EFFECTIVENESS OF SECOND AMENDMENT TO INDIAN INSOLVENCY LAW

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The concept of insolvency has its origin embedded within the incorporation of the limited liability company itself. A limited liability company is a contract of equity and debt. Both of them either need to balance each other out, or the equity must outweigh the debt to enable the continuation of the company as a going concern, else, once the debt supersedes the quantity of equity, the company starts failing and eventually may even be led to liquidation.

Before the introduction of the Insolvency and Bankruptcy Code, 2016, in India, in case of default, neither the creditors were considered as the first owners of the company nor did the shareholders or promoters preferred passing on the control of the company to creditors. This often led to the deterioration of the value of assets of the company and in this manner, the company used to end up losing its market credibility. The Code came up with the solution to all these problems as it not only made the procedure time bound but also paused the parallel proceedings against the debtor during the continuance of resolution process, thereby putting an end to the issue of forum shopping.

Yet, the Code is still in its nascent stages. With the recent amendment to the Code and its ascent from Lok Sabha, the law has taken a few more baby steps to tackle the upcoming issues. There is a requirement to analyse its position with respect to the current regime of law and its impact on the economy. This research paper analyses the second amendment introduced in 2018 and examines their effect in the present regime.

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I. INTRODUCTION

Insolvency's origin is embedded within the incorporation of a limited liability company. A limited liability company is a contract of equity and debt.[1] Both need to balance one another out, or the equity must outweigh the debt[2] to enable the company's continuation. On the contrary, if the debt

[1] Bankruptcy Law Reform Committee (2015). *The Report of Bankruptcy Legislative Reforms Committee Volume I: Rationale and Design*.

[2] The Insolvency and Bankruptcy Code, No. 31 of 2016, Sec. 3(11). The Code defines a "debt" as a liability or obligation in respect of a claim which is due from any person and has stated that a debt can include a financial debt and an operational debt. Under the Code, a financial debt has been defined in Section 5(8) to mean: "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 purposes 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 (16 of 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; or
(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clause (a) to (h) of this clause." While operational debt is defined in Section 5(21) to mean a claim in respect of the provision of goods or

supersedes the quantity of equity, the company starts failing, which could eventually lead to liquidation.[3] Creditors do not intend to contribute to such doomed companies to go into liquidation. They invest in companies with an expectation of positive future cash flows. However, the returns expected on these investments are associated with high-risk factors due to the attached uncertainty of timely repayment, delay or default.[4] For example, when the default occurs, the debtor is considered to be insolvent.[5]

The debtor's insolvency can be attributed either to business or financial failure.[6] A sound bankruptcy law helps to assess the situation and decide the fate of a company.[7] Therefore, whenever a company plans to invest in any country other than its "home" country, the insolvency regime has been considered one of the ten parameters for making such a decision, as per the World Bank Report.[8] Before 2018, India was ranked 130th out of 180 countries in the World Bank's Ease of Doing Business Index.[9]

India's current insolvency regulatory system is entirely different from what it was before 2016. In the previous system, the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act of 2002 ("**SARFAESI**")[10], the Recovery of Debt Due to Banks and Financial Institutions Act of1993 ("**RDDBFI**")[11], the Sick Industrial Companies (Special Provisions) Ac of 1986 ("**SICA**")[12] and the Companies Act of 2013 ("**Companies Act**")[13] were some of the major redressal mechanisms for insolvency-related matters. The existence of these legislative acts led to the incorporation of different tribunals having their

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services that is inclusive of 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 such local authority.

[3] Bankruptcy Law Reform Committee, *supra* note **Error! Bookmark not defined.**, at 10.

[4] Bankruptcy Law Reform Committee, *supra* note **Error! Bookmark not defined.**, at 10.

[5] Bankruptcy Law Reform Committee, *supra* note **Error! Bookmark not defined.**, at 10. Insolvency is the inability to pay whereas the term 'bankruptcy' is a step subsequent to insolvency when the firm is deemed to be insolvent i.e. when the court declares an entity to be insolvent.

[6] M/s. Innoventive Industries Ltd. v. ICICI Bank and Anr., (2018) 1 SCC 407 (India).

[7] Bankruptcy Law Reform Committee, *supra* note **Error! Bookmark not defined.**, at 20.

[8] World Bank Group, *Doing Business 2018: Reforming to Create Jobs,* 15 (2018). The World Bank's Ease of Doing Business index ranks the nation based on the 10 indicators. These indicators are: Starting a business, dealing with construction permits, getting electricity, registering property, getting credit, protecting minority investors, paying taxes, trading across borders, enforcing contracts and resolving insolvency. Each one of these indicators carry equal weightage. In the index, the leading country is Singapore followed by New Zealand.

[9] *Id.* The World Bank's Ease of Doing Business index ranks India at 130th position.

[10] The Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, No. 54 of 2002.

[11] Recovery of Debt Due to Banks and Financial Institutions Act, No. 51 of 1993.

[12] Sick Industrial Companies (Special Provisions) Act, No. 1 of 1986.

[13] The Companies Act, No. 18 of 2013.

own distinct proceedings, which, in turn, led to forum shopping and multiple proceedings in a single matter.[14] Delay had become a consistent problem due to multiple mechanisms and their appeals.

The procedure was so lengthy[15] that it only resulted in diminishing the value of the assets and the business, thereby decreasing every possible chance of full recovery of the debt amount. This only led to an increase in the percentage of Non-Performing Assets[16] ("**NPA**") with banks, resulting in the failure of some of the major banks of the country such as the IDBI Bank. Between 2015 and 2017, the average recovery ratio of banks had gone down to 26.4%, which, in turn, increased the risk of failure of the economy.[17]

The behaviour of the debtors and promoters also led to the non-development of the investment market within the country. Creditors started to become apprehensive of lending and preferred lending only to those corporations which promised greater probability of returns. This trend in lending stagnated the cash flow within the credit market and led to the depletion of opportunities for the newly incorporated companies.

Therefore, it had become essential to come up with a single mechanism which was not only efficient, but also efficacious enough to enslave all other existing mechanisms.

The Insolvency and Bankruptcy Code ("**Code**"), when passed in May 2016, came up with a fresh breath of relief and resolved numerous issues including multiple legislations, forum selection/cross litigations, time lag and the loss of asset value. It is one of the adaptations of a sustainable new attitude to withstand in the business world. The Code not only made the procedure time-bound, but also paused the parallel proceeding against the debtor during the continuance of the resolution process, thereby putting an end to the issue of forum shopping.

The new insolvency regime has been referred to as a 'Code' by the legislature and not as an 'Act'. The Supreme Court had settled the position of law and stated that in cases where a statute was a complete code in itself, then it shall contain the complete substantive as well as procedural law.[18]

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[14] Bankruptcy Law Reform Committee, *supra* note **Error! Bookmark not defined.**, at 10.

[15] M/s. Innoventive Industries Ltd. v. ICICI Bank and Anr., (2018) 1 SCC 407 (India). One of the Code's objective is to consider time as an essence and the Supreme Court in the Innoventive judgment discussed the delay in insolvency resolution in India and relied on world bank report of 2016 which stated that India took almost 4.3 years, while United Kingdom took 1 year, United States took 1.5 years and South Africa took 2 years.

[16] Rbi.org.in. (2018). *Reserve Bank of India - Master Circulars*. (20th Oct. 2018, 11:30 am). https://rbi.org.in/scripts/BS_ViewMasCirculardetails.aspx?id=7357#def. A non-performing asset is a loan or advance or leased asset that does not generate any income for the bank.

[17] Saloni Shukla, *Banks can take advantage of the IBC to clean up their balance sheets*, ECON. TIMES (Oct. 20, 2018), https://economictimes.indiatimes.com/news/economy/policy/banks-can-take-advantage-of-the-ibc-to-clean-up-their-balance-sheets-rbi/articleshow/62206604.cms

[18] Hukumdev Narain Yadav v. Lalit Narain Mishra, (1974) 2 SCC 133. (India).

The Honourable Supreme Court had defined the meaning of the Code and stated that:

> "*It is settled law that a consolidating and amending act like the present Central enactment forms a code complete in itself and is exhaustive of the matters dealt with therein*."[19]

Therefore, the interpreter is not required to look beyond the Code for other possible solutions in this area of law.

The Code permits the creditors to decide to either let the debtor company continue as a going concern or to proceed with liquidation, based on maximum recovery of debt.[20] For the first time in the history of Indian law, the creditors have been empowered with the right to determine the procedure of recovery.

With enactment of the Code, India's ranking has jumped by 30 positions to 130th in World Bank's Ease of Doing Business Index of 2018.[21] Yet, the Code is still in its nascent stages and must be analysed with respect to the current law.

This research paper analyses the amendment introduced in the Code. The paper has been categorised into different chapters. Chapter One provides for the procedure established in accordance to the law of India, and includes a comparison with other laws enforced around the world, Chapter Two summarizes and analyses the highlights of the second amendment of the Code in 2018, Chapter Three provides for analysis of code, and Chapter Four provides for a post-amendment scenario. The paper ends with a conclusion.

II. INSOLVENCY LAW IN INDIA

Prior to 2016, the law on insolvency in India was comprised of different acts which were uniquely applicable to each legal entity. In case of a company, it was broken into different acts namely, Companies Act, SICA, SARFAESI, The Presidency Towns Insolvency Act, 1909 and The Provincial Insolvency Act, 1920. In case of an individual, the law was based in the Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920. These legislations were archaic and inadequate in the absence of an umbrella law on insolvency matters.[22] This framework for insolvency and

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[19] M/s. Innoventive Industries Ltd. v. ICICI Bank and Anr., (2018) 1 SCC 407 (India). *See* Paragraph 53.

