

**Insolvency & Bankruptcy Code, 2016
Presentation on Definitions**

**At
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Legal Framework for Insolvency in India

1. The Companies Act 2013 (CA2013) - For companies in the following cases:

(a) if the company has, by special resolution, resolved that the company be wound up by the Tribunal;

(b) if the company has acted against the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality;

(c) if on an application made by the Registrar or any other person authorised by the Central Government by notification under this Act, the Tribunal is of the opinion that the affairs of the company have been conducted in a fraudulent manner or the company was formed for fraudulent and unlawful purpose or the persons concerned in the formation or management of its affairs have been guilty of fraud, misfeasance or misconduct in connection therewith and that it is proper that the company be wound up;

(d) if the company has made a default in filing with the Registrar its financial statements or annual returns for immediately preceding five consecutive financial years; or

(e) if the Tribunal is of the opinion that it is just and equitable that the company should be wound up.

Legal Framework for Insolvency in India (Cont.)

2. Insolvency & Bankruptcy Code, 2016 (Insolvency Code)

- **In case of Insolvency - For Corporate Persons, Individuals and partnership firms if they are unable to pay debts; and**
- **Solvent Corporate Persons - Voluntary winding-up of Corporate Persons.**

3. Notably, voluntary winding-up of companies is covered both under Insolvency Code and CA2013. However, the winding-up procedure is given only in Insolvency Code. Likewise, Solvent LLP can also be voluntarily liquidated under the Insolvency Code.

4. More importantly, now, CA2013 as well as LLP Act 2008 have no provision for winding up in case of inability to pay debts as it is covered under Insolvency Code.

Overview of Insolvency Code

5. Insolvency Code has 255 sections divided into following 5 parts and 11 Schedules:

- Part 1 – Preliminary – Section 1 to 3**
- Part 2 – Insolvency Resolution and Liquidation for Corporate Person - Section 4 to 77**
- Part 3 – Insolvency Resolution and Bankruptcy for individuals & Partnership Firms – Section 78 to 187**
- Part 4 – Regulation of Insolvency Professionals, Agencies & Information Utilities – Section 188 to 223**
- Part 5 – Miscellaneous – Section 224 to 255**

6. Each of the Part – 1, 2 and 3 has a definition section, i.e., section 3, section 5 and section 79 respectively. Thus, there are total 3 sections of definitions in Insolvency Code.

7. The definitions given in section 3 (Part - 1) are applicable to entire Insolvency Code.

8. The definitions given in section 5 (Part 2) are applicable to only to Part 2 and regulations made under section related thereto.

9. The definitions given in section 79 (Part 3) are applicable to only to Part 3 and regulations to be made under section related thereto.

Overview of Insolvency Code (Cont.)

10. Corporate Insolvency Resolution Process of defaulting Corporate Persons is governed by the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations)

11. Voluntary liquidation of the solvent Corporate Persons is governed by the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017 (Voluntary Liquidation Regulations)

12. Liquidation of insolvent Corporate Persons is governed by the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (Liquidation Regulations)

Overview of Insolvency Code (Cont.)

13. Type of definitions used in Insolvency Code & their Generic Meaning

- **Means** - The use of the word 'means' indicates that "definition is a hard-and-fast definition, and no other meaning can be assigned to the expression than is put down in definition.

- **Includes** - The word 'includes' when used, enlarges the meaning of the expression defined so as to comprehend not only such things as they signify according to their natural import but also those things which the clause declares that they shall include.

- **Means and Includes** - The words "means and includes", on the other hand, indicate "an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions"

Citation - STATE BANK OF PATIALA V/s COMMISSIONER OF INCOME TAX, Patiala (CIVIL APPEAL NOS. 5212-5220 OF 2007)

Overview of Insolvency Code (Cont.)

14. Main Definitions given in Part – 1 (Section 3)

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

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

Question – What is any other person incorporated with limited liability?

Overview of Insolvency Code (Cont.)

