PART III

INSOLVENCY, LIQUIDATION & WINDING UP

Lesson 14

Insolvency

KEY CONCEPTS

■ Insolvency ■ Bankruptcy ■ Liquidation ■ Insolvency and Bankruptcy Board of India ■ Insolvency Professionals ■ Insolvency Professionals Agencies ■ Adjudicating Authority ■ Information utility ■ Corporate Debtor ■ Financial Creditor

Learning Objectives

To understand:

- Historical background of Insolvency Resolution
- Committees on Bankruptcy Reform
- Salient Features of I&B Code
- Pillars of I&B Code

Lesson Outline

- Introduction
- Concept of insolvency and bankruptcy
- Insolvency framework in other countries
- Historical developments in insolvency laws in India
- Need of the Code
- Scheme of the Code
- Pillars under IBC
- Key definitions and concepts
- Lesson Round-Up
- Glossary
- Test Yourself
- List of Further Readings
- Other References (Including Websites / Video Links)

REGULATORY FRAMEWORK

- Insolvency and Bankruptcy Code, 2016
- IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016
- IBBI (Liquidation Process) Regulations, 2016
- IBBI (Voluntary Liquidation Process) Regulations, 2017
- IBBI (Insolvency Professionals) Regulations, 2016

INTRODUCTION

The word "bankruptcy" is widely believed to have originated from an Italian phrase "bancarotta"-"banca" means bench and "rotta" means broken. It is believed that the word "bankruptcy" originated from the trade that was carried out on Ponte Vecchio, a medieval segmental arch bridge over the Arno River, in Florence, Italy. In medieval Italy, if a banker, who conducted his market place transactions on a bench, was unable to meet business obligations and was in debt, his bench was broken in a symbolic show of failure and his in ability to continue. This act of "bancarotta" or "breaking the bench" is believed to have evolved into the modern concept of bankruptcy. The role of the law, in a formal bankruptcy process, is to lay down rules of procedure into which the conflict is channelled, and results in a solution. A sound legal framework provides procedural certainty about the process of negotiation, in such a way as to reduce problems of common property and reduce information asymmetry for all economic participants.

The objective of the bankruptcy process is to create a platform for negotiation between creditors and external financiers which can create the possibility of such rearrangements.

Creditors put money into debt investments today in return for the promise of fixed future cash flows. But the returns expected on these investments are still uncertain because at the time of repayment, the seller (debtor) may make repayments as promised, or he may default and does not make the payment. When this happens, the debtor is considered insolvent. Other than cases of outright fraud, the debtor may be insolvent because of

- *Financial failure* - a persistent mismatch between payments by the enterprise and receivables into the enterprise, even though the business model is generating revenues, or
- *Business failure* - which is a breakdown in the business model of the enterprise, and it is unable to generate sufficient revenues to meet payments. Often, an enterprise may be a successful business model while still failing to repay its creditors.

A sound bankruptcy process is one that helps creditors and debtors realise and agree on whether the entity is facing financial failure and business failure. This is important to allow both parties to realise the maximum value of the business in the insolvency.

CONCEPT OF INSOLVENCY, BANKRUPTCY AND LIQUIDATION

The words "Insolvency" and "Bankruptcy" are generally used interchangeably in common parlance but there is a marked distinction between the two. Insolvency and bankruptcy are not synonymous.

The term **"insolvency"** notes the state of one whose assets are in sufficient to pay his debts; or his general inability to pay his debts. The term "insolvency" is used in a

> Section 79(4) of the Insolvency and Bankruptcy Code, 2016 defines the term "bankruptcy" as the state of being bankrupt.
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> According to Section 79(3) of the Code, **"bankrupt"** means
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> (a) a debtor who has been adjudged as bankrupt by a bankruptcy order under section 126;
>
> (b) each of the partners of a firm, where a bankruptcy order under section 126 has been made against a firm; or
>
> (c) any person adjudged as an undischarged insolvent.

restricted sense to express the inability of a party to pay his debts as they become due in the ordinary course of business.

The word **"bankruptcy"** is the condition of insolvency. It is a legal status of a person or an entity who cannot repay debts to creditors. The bankruptcy process begins with filing of a petition in a court or before an appropriate authority designated for this purpose. The debtor's as sets are then evaluated and used to pay the creditors in accordance with law.

Therefore, while insolvency is the inability of debtors to repay their debts, the bankruptcy, on the other hand, is a formal declaration of insolvency in accordance with law of the land. Insolvency describes a situation where the debtor is unable to meet his/her obligations and bankruptcy occurs when a court determines insolvency, and gives legal orders for it to be resolved. Thus insolvency is a state and bankruptcy is the conclusion. In case of insolvency, one cannot payoff the debts, whereas in the case of bankruptcy, a court order states as how an insolvent person or business has to pay off their debts-by way of selling their assets or erasing the debt that cannot be paid.

The term insolvency is used for individuals as well as organisations/corporates. If insolvency is not resolved, it leads to **bankruptcy** in case of individuals and **liquidation** in case of corporates.

Liquidation, on the other hand, in its general sense, means closure or winding up of a corporation or an incorporated entity through legal process on account of its inability to meet its obligations or to pay its debts. In order to clear the indebtedness, the assets are sold at the most reasonable rates by a competent liquidator appointed in this regard.

INSOLVENCY FRAMEWORK IN UK, USA AND INDIA

United Kingdom

In England, the Act of Parliament of 34 & 35 Henry VIII, c4 is regarded as the first legislation on the subject. Promulgated in 1542 under the reign of Henry VIII, it was a strict and creditor supportive legislation enacted mainly for the benefit of creditors. This Act of 1542, was in fact akin to a criminal statute directed against men who indulged in wasteful expenditures and then refused to pay off debts incurred during the course of extravagance. The 1542 Act looked upon the debtors as offenders. There was no provision for the discharge of debtors and even future earnings of the debtors were not exempt from execution for the debt.

The early bankruptcy laws of England were an instrument of debt-collection and aimed at seizing the debtor's assets against the strong protections to private property offered by the Common law, since medieval times.

In the beginning of the eighteenth century, these strict and creditor supportive medieval laws began to lose its punitive nature. That is why a few authors maintain that the first real bankruptcy laws in England were 4 Anne, c. 17(I705), and 10 Anne, c.15(1711) as unlike earlier statutes which looked upon debtors as offenders, the highlighting feature of the Statutes of Anne was the discharge of the bankrupt who conformed to the provisions of the law. While the additional rights given to the bankrupt under the 1705 Act were significant yet the Act was passed for the sole benefit of the creditors. In contrast, the primary focus of modern insolvency laws is not elimination of insolvent entities but on their rehabilitation and continuation of their business.

The Current Regulatory Framework in UK

The Insolvency Act, 1986 and the Insolvency Rules, 1986 regulate the insolvency framework is the United Kingdom. The Insolvency Act, 1986 was enacted on the recommendation of the Cork Review Committee Report on Insolvency Law and Practice (1982). Prior to the enactment of the Insolvency Act, 1986, the law relating to insolvency in the UK was fragmented and was contained in the Bankruptcy Act, 1914, the Deeds of Arrangement Act, 1914, the Companies Act, 1948 and parts of the County Courts Act, 1959. They Acts were supplemented by the principles of common law and equity.

The Act of 1986 consolidated all

- enactments relating to company insolvency and winding up,

- enactments relating to the insolvency and bankruptcy of individuals, and
- all other enactments bearing on these two subject matters, including the functions and qualification of insolvency practitioners, the public administration of insolvency, the penalisation and redress of malpractice and wrong doing, and the avoidance of certain transactions at an under value.

The Insolvency Act, 1986 deals with the insolvency of individuals and companies and is divided into the following three groups.

- Group 1 deals with Company Insolvency;
- Group 2 deals with Insolvency of Individuals; and
- Group 3 deals with Miscellaneous Matters Bearing on both Company & Individual Insolvency.

The Insolvency Act, 1986 introduced the following three new procedures in order to explore the possibility of bringing a burdened company back to life as a viable entity. These measures in the UK Insolvency Act, 1986 represent an attempt to emulate the 'rescue culture', a characteristic of the corporate sector in the US.

1. *'Company Voluntary Arrangements' (CVAs)*- It provides away where a company in financial difficulty can come to a binding agreement with its creditors. It is are negotiation by a company of the payments due to all of its creditors, or other form of financial restructuring, and is subject to creditors meeting and approval of 75% of the creditors present and voting.
2. *'Administration'*- In this second option, an administrator is appointed by a court to suggest proposals to deal with the company's financial difficulties. This option offers companies a breathing space as the creditors are restrained from taking any action during this period. It is designed to hold a business together while plans are formed, either to put in place a financial restructuring plan to rescue the company, or to sell the business and assets, to produce better results for the creditors, than a liquidation.
3. *'Administrative Receivership'*- This third option permits the appointment of a receiver by certain creditors (normally the holders of a floating charge).

United States of America

America being a colony of the United Kingdom, followed the English bankruptcy system and like the UK system, American bankruptcy laws involved imprisonment until debts were paid or creditors agreed for the release of the debtor. There was no uniform law in America as bankruptcy laws differed from State to State. Some of these American states became in famous as debtor's havens because of their unwillingness to enforce commercial obligations.

The lack of uniformity in bankruptcy and debt enforcement laws adversely affected business and commerce between the states. Article I, Section 8, Clause 4 of the United States Constitution as adopted in the year 1789, made provision for the grant to Congress the power to establish uniform bankruptcy law throughout the United States.

The Congress enacted temporary bankruptcy statutes in 1800, 1841 and 1867 to deal with economic recessions. The Acts of 1800 and 1841 vested jurisdiction in the federal district courts. The district court judges were given the power to appoint commissioners or assignees to take charge of and liquidate a debtor's property. However, these laws were temporary measures and were repealed as soon as economic conditions stabilized.

There was not a permanent bankruptcy law in the United States of America until 1898, when the National Bankruptcy Act was enacted. This Act of 1898 was later amended in 1938 to provide for the rehabilitation of a debtor as an alternative to liquidation of assets. The National Bankruptcy Act, 1898 governed bankruptcy in the United States for 80 years until 1978, when after a thorough review of the then existing law and practice, the Bankruptcy Reform Act, 1978 was enacted.

The Bankruptcy Reform Act, 1978 superseded the National Bankruptcy Act, 1898 and established bankruptcy courts in each district and made provisions for the appointment of separate bankruptcy judges.

The Current Regulatory Framework in USA

"Bankruptcy Code", a federal law, governs bankruptcy in the United States of America. It is a uniform federal law that governs all bankruptcy cases in America. The Bankruptcy Code was enacted in 1978 by § 101 of the Bankruptcy Reform Act, 1978 and is codified as title 11 of the United States Code. The procedural aspects of the bankruptcy process are governed by the Federal Rules of Bankruptcy Procedure (Bankruptcy Rules).

Six basic types of bankruptcy cases are provided for under the Bankruptcy Code.

Chapter 7 titled "Liquidation" - In Chapter 7 Bankruptcy, a court-appointed trustee or administrator takes possession of non-exempt assets, liquidates these assets and then uses the proceeds to pay creditors. He shall be accountable for all the property received and has the right to investigate the financial affairs of the debtor. He shall also file accounts of the administration of the estate with the United States Trustee and the Court.

Chapter 9 titled "Adjustment of Debts of a Municipality". - Chapter 9 Bankruptcy proceedings provides for reorganization which is available to municipalities. In Chapter 9 Bankruptcy proceedings a municipality (which includes cities, towns, villages, counties, taxing districts, municipal utilities, and school districts) get protection from creditors and a municipality can pay back debt through a confirmed payment plan.

Chapter 11 titled "Reorganization" - Unlike Chapter 7 where the business ceases operations and a trustee sells all of its assets, under Chapter 11 the debtor remains in control of its business operations and repay creditors concurrently through a court-approved reorganization plan. Generally, it is a debtor in possession regime. Section 1106 of the Bankruptcy Code requires the trustee, where appointed, to file a plan "as soon as practicable" or, alternatively, to file a report explaining why a plan will not be filed or to recommend that the case be converted to another chapter or dismissed.

Chapter 12 was added to the Bankruptcy Code in 1986. It allows a family farmer or fisherman to continue to operate the business while the plan is being carried out.

Chapter 13 enables individuals with regular income to develop a plan to repay all or part of their debts.

Chapter 15 was added to the Bankruptcy Code in 2005. It provides mechanism for dealing with insolvency cases involving debtors, claimants and other interested parties involving more than one country. Under Chapter 15 are presentative of a corporate bankruptcy proceeding outside the country can get access to the United States courts.

Historical developments of Insolvency Laws in India

The law of Insolvency in India owes its origin to English law. India being a colony of the United Kingdom, followed the English insolvency system. In India, the earliest provisions relating to insolvency can be traced to sections 23 and 24 of the Government of India Act, 1800. These sections conferred insolvency jurisdiction on Supreme Court at Fort Williams (Calcutta), Madras and Recorder's Court at Bombay as the need for an insolvency law was first felt in Presidency Towns of Calcutta, Bombay and Madras where the British majorly carried on their trade. These Courts were empowered to make rules and grant relief to insolvent debtors.

Later insolvency courts were established in the Presidency-Towns when Statute 9 (Geo. IV c. 73) was passed in 1828. This Act of 1828 marks the beginning of special insolvency legislation in India. The insolvency court had a distinct existence although the court was presided over by a Judge of the Supreme Court. The Act of 1828 was originally intended to remain in force for a period of four years but subsequent legislation extended its duration up to 1848. The Provisions of the Indian Insolvency Act was passed in 1848 and remained in force until the enactment of the Presidency Towns Insolvency Act, 1909. Later Provincial Insolvency Act was passed in 1920.

The Presidency Towns Insolvency Act, 1909 and Provincial Insolvency Act, 1920 were two major enactments that dealt with personal insolvency but the two differ in respect of their territorial jurisdiction. While Presidency Towns Insolvency Act, 1909 applied in Presidency towns of Calcutta, Bombay and Madras, the Provincial Insolvency Act, 1920 applied to all provinces of India. These two Acts were applicable to individuals as well as partnership firms.

