Evolution of Insolvency and Bankruptcy Code 2016
(February, 2018)

45 Years of Leadership

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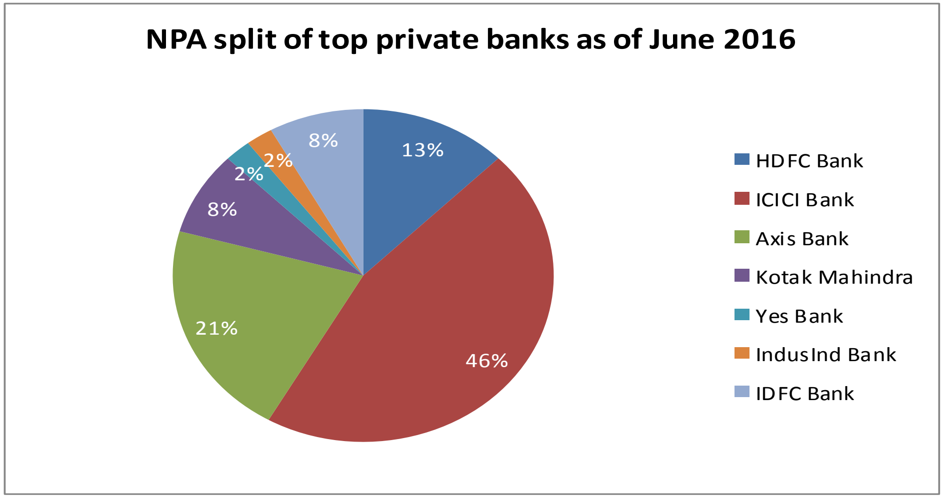
Need for IBC in India – Rising Bad Loan situation

- Between early 2000's and 2008 Indian economy was in the boom phase. During this period banks especially public sector banks lent extensively to corporates. However, the profits of the corporates dwindled due to slowdown in the global economy, ban on mining projects, and delay in environmental related approvals. The slowdown primarily affected the power, iron and steel sector, increasing the raw material price volatility and raw material availability. This in turn negatively impacted the ability of these companies to pay back their loans and is one of the important reasons behind increase in Non-Performing Assets (NPA) in India



Source: Ministry of Finance/The Hindu

In addition to the above, the below mentioned points also contributed to the rising NPA situation in India:

- Lax lending norms, including inadequate analysis of the borrower's financial status/ credit rating;
- Insufficient implementation of project risk mitigation tools such contingency planning for eventualities like failure of gas projects, failure of companies to acquire land for highway development projects etc.;
- Loan restructuring facilities for highly leveraged companies with low profit margins, based on optimistic cash flows.
- New loan facilities for companies facing difficulty in meeting their existing debt obligations

Bad Loan Recovery Mechanisms - Prior to Insolvency and Bankruptcy Code

The bad loan recovery mechanism was governed by the following legislations prior to the enactment of Insolvency and Bankruptcy Code, 2016 (IBC)

- SARFAESI Act, 2002
- The Presidency Towns Insolvency Act, 1909 and The Provincial Insolvency Act, 1920
- Companies Act, 2013
- The Recovery of Debts due to Banks and Financial Institutions Act, 1993
- The Sick Industrial Companies (Special Provisions) Act, 1985
- CDR/SDR/S4A

SARFAESI Act, 2002

Background:

- The ’Recovery of Debts due to Banks and Financial institutions Act ,1993’ had several loopholes which were misused by the borrower. To address these issues, the Government enacted the ‘Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002’ (‘SARFAESI’) based on the recommendations of the Andhyarujina committee
- SARFAESI provides financial institutions a mechanism to make recoveries in their NPAs without the intervention of the court as long as the NPAs are backed by securities charged to the bank by way of hypothecation or mortgage or assignment. If the asset in question is an unsecured asset, the bank would have to move to court to file a civil case against the defaulters

Mechanics:

- Securitization: It is the process of issuing marketable securities backed by a pool of existing assets such as auto or home loans. The process involves converting a financial asset into a marketable security for the purpose of selling it. A securitization company (‘SC’) forms a scheme for acquiring financial assets and raises funds from Qualified Institutional Buyers (‘QIB’) for this purpose. The SC issues a security receipt to the investors for the funds raised, which may thereafter be traded by the investor
- Asset Reconstruction: The bank bundles a few NPAs and sells them off to an Asset Reconstruction Company (‘ARC’) at a discount. The ARC may then take over or change the management of the borrower, sell or lease off part or whole of the borrower’s business, reschedule the debts repayment schedule of the borrower and/ or enforce the security interest in accordance with the provisions of SARFAESI

Shortcomings:

- In certain cases, the due process of recovering micro, small and medium enterprises (MSME) loans were overthrown by taking coercive actions under the SARFAESI Act as a first resort.
- Though SARFAESI Act technically appeared to be a sound tool, possession of security was a challenge in majority of the cases.

The Presidency Towns Insolvency Act, 1909 and The Provincial Insolvency Act, 1920

Background:

- The Presidency Towns Insolvency Act, 1909 (PTSI) was enacted on March 12, 1909 and was enforced on January 01, 1910. The Act covered insolvency of individuals, partnerships and associations of individuals in the erstwhile presidency towns of Chennai, Kolkata and Mumbai
- The Provincial Insolvency Act, 1920 (PSI) was enacted on February 25, 1920. The Act laid down insolvency laws for individuals, partnerships and associations of individuals in India except for the presidency towns mentioned above.
- The two enactments dealt with personal insolvency, had parallel provisions and their substantial content was similar, however, the two differed in respect of their territorial jurisdiction as specified above

Mechanics:

- An insolvency petition is to be filed either by the debtor himself or his creditor in an insolvency court. For an insolvency petition to be accepted by the court, the amount of debt must be more than INR 500
- An interim receiver is appointed by the court to take immediate possession of the property of the debtor. The interim receiver's office continues until a regular officer is appointed in his place
- The Court, on being satisfied about the reasonability of the petition, shall pass an order of adjudication. Such an order results in the debtor being classified as a 'undischarged insolvent' and his property is vested with an officer called 'Official Assignee/ Receiver' under the respective legislations
- The Official Assignee/ Receiver shall sell the property and the money so generated shall be distributed among the creditors
- If the debtor's insolvency was due to misfortune and not due to dishonest or unscrupulous behaviour of the debtor, a certificate of 'absolute discharge' is granted to the debtor. For this purpose, the behaviour of the debtor during the insolvency proceedings must also be satisfactory
- On the award of the 'absolute discharge certificate', any unpaid debts of the debtor are cancelled

