

# INTRODUCTION TO THE INSOLVENCY AND BANKRUPTCY CODE, 2016

## THEN

### → ERSTWHILE LEGISLATIVE FRAMEWORK:

- Chapter XIX & Chapter XX of Companies Act, 2013
- Part VIA, Part VII & Section 391 of Companies Act, 1956
- RDDBFI Act, 1993
- SARFAESI Act, 2002
- SICA Act, 1985 ( Now Repealed)
- The Presidency Towns Insolvency Act, 1909 (Now Repealed)
- The Provincial Insolvency Act, 1920 (Now Repealed)
- Chapter XIII of the LLP Act, 2008

### → NON – STATUTORY GUIDELINES / OUT – OF – COURT MECHANISM:

- Bilateral restructuring
- One-time settlement
- JLF(Joint Lenders Forum) / CDR / SDR (Strategic Debt Restructuring)
- Sale of loan to ARC

## NOW

# The Insolvency and Bankruptcy Code, 2016 (IBC)

## IBC

- Paradigm shift from the existing ‘Debtor in possession’ to a ‘Creditor in control’ regime.
- Consolidating all existing insolvency related laws and amending multiple legislation including Companies Act.
- IBC would have an overriding effect on all other laws relating to Insolvency & Bankruptcy.
- Resolve insolvencies in time-bound manner (180 days).
- Introduction of IPs, formation of IBBI, IPAs IUs.
- Moratorium declared under IBC – automatic stay on winding up proceedings under the Companies Act, 2013.

## Companies Act, 2013

- Grounds for winding up under the Companies Act, 2013:
  - ‘Revival of company’– omitted in line with SICA repeal and Chapter XIX omission.
  - ‘Inability to pay debts’ - Omitted from Companies Act, 2013 and covered under IBC.
  - Voluntary winding up- no longer available under the Companies Act, 2013 – option for voluntary liquidation under IBC.
  - New ground “affairs of company conducted fraudulently / for unlawful purposes” – extends to conduct by promoters / managers (on application by ROC / CG).
- Other grounds – On passing of special resolution for winding up, NCLT is of the opinion that it is just and equitable to wind up the company, default in filing financial statements/ annual returns for preceding 5 consecutive FY with ROC.

## IBC

- Priority waterfall under IBC provides priority to secured creditors over Government dues and to FCs over OCs – Companies Act, 2013 provides for same priority waterfall as under the Companies Act, 1956.
- IBC – Preferential, Undervalued and Extortionate Credit transactions.
- Antecedent transactions can be investigated and in case of any illegal diversion of assets personal contribution can be ordered by court.

## Companies Act, 2013

- Different ‘Order of Priority’.
- Liquidators under the Companies Act, 2013:
  - Only IP registered under IBC to be liquidators (official or provisional)
  - CG panel of provisional liquidators to be dismantled.
- Time bound processes – Companies Act 2013 – order by NCLT on winding up petition within 90 days of filing petition.
- Scope of antecedent transactions is extended:
  - Companies Act, 2013 – fraudulent preference (extended to surety and guarantors)

**No power of NCLT to stay proceedings for revival/rehabilitation of company post winding up order.**

# WHAT'S NEW IN IBC ?

Contd....

## Classification of Creditors

### Financial creditors ("FC")

- persons to whom financial debt is due and

### Operational creditors ("OC"):

- Trade creditors, employees etc.

### Financial debt:

means a debt (+ interest) disbursed against the consideration for the time value of money and **includes** —

money borrowed  
against interest;

credit facility  
acceptances;

issue of bonds,  
notes, debentures,  
loan stock or any  
similar instrument

any liability for  
lease/ hire  
purchase contract;

receivables sold or  
discounted;

forward sale or  
purchase  
agreement;

derivative  
transaction

Counter indemnity

guarantee or  
indemnity for  
above

# **WHAT'S NEW IN IBC ?**

## **Operational debt:**

- a claim for provision of goods or services (including employment) and government dues.

