THE INSOLVENCY AND BANKRUPTCY CODE, 2016

LEARNING OUTCOMES

By the end of this Chapter, you will be able to:

- Know the concepts of Insolvency and Bankruptcy.
- To have understanding of important terminologies used in the Code.
- Identify the structure and applicability of the Code.
- Understand the manner and process of Corporate Insolvency Resolution Process & Fast track resolution corporate process.
- Know the process of Voluntary liquidation of corporate person.

1. INTRODUCTION

Concept of Insolvency and Bankruptcy

- The term insolvency is used for both individuals and organizations. For individuals, it is known as bankruptcy and for corporate it is called corporate insolvency. Both refer to a situation when an individual or company are not able to pay the debt in present or near future and the value of assets held by them are less than liability.

- Insolvency in this Code is regarded as a “state” where assets are insufficient to meet the liabilities. If untreated, insolvency will lead to bankruptcy for non-corporates and liquidation of corporates.
While insolvency is a situation which arises due to inability to pay off the debts due to insufficient assets, bankruptcy is a situation wherein application is made to an authority declaring insolvency and seeking to be declared as bankrupt, which will continue until discharge.

From the above it is evident that insolvency is a state and bankruptcy is a conclusion. A bankrupt would be a conclusive insolvent whereas all insolvencies will not lead to bankruptcies. Typically insolvency situations have two options – resolution and recovery or liquidation.

**Relationship between Bankruptcy, Insolvency & Liquidation**

Bankruptcy is a legal proceeding involving a person or business that is unable to repay outstanding debts. The bankruptcy process begins with a petition filed by the debtor, or by the creditors. All of
the debtor's assets are measured and evaluated, and the assets may be used to repay a portion of outstanding debt.

In lucid language, if any person or entity is unable to pay off the debts, it owes, to their creditor, on time or as and when they became due and payable, then such person or entity is regarded as “insolvent”.

**Liquidation** is the winding up of a corporation or incorporated entity. There are many entities that can initiate proceedings to cause the Liquidation, those being:-

- The Regulatory Bodies;
- The Directors of a Company;
- The Shareholders of a Company; and
- An Unpaid Creditor of a Company

In nut shell, insolvency is common to both bankruptcy and liquidation. Not being able to pay debts as and when they became due and payable are the leading cause of Liquidations and is the only way that can cause a natural person to become a bankrupt.

**Insolvency and Bankruptcy Code**

The Code seeks to provide an effective legal framework for timely resolution of insolvency and bankruptcy which would support development of credit markets and encourage entrepreneurship, and facilitate more investments leading to higher economic growth and development.

**Features of the Insolvency and Bankruptcy Code:**

The Insolvency and Bankruptcy Code, 2016 has following distinguishing features:-

(i) **Comprehensive Law:** Insolvency Code is a comprehensive law which envisages and regulates the process of insolvency and bankruptcy of all persons including corporates, partnerships, LLP’s and individuals.

(ii) **No Multiplicity of Laws:** The Code has withered away the multiple laws covering the recovery of debts and insolvency and liquidation process and presents singular platform for all the reliefs relating to recovery of debts and insolvency.

(iii) **Low Time Resolution:** The Code provides a low time resolution and defines fixed time frames for insolvency resolution of companies and individuals. The process is mandated to be completed within 180 days, extendable to maximum of 90 days. Further, for a speedier process there is provision for fast-track resolution of corporate insolvency within 90 days. If insolvency cannot be resolved, the assets of the borrowers may be sold to repay creditors.

(iv) **One Window Clearance:** It has been drafted to provide one window clearance to the applicant whereby he gets the appropriate relief at the same authority unlike the earlier position of law where in case the company is not able to revive the procedure for winding
up and liquidation has to be initiated under separate laws governed by separate authorities.

(v) **One Chain of Authority:** There is one chain of authority under the Code. It does not even allow the civil courts to interfere with the application pending before the adjudicating authority, thereby reducing the multiplicity of litigations. The National Company Law Tribunal (NCLT) will adjudicate insolvency resolution for companies. The Debt Recovery Tribunal (DRT) will adjudicate insolvency resolution for individuals.

(vi) **Priority to the interests of workman and employees:** The Code also protects the interests of workman and employees. It excludes dues payable to workmen under provident fund, pension fund and gratuity fund from the debtor’s assets during liquidation.

(vii) **New Regulatory Authority:** It provides for constitution of a new regulatory authority ‘Insolvency and Bankruptcy Board of India’ to regulate professionals, agencies and information utilities engaged in resolution of insolvencies of companies, partnership firms and individuals. The Board has already been established and started functioning.

**Objectives of the Code**

The Insolvency and Bankruptcy Code, 2016 is intended to strike the right balance of interests of all stakeholders of the business enterprise so that the corporates and other business entities enjoy availability of credit and at the same time the creditor do not have to bear the losses on account of default. The purpose of enactment of the Insolvency and Bankruptcy Code, 2016 is as follows:

(a) To consolidate and amend the laws relating to re-organization and insolvency resolution of corporate persons, partnership firms and individuals.

(b) To fix time periods for execution of the law in a time bound manner.

(c) To maximize the value of assets of interested persons.

(d) To promote entrepreneurship

(e) To increase availability of credit.

(f) To balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues.

(g) To establish an Insolvency and Bankruptcy Board of India as a regulatory body for insolvency and bankruptcy law.

**Regulatory Mechanism**

The Insolvency and Bankruptcy Code, 2016 provides a new regulatory mechanism with an institutional set-up comprising of following five pillars:-
1. **Insolvency and Bankruptcy Board of India** - The Code provides for establishment of a Regulator who will oversee these entities and to perform legislative, executive and quasi-judicial functions with respect to the Insolvency Professionals, Insolvency Professional Agencies and Information Utilities. The Insolvency and Bankruptcy Board of India was established on October 1, 2016. The head office of the Board is located at New Delhi.

   The Board is a body corporate, having perpetual succession and a common seal, with power, subject to the provisions of this Code, to acquire, hold and dispose of property, both movable and immovable, and to contract, and shall, by the said name, sue or be sued.

2. **Insolvency Professional Agencies (IPA)** - The Code provides for establishment of insolvency professionals agencies to enroll and regulate insolvency professionals as its members in accordance with the Insolvency and Bankruptcy Code 2016 and read with regulations. IPA will perform three key functions:
3. **Insolvency Professionals:** The Code provides for insolvency professionals as intermediaries who would play a key role in the efficient working of the bankruptcy process. The role of the IP encompasses a wide range of functions, which include adhering to procedure of the law, as well as accounting and finance related functions. He shall have the power and responsibility to monitor and manage the operations and assets of the enterprise.

In the resolution process, the insolvency professional verifies the claims of the creditors, constitutes a creditors committee, runs the debtor's business during the moratorium period and helps the creditors in reaching a consensus for a revival plan. In liquidation, the insolvency professional acts as a liquidator and bankruptcy trustee.

An Insolvency Professional if appointed as a Resolution Professional shall act as a as a neutral trustee of the assets of the organization.

Every insolvency professional shall abide by the following code of conduct:—

- to take reasonable care and diligence while performing his duties;
- to comply with all requirements and terms and conditions specified in the bye-laws of the insolvency professional agency of which he is a member;
- to allow the insolvency professional agency to inspect his records;
- to submit a copy of the records of every proceeding before the Adjudicating Authority to the Board as well as to the insolvency professional agency of which he is a member; and
• to perform his functions in such manner and subject to such conditions as may be specified.

4. **Information Utilities** – The Code envisages creation of information utility to collect, collate, authenticate and disseminate financial information of debtors in centralized electronic databases, at all times.

The Code requires creditors to provide financial information of debtors to multiple utilities on an ongoing basis. Such information would be available to creditors, resolution professionals, liquidators and other stakeholders in insolvency and bankruptcy proceedings. The purpose of this is to remove information asymmetry and dependency on the debtor’s management for critical information that is needed to swiftly resolve insolvency.

**Obligations of Information Utility:**

An information utility shall provide such services as may be specified including core services to any person if such person complies with the terms and conditions as may be specified by regulations.

For the purposes of providing core services to any person, every information utility shall—

(a) create and store financial information in a universally accessible format;
(b) accept electronic submissions of financial information from persons who are under obligations to submit financial information
(c) accept, in specified form and manner, electronic submissions of financial information from persons who intend to submit such information;
(d) meet such minimum service quality standards as may be specified by regulations;
(e) get the information received from various persons authenticated by all concerned parties before storing such information;
(f) provide access to the financial information stored by it to any person who intends to access such information in such manner as may be specified by regulations;
(g) publish such statistical information as may be specified by regulations;
(h) have inter-operatability with other information utilities.

5. **Adjudicating Authority** - The Adjudicating Authority for corporate insolvency and liquidation is the National Company Law Tribunal (NCLT). Appeals against NCLT orders shall lie with National Company Law Appellate Tribunal (NCLAT) and thereafter to the Supreme Court of India.

The Code has created one chain of authority for adjudication under the Code. Civil Courts have been prohibited to interfere in the matters related with application pending before the Adjudicating Authority. No injunction shall be granted by any Court, Tribunal or Authority in respect of any action taken by the NCLT.
For individuals and other persons, the Adjudicating Authority is the Debt Recovery Tribunal (DRT), appeals lie to the Debt Recovery Appellate Tribunal (DRAT) and thereafter to the Supreme Court.

