

Daryaganj CPE Study Circle



SEMINAR ON INSOLVENCY AND BANKRUPTCY CODE,

2016





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AGENDA FOR TODAY

- Insolvency regime in India
- Need for new law
- Insolvency and Bankruptcy Code, 2016 ('IBC)
 - Journey of IBC
 - Preamble of IBC
 - Applicability
 - Important Definitions
 - Corporate Insolvency Application before NCLT
 - Resolution Professional
 - Corporate Insolvency Resolution Process
 - Liquidation
- Professional Opportunities

INSOLVENCY REGIME IN INDIA

- Multiple laws
- Lack of holistic remedy
- Insolvency resolution framework for Individuals stagnant for over 100 years
 - The Presidency Towns Insolvency Act, 1909, covers the insolvency of individuals and Of partnerships and associations of individuals in presidency towns
 - The Provincial Insolvency Act, 1920, is the insolvency law for individuals in areas other than the Presidency towns, deals with insolvency of individuals, including individuals as proprietors
- Framework for resolution of Corporate bankruptcy is lethargic too
 - Winding up provisions under the Companies Act, 1956 unchanged for nearly 6 decades;

INSOLVENCY REGIME IN INDIA

Other laws in place . . .

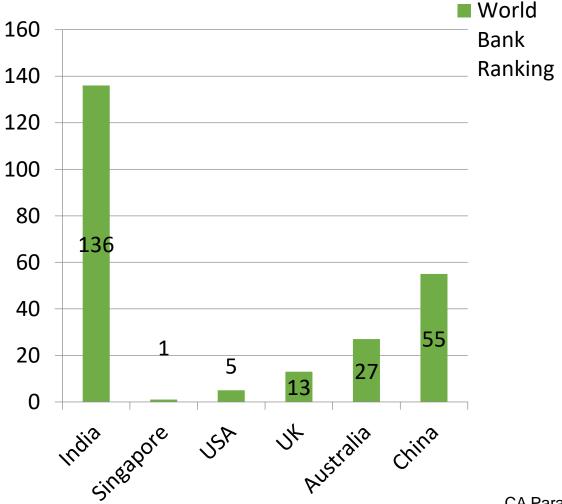
- The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002
 - Enforcement of security interests by creditors is based on a "might is right" principle;
 - Interests of stakeholders other than creditors get subdued
- The Recovery of Debts Due to Banks and Financial Institutions Act, 1993
 - Grants special rights to banks for recovery of debts
- The Sick Industrial Companies (Special Provisions) Act, 1985
 - Revival a central theme
 - Virtually redundant because of amendments made by SARFAESI

NEED FOR NEW LAW

- Existing Mechanism Inadequate & Ineffective :
 - ✓ No single Law dealing with IB in India;
 - ✓ overlapping jurisdiction
- Painfully Slow Pace

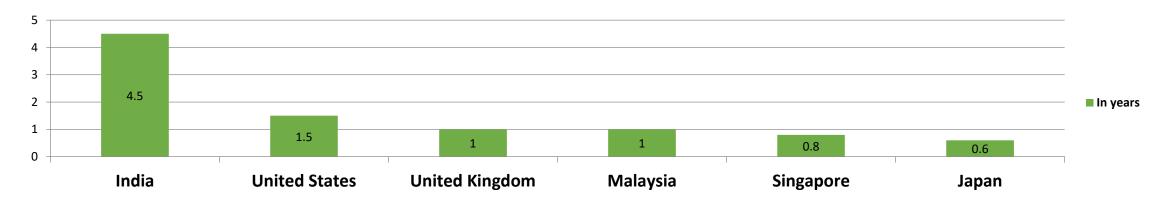


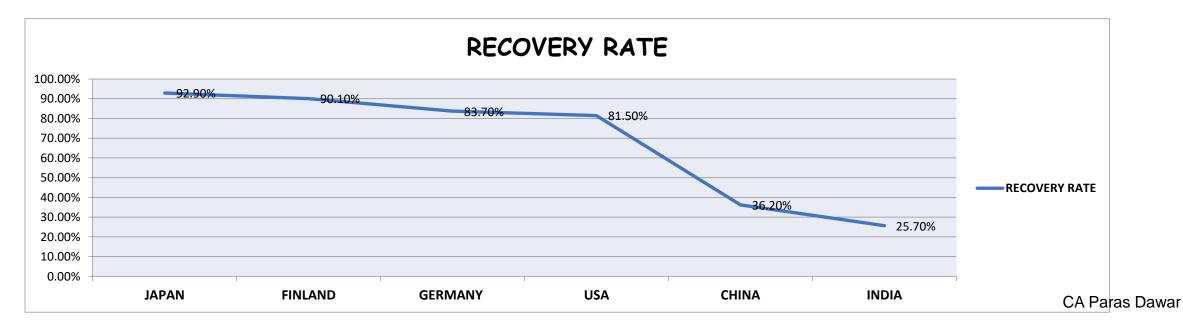
Insolvency Resolution



NEED FOR NEW LAW

RESOLUTION TIME - Takes 4.5 years to Wind Up an Existing Co.





