The Insolvency & Bankruptcy Code (IBC)

Presentation by –
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**Background**

- **Erstwhile legislative framework**
  - Chapter XIX & Chapter XX of Companies Act, 2013
  - Part VIA, Part VII & Section 391 of Companies Act, 1956
  - RDDBFI Act, 1993
  - SARFAESI Act, 2002
  - SICA Act, 1985 (Now Repealed)
  - The Presidency Towns Insolvency Act, 1909 (Now Repealed)
  - The Provincial Insolvency Act, 1920 (Now Repealed)
  - Chapter XIII of the LLP Act, 2008

- **Non-statutory guidelines/out-of-court mechanism:**
  - Bilateral restructuring
  - One-time settlement
  - JLF (Joint Lenders Forum)/CDR/SDR (Strategic Debt Restructuring)
  - Sale of loan to ARC

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Now IBC and related Rules & Regulations

- **Act:**
  - Insolvency & Bankruptcy Code, 2016 (w.e.f. 28th May, 2016).

- **Rules:**
  - The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (w.e.f. 01.12.2016).

- **Regulations:**
  - Insolvency and Bankruptcy Board of India (Insolvency Professional Agencies) Regulations, 2016. (w.e.f. 21st nov. 2016)
  - Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016. (w.e.f. 21st nov, 2016)
  - Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016. (w.e.f. 23rd Nov, 2016)
Regulations

- Insolvency and Bankruptcy Board of India (Insolvency Resolution Process For Corporate Persons) Regulations, 2016. (w.e.f. 30th Nov. 2016)
- Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016. (w.e.f. 15th Dec, 2016)
- Insolvency and Bankruptcy Board of India(Engagement Of Research Associates And Consultants) Regulations, 2017. (w.e.f. 31st Jan, 2017)
- Insolvency and Bankruptcy Board of India( Advisory Committee) Regulations, 2017. (w.e.f. 31st Jan, 2017)
- Insolvency & Bankruptcy Board of India (Procedure For Governing Boards Meetings) Regulations, 2017 (w.e.f. 31st Jan, 2017)
Regulations/Guidelines

- **Insolvency and Bankruptcy Board of India (Voluntary Liquidation process) Regulations, 2017** (w.e.f. 31st March, 2017)
  - Clarification for IBBI (Voluntary Liquidation Process) Regulations, 2017 (5th May, 2017)

- **Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017** (w.e.f. 31st March, 2017)

- **The Insolvency and Bankruptcy Board of India (Inspection and Investigation) Regulations, 2017** (w.e.f. 14th June, 2017)

- **The Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017** (w.e.f. 15th June, 2017)

**Guidelines**-

- **Insolvency Professionals to act as IRP (Recommendation) Guidelines, 2017** (w.e.f. 25th May, 2017).
IBC Framework -

- IBC code is divided into 5 Parts consisting of 255 sections.
- **Part- I** – Preliminary (defines General terms)
- **Part- II**- (consists of VII chapters) – deals with Insolvency Resolution And Liquidation for Corporate Persons.
  - Chapter- I – **Preliminary** (Definitions)
  - Chapter – II- **Corporate Insolvency Resolution Process**
  - Chapter- III- **Liquidation Process**
  - Chapter IV- **Fast Track Corporate Insolvency Resolution Process**
Part II..

- Chapter V- Voluntary Liquidation of Corporate Persons.
- Chapter VI- Adjudicating Authority for Corporate Persons.
- Chapter VII- Offences & Penalties.

Part III: (consists of VII chapters) – deals with Insolvency Resolution And Bankruptcy for individuals & Partnership Firms.

- Chapter- I - Preliminary (definitions).
- Chapter-II- Fresh Start Process.
- Chapter- III- Insolvency Resolution Process
- Chapter IV- Bankruptcy Order for Individual and Partnership Firm.
Part III..