Example: XY & Co., a firm applied to NCLT to be declared insolvent as the firm is not able to pay off debts to his creditors in present and in coming future. State whether the act of the firm is valid as to the filing of application in terms of jurisdiction.

Answer: No, as per the Code, individual & firms in relation to Insolvency matters shall apply to the DRT not to NCLT. Here there is violation of jurisdiction in relation to adjudicating authority.

Structure of the Code

The Code is structured into 5 parts comprising of 255 sections and 11 Schedules. Each part deals with a distinct aspect of the insolvency resolution process. Part II, Chapters I and II are of particular significance for the students from examinations perspective and are discussed in detail hereunder:

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**Extent and Commencement of the Code:**

As per section 1 of the Insolvency and Bankruptcy Code, it extends to the whole of India except Part III (Insolvency Resolution and Bankruptcy for Individuals and Partnership Firm) which excludes the state of Jammu and Kashmir.

This Code came into enforcement on 28th May 2016, however, the Central Government appointed different dates for different provisions of this Code and any reference in any such provision to the commencement of this Code shall be construed as a reference to the commencement of that provision.

**Significant amendments:** The Code has been first amended by the Insolvency and Bankruptcy (Amendment) Ordinance, 2017, passed on November 23, 2017. This Ordinance became an Act on January 18, 2018. It was known as the Insolvency and Bankruptcy Code (Amendment) Act, 2018. It was made applicable from November 23, 2017.

The second amendment was made vide the **Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018, on June 6, 2018.** Further, the said ordinance, in the form of the Insolvency and Bankruptcy (Second Amendment) Bill received the assent of the President on the 17th August, 2018 and thus the **Insolvency and Bankruptcy Code (Second Amendment) Act, 2018** was promulgated.
Applicability of the Code

The provisions of the Code shall apply for insolvency, liquidation, voluntary liquidation or bankruptcy of the following entities:-

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

(b) Any other company governed by any special act for the time being in force, except in so far as the said provision is inconsistent with the provisions of such Special Act.

(c) Any Limited Liability Partnership under the LLP Act 2008.

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

(e) personal guarantors to corporate debtors;

(f) partnership firms and proprietorship firms; and

(g) individuals, other than persons referred to in clause (e),

Non-applicability of the Code: The Code is not applicable to corporates in finance sector. Section 3(7) of Insolvency & Bankruptcy Code, 2016 states that "Corporate person" shall not include any financial service provider.

Thus, the Code does not cover Bank, Financial Institutions, Insurance Company, Asset Reconstruction Company, Mutual Funds, Collective Investment Schemes or Pension Funds.

However, NBFC is engaged in various activities and hence NBFC is not ipso facto excluded from definition of 'corporate person' under section 3(7) of Insolvency Code. NBFC can be a 'corporate debtor' [Jindal Saxena Financial Services v. Mayfair Capital (2018)]

"Financial service provider" means a person engaged in the business of providing financial services in terms of authorisation issued or registration granted by a financial sector regulator [section 3(17)].
However, section 227 of the Code, which was notified on 1-5-2018 provided that, Central Government can notify financial service providers for purpose of insolvency and liquidation proceedings, which may be conducted under the Insolvency & Bankruptcy Code, in consultation with appropriate financial sector regulator.

2. IMPORTANT DEFINITIONS [SECTIONS 3 AND 5]

(1) **Claim** means a right to payment or right to remedy for breach of contract if such breach gives rise to a right to payment whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured. [Section 3(6)]

(2) **Corporate Person** means

(a) a company as defined under section 2(20) of the Companies Act, 2013;

(b) a Limited Liability Partnership as defined in 2(1)(n) of Limited Liability Act, 2008; or,

(c) any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider. [Section 3(7)]

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

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

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

(6) **Default** means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be. [Section 3(12)]

(7) **Financial information**, in relation to a person, means one or more of the following categories of information, namely:—

(a) records of the debt of the person;

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

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

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

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

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

(8) **A person** includes:

- an individual
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- a Hindu Undivided Family
- a company
- a trust
- a partnership
- A limited liability partnership, and
- any other entity established under a Statute.

And includes a person resident outside India [Section 3(23)]

(9) **Secured creditor** means a creditor in favour of whom security interest is created; [Section 3(30)]

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

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

(12) **Transfer** includes sale, purchase, exchange, mortgage, pledge, gift, loan or any other form of transfer of right, title, possession or lien. In case of property - transfer of property means transfer of any property. [Section 3(34)]

(13) **Transfer of property** means transfer of any property and includes a transfer of any interest in the property and creation of any charge upon such property; [Section 3(35)]

(14) **Adjudicating Authority**, for the purposes of this Part II (Insolvency Resolution and Liquidation for corporate persons), means National Company Law Tribunal constituted under section 408 of the Companies Act, 2013 [Section 5(1)]

(15) **Corporate applicant** means—

(a) corporate debtor; or

(b) a member or partner of the corporate debtor who is authorised to make an application for the corporate insolvency resolution process under the constitutional document of the corporate debtor; or

(c) an individual who is in charge of managing the operations and resources of the corporate debtor; or
(d) a person who has the control and supervision over the financial affairs of the corporate debtor; [Section 5(5)]

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

(17) Dispute includes a suit or arbitration proceedings relating to—

(a) the existence of the amount of debt;

(b) the quality of goods or service; or

(c) the breach of a representation or warranty; [Section 5(6)]

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

(19) Financial debt means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes—

(a) money borrowed against the payment of interest;

(b) any amount raised by acceptance under any acceptance credit facility or its dematerialised equivalent;

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

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

(e) receivables sold or discounted other than any receivables sold on non-recourse basis;

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

[Explanation.—For the purposes of this sub-clause,—

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

(ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]

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

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

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

(20) **Financial position**, in relation to any person, means the financial information of a person as on a certain date; [Section 5(9)]

(21) **Information memorandum** means a memorandum prepared by resolution professional under section 29(1); [Section 5(10)]

(22) **Initiation date** means the date on which a financial creditor, corporate applicant or operational creditor, as the case may be, makes an application to the Adjudicating Authority for initiating corporate insolvency resolution process; [Section 5(11)]

Provided that where the interim resolution professional is not appointed in the order admitting application under section 7, 9 or section 10, the insolvency commencement date shall be the date on which such interim resolution professional is appointed by the Adjudicating Authority;

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

Provided that where the interim resolution professional is not appointed in the order admitting application under section 7, 9 or section 10, the insolvency commencement date shall be the date on which such interim resolution professional is appointed by the Adjudicating Authority;

(24) **Insolvency resolution process period** means the period of one hundred and eighty days beginning from the insolvency commencement date and ending on one hundred and eightieth day; [Section 5(14)]

(25) **Liquidation commencement date** means the date on which proceedings for liquidation commence in accordance with section 33 or section 59, as the case may be; [Section 5(17)]

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

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

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

(29) **Related party**, in relation to a corporate debtor, means—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

   (iv) provision of essential technical information to, or from, the corporate debtor; [Section 5(24)]
"Related party", in relation to an individual, means—

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

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

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

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

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

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

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

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

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

*Explanation*—For the purposes of this clause,—

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

(i) members of a Hindu Undivided Family,

(ii) husband,

(iii) wife,

(iv) father,

(v) mother,

(vi) son,

(vii) daughter,

(viii) son’s daughter and son,
(ix) daughter's daughter and son,
(x) grandson's daughter and son,
(xi) granddaughter’s daughter and son,
(xii) brother,
(xiii) sister,
(xiv) brother’s son and daughter,
(xv) sister's son and daughter,
(xvi) father’s father and mother,
(xvii) mother’s father and mother,
(xviii) father’s brother and sister,
(xix) mother’s brother and sister, and

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

(31) **Resolution applicant** means a person, who individually or jointly with any other person, submits a resolution plan to the resolution professional pursuant to the invitation made under clause (h) of sub-section (2) of section 25; [Section 5(25)]

(32) **Resolution plan** means a plan proposed by resolution applicant for insolvency resolution of the corporate debtor as a going concern in accordance with Part II; [Section 5(26)]

(33) **Resolution professional**, for the purposes of this Part, means an insolvency professional appointed to conduct the corporate insolvency resolution process and includes an interim resolution professional; [Section 5(27)]

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

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**3. CORPORATE INSOLVENCY RESOLUTION PROCESS**

**[SECTIONS 4, 6-32]**

Provisions related to Insolvency Resolution and Liquidation process for Corporate Persons are covered in Part II of the Code.

Corporate Insolvency Resolution is a process during which financial creditors assess whether the debtor’s business is viable to continue and the options for its rescue and revival, if any. If the insolvency resolution process fails or financial creditors decide that the business of debtor cannot
be carried on in a profitable manner and it should be wound up, the debtor will undergo liquidation process and the assets of the debtor shall be realized and distributed by the liquidator.

The Insolvency Resolution Process provides a collective mechanism to lenders to deal with the overall distressed position of a corporate debtor. This is a significant departure from the existing legal framework under which the primary onus to initiate a re-organization process lies with the debtor, and lenders may pursue distinct actions for recovery, security enforcement and debt restructuring.

