Investigation of Interpretative Growth of Corporate Insolvency Resolution Statutes: Settlements, Open-Ends and Lacunae

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The Insolvency and Bankruptcy Code, 2016 was passed to consolidate and amend the existing legal framework of reorganisation and resolution of insolvent and bankrupt persons and improve on it by inculcating characteristics of lesser time; lesser loss in recovery and high levels of financing. Taking power from the Roman principle of 'cession bonorum', the Insolvency Resolution Process espouses to resolve, liquidate, restructure the assets of the debtor through the combined effort of time bound multi-party negotiations such that it maximises the value of assets; promotes entrepreneurship and brings about payment of Government dues, all for the main purpose of increasing ease of business.

The Paper's objective is to analyse the statutes of corporate insolvency resolution process and trace the legal interpretative journey taken towards solving its ambiguities and lacunae, if any. Through empirical investigation of precedents set by the Court; amendments made by the legislators and the contemporary impact of the Code; the Paper tries to answer whether the law of Corporate Insolvency Resolution Process needs further resolution.

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Introduction

Like the Insolvency and Bankruptcy Code, 2016, the effort of this paper is to present the investigation, observations and conclusions is a clear, concise and comprehensive manner. The separate headings of the project will consist of a literal reading of the provisions; identification of interpretative ambiguities or lacunae of law coupled with an elucidation of legal amendments and judicial discussions and succinct observations. The conclusion wraps up the paper with some recommendations and closing comments.

A list of abbreviations used for the sake of brevity has been given below:

Insolvency and Bankruptcy Code, 2016	Code
Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016	AA Rules
Insolvency Resolution Process	IRP
Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016	IRP Regulations
National Company Law Tribunal	NCLT
National Company Law Appellate Tribunal	NCLAT
Adjudicating Authority	AA

Default: Interpretation of Debt

When a corporate body defaults, it is because they have failed to pay its debt or instalment of debt in whole or in part[2]; the debt being of an amount not less than one lakh rupees[3]. After the default, the creditor can file for initiation of IRP with the NCLT, which performs the duties of an AA for the provisions of the Code[4], and will admit the said application. On literal reading of the definition, the nature of the debt is unclear i.e. should it be legally actionable and within the statute of limitations. The debt is a liability or obligation in respect of a claim[5] and hence, should be legally actionable at the time of initiation of IRP, however, the application of Limitation Act has been contended in many cases.

When an employee in *Sanjay Bagrodia v. Sathyam Green Power Pvt. Ltd.*[6] filed for IRP after non-payment of salary dues, the fact that the claim was time-barred, created doubt regarding its admissibility. The salary for a period of October 2012 to September 2013 was demanded in May 2017 with the argument that as no provision was present in the Code to explicitly accept and apply the Limitation Act, it could not be said that the dues were affected by the statute of limitations. The NCLT rejected the argument and adjudged that the AA could not be a 'flowering pot for claims that are wholly time barred.[7]'

However, in *Neelkanth Township and Construction Pvt. Ltd. v. Urban Infrastructure Trustees Ltd.*[8], an application filed for dues on matured optionally convertible debentures was accepted by the NCLAT. The Tribunal pointed out that the Code initiated IRPs and did not refund money claims. If the interest rate on matured OCDs was a continuous claim, it could not be time-barred. The decision also accepted the above-mentioned argument i.e. no provision in the Code or otherwise affirmed the Limitation Act.

Analysing this decision, it can be observed that the order of the Tribunal is merely based on the merits of the case rather than being a law-clarifying order. On the same note, it is interesting to note that the Apex Court accepted the merits of the NCLAT order but subtly rejected the interpretation regarding the Limitation Act and has kept it open for future discussion[9].