- Chapter V- Administration and Distribution of the Estate of the Bankrupt.
- Chapter VI- Adjudicating Authority for Individuals and Partnership Firms.
- Chapter VII- Offences and Penalties.

Part IV: Regulation of Insolvency Professionals, Agencies and Information Utilities:

- Chapter I- Insolvency and Bankruptcy Board of India
- Chapter II- Powers and functions of the Board.
- Chapter III- Insolvency Professional Agencies.
- Chapter IV- Insolvency Professionals.
- Chapter V- Information Utilities.
- Chapter VI- Inspection and Investigations.
- Chapter VII- Finance, Accounts and Audit.

Part V: Miscellaneous.
Schedules: (Deals with Amendment to various laws)

1. First Schedule – Amendment to Indian Partnership Act, 1932
2. Second Schedule- Amendment to Central Excise Act, 1944
3. Third Schedule - Amendment to the Income Tax Act, 1961
4. Fourth Schedule- Amendment to the Customs Act, 1962
7. Seventh Schedule- Amendment to SARFAESI Act, 2002
10. Tenth Schedule- Amendment to LLP Act, 2008
Key Aspects:

- Paradigm shift from the existing ‘Debtor in possession’ to a 'Creditor in control' regime.
- Consolidating all existing insolvency related laws and amending multiple legislation including Companies Act.
- IBC would have an *overriding effect on all other laws* relating to Insolvency & Bankruptcy.
- *Resolve insolvencies in time-bound manner* (180 days).
- *Moratorium of 180 days* - IP to take over management.
- ‘*Order of Priority’* Different from Companies Act.
- *Antecedent transactions can be investigated* and in case of any illegal diversion of assets personal contribution can be ordered by court.
- Introduction of IPs, formation of IBBI, IPAs IUs.
IBC v. Companies Act:

- Parallel regimes under IBC (for Liquidation) and the Companies Act, 2013 (“2013 Act”) (for winding up) to co-exist.

- **Grounds** for winding up under the 2013 Act-
  - ‘Revival of company’— omitted in line with SICA repeal and Chapter XIX omission.
  - ‘Inability to pay debts’- Omitted from 2013 Act and covered under IBC.
  - Voluntary winding up- no longer available under 2013 Act – option for voluntary liquidation under IBC.
  - New ground “affairs of company conducted fraudulently/ for unlawful purposes”— extends to conduct by promoters/ managers (on application by ROC/CG)
IBC v. Companies Act:

- Other grounds – On passing of special resolution for winding up, NCLT 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 ROC.

- No power of NCLT to stay proceedings for revival/rehabilitation of company post winding up order

- Liquidators under the 2013 Act
  - Only IP registered under IBC to be liquidators (official or provisional)
  - CG 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.

- Moratorium declared under IBC – automatic stay on winding up proceedings under the 2013 Act
IBC v. Companies Act:

- Establishment of winding up committee
  - Consisting of official liquidator, nominee of secured creditor, professional nominated by NCLT
  - Role includes assisting & monitoring liquidation proceedings.

- New layer of overriding preferential payments – payments of wages & salary outstanding for more than 2 years preceding winding up (same as IBC)

- Priority waterfall under IBC provides priority to secured creditors over Government dues and to FCs over OCs
  - 2013 Act provides for same priority waterfall as under the Companies Act, 1956
IBC v. Companies Act:

- **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 is extended:**
  - 2013 Act – fraudulent preference (extended to surety and guarantors)
  - IBC – Preferential, Undervalued and Extortionate Credit transactions
SICA to IBC

- **Repeal of SICA**

- Repeal of the Sick Industrial Companies (Special Provisions) Act, 1985 notified with effect from 1\textsuperscript{st} December, 2016.

- Chapter XIX of 2013 Act (Revival and Rehabilitation of Sick Companies) omitted by IBC w.e.f. 15\textsuperscript{th} November, 2016

- Pending proceedings under SICA shall stand abated – Reference to NCLT can be made under IBC within 180 days from commencement of IBC – Orders approving scheme saved.

