



“Insolvency and Bankruptcy Code (IBC) and other
Corporate Laws”.



Dhir & Dhir Associates
Advocates & Solicitors

EARLIER INSOLVENCY REGIMES IN INDIA

- 1956 – Companies Act, 1956
- 1985 – Sick Industrial Companies (Special Provisions) Act – SICA
- 1993 – Recovery of Debts Due to Bank and Financial Institutions Act – RDDDBFI/ DRT Act
- 2002 – Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act – SARFAESI
- 2013 – Companies Act – Chapter XIX & XX
- 2016 – The Insolvency and Bankruptcy Code – IBC

IBC – THE COMPLETE CODE

- The Insolvency and Bankruptcy Code, 2016 (IBC) deals with:
 - a) Insolvency Resolution and Liquidation of Corporate Entities; and
 - b) Bankruptcy of individuals and partnership firms.

Objectives of the Code

- A comprehensive Code to achieve a time bound resolution of insolvency and bankruptcy of corporates, partnerships and individuals.
- Facilitate the application of consistent and coherent provisions to different stakeholders affected by Business failure and inability to pay debt
- Address the challenges being faced for swift and effective bankruptcy resolution
- Improve the handling of conflict between creditors and debtors
- Avoid destruction of value
- Distinguishes malfeasance vis-à-vis business failure
- Allocate losses in macro economic downturns
- Improve ease of doing business ranking for India
- To develop a vibrant market for debt
- To increase flow of lending by banks and reduce rate of interest

Corporate Insolvency Resolution Process (CIRP)

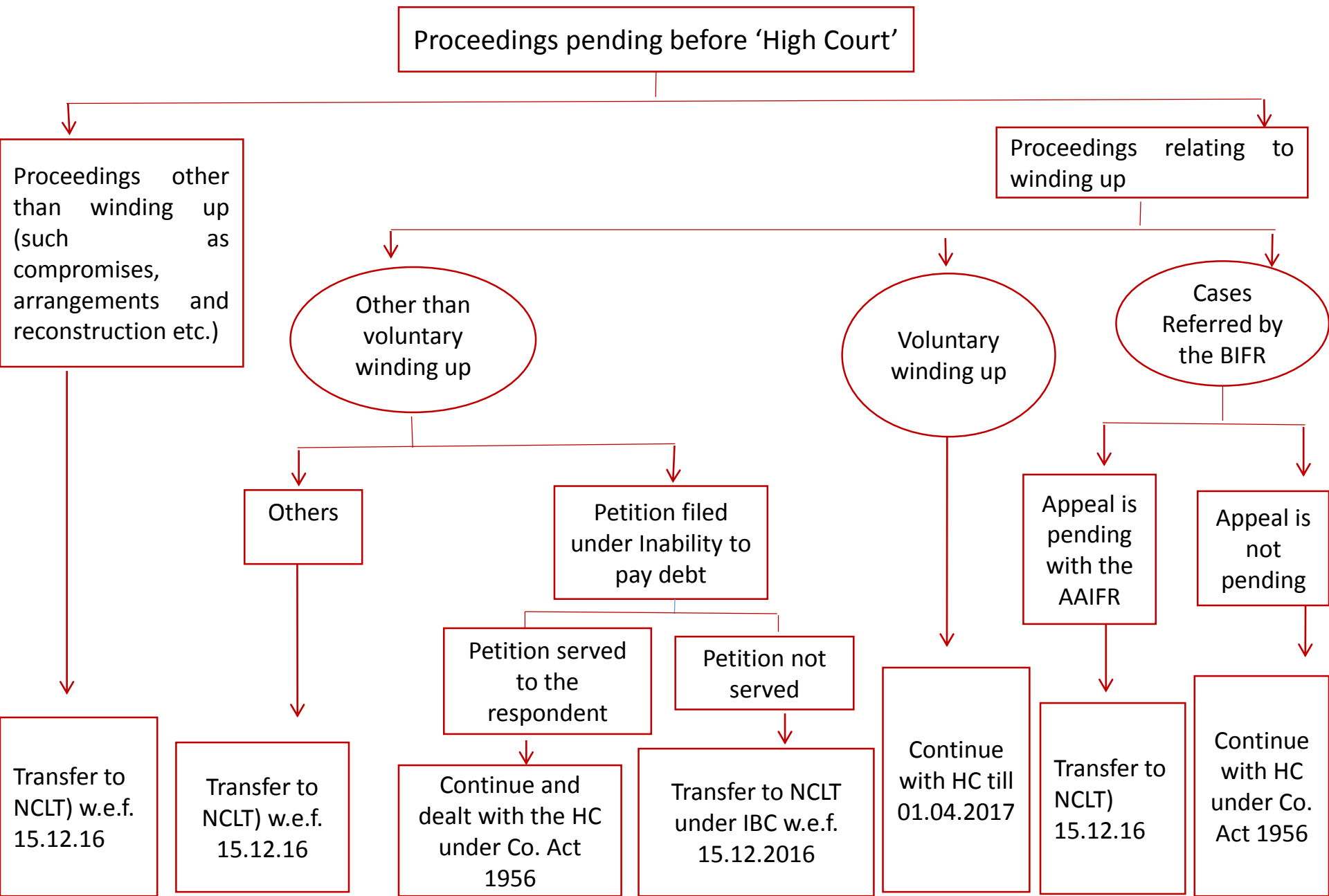
- **Application for CIRP by**
 - Financial Creditor (FC) [Sec 7(1)] - to whom a financial debt is owed (both secured or unsecured) or assignee
 - Operational Creditor (OC) [Sec 9(1)] – who have rendered goods or services including workmen and statutory dues
 - Corporate Debtor (CD)[Sec 10(1)]- The defaulting borrower
- **Trigger Event** - In the event of default in payment of debt obligation (in case of FC) or non-receipt of payment or notice of dispute within 10 days of demand (in case of OC)

