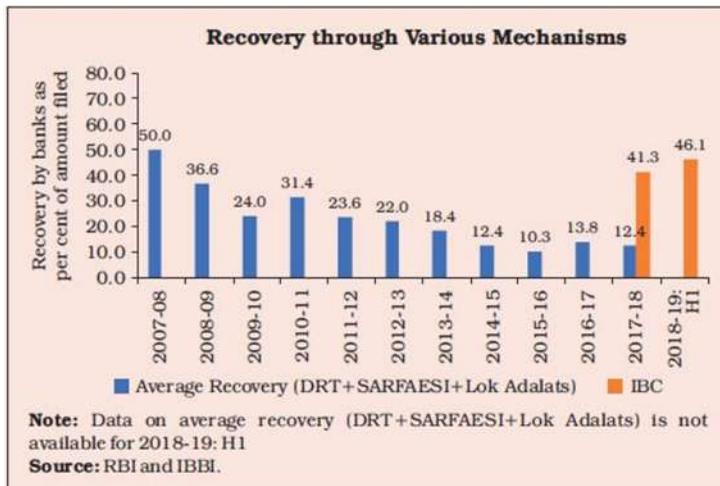


## INSOLVENCY AND BANKRUPTCY CODE (AMENDMENT ACT), 2020: AN ANALYSIS

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### Introduction

The Insolvency and Bankruptcy Code (hereafter, ‘IBC’), 2016 is considered to be a landmark legislation. It officially commenced on 28 May, 2016. According to the World Bank’s Doing Business report<sup>1</sup> which was released in 2016, the secured creditors in India on an average recovered only 20% of their entire debt from an insolvent firm at the end of the insolvency proceedings which was in stark contrast to the OECD (The Organisation for Economic Co-operation and Development) countries where creditors recovered up to 72.3% of their debt. In addition to this, the legislative frameworks which existed in India before the enactment of the IBC, were time consuming as the whole process of debt recovery took about 4.3 years to conclude whereas it took just around 1.7 years in the OECD countries. For the reasons stated above, India was ranked at an abysmal 130 out of 189 countries with respect to resolving insolvency. However, with the introduction of the IBC the current recovery rate has increased from 20 to 42%.<sup>2</sup>



<sup>1</sup>A World Bank Group Flagship Report - Doing Business 2016 Measuring Regulatory Quality and Efficiency, 13<sup>th</sup> Edition, <https://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB16-Full-Report.pdf>

<sup>2</sup>Id.



### **The Amendment Act- Salient Features**

The Insolvency and Bankruptcy Code (Amendment Act), 2020 (“The Amendment “) was passed by the Parliament on March 12, 2020. Some of the key features of the Amendment are as follows:

**1. Minimum threshold for initiating the process of resolution :**As per Section 7, of the current Act, any financial creditor upon the default of Rs. 1 lakh from the corporate debtor can initiate an insolvency proceeding in the National Company Law Tribunal (NCLT).<sup>3</sup> Later on, the home buyers were added under the category of a financial creditor.<sup>4</sup> This has led to a trend of real-estate builders undergoing Insolvency due to a proceeding initiated by a single buyer. As a result of this since June 2018 there has been a marked rise in number of cases. Till now 1,828 cases have been filed by a single real estate buyer alone. The new amendment has shifted the process of initiation of the proceedings from monetary terms to affected crowd. In other words, in case of real estate projects, if an allottee (person to whom a plot, apartment, or building has been allotted or sold) wants to initiate a resolution, then the application should be filed jointly by at least 100 allottees of the same real estate project, or 10% of the total allottees under that project, whichever is less.<sup>5</sup>

For other financial creditors, where the debt owed is either in the form of securities or deposits, or to a class of creditors, the application should be filed jointly by at least 100 creditors in the same class, or 10% of the total number of such creditors in the same class, whichever is less.

**2. Appointment of resolution professional -** As per the current provision, Section 5 (12) defines the term “insolvency commencement date”<sup>6</sup> and S.16 reads that the Resolution Professional is to be appointed within 14 days of the insolvency commencement date<sup>7</sup>. As per the proposed amendment, Section 5 stands repealed<sup>8</sup>. As a result of which, there’s an automatic change in Section 16(1) of the IBC, now the Resolution Professional shall be deemed to have been appointed on the date of the commencement of the insolvency itself.

**3. Right of the Corporate Debtor to initiate the CIRP Process – Prior to the amendment,** there was no clear instruction regarding the rights of a

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<sup>3</sup> §7, The Insolvency and Bankruptcy Code, 2016 Act No.31 of 2016.

<sup>4</sup> IBC Changes :Want to drag realtor to NCLT? Draw in 99 homebuyers, The Financial Express, <https://www.financialexpress.com/industry/ibc-changes-want-to-drag-realtor-to-nclt-draw-in-99-homebuyers/1739035/>.

<sup>5</sup>Id.

<sup>6</sup> §5(12), The Insolvency and Bankruptcy Code, 2016 Act No.31 of 2016.

<sup>7</sup> §16, The Insolvency and Bankruptcy Code, 2016 Act No.31 of 2016.

<sup>8</sup> Insolvency and Bankruptcy Code (Second Amendment) Bill, 2019 Quick review of Proposed Amendments, Vinod Kothari Consultants, <http://vinodkothari.com/2019/12/ibc-second-amendment-bill-2019-quick-review/>.

