



**CS PROFESSIONAL**

**CORPORATE  
RESTRUCTURING,  
VALUATION &  
INSOLVENCY** **PART - III**

**GROUP 2, PAPER 6**





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**CORPORATE  
RESTRUCTURING,  
VALUATION,  
AND  
INSOLVENCY**

**PART III**

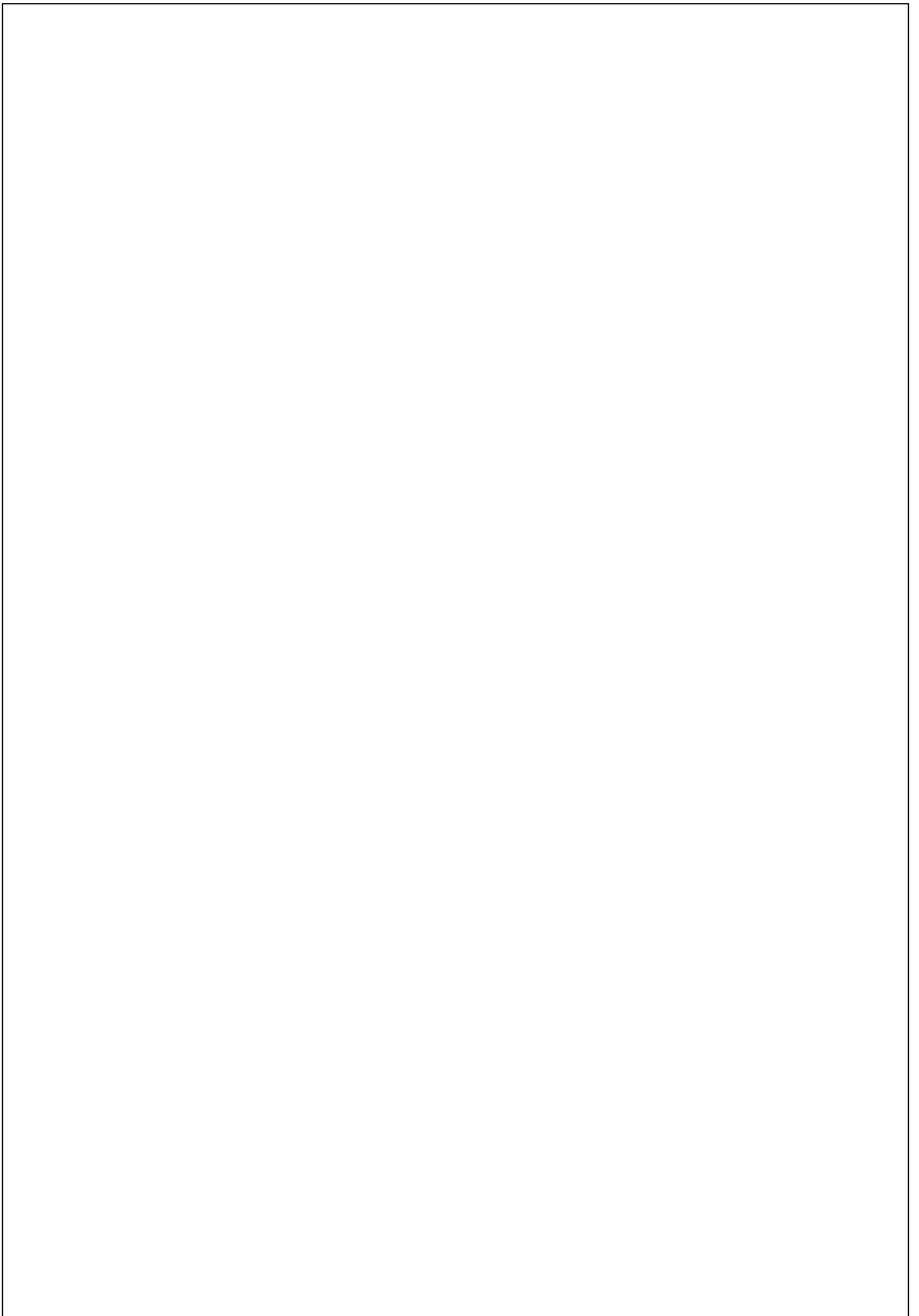
*Group II*

*Paper 06*



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- *Vaibhav Chitlangia*  
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For those who believe themselves to be  
the best !!

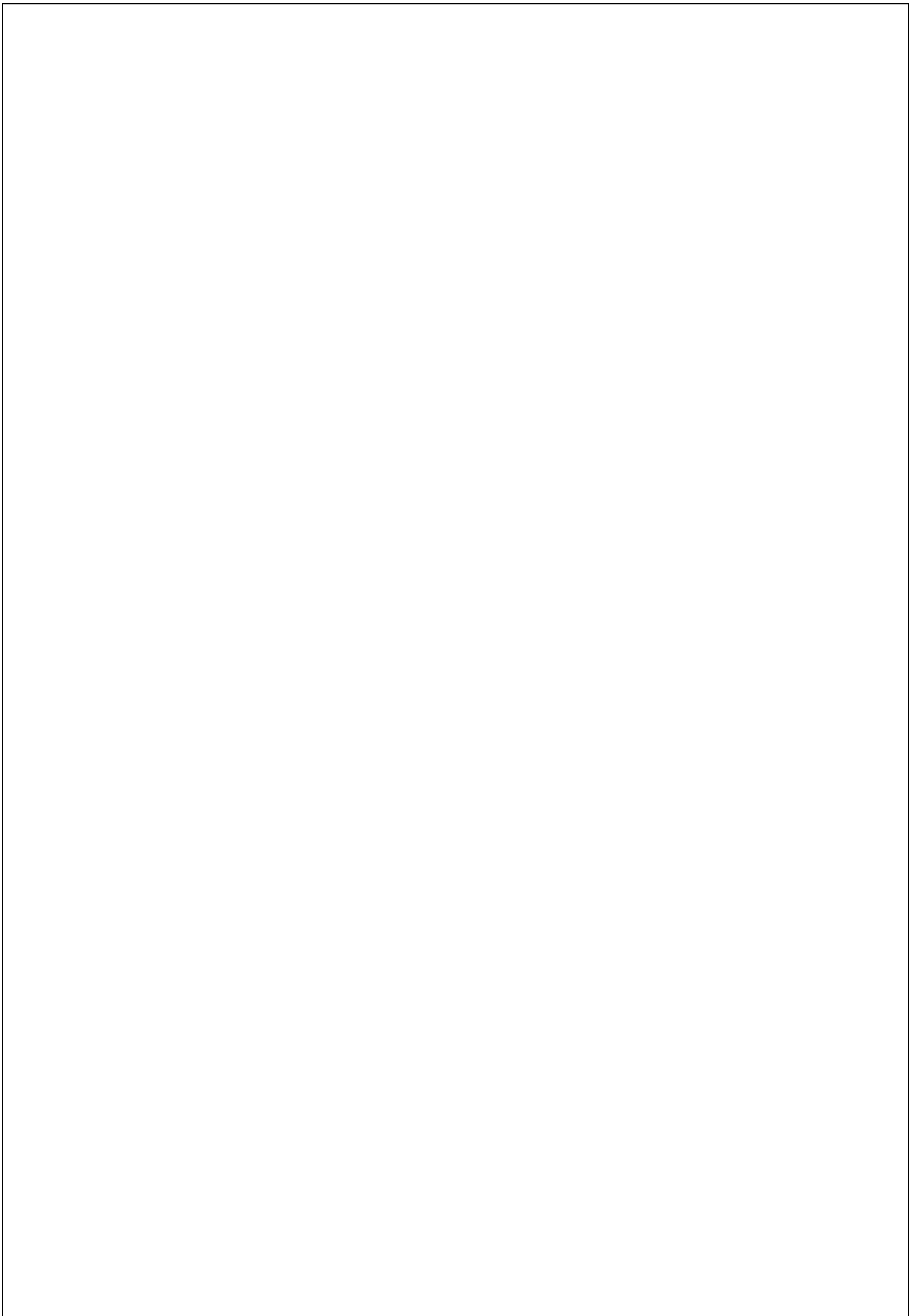
For those who tried &  
failed, but never gave  
up !!

