

THE INSOLVENCY AND BANKRUPTCY CODE, 2016



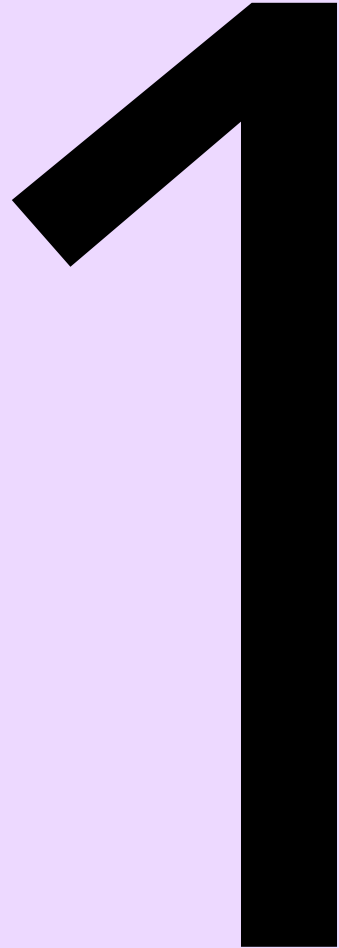
**JOURNEY
SO FAR
&
WAY
FORWARD**

**Presented by
CA Vandana Garg**

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IBC Process - Key Highlights

Snapshot on IBC Recovery

Amount in INR Lakh Crores

Top 12 large Insolvency & Bankruptcy Cases

Resolution of Top 12 large accounts were initiated by banks, as directed by RBI.

Outstanding claim for 12 companies - **INR 3.45 lakh crores** as against liquidation value of **INR 73,220 crores**.

Of these, resolution plan in respect of eight (8) CDs have been approved and orders for liquidation have been passed in respect of two (2) CDs.

Thus, CIRPs in respect of two (2) and liquidation in respect of two (2) CDs are ongoing and are at different stages of the process.

Other CIRP Process yielded Resolution

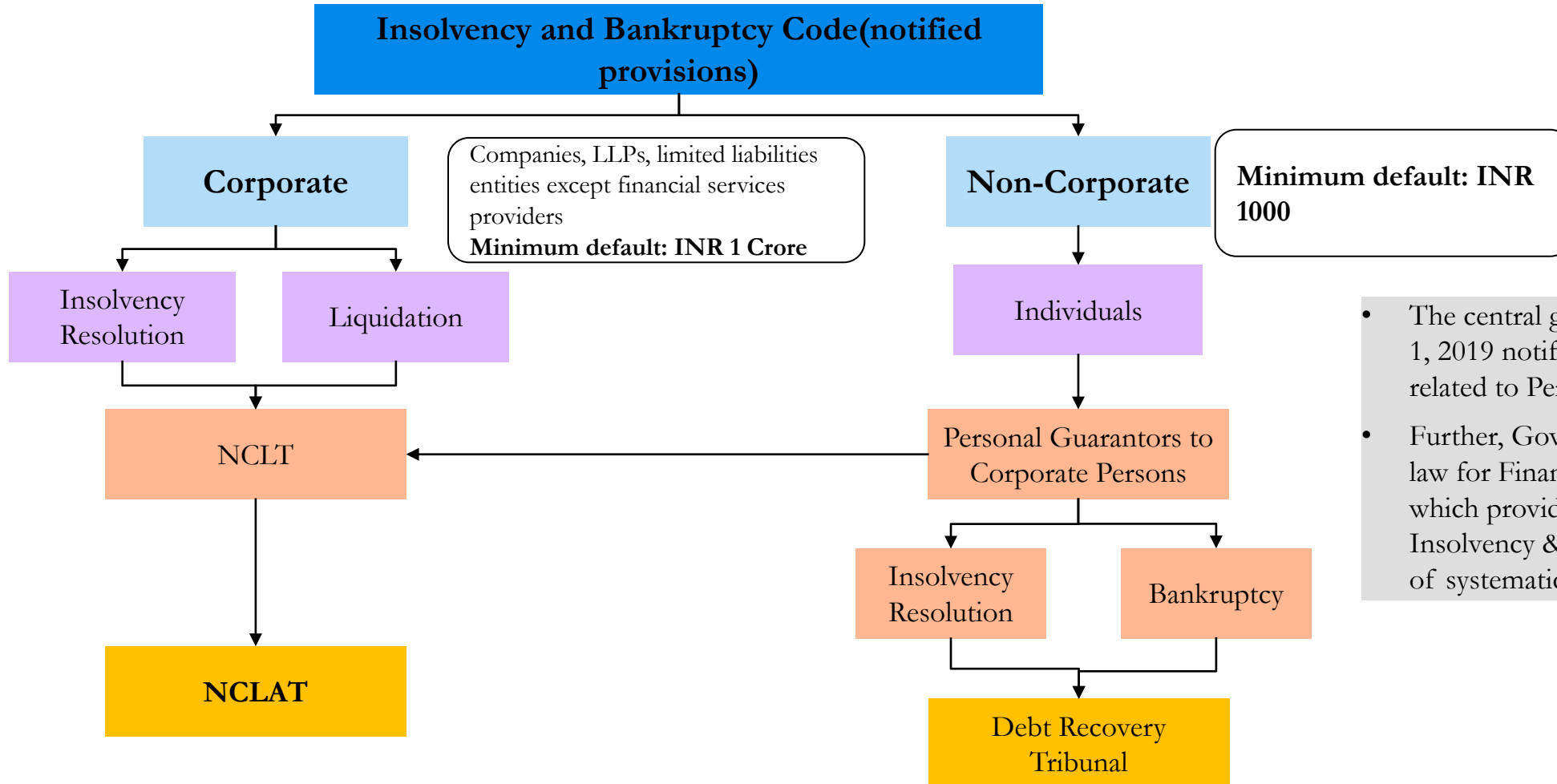
A total of **222 CDs** undergoing CIRP were resolved till March 31, 2020.