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[2] Insolvency and Bankruptcy Code 2016 (Code), s 3(12)
[3] Code, s 4(1)
[4] Code, s 5(1)
[5] Code, s 3(11)
[6] [C.P. No. (I.B.) 108/PB/2017] See also *M/s Deem Roll-Tech Limited v. M/s R.L. Steel & Energy Limited* [Company Application No. (I.B.) 24/PB/2017]
[7] ibid (n 5) para. 12
[8] [Company Appeal (AT) (Insolvency) No. 44 of 2017]
[9] *Neelkanth Township and Construction Pvt. Ltd. v. Urban Infrastructure Trustees Ltd.* [Civil Appeal No. 10711 of 2017]

Initiation of IRPs: The Persons Involved

The persons that can initiate IRPs are: financial creditor; operational creditor; or the corporate debtor themselves[10]. This is a healthy deviation from the previous paradigm wherein only financial creditors could file an application for IRPs. The Bankruptcy Law Reform Committee Report rejected the former paradigm[11] and through the provisions of Section 6,7,8,9 and 10, have widened the set of empowered persons along with formulating an airtight procedural framework. The AA Rules intertwined with these statutory provisions attempt to create a strict schema for the collection of proper documentation which can be trusted to prove claim of insolvency. It espouses to fix the information asymmetry between the creditors' application and the debtors' application[12]. The provisions of Section 11 sponges off the right of certain parties from making the application.

Under the provisions of the Code: a financial creditor is owed a financial debt i.e. a debt with an interest which must be disbursed against the consideration for time[13]; while an operational creditor is owed an operational debt i.e. dues with respect to goods and services or payment pending under any law to Central, State or Local Government[14]. A moneylender or bank that loans an amount to debtors will be a financial creditor while the lessor that the debtor rents out space from is an operational creditor[15]

I. Homebuyers

However, despite the close attention to detail, cases questioning some ambiguities and lacunae have emerged, especially with respect to the status of homebuyers' claims on real-estate corporate companies.

In the case of *Neelkanth Township and Construction Pvt. Ltd. v. Urban Infrastructure Trustees Ltd* [16], the facts of which has already been stated in the previous heading; the Appellants contended that the purchase of OCDs was merely a form of investment and that the interest rate was too low to create any consideration which would qualify them to be treated as financial creditors. These grounds were rejected by the Tribunal clarifying that under the Code, OCDs created a financial debt[17] and hence the applicants were financial creditors.

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[10] Code, s 6
[11] The Report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design, available at https://www.ibbi.gov.in%2FBLRCReportVol1_04112015.pdf, s 5.2.1
[12] ibid (n 11)
[13] Code, s 5(8)
[14] Code, s 5(21)
[15] ibid (n 11)
[16] [Company Appeal (AT) (Insolvency) No. 44 of 2017] See also *Nikhil Mehta v. A.M.R Infrastructures Ltd.* [CP No.(ISB)-03/(PB)/2017]
[17] Code, s 5(8)(c)

However, in the case of *Pawan Duber and Another v. J.B.K. Developers Private Limited*[18], the applicant; a person who had paid an advance amount for purchase and booking of a unit for their personal or commercial endeavours; was not considered to be any creditor under the Code even after the realtor-debtor failed to complete and allot the unit to the persons. The Tribunal was unable to stretch the scope of the definition and declare the applicants as operational creditors and examined that the nature of contract between the homebuyer and the realtor was not that of contract of service or even sale of goods[19]. The restitution and refund claim of the homebuyers as was the issue in this case, could have been exercised through proceedings under Consumer Protection Act or the Indian Penal Code, and more successfully so[20].

Additionally, it is observed that the inherent purpose of the Code is the laying down of guidelines for swift resolution, liquidation and restructuring of debts and financial assets to facilitate ease of business. Given that the schema of the IRP is designed to bring about the settlement of claims through negotiations with a wide array of creditors and claimants, private restitution for the grievance caused to homebuyers would not be the main priority of these proceedings; in contrast to proceedings before a Consumer Court or Civil Court.