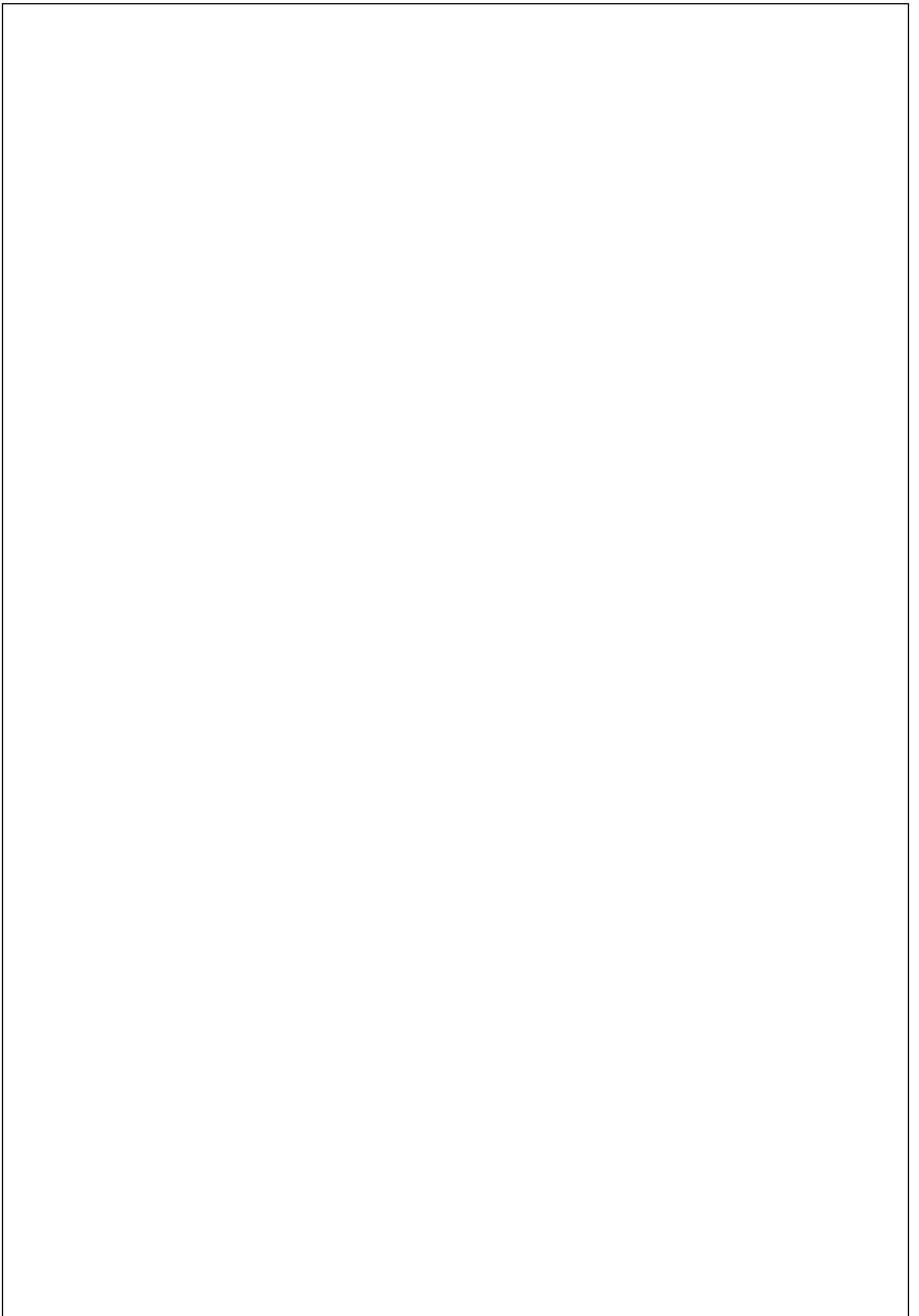
Hard work always pays off!

Have faith!

May God bless you!!

Yours -  
Vaibhav Chitlangia

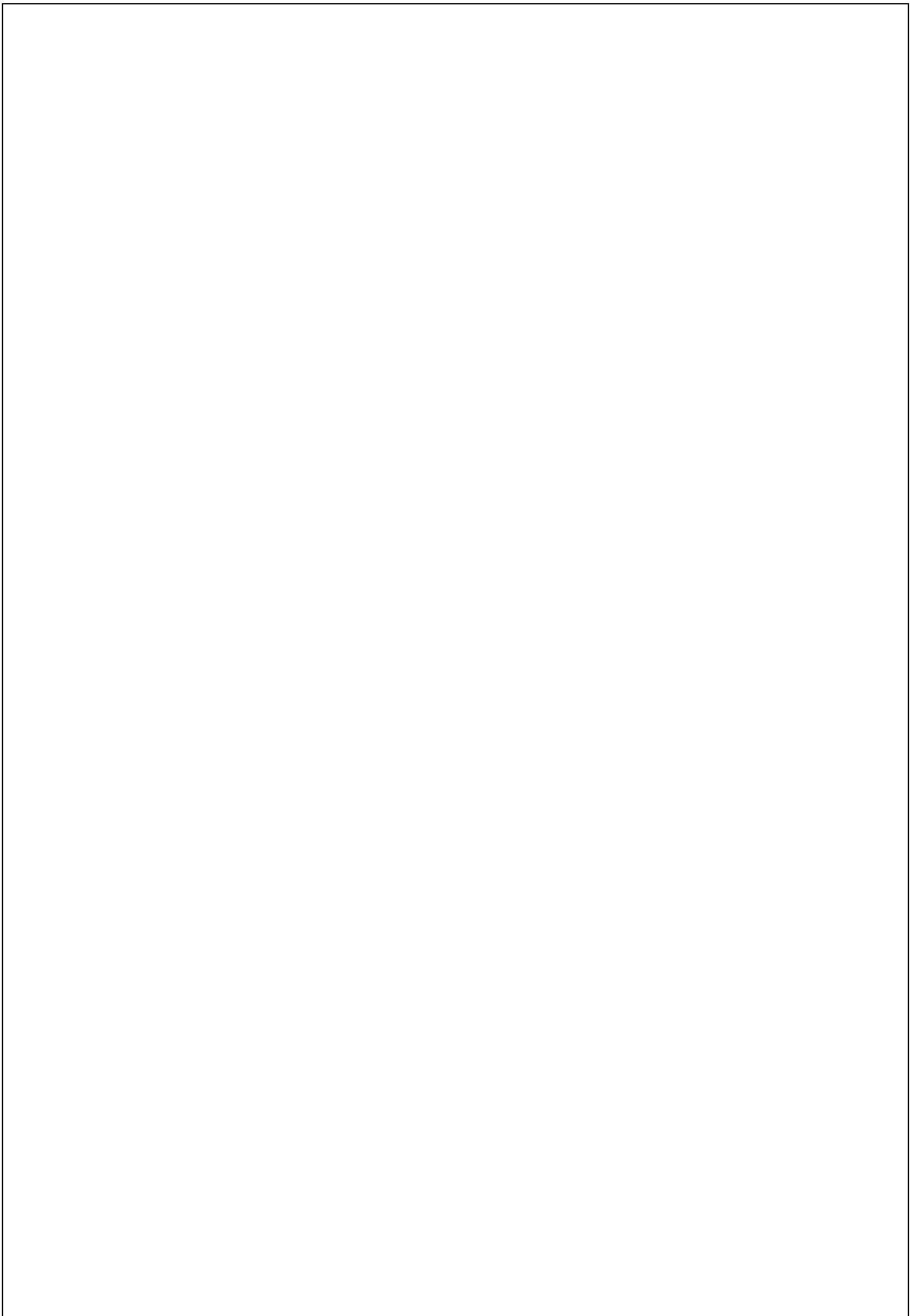


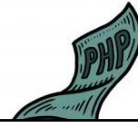


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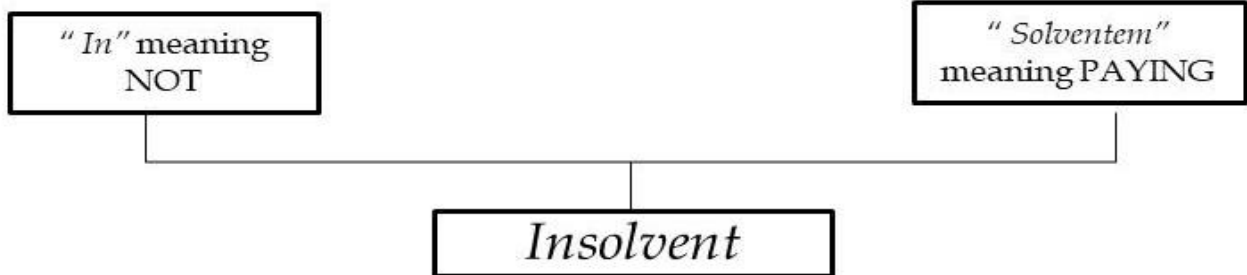




## CH 14 - INSOLVENCY



### WHAT IS INSOLVENCY?

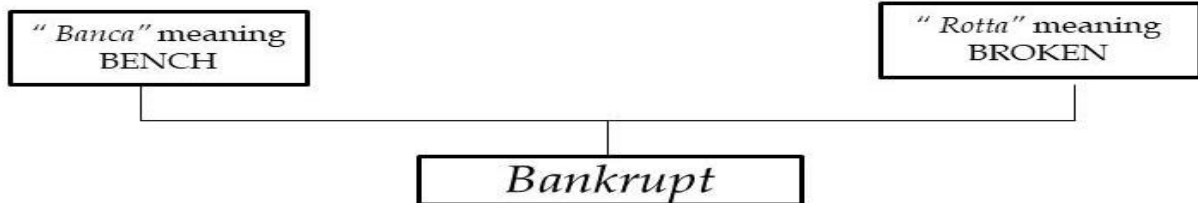


*Insolvent means a person who is unable to pay his/her/lits debts as they become due in the ordinary course of business. Insolvency is "the state of one whose assets are insufficient to pay his debts."*

*Other than cases of outright fraud, the debtor may be insolvent because of the following cases-*

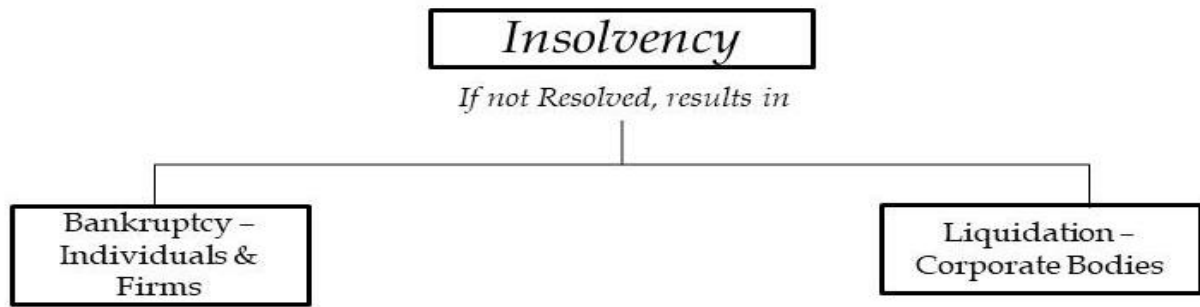
- *Financial failure-* a persistent mismatch between payments by the enterprise and receivables into the enterprise, even though the business model is generating revenues, or

- **Business failure**- which is a breakdown in the business model of the enterprise, and it is unable to generate sufficient revenues to meet payments. Often, an enterprise may be a successful business model while still failing to repay its creditors.



