

RECENT REFORMS IN IBC

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- Vinod Kothari Consultants Private Limited, consultants and advisors
 - Based out of Kolkata, New Delhi & Mumbai
- We are a team of consultants, advisors & qualified professionals having over 30 years of practice.

Our Organization's Credo:

Focus on capabilities; opportunities follow



Relaxations & Amendments due to Lockdown



Steps taken in light of COVID-19



Suo-moto Order of Hon'ble Supreme Court dated 23.02.2020, thereby exclusion lockdown period for determining limitation

Minimum default threshold for Filing application increased to Rs. 1,00,00,000/- w.e.f. 24.03.2020

CIRP Regulations- Reg. 40C- Relaxation in time- Lines for excluding lockdown Period

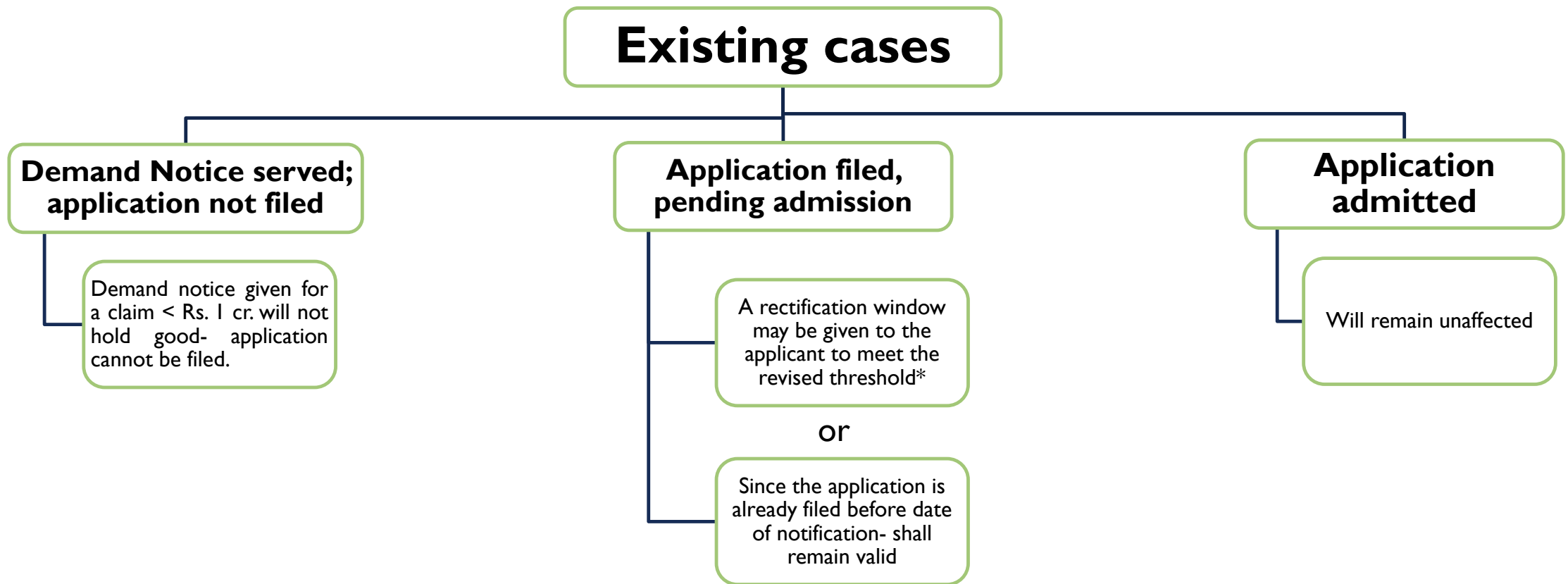
IBBI (Insolvency Professionals) Regulations, 2016- Extension for payment of fee till 30.06.2020

Suo-moto Order of Hon'ble NCLAT dated 30.03.2020, w.r.t. extension of CIRP period & validity of interim orders

Enrollment for Limited Insolvency Examination and Valuation Examination suspended till 14.04.2020

Liquidation Regulations- Reg 47A- Relaxation in timelines for excluding lockdown period

Revision in Threshold- Impact on Existing Cases



* There is no formal clarity w.r.t. the same. It has been inferred as similar rectification window was given in case of revision of threshold under IBC (Amendment) Bill, 2020 for application by Real-Estate Creditors



Committee Reports on IBC



List of Committee Reports w.r.t. IBC

| Year | Name of the Committee | Mandate | Recommendations | Outcome |
|--------|---|---|--|--------------------------------------|
| Nov'15 | Report of Bankruptcy Law Reforms Committee- https://www.ibbi.gov.in/uploads/resources/BLRCReportVolI_04112015.pdf | To study the corporate bankruptcy legal framework in India | <ul style="list-style-type: none"> i. Consolidated omnibus legislation dealing with corporate and personal insolvency, ii. a calm period for negotiations, iii. an adjudicating authority to ensure adherence to the process, iv. management of the processes by a regulated professional, v. commercial decisions to be taken a committee of creditors, vi. insolvency resolution to be time-bound, vii. an irreversible and time-bound liquidation process with defined payout prioritisation, etc. | Insolvency and Bankruptcy Code, 2016 |
| Apr'16 | Report of the Joint Committee of Parliament- https://www.ibbi.gov.in/uploads/resources/16_Joint_Committee_on_Insolvency_and_Bankruptcy_Code_2015_1.pdf | To study and make recommendations of the Report of Bankruptcy Law Reforms Committee | <ul style="list-style-type: none"> i. Including public financial institutions in the definition of financial institutions ii. Modifications in the definition of Operational creditors iii. Bringing clarity regarding applicability of the provisions of Part-II relating to Corporate Insolvency and Part-III relating to Insolvency and Bankruptcy for individuals and partnership firms iv. Mode of delivery of demand notice of unpaid operational debt v. Giving reasons for rejection of an application for initiating corporate insolvency resolution process vi. Requirement of consent of the secured creditor for liquidation estate vii. Notice of CoC meetings & Approval of plan by AA viii. Assistance to liquidator ix. Excluded assets and debts in case of personal insolvency x. Prohibition on alienation of asset | Insolvency and Bankruptcy Code, 2016 |

| Year | Name of the Committee | Mandate | Recommendations | Outcome |
|--------|---|---|---|---|
| Aug'17 | Report of Working Group on Individual Insolvency https://www.ibbi.gov.in/uploads/resources/Final-Report_of_WG_on_Indiv_Insol-Aug_2017.pdf | To prepare Draft Rules and Regulations for personal insolvency | <ul style="list-style-type: none"> i. Code to provide for time-bound mediation in respect of individual insolvency ii. A new cadre of professional mediators should be recognised to oversee the individual and partnership insolvency resolution process in place of Adjudicating Authority iii. The Insolvency and Bankruptcy Board of India may recognise certain mediation centres to provide mediation facility iv. amending the Code to designate the head of district judiciary, by whichever other name called, as the Adjudicating Authority in place of Debt Recovery Tribunal. | Draft Rules & Regulations |
| Mar'18 | Report of Insolvency Law Committee- https://www.ibbi.gov.in/uploads/resources/ILRReport2603_03042018.pdf | To recommendations on- (a) issues arising from the functioning and implementation of the Code, (b) issues that may impact the efficiency of the corporate insolvency resolution and liquidation framework prescribed under the Code, and (c) any other relevant matters as it deems necessary. | <ul style="list-style-type: none"> i. To provide relief to MSMEs ii. Streamlining of section 29A to avoid unintended exclusions iii. To treat homebuyers as financial creditors iv. to clear the confusion regarding treatment of assets of guarantors of the corporate debtor vis-à-vis the moratorium on the assets of the corporate debtor v. Reduce voting threshold for approval of plan vi. Allowing withdrawal of application during CIRP vii. Requirement of Special Resolution in case of section 10 applications | Insolvency and Bankruptcy Code, 2016 amended to include the recommendations |

| Year | Name of the Committee | Mandate | Recommendations | Outcome |
|--------|--|---|--|---------|
| Oct'18 | Report of Working Group on Individual Insolvency- https://www.ibbi.gov.in/uploads/resources/Final_report_of_VWG_on_Individual_insolvency-Oct18.pdf | To Recommend a phased implementation of a separate set of rules and regulations be made for separate categories of individuals under Part III of the Code | <ul style="list-style-type: none"> i. Separate set of rules and regulations. ii. Notification in phases iii. Linking proceedings with corporate debtor (It was discussed that merely having a common forum may not be sufficient to coordinate parallel proceedings of the corporate debtor and its personal guarantor) | |
| Oct'18 | Report of Insolvency Law Committee on Cross Border Insolvency- https://www.ibbi.gov.in/uploads/resources/Report_on_Cross%20Border_Insolvency.pdf | To make recommendations on adoption of the UNCITRAL Model Law and the modifications necessary in the Indian context. | <p>Based on the UNCITRAL Model Law on Cross-Border Insolvency, 1997, which is based on Access, Recognition, Cooperation and coordination. Additionally, it provides for</p> <ul style="list-style-type: none"> (i) Access to Foreign Rep. (ii) Participation of foreign representative in a proceeding under the Code. (iii) Access of foreign creditors to a proceeding under the Code. (iv) Notice to foreign creditors. (v) Coordination of concurrent proceedings: to take place simultaneously and the payment to creditors. | |

| Year | Name of the Committee | Mandate | Recommendations | Outcome |
|--------|--|---|--|---|
| Mar'19 | Report of Working Group on Individual Insolvency- https://www.ibbi.gov.in/uploads/resources/e6153215c43ebfcd00b29f946d8005bc.pdf | To suggest mechanisms to streamline the processes for insolvency and bankruptcy of the other categories of individuals under Part III of the Code | <ul style="list-style-type: none"> i. Separate rules and regulations ii. Simpler process for individual insolvency and bankruptcy iii. Linking processes with Corporate Debtor iv. Recommendations w.r.t. mode of application- forms and fee v. eligibility of bankruptcy trustee | Provisions for the personal guarantors of the corporate debtor enforced w.e.f. 01.12.2020 |
| Sep'19 | Report of the Working Group on Group Insolvency- https://www.ibbi.gov.in/uploads/resources/d2b41342411e65d9558a8c0d8bb6c666.pdf | To recommend a framework to facilitate insolvency resolution and liquidation of corporate debtors in a group. | <p>The Report provides for a phased implementation of the framework for enabling group insolvency.</p> <p>The Report provides for a procedural co-ordination, thereby providing for the following-</p> <ul style="list-style-type: none"> i. Joint application ii. Communication, cooperation and information sharing iii. Single insolvency professional and single Adjudicating Authority iv. Creation of a group creditors' committee, and v. Group coordination proceedings | |

| Year | Name of the Committee | Mandate | Recommendations | Outcome |
|---------|--|---|--|--|
| Feb'20 | Insolvency Law Committee Report (Part II)- https://www.ibbi.gov.in/uploads/resources/c6cb71c9f69f66858830630da08e45b4.pdf | (a) issues arising from the functioning and implementation of the Code, (b) issues that may impact the efficiency of the corporate insolvency resolution and liquidation framework prescribed under the Code, and (c) any other relevant matters as it deems necessary. | i. Application for Initiation CIRP by Class of Creditors ii. Continuation of Licenses, etc. granted by Government authorities during the Moratorium period/ iii. Continuation of Critical Supplies during the Moratorium period iv. Liability of corporate debtor for offences committed prior to initiation of CIRP v. Schemes of Arrangement in Liquidation vi. increasing the trigger of default from 11 lakhs to 10 lakhs vii. increasing the reliance on IU while admitting an application viii. Investigation of Avoidable and improper Trading; ix. Out of Court settlement | Recommendations have been adopted in IBC (Amendment) Act, 2020 |
| Mar' 20 | 6 th Report of the Standing Committee of Finance of Insolvency and Bankruptcy Code, Amendment Bill, 2020 https://www.ibbi.gov.in/uploads/resources/20ef77b3a1200f12ad19cee1c2c3dba9.pdf | To study and comment upon the amendments introduced in the IBC (Second Amendment) Bill, 2019- specifically, increase in eligibility threshold for real estate creditors | 1. To remove clauses pertaining to continued supplies to CD; 2. Upheld inclusion of section 32A | Recommendations not considered- INB (Amendment) Act was introduced on 13.03.2020 w.e.f. 28.12.2019 |



