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INSOLVENCY ROUND-UP

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PREFACE

Manoj K. Singh
Founding Partner

We are elated to present this very first issue of our in-house publication on Insolvency and Bankruptcy Code 2016 (the 'Code') christened as the ***Insolvency Roundup***. This will be our third in-house publication in addition to existing *Indian Legal Impetus* and *IP-Tech* newsletters.

What was the need of the Code? May be it was required to better the ranking of India in the Ease of Doing Business Report of the World Bank; wherein out of 189 countries, India stands at 136. Few concern areas were difficulties faced in recovery of debts, enforcement of security interests, prolonged proceedings, etc. As many 13 as enactments (such as SARFASEI, RDB Act, SICA, Company law etc.) dealing with insolvency and bankruptcy existed and there was no single law in India which deals with insolvency and bankruptcy. The framework for insolvency and bankruptcy was felt to be inadequate, ineffective and result in undue delay in resolution on account of multiple fora, multiple enactments, conflict of law and conflict of judgments by various courts. And it emerged over the years that since the legislations were so scattered and it was bound in so many different legislative pieces, the system was evolving in a way that the legal system was under a huge burden of binding legislation. If records are to be believed more than 5,000 companies were undergoing the process of liquidation without reaching its logical conclusion. Hence, came in the Code.

The Code aims to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto (*Preamble* of the Code). The most important aspect of the Code can be said to be alacrity, i.e. timely resolution and timely liquidation. The Code provides for time-bound procedures for preparation and implementation of resolution plan, liquidation process, fast track corporate insolvency resolution process, voluntary liquidation. The Code also gives an opportunity to the corporate debtor itself to approach the adjudicating authority seeking preparation, approval and implementation of a resolution plan which may result in revival of the corporate debtor.

Be that as it may, since the Code is in its nascent stage and the provisions of the Code are being interpreted and applied by the adjudicating as well as appellate authorities on case to case basis. We already have seen judgments in cases of *Era-Predico, Starlog, Innoventive Industries, JK Jute Mills, Sree Metaliks* etc. wherein the various facets and procedures/technicalities of the Code have been have been put to scrutiny. As the adjudicating / appellate authorities seem to hold the provisions of the Code in letter & spirit, it goes without saying that down the line there will be much more precedents that will set the tone for the Code's effective implementation.

As lawyers we find ourselves fortunate to experience this paradigm shift in insolvency laws and to have first-hand experience in handling matters under the Code. Consequently, we find it imperative to bring about a compilation which makes it easy for the interested parties to understand the Code and its implications. Being this the first issue of *Insolvency Roundup*, we have included illustrative time-charts on procedures envisaged in the Code. Thereafter, write-ups on key aspects of notice under section 8, timelines stipulated and also on interpretation of the term 'default' under the Code have been included in the current issue. Further, critical appraisal on scope of courts intervention, fast track procedure and whether a corporate debtor has a say during the resolution process form part of this issue. Lastly, implication of rendering false information furnished in application under section 7 of the Code is discussed here as well.

We sincerely hope that the content of this *Insolvency Roundup* is helpful for its readers in better understanding the Code and its applicability. Please feel free to send your valuable inputs / comments at newsletter@singhassociates.in.

Thank you.

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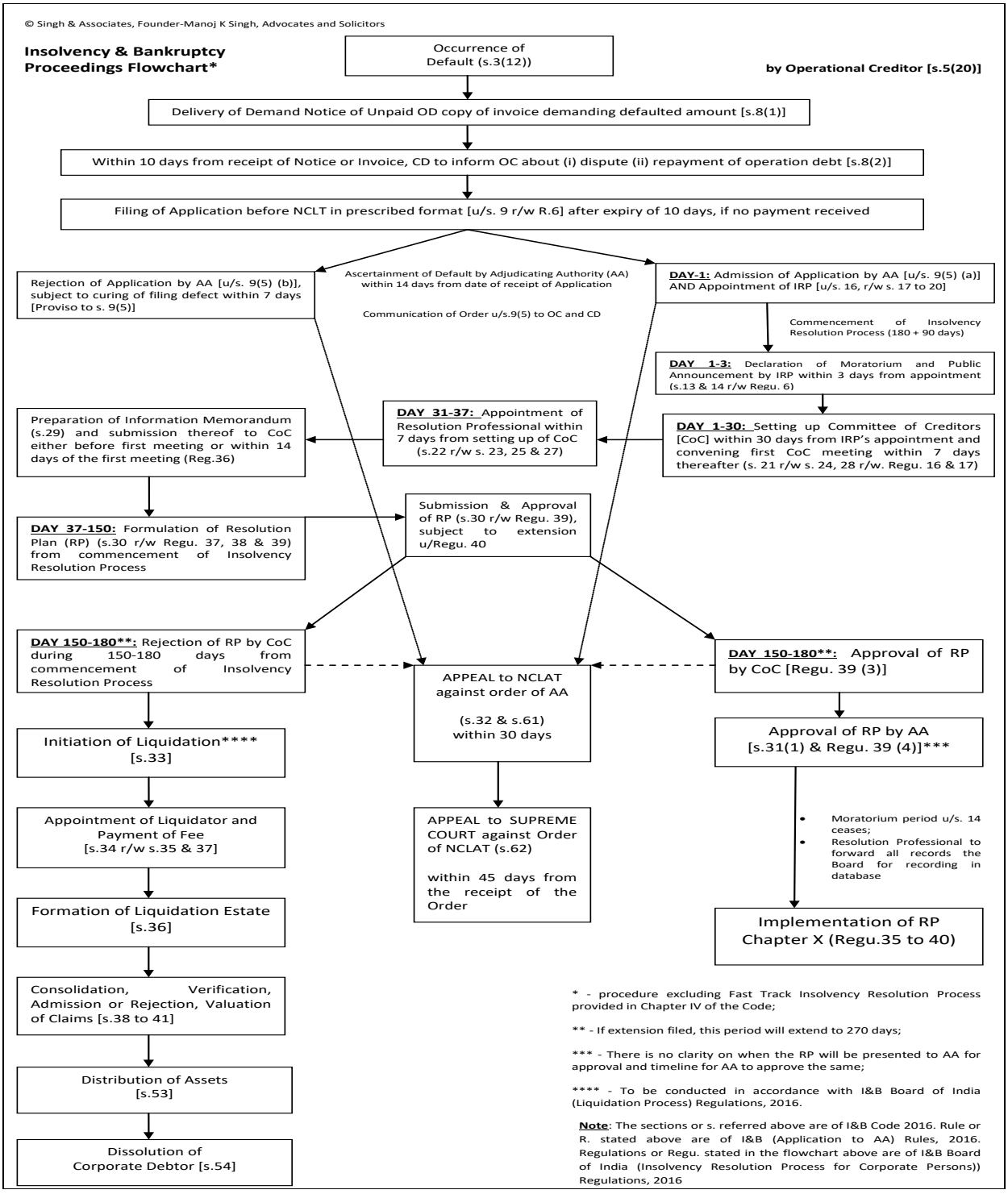

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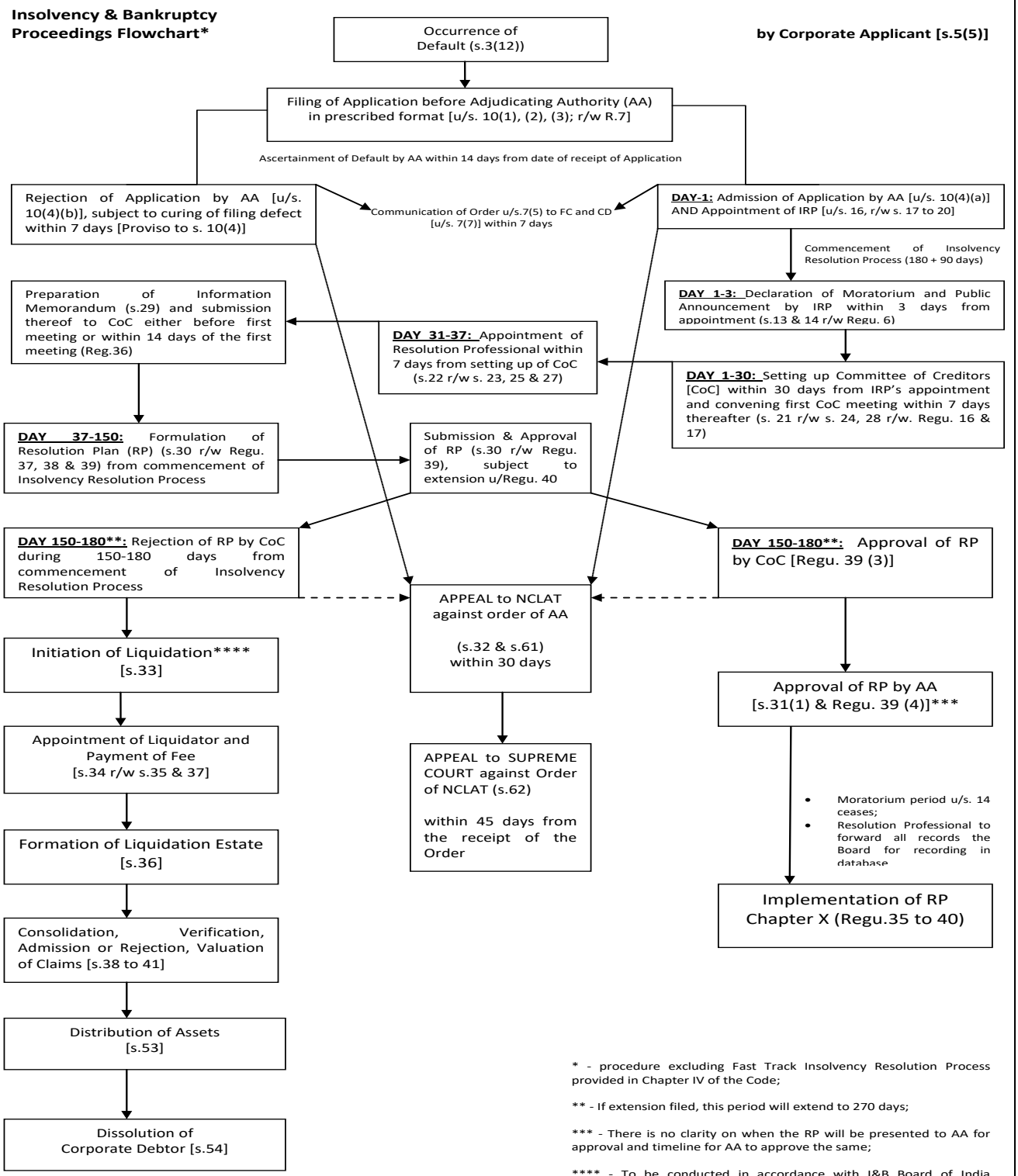