Insolvency law usually has a two-fold purpose-(i) to give relief to the debtor from the harassment of creditors whose claims he is unable to meet, and (ii) to provide a machinery by which creditors who are not secured in the payment of their debts are to be satisfied.

The Insolvency and Bankruptcy Code, 2016 has repealed both the Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920.

Before the enactment of the Insolvency and Bankruptcy Code, 2016, the provisions relating to insolvency and bankruptcy were fragmented and there was no single law to deal with insolvency and bankruptcy in India. Before the enactment of the Insolvency and Bankruptcy Code, 2016 the following Acts dealt with insolvency and Bankruptcy in India:

- The Presidency Towns Insolvency Act, 1909
- Provincial Insolvency Act, 1920
- Indian Partnership Act, 1932
- The Companies Act, 1956
- The Sick Industrial Companies (Special Provisions) Act, 1985 (SICA)
- The Recovery of Debts due to Banks and Financial Institutions Act, 1993 (RDDBFI Act)
- The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act, 2002)
- The Companies Act, 2013.

Under the Constitution of India 'Bankruptcy & Insolvency' is provided in Entry 9 of List III (Concurrent List) in the Seventh Schedule to the Constitution. Hence both the Centre and State Governments are authorised to make laws on the subject.

Government Committees on Bankruptcy Reforms

Various committees were constituted from time to time by the Government to review the existing bankruptcy and insolvency laws in India. These committees analysed the laws and suggested reforms to bring the law in tune with ever evolving circumstances. Following is a snapshot of various committees constituted along with the outcome.

S.No.	Year	Committee/ Commission	Recommendations/Outcome
1	1964	Third Law Commission	Third Law Commission was established in 1961 under the Chairmanship of Justice J L Kapur. It submitted 26th Law Commission Report in 1964 proposing amendments to the Provincial Insolvency Act, 1920.
2	1981	Tiwari Committee	Following the recommendations of the Tiwari Committee, the Government of India enacted the Sick Industrial Companies (Special Provisions) Act, 1985, (SICA) in order to provide for timely detection of sickness in industrial companies and for expeditious determination of preventive and remedial measures.
3	1991	Narasimham Committee I	The government enacted Recovery of Debts Due to Banks and Financial Institutions (RDDBFI) Act, 1993.

S.No.	Year	Committee/ Commission	Recommendations/Outcome
4	1998	Narasimham Committee II	The committee's recommendations led to the enactment of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (SARFAESI), 2002.
5	1999	Justice Eradi Committee	Recommended setting up of a National Company Law Tribunal (NCLT) and proposed repeal of SICA.
6	2001	NL Mitra Committee	Proposed a comprehensive bankruptcy code.
7	2005	J J Irani Committee	The Committee proposed significant changes to make the restructuring and liquidation process speedier, efficient and effective and accordingly amendments were made to (RDDBFI) Act, 1993 and (SARFAESI), 2002.
8	2008	Raghuram Rajan Committee	Proposed improvements to credit infrastructure.
9	2013	Financial Sector Legislative Reforms Commission	Recommended changes in Indian Financial Sector.
10	2014	Bankruptcy Law Reforms committee (BLRC)	Reviewed the existing bankruptcy and insolvency framework in the country and proposed the enactment of Insolvency and Bankruptcy Code as a uniform and comprehensive legislation on the subject.

Need for a New Law

Before the enactment of the Insolvency and Bankruptcy Code, there was no single law in the country to deal with insolvency and bankruptcy. There were multiple overlapping laws and adjudicating forums dealing with financial failure and insolvency of companies and individuals in India. The framework for insolvency and bankruptcy was inadequate, ineffective and resulted in undue delays in resolution. The legal and institutional framework did not aid lenders in effective and timely recovery or restructuring of defaulted assets and causes undue strain on the Indian credit system.

Prior to the enactment of the Insolvency and Bankruptcy Code, the provisions relating to insolvency and bankruptcy for companies were made in the Sick Industrial Companies (Special Provisions) Act, 1985, the Recovery of Debt Due to Banks and Financial Institutions Act, 1993, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the Companies Act, 2013. These statutes provided for creation of multiple fora such as Board of Industrial and Financial Reconstruction (BIFR), Debt Recovery Tribunal (DRT) and their respective Appellate Tribunals. Liquidation of companies was handled by the High Courts. Individual bankruptcy and insolvency was dealt with under the Presidency Towns Insolvency Act, 1909, and the Provincial Insolvency Act, 1920.

The liquidation of companies was handled under various laws and different authorities such as High Court, and Debt Recovery Tribunal had overlapping jurisdiction which was adversely affecting the debt recovery process.

As per World Bank data in 2015, insolvency resolution in India took 4.3 years on an average, which was way higher when compared to other countries such as United Kingdom (1 year) and United States of America (1.5 years). These delays were caused due to time taken to resolve cases in courts, and confusion due to a lack of clarity about the current bankruptcy framework.

The Statement of Objects and Reasons for the IBC reads as follows:

There is no single law in India that deals with insolvency and bankruptcy. Provisions relating to insolvency and bankruptcy for companies can be found in the Sick Industrial Companies (Special Provisions) Act, 1985, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the Securitisation and Reconstruction of

Financial Assets and Enforcement of Security Interest Act, 2002 and the Companies Act, 2013. These statutes provide for creation of multiple fora such as Board of Industrial and Financial Reconstruction (BIFR), Debts Recovery Tribunal (DRT) and National Company Law Tribunal (NCLT) and their respective Appellate Tribunals. Liquidation of companies is handled by the High Courts. Individual bankruptcy and insolvency is dealt with under the Presidency Towns Insolvency Act, 1909, and the Provincial Insolvency Act, 1920 and is dealt with by the courts. The existing framework for insolvency and bankruptcy is inadequate, ineffective and results in undue delays in resolution, therefore, the proposed legislation.

The objective of the Insolvency and Bankruptcy Code, 2015 is to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time-bound manner for 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 priority of payment of government dues and to establish an Insolvency and Bankruptcy Fund, and matters connected therewith or incidental thereto. An effective legal framework for timely resolution of insolvency and bankruptcy would support development of credit markets and encourage entrepreneurship. It would also improve Ease of Doing Business, and facilitate more investments leading to higher economic growth and development.

In the case of Independent Sugar Corporation Ltd. {Appellant(s)} Vs. Girish Sriram Juneja & Ors{Respondent(s)}, Civil Appeal No. 6071 of 2023, 2025 INSC 124, Judgement dated January 29, 2025, Hon'ble Supreme Court of India emphasised the Policy Underlying the IBC. Apex Court said that the BLRC report notes and acknowledges that the failure of a few business plans is integral to the process of the market economy. When business failure occurs, the best outcome for society is to have a rapid renegotiation between the financiers to finance a going concern using new arrangements of capital and restructured management. The re-negotiating process is known as the "Corporate Insolvency Resolution Process". The primary object of this effort, briefly stated, is the value maximization of the corporate debtor. The CIRP keeps the corporate debtor as a going concern and runs on the theory that the value of the business is worth more than the realisation of the piecemeal distribution of assets. However, if this objective cannot be achieved, the best outcome for society is the rapid liquidation of a failing corporate debtor. When such statutory arrangements are put into place, the market process of creative construction, on the one hand, and creative destruction, on the other hand, will work smoothly with greater competitive vigour.

BLRC lays emphasis on a strong and mature market economy. This involves well-drafted modern laws that replace the laws of the preceding 100 years and high-performance institutions which enforce these new laws. The Committee has the end word to provide one critical building block of this process with a modern Insolvency and Bankruptcy Code and the statutory design associates institutional infrastructure, which reduces delays and transaction costs. The BLRC, through the IBC, compartmentalized the functions and duties of RP, CoC and the Adjudicating Authority.

The report recommended assessing the viability of a corporate debtor and noted that the economic purview presented an advantage by calling for the assessment of the viability of an enterprise or a project. An enterprise that has fastened financial failure is considered as a viable enterprise and there is possible financial re-arrangement that can earn the creditors a higher economic value in contrast to shutting down such an enterprise. On the contrary, if the cost of financial re-arrangement required to keep the enterprise going is higher than the non-performance value of future expected cash flows, then the enterprise is considered unviable or bankrupt and is better shut down as soon as possible.

After taking note of the emerging Indian economy, the best practices of resolution and liquidation in other economies and the model code of UNCITRAL, the report has recommended the following guiding principles to the Parliament for a new Code. Broadly, the objects sought to be achieved by the IBC are (i) provision of certainty in the market to promote efficiency and growth, (ii) maximization of value of assets, (iii) striking a balance between liquidation and reorganisation, (iv) ensuring equitable treatment of similarly situated creditors, (v) provision of timely, efficient and impartial resolution of insolvency, (vi) preservation of the insolvency estate to allow equitable distribution to creditors, (vii) ensuring a transparent and predictable insolvency law that contains incentives for gathering and dispensing information, (viii) recognition of existing creditor rights and establishment of clear rules for ranking priority of claims, and (ix) establishment of a framework for cross-border insolvency.

In the case of Independent Sugar Corporation Ltd. {Appellant(s)} Vs. Girish Sriram Juneja & Ors{Respondent(s)}, Civil Appeal No. 6071 of 2023, 2025 INSC 124, Judgement dated January 29, 2025, Hon'ble Supreme Court of India in its conclusion said that:

148. As India aspires to establish itself as a global manufacturing powerhouse and investment hub, it is imperative that it is able to provide a reliable, robust and competitive business environment for both domestic and international stakeholders. In essence, the introduction of the Green Channel route, which strives to create a level-playing field and enable new entrants to effectively compete with established players in the Indian market, is a significant step in that direction. However, to ensure that entities operate with utmost confidence in the sanctity and fairness of India's legal and regulatory system, the objectives of the IBC and the Competition Act must also necessarily be in harmony with one another.

149. Within that context, while the IBC's primary objective is the timely resolution of stressed assets with maximised value realisation for the stakeholders, the significant delay seen in the present case is both unfortunate and regrettable. Nevertheless, expeditious resolution cannot come at the cost of disregarding statutory provisions. Providing relief for stressed assets must necessarily align with the statutory framework, as adherence to legal principles is fundamental to a fair and just resolution process.

150. In the present case, for reasons discussed above, the statutory provision and legislative intent unequivocally affirm the mandatory nature of the proviso to Section 31(4) of the IBC. For a Resolution Plan containing a combination, the CCI's approval to the Resolution Plan, in our opinion, must be obtained before and consequently, the CoC's examination and approval should be only after the CCI's decision. This interpretation respects the original legislative intent, and deviation from the same would not only undermine the statute but would also erode the faith posed by the stakeholders in the integrity of our legal and regulatory framework.

151. Where the provisions allow for dilution or departure from the intended scheme of the IBC or the Competition Act, it is the responsibility of the legislature to rectify such inconsistencies through appropriate legislative measures and the judiciary should not normally venture into the legislative domain.

152. Further, the indispensability of procedural safeguards as an integral component of a just legal order must be given its due weight, especially as procedural requirements are not mere formalities to be circumvented for expediency but substantive protections designed to ensure fairness and transparency. In that light, the procedural lapses with respect to objections to the proposed combination and the consequent divestiture modification proposed within the framework of the Competition Act, 2002, seriously vitiated the integrity of the process. It is therefore reiterated and reinforced that adherence to procedural propriety is non-negotiable and that the ends cannot justify the means.

153. By upholding the mandatory nature of the statutory provision and emphasising upon the critical importance of procedural safeguards, the principle of rule of law is upheld in alignment with global best practices which underscore fairness, predictability and transparency. Such an approach not only reinforces the integrity and credibility of the legal framework but also highlights India's commitment to fostering a regulatory environment, which is conducive to both business and innovation. Additionally, it also ensures the protection and enforcement of rights in an equitable manner, free from bias or favoritism.

154. Therefore, a balance between the need for expeditious relief and adherence to the statutory framework must necessarily be maintained, in order to ensure that the objectives of both, the IBC and the Competition Act are met in a manner that supports India's long-term economic aspirations.

in Arun Kumar Jagatramka v Jindal Steel & Power Ltd 4 (2021) 7 SCC 474 , Hon'ble Supreme Court observed as follows:

"41. ... First and foremost, the IBC perceives good corporate governance, respect for and adherence to the rule of law as central to the resolution of corporate insolvencies. Second, the IBC perceives corporate insolvency not as an isolated problem faced by individual business entities but places it in the context of a framework which

is founded on public interest in facilitating economic growth by balancing diverse stakeholder interests. Third, the IBC attributes a primacy to the business decisions taken by creditors acting as a collective body, on the premise that the timely resolution of corporate insolvency is necessary to ensure the growth of credit markets and encourage investment. Fourth, in its diverse provisions, the IBC ensures that the interests of corporate enterprises are not conflated with the interests of their promoters; the economic value of corporate structures is broader in content than the partisan interests of their managements. These salutary objectives of the IBC can be achieved if the integrity of the resolution process is placed at the forefront. Primarily, the IBC is a legislation aimed at reorganisation and resolution of insolvencies. Liquidation is a matter of last resort. These objectives can be achieved only through a purposive interpretation which requires courts, while infusing meaning and content to its provisions, to ensure that the problems which beset the earlier regime do not enter through the backdoor through disingenuous stratagems."

The objective of the Insolvency and Bankruptcy Code is to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner. An effective legal framework for timely resolution of insolvency and bankruptcy will not only encourage entrepreneurship but will also improve Ease of Doing Business, and facilitate more investments leading to higher economic growth and development.

The Insolvency and Bankruptcy Code, 2016 – Introduction

In India, the legal and institutional machinery for dealing with debt default has not been in line with global standards. The recovery action by creditors, either through the Contract Act or through special laws such as the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, has not had desired outcomes. Similarly, action through the Sick Industrial Companies (Special Provisions) Act, 1985 and the winding up provisions of the Companies Act, 1956 have neither been able to aid recovery for lenders nor aid restructuring of firms. Laws dealing with individual insolvency, the Presidential Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920, are almost a century old. This has hampered the confidence of the lender. When lenders are unconfident, debt access for borrowers is diminished. This reflects in the state of the credit markets in India. Secured credit by banks is the largest component of the credit market in India. The corporate bond market is yet to develop.

