While the IRP is in process, the law enshrines a "calm period" where creditors stay their claims. This gives a better chance for the firm to survive as a going concern.

(vi) *Time bound CIRP:* The Committee recommended that for the 180 days for which the IRP is in operation, the creditors committee will analyse the company, hear rival proposals, and make up its mind about what has to be done. When 75% of the creditors agree on a revival plan, this plan would be binding on all the remaining creditors. If, in 180 days, no revival plan achieves support of 75% of the creditors, the firm goes into liquidation.

(vii) *One time extension of time limit of 180 days:* In limited circumstances, if 75 % of the creditors committee decides that the complexity of a case requires more time for a resolution plan to be finalised, a one-time extension of the 180 day period for up to 90 days is possible with the prior approval of the adjudicator.

INTRODUCTION

The Preamble of the Code lays down the objective as follows:

"An Act to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto."

Therefore, the Preamble itself made it clear that the purpose of the Code is to reorganize and resolve the insolvency of corporate persons along with maximization of assets of such corporate persons and not to liquidate it at first instance. Voluntary Liquidation is the only way to liquidate a company having no default.

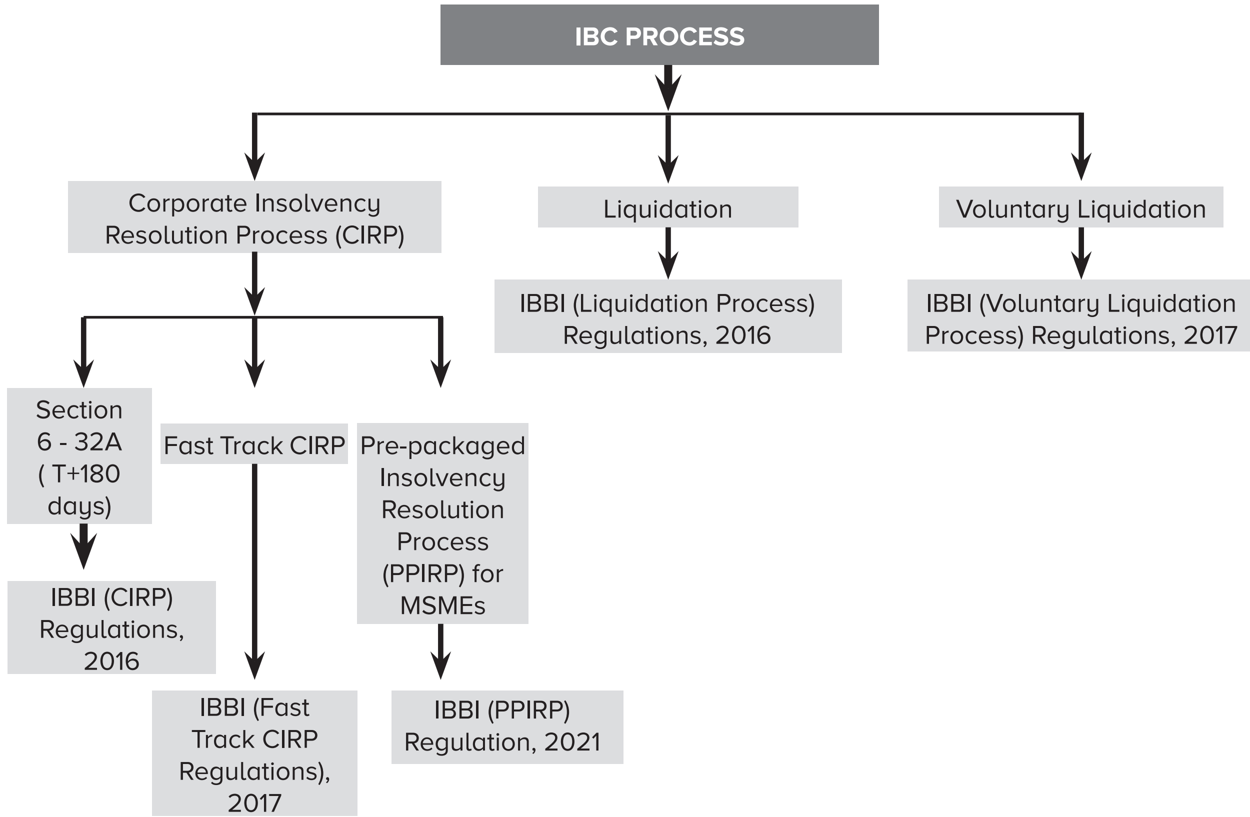
In the case of ***Swiss Ribbons Private Limited and Another Vs. Union of India and Others [(2019) 4 SCC 17]***, the Supreme Court upheld the constitutionality of the IBC and observed that the foremost and primary objective of the IBC is the reorganization and insolvency resolution of the CD in a time-bound manner.

The Code has five parts and Part II of the Insolvency and Bankruptcy Code, 2016 deals with the insolvency resolution and liquidation for corporate persons. Part II is summarized as follows:

THE INSOLVENCY AND BANKRUPTCY CODE, 2016		
PART II ***Insolvency Resolution and Liquidation for Corporate Persons***		
Chapter 1	Preliminary	Sections 4-5
Chapter II	Corporate Insolvency Resolution Process	Sections 6-32A
Chapter III	Liquidation Process	Sections 33-54
Chapter III-A	Pre-Packaged Insolvency Resolution Process	Sections 54A- 54P
Chapter IV	Fast Track Corporate Insolvency Resolution Process	Sections 55- 58
Chapter V	Voluntary Liquidation Of Corporate Persons	Sections 59
Chapter VI	Adjudicating Authority For Corporate Persons	Sections 60- 67A
Chapter VII	Offences and Penalties	Sections 68- 77A

Chapter II of Part II (Sections 6 to 32A) deals with the provisions for reorganization and resolution of insolvency process of Corporate Persons known as Corporate Insolvency Resolution Process (CIRP). CHAPTER IV of Part II (Sections 55- 58) covers Fast Track Corporate Insolvency Resolution Process meant for small companies. Both Chapter II and Chapter IV of Part II are covered here.

The expression "Corporate Insolvency Resolution Process" (CIRP) is not defined in the Insolvency and Bankruptcy Code, 2016. The IBBI (CIRP) Regulations,2016 as well as the Insolvency and Bankruptcy (Application



to Adjudicating Authority) Rules, 2016 defines the expression "corporate insolvency resolution process" in same way. According to Rule 3(1)(b), "corporate insolvency resolution process" means the insolvency resolution process for corporate persons under Chapter II of Part II of the Code.

Section 4 of the Insolvency and Bankruptcy Code, 2016 provides that Part II of the Code shall apply to matters relating to the insolvency and liquidation of corporate debtors where the minimum amount of the default is one lakh rupees. The proviso to section 4 empowers the Central Government to specify, by notification, the minimum amount of default of higher value but it shall not be more than one crore rupees.

Central Government has raised default limit of Corporate Debtor from 1 lakh to 1 crore w.e.f. 24.03.2020. So, CIRP can be initiated only if there is default of minimum Rs 1 crore by corporate debtor.

There were six modes of compulsory winding up of companies under the Companies Act, 1956. With the enactment of IBC,2016, winding up of companies due to their inability to pay debt will be governed by the provisions of the Code, 2016 while remaining will continue to be governed by the Companies Act,2013.

The Code contains the processes for starting and running the Corporate Insolvency Resolution Process (CIRP). To supplement this:

(i) *The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016:* The Central Government has issued the Application to AA Rules, which detail the process and various steps involved in applying to the AA to initiate the CIRP.

(ii) *The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016* (hereinafter referred as the IBBI(CIRP) Regulations,2026): The IBBI has issued the CIRP Regulations, which detail the process and various steps involved in running a CIRP.

Persons who may Initiate Corporate Insolvency Resolution Process

Who can file application for CIRP?

A financial creditor | Operational Creditor | Corporate Debtor

Section 5(1) defines "Adjudicating Authority", for the purposes of Part II, means National Company Law Tribunal constituted under section 408 of the Companies Act, 2013

Section 6 of the Insolvency and Bankruptcy Code, 2016 provides that where any corporate debtor commits a default, a financial creditor, an operational creditor or the corporate debtor itself may initiate corporate insolvency resolution process in respect of such corporate debtor in the manner as provided under Chapter II of Part II of the Code.

(i) *Default is the mandatory trigger point to initiate CIRP:* Going by the combined reading of section 4 along with section 6 of the Code, CIRP can be initiated against a corporate debtor only if corporate debtor commits a default of Rs. 1(one) crore or more .

> "Default" is defined in section 3(12) of the IBC as non-payment of a debt when the whole or any part or installment of the amount of debt has become due and payable, and is not paid by the debtor or the corporate debtor, as the case may be.
>
> According to section 3(8), a "corporate debtor" means a corporate person who owes a debt to any person

(ii) *Who may initiate CIRP:* In case of a default, the following people are entitled to initiate a corporate insolvency resolution process:

- **A financial creditor**
- **An operational creditor**: According to section 5(20) an "operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred or
- **The corporate debtor itself**: The Insolvency and Bankruptcy Code, 2016 permits the corporate debtor itself to initiate the insolvency resolution process once it has defaulted on a debt.

(iii) *Initiation Date:* Section 5 (11) of the Code defines "initiation date" as the date on which a financial creditor, corporate applicant or operational creditor, as the case may be, makes an application to the Adjudicating Authority for initiating corporate insolvency resolution process or pre-packaged insolvency resolution process, as the case may be.

Initiation of corporate insolvency resolution process by financial creditor

Section 7 of the Code lays down the procedure for the initiation of the corporate insolvency resolution process by a financial creditor or two or more financial creditors jointly.

Default of financial debt ≥ Rs 1 crore (Section 4) → Application to initiate CIRP under section 7 → Admission or rejection of application by the Adjudicating Authority

Application to initiate corporate insolvency resolution process: Section 7(1) of the Codes states that who can file application to initiate corporate insolvency resolution process:

- a financial creditor, either by itself or jointly with other financial creditors, or
- any other person on behalf of the financial creditor, as may be notified by the Central Government, may file an application for initiating a corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred in payment of financial debt by the financial creditor.

For the purpose of section 7(1), a default includes a default on a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor.

> According to Section 5(7), a "financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to.

Financial Debt (Sec, 5(8) means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes-

- (a) money borrowed against the payment of interest;
- (b) any amount raised by acceptance under any acceptance credit facility or its dematerialised equivalent;
- (c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;
- (d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed .
- (e) receivables sold or discounted other than any receivables sold on non-recourse basis;
- (f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;
  - *Explanation*, For the proposes of this sub-clause,
    - (i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and
    - (ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016.
- (g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;
- (h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;
- (i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;

First proviso to section 7(1) provides that an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such creditors in the same class or not less than ten per cent of the total number of such creditors in the same class, whichever is less if financial creditors belong to clauses (a) and (b) of sub-section (6A) of section 21.

Section 21(6A) provides for following creditors in clause (a) and (b) as follows:

(a) Where a financial debt is in the form of securities or deposits and the terms of the financial debt provide for appointment of a trustee or agent to act as authorised representative for all the financial creditors

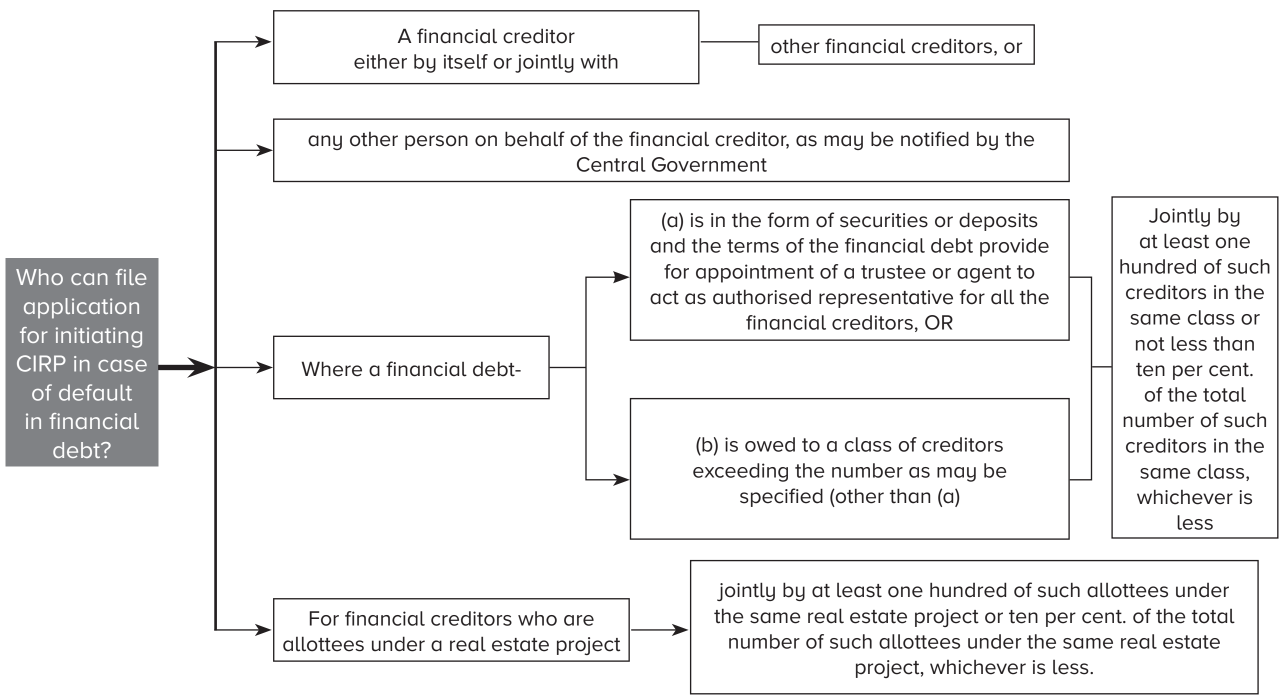
(b) Where a financial debt- is owed to a class of creditors exceeding the number as may be specified (i.e., ten) but do not fall in

- Clause (a) or
- Section 21(6) i.e., where the terms of the financial debt extended as part of a consortium arrangement or syndicated facility do not provide for a single trustee or agent to act for all financial creditors.