Withdrawal of CDs from CIRP

A total of **381 CDs** undergoing CIRP were withdrawn till March 31, 2020.

Sr. No	Name of the Corporate	Debt Size	Debt Recovered	Resolved /Liquidated/under Process	Success Resolution Applicant
1.	ABG Shipyard	3.45	40% Recovered by Banks	Liquidated	No
2.	Alok Industries			Liquidated	Reliance Industries Limited, JM Financial Asset Reconstruction Company Ltd., JMFARC - March 2018 – Trust
3.	Amtek Auto			CIRP Re-commenced	In process
4.	Bhushan Power & Steel Limited			Resolved	JSW Limited
5.	Bhushan Steel			Resolved	Tata Steel Ltd.
6.	Electrosteel			Resolved	Vedanta Ltd.
7.	Era Infra Engineering			CIRP under progress	In Process
8.	Essar Steel			Resolved	Arcelor Mittal India Pvt. Ltd.
9.	Jaypee Infratech			Resolved	NBCC (India) Limited
10.	Jyoti Structures			Resolved	Group of HNIs led by Mr. Sharad Sanghi
11.	Lanco Infratech			Liquidated	No
12.	Monnet Ispat			Resolved	Consortium of JSW and AION Investments Pvt. Ltd.

Applicability of the Code

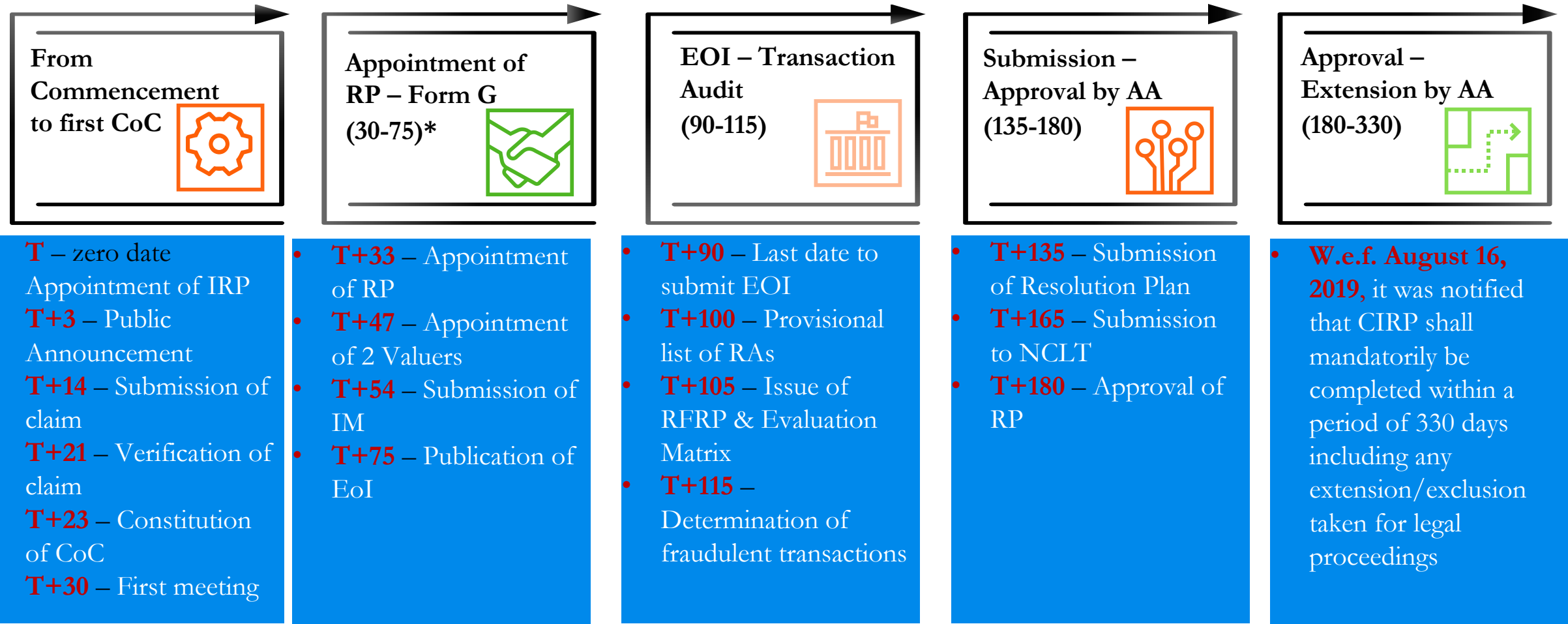


- The central government, w.e.f December 1, 2019 notified the sections and rules related to Personal Guarantors .
- Further, Govt. also notified Insolvency law for Financial Service Providers which provides framework for Insolvency & Liquidation Proceedings of systematically FSPs other than banks

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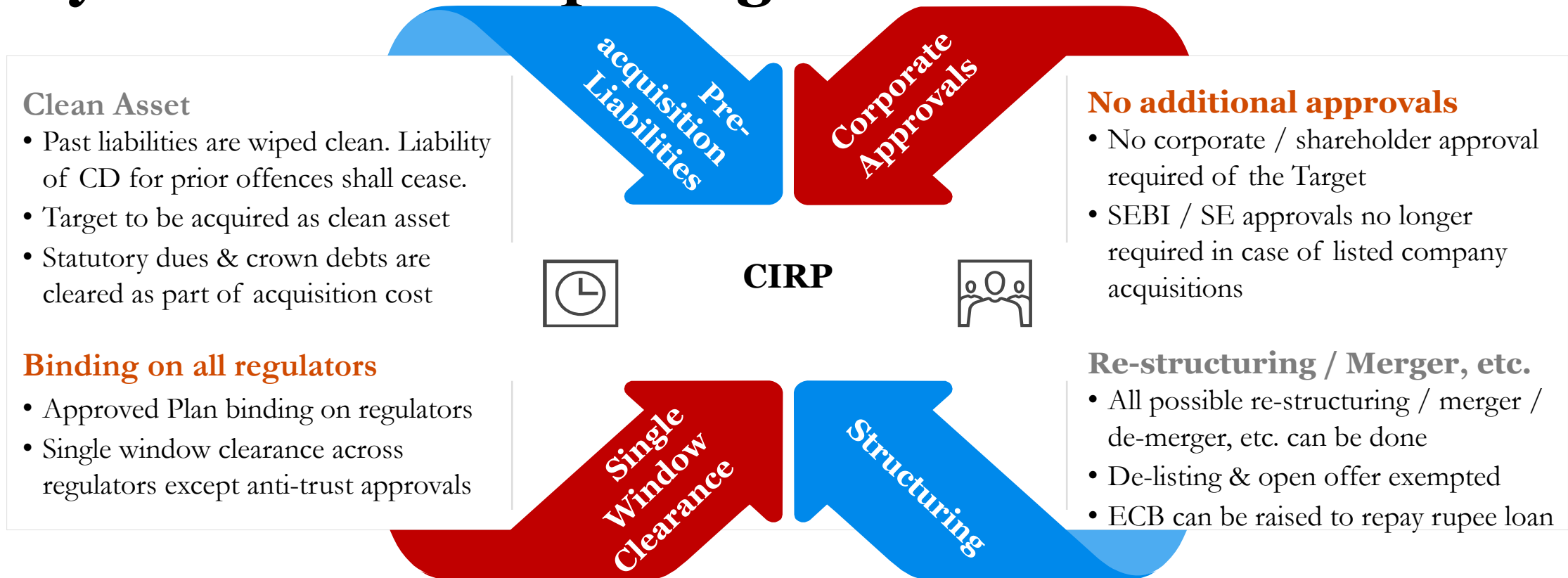
CIRP Process

CIRP Process Timelines



**Withdrawal of application, approval of the application by the CoC and filing application of withdrawal to AA shall be permissible only before the submission of EOI i.e. before the 75th day from the CIRP date.*