[20] World Bank (2018). *Doing Business 2018 Fact Sheet: India*. (20th Oct. 2018, 11: 30 am) : http://www.worldbank.org/en/news/press-release/2017/10/31/doing-business-2018-fact-sheet-india.

[21] World Bank Group, *supra* note 10.

[22] Bankruptcy Law Reform Committee, *supra* note 3 at 30.

bankruptcy law was not only ineffective but also made for slow resolution of the issues.[23] Creditors had little recourse for enforcing their legal right which resulted in low recovery rates and thus, made them averse to lending.[24]

The Code introduced in 2016, was based on the principle that the control of a company was not an unqualified right and therefore, that when a firm defaults on its debt the control of the company should shift to its creditors. Therefore, the Code sets out to address these lacuna and aims at facilitating the assessment of an enterprise and an individual, at an early stage.

The default process[25] is the foundation for initiating insolvency resolution. Key stakeholders of the company are made participants to the insolvency process in order to ensure collective assessment of the viability of the company.[26] In order to determine such insolvency, different methods are used in different jurisdictions. The liquidity test,[27] and the balance sheet test[28] and inability to pay test are the most common procedures used to determine the solvency of the corporate debtor. According to the 2016 committee report elaborating on the Code, the committee report asserts that insolvency is efficient only when the default is based on a cash insolvency[29] and not in the case of a balance sheet insolvency. Even though the Mitra committee report deduced six such different triggers, the recent committee report relied on the cash insolvency rather than balance sheet insolvency.[30]

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[23] *Id.*

[24] Bankruptcy Law Reform Committee*, supra* note 3 at 20.

[25] The Insolvency and Bankruptcy Code, Act of 31 of 2016. Sec. 3(12). Default is a term used to describe a non-fulfilment of an obligation. Under the Code, a "default" means non-payment of debt when whole or any part or instalment 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.

[26] Insolvency Bankruptcy Board of India. *Newsletter*. (20th Oct. 2018, 11:40 am) https://ibbi.gov.in/Newsletter_IBBI_April_jun2018.pdf.

[27] Under the liquidity test, the debtor has generally stops making payments and will not have sufficient cash flow to service its existing obligations as they fall due in the ordinary course of business.

[28] UNCITRAL: "Legislative Guide on Insolvency Law". (2005) Paragraph 25 of Part II. United Nations Commission on International Trade Law, *UNCITRAL Model Law Legislative Guide on Insolvency Law* (New York: United Nations, 2005). The Balance sheet test is based on excess of liabilities over assets as an indication of financial distress in the balance sheet of the entity.

[29] Mitra Committee in its 2001 report identified as many as six triggers of insolvency proceedings: Cash test; Solvency or Asset Test; Net Worth Test; Continuous Asset Depletion through continuous loss Test and Irretrievable Breakdown Test.

[30] Bankruptcy Law Reform Committee*, supra* note 3 at 79. The default can be either based on non- payment of cash in an occasion or based on the structure of the balance sheet. In United Kingdom, both Balance sheet and insolvency based on cash flow has been recognised in United Kingdom. However, according to the committee report released in India, India has huge variations in accounting standard. It suffers from having both a low average standard of accounting quality as well a wide variation across single entities. Therefore, balance sheet test is more vulnerable and non-compliant to the situation of the country and hence, case flow must be looked into for ascertaining any debt; also see *supra* note 31 at Chapter V, Part 8.

The objective of the code includes reduced time in the resolution process, promotion of entrepreneurship, availability of credit, balancing the interest of all the stakeholders and maximising the value of assets which inter-alia reduces the probability of loss of asset value of the debtor.[31]

The Code comprises of 255 (two hundred fifty-five) sections, divided into 5 (five) parts,

> Part I (Section 1 to Section 3): The preliminary aspects of the Code;
> Part II (Sections 4 to Section 77): The corporate insolvency resolution process, comprising of seven chapters;
> Part III (Sections 78 to Section 187): The insolvency resolution and bankruptcy for individuals and partnership firms, comprising of seven chapters;
> Part IV (Sections 188 to Section 223): The regulation of insolvency professionals, insolvency resolution professional agencies and information utilities, comprising of seven chapters; and
> Part V (Sections 224 to Section 255): Miscellaneous provisions.[32]
> Read along with 11 Schedules and prescribed Regulations.

III. PROCEDURE UNDER THE CODE

As per section 6[33] of the Code, whenever a corporate debtor[34] commits a default, a Corporate Insolvency Resolution Process[35] ("**CIRP**")

[31] The Insolvency and Bankruptcy Code, Act of 31 of 2016. Preamble. The Code's preamble state that the Act is 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 maximization 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.

[32] Shivam Goel, *The Insolvency and Bankruptcy Code 2016: Problems and Challenges*, IJIR 1724 (2017).

[33] The Insolvency and Bankruptcy Code, Act of 31 of 2016. Sec. 6. A corporate insolvency resolution may be initiated by a financial creditor, an operational creditor or the corporate debtor in respect of such corporate debtor.

[34] The Insolvency and Bankruptcy Code, Act of 31 of 2016. Sec. 3(8). A corporate debtor means a corporate person who owes a debt to any person.

[35] A corporate Insolvency Resolution Process under the Code is the procedure undertaken for the resolution of a company's debt and analysis it as a going concern or a possible liquidating entity.

can be initiated either by the financial creditor[36],[37] an operational creditor[38] or by the corporate debtor[39] itself, as per the procedure laid down under chapter II of the Code.

Both the financial creditor and operational creditors are required to file proof of their claims against the debtor before the adjudicating

[36] The Insolvency and Bankruptcy Code, Act of 31 of 2016. Sec. 5(7). It has defined a financial creditor to mean any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to.

[37] The Insolvency and Bankruptcy Code, Act of 31 of 2016. Sec. 7. It has been defined to understand that a financial creditor, either by itself or jointly with other financial creditors, or any other person on behalf of the financial creditor, may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred and a period of 14 day is given to the adjudicating authority to ascertain the existence of such default. The corporate insolvency resolution process shall commence from the date of the application's admission by the Adjudicating Authority and the communication of such order shall be made to the corporate debtor within seven days of admission or rejection of such application.

[38] The Insolvency and Bankruptcy Code, Act of 31 of 2016. Sec. 8. The Code also defines the method in which an operational creditor may file an application to the adjudicating authority. If there is a default an operational creditor may 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. But an additional obligation is casted on the operational creditor to provide a demand notice or copy of invoice to the debtor who shall within a period of ten days of such receipt of the demand notice or copy of the invoice bring to the notice of the operational creditor of either an (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.

[39] The Insolvency and Bankruptcy Code, Act of 31 of 2016. Sec. 10. Even the corporate debtor can initiate such an application. If a corporate debtor has committed a default, a corporate applicant may file an application for initiating a corporate insolvency resolution process with the Adjudicating Authority. It shall be filed along with:

> "(2)The application under sub-section (1) shall be filed in such form, containing such particulars and in such manner and accompanied with such fee as may be prescribed.
> (3) 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 (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) The 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) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (4) of this section."

authority.[40] If National Company Law Tribunal ("**NCLT**") i.e. the adjudicating entity, accepts the application then insolvency proceedings are initiated against the corporate debtor.

Unlike the financial creditor, who needs to show a default in repayment, the operational creditor requires an additional layer of proof that there exists no dispute[41] between the operational creditor and the corporate debtor pursuant to which the default has been committed.[42] In either case, NCLT has 14 days to either accept or reject the application.

A moratorium period[43] i.e., a 'cooling period' wherein a stay is put on all recovery actions or filing of fresh suit against the company, starts from

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[40] The Insolvency and Bankruptcy Code, Act of 31 of 2016. Sec. 123(1).

[41] Mobilox Innovations Private Limited v. Kirusa Software Private Limited, Civil Appeal No. 9405 of 2017. The Supreme Court in Paragraph 40 stated that the adjudicating authority must assess at the preliminary stage whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to reject a spurious defence which is mere bluster but in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists and is not spurious, hypothetical or illusory, the adjudicating authority must reject the application.

[42] The Insolvency and Bankruptcy Code, Act of 31 of 2016. Sec. 9(3). The operational creditor requires to submit additional documents along with the application. The document list includes (a) a copy of the invoice demanding payment or 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 of the unpaid operational debt; (c) a copy of the certificate from the 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 information utility confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available; and (e) any other proof confirming that there is no payment of any unpaid operational debt by the corporate debtor or such other information, as may be prescribed.

[43] The Insolvency and Bankruptcy Code, Act of 31 of 2016. Sec. 14. The Code provides for the moratorium period, under the code, it states that

> "(1) 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.
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> (2) 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.

the date of acceptance of the application by NCLT and lasts either until the conclusion of the resolution plan or 180 days whichever is earlier. The plan provides the method of ensuring payment to the creditors in exchange of a bid made to save the company's existence. However, proceedings can be initiated by the corporate debtor for recovery of money from his debtors.

Subsequent to NCLT's admission of the application, an Interim Resolution Professional[44] ("**IRP**") is temporarily appointed. The powers of directors of company are suspended and IRP takes over the control of the management of the company from thereon. The IRP is also responsible for forming the Committee of Creditor ("**CoC**").

The CoC consists usually of the financial creditors. Operational creditors are not typically a part of CoC[45] but in exceptional circumstances where there are no financial creditors then they do constitute the CoC.[46] The reasoning is based on the fact that unlike financial creditors, operational creditors are not concerned with the life of company but with the recovery of money, which may defeat the very object of Code.