INTERPLAY – IBC & OTHER ENACTMENTS

IBC brings with itself the amendments to the following enactments:

- Indian Partnership Act, 1932 – Section 245 R/w First Schedule
- Central Exercise Act, 1944 – Section 246 R/w Second Schedule
- Income – Tax Act, 1961 – Section 247 R/w Third Schedule
- Customs Act, 1962 – Section 248 R/w Fourth Schedule
- Recovery of Debts Due to Banks and FI Act, 1993 –

- The Finance Act, 1994 – Section 250 R/w Sixth Schedule
- SARFAESI Act, 2002 – Section 251 R/w Seventh Schedule
- SICK Industrial Companies (Special Provisions) Repeal Act, 2003
- Payment and Settlement Systems Act, 2007 – Section 253 R/w Ninth Schedule
- Amendment to the LLP Act, 2008 – Section 254 R/w Tenth Schedule
- Amendment to the Companies Act, 2013 – Section 255 R/w Eleventh Schedule



AMENDMENT TO THE COMPANIES ACT, 2013

- Companies Act, 2013 has been amended by the Eighth Schedule of Insolvency and Bankruptcy Code, 2016
- Winding up means winding up under the Companies Act and liquidation under IBC, 2016
- Creditor has no right to initiate winding up under Section 272 of the Companies Act, 2013
- Ground inability to pay debt no longer subsists and a creditor (financial and operational) can initiate insolvency proceedings only before NCLT under IBC

- The scope of default under IBC is wide as compared to inability to pay earlier provided under the Companies Act, 2013.
- Voluntary winding up has been incorporated in the Bankruptcy code as Section 59 and thus the reference of Section 304 which now stands deleted has been substituted with Section 59 of the Bankruptcy Code.
- Section 275(2) primarily recognizes the insolvency professions as registered under the Code who can now be the sole people to be appointed for any winding up or liquidation proceeding either under the Companies Act, 2013 and the Insolvency Code.

PRIORITY IN DEBTS OVERRIDING PREFERENTIAL PAYMENTS UNDER COMPANIES ACT, 2013 – AMENDED BY IBC

- Section 326 of Companies Act, 2013 has been amended and dues of workmen and the secured creditor are in priority to all other dues. Earlier, the dues of secured creditor were to rank pari passu in terms of proviso to sub Section 1 of Section 325. Now the secured creditor who has realized a secured asset is also entitled to priority towards the balance of his dues.
- The distribution and preferential payment under Companies Act and IBC are different and Section 326 shall not be applicable in the event of liquidation under IBC.

Priority for Distribution UNDER IBC

[Sec 53]

- The Code also provides for priorities [waterfall] wherein the proceeds from the realization of assets of the entity are to be distributed to its creditors in case of liquidation. The priority as envisaged in Section 53 is as follows:
 - a. Insolvency Resolution Process costs and liquidation costs paid in full;
 - b. Debts owed to secured creditor who has relinquished his security and workmen's due for a period of 24 months before the liquidation commencement date [as per S.5(17) the date on which liquidation proceeding commenced as per S. 33 or S. 59] shall rank equally;
 - c. Wages and unpaid dues owed to employees other than

..Priority for Distribution

- d. Financial debts owed to unsecured creditors;
- e. State and Central Government dues for a period of 2 years preceding the liquidation commencement date and dues to secured creditors remaining unpaid following enforcement of security interest, shall rank pari-passu;
- f. Any remaining debts and dues;
- g. Preference shareholders, if any; and
- h. Equity shareholders or partners as the case may be.