> The IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 defines in Regulation 2(1) (aa) “class of creditors” which means a class with at least ten financial creditors under clause (b) of sub-section (6A) of section 21 and the expression, “creditors in a class” shall be construed accordingly.

As explanation to section 5(8) (f) has clarified that any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing and therefore, a financial debt, It is further provided in section 7(1) that an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such allottees under the same real estate project or not less than ten per cent of the total number of such allottees under the same real estate project, whichever is less.

It is to be noted that applicant shall be allottees under the same real estate project.



Application to be made in prescribed form with prescribed fee:

- Section 7(2) of the Code states *that t*he financial creditor shall make an application under sub-section (1) in such form and manner and accompanied with such fee as may be prescribed.

- *The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016* spell out the procedural part of making application by financial creditor under section 7 of the Code as follows:

  Application by financial creditor (Rule 4)—

  (1) A financial creditor, either by itself or jointly along with prescribed fee shall make an application for initiating the corporate insolvency resolution process against a corporate debtor under section 7 of the Code in Form 1, accompanied with documents and records required therein and as specified in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

  (2) Where the applicant under sub-rule (1) is an assignee or transferee of a financial contract, the application shall be accompanied with a copy of the assignment or transfer agreement and other relevant documentation to demonstrate the assignment or transfer.

  (3) The applicant shall serve a copy of the application to the registered office of the corporate debtor and to the Board, by registered post or speed post or by hand or by electronic means, before filing with the Adjudicating Authority.

  (4) In case the application is made jointly by financial creditors, they may nominate one amongst them to act on their behalf.

Fee payable: The financial creditor should submit the application to the Adjudicating Authority as per the applicable rules/procedures of the relevant Adjudicating Authority, along with prescribed fee of 25,000 Indian rupees in favor of the Pay and Accounts Officer, Ministry of Corporate Affairs, payable in Mumbai, New Delhi, Kolkata, or Chennai.

Documents to be furnished with the application:

- Section 7(3) of the Code provides that the financial creditor shall, along with the application furnish:

  (a) record of the default recorded with the information utility or such other record or evidence of default as may be specified;

  (b) the name of the resolution professional proposed to act as an interim resolution professional; and

  (c) any other information as may be specified by the Board.

- The IBBI (CIRP) Regulations, 2016 provides in Regulation 2A for record or evidence of default by financial creditor. It states that for the purposes of clause (a) of sub-section (3) of section 7 of the Code, the financial creditor may furnish any of the following record or evidence of default, namely: -

  (a) certified copy of entries in the relevant account in the bankers' book as defined in clause (3) of section 2 of the Bankers' Books Evidence Act, 1891 (18 of 1891);

  (b) an order of a court or tribunal that has adjudicated upon the non-payment of a debt, where the period of appeal against such order has expired.

Time frame for ascertaining the existence of default.

- Section 7(4) of the Code provides for the timeline for AA to either accept or reject the application.
- The Adjudicating Authority shall, within **fourteen days** of the receipt of the application under sub-section (2), ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor under sub-section (3).
- Provided that if the Adjudicating Authority has not ascertained the existence of default and passed an order under sub-section (5) within such time, it shall record its reasons in writing for the same.

Decision criterion for the Adjudicating Authority is whether default exists or not.

In the matter of *Surendra Trading Company v. Juggilal Kamlapat Jute Mills Company Limited and Other,* the Supreme Court held that time period of 14 days is directory and not mandatory.

Admission or rejection of application by the Adjudicating Authority:

According to section 7(5), where the Adjudicating Authority is satisfied that –

(a) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or

(b) default has not occurred or the application under sub-section (2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application:

Provided that the Adjudicating Authority shall, before rejecting the application under clause (b) of sub-section (5), give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority.

Insolvency Commencement Date*:* Section 7(6) states that the corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5).

> Section 5(12) of the Code defines "insolvency commencement date" which means the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under sections 7, 9 or section 10, as the case may be.

Timeline for communication of order by the Adjudicating Authority*:*

Section 7(7) makes it mandatory for the Adjudicating Authority to communicate-

(a) the order of admission within 7 days of decision of admission of such application under clause (a) of sub-section (5) to the financial creditor and the corporate debtor;

(b) the order of rejection within 7 days of decision of rejection of such application under clause (b) of sub-section (5) to the financial creditor,

FORM 1 to be filed by Financial creditor is divided in five parts detailed as:	
Form 1 **APPLICATION BY FINANCIAL CREDITOR(S) TO INITIATE CORPORATE INSOLVENCY RESOLUTION PROCESS UNDER THE CODE.** (Under section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 (1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016)	
Part-I	PARTICULARS OF APPLICANT (PLEASE PROVIDE FOR EACH FINANCIAL CREDITOR MAKING THE APPLICATION)
Part-II	PARTICULARS OF THE CORPORATE DEBTOR
Part-III	PARTICULARS OF THE PROPOSED INTERIM RESOLUTION PROFESSIONAL
Part - IV	PARTICULARS OF FINANCIAL DEBT
Part-V	PARTICULARS OF FINANCIAL DEBT [DOCUMENTS, RECORDS AND EVIDENCE OF DEFAULT]
Attachment	Copies of all documents referred to in this application.
	Written communication by the proposed interim resolution professional as set out in Form 2.
	Proof that the specified application fee has been paid.
	Where the application is made jointly, the particulars specified in this form shall be furnished in respect of all the joint applicants along with a copy of authorisation to the financial creditor to file and act on this application on behalf of all the applicants.

Practical Questions
Case: There are three financial creditors AM Bank, BN financial institution, CP Bank of XYZ Limited. An application for initiating CIRP has to be made against XYZ Limited as it has made default in repaying debt of AM Bank of Rs 70 Lakhs and BN financial institution of Rs 50 Lakhs. However, there is no default in repayment of debt of CP Bank having outstanding of Rs. 30 Lakhs. Answer the following queries: *Q. Can Corporate Insolvency Resolution Process (CIRP) be initiated against XYZ Limited?* Ans: Yes, CIRP can be initiated against XYZ Limited by the financial creditor as it has committed default in repayment of debt worth Rs. 1.2 crore (70+50 Lakhs) whereas section 4 of the Code provides that CIRP can be initiated against a corporate debtor if it commits default of Rs. 1 crore or more. Section 7(1) of the Codes states that a financial creditor, either by itself or jointly with other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government, may file an application for initiating a CIRP against a corporate debtor before the Adjudicating Authority when a default has occurred in payment of financial debt by the financial creditor. For the purpose of section 7(1), a default includes a default on a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor. Therefore, as joint application is permitted, default of both financial creditors will be clubbed for knowing whether it has committed default in repayment of debt of Rs 1 cr or more.
Q. Can CP Bank initiate CIRP against XYZ Limited? Ans: Yes, CP Bank can initiate CIRP against XYZ Limited as Explanation to section 7(1) provides that for the purposes of this sub-section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor.
Q. Whether AM Bank and BN financial institution have to file joint application or they may file it individually? Ans: Pursuant to provisions of section 7(1) of the Code, AM Bank and BN financial institution can file application to initiate CIRP individually or jointly too.

Q. Whether a Power of Attorney holder of Financial Creditor can initiate insolvency proceedings under the Code?
Legal Provision 1. Entry 5 & 6 (Part I) of Form 1 mandates the Financial Creditor to submit name and address of person authorized to submit application. Further, the particulars shall be signed by person authorized to act on behalf of financial creditor at the end. 2. Similar provision is made with regard to application by Operational Creditor and corporate applicant i.e., the application must be signed by a person authorized. 3. Rule 23(1) of NCLT Rules reads as under: "23. Presentation of petition or appeal – (1) Every petition, application, caveat, interlocutory application, documents and appeal shall be presented in triplicate by the appellant or applicant or petitioner or respondent, as the case may be, in person or by his duly authorised representative or by an advocate duly appointed in this behalf in the prescribed form with stipulated fee at the filing counter and non-compliance of this may constitute a valid ground to refuse to entertain the same. In ***Palogix Infrastructure Pvt. Ltd. v. ICICI Bank Ltd. [Company Appeal (AT) (Insol.) No. 30 of 2017]***, NCLAT held that a 'Power of Attorney Holder' is not competent to file an application on behalf of a 'Financial Creditor' or 'Operational Creditor' or 'Corporate Applicant'. NCLAT held that a power of attorney holder is not authorised to present application for CIRP under sections 7, 9 and 10 of the Code. It is only authorised representatives, duly authorised by board resolution, who are eligible to present the same.

Whether NCLT, in exercise of its inherent powers, can convert an application under section 9 of the Code by an operational creditor to an application under section 7 of the Code by a Financial Creditor?
In ***Sanjeev Jain vs. M/s Eternity Infracon Pvt. Ltd. [Company Petition no. (IB) 113(ND)/2017]***, the NCLT observed as under: 16… The Code prescribes stipulated time frame to be followed at every relevant stage of the resolution proceedings. Besides the insolvency resolution process has serious civil consequences, which suggests for a cautious approach strictly in accordance with the procedure prescribed by the Code. 17. …It is also pertinent to note that the provisions and scope of Section 9 including the applicable rules, forms and procedure are totally distinct and separate from that of Section 7 of the Code. There is no provision in the Code to convert a section 9 application into a section 7 as prayed. On the contrary, the Code provides that applications filed under section 7, 9 or 10 as the case may be, should either be admitted or rejected in accordance with respective provisions.

Operational Creditors

An Operational Creditor is defined under section 5(20) of the Code as any person to whom an operational debt is owed (and includes a legal assignee/transferee).

An "operational debt" is defined in section 5(21) as a claim in respect of the provision of goods or services including employment or a debt in respect of the payment 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;

An application to initiate a corporate insolvency resolution process against a corporate debtor may be filed by an operational creditor under section 9 of the Code. However, before filing the application, the operational creditor must serve a demand notice on the corporate debtor under section 8 of the Code.

Insolvency resolution by operational creditor

Default of operational debt ≥ Rs 1 crore (Section 4) → Serving of Demand Notice (Section 8) → Application for Initiation of CIRP by Operational Creditor (Section 9) → Admission or rejection of application by the Adjudicating Authority

The rationale for a different procedure in case of operational creditor is based on the premise that the operational debts (such as trade debts, salary or wage claims, and government dues) generally tend to be of smaller amounts (in comparison to financial debts) or are recurring in nature. The possibility of disputed debts in relation to operational creditors is also higher in comparison to financial creditors such as banks and financial institutions.

***Serving of Demand Notice* (Section 8)**

- *Demand notice or copy of invoice demanding payment of the debt*: Section 8(1) of IBC states that an operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.
- Explanation to section 8 of the Code states that for the purposes of this section, a "demand notice" means a notice served by an operational creditor to the corporate debtor demanding payment of the operational debt in respect of which the default has occurred.
- *The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016:* Rule 5 of these rules prescribes Form in which demand notice or copy of invoice demanding payment shall be served and the manner in which it shall be served as follows:

Demand notice by operational creditor (Rule 5)—

(1) An operational creditor shall deliver to the corporate debtor, the following documents, namely. -

(a) a demand notice in Form 3; or

(b) a copy of an invoice attached with a notice in Form 4.

(2) The demand notice or the copy of the invoice demanding payment referred to in sub-section (2) of section 8 of the Code, may be delivered to the corporate debtor,

(a) at the registered office by hand, registered post or speed post with acknowledgement due; or

(b) by electronic mail service to a whole-time director or designated partner or key managerial personnel, if any, of the corporate debtor.

(3) A copy of demand notice or invoice demanding payment served under this rule by an operational creditor shall also be filed with an information utility, if any.

In most cases, the demand notice is delivered through registered post/hand delivery, or via an email. Acknowledgment/proof of delivery of the demand notice must be provided to the Adjudicating Authority as part of the application by the operational creditor under section 9 of the Code.