The Code creates time-bound processes for insolvency resolution of companies and individuals. These processes will be completed within 180 days, extendable by 90 days. It also provides for fast-track resolution of corporate insolvency within 90 days. If insolvency cannot be resolved, the company goes into liquidation under which, the assets of the borrowers may be sold to repay creditors.

i. Process Flow

A comprehensive process that covers the gamut of insolvency resolution framework for Corporates and includes processes relating to:-

- Filing of application before NCLT
- Adjudication: Admission or Rejection of application
- Moratorium and Public Announcement
- Appointment of Interim Resolution Professional
- Formation of the Committee of Creditors
- Preparation and approval of the Resolution Plan
- Consequences of non-submission of the Resolution Plan
ii. Application to National Company Law Tribunal

Commitment of Default

The process of insolvency is triggered by occurrence of default. Default occurs when a whole or any part of the amount of debt has become due and payable and is not paid by the debtor. The provisions relating to the insolvency and liquidation of corporate debtors shall be applicable only when the amount of the default is one lakh rupees or more. However, the Central Government may, by notification, specify the minimum amount of default of higher value which shall not be more than one crore rupees. [Section 4]

Filing of application before NCLT

The corporate insolvency process may be initiated against any defaulting corporate debtor by making an application for corporate insolvency resolution. The application may be made by:-

(a) Financial creditor
(b) Operational creditor
(c) Corporate debtor

(A) Filing of an application by a financial creditor: A financial creditor either itself or jointly with other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government, may file an application before the Adjudicating Authority (National Company Law Tribunal) for initiating corporate insolvency resolution process against a corporate debtor who commits a default in payment of its dues.

Vide Notification S.O.1091(E) dated 27th February, 2019, the Central government hereby notifies following persons who may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority, on behalf of the Financial Creditor:-

(i) a guardian;
(ii) an executor or administrator of an estate of a financial creditor;
(iii) a trustee (including a debenture trustee); and
(iv) a person duly authorized by the Board of Directors of a Company.

• Evidence in support of default and name of the Interim resolution professional by financial creditor: The Financial Creditor shall along with the application give following evidence in support of the default committed by the corporate debtor-

(a) record of the default recorded with the information utility or such other record or evidence of default as may be specified;
(b) the name of the resolution professional proposed to act as an interim resolution professional; and
(c) any other information as may be specified by the Board.
(B) Filing of an application by an operational creditor: An operational creditor shall on the occurrence of default, shall:

♦ first send a demand notice and a copy of invoice to the corporate debtor.

♦ The corporate debtor shall within a period of ten days of receipt of demand notice or copy of invoice intimate to the operational creditor about the existence of a dispute, if there is any and record of pendency of any suit or arbitration proceedings.

♦ He shall also provide the details of payment of unpaid operational debt in case the debt has or is being paid.

♦ After the expiry of ten days, if the operational creditor does not receive his payment or the confirmation of a dispute that existed even before the demand notice was sent, he may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.

♦ The operational creditor shall, along with the application furnish—

(a) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;

(b) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;

(c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available;

(d) a copy of any record with information utility confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available; and

(e) any other proof confirming that there is no payment of an unpaid operational debt by the corporate debtor or such other information, as may be prescribed.

♦ An operational creditor initiating a corporate insolvency resolution process under this section, may propose a resolution professional to act as an interim resolution professional.

(C) Filing of an application by corporate applicant: Where a corporate debtor has committed a default, a corporate applicant thereof may file an application for initiating corporate insolvency resolution process with the Adjudicating Authority. The corporate applicant shall along with the application furnish the particulars related to the information relating to books of account and other documents, the name of a resolution professional proposed to be appointed as interim resolution professional, and the special resolution passed by shareholders of the corporate debtor or the resolution passed by at least three-fourth of the total number of partners of the corporate debtor, as the case may be, approving filing of the application.
Persons not entitled to initiate insolvency process:

<table>
<thead>
<tr>
<th>persons</th>
<th>In the circumstances</th>
<th>Can/cannot Initiate Insolvency process</th>
</tr>
</thead>
<tbody>
<tr>
<td>Corporate debtor, who</td>
<td>• already undergoing an insolvency resolution process</td>
<td>• Cannot initiate Insolvency process</td>
</tr>
<tr>
<td></td>
<td>• having completed corporate insolvency resolution process 12 months preceding the</td>
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<td>date of making of the application</td>
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<td>• who has violated any of the terms of resolution plan which was approved 12 months</td>
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<td>before the date of making of an application;</td>
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<td>• in respect of whom a liquidation order has been made</td>
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<tr>
<td>financial creditor, who</td>
<td>has violated any of the terms of resolution plan which was approved 12 months before</td>
<td>Cannot initiate Insolvency process</td>
</tr>
<tr>
<td></td>
<td>the date of making of an application;</td>
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</table>

Here, a corporate debtor includes a corporate applicant in respect of such corporate debtor. [Section 11]

iii. **Adjudication: Admission or Rejection of Application**

The Adjudicating Authority may either accept or reject the application within fourteen days of receipt of application. However, applicant should be allowed to rectify the defect within seven days of receipt of notice of such rejection.

The insolvency resolution process shall commence from the date of admission of application by the Adjudicating Authority. It is referred to as the Corporate Insolvency Resolution Date.
iv. Moratorium

With the admission of an insolvency application and commencement of Corporate Insolvency Resolution process, the Adjudicating authority will declare moratorium period during which no action can be taken against the company or the assets of the company to keep the Company as a going concern.

A calm period for 180 days is declared, during which all suits and legal proceedings etc. against the Corporate Debtor are held in abeyance to give time to the entity to resolve its status. It is called the Moratorium Period. [Section 14]

Section 14 of the Code provides that the following acts shall be prohibited during the moratorium period:

(a) The institution of suits or continuation of any pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the SARFAESI Act, 2002

(d) The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor. [Section 14]
Exemptions: The following act shall not be prohibited during moratorium:

1. The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

2. such transaction as may be notified by the Central Government in consultation with any financial regulator;

3. a surety in a contract of guarantee to a corporate debtor.

Date of effect of order: The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process.

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under section 31(1) or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

Example: After commencement of Corporate Insolvency Resolution, NCLT declared Moratorium against the corporate debtor. Within a month of declaration, corporate debtor disposed of his property. State validity of the act of corporate debtor.

Answer: As per section 14 of the Code, any transaction/disposal/ of any assets of Corporate Debtor during the moratorium period which is 180 days from date of commencement of corporate insolvency resolution, is prohibited. So such an act of corporate debtor is not valid.

v. Appointment, Term and Powers of Interim Resolution Professional (IRP)

Interim Resolution Professional is the Insolvency Professional appointed by Adjudicating Authority to manage the affairs of Corporate Debtor from the date of such appointment till the date of appointment of Resolution Professional (the other Insolvency Professional) by Committee of Creditors.

Appointment of IRP: Adjudicating authority shall appoint an Interim Resolution Professional within 14 days from the commencement date. Section16 of the Code lays down the procedure for appointment of an Interim Resolution Professional.

In case of application filed by FC and CD: Where the application for corporate insolvency resolution process is made by a financial creditor(FC) or the corporate debtor (CD), the resolution professional as proposed in the application shall be appointed as the interim resolution professional, if no disciplinary proceedings are pending against him.

In case of application filed by OC: Where the application for corporate insolvency resolution process is made by an operational creditor with the following situations:

(a) Where no proposal for an interim resolution professional is made: The Adjudicating Authority shall make a reference to the Board for the recommendation of an insolvency professional who may act as an interim resolution professional.

The Board shall recommend the name of an insolvency professional to the Adjudicating
Authority against whom no disciplinary proceedings are pending, within ten days of the receipt of a reference from the Adjudicating Authority.

(b) **Where a proposal for an interim resolution professional is made:** the proposed resolution professional shall be appointed as the interim resolution professional, if no disciplinary proceedings are pending against him.

**Period of appointment of IRP:** The term of the interim resolution professional shall continue from his appointment till the date of appointment of the resolution professional by CoC in first meeting of CoC under section 22 of the Insolvency & Bankruptcy Code, 2016.

Insolvency Professional shall make a public announcement of initiation of corporate insolvency resolution process in Form A immediately within three days from the date of his appointment as an Interim Resolution professional.

**Powers of IRP:** As per Section 17 of the Code, the interim resolution professional shall have following powers:-

(a) **Management of Affairs:** The management of the affairs of the corporate debtor shall vest in the interim resolution professional from the date of his appointment.

(b) **Exercise of Power of BoD/ partners:** The powers of the board of directors or the partners of the corporate debtor, as the case may be, shall stand suspended and be exercised by the interim resolution professional.

(c) **Reporting of officers/managers:** The officers and managers of the corporate debtor shall report to the interim resolution professional and provide access to such documents and records of the corporate debtor as may be required by the interim resolution professional.

(d) **Instructions to financial institutions:** The financial institutions maintaining accounts of the corporate debtor shall act on the instructions of the interim resolution professional in relation to such accounts and furnish all information relating to the corporate debtor available with them to the interim resolution professional.

**Duties of IRP:** As per section 18 of the IBC, Interim Resolution professional shall perform the following duties:

1. Collect all information relating to the assets, finances and operations of the corporate debtor.
2. receive and collate all the claims submitted by creditors.
3. Constitute a committee of creditors.
4. Monitor the assets of the corporate debtor.
5. File information collected with the information utility.
6. Take control and custody of any asset over which the corporate debtor has ownership rights.
7. To perform such other duties as may be specified by the Board.
For the purposes of this section, the term "assets" shall not include the following, namely:

(a) assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment;
(b) assets of any Indian or foreign subsidiary of the corporate debtor; and
(c) such other assets as may be notified by the Central Government in consultation with any financial sector regulator.

vi Appointment of Resolution Professional (RP)

As per section 22 of the Code, the first meeting of the committee of creditors shall be held within seven days of the constitution of the committee of creditors.