14. Main Definitions given in Part – 1 (Section 3)

- “**Financial Service**” includes any of the following services, namely:

- (a) accepting of deposits;
- (b) safeguarding and administering assets consisting of financial products, belonging to another person, or agreeing to do so;
- (c) effecting contracts of insurance;
- (d) offering, managing or agreeing to manage assets consisting of financial products belonging to another person;
- (e) rendering or agreeing, for consideration, to render advice on or soliciting for the purposes of:
 - (i) buying, selling, or subscribing to, a **financial product**;
 - (ii) availing a financial service; or
 - (iii) exercising any right associated with a financial product or financial service;
- (f) establishing or operating an investment scheme;
- (g) maintaining or transferring records of ownership of a financial product;
- (h) underwriting the issuance or subscription of a financial product; or
- (i) selling, providing, or issuing stored value or payment instruments or providing payment services. [Section 3(16)]

Overview of Insolvency Code (Cont.)

14. Main Definitions given in Part – 1 (Section 3)

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

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

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

Question – Whether an CD exempted from obtaining license to providing financial services is presently covered under the Insolvency Code?

Overview of Insolvency Code (Cont.)

14. Main Definitions given in Part – 1 (Section 3)

The relevance of Financial Service Provider:

(a) As per section 50 and 167, for an extortionate credit transaction involving the receipt of financial or operational debt entered within two years preceding the insolvency/bankruptcy commencement date, the liquidator/bankruptcy trustee or the resolution professional as the case may be, may make an application for avoidance of such transaction to the Adjudicating Authority if the terms of such transaction required exorbitant payments to be made by the corporate debtor/bankrupt.

Exception - Any debt extended by any person providing financial services which is in compliance with any law for the time being in force in relation to such debt shall in no event be considered as an extortionate credit transaction.

(b) The Central Government may notify financial service providers or categories thereof for the purpose of their insolvency and liquidation proceedings, which may be conducted under the Insolvency Code, in such manner as may be prescribed. [Section 227]

Overview of Insolvency Code (Cont.)

14. Main Definitions given in Part – 1 (Section 3)

- “**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)]

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

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

- “**Financial Institution**” means:

(a) a scheduled bank;

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

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

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

Overview of Insolvency Code (Cont.)

14. Main Definitions given in Part – 1 (Section 3)

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

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

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

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

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

Overview of Insolvency Code (Cont.)

14. Main Definitions given in Part – 1 (Section 3)

- “**Claim**” means—

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

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

[Section 3(6)]

- “**Secured Creditor**” means a creditor in favour of whom security interest is created.

[Section 3(30)]

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

Overview of Insolvency Code (Cont.)

14. Main Definitions given in Part – 1 (Section 3)

- “**Workman**” shall have the same meaning as assigned to it in clause (s) of section 2 of the Industrial Disputes Act, 1947. [Section 3(36)]

Relevance – Workmen dues for two years preceding the liquidation commencement date will have priority along with secured creditors u/s 53.

- **Section 3(37)** - Words and expressions used but not defined in the Insolvency Code but defined in the Indian Contract Act, 1872, the Indian Partnership Act, 1932, the Securities Contract (Regulation) Act, 1956, the Securities Exchange Board of India Act, 1992, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the Limited Liability Partnership Act, 2008 and the Companies Act, 2013, shall have the meanings respectively assigned to them in those Acts.

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

Overview of Insolvency Code (Cont.)

15. Main Definitions given in Part – 2 (Section 5)

Opportunities for Insolvency Professionals

- “**Resolution Professional**”, for the purposes of this Part 2, means an insolvency professional appointed to conduct the corporate insolvency resolution process and includes an interim resolution professional. [Section 5(27)]
- “**Liquidator**” means an insolvency professional appointed as a liquidator in accordance with the provisions of Chapter III or Chapter V of this Part 2, as the case may be. [Section 5(18)]
- 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 provided that the fees payable to such insolvency professional representing any individual creditor will be borne by such creditor. [Section 24(5)]
- “**Resolution Professional**” means an insolvency professional appointed under this part as a resolution professional for conducting the fresh start process or insolvency resolution process. [Section 79(21)]
- “**Bankruptcy Trustee**” means the insolvency professional appointed as a trustee for the estate of the bankrupt under section 125. [Section 79(9)]

Overview of Insolvency Code (Cont.)

15. Main Definitions given in Part – 2 (Section 5)

- “**Adjudicating Authority**”, for the purposes of this Part (relating to Corporate Persons), means National Company Law Tribunal constituted under section 408 of the Companies Act, 2013. [Section 5(1)]

- “**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)]

Relevance – U/s 10 of Insolvency Code, in case of default by CD, the corporate applicant may file an application for initiating corporate insolvency resolution process.