Recent Updates

Amendments in the IBC Framework from Apr'19-Apr'20

Updates in the IBC Framework

| Amendments in | | | |
|---|---|--|--|
| Insolvency and Bankruptcy Code | CIRP Regulations | Liquidation Regulations | Other Rules/ Regulations |
| <u>IBC (Amendment) Act, 2018- 06.08.2019</u> <ul style="list-style-type: none"> ▪ CIRP process to be cannot exceed 330 days (incl. litigation) ▪ Voting by AR of financial creditors ▪ Payment to OC under plans = liquidation value ▪ Res. Plan to be binding on all stakeholders ▪ Liquidation of CD prior to completion of CIRP period may be decided by CoC | <u>Amendment dated 25.07.2019</u> <ul style="list-style-type: none"> ▪ Withdrawal of Application in terms of sec 12A ▪ Approval of plan for meeting the estimated cost of liquidation ▪ Fixation of fee payable to the liquidator by CoC ▪ Recommend sale of CD as going-concern | <u>Amendment dated 25.07.2019</u> <ul style="list-style-type: none"> ▪ Expansion in scope of Liquidation cost ▪ Contribution to liquidation costs by FCs ▪ Scheme of compromise/ arrangement under liquidation ▪ Amendments in liquidator's fee ▪ Presumption of security interest by SCs ▪ Constitution of Stakeholders' Constitution Committee ▪ Sale as going concern | <ul style="list-style-type: none"> ▪ Notification for inclusion of Financial Service providers under the scope of IBC <ul style="list-style-type: none"> ▪ Currently only applicable for HFCs and NBFCs having net asset of Rs. 500 crore or more ▪ Enforcement of Insolvency process and Bankruptcy Regulations for personal guarantors of corporate debtors- w.e.f. 01.12.2019 |

Amendments in

| Insolvency and Bankruptcy Code | CIRP Regulations | Liquidation Regulations | Other Rules/ Regulations |
|---|---|--|---|
| <p><u>IBC (Amendment) Act, 2020- dated 13.03.2020, w.e.f. 28.12.2019</u></p> <ul style="list-style-type: none"> Procedural & Technical amendments (see below) W.r.t. offences prior to CIRP <p><u>IBC (Second Amendment) Act, 2020- 24.03.2020</u></p> <ul style="list-style-type: none"> Min. default amt. u/s 4 increased to Rs. 1 crore | <p><u>Amendment dated 28.11.2019</u></p> <ul style="list-style-type: none"> Voting by AR Filing of Forms by IRP/ RP <p><u>Amendment dated 29.03.2020</u></p> <ul style="list-style-type: none"> Insertion of reg. 40A for relaxation of timeline during lockdown | <p><u>Amendment dated 06.01.2020</u></p> <ul style="list-style-type: none"> Exclusion of persons disqualified u/s 29A from being party to any scheme during liquidation <ul style="list-style-type: none"> From NCLAT orders in indal Steel and Power Limited v. Arun Kumar Jagatramka & Gujarat NRE Coke Limited Sale outside liquidation <ul style="list-style-type: none"> To be time-bound Cannot be made to persons disqualified u/s 29A Contribution of Corporate Liquidation Account <p><u>Amendment dated 17.04.2020</u></p> <ul style="list-style-type: none"> Insertion of reg 47A for relaxation of timeline during lockdown | <ul style="list-style-type: none"> Amendment in IBBI (Voluntray Liquidation) Regulations, 2016 on 15.01.2020- <ul style="list-style-type: none"> Contribution to Corporate Voluntary Liquidation Account Enforcement of Personal Bannkrupctcy Rules w.e.f. 01.12.2019 |

Snapshot of Major Developments



IBC (Amendment) Bill, 2020- Quick Overview

| Sl. No. | Section | Subject |
|---------|---------------|---|
| 1. | 5 (12) & (15) | Definition of Insolvency Commencement Date & Interim Finance |
| 2. | 7 | Application by financial creditors- Threshold increased for application by Real-Estate Creditors/ Home-Buyers |
| 3. | 11 | Clarified that a CD can file application for initiation of CIRP against another company |
| 4. | 14 | Continuation of licenses, permits, quotas or similar grants during CIRP |
| 5. | 16 | Appointment of IRP on the same day as order of CIRP commencement |
| 6. | 21 | Conditions on which a FC not be considered a related party of the CD widened |
| 7. | 23 | Affairs of CD during the time-gap between the period of conclusion of CIRP and (a) Implementation of Resolution Plan; or (b) commencement of liquidation shall now be the responsibility of the RP |
| 8. | 29A | Conditions on which a FC not be considered a related party of the CD widened |
| 9. | 32A | New insertion- w.r.t. liability of prior offences |
| 10. | 227 | Power of CG to notify FSPs under the Code |

Curtailment of Powers of Small Financial Creditors (1/2)

- Section 7: Minimum threshold for certain classes of financial creditors-
- Lower of
 - 100 creditors of same class
 - 10% of the total number of such creditors in the same class
 - **Threshold based on number not “value”**
- Covers financial creditors under section 21(6A)
- Covers clause (a)- security deposits
- Clause (b) – others where creditors are represented by AR
 - For home buyers, the threshold is to be applied “project-wise” (**“same real estate project”**)

Applicability

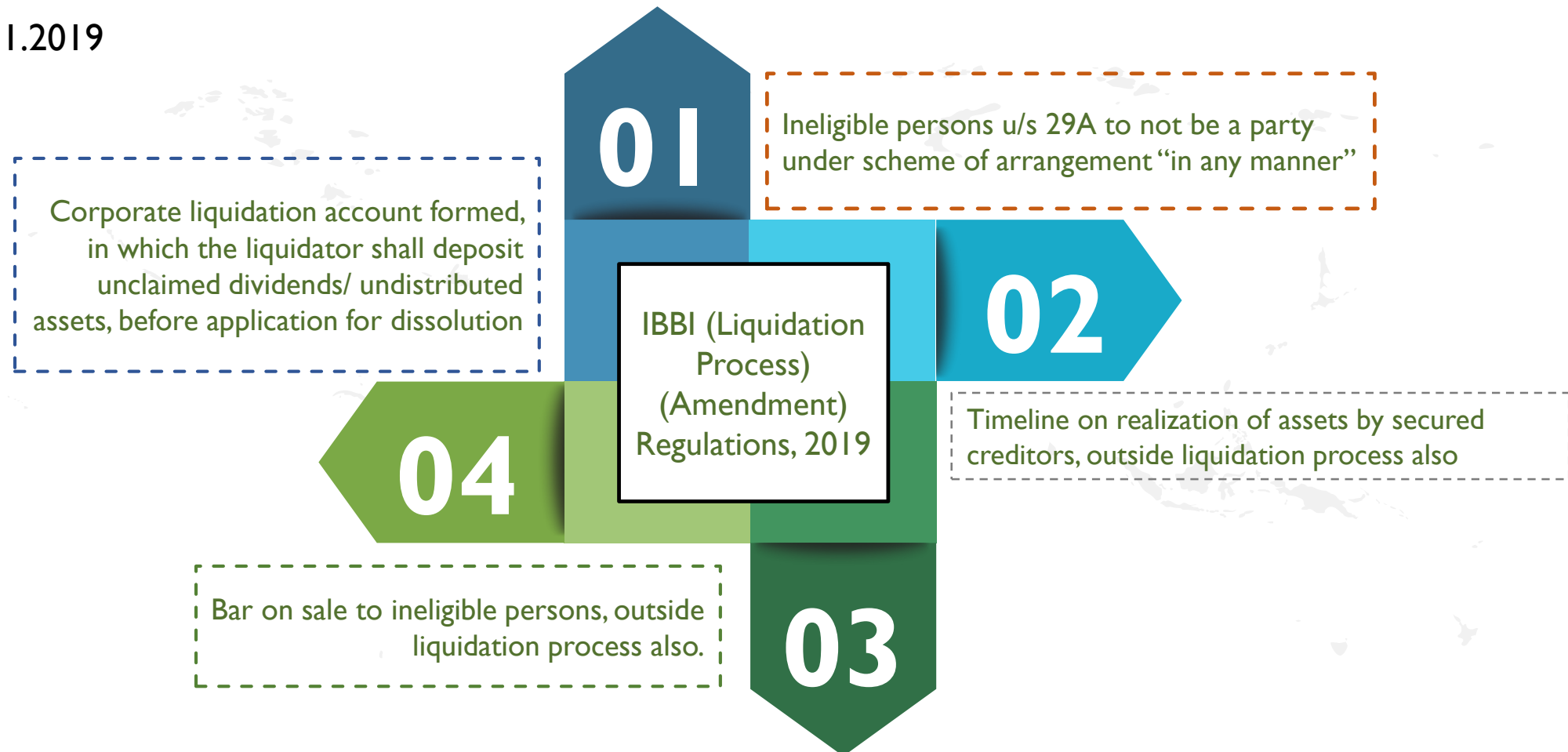
- Applicable on applications filed but not admitted till commencement of Amendment
- Application to be modified within 30 days of the commencement of Amendment
 - If not modified, shall be deemed to be withdrawn before admission

Order by Hon’ble SC- dated 13.01.2020

- Appeal was filed by Home-buyers;
- Partial relief provided-
 - Application filed but not admitted, will not be affected and status-quo has to be maintained

IBBI (Liquidation Process) (Second Amendment) Regulations, 2019

w.e.f. 28.11.2019





Insolvency & Bankruptcy Process Against Individuals

Provisions Enforced For Personal Guarantors To Corporate Debtors

Two Routes Available for Individuals

Fresh Start Process

Eligible Applicants-

- Gross Annual Income < Rs 60,000
- Agg. value of assets < Rs. 20,000
- Agg. Value of “qualifying debt” < Rs. 35,000
- Not an undischarged bankrupt
- Does not own a dwelling unit
- A Fresh Start Process not subsisting against applicant
- Insolvency Process, Bankruptcy Process not subsisting
- No prev. FSP in 12 months preceding the application