Committee of Creditors in its first Meeting by majority (not less than 66% of voting shares) appoint Interim Resolution Professional or any other Insolvency Professional to act as Resolution Professional. In case CoC resolved to appoint any other Insolvency Professional to act as an RP, it shall file an application before the Adjudicating Authority for the appointment of the proposed Resolution Professional.

If the Board does not confirm the name of the proposed resolution professional within ten days of the receipt of the name of the proposed resolution professional, the Adjudicating Authority shall direct the interim resolution professional to continue as the resolution professional until such time as the Board confirms the Appointment of the proposed resolution professional.

Duties of a resolution professional: It shall be the duty of the Resolution Professional to preserve and protect the assets of the corporate debtor including the continued business operations of the corporate debtor. (section 25)

Powers of a resolution professional: Section 25(2) of the Code states that the Resolution Professional so appointed can take following actions:

1. Take custody and control of all the assets of the corporate debtor.
2. Represent and act on behalf of the corporate debtor with third parties.
3. Raise interim finances subject to the approval of the committee of creditors.
4. Appoint accountants, legal or other professionals.
5. Maintain an updated list of claims.
6. Convene and attend all meetings of the committee of creditors.
7. Prepare the information memorandum.
8. Invite prospective lenders, investors, and any other persons to put forwarder solution plans.
9. present all resolution plans at the meetings of the committee of creditors.
10. file application for avoidance of transactions.
Eligibility of an insolvency Professional to be appointed as a Resolution Professional

As per Regulation 3 of Insolvency and Bankruptcy (Insolvency Resolution process for corporate persons) Regulation, 2016, an insolvency professional shall be eligible for appointment as a resolution professional for a corporate insolvency process if he and all partners and directors of the insolvency professional entity of which he is partner or director are independent of the corporate debtor:

(a) He is eligible to be appointed as an independent director on the board of the corporate debtor under section 149 of the Companies Act, 2013, where the corporate debtor is a company.

(b) He is not a related party of the corporate debtor.

(c) He is not an employee or proprietor or a partner of a firm of auditors or secretarial auditors in practice or cost auditors of the corporate debtor in the last three financial years.

(d) He is not an employee or proprietor or a partner of a legal or consulting firm that has or had any transaction with the corporate debtor amounting to five per cent or more of the gross turnover of such firm in the last three financial years.

Fees of Resolution Professional

As per Section 5(13) of the Code, the fees payable to any person acting as a resolution professional and any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern shall be included in the insolvency resolution process costs. It shall have priority over other costs in the event of winding up of the corporate debtor.

Replacement of Resolution Professional

- If a debtor or a creditor is of the opinion that the resolution professional appointed is required to be replaced, he may apply to the Adjudicating Authority for replacement of such professional.

- The Adjudicating Authority within seven days of receipt of the application may make reference to the Board for Replacement of Resolution Professional.

- As per Section 27 of the Code, The committee of creditors may, at a meeting, by a vote of sixty-six per cent of voting shares, resolve to replace the resolution professional appointed under section 22 with another resolution professional, subject to a written consent from the proposed resolution professional in the specified form.

- The Committee of Creditors shall forward the name of the new proposed Insolvency Professional to the Adjudicating Authority, and

- After the confirmation of the proposed insolvency resolution professional by the Board he shall be appointed in the same manner as laid down in Section 16 which deals with the Appointment of IRP.
**Example:** Mr. Z was continuing as Interim resolution professional (IRP) in XY company. The committee of creditors by majority vote of financial creditors proposed to appoint Mr. Final as Resolution professional (RP) of the XY & Co. The said proposal was confirmed by the Board after the 10 days. State whether Mr. Final is appointed as Resolution professional.

**Answer:** No, as per the Code, if Board does not confirm the proposed name as RP within 10 days of receipt of proposal, the Adjudicating authority shall direct IRP to continue as RP for such time as the Board would have confirmed for the appointment of Proposed RP.

**vii Public Announcement**

Insolvency Professional shall make a public announcement of initiation of corporate insolvency resolution process in Form A immediately within three days from the date of his appointment as an Interim Resolution professional.

As per Section 15 of the Code, public announcement shall include the following:

- (a) name and address of the corporate debtor under the CIRP;
- (b) name of the authority with which the corporate debtor is incorporated / registered;
- (c) the last date for submission of claims, as may be specified;
- (d) details of the interim resolution professional vested with the management of the corporate debtor and be responsible for receiving claims;
- (e) penalties for false or misleading claims; and
- (f) the date on which the CIRP shall close, which shall be the one hundred and eightieth day from the date of the admission of the application under sections 7, 9 or section 10, as the case may be.

The expenses of public announcement shall be borne by the applicant which may be reimbursed by the Committee of Creditors, to the extent it ratifies them.

**viii Committee of Creditors**

After the collation of all claims received against the corporate debtor and determination of the financial position of the corporate debtor, the interim resolution professional shall constitute a committee of creditors.

The composition of the committee shall be as follows:

1. **Where Financial Creditors exist:** The Committee of creditors shall comprise of all financial creditors of a corporate debtor. The Resolution Professional shall identify the financial creditors and constitutes a creditors committee. The resolution professional shall conduct all the meetings of the Committee of Creditors.

After the constitution of committee of creditors, the interim resolution professional is required to file a report certifying the constitution of the committee to the Adjudicating Authority. The
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report shall be filed on or before the expiry of thirty days from the date of appointment of the interim resolution professional.

2. **Where Financial Creditors don’t exist:** As per Regulation 16 of the Insolvency and Bankruptcy (Insolvency Resolution) Regulations, 2016, where the corporate debtor has no financial debt or where all financial creditors are related parties of the corporate debtor, the committee shall be formed comprising of following members:-

   (a) 18 largest operational creditors by value.
   (b) 1 representative elected by all workmen
   (c) 1 representative elected by all employees.

Where the number of operational creditors is less than 18, the committee shall include all such operational creditors.

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**Exception:** Provided that a financial creditor or the authorised representative of the financial creditor referred to in section 21 (6) or section 21(6A) or section 24(5), if it is a related party of the corporate debtor, shall not have any right of representation, participation or voting in a meeting of the committee of creditors:

**Provided further** that the first proviso shall not apply to a financial creditor, regulated by a financial sector regulator, if it is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares, prior to the insolvency commencement date.

**Where a person is both FC and OC:** Where any person is a financial creditor (FC) as well as an operational creditor (OC),

   (a) such person shall be a financial creditor to the extent of the financial debt owed by the corporate debtor, and shall be included in the committee of creditors, with voting share proportionate to the extent of financial debts owed to such creditor;
   (b) such person shall be considered to be an operational creditor to the extent of the operational debt owed by the corporate debtor to such creditor.
In case of Joint financial creditors: Where the corporate debtor owes financial debts to two or more financial creditors as part of a consortium or agreement, each such financial creditor shall be part of the committee of creditors and their voting share shall be determined on the basis of the financial debts owed to them.

Where the terms of the **financial debt extended as part of a consortium arrangement** or syndicated facility provide for a single trustee or agent to act for all financial creditors, each financial creditor may-

(a) authorise the trustee or agent to act on his behalf in the committee of creditors to the extent of his voting share;

(b) represent himself in the committee of creditors to the extent of his voting share;

(c) appoint an insolvency professional (other than the resolution professional) at his own cost to represent himself in the committee of creditors to the extent of his voting share; or

(d) exercise his right to vote to the extent of his voting share with one or more financial creditors jointly or severally. [Section 21(6)]

Nature of the financial debt in case of joint financial creditors: Section 21(6A) provides that where a financial debt—

(a) is in the form of securities or deposits and the terms of the financial debt provide for appointment of a trustee or agent to act as authorised representative for all the financial creditors, such trustee or agent shall act on behalf of such financial creditors;

(b) is owed to a class of creditors exceeding the number as may be specified, other than the creditors covered under section 21(6)(a), the interim resolution professional shall make an application to the Adjudicating Authority along with the list of all financial creditors, containing the name of an insolvency professional, other than the interim resolution professional, to act as their authorised representative who shall be appointed by the Adjudicating Authority prior to the first meeting of the committee of creditors;

(c) is represented by a guardian, executor or administrator, such person shall act as authorised representative on behalf of such financial creditors, and such authorised representative under clause (a) or clause (b) or clause (c) shall attend the meetings of the committee of creditors, and vote on behalf of each financial creditor to the extent of his voting share.

Remuneration to these authorised representatives: Section 21(6B) provides of the remuneration payable to the authorised representative—

(i) under clauses (a) and (c) of sub-section (6A), if any, shall be as per the terms of the financial debt or the relevant documentation; and

(ii) under clause (b) of sub-section (6A) shall be as specified which shall form part of the insolvency resolution process costs.
Voting in the Meeting

The Board may specify the manner of voting and the determining of the voting share in respect of financial debts covered under sub-sections (6) and (6A). All the decisions of the committee of creditors shall be taken by vote of **minimum fifty one percent of the voting share of the financial creditors**. The voting share is determined based on the value of the debt of the creditor in proportion to the total debt.