The Insolvency and Bankruptcy Code Bill was drafted by a specially constituted "Bankruptcy Law Reforms Committee" (BLRC) under the Ministry of Finance. The Insolvency and Bankruptcy Code was introduced in the Lok Sabha on 21 December 2015 and was subsequently referred to a Joint Committee of Parliament. The Committee submitted its recommendations and the modified Code was passed by Lok Sabha on 5 May 2016. The Code was passed by Rajya Sabha on 11 May 2016 and it received the presidential assent on 28 May 2016.

The objective of the Code is to promote entrepreneurship, availability of credit, and balance the interests of all stakeholders by consolidating and amending the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner and for maximization of value of assets of such persons and matters connected therewith or incidental thereto.

The salient features of the law are as follows:

i. Clear, coherent and speedy process for early identification of financial distress and resolution of companies and limited liability entities if the underlying business is found to be viable.

ii. Two distinct processes for resolution of individuals, namely- "Fresh Start" and "Insolvency Resolution".

iii. Debt Recovery Tribunal and National Company Law Tribunal to act as Adjudicating Authority and deal with the cases related to insolvency, liquidation and bankruptcy process in respect of individuals and unlimited partnership firms and in respect of companies and limited liabilities entities respectively.

iv. Establishment of an Insolvency and Bankruptcy Board of India to exercise regulatory oversight over insolvency professionals, insolvency professional agencies and information utilities.

v. Insolvency professionals would handle the commercial aspects of insolvency resolution process. Insolvency professional agencies will develop professional standards, code of ethics and be first level regulator for insolvency professionals members leading to development of a competitive industry for such professionals.

vi. Information utilities would collect, collate, authenticate and disseminate financial information to be used in insolvency, liquidation and bankruptcy proceedings.

vii. Enabling provisions to deal with cross border insolvency.

The Insolvency and Bankruptcy Code, 2016 extends to the whole of India.

Section 1 of the Code provides that the Central Government may appoint different dates for different provisions of this Code and any reference in any such provision to the commencement of this Code shall be construed as a reference to the commencement of that provision.

The Insolvency and Bankruptcy Code, 2016 consolidates the existing framework by creating a single law for insolvency and bankruptcy. The Code applies to companies, partnerships, limited liability partnerships, individuals and any other body which the central government may specify.

Section 2 of the Insolvency and Bankruptcy Code, 2016 provides that the provisions of the Code shall apply to –

(a) any company incorporated under the Companies Act, 2013 or under any previous company law,

(b) any other company governed by any special Act for the time being in force,

(c) any Limited Liability Partnership incorporated under the Limited Liability Partnership Act, 2008,

(d) such other body incorporated under any law for the time being in force, as the Central Government may, by notification, specify in this behalf,

(e) personal guarantors to corporate debtors,

(f) partnership firms and proprietorship firms; and

(g) individuals, other than persons referred to in clause (e) in relation to their insolvency, liquidation, voluntary liquidation or bankruptcy, as the case may be.

The Insolvency and bankruptcy Code, 2016 is one of the biggest economic reforms which provides a uniform and comprehensive insolvency legislation covering corporates, partnerships and individuals (other than financial firms). The Code gives both the creditors and debtors the power to initiate proceeding. It has helped India achieve a historic jump in the ease of doing business rankings by consolidating the law and providing for resolution of insolvencies in a time-bound manner.

Key Objectives of the Insolvency and Bankruptcy Code, 2016

The objects clause of the Insolvency and Bankruptcy Code lays down the following key objectives:

1. To consolidate and amend the laws relating to re-organisation and insolvency resolution of corporate persons, partnership firms and individuals to provide for a time bound insolvency resolution mechanism;
2. To ensure maximisation of value of assets;
3. To promote entrepreneurship;
4. To increase availability of credit;
5. To balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues; and

6. To establish an Insolvency and Bankruptcy Board of India as a regulatory body; and
7. To provide procedure for connected and incidental matters.

HOW CODE IS ORGANISED?

The Insolvency and Bankruptcy Code, 2016 consists of total 255 sections organised in five Parts. Part II deals with insolvency resolution and liquidation for corporate persons whereas Part III lays down procedure for insolvency resolution and bankruptcy for individuals and partnership firms. Part IV of the Code makes provisions for regulation of Insolvency Professionals, Agencies and Information Utilities and Part V includes provisions for miscellaneous matters. The Code also has eleven Schedules which amends various statutes.

Part I Preliminary (Sections 1 to 3)

Part II Insolvency Resolution and Liquidation for Corporate Persons

- Chapter I Preliminary (Sections 4 to 5)
- Chapter II Corporate Insolvency Resolution Process (Sections 6 to 32)
- Chapter III Liquidation Process (Sections 33 to 54)
- Chapter III A Pre-Packaged Insolvency Resolution Process (Section 54A-54P)
- Chapter IV Fast Track Corporate Insolvency Resolution Process (Sections 55 to 58)
- Chapter V Voluntary Liquidation of Corporate Persons (Section 59)
- Chapter VI Adjudicating Authority for Corporate Persons (Sections 60 to 67)
- Chapter VII Offences and Penalties (Sections 68 to 77).

Part III Insolvency Resolution and Bankruptcy for Individuals and Partnership Firms

- Chapter I Preliminary (Sections 78 to 79)
- Chapter II Fresh Start Process (Sections 80 to 93)
- Chapter III Insolvency Resolution Process (Sections 94 to 120)
- Chapter IV Bankruptcy Order for Individuals and Partnership Firms (Sections 121 to 148)
- Chapter V Administration and Distribution of the Estate of the Bankrupt (Sections 149 to 178)
- Chapter VI Adjudicating Authority for Individuals and Partnership Firms (Sections 179 to 187).

Part IV Regulation of Insolvency Professionals, Agencies and Information Utilities

- Chapter I The Insolvency and Bankruptcy Board of India (Sections 188 to 195)
- Chapter II Powers and Functions of the Board (Sections 196 to 198)
- Chapter III Insolvency Professional Agencies (Sections 199 to 205)
- Chapter IV Insolvency Professionals (Sections 206 to 208)
- Chapter V Information Utilities (Sections 209 to 216)
- Chapter VI Inspection and Investigation (Sections 217 to 220)
- Chapter VII Finance, Accounts and Audit (Sections 221 to 223).

Part V Miscellaneous (Sections 224 to 255)

- The First Schedule (see Section 245) amendment to the Indian Partnership Act, 1932
- The Second Schedule (see Section 246) amendment to the Central Excise Act, 1944
- The Third Schedule (see Section 247) amendment to the Income-Tax Act, 1961
- The Fourth Schedule (see Section 248) amendment to the Customs Act, 1962
- The Fifth Schedule (see Section 249) amendment to the Recovery of Debts Due to Banks and Financial Institutions Act, 1993
- The Sixth Schedule (see Section 250) amendment to the Finance Act, 1994
- The Seventh Schedule (see Section 251) amendment to the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002
- The Eighth Schedule (see Section 252) amendment to the Sick Industrial Companies (Special Provisions) Repeal Act, 2003
- The Ninth Schedule (see Section 253) amendment to the Payment and Settlement Systems Act, 2007
- The Tenth Schedule (see Section 254) amendment to the Limited Liability Partnership Act, 2008
- The Eleventh Schedule (see Section 255) amendments to the Companies Act, 2013
- The Twelfth Schedule (see Section 29A(d)) Act for the pruposes of clause (d) of Section 29A.

Salient Features of the Insolvency and Bankruptcy Code, 2016

1. The Insolvency and bankruptcy Code, 2016 offers a uniform, comprehensive insolvency legislation covering all companies, partnerships and individuals. Financial service providers are not included in the ambit of the Insolvency and Bankruptcy Code, 2016.

2. To ensure a formal and time bound insolvency resolution process, the Code creates a new institutional framework consisting of the Insolvency and Bankruptcy Board of India (IBBI), Adjudicating Authorities (AAs), Insolvency Professionals (IPs), Insolvency Professional Agencies (IPAs) and Information Utilities (IUs).

3. The Code provides for Insolvency Professionals (IPs), a class of regulated but private professionals having minimum standards of professional and ethical conduct, to act as intermediary in the insolvency resolution process. Insolvency Professional Agencies are designated to regulate Insolvency Professionals. These agencies enrol Insolvency Professionals, provide pre-registration educational course to its enrolled members and enforce a code of conduct for their functioning. They also issue 'authorisation for assignment' to the IPs enrolled with them. Following are the designated Insolvency Professional Agencies (IPAs) established under the Code:

    - The Indian Institute of Insolvency Professionals of ICAI,
    - ICSI Institute of Insolvency Professionals, and
    - Insolvency Professional Agency of Institute of Cost Accountants of India.

To regulate the working of Insolvency Professional Agencies (IPAs), the Insolvency and Bankruptcy Board of India (IBBI) has framed the following regulations in exercise of the powers conferred by the Insolvency and Bankruptcy Code, 2016:

- The Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016; and
- The Insolvency and Bankruptcy Board of India (Insolvency Professional Agencies) Regulations, 2016.

4. The Insolvency Professionals control the assets of the debtor during the insolvency resolution process. The insolvency professional verifies the claims of the creditors, constitutes a committee of creditors, runs the debtor's business as a going concern during the moratorium period and assists the creditors in finalising the revival plan. He also ensures that the debtor is in compliance with all laws applicable to it during the revival process. In liquidation, the insolvency professional acts as a liquidator and bankruptcy trustee. The Insolvency and Bankruptcy Board of India has framed the IBBI (Insolvency Professional) Regulations, 2016 to regulate the working of Insolvency Professionals. These regulations are amended from time to time by the Insolvency and Bankruptcy Board of India.

5. While the Insolvency professionals assist in the insolvency resolution proceedings envisaged in the Code, the Information Utilities, on the other hand, collect, collate, authenticate and disseminate financial information. The purpose of such collection, collation, authentication and dissemination financial information of debtors in centralised electronic databases is to facilitation swift decision making in the resolution proceedings. The Insolvency and Bankruptcy Board of India has framed the IBBI (Information Utilities) Regulations, 2017. These regulations are amended from time to time by the Insolvency and Bankruptcy Board of India.

6. The Code provides for the constitution of a new insolvency regulator i.e., the Insolvency and Bankruptcy Board of India (IBBI). Its role includes overseeing the functioning of insolvency intermediaries i.e., insolvency professionals, insolvency professional agencies and information utilities as well as regulating the insolvency process. The members of the Board include representatives from the central government as well as the Reserve Bank of India. The Board is empowered to frame and implement regulations to regulate the profession as well as processes envisaged in the Code. The Bankruptcy Board of India has also been designated as the 'Authority' under the Companies (Registered Valuers and Valuation Rules), 2017 for regulation and development of the profession of valuers in the country.

7. The Code proposes two Tribunals to adjudicate insolvency resolution cases. In the case of insolvency of companies and Limited Liability Partnerships (LLPs), the Adjudication Authority is the National Company Law Tribunal (NCLT), while the cases involving individuals and partnership firms are handled by the Debts Recovery Tribunals (DRTs). The insolvency proceeding will be initiated by NCLT or DRT, as the case may be, after verification of the claims of the initiator. Appeals from NCLT orders lie to the National Company Law Appellate Tribunal (NCLAT) and thereafter to the Supreme Court of India. For individuals and other persons, the Adjudicating Authority is the DRT. Appeals from DRT orders lie to the Debt Recovery Appellate Tribunal (DRAT) and thereafter to the Supreme Court.

To ensure that the insolvency resolution is commercially viable, the Code separates the commercial aspects from the judicial aspects and thus limits the role of adjudicating authorities to ensuring due process rather than adjudicating on the merits of the insolvency resolution.

8. To initiate an insolvency process for corporate debtors, the default should be atleast INR 1, 00, 00,000. Central Government may, by notification, specify such minimum amount of default of higher value, which shall not be more than one crore rupees, for matters relating to the prepackaged insolvency resolution process of corporate debtors under Chapter III-A. Central government vide Notification S.O. 1543(E) dated 9th April 2021 specified ten lakh rupees as the minimum amount of default for the matters relating to the pre-packaged insolvency resolution process of corporate debtor under Chapter III-A of the Code.

9. In resolution process for corporate persons, the Code proposes two independent stages:
   (i) Insolvency Resolution Process, during which the creditors assess the viability of debtor's business and the options for its rescue and revival
   (ii) Liquidation, in case the insolvency resolution process fails or financial creditors decide to wind up and distribute the assets of the debtor.

10. The Code envisages two distinct processes in case of Insolvency Resolution Process (IRP) for Individuals/ Unlimited Partnerships

    (i) Automatic Fresh Start

    (ii) Insolvency Resolution.

11. The Code provides a Fresh Start Process for individuals under which they will be eligible for a debt waiver of up to INR 35,000. The individual will be eligible for the waiver subject to certain limits prescribed under the Code. Under the automatic fresh start process, eligible debtors can apply to the Debt Recovery Tribunal (DRT) for discharge from certain debts not exceeding a specified threshold, allowing them to start afresh.

12. A financial creditor (for a defaulted financial debt) or an operational creditor (for an unpaid operational debt) can initiate an Insolvency Resolution Process (IRP) against a corporate debtor. The defaulting corporate debtor, its shareholders or employees, may also initiate voluntary insolvency proceedings. The National Company Law Tribunal (NCLT) is the designated adjudicating authority in case of corporate debtors.

    In case of individuals and unlimited partnerships, the insolvency resolution process consists of preparation of a repayment plan by the debtor. If approved by creditors, the DRT passes an order binding the debtor and creditors to the repayment plan. If the plan is rejected or fails, the debtor or creditors may apply for a bankruptcy order.