The important particulars of FORM 3 and FORM 4 are emphasized as follows:

<table>
<tr><td colspan="3">FORM 3
FORM OF DEMAND NOTICE / INVOICE DEMANDING PAYMENT UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016
(Under rule 5 (1)(a) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016)</td></tr>
<tr><td colspan="3">1. It has to be stated specifically that this letter is a demand notice/invoice demanding payment of an unpaid operational debt due from [name of corporate debtor].</td></tr>
<tr><td colspan="3">2. PARTICULARS OF OPERATIONAL DEBT has to be clearly stated in terms of
● total amount of debt due,
● transactions in terms of which debt is due and the date it fell due,
● amount claimed to be in default and the date of default,
● details of security if any,
● details of retention of title, if any,
● Provision of Law, Contract or other Document under which Debt has become due.</td></tr>
<tr><td colspan="3">Other contents of Information to be stated in FORM 3</td></tr>
<tr><td rowspan="3">Operational Creditor has to specifically ask Corporate Debtor to provide proof of pendency of pre-existing dispute or payment of debt, if it has been paid already.</td><td colspan="2">If you dispute the existence or amount of unpaid operational debt (in default) please provide the undersigned, within ten days of the receipt of this letter, of the pendency of the suit or arbitration proceedings in relation to such dispute filed before the receipt of this letter/notice.</td></tr>
<tr><td rowspan="2">If you believe that the debt has been repaid before the receipt of this letter, please demonstrate such repayment by sending to us, within ten days of receipt of this letter, the following:</td><td>a) an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or</td></tr>
<tr><td>b) an attested copy of any record that [name of the operational creditor] has received the payment.</td></tr>
</table>

Attachment	The workings for computation of default in tabular form Copy of a certificate of registration of charge issued by the registrar of companies (if the corporate debtor is a company) Record of default with the information utility (if any)
Operational Creditor has to attach confirmation from Information Utility for no record of dispute with it, if applicable.	The undersigned, hereby, attaches a certificate from an information utility confirming that no record of a dispute raised in relation to the relevant operational debt has been filed by any person at any information utility. (if applicable)
It has to be a demand notice specifically asking for Unconditional repayment in full within 10 days with declaration that if payment not made in time, Operational Creditor shall initiate corporate insolvency resolution process.	The undersigned request you to unconditionally repay the unpaid operational debt (in default) in full within ten days from the receipt of this letter failing which we shall initiate a corporate insolvency resolution process in respect of [name of corporate debtor.

Form 4
(See clause (b) of sub-rule (1) of rule 5)
FORM OF NOTICE WITH WHICH INVOICE DEMANDING PAYMENT IS TO BE ATTACHED
(Under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016)

[Name of operational creditor], hereby provides notice for repayment of the unpaid amount of INR [insert amount] that is in default as reflected in the invoice attached to this notice.

In the event you do not repay the debt due to us within ten days of receipt of this notice, we may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process under section 9 of the Code.

FORM 4 has to be sent with invoice and it is mandatory to quantify debt defaulted as well an intimation of initiating CIRP if corporate debtor fails to repay within 10 days of receipt of this notice.

Existence of dispute or payment of debt

- Section 8(2) of the Code mandates the corporate debtor to bring to the notice of the operational creditor, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1)–
  - (a) existence of a dispute, if any, or record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;
  - (b) the payment of unpaid operational debt-
    - (i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or
    - (ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.

Section 5(6) of the Code defines dispute as “dispute” includes a suit or arbitration proceedings relating to–

(a) the existence of the amount of debt;

(b) the quality of goods or service; or

(c) the breach of a representation or warranty.

Application for Initiation of Corporate Insolvency Resolution Process by Operational Creditor (Section 9)

- The Insolvency and Bankruptcy Code ,2016 (Section 9): (i) *Application to initiate CIRP by Operational Creditor:* After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under sub-section (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process in such form and manner and accompanied with such fee , as may be prescribed.

- *The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016:* Rule 6 of the Rules prescribes that:

  (1) An operational creditor, shall make an application for initiating the corporate insolvency resolution process against a corporate debtor under section 9 of the Code in **Form 5**, accompanied with documents and records required therein and as specified in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

  (2) The applicant under sub-rule (1) shall serve a copy of the application to the registered office of the corporate debtor and to the Board, by registered post or speed post or by hand or by electronic means, before filing with the Adjudicating Authority.

The Form 5 is divided in five parts, each providing for the submission of the following particulars:

Form 5 **APPLICATION BY OPERATIONAL CREDITOR TO INITIATE CORPORATE INSOLVENCY RESOLUTION PROCESS UNDER THE CODE.** (Under rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016)	
Part – I	PARTICULARS OF APPLICANT
Part – II	PARTICULARS OF CORPORATE DEBTOR
Part-III	PARTICULARS OF THE PROPOSED INTERIM RESOLUTION PROFESSIONAL [IF PROPOSED]
Part-IV	PARTICULARS OF OPERATIONAL DEBT
Part-V	PARTICULARS OF OPERATIONAL DEBT [DOCUMENTS, RECORDS AND EVIDENCE OF DEFAULT]
Note:	Where workmen/employees are operational creditors, the application may be made either in an individual capacity or in a joint capacity by one of them who is duly authorised for the purpose.

Documents to be submitted with the application:

- *The Insolvency and Bankruptcy Code ,2016 (Section 9):* As per section 9 (3) of the IBC, the Operational Creditor shall, along with the application, furnish:

  (a) a copy of the demand notice delivered by the operational creditor to the corporate debtor;

  (b) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute in the unpaid operational debt (that is, no notice under section 8(2) of the IBC);

  (c) a copy of a certificate from financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available;

(d) a copy of any record with an Information Utility (IU) confirming that there has been no payment of an unpaid operational debt by the corporate debtor, if available;

(e) any other proof confirming that there has been no payment of the unpaid operational debt by the corporate debtor or such other information as may be prescribed;

- *The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (Regulations 2B):* Record or evidence of transaction, debt and default by operational creditor (Regulation 2B): The operational creditor shall, alongwith application under section 9, furnish copies of relevant extracts of Form GSTR-1 and Form GSTR-3B filed under the provisions of the relevant laws relating to Goods and Services Tax and the copy of e-way bill wherever applicable:

  Provided that provisions of this regulation shall not apply to those operational creditors who do not require registration and to those goods and services which are not covered under any law relating to Goods and Services Tax.

- *The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016:* Form 5 to be furnished pursuant to Rule 6 prescribes following annexure to be filed along with it:

Annex	1.	Copy of the invoice / demand notice as in Form 3 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 served on the corporate debtor.
	2.	Copies of all documents referred to in this application.
	3.	Copy of the relevant accounts from the banks/financial institutions maintaining accounts of the operational creditor confirming that there is no payment of the relevant unpaid operational debt by the operational debtor, if available.
	4.	Affidavit in support of the application in accordance with the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.
	5.	Written communication by the proposed interim resolution professional as set out in Form 2 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. [WHERE APPLICABLE]
	6.	Proof that the specified application fee has been paid.

The application should be submitted by the operational creditor to the Adjudicating Authority (AA) complying with the applicable rules/procedures of the relevant AA, along with a demand draft of 2,000 Indian rupees in favor of the Pay and Accounts Officer, Ministry of Corporate Affairs, payable in Mumbai, New Delhi, Kolkata, or Chennai.

(iii) Recommending name of Interim Resolution Professional is discretionary for Operational Creditor:

Section 9(4) provides that an operational creditor initiating a corporate insolvency resolution process under this section, may propose a resolution professional to act as an interim resolution professional.

If not proposed, the Adjudicating Authority will appoint an interim resolution professional, usually from the panel formed by the IBBI.

Macquarie Bank Limited Vs. Shilpi Cable Technologies Ltd. [(2018) 2SCC 674]

In this case, the Supreme Court held that

- A certificate from the financial institution maintaining accounts of an operational creditor (as provided for in section 9(3) of the IBC) is not mandatory for triggering a CIRP of the corporate debtor. The debt and default can be proved by other documents as well.
- An authorized agent or a lawyer acting on behalf of a client can issue a demand notice under section 8(2) of the IBC.
- Section 9(4) of the IBC states that an operational creditor may propose an insolvency professional to act as an Interim Resolution Professional (IRP). If not proposed, the Adjudicating Authority will appoint an IRP, usually from the panel formed by the IBBI.

Query: Whether the Principal and Interest amounts can be clubbed together to reach the minimum threshold of Rs. 1 Crore for operational debt as stipulated under Section 4 of IBC, 2016?
NCLT Chandigarh Bench in the matter of ***M/s. Wanbury Ltd. Vs. M/s. Panacea Biotech Ltd. in CP No. 8/2016 dated 18.04.2017*** held that –   "There is a marked difference between the definition of the term 'financial debt' and the 'operational debt'. Under Section 5(8) the term 'financial debt' means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and that is an inclusive definition. In the definition of the term 'operational debt' under section 5(21) the word 'interest' has not been mentioned..."   In the light of the above decision, it was held by NCLT, New Delhi Bench in *CBRE South Asia Private Limited vs. M/s. United Concepts and Solutions Private Limited, (IB)-797(ND)2021*, that the Interest amount cannot be clubbed with the principal amount of operational debt to arrive at the minimum threshold of Rs.1 Crore for complying with the provision of Section 4 of IBC, 2016.

Whether two or more operational creditors can file a joint application under section 9 of the Code?
In ***Uttam Galva Steels Limited vs. DF Deutsche Forfait AG & Anr. [Company Appeal (AT) (Insolvency) 39 of 2017], decided on 28th July, 2017***, an application was filed by two Operational Creditors namely M/s DF Deutsche Forfait AG ("Deutsche") and Misr Bank Europe GmbH ("Misr Bank") against Uttam Galva Steels Limited, Corporate Debtor ("Uttam Galva") stating that the Corporate Debtor had defaulted in making payment of an amount payable towards 20,000 tons of prime steel billets supplied by German Company named AIC Handels GmbH ("AIC Handels").   The debt, running to the tune of around Rs. 110 crores, was initially assigned by AIC Handels to Deutsche by entering into a discount agreement, thereafter Deutsche, in turn, subsequently assigned a part of this debt to Misr Bank. This is how the application came to be filed by above two Operational Creditors.   The application was accepted by NCLT and CIRP was initiated against Uttam Galva.   In appeal before NCLAT, a contention was raised by Uttam Galva that the joint application filed two Operational Creditors was not maintainable.   NCLAT, upon perusal of definition of section 9 and section 7 of the Code, came to the conclusion that since the language used in section 9 of the Code is different from section 7 of the Code, two or more operational creditors cannot file a joint application under section 9 of Code. NCLAT noted that in section 7 of Code, it is specifically written that a Financial Creditor can file application either by 'itself or jointly with other financial creditors', whereas, such phrase is not used in section 9 of Code.

Admission or rejection of application by Adjudicating Authority (AA)

Section 9(5) provides the conditions subject to which the Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order, admit or reject the application.

Clause (i) provides that AA shall admit the application and communicate such decision to the operational creditor and the corporate debtor if, -

(a) the application made under sub-section (2) is complete;

(b) there is no payment of the unpaid operational debt;

(c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;

(d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and

(e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any.

Clause (ii) provides that Adjudicating Authority shall reject the application and communicate such decision to the operational creditor and the corporate debtor, if –

(a) the application made under sub-section (2) is incomplete;

(b) there has been payment of the unpaid operational debt;

(c) the creditor has not delivered the invoice or notice for payment to the corporate debtor;

(d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or

(e) any disciplinary proceeding is pending against any proposed resolution professional:

It is provided that Adjudicating Authority shall, before rejecting an application under sub-clause (a) of clause (ii), give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the adjudicating Authority.

Decision of admission or rejection of application shall be communicated to both operational creditor and corporate debtor.

In ***Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Limited [(2018) 1 SCC 353]***, the Supreme Court undertook a detailed analysis of the provisions relating to applications by an operational creditor (OC) under section 9 of the IBC and laid down the following principles:

When examining an application under section 9 of the IBC, the NCLT will have to determine:

i. whether there is an operational debt exceeding Rs 100,000;

ii. whether the documentary evidence furnished with the application demonstrates that the debt is due and has not yet been paid;

iii. whether there are any disputes between the parties over the debt, or a record of pendency of any suit or arbitration proceeding filed before the receipt of the demand notice in relation to the dispute.

If any of the above conditions are not satisfied, the operational creditor's application will be rejected by the Adjudicating Authority. Any "notice of dispute" issued by the corporate detbor under section 8(2) of the IBC must bring to the notice of the operational creditor the "existence of a dispute," or the fact that a suit or arbitration proceedings relating to a dispute is pending between the parties. What is important is that the dispute must predate the receipt of the demand notice. The definition of "dispute" in section 5(6) is inclusive. It must relate to one of the three sub-clauses of section 5(6)–(a) the existence of the amount of debt, (b) the quality of goods or service, or (c) the breach of a representation or warranty, either directly or indirectly.

The difference between initiating CIRP by financial creditor and operational Creditor was laid down by Apex Court in ***Innoventive Industries Ltd. Vs. ICICI Bank & Another [(2018) 1 SCC 407]***

The first application to be filed under section 7 of the IBC was by ICICI Bank, financial creditor (the FC) against Innoventive Industries Limited, corporate debtor (the CD). The application was admitted by the Mumbai bench of the Adjudicating Authority (AA). The directors of the CD appealed against the admission order. The NCLAT upheld the order passed by the AA. The directors then appealed to the Supreme Court. The Supreme Court observed that since the application filed by the financial creditor was the very first application that had been moved under the IBC, it was necessary to deliver a detailed judgment so that all courts and tribunals would take notice of a paradigm shift in the law. The Supreme Court noted that entrenched managements are no longer allowed to continue in management if they cannot pay their debts and went on to examine various aspects of the IBC, especially section 7.

The Supreme Court held that:

- A financial creditor can trigger section 7(1) of the IBC for default of a financial debt owed by the corporate debtor to any financial creditor. It need not be a debt owed to the financial creditor who is the applicant.

- Under section 8 of the IBC, a dispute that existed before the receipt of a demand notice/invoice by the corporate debtor will make the application of an operational creditor inadmissible. On the other hand, under section 7, the moment the AA is satisfied that a default has occurred, the application of the financial creditor must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the errors within seven days of receiving a notice from the Adjudicating Authority.
- The concept of "default" under the IBC is very wide. It is simply a non-payment of debt that has become due and includes non-payment of even a part of it. Even non-payment of a disputed financial debt when due would constitute a default under the IBC. In other words, so long as the debt is due it does not matter if it is disputed.