Where a corporate debtor does not have any financial creditors, the committee of creditors shall be constituted and comprise of such persons to exercise such functions in such manner as may be specified by the Board.

**Conduct of Meeting of committee of creditors** : All meetings of the committee of creditors shall be conducted by the resolution professional.

**Notice of the Meeting** : The resolution professional shall give notice of each meeting of the committee of creditors to:

(a) Members of Committee of creditors, including the authorised representatives referred to in sub-sections (6) and (6A) of section 21 and sub-section (5).

(b) Members of the suspended Board of Directors or the partners of the corporate persons, as the case may be;

(c) Operational creditors or their representatives if the amount of their aggregate dues is not less than ten per cent. of the debt.

The directors, partners and operational creditor /one representative of operational creditors do not have right to vote in the meeting of Committee of Creditors, however, they may attend the meetings of Committee of Creditors.

Any creditor who is a member of the committee of creditors may appoint an insolvency professional other than the resolution professional to represent such creditor in a meeting of the committee of creditors:

Further, as defined in section 5(24) of the Code, a Related Party to whom a Corporate Debtor owes a financial debt shall not have any right of Representation, Participation or Voting in a meeting of the Committee of Creditors.

**Quorum for the Meeting**

- A meeting of committee of creditors shall quorate if members of the committee of creditors representing at least thirty three percent of the voting rights are present either in person or by video/audio means.

- If the requisite quorum for committee of creditors is not fulfilled the meeting cannot be held and the meeting shall automatically stand adjourned at the same time and place on the next day.
The adjourned meeting shall quorate with the members of the committee attending the meeting.

**Example:** Committee of creditors approved the resolution plan with respect to the management of affairs of the company by more than 50% of voting share of the financial creditors. State whether decision given on the resolution plan is binding on the corporate debtors and all its creditors?

**Answer:** As per the Code, the resolution plan shall be approved by the committee of creditors by vote of not less than 51% of voting share of the financial creditors. Therefore Resolution plan here was passed by majority, and so was binding on the corporate debtors and all its creditors.

**ix Resolution Plan (Section 22-31)**

A resolution plan is a proposal agreed to by the Debtors and Creditors of an entity in a collective mechanism to propose a time bound solution to resolve the situation of insolvency.

**Formulation of Resolution Plan (Section 28)**

- The Resolution Professional shall prepare an Information Memorandum which shall contain information for preparing resolution plan.

- Resolution Professional shall provide access of the following to a Resolution applicant in order to prepare the Resolution Plan:
  
  o Financial position of corporate debtor
  
  o Information required by applicant for resolution plan
  
  o Other matters pertaining to corporate debtor

- Resolution Professional shall examine the Resolution Plan and submit the same to Committee of Creditors for its approval.

**Persons not eligible to be resolution applicant. [Section 29A]** - A person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly or in concert with such person—

(a) is an undischarged insolvent;

(b) is a wilful defaulter in accordance with the guidelines of the Reserve Bank of India

(c) at the time of submission of the resolution plan has an account, or an account of a corporate debtor under the management /control of such person / of whom such person is a promoter, classified as non-performing asset and at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor.

Provided further that nothing in this clause shall apply to a resolution applicant where such applicant is a financial entity and is not a related party to the corporate debtor.
(d) has been convicted for any offence punishable with imprisonment –
   (i) for two years or more under any Act specified under the Twelfth Schedule; or
   (ii) for seven years or more under any law for the time being in force:

Provided that this clause shall not apply to a person after the expiry of a period of two years from the date of his release from imprisonment:

Provided further that this clause shall not apply in relation to a connected person.

(e) is disqualified to act as a director under the Companies Act, 2013. Provided that this clause shall not apply in relation to a connected person.

(f) is prohibited by the Securities and Exchange Board of India from trading in securities or accessing the securities markets;

(g) has been a promoter or in the management or control of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place and in respect of which an order has been made by the Adjudicating Authority.

Provided that this clause shall not apply if a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place prior to the acquisition of the corporate debtor by the resolution applicant pursuant to a resolution plan approved or pursuant to a scheme or plan approved by a financial sector regulator or a court, and such resolution applicant has not otherwise contributed to the preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction.

(h) has executed a guarantee in favour of a creditor in respect of a corporate debtor against which an application for insolvency resolution made by such creditor has been admitted under this Code and such guarantee has been invoked by the creditor and remains unpaid in full or part;

(i) is subject to any disability, corresponding to clauses (a) to (h), under any law in a jurisdiction outside India; or

(j) has a connected person not eligible under clauses (a) to (i).

**Submission of Resolution Plan**

- A resolution applicant may submit a resolution plan along with an affidavit stating that he is eligible under section 29A to the resolution professional prepared on the basis of the information memorandum.

- The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan –
  
  (a) provides for the payment of insolvency resolution process costs in a manner in priority to the payment of other debts of the corporate debtor.
(b) provides for the payment of the debts of operational creditors

(c) provides for the management of the affairs of the Corporate debtor after approval of the resolution plan

(d) implementation and supervision of the resolution plan;

(e) does not contravene any of the provisions of the law. For this, if any approval of shareholders is required under the Companies Act, 2013 or any other law for the time being in force for the implementation of actions under the resolution plan, such approval shall be deemed to have been given and it shall not be a contravention of that Act or law.

(f) conforms to such other requirements as may be specified by the Board.

- The resolution professional shall present to the committee of creditors for its approval such resolution plans.

- The committee of creditors may approve a resolution plan by a vote of not less than 66% 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. However, he shall not have a right to vote at the meeting of the committee of creditors unless such resolution applicant is also a financial creditor.

- The resolution professional shall submit the resolution plan as approved by the committee of creditors to the Adjudicating Authority.

**Procedure after submission of resolution plan**

If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors meets the requirements specified in section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan. Where the Adjudicating Authority is satisfied that the resolution plan does not confirm to the requirements, it may, by an order, reject the resolution plan.
The resolution applicant shall, pursuant to the resolution plan approved under sub-section (1), obtain the necessary approval required under any law for the time being in force within a period of one year from the date of approval of the resolution plan by the Adjudicating Authority or within such period as provided for in such law, whichever is later. Provided, that where the resolution plan contains a provision for combination, as referred to in section 5 of the Competition Act, 2002, the resolution applicant shall obtain the approval of the Competition Commission of India under that Act prior to the approval of such resolution plan by the committee of creditors.

**Appeal against Approval of Resolution Plan**

As per Section 61(3) of the Code, an appeal against an order of Adjudicating Authority for approving the resolution plan may be filed on the following grounds:-

(a) The approved resolution plan is in contravention of the provisions of any law for the time being in force.

(b) There has been material irregularity in exercise of the powers by the resolution professional during the corporate insolvency resolution period.

(c) The debts owed to operational creditors of the corporate debtor have not been provided for in the resolution plan in the manner specified by the Board.

(d) The insolvency resolution process costs have not been provided for repayment in priority to all other debts.

(e) The resolution plan does not comply with any other criteria specified by the Board.

**xi. Consequences of non-submission of a Resolution Plan**

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. 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 a resolution passed at a meeting of the committee of creditors by a vote of 66 per cent of the voting shares.

On receipt of an application, if the Adjudicating Authority is satisfied that the corporate insolvency resolution process cannot be completed within one hundred and eighty days, it may by order extend the duration by such further period, but not exceeding ninety days. It shall not be granted more than once.

Therefore, when the Resolution Plan is not filed within 180 days of the Commencement date or such other extended period the Adjudicating Authority may pass orders for the liquidation of the corporate debtor.

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**Timeline**

- 180 days
- 90 days (Maximum)
- 270 days
xii. Withdrawal of application admitted under section 7, 9 or 10.

The Adjudicating Authority may allow the withdrawal of application admitted under section 7 or section 9 or section 10, on an application made by the applicant with the approval of ninety per cent voting share of the committee of creditors, in such manner as may be specified. [Section 12A]

xiii. Order of Liquidation

As per Section 33 of the Code, the Adjudicating Authority may order for liquidation of the Corporate Debtor in the following cases:-

a) Where before the expiry of the Insolvency Resolution Process or within 180 days of the initiation of Insolvency Resolution or the fast track corporate insolvency resolution process under section 56, the Adjudicating Authority does not receive the Resolution Plan.

b) If the Committee of Creditors before the expiry of the resolution process intimate the Adjudicating Authority of their decision approved by not less than sixty-six per cent of the voting share that they have passed an order for liquidation of the Corporate Debtor.

c) Where the resolution plan approved by the Adjudicating Authority is contravened by the concerned corporate debtor, any person other than the corporate debtor, whose interests are prejudicially affected by such contravention, may make an application to the Adjudicating Authority for a liquidation order

Once the Adjudicating Authority passes an order of liquidation, a moratorium is imposed on the pending legal proceedings against the corporate debtor, and the assets of the debtor (including the proceeds of liquidation) vest in the liquidation estate.

xiv. Appointment of Liquidator: Where the Adjudicating Authority passes an order for liquidation of the corporate debtor, the resolution professional appointed for the corporate insolvency resolution process under shall, subject to submission of a written consent by the resolution professional to the Adjudicatory Authority in specified form, act as the liquidator for the purposes of liquidation unless replaced by the Adjudicating Authority. On his appointment, all powers of the board of directors, key managerial personnel and the partners of the corporate debtor, shall cease to have effect and shall be vested in the liquidator. [Section 34]

Eligibility for appointment of Liquidator: To be a Liquidator person should be independent of the Corporate Debtor.

