Ch. 2 Insolvency and Bankruptcy code, 2016

IBBI (Insolvency Resolution for corpo. person) Reg. 2016

Sec./Reg.	
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PART - I [sec 6 to 11]

Important Terms

⇒ **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 paid by the debtor or the corporate debtor as the case may be.

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section 4 of the IBC 2016 provides that part II of the code shall apply to the matters relating to insolvency and Liquidation of corporate debtor where the minimum amount of default is ₹ 1 crore

⇒ **Financial creditor** :- [sec. 5(7)]

Means any person to whom the Financial debt is owed and include a person to whom the such debt is legally assigned or transferred.

⇒ **operational creditor** - [sec. 5(20)]

Means a person to whom the operational debt is owed and include a person to whom such debt is legally assigned or transferred.

⇒ **Operational Debt**

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A claim.

- for provision of Goods or services
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  Eg - amt due for raw m.
  - fees to auditor etc.
- Incl. employment
  ↓
  Eg. salary of employee
- Debt payable under any Law
  ↓
  Eg Taxes
  to under CG / SG / LA

⇒ **Financial Debt**

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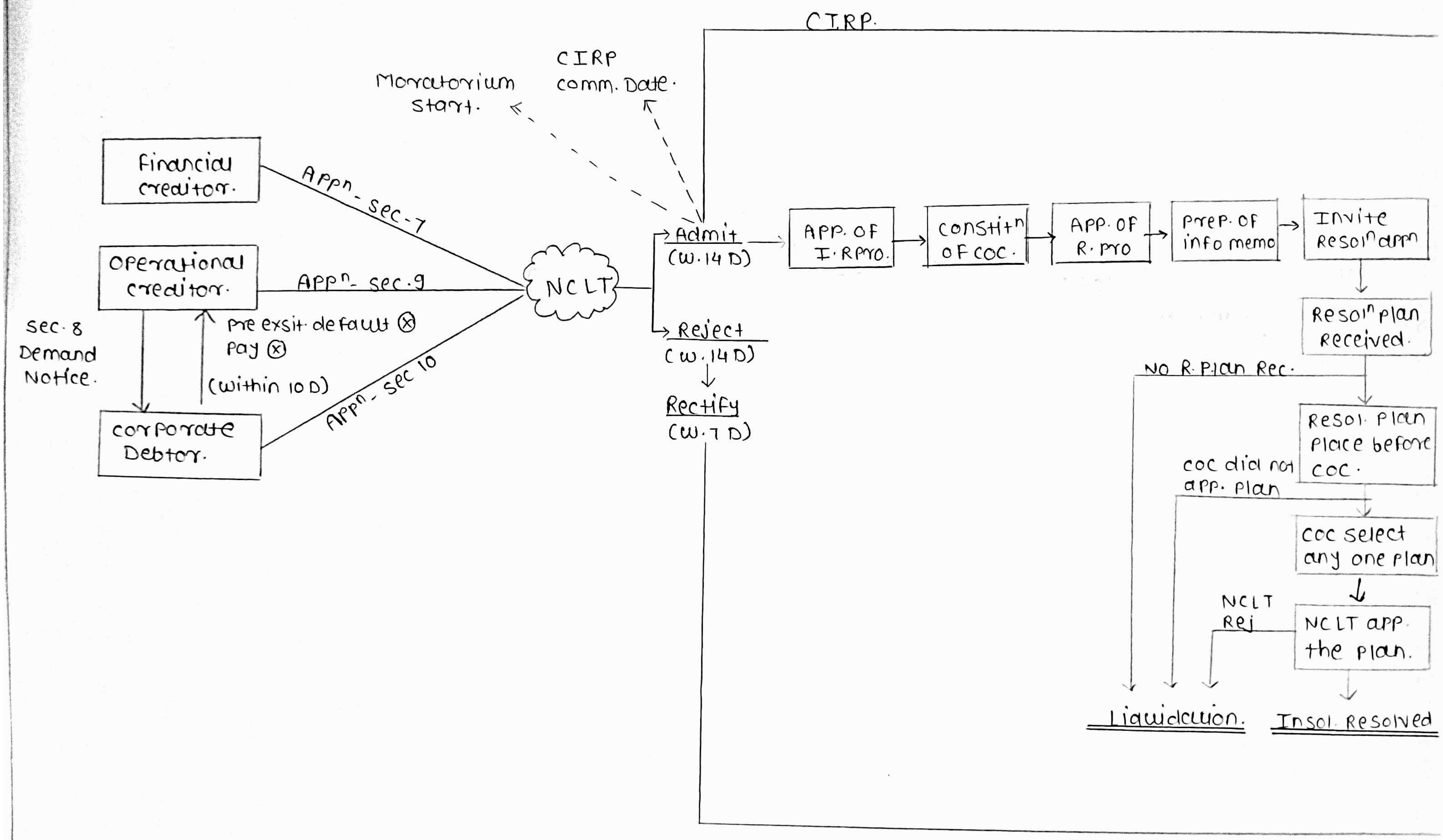
A debt which is disbursed under time value of money. - includes.

