

ICSI IIP – IBC KNOWLEDGE CAPSULE 12

FRAMEWORK FOR MSMEs AND NBFCs UNDER IBC

The following three tables show the provisions (Code/Regulations/Notifications/Circulars) under IBC framework and the case laws that deal with timely resolution where the corporate debtor or any other party in a CIRP is a Medium, Small and Micro Enterprise (MSME) and Non-Banking Financial Company (NBFC).

Table 1: Provisions and Case laws dealing with MSMEs.

Table 2: Provisions and Case laws dealing with NBFCs.

The tables have been color coded as follows:

Code	
Regulations/Rules	
Case laws	
Circulars/Notifications and Others	

TABLE 1: Provisions and Case laws dealing with MSME

<u>Source</u>	<u>Details</u>	<u>Explanation</u>
Section 4 of the Code	The lockdown and pandemic outburst of Corona may result for many default as business cycle has reached to almost a halt. All over the country, cities have been locked down, curfews have been imposed, people are working from home, operations are disrupted, factories and offices are closed. This led the Finance Minister to raise the existing minimum amount of default for initiating	The intention of the said notification is to ease out the pressure on small sized companies and MSME and not drive them into insolvency and

	<p>proceeding under Section 4 of IBC from Rs. 1 Lakh to Rs. 1 Crore. Accordingly, pursuant to the notification of Ministry of Corporate Affairs dated 24th March, 2020¹, Government of India has increased the threshold for default by corporate debtors under section 4 of IBC, as amended from Rs. 1 lakh to Rs. 1 Crore. As per the notification:</p> <p><i>“In exercise of the powers conferred by the proviso to section 4 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Central Government hereby specifies one crore rupees as the minimum amount of default for the purposes of the said section.”</i></p> <p>Section 4 of the IBC, 2016:</p> <p>Section 4 under Part-II of the Code provides the applicability of the provisions of Insolvency Resolution and liquidation for Corporate persons. As per Section 4, this part shall apply to matters relating to the insolvency and liquidation of corporate debtors where the minimum amount of the default is one lakh rupees. However, it is also provided under Section 4 that the Central Government may, by notification, specify the minimum amount of default of higher value which shall not be more than one crore rupees.</p> <p>Accordingly, in exercise of the powers conferred by the proviso to Section 4, Central Government has vide its notification dated 24.03.2020 specified Rs. One crore as the minimum of default under IBC.</p>	bankruptcy.
Section 240A of the Code	<p>(1) Notwithstanding anything to the contrary contained in this Code, the provisions of clauses (c) and (h) of section 29A shall not apply to the resolution applicant in respect of corporate insolvency resolution process of any micro, small and medium enterprises.</p> <p>(2) Subject to sub-section (1), the Central Government may, in the public interest, by notification, direct that any of the provisions of this Code shall—</p> <p>(a) not apply to micro, small and medium enterprises; or</p> <p>(b) apply to micro, small and medium enterprises, with such modifications as may be specified in the notification.</p> <p>(3) A draft of every notification proposed to be issued under subsection (2),</p>	This provision of the Code gives power of the Central Government to notify any non application of provisions of the Code to MSMEs and by virtue of such power the provisions of Section 29A (c) to (h) have been exempted from being applicable to MSMEs. Accordingly, to avoid liquidation of these MSMEs, not

¹<https://www.ibbi.gov.in/uploads/legalframework/48bf32150f5d6b30477b74f652964edc.pdf>

