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THE INSOLVENCY AND BANKRUPTCY CODE, 2016

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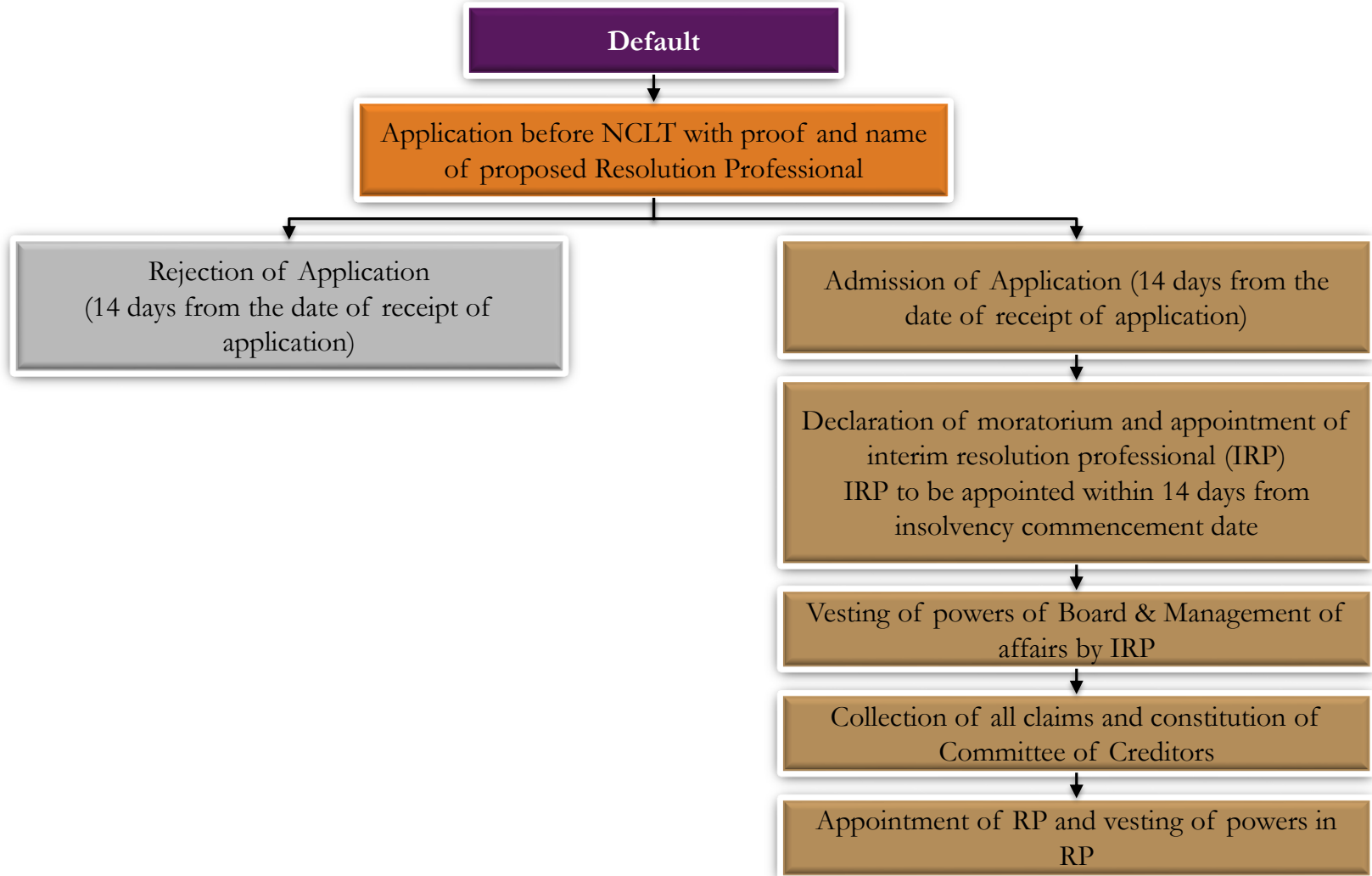