NEED FOR NEW LAW

- Indian Bank Neck Deep in Bad
 - ✓ Gross NPA 4 Lakh Crores & Huge amount of Restructured Loans
 - ✓ Total Stressed Assets 11% of Total Lending
 - ✓ Bad Loans has grown from 3.49% (2013) to 8.3% (2015)
 - ✓ Corporate Bad Loans 56% Bad Loans of India Bank.
- Process Cost of Insolvency in India vis-a-vis-Other Countries
- Ease of Doing Business Easy Exit--Where India Stands

EASE OF DOING BUSINESS

	2015	2014	
Singapore	1	1	
New Zealand	2	2	
Hong Kong	3	3	
Brazil	120	123	
Russia	62	64	
India	142	140	
China	90	93	
South Africa	43	37)



Journey of IBC

21.12.2015- IBC Bill of 2015 -introduced in LS

23.12.2015 - IBC Bill of 2015 - Referred to Joint Committee of both Houses of Parliament

28.04.2016- IBC Bill of 2015 - Joint Committee placed its Report to both Houses of Parliament

05.05.2016- IBC Bill of 2015 -passed by LS

11.05.2016- IBC Bill of 2015 -passed by RS

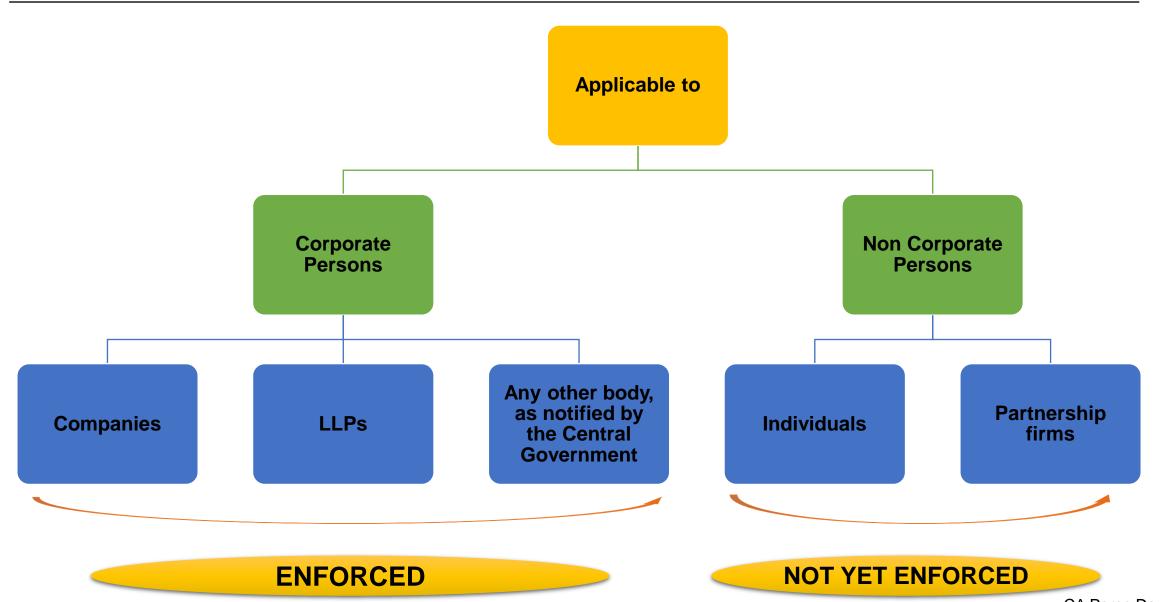
28.05.2016 - IBC, 2016 - Assented by President of India & Notified

PREAMBLE OF THE CODE

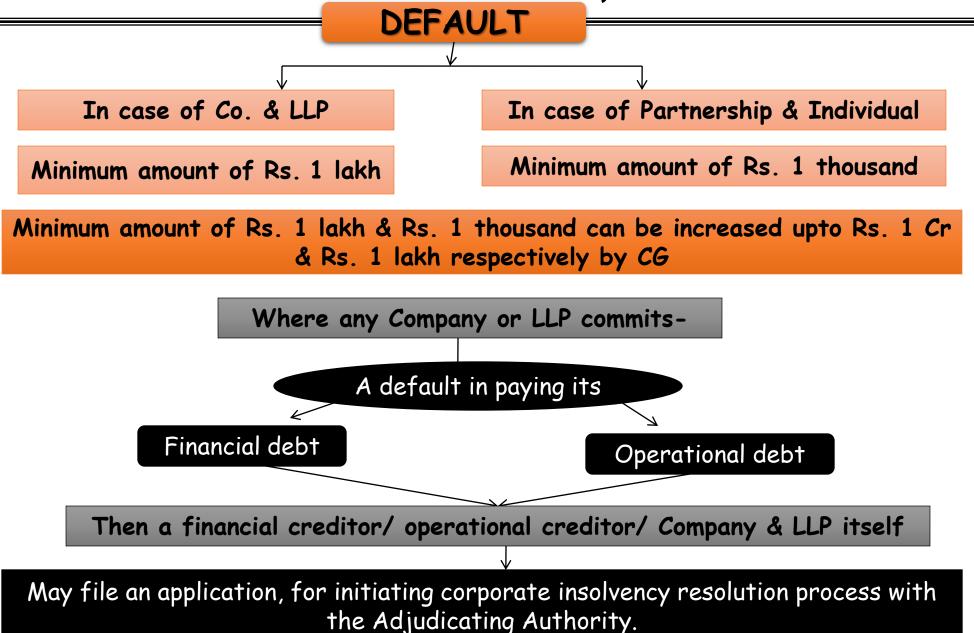
An Act to consolidate and amend the laws relating to

- <u>reorganisation and insolvency</u> resolution of
 - corporate persons,
 - partnership firms and
 - individuals
- in a time bound manner for maximisation 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.