- IBC does not deal with sick companies – no provision for formulation of scheme for revival of sick companies under IBC.
Classification of creditors—Financial creditors ("FC") (‘persons to whom financial debt is due’) and Operational creditors ("OC") (Trade creditors, employees etc.)

"financial debt" means a debt (+ interest) disbursed against the consideration for the time value of money and includes—(a) money borrowed against interest; (b) credit facility acceptances; (c) issue of bonds, notes, debentures, loan stock or any similar instrument; (d) any liability for lease/hire purchase contract; (e) receivables sold or discounted; (f) forward sale or purchase agreement; (g) any derivative transaction; (h) any counter-indemnity; (i) the guarantee or indemnity for above;
CIRP Process - basics

- "operational debt" - a claim for provision of goods or services (including employment) and government dues.

- S 3(12): "Default" means non-payment of debt when whole or any part or installment 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;

- 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 Corporate Debtor ("CD").

- When--upon payment DEFAULT of Rs 1 Lakh or more.

- Who Controls? Resolution professional ("RP") under supervision of a committee of independent FCs including control over all bank accounts of CD –will run CD on a "going concern" basis.
Objective of IBC & its judicial Structure:

- **Objectives** - (a) Low time to Resolution; (b) Low loss in Recovery; (c) Higher level of debt financing.

- **Judicial Structure:**

  - **Supreme Court**
    - Appeal within 45 days
    - NCLAT
      - Appeal within 30 days
        - Board
          - Application against Company/LLP
        - NCLT
          - Application against Individual/Partnership Firm
    - DRAT
      - Appeal within 45 days
      - DRT
CIRP Process: (for DEFAULT of 1 lakh & above)

- FC/OC/Corporate Applicant may file Application (in form 1/5/6) with supporting documents (record of default/demand notice, invoice copy/ books of A/cs) and proposing RP (take proposed RP’s consent in Form 2, to be enclosed with Application), by paying specified fees (25k/2000/25k). FC/OC to send copy of above application to registered office of CD by RPAD/ speed post.

- NCLT to accept/reject application within 14 days and communicate decision to FC/OC/CD. If admits, CIRP to commence from the date of admission of application (thereafter, no withdrawal of application possible on the ground of settlement/consent, as it becomes ‘representative suit’).
CIRP Process..

- Time limit (Calm Period)- 180 days from admission of Application (extendible upto max 90 days for sufficient cause)
- NCLT to order –
  (a) Moratorium [effects- legal proceedings be stayed/new proceedings be prohibited; Assets prohibited from being transferred/encumbered; no enforcement of security interest; no recovery of the property by owner/lessor; continue supply of essential goods and services];
  (b) Appointment of IRP (within 14 days of Insolvency Commencement Date) for 30 days.
  (c) Cause Public Announcement.
CIRP Process..

IRP take over the management of affairs [and Board of directors powers get suspended; employees to report to IRP; Banks/FIs to follow instructions of IRP].

IRP, within 3 days of his appointment, make public announcement in Form A in English + vernacular language News papers + CD’s website + IBBI’s website [specifying last day of submitting claims (i.e. 14 days from date of appointment of IRP)].

IRP to appoint registered valuer within 7 days of his appointment to determine liquidation value.

Crs. To submit Proof of claims (in Form B/C/D) within above timelines.
IRP shall verify the claims within 7 days of last date of receiving claims and prepare ‘list of crs.’

Committee of Crs ("COC"): IRP to constitute COC (of all independent FCs) and shall file report with NCLT within 30 days of his appointment certifying constitution of COC. First Meeting of COC to be held within 7 days of filing of Report with NCLT. COC can seek financial information of CD, which IRP/RP must provide within 7 days. All decisions of COC can be taken by majority of 75% voting share.

