Insolvency & Bankruptcy Code

Smart notes with procedure & judgments

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It is said, "Knowledge is Power". This quote has versatile shades of application and holds good in several contexts. Knowledge has enabled us make all the advancements in the science and techn ple to achiev perior and earth. Know learly distin imals. Without knowledge, you cannot be successful in life. To grow in one's career, gaining as much knowledge as possible is important. Knowledge does not pertain to science and technology and the fields you study in books. Knowledge is also very important to shape your personality and perfect our behavior and dealings with people. You need to understand ourselves, our strengths and weaknesses. You need to learn the art of life. You must make best judgments and decide on the right course that will let us move successfully.

- Success

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Introduction

The **Insolvency and Bankruptcy Code, 2016** (**IBC**) is the bankruptcy law of India which seeks to consolidate the existing framework by creating a single law for insolvency and bankruptcy. It was introduced amidst various other reforms introduced by the Government, with focused emphasis on the "Ease of Doing Business in India". Ease of Doing Business not only means speedy and easy entry, and ease of carrying out operation of businesses; it also covers in its ambit, the ease of exit. The Insolvency and Bankruptcy Code, 2015 was introduced in Lok Sabha in December 2015. It was passed by Lok Sabha on 5 May 2016 and by Rajya Sabha on 11 May 2016. The Code received the assent of the President of India on 28 May 2016. Certain provisions of the Act have come into force from 5 August and 19 August 2016. The Code has been amended several times till June, 2020. The bankruptcy Code is a one stop solution for resolving insolvencies which previously was a long process that did not offer an economically viable arrangement. It was done to consolidate all the existing laws related to insolvency in India and to simplify the process of insolvency resolution.

This Code applies to a company registered under the Companies Act 1956, a Limited liability partnership, Partnership firms and Individuals. Under the Insolvency and Bankruptcy Code, any financial creditor or an operational creditor can initiate corporate insolvency process against a corporate debtor when the corporate debtor commits a default in repayment of debts. Default involves non repayment of debt when it has become due and payable.

Hence, when any financial or operational creditor is not honoured duly, he can initiate the insolvency proceedings against the corporate debtor.

IBC lays down strict time frame for each and every process for resolution process right from admission of application, appointment of Interim Resolution Professional, lodging of claim, formation of Creditors Committee, consideration of resolution plan and submission of plant to adjudicating authority and its approval thereof. To effectively address the issues of participation of various stake holders, the Code has divided creditors into two categories of **'Financial Creditors'** and **'Operational Creditors'.**

The IBC has 255 sections and 11 Schedules. IBC is divided into 4 parts i.e.

- Preliminary (Part I);
- Insolvency Resolution and Liquidation of Corporate Persons (Part II);

- Insolvency Resolution and Liquidation of Individuals and Partnership Firms (Part III);
- Regulation of insolvency professionals, agencies and information utilities (Part IV).

"As per the data provided by National Company Law Tribunal (NCLT), total 19,771 cases were pending with NCLT benches on 30.09.2019, which include 10,860 cases under Insolvency and Bankruptcy Code (IBC), 2016."

What is Insolvency & Bankruptcy Code?

- The Insolvency and Bankruptcy Code, 2016 (IBC) is *the **bankruptcy law of India** which seeks to consolidate the existing framework by creating a **single law for insolvency and bankruptcy.***
- Insolvency and Bankruptcy Code, 2016 is considered as one of the biggest insolvency reforms in the economic history of India.
- This was enacted for reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of the value of assets of such persons.
- IBC resolve claims involving insolvent companies. This was intended to tackle the bad loan problems that were affecting the banking system. Two years on the IBC has succeeded in a large measure in preventing corporates from defaulting on their loans. The IBC process has changed the debtor-creditor relationship. A number of major cases have been resolved in two years, while some others are in advanced stages of resolution.

The IBC envisages filing of Corporate Insolvency Resolution Process (hereinafter referred to as "CIRP") by the Corporate Debtor, Financial Creditor and Operational Creditor. However, in neither of the said proceedings, time frame for filing of CIRP has been provided. It is imperative to point out that the IBC is silent on the time period within which a petition for insolvency resolution is required to be filed. Some landmark cases in the Supreme Court related to IBC will also be examined and hence will facilitate in giving us a clear overview of whether or not the enactment has in anyway been detrimental to the well being of the corporate dealing or if it has indeed been a game changer and has eased the burden as well as quickened the pace of disposing off the cases and whether due to the power shift, it has given an equal authority to the creditor to file for liquidation if he has been a defaulter

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Need of Insolvency & Bankruptcy Code

There was no single law dealing with insolvency and bankruptcy in India. The liquidation of companies and individuals were handled under various Acts (around 12 in number). Some of them were:

- Presidency Towns Insolvency Act, 1909
- The Provincial Insolvency Act, 1920
- Sick Industrial Companies Act
- The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (also known as the Sarfaesi Act)
- Companies Act 2013
- Recovery of debts due to banks and financial Institutions Act

It led to an overlapping jurisdiction of different authorities like High Court, Company Law Board, Board for Industrial and Financial Reconstruction (BIFR) and Debt Recovery Tribunal. This overlapping jurisdictions and multiplicity of laws made the process of insolvency resolution very cumbersome in India.

As per the World Bank data, **it takes an average 4.3 years to wind up a company in India.** It is easier to start a business than to exit it. The new Insolvency and Bankruptcy Code seeks to cut it to 1 year.

The new Code seeks to help banks and other creditors from recovering their loans from the bankrupt companies in a timely and efficient way.

Aims & Objective of IBC

The Code applies to companies, partnerships and individuals. It provides for a time-bound process to resolve insolvency. When a default in repayment occurs, creditors gain control over debtor's assets and must take decisions to resolve insolvency within a 180-day period. To ensure an uninterrupted resolution process, the Code also provides immunity to debtors from resolution claims of creditors during this period. The Code also consolidates provisions of the current legislative framework to form a common forum for debtors and creditors of all classes to resolve insolvency. Under IBC debtor and creditor both can start 'recovery' proceedings against each other.

The main objective of this Code is:-

- Consolidate and amend all existing insolvency laws in India.
- To simplify and expedite the Insolvency and Bankruptcy Proceedings in India.
- To protect the interest of creditors including stakeholders in a company.
- To revive the company in a time-bound manner.
- To promote entrepreneurship.
- To get the necessary relief to the creditors and consequently increase the credit supply in the economy.
- To work out a new and timely recovery procedure to be adopted by the banks, financial institutions or individuals.
- To set up an Insolvency and Bankruptcy Board of India.
- Maximization of the value of assets of corporate persons.

Advantage to lenders for resorting to IBC

- Creditors in control as most decision making with the lenders.
- Time bound and quick solution for stressed and NPA accounts.
- Change of management possible.
- Brings financial lenders to a platform – enabling quick decision making and arriving at consensus quickly.
- Prepare and examine resolution plan by professionals appointed by creditors ensuring fearless decision making.
- Final approval by NCLT (a legal entity) which ensures accountability and vigilance.
- Fair chance to viable and sustainable entities for time bound revival. In case of unviable accounts, faster, transparent and smooth liquidation process.
- Clear and fair distribution of funds in case of liquidation. Government / Statutory dues do not get priority.
- Protection of assets of secured borrowers with maximization of realization.
- Positive support from government for realization and resolution of NPAs.

Advantage to Borrowers to approach NCLT

- There is no need to pay Court Fee in NCLT (which is 5% or more in courts)
- In Courts generally it takes 3-4 years but not in NCLT because in NCLT we don't approach for recovery of money.
- Less chances for settlement in less amount.
- Provides for time bound resolution forcing lenders to take a decisive action.
- A Resolution plan approved by NCLT has legal sanction and is binding on all stakeholders.
- Transparent process under judicial supervision removes investigation and vigilance fear from the lender's perspective which is expected to improve decision making.
- Preempt all creditors, legal cases and other recovery actions during moratorium period.
- Not only loans, but all types of debt, including operational creditors and government dues can be restructured/realigned/reduced under the Code.
- The Borrower has the option of applying himself under the code in which case borrowers' proposed IP would be appointed as IRP.
- Company to work under the control of IRP/RP who are supposed to preserve the economic value of the company as a going concern entity.
- It can be used as a measure of last resort when other options like CDR, SDR, S4A have been exhausted.
- Attracting investor (financial / strategic/ JV Partner) would be easier particularly in case of unlisted companies.
- The Possibility of raising additional finance as the same will have priority as it will form part of CIRP cost.

Important Definitions & Concepts

- **Insolvency –**
  legal terms, insolvency is a state where the liabilities of an individual or an organization exceeds its asset and that entity is unable to raise enough cash to meet its obligations or debts as they become due for payment. Technically insolvency could be a financial state when the value of total assets of an individual or a group exceeds its liabilities.