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corporate debtor and whether he can institute an insolvency proceeding against another corporate debtor. Section 11 of the Amendment Act aims to resolve this conflict as it states that a corporate debtor who has an ongoing Insolvency proceeding taking place against him, has the right to commence an Insolvency proceeding against another corporate debtor.<sup>9</sup>

4. **Moratorium** – The amendment in Section 14 (1) of the Amendment states that any existing licence, permit, registration, quota, concession, or clearance, given by the government or local authority, will not be suspended or terminated on the grounds of insolvency. However, there should be no default in payment of current dues for the use or continuation of such grants. Insolvent professionals will have the authority to extend the moratorium to include the continuance of supply of goods and services that he or she considers essential.
5. **Parties related to the Corporate Debtor** -The Code recognises and prescribes that the parties related to the corporate debtor are not eligible to be a part of the committee of creditors. However, the Code has absolved the financial creditors of their ineligibility wherein the reason behind them becoming a related party was the result of mergers, transfer of shares due to debt etc., The Amendment has clarified that the Central Government may prescribe certain additional transactions that shall not come under the category of a related party.
6. **Office of the Resolution Professional** –As per Section 23 (1) of the current IBC, the Resolution Professional is responsible for the affairs of the Corporate Debtor, until a resolution plan was submitted to the Adjudicating Authority. However, this section has been proposed to be amended in a way so as to extend the responsibility of the Resolution Professional till a plan has been approved by the court or till a liquidator has been appointed.
7. **Immunity for Prior Offences: Addition of Section 32A** – Newly inserted section 32A in the Code provides that corporate debtors will have immunity against offences committed by them prior to the commencement of the resolution process. Adding to that, the Amendment also prohibits any action against the Corporate Debtor in respect to any immovable property including attachment, seizure or confiscation. It is only applicable if there is a shift of control in promoters or management after the approval of the Resolution Plan.
8. **Widening of the scope of Interim Finance** - The Amendment expands the definition of ‘interim finance’ to include, ‘such other debt as may be notified’. The intent of this addition is made clear by the statement of objects and reasons, which suggests that ‘last mile funding’ options to

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<sup>9</sup>Id.



‘prevent insolvency’ is likely to be included under interim finance and thereby, enjoy priority in the insolvency or liquidation process under the IBC. The ambit of such debts has not yet been decided, and will be further notified.

**9. Financial Service Providers** – The explanation inserted in Section 227 of the Amendment describes that the Insolvency Proceeding against a financial institution or financial service provider will be conducted in the manner prescribed, with modifications that will be further notified.

**10. A New timeline of 330 days** – The time period for the whole proceeding has been increased to a maximum limit of 330 days. If the process is not complete within the said time frame then the Resolution Professional needs to give in writing the reasons for the delay. This has been done with the aim to speed up the mechanism.

### **Impact of new amendments**

The Amendment aims at improving the IBC as a mode of recovery. It also aims at preventing frivolous applications and to not diminish the value of the corporate debtor by preventing the supply of goods and services which are critical to its value. We will now discuss, what will be the implications of the Amendment:

1. The Forum for People’s Collective Efforts (FPCE)<sup>10</sup>, a national lobby of homebuyers, highlighted that the new Amendment will defeat the purpose of adding homebuyers as financial creditor. It will surely increase the work of Advocates as now they will also have to act as a mediator, in order to convince other buyers to institute a proceeding. In a way, this change will give the monetarily strained builders a chance to revive their business. On the other hand, a decline in the number of insolvency applications by homebuyers may be seen.
2. Since the Resolution Professional is to be admitted on the day the Insolvency proceeding starts, it will increase the efficiency and help complete the proceedings in a time-bound manner. The stakeholders will be made to follow a strict timeline and also all the paperwork will need to have been done before the commencement of the proceeding. This will enable a better approach at the revival of the company, as time will be counted from the day of the commencement of the proceedings<sup>11</sup>.

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<sup>10</sup> Homebuyers object to Insolvency code amendment approach parliamentary committee, The Economic Times, <https://economictimes.indiatimes.com/industry/services/property/-/construction/homebuyers-object-to-insolvency-code-amendment-approach-parliamentary-committee/articleshow/74049218.cms?from=mdr>

<sup>11</sup> Insolvency and Bankruptcy Code (Second Amendment) Bill, 2019 Quick review of Proposed Amendments, Vinod Kothari Consultants, <http://vinodkothari.com/2019/12/ibc-second-amendment-bill-2019-quick-review/>

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3. With the clarity of the rights of the Corporate Debtor, i.e., that he can institute an Insolvency proceeding against another Corporate Debtor even when undergoing an Insolvency proceeding against himself, the root cause of default may be addressed.
4. The non-cancellation of lease, license, quota, grants etc will benefit the Corporate Debtor ensuring the essential requirement for the conduct of the company during Insolvency proceedings remain intact.
5. Widening of the definition of interim finance will encourage more investment for revival of the Corporate debtor.

### **Conclusion**

The new measures aim to economically boost the Corporate sector. Due emphasis has been given to the survival and revival of the Corporate Debtor. In a way, it can be said that the new Amendment is inclined towards the Corporate Debtor.<sup>12</sup> The proposed changes will hugely impact the Corporate Debtors and professionals of this field. It is also believed to create a positive imprint on the economy as the approach has changed from debt recovery to corporate revival.

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<sup>12</sup>IBC Second Amendment Bill, 2019: Finishing Touches to the Indian Restructuring Landscape, India Corporate Law, Cyril Amarchand Mangaldas Blog, <https://corporate.cyrilamarchandblogs.com/2019/12/ibc-second-amendment-bill-2019-finishing-touches-to-the-indian-restructuring-landscape/>