

Insolvency and Bankruptcy Code-2016

Evolving Jurisprudence

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INSOLVENCY VS BANKRUPTCY



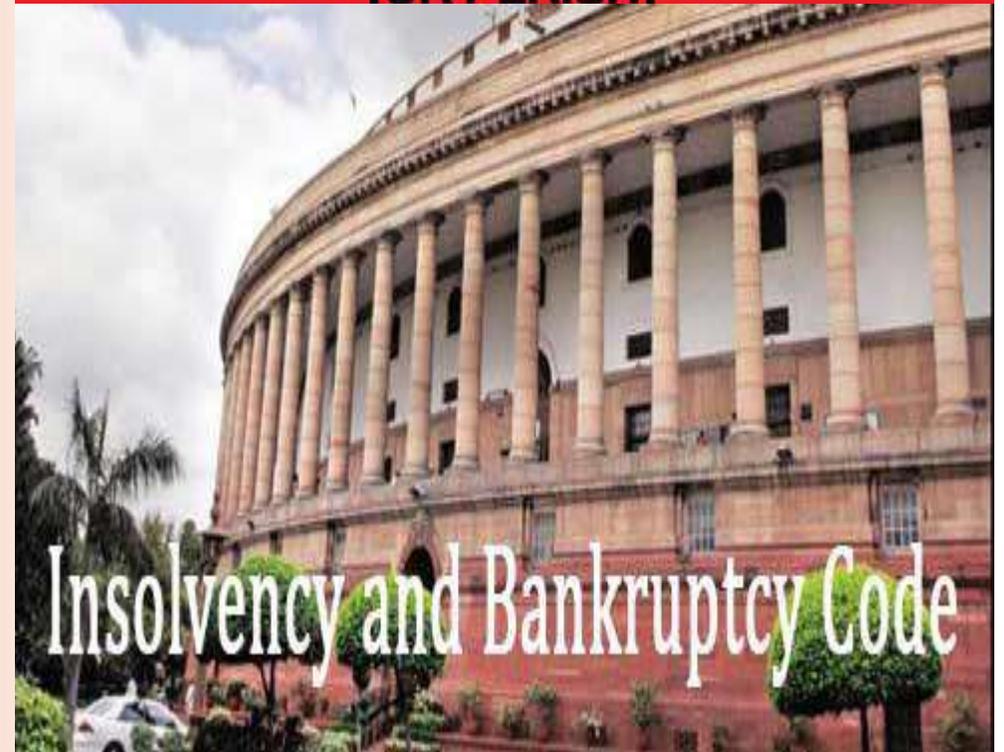
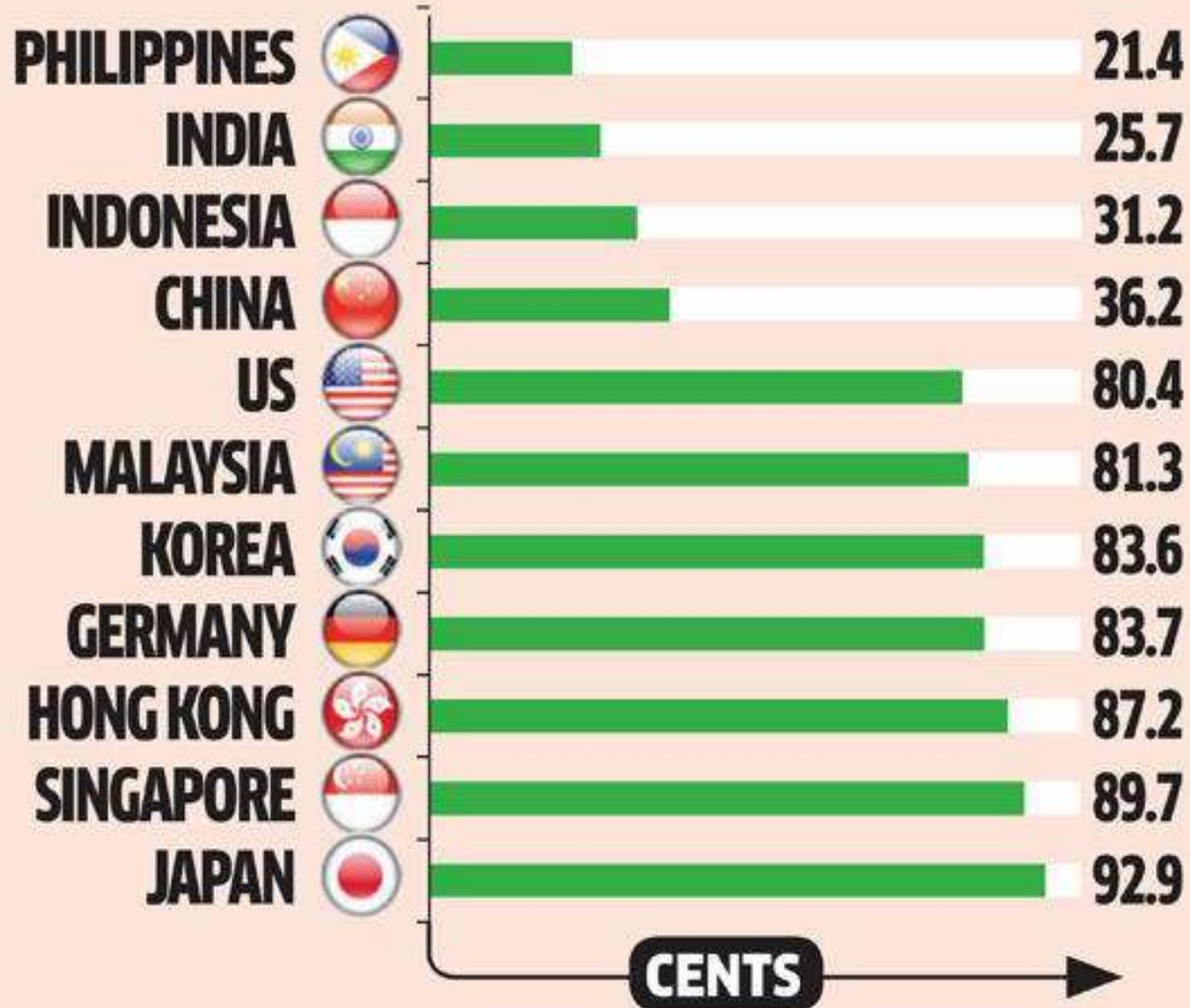
Why we need IBC ?

- Indian Banks have become immensely vulnerable to ineffective & poor recovery mechanism on their corporate loans.
- Non Performing Assets i.e. Gross NPAs of the banking industry have seen rise from **2.4%** (base of INR 23.3 trillion of advances) in 2008 to **4.8 %** base of INR 59.8 trillion of advances) in 2015 and to **20.41 %** in 2017.
- Restructured advances (ie loans whose terms have been revised and which have a higher probability of becoming NPA in future) have increased from **1.2 %** in 2008 to **6.8 %** in 2015 to **9.6 %** in 2017



Global Recovery Rate

(Cents on the dollar)



Legislative intent behind the Code

*An Act to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for **maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders** including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto.*