This CoC appoints a Resolution Professional (**"RP"**) who is responsible for management of affairs of the company. However, he requires permission of the CoC to make any major decisions such as changing the capital structure of the company, creating any security interest over any

(3) The provisions of sub-section (1) shall not apply to — (a) such transaction as may be notified by the Central Government in consultation with any financial regulator; (b) a surety in a contract of guarantee to a corporate debtor.

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process: Provided 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."

[44] The Insolvency and Bankruptcy Code, Act of 31 of 2016. Sec. 16. Under the Code, the adjudicating authority shall appoint an interim resolution professional within fourteen days from the insolvency commencement date. In case an application for corporate insolvency resolution process is made by a financial creditor or the corporate debtor, the resolution professional can be proposed by the aforementioned entities and be appointed as the interim resolution professional if no disciplinary proceedings are pending against him. In the case of an operational debtor, the board decides on the interim resolution professional.

[45] The Insolvency and Bankruptcy Code, Act of 31 of 2016. Sec. 21(2). The committee of creditors shall comprise all financial creditors of the corporate debtor given that all other pre-requisites to act as a member of committee of creditor is fulfilled by the financial creditor which makes such entity ineligible of representation, participation or voting in a meeting of the committee of creditors and such restriction shall not be extended to an entity regulated by a financial sector regulator, if it is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares, prior to the insolvency commencement date.

[46] The Insolvency and Bankruptcy Code, Act of 31 of 2016. Sec. 21(6B). In situations where a corporate debtor does not have any financial creditors, the committee of creditors shall be constituted and shall comprise of such persons to exercise such functions in such manner as may be specified.

assets of the company, undertaking any related party transaction, etc.[47] Then, RP publishes an information memorandum for inviting resolution plans[48]. The resolution plan may be submitted by any person or entity to the RP, provided his application is not barred under Sec. 29A of the Code.[49] The resolution plans, which fulfil the basic and minimum criteria, shall be presented by the RP before the CoC[50]. The resolution plans will then be approved by at least a majority of 66 (sixty-six) percent of CoC.[51] As operational creditors have no representative in the CoC, the IRP and NCLT must keep the well-being of operational creditors in mind while proceeding with the resolution plan. Thus, providing proper and equal footing to each individual in the resolution proceeding.

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[47] The Insolvency and Bankruptcy Code, Act of 31 of 2016. Sec. 28. The Code provides for the interim resolution professional to take approval through voting by obtaining at least 66 % of the voting share of the committee of creditors for certain matters such as:

> (a) raise any interim finance in excess of the amount as may be decided by the committee of creditors in their meeting;
> (b) create any security interest over the assets of the corporate debtor;
> (c) change the capital structure of the corporate debtor, including by way of issuance of additional securities, creating a new class of securities or buying back or redemption of issued securities in case the corporate debtor is a company;
> (d) record any change in the ownership interest of the corporate debtor;
> (e) give instructions to financial institutions maintaining accounts of the corporate debtor for a debit transaction from any such accounts in excess of the amount as may be decided by the committee of creditors in their meeting;
> (f) undertake any related party transaction;
> (g) amend any constitutional documents of the corporate debtor;
> (h) delegate its authority to any other person;
> (i) dispose of or permit the disposal of shares of any shareholder of the corporate debtor or their nominees to third parties;
> (j) make any change in the management of the corporate debtor or its subsidiary;
> (k) transfer rights or financial debts or operational debts under material contracts otherwise than in the ordinary course of business;
> (l) make changes in the appointment or terms of contract of such personnel as specified by the committee of creditors; or
> (m) make changes in the appointment or terms of contract of statutory auditors or internal auditors of the corporate debtor.

[48] The Insolvency and Bankruptcy Code, Act of 31 of 2016. Sec. 29. The resolution professional shall prepare an information memorandum in such form and manner containing such relevant information as may be specified by the Board for formulating a resolution plan and the resolution professional shall provide to the resolution applicant access to all relevant information in physical and electronic form, provided such resolution applicant undertakes- (a) to comply with provisions of law for the time being in force relating to confidentiality and insider trading; (b) to protect any intellectual property of the corporate debtor it may have access to; and (c) not to share relevant information with third parties unless clauses (a) and (b) of this sub-section are complied with.

[49] The Insolvency and Bankruptcy Code, Act of 31 of 2016. Sec. 16. The financial creditor must not be associated with the corporate debtor as related party.

[50] The Insolvency and Bankruptcy Code, Act of 31 of 2016. Sec. 30. The resolution plan will be analysed by the resolution professional and submitted to the CoC. The CoC shall decide on whether to accept or reject the application submitted by the resolution applicant.

[51] The Insolvency and Bankruptcy Code, Act of 31 of 2016. Sec. 21(6B).

In the given scenario, either the resolution plan will be accepted with the company continuing as a going concern or else it may lead to the liquidation of the company. In case of liquidation, the company shall be subjected to the regulations as provided under the Companies Act of 2013. Once the resolution plan is accepted by CoC, the proceeds from the plan shall be distributed as follows:

a. the insolvency resolution process cost and the liquidation costs paid in full;
b. Workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52, have been given equal footing;
c. wages and any unpaid dues owed to employees for the period of twelve months preceding the liquidation commencement date;
d. financial debts owed to unsecured creditors;
e. any amount due to the Central Government and the State Government and debts owed to a secured creditor for any amount unpaid following the enforcement of security interest have to be considered at equal footing;
f. any remaining debts and dues;
g. preference shareholders, if any and
h. equity shareholders or the partners as the case may be.

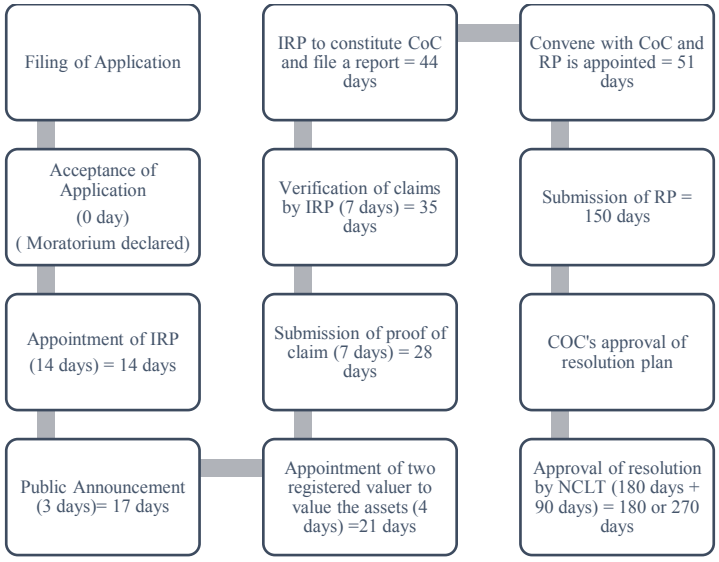
The NCLT has been set up as Adjudicating Authority under the Code.[52] Any appeal against NCLT order can be filed before the National Company Law Appellate Tribunal **("NCLAT")**[53] and thereafter, the matter shall be directed to the Supreme Court for final adjudication under the Code. In addition to that, Insolvency and Bankruptcy Board of India ("**IBBI**")[54] has been set up to regulate the insolvency proceedings and entities like Insolvency Professional Agencies ("**IPA**"), Insolvency Professionals ("**IP**") and Information Utilities ("**IU**") in India.[55]

Just after the introduction of the Code, the Reserve Bank of India ("**RBI**") published the first list of 12 (twelve) companies which were NPA's

[52] The Insolvency and Bankruptcy Code, Act of 31 of 2016. Sec. 5(1). Adjudicating authority is the National Company Law Tribunal constituted under section 408 of the Companies Act, 2013 (18 of 2013).
[53] The Insolvency and Bankruptcy Code, Act of 31 of 2016. Sec. 61. Any person aggrieved by National Company Law Tribunal can approach National Company Law Appellant Tribunal.
[54] The Insolvency and Bankruptcy Code, Act of 31 of 2016. Sec. 3(1). The Insolvency and Bankruptcy Board of India established under subsection (1) of section 188 where in the Central Government has appointed the board.
[55] The Code has provided for Insolvency Professional Agencies, Insolvency Professionals and Information Utilities and provided their functions that are required under Part IV of the Code.

and were holding large bad loans. They were pushed towards insolvency and the matter was initiated. However, only 2 companies have successfully undergone the insolvency process till May 09, 2018. [56]

The timeline of the process is as follows:



After the case of Essar Steel[57], the timeline is required to be strictly adhered to and the time period in which a judicial or quasi-judicial body puts a stay on, such proceeding is said to be excluded for the requisite period of 180 days. Additionally, the judgment also refused to exclude such time period in which the proceeding which may be connected with the issue but does not really constitute the heart and soul of the matter i.e. the ancillary and supplementary issues are sub-judice during the pendency of the main proceeding.

In this regard, the Code acted as a consolidation of all the legislative decisions taken with respect to the insolvency and has only been brought to effect in parts so that the transition of law is smooth and undertaken one at a time rather than forming a rushed up legislation with lacunae acting as a side-track for getting away and abusing the position of controlling the company.

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[56] Pragya Srivastava. *NPA fix: Only 2 from RBI's 'Dirty Dozen' resolved under IBC; what about others? Is the delay hurting?*, Financial Express (Oct. 14, 2018) https://www.financialexpress.com/industry/banking-finance/npa-fix-only-2-from-rbis-dirty-dozen-resolved-under-ibc-what-about-others-is-the-delay-hurting/1160770/.

[57] Arcelormittal India Pvt. Ltd. v. Satish Kumar Gupta and Ors., (2018) AIR SC 5646 (India).