A person is considered independent of Corporate Debtor if he:-

♦ Is eligible to be appointed an as Independent Director on the board of the corporate debtor.
♦ Is not related party of the Corporate Debtor.
♦ Not has been employee or proprietor or a partner of a firm of auditors of legal firm.
Powers of the liquidators: As per section 35, here are some of the important powers:

(a) To verify all the claims of the creditors.
(b) To take all the assets, property, effects and actionable claims of the Corporate Debtor into his custody.
(c) To evaluate the assets and property of the Corporate Debtor.
(d) To carry out the business of Corporate Debtor for its beneficiary liquidation.
(e) To make the Progress Report of the Corporate Debtor.

Liquidation estate: As per section 36 of the Code, for the purposes of liquidation, the liquidator shall form an estate of the assets, which will be called the liquidation estate in relation to the corporate debtor.

Liquidation estate shall comprise all liquidation estate assets which shall include the following:

(a) any assets over which the corporate debtor has ownership rights, including shares held in any subsidiary of the corporate debtor;
(b) assets that may or may not be in possession of the corporate debtor;
(c) tangible assets;
(d) intangible assets;
(e) assets subject to the determination of ownership by the court or authority;
(f) any assets or their value recovered through proceedings for avoidance of transactions;
(g) any asset of the corporate debtor in respect of which a secured creditor has relinquished security interest;
(h) any other property belonging to or vested in the corporate debtor at the insolvency commencement date; and
(i) all proceeds of liquidation as and when they are realised.

Exemptions from inclusion in the liquidation estate assets: The following shall not be included in the liquidation estate assets and shall not be used for recovery in the liquidation:

(a) assets owned by a third party which are in possession of the corporate debtor, including—
   (i) assets held in trust for any third party;
   (ii) bailment contracts;
   (iii) all sums due to any workman or employee from the provident fund, the pension fund and the gratuity fund;
   (iv) other contractual arrangements which do not stipulate transfer of title but only use of the assets; and
(v) such other assets as may be notified by the Central Government in consultation with any financial sector regulator;

(b) assets in security collateral held by financial services providers;

(c) personal assets of any shareholder or partner of a corporate debtor except that such assets are not held on account of avoidance transactions that may be avoided;

(d) assets of any Indian or foreign subsidiary of the corporate debtor; or

(e) any other assets as may be specified by the Board, including assets which could be subject to set-off on account of mutual dealings between the corporate debtor and any creditor.

xv. Consolidation of claim

The Code has significantly changed the priority waterfall for distribution of liquidation proceeds. As per the section 38 of the Code, the liquidator shall receive or collect the claims of creditors within a period of thirty days from the date of the commencement of the liquidation process.

A financial creditor may submit a claim to the liquidator by providing a record of such claim with an information utility. Where the claim is not recorded in the information utility, the financial creditor may submit the claim as an operational creditor in the prescribed form along with supporting documents.

Where a creditor is partly a financial creditor and partly an operational creditor shall submit claims to the liquidator to the extent of his financial debt and to the extent of his operational debt. A creditor may withdraw or vary his claim within fourteen days of its submission.

The liquidator may, after verification of claims under section 39, either admit or reject the claim, in whole or in part. And shall communicate his decision of admission or rejection of claims to the creditor and corporate debtor within seven days of such admission or rejection of claims.

xvi Preferential transactions, undervalued transactions, Transaction defrauding creditors & Extortionate credit transactions

Preferential transactions: As per section 43 of the Code, where the liquidator or the resolution professional, is of the opinion that the corporate debtor has at a relevant time given a preference in such transactions (as given below), to any persons as specified below, he shall apply to the Adjudicating Authority for avoidance of preferential transactions and for, one or more of the orders referred to in section 44 of The Code.

Types of preferential Transactions: A corporate debtor shall be deemed to have given a preference, if—

(a) there is a transfer of property or an interest thereof of the corporate debtor for the benefit of a creditor or a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor; and
(b) the transfer under clause (a) has the effect of putting such creditor or a surety or a guarantor in a beneficial position than it would have been in the event of a distribution of assets being made in accordance with section 53.

Exceptions: Following preference shall not include the following transfers—

(a) transfer made in the ordinary course of the business or financial affairs of the corporate debtor or the transferee;

(b) any transfer creating a security interest in property acquired by the corporate debtor to the extent that —

(i) such security interest secures new value and was given at the time of or after the signing of a security agreement that contains a description of such property as security interest, and was used by corporate debtor to acquire such property; and

(ii) such transfer was registered with an information utility on or before thirty days after the corporate debtor receives possession of such property.

Provided that any transfer made in pursuance of the order of a court shall not, preclude such transfer to be deemed as giving of preference by the corporate debtor.

"new value" means money or its worth in goods, services, or new credit, or release by the transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the liquidator or the resolution professional under this Code, including proceeds of such property, but does not include a financial debt or operational debt substituted for existing financial debt or operational debt.

Persons to whom preference share is deemed to be made: A preference shall be deemed to be given at a relevant time, if—

(a) It is given to a related party (other than by reason only of being an employee), during the period of two years preceding the insolvency commencement date; or

(b) a preference is given to a person other than a related party during the period of one year preceding the insolvency commencement date.

Avoidance of undervalued transactions: As per section 45 of the Code, if the liquidator or the resolution professional, on an examination of the transactions of the corporate debtor determines that certain transactions were made during the relevant period under section 46, which were undervalued, he shall make an application to the Adjudicating Authority to declare such transactions as void and reverse the effect of such transaction in accordance with this Chapter.

A transaction shall be considered undervalued where the corporate debtor —

(a) makes a gift to a person; or

(b) enters into a transaction with a person which involves the transfer of one or more assets by the corporate debtor for a consideration the value of which is significantly less than the value of the consideration provided by the corporate debtor,

and such transaction has not taken place in the ordinary course of business of the corporate debtor.
Relevant period for avoidable transactions.

Section 46 provides that in an application for avoiding a transaction at undervalue, the liquidator or the resolution professional, shall demonstrate that—

(i) such transaction was made with any person within the period of one year preceding the insolvency commencement date; or

(ii) such transaction was made with a related party within the period of two years preceding the insolvency commencement date.

Where an undervalued transaction has taken place and the liquidator or the resolution professional has not reported it to the Adjudicating Authority, a creditor, member or a partner of a corporate debtor, may make an application to the Adjudicating Authority to declare such transactions void and reverse their effect.

Order passed by AA: The Adjudicating Authority, after examination of the application is satisfied that—

(a) undervalued transactions had occurred; and

(b) liquidator or the resolution professional, after having sufficient information or opportunity to avail information of such transactions did not report such transaction to the Adjudicating Authority.

Adjudicating Authority shall pass an order—

(a) restoring the position as it existed before such transactions and reversing the effects thereof in the manner as laid down in section 45 and section 48;

(b) requiring the Board to initiate disciplinary proceedings against the liquidator or the resolution professional as the case may be.

Transactions defrauding creditors: As per section 49 of the Code, where the corporate debtor has entered into an undervalued transaction and the Adjudicating Authority is satisfied that such transaction was deliberately entered into by such corporate debtor, there the Adjudicating Authority shall make an order—

(i) restoring the position as it existed before such transaction as if the transaction had not been entered into; and (ii) protecting the interests of persons who are victims of such transactions:

Provided that an order under this section—

(a) shall not affect any interest in property which was acquired from a person other than the corporate debtor and was acquired in good faith, for value and without notice of the relevant circumstances, or affect any interest deriving from such an interest, and

(b) shall not require a person who received a benefit from the transaction in good faith, for value and without notice of the relevant circumstances to pay any sum unless he was a party to the transaction.
Extortionate credit transactions: Section 50 of the Code specifies that where the corporate debtor has been a party to an extortionate credit transaction involving the receipt of financial or operational debt during the period within two years preceding the insolvency commencement date, the liquidator or the resolution professional, may make an application for avoidance of such transaction (as board may specify) to the Adjudicating Authority if the terms of such transaction required exorbitant payments to be made by the corporate debtor.

xvii. Secured creditor in liquidation proceedings: A secured creditor who seeks to realize its security interest under section 52 of the Bankruptcy & Insolvency Code, 2016 shall intimate the liquidator of the price at which he proposes to realize its secured asset.

A secured creditor may enforce, realise, settle, compromise or deal with the secured assets in accordance with such law as applicable to the security interest being realised and to the secured creditor and apply the proceeds to recover the debts due to it.

If in the course of realising a secured asset, any secured creditor faces resistance from the corporate debtor or any person connected therewith in taking possession of, selling or otherwise disposing off the security, the secured creditor may make an application to the Adjudicating Authority to facilitate the secured creditor to realise such security interest in accordance with law for the time being in force.

The Adjudicating Authority, on the receipt of an application from a secured creditor, may pass such order as may be necessary to permit a secured creditor to realise security interest in accordance with law for the time being in force.

Where the enforcement of the security interest, yields an amount by way of proceeds in excess of the debts due to the secured creditor, the secured creditor shall—

(a) account to the liquidator for such surplus; and

(b) tender to the liquidator any surplus funds received from the enforcement of such secured assets.