Key Benefits of Acquiring Stressed Assets under IBC

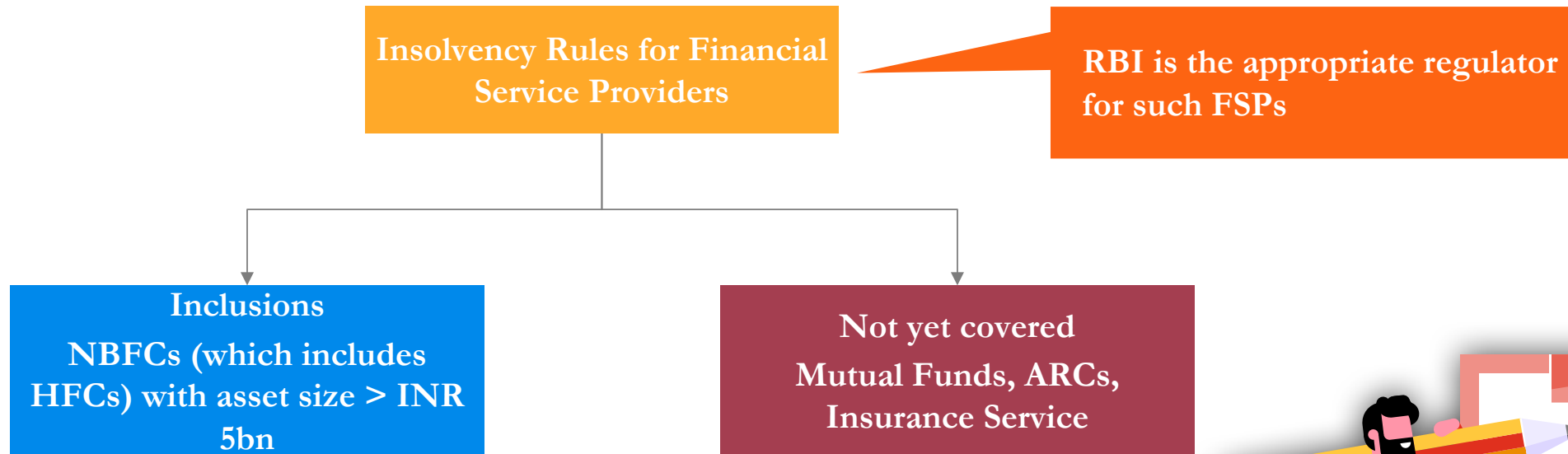


Protection from past liabilities: Financial and operational

Protection from past liabilities: Criminal

Protection from termination or suspension of licenses, permits, concessions and clearances

Insolvency - Financial Service Providers (1/2)



Insolvency - Financial Service Providers (2/2)

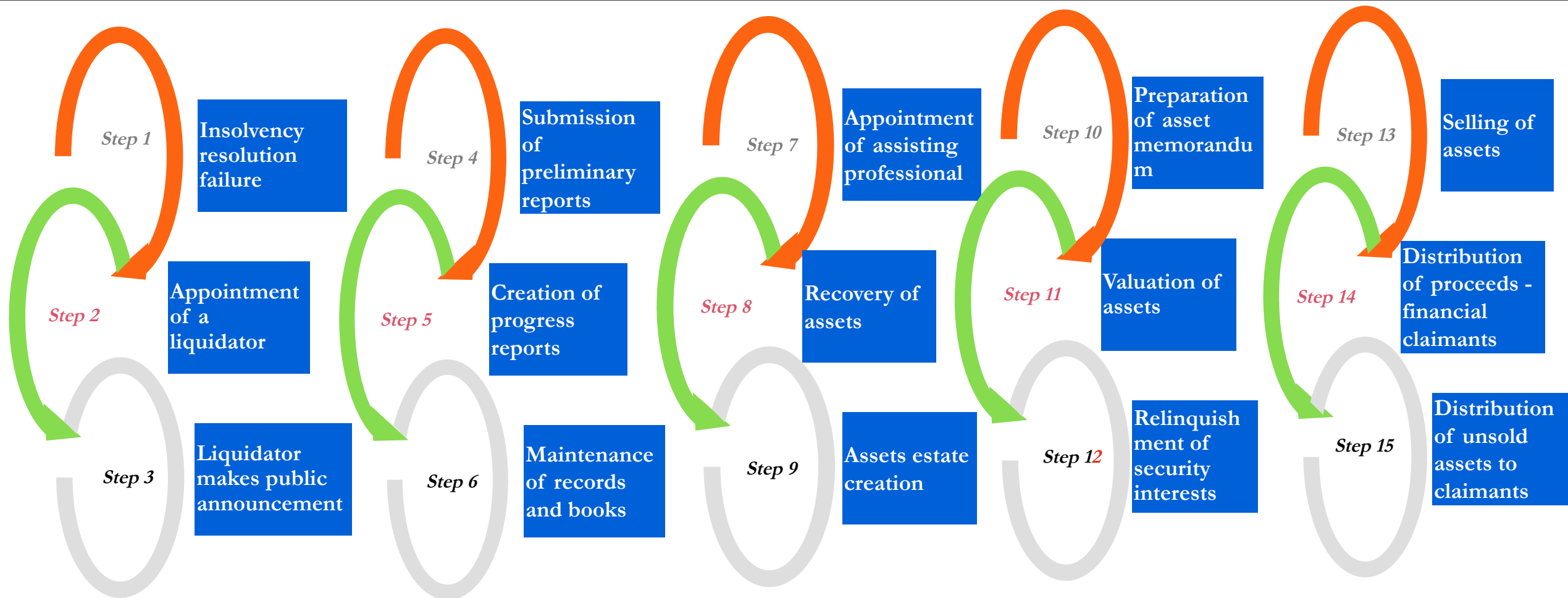
Key differences in CIRP Process of FSPs and CDs