IV. HIGHLIGHTS OF THE AMENDMENT

The financial position of any corporation is secured either by funding in the form of debt or in equity. Equity finance is the most preferable choice in the market as debt undertaken in the form of equity is considered as a temporary source of funding and carries an obligation to be returned in the future. However, in certain cases, such as compulsory convertible debentures or optionally convertible debentures, such a debt can even be converted into equity.

This conversion of debt into equity resolves dual purposes. First, it relieves the debtor from the burden of a debt and second, the creditor gets ownership rights in the company, thereby converting it into an investment.

In view of the increasing number of stressed assets, the scheme of strategic debt restructuring was first suggested by the RBI in 2014.[58] But, little did RBI know that a 2016 legislation would overturn the very objective of its move.

The Code has since been amended twice, once in 2017 and the other in 2018. The changes provided in the 2018 ordinance were successfully included in the amended Code. Its intent was to fill the gaps that became clear while the Code was applied in real life scenarios. A detailed explanation of the 2018 amendment has been provided hereinafter:

A. *RELATED PARTY TRANSACTION*

The recent Code has covered a wide ambit and has resolved to undertake all possible holes that can be hindering the smooth functioning of the insolvency code. The definition of the term "related party" has been provided under section 5(24)[59]. The definition provided a list of parties

[58] Reserve Bank of India, Strategic Debt Restructuring Scheme, (12th Sept. 2018) https://rbi.org.in/Scripts/NotificationUser.aspx?Id=9767.

[59] The Insolvency and Bankruptcy Code, Act of 31 of 2016. Sec. 5(24). The Code has defined related party in relation to a corporate debtor and has considered it to include:

> "(a) a director or partner of the corporate debtor or a relative of a director or partner of the corporate debtor;
> (b) a key managerial personnel of the corporate debtor or a relative of a key managerial personnel of the corporate debtor;
> (c) a limited liability partnership or a partnership firm in which a director, partner, or manager of the corporate debtor or his relative is a partner;
> (d) a private company in which a director, partner or manager of the corporate debtor is a director and holds along with his relatives, more than two per cent. of its share capital;
> (e) a public company in which a director, partner or manager of the corporate debtor is a director and holds along with relatives, more than two per cent. of its paid- up share capital;

deemed to be related to the concerned corporate entities in such a manner that they are ineligible to be a part of the CoC. Before the amendment, the provision was ambiguous and wide. In the case of Wig Associates Private limited[60], it was held that section 29A will have a prospective effect rather than a retrospective effect.

This inclusive definition thereby in turn ban these financial creditors, who may hold the maximum amount of the credit percentage in the complete list of creditors and make such institutions impaired from being a part of the restructuring of the debtor. Interestingly, banks and other institutions regulated by financial sector regulators have also been included under the section, thereby preventing them from being a part of the CoC.[61] For instance, in a list of 5 (five) creditors, if a bank regulated by a financial institution holds 20% of credit against the debtor (which is a substantial debt) yet, by virtue of the said section, during the formation of CoC, the bank will still not be a part of the CoC.

In the matter of *SREI Infrastructure Finance Limited v. Canara Bank*[62], the financial creditor had interest in the company as both, in the capacity of a shareholder as well as a debtor. The financial creditors had disbursed a sum of Rs. 240 Crores to the corporate debtor against the grant for time value of money. The corporate debtor thereafter, converted a sum of Rs. 20 Crores (Rs. Twenty Crores) out of the Rs. 240 Crores/- into an

(f) anybody corporate whose board of directors, managing director or manager, in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor;
(g) any limited liability partnership or a partnership firm whose partners or employees in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor;
(h) any person on whose advice, directions or instructions, a director, partner or manager of the corporate debtor is accustomed to act;
(i) a body corporate which is a holding, subsidiary or an associate company of the corporate debtor, or a subsidiary of a holding company to which the corporate debtor is a subsidiary;
(j) any person who controls more than twenty per cent. of voting rights in the corporate debtor on account of ownership or a voting agreement;
(k) any person in whom the corporate debtor controls more than twenty per cent. of voting rights on account of ownership or a voting agreement;
(l) any person who can control the composition of the board of directors or corresponding governing body of the corporate debtor;
(m) any person who is associated with the corporate debtor on account of- (i) participation in policy making processes of the corporate debtor; or (ii) having more than two directors in common between the corporate debtor and such person; or (iii) interchange of managerial personnel between the corporate debtor and such person; or (iv) provision of essential technical information to, or from, the corporate debtor."

[60] In Re. Wig Associates, (2018) 145 CLA 255 (India).
[61] The Insolvency and Bankruptcy Code, Act of 31 of 2016. Sec. 21(2).
[62] SREI Infrastructure Finance Ltd. v. Canara Bank, (2018) 145 CLA 315 (India).

equity and the rest continued to be a financial debt. Thereby, by the given conduct, the financial creditors should not have been treated like any other shareholder or promoter of the company. Since, as per the proviso to Section 21 (2), a related party to a corporate creditor cannot be made a part of CoC. The RP had to reject the claim of the financial creditor due to a limitation provided under the act which restricted an RP from going beyond the written law and including such financial creditor in CoC.

SREI Infrastructure is just one such example. There are a plethora of such cases which reflect the limitation quite clearly. Hence, the schemes which were originally introduced to strengthen the lenders' ability to deal with stressed assets and to put real assets back on track by providing an avenue for re-working the financial structure of entities, had been struck down for the protection of the very same creditors.

The term related party has been widely used in the Code and it is not limited to just one context. For example, Section 28(1) requires approval of the CoC for certain transactions undertaken by the IRP/RP during CIRP. One such transaction is the related party transaction in terms of Section 28(1)(j). Similarly, the explanation of Section 29A(j) defines 'connected persons' in the context of eligibility of a resolution applicant and uses the term 'related party' in the context of entities over and above the corporate debtor. Thus, related person has been defined in the context of promoters, corporate debtors, and individuals connected to the corporate debtor, bidder[63] or any other such stakeholder.

Thus, section 29[64] considered de facto persons and Section 29A[65] included them in the de jure list whose connection to the corporate debtor could have been only visible on a careful inspection by piercing the corporate veil.

Since, the principle of lifting the veil is a strategy to prevent devices in order to avoid welfare legislation.[66] It is neither necessary nor desirable to enumerate the classes of cases wherein lifting the veil is acceptable, because that depends on the relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of the element of the public interest, the effect on parties who may be affected etc. is relevant and without such inspection a prima facie connection shall not be established.[67]

The erstwhile Code had a limited definition of the term "related party". The Code therein dealt with a restrictive ambit of the related party who were directly associated with the corporate debtor. With the new amendment, the issue includes the wide implications that may be brought in

[63] Arcelormittal India Pvt. Ltd. v. Satish Kumar Gupta and Ors., (2018) AIR SC 5646 (India).
[64] The Insolvency and Bankruptcy Code, Act of 31 of 2016. Sec. 29.
[65] The Insolvency and Bankruptcy Code, Act of 31 of 2016. Sec. 29(A).
[66] Workmen v. Associated Rubber Industry Ltd. (1985) 4 SCC 114 (India).
[67] ArcelorMittal India Pvt. Ltd. v. Satish Kumar Gupta and Ors., (2018) AIR SC 5646 (India).

as a consequence of lifting the corporate veil (i.e. finding a remote connection that causes in-eligibility of a party). Now, the bidders shall misuse such provision for their respective gains and try to move to NCLT for delaying or questioning the position taken by the CoC in deciding the bid.[68] However, the Code originally only defined related party with reference to the corporate debtor. As a result, interpreter had to refer beyond the Code and rely on the definition of related party as defined in section 2(76) of the Companies Act, 2013 and all other such relevant Acts.[69] Even though this interpretation was done in line with section 3(37) of the Code, which permitted the usage of definitions provided under the Companies Act and other such relevant Acts, it wasn't fulfilling the purpose. The term "related party" was too crucial to the Code to be left to external sources for interpretation. Hence, this section contradicted the very object of the Code[70]. Therefore, the newly inserted amendment through the 2018 committee report, added the following proviso after section 21(2) of the Code stating that:

"*Financial creditors which are regulated by financial sector regulators and who become related parties solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares, prior to the insolvency commencement date, shall not be considered related parties."*

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[68] Sangita Mehta. *Patanjali moves NCLT against Ruchi Soya Lenders*. Economic Times. (Oct. 16, 2018, 12:30 pm) https://economictimes.indiatimes.com/news/economy/policy/patanjali-moves-nclt-against-ruchi-soya-lenders-approving-adani-wilmar-bid/articleshow/65532423.cms.

[69] The Companies Act, No. 18 of 2013. Sec. 2(76). A "related party", in reference to a company, means—

1. a director or his relative;
2. a key managerial personnel or his relative;
3. a firm, in which a director, manager or his relative is a partner;
4. a private company in which a director or manager or his relative is a member or director;
5. a public company in which a director or manager is a director and holds along with his relatives, more than two per cent of its paid-up share capital;
6. anybody corporate whose Board of Directors, managing director or manager is accustomed to act in accordance with the advice, directions or instructions of a director or manager;
7. any person on whose advice, directions or instructions a director or manager is accustomed to act:
8. that nothing in sub-clauses (vi) and (vii) shall apply to the advice, directions or instructions given in a professional capacity;
9. any company which is—
- a holding, subsidiary or an associate company of such company; or
- a subsidiary of a holding company to which it is also a subsidiary;
10. such other person as may be prescribed.

[70] M/s. Innoventive Industries Ltd. v. ICICI Bank and Anr., (2018) 1 SCC 407 (India). In the Innoventive Judgment, the Supreme Court had considered the Code to be exhaustive in itself.