* - procedure excluding Fast Track Insolvency Resolution Process provided in Chapter IV of the Code;

** - If extension filed, this period will extend to 270 days;

*** - There is no clarity on when the RP will be presented to AA for approval and timeline for AA to approve the same;

**** - To be conducted in accordance with I&B Board of India (Liquidation Process) Regulations, 2016.

The sections or s. referred above are of I&B Code 2016. Rule or R. stated above are of I&B (Application to AA) Rules, 2016. Regulations or Regu. stated in the flowchart above are of I&B Board of India (Insolvency Resolution Process for Corporate Persons)) Regulations, 2016

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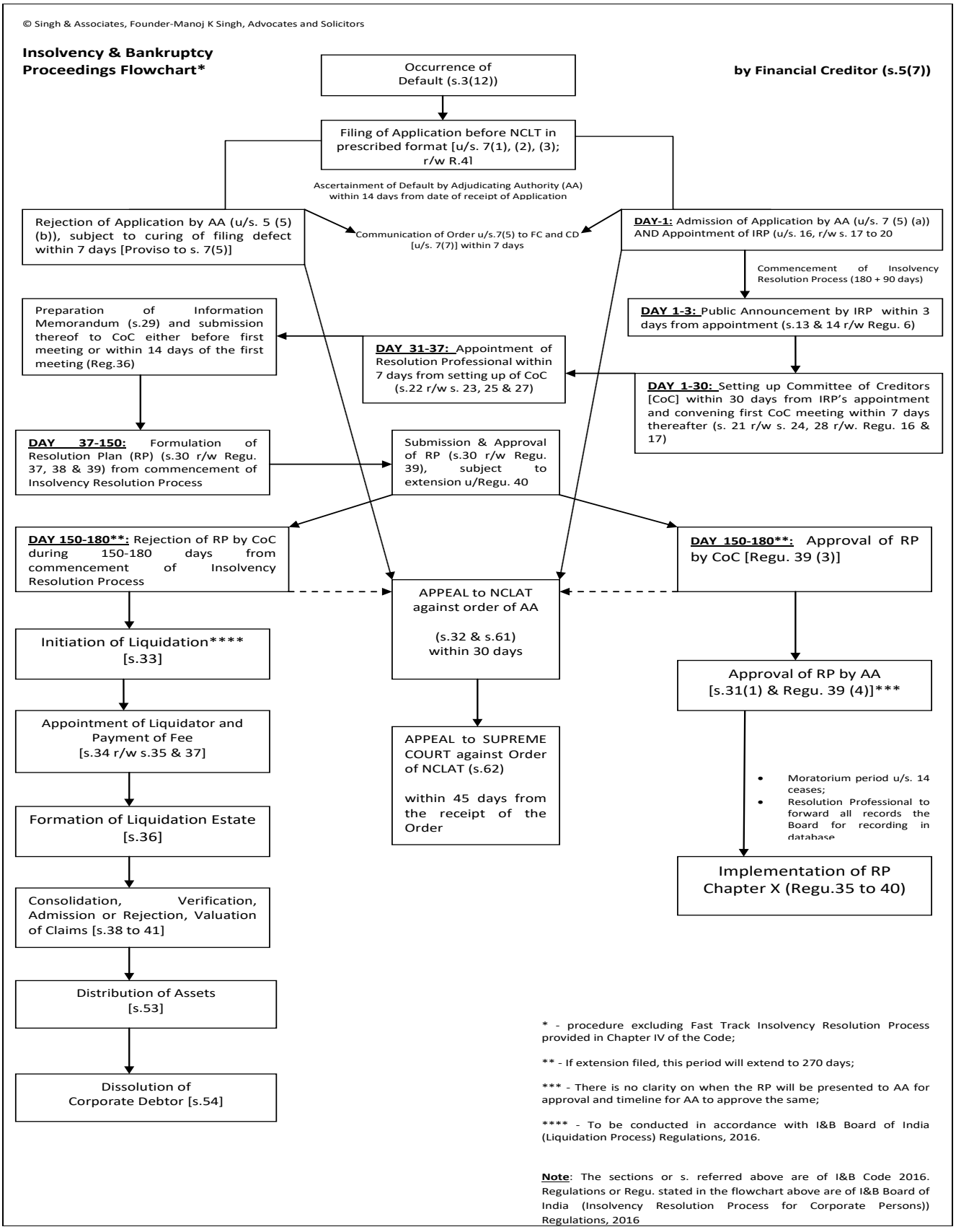

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INSOLVENCY & BANKRUPTCY PROCEEDINGS FLOWCHART - FAST TRACK CIRP (CHAPTER IV) & CHAP. II + CHAP. VII

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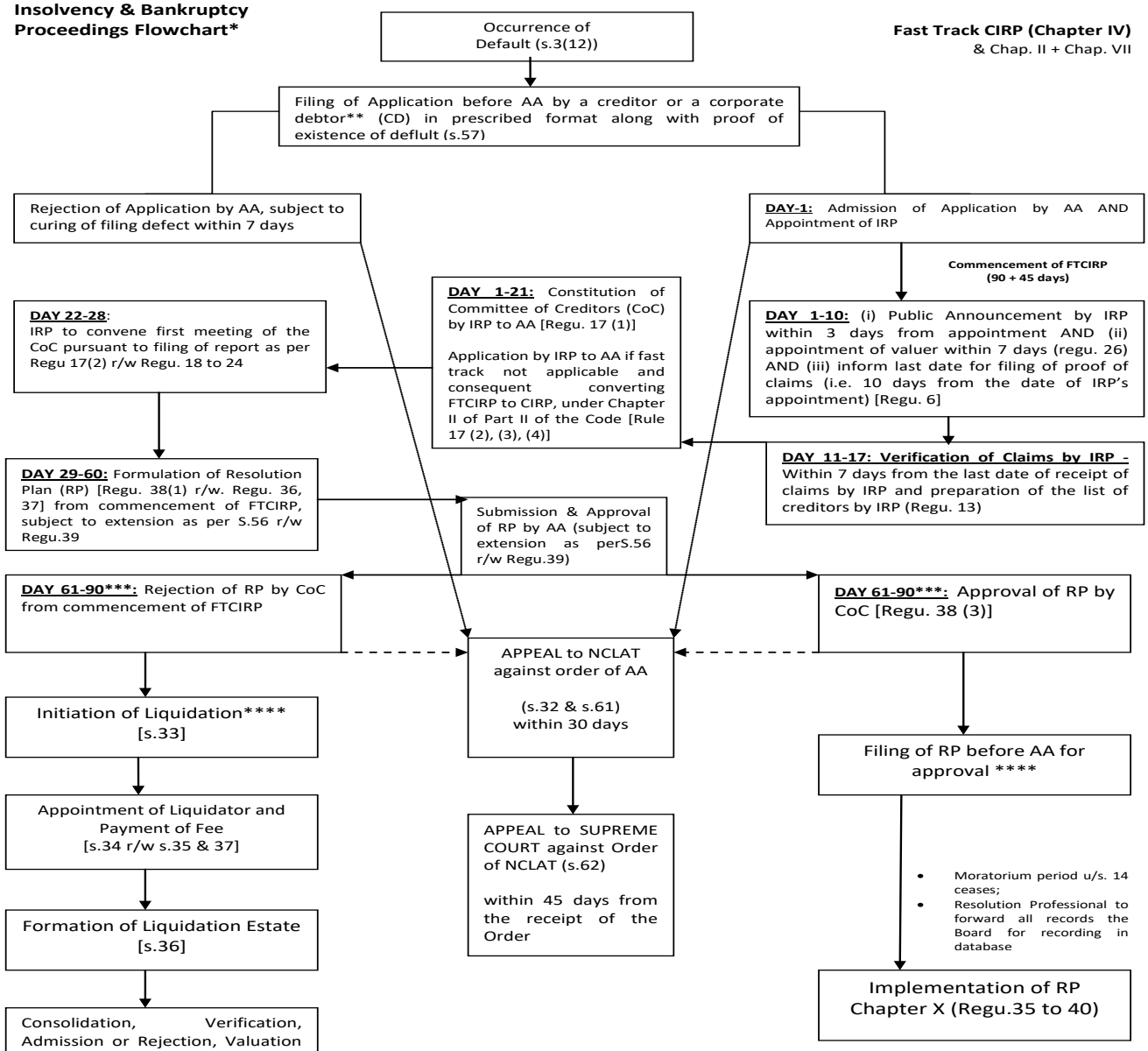
Insolvency & Bankruptcy Proceedings Flowchart*

Fast Track CIRP (Chapter IV)
& Chap. II + Chap. VII



* - procedure excluding Fast Track Insolvency Resolution Process provided in Chapter IV of the Code;
** - CDs defined in S.O.1911 dated 14.06.17 issued by MCA
*** - If extension filed, this period will extend to 135 days;
*** - There is no clarity on when the RP will be presented to AA for approval and timeline for AA to approve the same;
**** - To be conducted in accordance with I&B Board of India (Liquidation Process) Regulations, 2016.