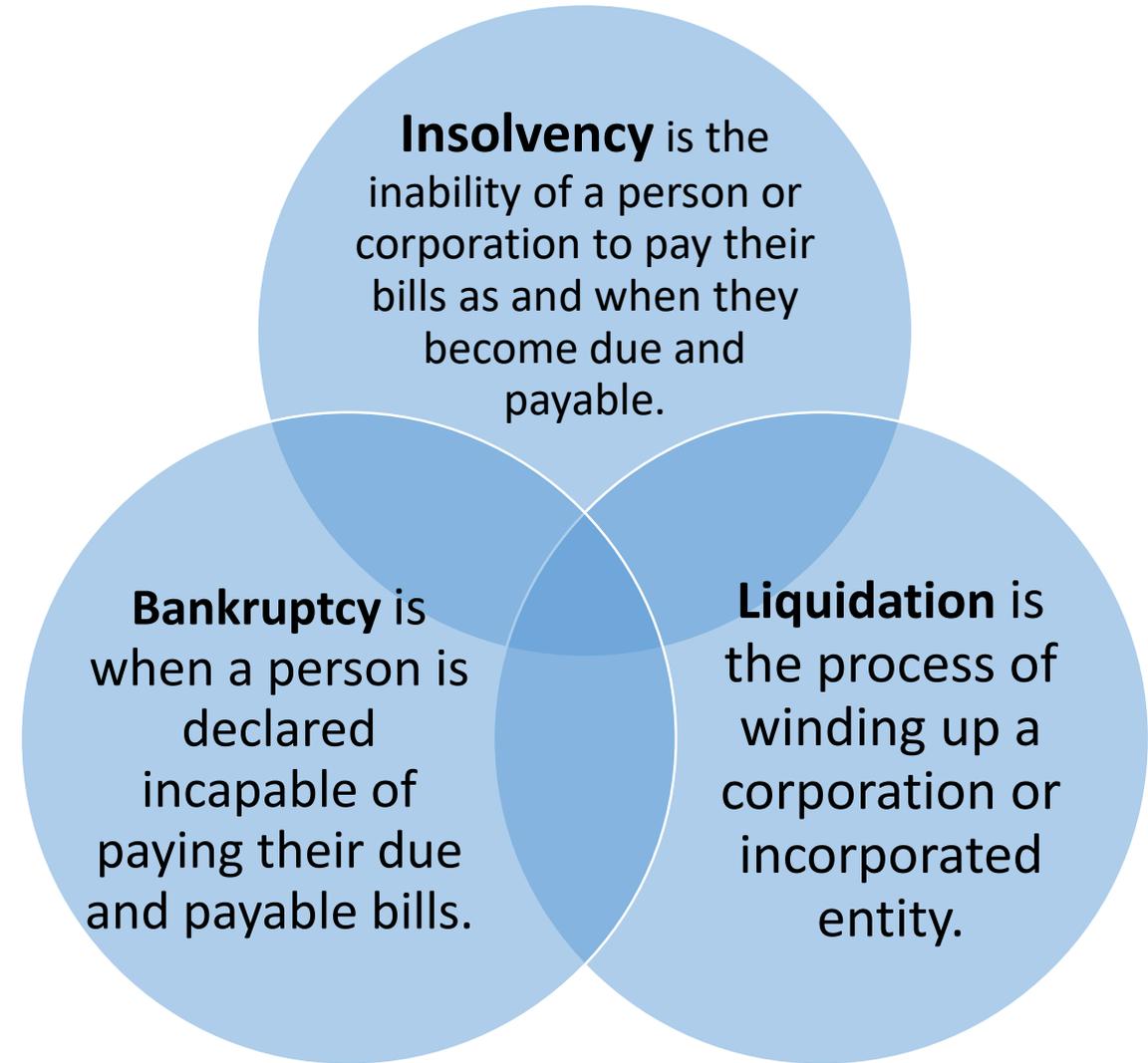
Understanding the Code

Differentiation

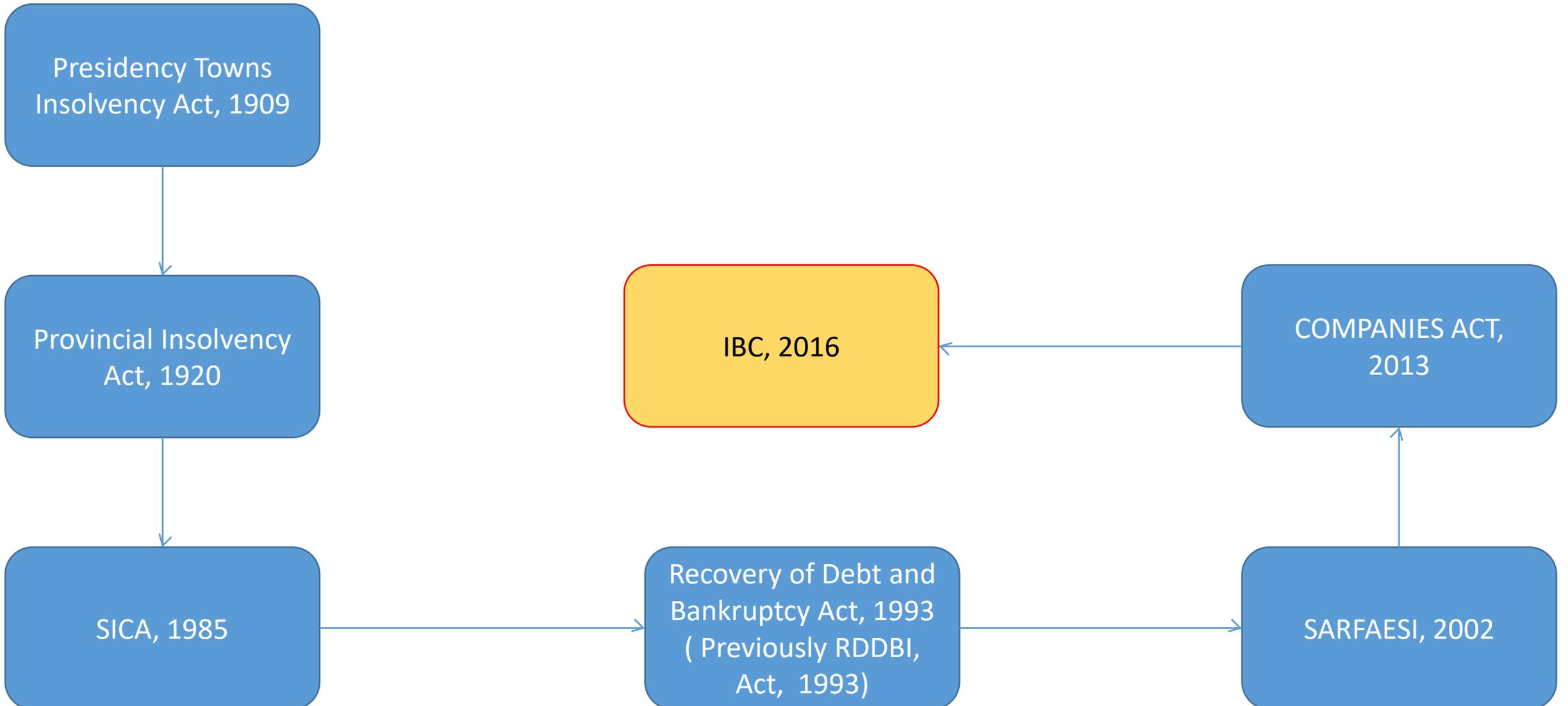
- Insolvency;
- Bankruptcy; and
- Liquidation

Why is it a Code?

“Code” is usually known as a collection or compendium of laws. It refers to a systematic and comprehensive compilation of laws, rules or regulations that are consolidated and classified according to a particular subject matter.



Inception of Insolvency Laws in India



Supreme Court- 2016 Supreme Court in the matter of Madras Petrochem Ltd.. Vs. BIFR and Ors.-AIR 2016 SC 898 decided on the interplay of statutes

Impact on other statutes

Repealed Acts

- Presidency Town Insolvency Act, 1909; and
- Provisional Insolvency Act, 1920

Some of the amended Acts

- Sick Industrial Companies (Special Provisions) Repeal Act, 2003;
- Recovery of Debts Due to banks and financial institutions Act, 1993;
- Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; and
- The Companies Act, 2013

Key Features

- Applicable to both corporate and non-corporate persons;
- Shifting the concept to Debtor in possession to Creditor in control
- Allow creditors, whether secured; unsecured; financial or operational; domestic or international to initiate a resolution processes thereby aiming for an early detection of the fraud;
- Establishes time-bound moratorium on acceleration and enforcement of debts against the company;
- The resolution professionals can replace the existing management during insolvency proceedings;
- Provides for time-bound viability assessment mechanisms, liquidation processes and distribution waterfalls;
- Provides for penalties on promoters for asset diversion leading up to liquidation;
- The provisions of the Code overrides SARFAESI Act, 2002;
- An inability to pay debt will no more be a ground for winding up under the Companies Act;
- Voluntary Liquidation shall be subject to provisions of the Code; and
- Chapter governing Revival and Rehabilitation of Sick Companies of Companies Act 2013,

Innoventive Industries Ltd. vs. ICICI Bank & Anr

(AIR 2017 SC 4084)

- **Issue:**

The main issue that arose in this case was **whether the Code prevails over the Maharashtra Relief Undertaking (Special Provisions) Act, 1958** (in respect of the Moratorium imposed under Section 13, 14 of the Code and Section 4 of the Maharashtra Relief Undertaking (Special Provisions) Act, 1958).

- **Decision:**

- ❖ The Code being a Parliamentary Enactment and Maharashtra Relief Undertaking (Special Provisions) Act, 1958 being a State Enactment, by virtue of Article 254 of the Constitution of India, in case of inconsistency between the Laws made by the parliament and the laws made by the Legislatures if the State, the former one prevails.
- ❖ Therefore, **in the present case in view of the repugnancy between the two, the Code, being the Parliamentary Enactment will prevail over the Maharashtra Relief Undertaking (Special Provisions) Act, 1958.** The State Law cannot hinder or stall the scheme of the Parliamentary Enactment.
- ❖ Section 238 of the Code also provides an overriding effect to the provisions of the Code over other laws. (I.e. the non-obstante clause under Section 238 of the Code would prevail over the limited non-obstante under section 4 of the Maharashtra Relief Undertaking (Special Provisions) Act, 1958.
- ❖ the Code being a consolidating and amending central legislation is a complete Code in itself and is exhaustive in respect to the matter dealt with therein.
- ❖ The Erstwhile directors of the corporate body, who were no longer in management, could not maintain an appeal on behalf of such corporate body.

Applicability, Scope & Structure

Applicability

All kinds of:

- Corporate Enterprises;
- Limited Liability Partnerships;
- Personal Guarantors for Corporate Debtor
- Partnership Firms; and
- Individuals (Other than Personal Guarantor to the Corporate Debtor)

Scope

- Insolvency;
- Liquidation;
- Voluntary Liquidation (solvent insolvency); and
- Bankruptcy

STRUCTURE

In entirety, the Code has 255 sections which are divided into 5 Parts as given below

Part I
Preliminary
(Definitions)
(Section 1 to 3)

Part II
Insolvency
Resolution and
Liquidation for
Corporate Persons
(Section 4 to 77)