However, despite the purposive construction of the Tribunals, the intervention of the Apex Court in the Jaypee Infratech insolvency issue is drawing a new line in the sand for the grievances of the homebuyers. After filing of over 4000+ civil and criminal cases against Jaypee[21] and its various real estate projects, the Apex Court had stayed the order of Allahabad NCLT for initiation of IRPs against Jaypee Infratech.[22]. The stay order was later vacated by the Apex Court[23], however, Regulation 9A was amended into the IRP Regulation through which any person claiming to be a creditor can fill Form F attached with: records held by Information Utilities; documentary evidence; back statements which prove non-satisfaction of debt or an order of a Court or Tribunal regarding re-payment to enter the proceedings. The effects of the amendments are still premature to judge, however, it has created some confusion with regards to what the inherent purposes of

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[18] [C.P. No. (IB)-19 (PB)/2017]
[19] ibid (n 18). Citing *Col. Vinod Awasthy v. A.M.R. Infrastructures Ltd.* [C.P. No. (IB)-10 (PB)/2017]
[20] ibid (n 19)
[21] Karan Choudhary, 'Homebuyers to bombard Jaypee Infratech with 4000 lawsuits' *Business Standard* (New Delhi, 5 September 2017) http://www.business-standard.com/article/companies/jaypee-homebuyers-ready-to-bombard-developer-with-4-000-lawsuits-117090401085_1.html accessed 26 November 2017
[22] *Chitra Sharma & Ors. V. Union of India & Ors.* [Writ Petition(s) (Civil) No. 744/2017]
[23] *Chitra Sharma & Ors. V. Union of India & Ors.* [SLP(C)Nos. 24001 & 24002/2017]

the IRP are i.e. whether the proceedings will continue to resolve the debts of a group of creditors or whether it will also take up the task of restitution of individual claims.

II. Employee or Workman

An employee or workman; the contract of service or employment which defines them as operational creditors; may file their claims with the interim resolution professional through Form D of the IRP Regulations[24]. In order to prove the claim of default on salary, they must submit: the contract of employment; a copy of notice demanding payment of dues to prove non-payment; order of a court or tribunal sanctioning payment of dues or other records available with information utilities[25].

III. Authorised Representatives

The claims of the persons and its corresponding documentation can also be submitted by "authorised representatives"[26].

In *J.K. Jute Mills Mazdoor Morcha vs. Juggilal Kamlapat Jute Mills Co. Ltd*[27], the NCLAT examined an application filed on behalf of aggrieved workmen by a Workmen's Association acting as "authorised representatives". The application was rejected stating that the Association i.e. a Trade Union was not under a contract of service with the debtor and could not file for IRP.

In the matter of *Palogix Infrastructure Pvt. Ltd. v. ICICI Bank Ltd* [28], where the initiation of IRP was done by a power of attorney holder of a financial creditor, the NCLAT accept them as "authorised representatives".

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[24] Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (IRP Regulations), Regulation 9(1)
[25] IRP Regulations, Regulation 9(1)
[26] IRP Regulations, Form B, C, D
[27] [Company Appeal (AT) (Insolvency) No. 82 of 2017]
[28] [Company Appeal (AT) (InsoL) No. 30 of 2017]

Intricacies of Demand Notice and Dispute

The operational creditor must deliver a demand notice to the debtor asking for payment of debts before filing for IRP[29]. The rationale behind the demand notice is to: bring about a degree of seriousness to the consequences of non-payment of debt; and to provide the debtor with time to rectify the debt or otherwise dispute it; as stated by the Tribunal in *Uttam Galva Steels Limited v. DF Deutsche Forfait AG & Anr* [30].

I. Demand Notice

The demand notice can be sent by the operational creditor or any person authorised by the operational debtor to act on their behalf having a position with or in relation with the creditor[31]. This displays the intention of the drafters to facilitate a wide construction of who can send the demand notice.