The sections or s. referred above are of I&B Code 2016. Rule or R. stated above are of I&B (Application to AA) Rules, 2016. Regulations or Regu. stated in the flowchart above are of I&B Board of India (Insolvency Resolution Process for Corporate Persons)) Regulations, 2016 as amended by S.O.1911 dated 14.06.17

INTERPRETING THE NATURE OF THE NOTICE UNDER SECTION 8 OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016

INTRODUCTION

The Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "**Code**") provides for a time-bound resolution process for insolvency and bankruptcy. Part II of the Code, provides for the procedure for the insolvency resolution wherein financial creditors, operational creditors and/or corporate debtors themselves can approach the Adjudicating Authority for initiation of corporate insolvency resolution process under the provisions of Sections 7, 8, and 10 respectively.

Section 9 of the Code deals with the application for the initiation of the corporate insolvency resolution process by the operational creditor, where sub-section (1) provides that the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process after sub section (1) and (2) of Section 8 have been complied with. For the purposes of this article I will be referring only to the provision under sub-section (1) of Section 8 which provides that after the occurrence of a default, the operational creditor has to deliver a demand notice of the unpaid default to the debtor; subsequent to which, the corporate debtor has to reply within a period of ten days under the provision of sub-section (2) - either disputing the claim of the operational creditor or repaying the operational debt.

In the case of *Era Infra Engineering vs. Prideco Commercial Projects Pvt. Ltd*, the appellate authority (NCLAT) was called upon to adjudicate the issue - whether the NCLT was correct in admitting the petition to initiate the corporate resolution process and subsequent appointment of Insolvency Resolution Professional and declaration of moratorium period, on the basis of an application filed by Operational Creditor under Section 9 of I&B Code 2016, even when there was no proper notice served under Section 8(2) and Rule 5 in Form 3 of the Code.

THE MANDATORY NATURE OF THE NOTICE SERVED UNDER THE SECTION 8(1) OF THE CODE

In the case, Era Infra Engineering Ltd. was taken to the National Company Law Tribunal (NCLT) by one of its operational creditors, Prideco Commercial Projects Pvt. Ltd, for non-payment of dues. The case was admitted for bankruptcy by the Delhi bench of NCLT on 12 April 2017, and an interim insolvency professional was appointed. The present challenge before the NCLAT arose on the issue that Prideco did not serve notice as mandated by the provisions of Section 8(2) read with Rule 5 in Form 3 of the Code; to which Prideco's stand was that the notice served to Era during the winding up petition filed under the provision of Section 271 of the Companies Act, 2013 was sufficient to meet the criteria of serving of notice under Section 8 of the Code.

The NCLAT, did not agree with the argument of the operational creditor holding that, "*Admittedly, no notice issued by Operational Creditor stipulated under Rule 5 in Form 3 has been served. Therefore, in absence of any expiry period of tenure of 10 days there was no question of preferring an application under Section 9 of I&B Code 2016*". The Hon'ble NCLAT further held that "*the Adjudicating Authority has failed to notice the aforesaid facts and the mandatory provisions of law as discussed above. As the application was not complete and there was no other way to cure the defect, the impugned order cannot be upheld*".

The Hon'ble Tribunal opined that the application of the corporate insolvency resolution process, can be filed only after expiry of period of 10 days from the date of delivery of the notice or invoice demanding payment, as provided under sub section (1) of section 9, because it is only subsequent to this that the Adjudicating Authority, in terms of sub-section (5) of Section 9 can choose to either accept the application, if it is complete, or reject the application provided 7-days time was granted for the curing of any procedural defect in the

application. Since this mandatory position of law was not followed, the NCLT was not correct in allowing the petition and thereby the NCLAT set aside the order passed by the Hon'ble Adjudicating Authority and quashed all orders and interim arrangements including declaration of moratorium and appointment of Insolvency Resolution Professional. It further held that all actions taken by Interim Resolution Professional after passing of the order as illegal. The Appellant Tribunal observed that serving of notice under Section 271 of Companies Act, 2013 cannot be considered as sufficient notice as required to be served under Section 8(1) of I&B Code 2016 in the prescribed format.

CONCLUSION

This case is important since it interprets the mandatory nature of the notice that needs to be served under Section 8 of the Code. The attempt to couch the serving of notice under the Code by clubbing it with the serving of notice under some other legislation (in this case, Section 271 of the Companies Act, 2013) cannot be allowed.

INSOLVENCY AND BANKRUPTCY CODE, 2016: A TIME-PERIOD PUZZLE

The Insolvency and Bankruptcy Code, 2016 aims to consolidate and amend the laws relating to insolvency resolution of companies and limited liability entities, partnerships and individuals, which are contained in various enactments, into a single legislation. The focus of this legislation is to provide e resurrection and resolution for maximization of value of debtor's assets. The Code has put forth an overarching framework to aid sick companies to either wind up their business or engineer a revival plan, and for investors to exit. Notably, the Code has also empowered the operational creditors (workmen, suppliers etc.) to initiate the insolvency resolution process if default occurs.

Another important feature of this Code is the time bound resolution process, which tries to make sure that the process of resolution and liquidation does not suffer the trauma of never ending litigations. However, the time-line provided does not always give a coherent mechanism and therefore, calls for following considerations.

INITIATION OF CORPORATE INSOLVENCY RESOLUTION PROCESS:

Section 7 of the Code enshrines the initiation of the Corporate Insolvency Resolution Process. Therefore, for greater understanding, it is imperative to produce the relevant part of the provision here.

> "7. *Inter alia,*
>
> *(4) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor under sub-section (3).*
>
> *(5) Where the Adjudicating Authority is satisfied that—*
>
> *(a) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or*
>
> *(b) default has not occurred or the application under sub-section (2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application:*

Provided that the Adjudicating Authority shall, before rejecting the application under clause (b) of sub-section (5), give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority.

> *(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5).*
>
> *(7) The Adjudicating Authority shall communi cate—*
>
> *(a) the order under clause (a) of sub-section (5) to the financial creditor and the corporate debtor;*
>
> *(b) the order under clause (b) of sub-sec tion (5) to the financial creditor,*

within seven days of admission or rejection of such application, as the case may be."

Under section 7(4), the Adjudicatory Authority shall ascertain the existence of a default within 14 days of the receipt of the application. Proviso of section 7(5) provides that if the submitted application has any defect, such defect can be rectified within 7 days of receipt of such notice of rectification from the Adjudicating Authority. The difficulty lies in ascertaining whether the 14-days period will be inclusive of the 7-days period of rectification or not?

Moreover, in *Bank of India v. Tirupati Infraprojects Pvt. Ltd*[1], the NCLT Principal Bench Delhi has stated that the interim order[2] giving stipulated period of 7 days to rectify the defect cannot be regarded as notice within

1 *Order dated 30.05.2017 in C.P No. (IB)-104(PB)/2017.*
2 *Order dated 03.07.2017 in C.P No. (IB)-104(PB)/2017.*

the meaning of proviso to Section 7(5) of the Code. In consequence, extending the total period by 7 days, that excludes 14 days period of admission or rejection of the application and 7-days notice period for rectification of defects.

Further in *J.K Jute Mills Company Limited v. Surendra Trading Company Case*[3], the NCLAT has ruled,

> *"50. Inter alia,*
>
> *The time is the essence of the Code and all the stakeholders, including the Adjudicating Authority are required to perform its job within the time prescribed under the Code except in exceptional circumstances if the Adjudicating Authority for one or other good reason fails to do so. In the case in hand we find that the Adjudicating Authority has unnecessarily adjourned the case from time to time which is against the essence of the Code.*
>
> *51. Further, we find that the application was defective, and for the said reason the application was not admitted within the specified time. Even if it is presumed that 7 additional days' time was to be granted to the operational creditor, the defects having pointed out on 16th February 2017 and having not taken care within time, we hold that the petition under section 9 filed by respondent/operational creditor being incomplete was fit to be rejected."*

The above paragraphs of the case clearly lay down that the object behind the time period prescribed under the Code is to prevent the delay in hearing the disposal of the cases and 7 days' period for rectification of any defect is mandatory and on failure, such applications are fit to be rejected. Whether the same reasoning of the above-mentioned case can be considered under section 7(4) and can it be said that if the Adjudicatory Authority does not ascertain the existence of a default within 14 days, then such application is fit to be rejected.