The Presidency Towns Insolvency Act, 1909 and The Provincial Insolvency Act, 1920

Shortcomings:

- The legislations specifically prohibit any insolvency petition against any corporation/ association/ company registered under any enactment and to this extent the law is not universally applicable
- The legislations do not provide a time frame for disposal of insolvency applications
- The legislations do not provide the debtor an opportunity to resolve their debts and it directly provide for the sale of the debtor’s properties

The Companies Act, 2013

Background:

- The Companies Act, 2013 (Act) provides for a comprehensive guidance for insolvency of companies through the following:
  - Revival and Rehabilitation of Companies - Chapter XIX of the Companies Act, 2013
  - Liquidation of Companies – Chapter XX of the Companies Act, 2013
- While the provisions relating to revival and rehabilitation of companies stand omitted, provisions relating to liquidation of companies came into effect from December 15, 2016.
- The legislation provides for liquidation of companies when a company is not able to pay off its debts outstanding to its creditors including winding up of a company by the National Company Law Tribunal (NCLT).

Mechanics:

- The NCLT shall appoint a 'Company liquidator', who shall be vested with various powers including power to:
  - Sell immovable and movable properties and actionable claims of the company by public auction or private contract, along with the power to transfer such property to any person or body corporate, or to sell the same in parcels
  - Sell the company as a going concern
  - Invite and claims of creditors, employees or any other claimant and distribute the asset sale proceeds in accordance with provisions of this legislation
- The Company Liquidator shall, in the administration of the assets of the company and the distribution thereof among its creditors, have regard to any directions which may be given by the resolution of the creditors at any general meeting.

Shortcomings:

- The legislation provides for liquidation of a company only on basis of the order passed by the NCLT. There are no provisions relating to the voluntary liquidation of company
- The legislation does not provide a revival solution for the defaulting companies

Recovery of Debts due to Banks and Financial Institutions Act, 1993

Background:

- As at September 30, 1990 numerous cases were pending in various courts amounting to Rs.6000 crores in dues of Public Sector Banks and financial institutions.
- The existing procedure for recovery of debts due to the banks and financial institutions had blocked a significant portion of funds of banks and financial institutions in unproductive assets, the value of which deteriorated over time.
- Hence, the Recovery of Debts due to Banks and Financial Institutions Act, 1993 was enacted to provide for the establishment of Debt Recovery Tribunal (DRT) and Appellate Tribunals (AT) for expeditious adjudication and recovery of debts due to banks and financial institutions.

Debt recovery mechanisms under the Act:

- A bank or financial institution which has to recover any debt from any person, it may make an application to the DRT for recovery of debts. The DRT shall issue summons to the defendant, requiring the defendant to show cause within thirty days of the service of summons.
- Where the DRT considers it to be just and reasonable, the tribunal shall pass a final order by issuing a certificate for recovery of debts.
- A Recovery officer, on receipt of such a certificate shall proceed to recover the amounts by
    - attachment and sale of the movable or immovable property of the defendant
    - arrest of the defendant and his detention in prison
    - appointing a receiver for the management of the movable or immovable properties of the defendant.
- The Act also provides for other means of recovery of dues to banks and financial institutions
- This mechanism was not proving to be very effective due to substantial delays in decisions.

Sick Industrial Companies (Special Provisions) Act, 1985 (SICA)

Background:

- Sick industrial units are entities making losses that are more or less permanent in nature and not likely to be eliminated easily. In the normal course, such units would close down or would undergo extensive restructuring to eliminate the operations or activities that are particularly non profitable
- Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) was enacted with an aim to detect industrial sickness and provide for speedy remedial measures. It aimed at expediting the revival of potentially viable units and at the same time, to ensure the closure of unviable units so as to release the investments locked up in such units for productive use elsewhere
- Board for Industrial and Financial Reconstruction (BIFR) was set up to expedite the revival process of potentially viable units or closure of unviable units

Mechanics:

- Interested parties in a company shall make a reference to the BIFR to report the sickness of the company.
- BIFR shall make an enquiry into the sickness of the company. If the company is found to be sick, BIFR may grant the company time to turn profitable. If the company is not able to turn profitable in the given time period, BIFR shall appoint an operating agency to prepare a revival package.
- The operating agency, while preparing a revival plan, shall consider further financial assistance or relief, concessions, sacrifices as it may deem fit. The said scheme will be circulated to the concerned agencies for their consent.
- Once an approval, with or without modifications, is obtained from the concerned agencies, the scheme will be binding for all the parties.
- However, if the scheme is rejected by the concerned parties, BIFR shall recommend the winding up of the company
- Winding up would take place under the supervision of the High court, governed by the provisions of the Companies Act, 2013.

Sick Industrial Companies (Special Provisions) Act, 1985 (SICA)

Shortcomings:

- SICA applied only to industrial units specified in the First Schedule of Industries (Development & Regulation) Act, 1951 subject to exemptions specified in the Act. Hence, the provision covered only specific set of Industrial units. Government companies having State or Central Government share holdings of 51% or more were kept outside the purview of SICA. Also small scale industrial units and ancillary units were kept outside the purview of SICA
- SICA applied only to those industrial units which were existing for more than 5 years and had accumulated losses equal to or greater than the net worth of the company. Hence, the provisions could not be applied at an early stage of sickness
- Significant time taken by BIFR to admit an application under SICA for further investigation. Hence, ensuring a time bound resolution process under SICA was difficult to achieve
- An essential part of SICA was that while the scheme was being prepared and approved, there was a moratorium on taking any legal action against the company for recovery of debts, enforcement of security, winding up, etc. Unfortunately, companies ended up staying within the protection of the SICA moratorium for years without any successful scheme for rehabilitation
- BIFR and High Courts were reluctant in liquidating a sick company due to fear of loss of jobs, labour unrest, etc.
- In case of winding up of a company, SICA did not provide for any mechanism for distribution of assets of the company. The same was then governed by the provisions of Companies Act, 1956.
- The Act has been repealed.