Category	Insolvency Procedure – FSPs	Insolvency Procedure - ordinary corporate debtor
Right to initiate Insolvency Proceedings	Can be initiated by <u>Appropriate Regulator</u> only.	Can be initiated by a financial creditor, an operational creditor or the corporate debtor itself.
Voluntary Liquidation Process	Can be initiated only with the <u>approval</u> of the Appropriate Regulator.	No such requirement.
Management during the CIRP	<p>Administrator recommended by Appropriate Regulator, which the NCLT appoints on admission</p> <p>This Administrator Advisory Committee –Appropriate Regulator may constitute an Advisory committee' (comprising 3 or more members) to advise the Administrator on the operation of the FSP.</p> <p>CoC does not have any right to recommend or seek the appointment or replacement of the Administrator or any member of the Advisory Committee.</p>	Management is controlled by IRP, resolution professional or liquidator (depending on the stage of the insolvency proceeding).
Interim Moratorium	<p>Commences from the date of filing of the application.</p> <p>In effect extends the moratorium to the period during which the NCLT is considering the application.</p>	Moratorium only commences upon admission of the insolvency application.
Approval of Resolution Plan	<p>The CoC has the right to approve the resolution plan in accordance with the Code.</p> <p>Once approved, the Administrator is required to obtain a 'no-objection' from the Appropriate Regulator, before submitting the plan to the NCLT.</p>	No requirement to obtain an approval or no-objection from regulatory bodies, before submitting the plan to the NCLT.

3

Liquidation Process

Process of Liquidation



4

**Code Reboot -
Key Amendments**

Code Reboot – Amendments and its Implications (1/5)

<i>Issues</i>	<i>Judgment</i>	<i>Amendment</i>	<i>Implication</i>
<i>Ringfencing to Successful RAs</i>	<p>Judgment-NCLAT judgment in the matter of JSW Steel against ED attachment of assets of Bhushan Power and Steel</p>	<p>Section 32A introduced vide second amendment of code</p>	<ul style="list-style-type: none">• Protection available to successful RAs for CD's offences committed prior to commencement of CIRP subject to fulfilment of certain conditions.
<i>Relief to Homebuyers</i>	<p>The code did not include homebuyers of under-construction projects as creditors under any category. But when the corporate insolvency resolution process (CIRP) was initiated against Jaypee Infratech, its beleaguered homebuyers created a lot of hue and cry.</p>	<p>Section 5(8)(f) Any amount raised from an “allottee” in a “real estate project” shall come under the definition of financial debt pursuant to explanation inserted to section 5(8)(f) of the code *”allottee” and “real estate project” are defined in RERA.</p>	<ul style="list-style-type: none">• Earlier Home Buyers were not recognised as FC or OC. With the amendment, they will now be treated as FC.• They will have right to participate in CoC alongwith voting rights.• Will be treated in Par with other FCs, in case of Liquidation Scenario.

Code Reboot – Amendments and its Implications (2/5)

<i>Issues</i>	<i>Judgment</i>	<i>Amendment</i>	<i>Implication</i>
<i>Moratorium during the CIRP period</i>	<p>Hon'ble Supreme Court in the matter of SBI v V Ramakrishnan has held that a plain reading of the said section, therefore, leads to a conclusion that the moratorium referred to in section 14 can have no manner of application to personal guarantors of a corporate debtor.</p>	<p>Section 14(3)(b) Moratorium during CIRP shall not apply to a guarantor in a contract of guarantee to the corporate debtor (guarantees granted by promoter guarantors or other group companies which are not undergoing a CIRP)</p>	<ul style="list-style-type: none">• Financial Creditors can invoke the Personal / Corporate Guarantees during the CIRP• Better support from Promoters during CIRP
<i>Applicability of Limitation Act to IBC</i>	<p>Initially various benches of NCLT differed while deciding upon applicability of Limitation Act to proceedings under the IBC.</p> <p>In the matter of Neelkanth Township and Construction Pvt. Ltd vs Urban Infrastructure Trustees Ltd. and elaborate order in Speculum Plast Pvt Ltd. vs PTC Techno Pvt Ltd. NCLAT held that provisions of Limitation Act are not applicable to proceedings under the Code</p>	<p>Section 238A has been inserted In IBC</p> <p>SC decision in Sept 2018 in BK Educational Services Pvt Ltd v Parag Gupta and Associates- Limitation Act is applicable to IBC</p>	<p>Timely filing of applications and appeals to resolve disputes in NCLT, NCLAT, DRT and DRAT</p>

Code Reboot – Amendments and its Implications (3/5)

Issues

Increase in Voting threshold for CoC to take timely decisions

Withdrawal of applications admitted u/s 7,9 or 10

Judgment

- The NCLT Hyderabad bench, in Kamineni Steels matter, tried to reduce the threshold following the spirit of the Code.
- The NCLT, Mumbai bench, in Innoventive Industries though sharing the concerns of the resolution process being stalled due to slightly less than 75% of COC support.