Section 11 of the Code disentitles the following persons to make an application to initiate corporate insolvency resolution process:

(a) a corporate debtor undergoing a corporate insolvency resolution process; or

(aa) a financial creditor or an operational creditor of a corporate debtor undergoing a pre-packaged insolvency resolution process; or

(b) a corporate debtor having completed corporate insolvency resolution process twelve months preceding the date of making of the application; or

(ba) a corporate debtor in respect of whom a resolution plan has been approved under Chapter III-A, twelve months preceding the date of making of the application; or

(c) a corporate debtor or a financial creditor who has violated any of the terms of resolution plan which was approved twelve months before the date of making of an application under this Chapter; or

(d) a corporate debtor in respect of whom a liquidation order has been made.

It may be noted that a corporate debtor falling under the above clauses can initiate corporate insolvency resolution process against another corporate debtor.

13. The Code provides for a time bound Insolvency Resolution Process for companies and individuals, which is required to be completed within 180 days (subject to a one-time extension by 90 days) and mandatorily be completed within 330 days from the insolvency commencement date. Corporate insolvency resolution process shall mandatorily be completed within a period of three hundred and thirty days from the insolvency commencement date, including any extension of the period of corporate insolvency resolution process and the time taken in legal proceedings in relation to such resolution process of the corporate debtor. If the resolution plan does not get finalised or is rejected by NCLT or DRT on technical grounds, then assets of the debtor are sold to repay his outstanding dues.

14. The Code makes significant changes in the priority of claims for distribution of liquidation proceeds. In case of liquidation, the assets will be distributed in the following order: (i) fees of insolvency professional and costs related to the resolution process, (ii) workmen's dues for the preceding 24 months and secured creditors, (iii) employee wages, (iv) unsecured creditors, (v) government dues and remaining secured creditors (any remaining debt if they enforce their collateral), (vi) any remaining debt, and (vii) shareholders.

Before the enactment of the Insolvency and Bankruptcy Code, the Government dues were immediately below the claims of secured creditors and workmen in order of priority. Now the Central and State Government's dues stand below the claims of secured creditors, workmen dues, employee dues and other unsecured financial creditors.

15. The Code provides for the creation of Insolvency and Bankruptcy Fund. Section 224 of the Code provides that the following amounts shall be credited to the fund

- the grants made by the Central Government for the purposes of the Fund;
- the amount deposited by persons as contribution to the Fund;
- the amount received in the Fund from any other source; and
- the interest or other income received out of the investment made from the Fund.

Section 224(3) further provides that a person who has contributed any amount to the Fund may, in the event of proceedings initiated in respect of such person under the Code before an Adjudicating Authority, make an application to such Adjudicating Authority for withdrawal of funds not exceeding the amount contributed by it, for making payments to workmen, protecting the assets of such persons, meeting the incidental costs during the proceedings or such other purposes as may be prescribed.

16. The Code specifies stringent penalties for certain offences such as concealing property in case of corporate insolvency. The imprisonment in such cases may extend up to five years, or a fine of up to one crore rupees, or both.

17. In case of cross-border insolvency proceedings, the central government may enter into bilateral agreements and reciprocal arrangements with other countries to enforce provisions of the Code.

The Code repeals the Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920.

In addition, it amends the following 11 Acts:

- The Indian Partnership Act, 1932
- The Central Excise Act, 1944
- The Income-Tax Act, 1961
- The Customs Act, 1962
- The Recovery of Debts Due to Banks and Financial Institutions Act, 1993
- The Finance Act, 1994
- The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002
- The Sick Industrial Companies (Special Provisions) Repeal Act, 2003
- The Payment and Settlement Systems Act, 2007
- The Limited Liability Partnership Act, 2008
- The Companies Act, 2013.

PILLARS OF INSOLVENCY AND BANKRUPTCY CODE, 2016

(A) Insolvency and Bankruptcy Board of India (IBBI)

The Insolvency and Bankruptcy Code, 2016 provides for the constitution of a new insolvency regulator i.e., the Insolvency and Bankruptcy Board of India (IBBI). The Insolvency and Bankruptcy Board of India was established on 1st October 2016. It is a unique regulator which regulates a profession as well as processes under the Code. Its role includes over seeing the functioning of insolvency intermediaries i.e., insolvency professionals, insolvency professional agencies and information utilities. The Board is responsible for implementation of the Code that consolidates and amends the laws relating to insolvency resolution of **corporate persons, partnership firms and individuals** in a time bound manner. The Board is empowered to frame and enforce rules for various processes under the Code, namely, corporate insolvency resolution, corporate liquidation, individual insolvency resolution and individual bankruptcy.

Section 188 (2) of the Code provides that the Board shall be a body corporate having perpetual succession and a common seal, with power, subject to the provisions of this Code, to acquire, hold and dispose of property, both movable and immovable, and to contract, and shall, by the said name, sue or be sued. As per section 189 (4), the term of office of the Chairperson and members (other than ex officio members) shall be five years or till they attain the age of sixty-five years, whichever is earlier, and they shall be eligible for reappointment.

Removal of member from office

Section 190 empowers the Central Government to remove a member from office if he-

(a) is an undischarged bankrupt as defined under Part III;

(b) has become physically or mentally incapable of acting as a member;

(c) has been convicted of an offence, which in the opinion of the Central Government involves moral turpitude;

(d) has, so abused his position as to render his continuation in office detrimental to the public interest.

Section 190 mandates that no member shall be removed under clause (d) unless he has been given a reasonable opportunity of being heard in the matter.

Powers and Functions of the Board

Section 196(1) of the Insolvency and Bankruptcy Code provides that the Board shall, subject to the general direction of the Central Government, perform all or any of the following functions namely:

(a) Register insolvency professional agencies, insolvency professionals and information utilities and renew, withdraw, suspend or cancel such registrations.

(aa) promote the development of, and regulate, the working and practices of, insolvency professionals, insolvency professional agencies and information utilities and other institutions, in furtherance of the purposes of this Code.

(b) Specify the minimum eligibility requirements for registration of insolvency professional agencies, insolvency professionals and information utilities.

(c) Levy fee or other charges for carrying out the purposes of this Code, including fee for registration and renewal of insolvency professional agencies, insolvency professionals and information utilities.

(d) Specify by regulations standards for the functioning of insolvency professional agencies, insolvency professionals and information utilities.

(e) Lay down by regulations the minimum curriculum for the examination of the insolvency professionals for their enrolment as members of the insolvency professional agencies.

(f) Carry out inspections and investigations on insolvency professional agencies, insolvency professionals and information utilities and pass such orders as may be required for compliance of the provisions of this Code and the regulations issued hereunder.

(g) Monitor the performance of insolvency professional agencies, insolvency professionals and information utilities and pass any directions as may be required for compliance of the provisions of this Code and the regulations issued hereunder.

(h) Call for any information and records from the insolvency professional agencies, insolvency professionals and information utilities.

(i) Publish such information, data, research studies and other information as may be specified by regulations.

(j) Specify by regulations the manner of collecting and storing data by the information utilities and for providing access to such data.

(k) Collect and maintain records relating to insolvency and bankruptcy cases and disseminate information relating to such cases.

(l) Constitute such committees as may be required including in particular the committees laid down in Section 197.

(m) Promote transparency and best practices in its governance.

(n) Maintain websites and such other universally accessible repositories of electronic information as may be necessary.

(o) Enter into memorandum of understanding with any other statutory authorities.

(p) Issue necessary guidelines to the insolvency professional agencies, insolvency professionals and information utilities.

(q) Specify mechanism for redressal of grievances against insolvency professionals, insolvency professional agencies and information utilities and pass orders relating to complaints filed against the aforesaid for compliance of the provisions of this Code and the regulations issued hereunder.

(r) Conduct periodic study, research and audit the functioning and performance of to the insolvency professional agencies, insolvency professionals and information utilities at such intervals as may be specified by the Board.

(s) Specify mechanisms for issuing regulations, including the conduct of public consultation processes before notification of any regulations.

(t) Make regulations and guidelines on matters relating to insolvency and bankruptcy as may be required under this Code, including mechanism for time bound disposal of the assets of the corporate debtor or debtor.

(u) Perform such other functions as may be prescribed.

Section 196(2) of the Code further provides that the Board may make model bye-laws to be to adopted by insolvency professional agencies which may provide for:

(a) The minimum standards of professional competence of the members of insolvency professional agencies.

(b) The standards for professional and ethical conduct of the members of insolvency professional agencies.

(c) Requirements for enrolment of persons as members of insolvency professional agencies which shall be non-discriminatory.

Explanation.– For the purposes of this clause, the term “non-discriminatory” means lack of discrimination on the grounds of religion, caste, gender or place of birth and such other grounds as may be specified.

(d) The manner of granting membership.

(e) Setting up of a governing board for internal governance and management of insolvency professional agency in accordance with the regulations specified by the Board.

(f) The information required to be submitted by members including the form and the time for submitting such information.

(g) The specific classes of persons to whom services shall be provided at concessional rates or for no remuneration by members.

(h) The grounds on which penalties may be levied upon the members of insolvency professional agencies and the manner thereof.

(i) A fair and transparent mechanism for redressal of grievances against the members of insolvency professional agencies.

(j) The grounds under which the insolvency professionals may be expelled from the membership of insolvency professional agencies.

(k) The quantum of fee and the manner of collecting fee for inducting persons as its members.

(l) The procedure for enrolment of persons as members of insolvency professional agency.

(m) The manner of conducting examination for enrolment of insolvency professionals.

(n) The manner of monitoring and reviewing the working of insolvency professional who are members.

(o) The duties and other activities to be performed by members.

(p) The manner of conducting disciplinary proceedings against its members and imposing penalties.

(q) The manner of utilising the amount received as penalty imposed against any insolvency professional.

Section 196(3) states that the Board shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908, while trying a suit, in respect of the following matters, namely:

1. The discovery and production of books of account and other documents, at such place and such time as may be specified by the Board.

2. Summoning and enforcing the attendance of persons and examining them on oath.

3. Inspection of any books, registers and other documents of any person at any place.

4. Issuing of commissions for the examination of witnesses or documents.

(B) Insolvency Professionals (IPs)

The Code provides for Insolvency Professionals (IPs) to act as intermediary in the insolvency resolution process. Insolvency professionals are a class of regulated but private professionals having minimum standards of professional and ethical conduct. Section 3(19) of the Code defines an “insolvency professional” as a person enrolled under section 206 with an insolvency professional agency as its member and registered with the Board as an insolvency professional under section 207.

An insolvency professional plays a very important role under the Code. He acts as an “interim resolution professional” and/or as a “resolution professional” in the corporate insolvency resolution process (specified in Part II of the Code which deals with corporate persons) as well as Part III of the Code (which deals with Insolvency Resolution and Bankruptcy for Individuals and Partnership Firms) for conducting the fresh start process or insolvency resolution process.

An insolvency professional also acts as a liquidator in accordance with the provisions of Part II as well as a "bankruptcy trustee" for the estate of the bankrupt under section 125 in Part III of the Code.

Enrolment and Registration of Insolvency Professionals

Section 206 lays down that no person shall render his services as insolvency professional under this Code without being enrolled as a member of an insolvency professional agency and registered with the Board.

Section 207(1) further lays down that every insolvency professional shall, after obtaining the membership of any insolvency professional agency, register himself with the Board within such time, in such manner and on payment of such fee, as may be specified by regulations. Section 207(2) empowers the IBBI to specify the categories of professionals or persons possessing such qualifications and experience in the field of finance, law, management, insolvency or such other field to act as insolvency professionals.

The Insolvency and Bankruptcy Board of India has framed the IBBI (Insolvency Professional) Regulations, 2016 to regulate the working of Insolvency Professionals. These regulations are amended from time to time by the Insolvency and Bankruptcy Board of India.

Functions and obligations of insolvency professionals

Section 208(1) of the Code provides that where any insolvency resolution, fresh start, liquidation or bankruptcy process has been initiated, it shall be the function of an insolvency professional to take such actions as may be necessary, in the following matters, namely:–

(a) a fresh start order process under Chapter II of Part III;

(b) individual insolvency resolution process under Chapter III of Part III;

(c) corporate insolvency resolution process under Chapter II of Part II;

(d) individual bankruptcy process under Chapter IV of Part III; and

(e) liquidation of a corporate debtor firm under Chapter III of Part II.

Section 208(2) mandates that every insolvency professional shall abide by the following code of conduct:–

(a) to take reasonable care and diligence while performing his duties;

(b) to comply with all requirements and terms and conditions specified in the bye-laws of the insolvency professional agency of which he is a member;

(c) to allow the insolvency professional agency to inspect his records;

(d) to submit a copy of the records of every proceeding before the Adjudicating Authority to the Board as well as to the insolvency professional agency of which he is a member; and

(e) to perform his functions in such manner and subject to such conditions as may be specified.

(C) Insolvency Professional Agencies (IPA)

Section 3(20) of the Code defines "insolvency professional agency" as any person registered with the Board under section 201 as an insolvency professional agency.

Insolvency Professional Agencies are designated to regulate Insolvency Professionals. These agencies enrol Insolvency Professionals, provide pre-registration educational course to its enrolled members and enforce a code of conduct for their functioning. They also issue 'authorisation for assignment' to the IPs enrolled with them. In exercise of powers conferred by the Insolvency and Bankruptcy Code, 2016, the Insolvency and Bankruptcy Board of India (IBBI) has framed the following regulations to regulate the working of Insolvency Professional Agencies (IPAs):

- The Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016, and
- The Insolvency and Bankruptcy Board of India (Insolvency Professional Agencies) Regulations, 2016.

Following are the Insolvency Professional Agencies (IPAs) registered under the Code:

- The Indian Institute of Insolvency Professionals of ICAI;
- **ICSI Institute of Insolvency Professionals; and**
- Insolvency Professional Agency of Institute of Cost Accountants of India.

Section 199 of the Code provides that save as otherwise provided in this Code, no person shall carry on its business as insolvency professional agencies under this Code and enrol insolvency professionals as its members except under and in accordance with a certificate of registration issued in this behalf by the Board.