Overview of Insolvency Code (Cont.)

15. Main Definitions given in Part – 2 (Section 5)

- “**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)]

- “**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)]

- “**Operational Debt**” means *a claim in respect of the provision of goods or services* including employment or a debt in respect of the repayment 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)]

Question – Whether a claim in respect of the provisions of goods or service not rendered by a service provider/vendor is Operational Debt?

Overview of Insolvency Code (Cont.)

15. Main Definitions given in Part – 2 (Section 5)

- The definition of “**Dispute**” has been a contentious issue until NCLAT decided the same.
- NCLT Mumbai Bench said the definition of Dispute as ‘exhaustive’ even though the word ‘**include**’ was used in the definition.
- NCLT Delhi Bench said the definition of Dispute is not exhaustive but is, in fact, illustrative.
- Finally, NCLAT, in the matter of Kirusa Software Pvt Ltd. V/s Mobilox Innovations Pvt Ltd. decided that *‘The definition of "Dispute" is "inclusive" and not "exhaustive". The same has to be given wide meaning provided it is relatable to the existence of the amount of the debt, quality of good or service or breach of a representation or warranty.’*

Overview of Insolvency Code (Cont.)

15. Main Definitions given in Part – 2 (Section 5)

- “**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;
- (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;

Overview of Insolvency Code (Cont.)

15. Main Definitions given in Part – 2 (Section 5)

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

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

- The definition of Financial Debt was considered by NCLT Delhi in matter of Nikhil Mehta & Sons (HUF) and others V/s AMR Infrastructure Ltd. The fact are as under:

- The applicants booked units in real estate projects of CD wherein CD agreed that assured return will be payable to applicants in case of delay in possession.
- CD paid assured return for some time and thereafter stopped payment because of financial problems.
- Multiple winding-up petitions were filed against CD by various unit holders u/s 433(e) of the Companies Act, 1956 which were already admitted by Hon'ble Delhi High Court.
- Applicants filed this application claiming themselves to be FC.

Overview of Insolvency Code (Cont.)

15. Main Definitions given in Part – 2 (Section 5)

- The observations of NCLT on the definition of Financial Debt are as under:

(a) The opening words of the definition clause would indicate that a financial debt is a debt along with interest which is disbursed against the consideration for the time value of money and it may include any of the events enumerated in sub-clauses (a) to (i). ***Therefore, the first essential requirement of financial debt has to be met viz. that the debt is disbursed against the consideration of time value of money and which may include the events enumerated in various sub-clauses.***
[Para 12 on page 7]

(b) ***The key feature of financial transaction as postulated by section 5(8) is its consideration for time value of money.*** In other words, the legislature has included such financial transactions in the definition of 'financial debt' which are usually for a sum of money received today to be paid for over a period of time in a single or series of payments in future. It may also be a sum of money invested today to be repaid over a period of time in a single or series of instalments to be paid in future. [Para 12 on page 8]

Overview of Insolvency Code (Cont.)

15. Main Definitions given in Part – 2 (Section 5)

(c) *It is significant to note that in order to satisfy the requirement of this provision, the financial transaction should be in nature of debt and no equity has been implied by the opening words of section 5(8) of IBC.* It is true that there are complex financial instruments which may not provide a happy situation to decipher the true nature and meaning of the transaction. [Para 12]

NCLT Conclusion –

- (a) The applicants were not FC and, thus, the application was dismissed.
- (b) The remedy of the applicants may lie elsewhere. [Para 15]

Comment – The matter is pending in appeal before NCLAT.

Question – Is Mr. Mehta is a Operational Creditor?

Overview of Insolvency Code (Cont.)

15. Main Definitions given in Part – 2 (Section 5)

- **“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)]

- **“Personal Guarantor”** means an individual who is the surety in a contract of guarantee to a corporate debtor. [Section 5(22)]

Relevance – As per section 60 of Insolvency Code, the Adjudication Authority in respect of Personal Guarantor of Corporate Debtor is NCLT and not DRT.

- **“Resolution Applicant”** means any person who submits a resolution plan to the resolution professional. [Section 5(25)]

- **“Resolution Plan”** means a plan proposed by any person for insolvency resolution of the corporate debtor as a going concern in accordance with Part II. [Section 5(26)]

Overview of Insolvency Code (Cont.)