APPLICABILITY OF THE CODE



TRIGGER POINT TO INVOKE IBC, 2016



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IMPORTANT DEFINITION

Default [Section 3(12)]

- Means <u>non-payment</u> of **debt** when it has become <u>due and payable</u>
- Is <u>not repaid</u> by the debtor/corporate debtor

Debt [Section 3(11)]

- means a <u>liability or obligation</u> in respect of a <u>claim</u> which <u>is due</u> from any person and
- includes a financial debt and operational debt;

Claim [Section 3(6)]

- Means a <u>right to payment</u>, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;
- 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;

IMPORTANT DEFINITION

Financial Debt [Section 5(8)]

- Means a <u>debt</u> along with interest, <u>if any</u>, 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 under any credit facility
 - (c) any amount raised by issue of bonds, notes, debentures, loan stock etc;
 - (d) liability in respect of any <u>lease or hire purchase</u> which is deemed as a finance or capital lease under the Accounting Standards
 - (e) receivables sold or discounted
 - (f) any amount raised under <u>any other transaction</u>, including any forward sale or purchase agreement, having the <u>commercial effect of a borrowing</u>;
 - (g) any <u>derivative transaction</u> entered into in connection with protection against or benefit from fluctuation in any rate or price;
 - (h) 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-clauses (a) to (h) of this clause;

IMPORTANT DEFINITION

Operational Debt [Section 5(21)]

- Means a <u>claim</u> in respect of the provision of
- goods or services
- including <u>employment</u> or
- <u>dues under any law</u> and payable to the Central <u>Government</u>, any State Government or any local authority;

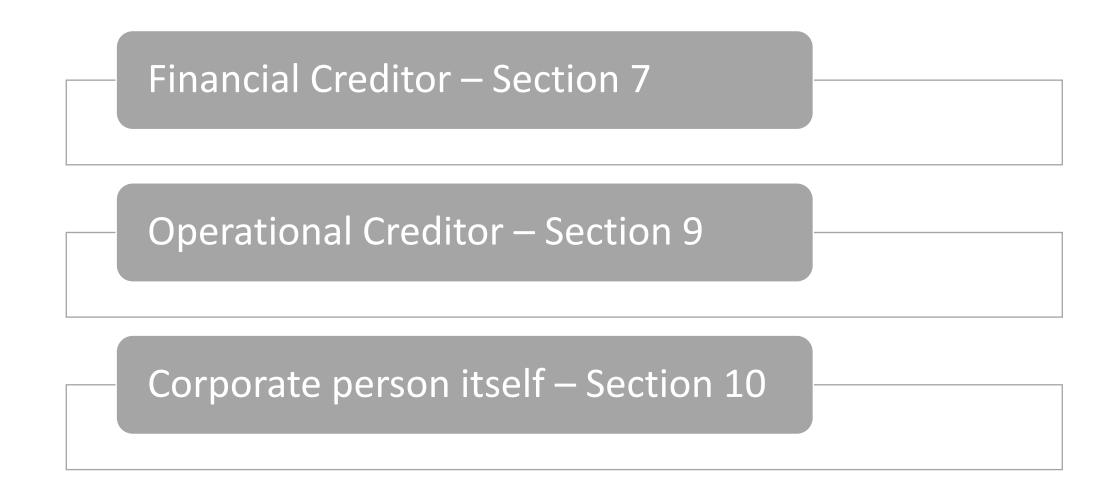
Financial Creditor [Section 5(7)]

- Means any person to whom a <u>financial debt is owed</u> and
- includes assignee

Operational Creditor [Section 5(20)]

- Means any person to whom a <u>operational debt is owed</u> and
- includes assignee

Who can file Corporate Insolvency Application?



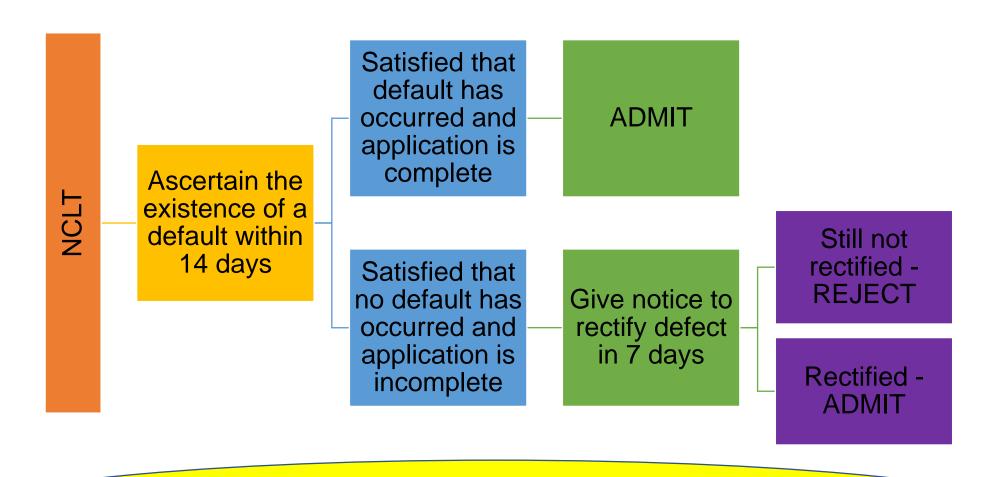
Section 7 – Application by Financial Creditor

• Corporate Debtor defaults on Financial Debt ≥ Rs. 1,00,000

Financial Creditor files application before NCLT for initiating CIRP

- Application to be made in Form No. 1 along with fee of Rs. 25,000/-
- Financial Creditor to furnish following with the Application
 - a) Record of default
 - b) Evidence of default
- Financial Creditor must specify name of the resolution professional proposed to act as an interim resolution professional

Section 7 – Application by Financial Creditor



The corporate insolvency resolution process shall commence from the date of admission of the application

Section 8 – Application by Operational Creditor

- Corporate Debtor defaults on Operational Debt ≥ Rs. 1,00,000
- Operational Creditor to deliver a demand notice or copy of invoice to Corporate Debtor
- Corporate Debtor <u>within 10 days</u> of notice must bring to the notice of Operational Creditor
 - a) <u>existence of a dispute</u>, if any, <u>and</u> record of the <u>pendency of the suit or</u> <u>arbitration proceedings</u> filed <u>before</u> the receipt of such notice; or
 - b) the repayment of unpaid operational debt
 - (i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or
 - (ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.