The word **Bankruptcy** has its roots in the trade that was carried out on Ponte Vecchio, a medieval segmental arch bridge, in Florence, Italy. In medieval Italy, if a banker, who conducted his marketplace transactions on a bench, was unable to meet business obligations and was in debt, his bench was broken in a symbolic show of failure and his inability to continue.

<b>Insolvency</b>	<b>Bankruptcy</b>
<ul style="list-style-type: none"> <li>• <i>Insolvency is the State of not being able to repay one's debts</i></li> <li>• <i>It is merely a situation in which a person is generally not able to pay his/her debts.</i></li> <li>• <i>This term can be used in respect of individuals as well as corporates.</i></li> </ul>	<ul style="list-style-type: none"> <li>• <i>Bankruptcy is the legal status accorded to such people</i></li> <li>• <i>It is a formal declaration of insolvency in accordance with the law of the land.</i></li> <li>• <i>This term can be used only in respect of individuals and Partnership firms</i></li> </ul>



<i>Bankruptcy</i>	<i>Liquidation</i>
<ul style="list-style-type: none"> <li>• Section 79(4) of the Insolvency and Bankruptcy Code, 2016 defines the term "bankruptcy" as the state of being bankrupt.</li> <li>• Under the IB Code, 2016, "bankrupt" means                             <ul style="list-style-type: none"> <li>✓ a debtor who has been adjudged as bankrupt under section 126</li> <li>✓ each of the partners of a firm, where a bankruptcy order under section 126 has been made against a firm</li> <li>✓ any person adjudged as an undischarged insolvent.</li> </ul> </li> <li>• The bankruptcy process begins with filing of a petition before an appropriate authority.</li> <li>• The debtor's assets are then evaluated and used to pay the creditors in accordance with law.</li> </ul>	<ul style="list-style-type: none"> <li>• Liquidation means closure or winding up of a corporation or an incorporated entity through legal process.</li> <li>• In liquidation process, the assets of the corporate body are sold and its liabilities are discharged</li> <li>• The liquidation process begins with an order passed in this regard by an appropriate authority.</li> <li>• Liquidation leads to dissolution of the company by virtue of which, the company ceases to exist.</li> </ul>

## INSOLVENCY FRAMEWORK IN THE UNITED KINGDOM

### Historical Development

- In England, the Act of Parliament of 34 & 35 Henry VIII, c4 is regarded as the first legislation on the subject.
- It was a strict and creditor supportive legislation enacted mainly for the benefit of creditors.
- This Act of 1542, was similar to a criminal statute directed against men who indulged in wasteful expenditures and then refused to pay off debts incurred during the course of extravagance.
- The 1542 Act looked upon the debtors as offenders.
- There was no provision for the discharge of debtors and even future earnings of the debtors were not exempt from execution for the debt.
- The Statute of Anne, passed in 1705, aimed to discharge the bankrupt who conformed to the provisions of the law.

### Current Scenario

- The primary focus of modern insolvency laws is not elimination of insolvent entities but on their rehabilitation and continuation of their business.
- The Insolvency Act, 1986 and the Insolvency Rules, 1986 regulate the insolvency framework in the United Kingdom.
- The Insolvency Act, 1986 was enacted on the recommendation of the Cork Review Committee Report on Insolvency Law and Practice (1982).
- The Act of 1986 consolidated the following -
  - Acts relating to company insolvency and winding up,
  - Acts relating to the insolvency and bankruptcy of individuals, and
  - all other Acts bearing on these two subject matters, including the functions and qualification of insolvency practitioners, the public administration of insolvency, the penalisation and redress of malpractice and wrong doing, and the avoidance of certain transactions at an under value.

The Insolvency Act, 1986 deals with the insolvency of individuals and companies and is divided into the following three groups.

- i. Group 1 deals with Company Insolvency;
- ii. Group 2 deals with Insolvency of Individuals; and
- iii. Group 3 deals with Miscellaneous Matters Bearing on both Company & Individual Insolvency.

### Procedures under the Insolvency Act, 1986

#### Company Voluntary Agreement

- It provides away where a company in financial difficulty can come to a binding agreement with its creditors.
- It is a negotiation by a company of the payments due to all of its creditors, or other form of financial restructuring, and is subject to creditors meeting and approval of 75% of the creditors present and voting.

#### Administration

- An administrator is appointed by a court to suggest proposals to deal with the company's financial difficulties.
- The creditors are restrained from taking any action during this period.
- It is designed to hold a business together while plans are formed, either to put in place a financial restructuring plan to rescue the company, or to sell the business and assets, to produce better results for the creditors, than a liquidation.

#### Administrative Receivership

- This option permits the appointment of a receiver by certain creditors.
- This is normally used by the holders of a floating charge.

## INSOLVENCY FRAMEWORK IN THE UNITED STATES OF AMERICA

### Historical Development

- America followed the English bankruptcy system and like the UK system, American bankruptcy laws involved imprisonment until debts were paid or creditors agreed for the release of the debtor.
- Article 1, Section 8, Clause 4 of the United States Constitution as adopted in the year 1789, made provision for the grant to Congress the power to establish uniform bankruptcy law throughout the United States.

- *Certain laws were enacted in 1800 and 1841 which vested jurisdiction in the federal district courts who were given the power to appoint commissioners or assignees to take charge of and liquidate a debtor's property.*
- *National Bankruptcy Act was enacted in 1898 and later amended in 1938 to provide for the rehabilitation of a debtor as an alternative to liquidation of assets.*
- *The Bankruptcy Reform Act, 1978 was enacted in 1978 which superseded the National Bankruptcy Act, 1898 and established bankruptcy courts in each district and made provisions for the appointment of separate bankruptcy judges.*

### Current Scenario

*The Bankruptcy Code, 1978 which is a federal law, governs bankruptcy in the United States of America. Following are important chapters under this law -*

#### **Chapter 7 titled "Liquidation"**

- A court-appointed trustee or administrator takes possession of non-exempt assets, liquidates these assets and then uses the proceeds to pay creditors.

#### **Chapter 9 titled "Adjustment of Debts of a Municipality"**

- This chapter provides for reorganization which is available to municipalities where a municipality (which includes cities, towns, villages, counties, taxing districts, municipal utilities, and school districts) get protection from creditors and a municipality can pay back debt through a confirmed payment plan.

#### **Chapter 11 titled "Reorganization"**

- Under this process, the debtor remains in control of its business operations and repays creditors concurrently through a court-approved reorganization plan. Generally, it is a debtor in possession regime.

#### **Chapter 12**

- This chapter allows a family farmer or fisherman to continue to operate the business while the plan is being carried out.