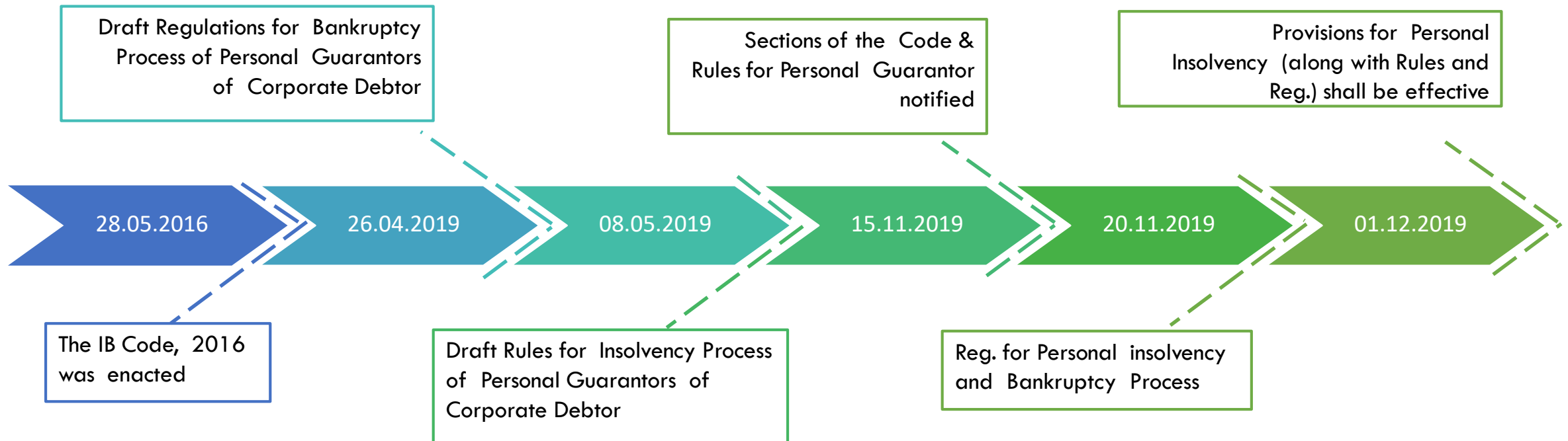
Insolvency Resolution & Bankruptcy Process

Eligible Applicants-

- Having min. default of Rs. 1,000/-
- Those ineligible under FSP may apply under this route

Enforcement of Provisions

Sections 94 to 187 of the Code, read with sec. 60 (1) and (2), notified *vide* notification dated 15.11.2019, along with rules and regulations for insolvency and bankruptcy process of Personal Guarantors-
Applicable from 01.12.2019



Personal Insolvency vs. Corporate Insolvency

| Point of difference | Personal Insolvency | Corporate Insolvency |
|-------------------------------|---|--|
| Distinction between creditors | No classification w.r.t. type of creditor i.e. operational or financial | Three classes of creditors – financial, operational, other |
| Withdrawal of Application | Yes Requires 90% consent of creditors | Yes Requires 90% consent of CoC |
| CoC | No concept of CoC- a general list of creditors is formed | Constitution of CoC mandatory- shall comprise of financial creditors only. |
| Meeting of Creditors | Not Mandatory- shall be conducted if deemed necessary by the RP – subject to conditions | Mandatory to conduct the CoC |
| Moratorium | Yes | Yes |
| Interim Moratorium | Yes | No |
| Approval of Plan | Requires 75% assent of creditors present and voting | Requires 66% assent of CoC |
| Rejection of plan | Application for bankruptcy <u>may be</u> filed | Leads to compulsory liquidation |
| Role of the IP | Pre-scrutiny of the insolvency application and repayment plan by the RP | RP does not come into picture until admission |

Personal Insolvency Resolution vs. Bankruptcy

| Point of difference | Insolvency Resolution | Bankruptcy |
|---------------------------------|--|---|
| Necessary condition | Default by the debtor. | Rejection of application for insolvency resolution; or rejection of repayment plan; or premature termination of the repayment plan. |
| Eligible applicants | Debtor/creditor. | Debtor/creditor; in some circumstances, only creditor – section 100(4). |
| Dominant Aspect | Preparation of Repayment plan | Administration, liquidation and distribution of estate |
| Interim-moratorium | Yes | Yes |
| Role of insolvency professional | Resolution Professional | Bankruptcy Trustee |
| Moratorium on creditors | Yes, includes restrictions on creditors too. | Assets of the bankrupt vest in the hands of trustee. Secured creditors may sell |
| Vesting of estate | No | Yes |
| Committee of Creditors | Not mandatory | Established u/s 134 |
| Period of Discharge | No default period specified; on implementation of the repayment plan. | Earlier of 1 year or completion of administration is approved by the committee of creditors. |
| Phases | Insolvency → Resolution → Failure → Bankruptcy/Liquidation → Dissolution | Insolvency → Repayment Plan → Failure → Bankruptcy → Discharge |

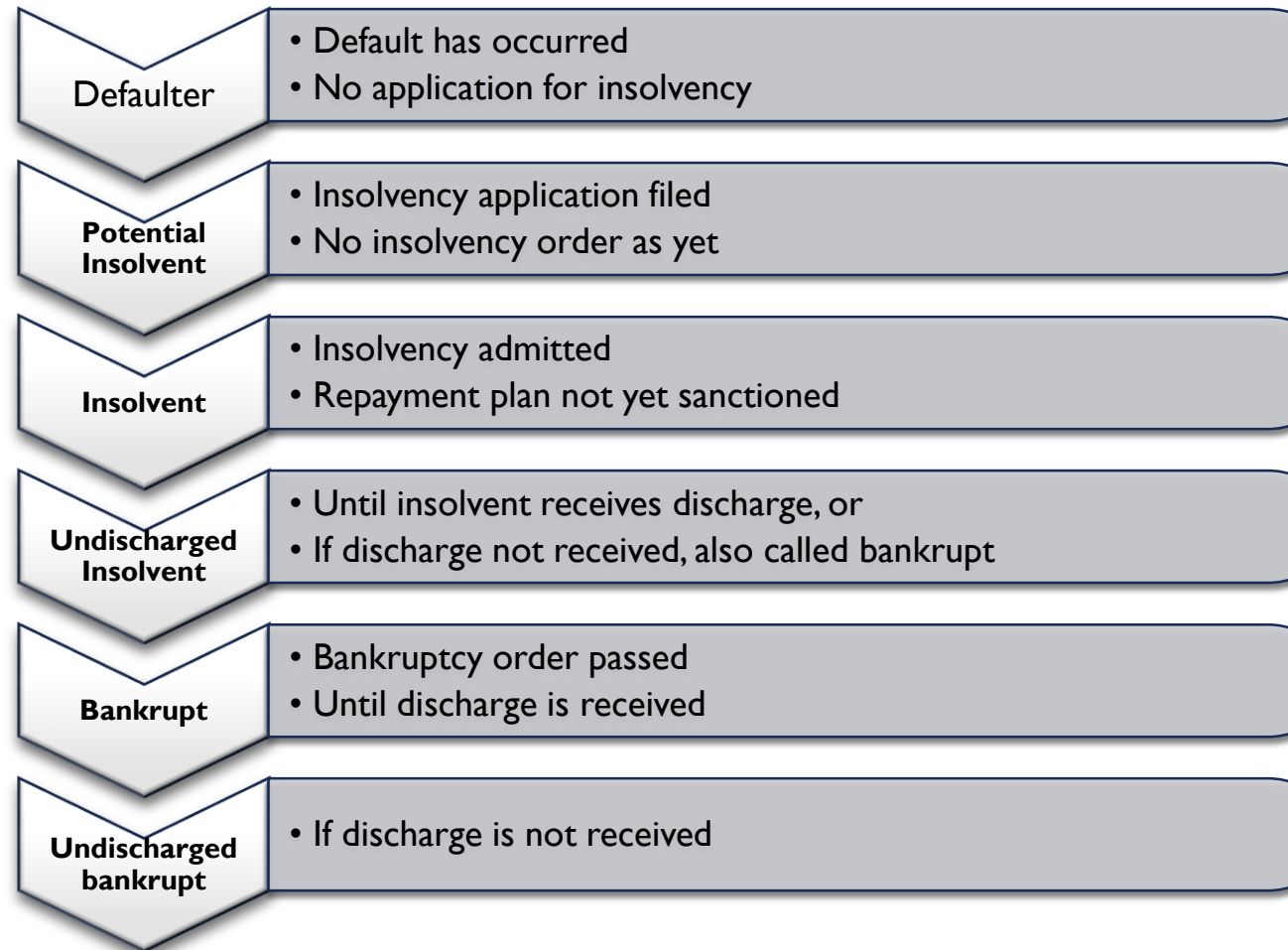
Corporate Liquidation vs. Personal Bankruptcy (1/2)

| Point of difference | Liquidation | Bankruptcy |
|--------------------------------------|--|---|
| Manner of initiation | Automatically triggered u/s 33 | Creditor/debtor become entitled to file for bankruptcy Section 100 – Rejection of insolvency resolution application by AA. Section 115 – Rejection of repayment plan by AA. Section 118 – Premature closing of repayment plan Note undischarged insolvent u/s 92 (2) may also be adjudged as bankrupt |
| Reversibility/modification or recall | No specific provision – right to appeal against AA's order – section 61. | Possible – by AA, on application or suo-motu – section 142 (either erroneous initiation or full repayment). |
| Interim-moratorium | No | Yes – sec. 124 (1)- on application – lasts till bankruptcy order is passed |
| Moratorium | Sec. 33 - On liquidation order being passed | Sec. 128 - On bankruptcy order being passed |
| Role of Insolvency Professional | As liquidator | As bankruptcy trustee |
| Estate of debtor | Liquidation estate held by liquidator as fiduciary for benefit of all creditors – section 36 | Estate of the bankrupt vests in the bankruptcy trustee – section 154 |
| Manner of vesting of estate | No conveyance, assignment – the estate is constructive | Section 154(2) provides that there is no need for conveyance, assignment or transfer for vesting of property in the trustee. |

Corporate Liquidation vs. Personal Bankruptcy (2/2)

| Point of difference | Liquidation | Bankruptcy |
|---------------------------------|--|---|
| Involvement of creditors | Liquidator has to constitute the Stakeholders' Consultation Committee (including creditors). No provision for a committee of creditors | Considerable- a meeting of creditors is summoned, a committee of creditors is appointed for approval of the report on administration of the estate; the bankruptcy requires approval of the committee for several acts (sec. 153), and the committee of creditors decides on the release of the bankruptcy trustee. |
| Priority of pay-out from estate | Sec 53- financial debts takes priority over operational debts | Sec. 178 – distinction b/w financial creditor and operational creditor does not exist [even if the individual is carrying on business] |
| Final Stage | Dissolution – the entity loses its existence | Discharge – releases the bankrupt from all bankruptcy debts. |