- → Borrowing
- → Accept credit facility.
- → Bonds, deb, int, notes pur facility
- → Lease / HP → Finance / car lease
- → sold Receivable - Reco. basis (AS)
- → Forward / sale, pur → commercial effect of borrowing.
- → Derivative [protection / gain]
- → counter indem obligation
- → above points → (ind. / guarantee)

An overview of CIRP.



⇒ **Section 6 - who can initiate CIRP**

- Financial creditor (sec. 7)
- operational creditor (sec. 8, 9)
- corporate Debtor. (sec. 10)

⇒ **Section 7 - Initiation of CIRP by Financial creditor**

F.C either by itself or Jointly by other Financial creditors
or
any other person on behalf of F.C. as may be notified by CG
↓
May file app^n for initiating CIRP against C.D.

F.C. as referred to in sec 21 (6A) (a) & (b)
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File an application for initiating CIRP Jointly not less than
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a) 100 of such creditors in such class
or
b) 10% of total no. of such class. whichever is lower.

Financial creditors are allottees under real estate project
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An application for initiating CIRP against C.D shall be filed Jointly by Not less than
↓
a) 100 of such allottees under same Real estate project
or
b) 10% of total no. of such allottees under same project whichever is lower.

→ Here Default include default in respect of Financial debt owned not only to applicant Financial cr. but to any other Financial creditor of corporate debtor.

→ Financial creditor. along with —Form - 1 Application→ NCLAT (Adjudicating Authority)

+ Fees - As may be prescribed

- Record of default with information utility, evidence of default as may be specified.
- The Name of the Resolution prof. act as a interim $Resol^n$ professional
- Any other info. as may be specified by board (IBBI)

→ **Adjudicating Authority**

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Within $\boxed{14 \text{ days}}$ of Receipt of Application
(Refer case - 1)

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Ascertain the existance of default from record of an info. utility or other evidence furnished by Financial creditor.

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- If AA has not ascertained the existance of default and pass any such order.
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  It shall record its reason for the same in writing.

- If AA satisfied that :-
  - Default has occured & Application is complete & There is no disciplinary proceeding pending against RP

  ⇓

  May admit the application

  ↓

  However.
  - Default has not occurred or Application is incomplete or any discip proceeding is pending

  ⇓

  { It may order Reject the appⁿ

  ⇐ Before Rejecting the Appⁿ
  AA ⟶ Notice ⟶ Applicant
  ↓
  Rectify the defect within $\boxed{7 \text{ days}}$.

→ CIRP shall commence from the date of Admission of application.

→ AA ⟶ communicate ⟶ order ⟶ FC + C.D (within $\boxed{7 \text{ days}}$) of Rejection or admission of application. if appⁿ is rejected only FC will inform

• Important point :-

→ A power of Attorney holder is not competent to file an application on behalf of a Financial creditor, operational creditor or corporate debtor (Refer case No. 2)

Section 9 - Initiation of CIRP by operational creditor.

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sec-8 → operational creditor on occurance of Default. , deliver - - sec.8

- Demand Notice of unpaid operational debt.
- copy of invoice demanding payment of amt invoiced in default of corpo debtor

Corporate Debtor

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within 10 days of receipt of Demand notice & invoice bring to notice of o. cr.

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- → Existance of Dispute or
- → Record of Pendency of suit
- → Arbitration proceeding filed before receipt of DN or invoice.

- → Payment of unpaid op debt
  - Attested copy of record of electronic trf of unpaid amt from bank A/c.
  - Attested copy of record that op. cr has encashed cheque issued by C.D.

→ sec-9 → After expiry of 10 days from the delivery of Demand Notice & Invoice.

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IF O.C. does not receive payment from C.D.

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OC may file application to AA for init CIRP. [Form 5]

+ Furnish.

- copy of DN & Invoice demanding payment delivered by O.C → C.D.
- affidavit to effect that there is no notice given to by CD rel. to dispute of opⁿ debt.
- A copy of certificate from fin. institutⁿ confirming that there is no payment of unpaid debt by C.D. if available.
- copy of any record with info. utility confirming that there is Not
- Any other proof confir. that there is no payment of unpaid debt by C.D.