According to this provision, a regulating body is no longer prohibited by the limitation merely on account of conversion or substitution of the debt. The expectation of such an amendment was to bring down the ambiguity and unreasonable bar brought through the amendment. According to the present law of the land, the investors whose debt had been converted to equity before institution of insolvency proceedings can now actively participate in the meetings of Committee of Creditors. As a result, the Committee amended section 4(25) and added a new clause defining the term "related party" with reference to a person. With such an elaborate definition, though, there will be more interpretations and therefore, more confusion. A concise definition as in the Companies Act of 2013, would have sufficed.

Further, for enhancement of the fulfilment of the object of the Code, the promoter of Micro, Medium and Small Enterprises ("**MSME**") has been exempted from the bounds of Sec. 29A as the number of new resolution applicants has been fairly low in the past two years. The newly inserted Section 240A provides for a notwithstanding clause, which means that the inserted amendment applies irrespective of what has been stated otherwise in the Code. It states that Section 29A shall not apply to the resolution applicant in respect of corporate insolvency resolution process of any micro, small and medium enterprises.

B. *PERSONAL GUARANTOR*

A 'contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the 'surety;' the person in respect of whose default the guarantee is given is called the 'principal debtor,' and the person to whom the guarantee is given is called the 'creditor.'[71]

A contract of guarantee is a tripartite agreement between the creditor, corporate debtor and the surety. Therefore, in case of default in performance by the corporate debtor, a creditor can move to the guarantor for the performance of contract. However, the question on the extent of liability of the surety and manner of invoking such liability remains an issue. The question of law is whether the liability of surety arises only when the creditor has extinguished all his remedies against the debtor or can the creditor call for surety as soon as a default is committed by the debtor.

[71] The Indian Contract Act, No. 9 of 1872. Sec. 126. The Contract Act has defined a contract of guarantee as a contract to perform the promise, or discharge the liability, of a third person in case of his default. Such a guarantee may be either oral or written. The person who gives such a guarantee as 'surety' who gives such guarantee on behalf of the person in respect of whose default the guarantee is given i.e. the 'principal debtor', and the person to whom the guarantee is given to is called the 'creditor'.

In the case of *Industrial Investment Bank v. Biswanath Jhunjhunwa*la[72], the Honourable Supreme Court had held that liability of the guarantor is co-extensive with that of the corporate debtor and not alternative with respect to the erstwhile law. The Court dismissed the idea that the rights of the creditor against the surety as guarantor does not crystallize till the rights of the creditor against the borrower company are established as it is the discretion of the creditor to go against any of the parties to the contract, in case of default.

Under Section 14[73] of the Code, whenever a CIRP is instituted against a corporate debtor, the company goes through 180 days of a moratorium period. During this period, no suit of any nature can be filed against the corporate debtor. Now, since the surety is independent from the corporate debtor, the question continuously raised before the court is whether this bar of moratorium is also the protection available to the surety. Is the principle of co-extensive liability is also applicable in the insolvency matter? Is the creditor can sue both the corporate debtor and surety at the same time? The answer to both above questions is positive. Under Section 60(2) of the Code, the creditor can proceed against the corporate debtor[74] as this is in tune with the legislature's objective of the speedy recovery of loan.[75]

In the matter of *Alpha & Omega Diagnostics (India) Ltd. v. Asset Reconstruction Company of India Ltd. & Ors.*[76], held that the benefit of moratorium under Section 14 of the Code, is not available to the guarantor of the corporate debtor. Same position was reiterated in the judgement of *Schweitzer Systemtek India Pvt. Ltd. v. Pheonix ARC Pvt. Ltd. & Ors*.[77]. The position was finally settled down by the Honourable Supreme Court in the case of *State of Bank of India v V. Ramakrishnan & Anr.,*[78]

which held that moratorium under Section 14 is not applicable to the personal guarantor as Section 31 provides for payment under resolution plan to be made by such personal guarantor. In this regard, the Court observed that:

"Section 31 is one more factor in favour of a personal guarantor having to pay for debts due without any moratorium applying to save him."

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[72] Industrial Investment Bank v. Biswanath Jhunjhunwala, (2009) 9 SCC 478 (India).
[73] The Insolvency and Bankruptcy Code, Act of 31 of 2016. Sec. 14.
[74] Sanjeev Shriya v. State Bank of India, (2018) AIR CC 1583 (India).
[75] The Insolvency and Bankruptcy Code, Act of 31 of 2016, (2019), Preamble.
[76] Alpha & Omega Diagnostics (India) Ltd. v. Asset Reconstruction Company of India Ltd. and Ors., (2011) 100 CLA 493 (India).
[77] Schweitzer Systemtek India Pvt. Ltd. v. Phoenix ARC Pvt. Ltd. and Ors., (2017) 140 CLA 128 (India).
[78] State of Bank of India v. V. Ramakrishnan & Anr., (2018) AIR 3876 SC (India).

Personal guarantors were brought under the ambit of the Code by virtue of its amendment in 2017 which substituted Section 2(e)[79] of the Code. The Court held that Section 2(e) shall apply only for restrictive purposes in Section 60 (2)[80] and Section 60 (3)[81] wherein the insolvency proceeding of the personal guarantor can be transferred to the adjudicating authority undertaking the corporate debtor's matter under the Code. The Court believed that the true purpose behind this amendment was to "*strengthen the corporate insolvency resolution process*."

To provide further clarity in the situation, an ordinance was passed in June 2018 to clear the air. Additionally, Section 60(1)[82] of the Code, has been amended and NCLT will have jurisdiction over the matters relating to a personal guarantee.

C. *LIMITATION ACT*

The legislative intent behind the Limitation Act was discussed in the Third Law Commission Report of India[83]. The report explained:

"*It has been said that the statute of limitation is a statute of repose, peace, and justice. It is one of repose because it extinguishes stale demands and quiets title*"

Thus, the intent of framing the Limitation Act of 1963 ("**Limitation Act**") was to bring litigation to an end.[84] It provided for a time period within

[79] The Insolvency and Bankruptcy Code, Act of 31 of 2016, (2019), Sec. 2(e). The applicability of the Code was extended to the personal guarantors to corporate debtors.

[80] The Insolvency and Bankruptcy Code, Act of 31 of 2016, (2019), Sec. 60(2). The Code also contemplates scenarios in which a corporate insolvency resolution process or liquidation proceeding of a corporate debtor is pending before a National Company Law Tribunal and provides that in such scenarios an application relating to the insolvency resolution or liquidation or bankruptcy of a corporate guarantor or personal guarantor, as the case may be, of such corporate debtor shall be filed before the National Company Law Tribunal.

[81] The Insolvency and Bankruptcy Code, Act of 31 of 2016, (2019), Sec. 60(3). The Code also provides for the insolvency resolution process or liquidation or bankruptcy proceeding of a corporate guarantor or personal guarantor, as the case may be, of the corporate debtor pending in any court or tribunal to be transferred to the Adjudicating Authority dealing with insolvency resolution process or liquidation proceeding of such corporate debtor.

[82] The Insolvency and Bankruptcy Code, Act of 31 of 2016, (2019), Sec. 60(1). The Code under the given section provides that an adjudicating authority in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the National Company Law Tribunal having territorial jurisdiction over the place where the registered office of a corporate person is located.

[83] Law Commission of India, Third Report, Part I. Chapter I, 1.

[84] The Limitation Act, No. 36 of 1963. The preamble of the limitation act states that it restricts the time period for filing of proceedings of a suit or related matters in courts.

which an aggrieved party must approach court for enforcement of their right.[85]

Under the Schedule of the Limitation Act, different time periods have been provided for different situations. If an aggrieved party wishes to make such a claim for money, a time period of three years has been provided for it. Such a time period is said to be provided from the date on which such cause of action has arisen from.[86] Beyond such period, the right to enforce the debt by judicial process is barred even though the right to such debt continues to remain.[87]

The law of limitation is applicable to all central or state legislations, unless such enactment has expressly excluded itself from the clutches of the Act.[88] However, a Code is considered to be a complete enactment[89], so the applicability of limitation is considered to be dependent on the analysis of the Code.

As the provisions of the Code prevailed over any other existing law in force[90], it was necessary to analyse whether the provisions of the Limitation Act were acting contrary to the Code. The provisions of the Code were silent on the issue of statute of limitation. Therefore, as no contrary intention could have been deduced from the Code and an ideal presumption of applicability could have been created therein.[91]

However, if the Code either provides such limitation explicitly[92] or even if, no such explicit exclusion of the applicability of limitation was made in the special enactment, then leaving it to the discretion of the judiciary to determine how and to what extent the subject matter's nature and the special law's scheme exclude their operation seemed logical.[93]

Various cases were filed before the NCLT and the NCLAT to get a clarity on the position of the Code with respect to the statute of Limitation.

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[85] The Limitation Act, No. 36 of 1963. Sec. 15. Section 15 of the limitation act states that the limitation for filing a suit for an issue of claim of money is 3 years.
[86] *Id.*
[87] Punjab National Bank and Ors. v. Surendra Prasad Sinha, (1993) Supp 1 SCC 499 (India); *see also* Bihar State Co-operative Bank Ltd., Patna v. Nareshwar Prasad, (1960) 3 SCR 58 (India).
[88] The Limitation Act, No. 36 of 1963. Section 29 of the limitation act provides for the applicability of schedule 1; *see also* Hukumdev Narain Yadav v. Lalit Narain Mishra, AIR 1974 SC 480 (India); *see also* Patel Brothers v. State of Assam and Ors., AIR 2017 SC 383 (India).
[89] M/s. Innoventive Industries Ltd. v. ICICI Bank and Anr., (2018) 1 SCC 407 (India).
[90] The Insolvency and Bankruptcy Code, Act of 31 of 2016. Part V. Sec. 238. The Code prevails over other Acts.
[91] The Board of Trustees of the Port of Bombay and Ors. v. M/s. Sriyanesh Knitters, (1999) 7 SCC 359 (India).
[92] Subhadip Choudhuri, Should The Insolvency And Bankruptcy Code Be Shadowed By Limitation, (2018). http://www.ibbi.gov.in/WinnerSubhadipChoudhuriGNLUGandhinagar.pdf.
[93] Patel Brothers v. State of Assam and Ors., (2017) AIR SC 383 (India).