#### **Chapter 13**

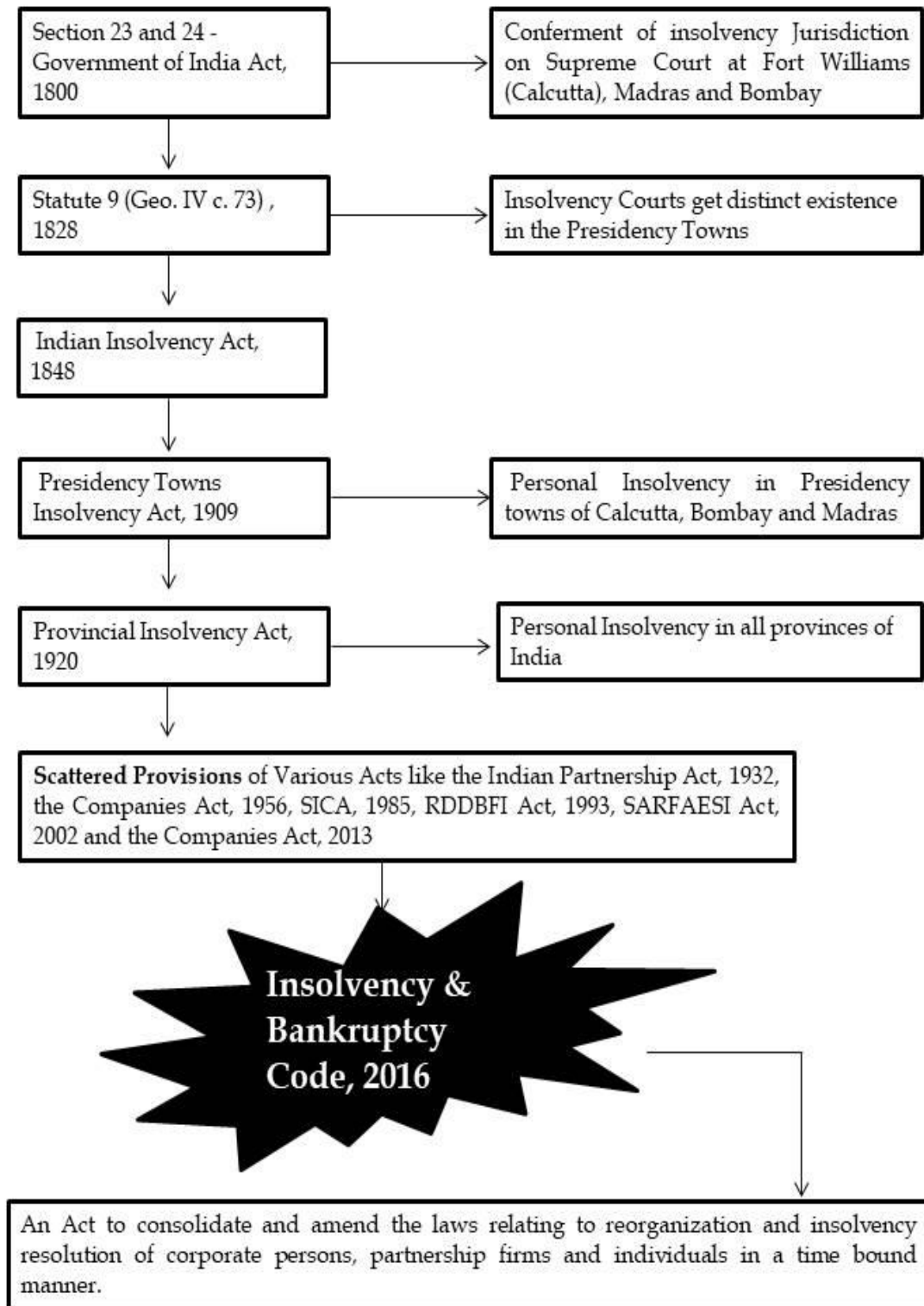
- This chapter enables individuals with regular income to develop a plan to repay all or part of their debts.

#### **Chapter 15**

- It provides mechanism for dealing with insolvency cases involving debtors, claimants and other interested parties involving more than one country

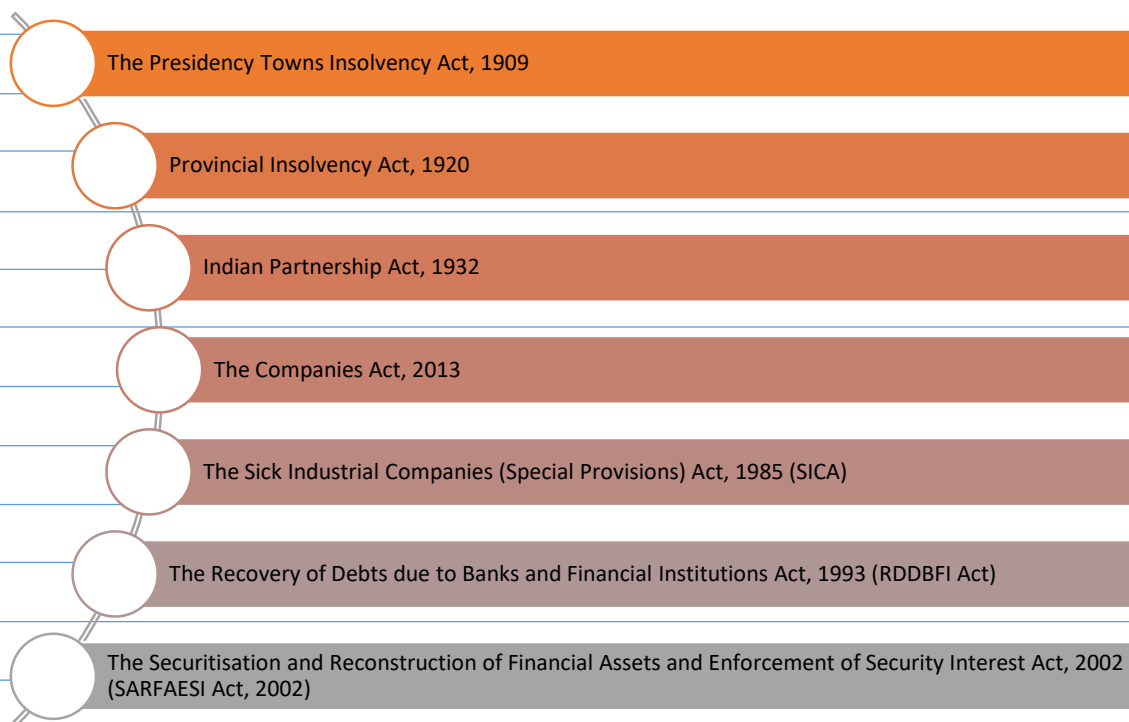
**HISTORICAL DEVELOPMENTS OF INSOLVENCY LAWS IN INDIA**

The following chart traces the history of the development of insolvency laws in India -





*Before the enactment of the Insolvency and Bankruptcy Code, 2016 the following Acts dealt with insolvency and Bankruptcy in India*



Under the Constitution of India 'Bankruptcy & Insolvency' is provided in Entry 9 of List III (Concurrent List) in the Seventh Schedule to the Constitution. Hence both the Centre and State Governments are authorised to make laws on the subject.



**GOVERNMENT COMMITTEES ON BANKRUPTCY REFORMS**

<b>Committee</b>	<b>Year</b>	<b>Recommendation</b>
Third Law Commission	1964	Under the Chairmanship of Justice J L Kapur. It proposed amendments to the Provincial Insolvency Act, 1920
Tiwari Committee	1981	Enactment of the Sick Industrial Companies (Special Provisions) Act, 1985, (SICA)
Narsimham Committee I	1991	Enactment of the Recovery of Debts Due to Banks and Financial Institutions (RDDBFI) Act, 1993
Narsimham Committee II	1998	Enactment of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (SARFAESI), 2002
Justice Eradi Committee	1999	Recommended setting up of a National Company Law Tribunal (NCLT)
N L Mitra Committee	2001	Proposed a comprehensive bankruptcy code
J J Irani Committee	2005	Proposed significant changes to make the restructuring and liquidation process speedier, efficient and effective and accordingly amendments were made to (RDDBFI) Act, 1993 and (SARFAESI), 2002
Raghuram rajan Committee	2008	Proposed improvements to credit infrastructure.
Financial Sector Legislative Committee	2013	Recommended changes in Indian Financial Sector

<i>Bankruptcy Law Reform Committee</i>	<i>2014</i>	<i>Reviewed the existing bankruptcy and insolvency framework in the country and proposed the enactment of Insolvency and Bankruptcy Code as a uniform and comprehensive legislation on the subject</i>
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### WHY NEW LAW?

- *There were multiple overlapping laws and adjudicating fora dealing with financial failure and insolvency of companies and individuals.*
- *The framework for insolvency and bankruptcy was inadequate, ineffective and resulted in undue delays in resolution.*
- *The framework did not provide the lenders an effective and timely way of recovery or restructuring of defaulted assets and caused undue strain on the Indian credit system.*
- *Individual bankruptcy and insolvency was dealt with under the Presidency Towns Insolvency Act, 1909, and the Provincial Insolvency Act, 1920, which are both about a century old legislations.*
- *The liquidation of companies was handled under various laws and different authorities.*
- *None of the laws provided for a strict time frame within which the process to resolve insolvency was to be completed*



As per World Bank data in 2015, insolvency resolution in India took 4.3 years on an average, which was way higher when compared to other countries such as United Kingdom (1 year) and United States of America (1.5 years). These delays were caused due to time taken to resolve cases in courts, and confusion due to a lack of clarity about the current bankruptcy framework.

Keeping in mind these shortcomings of the previous legislation, the Insolvency and Bankruptcy Code, 2016 was enacted with an objective to

*"consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner."*

### LAWS AMENDED BY THE INSOLVENCY AND BANKRUPTCY CODE, 2016

- i. The Indian Partnership Act, 1932
- ii. The Central Excise Act, 1944
- iii. The Income-Tax Act, 1961
- iv. The Customs Act, 1962
- v. The Recovery of Debts Due to Banks and Financial Institutions Act, 1993
- vi. The Finance Act, 1994
- vii. The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002
- viii. The Sick Industrial Companies (Special Provisions) Repeal Act, 2003
- ix. The Payment and Settlement Systems Act, 2007
- x. The Limited Liability Partnership Act, 2008
- xi. The Companies Act, 2013.

In addition to the above, IBC has repealed the following two laws -

- i. The Presidency Towns Insolvency Act, 1909
- ii. The Provincial Insolvency Act, 1920

## INSOLVENCY AND BANKRUPTCY CODE, 2016 - AN INTRODUCTION

The Insolvency and Bankruptcy Bill was introduced in the Lok Sabha on 21 December, 2015 and was subsequently referred to a Joint Committee of Parliament. The Committee submitted its recommendations and the modified Bill was passed by the Lok Sabha on 5 May, 2016. The Bill was passed by Rajya Sabha on 11 May, 2016 and it received the presidential assent on 28 May 2016. The Code was notified in the Official Gazette on 28 May, 2016.