	<p>shall be laid before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions. (4) If both Houses agree in disapproving the issue of notification or both Houses agree in making any modification in the notification, the notification shall not be issued or shall be issued only in such modified form as may be agreed upon by both the Houses, as the case may be.</p> <p>(5) The period of thirty days referred to in sub-section (3) shall not include any period during which the House referred to in sub-section (4) is prorogued or adjourned for more than four consecutive days.</p> <p>(6) Every notification issued under this section shall be laid, as soon as may be after it is issued, before each House of Parliament.</p> <p>Explanation.— For the purposes of this section, the expression "micro, small and medium enterprises" means any class or classes of enterprises classified as such under sub-section (1) of section 7 of the Micro, Small and Medium Enterprises Development Act, 2006 (27 of 2006).]</p>	<p>only the promoters of MSMEs have been allowed to bid for their own companies even though they had become NPA or are guarantors, but also <i>any</i> bidder for MSMEs who is otherwise disqualified on account of its account being NPA can also bid for such MSMEs.</p>
<p>Chapter-IV: Fast Track Corporate Insolvency Resolution Process, Section 55 to Section 58 (both inclusive of the Code) read with MCA notification dated 14th June, 2017 and IBBI (Fast Track Corporate Insolvency Resolution Process)</p>	<p>55. Fast track corporation insolvency resolution process. -</p> <p>(1) A corporate insolvency resolution process carried out in accordance with this Chapter shall be called as fast track corporate insolvency resolution process.</p> <p>(2) An application for fast track corporate insolvency resolution process may be made in respect of the following corporate debtors, namely: -</p> <p>(a) a corporate debtor with assets and income below a level as may be notified by the Central Government; or</p> <p>(b) a corporate debtor with such class of creditors or such amount of debt as may be notified by the Central Government; or</p> <p>(c) such other category of corporate persons as may be notified by the Central Government.</p>	<p>Under the Insolvency and Bankruptcy Code, 2016, a provision for fast-track corporate insolvency resolution process has been laid down, which is applicable to small-scale corporates in India. The Code focuses on a time-bound resolution of insolvency process and financial claims of the creditors of a corporate debtor.</p>

	<p>Further, the Ministry of Corporate Affairs via its notification dated 14th June 2017² notified that Section 55-58 of the Code are to be read with the notification whereby the fast track CIRP process can only apply to the following corporate debtors-</p> <ul style="list-style-type: none"> • A small company under section 2 of the Companies Act, 2013; or • A Startup (other than the partnership firm) • An unlisted company with total assets, in the immediately preceding financial year, not exceeding INR 1 crore. <p>The Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017³ lays down the definition of “fast track process period” in Regulation 2(1)(j), as per which it means that the process of fast track CIRP is a form of fast track resolution under IBC, which must be completed within 90 days from the date on which the process commences.</p>	
<p>Sarvana Holdings Pvt Ltd. V. Bafnapharmaceutical Pvt. Ltd., Company Appeal (AT) (Insolvency) No. 203 of 2019 (04.07.2019)- If Corporate Debtor is a MSME, it is not necessary for the CoC to follow all the procedures under</p>	<p><i>“the 'Committee of Creditors' isto consider the feasibility, viability and such other requirements as has been specified by the Board. If it proposes maximization of the assets and is found to be feasible, viable and fulfil all other requirements as specified by the Board, the company being MSME, it is not necessary for the 'Committee of Creditors' to follow all the procedures under the 'Corporate Insolvency Resolution Process'...</i></p> <p><i>The Parliament with specific intention amended the provisions of the 'I&B Code' by allowing the Promoters of 'MSME' to file 'Resolution Plan'. The intention of the legislature shows that the Promoters of 'MSME' should be encouraged to pay back the amount with the satisfaction of the 'Committee of Creditors' to regain the control of the 'Corporate Debtor' and entrepreneurship</i></p>	<p>Appellate Tribunal held that in exceptional circumstances, if the Corporate Debtor is an MSME, it is not necessary for the Promoters to compete with other Resolution Applicants to regain the control of the Corporate Debtor. Further held that it is open to the CoC to defer the process of issuance of Information Memorandum, if the Promoter of MSME offers a</p>

²https://ibbi.gov.in/webadmin/pdf/legalframework/2017/Jul/notification_before_publication.pdf

³https://ibbi.gov.in/webadmin/pdf/legalframework/2018/Apr/word%20copy%20updated%20First%20Track%20Regulations%20upto%2007.02.2018_2018-04-11%2016:27:13.pdf

the CIRP	<i>by filing 'Resolution Plan' which is viable, feasible and fulfils other criteria as laid down by the 'Insolvency and Bankruptcy Board of India'"</i>	viable and feasible plan maximising the assets of the Corporate Debtor and balancing all the stakeholders. For such purpose, it is not required to follow all the procedure as the case for accepting the proposal under Section 12A of the Code.
M/s. Bannari Amman Spinning Mills Ltd. v. M/s My Choice Knit & Apparels Pvt. Ltd, Company Appeal (AT) (Insolvency) No. 513 of 2019, 03.09.2019 ⁴	<i>In the aforesaid circumstances, as there being a default of debt of more than Rs. 1 Lakh and, in absence of any pre-existence of dispute, it washeld that the Adjudicating Authority has no jurisdiction to reject the application under Section 9 only on the ground that the 'Corporate Debtor' is MSME. There is no such provision under the Act which stipulates that a Company ('Corporate Debtor') which is MSME does not come within the purview of 'I&B Code' or application under Sections 7 or 9 or 10 is not maintainable.</i>	The Appellant had filed an application under Section 9 of IBC for initiation of CIRP against the Respondent (Corporate Debtor). The AA had dismissed the application on the ground that the Corporate Debtor is a MSME, and the Code provides some safeguards to run its business and also a mechanism is provided in the Code itself to settle their dispute arising out of the business transactions made by the MSME with the other business establishments. NCLAT held that Adjudicating Authority has no jurisdiction to reject the application under Section 9 only on the ground that Corporate Debtor is MSME.