Meaning of 'Dispute'

Dispute [Section 5(6)]

"dispute" includes a suit or arbitration proceedings relating to—

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

Also, as per section 8(2)(a) of IBC, 2016

"Corporate Debtor within 10 days of notice must bring to the notice of Operational Creditor

a) <u>existence of a dispute</u>, if any, **and** record of the <u>pendency of the suit or arbitration</u> <u>proceedings</u> filed <u>before</u> the receipt of such notice;"

SOME QUESTIONS-

- 1. Is pendency of suit or arbitration proceeding, necessary for existence of dispute?
- 2. Can there be a dispute on any matter other that situations (a), (b) and (c) prescribed in section 5(6)?

Meaning of 'Dispute'

Supreme Court in Mobilox Innovations (P.) Ltd. v. Kirusa Software (P.) Ltd. [2017] 85 taxmann.com 292 (SC) held that

With respect to the contention that pendency of suit or arbitration proceeding, necessary to existence of dispute

- The word <u>'and'</u> occurring in section 8(2)(a) must be read as <u>'or'</u> keeping in mind the legislative intent and the fact that an anomalous situation would arise if it is not read as 'or'.
- If read as 'and', disputes would only stave off the bankruptcy process if they are already pending in a suit or arbitration proceedings and not otherwise. This would lead to great hardship
- ...once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority <u>must reject</u> the application u/s 9(5)(2)(d) if notice of dispute has been received by the operational creditor
- ...all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the 'dispute' is not a patently feeble legal argument or an assertion of fact unsupported by evidence.

Meaning of 'Dispute'

- It is important to separate the grain from the chaff & to reject a spurious defence which is mere bluster.
- However, the Court <u>does not need to be satisfied that the defence is likely to succeed.</u> The Court does <u>not at this stage examine the merits</u> of the dispute except to the extent indicated above.
- So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.
- What is also important is that the existence of the dispute and/or the suit or arbitration proceeding
 must be pre-existing i.e. it must exist before the receipt of the demand notice

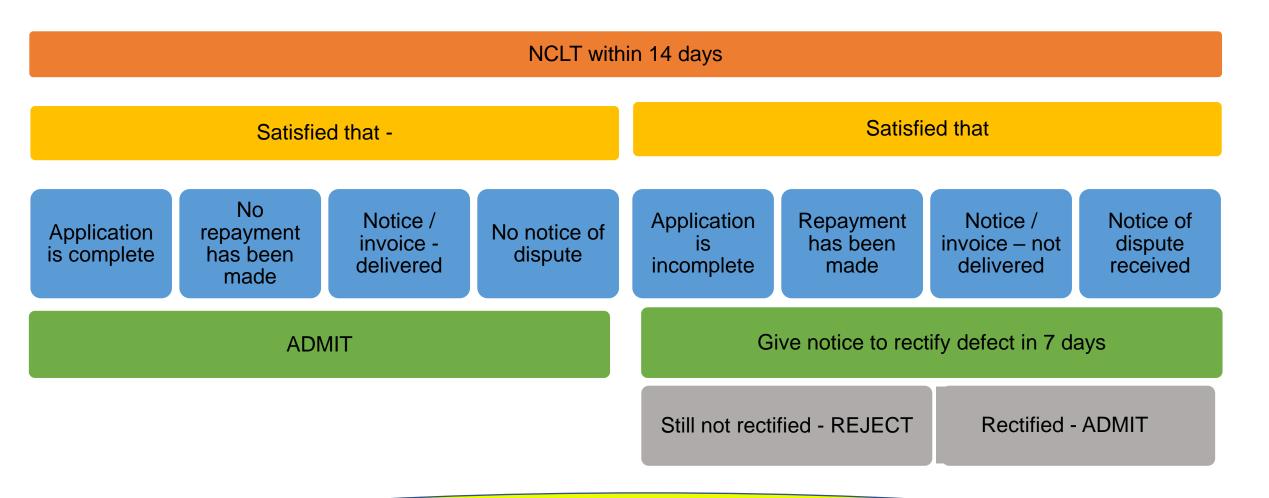
With respect to the contention that dispute must be on situations (a), (b) or (c) prescribed in section 5(6)

- Such a contention is not acceptable.
- the definition is an inclusive one and not exhaustive one.

