

Insolvency and Bankruptcy Law in India

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Week 03

Lecture 13

Welcome to all as part of the course on Insolvency and Bankruptcy Law in India.

Today, we are going to discuss who can initiate the insolvency proceedings under the IBC code. In the last class, we discussed various definitions under the Insolvency and Bankruptcy Code. Today, we are going to discuss who may initiate Insolvency Proceedings (CIRP) and how to initiate insolvency proceedings by a financial creditor. So, before discussing who may initiate, let us discuss how the flow chart for CIRP works. Whenever a default is above 1 crore rupees, the minimum triggering point for default is 1 crore rupees.

That is, if the corporate debtor fails to pay 1 crore or more, then in such cases, there is a default. Then, the financial creditor, operational creditor, and corporate debtor can file an application to NCLT themselves. So, who can initiate the CIRP process? Financial creditors are divided into three categories: financial creditors, operational creditors, and corporate debtors themselves. So, they have to make an application to the NCLT.

NCLT will verify that we are going to discuss in the subsequent lessons what to verify, the checklist that is there, and how to verify everything we are going to discuss. NCLT will verify, and then within 14 days, they will admit the application, or else they will reject it. Whenever they reject the application, they are supposed to give an explanation for the rejection. So, once the NCLT (National Company Law Tribunal) admits the application, it will appoint the IRP (Interim Resolution Professional). So, if the financial creditor makes the application, the name of the interim resolution professional will be mentioned in the application itself.

Whereas the operational creditor may or may not be mentioned, the corporate debtor has to mention the name of the interim resolution professional. Then, once the interim resolution professional is appointed, the board of directors' powers will be suspended. That means the interim resolution professional, who is the resolution professional, will replace the board of directors. Once the CIRP process is started, the moratorium will be affected as per section 14 of the IBC, and the moratorium will be implemented. In the subsequent lessons, we will discuss what a moratorium is and its scope.

In simple language, for the time being, I can say that a moratorium is in effect during the CIRP process; no one can file a suit against the company. So, which suit can be filed, which suit cannot be filed, what can be stalled, and what cannot be stalled—everything we are going to discuss in the subsequent lessons—is okay. Then, within a 30-day tenure, the IRP will do the following. So, what is he going to do? He is going to do the public announcement. Then, he will collate and verify the claims, so if any creditor has any claims, he will invite the creditors to submit them through a public announcement.

Once the claims are submitted, he will collate and verify them. Then, he will constitute a committee of creditors, simply referred to as the committee of creditors (CoC). The committee of creditors will hold the first meeting. In the first meeting, the IRP will appraise the COC, then the IRP will return. So, the interim resolution professional will return.

Please remember that the IRP will be there in the picture from the date of application to the NCLT, once it is admitted, until the COC takes charge. Subsequently, once the COC has entered the picture, they will appoint a resolution professional. Please remember that this IRP may continue as a resolution professional, so there is no bar. Thus, you may appoint another resolution professional or continue with the IRP; that is up to the discretion of the creditors' committee. Then, once the resolution professional is appointed, he is going to manage the affairs of the corporate debtor, including compliance.

Please remember that until now, it has been the responsibility of the board of directors to manage compliance in a company. Now, it is because the resolution professional is replacing the board of directors, so that is why it is his responsibility to manage the entire management as a going concern. He is supposed to manage the company, and he is also a responsible person for compliance. Then, check the legitimacy of the resolution plan and present it before the COC for voting. So, before that, he is supposed to appoint the valuer and prepare the information memorandum.

He is supposed to assess the company's assets to determine their value. He is responsible for preparing everything, and in that process, he can appoint various professionals because a single person cannot manage the entire company. He can appoint various individuals, and these valuers will provide the valuation report based on which he will present this valuation in the public announcement. Then he is going to invite the creditors to submit their claims. Once the claims are given, he is going to verify them based on the books of accounts.

He is going to update the claims register. Then he is going to make the public announcement for the expression of interest, so once everything is done, he is sure about or aware of what the assets and liabilities of the company are, because unless he is able to

arrive at the claims and valuation of the company, he cannot invite people or any resolution applicant to submit an application. So, he is going to make the public announcement for the expression of interest. Then, once the resolution plans are submitted by the resolution applicants, he will verify their legitimacy because certain categories of people cannot submit resolution plans. In the subsequent lessons, we will discuss who is eligible to file a resolution plan and who is not eligible to file one.