Different rulings of the tribunals led the Supreme Court to impose a stay[94] on the position taken by the quasi-judicial bodies.

Subsequently, an amendment to the provision was brought in that provided a section explicitly explaining the application of the Act on the Code.

The essential elements of the newly inserted section are[95]:

1. Applicability of the Indian Limitation Act, 1963;
2. Shall, *as far as may be*, apply;
3. On proceedings or appeal; and
4. Before the adjudicating bodies i.e. NCLT, NCLAT or DRT.

The language of the section has used the terms "*as far as may be*" thereby creating a discretionary application of Limitation Act on the Code. The reason behind such discretion is the inability to apply the Limitation Act in all the scenarios of the Code and thereby making it dependent on the situation of the case. The Act shall be only partially applicable to the Code when,

1. The AA takes the Limitation Act into consideration before accepting an applicant as a creditor for CIRP. When the Code was introduced on December 1st of 2016, the stale proceedings initiated by the Creditors caused unnecessary delay and backlog.[96] However, the intent of the Code was not to provide a solace or fresh opportunity to the time-barred creditors.[97] In those situations, if the cause of action was presumed to have initiated from the date of introduction of the Code, then there would have been numerous cases before the bar of limitation stepped in, resulting in the opening of age-old cases.[98]NCLT rejected the position and held that the Code cannot be a flowering pot for claims that are time barred[99] whereas if it has continuous interest being applied on it then it shall not be time barred.[100] Thus, the period of limitation had to be considered applicable based on case to case basis.

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[94] The Board of Trustees of the Port of Bombay and Ors. v. M/s. Sriyanesh Knitters, (1999) 7 SCC 359 (India).
[95] The Insolvency and Bankruptcy Code, Act of 31 of 2016. Sec. 238(A).
[96] M/s. Speculum Plast Pvt. Ltd. v. PTC Techno Pvt. Ltd., (2018) 142 CLA 165 (India).
[97] Punjab National Bank and others v. Surendra Prasad Sinha, (1992) AIR SC 1815 (India).
[98] Insolvency Law Committee (March 26, 2018). *Report of the Insolvency Law Committee*. P. 72.
[99] Neelkanth Township and Construction Pvt. Ltd. v. Urban Infrastructure Trustees Ltd., (2017) 140 CLA 235 (India); *see also* Sanjay Bagrodia v. Sathyam Green Power Pvt. Ltd., (2018) 210 CompCas 38 (India); *see also* M/s. Deem Roll-Tech Ltd. v. M/s R.L. Steel & Energy Ltd., C.A. (IB) 24 of 2017, N.C.L.T. (PB) Del., 31 March 2017.
[100] Neelkanth Township and Construction Pvt. Ltd. v. Urban Infrastructure Trustees Ltd., (2017) 140 CLA 235 (India); *see also* Sanjay Bagrodia v. Sathyam Green Power Pvt. Ltd., (2018) 210 CompCas 38 (India); *see also* M/s. Deem Roll-Tech Ltd. v. M/s R.L. Steel & Energy Ltd., C.A. (IB) 24 of 2017, N.C.L.T. (PB) Del., 31 March 2017.

2. The IRP was not falling within the scope of the former Code as a consequence the IRP would have been forced to accept all the applications from all the creditors.[101]

3. The period of limitation could have been exercised over Corporate Applicants filing under Section 7 or 9 of the Code only. However, the period cannot be exercised on the corporate debtor under Section 10 of the Code as such application would be directly against the object of the Code. The sick company, which has been closed for more than 3 years and unable to repay its debts, will continue to remain in the same state, while the value of its assets keeps on depreciating.[102]

Thus, it rests the uncertainty faced in law and making the Limitation Act applicable to different situations and circumstances. Even though an explicit inclusion has been provided in the Code, yet the decision has been left to the judiciary's interpretation according to the specific need of the case.[103]

D. *VOTING RELAXATION OF COMMITTEE OF CREDITORS (CoC)*

With the new legislation, there has been a significant relaxation with respect to decision making power of the CoC. Before, a minimum of 75% of votes was required to make any decision in the meeting of CoC. However, this threshold was proving to be a roadblock to the objective of running viable companies as going concern. This 75% voting share threshold was successfully mostly in those matters wherein the majority of CoC were banks. As per the 2018 Insolvency and Bankruptcy Board of India report, eight out of the nine cases that went into liquidation[104] were solely due to a lack of majority votes among the CoC.[105] While the reality of the other end remained that, wherein the CoC was consisting of diverse creditors such as individuals, Asset Reconstruction Companies, banks and other corporation, it was getting difficult to get the appropriate resolution plan passed.

Under the Code, many new sections have been introduced to encourage resolution over liquidation. Therefore, the conditions have been varied according to the needs and requirements of the situation.

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[101] M/s. Speculum Plast Pvt. Ltd. v. PTC Techno Pvt. Ltd., (2018) 142 CLA 165 (India).; *see also* Ashlay Infrastructure Pvt. Ltd. V. LDS Engineers Pvt. Ltd., (2018) 142 CLA 165 (India).

[102] The Insolvency and Bankruptcy Code, Act of 31 of 2016. Sec. 238.

[103] *Id.*

[104] Insolvency Law Committee, *supra* note 100, at 43

[105] R. Venkatakrishnan v. Auto Mira Energy Co. Pvt. Ltd., C.A. (IB) 70 of 2017, N.C.L.T. C.N., 4 January 2018.

Based on the abovementioned reasons, a need arose to reduce the threshold limit arose. The threshold got re-calibrated to 66% of voting share for taking all major decisions by CoC such as extension of Corporate Insolvency Resolution Process (CIRP), [106] appointment of resolution professional,[107] replacement of existing resolution professional,[108] certain actions that require the RP to take approval[109] and approval of resolution plan.[110] Moreover, under the newly inserted sections, merely 51% of the voting rights of the committee has been kept as the threshold for the continuation of the company as a going concern.[111]

E. *HOMEBUYERS AS FINANCIAL CREDITORS*

Indian real estate is an ever growing sector. It has high demands but low outputs. Delay in completion of the projects is a common phenomenon. Out of 782 projects, only 215 are delayed for a time period ranging from 1 to 261 months.[112] A study by Associated Chambers of Commerce and Industry of India, revealed that 826 housing projects are running behind schedule across 14 states as of December 2016.[113] The allottees have been given a recourse under the special legislation of Real Estate Regulatory Authority Act of 2016 ("**RERA**"), against such delays but the situation gets complicated when the developer company undergoes insolvency under the Insolvency and Bankruptcy Code of 2016.

Before the amendment, there were no particular provisions directly addressing the concerns of home buyers for under construction apartments. During the CIRP, the home buyers neither had an option to use alternative remedies of approaching the courts due to the applicability of moratorium period nor were they provided any relief under the Code.

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[106] The Insolvency and Bankruptcy Code, Act of 31 of 2016. Sec. 30.
[107] The Insolvency and Bankruptcy Code, Act of 31 of 2016. Sec. 22. In the first meeting of CoC, the interim resolution professional must be appointed by the CoC with at least 66% of CoC agreeing upon it.
[108] The Insolvency and Bankruptcy Code, Act of 31 of 2016. Sec. 27. This section provides that if there is a requirement of replacing such interim resolution professional during the insolvency resolution proceeding then an approval of minimum 66% of the CoC is required.
[109] The Insolvency and Bankruptcy Code, Act of 31 of 2016. Sec. 28(3). This section provides that the approval of minimum 66% of CoC is a mandatory requirement.
[110] The Insolvency and Bankruptcy Code, Act of 31 of 2016. Sec. 30(4). The CoC is empowered to approve a resolution plan with the approval of minimum 66% of the total creditors in the CoC.
[111] The Insolvency and Bankruptcy Code, Act of 31 of 2016. Sec. 21(8). Unless explicitly provided otherwise, the CoC can take decision after approval from a minimum of 51% of the creditors in the CoC.
[112] National Statistical Commission, *Annual Report 2015-16*, Ministry of Statistics and Programme Implementation.
[113] Insolvency Law Committee, *supra* note 100, at 17.

Thus, once an application was admitted under the Code and a moratorium was declared, any proceedings commenced under Real Estate Regulatory Authority Act of 2016 would be suspended by virtue of Section 14 of the Code i.e. moratorium period and would remain suspended till the completion of the resolution process.[114]

In the case of *Pawan Dubey and Another v. J.B.K. Developers Private Limited*[115], the applicant had paid an advance amount for booking of a unit for his personal or commercial endeavours. He was not considered to be a creditor under the Code even after the realtor-debtor failed to complete and allot the unit to the applicant on time. NCLT failed to place the applicant as a financial creditor or an operational creditor. It examined the nature of contract with the homebuyer and concluded that the contract in question is neither a contract of service nor of sale of goods[116]. The only remedy available to a homebuyer restitution was falling under Consumer Protection Act or the Indian Penal Code.[117]

To clarify the position of the law, the NCLAT created a distinction between buyers with an agreement of assured returns as financial creditors[118] and those without assured returns[119] to be not falling under the definition of creditors under the Code and, therefore, not eligible to initiate CIRP against the corporate debtor. The Appellate Authority in Nikhil Mehta v. AMR Infrastructure[120] held that the presence element of assured return scheme in the contract enabled homebuyers to form a part of financial creditors.