The amount of insolvency resolution process costs, due from secured creditors who realise their security interests in the manner provided in this section, shall be deducted from the proceeds of any realisation by such secured creditors, and they shall transfer such amounts to the liquidator to be included in the liquidation estate.

Where the proceeds of the realisation of the secured assets are not adequate to repay debts owed to the secured creditor, the unpaid debts of such secured creditor shall be paid by the liquidator in the manner specified in section 53(1)(e).

xviii. Distribution of assets: According to Section 53, the proceeds from the sale of the liquidation assets shall be distributed in the following order of priority:

(a) the insolvency resolution process costs and the liquidation costs;

(b) the following debts which shall rank equally between and among the following:
(i) workmen’s dues for the period of twenty-four months preceding the liquidation commencement date; and

(ii) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;

(c) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;

(d) financial debts owed to unsecured creditors;

(e) the following dues shall rank equally between and among the following:—

(i) any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;

(ii) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;

(f) any remaining debts and dues;

(g) preference shareholders, if any; and

(h) equity shareholders or partners, as the case may be.

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**Priority of claim**

The fees payable to the liquidator shall be deducted proportionately from the proceeds payable to each class of recipients, and the proceeds to the relevant recipient shall be distributed after such deduction.
Application for dissolution of corporate debtor on liquidation: According to section 54 of the Code, where the assets of the corporate debtor have been completely liquidated, the liquidator shall make an application to the Adjudicating Authority for the dissolution of such corporate debtor.

The Adjudicating Authority shall, on application, order that the corporate debtor shall be dissolved from the date of that order and the corporate debtor shall be dissolved accordingly.

A copy of an order shall within seven days from the date of such order, be forwarded to the authority with which the corporate debtor is registered.

4. FAST TRACK INSOLVENCY RESOLUTION FOR CORPORATE PERSONS

The Code introduced a speedy process for corporate insolvency resolution. It is termed as fast track corporate insolvency resolution process for small corporates.

Applicability of the provisions— An application for fast track corporate insolvency resolution process may be made in respect of the following corporate debtors:

(a) a corporate debtor with assets and income below a level as may be notified by the Central Government; or

(b) a corporate debtor with such class of creditors or such amount of debt as may be notified by the Central Government; or

(c) such other category of corporate persons as may be notified by the Central Government. [Section 55(2)]

Vide notification no. SO 1911(E) dated 14-6-2017, the Central Government prescribed the following class of corporate debtors on whom the provisions pertaining to the fast track corporate insolvency resolution process are applicable—

(a) small company under section 2(85) of Companies Act

(b) a start-up (other than partnership firm) as defined by Ministry of Commerce and Industry notification No. GSR 501(E) dated 23-5-2017

(c) an unlisted company with total assets not exceeding ₹ one crore as per financial statement immediately preceding the financial year - SO 1911(E) dated 14-6-2017.

Time period for completion of fast track corporate insolvency resolution process.

Period for CIRP: According to section 56 of the Code, the fast track corporate in solvency resolution process shall be completed within a period of ninety days from the insolvency commencement date.

Extension of period: The resolution professional shall file an application to the Adjudicating Authority to extend the period of the fast track corporate insolvency resolution process beyond ninety
days if instructed to do so by a resolution passed at a meeting of the committee of creditors and supported by a vote of seventy five per cent of the voting share.

**Limitation on extension of time period:** On receipt of an application, if the Adjudicating Authority is satisfied that the subject matter of the case is such that fast track corporate insolvency resolution process cannot be completed within a period of ninety days, it may, by order, extend the duration of such process beyond the said period of ninety days by such further period, as it thinks fit, but not exceeding forty-five days:

**Number of extension:** Provided that any extension of the fast track corporate insolvency resolution process under this section shall not be granted more than once.

**Manner of initiating fast track corporate insolvency resolution process**

Section 57 of the Code specifies, an application for fast track corporate insolvency resolution process may be filed by a creditor or corporate debtor as the case may be, alongwith—

(a) the proof of the existence of default as evidenced by records available with an information utility or such other means as may be specified by the Board; and

(b) such other information as may be specified by the Board to establish that the corporate debtor is eligible for fast track corporate insolvency resolution process.

The process for conducting a corporate insolvency resolution process, shall apply mutatis mutandis to fast track corporate insolvency resolution process.

### 5. VOLUNTARY LIQUIDATION OF CORPORATE PERSONS [SECTION 59]

**Voluntary liquidation by corporates with no default:** A corporate person who intends to liquidate itself voluntarily and has not committed any default may initiate voluntary liquidation proceedings under section 59(1) of Bankruptcy & Insolvency Code, 2016.

Company can also liquidate voluntarily if fixed period or event was specified in Articles of company for its dissolution.

The voluntary liquidation of a corporate person shall be allowed such conditions and procedural requirements as may be specified by the Board (IBBI).

**Procedure of voluntary liquidation:** Company should first prepare declaration from majority of the directors of the company verified by an affidavit stating that—

(i) they have made a full inquiry into the affairs of the company and they have formed an opinion that either the company has no debt or that it will be able to pay its debts in full from the proceeds of assets to be sold in the voluntary liquidation; and

(ii) the company is not being liquidated to defraud any person under section 59(3)(a).
Documentations: The declaration shall be accompanied with the following documents, namely –

(i) audited financial statements and record of business operations of the company for the previous two years or for the period since its incorporation, whichever is later

(ii) a report of the valuation of the assets of the company, if any prepared by a registered valuer.

Special resolution after declaration - Within four weeks of a declaration, there shall be—

(i) a special resolution of the members of the company in a general meeting requiring the company to be liquidated voluntarily and appointing an insolvency professional to act as the liquidator; or

(ii) a resolution of the members of the company in a general meeting requiring the company to be liquidated voluntarily as a result of expiry of the period of its duration, if any, fixed by its articles or on the occurrence of any event in respect of which the articles provide that the company shall be dissolved, as the case may be and appointing an insolvency professional to act as the liquidator:

Approval of creditors if company owes debt - If the company owes any debt to any person, creditors representing two-thirds in value of the debt of the company shall approve the resolution passed within seven days of such resolution [proviso to section 59(3)].

Notification to Registrar of company and the Board: The Company shall notify the Registrar of Companies and the Board about the resolution to liquidate the company within seven days of such resolution or the subsequent approval by the creditors, as the case may be.

Commencement of liquidation proceeding: The voluntary liquidation proceedings in respect of a company shall be deemed to have commenced from the date of passing of the resolution by members, subject to approval of creditors.

Application of provisions of this Code: The provisions of sections 35 to 53 of Chapter III and Chapter VII shall apply to voluntary liquidation proceedings for corporate persons with such modifications as may be necessary.

Application to adjudicating authority on complete wound up of the corporate person: Where the affairs of the corporate person have been completely wound up, and its assets completely liquidated, the liquidator shall make an application to the Adjudicating Authority for the dissolution of such corporate person.

Passing of an order of dissolution: The Adjudicating Authority shall on an application filed by the liquidator, pass an order that the corporate debtor shall be dissolved from the date of that order and the corporate debtor shall be dissolved accordingly. [Section 59(9)]

Forward of copy of order: A copy of an order shall within fourteen days from the date of such order, be forwarded to the authority (RoC) with which the corporate person is registered.
Multiple Choice Questions

1. RAB Bank Limited, a banking company, has defaulted in the payment of dues to their catering contractor. Can the contractor, as an operational creditor initiate insolvency process against the bank-
   (a) Yes, operational creditors are entitled
   (b) No, financial service providers are excluded
   (c) Yes, banking companies are covered under this code
   (d) No, catering is an excluded service under the Code

2. The time line of 180 days for the Corporate Insolvency Resolution process commences from the
   (a) Date of Debt
   (b) Date of preferring the application
   (c) Date of admission of application by NCLT
   (d) 90 days after the debt is due

3. Ruby Ltd. filed an application to the NCLT stating that corporate insolvency resolution process against him, cannot be completed within the 90 days under the fast track insolvency resolution process. Considering application and on being satisfied, NCLT ordered to extend the period of such process by 30 days. Later, again Ruby Ltd. initiated an application for further extension of time period of insolvency process by 15 days. Decide in the given situation, whether NCLT, can extend timelines by further 15 days.
   (a) Yes, because extension of duration in toto, is not exceeding 45 days.
   (b) Yes , depends of the facts , if it is justified , NCLT may extend the timelines.
   (c) No, extension of the fast track insolvency resolution process shall not granted more than once.
   (d) (a) & (b)

4. Whether an operational creditor can assign or legally transfer any operational debt to a financial creditor:
   (a) Yes. However, the transferee shall be considered as an operational creditor to such extent of transfer.
   (b) Yes but the transferee shall be considered as a financial creditor in relation to such transfer.
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(c) No. An operational creditor cannot assign or legally transfer any operational debt to a financial creditor.

(d) No. An operational creditor can assign or legally transfer an operational debt only to an operational creditor.

5. ________________ shall be responsible for carrying out the entire Corporate Insolvency resolution process and managing the operations of the corporate debtor during the process.

(a) Committee of creditors

(b) Adjudicating Authority

(c) Insolvency professionals

(d) Resolution Professional

6. ABC and Co, the tax consultants of X Limited for which an interim resolution professional – Mr. A, has been appointed under the Corporate Insolvency resolution process has refused to furnish information to Mr. A on the grounds of client confidentiality. Are they right?