Phases of a Debtor in IBC Proceedings

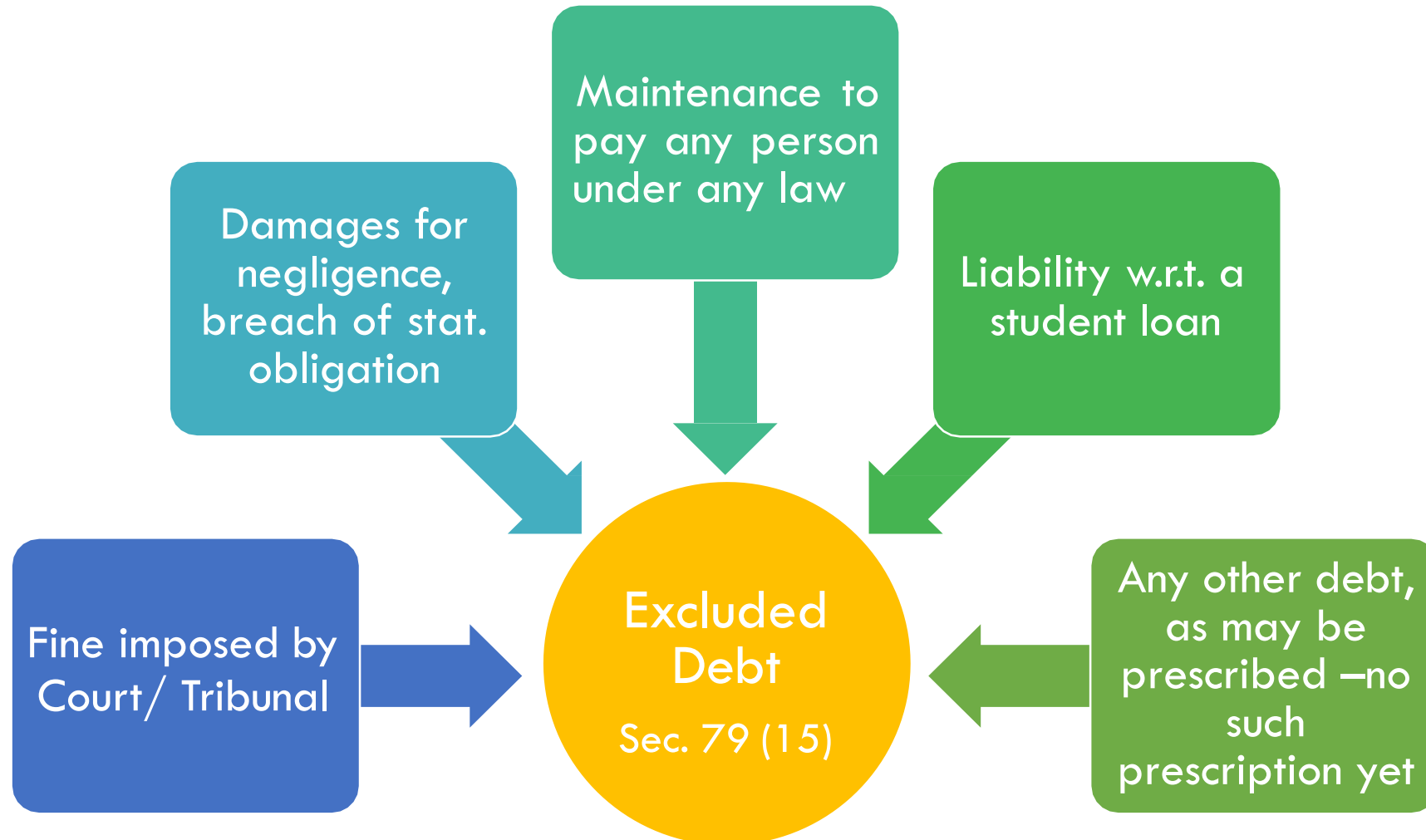


Who is a Personal Guarantor?

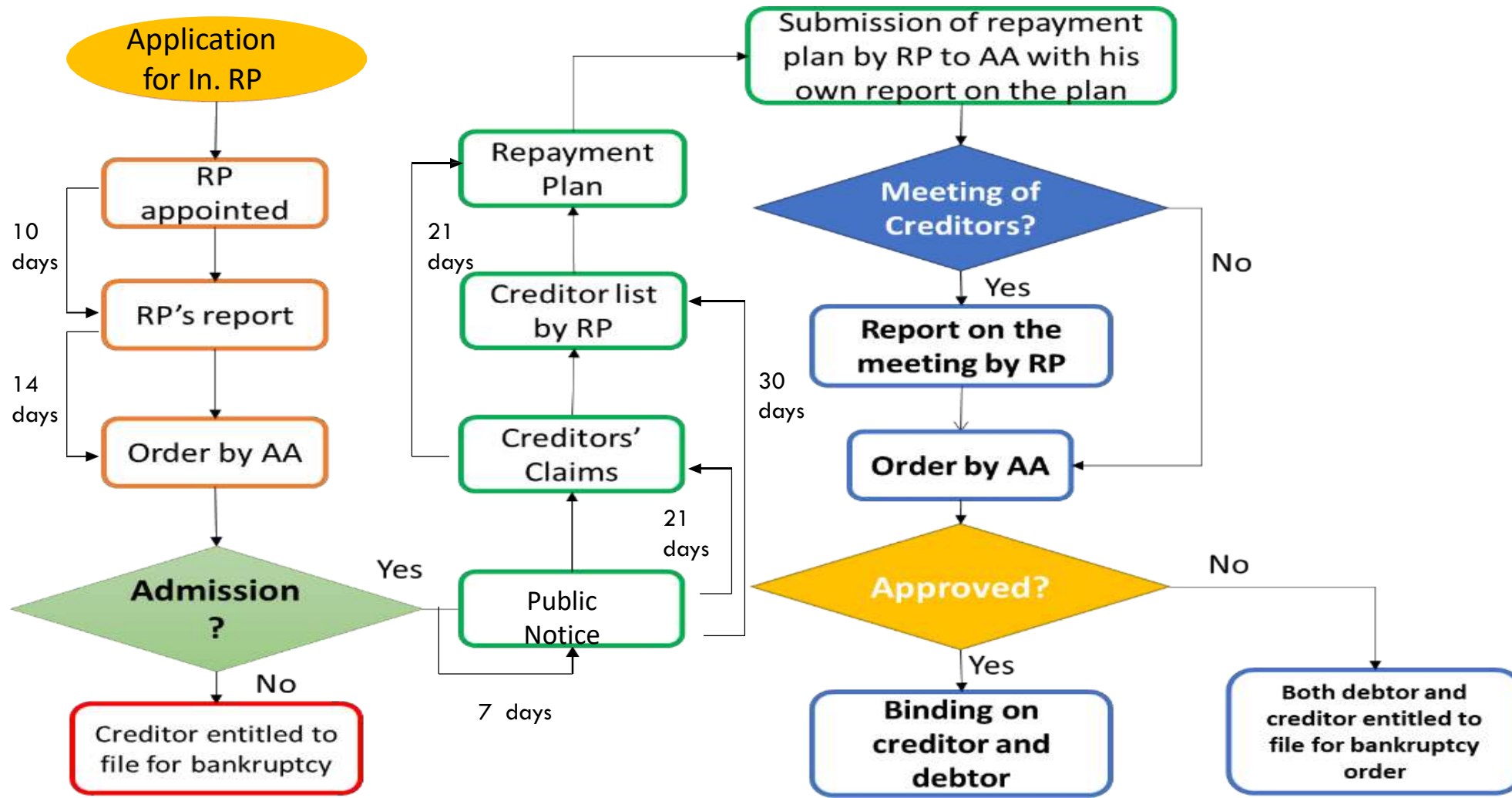
■ Elements of the definition:

- Must be a debtor – sec 79 (12) provides an inclusive definition, to include judgement debtor. Meaning should come from “debt” in sec 3 (11)
- Who is a personal guarantor
 - Sec 5 (22) – covers only individuals who are sureties to a contract of guarantee to a corporate debtor;
 - Principal debtor must be a corporate debtor; guarantor must be individual
- Guarantee has been invoked
 - Invocation of guarantee must be in terms of the guarantee deed; provisions of sec 126-147 of the Contracts Act
 - Usually guarantee is invoked by notice Remains unpaid in full or part
- Does it make a difference if the personal guarantor gave securities as well? – No
- What if there are joint sureties:
 - Depending on construction of the guarantee, but proceedings may be filed against one or all – based on joint and several liability

What Are Excluded Debts?



Insolvency Resolution Process: A Snapshot



Moratorium during Insolvency Process

Stages of Moratorium

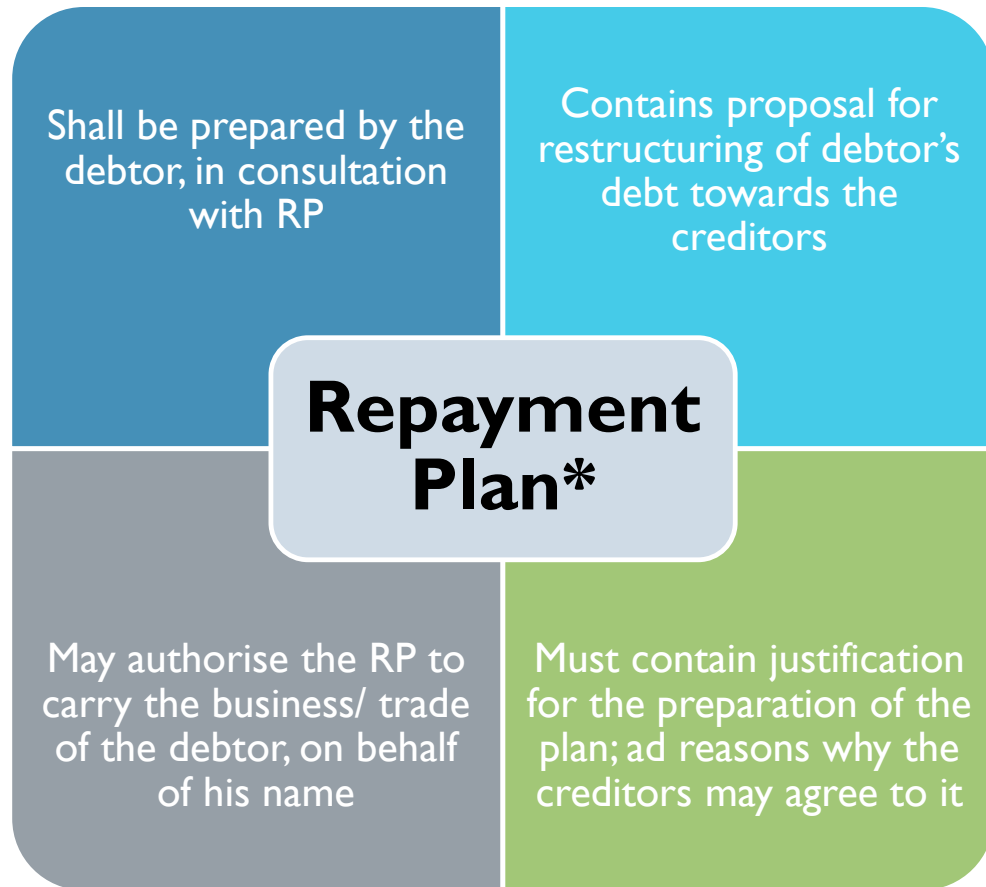
Interim (Sec. 96)

- From date of filing of application till its admission
 - No time limit specified
- Against pending legal action w.r.t. **ANY** debt;
- Initiation of proceedings against **ANY** Debt
- Initiation of proceedings against **ANY** Debt.