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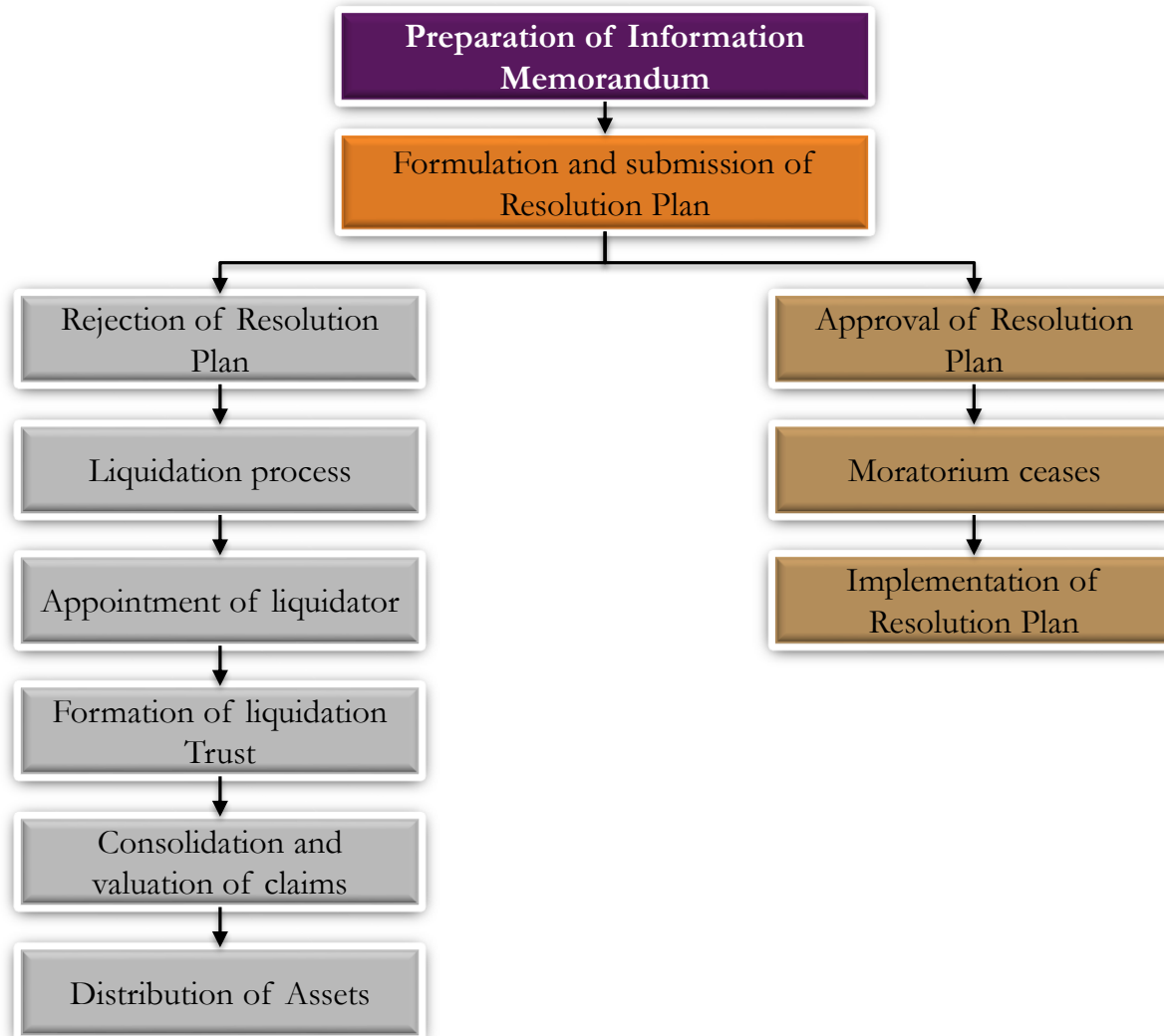
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The Insolvency and Bankruptcy Code, 2016 - Overview