  Insolvency is the inability of a person or companies to pay their bills as and when they becomes due and payable. It is a situation where individuals or companies are unable to repay

their outstanding debt. If insolvency cannot be resolved, assets of the debtor may be sold to raise money, and repay the outstanding debt.

The term Insolvency is a state whereas Bankruptcy is the effect of that act. In legal terms, insolvency is a state where the liabilities of an individual or an organization exceeds its assets and that entity is unable to raise enough cash to meet its obligations or debts as they become due for payment. When an individual is unable to pay off his liabilities and debts then he generally files for bankruptcy. Here the entity asks for help from government to pay off his debts to his creditors.

The main reasons behind insolvency are primarily poor management and financial constraints. This is much more prevalent in smaller companies. Some common rationale for insolvency are:-

a) Bad debt- obviously money owned by customers
b) Management- failure to acquire adequate skills, imprudent accounting, lack of information system
c) Finance- loss of long term finance, over gearing or lack of cash flow
d) Other- for examples excessive overheads etc.

- **Bankruptcy –**

Bankruptcy is when a person or company is legally declared incapable of paying their due and payable bills.

When an individual is unable to pay off his liabilities and debts then he generally files for bankruptcy. Here is asks for help from government to pay off his debts to his creditors. Bankruptcy could of two types, namely, reorganization bankruptcy and liquidation bankruptcy. Usually people tend to restructure the repayment plans to pay them easily under reorganization bankruptcy. And under liquidation bankruptcy, the debtor tends to sell of certain of their assets to pay off their debts for their creditors.

The Black's Law Dictionary defines the work *"Bankrupt"* as the state or condition of a person who is unable to pay its debt as they are or has become, due. The condition of one whose circumstances are such that he is entitled to take the benefit of the federal bankruptcy laws. The term includes a person against whom an involuntary petition has been filed, or who has filed a voluntary petition.

Under bankruptcy law, the condition of a person or firm that is unable to pay debts as they fall due, or in the usual course of trade or business and financial condition such that businesses or persons debts are greater than aggregate of such debtors' property at a fair value.

- **Insolvency Vs. Bankruptcy**

  - Insolvency is not the same as bankruptcy. Insolvency is a state of economic distress, whereas bankruptcy is a court order that decides how an insolvent debtor will deal with unpaid obligations. That usually involves selling assets to pay the creditors and erasing debts that can't be paid. Bankruptcy can severely damage a debtor's credit rating and ability to borrow for years.
  - An individual or company can be insolvent without being bankrupt — especially if the insolvency is temporary and correctable — but not the opposite.
  - Insolvency can lead to bankruptcy if the insolvent party is unable to successfully address its financial condition.
  - Insolvent companies can reverse course by cutting costs, selling assets, borrowing money, renegotiating debt or allowing themselves to be acquired by a larger corporation that agrees to take over the insolvent company's debts in return for control of its products or services.

- **Liquidation –**

  Liquidation is the process of winding up a corporation or incorporated entity.

- **Default –**

  Default means non-payment of debt when whole or any part or installment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be. In IBC, default means failure to pay whole or any part or installment of amount of debt or interest due of minimum Rs.1 Crore. Default amount under section 4 of IBC was Rs.1 Lakh, but after central govt. notification dated 24.03.2020, minimum default amount raised to Rs.1 Crore.

- **Financial Creditor, Operational Creditor & Corporate Debtor –**

  It means any person to whom a 'financial debt' and 'operational debt' respectively, is owed and includes a person to whom such debt has been legally transferred or assigned to. By amendment in IBC, Homebuyers Recognized as Financial Creditors giving them due to

representation in the Committee of Creditors (CoC). Thus, now home buyers will be an integral part of the decision making process. The Code differentiates between both, financial creditors are those whose relationship with the entity is a pure financial contract, such as loan or debt security and therefore is debt, along with interest, if any, which is disbursed against the consideration for the time value of money, whereas Operational creditors are those whose liabilities from the entity comes from a transaction on operations. Operational Creditors includes government & employees or workmen. A corporate debtor is the Corporate Person who owes a debt to any person.

- **Corporate Applicant –**

  Corporate Applicant means
  a) Corporate Debtor, or
  b) A Member or the partner of the corporate debtor who is authorized to make an application for the CIRP under the constitutional documents of the corporate debtor, or
  c) An individual who is in-charge of managing the operations and resources of the corporate debtor, or
  d) A person who has control and supervision over the financial affairs of the corporate debtor;

- **Committee of Creditors (CoC) –**

  The committee of creditor formed under section 21 of the code and shall consist of all the financial creditors of the corporate debtor. The interim resolution professional after collation of claims and assessing the information of the debtor constitute a committee of creditors. There voting share shall be determined on the basis of the financial debt owed to them. Otherwise provided in the code, all the decisions of the committee of creditors shall be taken by a vote of not less than 51%. It shall require a resolution professional to furnish any financial information in relation to the corporate debtor during the resolution process.

- **Moratorium –**

  The term Moratorium is nowhere defined in the Code, however, the term in basic parlance means, *"a stopping of activity for an agreed amount of time"*. Under the Code, Moratorium is actually described as a period wherein no judicial proceedings for recovery, enforcement of security interest, sale or transfer of assets, or termination of essential contracts can be instituted or continued against the Corporate Debtor.

The Adjudicating Authority [National Company Law Tribunal], whilst admitting a petition against the Corporate Debtor is required to declare the moratorium period as described under Section 14 of the Code.

The main purpose of declaring the moratorium period is to keep the Corporate Debtor's assets intact during the CIRP, which otherwise may be attached by any competent court of law during the pendency of proceedings against the Corporate Debtor. In other words, the moratorium ensures that the time-bound completion of the CIRP and also that the corporate debtor may continue as a going concern.

Apart from staying the pending proceedings, the moratorium also casts a bar upon the directors of the company, who cannot use or take the amount available on the date of declaration of the moratorium in the company. If the moratorium period is not declared, the insolvency process will be frustrated which in turn will fail the objective of the Code.

Punishment - Under Section 74 of the IBC, officials of the corporate debtor who violate provisions of moratorium can be imprisoned for a minimum of three years, which may be extended up to five years. Such officials will also be fined a minimum of Rs 100,000 but not more than Rs 300,000. Officials of creditors who knowingly and willfully authorize or permit such contravention can be jailed for a minimum of one year, with a maximum tenure of five years. Such officials will also be fined a minimum of Rs 100,000, with the maximum penalty of up to Rs 10 million.

Further, the Hon'ble National Company Law Appellate Tribunal, vide its recent judgment has also held that in case any Director withdraws money from the account of the company during the moratorium period, he will be held liable for the criminal offences of misappropriation and breach of trust.

- **Resolution Applicant –**

As per the Code, a Resolution Professional has to appoint a Resolution Applicant who in-turn is required to prepare different resolution plans for different stakeholders in corporate insolvency resolution process. The code defines the resolution applicant under section 5(25) "as a person who submits a resolution plan to insolvency professional". A resolution plan specifies the details of how the debt of a defaulting debtor can be restructured.

- **Corporate Insolvency Resolution Process (CIRP) -**
  The creditor's committee will take a decision regarding the future of the outstanding debt owed to them. They may choose to revive the debt owed to them by changing the repayment schedule or sell (liquidate) the assets of the debtor to repay the debts owed to them. If a decision is not taken in 180 days, the debtor's assets go into liquidation.

The Insolvency & Bankruptcy Code ecosystem

- **Insolvency and Bankruptcy Board (IBBI) -**
  IBBI is an apex body governing Insolvency and Bankruptcy Code. It consists of representatives of Reserve Bank of India, and the Ministries of Finance, Corporate Affairs and Law. It is setting up the necessary infrastructure and accredits Insolvency Professionals (IPs) and Information Utilities (IUs).It manages and controls Insolvency Professionals, Agencies and Information Utilities set up under the Code.

- **Insolvency Professionals (IPs)-**

  IPs are licensed professionals registered with IBBI who act as Resolution Professional/ Liquidator/ Bankruptcy trustee in an insolvency resolution process. A Specialized category of officers is created to administer and enforce the resolution process, manage the affairs of the corporate debtor and share information with creditors to help them in decision-making. The adjudicating authority shall appoint an interim resolution professional within 14 days from the insolvency commencement date. He shall collect the information relating to the debtor's assets, finances and operations, take its control and custody, receive and collate claims and constitute a committee of creditors. The personnel i.e. managers and employees of the corporate debtors shall extend cooperation to insolvency professional. He shall make efforts to preserve the value of corporate debtor's property and manage the operations as a going concern. Within 7 days of the constitution of the committee of creditors, they should by a vote of 66% resolve to appoint an interim resolution professional as resolution professional or replace him by another one.