Further, if in case the Adjudicatory Authority decides to accept the application, then what will be the date of admission of application, the original date or the date on which the rectified application is filed? By reason, the date of admission should be the date on which the rectified application is filed as the Adjudicatory Authority will pass the order of initiating the resolution process only when application under section 7 is rectified.

PUBLIC ANNOUNCEMENT:

Under section 12 of the Code, the time-limit for the completion of the Corporate Insolvency Resolution Process (CIRP) is given to be 180 days with the extension of 90 days, if instructed through a resolution passed at a meeting of the committee of creditors by a vote of 75% of the voting shares. Under section 13, the Adjudicatory Authority, through order, cause a public announcement of the initiation of CIRP immediately[4] after appointment of Interim Resolution Professional. Section 15 of the Code, gives the details of the public announcement including the closing date of CIRP, i.e. 180 days from the admission of the application.

Now, the question arises that if the Resolution Professional (RP) takes an extension period of 90 days after the public announcement then the closing date of the CIRP will also be shifted beyond 180 days. In such scenario, the question arises whether the RP has to make another public announcement of such extension or the process continues without the announcement.

APPEAL:

Under Section 61 of the Code, any person aggrieved by the order of the Adjudicatory Authority can file an appeal to NCLAT. Sub-section (2) says, *"Every appeal shall be filed within thirty days before the NCLAT"*. However, the section does not mention about the initiation of 30 days. Whether the period of 30-days starts from passing of order by the Adjudicatory Authority or starts from the day of communication of the order to the concerned parties, which has to be done under section 7(7) by the Adjudicatory Authority. If the day of communication of the order is considered as date of initiation of 30 days appeal period, then the appeal period gets extended by 7 days.

CONCLUSION:

3 *Company Appeals (AT) (Ins) No. 9 of 2017*

4 *Immediately meaning not later than 3 days from the date of appointment of Interim Resolution Professional. (Regulation 6 of the IRPCP, 2016)*

The Insolvency and Bankruptcy Code, 2016 clearly highlights the intention of the legislature for speedy disposal for the cases. But looking at the above discussion, the intention is not clearly outlined in the Act. As the Code is still at a nascent stage, it does need the help of Adjudicatory Authority to unfold the answers to above referred questions on time-line.

DEFAULT UNDER INSOLVENCY & BANKRUPTCY CODE, 2016

Insolvency and Bankruptcy Code, 2016 (*hereinafter,* 'the Code') has been envisaged as a tool to assist debt laden companies to clear their dues and start afresh after undergoing the process of revival. only if they miss this chance for revival, the liquidation process is commenced. The event which triggers the applicability of the Code is 'occurrence of default'. It is thus necessary to determine what constitutes 'default'. Section 3(12) of the Code defines 'default' as *non-payment of debt when whole or any part or installment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be*. The phrase 'debt has become due and payable' means that the debt is payable at the present moment.[5] Whenever, as per the contract between the parties, debt is payable after a certain point of time or on happening of a certain event, the debt becomes due only after that point of time. Thus, if in a case, the debt is payable and the person has not made the payment, a default can be said to have occurred and application for that can be brought.

The next question which arises is as to how this default or non-payment of debt is to be determined. Sub-section 4 of section 7 states that the Adjudicating Authority shall ascertain the existence of a default from the records of information utility or on the basis of other evidence furnished by the financial creditor under sub-section (3). The provision reveals that default will be determined as per the submissions of the creditor or the records of information utility. The aforesaid provision does not provide an opportunity to the debtor to put forth his case.

Moreover, the scheme of Part II of the Code is such that u/s 9 if the creditor alleges default, the debtor may disprove it by evidence of repayment of operational debt u/s 8 or by bringing in a notice of dispute. But under section 7 there is no requirement of such notice to be furnished to the debtor before bringing in the application. Regulation 4(3) of the I&B (Application to Adjudicating Authority) Rules, 2016, provides for a copy of the application filed with the Adjudicating Authority to be dispatched to the corporate debtor. But the provisions of the Code do not afford an opportunity for the debtor to make his submissions with respect to the default. This deliberate omission on part of the legislature should be read as clear expression of its intent. Such scheme under section 7 is also consistent with the objective of the Code to ensure quick disposal of the application by NCLT and consequently, Insolvency Resolution Process. It provides a safeguard against frivolous and vexatious objections by the debtors to stall the application.

However, Adjudicating Authority has read in the provisions, the necessity of providing an opportunity to the debtors to make their submissions with respect to default. Ahmadabad bench of NCLT in *M/s State Bank of India, Colombo v. Western Refrigeration Pvt. Ltd*[6] recognized that the most important function of the Adjudicating Authority u/s 7 is to ascertain the existence of default and that a default has occurred. It observed that to ascertain the same *it is necessary to consider the documents filed by both Petitioner Bank as well as the Respondent Company and contention of both the parties.*

The Tribunal relied on the Supreme Court's decision in *Madhusudhan Gordhandas & Co. v. Madhu Woolen Industries Pvt. Ltd.*[7] wherein it was held as follows:

> *"the debt is bona fide disputed and the defense is a substantial one, the court will not wind up the company… The principles on which the court acts are first that the defense of the company is in good faith and one of substance, secondly, the defense is likely to succeed in point of law and thirdly the company adduces prima facie proof of the facts on which the defense depends."*

In the Western Refrigeration case mentioned above the facts were that the proceedings u/s 7 were brought against the Guarantor. There was a liquidation proceeding pending against the Principal Borrower, and the Bank had filed a claim there as well. Moreover,

5 *Krishna Kilaru and Another v. Maytas Properties Limited Rep., by its Managing Director, Hyderabad, Krishna Kilaru and Another v. Maytas Properties Limited Rep., by its Managing Director, Hyderabad, MANU/AP/0745/2012.*

6 *17/7/NCLT/AHM/2017, delivered on 26.05.2017.*

7 *AIR 1971 SC 2600.*

the Guarantors had discontinued and determined the guarantee, notice of which had been duly served on the bank. The Petitioner bank however, did not bring this information to the knowledge of the bench. The bench while rejecting the petition went on to say that:

'*The Adjudicating Authority need not be carried away by the documents filed by the Financial Creditor alone in all cases, but in a given case it shall consider the relevant bona fide pleas of Corporate Debtor in earlier proceedings in order to satisfy about the existence of default or occurrence of default.*"

Calcutta High Court in *Sree Metaliks Limited and Another v Union of India*[8] and NCLAT in *M/s Innoventive Industries Limited v ICICI Bank and Another* [9] have observed that for an application u/s 7 of the Code, NCLT is obliged to afford a reasonable opportunity to the financial debtor to contest such claim of default by filing a written objection or any other written document. In the former case, the Calcutta High Court observed that u/s 424 of the Companies Act, 2013 the NCLT has to follow the principles of natural justice while disposing off proceedings before it.

Even though, the decision saves an innocent debtor from the grave effects the admission of application might have on its business and someone who might have valid defense against the default or who because of an inadvertent error failed to repay the debt, but had no intention of not paying, it also opens doors for many other objections by the debtors which might have no legal basis and been put forth merely to delay and frustrate the process. It is now to be seen, what possible consequences can this have on the working of the Code and strict timeline of 14 days (along with 10 days u/s 62) to dispose the application. If the Adjudicating Authorities are not strict on debtors bringing in trivial objections, it might have a hard time disposing the applications.

Furthermore, it is to be noted that the Code envisages establishment of information utilities which when once formed will record all financial information pertaining to debt and its payment. Once this Information Utility infrastructure comes into existence, it will be easier to determine the existence of default as these utilities will enable access to irrefutable and transparent evidence of the default. The records with the Utilities will serve as primary evidence with minimal possibilities of misinformation. Therefore, it is only a matter of time that default can be established with ease and accuracy without much aid by submissions of creditor or debtor.

8 *WP 7144(W) of 2017, CalHC.*
9 *Company Appeal (AT) (Insolvency) No. 1 & 2 of 2017, decided on 15.05.2017.*

SCOPE OF COURT INTERVENTION IN THE INSOLVENCY RESOLUTION PROCESS TIMELINE

According to the recent Ease of Business Report 2017 released by the World Bank, India ranks a poor 136th on the Insolvency Resolution component out of a possible 190.[10] The major reason for this poor ranking is the undue long time it takes for insolvency resolution process to be completed in India – averaging at 4.3 years.[11] This problem has been addressed in the Insolvency and Bankruptcy Code, 2016. The legislative debates, the statement of object and reasons and the preamble to the Insolvency and Bankruptcy Code - all show that the Code intends to complete the corporate insolvency resolution process in a "time bound manner". In order to achieve this objective of "time bound" resolution, Section 12 lays down the time period for completion of the insolvency resolution process. Section 12 reads –

> 12. **Time-limit for completion of insolvency resolution process** – (1) Subject to sub-section (2), the corporate insolvency resolution process shall be completed within a period of one hundred and eighty days from the date of admission of the application to initiate such process.
>
> (2) The resolution professional shall file an application to the Adjudicating Authority to extend the period of the corporate insolvency resolution process beyond one hundred and eighty days, if instructed to do so by a resolution passed at a meeting of the committee of creditors by a vote of seventy-five per cent of the voting shares.
>
> (3) On receipt of an application under sub-section (2), if the Adjudicating Authority is satisfied that the subject matter of the case is such that corporate insolvency resolution process cannot be completed within one hundred and eighty days, it may by order, extend the duration of such process beyond one hundred and eighty days by such further period as it thinks fit, but not exceeding ninety days - provided that any extension of the period of corporate insolvency resolution process under this section shall not be granted more than once.