### Salient features of the Code

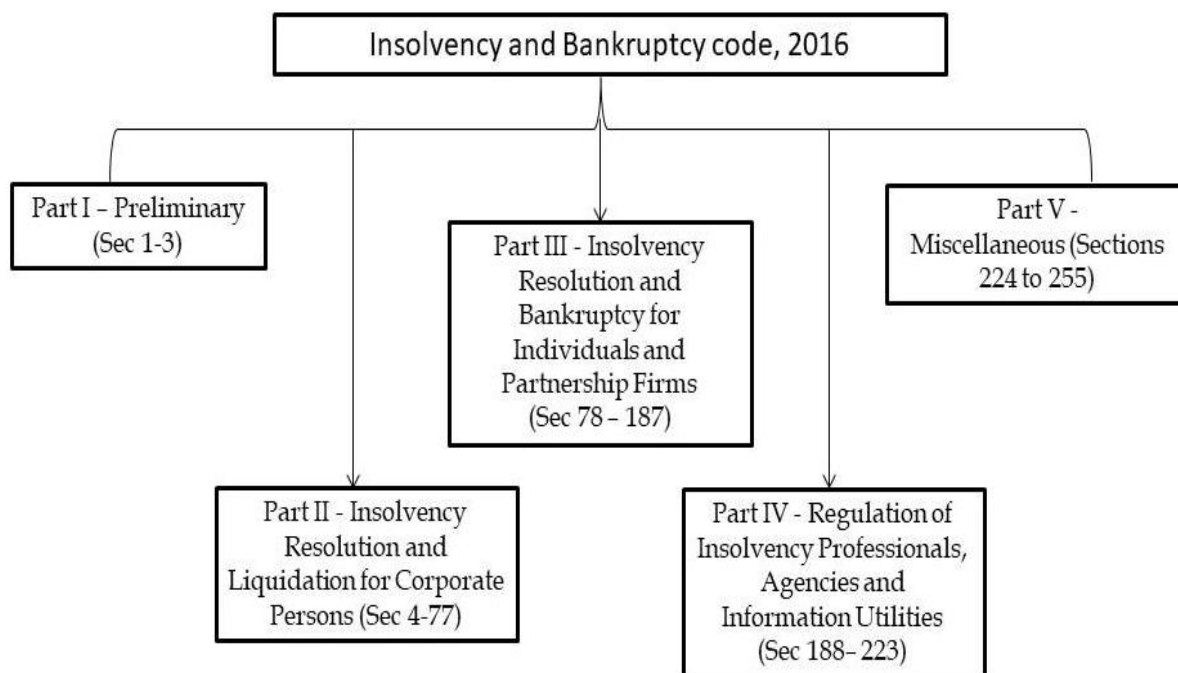
1. Clear, coherent and speedy process for early identification of financial distress and resolution of companies and limited liability entities if the underlying business is found to be viable.
2. Two distinct processes for resolution of individuals, namely- "Fresh Start" and "Insolvency Resolution".
3. Debt Recovery Tribunal and National Company Law Tribunal to act as Adjudicating Authority and deal with the cases related to insolvency, liquidation and bankruptcy process in respect of individuals and unlimited partnership firms and in respect of companies and limited liabilities entities respectively.
4. Establishment of an Insolvency and Bankruptcy Board of India to exercise regulatory oversight over insolvency professionals, insolvency professional agencies and information utilities.
5. Insolvency professionals would handle the commercial aspects of insolvency resolution process. Insolvency professional agencies will develop professional standards, code of ethics and be first level regulator for insolvency professionals members leading to development of a competitive industry for such professionals.
6. Information utilities would collect, collate, authenticate and disseminate financial information to be used in insolvency, liquidation and bankruptcy proceedings.
7. Enabling provisions to deal with cross border insolvency.

### Key Objectives of the Insolvency and Bankruptcy Code, 2016

- To consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals
- To provide for a time bound insolvency resolution mechanism
- To ensure maximisation of value of assets
- To promote entrepreneurship
- To increase availability of credit
- To balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues
- To establish an Insolvency and Bankruptcy Board of India as a regulatory body
- To provide procedure for connected and incidental matters

### ORGANISATION OF THE CODE

The Insolvency and Bankruptcy Code, 2016 consists of total 255 sections organised in 5 Parts.



## PART I - PRELIMINARY

### Section 01

It provides that the Central Government may appoint different dates for different provisions of this Code and any reference in any such provision to the commencement of this Code shall be construed as a reference to the commencement of that provision

### Section 02 - Applicability of the Code

It provides that the provisions of the Code shall apply to :

- i. Any company incorporated under the Companies Act, 2013;
- ii. Any other company governed by any special Act;
- iii. Any Limited Liability Partnership;
- iv. Such other body incorporated under any law, as the Central Government may by notification specify;
- v. Personal guarantors to corporate debtors;
- vi. Partnership firms,
- vii. Individuals.

## PART IV - REGULATION OF INSOLVENCY PROFESSIONALS, AGENCIES AND INFORMATION UTILITIES

Also known as Pillars of IBC, Part IV talks about the establishment and functioning of the following authorities that together ensure a smooth application of the provisions of the IBC -

- Insolvency and Bankruptcy Board of India (IBBI),
- Adjudicating Authorities (AAs),
- Insolvency Professionals (IPs),
- Insolvency Professional Agencies (IPAs) and
- Information Utilities (IUs)

## THE INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (IBBI)

The Insolvency and Bankruptcy Board of India was established on 1st October 2016. It is a unique regulator which regulates a profession as well as processes under the Code. Its role includes overseeing the functioning of insolvency intermediaries i.e., insolvency professionals, insolvency professional agencies and information utilities.

IBBI is a body corporate having perpetual succession and a common seal, with power, subject to the provisions of this Code, to acquire, hold and dispose of property, both movable and immovable, and to contract, and shall, by the said name, sue or be sued.

### Composition (Section 189)

The Board shall consist of the following members who shall be appointed by the Central Government, namely:

- A Chairperson
- Three members not below the rank of joint Secretary or equivalent, one of each to represent the Ministry of Finance, the Ministry of Corporate Affairs and Ministry of Law, ex-officio.
- One member to be nominated by the Reserve Bank of India, ex-officio.
- Five other members to be nominated by the Central Government, of whom at least three shall be the whole-time members.



The term of office of the Chairperson and members (other than ex officio members) is of five years or till they attain the age of sixty-five years, whichever is earlier, and they are eligible for reappointment.



### Removal of Members (Section 190)

The Central Government has the power to remove a member from office, after giving an opportunity of being heard to the member, if he /she -

- i. is an undischarged bankrupt as defined under Part III;
- ii. has become physically or mentally incapable of acting as a member;
- iii. has been convicted of an offence, which in the opinion of the Central Government involves moral turpitude;
- iv. has, so abused his position as to render his continuation in office detrimental to the public interest.

### Powers and Functions of IBBI (Section 196)

Section 196(1) provides for the following functions of the Board:

- i. Regulation of Information Utilities;
- ii. Regulation of Insolvency Professional Agencies and Insolvency Professionals;
- iii. Regulation making in specific areas about procedural details in the insolvency and bankruptcy process & data collection, research and performance evaluation;
- iv. Regulating all matters related to insolvency and bankruptcy process.
- v. Setting out eligibility requirements of insolvency intermediaries i.e., Insolvency Professionals, Insolvency Professional Agencies and Information Utilities.
- vi. Regulating entry, registration and exit of insolvency intermediaries.
- vii. Making model bye laws for Insolvency Professional Agencies.
- viii. Setting out regulatory standards for Insolvency Professionals.
- ix. Register insolvency professional agencies, insolvency professionals and information utilities and renew, withdraw, suspend or cancel such registrations.
- x. promote the development of, and regulate, the working and practices of, insolvency professionals, insolvency professional agencies and information utilities and other institutions, in furtherance of the purposes of the Code.
- xi. Levy fee or other charges for carrying out the purposes of this Code, including fee for registration and renewal of insolvency professional agencies, insolvency professionals and information utilities.

- xii. *Specify by regulations standards for the functioning of insolvency professional agencies, insolvency professionals and information utilities.*
- xiii. *Lay down by regulations the minimum curriculum for the examination of the insolvency professionals for their enrolment as members of the insolvency professional agencies;*
- xiv. *Carry out inspections and investigations on insolvency professional agencies, insolvency professionals and information utilities and pass such orders as may be required for compliance of the provisions of this Code and the regulations issued hereunder.*
- xv. *Monitor the performance of insolvency professional agencies, insolvency professionals and information utilities and pass any directions as may be required for compliance of the provisions of this Code and the regulations issued hereunder.*

*Section 196(2) provides that IBBI may make model bye-laws to be adopted by insolvency professional agencies which may provide for:*

- i. *The minimum standards of professional competence of the members of insolvency professional agencies.*
- ii. *The standards for professional and ethical conduct of the members of insolvency professional agencies.*
- iii. *Requirements for enrolment of persons as members of insolvency professional agencies which shall be non-discriminatory.*
- iv. *The manner of granting membership.*
- v. *Setting up of a governing board for internal governance and management of insolvency professional agency in accordance with the regulations specified by the Board.*
- vi. *The information required to be submitted by members including the form and the time for submitting such information.*
- vii. *The specific classes of persons to whom services shall be provided at concessional rates or for no remuneration by members.*
- viii. *The quantum of fee and the manner of collecting fee for inducting persons as its members.*
- ix. *The procedure for enrolment of persons as members of insolvency professional agency.*
- x. *The manner of conducting examination for enrolment of insolvency professionals*

Section 196(3) states that IBBI shall have the following powers as are vested in a civil court under the Code of Civil Procedure, 1908, while trying a suit -

- i. The discovery and production of books of account and other documents, at such place and such time as may be specified by the Board.
- ii. Summoning and enforcing the attendance of persons and examining them on oath.
- iii. Inspection of any books, registers and other documents of any person at any place.
- iv. Issuing of commissions for the examination of witnesses or documents.