In ***Swiss Ribbons Private Limited and Another Vs. Union of India and Others [(2019) 4 SCC 17]***, the Supreme Court held that a review of the definition of "financial creditor" and "financial debt" makes it clear that a financial debt is a debt together with any interest that is disbursed against the consideration for the time value of money.

It may further be money that is borrowed or raised in any of the manners prescribed in section 5(8) or otherwise, as section 5(8) provides an inclusive definition. On the other hand, an "operational debt" would include a claim for the provision of goods or services, including employment, or a debt in respect of payment of dues arising under any law, and payable to the government or any local authority.

The court further observed that most financial creditors, particularly banks and financial institutions, are secured creditors whereas most operational creditors are unsecured—payments for goods and services as well as payments to workers not being secured by mortgaged documents and the like. The distinction between secured and unsecured creditors has been made since the earliest of the Companies Acts was passed both in the United Kingdom and in this country. Moreover, the nature of the loan agreements with financial creditors differs from contracts with operational creditors for supplying goods and services. Financial creditors generally lend finance on a term loan or for working capital that enables the corporate debtor to set up or operate its business. On the other hand, contracts with operational creditors relate to the supply of goods and services in the operation of the business. Financial contracts generally involve large sums of money. In contrast, the dues of operational contracts are generally lower. In the running of a business, operational creditors can be many as opposed to financial creditors. In addition, financial creditors have specified repayment schedules, and defaults entitle financial creditors to recall a loan in totality. Contracts with operational creditors do not have such stipulations. Also, the forum in which dispute resolution takes place is completely different. Contracts with operational creditors can and do have arbitration clauses where dispute resolution is done privately. The court observed that operational debts also tend to be recurring in nature and the possibility of genuine disputes in the case of operational debts is much higher compared to financial debts.

The court held that, most importantly, financial creditors are, from the very beginning, involved with assessing the viability of the corporate debtor. They can and do engage in restructuring the loan as well as reorganizing the corporate debtor's business when there is financial stress. These are steps that operational creditor do not and cannot take. Thus, to preserve the corporate debtor as a going concern, while ensuring maximum recovery for all creditors, the IBC needs to distinguish between financial creditors and operational creditors. The difference directly relates to the IBC's objectives.

Other requisites in filing application u/s 7 or 9:

Submission of information along with application. The financial creditor or operational creditor shall, while filing application under section 7 or 9, as the case may be, also furnish details of his/ its— (a) Permanent Account Number; and (b) Email-ID.

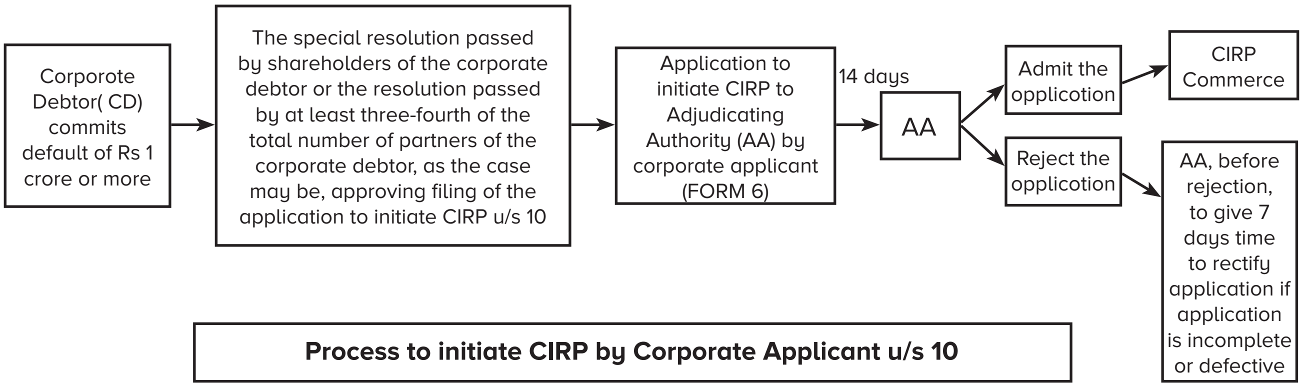
Details of debt, default and limitation in respect of applications under section 7 or section 9.

While filing an application under section 7 or 9, the financial creditor or the operational creditor, as the case may be, shall also submit along with evidence, chronology of the debt and default including the date when the debt became due, date of default, dates of part payments, if any, date of last acknowledgment of debt and the limitation applicable.

The Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017

- As per regulation 20 of the Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017 ("IU Regulations"), a creditor needs to submit financial information to the IU in Form C of the schedule. The documents to be uploaded as evidence for 'debt'/ or 'default of debt', have been specified by the Board in Form C.
- Vide notification dated 14th June, 2022, Sub-regulation (1A) has been inserted in the Regulation 20 which makes it mandatory for the creditor to file the information of default, with the information utility before filing an application to initiate corporate insolvency resolution process under section 7 or 9, as the case may be and the information utility shall process the information for the purpose of issuing record of default in accordance with Regulation 21.
- Sub-regulation (4) of Regulation 21 provides that after recording the status of information of default under sub-regulation (3), the information utility shall communicate the status of authentication in physical or electronic form of the relevant colour, indicating whether default is authenticated or disputed, as the case may be, by issuing a record of default in Form D of the Schedule, to the registered users who are-
  - (a) creditors of the debtor who has defaulted in payment of a debt;
  - (b) parties and sureties, if any, to the debt in respect of which the information of default has been received.

Initiation of corporate insolvency resolution process by corporate applicant (Section 10)



Process to initiate CIRP by Corporate Applicant u/s 10

Section 10 of the Code provides an option to the corporate debtor to voluntary initiate process of corporate insolvency resolution in case of default. So, it is not necessary that only financial or operational creditors come forward to opt for IBC to resolve insolvency of corporate debtor and run it as going concern but corporate debtor itself can be applicant to initiate it's own CIRP.

A corporate applicant is defined in section 5(5) of the IBC as

(a) corporate debtor; or

(b) a member or partner of the corporate debtor who is authorised to make an application for the corporate insolvency resolution process or the pre-packaged insolvency resolution process, as the case may be, under the constitutional document of the corporate debtor; or

(c) an individual who is in charge of managing the operations and resources of the corporate debtor; or

(d) a person who has the control, and supervision over the financial affairs of the corporate debtor.

Section 5(4) of the Code defines "constitutional document", in relation to a corporate person, as includes articles of association, memorandum of association of a company and incorporation document of a Limited Liability Partnership.

1. Application to initiate corporate insolvency resolution process:

Section 10(1) of IBC, 2016: Where a corporate debtor has committed a default, a corporate applicant thereof may file an application for initiating corporate insolvency resolution process with the Adjudicating Authority.

2. Form, Manner and Fee of Application: The application shall be filed in such form, containing such particulars and in such manner and accompanied with such fee as may be prescribed.

The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016: Rule 7 prescribes form and manner of application by corporate applicant. —

(1) A corporate applicant, shall make an application for initiating the corporate insolvency resolution process against a corporate debtor under section 10 of the Code in Form 6, accompanied with documents and records required therein and as specified in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

(2) The applicant under sub-rule (1) shall serve a copy of the application to the Board by registered post or speed post or by hand or by electronic means, before filing with the Adjudicating Authority.

- The application should be submitted by the corporate applicant to the AA along with a demand draft of 25,000 Indian rupees favoring the Pay and Accounts Officer, Ministry of Corporate Affairs, payable in Mumbai, New Delhi, Kolkata, or Chennai.

FORM 6

APPLICATION BY CORPORATE APPLICANT TO INITIATE CORPORATE INSOLVENCY RESOLUTION PROCESS UNDER THE CODE.

(Under rule 7 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016)

Form 6 is divided into three parts, each providing for the submission of the following particulars:

Part-I	**PARTICULARS OF THE CORPORATE APPLICANT-**	Details of all directors, promoters, and partners; the date of incorporation, nominal and paid-up share capital; and details of the authorized representative, along with details of the CD.
Part II	**Particulars of the proposed IRP—**	Details such as the name, address, email address, and registration number of the proposed IRP
Part III	**Particulars of the financial or operational debt-** [CREDITOR WISE, AS APPLICABLE]	Details of the financial or operational creditors, the total amount of debt along with the date(s) when the debts were incurred, particulars of the security amount claimed to be in default, and the date on which the default occurred.

3. Information/Documents to be furnished with the application:

Section 10(3) of IBC, 2016: The corporate applicant shall, along with the application, furnish-

(a) the information relating to its books of account and such other documents for such period as may be specified;

(b) the information relating to the resolution professional proposed to be appointed as an interim resolution professional; and

(c) the special resolution passed by shareholders of the corporate debtor or the 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.

4. Timeline for admission or rejection of application:

Section 10(4) of the Code states that *t*he Adjudicating Authority shall, within a period of **fourteen days** of the receipt of the application, by an order-

(a) admit the application, if it is complete and no disciplinary proceeding is pending against the proposed resolution professional; or

(b) reject the application, if it is incomplete or any disciplinary proceeding is pending against the proposed resolution professional.

Provided that Adjudicating Authority shall, before rejecting an application, give a notice to the applicant to rectify the defects in his application within seven days from the date of receipt of such notice from the Adjudicating Authority.

5. Commencement of CIRP

Section 10(5) of the Code provides that the corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (4) of this section.

In ***M/s. Unigreen Global Private Limited Vs. Punjab National Bank and Others [Company Appeal (AT) (Insolvency) No. 81 of 2017]***, the NCLAT examined the scope of discretion available to an Adjudicating Authority in admitting or rejecting a section 10 application. The NCLAT held that the Adjudicating Authority must admit an application filed by a Corporate Debtor to initiate a CIRP if it is satisfied that:

- the default has occurred
- the application is complete, and
- the Corporate Debtor is not barred under section 11 of the IBC.

Facts unrelated to or beyond the requirement of the IBC or the forms prescribed cannot amount to suppression of facts and cannot be looked at by the AA for denying admission.

Intimation to Information Utility

IBBI vide Circular No. IBBI/IU/51/2022 dated 15th June 2022 decided to forward all the applications received for initiating insolvency to the Information Utility (IU) and, the IU is required to (a) inform other creditors of the CD by sharing the application; (b) issue notice to the applicant, requiring it to file 'information of default' as per IU Regulations; and (c) process the 'information of default' for the purpose of issuing ROD as per the IU.

Fraudulent or Malicious Initiation of Proceedings

While evaluating whether to initiate a corporate insolvency resolution process, the applicant(s) should be aware of the potential impact of section 65 of the IBC, which deals with fraudulent or malicious initiation of proceedings. This provision says that if any person initiates a corporate insolvency resolution process or liquidation process fraudulently, or with malicious intent, for any purpose other than the resolution of insolvency, or liquidation, the

Adjudicating Authority may impose on him/her a penalty which shall not be less than one lakh rupees, but may extend to one crore rupees..

Applicability of the Limitation Act

Section 238A was inserted in the IBC through the Insolvency and Bankruptcy (Amendment) Ordinance 2018 (later replaced by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018), to make the provisions of the Limitation Act, 1963, apply to proceedings or appeals before the Adjudicating Authority, the NCLAT, the Debt Recovery Tribunal, and the Debt Recovery Appellate Tribunal.

Thus, applications under sections 7, 9, or 10 cannot be admitted for time-barred debts.

In ***B.K. Educational Services Private Limited Vs. Parag Gupta and Associates [(2019) 11 SCC 633]***, the Supreme Court observed that the intention of lawmakers, from the very beginning, was to apply the Limitation Act, 1963, to the NCLT and the NCLAT while deciding applications filed under section 7 and section 9 of the IBC and appeals. The relevant section of the Limitation Act is section 137. No doubt, the right to sue accrues when a default occurs. But if the default has occurred more than three years before the date of filing the application, it would be barred by section 137, except in cases where the delay can be condoned under section 5 of the Limitation Act. It also held that section 238A of the Code should apply the provisions of the Limitation Act, "as far as may be." Therefore, where periods of limitation have been laid down in the IBC, they will apply notwithstanding anything to the contrary contained in the Limitation Act.

In ***Dena Bank (Now Bank of Baroda) Vs. C. Shivakumar Reddy & Anr. 2021 SCC Online SC 543***, Supreme Court held that entries in books of accounts and/or Balance sheets of a Corporate Debtor would amount to an acknowledgment under Section 18 of the Limitation Act.

Placing reliance upon same, the NCLT, New Delhi Bench, while adjudicating an application filed under section 9 of Insolvency and Bankruptcy Code, 2016 ("IBC, 2016") in *M/s SKC Infratech Pvt. Ltd vs M/s EOS Hospitality Pvt. Ltd.* has reiterated that entries made in the Balance Sheet amounts to acknowledgement of debt as per section 18 of Limitation Act, 1963.

In ***Babulal Vardharji Gurjar Vs. Veer Gurjar Aluminium Industries Private Limited & Another [Civil Appeal No. 6347 of 2019]***, the Supreme Court examined the limitation period for filing section 7 applications and observed:

The period of limitation for an application to initiate a corporate insolvency resolution process under section 7 of the IBC is governed by article 137 of the Limitation Act and is, therefore, three years from the date when the right to apply accrues.

The right to apply under the IBC accrues on the date when the default occurs. If the default had occurred over three years prior to the date of filing the application, the application would be time-barred, save and except in those cases where, on facts, the delay in filing may be condoned.