## **Default:**

- means non-payment of debt when whole or any part or installment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be.

## **Who and when one can make application ?**

### **Who ?**

- Creditors (both financial and operational);
- Debtors;
- authorised members; and
- person in charge of managing the operations and who has control and supervision of the Corporate Debtor (“**CD**”).

### **When ?**

- upon payment **DEFAULT** of ₹ 1 Lakh or more.

## **Controlling Authority:**

Resolution professional (“RP”) under supervision of a committee of independent FCs including control over all bank accounts of CD –will run CD on a “going concern” basis.

## **CIRP Process: (for DEFAULT of ₹ 1 lakh & above)**

**FC/OC/Corporate Applicant may file Application (in form 1/5/6) with supporting documents (record of default/demand notice, invoice copy/ books of A/cs) and proposing RP (take proposed RP's consent in Form 2, to be enclosed with Application), by paying specified fees.**



**FC/OC to send copy of above application to registered office of CD by Regd Post / speed post.**



**NCLT to accept/reject application within 14 days and communicate decision to FC/OC/CD.**



**If admits, CIRP to commence from the date of admission of application (thereafter, no withdrawal of application possible on the ground of settlement/consent, as it becomes 'representative suit')**

# *NCLT TO ORDER*



## MORATORIUM

- [effects - legal proceedings be stayed / new proceedings be prohibited; Assets prohibited from be in transferred / encumbered; no enforcement of security interest; no recovery of the property by owner / lessor; continue supply of essential goods and services]

## APPOINTMENT OF IRP

- (within 14 days of Insolvency Commencement Date) for 30 days

## PA

- Cause Public Announcement





## IRP Role and Responsibilities:

Contd....

- *IRP takeover the management of affairs [and Board of directors powers get suspended; employees to report to IRP; Banks/FIs to follow instructions of IRP].*



- *To make PA, within 3 days of his appointment in Form A in English + vernacular language News papers + CD's website + IBBI's website [specifying last day of submitting claims (i.e. 14 days from date of appointment of IRP)].*



- *IRP to appoint registered valuer within 7 days of his appointment to determine liquidation value. Creditors to submit Proof of claims (in Form B/C/D) within above timelines.*



- *IRP Shall Verify The Claims Within 7 Days Of Last Date Of Receiving Claims And Prepare 'List Of Creditors.'*



## *IRP Role and Responsibilities:*

- *Committee of Crs (“COC”): IRP to constitute COC (of all independent FCs) and shall file report with NCLT within 30 days of his appointment certifying constitution of COC. First Meeting of COC to be held within 7 days of filing of Report with NCLT.*



- *COC can seek financial information of CD, which IRP/RP must provide within 7 days. All decisions of COC can be taken by majority of 75% voting share.*



- *Appointment of RP: in the first meeting of COC by 75% voting share. RP so appointed to conduct CIRP and exercise powers & duties of IRP.*

# Meetings:

*RP can convene the meeting (and he SHALL convene meeting, if 33% voting share of committee members so require) by giving atleast 7 days notice to-*

- (a) every member of COC,*
- (b) suspended BOD and*
- (c) OC, if its debt exceed 10% of the debt due) by post AND e-mail.*

*Quorum – Members with 33% voting share.*



# *Information Memorandum and Resolution Plan:*

*Preparation of Information Memorandum by RP: within 14 days of first meeting - for formulation of resolution plan*



*Submission of Resolution Plan by Resolution Applicant to RP- at least 30 days before expiry of CIRP period, which is required to be approved by COC by 75% voting share.*



*If NCLT is satisfied that Resolution Plan – is approved by COC; and complies with conditions*



*• It shall approve the Resolution Plan, which shall be binding on CD (and its employees), Creditors., Guarantors & other stakeholders. Else, NCLT may reject. RP shall forward a copy of order to – IBBI for recording entry;*

*All participants & Resolution Applicant. Moratorium Ceases.*



*• RP shall examine each Resolution Plan received by it (which should not contravene any provision of law) to confirm that it provides for –*

- (a) Payment of CIRP cost in priority to payment of any other debt of CD;*
- (b) repayment of debt due to OC [OC to be paid (in priority to FC) within 30 days of approval of Resolution Plan by COC]; and Liquidation value for dissenting FCs;*
- (c) management of affairs of CD post-Resolution Plan; and also for implementation and supervision of Resolution plan; (i.e. Terms of Plan, implementation Schedule & means of supervision)*



### Time limit (Calm Period)

- 180 days from admission of Application (extendible upto max 90 days for sufficient cause).