Position of Secured Creditor in liquidation

- A secured creditor can [S. 52(1)]:
 - Relinquish its security interest to the liquidation estate and receive proceeds from sale of assets by liquidator
 - Realize its security in the manner as specified in this section
- If the secured creditor realizes security interest, he shall inform the liquidator and identify the asset subject to such security interest [S. 52(2)]
- Liquidator to verify security interest by record maintained by IU or any other means as may be specified and permit the secured creditor to realize only such security interest as provable [S. 52(3)(a)]
- Secured creditor may enforce, realize, settle, compromise or deal with the secured assets in accordance with the law to recover its dues [S. 52(4)] and in case it faces resistance from CD or any person connected therewith in taking possession or, selling/ disposing of the secured asset it may apply to AA to facilitate secured creditor to realize such security interest in accordance with the law for the time being in force [S. 52 (5)] and AA may pass such order as necessary to permit secured creditor to realize security interest in accordance with the law [S. 52 (6)]

..Position of Secured Creditor in liquidation

- If amount realized by secured creditor is more than its dues, the surplus shall be credited to the account of liquidator [S. 52(7)]
- If amount realized by secured creditor is less than its dues, the remaining debt shall be paid by liquidator as per this Code [S. 52(9)]
- The insolvency costs or liquidation costs shall be realized from the proceeds of such sale of assets by the secured creditor [S. 52(8)]

AMENDMENT TO SARFAESI ACT, 2002

- Section 251 R/w Seventh Schedule of IBC
- In Section 13, in sub-section (9), the words “subjected to the provisions of the Insolvency and Bankruptcy Code, 2016 has been added to avoid any conflict with the distribution of proceeds from the assets.

Amendment to RDDDBFI ACT, 1993

- Section 249 R/w Fifth Schedule of the IBC
- In the title, after the words financial institutions, the words, insolvency resolution and bankruptcy of individuals and partnership firms shall be inserted.

Amendment to SICK Industrial Companies (Special Provisions) Repeal Act, 2003

- Section 252 R/w Eighth Schedule of the IBC.
- Section 4B has been amended and same has given liberty to companies before BIFR and AAIFR to file a reference before NCLT within one hundred and eighty days.
- No fees is payable for making reference under Insolvency and Bankruptcy Code, 2016 by a Company whose appeal or reference or inquiry stands abated under this clause.

Amendment to The Indian Partnership Act, 1932

- Section 41(a) of Indian Partnership Act provides for Compulsory dissolution which reads as under:

A firm is dissolved-

(a) by the adjudication of all the partners or of all the partners but one as insolvent.

- Part III of the IBC (Section 78-187) deals with Insolvency Resolution and Bankruptcy for Individuals and Partnerships Firms and accordingly Section 41(a) has been omitted by virtue of Section 245 R/w First Schedule of IBC.

Amendment to The LLP Act, 2008

- Section 64(c) of LLP Act 2008 which provided for inability to pay debt as a Circumstance in which LLP may be wound up by Tribunal has been omitted by virtue of Section 254 R/w Tenth Schedule of IBC.
- The definition of Corporate persons as provided under Section 3(7) of IBC includes a LLP, as defined in the LLP Act.
- Ground inability to pay debt no longer subsists and a creditor (financial and operational) can initiate insolvency proceedings against a LLP only before NCLT under IBC.

Conclusion - Impact of IBC on Other Corporate Laws

- Section 238 of the IBC provides for overriding nature of the provisions of IBC.
- Once a corporate entity comes within the process as envisaged under the IBC, all the other applicable provisions of law have to give way to the IBC proceedings.
- Companies Act, 2013 has been majorly amended and made harmonious to the provisions of the IBC.
- All the other proceedings against a company undergoing restructuring now fall within the exclusive jurisdiction of the IBC proceedings. (Section 14 moratorium order and Section 231 bar on jurisdiction of civil courts)



**Dhir
& Dhir**

D-55, Defence Colony, New Delhi – 110024 | T : +91 11 42410000 | F : +91 11 424 10091 | contact@dhirassociates.com | www.dhirassociates.com

NEW DELHI

MUMBAI

HYDERABAD

JAPAN