According to Section 204 of the Code, insolvency professional agencies perform the following functions, namely:

(a) grant membership to persons who fulfil all requirements set out in its byelaws on payment of membership fee;

(b) lay down standards of professional conduct for its members;

(c) monitor the performance of its members;

(d) safeguard the rights, privileges and interests of insolvency professionals who are its members;

(e) suspend or cancel the membership of insolvency professionals who are its members on the grounds set out in its bye-laws;

(f) redress the grievances of consumers against insolvency professionals who are its members; and

(g) publish information about its functions, list of its members, performance of its members and such other information as may be specified by regulations.

(D) Adjudicating Authority (AA)

Section 5(1) of the Code provides that the "Adjudicating Authority" for insolvency resolution and liquidation for corporate persons means National Company Law Tribunal constituted under section 408 of the Companies Act, 2013. Section 60(5) of the Code further provides that notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of –

(a) any application or proceeding by or against the corporate debtor or corporate person;

(b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and

(c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.

Section 63 of the Code excludes the jurisdiction of the civil courts. It provides that no civil court or authority shall have jurisdiction to entertain any suit or proceedings in respect of any matter on which National Company Law Tribunal (NCLT) or the National Company Law Appellate Tribunal (NCLAT) has jurisdiction under this Code.

Similarly, in case of individuals and partnership firms, section 79(1) of the Code provides that the "Adjudicating Authority" for insolvency resolution and bankruptcy for individuals and partnership firms is the Debt Recovery.

Tribunal constituted under sub-section (1) of section 3 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993.

Section 179(1) of the Code provides that subject to the provisions of section 60, the Adjudicating Authority, in relation to insolvency matters of individuals and firms shall be the Debt Recovery Tribunal having territorial jurisdiction over the place where the individual debtor actually and voluntarily resides or carries on business or personally works for gain and can entertain an application under this Code regarding such person.

Section 179(2) of the Code further provides that the Debt Recovery Tribunal shall, have jurisdiction to entertain or dispose of –

(a) any suit or proceeding by or against the individual debtor;

(b) any claim made by or against the individual debtor;

(c) any question of priorities or any other question whether of law or facts, arising out of or in relation to insolvency and bankruptcy of the individual debtor or firm under this Code.

Section 180 of the Code excludes the jurisdiction of civil courts. The section provides that no civil court or authority shall have jurisdiction to entertain any suit or proceedings in respect of any matter on which the Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal has jurisdiction under this Code.

Thus, the Insolvency and Bankruptcy Code proposes two tribunals to adjudicate insolvency resolution cases. In the case of insolvency of companies and Limited Liability Partnerships (LLPs), the adjudication authority is the National Company Law Tribunal (NCLT), while the cases involving individuals and partnership firms are handled by the Debts Recovery Tribunals (DRTs).

Appeals from NCLT orders lie to the National Company Law Appellate Tribunal (NCLAT) and thereafter to the Supreme Court of India. For individuals and other persons, the adjudicating authority is the DRT. Appeals from DRT orders lie to the Debt Recovery Appellate Tribunal (DRAT) and thereafter to the Supreme Court.

(E) Information Utility (IU)

Section 3(21) of the Code defines an "information utility" as a person who is registered with the Board as an information utility under section 210.

While the Insolvency professionals assist in the insolvency resolution proceedings envisaged in the Code, the Information Utility, on the other hand, collect, collate, authenticate and disseminate financial information. The purpose of such collection, collation, authentication and dissemination financial information of debtors is to facilitation swift decision making in the resolution proceedings. The Insolvency and Bankruptcy Board of India oversees the functioning of such information utilities. The Insolvency and Bankruptcy Board of India has framed the IBBI (Information Utilities) Regulations, 2017. These regulations are amended from time to time by the Insolvency and Bankruptcy Board of India.

Obligations of information utility (Section 214)

(a) create and store financial information in a universally accessible format;

(b) accept electronic submissions of financial information from persons who are under obligations to submit financial information under sub-section (1) of section 215, in such form and manner as may be specified by regulations;

(c) accept, in specified form and manner, electronic submissions of financial information from persons who intend to submit such information;

(d) meet such minimum service quality standards as may be specified by regulations;

(e) get the information received from various persons authenticated by all concerned parties before storing such information;

(f) provide access to the financial information stored by it to any person who intends to access such information in such manner as may be specified by regulations;

(g) publish such statistical information as may be specified by regulations;

(h) have inter-operatability with other information utilities.

Key Definitions and Concepts

Sections 3, 5 and 79 of the Insolvency and Bankruptcy Code, 2016 define important terms used in the Code. Section 3 of the Code defines general important terms used in the Code whereas section 5 of the Code defines important terms relating to Insolvency Resolution and Liquidation for Corporate Persons covered in Part II of the Code. Similarly section 79 of the Code defines important terms relating to Insolvency Resolution and Bankruptcy for Individuals and Partnership Firms which is discussed in Part III of the Code.

Definitions in Section 3 of the Code

Section 3(37) provides that words and expressions used but not defined in the Insolvency and Bankruptcy Code, 2016 but defined in the Indian Contract Act, 1872, the Indian Partnership Act, 1932, the Securities Contact (Regulation) Act, 1956, the Securities Exchange Board of India Act, 1992, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the Limited Liability Partnership act, 2008 and the Companies Act, 2013, shall have the meanings respectively assigned to them in those acts. Therefore, all such words and expressions not defined in the Code but defined in other acts shall have the meanings assigned to them in those other acts.

Section 3 states that unless the context otherwise requires,

"Board" means the Insolvency and Bankruptcy Board of India established under sub-section (1) of section 188 [Section 3(1)].

"Bench" means a bench of the Adjudicating Authority [Section 3(2)].

"Bye-laws" mean the bye-laws made by the insolvency professional agency under section 205 [Section 3(3)].

"Charge" means an interest or lien created on the property or assets of any person or any of its undertakings or both, as the case may be, as security and includes a mortgage [Section 3(4)].

"Claim" means –

(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;

(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured [Section 3(6)].

Claim' gives rise to 'debt' only when it is due and 'default' occurs only when debt becomes due and payable and is not paid by the debtor. *(Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors. [WP (Civil) Nos. 99, 100, 115, 459, 598, 775, 822, 849, and 1221 of 2018, SLP (Civil) No. 28623 of 2018 and WP (Civil) 37 of 2019] SC judgement dated 25.01.2019).*

'Claim' under section 3(6) of the Code means a right to payment, even if it is disputed. *(Innoventive Industries Ltd. Vs. ICICI Bank & Anr. [Civil Appeal Nos. 8337-8338 of 2017] SC judgement dated 31.08.2017)*

"Corporate Person" means a company as defined in clause (20) of section 2 of the Companies Act, 2013, a limited liability partnership, as defined in clause (n) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008, or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider [Section 3(7)].

National Highway Authority of India (NHAI) is a statutory body which functions as an extended limb of the Central Government and performs Governmental functions which obviously cannot be taken over by an RP, or by any other corporate body nor can NHAI ultimately be wound up under the Code. For all these reasons, it is not possible to either read in, or read down; the definition of 'corporate person' in section 3(7) of the Code to include NHAI. *(Hindustan Construction Company Ltd. & Anr. Vs. Union of India & Ors. [WP (Civil) No. 1074 of 2019 with other Civil Appeals] SC judgement dated 27.11.2019)*

"Corporate Debtor" means a corporate person who owes a debt to any person [Section 3(8)].

If a corporate person extends guarantee for the loan transaction concerning a principal borrower not being a corporate person, it would still be covered within the meaning of expression "corporate debtor" in section 3(8) of the Code. *(Laxmi Pat Surana Vs. Union Bank of India & Anr. [Civil Appeal No. 2734 of 2020] SC judgement dated 26.03.202)*

"Core Services" means services rendered by an information utility for –

(a) accepting electronic submission of financial information in such form and manner as may be specified;

(b) safe and accurate recording of financial information;

(c) authenticating and verifying the financial information submitted by a person; and

(d) providing access to information stored with the information utility to persons as may be specified [Section 3(9)].

"Creditor" means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree holder [Section 3(10)].

In the matter of *Digamber Bhondwe Vs. JM Financial Asset Reconstruction [CA(AT)(Ins) No. 1379 of 2019]* it was held "......We further reject the submission that because in Section 3(10) of I&B Code in definition of "Creditor" the "decree holder" is included it shows that decree gives cause to initiate application under Section 7 of I&B Code. Section 3 is in Part I of I&B Code. Part II of I&B Code deals with "Insolvency Resolution and Liquidation for Corporate Person", & has its own set of definitions in Section 5. Section 3 (10) definition of "Creditor" includes "financial creditor", "operational creditor" "decree-holder" etc. But Section 7 or Section 9 dealing with "Financial Creditor" and "operational creditor" do not include "decree-holder" to initiate CIRP in Part II."

Sh. Sushil Ansal Vs Ashok Tripathi and Ors, the National Company Law Appellate Tribunal, Delhi (NCLAT) held that no decree holder who is covered within the definitions of a creditor given under Section 3(10) of the Insolvency and Bankruptcy Code (IBC) can come within the ambit of the class of a financial creditor. This implies that a decree holder is not permitted to incorporate any corporate insolvency resolution process (CIRP) against any corporate debtor with the soul objective of executing a decree under it.

"Debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt [Section 3(11)].

"Default" means non-payment of debt when whole or any part or 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 [Section 3(12)].

'Default' is defined in section 3(12) of the Code in very wide terms as non-payment of a 'debt' once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. (*Innoventive Industries Ltd. Vs. ICICI Bank & Anr. [Civil Appeal Nos. 8337-8338 of 2017] SC judgement dated 31.08.2017)*

The context of section 3(12) of the Code is actual non-payment by the CD when a 'debt' has become due and payable. *(B. K. Educational Services Pvt. Ltd. Vs. Parag Gupta and Associates [Civil Appeal No. 23988 of 2017 and other appeals] SC judgement dated 11.10.2018)*

"Financial Information", in relation to a person, means one or more of the following categories of information, namely:–

(a) records of the debt of the person;

(b) records of liabilities when the person is solvent;

(c) records of assets of person over which security interest has been created;

(d) records, if any, of instances of default by the person against any debt;

(e) records of the balance sheet and cash-flow statements of the person; and

(f) such other information as may be specified [Section 3(13)].

"Financial Institution" means –

(a) a scheduled bank;

(b) financial institution as defined in section 45-I of the Reserve Bank of India Act, 1934;

(c) public financial institution as defined in clause (72) of section 2 of the Companies Act, 2013; and

(d) such other institution as the Central Government may by notification specify as a financial institution [Section 3(14)].

"Financial Product" means securities, contracts of insurance, deposits, credit arrangements including loans and advances by banks and financial institutions, retirement benefit plans, small savings instruments, foreign currency contracts other than contracts to exchange one currency (whether Indian or not) for another which are to be settled immediately, or any other instrument as may be prescribed [Section 3(15)].

"Financial Service" includes any of the following services, namely:–

(a) accepting of deposits;

(b) safeguarding and administering assets consisting of financial products, belonging to another person, or agreeing to do so;

(c) effecting contracts of insurance;

(d) offering, managing or agreeing to manage assets consisting of financial products belonging to another person;

(e) rendering or agreeing, for consideration, to render advice on or soliciting for the purposes of –

(i) buying, selling, or subscribing to, a financial product;

(ii) availing a financial service; or

(iii) exercising any right associated with a financial product or financial service.

(f) establishing or operating an investment scheme;

(g) maintaining or transferring records of ownership of a financial product;

(h) underwriting the issuance or subscription of a financial product; or

(i) selling, providing, or issuing stored value or payment instruments or providing payment services [Section 3(16)].

"Financial Service Provider" means a person engaged in the business of providing financial services in terms of authorisation issued or registration granted by a financial sector regulator [Section 3(17)].

"Financial Sector Regulator" means an authority or body constituted under any law for the time being in force to regulate services or transactions of financial sector and includes the Reserve Bank of India, the Securities and Exchange Board of India, the Insurance Regulatory and Development Authority of India, the Pension Fund Regulatory Authority and such other regulatory authorities as may be notified by the Central Government [Section 3(18)].

"Insolvency Professional" means a person enrolled under section 206 with an insolvency professional agency as its member and registered with the Board as an insolvency professional under section 207 [Section 3(19)].

"Insolvency Professional Agency" means any person registered with the Board under section 201 as an insolvency professional agency [Section 3(20)].

"Information Utility" means a person who is registered with the Board as an information utility under section 210 [Section 3(21)].

"Person" includes –

(a) an individual;

(b) a Hindu Undivided Family;

(c) a company;

(d) a trust;

(e) a partnership;

(f) a limited liability partnership; and

(g) any other entity established under a statute, and includes a person resident outside India [Section 3(23)].

A sole proprietary concern, not being a 'person' under section 3(23) of the Code and also when there is a pre-existing dispute, cannot file application under section 9. *(R.G. Steels Vs. Berrys Auto Ancillaries (P) Ltd. [IB722/ND/2019] NCLT, New Delhi judgement dated 23.09.2019)*

A 'trade union' is an entity established under a statute i.e. the Trade Unions Act, 1926 and is therefore, a 'person' under section 3(23) of the Code. *(JK Jute Mill Mazdoor Morcha Vs. Juggilal Kamlapat Jute Mills Company Ltd. & Ors. [Civil Appeal No. 20978 of 2017] SC judgement dated 30.04.2019)*

A proprietorship concern does not fall within the purview of "person" as per section 3(23) for the purpose of filing an application under section 9 of the Code. Proprietorship concern cannot sue and be sued unless it is represented by a proprietor. *(Shri Shakti Dyeing Works Vs. Berawala Textiles Pvt. Ltd. [CP (IB) No. 854/NCLT/AHM/2019] NCLT, Ahmedabad judgement dated 25.01.2021)*

"Property" includes money, goods, actionable claims, land and every description of property situated in India or outside India and every description of interest including present or future or vested or contingent interest arising out of, or incidental to, property [Section 3(27)].

"Secured Creditor" means a creditor in favour of whom security interest is created [Section 3(30)].