  Some important duties and function of the Insolvency Professional:-

  - To make public announcement of insolvency process in English and local language newspaper.

- To manage affair of the company as a going concern.
- To collect information relating to the assets, finances and operation of corporate debtor for determining the financial position.
- To collect all claims received from creditors and assess them.
- To constitute a committee of creditors etc.
- To appoint to registered valuers to evaluate the assets.
- To coordinate with NCLT and IBBI.

- **Information Utilities -**

Information Utilities would collect, store and distribute information related to the indebtedness of companies. A person registered with the Board as Information Utility i.e. a person to whom the creditors report the financial information of the debt owed to them by the debtors which include debt, liabilities and default.

- **Insolvency Professional Agencies -**

Insolvency Professional Agencies (IPAs) are enrolling insolvency professionals as members. These agencies conduct an examination and certify these insolvency professionals as well as defines their code of conduct for their duties and performance.
Currently, there are three IPAs:
(i) ICSI Insolvency professional Agency
(ii) Indian Institute of Insolvency Professionals of ICAI
(iii) Insolvency professional Agency of Institute of cost Accountants of India

- **Adjudicating Authorities (AA) -**

Adjudicating Authorities (AA) have the exclusive jurisdiction to deal with insolvency related matters.
- National Company Law Tribunal (NCLT) is the AA for Corporate and LLP insolvency.
- Debt Recovery Tribunal (DRT) would be AA for individual or partnership Firms Insolvency.

A person aggrieved by the order of the Adjudicating Authority under Part III of IBC (insolvency resolution and bankruptcy for individuals and partnership firms), viz. DRT, may prefer an appeal to the Debt Recovery Appellate Tribunal ("DRAT") under Section 181. Thus, statutory forums in the form of NCLAT and DRAT have been designated as the appellate

authority under IBC for redressal of grievances arising out of an order of the Adjudicating Authority under Part II and Part III of IBC respectively. Further, any person aggrieved by an order of the NCLAT or DRAT may file an appeal to the Supreme Court on a question of law arising out of such order. Thus, IBC provides for a three-tier adjudicatory mechanism, for dealing with all issues that may arise in relation to the insolvency resolution and liquidation for corporate persons and insolvency resolution and bankruptcy for individuals and partnership firms, namely (i) NCLT/ DRT; (ii) the NCLAT/ DRAT (iii) the Supreme Court.

It shall be the National Company Law Tribunal (NCLT) having the territorial jurisdiction over the place where the registered office of the corporate person is located. Any insolvency resolution, liquidation or bankruptcy proceedings shall stand transferred to NCLT. Any person aggrieved by its order can prefer an appeal to the National Company Law Appellate Tribunal (NCLAT) within 30 days of the NCLT order, which in turn can be appealed to the Supreme Court within 45 days of NCLAT order on questions of law arising out of such order. If both the Appellate courts are satisfied about the sufficient cause they may extend the time for appeal by 15 days. No civil court shall have jurisdiction over the matters of NCLT.

Applicability of code

Applies to whole of India including J&K and Ladakh.

Persons covered:-

- ✓ Company
- ✓ Limit Liability Partnership
- ✓ An individual
- ✓ A Hindu Undivided Family
- ✓ A Partnership
- ✓ A Trust
- ✓ Any other entity established under a statute, and includes a person resident outside the India.

Who can approach

Any person whose amount is due with the Company or LLP (minimum amount 1,00,00,000) can approach to **NCLT (National Company Law Tribunal)** under IBC (Insolvency and Bankruptcy Code) 2016 for Liquidation of that Company / LLP. Examples are written as following.

1. **Financial/ Operational Creditors**
2. **Corporate Debtor**
3. **Corporate Applicant**
4. **An Employee**: A person who was / is working in a Company / LLP may file a petition if his dues are 1,00,00,000 or more.
5. **Service Provider:** Any service provider who has given the services and raised the Invoice but unable to recover the dues may file a petition if his dues are 1,00,00,000 or more. *(After central govt. notification dated 24.03.2020)*
6. **Goods Provider:** Any Goods Provider who has delivered the goods and raised the Invoice but unable to recover the dues may file a petition if his dues are 1,00,00,000 or more. *(After central govt. notification dated 24.03.2020)*

Jurisdiction to file the application before NCLT

Jurisdiction as per the State in which Company (to whom we are filling a suit) is registered. As per that state connected NCLT shall be the jurisdiction to file the petition.
Example is given as below.

1. Arnav who is service provider from Jaipur has given the services to ABC Private Limited Jaipur branch office and the company is registered in Gurgaon. Total Dues are 15,00,00,000.
– Mr. Arnav needs to file petition before NCLT Chandigarh Bench (Because Company is Registered in Gurgaon and connected NCLT bench is in Chandigarh for the state of Haryana)

2. Ankur who is resident of Delhi, South Ex and working in a Company XYZ Private Limited as a manger in Lucknow. Company is registered in Delhi. Total Salary due is 8,00,00,000.
– Ankur needs to file petition before NCLT New Delhi bench (because Company is Registered in Delhi and connected NCLT bench is in Delhi).

Applicability of Limitation Law

At the outset, it may be noted that the law of limitation would apply equally to an applicant's claim as well as claims of other creditor who submit proof of claim before the RP/liquidator. As per the Act, being a general law, the right to sue accrues when the default has occurred and the default should have occurred **not beyond 3 years** from filing of the application.

However, when introduced, the Code did not explicitly provide for applicability of limitation law for matters under the Code- hence the anomaly.

The issue of applicability of the Limitation Act to proceedings under the IBC emerged as a moot point. The same was initially dealt with by the National Company Law Appellate Tribunal (NCLAT) in "*Speculum Plast Private Limited Vs. PTC Techno Private Limited*" and in "*Neelkanth Township and Construction Pvt. Ltd. Vs. Urban Infrastructure Trustees Ltd*" wherein it was held that the Limitation Act will not be applicable to proceedings under the IBC. However, this position left litigants with many unanswered queries. Furthermore, having realized the ambiguity with respect to the applicability of the Limitation Act upon proceedings under the IBC, the Parliament inserted section 238A to the IBC through the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 that took effect on 6th June 2018. This states that the provisions of the Limitation Act will apply to proceedings under the IBC.

238A. Limitation:

The provisions of the Limitation Act, 1963 shall, as far as may be, apply to the proceedings or Appeals before the Adjudicating Authority, the National Company aw Appellate Tribunal, the Debt Recovery Appellate Tribunal, as the case may be."

Furthermore, the Supreme Court in of "*B.K. Educational Services Private Limited Vs. Parag Gupta and Associates*" clarified the applicability of the Limitation Act and held:

> *"27…It is thus clear that since the Limitation Act is applicable to applications filed under Sections 7 and 9 of the Code from the inception of the Code, Article 137 of the Limitation Act gets attracted. "The right to sue", therefore, accrues when a default occurs.* **If the default has occurred over three years prior to the date of filing of the application, the application would be barred under Article 137 of the Limitation Act***, save and except in those cases where, in the facts of the case, Section 5 of the Limitation Act may be applied to condone the delay in filing such application."*

Conflict between Supreme Court & NCLAT

The Supreme Court in "*Gaurav Hargovindbhai Dave Vs. Asset Reconstruction Company (India) Ltd.*, September 2019" held that the proceedings under section 7 of the IBC are *"an application"* and not *"suits"*; thus they would fall within the residuary Article 137 of the Limitation Act and the right to apply will arise from the date of default. It was again reiterated by the Supreme Court in "*Jignesh Shah Vs. Union of India*, September 2019" that the right to

apply under the IBC will be from date of default and not from the date of enactment of the IBC, i.e., 1st December 2016.

While the abovementioned judgments were pronounced by the Supreme Court on 18th September 2019 and 25th September 2019 respectively, the NCLAT has once again stoked uncertainty by passing a judgment on 26th September 2019, whereby in "*B. Prashanth Hegde Vs. SBI*, 26th September 2019" it applied article 137 and held that the right to apply under section 7 of IBC will accrue on 1st December 2016, i.e., when IBC was enacted. The NCLAT also held that since the banks have initiated proceedings under provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (SARFAESI Act), the period of limitation will also be governed by articles 61 and 62 of the Limitation Act. However, this reasoning of the NCLAT is contrary to the observation of the Supreme Court in *Jignesh Shah*, wherein the Court stated that only the date of default will be relevant for the purpose of winding up proceedings (and, by extension, to IBC applications). Having noticed the divergent view of the NCLAT, the Supreme Court in "*Sagar Sharma Vs. Phoenix ARC Pvt. Ltd.*, 30th September 2019" has made it loud and clear that the judgment passed by the Supreme Court should be taken in letter as well as spirit and hence NCLAT cannot, time and again, apply Article 62 to the applications made under the IBC.

