

SESSION 1:
UNDERSTANDING
INSOLVENCY AND
BANKRUPTCY

INSOLVENCY &
BANKRUPTCY CODE,
2016

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A. MEANING OF INSOLVENCY AND BANKRUPTCY

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- Insolvency and Bankruptcy Code, 2016 (“IBC”) came into effect with the assent of the President on 28th May, 2016. The provisions relating to **insolvency and liquidation of corporate persons came into force on December 1, 2016**, while those of **insolvency resolution and bankruptcy of personal guarantors to corporate debtors (CDs) came into effect on December 1, 2019**. Insolvency and Bankruptcy provisions for other category of **individuals are yet to be notified**.
- The aim of the Code is to protect **the interest of small investors** and at the same time make the process of doing business less cumbersome.
- The IBC does not define the terms ‘Insolvency’ and ‘Bankruptcy’ *per se*. But one can gather the meaning from the Preamble to the statute.
- IBC was enacted with an aim to consolidate and amend the laws relating to:
 - Re-organisation 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 order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India;
 - matters connected therewith or incidental thereto.
- The meaning of Insolvency and Bankruptcy can also be understood by looking at the various landmark judgments of the Hon’ble Supreme Court.

SUPREME COURT JUDGMENTS

1. **Swiss Ribbons v. Union of India [WRIT PETITION (CIVIL) NO. 37 OF 2019]**

- In this case, the constitutional validity of the Insolvency & Bankruptcy Code was challenged on grounds the classification of creditors as operational and financial is not based on an intelligible criteria, and is, therefore, violative of Article 14 of the Constitution. Along with this, Section 12A and 29A were also challenged.
- The Hon'ble Supreme Court of India while upholding the constitutional validity of the Insolvency and Bankruptcy Code, 2016 explained the rationale and object behind the Code as:

“27. 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 re-paid in full, and shareholders/investors are able to maximise 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.

28. It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation the Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors. The interests of the corporate debtor have, therefore, been bifurcated and separated from that of its promoters/those who are in management. Thus, the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests. The moratorium imposed by Section 14 is in the interest of the corporate debtor itself, thereby preserving the assets of the corporate debtor during the resolution process. The timelines within which the resolution process is to take place again protects the corporate debtor's assets from further dilution, and also protects all its creditors and workers by seeing that the resolution process goes through as fast as possible so that another management can, through its entrepreneurship skills, resuscitate the corporate debtor to achieve all these ends.”

2. Essar Steel-Arcelor Mittal Judgment [Civil Appeal No.8766-67 of 2019]

- The constitutional validity of Section 4 & 6 of the IBC was challenged along with the role of resolution professional and the committee of creditors formed under the code.
- The Hon'ble Supreme Court of India held that the role of the resolution professional is not adjudicatory but administrative. It is the commercial wisdom of the CoC to decide as to whether or not to rehabilitate the corporate debtor by accepting a particular resolution plan. The CoC may approve a resolution plan by a vote of not less than 66% (sixty-six percent) of voting share of the financial creditors, after considering its feasibility and viability.
- The Hon'ble Supreme Court of India held that time taken in legal proceedings cannot possibly harm a litigant if the Tribunal itself cannot take up the litigant's case within the requisite period for no fault of the litigant – a provision which mandatorily requires the CIRP to end by a certain date – without any exception thereto – may well be an excessive interference with a litigant's fundamental right to non-arbitrary treatment under Article 14 and therefore unreasonable restriction on a litigant's fundamental right to carry on business under Article 19(1)(g) of the Constitution of India. However, the time taken in legal proceedings is certainly an important factor which causes delay, and which has made previous statutory experiments fail.
- Therefore, it is only in exceptional cases that time can be extended, the general rule being that 330 (three hundred and thirty) days is the outer limit within which resolution of the stressed assets of the corporate debtor must take place beyond which it is to be driven into liquidation.

B. KINDS OF DEBTS AND CREDITORS

KINDS OF DEBTS AND CREDITORS

- **Who is a Creditor?**

A creditor is an entity (person or institution) that extends credit by giving another entity permission to borrow money intended to be repaid in the future.

- **What is a Debt?**

Debt is something, usually money, borrowed by one entity from another.

- **What is Claim?**

According to Section 3 of the Insolvency and Bankruptcy Code 2016 (IBC), it is *“the right to payment whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured.”*

- **Who is a Financial Creditor?**

As per Section 5(7) of the IBC, Financial Creditor is *“an entity to whom a financial debt is owed and included a person to whom such debt has been legally assigned or transferred.”* They are those whose relationship with the entity is a pure financial contract for example loan or debt security.