Thus u/s 12, the corporate insolvency resolution process has to be completed within 180 days from the date of admission of application. Arguments have been raised in favour of such a short time period as a long drawn out liquidation period reduces the liquidation value.[12]

This period might be extended by not more than 90 days. However, the procedure to avail of this extension is fairly difficult and rigid. First, the Committee of Creditors has to pass a resolution for an extension of time by a 75% majority. Following such a resolution by the Committee of Creditors the resolution professional has to make an application before the Adjudicating Authority. The Adjudicating Authority then, has to satisfy itself that in the given matter, the facts are such that the insolvency resolution process cannot be completed within 180 days and once it is satisfied, it *may* extend the time period beyond 180 days for such duration it deems fit, but not more than 90 days. Further, this extra time given by the Adjudicating Authority cannot be extended or granted more than once.

Thus, we see that the code lays down a very high threshold of requirements that have to be met before the 180-days time period can be extended. Accordingly, u/s 12 *only* the *Adjudicating Authority* can intervene to extend the period of the resolution *if and only if* the law laid down in Section 12 is followed. No other court can extend this timeline. This contention is further supported by S. 63 which puts an express bar on the jurisdiction of civil courts to entertain any proceedings

10 *World bank,'Resolving Insolvency' (Doingbusiness.org,2017)<http://www.doingbusiness.org/data/exploretopics/resolving-insolvency> accessed 17 July 2017*

11 *Ibid*

12 *The Financial Express, 'Insolvency and Bankruptcy Code: Here's why resolution must be strictly time-bound' (Financialexpresscom, 19 May 2017)<http://www.financialexpress.com/opinion/insolvency-and-bankruptcy-code-heres-why-resolution-must-be-strictly-time-bound/675643/> accessed 17 July 2017*

with respect to any matter under the code, meaning no other court can interfere with respect to the 180-days timeline under this Code.

Additionally, it has been clarified by the NCLAT that the time period u/s 12 is mandatory and cannot be extended past a total of 270 days. In *JK Jute Mills Company Limited v M/s Surendra Trading Company*[13] the NCLAT held –

> "45. Section 12 is a "time limit for completion of insolvency resolution process" which is to be completed within 180 days from the date of admission of the application. An extension of the period of corporate insolvency resolution process can be granted by the Adjudicating Authority but it cannot exceed 90 days and cannot be granted more than once.
>
> 46. The resultant effect of non-completion of insolvency resolution process within the time limit of 180 days + extended period of 90 days i.e. total of 270 days will result in to initiation of liquidation proceedings under section 33. As the end result of the Resolution Process is approval of the resolution plan or initiation of liquidation proceedings, we hold that the time granted under section 12 of 'the Code' is mandatory."

Because this judgment was passed by the NCLAT it is binding on all the benches of the NCLT and consequently, the NCLT benches cannot extend the time beyond 270 days.

Thus, to conclude, we see that there is not much scope for court intervention with respect to the extension of timeline of the insolvency resolution process. Intervention is allowed by the NCLT, but the same has to be in accordance with the law laid down by Section 12. This view is further supported by Section 64 – "**Expeditious disposal of applications**". Section 64(2) states that – "No injunction shall be granted by any court, tribunal or authority in respect to any action taken, or to be taken, in pursuance of any power conferred on the National Company Law Tribunal or the National Company Law Appellate Tribunal under this Code." Read harmoniously with Section 12, this section removes any doubt regarding the interference of Courts regarding the 270-days period given u/s 12 for completion of the insolvency resolution process.

13 *Company Appeal (AT) No. 09 of 2017 (NCLAT)*

FAST TRACK INSOLVENCY- IS IT REALLY FAST?

The very purpose of introducing Fast Track Regulation (hereinafter referred as "regulation") is to lower the burden on small companies from following the cumbersome procedure of Resolution Process as specified under the Insolvency and Bankruptcy Code (hereinafter referred as "code") for larger companies. The regulation came in force on June 14, 2017 and applies to small companies[14] , start-ups [15](which should be a private company, partnership or LLP and its turnover since incorporation shouldn't exceed 25cr.) and to unlisted company with total assets, as reported in the financial statement of the immediately preceding financial year, not exceeding Rs.1 cr.[16].

The regulation stipulates a period of 90 days for the resolution process[17], in case of small companies, though if 75% of the creditors apply to the adjudicating authority through the resolution professional, the adjudicating authority may extend the duration for a maximum period of forty-five days.[18] Whereas under the code, the resolution process has to completed within a period of 180 days which can be further extended for a maximum period of one-eighty days[19]. The moratorium period under the regulation has also been reduced to 90 days as the code specifies that further no proceedings can be initiated against the interim resolution professional or the resolution professional for the actions of the corporate debtor, prior to the fast track commencement date[20] , though there is no divergence between the resolution process and penalties under the regulation and the code.[21]

The quorum required for committee of creditors under the IBC code is 75% of the financial creditors whereas under the regulation the quorum required is 33% of the total members, which has been further given the right to modify the percentage required for quorum in respect of any future meetings of the committee.[22]

A creditor or a corporate debtor may file an application, along with the proof of existence of default, to the Adjudicating Authority for initiating fast track resolution process. After the application is admitted and the interim resolution professional ("IRP") is appointed, if the IRP is of the opinion, based on the records of corporate debtor, that the fast track process is not applicable to the corporate debtor, he shall file an application before expiry of 21 days from the date of his appointment, to Adjudicating Authority to pass an order to convert the fast track process into a normal corporate insolvency resolution process.[23]

In fast track solvency, when an interim resolution professional verifies a claim, he is not constrained to give a reason in writing to the creditor, thereby his claims may be prejudiced at times and has 7 days to verify the claims from the last date of receipt of claims[24], the intent of the legislature can be seen that it wants the fast track resolution to be conducted in a brisk manner.

The resolution professional shall endeavor to submit a resolution plan, prepared in accordance with the Code and these Regulations, to the Committee of Creditors, thirty days before expiry of the maximum period[25].

CONCLUSION

The fast track regulation affirms its name as the time frame is reduced to half as compared to the code, and the regulation process is also less intricate and more flexible as compared to the code. Though, the 90-days time limit is a burden imposed on the resolution professional to ensure that they respond in a time bound manner.

14 *2(85) Companies Act, 2013*
15 *Meaning of start up, Ministry of commerce and industry, 23 May 2017, http://egazette.nic.in/WriteReadData/2017/176201.pdf*
16 *http://ibbi.gov.in/notification_before_publication.pdf, accessed on July 4, 2017*
17 *Section 56(1), The Insolvency and Bankruptcy Code, 2016*
18 *Section 56(2), ibid*
19 *Section 12 , ibid*
20 *Regulation 38(7), Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017*
21 *Section 58, The Insolvency and Bankruptcy Code, 2016*
22 *Regulation 22(1), Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017*
23 *Regulation 17(2), ibid*
24 *Regulation 13(1), ibid*
25 *Regulation 38(1),ibid*

FALSE INFORMATION FURNISHED IN AN APPLICATION UNDER SECTION 7 OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016

INTRODUCTION

The Insolvency and Bankruptcy Code 2016 (hereinafter referred to as '*Code*') attempts to consolidate the laws for insolvency resolution of corporate persons in a time bound manner. Under Part II of the Code, process for insolvency resolution and liquidation process for corporate persons is described wherein financial creditors, operational creditors or corporate applicants can approach the Adjudicating Authority for initiation of corporate insolvency resolution process.

A financial creditor may file an application before the National Company Law Tribunal (which is the Adjudicating Authority under Part II) for initiating the corporate insolvency resolution process against a corporate debtor along with the record of default, name of the suggested interim resolution professional and any other relevant information as may be specified by the Insolvency Board.[26] The forms and contents of the application under this Section are specified in Form 1 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. In the event of a false application being filed by a financial creditor, two remedies are provided under the Code. One remedy is under Section 75 while the other remedy is under Section 65.

RECOURSE UNDER SECTION 75

Section 75 provides for punishment for false information furnished in an application under Section 7. When material particulars of the application are false or omitted and the applicant has knowledge of such error or omission, such an applicant may be punishable with fine which can range from one lakh rupees to one crore rupees. Application under Section 75 is deemed to be false in material particulars, if the non-omission or correctness of the fact would have been sufficient to prove default.[27]

Such recourse may be beneficial for a corporate debtor against whom a false application has been filed. However, according to the Code, such a right cannot be exercised by the corporate debtor. Section 75 is under Chapter VII of Part II which provides for Offences and Penalties. Section 236 states that all offences under the Code have to be tried by the Special Court set up under the Companies Act, 2013. Sub-Section (2) states that no court can take cognizance of any offence except when a complaint is made by the Board or the Central Government or any other person authorised by the Central Government. Since such a complaint can only be made by the abovementioned, the corporate debtor has been excluded from filing a complaint under Section 75. There is no provision for a corporate debtor making an application to the Board to initiate proceedings under Section 75 of the Code. The party against whom false information has been furnished cannot approach the Courts for any remedy.