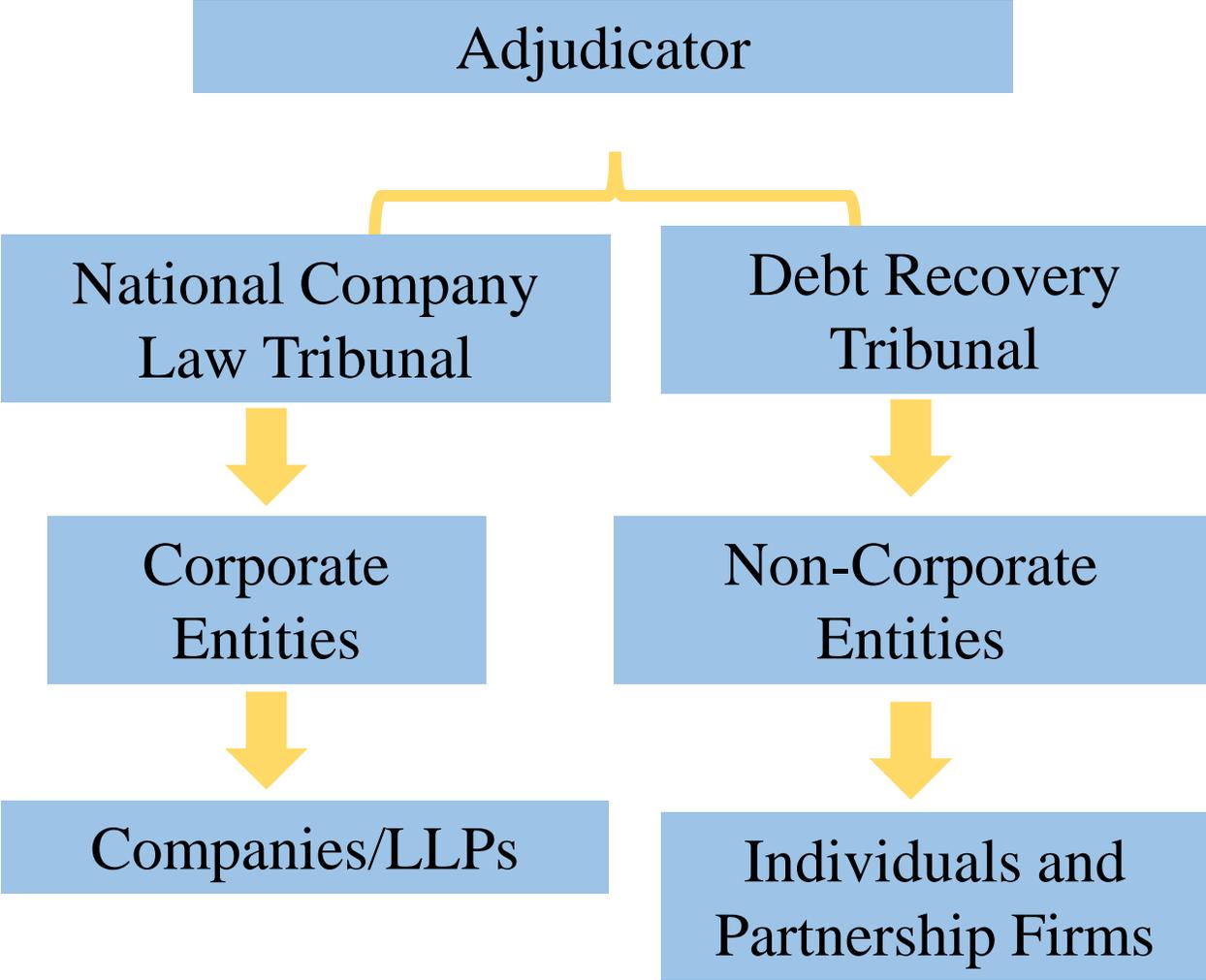
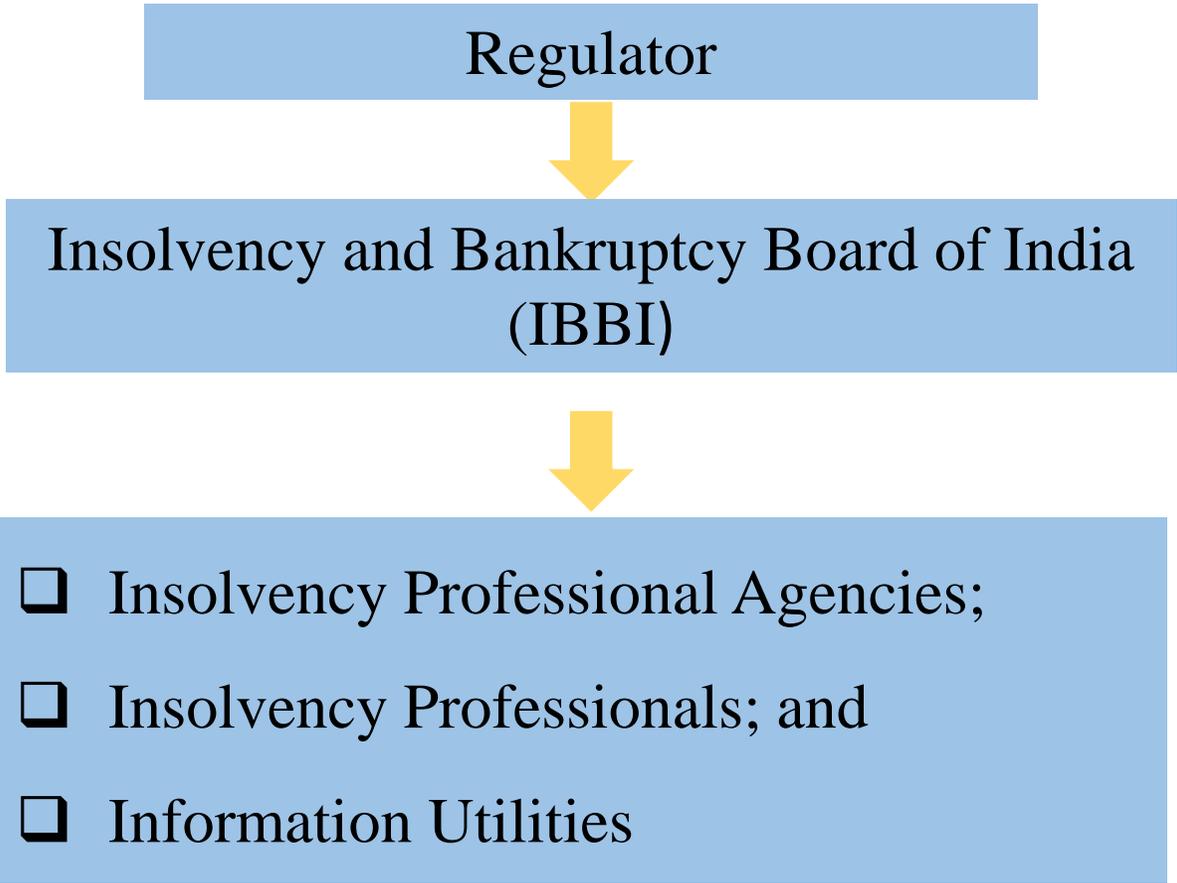
Part III
Insolvency Resolution
and Bankruptcy for
individuals and
Partnership Firms
(Section 78 to 188)

Part IV
Regulation of
Insolvency
Professionals,
Agencies and
Information
Utilities
(Section 188 to 223)

Part V
Miscellaneous
(enables
amendments in
other statues such
as Companies Act
2013)
(Section 224-255)

Schedules
(11 Schedules)
Provides for
amendments to be
carried out in other
statues

Framework of the Code



Important definitions

Debt means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt

Claim means

- (a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;
- (b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;

According to Black's Law Dictionary the term **Due** means is Just, Proper, Regular and reasonable, expected at or planned for at a certain time and;

The meaning of word **Due and payable** is owed and subject to immediate collection because a specified date has arrived or time has elapsed, or some other condition for collectability has been met.

Important definitions

"Operational Debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;

"Operational Creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred.

"Dispute" includes a suit or arbitration proceedings relating to-

- (a) the existence of the amount of the debt;
- (b) the quality of goods or service; or
- (c) the breach of a representation or warranty.

"Default" means non- payment of debt when whole or any part of instalment 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;

Important definitions

“**Financial Debt**” means a debt along with interest, if any, which is disbursed against the consideration for the **TIME VALUE OF MONEY** and includes—

- (a) money borrowed against the payment of interest;
- (b) any amount raised by acceptance under any acceptance credit facility or its dematerialised equivalent;
- (c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;
- (d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;
- (e) receivables sold or discounted other than any receivables sold on non-recourse basis;
- (f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing; *Explanation:- (i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and (ii) the expressions, “allottee” and “real estate project” shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);*
- (g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;
- (h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;
- (i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clause (a) to (h) of this definition;

Home Buyer | Financial OR Operational Creditor ???

- Col Vinod Awasthy vs AMR Infrastructures Limited – **Neither FC nor OC** – NCLT
- Nikhil Mehta vs AMR Infrastructures Limited – **FC** – NCLAT
 - Time Value of Money Involved
 - Component of Assured Return

FC as per Ordinance 2018

Is RERA redundant now ?
Whether Secured or Unsecured FC ?
Whether commercial real estate buyers are included?

Provisions of Limitation Act, 1963 vis-à-vis The proceedings under the Code

- ❖ In *Neelkanth Township and Construction Pvt. Ltd. vs. Urban Infrastructure Trustees Limited*, the appellate tribunal held that the **Limitation Act, 1963** is not applicable to the Corporate Insolvency Resolution Process. But it was **subject to a caveat being that if the NCLT notices that the application under Section 7 or 9 has been filed after a long delay**, it may give opportunity to the Applicant to explain the delay within a reasonable period to ascertain whether there are any delay or laches on the part of the Applicant.
- ❖ **However, in appeal before the apex court on the issue of limitation**, the court upheld the order of the appellate tribunal, but **left the question of application of the provisions of The Limitation Act, 1963 to the Code, open.**
- ❖ The Hon'ble NCLAT has re-established a stance on limitation in the judgment passed in *M/s. Speculum Plast Pvt. Ltd. Vs. PTC Techno Pvt. Ltd, Parag Gupta & Associates vs. B.K. Educational Services Pvt. Ltd & Associates, and Ashlay Infrastructure Pvt. Ltd. vs. LDS Engineers Pvt. Ltd* , whilst holding that the, *"The Limitation Act, 1963 is not applicable for initiation of 'Corporate Insolvency Resolution Process', we further hold that the Doctrine of Limitation and Prescription is Company Appeals (AT) (Insolvency) Nos. 47, 76 and 78 of 2017 37 necessary to be looked into for determining the question whether the application under Section 7 or Section 9 can be entertained after long delay, amounting to laches and thereby the person forfeited his claim. 69. If there is a delay of more than three years from the date of cause of action and no laches on the part of the Applicant, the Applicant can explain the delay."*

Provisions of Limitation Act, 1963 vis-à-vis The proceedings under the Code

- ❖ The said decision in *B. K. Educational Services Pvt. Ltd. vs. Parag Gupta & Associates*, was challenged before the Supreme Court, wherein the Apex Court stayed the remand to the NCLT.
- ❖ The issue of applicability of Limitation Act, 1963 is finally settled through the, “The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018”, which inserts Section 238 A in the code which provides that, the provisions of Limitation Act, 1963 are applicable to the proceedings or appeals before the adjudicating authority, NCLAT, DRT and DRAT, as the case may be. So, therefore now the provisions of the Limitation Act, 1963, are squarely made applicable to the code.

Corporate Insolvency Resolution Process: Initiation and Commencement

- Who is entitled to initiate Corporate Insolvency Resolution Process?
- When can a Corporate Insolvency Resolution Process be initiated?
- How the process will be initiated?
- What are the after-effects of initiation?
- Who is **not** entitled to initiate CIRP?
- What is the timeline specified in the Code vis-à-vis completion of CIRP?

Application under Sec.7

Under Section 7, Financial Creditor may file an application under Form-1 with NCLT (either singly or jointly) on event of “default” by a corporate debtor.

No prior demand notice is required to be issued to the Corporate Debtor. Along with Form-1, an Interim Resolution Professional is required to be nominated by the Financial Creditor. The consent from such IRP has to be taken in Form-2, AA Rules.

Within 14 days of filing, NCLT to pass an order admitting the application* and to communicate the same to FC and corporate debtor.

- Prior notice of the Application necessary to the Corporate Debtor.
- Involves court fees of Rs. 25,000;
- Proposed IRP to be paid fees towards consent letter/Form-2, later recoverable from COC.

**Insolvency
Commencement
Date**

**NCLT admits the application on being satisfied that a default has occurred, application is complete and there is no disciplinary proceedings pending against the proposed Interim Resolution Professional.*

OR

Within 14 days, NCLT to pass an order rejecting the application (after giving a 7 day period to the FC to rectify the defects) and communicate the same to the FC.