The resolution plan will be presented to the COC, and if the COC approves it, we will then apply to the NCLT for its approval. Please remember, NCLT is not going to verify the commercial wisdom of the COC, so if the resolution plan, suppose the haircuts are more, then NCLT will not verify. NCLT will only verify whether they followed the law and procedure while approving the resolution plan. Their role is to verify the legal formalities. Then, once the COC approves the resolution plan, they will approach the NCLT; you will make an application before the NCLT.

So, in case there is no resolution plan or no plan is approved, no one is willing to purchase the company; or if no resolution plan is approved by the COC, then you can approach the NCLT for liquidation. That is the second part of our session, where we are going to discuss liquidation. The other faculty will discuss liquidation in the subsequent lessons. This is the total overview, so you are going to make an application. The application is admitted by the NCLT.

Then, a resolution professional will be appointed. He will take over the company's management and prepare the assets and liabilities. Then he is going to conduct the committee of creditors meeting in parallel. In the creditors' committee meeting, this IRP will be replaced by the resolution professional; the same person may be appointed as the resolution professional. Then, he will verify all the data and prepare the company's data.

Then he is going to give a public announcement; he is going to make an invitation to the public investors and potential investors to give the resolution plan. These resolution plans will be placed before the committee of the creditors. The committee of creditors will approve it. If they do not approve it, or if you do not receive any resolution plan, then the NCLT will give the order for liquidation. So, the liquidation is the second part of our sessions, in our lessons.

Now, let us discuss the governing sections of the IBC Code 2016. Part 2 of the IBC code deals with insolvency, resolution, and liquidation for corporate persons. Let us see what is there. In part two, section six deals with the person who may initiate CIRP, so we have already discussed who may initiate CIRP; thus, CIRP may be initiated by the first category: financial creditor, operational creditor, or corporate debtor. Then, section seven deals with the financial creditor, and how to make an application by the financial creditor is discussed under section seven of the act.

Then, sections eight and nine both deal with the operational creditor. Sections 8 and 9 discuss how operational creditors must apply to the NCLT. Then Section 10 deals with the corporate applicant. So, if the corporation in the company itself wants to make an application for the CIRP process, then how is an application that is discussed under section 7 made? Then let us discuss who can initiate, as we have already discussed in the case of default. So, please remember the default amount must be more than the minimum of 1 crore rupees.

So, in case of a default, who is entitled to initiate the CIRP: the financial creditor, operational creditor, or the corporate debtor himself? So, these three categories of people can initiate the CIRP. Now, let us look at section 6 section-wise. Section 6 of the IBC provides that where any corporate debtor commits a default. So, the term “default” is very, very important; we have already discussed the definition. Today, we are going to discuss a few judgments as well.

So, if a default is committed, a financial creditor, an operational creditor, or the corporate debtor itself may initiate CIRP in respect of such corporate debtor in the manner provided in Chapter 2 of Part 2 of the Code. As we have already discussed, part 1 is the preliminary part, and part 2 deals with the company’s corporate insolvency and liquidation. So, in the manner that is prescribed in this chapter. Now, let us see. Now, one question mark may come into play.

So, we can initiate the CIRP process against companies, but is it possible to initiate the CIRP process against a government company? Because, according to the Constitution of India, government companies are considered to be instrumentalities; they are considered to be the state, and they fall within the definition of the state under the Constitution of India. Now, can you initiate the case against the government-owned company? The court may be under the impression that because it is considered to be a state, no one can initiate the liquidation proceedings or insolvency proceedings against the government, but in the case of *Harsh Pingay versus Hindustan Antibiotics Limited*, the NCLT Mumbai held that though it is a government entity and considered to be an instrumentality of the state, for commercial purposes it is also a company. So, we are categorizing the company as a government company because no less than 51% of the share capital is held by the government. So, here the government can be either the state government or the central government as defined under the Companies Act. So, merely because the government has share capital in the company, it does not mean that it is not regulated; it is controlled by the government.

IBC, because as we have already discussed, pertains to whom this legislation is applicable, the applicability of the legislation in the previous slides and lessons; the company is covered by the IBC and is regulated by the IBC. So, a government company is also a company. So that’s why a government company can initiate the CRP process

against the government company. In another case law, Central Inland Water Transport versus Brojo Nath Ganguly, NCLT held that yes, you can initiate the proceedings against the government company now. Who is a financial creditor? We are discussing the financial creditors today.