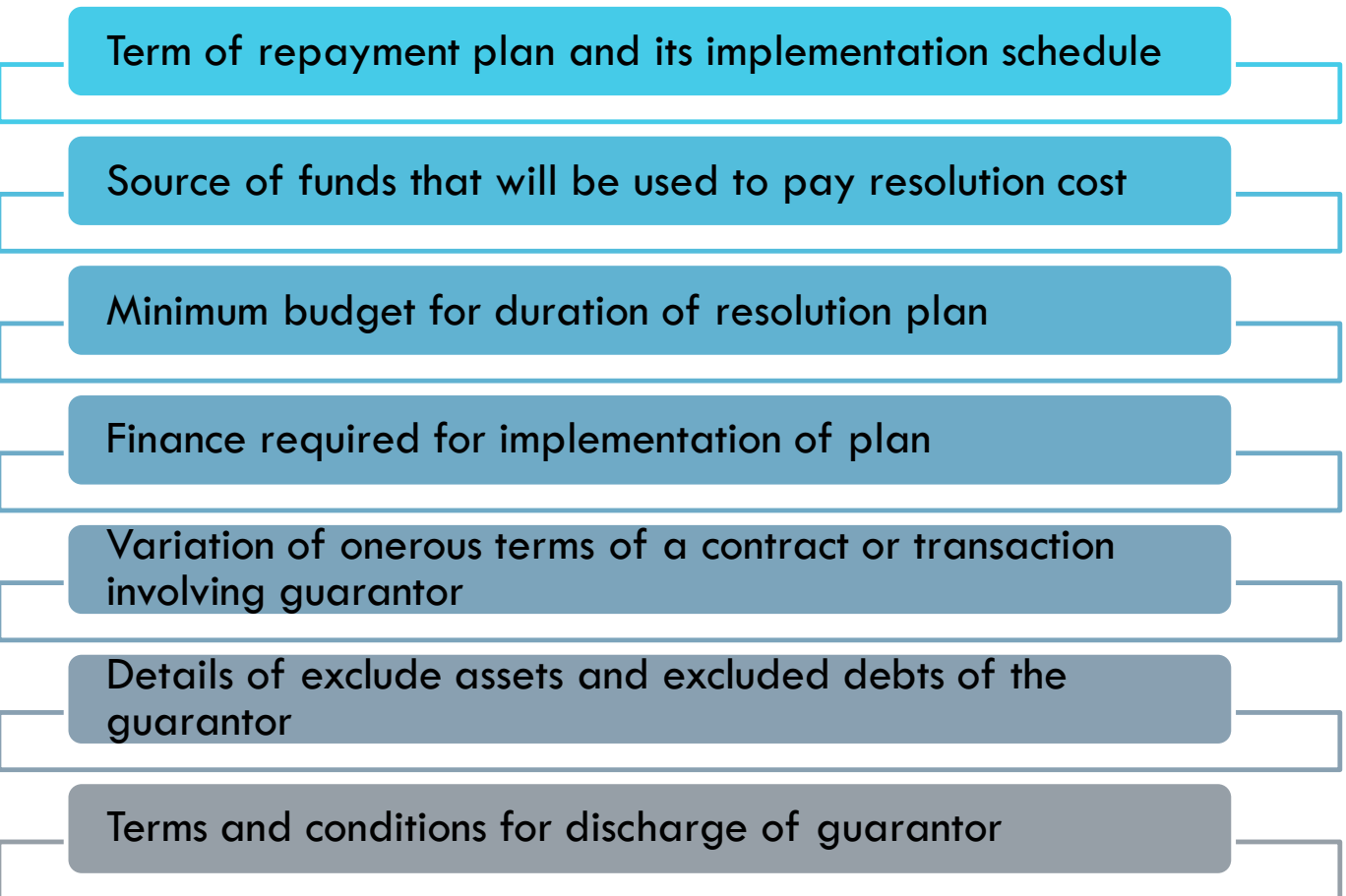
Final (Sec. 100)

- From admission of Application till 180 days or approval of Repayment Plan, whichever is earlier.
- Against pending legal action w.r.t. debt;
- Initiation of proceedings against debt;
- The debtor shall not transfer, alienate, encumber, any of his assets or legal rights

Features & Contents of Repayment Plan



Contents of Repayment Plan



****Repayment plan is approved upon assent by 75% creditors, present & voting***

Completion/Termination of Repayment Plan

Full Completion of Plan

As per section 117

Notice by RP

RP shall notify all persons bound by the Plan, that Plan has been fully implemented

Filing of Report

Report w.r.t. all receipts & payments pursuant to implementation of Plan shall be sent to all persons bound by the Plan

Premature Termination of Plan

As per section 118

Report by RP

RP shall submit report stating reasons for premature termination; and Details of creditors whose dues have not been paid as per Plan

Application for bankruptcy

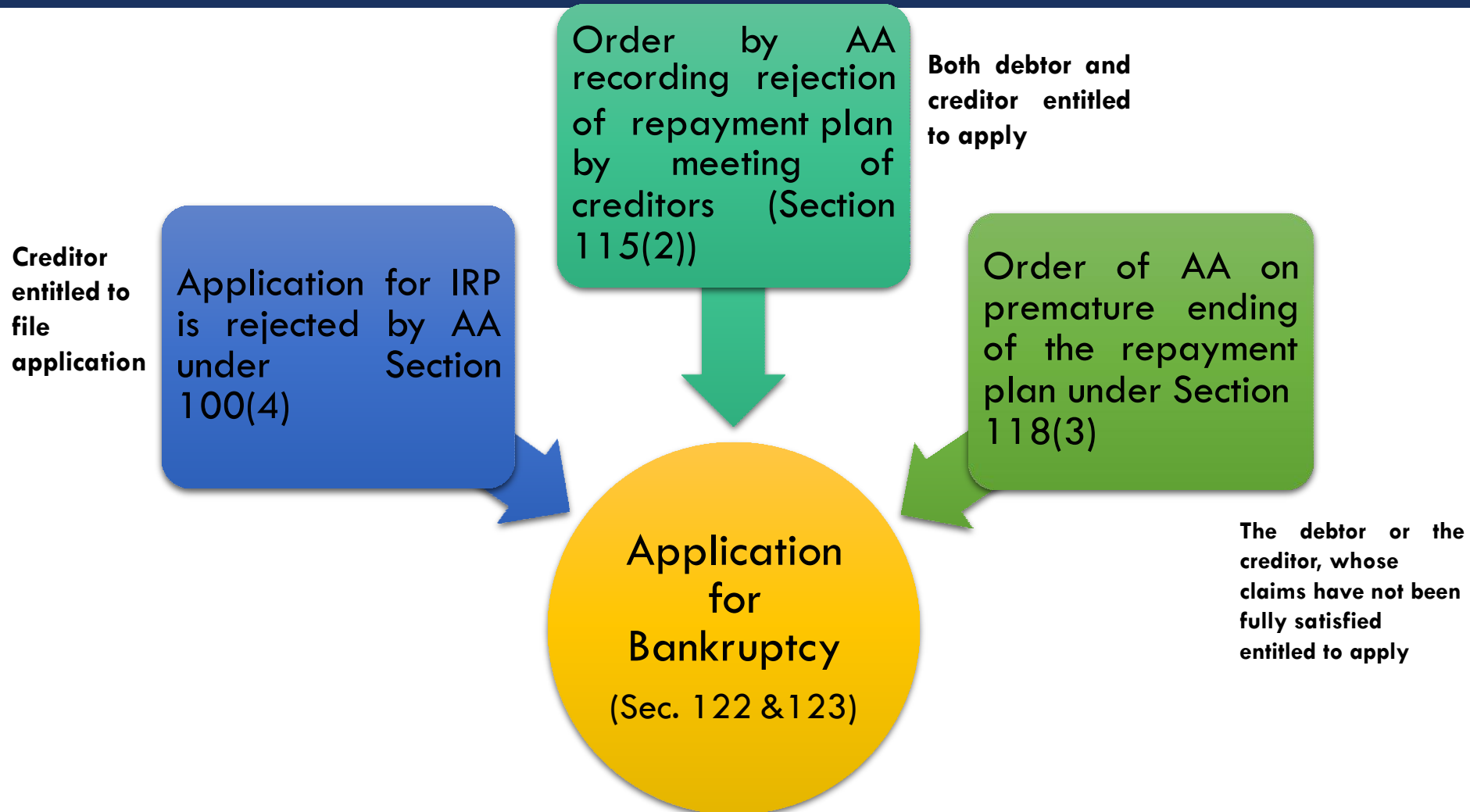
Creditors **whose claims have not been fully satisfied** may file for bankruptcy order