- Statutory appeal remedy to NCLAT.
- Conflicting views on whether Writ Petition is maintainable against an order admitting or rejecting this application;
- Issue whether NCLT while determining default has to check validity of the agreement

CIRP by Operational Creditors (“OC”) under section 8 & 9

OC to deliver, inter-alia, demand notice along with copy of invoice to the CD in case of default

- CD may notify to OC (within 10 days) about:
 - (a) existence of any dispute OR record of pendency of suit/ arbitration proceedings filed before, receipt of notice/ invoice;
 - (b) repayment of unpaid debt

- If no payment/ notice of dispute received by creditor within 10 days

- OC to file an application with NCLT along with affidavit under stating no notice of payment or notice of dispute received;

NCLT to admit the application within 14 days of receipt of application

OR

NCLT to reject the application within 14 days of receipt of application (after giving 7 days to rectify the defects)

Insolvency
Commencement
Date

M/s Surendra Trading Company vs. M/s Juggilal Kamlat Jute Mills Company Limited and others (2017 (11) SCALE 634)

- **Issue:**

- ❖ Whether the **time period of Seven Days** mentioned in the proviso to Section 9(5) of the Code for removing the defects **is mandatory or directory in nature.**
- ❖ **Whether the time limit** prescribed in the Code for admitting or rejecting a petition or initiation of the Insolvency resolution process, **is mandatory or not.**

- **Decision:**

- ❖ The Supreme Court observed that the word “shall” in the proviso to Section 9(5) of the Code would be read as “may”. The court held that the **time period of Seven Days** for removing the defects mentioned in the proviso to Section 9(5) of the Code **is directory in nature** and is not mandatory but subject to a caveat that the time period beyond seven days has to be justified with a sufficient cause.
- ❖ Therefore if the objections are not removed within seven days as prescribed, the applicant while refilling the application after removing defects has to satisfy the Adjudicating Authority as to why the defects could not be removed within a period of seven days as prescribed under the Code.
- ❖ On hearing the same, if the adjudicating authority is satisfied with the sufficient cause furnished by the applicant, the adjudicating authority shall entertain the application on merits. If otherwise, the adjudicating authority is possessed with the right to dismiss the application.
- ❖ The court made the seven day period for removing defects under the proviso to section 9(5) **directory in nature** subject to a caveat being the sufficient cause shown to the Adjudicating Authority for such delay in removing defects extending seven days as prescribed under the Code. The caveat of sufficient cause is prescribed to prohibit laxity for removing the defects in the prescribed time limit under the Code.

Mobilox Innovations Private Limited vs. Kirusa Software Private Limited

2017 (11) SCALE 754

- **Issue:**
- Whether the **breach of NDA (non-disclosure agreement) by the respondent constituted “existence of dispute”** so as to invalidate the corporate insolvency resolution process application filed by the Operational Creditor.
- **Decision:**
- ❖ The Apex Court while interpreting “existence of dispute” under section 8 (2) (a) of the Code, held that the “and” appearing in section 8 (2) (a) of the Code must be read as “or” because as per the earlier interpretation the dispute between an operation creditor and corporate debtor could only be valid if a suit or arbitration proceeding was filed prior to the receipt of demand notice.
- ❖ The court observed that such a situation would cause grave hardship as the Corporate Debtor could easily on the pendency of a suit or arbitration proceeding could easily do away with or stave off with the bankruptcy process.
- ❖ The Supreme Court highlighted that if the “and” under Section 8 (2) (a) of the Code would not be read as “or” then such persons would be excluded from the ambit of this section under the Code which cannot and would not be the intention of the legislature.
- ❖ The Apex Court also observed that the “existence of a dispute” and/or suit or arbitration proceeding must be prior to the receipt of demand notice i.e. **there must be a pre-existing dispute.**

Mobilox Innovations Private Limited vs. Kirusa Software Private Limited

2017 (11) SCALE 754

- ❖ **The Supreme Court provided a new test for determining the “existence of a dispute” viz: “The Plausible Contention Test”.** This test requires the adjudicating authority to see whether there is plausible contention which requires a further investigation and that the dispute is not a patently feeble argument. The sole objective is to reject a spurious defence.
 - ❖ The Adjudicating Authority while examining an application under Section 9 of the Code has to determine: whether there is an operation debt exceeding Rs. 1,00,000, and whether the evidence furnished shows that the debt is due and has not been paid, and whether there is an existence of dispute between the parties or any record of pendency of suit or arbitration proceeding filed before the receipt of Demand Notice, If any one of the conditions is lacking, the application under Section 9 of the Code shall be rejected.
 - ❖ The Supreme Court held that the, without going into merits of the dispute that there exists a plausible contention requiring further investigation and which is not a sham, spurious, frivolous defence.
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Macquarie Bank Limited vs. Shilpi Cable Technologies Ltd

AIR 2018 SC 498

- **Issue:**

- ❖ **Whether the provision contained in Section 9(3)(c) of the Code was mandatory or not.** Section 9 (3) (c) of the Code provides that the operational creditor shall along with the application for initiation of corporate insolvency resolution process, furnish a copy of the **certificate from the financial institutions** maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor.

- **Decision:**

- ❖ The Supreme Court whilst taking into consideration the Rule 6 Form 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority Rules), 2016 observed that the copy of the certificate from the financial institutions aforesaid is not a condition precedent for triggering the insolvency resolution process under Section 9 of the Code.

- ❖ The court further held that the expression “confirming” makes it clear that it was evidence, albeit an important one, but it only confirmed that there was no payment by the corporate debtor of an unpaid operational debt. Therefore the court held that the **requirement under section 9 (3) (c) of the Code is only directory in nature and not mandatory in nature.**

Macquarie Bank Limited vs. Shilpi Cable Technologies Ltd

AIR 2018 SC 498

- **Issue:**
- Whether a **demand notice of an unpaid operational debt under section 8 of the Code could be issued by a lawyer on behalf of the Operational creditor or not.** The Apex Court whilst considering Section 8 observed that the section speaks about operational creditor delivering the demand notice to the corporate debtor. The legislature has expressly used the expression “delivered” and not “issued”, thereby restricting the delivery of the Demand Notice by the Operational Creditor himself.
- **Decision:**
- ❖ The Apex Court while interpreting “existence of dispute” under section 8 (2) (a) of the Code, held that the “and” appearing in section 8 (2) (a) of the Code must be read as “or” because as per the earlier interpretation the dispute between an operation creditor and corporate debtor could only be valid if a suit or arbitration proceeding was filed prior to the receipt of demand notice.
- ❖ The Apex Court then considered Section 30 of the Advocates Act, 1961 which deals with the right of advocates to practise. The court observed that the expression “practise” has an extremely wide import and would include all preparatory steps. The court further observed that Section 238 of the Code providing for the non-obstante clause would not override the provisions of the Advocates Act, since there was no inconsistency between the two.
- ❖ The Supreme Court finally **applying the doctrine of harmonious construction** held that both statutes must be read together, and on a conjoint reading of section 8 and 9 of the Code along with Section 30 of the Advocates Act, **it would yield that the demand notice sent a lawyer on behalf of the Operational Creditor would be in order.**

CIRP by Corporate Applicant (“CA”) under Sec. 10

CA to file an application with NCLT on event of default by a CD along with books of accounts, details of proposed IRP and special resolution passed by the members of the corporate debtor

Within 14 days, NCLT to pass an order admitting the application* and to communicate the same to the CDA

OR

Within 14 days, NCLT to pass an order rejecting the application (after giving a 7 day period to the CDA to rectify the defects) and communicate the same to the CDA.

**Insolvency
Commencement Date**

**NCLT admits the application on being satisfied that a default has occurred, application is complete and there is no disciplinary proceedings pending against the proposed Interim Resolution Professional.*

Forch India Pvt. Ltd. vs. Edelweiss Assets Reconstruction Company Ltd. and

Anr

Company Appeal (AT) (Insolvency) no. 202 of 2017

- **Issue:**

- ❖ Whether **non-disclosure of facts beyond the statutory requirement under the Code could be a ground for dismissing an application for initiation of corporate insolvency resolution process.**

- **Decision:**

- ❖ The appellate tribunal while dealing with section 10 of the Code held that the adjudicating authority is not empowered to go beyond the records as prescribed by the Code. However, this is subject to the ineligibilities prescribed under section 11 of the Code.
- ❖ If all the information is prescribed under the Code and the corporate applicant is not ineligible under section 11 of the Code, the adjudicating authority is bound to admit the application. **Any fact or information beyond the requirement as prescribed under the Code is not required to be stated or pleaded.** Extraneous factors are not required to be disclosed.
- ❖ While dealing with the maintainability of the application under the Code for initiation of the insolvency and resolution process during the pendency of the winding up proceedings, the appellate tribunal held that the mere pendency of winding up proceedings wherein no order of winding up has been passed, cannot be a ground to reject application under Section 10 of the Code.

Forech India Pvt. Ltd. vs. Edelweiss Assets Reconstruction Company Ltd. and

Anr

Company Appeal (AT) (Insolvency) no. 202 of 2017

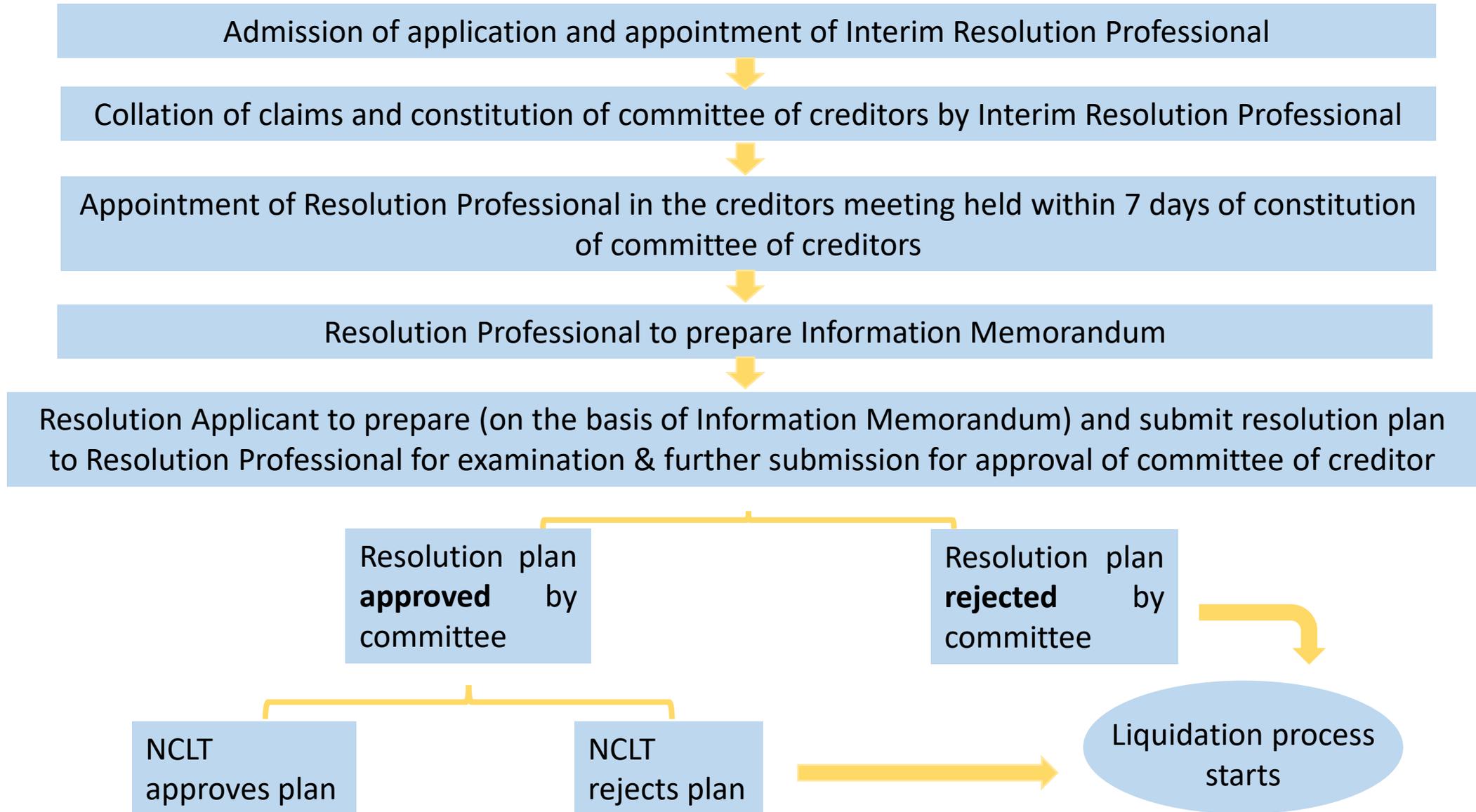
- ❖ Further while dealing with Section 65 of the Code, the Appellate Tribunal held that for imposition of penalty under the Code, the adjudicating authority has to, on the basis of record available form a prima facie opinion as to whether the petition for initiation of corporate insolvency resolution process has been filed maliciously or with a fraudulent intent. If so, then the adjudicating authority after recording its reason is required to give a reasonable opportunity to the person concerned, to explain his case.