The State Tax Officer does not come within the meaning of 'secured creditor' as defined under section 3(30) read with section 3(31) of the Code. *(Tourism Finance Corporation of India Ltd. Vs. Rainbow Papers Ltd. & Ors. [CA (AT) (Ins.) No. 354 of 2019 and other appeals] NCLAT judgement dated 19.12.2019)*

In the matter of *Rainbow Papers Ltd.,* Hon'ble SC held that the State is a secured creditor as per the Gujarat Value Added Tax Act, 2003 and are to be rank equally with secured debts under section 53(1)(b). As per section 3(30) of the Code, secured creditor means a creditor in favour of whom security interest is created. Such security interest could be created by operation of law. The definition of secured creditor in the Code does not exclude any Governmental Authority. Therefore, the resolution plan ignores the statutory dues payable to any State Government or legal authority, the Adjudicating Authority is bound to reject the resolution plan.

"Security Interest" means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person: Provided that security interest shall not include a performance guarantee; [Section 3(31)].

'Security Interest' does not include 'Performance Bank Guarantee' and it is not covered by section 14 of the Code. *(Indian Overseas Bank Vs. Arvind Kumar [CA (AT) (Ins.) No. 558 of 2020] NCLAT judgement dated 28.09.2020)*

"Transaction" includes an agreement or arrangement in writing for the transfer of assets, or funds, goods or services, from or to the corporate debtor [Section 3(33)].

"Transfer" includes sale, purchase, exchange, mortgage, pledge, gift, loan or any other form of transfer of right, title, possession or lien [Section 3(34)].

"Transfer of Property" means transfer of any property and includes a transfer of any interest in the property and creation of any charge upon such property [Section 3(35)].

Definitions in Section 5 of the Code

Section 5 belongs to Part II of the Code which lays down procedure for insolvency resolution and liquidation to be followed in case of corporate persons. Section 5 states that unless the context otherwise requires:

"Adjudicating Authority", for the purposes of Part II, means National Company Law Tribunal constituted under section 408 of the Companies Act, 2013 [Section 5(1)].

"Constitutional Document", in relation to a corporate person, includes articles of association, memorandum of association of a company and incorporation document of a Limited Liability Partnership [Section 5(4)].

"Corporate Applicant" means –

(a) corporate debtor; or

(b) a member or partner of the corporate debtor who is authorised to make an application for the corporate insolvency resolution process or the pre-packaged insolvency resolution process as the case may be, under the constitutional document of the corporate debtor; or

(c) an individual who is in charge of managing the operations and resources of the corporate debtor; or

(d) a person who has the control and supervision over the financial affairs of the corporate debtor [Section 5(5)].

"Corporate guarantor" means a corporate person who is the surety in a contract of guarantee to a corporate debtor [Section 5(5A)].

If CIRP has been initiated against the CD, the insolvency and bankruptcy process against the personal guarantor can be filed under section 60(2) before the same NCLT and not before the DRT. *(State Bank of India Vs. D. S. Rajender Kumar [CA (AT) (Ins.) No. 87 to 91 of 2018] NCLAT judgement dated 18.04.2018)*

Without initiating CIRP against the principal borrower, it is open to the FC to initiate CIRP under section 7 against corporate guarantors as the creditor is also the FC qua corporate guarantor. *(Rai Bahadur Shree Ram and Company Pvt. Ltd. Vs. Rural Electrification Corporation Ltd. & Ors. [Civil Appeal No. 1484 of 2019] SC judgement dated 11.02.2019)*

The principal debtor (CD) is discharged under the Code not on the instance of a creditor but due to operation of law, i.e., approval of resolution plan. Hence, the guarantor is not discharged of its liability merely because the creditor consented to a resolution plan of the principal debtor. *(State Bank of India Vs. Sungrowth Shares & Stocks Ltd. [CP (IB) No. 796/KB/2018] NCLT, Kolkata judgement dated 04.09.2019)*

The corporate guarantees given by the CD can be invoked only in the event of a default on the part of the borrower. *(Export Import Bank of India Vs. CHL Ltd. [CA (AT) (Ins.) 51 of 2018] NCLAT judgement dated 16.01.2019)*

It makes no difference as to whether the corporate person stood as guarantor to an individual or a corporate person, and as so long as the obligation in respect of a claim is due from a corporate person falling within the definition of 'financial debt', then it is obvious that the creditor can proceed under Section 7 of the Code against such corporate person. (*The Karur Vysya Bank Ltd. Vs. Maharaja Theme Parks and Resorts Pvt. Ltd. [CP/1314/IB/2018] NCLT, Chennai judgement dated 08.04.2019)*

The Code is at a nascent stage and it is better that the interpretation of the provisions is taken up by the SC to avoid any confusion and to authoritatively settle the law. It directed that no further petitions involving the challenge to the notification dated November 15, 2019, which brought into force certain provisions relating to the personal guarantors (PGs) to CDs, shall be entertained by any High Court *(Insolvency and Bankruptcy Board of India Vs. Lalit Kumar Jain & Ors. [TP (Civil) No.(s) 1034/2020 with other TPs] SC judgement dated 29.10.2020)*

Neither section 14 nor section 31 of the Code place any fetters on a bank/financial institution from initiation and continuation of proceedings against the guarantor for recovering of their dues. The liability of the principal borrower and guarantor remain coextensive and a bank/financial institution is entitled to initiate proceedings against the personal guarantor under the SARFAESI Act during the continuation of the CIRP against the principal borrower. *(Kiran Gupta Vs. State Bank of India & Anr. [W.P.(C) 7230/2020 & CM.APPL. 24414/2020 (stay)] HC, New Delhi judgement dated 02.11.2020)*

CIRP can be proceeded against the principal borrower as well as guarantor. *(State Bank of India Vs. Athena Energy Ventures Pvt. Ltd. [CA (AT) (Ins.) No. 633 of 2020] NCLAT judgement dated 24.11.2020)*

"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 [Section 5(6)].

Any observations with regard to individual officer if made by a court of law or in any communication made by the operational creditor, the same cannot be treated to be an existence of dispute. *(Yogendra Yasupal Vs. Jigsaw Solutions & Anr. [CA (AT) (Ins.) No. 222 of 2017] NCLAT judgement dated 16.10.2017)*

The test of existence of a dispute is: (a) whether the corporate debtor has raised a plausible contention requiring further investigation which is not a patently feeble legal argument or an assertion of facts unsupported by evidence (b) whether the defence is not spurious, mere bluster, plainly frivolous or vexatious (c) a dispute, if it truly exists in fact between the parties, which may or may not ultimately succeed. *(Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd. [Civil Appeal No.9405 of 2017] SC judgement dated 21.09.2017)*

The dispute should not be a mere eyewash and attempt to derail the OC's entitlement to initiate the proceedings under sections 8 and 9 of the Code. *(Simplex Infrastructures Ltd. Vs. Agrante Infra Ltd. [IB No. (IB)- 167(ND)/2017] NCLT, New Delhi judgement dated 10.08.2017)*

A unilateral transfer of liability does not constitute a 'dispute' within the meaning of section 5(6) and an inter-se dispute between two groups of shareholders of the CD does not constitute a 'dispute' in reference to OCs. The 'dispute' under section 5(6) of the Code must be between the CD and the OCs. *(Chetan Sharma Vs. Jai Lakshmi Solvents (P) Ltd. & Anr. [CA (AT) (Ins.) No. 66 of 2017 and other appeals] NCLAT judgement dated 10.05.2018)*

On the 'existence of a dispute', it was observed that section 5(6) is an inclusive provision and does not confine the AA from considering the existence of a dispute from a broader angle. Therefore, dispute in terms of section 8(2)(a) of the Code shall not be limited to instances specified in the definition under section 5(6). *(Anuj Khanna Vs. Wishwa Naveen Traders & Anr. [CA (AT) (Ins.) No. 555 of 2020] NCLAT judgement dated 25.11.2020)*

"Financial Creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to [Section 5(7)].

Essential criteria for being an FC: (i) A person to whom a financial debt is owed and includes a person whom such debt has been legally assigned or transferred to (ii) The debt along with interest, if any, is disbursed against the consideration for time value of money and include any one or more mode of disbursed as mentioned in clause (a) to (i) of sub-section (8) of Section 5. *(B.V.S. Lakshmi Vs. Geometrix Laser Solutions Pvt. Ltd. [CA (AT) (Ins.) No. 38 of 2017] NCLAT judgement dated 22.12.2017)*

The allottees/home buyers were included in the main provision, i.e., section 5(8)(f) with effect from the inception of the Code. The Explanation was added in 2018 merely to clarify doubts that had arisen. The deeming fiction that is used by the Explanation is to put beyond doubt the fact that allottees are to be regarded as financial creditors within section 5(8)(f) of the Code. *(Pioneer Urban Land and Infrastructure Ltd. & Anr. Vs. Union of India & Ors. [WP (C) No. 43 of 2019 with other appeals] SC judgement dated 09.08.2019)*

"Financial Debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes –

(a) money borrowed against the payment of interest;

(b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;

(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;

(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;

(e) receivables sold or discounted other than any receivables sold on nonrecourse basis;

(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

Explanation – For the purposes of this sub-clause,

(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and

(ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016.

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause [Section 5(8)].

The Joint Development Agreement entered, is a contract of reciprocal rights and obligations, both parties are admittedly Joint Development Partners, who entered into a consortium of sorts for developing an Integrated Township and for any breach of terms of contract, Section 7 Application is not maintainable as the amount cannot be construed as financial debt as defined under section 5(8) of the Code. *(Vipul Limited Vs. Solitaire Buildmart Pvt. Ltd. [CA (AT) (Ins.) No. 550 of 2020] NCLAT judgement dated 18.08.2020)*

A financial debt is a debt together with interest, if any, which is disbursed against the consideration for time value of money. *(Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors. [WP (Civil) Nos. 99, 100, 115, 459, 598, 775, 822, 849, and 1221 of 2018, SLP (Civil) No. 28623 of 2018 and WP (Civil) 37 of 2019] SC judgement dated 25.01.2019)*

The Supreme Court in the case of *Phoenix Arc Pvt. Ltd. Vs. Spade Financial Services Ltd. & Ors. [Civil Appeal No. 2842 of 2020 with 3063 of 2020] SC judgement dated 01.02.2021* held that (a) The collusive commercial arrangements between FCs and the CD would not constitute a 'financial debt'; (b) The objects and purposes of the Code are best served when the CIRP is driven by external creditors, so as to ensure that the CoC is not sabotaged by related parties of the CD. The purpose of excluding a related party of a CD from the CoC is to obviate conflicts of interest; (c) Exclusion under the first proviso to section 21(2) is related not to the debt itself but to the relationship existing between a related party FC and the CD.; and (d) The FC, who in praesenti is not a related party, would not be debarred from being a member of the CoC. However, in case where the related party FC divests itself of its shareholding or ceases to become a related party in a business capacity with the sole intention of participating in the CoC and sabotage the CIRP, it would be in keeping with the object and purpose of the first proviso to section 21(2), to debar the former related party creditor.

Advance amount paid as Security Deposit bearing interest is Financial Debt. NCLT, New Delhi Bench vide its order dated 11th October 2021 in case of *Magicon Impex Pvt. Ltd* observed that, the amount which has been released pursuant to Agreement in the form of Security Deposit and the same is interest bearing, which means it is carrying consideration of time value of money having commercial effect of a borrowing. Therefore, in our view the "debt" claimed is a "Financial Debt" within the definition of Section 5(8)(f) of IBC, 2016.

"Financial Position" in relation to any person, means the financial information of a person as on a certain date [Section 5(9)].

"Information Memorandum" means a memorandum prepared by resolution professional under sub- section (1) of section 29 [Section 5(10)].

"Initiation Date" means the date on which a financial creditor, corporate applicant or operational creditor, as the case may be, makes an application to the Adjudicating Authority for initiating corporate insolvency resolution process or the pre-packaged insolvency resolution proces as the case may be [Section 5(11)].

"Insolvency Commencement Date" means the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under sections 7, 9 or section 10, as the case may be [Section 5(12)].

"Insolvency Resolution Process Costs" means –

(a) the amount of any interim finance and the costs incurred in raising such finance;

(b) the fees payable to any person acting as a resolution professional;

(c) any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern;

(d) any costs incurred at the expense of the Government to facilitate the insolvency resolution process; and

(e) any other costs as may be specified by the Board [Section 5(13)].

is incurred towards supply of essential services during the period of moratorium, it may be accounted towards the insolvency resolution process costs. *(Dakshin Gujarat VIJ Company Ltd. Vs. ABG Shipyard Ltd. & Anr. [CA (AT) (Ins.) No. 334 of 2017] NCLAT judgement dated 08.02.2018)*

"Insolvency Resolution Process Period" means the period of one hundred and eighty days beginning from the insolvency commencement date and ending on one hundred and eightieth day [Section 5(14)].

It is always open to the NCLT/NCLAT to exclude certain period for the purpose of counting the total period of 270 days. The grounds include the following: (i) If the CIRP is stayed by a court of law or the NCLT/NCLAT/ Supreme Court (ii) If no RP is functioning for one or other reason during the CIRP (iii) The period between the date of order of admission/moratorium is passed and the actual date on which the RP takes charge for completing the CIRP (iv) On hearing a case, if order is reserved by the NCLT/NCLAT/Supreme Court and finally pass order enabling the RP to complete the CIRP (v) If the CIRP is set aside by the NCLAT or order of the NCLAT is reversed by the Supreme Court and CIRP is restored (vi) Any other circumstances which justifies exclusion of certain period. *(Quinn Logistics India Pvt. Ltd. Vs. Mack Soft Tech Pvt. Ltd. & Ors. [CA (AT) (Ins.) No. 185 of 2018] NCLAT judgement dated 08.05.2018)*

"Interim Finance" means any financial debt raised by the resolution professional during the insolvency resolution process period or by the corporate debtor during the pre packaged insolvency resolution process Period, as the case may be, and such other debt as may be notified [Section 5(15)].

The Ministry of Corporate Affairs vide notification dated 18th March, 2020 notified that a debt raised from the Special Window for Affordable and Middle-Income Housing Investment Fund I, for the purposes of the said clause.