However, even after such remarks from the Supreme Court, as recently as on 3rd December 2019, the NCLAT in "*Sesh Nath Singh Vs. Baidyabati Sheoraphuli Cooperative Bank Ltd*" held that time spent in proceedings under the SARFAESI Act can be condoned by the virtue of section 14 of the Limitation Act for the purpose of filing an application under the IBC. It is pertinent to mention here that under section 14 only such time can be condoned that was spent in *bona fide* proceedings due to defect of jurisdiction. The NCLAT failed to notice that proceedings under the SARFAESI Act before the enactment of IBC are not without defect of jurisdiction and, therefore, the same cannot be used to condone the delay for filing a petition under IBC.

Conclusion

In view of the catena of judgments passed by the NCLAT and Supreme Court, it can be ascertained that Article 137 will apply to proceedings filed under the IBC. However, the only point that arises for the consideration is the interpretation of the term "*when the right to apply accrues*", since the Supreme Court and NCLAT have adopted opposite views regarding the same.

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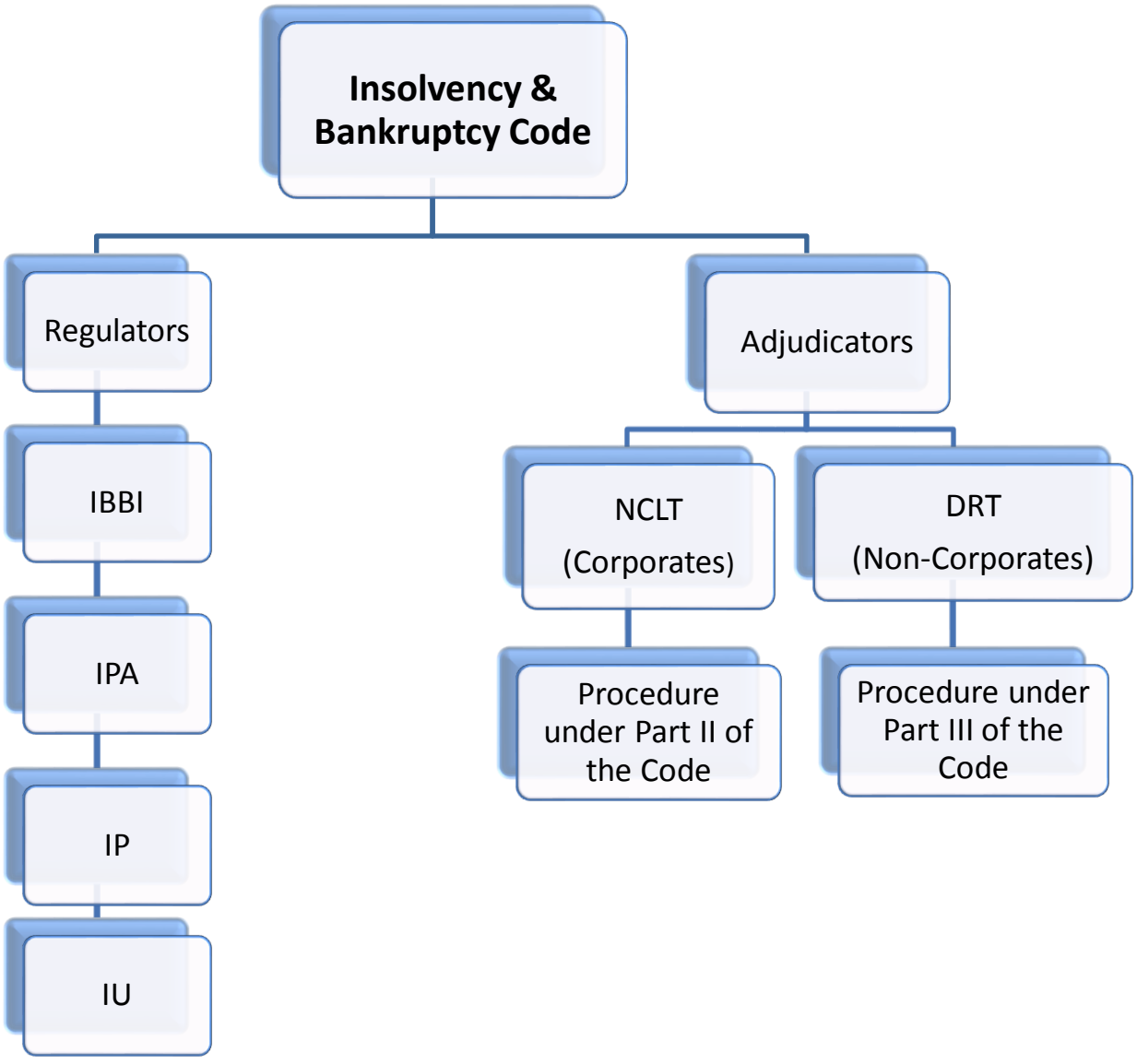
However, the Supreme Court has affirmed that the right to apply accrues from the *first date of default* irrespective of the fact that the IBC was enacted in 2016. It is also pertinent to mention that the Supreme Court in the abovementioned judgments set aside the decision of the NCLAT on the applicability of Article 137 from the date of enactment of IBC, but yet the NCLAT is applying and referring to different provisions of Limitation Act such as section 14 and Article 61 to effectively bypass the ruling of the Supreme Court one way or another. Hence, it was substantiated in clear words that the Limitation Act, 1963 is applicable to the Insolvency and Bankruptcy Code, 2016.

Insolvency & Bankruptcy Code – Framework



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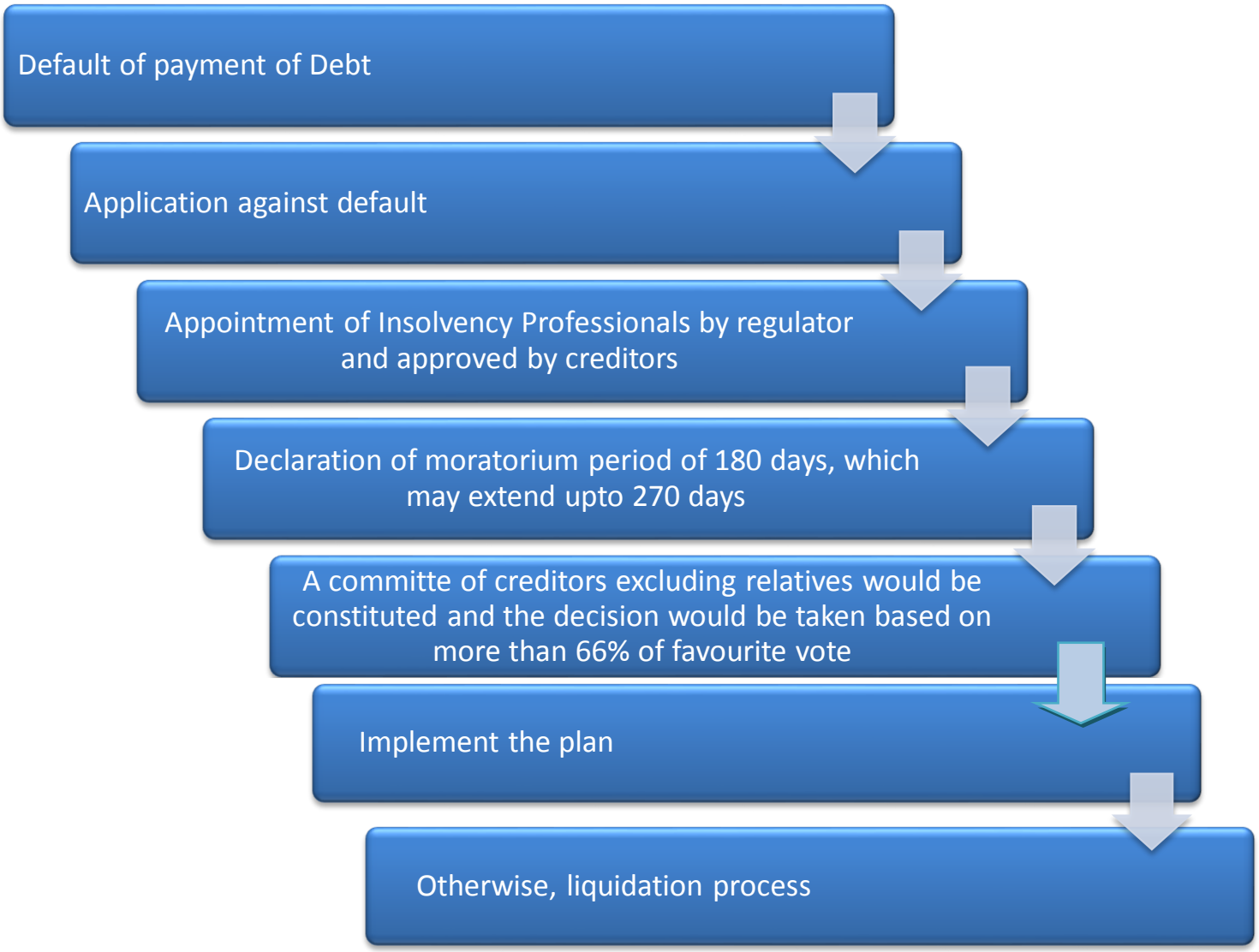
Procedure of CIRP



Explanation of Procedure

- Where any Corporate Debtor commits a default, a Financial Creditor u/s 7, Operational Creditor u/s 8 or the Corporate Applicant u/s 10 of the Code itself may initiate corporate insolvency resolution process. A creditor may, on the occurrence of default, deliver a demand notice of unpaid operation debtor copy of invoice demanding payment of amount involved in the default to the corporate debtor in such form and manner as may be prescribed. A Financial Creditor either by itself or jointly with other Financial Creditors may file an application against the Corporate Debtor before the Adjudicating Authority, when a default has occurred.