- **What is a Financial Debt?**

Section 5 (8) of the IBC defines Financial Debt *“to be any debt involving interest, if any, which is disbursed against the consideration for time value of money.”*

- **What is Operational Debt?**

A claim with respect to the provisions of goods or services including employment or a debt in respect to the repayment of dues arising under any law for the time being in force and payable to the authorities is defined to be an operational debt under Section 5 (21) of the IBC.

- **What is Operational Creditor?**

In accordance with Section 5(20) of the IBC, “*any person whom an operational debt is owed and included any person to whom such debt has been legally assigned or transferred*” is an operational creditor.

C. INSOLVENCY PROFESSIONALS

INSOLVENCY PROFESSIONALS

- Insolvency Professional (IP) is defined in section 3(19) of the IBC as *“a person enrolled under section 206 with an Insolvency Professional Agency (IPA) as a member and registered with the Board as an IP under section 207.”*
- No person shall render his services as an IP under this Code without being enrolled as a member of an IPA and registered with the Board. **(Section 206)**
- 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)**
- **SECTION 20 & 25:** The interim resolution professional have the duty to protect the property of the corporate debtor and manage its operations. She/ he shall have the power to raise interim finance, appoint Chartered Accountants and other legal professionals, take control of the assets of the debtor to keep the corporate debtor as a going concern.
- **SECTION 21:** After receiving all the claims against the corporate debtor, the committee of creditors shall be formed. All decisions relating to the Insolvency process shall have to be approved by 75% votes of the committee. Only the financial creditors shall form part of this committee. If a creditor is both financial and operational creditor then he shall have voting rights in proportion of the financial debt owed to him.

- **SECTION 22:** The first meeting of the COC will take place within 7 days of its constitution. The COC will appoint by 66% of votes the interim resolution professional as the Resolution Professional or replace him by another resolution professional.
- **SECTION 23:** Subject to section 27, the resolution professional shall conduct the entire corporate insolvency resolution process and manage the operations of the corporate debtor during the corporate insolvency resolution process period.
- **SECTION 24:** All meetings of the COC shall be conducted by the Resolution Professional. The notice of the meeting shall be communicated to the COC. The representatives of the operational creditors shall take part in the meeting but do not have the right to vote. A creditor may appoint a resolution professional on his behalf to represent him in the meeting.
- **SECTION 27:** If the committee of creditors wish to replace a resolution professional they can do so by a majority of 66% and propose a name of the resolution professional they choose to appoint and forward the same to the Adjudicating Authority. Then the AA shall forward the name to the board to replace the existing RP with the new one.
- **SECTION 28:** The RP cannot takes decisions relating to raising of interim finance in excess of the already decided amount, capital structure of the corporate debtor, record any change in the ownership, etc. without approval from the creditors.

- **SECTION 29:** The resolution professional shall prepare an information memorandum in such form and manner containing such relevant information as may be specified by the Board for formulating a resolution plan.
- **SECTION 30:** A resolution applicant may submit a resolution plan to the resolution professional prepared on the basis of the information memorandum. The committee of creditors may approve a resolution plan by a vote of not less than sixt-six per cent of voting share of the financial creditors. The resolution applicant may attend the meeting of the committee of creditors in which the resolution plan of the applicant is considered. The resolution professional shall submit the resolution plan as approved by the committee of creditors to the Adjudicating Authority.

**D. INSOLVENCY PROFESSIONALS – CODE
 OF CONDUCT**

INSOLVENCY PROFESSIONALS- CODE OF CONDUCT

- **Chapter III** of the **Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016** deals with **Registration of Insolvency Professionals**.
- The Eligibility, Qualification & Experience is dealt under **Regulation 4 & 5 of the Regulations of 2016 respectively**. These Regulations provides that an individual is eligible for registration as an IP if he has (a) ten years of post-membership experience as a Chartered Accountant, Company Secretary, Cost Accountant, or Advocate, or has 15 years of experience in management after a bachelor's degree, or successfully completed Graduate Insolvency Programme, (b) passed the Limited Insolvency Examination, and (c) undergone pre-registration training.
- **Regulation 7 (2) (h)** provides that an Insolvency professional “*shall abide by the Code of Conduct specified in the First Schedule to these Regulations*”
- The **First Schedule** is divided in to **10 (Ten) sub-heads**. Each sub-head talks about a different skill which is expected out of an Insolvency Professional.
- It must be noted that these code of conduct prescribes a particular set of skills which forms the pre-requisite for obtaining the due registration Certificate from IBBI.