Lokhandwala Kataria Construction Private Limited vs. Nisus Finance and Investment Managers LLP

Civil Appeal No. 9279 of 2017

- **Issue:**
- Whether **NCLAT could allow withdrawal of application after admission on the ground of consent terms agreed between the parties.**
- **Decision:**
- ❖ The petitioner approached NCLAT under Rule 11 of the NCLAT Rules, thereby invoking the inherent jurisdiction, for withdrawal of application on the basis of consent terms agreed between the parties. NCLAT refused to exercise its inherent powers.
- ❖ The Supreme Court held that **NCLAT was precluded for exercising its inherent powers after the admission of the application. It further held that the application could be withdrawn before its admission and withdrawal of such application after admission cannot be permitted on any ground whatsoever.**
- ❖ However, the Supreme Court, by invoking its inherent powers under Article 142 of the Constitution of India, allowed the parties to withdraw the application on the undertaking to pay the outstanding dues as per the consent terms.
- ❖ **Section 12A (inserted vide 2018 Ordinance) permits NCLT to allow the withdrawal of application admitted under section 7, 9 or 10 on an application made by the applicant with the approval of 90% voting share of CoC.**

Broad CIRP-Process



Committee of Creditors (CoC)

- IRP shall after collation of all claims constitute a committee of creditors (CoC).
- CoC shall comprise all financial creditors of the CD. Where a CD does not have any financial creditors or all the financial creditors are related parties of the CDs **then** CoC shall comprise of top 18 OCs by value, one representative of workmen and one representative of employees each.
- All decisions of the CoC shall require not less than 51% votes, except the certain matters requires 66% votes (earlier 75%) such as:
 - √ Extension of CIRP period beyond 180 days till 270 days
 - √ Appointment of RP in first COC
 - √ Replacement of RP with another RP (new RP to give written consent)
 - √ Approval of resolution plan
 - √ Decision to liquidate the CD during CIRP (no percentage specified prior to amendment)
 - √ All actions by RP during CIRP as specified in Section 28(1).

Matters Requiring Prior Approval of CoC

- (a) raise any interim finance in excess of the amount as may be decided by the committee of creditors in their meeting;
- (b) create any security interest over the assets of the corporate debtor;
- (c) change the capital structure of the corporate debtor, including by way of issuance of additional securities, creating a new class of securities or buying back or redemption of issued securities in case the corporate debtor is a company;
- (d) record any change in the ownership interest of the corporate debtor;
- (e) give instructions to financial institutions maintaining accounts of the corporate debtor for a debit transaction from any such accounts in excess of the amount as may be decided by the committee of creditors in their meeting;
- (f) undertake any related party transaction;
- (g) amend any constitutional documents of the corporate debtor;
- (h) delegate its authority to any other person;
- (i) dispose of or permit the disposal of shares of any shareholder of the corporate debtor or their nominees to third parties;
- (j) make any change in the management of the corporate debtor or its subsidiary;
- (k) transfer rights or financial debts or operational debts under material contracts otherwise than in the ordinary course of business;
- (l) make changes in the appointment or terms of contract of such personnel as specified by the committee of creditors; or
- (m) make changes in the appointment or terms of contract of statutory auditors or internal auditors of the corporate debtor.

Moratorium

- ❑ When can NCLT declare Moratorium?
- ❑ What does Moratorium includes:
 - institution/continuation of suit or proceedings against the corporate debtor;
 - transferring or disposing off any asset by the corporate debtor;
 - any action to foreclose/recover any security interest created by corporate debtor vis-à-vis property including any action under SARFAESI, 2002; and
 - recovery of any property by an owner where property is occupied/ is in possession of corporate debtor.
- ❑ Moratorium shall cease to be in effect:
 - on completion of CIRP; or
 - when resolution plan is approved by NCLT during the CIRP period; or
 - where liquidation order is passed

Alchemist Asset Reconstruction Company Ltd. vs. Hotel Gaudavan Pvt. Ltd. and Ors

AIR 2017 SC 124

- **Issue:**
 - ❖ **Whether arbitration proceedings could be invoked after the imposition of Moratorium under Section 14 the Code.**
- **Decision:**
 - ❖ The Supreme Court held that the mandate of the Code was that after the imposition of Moratorium under Section 14 of the Code, institution or continuation of pending suits or proceeding against the corporate debtor are prohibited.
 - ❖ Therefore, the court held that the **institution of arbitration proceeding after the imposition of Moratorium under Section 14 of the Code would be non-est in law.**

The Guarantor Conundrum- Moratorium and applicability to Guarantors

- ❖ In ***Alpha & Omega Diagnostics (India) Ltd. Vs. Asset Reconstruction Company of India & Ors .***, the main issue that arose for consideration was whether the movable or immovable property of the Guarantor may be attached pursuant to the Corporate Insolvency Resolution Process initiated under Section 10 against the Appellant-Corporate Applicant, or whether a property (ies) which is/are not 'owned' by a Corporate Debtor shall come within the ambits of Moratorium.
- ❖ The Appellate Tribunal observed that Section 14 of the code provides for declaration of Moratorium prohibiting, inter alia, *“any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property...”*
- ❖ The Appellate Tribunal observed that the expression “its” in Section 14 (1) (c) of the code was very significant for ascertaining/determining the true will of the legislature. The expression “its” in Section 14 (1) (c) denotes the property owned by the creditor. Therefore, the property not owned by the corporate debtor did not fall within the ambit of Moratorium under the code.
- ❖ The Appellate Tribunal held that declaration of Moratorium under the code had no application on the properties beyond the ownership of the corporate debtor.

The Guarantor Conundrum- Moratorium and applicability to Guarantors

- ❖ Similar issue arose in, ***Schweitzer Systemtek India Pvt. Ltd. vs. Phoenix ARC Pvt. Ltd. & Ors***, wherein the Appellate Tribunal after considering the expression “its” under Section 14(1) (c) of the code and Section 60 of the code which deals with adjudicating authority for corporate persons provides that if a Financial Creditor intends to proceed against the Personal Guarantor of the corporate debtor then he may file an application relating to ‘bankruptcy’ before the same adjudicating authority.
- ❖ The Appellate Tribunal held that, the application of Moratorium under the code was limited to the properties of the corporate debtor only and did not extend to the properties of the personal guarantor.
- ❖ However, in ***State Bank of India vs. Mr. V. Ramakrishnan***, the Appellate Tribunal on the similar issue took a view in direct contradiction to the earlier view in the case of ***Alpha & Omega Diagnostics (India) Ltd. Vs. Asset Reconstruction Company of India & Ors***, and ***Schweitzer Systemtek India Pvt. Ltd. vs. Phoenix ARC Pvt. Ltd. & Ors***.
- ❖ NCLAT has on the same issue recently in ***State Bank of India vs. D.S. Rajendra Kumar***, reaffirmed its view taken in ***State Bank of India vs. Mr. V. Ramakrishnan***, wherein it held that the order of Moratorium’ will be applicable against the ‘Corporate Debtor’ and also the ‘Personal Guarantor’. But the Appellate Tribunal entered into a caveat by stating that the order of moratorium will be applicable only to the proceedings against the corporate debtor and personal guarantor, if pending before any court of law/Tribunal or authority.
- ❖ The issue of applicability of Moratorium on surety in a contract of guarantee to a corporate debtor is settled through **“The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018”**, which provides that the provisions of Section 14 of the code i.e. Moratorium under the code are not applicable on surety in a contract of guarantee to a corporate debtor. Therefore, the financial or the operational creditor can proceed against the surety/ guarantor of the corporate debtor, even during the Moratorium under the code.

Public Announcement

- ❑ When a public announcement shall be given?
 - An insolvency professional shall make a public announcement **in Form A within 3 days** from the date of his appointment as an IRP.
 - The public announcement shall be published –
 - i. In one English and one regional language newspaper with wide circulation at the location of the registered office and principal office;
 - ii. On the website of corporate debtor
 - iii. On the website, if any, designated by the Board for the purpose

Information Memorandum

IM contains 'Relevant Information' i.e. information required by the Resolution Applicant to make the Resolution Plan the for CD and includes:

Assets and Liabilities on Insolvency Commencement Date

Audited Financial Statements("FS") for last 2 FY's and provisional FS up to not earlier than 14 days from application

list of creditors with names, claim and security interest

Related party debts due to/from corporate debtor

details of guarantees

details of partners/members holding at least 1% stake in corporate debtor

details of material litigation and ongoing investigation initiated by government and statutory authorities

number of workers/employees and liability towards them

other information which RP deems relevant to the COC

Structuring of Acquisition

Reg.38: A Resolution Plan shall provide for the measures, as may be necessary, for insolvency resolution of the corporate debtor for maximization of value of its assets, including but not limited to the following:-

- transfer of **all or part of the assets** of the corporate debtor **to one or more persons**;
- sale of **all or part of the assets** whether subject to any security interest or not;
- the **substantial acquisition of shares** of the corporate debtor, or the merger or consolidation of the corporate debtor with one or more persons;
- satisfaction or modification of any security interest;
- **curing or waiving of any breach of the terms of any debt** due from the corporate debtor;
- **reduction in the amount payable to the creditors**;
- extension of a maturity date or a change in interest rate or other terms of a debt due from the corporate debtor;
- amendment of the constitutional documents of the corporate debtor;
- **issuance of securities of the corporate debtor**, for cash, property, securities, or in exchange for claims or interests, or other appropriate purpose;
- change in portfolio of goods or services produced or rendered by the corporate debtor;
- change in technology used by the corporate debtor; and
- obtaining necessary approvals from the Central and State Governments and other authorities.