However, as per Section 11 of the Code, a Financial Creditors shall not entitle to make an application to initiate CIRP who has violated any of the terms of resolution plan which was approved 12 months before the date of making of an application.

- The Financial Creditor is required to file an application in "Form 1" of Insolvency and Bankruptcy (Application to Adjudicating Authority, rules, 2016). The Financial Creditor along with the application file a Demand Draft of Rs. 25,000/– in favour of " Pay and Accounts Officer, Ministry of Corporate Affairs" payable at Delhi and Written Consent of Insolvency Resolution Process in Form 2 of Insolvency and Bankruptcy (Application to Adjudicating Authority, rules, 2016) along with verifying affidavit in Form No.- NCLT 6.

- The Financial Creditor is required to propose the name of *'Interim Resolution Professional' at* the time of filing Application. Date of Commencement of Corporate Insolvency Resolution Process- With effect from date of admission of application by NCLT. The plea can be accepted or rejected in a maximum time period of 14 days. The NCLT/ DRT must find the existence of default within those 14 days.

- When the initiation is done by Financial Creditor, the authority within 14 days of the receipt of application ascertain the existence of default and after satisfaction about it as well as no pending disciplinary proceeding against the insolvency professional proposed to be appointed, by order admit the application and communicate to the parties. When the initiation is done by Operational Creditor, he is required to send a demand notice or invoice demanding payment of the default to the Corporate Debtor, who in turn is required to deliver the record of any dispute, suit or arbitration proceedings or the proof of paid amount within 10 days. After this period, he can file an application with the adjudicating authority, who within 14 days of the receipt of it may admit or reject the application.

- When the application is accept, then it will issue a moratorium under section 13(1) (a) of the Code which means all the pending suits before the corporate debtor will be stayed and no fresh suits can be filed against it. There shall be a public announcement of the Corporate Insolvency resolution process by the IRP, containing the name and address of the Corporate Debtor, name of the authority with which the Corporate Debtor is incorporated, last date of submission of claims, details of Interim Resolution Professional, penalties for false or misleading claims and the date on which CIRP shall close (section 15 of the Code).

- The authority will also appoint the Interim resolution professional under section 16 of the Code, for drafting a plan of resolution within a period of 180 days (that can be extended by 90 days), that will form the Committee of Creditors (CoC) under section 18(c) of the Code which shall constitute of only the Financial Creditors as given under section 21(2) of the Code, for taking decisions regarding insolvency resolution. In other words, CIRP must be completed within 180 days from 'insolvency commencement date'. One time extension not exceeding 90 days can be granted. If the Adjudicating Authority is satisfied that CIRP cannot be completed within 180 days, then it may grant extension upto 90 days. For startups and small companies the resolution time period is 90 days which can be extended by 45 days.

- The Committee of Creditors (CoC) will take a decision regarding the future of the outstanding debt owed to them. They may choose to revive the debt owed to them by changing the repayment schedule, or sell (liquidate) the assets of the debtor to repay the debts owed to them. If a decision is not taken in 180 days, the debtor's assets go into liquidation. If the Committee of Creditors decides to revive, they have to find someone willing to buy the firm. The creditors also have to accept a significant reduction in debt. The reduction is known as a "*haircut*". They invite open bids from the interested parties to buy the firm.

- The CoC may either decide to restructure the debtor's debt by preparing a resolution plan or liquidate the debtor's assets. To accept the resolution plan by creditors, committee is required to have minimum 66% vote, otherwise it may be rejection (which means liquidation of Corporation Debtor). *(Before 16.08.2019, voting share was 75%)*

- **Liquidation**- If the debtor goes into liquidation under section 33 of the Code, an Insolvency Professional administers the liquidation process and shall act as the liquidator under section 34 of the Code. The liquidator shall appoint two registered valuers to evaluate the assets & consolidate, verify, admit and determine the creditor's claim. The IBC prohibits the Insolvency Professional to sell Corporate Debtor's property to any person who is ineligible to be the resolution applicant. Proceeds from the sale of the debtor's assets are distributed in the following order of precedence:
  i) Insolvency resolution costs, including the remuneration to the insolvency professional,
  ii) Secured creditors, whose loans are backed by collateral, dues to workers, other employees (upto 12 months),
  iii) Unsecured creditors,

iv) Dues to government (upto 2 years),
v) Priority shareholders
vi) Equity shareholders

Difference between Section -7 & Section -9 of the Code:

Supreme Court held that for triggering Section 7 (1) of the IBC, a default could be in respect of default of financial debt owed to any Financial Creditor of the Corporate Debtor – it need not be a debt owed to the applicant Financial Creditor.

The Supreme Court contrasted the IBC provisions relating to applications by Financial and Operational creditors. It held that under Section 8(1), an Operational Creditor is required to deliver a demand notice on the occurrence of a default and under Section 8(2), the Corporate Debtor can bring to the notice of the creditor, existence of a dispute or the record of pendency of a suit or arbitration proceedings, which is pre-existing. Existence of such a dispute will make the application of Operational Creditor inadmissible.

On the other hand, under Section 7, the moment NCLT is satisfied that a default has occurred, the application of the Financial Creditor must be admitted (unless it is incomplete). The Corporate Debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. Supreme Court held that it is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date.

Practical procedure of filing application u/s 7

A. Filing of an application under section 7 of the IBC

I. Person who can file an application under section 7-

1. **A financial creditor**: either by itself or jointly with other financial creditors.

2. **Govt. notified person**: Any other person on behalf of the financial creditor, as may be notified by the Central Government. Following persons has been notified who may file an application for initiating CIRP on behalf of the financial creditor: –
   (i) a guardian;

   (ii) an executor or administrator of an estate of a financial creditor;

   (iii) a trustee (including a debenture trustee); and

   (iv) a person duly authorised by the Board of Directors of a Company.

3. **Depositors**: Where a financial debt is in the form of securities or deposits, an application for initiation CIRP shall be filed jointly by not less than 100 of such creditors in the same class or not less than 10% of the total number of such creditors in the same class, whichever is less.

4. **Class of Creditors**: Where a financial debt is owed to a class of creditors exceeding the number as may be specified, refer Sec. 21(6A)(b), an application for initiation CIRP shall be filed jointly by not less than 100 of such creditors in the same class or not less than 10% of the total number of such creditors in the same class, whichever is less.

5. **Home Buyer**: The application shall be filed jointly by not less than 100 of such allottees under the same real estate project or not less than 10% of the total number of such allottees under the same real estate project, whichever is less.

In case the application is made jointly by financial creditors, they may nominate one amongst them to act on their behalf.

Hon'ble Supreme Court in the matter of *"Sunrise 14 A/S Denmark Vs. Ravi Mahajan 61(IBC) 01/2018"* held that petition filed by an advocate would be maintainable. NCLAT in the matter of *"Palogix Infrastructure Private Limited Vs. ICICI Bank Limited"* held that a Power of Attorney holder cannot file any application u/s 7 or Sec. 9 or Sec. 10 of Code.

Gujarat High Court in the matter of *"Essar Steel India Ltd. Vs. RBI"* held that RBI is authorised to direct any banking company to initiate insolvency resolution process.