Earlier the Code did not provide for withdrawal of the Insolvency application once the application is admitted by the Adjudicating Authority.

NCLAT in the case of **Lokhandwala Kataria Construction Pvt Ltd. vs Nisus Finance & Investment Manager LLP**, could not utilize inherent power to allow to withdraw the insolvency application

Amendment

- Section 12, 22(2), 27(2), 28(3) section 12, 22(2), 27(2), 28(3) 30(4) and 33(2), Voting threshold reduced from 75% to 66% for major decisions
- Voting threshold reduced to 51% for routine decisions.

Lokhandwala matter went to Supreme Court which also could not allow such withdrawals but directed competent authority to take action in this regard.

Consequently, Section 12A was inserted in IBC -Withdrawal of ongoing CIRP applications with 90% approval of Committee of creditors.

Implication

- Low Hindrances and quick decision making in approval of Resolution Plan

- Timely decision making for resolution of a stressed asset.

Code Reboot – Amendments and its Implications (4/5)

<i>Issues</i>	<i>Judgment</i>	<i>Amendment</i>	<i>Implication</i>
<i>Exemption to few related parties to participate in CoC</i>	Certain Financial Creditors were not allowed to participate in the CoC as they came under the definition of Related Party.	Section 21(2) second proviso allows the Regulated financial creditors who became a related party solely on account of conversion of debt into equity/instruments convertible into equity to participate in CoC meetings at par with other financial creditors.	<ul style="list-style-type: none">• Relief to Financial Creditors having equity on account of conversion of debt during past restructuring.
<i>Benefits to MSMEs</i>	The resolution and revival of MSME was at stake due to Sec 29A applicability on the MSME Sector.	<ul style="list-style-type: none">• Section 240A Promoters of micro, small and medium sized enterprises (MSMEs*) be permitted to bid under the IBC process unless they are willful defaulter.	<ul style="list-style-type: none">• Increase competition in bidding process of MSME under CIRP.• Gives opportunity of Resolution for MSMEs under CIRP.• Gives importance to MSME sector in the Indian Economy.
<i>RP to conduct the CIRP till approval of Resolution Plan</i>	Currently, the RP is responsible to manage the Corporate Debtor only during the CIRP i.e., 180/270 days as the case may be. However, there was no guidance in the Code regarding the responsibility management after the CIRP process until an order was passed by the AA.	Sec 23: RP shall continue to manage the operations of the corporate debtor after the expiry of the CIRP period post submission of the resolution plan, until an order is passed by the AA.	<ul style="list-style-type: none">• Greater clarity on RPs role post CIRP• Continuations of statutory compliances of a corporate debtor till a final decision is taken by AA.

Code Reboot – Amendments and its Implications (5/5)

<i>Issues</i>	<i>Judgment</i>	<i>Amendment</i>	<i>Implication</i>
<i>Grace period for fulfilling statutory obligations</i>	<p>Successful Resolution Applicants finding it difficult to complete all the statutory obligation due to time constrain.</p>	<p>Section 31(4) The successful resolution applicant shall be provided one year grace period from the date of approval of plan to fulfil various statutory obligations required under various laws to implement the resolution plan.</p>	<ul style="list-style-type: none">• Less burden on the successful Resolution Applicant on implementation of Resolution Plan.• Ease in implementation of Resolution Plan.
<i>Affidavit for eligibility u/s 29A</i>	<p>In major Cases like Bhushan Steel, Essar Power, etc. the CIRP process got delayed due to litigation on ground of Section 29(A).</p>	<ul style="list-style-type: none">• Section 30(1) The resolution applicant shall submit resolution plan along with an affidavit stating they are eligible u/s 29A.	<ul style="list-style-type: none">• Now the RA itself will have to state its eligibility u/s 29A.

5

Landmark Judicial
Precedents

Judicial Precedents – Supreme Court (1/3)

CoC of Essar
Steel v. Satish
Kumar Gupta &
Ors. (SC –
15.11.2019) (Essar
Judgement)

Commercial Wisdom

- ultimate discretion of what & how much to pay to creditors (in accordance with the provisions of IBC) is with the CoC;
- no residual equity jurisdiction with AA or Appellate Tribunal to interfere in decisions of the CoC

Principle of “equality for all” is incorrect

- IBC doesn't conclude that the FCs and OCs or secured and unsecured creditors must be paid same amount, percentage wise, under the resolution plan;
- equitable treatment is only for similarly situated creditors and this equality principle cannot be stretched to treating unequals equally;

Extinguishment of Personal Guarantees

- the claims against the guarantor shall not be extinguished;

CIRP time period

- the word “mandatorily” is deleted thereby meaning that CIRP must be completed within the outer limit of 330 days which can be extended if shown that:
 - only a short period is left for completion beyond 330 days, and
 - it would be in the interest of all stakeholders and
 - the time taken in legal proceedings is largely due to factors owing to which the fault cannot be ascribed to the litigants but is being attributable to the tardy process of the AA and/or the Appellate Tribunal itself.