- **POWERS & DUTIES OF AN INSOLVENCY PROFESSIONAL (Section 208)**

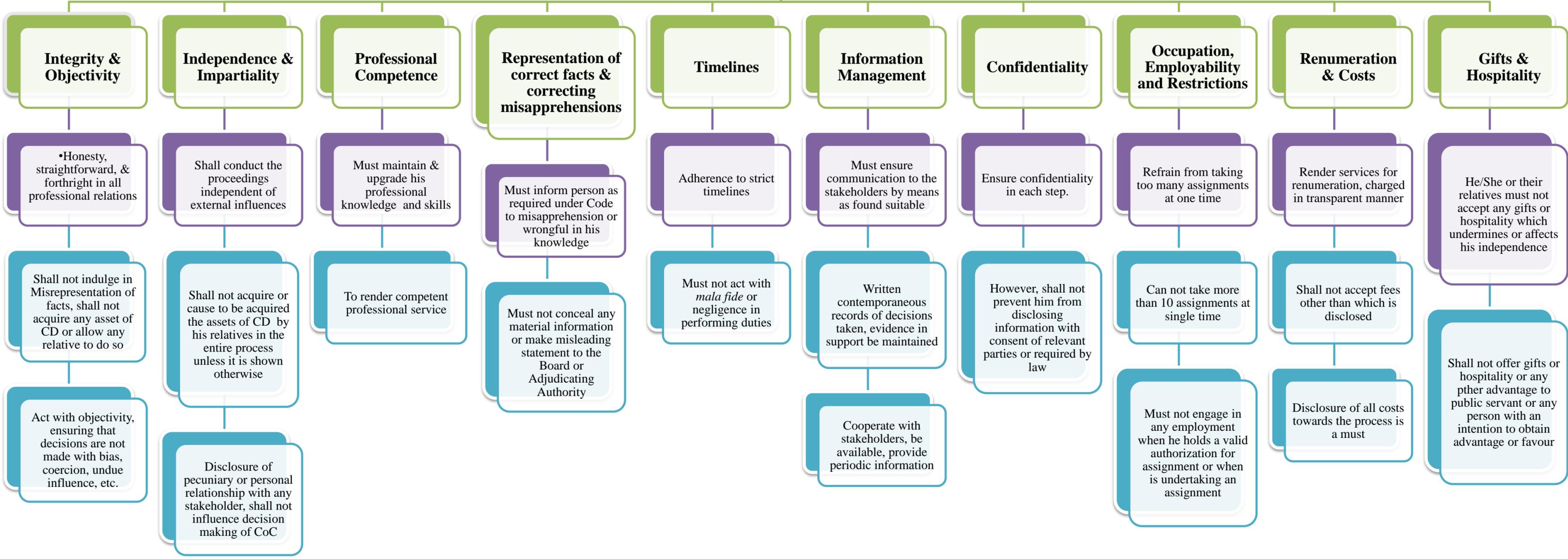
Section 208(1) provides that where any insolvency resolution, fresh start, liquidation, or bankruptcy process has been initiated, the IP's **function** is to order as required:

- (a) a fresh start process under Chapter II of Part III of the IBC;
- (b) an individual insolvency resolution process under Chapter III of Part III of the IBC;
- (c) a CIRP under Chapter II of Part II of the IBC;
- (d) an individual bankruptcy process under Chapter IV of Part III of the IBC;
- (e) the liquidation of a CD under Chapter III of Part II.

- Further, section 208(2) of the IBC stipulates that every IP shall abide by the following **code of conduct**:

- (a) exercise reasonable care and diligence while performing his/her duties;
- (b) comply with all requirements and terms and conditions specified in the bylaws of the IPA of which he/she is a member;
- (c) allow the IPA to inspect his/her records;
- (d) submit a copy of the records of every proceeding before the AA to the IBBI and the IPA of which he/she is a member;
- (e) comply with any other conditions as may be specified.

**CODE OF CONDUCT
(First Schedule)
[Under Regulation 7 (2)(h)]**



**E. INSOLVENCY REGULATOR – INSOLVENCY
 AND BANKRUPTCY BOARD OF INDIA**

Insolvency regulator Insolvency and Bankruptcy Board of India

What is Insolvency regulator?

It is a unique regulator which **regulates a profession as well as processes**. It has regulatory oversight over the Insolvency Professionals, Insolvency Professional Agencies, Insolvency Professional Entities and Information Utilities.