Discharge Order under Insolvency Process

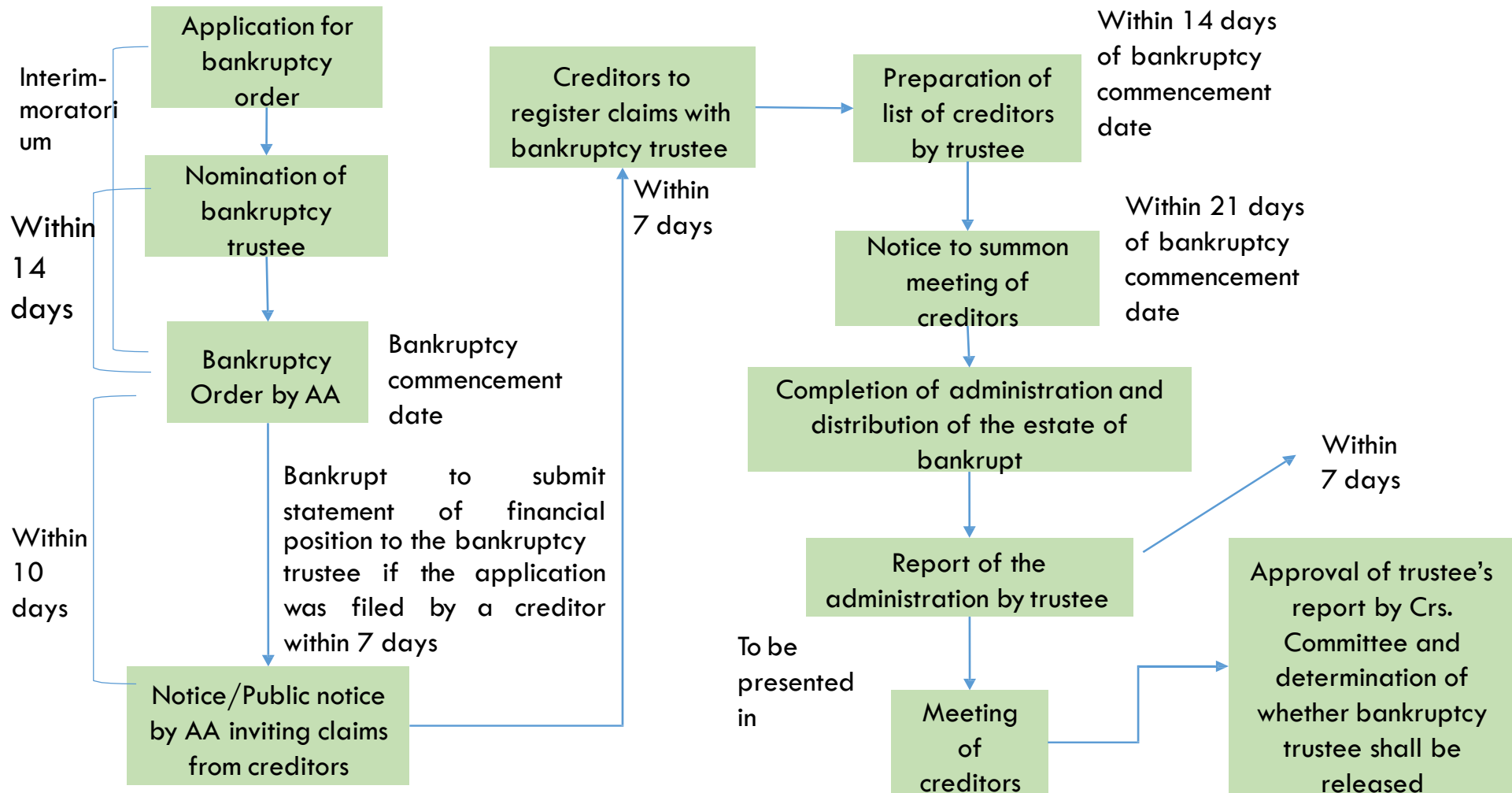
Application for discharge order (Section 119 read with reg. 21)-

- On the basis of the repayment plan, the resolution professional shall apply to the AA for a discharge order in relation to the debts mentioned in the repayment plan and the Adjudicating Authority may pass such discharge order.
- **The repayment plan may provide for -**
 - (a) early discharge; or
 - (b) discharge on complete implementation of the repayment plan.
- **Discharge order only for the Debtor-**
 - Discharge order under sub-section (3) shall not discharge any other person from
 - any liability in respect of his debt.

Bankruptcy application: Who can file and when?



Bankruptcy Process



Moratorium during Bankruptcy

Blocks these:

- A creditor shall not initiate any action against property of the bankrupt
- A creditor shall not commence any suit or other legal proceeding except with the leave of the AA
- Note the bar is only on a creditor – if there is a monetary implication against the debtor, the claimant becomes a creditor
- Can excluded debts be recovered? Usually AA should not object to recovery of an excluded debt by any action
 - Fines, damages, maintenance obligation, etc

Does not block these:

Enforcement action by secured creditor

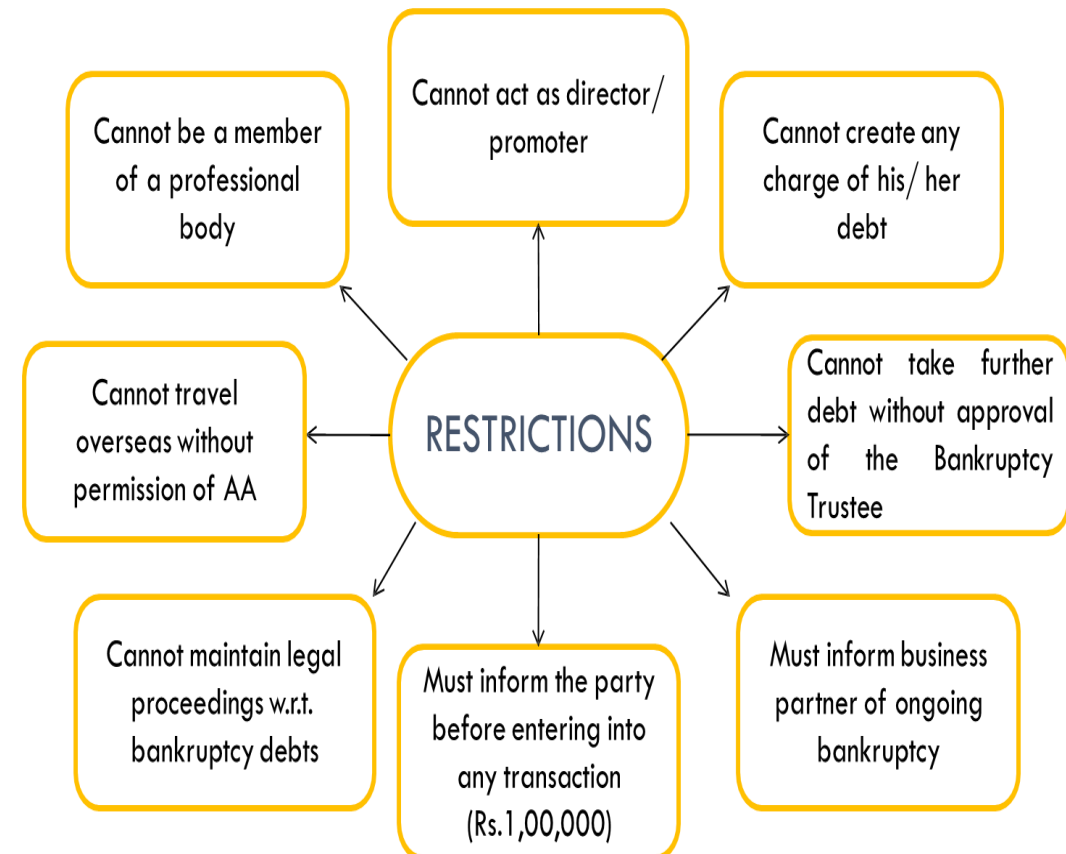
- – sec 128 (2)
- Punitive action for personal misconduct, such as contempt of court
- Ruling in Smith vs Braintree DC [1990] 2 AC 215 – criminal proceedings not stayed; quasi-criminal proceedings, with predominant purpose of enforcing a payment, may get stayed.

Disqualifications of & Restrictions on the Bankrupt

Sec 140: Upon Bankruptcy Order shall, the bankrupt shall be disqualified from acting as-

- a) being appointed or acting as a trustee or representative in respect of any trust, estate or settlement;
- b) being appointed or acting as a public servant;
- c) being elected to any public office where the appointment to such office is by election; and
- d) being elected or sitting or voting as a member of any local authority.

Restrictions u/s 141



Role of Creditors under Bankruptcy

| General meeting of creditors | Committee meeting of creditors |
|--|--|
| The first meeting of creditors will mandatorily have to be called, within 21 days of BCD – sec. 133 (1) | The Committee is constituted by the Trustee. Composition of the Committee is not laid down in the Code or the Regs |
| Primary business of the first meeting is to constitute the Committee of Creditors | Given the fact that Creditors' Committee has substantial powers to drive the bankruptcy process, including power to replace the trustee, the Committee's composition must reflect the voting share of the general body |
| Voting percentage for the general meeting is not given in the Code or the Regulations. Sec 134 (3) provides for passing of a resolution <ul style="list-style-type: none">• By common intuition, this should be ordinary majority resolution | Trustee to intimate to the AA the constitution of the Committee within 3 days – reg 20 (2) |

Voting Share for Guarantee Creditors

- Sec. 135 (3) – a creditor shall not be entitled to vote for an un-liquidated amount
 - Un-liquidated amount normally refers to un-liquidated damages for breach of a contract which requires adjudication;
 - The right of creditor to demand money from guarantor, if clear under the guarantee deed, is an ascertainable claim;
 - Several rulings of the SC on this point,
 - Biswanath Jhunjunwala, Ganga Kishun, etc
- The Code has several provisions for secured creditor's voting rights – only in respect of surrendered security interest, or unsecured part of his claim
 - Sec. 110, 123 (3)
- However, is a secured creditor of the CD a secured creditor of the guarantor?
 - Answer will be no, unless there assets of guarantor given as security
- Hence, the voting shares will be based on claims filed by the guarantee creditors
- Claim amount:
 - Where resolution plan for CD has been approved – the amount of haircut
 - Where the resolution plan for CD is not yet approved - the whole of the amount payable by the CD
 - Where the CD is in liquidation, and the creditor has relinquished security interest – the amount claimed, less any distribution
 - Where the CD is neither in resolution, nor liquidation
 - the amount due from CD, as demanded from guarantor

Discharge Order

Ref. section 138

- Application by Bankruptcy Trustee
- Earlier of-
 - Expiry of 1 year from bankruptcy commencement
 - Within 7 days of approval of CoC
- Effects
 - Bankrupt released from **all bankruptcy debts**
 - In case the application for discharge is filed within 7 days of the creditors' approval, the discharge does not affect
 - functions of the bankruptcy trustee
 - the operation of the provisions of Chapters IV and V of Part III;
- These remain unaffected
 - Right of the secured creditor to enforce his security for the payment of a debt from which the bankrupt is discharged
 - Bankrupt is not released in respect of debts incurred by means of fraud or breach of trust to which he was a party
 - Bankrupt is **not released from any excluded debt**

Estate of the Bankrupt (1/4)

Sec. 155- Estate of the Bankrupt shall

Include:

- All property belonging to or vested in the bankrupt at BCD;
- Capacity to exercise & initiate proceedings for exercising all such powers in or over or in respect of property
- All property by virtue of any provision of the Code

Exclude:

- Excluded assets (defined)
- Property held on trust for any other person;
- All sums due or pending w.r.t. provident fund, pension fund etc;
- Any assets as may be notified by CG

Estate of the Bankrupt (2/4)- Excluded Assets



Unencumbered tools, vehicles and other equipments, necessary for employment, business or vocation.