GOING CONCERN

Lets Discuss

- (a) In case CD has several business, whether the Resolution Plan can provide for transfer of one business to one of the Resolution Applicant and rest of the businesses to the other Resolution Applicant? In other words, whether the Resolution Applicant can bid for part of the business of CD?
- (b) Whether the statutory liabilities pertaining to the period prior to the Insolvency Commencement Date can be extinguished completely?
- (c) How the contingent liabilities relating to the period prior to Insolvency Commencement Date and from Insolvency Commencement Date till the Effective Date can be catered in the Resolution Plan?
- (d) Whether the Resolution Plan can provide for acquisition of shares for a nil consideration payable to the shareholder?

Lets Discuss

(e) Whether the Resolution Plan can be conditional?

(f) How international courts would approach to the Resolution Plan purports to compromise non-Indian law governed debts?

Contents of Resolution Plan

MANDATORY CONTENTS

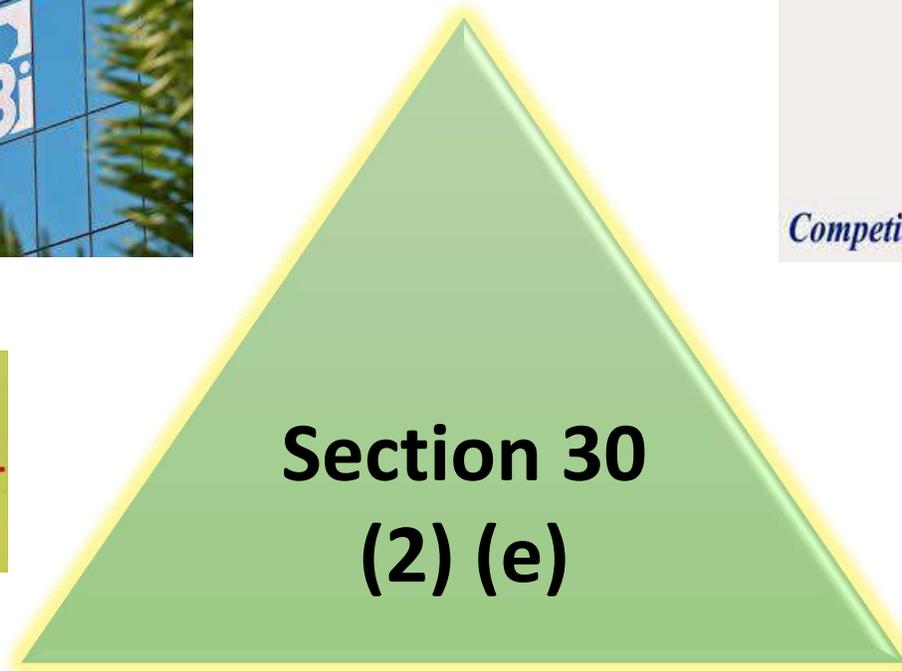
- Identify the specific source of funds to pay:
 - CIRP Cost; to be paid in priority to any other creditor
 - Liquidation Value due to OC; to be paid within 30 days of approval by NCLT and in priority to any FC
 - Liquidation Value due to Dissenting FC; to be paid in priority to Consenting FC
- Manner of dealing with the interest of the stakeholders
- Term of the Resolution Plan and Implementation Schedule
- Management and control of business during the term of the Resolution Plan
- Means of supervision of Resolution Plan
- Demonstrate the feasibility, capability of the Resolution Applicant to implement the Resolution Plan

OTHER CONTENTS

- Financial Proposal
- Extinguishment of Claims/Debts
- Reliefs, concessions, dispensations and prayers sought

NO Representations, Indemnity, Non Compete from the CD / Promoters

Compliances under Section 30(4)



Section 30 (2) (e) -The resolution professional shall examine the resolution plan received to confirm that such plan does not contravene any of the provisions of the law for the time being in force

Stressed M&A of Listed Company

❑ ICDR Regulations

- Provisions relating to Preferential Issue are not applicable except lock-in provision

❑ Minimum Public Shareholding Requirement

- 18 months to bring public shareholding upto 10%.
- 3 years to bring public shareholding upto 25%.

❑ Delisting Regulations

- Delisting regulations are not applicable for delisting the securities pursuant to resolution plan subject to:
 - Plan specifically providing the procedure to complete the delisting of securities; and
 - Exit opportunity is given to public shareholders.
- Exit price should not be less than liquidation value and exit price offered to existing promoters and other shareholders.
- Disclosure of exit price and justification within 1 day of resolution plan being approved.
- Cooling period of 5/10 years is not applicable in respect of securities delisted pursuant to resolution plan.

Interplay of SEBI Regulations and IBC

❑ Takeover Code

- Exemption from Open Offer under Reg 3.
- Resolution Applicant holding more than 25% can acquire more than 75% shares (i.e. exceeding minimum public shareholding requirement).

❑ LODR Regulations

- Provisions relating to Audit committee, nomination committee, stakeholders relationship committee, risk management committee are not applicable during CIRP.
- Provisions relating to composition of board of directors, number of Meetings, Compliance Report Compensation Payable to Directors are to applicable
- No shareholders approval required for:
 - Disposing more than 50% shares of material subsidiary;
 - Sell/dispose/lease assets to more than 20% of its material subsidiary.
- Disclosure of class of shareholders and conditions for reclassification of shareholders are not applicable.
- Obligation of Companies And Stock Exchange w.r.t draft scheme of arrangement are not applicable.
- Specific events have been specified which needs to be disclosed during CIRP process.

Resolution Applicant - Ineligibility

RA or any other person acting jointly or in concert with RA

- has an account, or an account of a CD under the management or in control of such person or whom such person is a promoter, classified as a NPA and at least 1 year has lapsed from the date of such classification
 - Cooling off period of 3 years from the date of approval of resolution plan under which such account was acquired.
 - Not applicable to a 'financial entity' who is related to CD.

Resolution Applicant - Ineligibility

- convicted with imprisonment for 2 years or more under 12th Schedule of IBC or 7 years or more under any other law
 - Cooling off period of 2 years from the date of release from imprisonment
 - Not applicable to connected person under clause (iii) of the explanation
- Disqualified to be a director
 - Not applicable to connected person under clause (iii) of the explanation
- Promoter or in management or control of CD in which tainted transaction has taken place and order has been passed in this regard
 - Not applicable if tainted transaction has taken place prior to the acquisition of CD by resolution applicant and no role of resolution applicant in such tainted transaction.

Resolution Applicant - Ineligibility

- Guarantor in respect of CD against which insolvency proceedings has been admitted
AND invoked guarantee remains unpaid
- Prohibited by SEBI from trading or accessing securities market
- Undischarged Insolvent
- Wilful Defaulter
- Disability under any foreign law corresponding to the above
- Connected Person ineligible under any of the above

**Whether connected person of 'person acting in concert' with
Resolution Applicant are also covered?**

Connected Person – Explained

The word “connected persons” appear in clause (j) of section 29A.

A person who is connected to the persons as defined under the Explanation, shall be disqualified if the other person suffers disability under clause (a) to (i) of section 29A.

Clause (i) - PRESENT PERSONS

- Promoter of the resolution applicant or
- The person in management of the resolution applicant or
- The person in control of the resolution applicant.

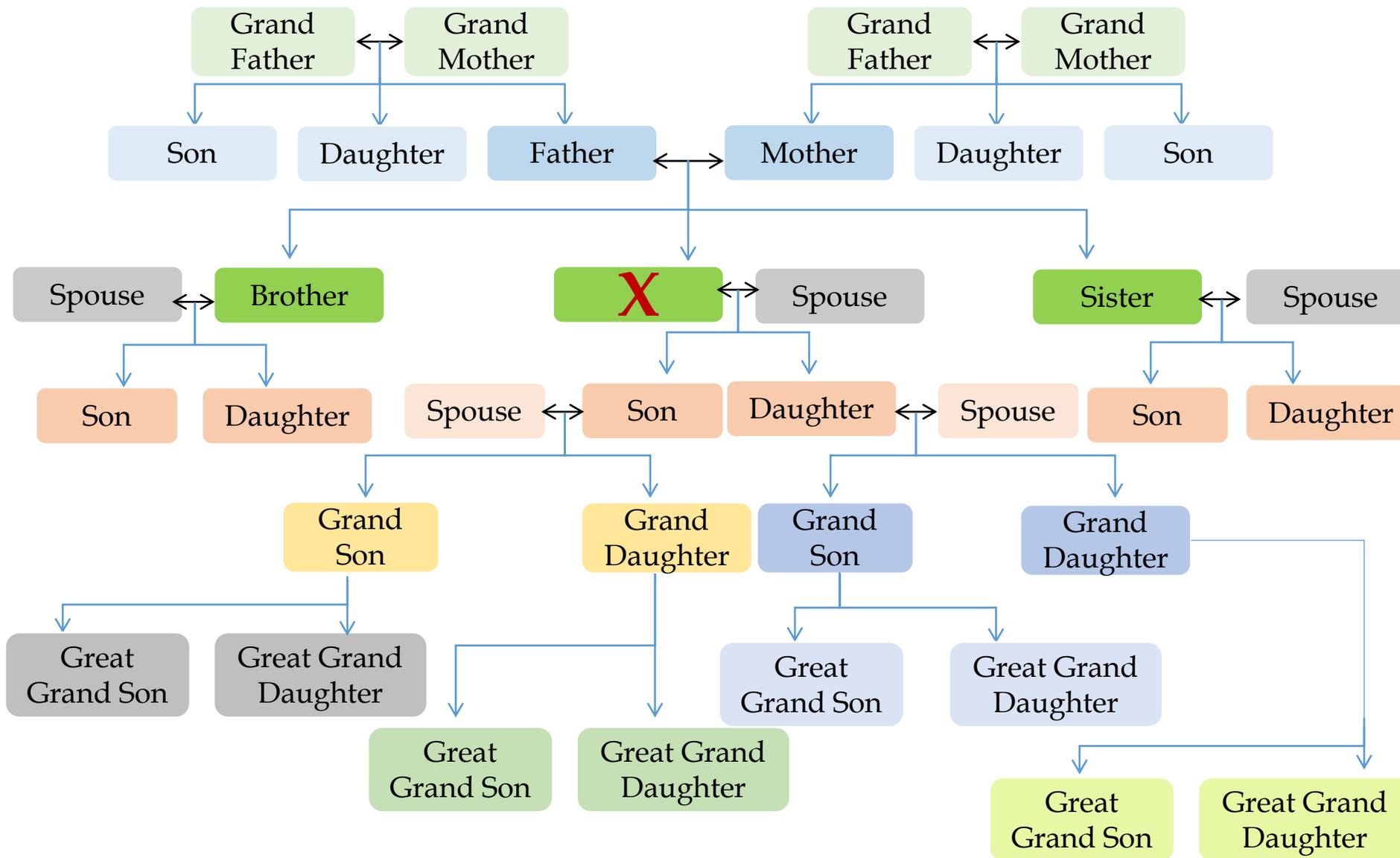
Clause (ii) - PROPOSED PERSONS DURING RESOLUTION PLAN