Even without resorting to CIRP against the Principal Borrower it is always open to the Financial Creditor to commence CIRP u/s 7 of the Code against the Guarantor *"Bijay Kumar Agarwal vs. State Bank of India and Anr. 149(IBC)114/2020–NCLAT"* but once CIRP initiated, for same set of claim & default application u/s 7 against the Principal Borrower is admitted, the application against the Corporate Guarantor is not maintainable *"M/s. SEW Infrastructure Ltd. Vs. M/s. Mahendra Investment Advisors Pvt. Ltd. 07(IBC)07/2020 –NCLAT"*

II. Persons not entitled to make application-

As per Sec. 11 of the Code, a Financial Creditors shall not entitle to make an application to initiate CIRP who has violated any of the terms of resolution plan which was approved 12 months before the date of making of an application.

III. Minimum amount of default-
A financial creditor can file application before NCLT against a corporate debtors where the minimum amount of the default is one lakh rupees.[Sec. 4].

Note: Vide Notification No. S.O. 1205(E) dated 24.03.2020, the default limit has been increased to 1 crore rupees.

IV. Application to be filed before NCLT-
The application for initiation of the CIRP can be filed before NCLT bench in the jurisdiction of the Corporate Debtor's registered office.

B. Application Form and documents

As per Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, an application for initiating the CIRP against a corporate debtor under section 7 of the Code in Form 1, accompanied with following documents and records:

- Record of the default recorded with the information utility or such other record or evidence of default as may be specified;
- The name of the resolution professional proposed to act as an interim resolution professional;
- Where the applicant is an assignee or transferee of a financial contract, the application shall be accompanied with a copy of the assignment or transfer agreement and other relevant documentation to demonstrate the assignment or transfer.

The applicant shall dispatch forthwith, a copy of the application filed with the Adjudicating Authority, by registered post or speed post to the registered office of the corporate debtor.

Note: NCLT vide order dated 12.05.2020 directed to file default record from Information Utility along with the new petitions being filed under section 7 of Insolvency and Bankruptcy Code, 2016 positively. No new petition shall be entertained without record of default under section 7 of IBC, 2016. Further, the Authorized Representative/ Parties in the cased pending (as on 12.05.2020) for admission under aforesaid section of IBC also directed to file default record from Information Utility before next date of hearing.

The Adjudicating Authority has no jurisdiction to direct the Corporate Debtor to deposit any amount to certain corpus or with regard to maintenance which may not be a subject matter of application under Section 7 NCLAT in Re *"Vipul Ltd Vs. M/s. Vipul Greens Residents Welfare Association"* .

C. Acceptance or rejection of the application

The Adjudicating Authority (NCLT) shall, within 14 days of the receipt of the application under Section 7, ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor. Where the Adjudicating Authority is satisfied that:

- A default has occurred and
- The application is complete, and
- There is no disciplinary proceedings pending against the proposed resolution professional,

it may, by order, admit such application;

OR

- Default has not occurred or
- The application is incomplete or
- Any disciplinary proceeding is pending against the proposed resolution professional,

it may, by order, reject such application.

The Adjudicating Authority shall, before rejecting the application, give a notice to the applicant to rectify the defect in his application within 7 days of receipt of such notice from the Adjudicating Authority.

If the earlier application u/s 7 was dismissed for non-prosecution, it was always open to the Respondent to file fresh application u/s 7 vide *"Venus Sugar Ltd. Vs. SASF 02(IBC)02/2020 –NCLAT"* . If a debt amount is disputed & the amount is more than Rs. 1 Lakh, application u/s 7 is maintainable & exact amount of claim will be considered at the stage of the CIRP vide *"Mr. A. Maheshwaran Vs. Stressed Assets Stabilization Fund & Anr. – NCLAT*"

Forensic Audit

In the matter of *"Allahabad Bank Vs. Poonam Resorts Limited"* [2020], NCLAT held that IBC Code does not envisage a pre-admission enquiry in regard to proof of default by directing a forensic audit of the accounts of the Financial Creditor, Corporate Debtor or any financial institution and noted following points:

- The dictum of law propounded by the Hon'ble Apex Court in *"Innoventive Industries Limited v. ICICI Bank and Anr"*, is loud and clear. The Adjudicating Authority cannot travel beyond the letter of law and the dictum of the Hon'ble Apex Court.

- The satisfaction in regard to occurrence of default has to be drawn by the Adjudicating Authority either from the records of the information utility or other evidence provided by the 'Financial Creditor'.

- The Adjudicating Authority cannot direct a forensic audit and engage in a long drawn pre-admission exercise which will have the effect of defeating the object of the 'I & B Code'.

- If the 'Financial Creditor' fails to provide evidence as required, the Adjudicating Authority shall be at liberty to take an appropriate decision.

- If the application is incomplete, it can return the same to the 'Financial Creditor' for rectifying the defect. This has to be done within 7 days of the receipt of notice from the Adjudicating Authority.

- However, the Code does not envisage a pre-admission enquiry in regard to proof of default by directing a forensic audit of the accounts of the 'Financial Creditor', 'Corporate Debtor' or any 'financial institution'. Viewed thus, the impugned order cannot be supported. Application under Section 75 of the Code on behalf of the 'Corporate Debtors' cannot be permitted to frustrate the provisions of the Code when the matter is at the stage of admission.

- Section 75 is a penal provision which postulates an enquiry and recording of finding in respect of culpability of the Applicant regarding commission of an offence. The same cannot be allowed to thwart the initiation of CIRP unless in a given case forgery or falsification of documents is patent and prima facie established.

D. Initiation & Commencement of CIRP

Initiation date of CIRP means the date on which a financial creditor, corporate applicant or operational creditor, as the case may be, makes an application to the Adjudicating Authority for initiating CIRP[Sec. 5(11)] and the CIRP shall commence from the date of admission of the application.

E. Communication of the Order

The Adjudicating Authority shall communicate within 7 days of admission or rejection of the application:

- To the financial creditor and the corporate debtor, in case of admission
- To the financial creditor, in case of rejection.

F. Once the Application is accepted

- As soon as matter is accepted by NCLT, then "Moratorium" will be issued. There shall be a public announcement of the corporate insolvency resolution process (CIRP) by the IRP, containing the name and address of the corporate debtor, name of the authority with which the corporate debtor is incorporated, last date of submission of claims, details of interim resolution professional, penalties for false or misleading claims and the date on which CIRP shall close.
- The NCLT proceeds with the appointment of an Interim Resolution Professional (IRP) who takes over the management of the defaulting debtor and draft a plan of resolution within a period of 180 days (that can be extended by 90 days). The Resolution Professional may then be continued or removed, contingent on the wishes of the Committee of Creditors (COC).

G. Decision time

Committee of Creditors may either decide to restructure the debtor's debt by preparing a resolution plan or liquidate the debtor's assets. To accept the resolution plan by creditors, committee is required to have minimum 66% vote. In the event a resolution plan is not submitted or not approved by the committee of creditors (COC) with minimum votes then the CIRP process is deemed to have failed. In such a situation the liquidation proceedings would then commence subject to the order of the tribunal.

Key points to be noted

- This act takes precedent over the DRT and SARFEASI ACT in insolvency related issues.

- The Part III of the code (i.e. INSOLVENCY RESOLUTION AND BANKRUPTCY FOR INDIVIDUALS AND PARTNERSHIP FIRMS) is not yet enforced.

- The Insolvency & Bankruptcy Code, 2016, (IBC) classifies individuals into three classes, namely, personal guarantors to CDs, partnership firms and proprietorship firms, and other individuals, to enable implementation of individual insolvency in a phased manner. The Central Government, vide a notification dated 15th November, 2019, appointed 1st December, 2019 as the date for commencement of the provisions of the Code relating to personal guarantors to CDs. It also notified the following on the same day-
  - The Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019; and
  - The Insolvency and Bankruptcy (Application to Adjudicating Authority for Bankruptcy Process for Personal Guarantors to Corporate Debtors) Rules, 2019.

- These Rules provide for the process and forms of making applications for initiating insolvency resolution and bankruptcy proceedings against personal guarantors to CDs, withdrawal of such applications, forms for public notice for inviting claims from the creditors, etc.

- There are occasions when a Corporate Debtor (CD) takes a loan guaranteed by another corporate person (corporate guarantor to the CD) or an individual (personal guarantor to the CD). The lender may pursue a remedy against the guarantor or the CD, being principal borrower, when there is a default in repayment of the loan. The insolvency resolution of corporate guarantors to the CD and of personal guarantors to the CD complement insolvency resolution of the CD. Accordingly, the IBC provides that where an application for insolvency resolution or liquidation proceeding of a CD is pending before a National Company Law Tribunal (NCLT), an application relating to insolvency resolution or liquidation or bankruptcy of a corporate guarantor or a personal guarantor shall be filed before the NCLT.

- It further provides that insolvency resolution, liquidation or bankruptcy proceeding of a corporate guarantor or a personal guarantor of the CD pending in any court or tribunal shall stand transferred to the NCLT dealing with insolvency resolution or liquidation proceeding of such CD.