Unencumbered furniture, equipment, necessary for basic domestic needs



Unencumbered personal ornaments, that cannot be parted with in accordance with religious usage

Upto Rs. 1,00,000/-



Unencumbered life insurance policy/ pension plan



Unencumbered single dwelling unit

Rural Area- Upto Rs. 10,00,000/-
Urban Area- Upto Rs. 20,00,000/-

Estate of the Bankrupt (3/4)- Excluded Assets

- Unencumbered single dwelling unit of such value as may be prescribed
 - Unit owned of by the debtor, of upto Rs 20 lacs in urban areas Upto Rs 10 lacs in rural areas Rural area defined in line with NREGA law – any area outside the area under a local body or cantonment board
 - As for determination of value, values' valuations may be relevant
- Unlikely that the bankrupt will have a dwelling unit of as much value
- Most bankrupt-owned properties may be of value higher than the ceilings:
 - Does the bankrupt get as much value from the bankruptcy estate, if he cedes his house to the estate?- Seems logical, equitable
- Tools, books, vehicle or other equipment
 - Necessary for personal use or the employment or vocation of the bankrupt.
- How many vehicles can be retained?
 - The question is one of necessity
 - Hence, seems exception is only for 1 vehicle
 - Luxury vehicles may also have to be vested
 - Furniture, household equipment or provisions necessary for basic domestic needs
 - Unencumbered LIP or pension plan

Estate of the Bankrupt (4/4)- Excluded Assets

- Estate of the bankrupt vests in the trustee
 - What is the meaning of estate? All the assets owned by the bankrupt as on the bankruptcy commencement date
- Sec 155 provides the scope of inclusions;
 - All property of the bankrupt or vested in the bankrupt on the BCD Powers to take proceedings, as the bankrupt would have done
 - All property that gets comprised by virtue of any of the provisions – such as preferential transfers, undervalued transactions
- Wide definition of “property” in sec 3
- Causes of action personal to the bankrupt do not form part of “property” Damages for pain/harm to body, mind or character – Grady v HM Prison Service (2003) EWCA Civ 523
- Damages for unfair dismissal
- Family property
 - Several rulings under erstwhile insolvency laws that interest of the bankrupt in family property may be liquidated as a part of the bankruptcy estate. Eg. Ramchandra Aiyar, (1922) 43 MLJ 569
- Doctrine of reputed ownership has not been incorporated in the Code Provident fund – sec 10 of the PF Act
- provides that money lying to the credit of the person shall not be subject to claim under erstwhile Insolvency laws
- Gratuity – sec 13 of the Gratuity Act

Powers of Bankruptcy Trustee

General Powers

Sell any part of the estate

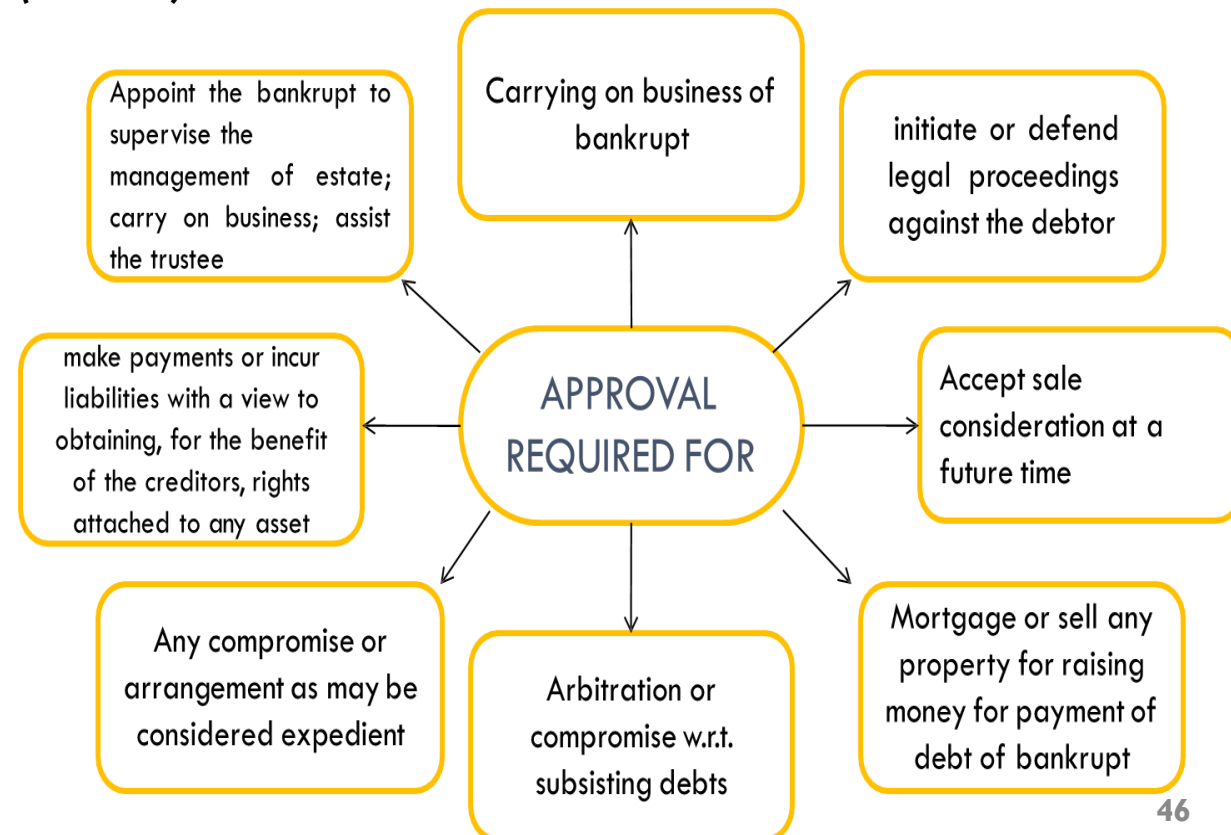
Give receipts for money received by him

Prove, rank, claim and draw any dividend due to the bankrupt as are comprised in the estate

Exercise right of redemption w.r.t. any property held in hypothecation

Deal with any property in the bankruptcy estate

Certain acts that require explicit approval of creditors are: (Sec 153)



Order of Priority for Distribution- sec 178

Costs

- Costs and expenses incurred by the bankruptcy trustee for the bankruptcy process- in full.

Workmen & Secured creditors

- Workmen dues for a period of 24 months prior to BCD;
- Debts to secured creditors

Employee dues

- Wages and any unpaid dues to employees, other than workmen, for a period of 12 months prior to BCD

Government Dues

- Any amount due to CG or SG, for 2 years preceding the BCD

Other debts

- All other debts and dues including unsecured debts

Vulnerable Transactions

Vulnerable Transactions under the Code

Undervalued Transactions (Sec. 164)

an undervalued transaction between a bankrupt and any person

- entered into during the period of two years ending on the filing of the application for bankruptcy; and
- Caused bankruptcy process to be triggered

Preference Transactions (Sec. 165)

The transaction giving preference to an associate of the bankrupt

- entered into during the period of two years ending on the filing of the application for bankruptcy; and
- Transactions another than with associate- 6 months

Extortionate Credit Transactions (Sec. 167)

In respect of extortionate credit transactions to which the bankrupt is or has been a party

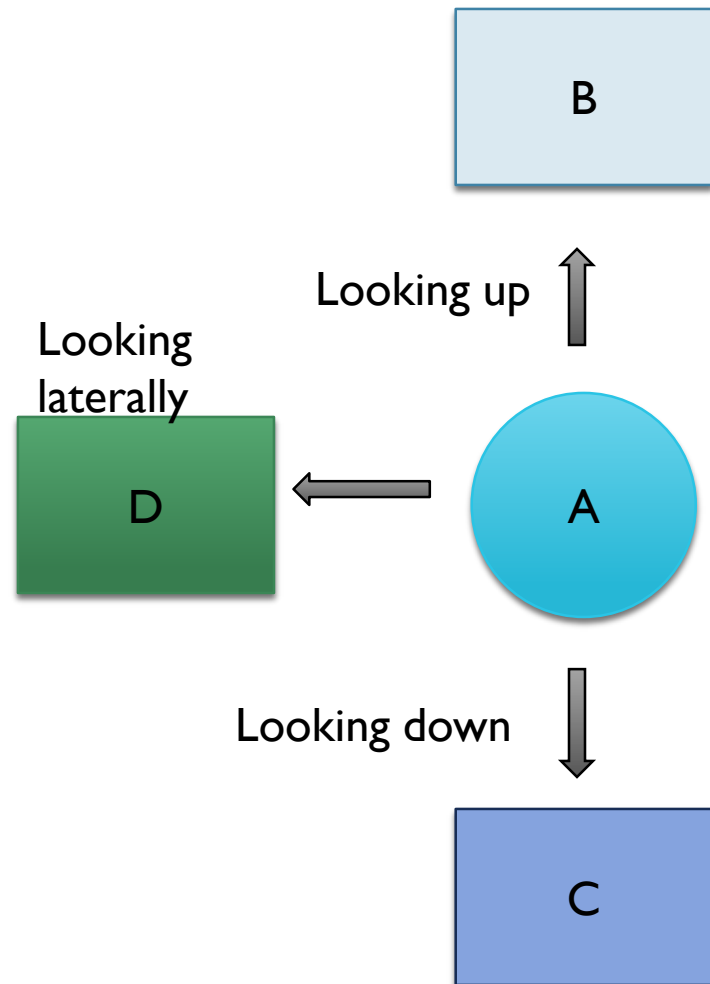
- entered into during the period of two years ending on the filing of the application for bankruptcy; and



Group Insolvency

Moving From “Entity” To “Enterprise”

Entity vs. Enterprise- Relevance

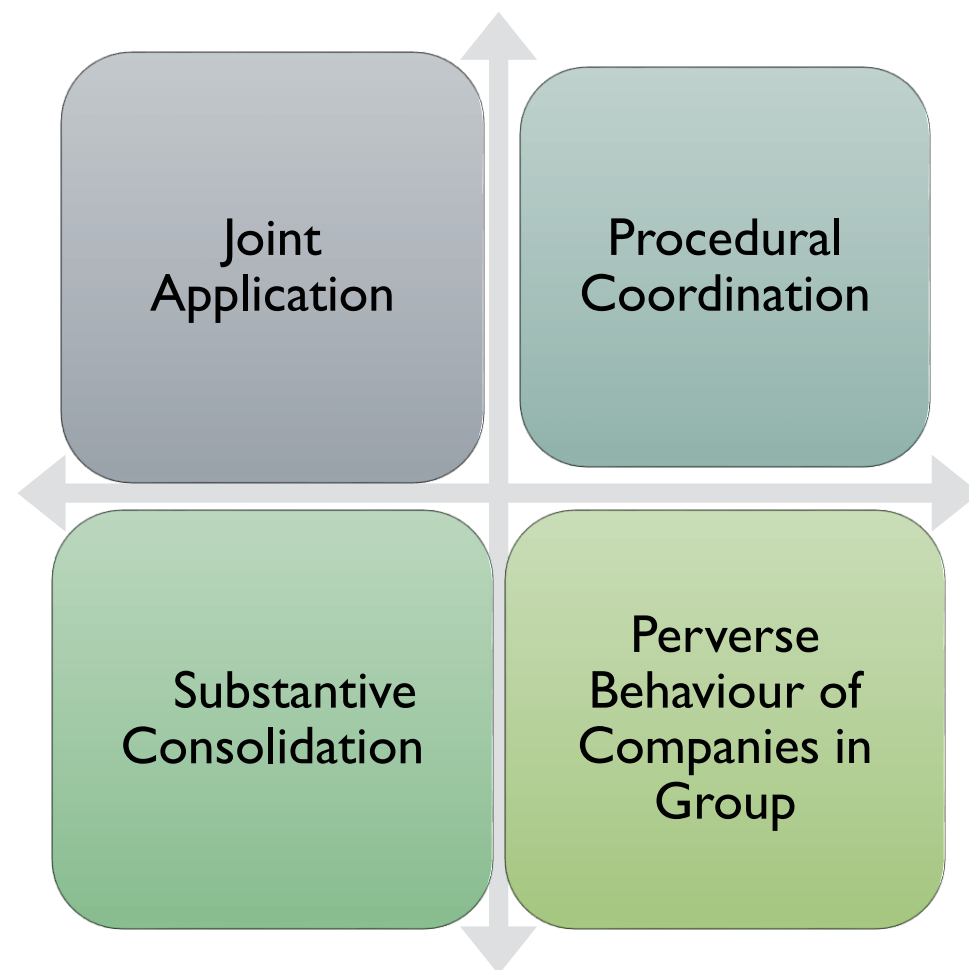


- Entity approach: *Salomon vs. Salomon*
- Present scenario in insolvency laws – “entity” focused
- Changing business dynamics
 - Localisation to MNCs
 - Enterprise value being scattered across entities
 - Holding-SPV structures
- Accounting standards
- Securities market regulators