In the case of *Macquarie Bank Limited v. Uttam Galva Metallics Limited*[32], the NCLAT did not consider the scope wide enough to include advocates as they could not be said to hold any position in the debtor-company. The Tribunal reasoned that the degree of seriousness would get diluted if the demand notice took the form of an advocate notice or a normal pleaders' notice. If the advocate were to be authorised by a resolution passed by the Board of Directors, then the demand notice issued by them would be valid.

II. Dispute

After receipt of demand notice, the corporate debtor has the option to able bring to notice the "existence of a dispute, if any, **and** record of the pendency of the suit or arbitration proceedings filed **before the receipt of such notice or invoice in relation to such dispute**"[33], if they are unable to pay the debt. Despite this conjunction "and", the Apex Court in *Mobilox Innovations Private Limited v Kirusa Software Private Limited* [34] harped on the disjunctive reading of the provision.

In the same case, the Supreme Court stated that the definition given is inclusive but not exhaustive i.e. it will include all disputes pre-existing or pending prior to the receipt of the notice and invoice. Therefore, it is important to check whether the dispute that the debtor presents is not an after-thought triggered by the receipt of demand notice as a mode of invalidating the application[35].

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[29] Code, s. 8(1)
[30] [Company Appeal (AT) (Insolvency) 39 of 2017]
[31] Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (AA Rules), Form 3
[32] [Company Appeals (AT) (Insol) No. 96 of 2017]
[33] Code, s 8(2)(a)
[34] [Civil Appeal No. 9405 of 2017] See also *Essar Projects India Ltd. v. MCL Global Steel Private Limited* [CP No. 20/1 & BP/NCLT/MAH/2017]
[35] ibid (n 34)

In *M/s Annapurna Infrastructure Pvt. Ltd.* v. *SORIL Infra Resources Ltd.*[36], the disputing parties had been involved in arbitration proceedings over the debt between them. After the arbitral award had been finalised, the creditor sent a demand notice under the Code. The debtor disputed the notice by pointing out their intention to institute appeal proceedings under Arbitration Act, 1996. Technically however, no appeal proceedings were pending before or on the date of issue of demand notice. The Tribunal upheld the spirit of the law rather than the letter and rejected the application filed. Despite the absence of any pre-existing disputes, the debtor's right to appeal under the Arbitration Act was protected.

This decision deters future applicants from filing multiple proceedings under various legal forums so as to discourage attempts of forum shopping. This dichotomy in orders portrays the importance of proper confirmation of documentation; analysis of the unique facts of the case and nature of the dispute or record of proceeding being put forth by the debtor.

However, to what extent can the dispute put forth by the debtor be analysed by the AA? It is important to point out that in the original draft of the Code, a dispute was defined as "bona fide suit or arbitration proceeding." The omission of the adjective "bona fide" can be construed as an attempt to reduce the onus on the AA.

The Apex Court in *Mobilox Innovations Private Limited v Kirusa Software Private Limited*[37] clarified that the AA only has to check for the existence of the dispute. The litmus test to gauge whether a dispute exists and if its strong enough to bring about rejection of the application is:

- Whether a plausible contention has been made which can further be investigated
- Existence of dispute, in fact; it must not be illusory, spurious, hypothetical or frivolous
- It is not the obligation of the AA to reason out whether the arguments made by the debtor would succeed in law or not;
- The AA is not obligated to examine the merits of the dispute; unless the dispute is glaringly flawed or lacks evidence

[36] [Company Appeal (AT) (Insolvency) No. 32 of 2017]
[37] [Civil Appeal No. 9405 OF 2017]

If the dispute raised is otherwise legally unsound, the duty to adjudicate upon that would be on the courts or the arbitrators as the case maybe. On this basis, the Apex Court has settled the boundaries of the duties of the AA with respect to dealing with the dispute raised by the debtor.