### INSOLVENCY PROFESSIONALS (IP)

Insolvency Professionals (IPs) are required to act as intermediaries in the insolvency resolution process. They are a class of regulated but private professionals having minimum standards of professional and ethical conduct. As per Section 206 of the IBC, an insolvency professional has to -

- i. Be a member of any Insolvency Professional Agency (IPA)
- ii. Be registered as an Insolvency Professional with the IBBI

### Functions and Obligations of Insolvency Professionals

To take such actions as maybe necessary and required in the following matters -

- i. fresh start order process under Part III
- ii. individual insolvency resolution process under Part III
- iii. corporate insolvency resolution process under Part II
- iv. Individual bankruptcy process under Part III
- v. liquidation of a corporate debtor firm under Part II.

### Code of Conduct of the Insolvency Professionals

- i. To take reasonable care and diligence while performing his duties
- ii. To comply with all requirements and terms and conditions specified in the bye-laws of the insolvency professional agency of which he is a member
- iii. To allow the insolvency professional agency to inspect his records

- iv. *To submit a copy of the records of every proceeding before the Adjudicating Authority to the Board as well as to the insolvency professional agency of which he is a member*
- v. *To perform his functions in such manner and subject to such conditions as may be specified*

The IBBI has framed the **IBBI (Insolvency Professional) Regulations, 2016** to regulate the working of Insolvency Professionals



### INSOLVENCY PROFESSIONAL AGENCIES (IPA)

*Insolvency Professional Agencies are designated to regulate Insolvency Professionals. Their main function is to conduct examinations to enrol Insolvency Professionals and enforce a code of conduct for their functioning. These agencies enrol Insolvency Professionals, provide pre-registration educational course to its enrolled members and*

*enforce a code of conduct for their functioning. They also issue 'authorisation for assignment' to the IPs enrolled with them.*

*Currently, there are 3 IPAs registered with the IBBI. They are -*



### Functions of IPAs

- i. grant membership to persons who fulfil all requirements set out in its byelaws on payment of membership fee
- ii. lay down standards of professional conduct for its members
- iii. monitor the performance of its members
- iv. safeguard the rights, privileges and interests of insolvency professionals who are its members
- v. suspend or cancel the membership of insolvency professionals who are its members on the grounds set out in its bye-laws
- vi. redress the grievances of consumers against insolvency professionals who are its members, and
- vii. publish information about its functions, list of its members, performance of its members and such other information as may be specified by regulations.

The Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016

The Insolvency and Bankruptcy Board of India (Insolvency Professional Agencies) Regulations, 2016



## INFORMATION UTILITIES

"Information utility" is defined as a person who is registered with the Board as an information utility under section 210.

The main duty of the Information Utilities (IUs) is to collect, collate, authenticate and disseminate financial information. The purpose of such collection, collation, authentication and dissemination financial information of debtors is to facilitate swift decision making in the resolution proceedings.

### Obligations of Information Utility

- i. create and store financial information in a universally accessible format
- ii. accept electronic submissions of financial information from persons who are under obligations to submit financial information
- iii. accept, in specified form and manner, electronic submissions of financial information from persons who intend to submit such information
- iv. meet such minimum service quality standards as may be specified by regulations
- v. get the information received from various persons authenticated by all concerned parties before storing such information
- vi. provide access to the financial information stored by it to any person who intends to access such information in such manner as may be specified by regulations
- vii. publish such statistical information as may be specified by regulations

The Insolvency and Bankruptcy Board of India has framed the **IBBI (Information Utilities) Regulations, 2017**



## ADJUDICATING AUTHORITY

The IB Code, 2016 provides for two Adjudicating Authorities. They are -

For Part II - National Company Law Tribunal

For Part III - Debt Recovery Tribunal

### National Company Law Tribunal

#### Section 5(1)

"Adjudicating Authority" for insolvency resolution and liquidation for corporate persons means National Company Law Tribunal constituted under section 408 of the Companies Act, 2013.

#### Section 60(5)

Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of -

- i. any application or proceeding by or against the corporate debtor or corporate person;
- ii. any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and
- iii. any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.

#### Section 63

No civil court or authority shall have jurisdiction to entertain any suit or proceedings in respect of any matter on which National Company Law Tribunal (NCLT) or the National Company Law Appellate Tribunal (NCLAT) has jurisdiction under this Code.

### Debt Recovery Tribunal

#### Section 79(1)

"Adjudicating Authority" for insolvency resolution and bankruptcy for individuals and partnership firms is 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 179(2)

Debt Recovery Tribunal shall, have jurisdiction to entertain or dispose of -

- i. any suit or proceeding by or against the individual debtor;
- ii. any claim made by or against the individual debtor
- iii. any question of priorities or any other question whether of law or facts, arising out of or in relation to insolvency and bankruptcy of the individual debtor or firm under this Code.

#### Section 180

No civil court or authority shall have jurisdiction to entertain any suit or proceedings in respect of any matter on which the Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal has jurisdiction under this Code.

### INSOLVENCY AND BANKRUPTCY FUND

The Code provides for the creation of an Insolvency and Bankruptcy Fund. Section 224 of IBC provides that the following amounts should be credited to the fund-

- i. Grants made by the Central Government for the purposes of the Fund
- ii. Amount deposited by persons as contribution to the Fund
- iii. Amount received in the Fund from any other source
- iv. Interest or other income received out of the investment made from the Fund.

It is further provided under Section 224(3) of IBC that a person who has contributed any amount to the Fund may, in the event of proceedings initiated in respect of such person under the Code, make an application to such Adjudicating Authority for withdrawal of funds not exceeding the amount contributed by it, for making payments



to workmen, protecting the assets of such persons, meeting the incidental costs during the proceedings or such other purposes as may be prescribed.

### KEY DEFINITIONS AND CONCEPTS

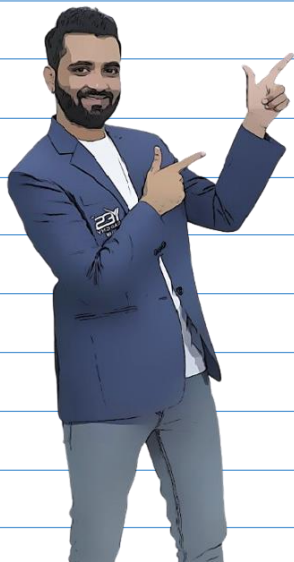
Sections 3, 5 and 79 of the Insolvency and Bankruptcy Code, 2016 define important terms used in the Code.

Section 3 - General Important Terms

Section 5 - Terms relating to Insolvency Resolution and Liquidation for Corporate Persons covered in Part II.

Section 79 - Terms relating to Insolvency Resolution and Bankruptcy for Individuals and Partnership Firms discussed in Part III.

### IMPORTANT DEFINITIONS UNDER SECTION 3-



Section 3(37) provides that words and expressions used but not defined in the Insolvency and Bankruptcy Code, 2016 but defined in the

- Indian Contract Act, 1872,
- Indian Partnership Act, 1932,
- Securities Contract (Regulation) Act, 1956,
- Securities Exchange Board of India Act, 1992,
- RDDBFI Act, 1993,
- Limited Liability Partnership Act, 2008 and
- Companies Act, 2013,

shall have the meanings respectively assigned to them in those Acts.

**"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)].

**1. Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors. (SC)**

'Claim' gives rise to 'debt' only when it is due and 'default' occurs only when debt becomes due and payable and is not paid by the debtor.



**2. Innoventive Industries Ltd. Vs. ICICI Bank & Anr. (SC)**

'Claim' under section 3(6) of the Code means a right to payment, even if it is disputed

**"Corporate Person"** means a company as defined in clause (20) of section 2 of the Companies Act, 2013, a limited liability partnership, as defined in clause (n) of sub-section (1) of section 2 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)].