Corporate Debt Restructuring (CDR)

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Background:

- In an effort to support corporates facing financial hardships on account of factors not in their control and to provide such corporates safety of the money lent to them, the need of a process such as CDR was identified. Consequently the Government introduced CDR and its detailed guidelines were issued by the RBI on August 23, 2001. In 2008, comprehensive guidelines for both institutional restructuring as well as non-institutional restructuring were issued. Master guidelines were issued in 2012, which were revised by the RBI on May 30, 2013

Mechanics:

- CDR is a voluntary non-statutory system for recovery/ restructuring of bad loan assets. The same may be done under a 'Joint Lender Forum' (JLF) mechanism or outside the JLF mechanism (JLF is a committee formed by the lenders of the defaulting company where dues are outstanding for 61 to 90 days based on RBI guidelines)
- CDR is based on Debtor-Creditor Agreement (DCA) and Inter-Creditor Agreement (ICA). The DCA has a legally binding 'stand still' agreement binding for 90/180 days whereby both the debtor and creditor(s) agree to 'stand still' and commit themselves not to take recourse to any legal action (except criminal action) during the period
- Decisions by lenders are taken by a super-majority vote (75% by value and 60% in number)
- CDR covers all categories of assets in the books of member-creditors classified in terms of RBI's prudential asset classification standards.
- Lenders in foreign currency outside the country are not a part of CDR system
- CDR Mechanism is applicable only where the aggregate exposure outstanding from a corporate debtor is of INR 100 Million and above.
- Who may make a reference?
  - Individual or joint application by a creditor(s) who have minimum 20% share in the working capital or term loan outstanding from the company or
  - By the corporate debtor himself, if supported by a bank or financial institution having stake as mentioned above

Corporate Debt Restructuring (CDR)

Shortcomings:

- Certain cases were being referred to CDR just to keep the asset classification intact., with a mindset that full loan needs to be repaid in 10 years (15 years in case of infrastructure companies).
- While reliefs and concession were agreed, adequate attention to cash flows was not paid and additional working capital needed was not being provided.
- Fresh cases of restructuring under CDR have not been referred since the RBI changed its guidelines and stipulated that the amount of provisions to be made for a restructured loan be same as that for an outright bad loan
- Keeping in view the experience that majority of cases could not get revived, there is a clear preference for other mechanisms such as strategic debt restructuring (SDR) and the scheme for sustainable structuring of stressed assets (S4A), wherein lenders were pushed to either take control of failed companies and sell them to buyers, or to ensure that a better price for the equity held in the debtor company is achieved

Strategic Debt Restructuring (SDR)

Background:

- In many cases of restructuring of accounts, debtor companies are unable to come out of stress due to operational/ managerial inefficiencies despite substantial sacrifices made by the lending banks. In such cases, change of ownership may be a preferred option.
- With a view to ensure more stake of promoters in reviving stressed accounts and provide banks with enhanced capabilities to initiate change of ownership in accounts which fail to achieve the projected viability milestones, banks may, at their discretion, undertake SDR wherein their loan receivables shall be converted into equity shares

Mechanics:

- At the time of initial restructuring, the terms and conditions to the restructured loan(s) must include an option to convert the entire loan (including unpaid interest), or part thereof, into shares of the company in the event the borrower is not able to achieve the viability milestones and/or adhere to 'critical conditions' as stipulated in the restructuring package
- If the viability milestones are not achieved, the JLF must review the account and examine whether the account would be viable by effecting a change in ownership. If found viable, the lenders may convert their debt into equity under the SDR framework or otherwise. Further, the decision to undertake the conversion shall be made by the creditor by a super-majority vote (75% by value and 60% in number)
- Post the conversion, all lenders under the JLF must collectively hold 51% or more of the equity shares issued by the company. JLF and lenders should divest their holdings in the equity of the company as soon as possible

Shortcomings:

- Under SDR, banks need to find an investor within 18 months. In practice, banks have found it difficult to find investors where SDR was invoked. Even where investors turned up, it was difficult for the bankers and the buyers to jointly settle on a price
- In infrastructure companies where SDR was invoked, there was significant erosion of economic value. This directly led to a diversion in expectation between the buyers and the banks

Scheme for Sustainable Structuring of Stressed Assets (S4A)

Background:

- The SDR framework provides banks only 18 months to transfer the shareholding acquired to the new investor and make the prescribed RBI provisions in their books and mark-to-market (MTM) their equity holding arising from conversion of their debt to equity
- The banking sector hence had made representations to the Government for allowing more time to write down the debt and make the required provisions in case of large accounts
- Accordingly, in order to ensure that adequate deep financial restructuring may be done keeping in view the actual availability of cash flows and to give projects a chance of sustained revival, the RBI prescribed the S4A scheme to facilitate the resolution of large accounts

Mechanics:

- Eligibility: The aggregate exposure (including accrued interest) of all institutional lenders in the account is more than INR 5000 Million (including Rupee loans, Foreign Currency loans/External Commercial Borrowings)
- The borrower's debt shall be bifurcated into 2 parts vis, Part A and Part B as under:
  - Part A is the debt that can be serviced by the borrower's current (latest reported) and prospective (not more than 6 months) cash flows. The portion of debt so determined shall be termed as the 'Sustainable Level of Debt'. For this purpose, the lenders shall be required to undertake an independent Techno-Economic Viability (TEV) study
  - S4A shall apply only if the Sustainable Debt as determined above is 50 percent or more of the borrower's funded liabilities
- The difference between the aggregate outstanding debt and Part A will be referred to as Part B
- The Resolution Plan shall have the following features:
  - There shall be no fresh moratorium granted on interest or principal repayment for servicing Part A
  - There shall not be any extension of the repayment schedule or reduction in the interest rate for servicing of Part A

Scheme for Sustainable Structuring of Stressed Assets (S4A)

- Part B shall be converted into equity/redeemable cumulative optionally convertible preference shares. However, in cases where the resolution plan does not involve change in promoter, banks may, at their discretion, also convert a portion of Part B into optionally convertible debentures.
- The resolution plan shall be agreed upon by a minimum of 75% of lenders by value and 50% of lenders in number

Shortcomings:

- The scheme favors promoters more than the underlying lenders because banks have to bear the loss of interest from their profits
- The sustainable debt calculation requires that the same must be capable of being serviced over the original loan tenor assuming the future cash flows remain at their current level. However, stressed companies may be functioning at sub-optimal levels and need constant working capital support, which was proving to be a challenge.
- High level of equity dilution also reduced the incentive for promoters to actually turn around the company

Insolvency and Bankruptcy Code (IBC)

Insolvency and Bankruptcy Code, 2016 (IBC)

Background:

- The Insolvency and Bankruptcy Code, 2016 ('IBC') is the newly enacted bankruptcy law of India which seeks to consolidate the existing framework for debt recovery by creating a single law for insolvency and bankruptcy. The Insolvency and Bankruptcy Code, 2015 was introduced in Lok Sabha in December 2015.
- It was passed by Lok Sabha on May 5, 2016 and it received the assent of the President of India on May 28, 2016. The Code became effective in December 2016.
- It is a one stop solution for resolving insolvencies which at present is a long process and does not offer an economically viable arrangement. A strong insolvency framework where the cost and time incurred is minimized in attaining liquidation has been long overdue in India. The code strives to protect the interests of investors and make the process of doing business a cumbersome-less process.

Insolvency and Bankruptcy Ecosystem

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- Insolvency and Bankruptcy
  - Insolvency Professional Agency (IPA)
    - Insolvency Professionals (IP)
  - Information Utility (IU)
  - Adjudicating Authority (AA)

Insolvency and Bankruptcy Board of India (IBBI)

- IBBI is the apex body governing Insolvency and Bankruptcy Code.
- Its role is to set up the necessary infrastructure and accredit Insolvency Professionals (IPs) and Information Utilities (IUs).

Insolvency Professionals (IPs)

- IPs are professionals registered with IBBI, who would act as Interim Resolution Professional/ Resolution Professional /Liquidator/ Bankruptcy Trustee in insolvency resolution process.

Information Utilities

- Information Utilities collect, store and distribute information related to the indebtedness of Companies.
- NeSL is first Information Utility under IBC, 2016.

Insolvency Professional Agency

- Insolvency Professional Agencies (IPAs) admit insolvency professionals as members amongst other responsibilities
- Currently there are three IPAs
  - Indian Institute of Insolvency Professionals of ICAI
  - ICSI Insolvency Professional Agency
  - Insolvency Professional Agency of Institute of Cost Accountants of India

Adjudicating and Appellate Authority

- Adjudicating Authority (AA) would have exclusive jurisdiction to deal with insolvency related matters. National Company Law Tribunal (NCLT) would be AA for Corporate Person and LLP firms insolvency while Debt Recovery Tribunal (DRT) would be the AA for individual or partnership insolvency respectively.
- National Company Law Appellate Tribunal (NCLAT) would be Appellate Authority for Corporate and LLP insolvency while Debt Recovery Appellate Tribunal (DRAT) would be the AA for individual or partnership insolvency respectively.

Salient features of IBC

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‘Exclusive Jurisdiction’ of Adjudicating Authority

Adjudicating Authority (NCLT/DRT) will have exclusive jurisdiction in insolvency related matters. No injunction can be granted by any court, tribunal or authority in respect to action taken by Adjudicating Authority. However, any person aggrieved by the order of Appellate Authority may file an appeal to the Supreme Court.

Moving from “Erosion of net worth” to “Payment Default”

- The Sick Industrial Companies (Special Provision) Act, 1985 relied on erosion of net worth to determined sickness, the code prescribes payment default of more than INR 1 Lakh to invoke the insolvency proceedings.
- New mechanism allows early detection of insolvency trend
- Lender can initiate the process even if the default is in respect of the debt with another lender

Rights to file for CIRP

- Financial Creditor Under Section 7
- Operational Creditor Under Section 9
- Corporate applicant Under Section 10

Creditor in ‘possession approach’ instead of Debtor in command

The board of directors are suspended and creditor approved resolution professional is appointed to manage the Company and to run it as a going concern

‘Time bound’ resolution process

The entire process should be completed in 180 days (90 days extension with approval of AA)

Corporate Insolvency Resolution Process (CIRP)

Default

Failure to pay whole or any part or installment of the amount of debt or interest due (min 1 Lakh)