Identification of a Group

- UNCITRAL Model law 'Enterprise Group'-
 - Two or more enterprises interconnected by '**Control**' and '**Significant Ownership**'
 - Includes other form of entities- such as special purpose entities (SPE), joint ventures, offshore trusts, income trusts and partnerships
 - Significant ownership- ability to control, holdings in the company.
 - Rebuttal presumption for lower holding and conclusive presumption for higher holding.
- Article 2(13) of the Regulation (EU) 2015/848
 - '**a parent undertaking and all its subsidiary undertakings**'.
- Working Group
 - Holding, Subsidiary and Associate company as defined in CA, 2013
 - Companies intrinsically linked as to form part of a 'group' in commercial understanding – on application to AA.

Modes of Grouping (1/3)



Modes of Grouping (2/3)

| Mode of Grouping | Working Group Recommendations |
|----------------------------------|---|
| Joint Application | <ul style="list-style-type: none">▪ Permitted applicants- Group members; creditors of any member▪ When the joint application is accepted by the AA, it may order for a single public announcement to be made for all companies. |
| Procedural Co-ordination | <ul style="list-style-type: none">▪ Preferred mode of “grouping” over substantial consolidation.▪ Framework is enabling, voluntary. Provisions relating to communication, cooperation and information sharing mandatory for IPs, AAs, and CoCs.▪ May be allowed at any stage of the insolvency resolution or liquidation process for companies.▪ Common AA & IP▪ Coordinated Resolution Plan▪ Group CoC may be formed;▪ Group co-ordination proceedings▪ Timelines<ul style="list-style-type: none">▪ For completion of process - 420 days including the additional extension of period up to 90 days and time taken in litigation |
| Substantive Consolidation | Prefers procedural consolidation to substantive consolidation |

Procedural vs. Substantive

Procedural coordination

- **Coordinates the 'procedures'** of insolvency and assets of each group company separate.
- **Purpose:** to make the administration of proceedings easier and inexpensive.
- **Separate legal entity** INTACT.
- Does NOT effect the **substantive rights of creditors**.
- **Inter-entity claims not impacted**

Substantive Coordination

- Consolidation of assets and liabilities of different group companies- treated as **single insolvency estate**.
- **Purpose:** equitable remedy against corporate disregard.
- **OVERTURNS** separate entity.
- Affects the **substantive rights of creditors**.
- Inter-entity claims vanish.



Cross Border Insolvency

Draft Part to be Introduced in the Code

Present Scenario in India

- Sections 234 and 235 of IBC
 - Section 234: Bilateral agreements, by CG
 - Section 235: Assets located abroad, the RP/Liquidator can apply to AA for a Letter of request to be issued by AA to competent foreign authority
- Recognition of foreign proceedings: Civil Procedure Code, 1908, common law
 - Principles of Comity – see later
- Recognition of Indian Proceedings in foreign jurisdictions
 - Order to be recognized by the foreign court

Principles of Comity

- Section 44A of the Code of Civil Procedure of 1908
 - allows Indian courts to enforce orders passed by non-Indian courts in “reciprocating territories”
 - A country would be considered a reciprocating territory if it were declared one by the Government of India through publication in the Official Gazette.
 - Section 13 imposes certain restrictions upon enforcement of foreign decrees.
- “comity of courts” principle ensures that foreign judgments and orders are unconditionally conclusive of the matter in controversy. *Surjeet Singh vs State & Another* [Delhi High Court]
- The principles of comity of nation demand us to respect the order of English Court. Even in regard to an interlocutory order, Indian Courts have to give due weight to such order unless it falls under any of the exceptions under Section 13 of the CPC.
 - *International Woolen Mills vs M/S. Standard Wool (U.K.) Limited* on 25 April, 2001, cited in *Alcon Electronics Pvt. Ltd. v. Celem S.A. of FOS 34320 Roujan, France, 2016*

Cross Border Rules- Why & How?

- Mutual/reciprocal assistance in insolvency/liquidation proceedings
- Taking control of assets lying in other jurisdictions
- Recognition of foreign proceedings in India: assistance to foreign court/foreign representative
 - Prioritization of law
 - Corporate debtor may have assets in India
- Assistance for domestic proceedings in foreign jurisdictions: assistance to adjudicating authority/insolvency professional
 - Corporate debtor may have assets in foreign jurisdictions, including investment in foreign subsidiaries
 - Personal or corporate guarantors
- Protection of rights of creditors – domestic/foreign
 - Making procedures easy
- Facilitating avoidance proceedings irrespective of location

Draft Part on Cross Border Insolvency: In Brief

Adopts UNCITRAL Model Law on Cross Border Insolvency: A midway between “Territorialist principle” and “Universalist Principle”

Chapter I: General Provisions

- Applicability limited to corporate debtors
 - Covers “corporate guarantors” but not “personal guarantors”
 - Provision to capture assistance in relation to proceedings against personal and corporate guarantors
 - Refer present section 234(2)
- Covers the following aspects
 - Mutual co-operation and assistance
 - Concurrent domestic and foreign proceedings
 - Foreign creditors interested in commencement of/participation in domestic proceeding
 - Existing right – “person” includes “person resident outside India”

■ Definitions

- COMI: “Centre of Main Interests”, covered in section 14
 - Presumption: Registered Office [in absence of contrary proof]
 - Exception: Where RO shifted within 3 months prior to insolvency commencement
- Foreign proceeding
 - Foreign main proceeding: in a State where debtor has COMI
 - Foreign non-main proceeding: in a State where debtor has “establishment”
 - The word “reorganization” shall be elaborated, in terms of the UNCITRAL Code, and the expression “by whatever name called” shall be added

Draft Part on Cross Border Insolvency: In Brief

Chapter II: Access of foreign representatives and creditors to adjudicating authority

- May be renamed as “Access to Foreign Representatives and Creditors to the Adjudicating Authority in Domestic Proceedings”
- A foreign representative can access AA/commence a domestic proceeding/participate in a domestic proceeding
- A foreign creditor to have same rights
 - Section 21 of the Code may have enabling provisions for collective representation of foreign creditors.
 - Notification to foreign creditors
- Section 7 (1) : Right of access to foreign representative shall be “indirect” as suggested under Para B (i)
 - “A foreign representative is entitled to apply to the Adjudicating Authority, *through an insolvency professional* .”

Chapter III: Recognition of foreign proceeding and relief

- **Section 12: Application for recognition of foreign proceeding**
 - Foreign representative may apply
 - Directly or indirectly through an insolvency professional?
 - What if a domestic proceeding has already been initiated? – section 25
 - To be decided by AA within 14 days from date of filing application
- **Section 17: Effects of recognition of a foreign main proceeding**
 - No clarification as to “modification and termination”
- **Section 18 (2): “interests of creditors in India is adequately protected”**
 - “adequately protected”: guidelines for AA?
 - Relief might be conditional
- **Section 20 provides for avoidance proceedings**
 - Foreign representative to have same powers as RP/Liquidator

Draft Part on Cross Border Insolvency: In Brief

Chapter IV: Co-operation with foreign courts and foreign representatives

- AA and foreign courts/foreign representatives
 - Guidelines to be prescribed by CG
 - Joint hearing possible
 - An intermediate relevant authority between AA and foreign courts for ease of communication
- RP/Liquidator and foreign courts/foreign representatives
 - Maximum co-operation, subject to supervision of AA
 - Direct communication, subject to supervision of AA
- Section 23 lists forms of co-operation
 - Includes co-ordination of the administration and supervision of the debtor's assets and affairs

Chapter V: Concurrent Proceedings

- Concurrent Proceedings
- Post recognition of a foreign proceeding (main/non-main), a domestic proceeding can only be commenced if –
 - Debtor has assets located in India
 - Problem area: Multiple locations of assets; varied jurisdictions; NCLT
- Where a domestic proceeding is ongoing, the foreign proceeding be recognized
 - Relief under section 17 shall not apply
 - Relief under section 18 shall be consistent with domestic proceedings
- Presumption of insolvency based on recognition of a foreign main proceeding
- Rule of payment in concurrent proceedings
 - Intent: Creditors, at the same ranking, to be treated at par

Agreement with Foreign States U/S I (4)

- Enabling provisions for
 - Recognition of domestic proceedings in foreign State and foreign proceedings
 - Stay on actions affecting assets of corporate debtor located in foreign jurisdictions
 - Akin to moratorium provisions u/s 14 of the Code
 - Access to resolution professional/liquidator to foreign Court, either directly or indirectly, having appropriate jurisdiction to initiate –
 - Avoidance proceedings
 - Sale/attachment proceedings
- Representation of domestic creditors in foreign proceedings
- Adequate protection of rights of creditors
- Right to realise properties, on the basis of orders of Adjudicating Authority



Model Guidelines & Conventions



International Standards/Principles/Model Laws & Foreign Laws

- **United Nations Commission on International Trade Law (UNCITRAL)**
 - Legislative Guide on Insolvency Law
 - Parts One and Two (2004)
 - Part Three: Treatment of enterprise groups in insolvency (2010)
 - Part Four: Directors' Obligations in the period approaching insolvency (2013)
 - Model Law on Cross Border Insolvency (1997)
- **The World Bank**
 - Principles for Effective Insolvency and Creditor/Debtor Regimes (2016)
- **The Insolvency Act, 1986 of United Kingdom**

Key Objectives of an Efficient and Effective Insolvency Law: UNCITRAL

- Provision of certainty in the market to promote economic stability and growth
- Maximization of value of assets
- Striking a balance between liquidation and reorganization
- Ensuring equitable treatment of similarly situated creditors
- Provision for timely, efficient and impartial resolution of insolvency
- Preservation of the insolvency estate to allow equitable distribution to creditors
- Ensuring a transparent and predictable insolvency law that contains incentives for gathering and dispensing information
- Recognition of existing creditor rights and establishment of clear rules for ranking of priority claims
- Establishment of a framework for cross-border insolvency

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