Apart from the issue of *locus standi*, Section 75 is silent on the aspect of limitation. If the Board or Central Government decide to file a complaint against a financial creditor, within how many days should the complaint be made? If the complaint is made after the application under Section 7 has been accepted or the resolution plan has been accepted or when the liquidation has commenced, the purpose of filing the complaint is defeated as the punishment prescribed is in the nature of fine and does not mention what impact it will have on the insolvency process. If the foundation of the process is based on false documents, the remedy should not be merely imposition of fine.

RECOURSE UNDER SECTION 65

The recourse against initiation of false proceedings may lie in Section 65 which states that when any person initiates the insolvency resolution process fraudulently or with malicious intent for any purpose other than the resolution of insolvency, the Adjudicating Authority shall impose such penalty which can range from one lakh rupees to one crore rupees.

26 Section 7, Insolvency and Bankruptcy Code, 2016.

27 Explanation, Section 77, Insolvency and Bankruptcy Code, 2016.

Even though the corporate debtor has the *locus standi* to approach the Adjudicating Authority under this Section, the relief that the Adjudicating Authority will provide is in the nature of fine. However, it is a well-founded principle of law that fraud vitiates all underlying transactions. Therefore, after the application under Section 7 has been accepted, an action under this Section 65 will render the entire insolvency resolution process void. It is to be noted that this provision doesn't provide for the nature of fact finding that the Adjudicating Authority will engage in for determining the presence of fraud or *male fide* intent. Proving such *male fide* intention on part of the financial creditors through evidence is a difficult task if it has to be proved beyond reasonable doubt. The nature of inquiry to be undertaken can be interpreted in consonance with paragraph 6.7 of the report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design which states that:

"An individual is not guilty of the offence if he proves that, at the time of the conduct constituting the offence, he had no intent to defraud."

A remedy against fraudulent proceedings under Section 65 is not brought under Offences and Penalties[28] and can be tried by the Adjudicating Authority but false information under Section 75 is an offence to be tried by the Special Courts. The rationale behind such a distinction has not been elaborated on by the drafters of the Code.

CONCLUSION

When the application under Section 7 is based on false documents filed by the financial creditor, the recourse available to the corporate debtor is insufficient. Under Section 75, it is not the corporate debtor but the Board or Central Government which has the locus to raise a claim. If the recourse under Section 65 is taken up, the relief provided is in the nature of a fine. However, fraud once proved will vitiate the entire insolvency process. Therefore, the recourse for a corporate debtor in the event of false application being filed by the financial creditor lies in Section 65.

28 *Part II, Chapter VII, Insolvency and Bankruptcy Code, 2016.*

INSOLVENCY AND BANKRUPTCY CODE, 2016: HAS CORPORATE DEBTOR NO SAY?

The aim and object of the Insolvency and Bankruptcy Code, 2016 is reorganization and insolvency resolution in a time bound manner for the maximization of value of assets of such persons to promote entrepreneurship and availability of credit. The Code provides a speedy process for deciding the application, presentation of resolution plan and to go for liquidation, if the resolution plan gets rejected. However, under this speedy process, the Code does not envisage situations which can defeat the very aim and object for which it was enacted. The Code does not provide any way for the involvement of corporate debtor, which can sometimes cause adverse effect on the company.

The focus of this article is to analyse the Code from the perspective of corporate debtor. The Code gives immense power and rights to financial creditor in order to get back their loans but the Code does not provide corporate debtor any recourse to address their grievances. This creates a heavy imbalance in favor of creditors against corporate debtor. This article analyzes various provisions of the Code and tries to unveil a picture which clearly shows that in situations where the corporate debtor is genuinely interested in revival and paying back loans, the creditor still has the power to take the company to liquidation.

PUBLIC HEARING

Under section 7 of the Code, the financial creditor can file an application for the initiation of Corporate Insolvency Resolution Process (CIRP) to the Adjudicatory Authority in the case of commission of default. Rule 4(4) of the Adjudicatory Authority Rules, mandates the applicants to dispatch forthwith, a copy of the application filed with the Adjudicatory Authority. The purpose for the same being, to give the corporate debtor adequate notice that such an application for initiation of insolvency process has been filed against him. However, the Code does not provide any provision for corporate debtor to make a representation in pursuance of such notice. The Code does not envisage the circumstance under which the financial creditor might have concealed relevant documents which can reject the application.

Although, through judicial ruling in the case of *Sree Metaliks Limited v. Union of India*[29], the Calcutta High Court has said that the Adjudicatory Authority has to adhere to the principle of natural justice while deciding application under section 7. The following paragraph clearly shows the objective of the High Court,

> *"In an application under Section 7 of the Code of 2016, the financial creditor is the applicant while the corporate debtor is the respondent. A proceeding for declaration of insolvency of a company has drastic consequences for a company. Such proceeding may end up in its liquidation. A person cannot be condemned unheard. Where a statute is silent on the right of hearing and it does not in express terms, oust the principles of natural justice, the same can and should be read into in. When the NCLT receives an application under Section 7 of the Code of 2016, therefore, it must afford a reasonable opportunity of hearing to the corporate debtor as Section 424 of the Companies Act, 2013 mandates it to ascertain the existence of default as claimed by the financial creditor in the application"*

The abovementioned rationale was reiterated by National Company Law Appellate Tribunal in the case of *ICICI Bank v. Innoventives Industries Ltd*[30] observing,

> *"52. The insolvency resolution process under Section 7 or Section 9 of I&B Code, 2016 have serious civil consequences not only on the corporate debtor company but also on its directors and shareholders in view of the fact that once the application under Sections 7 or 9 of the I&B Code, 2016 is admitted it is followed by appointment of an 'interim resolution professional' to manage the affairs of the corporate debtor, instant removal of the board of directors and moratorium*

29 *WP 7144(W) of 2017, Calcutta High Court.*
30 *Company Appeal (AT) (Insolvency) No. 1 & 2 of 2017*

for a period of 180 days.

However, the point of focus remains that the Code by itself does not provide any recourse for the corporate debtor to raise the grievance. It is for the Adjudicatory Authority to make ways for the corporate debtor to represent himself. Moreover, there is no written procedure laid down for the hearing given to the corporate debtor.

ASCERTAINMENT OF DEFAULT

Under section 7(4) of the Code, the Adjudicatory Authority has to ascertain the existence of the default for the purpose of admitting or rejecting the application within fourteen days from the day of receipt of the application. It means that the threshold of admitting an application is only to ascertain the existence of the default which is very low.

For instance, if a company failed to pay a creditor by one day, the creditor will have the right to file an application under the Code. Authority will only look into whether there was any default or not, and if there was default, the authority will admit the application which will result in appointment of interim resolution professional who will overtake the management of the company.

Reserve Bank of India, in its Master Circular of 2015[31], has given overdue[32] period of 90 days before declaring any asset as Non-Performing Asset and initiation of any debt recovery proceedings. Whereas the Adjudicatory Authority can within one day of default send the company into resolution process. Moreover, the Code does not recognize the situation where the corporate debtor has defaulted but started paying back the dues. For instance, Essar Steels Ltd, one of the twelve companies which the RBI has directed to be sent to NCLT, has started repaying their dues.

In this case, Essar Steels has submitted a revival plan to the creditors, who were part of the board meeting. The creditor has approved the revival plan which shows the co-operation between both the parties. Moreover, Essar has repaid Rs 3,467 from its day-to-day cash flow during the period from April 2016 to June 2017[33]. However, in such situation if any creditor decides to file an application for initiation of resolution process and replace the management with an IRP, the revival of whole company will fall on the shoulders of one person who is a stranger to the company and will handle the work of whole management team. This might reduce the chances of revival of a company while ascertaining that it is sent to liquidation.

CREDITOR COMMITTEE AND RESOLUTION PROFESSIONAL

The Creditors while filing an application for initiation of insolvency resolution process have to nominate an Interim Resolution Professional (IRP) also. Such IRP will form the committee of creditors, containing all financial creditors, on the basis of submission of respective claims[34]. Once the committee is constituted, the committee will appoint either the IRP as RP or will appoint a new person as RP with a vote of not less than seventy-five percent of voting share[35].

These provisions show that the person who will be appointed as RP will work for the interest of creditors only. The revival plan, presented by the resolution professional in front of the committee will be focused on the demand of creditors and will not care about the corporate debtor. Consider a situation, where there is chance of revival but the creditor wants to be paid expeditiously; however viable a revival plan, the resolution professional might present, it may not get the committee of creditors. Even if the resolution professional present a genuine revival plan, the committee can reject it and take the company to liquidation. Such action might be against the object of the Code to maximize the value of assets.