(a) Yes, they are right

(b) No, the Code provides powers to the IRP to access all information from various parties

(c) Partly right, they can do so only after consent of the directors

(d) Mr. A is not right in even asking for this information

7. Mr. Satya, file a petition for default of non-payment of the debt against Mr. X. The amount in default claimed by petitioner was ₹ 30 lakh. Mr. X (Respondent) pleaded before the adjudicating authority that the amount of claim was not belonging to the applicant. Mr. Satya, asserted that he himself with his son owns ₹ 26 Lakh to the respondent. Though nowhere in the petition he admitted that he himself with his Son owns ₹ 26 Lakh to the respondent. Considering the above facts in the light of the Insolvency and Bankruptcy Code, state the action to be taken by the Adjudicating Authority-

(a) NCLT will admit the application of Mr. Satya, as he jointly with his son owned the debt to the Mr. X, so he is a valid petitioner.

(b) NCLT will admit the application filed by Mr. Satya on behalf of his son.

(c) NCLT will reject the application considering that no default has occurred against Mr. Satya, and his stand as a financial creditor is not proved in the petition.

(d) NCLT will dismiss the application on the ground of non- clarity as to existence of dispute.
8. Person who has provided goods or services and the payment for same is due from the corporate debtor, is a:
   (a) Financial Creditor
   (b) Operational creditor
   (c) Corporate applicant
   (d) Both (a) & (b)

DESCRIPTIVE QUESTIONS

Question 1
When will the provisions of insolvency and liquidation of corporate persons be applicable on a corporate person?

Question 2
What is the Insolvency Resolution Process for financial creditors?

Question 3
What is the Insolvency Resolution Process for operational creditors?

Question 4
What are the eligibility criteria for appointment of an Insolvency Professional as a Resolution Professional for a corporate insolvency resolution process?

Question 5
What is the procedure of Insolvency Resolution Process for a Corporate Applicant?

Question 6
Is there any time limit for completion of the Insolvency Resolution Process?

Question 7
What is the effect of order of moratorium?

Question 8
What is a Resolution plan?

Question 9
When can a corporate person initiate voluntary liquidation process?
Question 10

Mr. Ram, an operational creditor filed an application for corporate insolvency resolution process. He does not proposed for appointment of an interim resolution professional in the application. State the provisions given by the Code in the given situation. State the term of such appointed IRP.

ANSWER/SUGGESTED

Answer to MCQs

1. (b)  Hint: [No, financial service providers are excluded as per the explanation to section 1 of the I&B Code, 2016]

2. (c)  Hint: Refer Section 5(14) & 5(12) of the Code.

3. (c)  Hint: As per section 56 of the I&B Code, 2016, the extension of the fast track corporate insolvency resolution process under this section shall not be granted more than once.

4. (a)  Hint: Refer Section 21(5) of the Insolvency and Bankruptcy Code.

5. (d)  Hint: As per section 23 of the IBC.

6. (b)  Hint: No, because as Per Section 17 of the I&B Code, the officers and managers of the corporate debtor shall report to the interim resolution professional and provide access to such documents and records of the corporate debtor as may be required by the interim resolution professional.

7. (c)  Hint: Refer section 7(5) of the IBC.

8. (b)  Hint: As per the IBC, an Operational Creditor means a person to whom an Operational debt is owed. Operational creditor refers to anyone who has provided goods or services and the payment for same is due from the corporate debtor.

Answer to Descriptive Questions

1. The provisions relating to the insolvency and liquidation of corporate debtors shall be applicable only when the amount of the default is one lakh rupees or more. However, the Central Government may, by notification, specify the minimum amount of default of higher value which shall not be more than one crore rupees.

2. A financial creditor either itself or along with other financial creditors may lodge an application before the Adjudicating Authority (National Company Law Tribunal) for initiating corporate insolvency resolution process against a corporate debtor who commits a default in payment of its dues.

   The financial creditor shall along with the application give evidence in support of the default committed by the corporate debtor. He shall also give the name of the interim resolution professional.
Where the Adjudicating Authority is satisfied that a default has occurred and the application by the financial creditor is complete and there is no disciplinary proceedings pending against the proposed resolution professional, it may admit such application made by the financial creditor. Otherwise, the application may be rejected. However, the applicant may rectify the defect within seven days of receipt of notice of rejection from the Adjudicating Authority.

3. On the occurrence of default, an operational creditor shall first send a demand notice and a copy of invoice to the corporate debtor.

The corporate debtor shall within a period of ten days of receipt of demand notice notify the operational creditor about the existence of a dispute, if there is any and record of pendency of any suit or arbitration proceedings. He shall also provide the details of repayment of unpaid operational debt in case the debt has or is being paid.

After the expiry of ten days, if the operational creditor does not receive his payment or the confirmation of a dispute that existed even before the demand notice was sent, he may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.

The Adjudicating Authority shall within fourteen days of receipt of the application, admit or reject the application. However, before rejecting the application, an opportunity shall be given to the applicant to rectify the defect within seven days of receipt of rejection.

4. As per Regulation 3 of Insolvency and Bankruptcy (Insolvency Resolution) Regulation, 2016, an insolvency professional shall be eligible for appointment as a resolution professional for a corporate insolvency resolution process if he and all partners and directors of the insolvency professional entity of which he is partner or director are independent of the corporate debtor i.e.,

- He is eligible to be appointed as an independent director on the board of the corporate debtor u/s 149 of the Companies Act, 2013, where the corporate debtor is a company.
- He is not a related party of the corporate debtor.
- He is not an employee or proprietor or a partner of a firm of auditors or company secretaries in practice or cost auditors of the corporate debtor in the last three financial years.
- He is not an employee or proprietor or a partner of a legal or consulting firm that has or had any transaction with the corporate debtor amounting to five per cent or more of the gross turnover of such firm in the last three financial years.

5. Where a corporate debtor has committed a default, a corporate applicant thereof may file an application for initiating corporate insolvency resolution process with the Adjudicating Authority.
The corporate applicant shall furnish the information relating to books of account and other documents and a resolution professional shall be appointed as interim resolution professional.

The Adjudicating Authority may either accept or reject the application within fourteen days of receipt of application. However, applicant should be allowed to rectify the defect within seven days of receipt of notice of such rejection.

6. Section 12 of the Code states that any 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 the process.

However, the National Company Law Tribunal (NCLT) may on an application made by the resolution professional, under a resolution passed by the Committee of Creditors, by a vote of 75% of voting shares, after consideration provide one extension which shall not extend more than 90 days.

7. Moratorium has been explained in Section 14 of the Code, during the moratorium period the following acts shall be prohibited:

(a) The institution of suits or continuation of any pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the SARFAESI Act, 2002

(d) The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

8. A resolution plan is a proposal agreed to by the Debtors and Creditors of an entity in a collective mechanism to propose a time bound solution to resolve the situation of insolvency.

As per Section 30, the Insolvency Resolution Professional (IRP) within the prescribed time i.e. 180 days or in case of extension 270 days, where Fast Track Resolution within 90 days or in case of extension 135 days, is required to submit the Resolution Plan to Adjudicating Authority (NCLT) prepared by the Resolution applicant on the basis of information memorandum.

The Resolution Plan should provide for:

(i) payment of insolvency resolution costs;

(ii) repayment of the debts to operational creditors;
(iii) management of affairs of the Company after approval of the resolution plan;
(iv) implementation and supervision of the resolution plan;
(v) does not contravene provisions of the law for the time being in force; and
(vi) conforms to such other requirement as may be specified by the Board.

9. Section 59 of the Code empowers a corporate person intending to liquidate itself voluntarily if it has not committed any default to initiate voluntary liquidation proceedings under the provisions of this Code.

Any corporate person registered as a company shall meet the following conditions to initiate a voluntary liquidation process:

(a) A declaration from majority of the directors of the company verified by an affidavit stating
   i. That they have made a full inquiry into the affairs of the company and have formed an opinion that either the company has no debts or that it will be able to pay its debts in full from the proceeds of assets to be sold in the voluntary liquidation; and
   ii. That the company is not being liquidated to defraud any person.

(b) The declaration shall be accompanied with the following documents, namely:
   i. Audited financial statements and a record of business operations of the company for the previous two years or for the period since its incorporation, whichever is later;
   ii. A report of the valuation of the assets of the company, if any, prepared by a registered valuer.

(c) After making the declaration the corporate debtor shall within four weeks -
   i. Pass a special resolution at a general meeting stating that the company should be liquidated voluntarily and insolvency professional to act as the liquidator may be appointed.
   ii. Pass a resolution at a general meeting stating that the company be liquidated voluntarily as a result of expiry of the period of its duration (fixed by its articles or on the occurrence of any event in respect of which the articles provide that the company shall be dissolved, if any) and appointing an insolvency professional to act as the liquidator.

10. **Appointment of IRP:** As per Section 16 of the Code where the application for corporate insolvency resolution process is made by an operational creditor and no proposal for an interim resolution professional is made in the said application. The Adjudicating Authority
shall make a reference to the Board for the recommendation of an insolvency professional who may act as an interim resolution professional.

The Board shall recommend the name of an insolvency professional to the Adjudicating Authority against whom no disciplinary proceedings are pending, within ten days of the receipt of a reference from the Adjudicating Authority.

**Period of appointment of IRP:** The term of the interim resolution professional shall continue from his appointment till the date of appointment of the resolution professional by CoC in first meeting of CoC under section 22 of the Insolvency & Bankruptcy Code, 2016.