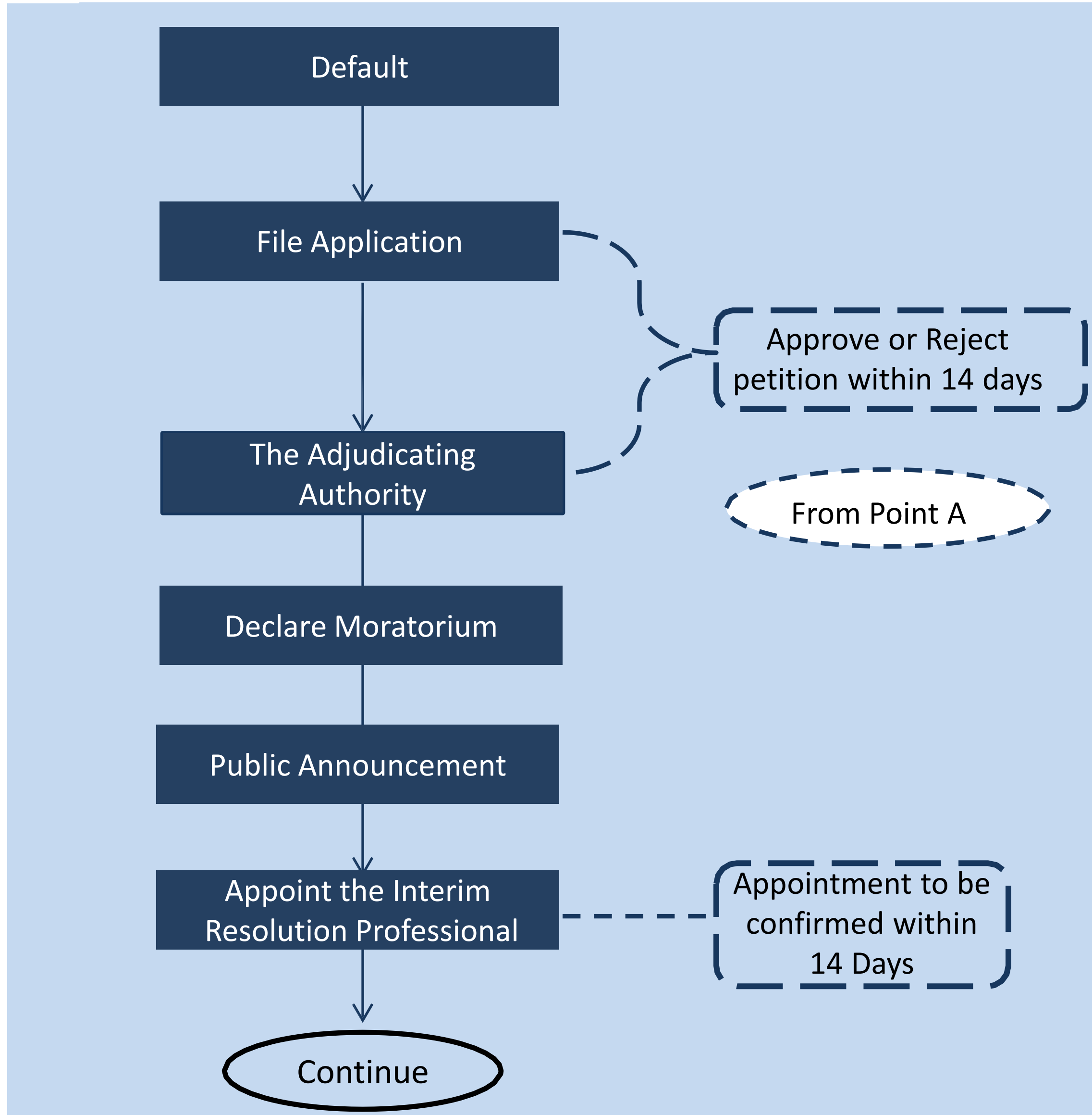
Who can file the application

- Financial creditors
- Operational creditors
- Corporate applicant

Interim Resolution Professional / Resolution professional (IRP/RP)

Applicant shall propose the name of an IRP at the time of filing the application

- Optional for operational creditor
- All powers of the board and management shall vest with the IRP/ RP
- IP is responsible to run the Company as a going concern during CIRP



Corporate Insolvency Resolution Process (CIRP)

Committee of Creditors

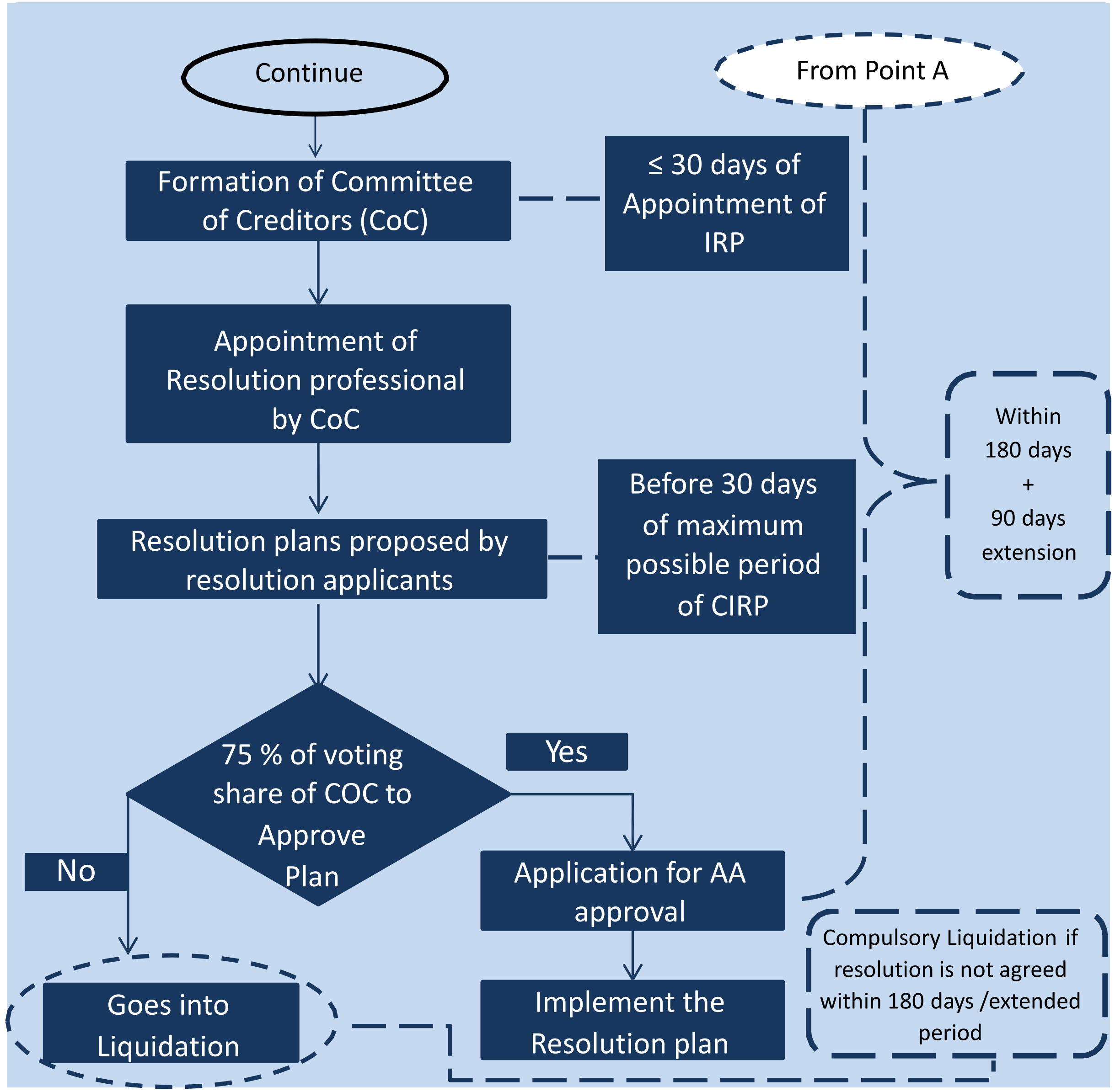
- Consists of financial creditors only
- Operational creditors to constitute committee when there are no financial creditors or all of them are related party of corporate debtor
- Will confirm IRP as RP or replace IRP.
- To approve several actions of RP

Resolution plan

Resolution Plan can be proposed by eligible Resolution Applicant

Voting Power

- Only financial creditors have voting power in the committee in the ratio of debt owed unless operational creditors constitute committee of committee
- All decision of the committee shall be approved by 75% of value of financial creditors/operational creditors, as case may be.