15. Main Definitions given in Part – 2 (Section 5)

- “**Personnel**” includes the directors, managers, key managerial personnel, designated partners and employees, if any, of the corporate debtor. [Section 5(24)]

Relevance – As per section 19, Personnel to extend cooperation to Interim Resolution Professional in managing the affairs of the corporate debtor.

- “**Related Party**” – Section 5(23) has given an exhaustive list of related parties.

Relevance:

(a) A related party cannot act as Insolvency Professional of that Corporate Debtor. [Regulation 3 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016]

(b) A related party cannot act as valuer of that Corporate Debtor. [Regulation 27 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016]

(c) A related party cannot as liquidator of that Corporate Debtor.

(b) A financial creditor who is related party cannot be part of Committee of Creditors. [Section 21(2)]

(d) Insolvency Resolution Professional cannot undertake any related party transaction without prior approval of committee of creditors. [Section 21(1(f))]

(e) Any preference transaction with related party undertaken during preceding the insolvency commencement date can be avoided/modified. [section 43/44]

Overview of Insolvency Code (Cont.)

15. Main Definitions given in Part – 2 (Section 5)

- **“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)]

- **Interim Resolution Period** - The term of the interim resolution professional shall not exceed thirty days from date of his appointment. [Section 11(5)]

- **“Insolvency Resolution Process Period”** means the period of 180 days beginning from the insolvency commencement date and ending on 180 day [Section 5(14)]. This can be extended by 90 days but only one extension is allowed. [Section 12(3)].

- **“Insolvency Resolution Process Costs”** means—

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

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

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

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

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

Relevance - Insolvency Resolution Process Costs has first priority in waterfall mechanism u/s 53.

Overview of Insolvency Code (Cont.)

15. Main Definitions given in Part – 2 (Section 5)

- “**Interim Finance**” means any financial debt raised by the resolution professional during the insolvency resolution process period [Section 5(15)].

Relevance - IRP can raise interim finance during Interim Resolution Period provided that no security interest shall be created over any encumbered property of the corporate debtor without the prior consent of the creditors whose debt is secured over such encumbered property. However, no prior consent of the creditor shall be required where the value of such property is not less than the amount equivalent to twice the amount of the debt [Section 22(2)(c)]. After Interim Resolution Period, the Interim Finance will be raised after approval of Committee of Creditors.

- As per regulation 31 of CIRP Regulations, the following as been specified as “Insolvency Resolution Process Costs” under Section 5(13)(e) by the Board:

- (a) amounts due to **suppliers of essential goods and services** under Regulation 32;
- (b) amounts due to a person whose rights are prejudicially affected on account of the moratorium imposed under section 14(1)(d);
- (c) expenses incurred on or by the interim resolution professional to the extent ratified under Regulation 33;
- (d) expenses incurred on or by the resolution professional fixed under Regulation 34; and
- (e) other costs directly relating to the corporate insolvency resolution process and approved by the committee.

Overview of Insolvency Code (Cont.)

15. Main Definitions given in Part – 2 (Section 5)

- As per regulation 32 of CIRP regulations, the essential goods and services referred to in section 14(2) shall mean: (1) electricity; (2) water; (3) telecommunication services; and (4) information technology services, to the extent these are not a direct input to the output produced or supplied by the corporate debtor.

Illustration- Water supplied to a corporate debtor will be essential supplies for drinking and sanitation purposes, and not for generation of hydro-electricity.

Relevance – The supply of essential goods or services to the corporate debtor shall not be terminated or suspended or interrupted during moratorium period. [Section 14(2)]

- “**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)]

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

Relevance – Liquidation Costs has first priority in waterfall mechanism u/s 53.

Overview of Insolvency Code (Cont.)

16. Main Definitions given in CIRP Regulations

- “**Corporate Insolvency Resolution Process**” means the insolvency resolution process for corporate persons under Chapter II of Part II of the Code. [Regulation 2(e)]

- “**Liquidation Value**” is the estimated realizable value of the assets of the corporate debtor if the corporate debtor were to be liquidated on the insolvency commencement date. [regulation 35]

Relevance – As per regulation 38, the resolution plan *inter-alia* must provide the following:
(a) payment of liquidation value due to operational creditors in priority to financial creditors within thirty days after the approval of a resolution plan by the Adjudicating Authority; and
(c) liquidation value due to dissenting financial creditors is paid before any recoveries are made by the financial creditors who voted in favour of the resolution plan.