These Regulations will come into force on 1st December, 2019.

Offences & Penalties

There are mainly two categories of punishment or fine under Part II of the Code:

A. Punishment for 3 to 5 years or a fine of Rupees 1 lakh to 1 Crore or both

- Where any officer of the Corporate Debtor within 12 months immediately preceding the insolvency commencement date or at any time after such date willfully, fraudulently, concealed any property or transferred/disposed of the property for a security interest in the non-ordinary course of business;
- Where any officer of the Corporate Debtor on or after the date of insolvency commencement date, misconducts in the course of insolvency resolution process, like does not disclose information, deliver property, books of accounts, other information to resolution professional or falsifies the books of Corporate Debtor or for willful and material omissions from statements relating to affairs of Corporate Debtor or false representation to creditors;
- Where Corporate Debtor willfully and knowingly provides false information in application made by the Corporate Debtor. But where any other person other than Corporate Debtor furnishes false information in the application made by Financial Creditors, shall only be punished with a fine and not imprisonment.

B. Punishment for 1 to 5 years or a fine of Rupees 1 lakh to 1 Crore or both

- Where any officer of the Corporate Debtor has transacted for defrauding creditors, like transfer of property in the form of gift/charge or other forms;
- Where the Corporate Debtor or any of its official contravenes the moratorium or the resolution plan.

C. Is there any imprisonment to debtor?

- No. There are no prisons for debtors in India and any such imprisonment will be unconstitutional. However, you can go to prison if you commit any fraud relating to the debts you owe. For example, if you take a housing loan using fake papers or you take a business loan but transfer the amount to a friend showing fake expenses, you can be prosecuted against for fraud.

Some Important Judgments

"Surendra Trading Company Vs. Juggilal Kamlapat Jute Mills Ltd. & Ors, Supreme Court in Civil Appeal No. 8400 of 2017"

The question before the NCLAT was as to whether time of fourteen days under section 9(5) given to the adjudicating authority for ascertaining the existence of default and admitting or rejecting the application is mandatory or directory. NCLAT hold that the mandate of sub-section (5) of section 7 or sub-section (5) of section 9 or sub-section (4) of section 10 is procedural in nature, a tool of aid in expeditious dispensation of justice and is directory. Further question (with which supreme Court is concerned) was as to whether the period of seven days for rectifying the defects under proviso to sub-section (5) of Section 9 is mandatory or directory. The aforesaid provision of removing the defects within seven days is directory and not mandatory in nature.

"Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited, Supreme Court in Civil Appeal No.9405 of 2017"

Section 9(1) contains the conditions precedent for triggering the Code insofar as an operational creditor is concerned. The requisite elements necessary to trigger the Code are:

I. Occurrence of a default;
II. Delivery of a demand notice of an unpaid operational debt or invoice demanding payment of the amount involved; and
III. The fact that the operational creditor has not received payment from the corporate debtor within a period of 10 days of receipt of the demand notice or copy of invoice demanding payment, or received a reply from the corporate debtor which does not indicate the existence of a pre-existing dispute or repayment of the unpaid operational debt.

The confirmation from a financial institution that there is no payment of an unpaid operational debt by the corporate debtor is an important piece of information that needs to be placed before the adjudicating authority, under Section 9 of the Code, but given the fact that the adjudicating authority has not dismissed the application on this ground and that the appellant has raised this ground only at the appellate stage, we are of the view that the application cannot be dismissed at the threshold for want of this certificate alone.

The Court held that the expression "and" occurring in section 8(2)(a) may be read as "or" in order to further the object of the statute and/ or to avoid an anomalous situation – once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility – So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application – A "dispute" is said to exist, so long as there is a real dispute as to payment between the parties that would fall within the inclusive definition contained in Section 5(6).

"***Alchemist Asset Reconstruction Company Limited Vs. M/s Hotel Gaudavan Private Limited, Supreme Court in Civil Appeal No. 16929 of 2017"***

An arbitration proceeding cannot be started after imposition of moratorium and that that the effect of Section 14(1) (a) is that the arbitration that has been instituted after the aforesaid moratorium is non est (Non est factum is a defense in contract law that allows a signing party to escape performance of an agreement which is fundamentally different from what he or she intended to execute or sign) in law.

"Nikhil Mehta & Sons & Ors. Vs. M/s AMR Infrastructure Ltd. (NCLT Delhi), C.P No (ISB)-03(PB)/2017, decided on 23.01.2017"

In this case the NCLT has ruled that a purchaser of real estate, under an 'Assured-Return' plan, would be considered as Financial Creditor for the purposes of IBC and is, therefore, entitled to initiate corporate insolvency process against the builder, in case of non-payment of such

Assured/Committed return' and non delivery of unit. NCLAT further went on to rule that the debt in this case was disbursed against the consideration for the time value of money which is the primary ingredient that is required to be satisfied in order for an arrangement to qualify as Financial Debt and for the lender to qualify as a Financial Creditor' under the scheme of IBC.

"K.S. Rangasamy Vs. State Bank of India, Supreme Court in 2018"

It was observed that if the corporate debtor is ready to pay the total amount with interest as the requirement deems then it will be open to the financial creditor to settle the dispute. If the Resolution Applicant proposes lesser amount and more time than the amount and time proposed by the appellant. In such case, it will be also open to the concerned person to move before an appropriate forum to make the settlement absolute. If the offer of the promoters is better than the resolution plan, leeway has been provided to approach the appropriate forum to get the settlement recorded.

"Indian Overseas Bank & Ors. Vs. Kamineni Steel & Power India Private Limited, NCALT, decided on 6th September 2018"

The Hyderabad bench of the NCLT, in an insolvency petition against Kamineni Steel & Power India, allowed a resolution plan approved by 66.67% of its committee of creditors. The Hyderabad NCLT said in its order that Section 30 (4) does not say whether such percentage is out of the total voting share of the financial creditors or those present during meetings of the CoC. "Since IBC is a new code and still evolving, the above percentage has to be read with various circulars issued by the Reserve Bank of India" it observed. The National Company Law Appellate Tribunal (NCLAT) has struck down an order passed by the bankruptcy court that approved a resolution plan for Kamineni Steel & Power despite the fact that it failed to receive the mandatory 75 percent vote share, a pre-requite according to the Insolvency and Bankruptcy Code (IBC) to get the plan endorsed by the court. (Now this voting share is 66 percent, w.e.f. 16.08.2019)

"Brilliant Alloys Private Vs. Mr. S. Rajagopal &Ors, Supreme Court in Special Leave to Appeal (C) No(s)-31557/2018 decided on 14.12.2018"

In this case an application was filed by the Resolution Professional of the corporate debtor before NCLT for withdrawal of CIRP on the ground that all claims of operation and financial creditors of the corporate debtor are settled. However, the application for withdrawal was filed under Section 60(5) of the IBC instead of Section 12A because the settlement happened after the issue of invitation for expression of interest under regulation 36A of CIRP Regulation. NCLT Chennai dismissed the application on the ground that since regulation 30A imposes condition for withdrawal application that it has to be filed before invitation for expression of interest; NCLT cannot pass an order allowing the withdrawal ignoring the conditional clause.

"Sandeep Kumar Gupta resolution Professional Vs. Stewarts & Lloyds of India Ltd. & Anr. Company Appeal (AT) (Insolvency) No.263 of 2017 decided on 28.02.2018"

The NCLAT ruled that Resolution Professional's performance did not amount to misconduct, but as the Adjudicating Authority was not satisfied with the performance of the RP, it was well within its jurisdiction to engage another person as RP or Liquidator.

"Shah Bros Ispat Pvt. Ltd Vs. P. Mohan raj & Ors. 2018 SCC Online NCLAT 415 decided on 31.07.2018"

The NCLAT held that Section 138 of the N.I Act is a penal provision which empowers the court of competent jurisdiction to pass order of imprisonment of fine, which cannot be held to be proceeding of any judgment, decree of money claim. It was further concluded that imposition of fine cannot be held to be a money claim or recovery against the corporate debtor nor order of imprisonment, if passed by the court of competent jurisdiction on the directors, they cannot come within the purview of Section 14 of the I &B Code, 2016. Hence no criminal proceedings are covered under Section 14 of the IBC.

"Transmission Corporation of Andhra Pradesh Limited Vs. Equipment Conductors and Cables Limited Civil Appeal No. 9597 of 2018 decided on 23.10.2018"

In this case the NCLAT without discussing the merits of the case and also without stated how the amount was payable, given wielded threat to the Appellant by giving a one chance, 'to settle the claim, failing which this Appellate Tribunal may pass appropriate orders on merit'. The Supreme Court relied on the decision in Mobilox case and held that while examining an application under Section 9 of the Act, the Adjudicating Authority will have to determine (i) Whether there is an "operational debt" as defined exceeding Rs 1 lakh, (ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid and (iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute. With these observations the NCLAT order was set aside.