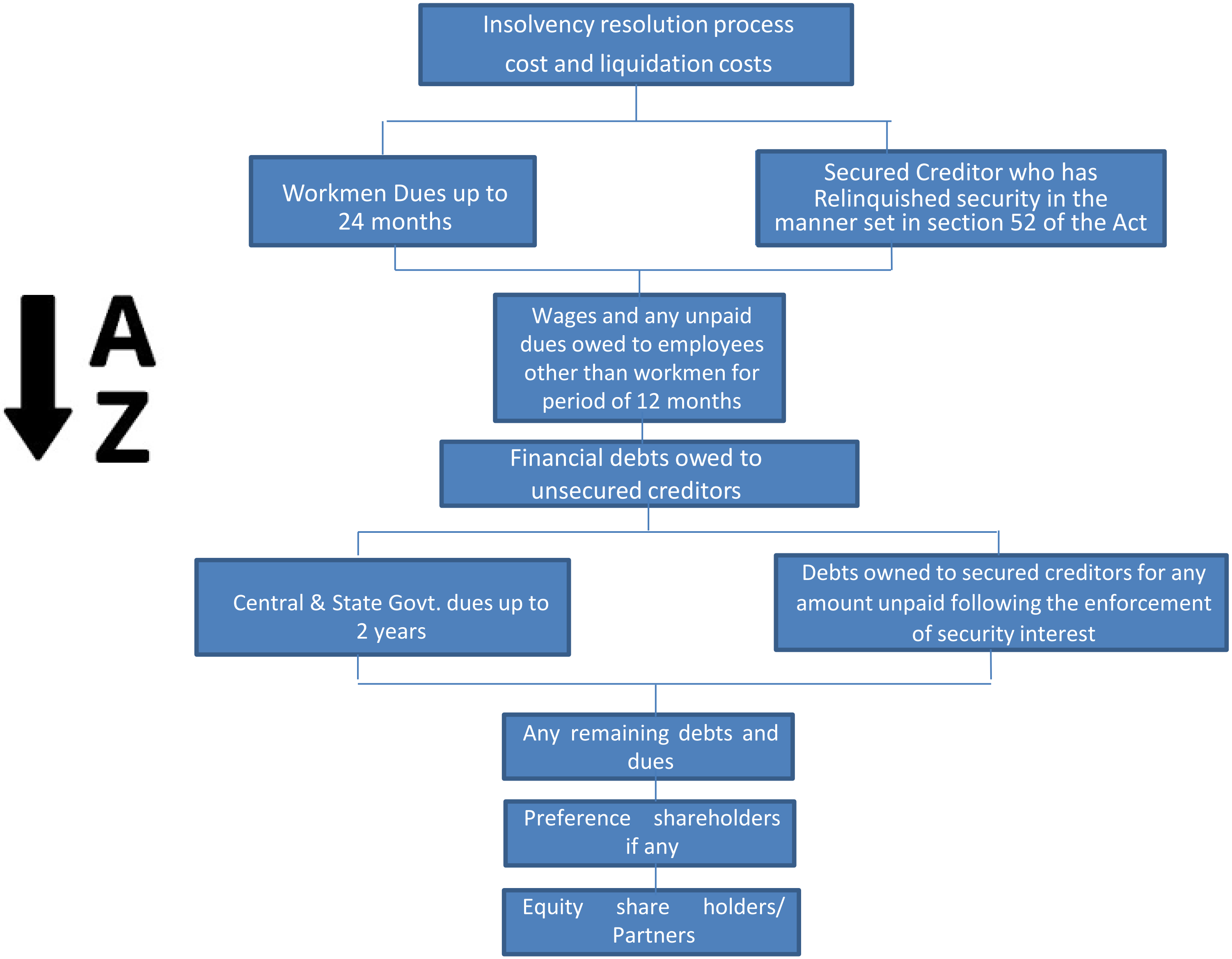


Liquidation Process

<u>Initiation:</u>
Failure to receive resolution plan before expiry of maximum period of CIRP, rejection of resolution plan by AA, Debtor can also opt for voluntary liquidation by passing a special resolution in a General Meeting.

<u>Liquidator</u>
- The IP may act as the liquidator and exercise all powers of the Board of Directors.
- The liquidator shall form a Liquidation Estate, invite, consolidate, verify, admit and determine value of creditors' claims.

Liquidation Process – Under Section 53



Power and Duties of Liquidator

Power and Duties of Liquidator

The Liquidator must try to maximise the value of the assets in the most efficient manner of disposal and create a liquidation trust for distribution.

The primary responsibilities of Liquidator are

- to verify claims of all the creditors
- to take into his custody or control all the assets, property, effects and actionable claims of the corporate debtor;
- to evaluate the assets and property of the corporate debtor in the manner as may be specified by the Board and prepare a report;
- to take such measures to protect and preserve the assets and properties of the corporate debtor as he considers necessary;
- to carry on the business of the corporate debtor as he considers necessary;
- to sell the immovable and movable property and actionable claims of the corporate debtor in liquidation by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels in such manner as may be specified;
- to maintain, preserve and submit reports and registers as may be specified;
- institute or defend any suit, prosecution or other legal proceedings, civil or criminal, in the name of on behalf of the corporate debtor;
- to investigate the financial affairs of the corporate debtor to determine undervalued or preferential transactions
- to obtain any professional assistance from any person