⁴<https://nclat.nic.in/Useradmin/upload/14442275d6f59579f5d5.pdf>

Landmark Judgement of Supreme Court in the matter of Swiss Ribbons Pvt. Ltd. &Anr. Vs. Union of India &Ors., WP (Civil) Nos. 99, 100, 115, 459, 598, 775, 822, 849, and 1221 of 2018, SLP (Civil) No. 28623 of 2018 and WP (Civil) 37 of 2019, 25.01.2019 ⁵	<i>"Thus, the rationale for excluding such industries from the eligibility criteria laid down in Section 29A(c) and 29A(h) is because qua such industries, other resolution applicants may not be forthcoming, which then will inevitably lead not to resolution, but to liquidation. Following upon the Insolvency Law Committee's Report, Section 240A has been inserted in the Code with retrospective effect from 06.06.2018"</i>	The case discussed the Insolvency Law Committee Report and their rationale for excluding MSMEs from eligibility criteria laid down in Section 29A (c) and 29A (h) of the Code is qua such industries, other resolution applicants may not be forthcoming which would not lead to resolution but liquidation.
Insolvency Law Committee Report, 2018 ⁶	<i>"27.4 Regarding the first issue, the Code is clear that default of INR one lakh or above triggers the right of a financial creditor or an operational creditor to file for insolvency. Thus, the financial creditor or operational creditors of MSMEs may take it to insolvency under the Code. However, given that MSMEs are the bedrock of the Indian economy, and the intent is not to push them into liquidation and affect the livelihood of employees and workers of MSMEs, the Committee sought it fit to explicitly grant exemptions to corporate debtors which are MSMEs by permitting a promoter who is not a wilful defaulter, to bid for the MSME in insolvency. The rationale for this relaxation is that a business of an MSME attracts interest primarily from a promoter of an MSME and may not be of interest to other resolution applicants."</i>	The Rationale for amending and addition of Section 240A of the Code was discussed and the rationale of providing the option of resolution by any means necessary to fulfill the objectives of the Code was emphasized upon.
Report of Insolvency Law Committee (February, 2020) ⁷	MSMEs have special position in the Indian economy, as key drivers of employment, growth & financial inclusion and forms major part of	Insolvency law committee led by senior Government officials were to recommend the

⁵[https://ibbi.gov.in/webadmin/pdf/order/2019/Jan/25th%20Jan%202019%20in%20the%20matter%20of%20Swiss%20Ribbons%20Pvt.%20Ltd.%20&%20Anr.%20Writ%20Petition%20\(Civil\)%20No.%2037,99,100,115,459,598,775,822,849%20&%201221-2018%20In%20Special%20Leave%20Petition%20\(Civil\)%20No.%2028623%20of%202018_2019-01-25%2013:07:58.pdf](https://ibbi.gov.in/webadmin/pdf/order/2019/Jan/25th%20Jan%202019%20in%20the%20matter%20of%20Swiss%20Ribbons%20Pvt.%20Ltd.%20&%20Anr.%20Writ%20Petition%20(Civil)%20No.%2037,99,100,115,459,598,775,822,849%20&%201221-2018%20In%20Special%20Leave%20Petition%20(Civil)%20No.%2028623%20of%202018_2019-01-25%2013:07:58.pdf)

⁶https://ibbi.gov.in/uploads/resources/ILRReport2603_03042018.pdf

	operational creditors alongwith employees and trade creditors. For creation of a robust and inclusive economy and special needs of operational creditors, the Committee considered whether the threshold should be revised in a modified manner in cases where operational creditors file applications under the Code. The Committee was conscious that one of the successes of the Code has been that it has made debt enforcement more credible, especially for operational creditors that are empowered to initiate CIRP under the Code. In the shadow of this mechanism, operational creditors have the bargaining power to reach out-of-court settlements with large corporate debtors. Given this, the Committee agreed that operational creditors should be allowed to have recourse to CIRP on a minimum default of INR 5 lakh only, and appropriate actions may be taken to revise the threshold accordingly."	enhancement of threshold limit for MSME to Rs 5 lakhs and for others it shall be Rs 50 lakhs.
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TABLE 2: Provisions and Case laws dealing with NBFCs