An application under section 7 of the IBC is not for enforcing mortgage liability and article 62 of the Limitation Act does not apply to this application.

The date of the IBC's coming into force on 01.12.2016 is irrelevant to the triggering of any limitation period for the purposes of the IBC.

In this case, the court observed that the Financial Creditor never made any arguments other than stating the date of default as "08.07.2011" in the application. Therefore, no case for extending the period of limitation is available to be examined. In other words, even if section 18 of the Limitation Act – (which allows the period of limitation to be extended if the defaulter had acknowledged the debt) – and the principles thereof were applicable, they would not apply to the application under consideration, looking at the averment made in the application regarding default and for want of any other averment in regard to acknowledgement. The court annulled the insolvency proceedings, holding that because the application of the financial creditor is barred by limitation, no proceedings undertaken after the order of admission could be of any effect.

Excluded Categories

The corporate person which are excluded from IBC falls in two categories:

1. Against which CIRP cannot be initiated

2. Persons not entitled to make application (Section 11)

Against which Corporate Insolvency Resolution Process cannot be initiated:

Corporate Insolvency Resolution Process can be initiated against a corporate debtor. A corporate debtor is defined in section 3(8) of the Code as a corporate person who owes a debt to any person. A "corporate person" is defined in section 3(7) to mean

- a company under the Companies Act, 2013,
- an LLP under the Limited Liability Partnership Act, 2008, or
- any other person incorporated with limited liability under any law in force at the time excluding financial service providers.

Therefore, a financial service provider is not a corporate debtor for the purposes of the Code and, consequently, a Corporate Insolvency Resolution Process against a financial service provider cannot be initiated under section 7, 9, or 10 of the IBC.

A "financial service provider" is defined in section 3(17) of the IBC as a person authorized and registered by a financial sector regulator to provide financial services. The terms "financial services" and "financial sector regulator" are defined in section 3(15) and section 3(18) respectively.

Section 239 of the Code entrust upon the Central Government power to make rules, by notification, carrying out the provisions of this Code. Without prejudice to the generality of the provisions of sub-section (1), the Central Government may make rules for any of the following matters, namely:

"(zk) the manner of conducting insolvency and liquidation proceedings under section 227;"

Section 227 of the IBC empowers the Central Government, in consultation with the appropriate financial sector regulators, to notify financial service providers or categories of financial service providers about their insolvency and liquidation proceedings, which may be conducted under the IBC with such modifications and in such manner as may be prescribed. Pursuant to its powers, the MCA introduced and notified the Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019.

The Financial Service Provider Rules empower the government to commence the Corporate Insolvency Resolution Process in terms of the IBC against financial service providers, in consultation with the appropriate financial sector regulator as prescribed by the law. In terms of the notification dated November 18, 2019, issued by the MCA, the Financial Service Provider Rules would apply to non-banking finance companies (which include housing finance companies) with asset size of Rs.500 crore or more, as per last audited balance sheet with the RBI as the appropriate financial service regulator.

Further, the MCA, in its notification dated January 30, 2020 notified the manner of dealing with the third-party assets in custody or possession of such financial service provider.

Dewan Housing Financial Corporation is the first financial service provider to come under the ambit of the IBC in the matter of ***RBI Vs. Dewan Housing Financial Corporation in C.P. (IB)-4258/MB/2019***. The RBI, in its capacity as appropriate regulator, in terms of rule 5 of the Financial Service Provider Rules, initiated the CIRP against Dewan Housing Financial Corporation. It was admitted by the NCLT, Mumbai bench, on December 3, 2019.

In ***Hindustan Construction Company Limited & Another Vs. Union of India & Others [WP (Civil) No. 1074/2019*** with other Civil Appeals], a CIRP was sought to be initiated against the National Highway Authority of India. The Supreme Court held that the National Highway Authority of India is a statutory body that functions as an extended limb of the Central Government and performs governmental functions that cannot be taken over by an RP under the IBC or by any other corporate body. Nor can such authority ultimately be wound up under the IBC. For all these reasons, it is not possible to either read in or read down the definition of "corporate person" in section 3(7) of the IBC.

Persons not entitled to make application (Section 11)

Section 11 of the Code states that certain persons are not entitled to make applications for initiating a Corporate Insolvency Resolution Process. These are:

a) a corporate debtor already undergoing a corporate insolvency resolution process or a pre-packaged insolvency resolution process; or

(aa) a financial creditor or an operational creditor of a corporate debtor undergoing a pre-packaged insolvency resolution process; or

(b) a corporate debtor having completed corporate insolvency resolution process twelve months preceding the date of making of the application; or

(ba) a corporate debtor in respect of whom a resolution plan has been approved under Chapter III-A, twelve months preceding the date of making of the application; or

(c) a corporate debtor or a financial creditor who has violated any of the terms of resolution plan which was approved twelve months before the date of making of an application under this Chapter; or

(d) a corporate debtor in respect of whom a liquidation order has been made.

Explanation I. - For the purposes of this section, a corporate debtor includes a corporate applicant in respect of such corporate debtor.

Explanation II.- For the purposes of this section, it is hereby clarified that nothing in this section shall prevent a corporate debtor referred to in clauses (a) to (d) from initiating corporate insolvency resolution process against another corporate debtor.

The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019 (later replaced by the Insolvency and Bankruptcy Code (Amendment) Act, 2020, has added Explanation II to the IBC that a corporate debtor may initiate insolvency proceedings against another corporate debtor for the debts owed to it. The explanation allows a corporate debtor to initiate CIRP against its corporate debtor by virtue of them now being a creditor. The amendment has sought to clarify the ambiguous and unsettled position of the law.

Timeline for admission or rejection of Application filed to initiate Corporate Insolvency Resolution Process, whether mandatory or directory

In all cases where an application to initiate a CIRP is filed, the IBC provides that the Adjudicating Authority (AA) should admit it within 14 days of receiving the application. The AA can reject such an application on the grounds mentioned in the respective sections 7,9 or 10, as may be applicable. However, if AA reject such an application on ground of being incomplete, the Adjudicating Authority shall, before rejecting such application, give a notice to the applicant to rectify the defects in his application within seven days from the date of receipt of such notice from the Adjudicating Authority.

Now, question arises whether this timeline of 14 days or 7 days is mandatory or discretionary for Adjudicating Authority.

M/s. Surendra Trading Company Vs. M/s. Juggilal Kampat Jute Mills Company Ltd. and Others [(2017) 16 SCC 143]

The question for consideration before the Supreme Court was whether the period of seven days to rectify errors was mandatory or a guideline (directory).

The appeal arose from an order of the NCLAT that held that the period of 14 days for admitting/rejecting the application under sections 7, 9, and 10 was directory and the period of seven days given to the applicant for rectifying errors was mandatory.

The Supreme Court upheld the NCLAT's view on 14 days for admission/rejection being directory and also held that there was no reason to make the proviso (that is, seven days for rectifying errors) mandatory. It held that the proviso is directory in nature; however, it also considered that there may be cases where:

(a) applicants or their counsel may not remove the objections in time, or

(b) frivolous applications may be filed with ulterior/oblique motives and kept pending without any removal of errors.

Hence, the Supreme Court, while interpreting the provisions to be directory in nature, held that the applicant/counsel is required to submit, in writing, why the removal of objections could not be completed within the stated seven days. If the court/tribunal is satisfied with the reasons given, it will entertain the application on merit; if not, the court/tribunal will have the right to dismiss it.

Time-limit for completion of insolvency resolution process (Section 12)

Thus the 14-day period given to the AA to admit or reject an application to initiate a Corporate Insolvency Resolution Process as well as 7 days period for rectification of defects is not mandatory.

Opportunity of Being Heard to Corporate Debtor

Before admitting a Corporate Insolvency Resolution Process application in respect of a Corporate Debtor, the Corporate Debtor must be given an opportunity to be heard.

Rules 4(3), 6(2), and 7(2) of the Application to Adjudicating Authority Rules mandate that the applicant (Financial Creditor, Operational Creditor, and Corporate Applicant, respectively) shall serve a copy of the application to the registered office of the corporate debtor and to the IBBI, by registered post or speed post or by hand or by electronic means, before filing with the Adjudicating Authority.

In practice, however, a prior service is made to the Corporate Debtor because the relevant registry of the NCLT may not accept filings any other way. Further, once the application is submitted to the Adjudicating Authority, the acknowledged copy of it should be served on the Corporate Debtor. The AA then allocates a company petition number to it. Thereafter, the application comes up for hearing before the Adjudicating Authority.

The relevant NCLT registry allocates a date and a courtroom number for the matter when it receives the covering letter. The matter is then listed for hearing by the Adjudicating Authority. If the Adjudicating Authority decides that the matter should be heard, it issues a notice to the Corporate Debtor. The copy of the application is served again on the Corporate Debtor when the Adjudicating Authority issues the notice. If the Corporate Debtor does not appear before the Adjudicating Authority, the Adjudicating Authority may require the filing of a service affidavit before it (showing evidence of service to the Corporate Debtor. Such practices are adopted to ensure that the Corporate Debtor is provided enough opportunity of being heard if it wishes to oppose the application for admission under the IBC.

Withdrawal of application admitted under section 7, 9 or 10 (Section 12A)

There are three phases in which application could be sought to be withdrawn by applicant:

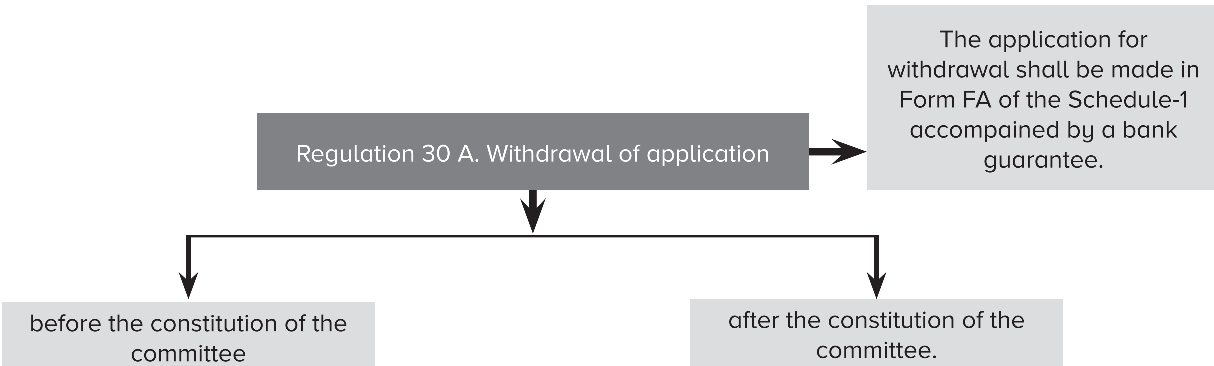
(i) *Case I: Before admission of application by Adjudicating Authority:* Rule 8 of the *Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016* provides for withdrawal of application as—The Adjudicating Authority may permit withdrawal of the application made under rules 4, 6 or 7, as the case may be, on a request made by the applicant before its admission.

(ii) *Case II:* After admission of application but before constitution of Committee of Creditors.

(iii) *Case III*: After constitution of Committee of Creditors.

Once an application for a CIRP is admitted by the Adjudicating Authority, it can be withdrawn under section 12A of the IBC read with Regulation 30A of the CIRP Regulations. The provisions of both are summarized below:

Section 12 A of the Code provides that the Adjudicating Authority may allow the withdrawal of application admitted under section 7 or section 9 or section 10, on an application made by the applicant with the approval of ninety per cent voting share of the committee of creditors, in such manner as may be specified.



Regulation 30A of the CIRP Regulations specifies the manner for such withdrawal after admission as follows:

Particulars	**Provisions where an application for withdrawal is made before the constitution of the committee**	**Provisions where an application for withdrawal is made after the constitution of the committee**
1. Through whom applicant can apply	the interim resolution professional	• the interim resolution professional; or • the resolution professional, as the case may be. In this case if application is made after the issue of invitation for expression of interest under regulation 36A, the applicant shall state the reasons justifying withdrawal after issue of such invitation.
2. Bank Guarantee to be given (Regulation 30A(2))	(a) towards estimated expenses incurred on or by the interim resolution professional for purposes of regulation 33, till the date of filing of the application before the constitution of the committee	(b) towards estimated expenses incurred for purposes of clauses (aa), (ab), (c) and (d) of regulation 31, till the date of filing of the application after the constitution of the committee.
3. Time period for submitting application to AA	By the interim resolution professional on behalf of the applicant **within three days of its receipt.**	• The committee shall consider the application, within seven days of its receipt. • If application is approved by COC with 90% voting share, the resolution professional shall submit such application along with the approval of the committee, **to the AA on behalf of the applicant, within three days of such approval.**

4. AA may approve or reject the application. If AA approves withdrawal	**Actions required:** 1. The applicant shall deposit an amount, towards the actual expenses incurred for the purposes referred to in clause (a) or clause (b) of sub-regulation (2) till the date of approval by the Adjudicating Authority, 2. The amount of deposit shall be determined by the interim resolution professional or resolution professional, as the case may be. **3. The applicant shall deposit the amount within three days of such approval, in the bank account of the corporate debtor.** 4. If applicant fails to deposit the amount in three days of approval, the bank guarantee received under sub-regulation (2) shall be invoked, without prejudice to any other action permissible against the applicant under the Code.