**Hindustan Construction Company Ltd. & Anr. Vs. UOI & Ors (SC)**

National Highway Authority of India (NHAI) is a statutory body which functions as an extended limb of the Central Government and performs Governmental functions which obviously cannot be taken over by an RP, or by any other corporate body nor can NHAI ultimately be wound up under the Code. For all these reasons, it is not possible to either read in, or read down; the definition of 'corporate person'

**"Corporate Debtor"** means a corporate person who owes a debt to any person [Section 3(8)]

***Laxmi Pat Surana Vs. Union Bank of India & Anr (SC)***

*If a corporate person extends guarantee for the loan transaction concerning a principal borrower not being a corporate person, it would still be covered within the meaning of expression "corporate debtor"*



*"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)].*

***Digamber Bhondwe Vs. JM Financial Asset Reconstruction (SC)***

*Part II of I&B Code deals with "Insolvency Resolution and Liquidation for Corporate Person", & has its own set of definitions in Section 5. Section 3 (10) definition of "Creditor" includes "financial creditor", "operational creditor" "decree-holder" etc. But Section 7 or Section 9 dealing with "Financial Creditor" and "operational creditor" do not include "decree-holder" to initiate CIRP in Part II."*



***Sh. Sushil Ansal Vs Ashok Tripathi and Ors (NCLAT)***

*No decree holder who is covered within the definitions of a creditor given under Section 3(10) of the Insolvency and Bankruptcy Code (IBC) can come within the ambit of the class of a financial creditor. This implies that a decree holder is not permitted to incorporate any corporate insolvency resolution process (CIRP) against any corporate debtor with the sole objective of executing a decree under it.*

*"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.*

*"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 [paid] by the debtor or the corporate debtor, as the case may be [Section 3(12)].*

***B. K. Educational Services Pvt. Ltd. Vs. Parag Gupta and Associates (SC)***

*The context of section 3(12) of the Code is actual non-payment by the CD when a 'debt' has become due and payable*



*"Financial Information", in relation to a person, means one or more of the following categories of information, namely:-*

- (a) records of the debt of the person;*
- (b) records of liabilities when the person is solvent;*
- (c) records of assets of person over which security interest has been created;*
- (d) records, if any, of instances of default by the person against any debt;*
- (e) records of the balance sheet and cash-flow statements of the person; and*
- (f) such other information as may be specified [Section 3(13)].*

*"Financial Institution" means -*

- (a) a scheduled bank;*
- (b) financial institution as defined in section 45-1 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*

*"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)]*

*"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/*

*"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.*

*"Insolvency Professional Agency" means any person registered with the Board under section 201 as an insolvency professional agency.*

*"Information Utility" means a person who is registered with the Board as an information utility under section 210.*

*"Person" includes -*

- (a) an individual;*
- (b) a Hindu Undivided Family;*
- (c) a company;*
- (d) a trust;*
- (e) a partnership;*
- (f) a limited liability partnership; and*
- (g) any other entity established under a statute, and includes a person resident outside India [Section 3(23)]*

***R.G. Steels Vs. Berrys Auto Ancillaries (P) Ltd. (Del HC)***

*A sole proprietary concern, not being a 'person' under section 3(23) of the Code and also when there is a pre-existing dispute, cannot file application under section 9*



***JK Jute Mill Mazdoor Morcha Vs. Juggilal Kamalpat Jute Mills Company Ltd. & Ors***

*A 'trade union' is an entity established under a statute i.e. the Trade Unions Act, 1926 and is therefore, a 'person' under section 3(23) of the Code.*

***Shri Shakti Dyeing Works Vs. Berawala Textiles Pvt. Ltd. (Ahm HC)***

*A proprietorship concern does not fall within the purview of "person" as per section 3(23) for the purpose of filing an application under section 9 of the Code. Proprietorship concern cannot sue and be sued unless it is represented by a proprietor.*

*"Secured Creditor" means a creditor in favour of whom security interest is created [Section 3(30)]*

***Tourism Finance Corporation of India Ltd. Vs. Rainbow Papers Ltd. & Ors (SC)***

*The State is a secured creditor as per the Gujarat Value Added Tax Act, 2003 and are to be rank equally with secured debts under section 53(1)(b).*



*"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)].*

***Indian Overseas Bank Vs. Arvind Kumar (NCLAT)***

*'Security Interest' does not include 'Performance Bank Guarantee' and it is not covered by section 14 of the Code*



**IMPORTANT DEFINITIONS UNDER SECTION 5**

*"Adjudicating Authority", for the purposes of Part II, means National Company Law Tribunal constituted under section 408 of the Companies Act, 2013.*

*"Constitutional Document", in relation to a corporate person, includes articles of association, memorandum of association of a company and incorporation document of a Limited Liability Partnership.*

*"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.

"Corporate guarantor" means a corporate person who is the surety in a contract of guarantee to a corporate debtor.

**Rai Bahadur Shree Ram and Company Pvt. Ltd. Vs. Rural Electrification Corporation Ltd. & Ors (NCLAT)**

Without initiating CIRP against the principal borrower, it is open to the FC to initiate CIRP under section 7 against corporate guarantors as the creditor is also the FC qua corporate guarantor.



**Export Import Bank of India Vs. CHL Ltd. (NCLAT)**

The corporate guarantees given by the CD can be invoked only in the event of a default on the part of the borrower.

**The Karur Vysya Bank Ltd. Vs. Maharaja Theme Parks and Resorts Pvt. Ltd. (NCLAT)**

It makes no difference as to whether the corporate person stood as guarantor to an individual or a corporate person, and as so long as the obligation in respect of a claim is due from a corporate person falling within the definition of 'financial debt', then it is obvious that the creditor can proceed under Section 7 of the Code against such corporate person.

**State Bank of India Vs. D. S. Rajender Kumar (NCLAT)**

If CIRP has been initiated against the CD, the insolvency and bankruptcy process against the personal guarantor can be filed under section 60(2) before the same NCLT and not before the DRT



***Insolvency and Bankruptcy Board of India Vs. Lalit Kumar Jain & Ors (SC)***

*The Code is at a nascent stage and it is better that the interpretation of the provisions is taken up by the SC to avoid any confusion and to authoritatively settle the law. No further petitions involving the challenge to the notification dated November 15, 2019, which brought into force certain provisions relating to the personal guarantors (PGs) to CDs, be entertained by any High Court*



***Kiran Gupta Vs. State Bank of India & Anr (Del)***

*Neither section 14 nor section 31 of the Code place any fetters on a bank/financial institution from initiation and continuation of proceedings against the guarantor for recovering of their dues. The liability of the principal borrower and guarantor remain coextensive and a bank/financial institution is entitled to initiate proceedings against the personal guarantor under the SARFAESI Act during the continuation of the CIRP against the principal borrower*

***State Bank of India Vs. Athena Energy Ventures Pvt. Ltd (NCLAT)***

*CIRP can be proceeded against the principal borrower as well as guarantor*

*"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)].*

***Yogendra Yasupal Vs. Jigsaw Solutions & Anr (NCLAT)***

*Any observations with regard to individual officer if made by a court of law or in any communication made by the operational creditor, the same cannot be treated to be an existence of dispute*



***Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd (SC)***

*The test of existence of a dispute is: (a) whether the corporate debtor has raised a plausible contention requiring further investigation which is not a patently feeble legal argument or an assertion of facts unsupported by evidence (b) whether the defence is not spurious, mere bluster, plainly frivolous or vexatious (c) a dispute, if it truly exists in fact between the parties, which may or may not ultimately succeed*

***Simplex Infrastructures Ltd. Vs. Agrante Infra Ltd (NCLT)***

*The dispute should not be a mere eyewash and attempt to derail the OC's entitlement to initiate the proceedings under sections 8 and 9 of the Code.*

***Chetan Sharma Vs. Jai Lakshmi Solvents (P) Ltd. & Anr (NCLAT)***

*A unilateral transfer of liability does not constitute a 'dispute' within the meaning of section 5(6) and an inter-se dispute between two groups of shareholders of the CD does not constitute a 'dispute' in reference to OCs. The 'dispute' under section 5(6) of the Code must be between the CD and the OCs*

*"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)].*

***B.V.S. Lakshmi Vs. Geometrix Laser Solutions Pvt. Ltd. (NCLAT)***

*Essential criteria for being an FC: (i) A person to whom a financial debt is owed and includes a person whom such debt has been legally assigned or transferred to (ii) The debt along with interest, if any, is disbursed against the consideration for time value of money and include any one or more mode of disbursed as mentioned in clause (a) to (i) of sub-section (8) of Section 5*



***Pioneer Urban Land and Infrastructure Ltd. & Anr. Vs. Union of India & Ors (SC)***

*The allottees/home buyers were included in the main provision, i.e., section 5(8)(f) with effect from the inception of the Code. The Explanation was added in 2018 merely to clarify doubts that had arisen. The deeming fiction that is used by the Explanation is to put beyond doubt the fact that allottees are to be regarded as financial creditors within section 5(8)(f) of the Code*

***"Financial Debt"*** means a debt along with interest, if any, 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 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;*
- (e) receivables sold or discounted other than any receivables sold on nonrecourse basis;*
- (f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;*

*Explanation – For the purposes of this sub-clause,*

- (i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and*

(ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016

(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;

(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.

**Vipul Limited Vs. Solitaire Buildmart Pvt. Ltd (NCLAT)**

The Joint Development Agreement entered, is a contract of reciprocal rights and obligations, both parties are admittedly Joint Development Partners, who entered into a consortium of sorts for developing an Integrated Township and for any breach of terms of contract, Section 7 Application is not maintainable as the amount cannot be construed as financial debt as defined under section 5(8) of the Code.



**Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors. (SC)**

A financial debt is a debt together with interest, if any, which is disbursed against the consideration for time value of money.

**In the matter of Magicon Impex Pvt. Ltd (NCLT)**

The amount which has been released pursuant to Agreement in the form of Security Deposit and the same is interest bearing, which means it is carrying consideration of time value of money having commercial effect of a borrowing. Therefore, in our view the "debt" claimed is a "Financial Debt" within the definition of Section 5(8)(f) of IBC, 2016



**Phoenix Arc Pvt. Ltd. Vs. Spade Financial Services Ltd. & Ors.  
(SC)**

(a) The collusive commercial arrangements between FCs and the CD would not constitute a 'financial debt'; (b) The objects and purposes of the Code are best served when the CIRP is driven by external creditors, so as to ensure that the CoC is not sabotaged by related parties of the CD. The purpose of excluding a related party of a CD from the CoC is to obviate conflicts of interest; (c) Exclusion under the first proviso to section 21(2) is related not to the debt itself but to the relationship existing between a related party FC and the CD.; and (d) The FC, who in praesenti is not a related party, would not be debarred from being a member of the CoC. However, in case where the related party FC divests itself of its shareholding or ceases to become a related party in a business capacity with the sole intention of participating in the CoC and sabotage the CIRP, it would be in keeping with the object and purpose of the first proviso to section 21(2), to debar the former related party creditor.