Appointment of RP: in the first meeting of COC by 75% voting share. RP so appointed to conduct CIRP and exercise powers & duties of IRP.
CIRP Process..

- RP can convene the meeting (and he SHALL convene meeting, if 33% voting share of committee members so require) by giving at least 7 days notice (to – (a) every member of COC, (b) suspended BOD and (c) OC, if its debt exceed 10% of the debt due) by post AND e-mail.

- Quorum – members with 33% voting share.

- Preparation of Information Memorandum by RP: within 14 days of first meeting - for formulation of resolution plan.

- Submission of Resolution Plan by Resolution Applicant to RP- at least 30 days before expiry of CIRP period, which is required to be approved by COC by 75% voting share.
CIRP Process..

If NCLT is satisfied that Resolution Plan – (a) is approved by COC; and (b) complies with conditions of S 30(2), it shall approve the Resolution Plan, which shall be binding on CD (and its employees), Crs., Guarantors & other stakeholders. Else, NCLT may reject. RP shall forward a copy of order to– (a) IBBI for recording entry; (b) all participants & Resolution Applicant. Moratorium Ceases.

S 30(2) – RP shall examine each Resolution Plan received by it (which should not contravene any provision of law) to confirm that it provides for –

(a) Payment of CIRP cost in priority to payment of any other debt of CD;

(b) repayment of debt due to OC [OC to be paid (in priority to FC) within 30 days of approval of Resolution Plan by COC]; and Liquidation value for dissenting FCs;
CIRP Process..

(c) management of affairs of CD post-Resolution Plan; and also for implementation and supervision of Resolution plan; (i.e. Terms of Plan, implementation Schedule & means of supervision)

**Appeal** - Person aggrieved may **Appeal against order of NCLT approving Resolution Plan**- to NCLAT, within 30 days, if –

(a) Approved plan is in contravention of law;
(b) CIRP cost not provided for in priority to other debts;
(c) Debt to OC has not been provided for;
(d) Material irregularity in exercise of powers by RP;
(e) Does not comply with any criteria of IBBI.

The next Step is **Liquidation**- if No Resolution Plan/Resolution plan is not approved by COC or NCLT/ CD contravenes Resolution Plan approved by NCLT/ COC decides for liquidation.
CIRP Process Flow Chart

1. Default

2. Application before NCLT with proof and name of proposed RP

3. Admission/Rejection of Application (14 days from the date of receipt of application).

4. If admitted-- Vesting of powers of Board & Management of affairs by IRP;
   • Declaration of moratorium and appointment of IRP;
   • IRP to be appointed within 14 days from insolvency commencement date.

5. Public Announcement for inviting the Claims & Appointment of Registered Valuers.

6. Collection of all claims, verification of claims and constitution of COC (reported to NCLT).

7. Appointment of RP and vesting of powers in RP.

8. Preparation of Information Memorandum & submission of Resolution Plan.
   • If Resolution Plan is approved- Moratorium ceases & Implementation of Resolution plan.
   • If Resolution Plan is rejected- Liquidation Process begins.

7/27/2017
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Certain Practical Situations & Clarity

- Debtor in default is a Trust but having a Corporate Guarantors. There is no provision for IRP for trust. So can one initiate CIRP against the Corporate Guarantors? – Yes! Under Contract Act, the Debt due from the Principal debtor and the Guarantor stands on the same footings, and Crs have choice to proceed against both or any of them. Under CIRP what is necessary element is existence of Debt & Default in paying debt (and covers both Debtor and Guarantor). So here, if its OC, the notice will be required to be given to the Guarantors (at their registered office) seeking payment (and if there are more than one guarantor, and having registered office at different locations, notice to be given to each of them and in case of default, can be proceeded against each of them at NCLT of respective locations). So may be separate applications may be required to be filed.
Some of the Judicial Positions:

- Moratorium does not affect any personal action taken on any asset which is not in balance-sheet of CD. E.g. Personal securities given by directors. [M/s. Schweitzer Systemtec India pvt. Ltd. v. Phoenix ARC Pvt. Ltd.]

