

ICSI IIP – IBC KNOWLEDGE CAPSULE 11

THE INSOLVENCY AND BANKRUPTCY CODE (AMENDMENT) ACT, 2020

The following table shows the major amendments being brought out by the Amendment Act 2020 and their impact in the current system of insolvency. It received the Presidents' assent on 13.03.2020. As per Section 1 of the Insolvency and Bankruptcy Code (Amendment) Act, 2020, the act will be in effect from 28-12-2019.

The inserted/omitted part of the provision is provided in **red** for ease of understanding.

<u>Provision amended/ insterted</u>	<u>Old provision</u>	<u>Amendment</u>	<u>Impact of the amendment</u>
Section 5(12)	<p>“insolvency commencement date” means the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under sections 7, 9 or section 10, as the case may be:</p> <p>Provided that where the interim resolution professional is not appointed in the order admitting application under section 7, 9 or 10, the insolvency commencement date shall be the date on which such interim resolution professional is appointed by the Adjudicating Authority</p>	<p>“insolvency commencement date” means the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under sections 7, 9 or section 10, as the case may be</p>	<p>The proviso has been omitted to ensure that the Interim Resolution Professional is appointed by the same order as that of initiation of insolvency and that to be considered the commencement date to ensure timelines are met and delay is avoided.</p>
Section	<p>“interim finance” means any</p>	<p>“interim finance” means any financial debt</p>	<p>The inclusion of ‘ such other debt as</p>

5(15)	financial debt raised by the resolution professional during the insolvency resolution process period	raised by the resolution professional during the insolvency resolution process period and such other debt as may be notified	may be notified' is to leave it open to the Regulator and the government to expand the definition as and when required.
Section 7	(1) A financial creditor either by itself or jointly with other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.	(1) A financial creditor either by itself or jointly with [other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government] may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred. [Provided that for the financial creditors, referred to in clauses (a) and (b) of subsection (6A) of section 21, an application for initiation corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such creditors in the same class or not less than ten per cent. of the total number of such creditors in the same class, whichever is less: Provided further that for financial creditors who are allottees under a real estate project, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such allottees under the same real estate project or not less than ten per cent. of the total number of such allottees under the same real estate project, whichever is less: Provided also that where an application for initiating the corporate insolvency resolution	<ul style="list-style-type: none"> • Insertion of the first proviso is so that normally debts, as referred to in clause (a) or (b) of subsection 6A of Section 21 is financial debt owed to retail debenture holders or depositors. Thus, such retail debenture holders/depositors can file application only jointly with 100 other such debenture holders/depositors or 10% of the total number of financial creditors of such class, whichever is less. The amendment effectively bars application under Section 7 of the IBC by a financial creditor being single debenture holder or depositor. • Insertion of second proviso is so that an application for initiating corporate insolvency application can be filed only jointly by not less than 100 such allottees or not less than 10% of the total such allottees, whichever is less. Thus, for example, if a real estate project has 500 allottees, the application can be filed only jointly by at least 50 allottees.

		<p>process against a corporate debtor has been filed by a financial creditor referred to in the first or second provisos and has not been admitted by the Adjudicating Authority before the commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2020, such application shall be modified to comply with the requirements of the first or second provisos as the case may be within thirty days of the commencement of the said Act, failing which the application shall be deemed to be withdrawn before its admission.]</p>	<ul style="list-style-type: none"> • These <i>provisos</i> are inserted owing to the practice of IBC process being used as a recovery procedure by many of the creditors, which have defeated the very purpose of IBC. The amendments will deter such practices though at the same time, in case of serious defaults, real estate allottees or retail debenture holders or depositors can start the process by filing a joint application with required numbers of co-applicants. <p>The provision is likely to reduce the workload of tribunals substantially, so that tribunals can take up actual cases of default without compromising the objectives of the Code.</p>
<p>Section 11</p>	<p>The following persons shall not be entitled to make an application to initiate corporate insolvency resolution process under this Chapter, namely: - (a) a corporate debtor undergoing a corporate insolvency resolution process; or (b) a corporate debtor having completed corporate insolvency resolution process twelve months preceding the date of making of the application; or (c) a corporate debtor or a financial creditor who</p>	<p>The following persons shall not be entitled to make an application to initiate corporate insolvency resolution process under this Chapter, namely: - (a) a corporate debtor undergoing a corporate insolvency resolution process; or (b) a corporate debtor having completed corporate insolvency resolution process twelve months preceding the date of making of the application; or (c) a corporate debtor or a financial creditor who has violated any of the terms of resolution plan which was approved twelve months before the date of making of an application under</p>	<p>After a lot of applications before the AA, asking for clarity over whether corporate debtor can file an application against another corporate debtor owing to the fact that most corporate debtors themselves are creditors which leads them to be defaulters. The AA has allowed in various cases the corporate debtor to initiate a CIRP application and thus an explanation to clarify the same has been inserted.</p>