Withdrawal Rule

The applicants can withdraw the application as long as they do so before the date of admission by the AA[38]. In the case of *Lokhandwala Kataria Construction Limited v. Nisus Finance and Investment Managers, LLP*[39] the financial creditor applied for withdrawal of the application after private settlement with the debtor. This withdrawal application came after the main application had already been admitted and therefore, the withdrawal request was rejected. With the growing focus on alternate dispute resolution, settlement of an issue between two parties should have been merrily accepted, however, herein it is another instance of confusion regarding the purpose of the Code. The IRP is supposed to be a multi-party endeavour of planning, negotiations and transparency. The provisions of public announcement[40]; call for claims from other creditors; formation of a committee of creditors[41] are snippets of purposive drafting. When the resolution plan is accepted, its effect spreads through plethora of parties and their representatives, not just the creditor and debtor.

Time is of the Essence

The strict adherence to time limits for filing of application reiterates the intent to make the process swifter in order to facilitate ease of business. The process which was recorded to take up 3-4 years on average has been shrunk down to a mere 180+90 days[42]. Why the drafters zeroed in on the quantum of 180 days for the IRP is not known. The AA may choose to extend the process by at most 90 days if it is "satisfied that the subject matter of the case is such that the IRP cannot be completed within 180 days"[43].

It is surely not implausible to imagine that a matter may be too vast to complete in 180 days; the possibility of extension is not an issue, however, the ambiguities with respect to applying for extension must be cleared.

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[38] AA Rules, Rule 8
[39] [Civil Appeal No. 9279 of 2017]
[40] Code, s 15
[41] Code, s 21
[42] Code, s 12(1); 12(3)
[43] ibid (n 42)

The procedural time limits placed on the AA for admitting the application i.e. 14 days[44]; and the time span for the rectification of errors in the application i.e. 7 days[45] was put under the scanner in the case of *M/s Surendra Trading Co. v. JK Jute Mills Co. Ltd & others*[46]. Firstly, the NCLAT opined that the 14 days' time span is just directory i.e. the AA may decide and dispose of an application before as well. This span of 14 days would be counted from the day the AA admits the issue rather than the day of application. The Apex Court affirmed this ruling of the Tribunal and extended the same directory nature to the 7 days period. The Apex Court with apt foresight saw that flexibility with respect to time span would lead to laxity with the rules. Failure to rectify the errors in application can easily be checked by filing a fresh application. To deter this, the Apex Court laid down proper safeguards to hold the parties accountable to the usual time span. The fresh applications would have to be attached with affidavits giving reasons for failure to rectify errors during the assigned time span. If the affidavit is not able to satisfy the AA, it would be grounds enough for rejection of application. This watchdog approach should be applied to extension of IRPs as well in order to uphold the time managed feature of the Code.

Moratorium

After the acceptance of IRP, the AA will declare a period of moratorium to ensure that proceedings take place calmly, without outside encumbrances[47]. The moratorium protects the debtor from overburdening legal obligations during the IRP, by the provision of barring institution or continuation of suits and other proceedings[48]; and preventing harassment from third parties like owner or lessor of the property in possession of or owned by the debtor[49]. The moratorium cannot be used to stop the transfer of essential goods to the debtor[50]. At the same time, the debtors are barred from manipulating, transferring, disposing or alienating its property, assets or securities[51].

On literal reading of the provision, it is clear that the scope of that actions that can be taken under moratorium is not exhaustive. Also, the phraseology of the provisions can be considered wide and ambiguous.

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[44] Code, s 7(4); 9(5); 10(4)
[45] ibid (n 44)
[46] [Civil Appeal No. 8400 of 2017]
[47] Code, s 13
[48] Code, s 14(1)(a)
[49] Code, s 14(1)(d)
[50] Code, s 14(2)
[51] Code, s 14(1)(b)

I. Effect of Moratorium

The phrase: "prohibiting…. the institution …. continuing of pending suits" brings doubt as to whether the suits get suspended or stayed during moratorium. Due to the understanding that moratorium is intended to be a temporary incubation period for IRPs, it may be understood as an order that suspends the pending suits and proceedings. However, further legal discussion is surely required to settle this issue.