Judicial Precedents – Supreme Court (1/3)

CoC of Essar
Steel v. Satish
Kumar Gupta &
Ors. (SC –
15.11.2019) (Essar
Judgement)

While the CoC can delegate its administrative powers or power of negotiation with the resolution applicants to a smaller committee, such acts, in the ultimate analysis would be required to be approved and ratified by the CoC

Commercial decision of CoC paramount who has to determine 'feasibility & viability' of a plan factoring all aspects, including manner of distribution

-AA has only 'limited judicial review' over CoC decision (P43), to ensure inter alia that stakeholders' interest has been taken care of

-Allocating Nil value to OCs basis liquidation value would amount to not balancing interest of all stakeholders

-AA can send back plan to CoC only if CoC has not acted within defined parameters, but not basis merits of commercial decision

Judicial Precedents – Supreme Court (2/3)

Swiss Ribbons – Supreme Court of India

1. Constitutional Validity of Code **was upheld**

2. The code's sole objective is to strive **to achieve value maximization and resolution**. Liquidation should be the last resort

2. **Powers of Resolution Professional (RP):** - RP has no adjudicatory powers. He has administrative powers as opposed to quasi-judicial powers.

3. **Classification between FC and OC**—whether violative of Article 14 of the Constitution of India ?

Banks and financial institutions, are best equipped to assess the viability and feasibility of the business of the corporate debtor; whereas operational creditors are only involved in the recovery of amounts and are typically unable to assess the viability and feasibility of the business.

Hence upheld the classification between FCs and Ocs as constitutionally valid.

4. **Upheld the Constitutional validity of Section 29A**

SC observed that the primary basis for Section 29A lies in the fact that a person who is unable to service its own debts for such a long period of time is unfit to be a resolution applicant. It referred to circulars issued by the Reserve Bank of India which grant a long grace period to persons unable to pay debts, before an asset is classified as a non-performing asset.

Judicial Precedents – Supreme Court (3/3)

Cool Tech
Appliances Pvt.
Ltd v. Kail Ltd &
Ors.

FACTS:

During the pendency of CIR Process of the corporate debtor, the bank accounts of the corporate debtor were frozen (kept on hold to release any fund) due to receipt of various Garnishee Orders and demand Notice to the Banker (SBI) of corporate debtor from the Respective State Sales Tax authorities against the payment of unpaid taxes.

Resolution Professional was unable to utilize the amount lying in the Bank accounts for running the company as a going concern. In view of the above, an application was filed by RP before the Hon'ble NCLT, Mumbai Bench for setting aside the Garnishee Orders issued to SBI under section 14 of the Code and directing SBI to release the hold on account.

Judgment - Section. 238 of the Code states as follows-“The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.”

It is clear that Section 238 of the Code should be interpreted in a way that it does not hamper recovery of dues or enhance the value of assets of Corporate Debtor. In view of the above, the garnishee orders issued by Sales tax authorities were set aside with a direction to file their claim before the Resolution Professional as provided under the code. Therefore, SBI was directed to release the blocked funds due to said garnishee orders.

6

Key Measures – Covid-19

Key measures from COVID-19

✓ **Default threshold** -
Increased from INR 1 lakh
to INR 1 Crore

✓ **Regulation 40C of CIRP Regulations** –
Lockdown period excluded
from insolvency process
timelines for any activity
that could not be
completed due to such
lockdown;

✓ **Regulation 47A of Liquidation Regulations**
– Lockdown period
excluded from liquidation
process timelines for any
activity that could not be
completed due to such
lockdown;

✓ **Suspension of rights to
invoke of insolvency or
bankruptcy** –
Government may consider
suspending section 7, 9
and 10 for six months;
extendable for one year

Key measures from COVID-19

1. **Increase in the Default limit** : Threshold for initiating corporate insolvency resolution process. Exercising its powers under Section 4 of the Insolvency and Bankruptcy Code, 2016 (IBC Code), the Government of India issued a notification on 24 March 2020 increasing the de-default amount for filing an application to initiate CIRP of a corporate debtor from INR 1 lakh to INR 1 Crore. The Ministry of Finance (MoF) also issued a press release on 24 March 2020 stating that the objective of this amendment is to curb the filing of CIRP applications against micro small and medium enterprises.
2. **Amendment to the CIRP Regulations**
 1. Inserted a new regulation, Regulation 40C, to the Insolvency and Bankruptcy Board of India (Insolvency Resolution for Corporate Persons) Regulations, 2016 (CIRP Regulations) providing for the **exclusion of the period of lockdown** imposed by the Central Government in the wake of COVID-19 outbreak from computation of timelines for completion of activities under a CIRP, notwithstanding the timelines prescribed in the CIRP Regulations, but subject to the provisions set out in the IBC Code.
 2. The timeline under Regulation 40B of the CIRP Regulations for filing various forms (which provide information about the life-cycle of a CIRP of a corporate debtor) by the insolvency professional/interim resolution professional/resolution professional (as the case may be) has been extended to 30 October 2020. The penalty to be levied for not filing these forms shall only trigger post 30 October 2020.