	<p>has violated any of the terms of resolution plan which was approved twelve months before the date of making of an application under this Chapter; or (d) a corporate debtor in respect of whom a liquidation order has been made. Explanation 1 - For the purposes of this section, a corporate debtor includes a corporate applicant in respect of such corporate debtor.</p>	<p>this Chapter; or (d) a corporate debtor in respect of whom a liquidation order has been made. Explanation 1 - For the purposes of this section, a corporate debtor includes a corporate applicant in respect of such corporate debtor. [Explanation II.- For the purposes of this section, it is hereby clarified that nothing in this section shall prevent a corporate debtor referred to in clauses (a) to (d) from initiating corporate insolvency resolution process against another corporate debtor.]</p>	
<p>Section 14</p>	<p>(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)</p>	<p>(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 (54 of 2002); (d)the recovery of any property by an owner or lessor where such</p>	<p>The explanations have been added to allow the corporate debtor to exist as a going concern. It explains that all registrations, permissions, quota, rights etc. shall not be suspended on the ground of initiation of insolvency process. Further clause 2A has been added in Section 14 to provide that supply of goods or services shall not be terminated merely because insolvency process has started, provided the corporate debtor is making payment for such supplies.</p>

	<p>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 (54 of 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.</p> <p>(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.</p> <p>[(3) The provisions of sub-section (1) shall not apply to</p>	<p>property is occupied by or in the possession of the corporate debtor</p> <p>[Explanation.-For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license or a similar grant or right during moratorium period;]</p> <p>(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.</p> <p>[(2A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period</p>	
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		<p>of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.]</p> <p>3) The provisions of sub-section (1) shall not apply to — (a) such transactions, agreements or other arrangement as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;</p>	
Section 16	The Adjudicating Authority shall appoint an interim resolution professional within fourteen days from the insolvency commencement date.	The Adjudicating Authority shall appoint an interim resolution professional on the insolvency commencement date	In consequence to amendment in Section 5(12) to ensure that the Interim Resolution Professional is appointed by the same order as that of initiation of insolvency and that to be considered the commencement date to ensure timelines are met and delay is avoided.
Section 23	Subject to section 27, the resolution professional shall conduct the entire corporate insolvency resolution process and manage the operations of the corporate debtor during the corporate insolvency resolution process period: Provided that the resolution professional shall, if the resolution plan under sub-section (6) of section 30 has been submitted, continue to manage the operations of the corporate debtor after the expiry of the corporate insolvency	Subject to section 27, the resolution professional shall conduct the entire corporate insolvency resolution process and manage the operations of the corporate debtor during the corporate insolvency resolution process period: Provided that the resolution professional shall continue to manage the operations of the corporate debtor after the expiry of the corporate insolvency resolution process period, until an order approving the resolution plan under sub-section (1) of section 31 or appointing a liquidator under section 34 is passed by the Adjudicating Authority	This amendment has been done to allow the RP to manage the affairs of the corporate debtor till the approval of the resolution plan or till appointment of liquidator so that the CD is at no moment left without a head of the organization and continues its operations smoothly during this transition.