So, under section 7 of the IBC, a financial creditor can initiate the CIRP process. So, Section 7 lays down the procedure for the initiation of the corporate insolvency resolution process. From now onwards, I will call it a CIRP process. For our convenience's sake, I will call it the CIRP process. So, CIRP means Corporate Insolvency Resolution Plan process.

So, the CIRP process is conducted by the financial creator or by two or more financial creators jointly. The section 7 application can be made by one creditor or two or more financial creditors jointly; then, what are all the essentials that need to be satisfied for the admission of the corporate debtor? Whenever you are filing a case against the corporate debtor for the initiation of the CIRP process, there are certain essentials to be satisfied. First, there must be a debt; without a debt, there cannot be a case. So, what is the meaning of debt? It is given in the case of Webb versus Stenton. In this case, Justice Lindley defined debt as a sum of money that is now payable or will become payable in the future by reason of a present obligation.

That means that you currently have some obligations, and because of these obligations, they are becoming payable right now; maybe they are becoming payable right now, or they will become payable in the near future. So, they become payable now, or they are becoming payable in the near future, because of some present obligations. So then, that is called debt, so the first essential to be satisfied is debt. Then, having the debt is not sufficient; please remember, there must be a default. So, I'm having an obligation to pay, but if I fail to pay, then only you can exercise the right against me.

So, there must be a default within the period of limitation, so please remember that the Limitation Act is applicable. So, whenever there is a default, generally, if you are supposed to recover any money from someone, you are supposed to file the case within the three-year period. So, this period of limitation is applicable. Then, the amount of default should be above the threshold limit. So, if you observe this legislation, the threshold limit is one crore rupees.

What are all the essentials to be satisfied if you want to file an application or admit an application under this CODE? Three essentials must be satisfied. First, there must be a debt, it must be in default, and the amount of the default should be above the threshold limitation, which is a minimum of 1 crore rupees. Then, the definition of financial debt is given under section 5.8. Please remember that when a financial creditor wants to file a case or an application under this section, section 7, it should be for financial debt.

It is not only debt; it is a financial debt. We have already discussed the definition of financial debt in the previous lessons. It is defined under section 5, subsection 8 of the Act. If you observe section 5, subsection 8, which provides that under section 5, subsection a, disbursement should be to the corporate debtor, then if you observe the first line of section 5, subsection 8, it must be disbursed. They use the word “disbursement.” So, what is the meaning of “disbursement”? I have to give the money to the corporate debtor.

So, the Supreme Court, in the case of Pioneer Urban Land Infrastructure Limited versus Union of India, explained that the definition of financial debt states that the debt must be disbursed. First of all, there should be a debt; it must be disbursed against the consideration of the time value of money. The money should have some time value.

So now let us discuss: What is the meaning of disbursement? Do we know what the meaning of debt is now? What is the meaning of disbursement? Disbursement includes the departure of money from the creditor to the debtor; the money must be transferred from the creditor to the debtor, and it is available upon such departure. Please remember that once it is departed from the creditor, if it is not available for the debtor to use, then there is no disbursement.

Disbursement means that, suppose I am receiving some money, the money should be available for my utilization. Its availability upon such departure is required. Then, if these two conditions are satisfied, it is called a disbursement. So, when I can call it a disbursement, disbursement means the money should move from the creditor to the debtor and be available to the debtor for its use. Then it is called a disbursement, and the disbursement must happen for the time value of money.

What is the meaning of time value? Time value refers to the price associated with the length of time that an investor must wait until an investment matures or the related income is earned. The time value of money means, in simple language, that today I have invested 10 rupees. If I have to wait for some time, it may be after one year or two years. The value of money will obviously increase because, as the economy progresses, the generation of surplus is one of the major requirements of any business entity. The time value of money refers to the price associated with the length of time; as time goes on, it will have some value.

An investor must wait until an investment matures or the related income is earned. This is the meaning of the time value of money. Now, how do I initiate? First, we will look at the definition; we will look at section 7 in detail, and then we will try to discuss each and every point in detail. So let us look at the definition in section 7. Section 7 speaks about the initiation of the corporate insolvency resolution process by the financial creditor.

So, section 7 enables the financial creditor to initiate the CIRP process. The financial creditor either by itself or jointly. So please look at the word “the financial creditor,” either by itself or jointly. That means a joint application can also be made.