<u>Source</u>	<u>Details</u>	<u>Explanation</u>
Section 3(7) of the Code	<i>(7) "corporate person" means a company as defined in clause (20) of section 2 of the Companies Act, 2013 (18 of 2013), a limited liability partnership, as defined in clause (n) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009), or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider.</i>	NBFCs are neither explicitly included nor excluded in the definition of corporate person.
Section 3(16) of the Code	<i>(16) "financial service" includes any of the following services, namely: – (a) accepting of deposits; (b) safeguarding and administering assets consisting of financial products, belonging to another person, or agreeing to do so;</i>	AnNBFC is eligible to be classified as financial service Provideronlyifitcarries on a business classifiable in any of the clauses

⁷<https://www.ibbi.gov.in/uploads/whatsnew/4e94077d49f9dbd49c875097dbdcf791.pdf>

	<p><i>(c) effecting contracts of insurance;</i></p> <p><i>(d) offering, managing or agreeing to manage assets consisting of financial products belonging to another person;</i></p> <p><i>(e) rendering or agreeing, for consideration, to render advice on or soliciting for the purposes of-- (i) buying, selling, or subscribing to, a financial product; (ii) availing a financial service; or (iii) exercising any right associated with financial product or financial service;</i></p> <p><i>(f) establishing or operating an investment scheme;</i></p> <p><i>(g) maintaining or transferring records of ownership of a financial product; (h) underwriting the issuance or subscription of a financial product; or</i></p> <p><i>(i) selling, providing, or issuing stored value or payment instruments or providing payment services;</i></p>	between (a) to (i) of section 3(16) of the Code.
Section 3(17) of the Code	<i>(17) "financial service provider" means a person engaged in the business of providing financial services in terms of authorization issued or registration granted by a financial sector regulator.</i>	
Section 227 of the Code	<p><i>227. Power of Central Government to notify financial sector providers etc.- Notwithstanding anything to the contrary [contained in this Code] or any other law for the time being in force, the Central Government may, if it considers necessary, in consultation with the appropriate financial sector regulators, notify financial service providers or categories of financial service providers for the purpose of their insolvency and liquidation proceedings, which may be conducted under this Code, in such manner as may be prescribed.</i></p> <p><i>Explanation.- For the removal of doubts, it is hereby clarified that the insolvency and liquidation proceedings for financial service providers or categories of financial service providers may be conducted with such modifications and in such manner as may be prescribed.</i></p>	Under this provision the purview of IBC is sought to be extended to FSPs in consultation with the respective financial sector regulators; this empowers the central government to protect the interests in case where the financial services providers seem to significantly affect the economy.
Insolvency and Bankruptcy	<i>In exercise of the powers conferred under section 227 read with clause (zk) of sub-section (2) of section 239 of the Insolvency and Bankruptcy</i>	The rules were framed to provide a generic framework for insolvency

<p>(Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019.⁸</p>	<p><i>Code, 2016 (31 of 2016), the Central Government made the rules and notified them on 15th November 2019. The link for the rules is as under:</i></p>	<p>and liquidation proceedings of systemically important Financial Service Providers (FSPs) other than banks. The Rules shall apply to such FSPs or categories of FSPs, as will be notified by the Central Government under section 227 from time to time in consultation with appropriate regulators, for the purpose of their insolvency and liquidation proceedings.</p>
<p>Notification No. S.O. 464(E) dated 30.01.2020⁹</p>	<p><i>In exercise of the powers conferred by section 227 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016) and in pursuance of rule 10 of the Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019, the Central Government, in consultation with the Reserve Bank of India, hereby notifies the manner of dealing with the third party assets in custody or possession of such financial service providers, as referred to in the notification vide No. S.O. 4139(E), dated 18th November, 2019, by the Administrator appointed under clause (a) of rule 5 of the said rules. The link for the notification is as under:</i></p>	<p>As per the rules, while conducting a proceeding of an FSP, the Administrator shall have the same duties, functions, obligations, responsibilities, rights, and powers of an insolvency professional, interim resolution professional, resolution professional or liquidator, as the case may be. He shall be appointed or replaced by the Adjudicating Authority on an application made by the appropriate regulator in this behalf. The Administrator shall take control and custody of third-party assets or properties in custody or possession of the FSP and deal with them in the</p>