Section 188

This section covers Establishment and incorporation of the Board by the name of Insolvency and Bankruptcy Board of India. The Board shall be established by the Central Government. This sections makes few things clear

- 1) *Sub clause 2* – the board needs to be a body corporate and have perpetual succession and a common seal with powers subject to the provisions of the act.
- 2) *Sub clause 3* – The head office of the boards needs to be in National Capital Region as specified by the Central Government.
- 3) *Sub clause 4* – the board can establish offices in other cities of India as well.

Section 189

Focuses entirely on the Constitution of the Board and the members who are appointed by the Central Government. There is a Chairperson, three members from the Central Govt officers, one member from RBI, 5 members nominated by Central Govt out of which three would be whole-time members.

Section 190

This section speaks about when and how a member can be removed from the office. It could be due to the following reasons:

- 1) Undischarged Bankruptcy
- 2) Physically or mentally incapable
- 3) Convicted for an offence
- 4) Abused his/her power.

Section 191

This sections all the powers that lie with the chairperson. He can exercise these powers and any other powers as delegated by the Board

Section 192

This section covers meetings of the Board. The Board shall meet at such times and places and observe such rules of procedure in regard to the transaction of business at its meetings.

Section 193

Any member, who is a director of a company and who as such director has any direct or indirect pecuniary interest in any matter coming up for consideration at a meeting of the Board, shall, as soon as possible after relevant circumstances have come to his knowledge, disclose the nature of his interest at such meeting and such disclosure shall be recorded in the proceedings of the Board, and the member shall not take any part in any deliberation or decision of the Board with respect to that matter.

Section 194

This section ensures that no proceedings of the Board, officers and employees of the Board are invalid. It also takes care of vacancies. The Board may appoint other officers and employees as it considers necessary for the efficient discharge of its functions in such manner as may be specified. The salaries and other allowances are also regulated.

Section 195

As per this section, until the Board is established the Central Government can delegate any financial sector regulator to exercise the powers and functions of the Board under this code.

Section 196

This section in very detail speaks about the powers and key functions of the Board.

Powers & Functions:

- 1) Registration of insolvency Professional agencies and insolvency professionals.
- 2) Specifies minimum eligibility criteria e for regulation of insolvency agencies and professionals.
- 3) Levy fee or other charges for the registration.
- 4) Set regulation standards
- 5) Carry out inspections and investigations on these agencies and professionals.
- 6) Monitor the performance.
- 7) Call for information and records.

Section 197

In order to ensure there is efficient discharge of functions, the Board can constitute advisory and executives committee if they think is important.

Section 198

Notwithstanding anything contained in this Code, where the Board does not perform any act within the period specified under this Code, the relevant Adjudicating Authority may, for reasons to be recorded in writing, condone the delay.

Section 199

According to this section no person shall carry on its business as insolvency professional agencies under this Code and enroll insolvency professionals as its members except under and in accordance with a certificate of registration issued in this behalf by the Board.

Section 200

This section lays down the principles and ethics which the Board needs to consider while registering an insolvency professional agency.

- 1) Promoting professional development
- 2) Promoting services of competent insolvency
- 3) Promoting good professionals and ethical conduct.

Section 201

This section deals with the registration of an insolvency professional agency before the Board. It also stipulates the power of the Board to accept, reject or suspend the registration of an agency.

Section 202

Grants an agency to challenge any order made by the Board under Section 201 before the National Company Law Appellate Tribunal within a specific period of time.

Section 203

This section allows the board to set up the governing body of the insolvency agency to ensure the objectives sought to achieved under this code is taken into account.

Section 204

This section sheds light on the functions that are carried out by the insolvency professional agencies.

Section 205

Every insolvency professional agency shall make bye-laws consistent with the model bye-laws specified by the Board.

F. RESOLUTION PLAN

RESOLUTION PLAN

What is a Resolution Plan?

Section 5 (26) of the Code defines it as a plan proposed by resolution applicant for insolvency resolution of the corporate debtor as a going concern in accordance with Part II. It also includes provisions for restructuring of the Corporate Debtor, including by way of merger, amalgamation and demerger.

- **Section 29A** of the Code provides for '*persons not eligible to be resolution applicant*'. The *proviso* appended to the Section provides that any person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to nonperforming asset accounts before submission of resolution plan.
- The Submission of the Resolution Plan has to be made in accordance with **Section 30(2)** of the Code read with 'mandatory contents of resolution plan' under **Regulation 38** of the **Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016**

**G. FILINGS AND TIMELINES UNDER THE IB
CODE**

FILINGS AND TIMELINES UNDER THE IB CODE

FILINGS:

Section 7:

A person claiming to be a financial creditor has to invoke Section 7 of the IB Code for the purposes of filing an application before NCLT seeking initiation of CIR Process of the Corporate Debtor company.