We will discuss it in detail. With the subsidy, there is a provision for other financial creditors or any other person, on behalf of the financial creditor, as may be notified by the central government, to file an application for initiating the corporate insolvency process against the corporate debtor before the adjudicating authority when a default has occurred. If you look at this definition, we have to underline certain points: the financial creditor can apply either by itself, which means alone, or jointly, so the application can be made by the financial creditor. I mean single financial creditors or jointly two or more people. So, other financial creditors or any other person on behalf of the financial creditors may authorize someone else. That authorized person can also file, or may file, an application for the initiation of CIRP against the corporator before the adjudicating authority.

When there is a default, either he or he can file an application for the CIRP process before the adjudicating authority alone or jointly with others. In the last classes, we discussed what the meaning of default is. When there is a default, you can file an application under this section. Now, let us look at it. Provided that for the financial credit referred to in Clauses A and B of Subsection 6A of Section 21, an application for initiation of CIRP against the corporate debtor shall be filed jointly by not less than 100 of such creditors in the same class or not less than 10 percent of the total number of such creditors in the same class, whichever is less.

So, this was recently inserted. So, by virtue of this provision, it is not always the case that only one creator can file the case; there is a possibility that if any class of creditors is present, this was actually inserted to protect the interests of the home buyers. Based on the recent judgments given by the Supreme Court, the Court has issued various rulings. Homebuyers are considered financial creditors within the meaning of this legislation. We are going to discuss the judgment part later. Why are homebuyers considered to be financial creditors? What is the reason for it? We will discuss it later.

They can, because they are considered to be a separate class. This class of creditors may have 100 members, or 100 creditors, or else 1/10th of the total value, total credit 1/10th of the value. They can file an application under this section. So, this proviso is enabling you, or is enabling the class of creditors, to file an application under this section. Now provided, let us look at the provision provided further that the financial creditors who are allottees under the registered project, an application for the initiation of the CIRP process against the corporate debtor, that is CD, shall be filed jointly by not less than 100 of such allottees. So, a minimum of 100 members are there, and others are not less than 10 percent.

So, whichever is less, they can make an application. Provided also that where the application for initiation of CIRP against the CD has been filed by the Financial Creditor referred to in the first or second proviso and has not been admitted by the adjudicating authority before the commencement of the Amendment Act 2020. Because only these provisions were inserted in 2020, such applications shall be modified within 30 days to comply with the requirements of the first or second proviso. Through the Amendment Act 2020, the central government has enabled home buyers to be considered financial creditors, and they can file an application under Section 7 of the Act. So, they can file an application under this section and make the necessary changes accordingly within 30 days. Now, for the purpose of this section, a default includes defaults in respect of financial debt owed not only to the applicant financial creditor but also to any other financial creditor of the corporate debtor.

It means that when I say the defaults, why is it so important? As we have already discussed, there should be a default, and the default amount must be 1 crore. When I say that the possibility of 1 crore is there, one creditor has 90 lakhs; I mean one creditor's debt value is 90 lakhs, so he is not satisfying the 1 crore requirement. Therefore, we are not going to consider this person alone. So, together, if any other creditor is there and you are exceeding the triggering point, that is more than sufficient, which enables you to file a joint application. The financial creditor shall make an application under subsection 1 in such form as may be prescribed.

Today, we are also going to look at the form level. What is the form to be filed with the NCLT? We will see everything. Then the financial creditor shall furnish the application. A record of default is recorded with the information utility. One of the essential conditions is that there should be a debt, and it should be in default. We should provide evidence of whether the default exists and whether the debt is defaulted or not.

That is why you have to submit the record of default. How do we submit the record of default? We will discuss it. The record of default is recorded with the information utility or such other record or evidence as may be specified. Then, please remember the name of the resolution professional. Whenever you are making an application under this section, you are supposed to give the name of the resolution professional proposed to act as an interim resolution professional.

Subsequently, this person may act as a resolution professional. At present, you are proposing him as an interim resolution professional. Once the application is admitted by the NCLT, once the COC is formed, then the COC may appoint you as a resolution professional, or they may appoint another person as a resolution professional. So, the name of the resolution professional must be mentioned in the application, along with any other information as may be specified, because we have rules and regulations. IBBI is going to specify the rules and regulations, and as per the rules and regulations, you are

supposed to provide such other information as may be prescribed. Once you have made an application, the adjudicating authority shall ascertain the existence of the refund from the record of an information utility or on the basis of evidence furnished by the financial creditor within 14 days from the date of application under subsection 2.