In ***Swiss Ribbons Private Limited and Another Vs. Union of India and Others [(2019) 4 SCC 17]***, the Supreme Court held that the provision allowing an application to be withdrawn before an invitation for Expression of Interests is issued is directory and not mandatory. In exceptional cases, withdrawal may also be allowed after the invitation for Expression of Interests has been issued. The main precondition for withdrawal is that 90 percent of the Committee of Creditor's members have to agree to it.

Time-limit for completion of insolvency resolution process (Section 12)

Time-limit for completion of CIRP by Adjudicating Authority (Section 12)

180 days from the date of admission of the application to initiate such + One extension maximum days time of 90 →

- On an application filed by resolution professional,
- On the authority of a resolution passed at a meeting of the committee of creditors by a vote of 66% of the voting shares.
- If Adjudicating Authority is satisfied that the subject matter of the case is such that CIRP cannot be completed within 180 days

The corporate insolvency resolution process starts on the date the application is admitted. This is taken as the insolvency commencement date.

- Completion of CIRP in 180 days: Section 12(1) states that subject to sub-section (2), the corporate insolvency resolution process shall be completed within a period of one hundred and eighty days from the date of admission of the application to initiate such process.
- Application to file for extension beyond 180 days: Section (2) states that the resolution professional shall file an application to the Adjudicating Authority to extend the period of the corporate insolvency resolution process beyond one hundred and eighty days, if instructed to do so by a resolution passed at a meeting of the committee of creditors by a vote of sixty-six per cent of the voting shares.
- One time Extension by the Adjudicating Authority of maximum 90 days: Section 12 (3) states that on receipt of an application under sub-section (2), if the Adjudicating Authority is satisfied that the subject matter of the case is such that corporate insolvency resolution process cannot be completed within one hundred and eighty days, it may by order extend the duration of such process beyond one hundred and eighty days by such further period as it thinks fit, but not exceeding ninety days:

Proviso to sub-section (3) clarifies that any extension of the period of corporate insolvency resolution process under this section shall not be granted more than once.

It is further provided that the corporate insolvency resolution process shall mandatorily be completed within a period of three hundred and thirty days from the insolvency commencement date, including any extension of the period of corporate insolvency resolution process granted under this section and the time taken in legal proceedings in relation to such resolution process of the corporate debtor.

Regulation 40 of CIRP Regulations, 2016: It lays down similar provisions as follows:

Extension of the corporate insolvency resolution process period.

(1) The committee may instruct the resolution professional to make an application to the Adjudicating Authority under section 12 to extend the insolvency resolution process period.

(2) The resolution professional shall, on receiving an instruction from the committee under this Regulation, make an application to the Adjudicating Authority for such extension.

CoC of Essar Steel India Limited Vs. Satish Kumar Gupta [(2019) SCC Online SC 1478]

In this case, the Supreme Court examined the constitutionality of the amendment made in section 12(3) of the IBC (which provided that the corporate insolvency resolution process must mandatorily be completed within 330 days). While leaving the provision otherwise intact, it struck down the word “mandatorily” as being manifestly arbitrary under Article 14, as well as placing an excessive and unreasonable restriction on the litigant’s right to carry on business under Article 19(1) (g) of the Constitution. The court held that the effect of this declaration is that ordinarily the corporate resolution process of the corporate debtor must be completed within the outer limit of 330 days from the insolvency commencement date, including extensions and the time taken in legal proceedings.

However, on the facts of a given case, if it can be shown to the Adjudicating Authority and/or the NCLAT that only a short period is needed beyond the 330 days to complete the corporate insolvency resolution process; that it would be in the interest of all stakeholders for the corporate debtor to be put back on its feet instead of being liquidated; and that the time taken in legal proceedings is largely due to factors that cannot be ascribed to the litigants before the Adjudicating Authority and/or the NCLAT, the delay or a large part thereof being attributable to the tardy process of the AA and/or the NCLAT itself, the Adjudicating Authority and/ or the NCLAT may extend the time beyond 330 days. The general rule is that 330 days is the outer limit within which resolution of the stressed assets of the corporate debtor must take place. Beyond this period, the corporate debtor is to be liquidated.

Timelines within the Corporate Insolvency Resolution Process

The IBC and the IBBI (Corporate Insolvency Resolution Process) Regulations,2016 detail a timeline for each step to be taken by various participants in the CIRP. Regulation 40A of CIRP Regulations,2016 lays down model time-line for corporate insolvency resolution process in tablular form on the assumption that the interim resolution professional is appointed on the date of commencement of the process and the time available is hundred and eighty days :

[Section / Regulation	Description of Activity	Norm	Latest Timeline
Section 16(1)	Commencement of CIRP and appointment of IRP	....	T
Regulation 6(1)	Public announcement inviting claims	Within 3 Days of Appointment of IRP	T+3
Section 15(1)(c) / Regulations 6(2)(c) and 12 (1)	Submission of claims	For 14 Days from Appointment of IRP	T+14

[Section / Regulation	Description of Activity	Norm	Latest Timeline
Regulation 12(2)	Submission of claims	Up to 90th day of commencement	T+90
Regulation 13(1)	Verification of claims received under regulation 12(1)	Within 7 days from the receipt of the claim	T+21
	Verification of claims received under regulation 12(2)		T+97
Section 21(6A) (b) / Regulation 16A	Application for appointment of AR	Within 2 days from verification of claims received under regulation 12(1)	T+23
Regulation 17(1)	Report certifying constitution of CoC		T+23
Section 22(1) / Regulation 19(2)	1st meeting of the CoC	Within 7 days of filing of the report certifying constitution of the CoC, but with five days' notice	T+30
Section 22(2)	Resolution to appoint RP by the CoC	In the first meeting of the CoC	T+30
Section 16(5)	Appointment of RP	On approval by the AA	....
Regulation 17(3)	IRP performs the functions of RP till the RP is appointed.	If RP is not appointed by 40th day of commencement	T+40
Regulation 27	Appointment of valuer	Within 7 days of appointment of RP, but not later than 47th day of commencement	T+47
Section 12(A) / Regulation 30A	Submission of application for withdrawal of application admitted	Before issue of EoI	W
	CoC to dispose of the application	Within 7 days of its receipt or 7 days of constitution of CoC, whichever is later.	W+7
	Filing application of withdrawal, if approved by CoC with 90% majority voting, by RP to AA	Within 3 days of approval by CoC	W+10
Regulation 35A	RP to form an opinion on preferential and other transactions	Within 75 days of the commencement	T+75
	RP to make a determination on preferential and other transactions	Within 115 days of commencement	T+115
	RP to file applications to AA for appropriate relief	Within 130 days of commencement	T+130
Regulation 36 (1)	Submission of IM to CoC	Within 95 days of commencement	T+95
Regulation 36A	Publish Form G	Within 60 days of commencement	T+60
	Invitation of EoI		
	Submission of EoI	At least 15 days from issue of EoI (Assume 15 days)	T+75
	Provisional List of RAs by RP	Within 10 days from the last day of receipt of EoI	T+85

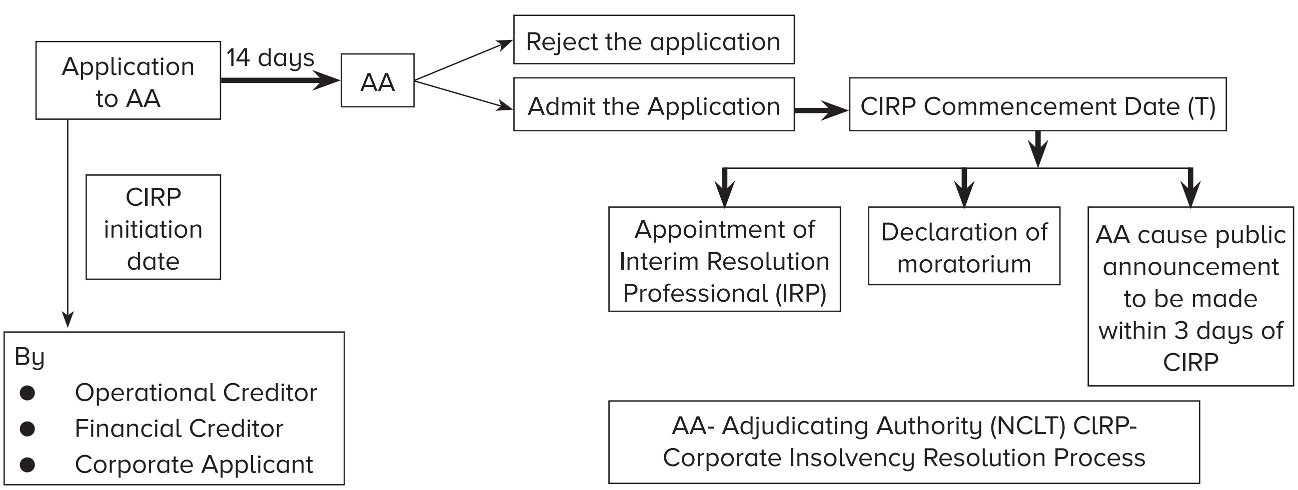
[Section / Regulation	Description of Activity	Norm	Latest Timeline
	Submission of objections to provisional list	For 5 days from the date of provisional list	T+90
	Final List of RAs by RP	Within 10 days of the receipt of objections	T+100
Regulation 36B	Issue of RFRP, including Evaluation Matrix and IM	Within 5 days of the issue of the final list	T+105
	Receipt of Resolution Plans	At least 30 days from issue of RFRP (Assume 30 days)	T+135
Regulation 39(4)	Submission of CoC approved Resolution Plan to AA	As soon as approved by the CoC	T+165
Section 31(1)	Approval of resolution plan by AA		T+180

Terms used in Table:

- RP –Resolution Professional
- AA-Adjudicating Authority
- CoC-Committee of Creditors
- IRP-Interim Resolution Professional
- IM- Information Memorandum
- RAs- Resolution Applicants
- EOI-Expression of Interest
- RFRP- Request For Resolution Plan
- IM- Information Memorandum
- AR-Authorised Representative
- CIRP-Corporate Insolvency Resolution Process.

In ***ArcelorMittal India Private Limited vs. Satish Kumar Gupta and Others [2018 (13) SCALE]***, the Supreme Court referred to regulation 40A of the CIRP Regulations and observed that "it is of utmost importance for all authorities concerned to follow this model timeline as closely as possible."

Declaration of moratorium and public announcement



The IBC has shifted the "debtor in possession" regime to a "creditor in control" model for corporate debtors undergoing Corporate Insolvency Resolution Process (CIRP). This control is exercised through an Interim Resolution Professional (and later the Resolution Professional). From the insolvency commencement date (ICD), the powers of the Board of Directors or the partners of the corporate debtor are suspended and are exercised by the Interim Resolution Professional. Similarly, the management of the corporate debtor vests in the Interim Resolution Professional (and later the Resolution Professional). This continues for the entire CIRP period, that is, from the insolvency commencement date (ICD) till the Adjudicating Authority (AA) passes an order for resolution (that is, an order approving the resolution plan) or liquidation of the corporate debtor.

The Interim Resolution Professional constitutes the Committee of Creditors based on claims submitted by the creditors pursuant to Public Announcement, which can then decide to either continue the Interim Resolution Professional as the Resolution Professional or replace him with another insolvency professional as the Resolution Professional.

On the insolvency commencement date, a "moratorium" in respect of the corporate debtor and its assets is declared, which continues for the entire CIRP period. During this time, the IRP (and later the RP) runs the CD as a going concern and fulfills various duties under the IBC and CIRP Regulations, under the overall supervision of the Committee of Creditors.

(i) *Section 13 IBC,2016:* Section 13 of the Code specifies three actions that the NCLT shall take after an application for initiating the corporate insolvency resolution process has been admitted.

According to section 13 of IBC,2016:

(1) The Adjudicating Authority, after admission of the application under section 7 or section 9 or section 10, shall, by an order –

 (a) declare a moratorium for the purposes referred to in section 14;

 (b) cause a public announcement of the initiation of corporate insolvency resolution process and call for the submission of claims under section 15; and

 (c) appoint an interim resolution professional in the manner as laid down in section.

(2) The public announcement referred to in clause (b) of sub-section (1) shall be made immediately after the appointment of the interim resolution professional.

Moratorium

The Bankruptcy Law Reforms Committee recommends that a provision relating to a "calm period" be introduced in the IBC so that all efforts are focused on resolution. The moratorium provisions are framed in the IBC to ensure that the corporate debtor is not burdened with additional stress. The Bankruptcy Law Reforms Committee, in its report, recommended two phases of resolution, upon commencement of the corporate insolvency resolution process.

(a) A serious effort be made to evaluate the viability of the debt during a "calm period" where the creditors' interests are preserved, without affecting the running of the corporate debtor's business. This is possible only when a moratorium is imposed on all recovery actions against the corporate debtor, so that an insolvency professional can manage and operate the company effectively.

(b) If the investigations into the viability of the company do not result in a solution that can be implemented, the corporate debtor may be considered unviable and the matter may proceed to a liquidation, which is regarded as the last resort. The Committee of creditors and the resolution professional should make every effort to maximize the value of the corporate debtor and balance the interest of all stakeholders.

Section 14 of the Code details the moratorium protection given to the corporate debtor. The entire period of corporate insolvency resolution professional is covered under this moratorium, during which all suits, legal proceedings, and recovery actions against the corporate debtor are held in abeyance to give time to the corporate debtor to resolve its status. Section 14 is reproduced below:

(1) Prohibitory order by the Adjudicating Authority: Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely: -

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing off by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

Explanation to sub-section (1) provides for non-termination of license, quota or any other amenities provided by government authority or sectoral regulator subject to payment of current dues arising due to their use during CIRP as:

'For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period;

(The explanation does not bar termination of such a license (or similar item) on grounds other than insolvency. Such a safeguard in terms of non-termination of licenses and permits and continued supply of critical goods and services has been provided to protect and preserve the value of the corporate debtor and manage its operations as a going concern.)