Process flow chart for insolvency resolution



Process flow chart for insolvency resolution



Bankruptcy Code - Salient Features

- *Who can apply* – Creditors (both financial and operational), debtors, authorised members, person in charge of managing the operations and who has control and supervision of the debtor
- *When* – upon payment default of a minimum of Rs 1 Lakh or a Central Government prescribed amount upto Rs 1 Crore – “Statutory” cross-default for financial creditors
- *Classification of creditors* – Financial creditors (‘persons to whom financial debt is due’) and Operational creditors (Trade creditors, employees etc.)
- *Timelines* – resolution process to complete within 180 (+90) days - failing which company liquidates compulsorily - 2 years timeline for liquidation

Bankruptcy Code - Salient Features

- *Moratorium* – effective till expiry of 180 days on institution/continuance of proceedings, security enforcement, termination of contracts for utilities, etc.
- *Who has control* – resolution professional (RP) under supervision of a committee of financial creditors including control over all bank accounts of the corporate debtors – will run the company on a “going concern” basis
- Committee of creditors (only financial creditors) to take all decisions
 - 75% voting requirement – Decision binding on all creditors and the corporate debtor
 - Exclusion of ‘Related Party’ creditors
 - Consent of Committee of creditors required for change in capital structure, creation of security, raising of interim finance etc. during CIRP

Bankruptcy Code - Salient Features

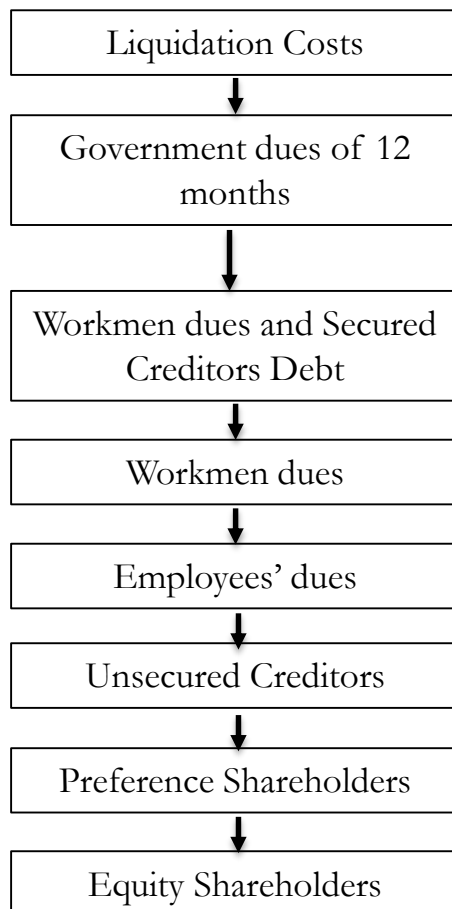
- *Role of shareholders* - no vote on the creditors committee - though they can attend meetings as observers
- Meetings may be attended by representatives of the operational creditors (holding at least 10% of total debt) – No vote for operational creditors
- In case of no financial debt/all financial creditors are ‘related parties’ – Committee of Creditors to comprise of a maximum of 18 largest operational creditors by value and one elected representative of workmen and employees each