So that means within 14 days, the adjudicating authority shall ascertain the existence of default. That means he should decide whether there is a default or not. Once there is a default, he can admit the application within 14 days. In the section, if you observe, the adjudicating authority shall have used the word “shall”.

But by the Supreme Court, it was not interpreted as “shall.” Though the section uses the word “shall,” it means that the adjudicating authority must admit the application within 14 days. The Supreme Court, in various judgments, stated that we may interpret it as “may” and not “shall,” which means the adjudicating authority has discretionary powers regarding whether to accept, admit, or reject the application. So, if the adjudicating authority has not ascertained the existence of a default, suppose after looking at the application, he is of the opinion that there is no default, okay. Then pass an order under subsection 5 within such time, and it shall record its reasons in writing for the same. They are saying that once you make an application for the CIRP process, the adjudicating authority will verify the documents.

Based on the document, he came to the conclusion that there is no default. In such cases, he may reject it. When he does so, please remember that he has to give the reasons for his rejection. Then, the adjudicating authority is satisfied that a default is present. Then a default has occurred, and the application under subsection 2 is complete, and there are no disciplinary proceedings against the proposed resolution professional. One of the checklists that the NCLT must observe is that it should be in default when the financial creditor proposes the resolution professional.

There shall not be any disciplinary proceedings against the resolution professional; if any disciplinary proceedings are pending against the resolution professional, the NCLT will not allow such a professional to act as an IRP. If the default has not occurred, or if the application under subsection 2 is incomplete, or if any disciplinary proceedings are pending against the proposed IRP, then they may reject the application. Clause A deals with the acceptance of applications, while Clause B deals with the rejection of applications. If the checklist is satisfied, there is a debt or default, and no proceedings are against the resolution professional, then the Tribunal will accept the application; if any of these three conditions are not satisfied, then the Tribunal will reject the application. Let us look at the subsequent section, which provides that the adjudicating authority shall give notice to the applicant to rectify the defects before rejecting the application under clause B of subsection 5.

Please remember, he cannot reject the application just like that. Whenever the NCLT rejects the application, the court cannot reject it like that. Whenever the NCLT rejects the application, it shall give a chance to the applicant to rectify the mistake. Suppose there are some errors in the application. Then, NCLT shall give the applicant an opportunity to rectify the mistake.

If there are any defects, he can rectify them within 7 days. The defect in his application should be rectified within 7 days of the receipt of such notice. Once a 7-day notice is given, the corporate insolvency resolution process shall commence. Once it is admitted, the CIRP process is started; that is called the commencement date. Once it starts, the adjudicating authority will communicate the order to the financial creditor and the corporate debtor. The order must be given to them immediately, stating that the resolution process has started now.

So, the order under the above subsection must be given to the financial creditor within 7 days of the admission. So, when you are supposed to give the order within 7 days, you must give the order to the financial creditor. In today's lesson, we discussed the CIRP flowchart and who can initiate the CIRP process. When the application is admitted by the adjudicating authority, what are the consequences? Like, how is the moratorium fixed? Then how is the interim resolution professional going to be appointed? Then, once the interim resolution professional is appointed, he will make the public announcement.

Then the COC will be formed. Then, subsequent to that, once the COC is formed, the resolution professional may be appointed. Then, subsequent to that, he is going to receive the claims. Then he will collate the claims. Then he is going to invite the prospective resolution applicants to submit the resolution plan.

Then, they will discuss the resolution plan, and then the COC will approve it. Once that is done, the resolution plan will be implemented; otherwise, if the COC fails to approve any resolution plan, the NCLT will give the order for the liquidation of the company. This is the CIRP flow chart we discussed in today's lessons. Then, subsequent to that, we have discussed governing sections like section 6, which speaks about who can initiate the CIRP process; then section 7, regarding the initiation of the CIRP process by the financial creditor; and sections 8 and 9. CIRP process initiated by the operational creator, section 10 by the corporate debtor.

We have discussed sections 6, 7, 8, 9, and 10. Then we discussed who can initiate CIRP. Then, before discussing who can initiate the CIRP process by the financial creditor, we have discussed the essentials to be satisfied or established for the admission of a corporate debtor. So, when I want to initiate the CIRP process against the corporate debtor, we need to satisfy certain essential conditions, which we discussed in today's lesson.