Case Laws related to section 14(1)(a)

In ***Alchemist Asset Reconstruction Company Limited Vs. Hotel Gaudavan Private Limited [(2018) 16 SCC 94]***, the Supreme Court affirmed that once a moratorium is imposed under the IBC, any proceeding initiated against the corporate debtor is non-est (does not exist) in law.

Powers of High Court under Article 226 and of Supreme Court under Article 32 of the Constitution are not affected by Moratorium: ***In Canara Bank Vs. Deccan Chronicle Holdings Limited [Company Appeal (AT) (Insolvency) No. 147 of 2017]***, the NCLAT held that the moratorium will not affect any proceedings initiated or pending before the Supreme Court under Article 32 of the Constitution of India or where an order is passed under Article 136. Further, it will not affect the powers of any High Court under Article 226 of the Constitution.

Proceeding in moratorium do not include prosecution: *In* ***Mr. Ajay Kumar Bishnoi Vs. M/s Tap Engineering and Other [Criminal Original Petition No. 34996 of 2019]***, the corporate debtor underwent insolvency resolution while a complaint was pending under section 138 of the Negotiable Instruments Act, 1881. Further, during this time, a resolution plan for the corporate debtor was approved with a change in management and control. The Managing Director (MD) of the erstwhile corporate debtor sought to quash the prosecution under section 138 in view of the approval of the resolution plan. The High Court confirmed that the moratorium under section 14 of the IBC prohibits proceedings, but such proceedings do not include prosecution.

Moratorium does not apply to criminal proceedings: In the matter of ***Varrsana Ispat Limited Vs. Deputy Director, Directorate of Enforcement [Company Appeal (AT) (Insolvency) No. 493 of 2018]***, the Resolution Professional (RP) had sought de-attachment of properties attached with the Directorate of Enforcement under the Prevention of Money Laundering Act, 2002, a considerable time prior to the initiation of corporate insolvency resolution process. The NCLAT had held that section 14 of the IBC is not applicable to the criminal proceeding or any penal action taken pursuant to the criminal proceeding or any act having the essence of crime or crime proceedings.

The Supreme Court also upheld the order passed by the NCLAT ***[Varrsana Ispat Limited Vs. Deputy Director, Directorate of Enforcement, Civil Appeal No. 5546 of 2019]***. While the bar under IBC is automatic, practically the IRPs/RPs may need to file an application before various forums where proceedings against the corporate debtor is continuing, bringing to their attention the commencement of CIRP and the moratorium declared by the AA under section 14 of the IBC, and requesting the relevant forums to pass an order staying proceedings.

Moratorium also applies on the Regulatory Authorities: In the matter of ***Ms. Anju Agarwal Resolution Professional For Shree Bhawani Paper Mills Ltd. Vs Bombay Stock 19 Exchange & Ors.***, the NCLAT observed that Section 28A of the SEBI Act, 1992 being inconsistent with Section 14 of IBC, it held that Section 14 of IBC will prevail over Section 28A of the SEBI Act, 1992 and SEBI cannot recover any amount including the penalty from the CD. The 'Bombay Stock Exchange' cannot suspend trading of shares of CD for the same reason.

Penalty imposed by Regulator may be claimed as Operational Creditor but cannot be recovered during the Resolution Process: In *the matter of* ***Maharashtra Seamless Ltd. Vs. Shri Padmanabhan Venkatesh & Ors.*** , the NCLAT held that the statutory dues i.e. the dues to Central Government or the State Government arising under any law for the time being in force and payable come within the meaning of 'Operational Debt'. If penalty is imposed or amount is payable to the 'Securities Exchange Board of India' in such case, it may claim as an 'Operational Creditor' but cannot recover the same during the 'Resolution Process'.

Under section 14(1)(b) and (c), the bar is only in respect of the Corporate Debtor and its assets. It follows that property not owned by the Corporate Debtor would not come under the protective umbrella of section 14 unless the property is occupied by or in possession of the Corporate Debtor (in which case, its recovery would be prohibited under section 14(1) (d) of the IBC).

Case laws related to section 14(1)(d)

In the matter of ***Rajendra K. Bhutta Vs. Maharashtra Housing and Area Development Authority (MHADA) and 17 Another***, the Supreme Court held that Section 14(1)(d) of the IBC, when it speaks about recovery of property "occupied", does not refer to rights or interests created in property but only actual physical occupation of the property:

In ***M/s Embassy Property Developments Pvt. Ltd. Vs. State of Karnataka and Others [2019 SCC Online SC 1542]***, one of the issues before the Supreme Court was whether the AA had the power under the IBC to review the order passed by the Government of Karnataka during the moratorium period, rejecting the auto-extension of a mining lease granted by it to the Corporate Debtor. The Supreme Court observed, among other things, that the moratorium under section 14 did not impact the right of the government to refuse extension of the lease. It observed that the purpose of section 14 was to preserve the status quo and not to create a new right. Even section 14(1)(d), which prohibits, during the period of moratorium, the recovery of any property by the owner/ lessor will not go to the rescue of the corporate debtor since what is prohibited is only right not to be dispossessed, but not the right to have renewal of the lease of such property. It was further observed that this right not to be dispossessed will have nothing to do with the rights conferred by a mining lease especially on government land. It was noted that what was granted to the Corporate Debtor was not an exclusive possession of the land in question so as to enable the RP to invoke section 14(1)(d) of the IBC.

(2) Supply of essential goods or service:

Following spirit of the "calm period" and running the corporate debtor as going concern during "calm period" as envisaged in BLRC report, sub-section 2 of section 14 mandates that the supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

Subsection 2A was added after section 14(1)(2) by way of the Insolvency and Bankruptcy Code (Amendment) Act, 2020, to the effect that where the interim resolution professional or the resolution professional considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended, or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.

This Amendment has vested discretion in IRP or RP to consider whether particular goods or services are essential or not and if according to them, they are essential and then their supply cannot be terminated provided the corporate debtor pays current dues in respect of the same during the moratorium period.

Regulation 32 of *the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016* defines Essential Supplies as follows:

Essential supplies: The essential goods and services referred to in section 14(2) shall mean-

(1) electricity;

(2) water;

(3) telecommunication services; and

(4) information technology services,

But the condition is that above (4) shall be treated as Essential Supplies only to the extent these are not a direct input to the output produced or supplied by the corporate debtor. Illustration-Water supplied to a corporate debtor will be essential supplies for drinking and sanitation purposes, and not for generation of hydro-electricity.

In ***Dakshin Gujarat VIJ Company Ltd. Vs. M/s. ABG Shipyard Ltd. and Another [Company Appeal (AT) (Insolvency) No. 334 of 2017]***,

The question that came before the NCLAT was whether the moratorium under section 14 of the IBC will cover the current charges payable by the corporate detbor for supply of such services as water and electricity.

The NCLAT held that:

- There is no prohibition or bar imposed on the payment of current charges for essential services. Such payment is not covered by the order of the moratorium.
- The law does not stipulate that essential goods, including water and electricity, should be supplied free of charge until the moratorium is ended. The amount paid for these services by the RP shall be part of the CIRP cost. The RP was directed to pay current charges for the supply of electricity during the moratorium.

(3) Exceptions to Moratorium

Section 14(3) of the Code provides exceptions to applicability of moratorium. It states that the provisions of sub-section (1) shall not apply to —

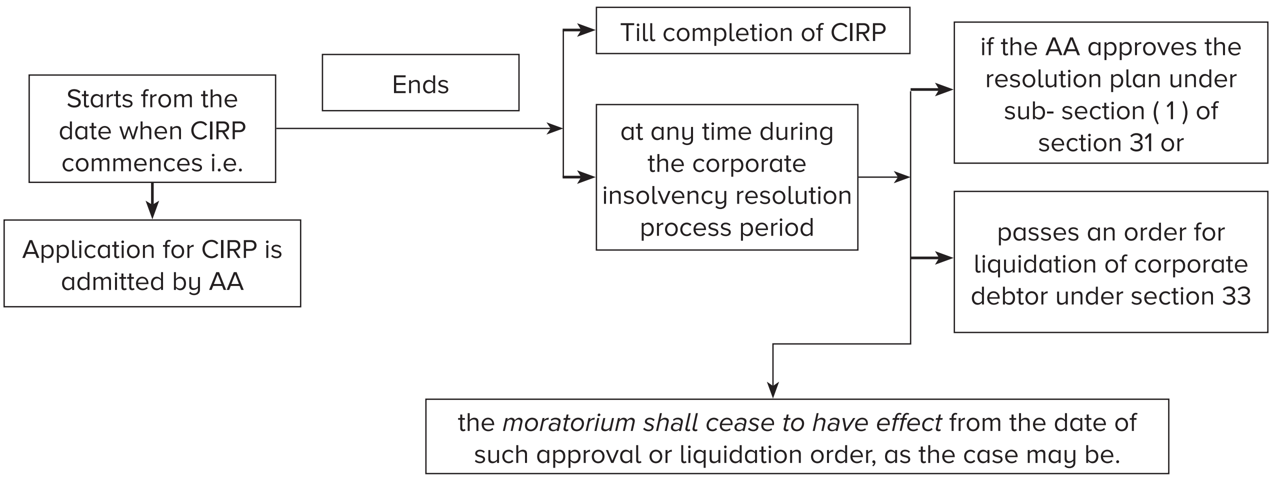
(a) such transactions, agreements or other arrangement as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;

(b) a surety in a contract of guarantee to a corporate debtor.

(Under the Insolvency and Bankruptcy Code,2016 the surety is denied the right to subrogation)

In ***State Bank of India Vs. Ramkrishnan [Civil Appeal Nos. 3595 & 4553 of 2018, (2018) 17 SCC 394]***, the Supreme Court held that section 14 did not apply to the personal guarantor of the corporate debtor but only to the corporate debtor. The court held that in a contract of guarantee, the liability of surety and that of principal debtor is coextensive and hence, the creditor can proceed against assets of either the principal debtor or the surety, or both, in no particular order.

(4) Duration of Moratorium



Sub-section (4) of section 14 of the Code provides that the order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

Proviso to sub-section (4) specifies the situations when CIRP comes to an end before statutory time period of CIRP mentioned under IBC (180/270/330 days) expires that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority

- approves the resolution plan under sub-section (1) of section 31 or
- passes an order for liquidation of corporate debtor under section 33,

the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

Punishment for Contravention of Moratorium

Section 74 (1) & (2) of the Code provides for punishment for contravention of moratorium as follows:

Section of the Code	Who violates the provisions of section 14	Who shall be liable for punishment	Punishment
74(1)	the corporate debtor or any of its officer	any such officer who knowingly or wilfully committed or authorised or permitted such contravention	• Imprisonment: Minimum three years to maximum five years, • Fine: Minimum Rs 1 Lakh to maximum three lakh rupees, or • Both.

74(2)	any creditor	any person who knowingly and wilfully authorised or permitted such contravention by a creditor	• Imprisonment: Minimum one years to maximum five years, • Fine: Minimum Rs one Lakh to maximum one crore rupees, or • Both.

Filing of Application and Application Fee

Rule 10 of the *Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 provides for the rules to be followed for filing application to initiate CIRP as follows:*

(1) Till such time the rules of procedure for conduct of proceedings under the Code are notified, the application made under sub-section (1) of section 7, sub-section (1) of section 9 or sub-section (1) of section 10 of the Code shall be filed before the Adjudicating Authority in accordance with rules 20, 21, 22, 23, 24 and 26 of Part III of the National Company Law Tribunal Rules, 2016.

(2) An applicant under these rules shall immediately after becoming aware, notify the Adjudicating Authority of any winding-up petition presented against the corporate debtor.

(3) The application shall be accompanied by such fee as specified in the Schedule.

(4) The application and accompanying documents shall be filed in electronic form, as and when such facility is made available and as prescribed by the Adjudicating Authority:

Provided that till such facility is made available, the applicant may submit the accompanying documents, and wherever they are bulky, in electronic form, in scanned, legible portable document format in a data storage device such as a compact disc or a USB flash drive acceptable to the Adjudicating Authority.

Rules 20, 21, 22, 23, 24 and 26 of the National Company Law Tribunal Rules, 2016

Procedure for filing petition: Rule 20 lays down procedure for filing petition with NCLT-

(1) Every appeal or petition or application or caveat petition or objection or counter presented to the Tribunal shall be in English and in case it is in some other Indian language, it shall be accompanied by a copy translated in English and shall be fairly and legibly type written, lithographed or printed in double spacing on one side of standard petition paper with an inner margin of about four centimeter width on top and with a right margin of 2.5. cm, and left margin of 5 cm, duly paginated, indexed and stitched together in paper book form.

(2) The cause title shall state "Before the National Company Law Tribunal" and shall specify the Bench to which it is presented and also set out the proceedings or order of the authority against which it is preferred.

(3) Appeal or petition or application or counter or objections shall be divided into paragraphs and shall be numbered consecutively and each paragraph shall contain as nearly as may be, a separate fact or allegation or point.

(4) Where Saka or other dates are used, corresponding dates of Gregorian Calendar shall also be given.