Amendments to Insolvency and Bankruptcy Code, 2016

Summary of Significant amendments to the IBC

Sr. No.	Particulars	Date of Amendment	Effective Date	Link to Amendment	Link to Circular
1	Relaxation in the provision relating to levy of MAT	January 06, 2018	FY 2017-18	Slide 28	http://ibbi.gov.in/webadmin/pdf/whatsnew/2018/Jan/CBDT_MAT_2018-01-06%2023:31:15.pdf
2	Issuance of shares at a discount	January 03, 2018	January 03, 2018	Slide 28	http://ibbi.gov.in/webadmin/pdf/whatsnew/2018/Jan/Press%20Release%20cirp_2018-01-07%2022:39:55.pdf
3	Valuation of assets by registered valuer	January 03, 2018	January 03, 2018	Slide 28	http://ibbi.gov.in/webadmin/pdf/whatsnew/2018/Jan/Press%20Release%20cirp_2018-01-07%2022:39:55.pdf
4	Non-Disclosure of liquidation value in information memorandum	January 01, 2018	January 01, 2018	Slide 28	http://ibbi.gov.in/webadmin/pdf/whatsnew/2018/Jan/press%20release%2001012018_2018-01-01%2022:19:50.pdf
5	Insertion of Section 29(A)	November 23, 2017	November 23, 2017	Slide 29	http://ibbi.gov.in/webadmin/pdf/whatsnew/2017/Nov/IBBI%20(Amendment)%20Ordinance,%202017_2017-11-30%2009:13:34.pdf
6	Due Diligence by committee of creditors	November 07, 2017	November 07, 2017	Slide 30	http://ibbi.gov.in/webadmin/pdf/whatsnew/2017/Nov/PRESS_RELEASE_7_11_2017_2017-11-30%2017:24:27.pdf
7	Inclusions in resolution plan	October 05, 2017	October 05, 2017	Slide 30	http://ibbi.gov.in/webadmin/pdf/whatsnew/2017/Nov/CIRP_amndmt_5_oct_2017-10-07_21-32-33_2017-11-03%2012:47:44.pdf
8	Submission of claim by creditors other than financial and operational creditors	August 16, 2017	August 16, 2017	Slide 30	http://ibbi.gov.in/webadmin/pdf/whatsnew/2017/Nov/FormforSubmissionofClaims_2017-11-03%2014:00:46.pdf
9	Notification of Fast Track Insolvency Resolution Process	June 14, 2017	June 14, 2017	Slide 31	http://www.mca.gov.in/Ministry/pdf/IBBINotification_14062017.pdf
10	Notification of Voluntary Liquidation Process	March 30, 2017	April 1, 2017	Slide 32	http://ibbi.gov.in/webadmin/pdf/whatsnew/2017/Nov/Press%20release%20Voluntary%20Liquidation_2017-11-03%2014:42:21.pdf

Amendments to Insolvency and Bankruptcy Code, 2016

1) **Relaxation in the provision relating to levy of MAT:**

The existing provisions of the Income tax Act, 1961 allow the lower of the brought forward business losses or unabsorbed depreciation to be deducted to determine the book profits taxable under Minimum Alternate Tax (MAT). Post this amendment, a company undergoing a CIRP shall be allowed to deduct the cumulative carried forward business losses as well as the unabsorbed depreciation to determine the book profits taxable under MAT.

2) **Issuance of shares at a discount** :

The erstwhile Section 53 of the Companies Act, 2013 prohibited issuance of shares at a discount. Pursuant to this amendment, companies may issue shares at a discount to its creditors when its debt is converted into shares in pursuance of any statutory resolution plan under the Code or debt restructuring scheme.

3) **Valuation of assets by registered valuer** :

Section 247 of the Companies Act, 2013 prohibited a registered valuer from undertaking valuation of any assets in which he has a direct or indirect interest or becomes so interested at any time during or after the valuation exercise. The Amendment Act now prohibits a registered valuer from undertaking valuation of any asset in which he has direct or indirect interest or becomes so interested at any time during three years prior to his appointment as valuer or three years after valuation of assets was conducted by him.

4) **Non-Disclosure of liquidation value in information memorandum:**

It is not necessary to disclose 'liquidation value' in the information memorandum. After the receipt of resolution plan(s) in accordance with the IBC regulations, the resolution professional shall share the liquidation value with every member of the committee of creditors after obtaining an undertaking from the member to the effect that such member shall maintain confidentiality of the liquidation value and shall not use such value to cause an undue gain/ loss to itself or any other person. Additionally, the interim resolution professional or the resolution professional, as the case may be, shall maintain confidentiality of the liquidation value.

5) **Insertion of Section 29(A):**

The persons mentioned below, or any person acting jointly with the persons mentioned below shall not be eligible to submit a resolution plan:

a. An undischarged insolvent;

b. A willful defaulter;

c. An entity classified as Non-Performing Assets (NPAs) for one year or more from the initiation of the resolution process and, has been unable to settle its overdue amount(s) prior to the submission of the resolution plan;

d. A person convicted for any offence punishable with imprisonment for two years or more;

e. A person disqualified to act as a director under the Companies Act, 2013;

f. A person prohibited by SEBI from trading in securities or accessing the securities markets;

g. A person who has been a promoter/ part of management/ in control of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place and in respect of which an order has been made by the adjudicating authority under the Code;

h. A person who has executed an enforceable guarantee in respect of a corporate debtor against whom an application for insolvency has been admitted under this Code;

i. A person who has been subject to any disability, corresponding to clauses (*a*) to (*h*), under any law in a jurisdiction outside India; or

j. A connected person falling in clauses (*a*) to (*i*).

A "connected person" means—

i. any person who is the promoter or in the management or in control of the resolution applicant; or
ii. any person who shall be the promoter or in management or in control of the business of the corporate debtor during the implementation of the resolution plan; or
iii. the holding company, subsidiary company, associate company or related party of a person referred to in clauses (i) and (ii):

clause (*iii*) above shall not apply to—

A. A scheduled bank; or
B. An asset reconstruction company registered with the Reserve Bank of India under section 3 of SARFAESI; or
C. An Alternate Investment Fund registered with the SEBI

6) Due Diligence by committee of creditors:

There is no restriction as to who can submit a resolution plan, the intention is that it should come from a person, who is capable to turn around the insolvent business and the Committee of Creditors (COC)is expected to approve the best of them.