Key measures from COVID-19

3. Amendment to the Liquidation Regulations

- The IBBI through the Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2020 (Liquidation Regulations) introduced Regulation 47A to the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016.
- This provision is similar to Regulation 40C of the CIRP Regulations. Regulation 47A sets out that subject to the provisions of the IBC Code the period of lockdown imposed by the Central Government in the wake of COVID-19, shall not be counted for the purposes of completion of tasks that could not be completed due to such lockdown, in relation to any liquidation process.

Key measures from COVID-19

4. Suo Moto Action and Order issued by NCLAT

- ❖ The Supreme Court of India on 23 March 2020 took suo moto cognizance of the hardships being faced by various persons and ordered that the period of limitation in all proceedings before all courts and tribunals in the country irrespective of the limitation prescribed under general law or special law, whether condonable or not, shall be extended with effect from 15 March 2020 till further order/s are passed by the Supreme Court to ensure that lawyers/litigants do not have to be physically present for filing petitions/applications/suits/appeals/any other proceedings.
- ❖ For all cases in which CIRP has been initiated and/or is pending before any bench of the national company law tribunal (NCLT) or in appeal before the NCLAT, the period of lockdown as ordered / extended in the area in which the registered office of the corporate debtor is, would be excluded for the purpose of determining the outer-limit of 330 (three hundred and thirty) days within which a CIRP is required to be completed as per Section 12 of the IBC Code.
- ❖ Any interim order/ stay order passed by the NCLAT under the IBC Code would continue until the next date of hearing.

Key measures from COVID-19

5. Amendment to the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2020 (IP Regulations)

As per Regulation 7(2)(ca) of the IP Regulations, an insolvency resolution professional (IP), who has obtained certificate of registration from the IBBI is required to pay to IBBI a fee calculated at the rate of 0.25% of the professional fee earned for the services rendered by the IP in the preceding financial year, on or before the 30 April of each year (Fee). The IBBI, by the Insolvency and Bankruptcy Board of India (Insolvency Professionals) (Amendment) Regulations, 2020 dated 20 April 2020 inserted a proviso into Regulation 7(2)(ca) of IP Regulations stipulating that for the financial year 2019-2020, an IP is required to pay the Fee before 30 June 2020.

7

Ordinance -5th June 2020

Ordinance - 5th June 2020

Insertion of Section 10A after Section 10 of the IBC 2016

- No Application for 'initiation of CIRP' shall be filed for any default arising on or after 25th March 2020 for a period of Six (6) months or such other period not exceeding one (1) year from such date as may be notified.
- No Application shall ever be filed for initiation of CIRP for the said default occurring during the said period.
- This suspension shall not apply to any default committed u/s 7, 9, 10 before March 25 2020.
- No application shall be filed by a resolution u/s 66(2) in respect of default against which initiation of CIRP is suspended u/s 10A

Challenges in Insolvency & Bankruptcy Code

Challenges Faced by IRP/RP

- IBC is not familiar to Every Statutory Bodies. Eg. IT Department, GST Departments, EPFO etc.
- Loopholes in the RoC Form filings due to Distinctive Law from Companies Act, 2013.
- Lack of support from the Corporate Debtor Employees in carrying out the Duties & Functions of CIRP/Liquidation.
- Challenges in getting timely court orders.
- No clarity on payment of RP Indemnity Insurance premium to avoid future threats to RP in CIRP.
- No Redressal Forum for RP compliant as on date.

Challenges Faced by RA

- Lack of Information available of Corporate Debtors.
- Challenges in getting timely Approval from AA on Resolution Plan.
- Challenges in decision making during implementation period of the Resolution Plan.
- Risk of handling of existing liabilities of the service provider of the Corporate Debtors.
- No relief towards existing Litigation of the Corporate Debtor.
- Difficulty in getting relief from various Statutory Bodies towards Direct & Indirect Taxes.

9

Way Forward /
Alternatives to IBC

Alternatives to IBC

- Flexible Debt Restructuring Guidelines
- Pre-Packaged Insolvency implementation for value maximization
- Sector specific guidelines/ relaxations for sector specific issues
- Operational and Management / Monitoring control in the hands of credible agencies/ professionals
- One time settlements schemes
- Assets Sale to ARCs
- Creation of Bad Bank
- Revision of funding norms with stringent controls to avoid any NPAs go forward
- Acquisition financing for investors.
- Interim funding support to Corporate Debtors.(for maintaining CD as a going concern)

!!Thank You!!