However, the Code provides provision for filing a complaint against insolvency professional or insolvency professional agency or information utility by any person in front of the Board[36]. The Board will direct any person to investigate and present a report in front of the Board[37]. Thereafter, the Board will form a disciplinary

31 *Master Circular No. DBR.No.BP.BC.2/21.04.048/2015-16 dated July 1, 2015*

32 *Any amount due to the bank under any credit facility is 'overdue' if it is not paid on the due date fixed by the bank.*

33 *Available at http://www.livemint.com/Companies/UPgt6Sazgkmx6kAtDOGpEI/Essar-Steel-case-hearing-today-a-litmus-test-for-debt-resol.html*

34 *Section 21*

35 *Section 22*

36 *Section 217*

37 *Section 218*

committee to examine the report[38]. Such disciplinary committee after satisfaction that sufficient cause exists will impose penalty[39].

The above complaint mechanism is too lengthy and tedious. Even if someone makes a complaint, the probability of getting the decision during the resolution process is very less. In essence, this provision is an empty gesture in the Code but of no use.

CONCLUSION

It is evident from the perusal reading of the Code that it is definitely an effective move towards establishing a strong regulatory framework to deal with insolvency and liquidation problems. However, the Code is at its nascent stage, it will take time to cross various practical and logistical hurdles before becoming fully comprehensive and consistent. At present, the Code illustrates a picture detrimental to the interest of debtor companies instead of a balance of interest between corporate debtors and their creditors. However, it can be hoped that such interest will be protected in future.

38 Section 219
39 Section 220

INTERPRETATION OF THE WORD 'DISPUTE', AND THE PHRASE 'NOTICE OF DISPUTE', UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016

Prior to the enactment of The Insolvency and Bankruptcy Code, 2016 (Hereinafter referred to as "Code"), there was no consolidated law in India, that dealt with insolvency and bankruptcy. The primary objective behind the enactment was to consolidate and amend the laws related to the reorganization and the insolvency resolution of corporate persons, firms and individuals in a time bound manner. However, as it exists, the Code is still in a very nascent stage of its operation, and on the perusal of the entire scheme of the Code, while it is clearly evident that time is of the essence for the entire insolvency resolution process, it is no less important that the Code is interpreted in a manner keeping in mind the mischief it seeks to rectify. In this regard, recent judgments passed by different benches of the NCLT gave rise to controversies surrounding the interpretation of the provisions of the Code.

Unlike a financial creditor who may directly file an application before the NCLT, the operational creditor has to comply with the requirements of Section 8 of the Code, wherein the operational creditor has to deliver a demand notice or a copy of an invoice to the corporate debtor for the amount of the unpaid operational debt in respect of which the default has occurred. Sub-section (2) of Section 8 provides a 10-day window to the corporate debtor to either repay such unpaid amount as stated in the demand notice, or, bring to the notice of the operational creditor an existence of a dispute if any, and record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute. In case payment has already been made, the corporate debtor has to send back the proof of such payment to the operational creditor. So basically, what the operational creditor receives is either payment or a 'notice of dispute'.

This is the question that had arisen before various NCLT's that whether a corporate debtor can raise all kinds of disputes underthe notice of dispute or can the notice of dispute only refer to pendency of a suit or an arbitration pending before the receipt of the demand notice under section 8 of the Code. Subsequently conflicting interpretations as to what constitutes a 'dispute' had arisen. The phrase "existence of disputes" assumes significance as it is largely the only legal defense that a corporate debtor can take to avoid insolvency/liquidation proceedings initiated by an operational creditor. The survival of the corporate debtor therefore to a large extent depends on whether there exists a dispute concerning the claims of the operational creditor because the Code empowers the Tribunal to either admit or reject the operational creditor's insolvency application based on whether or not a notice of dispute (in existence) has been received by such operational creditor from the corporate debtor.

CONTRADICTORY VIEWS TAKEN BY NCLTS

The Principal Bench, of NCLT, New Delhi, interpreted the term "dispute" in two of its decisions, namely, in *One Coast Plaster v. Ambience Private Limited*[40] and in *Philips India Limited v. Goodwill Hospital and Research Centre Limited*[41]. Both applications were filed under Section 9 of the Code by operational creditors of corporate debtors. The Principal Bench vide its separate orders dated March 1, 2017 rejected both applications on the common ground that the concerned corporate debtors in both matters had issued their *"notice of dispute"* in response to the applicant›s demand notice, and therefore, as per Section 9(5)(ii)(d) of the Code, the tribunal was liable to reject the applications. The Principal Bench, while interpreting the term «dispute» as defined in Section 5(6) of the Code, observed that the said definition was inclusive and not exhaustive considering the use of the expression «includes» which immediately succeeds the word «dispute.» Therefore, the bench was of the view that the legislature intended to give wider connotations to the said term «dispute» and it cannot be restrictively interpreted to mean a

40 Company Application No. (I.B.) 07/PB/2017
41 Company Application No. (I.B.) 03/PB/2017

pending suit or an arbitration proceeding in relation to a debt, quality goods/service, or breach of any contractual representation/warranty.

From the abovementioned decisions of the Principal Bench it was inferred that as long as a corporate debtor brings to the notice of the applicant the existence of a "dispute" within 10 days of the receipt of the demand notice or copy of the invoice issued by the applicant (or even thereafter)[3], the application for corporate insolvency of such corporate debtor is liable to be rejected by the tribunal, unless the said "dispute" can be dislodged on the basis of the evidence submitted by an application.

However, in complete contrast to the abovementioned decisions of the NCLT Principal Bench, Delhi, the learned NCLT Mumbai Bench while deciding a factually similar application filed by an operational creditor in *Essar Projects India Limited v. MCL Global Street Private Limited* ruled that since the "dispute" raised by the concerned corporate debtor under its reply to the demand notice of the applicant was not raised before any court of law till the receipt of such notice, such "dispute" cannot be treated as a "dispute in existence" at the time of receipt of the demand notice. The learned tribunal under its order dated March 6, 2017 noted that the corporate debtor had never raised any question on the invoices issued by the applicant creditors and rather admitted the same. Therefore, a simple denial of claim by the corporate debtor on grounds not raised previously and only pursuant to the receipt of a demand notice under Section 8(1) of the Code will not amount to a "dispute in existence" as required under Section 8(2)(a) of the Code. Therefore, the NCLT Mumbai Bench interpreted the term "dispute" in light of the statutory mandate provided under Section 8(2)(a) of the Code, i.e., upon receipt of a demand notice/invoice under Section 8(1), a corporate debtor must bring to the notice of the applicant creditor the "existence of a dispute" and any record of proceedings filed in relation thereto before the receipt of such demand notice/ invoice.

CURRENT POSTION OF LAW

Recently the National Company Law Appellate Tribunal, ("NCLAT") in its order dated May 24, 2017, in the matter of *Kirusa Software Pvt Ltd vs Mobilox Innovations Pvt. Ltd*[42]., has now put to rest the controversy as to what would mean dispute and existence of dispute for the purpose of determination of an application under section 9 of the IBC.

The NCLAT drew an interpretational analogy between section 8 and 9 of the IBC and Section 8 of the Arbitration and Conciliation Act, 1996, wherein the judicial authority is required to *prima facie* determine the existence of an arbitration agreement before it can exercise jurisdiction in relation to a dispute brought before it. The court opined that, "*Though the words 'prima facie' are missing in Sections 8 and 9 of the Code, yet the Adjudicating Authority would examine whether notice of dispute in fact raises the dispute and that too within the parameters of two definitions - 'debt' and 'default' and then it has to reject the application if it apparently finds that the notice of dispute does really raise a dispute and no other factual ascertainment is required. On the other hand, if the Adjudicating Authority finds that the notice of dispute lacks in particulars or does not raise a dispute, it may admit the application but in either case, there is neither an ascertainment of the dispute, nor satisfaction of the Adjudicating Authority.*" It held that the intent of the Legislature, was clearly evident from the definition of the term "dispute". If the intent of the Legislature was that a demand by an operational creditor can be disputed only by showing a record of suit or arbitration proceeding, the definition of "dispute" it would have simply said 'dispute means a dispute pending in arbitration or suit'. Thus, the legislature wanted the same to be illustrative and not exhaustive.

Further it also held that Section 8(2) of the IBC cannot be read to mean that a dispute must be pending between the parties prior to the notice of demand and that too in arbitration or a civil court and that even a dispute concerning execution of a judgment or decree passed in a suit or award passed by an arbitral tribunal can be used to prove a dispute under the IBC. The 'dispute' must be raised by the corporate debtor prior to the notice for insolvency resolution by an operational creditor under section 8 of the IBC. However it has to be noted that the raising of a pending 'dispute' by the corporate debtor cannot be done with a *mala fide* intention to only stall the insolvency resolution process. It emerges both from the object and purpose of the IBC and the context in which the expression is used, that disputes raised in the notice sent by the corporate debtor to the operational creditor would be covered within sub-section (2) of Section 8 of the IBC. Applying the aforementioned principles, the NCLAT came to the conclusion that in the instant case, the defense raised

42 MANU/NL/0027/2017

for dispute by the operational debtor was vague and motivated to evade liability.