Bankruptcy Code - Salient Features

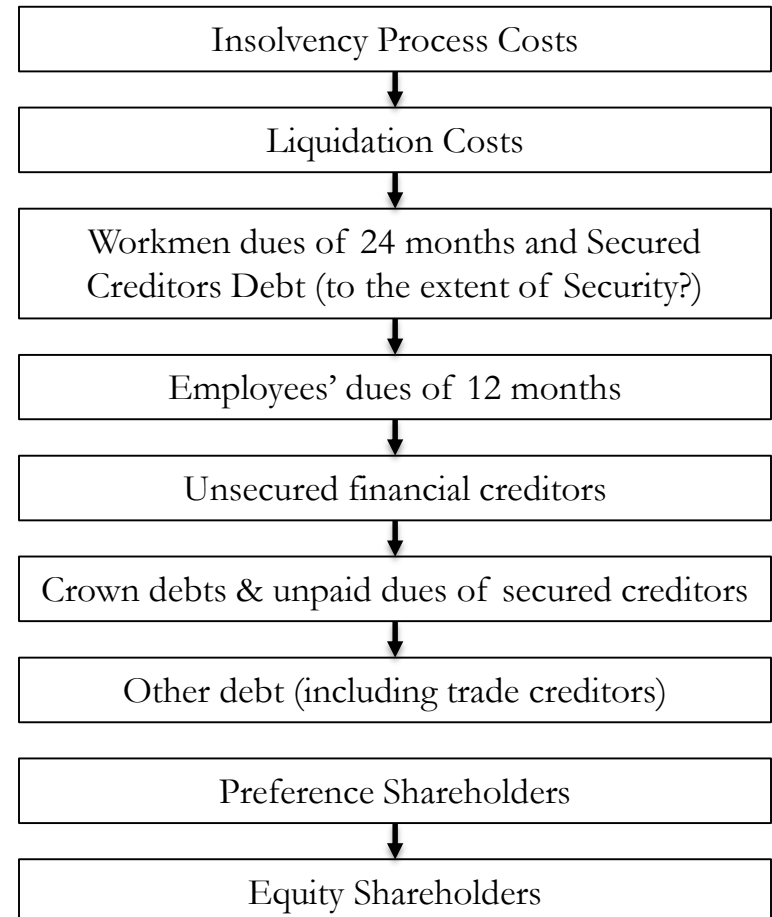
- *Resolution plan* – Binding on all and can be proposed by anyone
 - Dissenting financial creditors to get relative liquidation value paid in priority – disincentive to disagree on resolution plan
 - Can be submitted by anybody (including promoters); and should provide for (a) payment of insolvency resolution process costs; (b) repayment of debt of operational creditors; (c) does not contravene provisions of law; (d) conform to requirements of Insolvency Board; (e) provide for management of affairs of the corporate debtor; (f) implementation of the plan
 - Can be challenged for any contravention of applicable law, material irregularity by RP, no provision in resolution plan for debts owed to operational creditors/CIRP costs or non-compliance with Board's requirements
- *Super priority debt* – debt infused during CIRP to have super-priority

Priority in Liquidation

Companies Act, 1956



Insolvency and Bankruptcy Code, 2016



Bankruptcy Code - Salient Features

- *Responsibilities of Officers* - All ‘officers’ and ‘managers’ to report to RP and provide documents, records and other information - Penal provisions for non-compliance by officers set out in the Code; includes imprisonment in some cases
- *Fraudulent/ Malicious initiation of CIRP/Liquidation* – Punishable with a minimum penalty of Rs. 1 Lakh up to Rs. 1 Crore
- *Deliberate contravention of CIRP provisions by IP* - Punishable with imprisonment upto 6 months or a minimum penalty of Rs. 1 Lakh up to Rs. 5 Lakhs or both

Bankruptcy Code - Salient Features

- *Avoidance of transactions* - to be treated as void and will be reversed
 - ‘Preferential transactions’ (put creditor in beneficial position as compared to liquidation value)
 - *Look back period* - two years for related parties and one year for non-related party
 - ‘Undervalued transactions’ (gift/ transfer at significantly lesser value)
 - *Look back period* - two years for related parties and one year for non-related party
 - ‘Extortionate transactions’ (result in financial/operational debt for corporate debtor)
 - *Look back period* - two years preceding the commencement of insolvency
 - ‘Transactions defrauding creditors’ (gift/ transfer at significantly lesser value)
 - No look back period

Bankruptcy Code - Salient Features

- *Authorities* - NCLT as Adjudicating Authority, Insolvency and Bankruptcy Board of India, Information Utilities (IU), Resolution Professionals
- *Voluntary liquidation process* – With approval of 2/3rd of creditors – requires solvency declaration from directors
- *Overriding effect* – Code to have overriding effect on all other laws or any other instrument
- *Status* – Insolvency Board set up, Provisions of the Code (CIRP and liquidation) pertaining to Corporate Persons notified, rules and regulations, other than regulations in relation to procedure before the NCLT and voluntary liquidation, have been notified, 3 IP Agencies have been registered, Several IPs have been registered, CIRP applications are being filed, SICA repealed

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Key changes in the winding up regime
and repeal of SICA

Key changes in the winding up regime

- Parallel winding up regimes under the Code and the Companies Act, 2013 (“**2013 Act**”) to co-exist - Provisions effective from December 15, 2016
- Grounds for winding up under the 2013 Act
 - ‘Infeasibility of revival of company’ – omitted in line with SICA repeal and Chapter XIX omission
 - ‘Inability to pay debts’ - Omitted from 2013 Act and subsumed under the Code
 - Winding up of solvent companies (voluntary winding up) no longer available under 2013 Act – option for voluntary liquidation under the Code
 - New ground - “affairs of company conducted fraudulently/ for unlawful purposes” – extends to conduct by promoters/managers (on application by Registrar or Central Govt.)