Section 9 – Application by Operational Creditor

- Operational Creditor to file application before NCLT for initiating CIRP 10 days after delivery of notice if
 - a) No payment from the corporate debtor or
 - b) No notice of the dispute received
- Application to be made in Form No. 5 along with fee of Rs. 2,000/-
- Financial Creditor to furnish following with the Application
 - a) a copy of invoice or demand notice delivered to the corporate debtor
 - b) affidavit that no notice given by the corporate debtor relating to a dispute
 - c)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
- Operational Creditor may propose name of the resolution professional to act as an interim resolution professional

Section 9 – Application by Operational Creditor



The corporate insolvency resolution process shall commence from the date of admission of the application

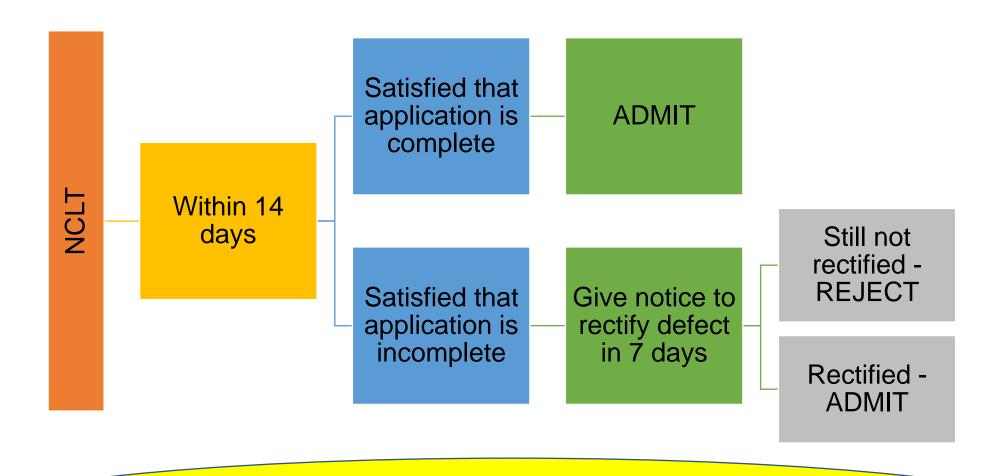
Section 10 – Application by Corporate Applicant

• Corporate Debtor committed a default ≥ Rs. 1,00,000

Corporate Applicant may file application before NCLT for initiating CIRP

- Application to be made in Form No. 6 along with fee of Rs. 25,000/-
- Corporate Applicant to furnish following with the Application
 - a) Books of accounts evidencing default
 - b) Other documents as may be prescribed
- Corporate Applicant must specify the name of the resolution professional proposed to act as an interim resolution professional

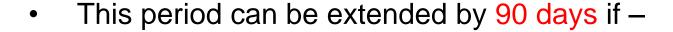
Section 10 – Application by Corporate Applicant



The corporate insolvency resolution process shall commence from the date of admission of the application

Section 12 – Time-limit for completion of CIRP

Must be completed in 180 days





- Resolution professional files application before NCLT to extend the period of the CIRP beyond 180 days, if instructed to do so by a resolution passed at a meeting of the committee of creditors by a vote of 75% of the voting shares, and
- NCLT accepts the extension prayer
- Extension of the period of CIRP shall not be granted more than once.

Section 13 – CIRP

- NCLT, after admission of the application under section 7 or section 9 or section 10, shall, by an order
 - a) declare a moratorium for the purposes referred to in section 14;
 - b) cause a public announcement of the initiation of corporate insolvency resolution process and call for the submission of claims under section 15; and
 - c) appoint an interim resolution professional in the manner as laid down in section 16.
- The order of moratorium shall have effect from the date of such order till the completion of the CIRP

Section 14 – Moratorium

On the insolvency commencement date, NCLT <u>shall</u> by order declare moratorium for prohibiting all of the following, namely:

- Institution of suits or continuation of pending of suits or proceedings including execution of any judgment, decree or order in any Court
- Transferring, encumbering, alienating or disposing of assets/legal right/beneficial interest
- Any action to Foreclosure, Recover or enforce any security interest created including any action under SARFAESI Act, 2002
- Recovery of any property by owner or lessor where such property is occupied by or in the possession of the corporate debtor

Section 15 – Public Announcement

Public announcement to be made in Form A and contains following information:

- Name & address of defaulted Corp. Debtor
- Name of Registrar with which Corp. Debtor is incorporated or registered
- Last date for submission of Claims (15 days time)
- Details of Interim Resolution Professional
- Date on which the Insolvency Resolution Process close (i.e. 180 days from the date of admission of application)
- Public Announcement shall be made in such manner as may be specified

Claims to be submitted in following forms

- Operational Creditors (Other than workman/employees)

 Form B
- Financial Creditors Form C
- Workmen/Employees Form D & E
- Any person other than Financial or Operational Creditors Form F

Section 16 & 17 – Interim Resolution Professional

APPOINTMENT:

Appointment by NCLT within 14 days from Admission of Application

TENURE:

Shall not exceed 30 days from date of Appointment

Once IRP is appointed:

Management of affairs of Corp.
Debtor shall vest with IRP

Powers of BOD/ Partners (LLP) shall stand suspended & will be exercised by IRP

Officers & Managers of Corp. Debtor shall report to IRP

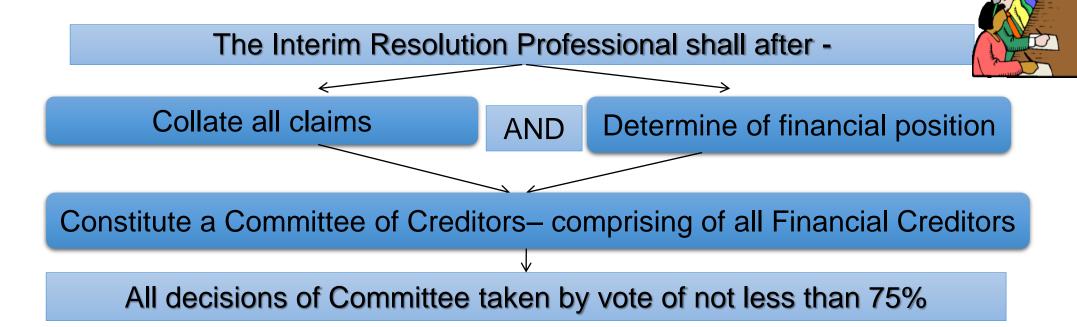
Financial Institutions
maintaining
accounts of Corp.
Debtor shall follow
instructions of IRP