⁸<https://ibbi.gov.in/uploads/legalframework/cb1d53c7fe47f8f22ab36a40f441db2c.pdf>

⁹<https://ibbi.gov.in/uploads/legalframework/3878e1c4a2332a3e4398d924fac58166.pdf>

		manner, to be notified by the Central Government under section 227.
Randhiraj Thakur v. Jindal Saxena Financial Services, Company Appeal (AT) (Insolvency) Nos. 32 & 50 of 2018, 18 th September 2018 ¹⁰	<i>“ 10. If the entire scheme of the I&B Code is seen, it will be evident that the Code is to consolidate and amend the laws relating to reorganisation and insolvency resolution of ‘corporate persons’, ‘partnership firms’ and ‘individual’ in a time bound manner. It is a self-contained Code which is exhaustive in nature when it comes to reorganisation and insolvency resolution. However, an exception had been carved out while enacting the Code that the ‘financial service providers’ have been kept outside the purview of the Code. Being a consolidating legislation only those acts are permitted which are mentioned in the Code and it cannot be made applicable to ‘financial service providers’ including ‘non-banking financial institutions’ and MFI’s banks, which have been kept outside the purview of the Code.”</i>	In the present case, the Corporate Debtor was a NBFC and had undertaken financial deposits from the respondent thus, falling under the ambit defined under Section 3(16) of the Code. The application was thus found non-maintainable under Section 7 of the Code. It is by virtue of these cases that a need for rules for FSP and their categories were recognized.
Housing Development Finance Corporation Ltd v. RHC Holding Private Ltd, Company Appeal (At)(Insolvency) No.26 Of 2019, 10 th July 2019 ¹¹	<i>“13. The definition of ‘financial services’ as defined in Section 3(16) of I&B Code is not limited to the 9 activities as shown at Clause (a) to (i) of Section 3(16). The aforesaid Clauses (a) to (i) are inclusive which means there are other services means there are other services which come within the meaning of “financial services”. 14. The Registration of Certificate issue by RBI shows that it has granted certificate to commence/carry on business of “non-banking financial services”. However, the Respondent has not been allowed to accept the public deposit and such certificate is condition to other conditions as provided in the back of the Certificate.”</i>	In the present case, the NCLAT held that a non-banking financial institution which is carrying on business of financial institution and thereby it being financial service provider will not come within the meaning of Corporate Person/Corporate Debtor. The NCLAT also suggested for the Appellant to bring any complaints against the Financial Institution to the Regulator, i.e., Reserve Bank of India.

¹⁰<https://nclat.nic.in/Useradmin/upload/18747772645ba1eb1cd5d90.pdf>

¹¹https://ibbi.gov.in/webadmin/pdf/order/2019/Jul/11493138195d25d9f0d704d_2019-07-11%2010:08:57.pdf

Reserve Bank of India v. Dewan Housing Finance Limited, C.P. (IB)-4258/MB/2019, in NCLT, Mumbai Bench, 03.12.2019 ¹²	<p><i>"The Applicant RBI in the capacity of "Appropriate Regulator" has submitted this Application against the 'Financial Service Provider' Dewan Housing Finance Corporation Limited on account of the fact that the default in repayment of the ECB Loan to SBI was committed, therefore, after following the due procedure as discussed supra prayed for "Admission" of the Petition u/s 7 to be read with Section 227 of the Insolvency Code.</i></p> <p><i>....7.4. Upon Admission it is hereby pronounced that "Moratorium" as defined u/s.14 of the Insolvency Code shall commence with effect from the date of Application i.e. 29.11.2019 as prescribed under Rule 5(b)(i) of FSP Rules 2019. On commencement of "Moratorium" the institution of any Suit or continuation of proceedings or execution of any decree against the Financial Service Provider (DHFL) shall be prohibited."</i></p>	<p>This is the first case to be admitted under the FSP Rules. The whole process to be followed under the rules was laid down in the order. RBI as the regulator had also appointed an administrator and formed an advisory committee to act as a COC for the same.</p> <p>The process followed has proved that IBC can prove to be a beneficial law for reconstruction and recovery even for financial service providers.</p>
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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

¹²<https://ibbi.gov.in/uploads/order/d9c77ba13d4eea5107ae79715a8c0402.pdf>

FC: Financial Creditor

OC: Operational Creditor

Code: Insolvency and Bankruptcy Code, 2016

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