In the case of *Chitra Sharma & Others* v. *Union of India & Others and Bikram Chatterji v. Union of India,* Honourable Supreme Court recognised the concerns of the homebuyers and provided them with the opportunity to submit a form to IRP and be considered while distribution of assets was taking place.[121]

Yet, the situation wasn't crystal clear as the fate of homebuyers was hanging at the discretion of the Court, which had different interpretation at every level. As a consequence of the inadequate protections, the home buyers had no remedy to support them. As a result, in 2018 a Committee was set up to analyse the meaning of 'financial debt' under the Section 5(8) of the Code:

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[114] Insolvency Law Committee, *supra* note 100, at 18.
[115] Pawan Dubey and Anr. v. JBK Developers Pvt. Ltd., (2018) 144 CLA 0232 (India).
[116] Col. Vinod Awasthy v. AMR Infrastructures Ltd., C.P. (IB) 10 of 2017, N.C.L.T. (PB) Del., 20 February 2017.
[117] *Id*.
[118] Nikhil Mehta v. AMR Infrastructure, (2018) 147 CLA 39 (India); *see also* Anil Mahindroo and Anr v. Earth Iconic Infrastructure, (2017) Indlaw 79 (India).
[119] Pawan Dubey and Anr. v. JBK Developers Pvt. Ltd., (2018) 144 CLA 0232 (India).
[120] Bankruptcy Law Reform Committee, *supra* note **Error! Bookmark not defined.**, at 20.
[121] Chitra Sharma and Ors. v. Union of India, (2018) 210 CompCas 609 (SC) (India).

"*financial debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes–*."

Therefore, the use of word 'includes' implies that definition is not an exhaustive one.[122] The phrase "disbursed against the consideration for the time value of money" has been the subject of interpretation only in a handful of cases under the Code. The words "time value" have been interpreted to mean compensation or the price paid for the length of time for which the money has been disbursed. This may be in the form of interest paid in money[123] or factoring of a discount in the payment. Hence, the committee held the view that the amount paid by the allottees to the developers are the tools for raising finance, thereby meaning that on failure of project, 'money raised is repaid based on time value of money.[124]

Section 5(8)(f) of the Code provides for residuary entries, and the essence of the entry is that the "amount should have been raised under a transaction having the commercial effect of a borrowing" and an example has been quoted in the section itself i.e. of forward sale or purchase agreement. The meaning of forward contract was interpreted Nikhil Mehta. The court stated that:

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

As a consequence, the requisite clause that made a forward sale and served as one of the conditions for the collection of money under Section 5(8) put the home-buyers in the ambit of financial creditors.

The recommendation of the committee was accepted by the Ministry of Finance. Yet, an explanation to Section 5(8)(f) was inserted to clarify that financial debt is consisted of:

> *(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*

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[122] BVS Lakshmi v. Geometrix Laser Solutions Pvt. Ltd., (2018) 142 CLA 321 (India).
[123] Col. Vinod Awasthy v. AMR Infrastructures Ltd., C.P. (IB) 10 of 2017, N.C.L.T. (PB) Del., 20 February 2017.
[124] National Statistical Commission*, supra* note 114.

(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."[125]

The new amendment has even allowed for the appointment of trustee or agent to act as authorised representative of the homebuyers and act on behalf of such financial creditors.[126]

RERA aims to regulate and promote the real estate sector by regulating the transactions between buyers and promoters in residential and commercial projects. It was a special legislation that aimed to address the concerns of the homebuyers and redress problems concerning real estate non-fulfilment.

An "allottee"[127] is, according to RERA, in the context of a real estate project, a person to whom a plot, apartment or building has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter and includes a subsequent acquirer of such property.

According to RERA, a "real estate project,"[128]

is the development of a building or a building consisting of apartments, or the conversion of an existing building or a part thereof into apartments, or the development of lands into plots or of apartments, for the purpose of selling all or some of the said apartments or plots or building, as the case may be.

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[125] Insolvency Law Committee, *supra* note 100.

[126] The Insolvency and Bankruptcy Code, Act of 31 of 2016. Sec. 21(6A). Section 21 (6A) provides for a financial debt:

> "(a) 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, such trustee or agent shall act on behalf of such financial creditors… such person shall act as authorised representative on behalf of such financial creditors, and such authorised representative under clause (a) or clause (b) or clause (c) shall attend the meetings of the committee of creditors, and vote on behalf of each financial creditor to the extent of his voting share."

[127] The Real Estate (Regulation and Development) Act, No. 16 of 2016. Sec. 2(d) of the act defines an allottee assomething: "in relation to a real estate project, means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent."

[128] The Real Estate (Regulation and Development) Act, No. 16 of 2016. Sec. 2(zn). of the act defines a real estate project as the development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of land into plots or apartment, as the case may be, for the purpose of selling all or some of the said apartments or plots or building, as the case may be, and includes the common areas, the development works, all improvements and structures thereon, and all easement, rights and appurtenances belonging thereto.

For a home-buyer, to commence proceedings under the Code as a financial creditor, there should be a default in relation to his financial debt. "Default"[129] is defined as the non-payment of the debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or corporate debtor.

In the given case, the RERA can be considered to be distinct from the Code. In RERA, default by the builder results in huge penalties,[130] whereas in case of insolvency, it assures repayment.[131]

Additionally, in RERA, the penalty imposed corresponds with the property provided by the builder, whereas in the Code, the recovery is only of the debt incurred by the home-buyers due to the non-fulfilment of such a promise.

The Section 88 and Section 89 of RERA and the Section 238 of the Code provide for the non-obstante clauses and discuss the preferability of the respective acts over any other law in force. There is a plausible dispute over which act shall prevail. This issue was settled in the case of *Bhoruka Steel Limited v. Fairgrowth Financial Services Ltd.*[132], wherein it was stated that the later special act prevails over the previous Act. Since then, the later act is made by taking the former into consideration. Even section 30(2)(e) of amendment provides that all proposed resolution plans must not contravene

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[129] The Insolvency and Bankruptcy Code, Act of 31 of 2016. Sec. 3(12).

[130] The Real Estate (Regulation and Development) Act, No, 16 of 2016. Chapter VIII. Under chapter VIII of this act, the real estate authority is empowered to penalise the builder or the allottee for violation of law prescribed under the Act.

[131] The Insolvency and Bankruptcy Code, Act of 31 of 2016. Sec. 53. Under this section a waterfall mechanism has been provided in which the distribution of the funds post accepting of resolution plan has been provided. Under the section, the disbursement is as follows:

a) the insolvency resolution process costs and the liquidation costs paid in full;
b) the following debts which shall rank equally between and among the following: -
    i. workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and
    ii. debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;
c) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;
d) financial debts owed to unsecured creditors;
e) the following dues shall rank equally between and among the following: -
    i. any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;
    ii. debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;
f) any remaining debts and dues;
g) preference shareholders, if any; and
h) equity shareholders or partners, as the case may be.

[132] Bhoruka Steel Ltd. v. Fairgrowth Financial Services Ltd., (1997) 89 CompCas 547 (India).

any provisions of law in force, i.e. they must conform to the provisions of RERA.

An additional development in the recognition of financial creditor took place recently due to the Ahmedabad NCLT which opined that a homebuyer who subrogate their right to a third party shall not be considered as a financial creditor.[133] Thus, the precluding treatment provided to homebuyers was removed and that the Code shall include the amounts raised from home-buyers / allottees under a real estate project [134] was stated. The issue was settled.

V. ANALYSING THE CODE'S RESTRAINTS

The Code has been established as a complete legislation in itself. It is a positive move towards a global compliant law, complying with all the requirement of the UNCITRAL model for insolvency.[135]

With its applicability, the debt financing sector is seen to have been shifted from banks to other sources such as bond market. It thereby decreased the burden of NPA on the shoulder of banks.

The introduction of the Code has even instilled fear in the management of Companies. They have started to act vigilantly to avoid the initiation of proceedings against their companies. Post the introduction of new taxation law in the country, companies have become active in ensuring that their affairs have been properly laid according to the law of the land. The directors make an effort to make timely payment and are being forced to bring in more cash flow in the market to strengthen their end game.[136]

Interestingly, in situation wherein the application is filed for initiation of insolvency, the number of settlement cases for insolvency have shown drastic change in the past 2 years. Nearly 28 percent[137] of the petitions were dismissed as settled and nearly 23 percent[138] were withdrawn and as a consequence of such withdrawal, they were dismissed as well. Moreover, out

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[133] Ajay Walia v. M/s. Sunworld Residency Pvt. Ltd., (2018) 210 CompCas 405 (India).
[134] Insolvency Law Committee, *supra* note 100.
[135] UNCITRAL*, supra* note 30.

[136] SHAJI VIKARAMAN, *HOW THE FIRST FRUIT OF INSOLVENCY LAW ALSO SPOTLIGHTS ITS WIDER CHALLENGES*, INDIAN EXPRESS (2018). HTTPS://INDIANEXPRESS.COM/ARTICLE/EXPLAINED/HOW-THE-FIRST-FRUIT-OF-INSOLVENCY-LAW-ALSO-SPOTLIGHTS-ITS-WIDER-CHALLENGES-TATA-STEEL-BHUSHAN-STEEL-5184691/.