Key changes in the winding up regime

- Other grounds – On passing of special resolution for winding up, Tribunal is of the opinion that it is just and equitable to wind up the company, default in filing financial statements/ annual returns for preceding 5 consecutive FY with the Registrar
- No power of Tribunal to stay proceedings for revival/rehabilitation of company post winding up order
- Liquidators under the 2013 Act
 - Only insolvency professions registered under the Code to be liquidators (official or provisional)
 - Central Govt. panel of provisional liquidators to be dismantled
- Time bound processes
 - 2013 Act – order by NCLT on winding up petition within 90 days of filing petition

Key changes in the winding up regime

- Moratorium declared under the Code – automatic stay on winding up proceedings under 2013 Act
- Establishment of winding up committee
 - Consisting of official liquidator, nominee of secured creditor, professional nominated by Tribunal
 - Role includes assisting and monitoring liquidation proceedings
- New layer of overriding preferential payments – payments of wages & salary outstanding for more than 2 years preceding winding up (same as Code)
- Priority waterfall under the Code – provides priority to secured creditors over Govt. dues and to financial creditors over operational creditors – 2013 Act provides for same priority waterfall as under the Companies Act, 1956 (“**1956 Act**”)

Key changes in the winding up regime

- Fraudulent preference & conduct
 - 1956 Act only envisaged preference to creditors – 2013 Act extends to surety and guarantor
 - Liability for fraudulent conduct of business now extends to persons who are or were directors/managers/officers of the company – 1956 Act applied only to persons knowingly parties to carrying on of business in fraudulent manner
- Scope of antecedent transactions have been extended
 - 2013 Act – fraudulent preference (extended to surety and guarantors)
 - Insolvency Code – Preferential, Undervalued and Extortionate Credit transactions

Key changes in the winding up regime

- Transfer of pending proceedings
 - Winding up proceedings pending before High Courts on the ground of ‘inability to pay debts’, and not served on the company, will be transferred to the NCLT as an application under the Code subject to the documents being provided within 6 months (if served – continue under 1956 Act)
 - All petitions under clauses (a) and (f) of Section 433 of 1956 Act pending before High Court where petition not served on Respondent are to be transferred to NCLT bench exercising appropriate jurisdiction under 2013 Act (if petition served – continue under 1956 Act)
 - All pending proceedings relating to voluntary winding up to continue to be dealt with under 1956 Act
 - All other proceedings relating to winding up which have not been transferred from High Court to be dealt with in accordance with provisions of 1956 Act and Companies (Court) Rules, 1959

Repeal of SICA

- Repeal of the Sick Industrial Companies (Special Provisions) Act, 1985 notified with effect from December 01st, 2016
- Chapter XIX of the 2013 Act (Revival and Rehabilitation of Sick Companies) omitted by the Code w.e.f. November 15, 2016
- Pending proceedings under SICA shall stand abated – Reference to NCLT can be under the Code within 180 days from commencement of the Code (December 01, 2016) – Orders approving scheme saved – Rules of administration of schemes not issued
- Code does not deal with sick companies – no provision for formulation of scheme for revival of sick companies under the Code

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Directors' Liability

Directors' Liability

- *Wrongful Trading*: A director of the company can be liable to contribute to the assets of the corporate debtor if such director knew that the company has no prospect of avoiding commencement of CIRP and he/she did not exercise any due diligence in minimising potential loss to creditors
 - Due diligence is diligence expected of persons carrying on same functions as the director
 - Additional duty implied on directors to closely monitor the financial position of the company. To file or not to file will be the question?

Directors' Liability

- *Fraudulent Trading*: Persons party to any business of the debtor carried on with the intent to defraud creditors or any other fraudulent purposes may be liable to contribute to the assets of the company as the NCLT deems fit
 - ‘Person party to business’ has been interpreted in parallel jurisdictions to include even ‘outsiders’
- Proceedings for ‘wrongful/ fraudulent trading’ will be initiated by RP before NCLT

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Questions & Answers

THANK YOU

Disclaimer

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