Section 18 – Duties of Interim Resolution Professional

The interim resolution professional shall perform the following duties, namely:—

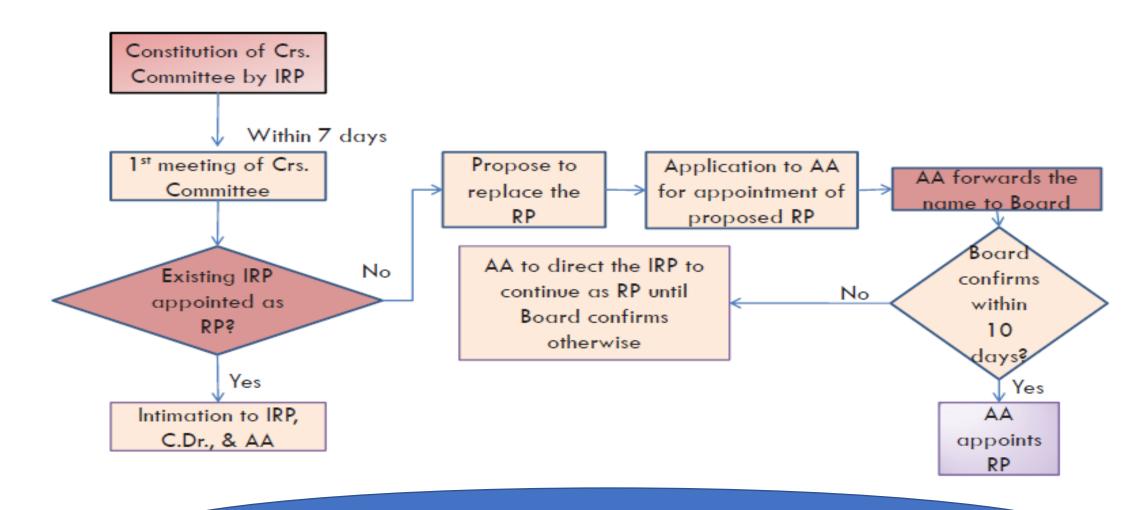
- a) collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor,
- b) receive and collate all the claims submitted by creditors to him
- c) constitute a committee of creditors;
- d) monitor the assets of the corporate debtor and manage its operations until a resolution professional is appointed by the committee of creditors
- e) take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor,
- f) to perform such other duties as may be specified by the Board.

Section 21 – Committee of Creditors



- Related Party Shall not be a part of CoC
- Operational Creditors to not be a part of CoC
- However, in a company with no financial creditor, COC to comprise following
 - 18 largest Operational Creditors by value
 - 1 representative of Workmen
 - 1 representative of Employeees