(5) Full name, parentage, age, description of each party and address and in case a party sues or being sued in a representative character, shall also be set out at the beginning of the appeal or petition or application and need not be repeated in the subsequent proceedings in the same appeal or petition or application.

(6) The names of parties shall be numbered consecutively and a separate line should be allotted to the name and description of each party.

(7) These numbers shall not be changed and in the event of the death of a party during the pendency of the appeal or petition or matter, his legal heirs or representative, as the case may be, if more than one shall be shown by sub-numbers.

(8) Where fresh parties are brought in, they may be numbered consecutively in the particular category, in which they are brought in.

(9) Every proceeding shall state immediately after the cause title the provision of law under which it is preferred.

Particulars to be set out in the address for service - Rule 21 lays provisions for the address for service:

The address for service of summons shall be filed with every appeal or petition or application or caveat on behalf of a party and shall as far as possible contain the following items namely: -

(a) the name of the road, street, lane and Municipal Division or Ward, Municipal Door and other number of the house;

(b) the name of the town or village;

(c) the post office, postal district and PIN Code, and

(d) any other particulars necessary to locate and identify the addressee such as fax number, mobile number, valid e-mail address, if any.

Initiating alteration- Rule 22 specifies that –

"Every interlineations, eraser or correction or deletion in any appeal or petition or application or document shall be initiated by the party or his authorised representative presenting it."

Presentation of petition or appeal

Rule 23 prescribes the manner of filing petition with NCLT:

(1) Every petition, application, caveat, interlocutory application, documents and appeal shall be presented in triplicate by the appellant or applicant or petitioner or respondent, as the case may be, in person or by his duly authorised representative or by an advocate duly appointed in this behalf in the prescribed form with stipulated fee at the filing counter and non-compliance of this may constitute a valid ground to refuse to entertain the same.

(2) Every petition or application or appeal may be accompanied by documents duly certified by the authorised representative or advocate filing the petition or application or appeal duly verified from the originals.

(3) All the documents filed in the Tribunal shall be accompanied by an index in triplicate containing their details and the amount of fee paid thereon.

(4) Sufficient number of copies of the appeal or petition or application shall also be filed for service on the opposite party as prescribed under these rules.

(5) In the pending matters, all applications shall be presented after serving copies thereof in advance on the opposite side or his authorised representative.

(6) The processing fee prescribed by these rules, with required number of envelopes of sufficient size and notice forms shall be filled alongwith memorandum of appeal.

Number of copies to be filed (Rule 24)

The appellant or petitioner or applicant or respondent shall file three authenticated copies of appeal or petition or application or counter or objections, as the case may be, and shall deliver one copy to each of the opposite party.

Endorsement and Verification (Rule 26)

(1) At the foot of every petition or appeal or pleading there shall appear the name and signature of the authorised representative.

(2) Every petition or appeal shall be signed and verified by the party concerned in the manner provided by these rules.

The National Company Law Appellate Tribunal (Chennai Bench) in a significant ruling in the matter of ***Nirej Vadakkedathu Paul & Ors Vs Sunstar Hotels & Estate Private Limited and Mcdowell Holdings Ltd (Company Appeal (AT) (CH) (Ins) No. 142/2022)*** dealt with the issue of objection by group of shareholders (which included some Foreign Portfolio Investors) of corporate debtor against which corporate insolvency resolution process (CIRP) has been initiated by the NCLT (Adjudicating Authority/AA) under section 7 of the I&B Code, 2016.

NCLAT Findings:

The NCLAT after going through the factual matrix of the case primarily decided the following two issues: - (a) Whether the shareholder of the 'Corporate Debtor' has any locus in Section 7 application filed by the 'Financial Creditor? (b) Whether the shareholders can make payment to satisfy financial debt of financial creditor in order to take away the 'Corporate Debtor' from the clutches of the 'Corporate Insolvency Resolution Process?

The NCLAT having regard to the provision under I&B Code, 2016 held that

- The shareholders have no 'locus' once an application under Section 7 of the I &B Code,2016 filed by a Financial Creditor is accepted and CIRP is initiated by the Adjudicating Authority.
- Once debt and default is established before the Adjudicating Authority, there is no law which allows a shareholder of a corporate debtor to challenge the initiation of corporate insolvency resolution process of the corporate debtor.
- The NCLAT further held that shareholders cannot be aggrieved merely by the admission of the corporate debtor into the corporate insolvency resolution process since such objection may render the object of I &B Code,2016 redundant since any shareholder of a corporate debtor against which insolvency proceedings have been initiated can seek to maintain a derivative action and question and sabotage a valid CIRP initiated by the Adjudicating Authority. A shareholder is technically an investor who owns limited investment in the company to the extent of share capital subscribed by him.
- The NCLAT relied on its judgment in the case of *Anant Kajare Vs Eknath Aher & Anr CA (AT) (Insolvency) No.296 of 2017* wherein it has been held that since appellant is an investor therefore it cannot claim to be an aggrieved person for preferring an appeal against the order passed by the Adjudicating Authority. However, the NCLAT held that an investor is entitled to file its claim before the Insolvency Resolution Professional.
- The NCLAT further held that in an appeal filed under section 61 of the I &B Code, no direction can be given to any party to the settlement (particularly to a third party) to perform certain duties to ensure settlement between other parties.
- Similarly, on the issue of settling of claims of the Financial Creditor by a third party, the NCLAT held that there is no law which allows a third party to settle claims of the Financial Creditor on behalf of the corporate debtor more so without the consent of the corporate debtor and in the teeth of opposition by the Financial Creditor.

Source: ICSIIIP Insolvency and Bankruptcy Journal March 2023

Supreme Court of India: Case title: ***Sabarmati Gas Limited vs. Shah Alloys Limited Case no.: Civil Appeal No. 1669 of 2020 Decision Date: 4th January, 2023***

Facts:

- The respondent, for its manufacturing needs, required commercial supply of natural gas. To facilitate the same the appellant and the respondent entered into a Gas Sales Agreement (GSA) whereby and where under the appellant was obligated to supply natural gas.
- On later stage the Respondent defaulted in the payment and made only partial irregular payments.
- Meanwhile, the respondent approached BIFR to get it declared as a 'sick unit' and for recommendation of a plan for its rehabilitation, in terms of the provisions under SICA.
- After the enactment of IBC, the Appellant issued a demand notice, under Section 8 of the IBC, 2016 demanding payment of operational debt. Respondent gave a reply to the aforesaid demand notice stating that there was shortfall in supply of natural gas and it caused huge loss due to the disconnection of gas supply. Therefore, Respondent declined the liability to pay the amount demanded.
- Thereafter, an application was fi led by under section 9 of Insolvency and Bankruptcy Code, 2016 (IBC) by Operational Creditor (Sabarmati Gas Limited) seeking initiation of Corporate Insolvency Resolution Process (CIRP) of Shah Alloys Limited.
- The said application was dismissed by the NCLT on the grounds of being barred by limitation and existence of a 'pre-existing dispute' between the appellant and the respondent. In the preset case, while the proceedings under SICA were pending, Insolvency & Bankruptcy Code came into effect, which repealed SICA. The Appellant could not have resorted to any legal proceedings to enforce its rights.
- The Hon'ble Supreme Court interpreted the provision related to limitation of time that section 238A of IBC renders the provision of Limitation Act applicable to the computation of the period of limitation in regard to proceedings before the NCLT.
- Decision in the case of *B.K. Educational Services Private Limited* was referred by the Hon'ble Supreme Court , that the period of limitation is three years from the right to apply accrues but the delay is condonable on sufficient grounds as provided under Section 5 of the Limitation Act.
- Sufficient cause is the cause for which a party could not be blamed. As such, in the absence of provisions for exclusion of the period of suspension of legal proceedings, the same can be excluded and is sufficient cause for condoning the delay under Section 5 of the Limitation Act.
- Hon'ble Court held that question of condonation of delay is not considered it will result in injustice as the party was statutorily prevented from initiating action against the industrial company concerned. Moreover, for an application filed under section 7 or 9 of IBC, the date of coming into force of IBC i.e., 01.12.2016 would not form the trigger point of limitation and the period of limitation for an application for initiating of CIRP under Section 9, IBC would be three years from the date when the right to apply accrues as provided by Article 137 of the Limitation Act.
- Furthermore, the Hon'ble Supreme Court concluded that there was a pre-existing dispute between the parties.

In the case of *Vishal Chelani & Ors. vs. Debashis Nanda (Civil Appeal No. 3806 of 2023)* the issue before Hon'ble Supreme Court was whether there could be different treatment of allottees in the resolution plan for the one who had invoked RERA and of others who did not approach RERA?

Hon'ble Apex Court while setting aside the order of NCLAT held that allottees who approached RERA were FCs under explanation to section 5(8)(f) of the Code. It was observed that per se there can be no distinction between different classes of FC for the purposes of drawing a resolution plan. Such a distinction is artificial and amounts to hyper classification, is thus contradictory to Article 14 of the Indian Constitution. It further observed that 'to treat a particular segment of that class differently for the purposes of another enactment, on the ground that one or some of them had elected to take back the deposits together with such interest as ordered by the competent authority, would be highly inequitable.

LESSON ROUND-UP

- The IBC regime provides that if a corporate debtor defaults on paying a debt, an application may be made to the jurisdictional AA by a creditor of the corporate debtor or by the corporate debtor itself to initiate a corporate insolvency resolution process (CIRP). Once a corporate insolvency resolution process starts, every attempt is made to resolve and reorganize the insolvency of corporate debtor.
- The insolvency of corporate debtor may get "resolved"—when a resolution plan for the corporate debtor is approved by the requisite majority (66%) of the committee of creditors of the corporate debtor and the plan is then approved by the Adjudicating Authority by way of an order passed under section 31 of the IBC.
- The corporate debtor does not get resolved through the CIRP—for instance, if no resolution plan is received or approved for the corporate debtor, or if the committee of creditors, prior to receiving any resolution plan takes a decision to liquidate the CD. The non-resolution of insolvency through a CIRP would lead to an order passed by the Adjudicating Authority under section 33 of the IBC to liquidate the corporate debtor, thereby starting the liquidation process.
- Hence, every CIRP, will lead to either an order of approval of the resolution plan by the Adjudicating Authority or an order of liquidation of the corporate debtor. It should be kept in mind that the primary aim of the IBC is to revive and save the corporate debtor (that is, to resolve). Only once the CIRP fails does the liquidation follow.
- Whenever an application is filed by any creditor or even corporate applicant to initiate CIRP against Corporate Debtor, Application to the Adjudicating Authority Rules states that the applicant shall dispatch forthwith, a copy of the application filed with the Adjudicating Authority, by registered post or speed post to the Board (i.e. IBBI) and registered office of the corporate debtor.
- Recommending name of Interim Resolution Professional: It is mandatory to recommend name of Interim Resolution Professional if applicant initiating CIRP is financial creditor or corporate debtor but is optional for Operational Creditor.
- An important distinction between the application filed by a financial creditor and an operational creditor is that in the case of the latter, the Adjudicating Authority admits the application only if demand notice has been served on the corporate debtor to make payment within 10 days of notice and there is no dispute regarding the existence of the debt.
- The Adjudicating Authority shall, within 14 days of receipt of application, either admit or reject the application filed to initiate CIRP. Though, Supreme Court has held that this timeline is directory and not mandatory.
- The corporate insolvency resolution process shall be completed within a period of one hundred and eighty days from the date of admission of the application to initiate such process. However, one time extension of maximum 90 days may be granted by the Adjudicating Authority on an application filed by the Resolution Professional provided it is approved by 66% voting by the members of the Committee of Creditors of the Corporate Debtor. It is further provided that the corporate insolvency resolution process shall mandatorily be completed within a period of three hundred and thirty days from the insolvency commencement date, including any extension of the period of corporate insolvency resolution process granted under this section and the time taken in legal proceedings in relation to such resolution process of the corporate debtor.
- The Adjudicating Authority, after admission of the application under section 7 or section 9 or section 10, shall, by an order –(a) declare a moratorium for the purposes referred to in section 14; (b) cause a public announcement of the initiation of corporate insolvency resolution process and call for the submission of claims under section 15; and (c) appoint an interim resolution professional in the manner as laid down in section.

- Section 14 of the Code details the moratorium protection given to the corporate debtor. The entire period of corporate insolvency resolution professional is covered under this moratorium, during which all suits, legal proceedings, and recovery actions against the corporate debtor are held in abeyance to give time to the corporate debtor to resolve its status.
- Rules 20, 21, 22, 23, 24 and 26 of Part III of the National Company Law Tribunal Rules, 2016 are applicable for filing application to initiate CIRP before the Adjudicating Authority (NCLT).

TEST YOURSELF

(These are meant for recapitulation only. Answer to these questions are not to be submitted for evaluation.)

1. What is the form and manner of filing application to initiate corporate insolvency resolution process under section 7 of IBC, 2016?
2. Whether the insolvency resolution proceedings under the Code can be initiated, in view of pendency of proceedings before Debt Recovery Tribunal and invocation of Section 13(4) of the SARFAESI Act?
3. Whether insolvency proceedings can be initiated against financial service providers under the provisions of the Insolvency and Bankruptcy Code, 2016?
4. What is the duration of Corporate Insolvency Resolution Process under the Insolvency and Bankruptcy Code, 2016?
5. Explain “moratorium” in accordance with the prohibitory provisions of IBC, 2016?

OTHER REFERENCES

- IBBI 2019 Handbook- Understanding the IBC
- Pronouncements under the Insolvency and Bankruptcy Code, 2016: Issue Analysis, ICSIIPA.