[137] Surbhi Bhatia. *Insolvency and Bankruptcy Code: One-Year Report Card,* Bloomberg Quint. (2018). https://www.bloombergquint.com/insolvency/insolvency-and-bankruptcy-code-one-year-report-card#gs.Q5n9mP0.
[138] *Id*.

of the 23 percent withdrawn petitions, roughly 10 percent[139] of the petitions were considered as defective. Another 10 percent[140] were put to rest due to the existence of disputes and about 22 percent as well, due to other reasons.

The Code is a business law in its truest sense, yet most of the applications to the adjudicating authority for the initiation of such proceedings are filed by operational creditors. The loss is immense, since the best interest of the company as well as the very object of the Code are totally disregarded by such a conduct of the operational creditors To return the money owed to the creditors is not necessarily the intent of the Code.[141]

There are problems even in cases wherein the Code has shown successful resolution of the insolvency proceeding. A major roadblock is that it is dependent on the backing of such RP by some organisation or the violation of the time limit of 180 or 270 days, provided by the Code. The Supreme Court, finally, set its foot down and provided for a timely resolution of the proceeding within the provided timeline and elaborately provided for the resolution timeline.[142]

Moreover, the mockery in the statute is the manner in which an RP is provided the reign of the company and is supposedly required to act as the board of the company. Although the intent of the Code is positive yet, there can be no denial of the fact that the provided an RP the responsibility of the complete company can be a riskier bet that a company is forced to take up.

Even, in a scenario wherein such RP is taken in, the Code is also deficient in providing a yardstick for the qualification of the interim and of the final IRP. It allows for any person to access the information memorandum put together by the insolvency professional without restricting competitors or imposing any confidentiality obligations. This allows for any person to access proprietary information of the corporate debtor and misuse the same, given that there is no law protecting confidentiality and vitiates the fundamental right to business under Article 19(1)(g).

Even if such IRP successfully decides the matter and follows all the requisite procedure in time bound manner, still there is no guarantee of successful completion of the proceeding on a happy note. An otherwise healthy company but not liquid enough to pay debts will be forced through the proceeding and merely, on account of non-availability of buyers for the company, such company would have to forcefully undergo liquidation even

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[139] Surbhi Bhatia, *supra* note 139.
[140] *Id*.
[141] Transmission Corporation of Andhra Pradesh Ltd. v. Equipment Conductors and Cables Ltd., (2018) 147 CLA 112 (SC) (India).
[142] Arcelormittal India Pvt. Ltd. v. Satish Kumar Gupta and Ors., (2018) AIR SC 5646 (India); *see also* Quinn Logistics India Pvt. Ltd. v. Mack Soft Tech Pvt. Ltd., (2018) 144 CLA 484 (India).

though, from a business point of view, that is not actually required. With no time restrained on undertaking such a liquidation process.

Additionally, it can be one of the viewpoints that the Code is not really friendly to the operational creditor i.e. not really viable for the social or economic benefit of the operational creditor. The position of such operational creditor in the waterfall mechanism is way below a sect of individuals provided for the discharge of such debts, nevertheless, the fact that some amount after haircut is recovered through the Code acts as an incentive enough for such operational creditors to misuse the Code and NCLT for recovery of their debts.

This Code provided an overhaul in comparison to the erstwhile law on insolvency. It hanged the facets of the law so much that there is new amendment or precedent being set on a daily basis by the legislature or the judiciary. The dissection of the Code provides the clarity on the gaps that are required to be fulfilled in it and at the same time ensures proper resolution of upcoming cases in an efficient manner.

VI. POST AMENDMENT SCENARIO

Post the amendment, the Code was supposedly improved for the betterment of the society. Yet, certain lacuna still subsists in the Code. Time and again, deadline has been crossed over and not followed properly. Even the 180 days' timeline is very ambitious for the execution undertaken for a company and to restrain themselves within the provided time. The timeline, if not followed as per the law, is blatant disregard to the legislative provision itself. Under the United States, chapter 11 i.e. insolvency resolution process, the resolution plan is initially proposed by the ailing company itself and subsequent to such application, the law gives the debtor 120 days to file a revival plan. This period of 120 days can be increased or reduced by the court, but in no case can this period exceed 18 months (that is, 1.5 years). If the debtor fails to file a revival plan within this stipulated period, the task is undertaken by the CoC.

In India, it is better to assess the time and the time lag, on the basis of already passed resolution plans and the ones that are already hanging, to increase the procedure window. Further, the IRP/RP undertaking analysis of the business during CIRP must have proper business sense as they are no business expert, and in case such appointment is being made, then it must be along with the appointment of one expert individual who can handle such functions of a company. It seems illogical to give all the board of director's responsibility to one entity even if we assume that such IRP/RP is having the requisite knowledge of the Company.

Even when we consider the recent changes undertaken through the amendment, one cannot overlook the fact that RERA, which is special legislation dealing with builders and allottees, provides for specific resolution mechanisms for situations of non-payment to the buyers. If all requisite conditions of the homebuyer as financial creditor are fulfilled, then the buyer, who has no interest in relation to saving the builder's company and their repayment, will have alternate remedies to avail from whereas the builder who may be a onetime defaulter be in a fix. This along with the fact that even though the Code is a complete legislation in itself, the clarity in context of other laws such as RERA or MSME has not been provided under the Code and left to be dealt with the Acts itself.

In regard to the code, the *Essar Steel*[143] and *Alok Industries case* had interesting tune of events, the IRP has the powers to initially kick start the process[144] and an opportunity must be provided to the other for the IRPs to approach the existing lenders of the company to infuse more funds in order to keep the firm's operations, to clear the dues and pay off the salaries of the employees. Therefore, there is a clear need for mechanism to give ample opportunity

Even with the present situation in hand, a minimum limit for triggering the procedure is not adequate and it must be increased from INR 1,00,000 to INR 10,00,000 as suggested by drafting committee, as it increases the chances of IBC being treated as recovery procedure instead of insolvency mechanism.

In this regard, if there are companies where they are no buyers, then in such a situation the promoters along with the RP or any other designated professional should be given a chance to revive the business in order to pay back the promoters.

Lastly, with respect to the issue of obtaining approvals / clearances from regulatory authorities for implementation of the approved resolution plan, the committee discussed that it would be desirable to amend the Code to provide for a timeline within which necessary approvals are required to be obtained. Accordingly, the committee recommended providing a maximum time limit of one year for obtaining relevant approvals (30 days in a typical case of approval of combinations by Competition Commission of India) unless the relevant law prescribes for a longer time period. Hence, the

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[143] Arcelormittal India Pvt. Ltd. v. Satish Kumar Gupta and Ors., (2018) AIR SC 5646 (India); *see also* Quinn Logistics India Pvt. Ltd. v. Mack Soft Tech Pvt. Ltd., (2018) 144 CLA 484 (India).

[144] Rajeev Nair, *Insolvency and Bankruptcy Code: An efficient mechanism for tackling NPAs but resolution professional face challenges*. FIRST POST (Oct 01, 2018, 02:15 pm). https://www.firstpost.com/business/insolvency-and-bankruptcy-code-an-efficient-mechanism-for-tackling-npas-but-resolution-professionals-face-challenges-4283949.html.

suggestion must be equivalent to the expectation with which such law was brought in.

VII. CONCLUSION

Within two years of the enforcement of the Code, second amendment to the Insolvency and Bankruptcy Code, 2016 was brought in. This amendment can be either considered the early acceptance of required changes by the legislative or the hastiness of the legislature in passing the original Code in 2016.[145] Nevertheless, the analysis so far has been that the amendment was fruitful for a number of creditors i.e., from home buyers to financial institutions.

The crisis of homebuyer being accepted as creditors had begun with the enforcement of Code. It has put to rest and for the past year was one of the most debatable issues in the Code. The judiciary was getting piled up with more and more cases every day, as infrastructure in India has been one of the fastest growing and on the corollary, one of the most backlogged sectors of the country. The legislature, by accepting homebuyers as financial creditors under Section 5(8)(f) of the Code has provided the aggrieving homebuyers with the remedy but their position in the waterfall mechanism is still a matter of concern. Similarly, the concept of related party has always been a part of every business in order to protect the stakeholders from the well-wishers of those in power. However, the object was never to defy the very purpose of the existing law. Therefore, it was essential that the 2018 amendment allowed the financial institution which had become a promoter of the corporate debtor by virtue of credit restructuring scheme of RBI to be exempted from the meaning of related party transaction. Now, such financial institution can not only form a part of CoC but are also not barred under Section 29A. Moreover, Section 29A was further amended to exclude all those parties whose inclusion was against the interest of creditors themselves, such as MSME's. The promoters of MSME's are now allowed to buy back their companies. In order to further smoothen the procedure and ensure timely recovery of debt, the voting percentage of acceptance of a resolution plan has been brought down to 66%. It will also increase the probability of positive voting in a diverse CoC. Yet, there are many companies which are still struggling to find an acceptable resolution plan.

Not only that, the issue of time lagging still subsists in these proceedings. Even after a number of amendments, the time lag has not been done away with. The number of pending cases is only increasing due to lack

[145] The Code was passed within 1.5 years of committee report. Shortest time period ever.

of existing jurisprudence and the number of loopholes[146] or drawbacks[147] still existing in the Code.

Thus, it can be deduced that the Code is a robust mechanism itself. However, it still has a long road to go on and early predictions on the performance of the Code, before its completion of five years, can result in undermining the power of the Code.[148]

[146] *See* Ch. 6.
[147] *See* Ch. 5.
[148] Radhika Merwin. *We are on track to ensure time-bound resolution*. Business Line (12th Oct., 2018, 02:30 pm), https://www.thehindubusinessline.com/money-and-banking/we-are-on-track-to-ensure-time-bound-resolution-sahoo/article25171989.ece.