II. Any Court

The phrase "any court of law" may include every court in the territory of the country. In the matter of *Canara Bank v. Deccan Chronicle Holdings Limited*[52], the NCLAT upheld the grammatical meaning of the phrase and held that High Courts and Supreme Court were not excluded from the effect of moratorium.

Neither will the moratorium have any impact on the continuation of any suit in foreign jurisdictions as held in the case of *State Bank of India, Colombo v. Western Refrigeration Pvt. Ltd.*[53]; wherein a petition filed by the debtor in the High Court of Colombo was considered free from the effects of the moratorium imposed due to IRP in India.

III. Any Judgement

However, the construction of the phrase "any judgement…" has not been done literally. Even though money suits and suits of recovery filed under the original jurisdiction of the High Court can still be barred by moratorium, writ petitions filed under Article 32 at the SC; Article 226 at the HC and orders passed under Article 136 would not affected by this order[54].

This form of reasoning portrays that provisions cannot be allowed to run so wide as to suspend cases unrelated to the IRP itself. Ejusdem generis must be applied to confine the ambit of this provision to the task of maintaining a period of calm during the proceedings by prohibiting the development of suits which could impact the financial positions of the debtor and/or of its assets and liabilities. However, does this mean that the financial position of the debtor should be protected in situations where moratorium could cancel other statutory liabilities or law and order?

Dishonour of cheques proceedings under the Negotiable Instruments Act, is one such example where these ambiguities arise. Proceedings under Section 136 of the NI Act is a matter where the

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[52] [Company Appeal (AT) (Insolvency) No. 147 of 2017]
[53] [2017 (7) TMI 110]
[54] ibid (n 52)

primary liability lies on the corporate debtor as cheques are issued on their name. Moratorium frees the debtor of the criminal liabilities and the same shifts to the directors of the company. If directors of the company become personally liable for the charges, the main purpose of the moratorium becomes redundant as the period of calm for the parties is broken.

Similarly, it must be clarified if proceedings regarding determination of tax liabilities or simply criminal proceedings of fraud, etc will also be affected during the moratorium as they all have the potential to affect the financial position of the corporate debtor. In addition, if the intent is to maintain the status quo of financial situations, should the negative effect be patent and or will latent, eventual or potential effects also be barred by the order.

IV. Its Properties

The phrase – "Its properties" is unclear as to which property and asset could be confined within this temporary embargo.

In the case of *Schweitzer Systemtek India Pvt. Ltd. v. Phoenix ARC Pvt. Ltd. and Ors.*[55], after the declaration of the moratorium, property held by the guarantor of the debtor was seized and attached in pursuance of the IRP. The NCLAT did not care for such an open-ended reading of the phrase and reasoned that the order only referred to the property and assets held by the debtor.

This case is not only a precedent against the open-ended interpretation of this phrase, but it can also curtail the influence of moratorium into the rights of guarantors. However; sticking to the literal interpretation of the statute, the NCLAT in *Mr. V. Ramakrishnan Vs. M/s Veesons Energy Systems Pvt. Ltd. & State Bank of India*[56] constructed the provisions of moratorium in a more purposive manner. In this case, the Tribunal barred the financial creditors from proceeding against the guarantor as this action if successful could create a new charge against the debtor in favour of the guarantor. This would violate the purposes of the order by encumbering the legal right or interest of the debtor.

In reply to a writ filed by the guarantors in *Sanjeev Shriya v. State Bank of India & Ors* [57], the Allahabad High Court preferred the purposive construction of the statute; conforming with the Tribunal in *Veesons Energy*. The guarantors had filed a writ for stay of proceedings in the DRT active during

[55] [Company Appeal (AT) (Insolvency) No. 129 of 2017]
[56] [Company Appeal (AT) (Insolvency) No. 116 of 2017]
[57] [Civil Writ Petition No. 30285 of 2017]

the moratorium. The High Court accepted the plea in order to protect the 'fluid stage' of the IRP from multiple proceedings at different forums which could hinder rights of the debtor.