- “**Dissenting Financial Creditors**” means the financial creditors who voted against the resolution plan approved by the committee. [Regulation 2(f)]

- “**Registered Valuer**” means a person registered as such in accordance with the Companies Act, 2013 (18 of 2013) and rules made thereunder [Regulation 2(m)]

Overview of Insolvency Code (Cont.)

17. IBC has only two types of creditors, i.e., Financial Creditor (FC) and Operational Creditor (OC). Thus, no remedy, either under CA2013 or Insolvency Code, is available to a creditor (who is neither FC nor OC) against the corporate debtor (CD)?

18. Who can file winding-up petition under Insolvency Code in respect of corporate debtors?

(a) OC for operational debt – Nominating IRP by applicant is not mandatory but initially the cost has to be paid by applicant.

(b) FC for financial debt - Nominating IRP by applicant is mandatory.

(c) CD itself for default of any debt - Nominating IRP by applicant is mandatory.

Overview of Insolvency Code (Cont.)

19. Application by Operational Creditor

19.1 The proceedings under Insolvency Code are in nature of summary proceedings and, thus, the Adjudicating Authority (NCLT) will not decide the matter on merits by recording evidence, etc., i.e., adjudication of dispute between the parties, if any.

19.2 OC **may**, on occurrence of default deliver demand notice of:
(a) unpaid operational debt; or (b) copy of invoice, demanding payment of amount involved in default in prescribed manner.
[Section 8(1)]

Overview of Insolvency Code (Cont.)

19.3 CD shall, within 10 days of receipt of such notice, bring into notice of OC: (i) **existence of dispute**, if any, and record of the pendency of the suit or arbitration in relation to such dispute; (ii) payment of operation debt along with proof of payment. [Section 8(2)]

19.4 NCLT shall, within 14 days of receipt of the application, after giving a reasonable opportunity of being heard, by an order admit the application if, *inter alia*, (i) **no notice of dispute has been received by the OC before issue of notice u/s 8**, or (ii) there is no record of dispute in the information utility. [Section 9(5)(d)]

Comment – In case of dispute pending before issue of notice u/s 8, the application of OC is not maintainable.

Overview of Insolvency Code (Cont.)

20. Main Definitions given in Part – 3 (Section 79)

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

- “**Bankrupt**” means:

- (a) a debtor who has been adjudged as bankrupt by a bankruptcy order under section 126;
- (b) each of the partners of a firm, where a bankruptcy order under section 126 has been made against a firm; or
- (c) any person adjudged as an undischarged insolvent. [Section 79(3)]

- “**Bankruptcy Debt**”, in relation to a bankrupt, means:

- (a) any debt owed by him as on the bankruptcy commencement date;
- (b) any debt for which he may become liable after bankruptcy commencement date but before his discharge by reason of any transaction entered into before the bankruptcy commencement date; and
- (c) any interest which is a part of the debt under section 171. [Section 79(5)]

Overview of Insolvency Code (Cont.)

20. Main Definitions given in Part – 3 (Section 79)

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

- **“Qualifying Debt”** means amount due, which includes interest or any other sum due in respect of the amounts owed under any contract, by the debtor for a liquidated sum either immediately or at certain future time and does not include:

(a) an excluded debt;

(b) a debt to the extent it is secured; and

(c) any debt which has been incurred three months prior to the date of the application for fresh start process. [Section 79(19)]

Relevance – Application for fresh restart can be filed only in respect of qualifying debts. [Section 80]

Overview of Insolvency Code (Cont.)

20. Main Definitions given in Part – 3 (Section 79)

- “**Excluded Debt**” means:

- (a) liability to pay fine imposed by a court or tribunal;
- (b) liability to pay damages for negligence, nuisance or breach of a statutory, contractual or other legal obligation;
- (c) liability to pay maintenance to any person under any law for the time being in force;
- (d) liability in relation to a student loan; and
- (e) any other debt as may be prescribed. [Section 79(15)]

Relevance –

1. No application of bankruptcy resolution in respect of Excluded Debt can be filed u/s 94.
2. Discharge order shall not discharge the bankrupt from any Excluded Debt [Section 139].

Thank You!