Section 22 – Resolution Professional



Resolution Professional appointed shall now carry out CIRP

Section 25 – Duties of Resolution Professional

MEETING OF THE COMMITTEE OF CREDITORS

- Convene & attend all meetings
- Present all resolution plans at the meetings

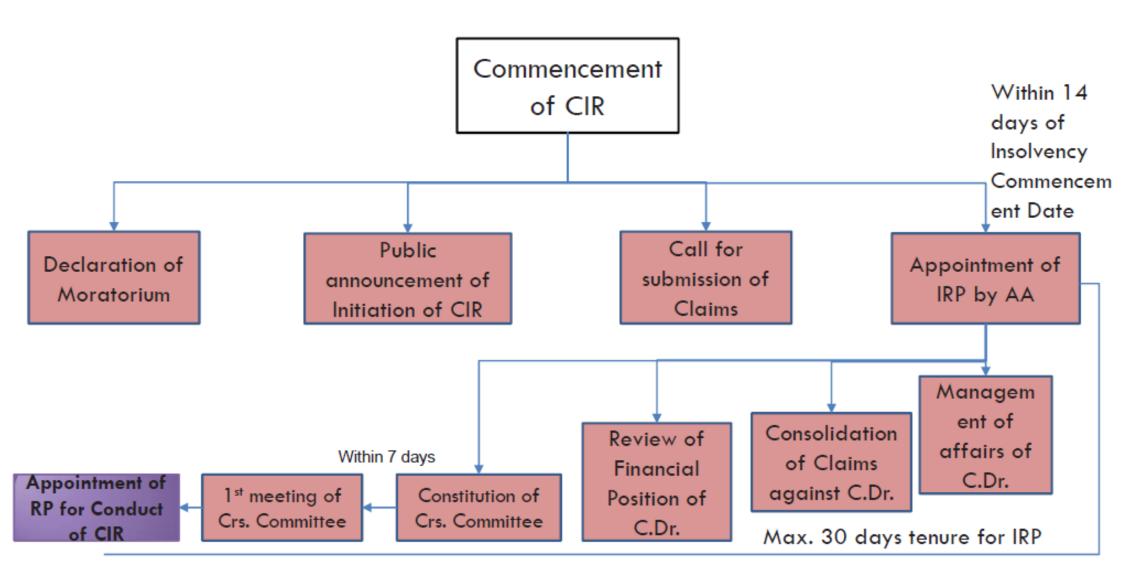
DOCUMENTS

- Maintain an updated list of claims
- Prepare the information memorandum

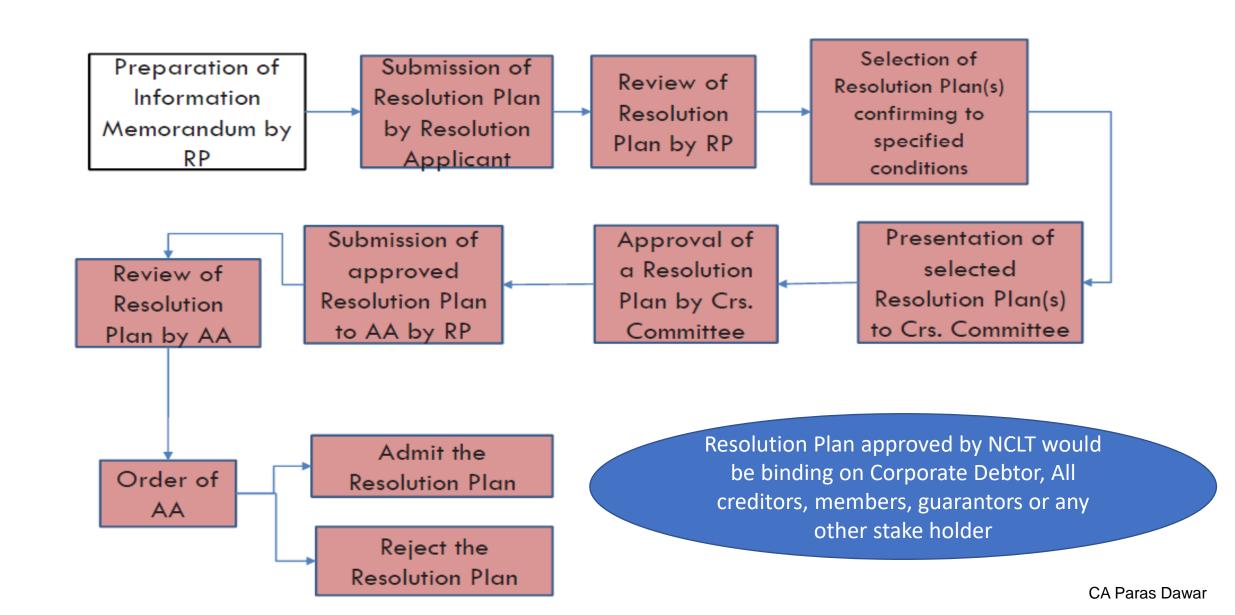
RIGHTS

- Take immediate custody and control of all the assets including business records of the company/LLP
- · Represent and act on behalf of the company/LLP with third parties

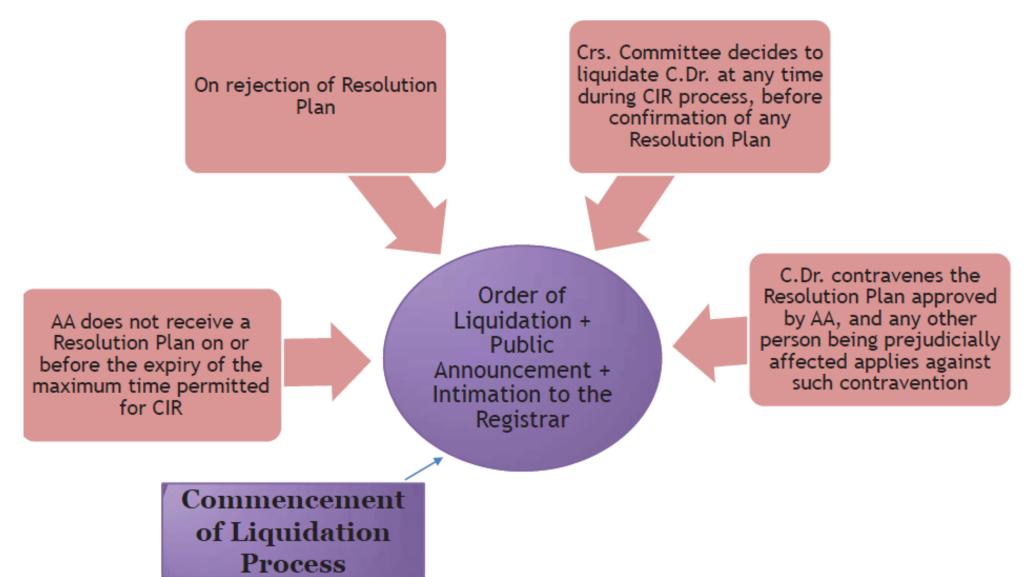
Summary of procedure after admission of CIR application