It's tough to decide which of the above-mentioned approach is the legally sound option, given that the orders were declared on the perusal of the unique facts and circumstances. It cannot be denied that the strict interpretation made in Schweitzer was sound in the sense that it put a stop to the open-ended usage of a vague and wide phrase, which could allow seizure and attachment of property of anyone even remotely related to the corporate debtor financially. However, the latter cases questions whether proceedings against guarantors; for the purpose of reimbursement; is beneficial during the IRP.

Conclusion

After elucidating the observations made and the tracing the interpretative journey of the IRP provisions, the author would like to conclude the research paper with the following recommendations:

1. The ambiguity with respect to time-barred debts must be cleared; applicability of Limitation Act must either be upheld or explicitly denied. The argument laid down and accepted in *Neelkanth Township and Construction Pvt. Ltd. v. Urban Infrastructure Trustees Ltd.*[58] is highly erroneous and needs quick upheaval. If this argument is enough to get rid of obligations under any Statute, legislators would be free of the checks and balances under other Acts and would draft illogical, repugnant or even illegal provisions. The non-obstante clause[59] would also become redundant. Additionally, it cannot be said that the Limitation Act is overridden by the non-obstante clause as there doesn't seem to be any inconsistency between the Acts.
2. The purpose of the Code must be kept in mind before succumbing to the pleas of homebuyers. The author opines out that the priorities of the IRP and the homebuyers are starkly different. The relief that homebuyers seek would not be the main priority of the multi-party negotiations of the IRP. The author accepts and reiterates the purposive construction done by the Tribunal in *Pawan Duber and Another v. J.B.K. Developers Private Limited*[60]
3. The author humbly strains from *Macquarie Bank Limited v. Uttam Galva Metallics Limited*[61] which excluded advocates from the set of persons authorised to send demand notice to the debtor. If the purpose of the demand notice is to create an aura of seriousness around the default, the

[58] [Company Appeal (AT) (Insolvency) No. 44 of 2017]
[59] Code, s 238
[60] [C.P. No. (IB)-19 (PB)/2017]
[61] [Company Appeals (AT) (Insol) No. 96 of 2017]

author believes that receipt of demand notice from an advocate would be able to better achieve that result. Additionally, the author is of the view that an advocate is a person authorised to act on the creditor's behalf and states that instead of authorising an advocate, the Board of Directors can instead send the notice themselves.

4. The author is of the opinion that the ambiguities with regard to dispute raised by the debtor after receipt of demand notice has been cleared by the clarifications of the Apex Court in *Mobilox Innovations Private Limited v Kirusa Software Private Limited*[62]. The author accepts and reiterates the same.
5. Penalties and safeguards should be put in law for the strict exercise of Section 12(3). The foresight shown by the Apex Court in *M/s Surendra Trading Co. v. JK Jute Mills Co. Ltd & others*[63] with respect to the 7-day period, must also be applied to the provisions allowing extension of IRPs. It is not implausible to imagine that parties can become lax and may misuse the extension option. The drafters must safeguard this accommodating provision with penalties or strengthen it with some statutory requirements. It is important for the AA and the legal diaspora to create precedents which place a heavy burden of proof on the applicants applying for this extension and also impose penalties on people shown to misuse the recourse given by unnecessarily extending the IRP beyond 180 days.
6. The legal provisions of the moratorium under Section 14 should be interpreted to deter the proceedings against guarantors in order to ensure calm period of proceedings. Not only will proceedings against guarantors lead to multiplicity of suits, it will also hinder the calm period that the Code wants to strictly ensure by causing encumbrances to the legal rights of the debtor. Lastly, if creditors become more concerned about getting back their debts through the contract of guarantee it erases all the efforts being taken to form the Committee of Creditors and brings to question as to why IRPs were instituted in the first place.

[62] [Civil Appeal No. 9405 of 2017]
[63] [Civil Appeal No. 8400 of 2017]

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