CONCLUSION

Based on the law laid down in the Kirusa case, it can be safely concluded that the definition of "dispute" is "inclusive" and not "exhaustive". The same has to be given wide meaning provided it is relatable to the existence of the amount of the debt, quality of goods or service or breach of a representation or warranty. Once the term "dispute" is given its natural and ordinary meaning, upon reading of the Code as a whole, the width of "dispute" has to be taken to cover all disputes on debt, default irrespective of the fact that whether there were any pending proceedings or not in front of a court or an arbitral tribunal. Thereby it would be incorrect to construe the word "dispute" in such a way that it limits the interpretation to the extent that only two ways of disputing a demand can be made by the corporate debtor, i.e. either by showing a record of pending suit or by showing a record of a pending arbitration.

Further in the very recent case of, *"Penugonda Satish Babu vs. Amarpali Biotech India*[43]" decided on 10/07/2017 before the principal bench of the NCLT at New Delhi, a similar issue was raised before the tribunal. In the aforementioned case, upon the service of the notice of the corporate insolvency proceedings against the corporate debtor, the corporate debtor was given an opportunity to file their reply wherein it was claimed that the creditor had violated several clauses of the agreement signed between them and had failed to discharge its obligations under the said agreement. The corporate debtor also went on to allege that the claim amounts remain totally unsubstantiated and thereby the claims are being vehemently disputed. The debtor argued that in view of the arbitration clause contained in the agreement and a bona fide dispute of the accounts of the parties, the remedy has to be sought elsewhere.

The tribunal after going through the arguments from both the parties held that it was quite evident that the disputes arose from the contractual relationship that the parties were in, and the subsequent transactions arising out of it. The tribunal, while dismissing the petition agreed with the contention of the Corporate Debtor that there was a bona fide dispute between the parties, and held that it would not be appropriate for the tribunal to go into the merits of it since there is a very limited period available for the disposal of such claims. The tribunal held that the Operational Creditor is free to seek any other remedy that may be available to him under law. This case is important as it follows the rationale laid down in the Kirusa case, that it is not mandatory for pending proceedings to exist in order to come under the purview of the word "dispute". Since in this case, clearly there was no pending arbitral proceeding or any proceeding before any civil court and yet the tribunal held that the dispute raised was bonafide in nature.

43 C.P. No. (IB)-58/(PB)/2017

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GUIDE TO INSOLVENCY CODE

PROTECTION 'FROM' BANKS/FIS? OR 'FOR' THEM?

DEFINITION

According to Merriam Webster dictionary, an Insolvent is a person who is a) unable to pay his debts as they fall due in the usual course of business and b) having liabilities in excess of a reasonable market value of assets held.

Insolvency is defined as the fact or state of being insolvent.

Insolvency can further be, either cash flow insolvency wherein the debtor suffers from lack of financial liquidity to pay off his debts though the value of his assets may be in excess of his total liabilities or the Balance Sheet insolvency wherein the liquidated value of all the assets would not be sufficient to cover off all the liabilities of the Debtor.

EVOLUTION OF INSOLVENCY LAW

As is the case of majority of the laws, insolvency laws in India find their origin in the English Law. While initially reliance was placed on the statutes enacted in the UK, the Indian Insolvency Act was passed in 1848. Over the years several enactments and amendments were brought in, especially resulting from the 26th Law Commission, and erstwhile laws (Presidency Towns Insolvency Act 1909 and Provincial Insolvency Act 1920) continued to be in effect till they were replaced by the Insolvency and Bankruptcy Code, 2016 (IBC).
Objective of the Insolvency Laws

The primary objective of any Insolvency or Bankruptcy law is to protect the troubled debtor from going into a tailspin and help it revive while at the same time balance the interests of all classes of creditors (including workmen) against it. Not only this is beneficial for the troubled debtor and associated creditors but also for the overall health of the financial system and economy as a whole.

Simple and effective insolvency laws go a long way in improving the overall business and investment climate of a nation. Friendly and time bound resolution of insolvency proceedings play a vital role in determining investor confidence by helping investors sail through a troubled investment in an efficient manner. Notably, India was ranked 130 out of 189 Countries evaluated on the Ease of Doing Business index and ranks 136 out of 189 Countries on the resolving insolvencies in the World Bank's Index Report 2016.

Besides the obvious intent to revive the ailing debtor and improve investor confidence, it is interesting to note, that a common theme which has prevailed and observed by various committees and commissions over the years on insolvency is to address the needs and grievance of classes of creditors other than secured creditors. Be it the Law Commission report of 1964 or the Bankruptcy Law Reforms committee of 2015, there is consensus on plight of non-secured creditors who are often left in the lurch.

BANKERS/ SECURED CREDITORS – THE PRIVILEGED CLASS

While secured creditors traditionally have had remedies available under the Code of Civil Procedure, even the Companies Act carved out special protection for their claims on the assets of a troubled enterprise. Banks and other Financial Institutions (FIs) have traditionally been the largest lenders to corporate debtors and most often hold a mortgage or charge over the assets of the borrowers to whom the loan is extended.

With the expansion of the economy, the reliance on bank finance has increased tremendously over the last few decades. Increasingly, more and more regulations have been brought in to assess and manage the financial health of the banks considering the immense impact that a failure will have on the overall economy.

While the banking regulator brought various regulations for the banks on conducting their business,

the Legislature has tried to augment the financial health of the banks, and thereby the entire economy, by bringing in specific legislations to help them address the challenges of ever mounting Non Performing Assets (NPAs) and difficulty in recovery thereof. The Recovery of Debts and Bankruptcy Act (RDB) came about in 1993 and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) act in 2002. It is pertinent to note that these two Acts have been specially created to cater to the interest of the Banks/ FIs, who most often than not are the only group of secured creditor. Also, the banks/FIs have the liberty to proceed under either or both of these acts and this right to proceed simultaneously has passed the test of constitutionality.

IS IBC MEANT TO BENEFIT THE BANKS/FISR TO PROTECT FROM IT?

The context above leads to an interesting proposition - given the fact that the object of the IBC is to revive the enterprise and to cater to all classes of creditors and the fact that the bankers already have very specific remedies available to them under SARFAESI and RDB, is the IBC meant to offer further protection to the bankers in recovering their debt or is it to protect the debtors and other classes of creditors from the coercive action of banks/FIs?

In our view, though there is no express bar or restriction placed on the secured creditors from initiating proceedings under the IBC, it is not a simple argument and should be academically debated to arrive at a logical view:

a) Against common logic: If the application under section 7 of IBC is admitted, then the moratorium placed by section 14 of IBC will stop any action taken under 13(4) of SARFAESI. Therefore, if the banks/FIs having already taken action under section 13(4) of SARFAESI are allowed to initiate proceedings under section 7 of IBC, then it will amount to them putting on hold their own action taken under SARFAESI. Such a situation would not only be quite bizarre but also lead to wastage of precious time and resources of all the parties involved.

b) No additional relief: Even if the Bank/ FI has not taken any action under SARFAESI, there is no incremental remedy available to the Banks/FIs than what is already available in the existing provisions available to them under SARFAESI and RDB. On the contrary, by initiating action under IBC, the bankers are only increasing the overall time to realize their due by subjecting themselves to the outcome of the resolution plan and the jurisdiction of the adjudicating authority.

WHY NO EXPRESS BAR?

The legislature in its wisdom has not expressly barred the bankers or secured creditors from initiating action under IBC despite there being a specific section for the purpose i.e. Section 11. This makes us ponder over the view taken so far and consider what might be the intent of legislature in not placing an express bar on the banks/FIs despite specific and similar relief already available to them. Following scenarios will help understand as to why the legislature has not expressly barred the banks/FIs or secured creditors from moving under the IBC despite it being almost contradictory not only to the objective of the insolvency laws but also creating multiplicity of proceedings and forum shopping by the banks:

a) No default towards one bank: In case of multi lender scenario or a consortium, as the case may be, if the default is only towards one of the lenders, say A, then that particular lender will have the right to proceed under SARFAESI to sell the secured asset. The sale of the secured asset may lead to downfall of the entire enterprise and as a result may lead to the default of the other bank, say B, whose account was not in default. The legislature has in its foresight worded the section 7 accordingly to accommodate such a situation. Section 7 of IBC states that a creditor can approach under section 7 not only for its own default but for a default of another creditor. Such an application from Bank B under section 7 will put on hold the action under SARFAESI taken by the Bank A thereby not only protecting the debtor but also Bank B and help it revive the firm. These rights were not available to the Bank B otherwise.

b) Creditors holding less 40% of Debt: Again in a multi lender situation, if 40% of the creditors do not wish to go for action under SARFAESI they cannot stop the other 60%. However, with the provisioning of the IBC, those creditors having minority share in the secured asset can also protect the debtors from the coercive action of the majority of the creditors.

In view of the above discussion, it is clear that though there is no express bar on the Banks/FIs to move under IBC, the primary intent is not to cater to their interests but to all the other classes of creditors who do not have

any remedy under SARFAESI and RDB and are at the mercy of the secured creditors. The secured creditor's only intent has been to recover their debts and they have, historically, not shown any consideration for either the revival or the debtor or the interest of any other stakeholder group. IBC provides a right to such class of creditors who either did not have a right under the earlier acts or were not able to effectively exercise that right in view of the dominant position held by the banks. Considering the fact that the IBC is to facilitate the revival of the company, letting the bankers initiate the proceedings would lead to continuous harassment of the ailing debtor at multiple forums and only contribute in its eventual downfall.

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