Explanation.– For the purposes of this notification, the expression "Special Window for Affordable and Middle-Income Housing Investment Fund I" shall mean the fund sponsored by the Central Government for providing priority debt financing for stalled housing projects, as an alternate investment fund and registered with the Securities and Exchange Board of India, established under sub-section (1) of section 3 of the Securities and Exchange Board of India Act, to provide financing for the completion of stalled housing projects that are in the affordable and middle-income housing sector.

"Liquidation Cost" means any cost incurred by the liquidator during the period of liquidation subject to such regulations, as may be specified by the Board [Section 5(16)].

"Liquidation Commencement Date" means the date on which proceedings for liquidation commence in accordance with section 33 or section 59, as the case may be [Section 5(17)].

"Liquidator" means an insolvency professional appointed as a liquidator in accordance with the provisions of Chapter III or Chapter V of this Part, as the case may be [Section 5(18)].

"Officer" for the purposes of Chapter VI and Chapter VII of this Part, means an officer who is in default, as defined in clause (60) of section 2 of the Companies Act, 2013, or a designated partner as defined in clause (j) of section 2 of the Limited Liability Partnership Act, 2008, as the case may be [Section 5(19)].

"Operational Creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred [Section 5(20)].

It is clear that an OC who has assigned or legally transferred any operational debt to an FC, the assignee or transferee shall be considered as an OC to the extent of such assignment or legal transfer. *(Cooperative Rabobank U.A. Singapore Branch Vs. Shailendra Ajmera [CA (AT) (Ins.) No. 261 of 2018] NCLAT judgement dated 29.04.2019)*

The workmen of a Company come within the meaning of an OC in terms of section 5(20) r/w section 5(21) of the Code. *(Suresh Narayan Singh Vs. Tayo Rolls Ltd. [CA (AT) (Ins.) No. 112 of 2018] NCLAT judgement dated 26.09.2018)*

An OC means a person to whom an operational debt is owed, and an operational debt under section 5(21) means a claim in respect of provision of goods or services. *(Innoventive Industries Ltd. Vs. ICICI Bank & Anr. [Civil Appeal Nos. 8337-8338 of 2017] SC judgement dated 31.08.2017)*

A Trade Union or Association of workmen/employee does not come within the meaning of OC as no services is rendered by the Workmen's Association/Trade Union to the CD to claim any dues which can be termed to be debt as defined in sub-section (11) of section 3. *(JK Jute Mill Mazdoor Morcha Vs. Juggilal Kamlapat Jute Mills Co. Ltd. [CA (AT) (Ins.) No. 82 of 2017] NCLAT 12.09.2017)*

"Operational Debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority [Section 5(21)].

Operational debt would include a claim in respect of the provision of goods or services, including employment, or a debt in respect of payment of dues arising under any law and payable to the Government or any local authority. *(Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors. [WP (Civil) Nos. 99, 100, 115, 459, 598, 775, 822, 849, and 1221 of 2018, SLP (Civil) No. 28623 of 2018 and WP (Civil) 37 of 2019] SC judgement dated 25.01.2019)*

The property seized by Kolkata Municipal Corporation (KMC) towards recovery of municipal tax dues from CD, can be the subject matter of the CIRP under the Code as the claim of KMC had attained finality and fastened a liability upon the CD, thus constituting an 'operational debt' under section 5(21) of the Code. *(Kolkata Municipal Corporation and Anr. Vs. Union of India and Ors. [WPA No.977 of 2020] HC, Calcutta, judgement dated 29.01.2021)*

Chipsan Aviation Pvt. Ltd. Vs. Punj Llyod Aviation Ltd. [Company Appeal (AT) (Insolvency) No. 261 of 2022] On an assurance from the CD, a sum of Rs. 60 lakh was advanced for aviation related services. The advance payment was reflected in the balance sheet of the CD. However, there was no contract between the parties for providing aviation services. The issue for consideration was whether such the advance paid will fall within the definition of 'operational debt' under the Code. The AA rejected the application holding that advance payment made by OC to the CD does not fall within operational debt. On appeal, the NCLAT observed that the expression 'in respect of' in section 5(21) of the Code has to be interpreted in a broad and purposive manner and held that the advance payment of Rs. 60 lakh was clearly an operational debt.

The Supreme Court in its order dated August 09,2019 in the case of *Pioneer Urban Land and Infrastructure Ltd. v. Union of India,* held that "a debt which arises out of advance payment made to a corporate debtor for supply of goods or services would be considered as an operational debt".

"Personal guarantor" means an individual who is the surety in a contract of guarantee to a corporate debtor [Section 5(22)].

"Personnel" includes the directors, managers, key managerial personnel, designated partners and employees, if any, of the corporate debtor [Section 5(23)].

"Preliminary Information Memorandum" means a memorandum submitted by the corporate debtor under clause (b) of sub-section (1) of section 54G [Section 5(23A)].

"Pre-Packaged Insolvency Commencement Date" means the date of admission of an application for initiating the pre-packaged insolvency resolution process by the Adjudicating Authority under clause (a) of sub-section (4) of section 54C [Section 5(23B)].

"Pre-Packaged Insolvency Resolution Process Costs" means-

(a) the amount of any interim finance and the costs incurred in raising such finance;

(b) the fees payable to any person acting as a resolution professional and any expenses incurred by him for conducting the pre-packaged insolvency resolution process during the pre-packaged insolvency resolution process period, subject to sub-section (6) of section 54F;

(c) any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern pursuant to an order under sub-section (2) of section 54J;

(d) any costs incurred at the expense of the Government to facilitate the prepackaged insolvency resolution process; and

(e) any other costs as may be specified [Section 5(23C)].

"Pre-Packaged Insolvency Resolution Process Period" means the period beginning from the pre-packaged insolvency commencement date and ending on the date on which an order under sub-section (1) of section 54L, or sub-section (1) of section 54N, or sub-section (2) of section 54-O, as the case may be, is passed by the Adjudicating Authority [Section 5(23D)].

"Related Party", in relation to a corporate debtor, means –

(a) a director or partner of the corporate debtor or a relative of a director or partner of the corporate debtor;

(b) a key managerial personnel of the corporate debtor or a relative of a key managerial personnel of the corporate debtor;

(c) a limited liability partnership or a partnership firm in which a director, partner, or manager of the corporate debtor or his relative is a partner;

(d) a private company in which a director, partner or manager of the corporate debtor is a director and holds along with his relatives, more than two per cent. of its share capital;

(e) a public company in which a director, partner or manager of the corporate debtor is a director and holds along with relatives, more than two per cent. of its paid-up share capital;

(f) anybody corporate whose board of directors, managing director or manager, in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor;

(g) any limited liability partnership or a partnership firm whose partners or employees in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor;

(h) any person on whose advice, directions or instructions, a director, partner or manager of the corporate debtor is accustomed to act;

(i) a body corporate which is a holding, subsidiary or an associate company of the corporate debtor, or a subsidiary of a holding company to which the corporate debtor is a subsidiary;

(j) any person who controls more than twenty per cent. of voting rights in the corporate debtor on account of ownership or a voting agreement;

(k) any person in whom the corporate debtor controls more than twenty per cent. of voting rights on account of ownership or a voting agreement;

(l) any person who can control the composition of the board of directors or corresponding governing body of the corporate debtor;

(m) any person who is associated with the corporate debtor on account of –

(i) participation in policy making processes of the corporate debtor; or

(ii) having more than two directors in common between the corporate debtor and such person; or

(iii) interchange of managerial personnel between the corporate debtor and such person; or

(iv) provision of essential technical information to, or from, the corporate debtor [Section 5(24)].

"Related Party", in relation to an individual, means –

(a) a person who is a relative of the individual or a relative of the spouse of the individual;

(b) a partner of a limited liability partnership, or a limited liability partnership or a partnership firm, in which the individual is a partner;

(c) a person who is a trustee of a trust in which the beneficiary of the trust includes the individual, or the terms of the trust confers a power on the trustee which may be exercised for the benefit of the individual;

(d) a private company in which the individual is a director and holds along with his relatives, more than two per cent. of its share capital;

(e) a public company in which the individual is a director and holds along with relatives, more than two per cent. of its paid-up share capital;

(f) a body corporate whose board of directors, managing director or manager, in the ordinary course of business, acts on the advice, directions or instructions of the individual;

(g) a limited liability partnership or a partnership firm whose partners or employees in the ordinary course of business, act on the advice, directions or instructions of the individual;

(h) a person on whose advice, directions or instructions, the individual is accustomed to act;

(i) a company, where the individual or the individual along with its related party, own more than fifty per cent. of the share capital of the company or controls the appointment of the board of directors of the company.

Explanation. For the purposes of this clause, –

(a) "relative", with reference to any person, means anyone who is related to another, in the following manner, namely: –

(i) members of a Hindu Undivided Family, (ii) husband, (iii) wife, (iv) father, (v) mother, (vi) son, (vii) daughter, (viii) son's daughter and son, (ix) daughter's daughter and son, (x) grandson's daughter and son, (xi) granddaughter's daughter and son, (xii) brother, (xiii) sister, (xiv) brother's son and daughter, (xv) sister's son and daughter, (xvi) father's father and mother, (xvii) mother's father and mother, (xviii) father's brother and sister, (xix) mother's brother and sister; and

(b) wherever the relation is that of a son, daughter, sister or brother, their spouses shall also be included. [Section 5(24A)].

In *Swiss Ribbons Pvt. Ltd. & Another Vs. Union of India & Others [(2019) 4 SCC 17],* a constitutional challenge was raised against section 29A(j) (connected parties) read with the definition of related party under the IBC. The Supreme Court examined the definition of "related party" and observed that persons who act jointly or in concert with others are connected with the business activity of the resolution applicant. Similarly, all the categories of persons mentioned in section 5(24A) (definition of related party to an individual) show that such persons must be "connected" with the resolution applicant within the meaning of section 29A(j). This being the case, the categories of persons who are collectively mentioned as a "relative" need to have a connection with the business activity of the resolution applicant. If this cannot be shown such person cannot be disqualified under section 29A(j). All the categories in this subsection deal with persons, natural as well as artificial, who are connected with the business activity of the resolution applicant. The expressions "related party" and "relative" contained in the definition sections must be read noscitur a sociis (the meaning of an unclear word or phrase should be interpreted within the context it is being used) with the categories of persons mentioned in Explanation I. So read, they would include only persons who are connected with the business activity of the resolution applicant.

"Resolution Applicant" means a person, who individually or jointly with any other person, submits a resolution plan to the resolution professional pursuant to the invitation made under clause (h) of sub- section (2) of section 25 or pursuant to the section 54K, as the case may be [Section 5(25)].

A resolution applicant whose resolution plan stands approved by CoC, cannot be permitted to alter his position to the detriment of various stake holders after pushing out all potential rivals during the bidding process, and the same fraught with disastrous consequences for the CD which may be pushed into liquidation, as the CIRP period may by then be over thereby setting at naught all possibilities of insolvency resolution and protection of a CD, more so, when it is a going concern. *(Kundan Care Products Ltd. Vs. Amit Gupta and Ors. [CA (AT) (Ins.) No. 653 of 2020] NCLAT judgement dated 30.09.2020)*

A successful resolution applicant cannot be permitted to withdraw the approved resolution plan, coupled with the fact in the instant case being the sole RA in the CIRP, which is an MSME and having knowledge of the financial health of the CD as a promoter or as a connected person cannot be permitted to seek revision of the approved plan, on the ground which would not be a material irregularity within the ambit of section 61(3) of the Code.*(Seroco Lighting Industries Pvt. Ltd. Vs. Ravi Kapoor, RP for Arya Filaments Pvt. Ltd. & Ors. [CA (AT) (Ins.) No. 1054 of 2020] NCLAT judgement dated 10.12.2020)*

"Resolution Plan" means a plan proposed by resolution applicant for insolvency resolution of the corporate debtor as a going concern in accordance with Part II. It may be noted that a resolution plan may include provision the restructuring of the corporate debtor, insolvency by way of merger, amalgamation and demerger [Section 5(26)].

"Resolution Professional" for the purposes of this Part, means an insolvency professional appointed to conduct the corporate insolvency resolution process or the prepackge insolvency resolution procers, as the case may be and includes an interim resolution professional [Section 5(27)].

"Voting Share" means the share of the voting rights of a single financial creditor in the committee of creditors which is based on the proportion of the financial debt owed to such financial creditor in relation to the financial debt owed by the corporate debtor [Section 5(28)].

Definitions in Section 79 of the Code

Section 79 belongs to Part III of the Code which lays down procedure for insolvency resolution and bankruptcy for **individuals and partnership firms**. Section 79 states that unless the context otherwise requires:

"Adjudicating Authority" means the Debt Recovery Tribunal constituted under sub-section (1) of section 3 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 [Section 79(1)].

"Associate" of the debtor means –

(a) a person who belongs to the immediate family of the debtor;

(b) a person who is a relative of the debtor or a relative of the spouse of the debtor;

(c) a person who is in partnership with the debtor;

(d) a person who is a spouse or a relative of any person with whom the debtor is in partnership;

(e) a person who is employer of the debtor or employee of the debtor;

(f) a person who is a trustee of a trust in which the beneficiaries of the trust include a debtor, or the terms of the trust confer a power on the trustee which may be exercised for the benefit of the debtor; and

(g) a company, where the debtor or the debtor along with his associates, own more than fifty per cent. of the share capital of the company or control the appointment of the board of directors of the company.

Explanation – For the purposes of this sub-section, "relative", with reference to any person, means anyone who is related to another, if –

(i) they are members of a Hindu Undivided Family;

(ii) one person is related to the other in such manner as may be prescribed [Section 79(2)].

"Bankrupt" means –

(a) a debtor who has been adjudged as bankrupt by a bankruptcy order under section 126;

(b) each of the partners of a firm, where a bankruptcy order under section 126 has been made against a firm; or

(c) any person adjudged as an undischarged insolvent [Section 79(3)].

"Bankruptcy" means the state of being bankrupt [Section 79(4)].