- Persons proposed as promoters ; or
- Person to be in the management ; or
- Person to be in control

Clause (iii) – Following company/party of (i) and (ii)

- Holding company ; or
- Subsidiary company ; or
- Associate company ; or
- Related party

Who are Relative under IBC, 2016



Jurisprudence – Section 29A

- In the matter of ***State Bank of India V. Electrosteels Limited***, following issues were answered by the Hon'ble NCLT Kolkata Bench:
 - ❖ *“As per section 29A (d) of the Code, the person is ineligible if he is **convicted for offence punishable with two years or more**. Sentence imposed being a sentence to pay fine and neither the directors of the Resolution Applicant nor the Subsidiary of the Resolution Applicant were convicted in an offence punishable with imprisonment, or any of the directors were not imprisoned and fine ordered to pay has been paid, Section 29A (d) of the Code does not attract in the case in hand”.*
 - ❖ **The offence punishable with imprisonment is different with that of an offence punishable with imprisonment or fine.** The Subsidiary of the Resolution Applicant was found guilty of an offence punishable with imprisonment or fine for a term not exceeding 3 years or both. So there was no imprisonment and therefore the disqualification as stated in section 29A (d) of the Code would not trigger.
- In ***Wig Associates Private Limited***, Hon'ble NCLT Mumbai Bench vide its recent judgment dated 04.06.2018 held as follows:
 - ❖ It is settled rule of interpretation of statute that any amendment to a statute affecting the legal rights of an individual must be presumed to be prospective unless it is made expressly or is impliedly retrospective. **So it was safely held that the present amended section of 29A of the Code is effective from the date of passing of the ordinance i.e., 23rd November, 2017 and not to the resolution plans already submitted before the date of such ordinance.**
 - ❖ *“Once CIRP has commenced and the Resolution Professional has invited Expression of interest which resulted into submission of Resolution plan by a Resolution Applicant the same is to be dealt with as per the provisions existed on the date when a Petition is “Admitted”. Because of this, the Resolution Plan is eligible on account of applicability of the old provisions of the Insolvency Code as they existed on the date of “Admission”. The admitted factual position is that the petition was “Admitted on 24th August 2017 by an order of NCLT Mumbai, as against that the Ordinance was pronounced on 23rd November 2017. Therefore the Resolution plan was eligible for due adjudication.”*

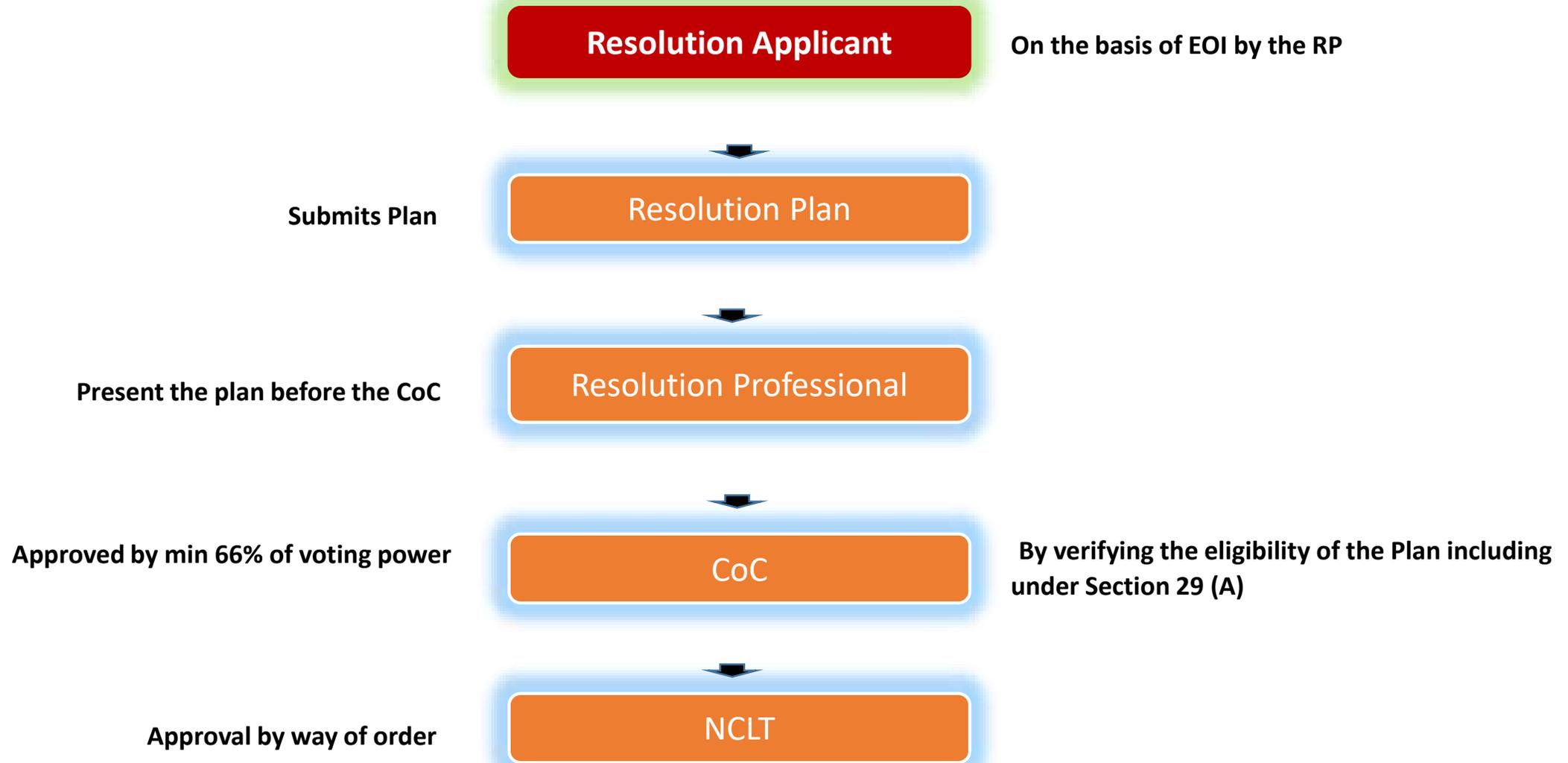
Jurisprudence – Section 29A

- In ***State Bank Of India Vs. Bhushan Steel Limited***, the Hon'ble Bench whilst interpreting clause (d) of Section 29 A of the code, held as follows:
 - ❖ ***“The provisions of Section 29A (d) of the Code would not be applicable to cover a juristic person and could be applied only to a natural person because it contemplates visiting the convict with imprisonment for two years or more. As there is no provision for imposition of fine and a corporate body like a company cannot be visited with imprisonment/custodial sentence.”***
 - ❖ ***“If minimum sentence is provided (not less than) then the Sentencing Court is bound to award that sentence and it has no option. However, in cases where no minimum or maximum sentence is provided then it is eventually for the Court to decide what sentence should be imposed.”***
 - ❖ ***“Section 29A (d) does not provide for imposition of fine and therefore, it would not be applicable to the facts in the present case because a Corporate Entity cannot be subjected to any custodial sentence which is the only provision made by sub section (d) of Section 29A of the Code.”***
 - ❖ ***“We do not feel persuaded by the argument advanced by Mr. Chandhiok that the expression punishable should mean that conviction alone is sufficient as the word punishable is immaterial and does not contemplate whether there is actual sentence or not.”***
 - ❖ ***“It is true that the argument raised by Mr. Chandhiok has arisen on account of the language used in Regulation 38(3) explanation (i) (b) of the CIRP Regulations. The argument based on the aforesaid regulation completely ignores the substantive provisions of the Principal Act made in Section 29A (d) of the Code.”***
 - ❖ ***“It is well settled that subordinate legislation like CIRP Regulations cannot run contrary to the Principal Act and the expression 'punishable with imprisonment for any offence for two years or more' has to be implied in the aforesaid Regulation. It is for the aforesaid reason we regret our inability to accept the objection raised by Mr. Chandhiok.”***
 - ❖ The NCLT held that the Section 29A(d) of the code does not provide for imposition of fine but provides for conviction in the form of imprisonment, and a Corporate Entity cannot be subjected to any custodial sentence which is the only provision made by sub section (d) of Section 29A of the Code.

Jurisprudence – Section 29A

- In ***Rajputana Properties Private Limited V. Ultra Tech Cement Limited & Ors.***, The Hon’ble Appellate Tribunal held as follows:
 - ❖ ***“Prima facie, in absence of any information through any source while scrutinizing the resolution plan under Section 30(2), the Resolution Professional cannot hold or decide as to who is ineligible under Section 29A. Section 30(2) does not confer such power to the Resolution Professional nor there is any other provision conferring such power to the Resolution Professional to scrutinize the eligibility of one or other Resolution Applicant.”***
-

RESOLUTION PLAN



Whether NCLT can modify the Resolution Plan approved by the CoC?

The Era of strict timelines

Section / Regulation	Description of Activity	Norm	Latest Timeline
Section 16 (1)	Commencement of CIRP and appointment of IRP	T
Regulation 6(1)	Public announcement inviting claims	Within 3 Days of Appointment of IRP	T+3
Section 15(1)(C)/Regulations 6(2)(C) and 12(1)	Submission of claims	For 14 days from Appointment of IRP	T+14
Regulation 12(2)	Submission of claims	Up to 90 th day of commencement	T+90
Regulation 13(1)	Verification of claims received under regulation 12(1)	Within 7 days from the receipt of the claim	T+21
Regulation 13(2)	Verification of claims received under regulation 12(2)		T+97
Section 21(6A) (b)/Regulation 16(A)	Application for appointment of AR	Within 2 days from verification of claims received under regulation 12(1)	T+23
Regulation 17(1)	Report certifying constitution of CoC		T+23

The Era of strict timelines

Section / Regulation	Description of Activity	Norm	Latest Timeline
Section 22(1) / Regulation 19(1)	1 st meeting of the CoC	Within 7 days of the constitution of the CoC, but with seven days' notice	T+30
Section 22(2)	Resolution to appoint RP by the CoC	In the first meeting of the CoC	T+30
Section 16(5)	Appointment of RP	On approval by the AA
Regulation 17(3)	IRP performs the functions of RP till the RP is appointed.	If RP is not appointed by 40 th day of commencement	T+40
Regulation 27	Appointment of valuer	Within 7 days of appointment of RP, but not later than 40 th day of commencement	T+47
Section 12(A) / Regulation 30 A	Submission of application of withdrawal of application admitted	Before issue of EoI	W
	CoC to dispose of the application	Within 7 days of its receipt or 7 days of constitution of CoC, whichever is later.	W+7
	Filing application of withdrawal, if approved by CoC with 90% majority voting, by RP to AA	Within 3 days of approval by CoC	W+10