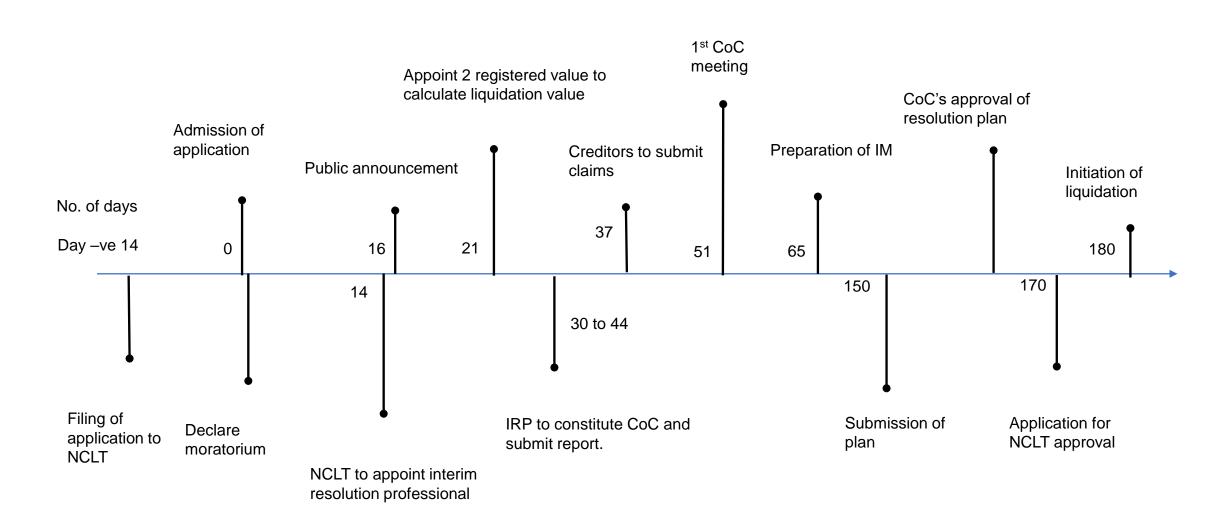
CIRP Process



Section 33- CIRP resulting in Liquidation Order by NCLT



Corporate Resolution process timeline



Liquidation process under the Code – Brief Snapshot

Liquidation order

Liquidation order will be passed if:

- CIRP period ends
- Plan not submitted to NCLT
- · Plan not approved
- · Decided by CoC
- Plan not properly implemented

Liquidation steps

- Appointment of liquidator
- Formation of liquidation estate
- · Consolidation of claims
- Distribution of assets
- Dissolution of corporate debtors (to be completed within 2 years)

Liquidator

Liquidator shall:

- Form liquidation estate
- take custody & control of all assets
- consolidate, verify, admit and determine value of creditors claims
- Carry on the business for its beneficial liquidation

Priority Waterfall of claims

Insolvency resolution process and liquidation costs

Secured creditor & workmen dues (up to 24 months)

Other employee dues (up to 12 months)

Financial debts of unsecured creditors

Government dues (up to 2 years) and unpaid secured creditors

Any remaining debts and dues

Preference shareholders, if any

Equity shareholders or partners, as the case may be

Reporting

- Preliminary report within 30 days from the date of the order;
- Progress report within 15 days after end of every period of 3 months from the date of order

Insolvency and liquidation cost

- Insolvency cost include interim funding, cost of running the debtor as going concern (eg rent or salary of employees), cost of IP etc
- Liquidation cost include any cost incurred by liquidator during liquidation period

Secured creditor in liquidation

Secured creditor has the option to:

- enforce and realise the security outside the Code, or
- relinquish its security interest and receive proceeds as defined in the priority of claim

Section 55- Fast Track CIRP

FAST TRACK:



Applicable on -

- a) Small Company u/s 2(85) of Companies Act, 2013; or
- a Startup (other than the partnership firm), as defined in the notification dated 23-05-2017 of the Ministry of Commerce and Industry; or
- c) an unlisted company with total assets, as reported in the financial statement of the immediately preceding financial year, not exceeding Rs.1 crore.



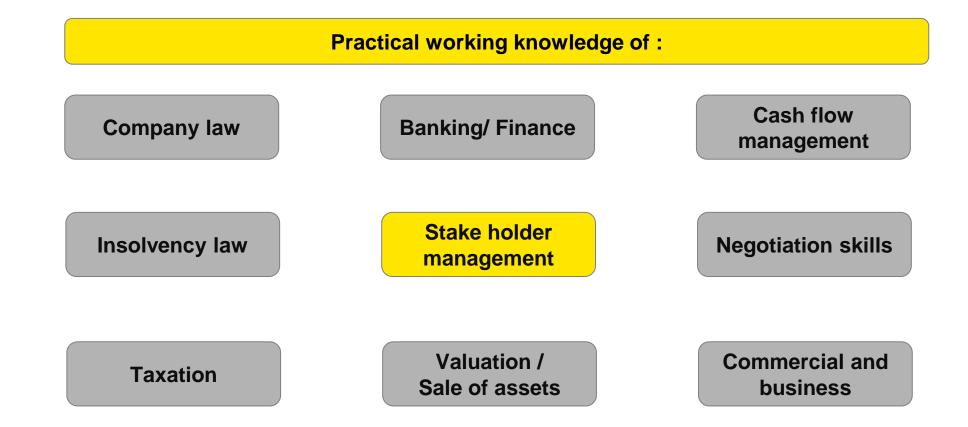
PROFESSIONAL OPPURTUNITIES

- Interim Resolution Professional
- Resolution Professional
- Liquidator
- To prepare Resolution plan
- To Represent
 - Financial Creditor;
 - Operational Creditor;
 - Corporate Debtor before NCLT- DRT & NCLAT- DRAT
- To represent the Winding Up cases before the Tribunal
- To prepare scheme & seek approval from Tribunal



Amount of Realisation /	Percentage of fee on the amount realized / distributed						
Distribution (In rupees)	in the first six	in the next six in the next one		Thereafter			
	months	months	year				
Amount of Realisation (exclusive of liquidation costs)							
On the first 1 crore	5.00	3.75	2.50	1.88			
On the next 9 crore	3.75	2.80	1.88	1.41			
On the next 40 crore	2.50	1.88	1.25	0.94			
On the next 50 crore	1.25	0.94	0.68	0.51			
On further sums realized	0.25	0.19	0.13	0.10			
Amount Distributed to Stakeholders							
On the first 1 crore	2.50	1.88	1.25	0.94			
On the next 9 crore	1.88	1.40	0.94	0.71			
On the next 40 crore	1.25	0.94	0.63	0.47			
On the next 50 crore	0.63	0.48	0.34	0.25			
On further sums distributed	0.13	0.10	0.06	0.05			

What makes a good insolvency professionals?



Questions



THANK YOU



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