The COC is expected to carry out due diligence of every resolution plan to satisfy itself that:

(a) the plan is viable, and

(b) the persons who have submitted the plan and who would implement the plan are credible,

According to the amendments the following disclosures shall be made in the resolution plan:

i. Details of the persons who are or shall be part of the promoter group/ management group/ controlling group of the resolution applicant during the implementation of the resolution plan;

i. Holding/ subsidiary/ associate companies and related parties of the above, if any.

ii. Details of convictions, pending criminal proceedings, disqualifications under the Companies Act, 2013, orders or directions issued by SEBI, categorization as a willful defaulter, etc.

iii. The resolution professional shall submit to the COC all resolution plans which comply with the requirements of the IBC and regulations made thereunder, along with details of preferential transactions under section 43, undervalued transactions under section 45, extortionate credit transactions under section 50, and fraudulent transactions under section 66 of IBC

7) Inclusions in resolution plan:

A resolution plan shall include a statement as to how it has dealt with the interests of all stakeholders, including financial creditors and operational creditors, of the corporate debtor

8) Submission of claim by creditors other than financial and operational creditors:

A person claiming to be a creditor, other than those covered under regulations 7, 8, or 9,(i.e. financial and operational creditor) shall submit proof of its claim to the interim resolution professional or resolution professional in person, by post or by electronic means in Form F of the Schedule.

The existence of the claim of the creditor referred to in sub-section (1) may be proved on the basis of –

(a) the records available in an information utility, if any, or

(b) other relevant documents sufficient to establish the claim, including any or all of the following:—

(i) documentary evidence demanding satisfaction of the claim;

(ii) bank statements of the creditor showing non-satisfaction of claim;

(iii) an order of court or tribunal that has adjudicated upon non-satisfaction of claim, if any.

9) Notification of Fast Track Insolvency Resolution Process :

These regulations provide the process from initiation of insolvency resolution of eligible corporate debtors till its conclusion with approval of the resolution plan by the Adjudicating Authority. The process in these cases shall be completed within a period of 90 days, as against 180 days in other cases. However, the Adjudicating Authority may, if satisfied, extend the period of 90 days by a further period up to 45 days for completion of the process. A creditor or a corporate debtor may file an application, along with the proof of existence of default, to the Adjudicating Authority for initiating fast track resolution process. After the application is admitted and the interim resolution professional (IRP) is appointed, if the IRP is of the opinion, based on the records of corporate debtor, that the fast track process is not applicable to the corporate debtor, he shall file an application before expiry of 21 days from the date of his appointment, to Adjudicating Authority to pass an order to convert the fast track process into a normal corporate insolvency resolution process.

The Ministry of Corporate Affairs has notified the relevant sections 55 to 58 of the Insolvency and Bankruptcy code,2016 pertaining to the Fast Track Process and also notified that fast track process shall apply to the following categories of corporate debtors:

a. a small company, as defined under clause (85) of section 2 of the Companies Act, 2013; or

b. a Startup (other than the partnership firm), as defined in the notification dated 23rd May, 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.

10) Notification of Voluntary Liquidation Process :

The regulations provide the process from initiation of voluntary liquidation of a corporate person - companies, limited liability partnerships and any other persons incorporated with limited liability - till its dissolution.

For the purpose of voluntary liquidation proceeding a resolution needs to be passed by majority of the directors or designated partners that:

i. the corporate person has no debt or it will be able to pay its debts in full from the proceeds of the assets to be sold under the proposed liquidation, and

ii. the corporate person is not being liquidated to defraud any person.

If the liquidator is of the opinion that the liquidation is being done to defraud a person or the corporate person will not be able to pay its debts in full from the proceeds of assets to be sold in the liquidation, he shall make an application to the Adjudicating Authority to suspend the process of liquidation and pass any such orders as it deems fit. The regulations prohibit an insolvency professional from acting as a liquidator for a corporate person if he is not independent of the corporate person. These prohibit partners or directors of an insolvency professional entity of which the insolvency professional is a partner or director from representing other stakeholders in the same liquidation process. These oblige the liquidator, and professional(s) assisting him in liquidation to make disclosures - initial and continuing - about pecuniary or personal relationship with any of the stakeholders or the corporate person.

Expected Changes in Insolvency and Bankruptcy Code, 2016

RBSA Advisors

- **Clarity on the definition of related parties**:

  The law as it currently stands effectively bans every related entity from participating in the resolution process. Further clarity on this aspect is required

- **Easing compliance requirements:**

  Routine disclosures while the insolvency process is on is another proposal as is the establishment of a detailed framework to deal with cross-border insolvencies.

- **Insolvency firms:**

  Currently only a registered individual insolvency professional can be appointed as a IRP/ RP. It is proposed that registered individual insolvency professionals may form a firm so that they may be better positioned to handle large and complicated transactions

- **Non-Corporate Debtors:**

  The code must be made comprehensive and should cover entities such as trusts, societies and Hindu Undivided Families (HUFs) as well.

- **Regularizing valuers:**

  The processes and transactions under the code require valuation of assets, however, IBC 2016 does not stipulate regulation for valuers. The Government is likely to regulate the profession of valuers and, if required, enable enforcement action against them.

- **Status of home buyers under IBC:**

  Clarity is needed whether buyers of immovable properties in the nature of residential flats (home buyers) shall be classified as financial creditors or will they fall under the other creditors classification

Expected Changes in Insolvency and Bankruptcy Code, 2016

- **25% Minimum public shareholding (MPS) prescribed by SEBI:**

  SEBI laws require that listed companies maintain a MPS of 25% at all times for all listed equity shares and/or listed debentures. MPS of 25% should be eased or removed for the insolvent listed companies since it is a possibility that then public shareholding would go below the required 25%, during the restructuring or resolution process

- **Delisting under insolvency resolution plan:**

  SEBI prescribes stringent procedures to de-list a company. Considering the stressed status of companies under CIRP, the delisting procedures for stressed companies must be simplified

- **Submitting annual results with ministry of corporate affairs (MCA):**

  Mandatory practice of submitting annual results of unlisted firms with the MCA should be relaxed in case of a company under insolvency resolution

- **Bench reviewing insolvency application of subsidiary companies**

  IBC should ensure that bankruptcy proceedings of subsidiary and holding companies must be overviewed by the same bench of the NCLT. Further it must be ensured that one insolvency professional handles the insolvency proceedings of all the subsidiary companies. The purpose behind this proposed amendment is to ensure that there is no conflict of opinion and there is a holistic resolution for the group companies

- **Withdrawal of admitted insolvency application:**

  Amendment of the NCLT rules to confer inherent powers upon the adjudicating authority to allow withdrawal of an application that has been admitted. However, doing so must ensure that withdrawing the application is not detrimental to interests of marginal creditors of the defaulting debtor company

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