"Bankruptcy Debt" in relation to a bankrupt, means –

(a) any debt owed by him as on the bankruptcy commencement date;

(b) any debt for which he may become liable after bankruptcy commencement date but before his discharge by reason of any transaction entered into before the bankruptcy commencement date; and

(c) any interest which is a part of the debt under section 171 [Section 79(5)].

"Bankruptcy Commencement Date" means the date on which a bankruptcy order is passed by the Adjudicating Authority under section 126 [Section 79(6)].

"Bankruptcy Order" means an order passed by an Adjudicating Authority under section 126 [Section 79(7)].

"Bankruptcy Process" means a process against a debtor under Chapters IV and V of this Part [Section 79(8)].

"Bankruptcy Trustee" means the insolvency professional appointed as a trustee for the estate of the bankrupt under section 125 [Section 79(9)].

"Committee of Creditors" means a committee constituted under section 134; [Section 79(11)].

"Debtor" includes a judgment-debtor [Section 79(12)].

"Discharge Order" means an order passed by the Adjudicating Authority discharging the debtor under sections 92, 119 and section 138, as the case may be [Section 79(13)].

"Excluded Assets" for the purposes of this part includes –

(a) unencumbered tools, books, vehicles and other equipment as are necessary to the debtor or bankrupt for his personal use or for the purpose of his employment, business or vocation;

(b) unencumbered furniture, household equipment and provisions as are necessary for satisfying the basic domestic needs of the bankrupt and his immediate family;

(c) any unencumbered personal ornaments of such value, as may be prescribed, of the debtor or his immediate family which cannot be parted with, in accordance with religious usage;

(d) any unencumbered life insurance policy or pension plan taken in the name of debtor or his immediate family; and

(e) an unencumbered single dwelling unit owned by the debtor of such value as may be prescribed [Section 79(14)].

"Excluded Debt" means –

(a) liability to pay fine imposed by a court or tribunal;

(b) liability to pay damages for negligence, nuisance or breach of a statutory, contractual or other legal obligation;

(c) liability to pay maintenance to any person under any law for the time being in force;

(d) liability in relation to a student loan; and

(e) any other debt as may be prescribed [Section 79(15)].

"Firm" means a body of individuals carrying on business in partnership whether or not registered under section 59 of the Indian Partnership Act, 1932 [Section 79(16)].

"Immediate Family" of the debtor means his spouse, dependent children and dependent parents [Section 79(17)].

"Partnership Debt" means a debt for which all the partners in a firm are jointly liable [Section 79(18)].

"Qualifying Debt" means amount due, which includes interest or any other sum due in respect of the amounts owed under any contract, by the debtor for a liquidated sum either immediately or at certain future time and does not include– (a) an excluded debt; (b) a debt to the extent it is secured; and (c) any debt which has been incurred three months prior to the date of the application for fresh start process [Section 79(19)].

"Repayment Plan" means a plan prepared by the debtor in consultation with the resolution professional under section 105 containing a proposal to the committee of creditors for restructuring of his debts or affairs [Section 79(20)].

"Resolution Professional" means an insolvency professional appointed under this part as a resolution professional for conducting the fresh start process or insolvency resolution process [Section 79(21)].

"Undischarged Bankrupt" means a bankrupt who has not received a discharge order under section 138 [Section 79(22)].

CASE LAWS

1. **The provisions of the IBC override anything contained in any other law in force or any instrument having effect by virtue of such law:** In the matter of *Innoventive Industries Ltd. v. ICICI Bank, the Supreme Court* for the first time explained the paradigm shift in law by virtue of the newly enacted Insolvency and Bankruptcy Code, 2016 which consolidates and amends all the laws relating to the insolvency and bankruptcy process in India.

   Facts of the case

   ICICI Bank had taken Innoventive Industries Ltd. to NCLT for the recovery of its due as the company had defaulted on loan repayment. The NCLT had given a verdict in favour of the ICICI Bank, which Innoventive Industries challenged in the National Company Law Appellate Tribunal (NCLAT), where it received yet another setback. The company later filed an appeal in the Supreme Court seeking relief under the Maharashtra Relief Undertaking (Special Provisions) Act, 1958 (MRUA), which states that if a company is facing bankruptcy, protection needs to be provided for the employees.

   Judgement

   The Supreme Court held that the Act is repugnant to the IBC. Under the MRUA, the State Government may take over the management of the undertaking and impose a moratorium in much the same manner as that contained in the IBC. By giving effect to the MRUA, the plan/scheme that may be adopted under the IBC will directly be hindered. There would be a direct clash between moratoriums under the two statutes. The non-obstante clause of the IBC will prevail over the non-obstante clause in the MRUA. On account of the non-obstante clause in the IBC, any right of the CD under any other law cannot come in the way of the IBC.

Further, In the case of *Pr. Commissioner of Income Tax Vs. Monnet Ispat And Energy Ltd. [SLP No. 6483-2018 & other petitions]*, the Supreme Court held that the IBC would override anything inconsistent contained in any other enactment, including the Income Tax Act, 1961.

2. **Enactment of the IBC has marked a quantum change in corporate governance and the rule of law:** *In the case of Arun Kumar Jagatramka vs. Jindal Steel and Power Ltd [CA 9664 of 2019] judgement dated March 15, 2021*, the Supreme Court observed that enactment of the IBC has marked a quantum change in corporate governance and the rule of law. First and foremost, the IBC perceives good corporate governance, respect for and adherence to the rule of law as central to the resolution of corporate insolvencies. Second, the IBC perceives corporate insolvency not as an isolated problem faced by an individual business entities but places it in the context of a framework which is founded on public interest in facilitating economic growth by balancing diverse stakeholder interests. Third, the IBC attributes a primacy to the business decisions taken by creditors acting as a collective body, on the premise that the timely resolution of corporate insolvency is necessary to ensure the growth of credit markets and encourage investment. Fourth, in its diverse provisions, the IBC ensures that the interests of corporate enterprises are not conflated with the interests of their promoters; the economic value of corporate structures is broader in content than the partisan interests of their managements. These salutary objectives of the IBC can be achieved if the integrity of the resolution process is placed at the forefront. Primarily, the IBC is a legislation aimed at re-organization and resolution of insolvencies. Liquidation is a matter of last resort. These objectives can be achieved only through a purposive interpretation which requires courts, while infusing meaning and content to its provisions, to ensure that the problems which beset the earlier regime do not enter through the backdoor through disingenuous stratagems.

3. **The primary focus of the IBC is to ensure the revival and continuation of the corporate debtor:** *In the matter of Gujarat Urja Vikas Nigam Limited Vs. Mr. Amit Gupta & Ors. [Civil Appeal No. 9241 of 2019 Judgment dated 8th March, 2021,* the Hon'ble Supreme Court of India observed that the primary focus of the IBC is to ensure the revival and continuation of the corporate debtor. The interests of the corporate debtor have been bifurcated and separated from the interests of persons in management. The timelines which are prescribed in the IBC are intended to ensure the resuscitation of the corporate debtor. The enactment of the IBC is in significant senses a break from the past. While interpreting the provisions of the IBC, care must be taken to ensure that the regime which Parliament found deficient and which was the basic reason for the enactment of the new legislation is not brought in through the back door by a process of disingenuous legal interpretation. However, this is not to say that the interpretation given to the statutory provisions that existed prior to the enactment IBC is to be rejected in toto. The interpretation given to such statutory provisions that are textually similar to Section 60(5)(c) may be relevant, provided that such interpretation is in tandem with the objective of enacting the IBC, that is, inter alia, avoidance of multiplicity of fora and a timely resolution of the insolvency process.

4. **The foremost and primary objective of the IBC is the reorganization and insolvency resolution of the Corporate Debtor (CD) in a time bound manner:** Hon'ble Supreme Court of India in the matter of *Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors. [WP (Civil) Nos. 99, 100, 115, 459, 598, 775, 822, 849, and 1221 of 2018, SLP (Civil) No. 28623 of 2018 and WP (Civil) 37 of 2019] Judgement dated 25th January, 2019* observed that as is discernible, the Preamble gives an insight into what is sought to be achieved by the Code. The Code is first and foremost, a Code for reorganization and insolvency resolution of corporate debtors. Unless such reorganization is effected in a time-bound manner, the value of the assets of such persons will deplete. Therefore, maximization of value of the assets of such persons so that they are efficiently run as going concerns is another very important objective of the Code. This, in turn, will promote entrepreneurship as the persons in management of the corporate debtor are removed and replaced by entrepreneurs. When, therefore, a resolution plan takes off and the corporate debtor is brought back into the economic mainstream, it is able to repay its debts, which, in turn, enhances the viability of credit in the hands of banks and financial institutions. Above all, ultimately, the interests of all stakeholders are looked after as the corporate debtor itself

becomes a beneficiary of the resolution scheme - workers are paid, the creditors in the long run will be repaid in full, and shareholders/investors are able to maximize their investment. Timely resolution of a corporate debtor who is in the red, by an effective legal framework, would go a long way to support the development of credit markets. Since more investment can be made with funds that have come back into the economy, business then eases up, which leads, overall, to higher economic growth and development of the Indian economy. What is interesting to note is that the Preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plans submitted are not up to the mark. Even in liquidation, the liquidator can sell the business of the corporate debtor as a going concern.

LESSON ROUND-UP

- The Code applies to companies, partnerships, limited liability partnerships, individuals and any other body which the central government may specify.
- The Insolvency and Bankruptcy Code, 2016 consists of total 255 sections organised in five Parts.
- Sections 3,5 and 79 of the Insolvency and Bankruptcy Code, 2016 define important terms used in the Code.
- The National Company Law Tribunal (NCLT) shall be the Adjudicating Authority with jurisdiction over companies, limited liability entities. Appeals from the order of NCLT shall lie to the National Company Law Appellate Tribunal (NCLAT).
- The Debt Recovery Tribunal (DRT) shall be the Adjudicating Authority with jurisdiction over individuals and partnership firms. Appeals from the order of DRT shall lie to the Debt Recovery Appellate Tribunal (DRAT).
- The Code establishes an Insolvency Regulator (The Insolvency and Bankruptcy Board of India) to exercise regulatory oversight over,
  - Insolvency Professionals;
  - Insolvency Professional Agencies; and
  - Information Utilities.
- An insolvency resolution process can be initiated by either a creditor, or by the debtor, upon an event of default.
- Section 3(19) of the Code defines an ‘insolvency professional’ as a person enrolled under section 206 with an insolvency professional agency as its member and registered with the Board as an insolvency professional under section 207.
- Section 3(20) of the Code defines ‘insolvency professional agency’ as any person registered with the Board under section 201 as an insolvency professional agency.
- Section 3(21) of the Code defines an ‘information utility’ as a person who is registered with the Board as an information utility under section 210.
- The Code proposes to regulate insolvency professionals and insolvency professional agencies. Under Regulator’s oversight, these agencies will develop professional standards, codes of ethics and exercise a disciplinary role over errant members leading to the development of a competitive industry for insolvency professionals.
- The Code proposes for Information Utilities which would collect, collate, authenticate and disseminate financial information from listed companies and financial and operational creditors of companies. An individual insolvency data base is also proposed to be setup with the goal of providing information on insolvency status of individuals.
- The Code proposes a swift process and timeline of 180 days for dealing with applications for corporate insolvency resolution. This can be extended for 90 days by the Adjudicating Authority as only one time extension. However, the process shall mandatorily be completed within a period of three hundred and hirty days from the insolvency commencement date.

GLOSSARY

Insolvency and Bankruptcy Board of India (IBBI) : The Insolvency and Bankruptcy Board of India is a unique regulator which regulates a profession as well as processes under the Code. Its role includes overseeing the functioning of insolvency intermediaries i.e., insolvency professionals, insolvency professional agencies and information utilities. The Board is responsible for implementation of the Code that consolidates and amends the laws relating to insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner.

Insolvency Professionals (IPs) : Insolvency Professionals (IPs) to act as intermediary in the insolvency resolution process. Insolvency professionals are a class of regulated but private professionals having minimum standards of professional and ethical conduct. Section 3(19) of the Code defines an "insolvency professional" as a person enrolled under section 206 with an insolvency professional agency as its member and registered with the Board as an insolvency professional under section 207.

Insolvency Professional Agency : Insolvency professional agency as any person registered with the Board under section 201 as an insolvency professional agency. Insolvency Professional Agencies are designated to regulate Insolvency Professionals.

Adjudicating Authority : Adjudicating Authority for insolvency resolution and liquidation for corporate persons means National Company Law Tribunal constituted under section 408 of the Companies Act, 2013.

Information Utility : An information utility as a person who is registered with the Board as an information utility under section 210. The Information Utility collect, collate, authenticate and disseminate financial information.

TEST YOURSELF

(These are meant for recapitulation only. Answer to these questions are not to be submitted for evaluation.)

1. Briefly explain the meaning of terms 'insolvency' and 'bankruptcy'. Discuss historical developments of insolvency law in India.
2. Discuss the insolvency framework in the United Kingdom and the United States of America.
3. Mentions the reasons that led to the enactment of the Insolvency and Bankruptcy Code, 2016. State the objectives of the Code.
4. What are the salient features of the Insolvency and Bankruptcy Code, 2016?
5. Discuss the institutional framework envisaged under the Insolvency and Bankruptcy Code, 2016 to achieve its objectives.
6. Write a note on the Insolvency and Bankruptcy Board of India (IBBI).
7. Discuss the jurisdiction of the Adjudicating Authorities under the Insolvency and Bankruptcy Board of India (IBBI).
8. Briefly mention the functions and obligations of the Insolvency professionals under the Insolvency and Bankruptcy Board of India (IBBI).
9. What is an information utility (IU) under the Insolvency and Bankruptcy Board of India (IBBI)? State its obligations.

10. Discuss with the help of a case law the overriding provisions of the Code with respect to other laws.

LIST OF FURTHER READINGS
● Insolvency and Bankruptcy Code, 2016 (Bare Act)

OTHER REFERENCES (Including Websites / Video Links)
● https://ibbi.gov.in