Section 9:

Similarly, a person claiming to be an operational creditor has to invoke Section 9 of the IB Code for filing an application before NCLT seeking initiation of CIR Process of the Corporate Debtor company.

Section 10:

The Corporate Debtor Company itself can also seek initiation of its CIR Process by filing an application under Section 10 of the IB Code.

Section 43, 45, 50, 66:

After admission of the Application filed in the above sections leading to initiation of CIR Process of the Corporate Debtor Company, the RP appointed in the matter will undertake an audit/ inspection of the financial history of the Company. If the RP finds certain questionable transactions having been committed in the company, she/ he is duty-bound to approach the Hon'ble NCLT under Sections 43,45,50,66 of the IB Code.

Section 43 – Avoidance of preferential transactions (Look back period for related party transactions is two years; for unrelated parties the lookback period is one year from commencement of CIR Process)

Section 45 – Avoidance of undervalued transactions (Look back period for related party transactions is two years; for unrelated parties the lookback period is one year from commencement of CIR Process)

Section 50 – Avoidance of extortionate transactions (Look back period is two years for all types of transactions)

Section 66 – Fraudulent or wrongful trading (no look back period specified)

Timelines:

- The CIR Process once initiated should be concluded within 180 days. (Section 12(1))
- The period however can be extended by NCLT upon application by RP under Section 12(2) for a period not more than 90 days. (Section 12(3))
- As per the 2nd proviso to Section 12(3), the upper limit of CIR Process period including extensions and the time taken in pending legal proceedings has been capped at 330 days. However, the Hon'ble Supreme Court in Committee of Creditors of Essar *supra* has observed that NCLT can extend the period beyond the prescribed upper limit of 330 days as well in certain exceptional circumstances to further the objects of the IB Code.
- Once the period prescribed under Section 12 lapses, the Corporate Debtor Company mandatorily has to go into liquidation under Section 33 of the IB Code.

H. LIQUIDATION UNDER THE IB CODE

LIQUIDATION UNDER THE IB CODE

- Chapter III of the Code deals with the Liquidation Process. Section 33 talks about the **Initiation of Liquidation** under the Code. Under the following circumstances the Liquidation process is initiated:

When the Adjudicating Authority does not receive a resolution Plan under the specified period

Resolution Plan is rejected by the Adjudicating Authority (Section 31)

The CoC has resolved to liquidated the CD before approval of plan with 66% voting share

When the Approved Resolution plan is contravened by the Corporate Debtor

- The Appointment of Liquidator takes places under Section 34 of the Code. Regulation 3 of the IBBI (Liquidation Process) Regulations 2016 mentions the eligibility criteria for an Insolvency Professional to be appointed as liquidator.
- In the matter of *SC Sekaran vs Amit Gupta & Ors*, the NCLAT while relying upon the decision of the Supreme Court in Swiss Ribbons; directed the liquidator to sell the assets of the Corporate Debtor under the provisions of Section 230 of the Companies Act, 2013 within 90 days. However, section 230 shall be used by the liquidator under such circumstances where the business of the Corporate Debtor is viable and would be more suitable than selling the corporate debtor as a going concern. Regulation 33 empowers liquidator to sell the business as a going concern.
- Subsequently, by a further amendment, IBBI (Liquidation Process) (First Amendment) Regulations. 2018 was made to introduce the concept of “sale of the business of the corporate debtor as a going concern”. [Regulation 32(c)]. Prior to this amendment, a Liquidator had limited options to either to sell the assets as

piecemeal or slump sale but now he has the power to sell the CD as a going concern. This resultantly means that Section 53 of the Code which deals with '*Distribution of Assets*' will not take place and the assets remain in the company.

- Once appointed, the Liquidator has to make a public announcement of his recruitment under Regulation 12 in Form B. A Liquidator derives all his powers from Section 35 of the Code. The Duties of a Liquidator are also provided under Section 35 of the Code.
- The Liquidator has the power subject to Section 52, to sell the immovable and moveable property and actionable claims of the Corporate Debtor in liquidation by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels in such manner as may be specified: (29A applicable).
- Under Section 54 of the Code Dissolution of the Corporate Debtor takes place after distributing all the proceeds between the creditors as specified in Section 53 of the Code.

THANK YOU !