- **ICICI case:** On 24th May, 17, NCLAT passed interesting order levying penalty on the FC (ICICI) for showing incorrect claim, moving application in haste and malafide manner, and obtaining ex-parte order from NCLT, which admitted such incorrect claim. It also advised that CIRP may have adverse impact on the welfare of the company and hence, it is imperative for NCLT to adopt cautious approach in admitting application and also adhere to the ‘principles of natural justice’.
Some of the Judicial Positions:

- It held that order of NCLT to be illegal and declared the appointment of IRP, moratorium, freezing of accounts, and all other orders passed by NCLT pursuant to impugned order and action taken by IRP including advertisement published in the newspaper inviting claims are declared illegal and directed NCLT to close the CIRP. Also levied penalty u/s 65 of Rs. 50,000/- for moving application with malafide intent. In this order, even IP was reprimanded for his high handed actions.

- In Bharat Steel v. Aarti Infra Projects Pvt. Ltd. (by order dated 22nd June, 17), NCLT (Mumbai) rejected the application of OC, on the ground that the amount written in Demand notice and the amount in the application differs.
Some of the Judicial Positions:

Existence of Dispute: In Essel Project case, the earlier correspondence between parties which shows there were dispute about quality of work and other issues, was accepted as ‘existence of dispute’.

E&Y Case- Certificate of registration was rejected by IBBI on the ground that IP can not be in employment.

Essar Steel Matter: Writ filed in the HC against RBI.
Other significant Developments

- **SEBI Relaxation:** (in meeting dated 21.06.2017)

- 1. **Restructuring in stressed companies:** It was represented to SEBI that where the lenders have acquired shares and propose to divest to a new investor, the new investor are reluctant due to mandatory ‘open offer’ which would reduce the funds available for investment in the company. Hence, they have requested for exemptions to these investors. SEBI decided to extend relaxations to the new investors acquiring shares in distressed companies pursuant to such restructuring schemes (subject to certain conditions like shareholder’s approval by special resolution, minimum three years lock-in of shareholding).
Other significant Developments

2. Resolution plans approved under IBC: The Board has also approved the proposal to provide exemption from open offer obligations, under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, for acquisitions pursuant to resolution plans approved by NCLT under IBC.

As per clarification issued by IBBI on 15th June, 2017, and IPE can not act as IP (because it does not fulfill the eligibility criteria of qualification of passing Limited Insolvency exam).
Other significant Developments

- RBI formally invoked Prompt Corrective Action (PCA) on certain banks such as IDBI Bank, UCO Bank, Bank of Maharashtra, Central Bank of India (and more PSUs in Queue). So these banks are no longer permitted to lend. RBI takes such PCA if the Bank’s Capital to risk ratio falls below 7.75%. However, if that falls below 3.625%, the bank will be closed/merged.

- Information Utility formed - National e-Governance Services Ltd.

- Ambiguity to the Bankers - Action under IBC v. SARFAESI.
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TBA: To be announced

Source: Banking sources, NCLT
Rising Demand of IPs:

Insolvency professionals in high demand: CAs, cost accountants and company secretaries rush to get qualified

KOLKATA/MUMBAI: As India’s banks try and resolve the bad loans that have long burdened the industry and pose a significant macroeconomic risk, insolvency professionals stand to get a big career boost. Chartered accountants, cost accountants and company secretaries are said to be rushing to get themselves qualified in their hundreds—and this is said to be just the beginning. If the bankruptcy process unfolds as it’s meant to, thousands of insolvency professionals will be needed to oversee the process and run distressed assets as part of asset-sale programmes, experts said.

The Institute of Chartered Accountants of India (ICAI) alone has enrolled more
THANK YOU VERY MUCH

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