The Era of strict timelines

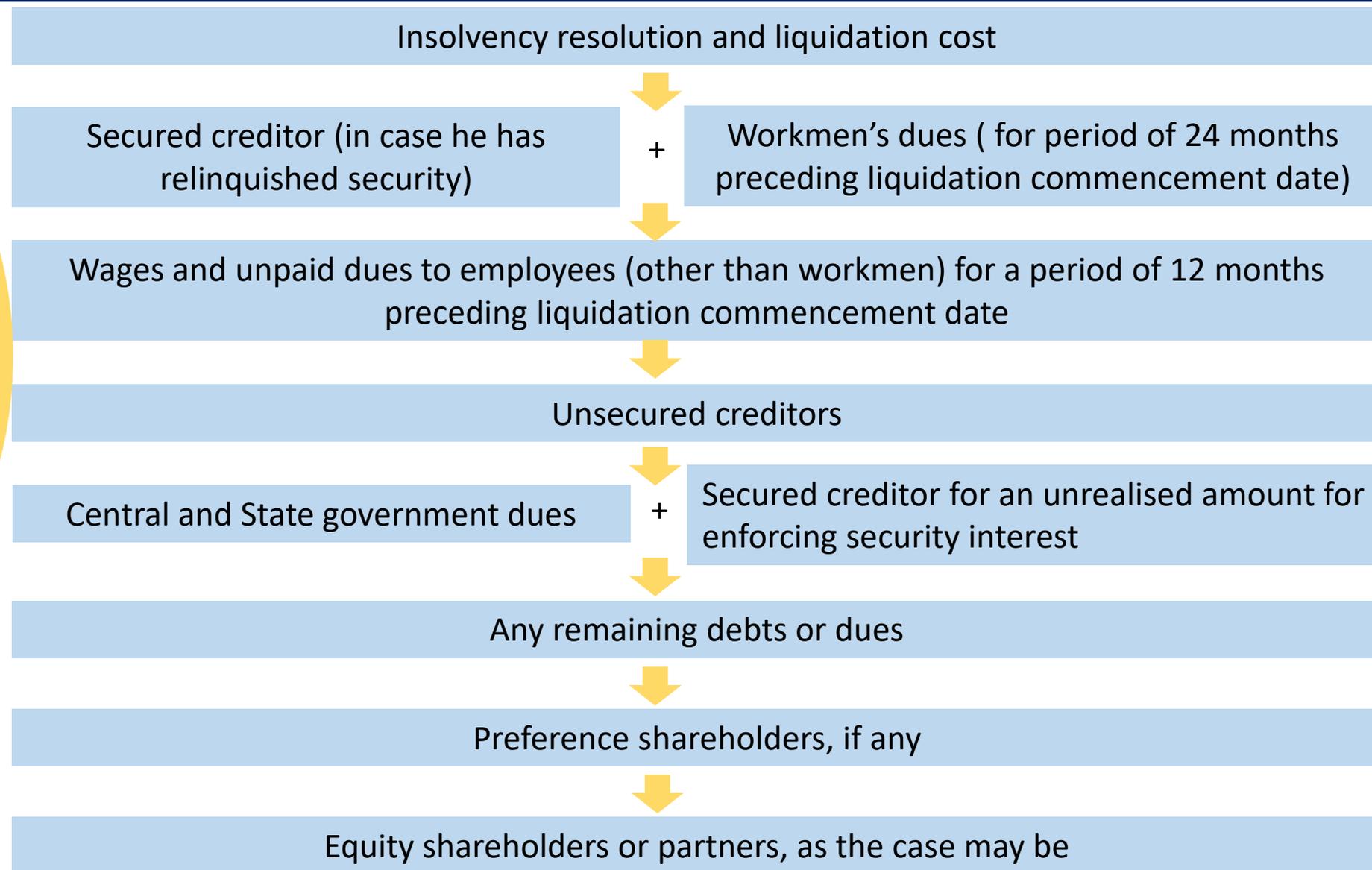
Section / Regulation	Description of Activity	Norm	Latest Timeline
Regulation 35 A	RP to form an opinion on preferential and other transactions	Within 75 days of the commencement	T+75
	RP to make a determination on preferential and other transactions	Within 115 days of commencement	T+115
	RP to file applications to AA for appropriate relief	Within 135 days of commencement	T+135
Regulation 36 (1)	Submission of IM to CoC	Within 2 weeks of appointment of RP, but not later than 54 th day of commencement	T+54
Regulation 36A	Publish Form G	Within 75 days of commencement	T+75
	Invitation of EoI		
	Submission of EoI	At least 15 days from issue of EoI (Assume 15 days)	T+90
	Provisional List of RAs by RP	Within 10 days from the last day of receipt of EoI	T+100
	Submission of objections to provisional list	For 5 days from the date of provisional list	T+105
	Final List of RAs by RP	Within 10 days of the receipt of objections	T+115

The Era of strict timelines

Section / Regulation	Description of Activity	Norm	Latest Timeline
Regulation 36B	Issue of RFRP, including Evaluation Matrix and IM	Within 5 days of the issue of the provisional list	T+105
	Receipt of Resolution Plans	At least 30 days from issue of RFRP (Assume 30 days)	T+135
Regulation 39(4)	Submission of CoC approved Resolution Plan to AA	As soon as approved by the CoC	T+165
Section 31(1)	Approval of resolution plan by AA		T=180

Waterfall Mechanism

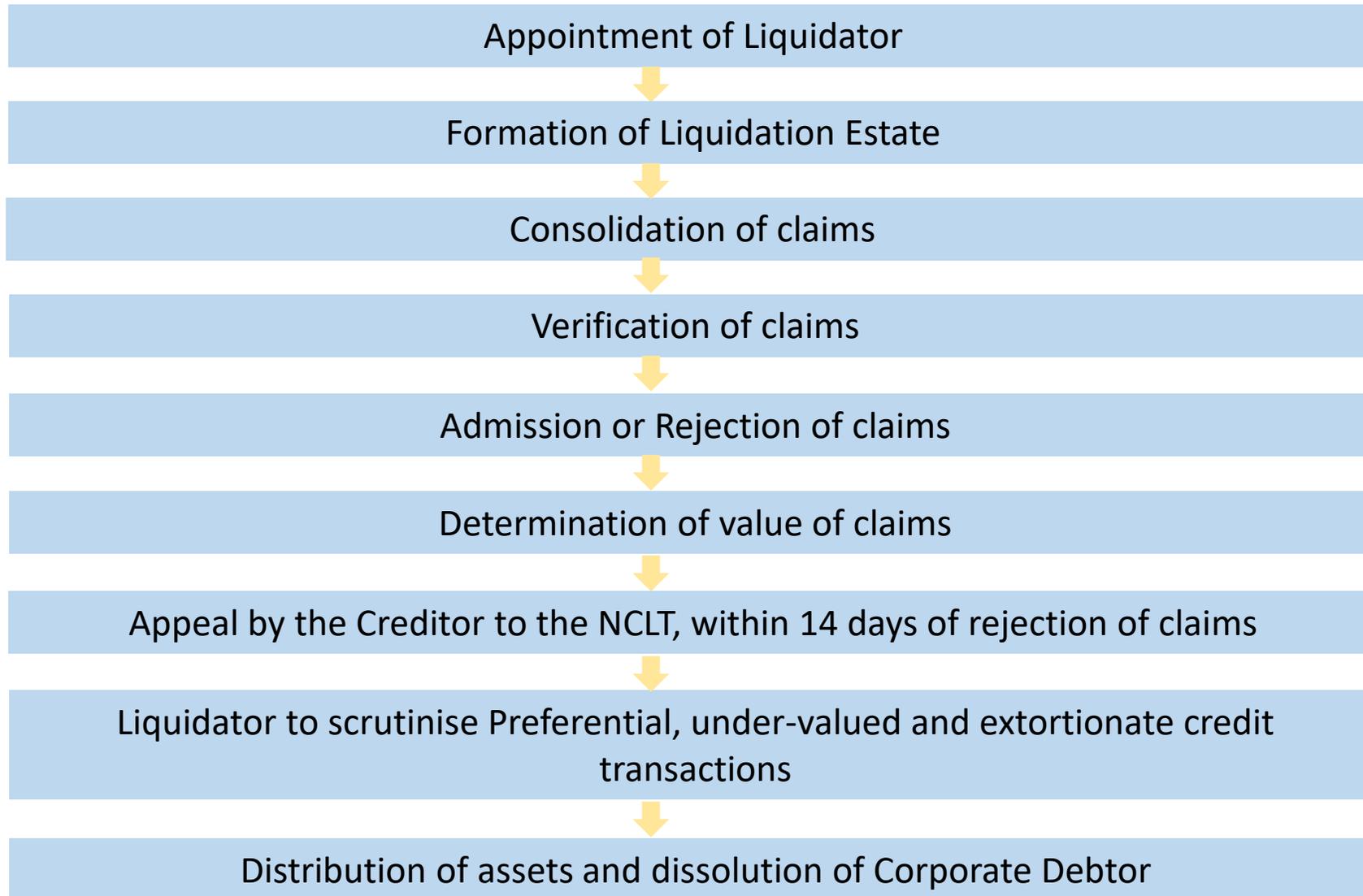
In case of liquidation, the asset of the corporate debtor will be sold and the proceeds will be distributed amongst the creditors in the following order of priority:-



Fair Value Vs Liquidation Value

Fair Value	Liquidation Value
<p>Fair Value means the estimated realizable value of the assets of the corporate debtor, if they were to be exchanged on the insolvency commencement date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had acted knowledgeably, prudently and without compulsion.</p>	<p>Liquidation value means the estimated realizable value of the assets of the corporate debtor, if the corporate debtor were to be liquidated on the insolvency commencement date.</p>

Broad Liquidation Process



Initiation of Liquidation

Where the RP, at any time during the CIRP but before confirmation of resolution plan, intimates the NCLT of the decision of the committee of creditors to liquidate the corporate debtor, NCLT shall pass a liquidation order



RP appointed for CIRP shall act as the liquidator for the purposes of liquidation unless replaced by NCLT

Duties of Liquidator

to **verify claims** of all the creditors

to draw, accept, make and endorse any **negotiable instruments** in the name and on behalf of the corporate debtor

to **take into his custody** or control all the assets, property, effects and actionable claims of the corporate debtor

to take out, in his official name, letter of administration to any deceased contributory and to do in his official name any other act necessary for obtaining payment of any money due and payable from a contributory or his estate

to **evaluate the assets and property of the corporate debtor** and prepare a report

to **carry on the business of the corporate debtor** for its beneficial liquidation

to **obtain any professional assistance from any person** or appoint any professional, in discharge of his duties, obligations and responsibilities

to **sell the immovable and movable property** and actionable claims of the corporate debtor in liquidation by public auction or private contract

to perform such other functions as may be specified

 ELECTROSTEEL

 **IFCI**
LIMITED

 vedanta


MONNET

PATANJALI



 FREECULTR

ATHENA

ESSAR 



THANK YOU

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