	resolution process period until an order is passed by the Adjudicating Authority under section 31		
Section 32A	**insertion of new provision**	<p>(1) Notwithstanding anything to the contrary contained in this Code or any other law for the time being in force, the liability of a corporate debtor for an offence committed prior to the commencement of the corporate insolvency resolution process shall cease, and the corporate debtor shall not be prosecuted for such an offence from the date the resolution plan has been approved by the Adjudicating Authority under section 31, if the resolution plan results in the change in the management or control of the corporate debtor to a person who was not- (a) a promoter or in the management or control of the corporate debtor or a related party of such a person; or (b) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court: Provided that if a prosecution had been instituted during the corporate insolvency resolution process against such corporate debtor, it shall stand discharged from the date of approval of the resolution plan subject to requirements of this sub-section having fulfilled: Provided further that</p>	<p>This Section ceases the liability of the corporate debtor and prevent any action being taken against its property from the date of approval of the resolution plan by the AA for any offence committed prior to the commencement of the corporate insolvency resolution process conditional to change in management and control of the corporate debtor; while continuing the liability of the promoter or personnel who were associated with the offence, on the basis of complaint or report made by the investigating authority.</p> <p>This provision while protecting the new management from liability as it has no relation with the offences previously committed, ensures that the previous management i.e., the actual offenders, are not advantaged by such relaxation. Such an amendment was necessary in the light of scenarios where the new management, which took over a corporate debtor, faced difficulties due to the continuation of the criminal proceedings and</p>

		<p>every person who was a “designated partner” as defined in clause (j) of section 2 of the Limited Liability Partnership Act, 2008 or an “officer who is in default”, as defined in clause (60) of section 2 of the Companies Act, 2013, or was in any manner in-charge of, or responsible to the corporate debtor for the conduct of its business or associated with the corporate debtor in any manner and who was directly or indirectly involved in the commission of such offence as per the report submitted or complaint filed by the investigating authority, shall continue to be liable to be prosecuted and punished for such an offence committed by the corporate debtor notwithstanding that the corporate debtor’s liability has ceased under this sub-section.</p> <p>(2) No action shall be taken against the property of the corporate debtor in relation to an offence committed prior to the commencement of the corporate insolvency resolution process of the corporate debtor, where such property is covered under a resolution plan approved by the Adjudicating Authority under section 31, which results in the change in control of the corporate debtor to a person, or sale of liquidation assets under the provisions of Chapter III of Part II of this Code to a person, who was not – (i) a promoter or in the management or control of the corporate debtor or a related party of such a person; or (ii) a person with regard to whom the relevant investigating authority</p>	consequent attachment or seizure of properties.
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has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court.

Explanation.- For the purposes of this sub-section, it is hereby clarified that,- (i) an action against the property of the corporate debtor in relation to an offence shall include the attachment, seizure, retention or confiscation of such property under such law as may be applicable to the corporate debtor; (ii) nothing in this sub-section shall be construed to bar an action against the property of any person, other than the corporate debtor or a person who has acquired such property through corporate insolvency resolution process or liquidation process under this Code and fulfils the requirements specified in this section, against whom such an action may be taken under such law as may be applicable.

(3) Subject to the provisions contained in sub-sections (1) and (2), and notwithstanding the immunity given in this section, the corporate debtor and any person, who may be required to provide assistance under such law as may be applicable to such corporate debtor or person, shall extend all assistance and co-operation to any authority investigating an offence committed prior to the commencement of the corporate insolvency

		resolution process.	
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Notes:**Abbreviations used:**

IBBI: Insolvency and Bankruptcy Board of India
IPA: Insolvency Professional Agency
ICSI IIP: ICSI Institute of Insolvency Professionals
IP: Insolvency Professional
CIRP: Corporate insolvency resolution process
IRP: Interim Resolution Professional
AR: Authorised Representative
COC: Committee of Creditors
CD: Corporate Debtor
FC: Financial Creditor
OC: Operational Creditor
Code: Insolvency and Bankruptcy Code, 2016

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