→ operational creditor initiating CIRP may propose Resolution professional to act as a interim Resolution professional.

→ Adjudicating Authority

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within $\boxed{14 \text{ days}}$ of receipt of application by an order

↓ Admit the application, if

→ Application is complete.
→ There is no payment of the unpaid op. debt.
→ The invoice or notice ~~ø~~ for payment to CD has been delivered by O.C.
→ No notice of dispute has been received by the O.C or no record of dispute in the info. utility.
→ There is no disciplinary proceeding pending against R.P.

↓ Reject the application, if

→ Application is incomplete
→ There has been payment of the unpaid op. debt.
→ The creditor has not delivered invoice or notice of payment to C.D.
→ Notice of dispute has been received by the op. creditors or there is a record of dispute in the info. utility.
→ any disciplinary proceeding is pending against any R.P.

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communicate such decision to operational cr. and corpo. Debtor.

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Befor Rejecting an application AA give Notice to the applicant to rectify the defect within $\boxed{7 \text{ days}}$.

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CIRP shall commence from the date of admission of application.

→ Important points :

- whether the principal and interest amount can be clubbed together to reach the min threshold of ₹ 1 crore for operational debt?
  → No, Refer case No. 5
- whether two or more operational creditors can file a Joint application under sec. 9 of the code
  → No, Refer case No. 6
- As per Reg. 20 of IBBI (information utilities) Reg 2017, a creditor need to submit financial info. to the info. utilities in form C. of the schedule. It is mandatory for the creditor to file the info. default with the info utility before filing an application to initiate CIRP

Section - 10 Initiation of CIRP by corporate Debtor

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where corporate debtor committed a default, a corporate applicant

- corpo. debtor
- mem/ partner of CD autho. to make appⁿ
- Individual who in charge of managing opⁿ & Resor. of CD
- A person who has control and supervision over the Fin. affairs of C.D.

[CD. mem, MD, CFO]

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May file an application in for init CIRP

Form 6

- The information relating to Books of account
- 4 Info. relating to resoln proposed professional prop. to be appointed as interim R.P.
- 4 SR passed by sh. hol. of CD or resolution passed by at least 3/4th of total no. of partners of C.D

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Adjudicating Authority

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within a period of 14 days of the receipt of application

Admit the application

↓ if

- → Application is complete or
- → No disciplinary pro. is pending against the proposed R.P.

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CIRP shall be comm. from date of admission of application.

Reject the Application.

↓ if

- → Application is incomplete or,
- → deciplinary proceeding is pending against prop. R.P.

↓ Before Rejecting appⁿ

Give Notice to applicant to rectify the defects in his appⁿ within 7 days

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• Important Points -

→ NCLT examined the scope of discretion available to an AA. [Refer case No. 5]

→ As per Relevant circumⁿ → decided to forward all the applications (U/S 7, 9, 10) received for initiating CIRP to info. utility

→ Fraudulent or malicious initiation of proceeding (Sec. 65) → If any person initiate CIRP or Liquidation process fraudulently or with malicious intent for any purpose other than insolv. or liquidⁿ

→ Penalty : Min 1 Lakh . Max 1 cr.

→ Applicability of Limitation Act (sec. 238 A) → Application under sec. 7, 9 or 10 can not be admitted for time barred debts

Section 11 Person not entitled to make Application

a) corporate dr. undergoing a CIRP.

or

aa) FC or an OC of CD undergoing a PPIRP

or

ba) CD in respect of whom a resol^n Plan has been approved 12 m preceeding the date of making the application.

b) a corporate debtor having completed CIRP 12 m preceeding the date of making of the application.

c) a CD or FC who has violated any of the terms of Resol^n plan which was appr. 12 m. preceeding the date of making an application.

d) CD in respect of whom a Liquid^n order has been made.

Excluded categories.

Against which corpo. insolvency Resol^n Process can not be initiated -

→ A Financial service provider is not a corporate debtor for the purpose of the code and consequently a CIRP against a Financial service provider can not be initiated u/s 7, 9 or 10 of the IBC.

→ A Financial service provider is a person authorised and Registered by a Financial sector Regulator to provide Financial services. The term Financial services and Financial service regulator are defined in sec. 3(15) & 3(18) respectively.

→ sec. 277 of the IBC empowers the central Goverment, in consultation with the appropriate Financial sector regulator to notify Financial service providers or categories of Financial service providers about their insolvency and Liquidation proceedings which may be conduct under IBC with such modifications and in such manner as may be prescribed.

→ Financial service provider Rules would apply to Non-Banking Finance company with asset size of Rs. 500 crore or more as per latest audited balance sheet