### Grounds of Appeal to NCLAT

- Person aggrieved may Appeal against order of NCLT approving Resolution Plan- within 30 days, if –

- (a) Approved plan is in contravention of law;
- (b) CIRP cost not provided for in priority to other debts;
- (c) Debt to OC has not been provided for;
- (d) Material irregularity in exercise of powers by RP;
- (e) Does not comply with any criteria of IBBI.

The next Step is Liquidation- if No Resolution Plan / Resolution plan is not approved by COC or NCLT/ CD contravenes Resolution Plan approved by NCLT / COC decides for liquidation.





# INTERESTING FACTS

*Moratorium does not affect any personal action taken on any asset which is not in balance-sheet of CD. E.g. Personal securities given by directors. [M/s. Schweitzer Systemtec India pvt. Ltd. v. Phoenix ARC Pvt. Ltd.]*

*ICICI case: On 24th May, 17, NCLAT passed interesting order levying penalty on the FC (ICICI) for showing incorrect claim, moving application in haste and malafide manner, and obtaining ex-parte order from NCLT, which admitted such incorrect claim. It also advised that CIRP may have adverse impact on the welfare of the company and hence, it is imperative for NCLT to adopt cautious approach in admitting application and also adhere to the 'principles of natural justice'.*



## *FEW MORE INTERESTING FACTS*

*In Bharat Steel v. Aarti Infra Projects Pvt. Ltd. (by order dated 22nd June, 17), NCLT (Mumbai) rejected the application of OC, on the ground that the amount written in Demand notice and the amount in the application differs.*



*It held that order of NCLT to be illegal and declared the appointment of IRP, moratorium, freezing of accounts, and all other orders passed by NCLT pursuant to impugned order and action taken by IRP including advertisement published in the news paper inviting claims are declared illegal and directed NCLT to close the CIRP. Also levied penalty u/s 65 of ₹ 50,000/- for moving application with malafide intent. In this order, even IP was reprimanded for his high handed actions.*



## SEBI Relaxation: (in meeting dated 21.06.2017)

### ***Restructuring in stressed companies***

- *It was represented to SEBI that where the lenders have acquired shares and propose to divest to a new investor, the new investor are reluctant due to mandatory 'open offer' which would reduce the funds available for investment in the company. Hence, they have requested for exemptions to these investors. SEBI decided to extend relaxations to the new investors acquiring shares in distressed companies pursuant to such restructuring schemes (subject to certain conditions like shareholder's approval by special resolution, minimum three years lock-in of shareholding).*

### ***Resolution plans approved under IBC***

- *The Board has also approved the proposal to provide exemption from open offer obligations, under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, for acquisitions pursuant to resolution plans approved by NCLT under IBC. As per clarification issued by IBBI on 15th June, 2017, and IPE can not act as IP (because it does not fulfill the eligibility criteria of qualification of passing Limited Insolvency exam).*

### ***Prompt Corrective Action***

- *RBI formally invoked Prompt Corrective Action (PCA) on certain banks such as IDBI Bank, UCO Bank, Bank of Maharashtra, Central Bank of India (and more PSUs in Queue). So these banks are no longer permitted to lend. RBI takes such PCA if the Bank's Capital to risk ratio falls below 7.75% . However, if that falls below 3.625%, the bank will be closed / merged.*
- *Information Utility formed- National e-Governance Services Ltd.*
- *Ambiguity to the Bankers - Action under IBC v. SARFAESI.*