"State Bank of India Vs. V. Ramakrishnan & Anr. Supreme Court in Civil Appeal No. 3595 of 2018, decided on 14.08.2018"

Section 14 of Insolvency & Bankruptcy Code, 2016, which provide for a moratorium for the limited period mentioned in the code, on admission of an Insolvency Petition, would not apply to a Personal Guarantor of a Corporate Debtor. The Supreme Court observed that protection of moratorium under Section 14 is applicable only to corporate debtor and not personal guarantor. The Court observed that Section 60(1) of the Code, which provided that the adjudicating authority in relation to the insolvency resolution and liquidation of both corporate debtors and personal guarantors shall be the NCLT.

"Karan Goel Vs. M/s Pashupati Jewellers & Anr., NCALT in Company Appeal (AT) (Insolvency) No. 1021 of 2019, decided on 01.10.2019"

NCLAT held that merely because a suit has been filed by the Appellant & pending, cannot be a ground to reject the application under Section 7 of the Code. Pre-existing dispute cannot be a subject matter of Section 7, though it may be relevant under section 9.

"Mr. Vineet Khosla Shareholders and (ex) Director Margra Industries Ltd. Vs. Edelweiss Asset Reconstruction Company Limited, NCALT in Company Appeal (AT) (Ins) No.441 of 2019, decided on 06.09.2019"

NCLAT held that the AA at the stage of admission of Application under section 7 is not required to consider, if or not Resolution for a given Company would be possible or not & whether or not it would be possible to keep it a going concern– NCLAT.

"Arcelormittal India Private Limited Vs. Satish Kumar Gupta & Ors., Supreme Court in Civil Appeal No. 8766-67 of 2019, decided on 15.11.2019"

Supreme Court held that stage of ineligibility attaches when the Resolution Plan is submitted by a Resolution Applicant; 270 Days time limit for completion of Insolvency Resolution Process is Mandatory. The Supreme Court, interpreting Section 29A(c) of the Insolvency and Bankruptcy Code, 2016, observed the stage of ineligibility attaches when the resolution plan is submitted by a resolution applicant and not any anterior stage. The bench comprising Justice Rohinton Fali Nariman and Justice Indu Malhotra also held that the time limit for completion of the insolvency resolution process as laid down in Section 12 is mandatory and it cannot be extended beyond 270 days.

"Power Finance Corporation Ltd Vs Mahender Khandelwal, NCLT Hyderabad Bench in (IA No. 234 of 2020 in CP (IB) No. 492/07/HDB/2019, decided on 09.06.2020"

The National Company Law Tribunal, Hyderabad has held that the power to replace an Interim Resolution Professional and appoint a new individual as Resolution Professional solely and absolutely vested with the Committee of Creditors. The pre-requisite for replacing the Interim Resolution Professional is meeting the requirements under Section 22 of Insolvency and Bankruptcy Code, 2016 and the same could be done without recording any reasons.
These pre-requisites, NCLT explained, are as follows:

- A Resolution passed by the CoC with at least 66% voting shares.
- Written consent from the proposed Resolution Professional in the specified form.

- Application by CoC before the Adjudicating Authority to confirm the appointment of the proposed Resolution Professional.
- Appointment by Adjudicating Authority after confirmation from IBBI.

The NCLT observed that in the present case, the first three conditions had been fulfilled and only the confirmation by IBBI was left. The NCLT thus stated that it could not find any infirmity with the decision of the CoC to replace Mahender Khandelwal with Sumit Binani as Resolution Professional for the Corporate Debtor and dismissed Khandelwal's application. It further directed the Registry to forward the name of the proposed Resolution Professional to IBBI for its confirmation.

IBC (Amendment) 2020

The Code has been amended time to time since its enactment to remove bottlenecks and to streamline the Corporate Insolvency Resolution Process ("CIRP") under the Code. In December, 2019, the legislature introduced "The Insolvency and Bankruptcy Code (Amendment) Bill, 2019, however, the same could not be passed during the then parliament session and was implemented by way of an ordinance w.e.f. 28.12.2019. In 2020, the parliament passed the Insolvency and Bankruptcy Code (Amendment) Act, 2020 [No. 1 of 2020] ('Amendment Act') and it received President's assent on 13th March, 2020. As per Section 1 (2) of the Amendment Act, the amendments deemed to have come in force on 28th December, 2019. The Amendment Act has amended Sections 5, 7, 11, 14, 16, 21, 23, 29A, 32A, 227, 239 and 240 of the Code.

The Amendment Act has endeavored to remove various bottlenecks and practical difficulties being faced while implementing the provisions of the Code and has also attempted to streamline the Corporate Insolvency Resolution Process ("CIRP"). The highlight of amendments are:

- **Central Govt. notified on 24.03.2020** that "Due to the emerging financial distress faced by most companies on account of the large-scale economic distress caused by COVID 19, it has been decided to raise the threshold of default under section 4 of the IBC 2016 to Rs 1 crore from the existing threshold of Rs 1 lakh";
- Insolvency commencement date is now the date of admission of an application for initiating CIRP;
- IRP to be appointed on the date of admission of application itself;

- IRP shall continue to manage the affairs of a Corporate Debtor till the time the resolution plan is approved by the Adjudicating Authority or an order for liquidation of Corporate Debtor is passed;
- A minimum threshold has been provided for the Financial Creditors falling under sub-section 6A of Section 21 and in respect of real estate allottees.
- During moratorium there shall not be termination of any licence, concession, permit, quota, clearance or any other similar right during the moratorium period, unless the Corporate Debtor does not default in necessary payment;
- Protection from prosecution granted to new management/ officials for offences committed prior to commencement of CIRP;
- Protection granted in respect of properties of Corporate Debtor from attachment/ seizure/ retention etc. for the offences committed prior to commencement of CIRP.

Although the Amendment Act has cleared many doubts which subsisted earlier and paved the way for the easy and speedy resolution process under the Code, however, has its own flaws which may not be ultimately beneficial to all the stakeholders. One of such instances is introduction of minimum threshold for a real estate allottee.

The minimum threshold now introduced, shall result in making the remedy provided under the Code to a real estate allottee, completely toothless, in as much as a real estate allottee is a person, who invested his hard earned money in buying a property and shall now feel harassed to find out 99 more buyers or 10% of the total number of buyers, before he could approach the Court for redressal of his grievances. Ultimately, this ought to have been kept in mind by the legislature that real estate allottees were included in the definition of 'Financial Creditor' after a huge number of defaults by real estate developers across the country. This legislation so brought was a welfare legislation, which has been diluted substantially to the grave prejudice of real estate allottees. As a matter of fact, the validity of this amendment was challenged before the Hon'ble Supreme Court of India and the Hon'ble Court has granted a status quo order in respect of pending matters. The final order is still awaited.

To know previous amendments open this link - https://ibbi.gov.in/webfront/legal_framework.php

Challenges for IBC

- **Lack of operational NCLT benches:** Though the government had, in July 2019, announced setting up of 25 additional single and division benches of NCLT at various places including Delhi, Jaipur, Kochi, Chandigarh, and Amravati, most of these remain non-operational or partly operational on account of lack of proper infrastructure or adequate support staff.
- **High number of liquidations** is a cause for major worry as it violates IBC's principal objective of resolving bankruptcy.
- **Slow judicial process** in India allows the resolution processes to drag on, this was the same reason for slow recovery under SICA or RBBD.

Conclusion

The IBC has taken its first steps to regularize the insolvency process in India. It has amended over 11 legislations in India, bringing about one of the most significant change to commercial laws in India in recent times. However, this nascent legislation has been ridden with controversies and speedy resolutions. It has also become a very important tool for banks to regularize multitudes of non-performing assets plaguing the country's economy.

Insolvency and Bankruptcy Code brought quite a few changes in the big business scenario in the country. Brought forward to reduce the time it takes to deal with the issue of bankruptcy, the code has morphed into something that is driving this country towards a new age of economy. However, what this road of growth might lead to is yet to be seen. The best we can do is making sure that our finances are in order and we never go insolvent.

With more than 11% of all loans in India being terms as bad loans, the IBC has become the need of the hour. The IBC has brought a plethora of changes to insolvency laws in India and aims to reduce the amount of bad loans that has saddled the economy over the last few years. We are beginning to see this through various companies successfully concluding their insolvency process. The first successful case of a CIRP was that of Bhushan Steel wherein TATA Steel agreed to purchase Bhushan Steel for Rupees Thirty-Two Thousand Five Hundred Crores.

With many more insolvency resolution processes in the pipe line, only time will tell if the IBC will prove to be a successful tool with its objective of streamlining the insolvency process in India.

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