**Chetan Sharma Vs. Jai Lakshmi Solvents (P) Ltd. & Anr  
(NCLAT)**

A unilateral transfer of liability does not constitute a 'dispute' within the meaning of section 5(6) and an inter-se dispute between two groups of shareholders of the CD does not constitute a 'dispute' in reference to OCs. The 'dispute' under section 5(6) of the Code must be between the CD and the OCs

**"Initiation Date"** means the date on which a financial creditor, corporate applicant or operational creditor, as the case may be, makes an application to the Adjudicating Authority for initiating corporate insolvency resolution process [Section 5(11)].

*"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*

Where the interim resolution professional is not appointed in the order admitting application under section 7, 9 or 10, the insolvency commencement date shall be the date on which such interim resolution professional is appointed by the Adjudicating Authority



*"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)].*

***Dakshin Gujarat VIJ Company Ltd. Vs. ABG Shipyard Ltd. & Anr.  
(NCLAT)***

*Any cost that is incurred towards supply of essential services during the period of moratorium, it may be accounted towards the insolvency resolution process costs.*



*"Insolvency Resolution Process Period" means the period of one hundred and eighty days beginning from the insolvency commencement date and ending on one hundred and eightieth day [Section 5(14)].*

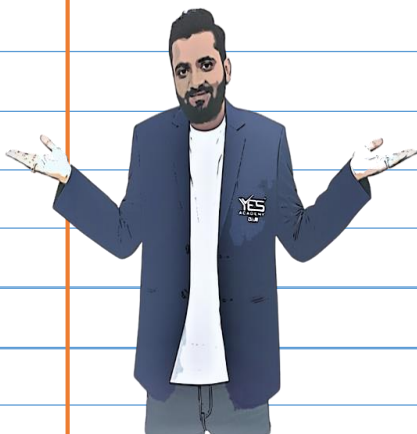
**Quinn Logistics India Pvt. Ltd. Vs. Mack Soft Tech Pvt. Ltd. & Ors (NCLAT)**

*It is always open to the NCLT/NCLAT to exclude certain period for the purpose of counting the total period of 270 days. The grounds include the following:*

- (i) If the CIRP is stayed by a court of law or the NCLT/NCLAT/ Supreme Court*
- (ii) If no RP is functioning for one or other reason during the CIRP*
- (iii) The period between the date of order of admission/moratorium is passed and the actual date on which the RP takes charge for completing the CIRP*
- (iv) On hearing a case, if order is reserved by the NCLT/NCLAT/Supreme Court and finally pass order enabling the RP to complete the CIRP*
- (v) If the CIRP is set aside by the NCLAT or order of the NCLAT is reversed by the Supreme Court and CIRP is restored*
- (vi) Any other circumstances which justifies exclusion of certain period*



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



The MCA vide notification dated 18th March, 2020 notified that a debt raised from the Special Window for Affordable and Middle-Income Housing Investment Fund I, (which means the fund sponsored by the Central Government for providing priority debt financing for stalled housing projects, as an alternate investment fund and registered with the Securities and Exchange Board of India, established under sub-section (1) of section 3 of the Securities and Exchange Board of India Act, to provide financing for the completion of stalled housing projects that are in the affordable and middle-income housing sector) as inclusion for the purposes of the said clause.

*"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)].*

***Cooperative Rabobank U.A. Singapore Branch Vs. Shailendra Ajmera (NCLAT)***

*It is clear that an OC who has assigned or legally transferred any operational debt to an FC, the assignee or transferee shall be considered as an OC to the extent of such assignment or legal transfer.*



***Suresh Narayan Singh Vs. Tayo Rolls Ltd. (NCLAT)***

*The workmen of a Company come within the meaning of an OC in terms of section 5(20) r/w section 5(21) of the Code.*

***Innoventive Industries Ltd. Vs. ICICI Bank & Anr (SC)***

*An OC means a person to whom an operational debt is owed, and an operational debt under section 5(21) means a claim in respect of provision of goods or services.*

***JK Jute Mill Mazdoor Morcha Vs. Juggilal Kamalpat Jute Mills Co. Ltd. (NCLAT)***

*A Trade Union or Association of workmen/employee does not come within the meaning of OC as no services is rendered by the Workmen's Association/Trade Union to the CD to claim any dues which can be termed to be debt as defined in sub-section (11) of section 3 - **This has been Overruled by the Supreme Court***

*"Operational Debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment 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)].*



**Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors. (SC)**

Operational debt would include a claim in respect of the provision of goods or services, including employment, or a debt in respect of payment of dues arising under any law and payable to the Government or any local authority.



**Kolkata Municipal Corporation and Anr. Vs. Union of India and Ors (Cal HC)**

The property seized by Kolkata Municipal Corporation (KMC) towards recovery of municipal tax dues from CD, can be the subject matter of the CIRP under the Code as the claim of KMC had attained finality and fastened a liability upon the CD, thus constituting an 'operational debt' under section 5(21) of the Code.

**Chipsan Aviation Pvt. Ltd. Vs. Punj Llyod Aviation Ltd. (NCLAT)**

The expression 'in respect of' in section 5(21) of the Code has to be interpreted in a broad and purposive manner and held that any advance payment made for a future contract of services is clearly an operational debt.

**"Related Party"**, in relation to a corporate debtor, means –

- (a) a director or partner of the corporate debtor or their relative;
- (b) a key managerial personnel of the corporate debtor or their relative;
- (c) an LLP or a partnership firm in which a director, partner, or manager of the corporate debtor or his relative is a partner;
- (d) a private company in which a director, partner or manager of the corporate debtor is a director and holds along with his relatives, more than 2% of its share capital;
- (e) a public company in which a director, partner or manager of the corporate debtor is a director and holds along with relatives, more than 2% of its paid-up share capital;

(f) any body corporate whose board of directors, managing director or manager, in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor;

(g) any LLP or a partnership firm whose partners or employees in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor;

(h) any person on whose advice, directions or instructions, a director, partner or manager of the corporate debtor is accustomed to act;

(i) a holding, subsidiary or an associate company of the corporate debtor, or a subsidiary of a holding company to which the corporate debtor is a subsidiary;

(j) any person who controls more than 20% of voting rights in the corporate debtor;

(k) any person in whom the corporate debtor controls more than 20% of voting;

(l) any person who can control the composition of the board of directors or corresponding governing body of the corporate debtor;

(m) any person who is associated with the corporate debtor on account of -

(i) participation in policy making processes of the corporate debtor; or

(ii) having more than two directors in common between the corporate debtor and such person; or

(iii) interchange of managerial personnel; or

(iv) provision of essential technical information to, or from, the corporate debtor. [Section 5(24)].

**"Related Party"**, in relation to an individual, means -

(a) a person who is a relative of the individual or a relative of the spouse of the individual;

(b) a partner of a limited liability partnership, or a limited liability partnership or a partnership firm, in which the individual is a partner;

(c) a person who is a trustee of a trust in which the beneficiary of the trust includes the individual, or the terms of the trust confers a power on the trustee which may be exercised for the benefit of the individual;

(d) a private company in which the individual is a director and holds along with his relatives, more than two per cent. of its share capital;

(e) a public company in which the individual is a director and holds along with relatives, more than two per cent. of its paid-up share capital;

(f) a body corporate whose board of directors, managing director or manager, in the ordinary course of business, acts on the advice, directions or instructions of the individual;

(g) a limited liability partnership or a partnership firm whose partners or employees in the ordinary course of business, act on the advice, directions or instructions of the individual;

(h) a person on whose advice, directions or instructions, the individual is accustomed to act;

(i) a company, where the individual or the individual along with its related party, own more than 50% of the share capital of the company or controls the appointment of the board of directors of the company. [Section 5(24A)].

*For the purposes of this clause, -*

*(a) "relative", with reference to any person, means anyone who is related to another, in the following manner, namely: -*

(i) members of a Hindu Undivided Family,

(ii) husband,

(iii) wife,

(iv) father,

(v) mother,

(vi) son,

(vii) daughter,

(viii) son's daughter and son,

(ix) daughter's daughter and son,

(x) grandson's daughter and son,

(xi) granddaughter's daughter and son,

(xii) brother,

(xiii) sister,

(xiv) brother's son and daughter,

(xv) sister's son and daughter,

(xvi) father's father and mother,

(xvii) mother's father and mother,

(xviii) father's brother and sister,

(xix) mother's brother and sister; and

*(b) wherever the relation is that of a son, daughter, sister or brother, their spouses shall also be included. [Section 5(24A)]*

**Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors. (SC)**

The persons who act jointly or in concert with others are connected with the business activity of the resolution applicant. Similarly, all the categories of persons mentioned in section 5(24A) show that such persons must be "connected" with the resolution applicant within the meaning of section 29A(j). This being the case, the categories of persons who are collectively mentioned as a "relative" need to have a connection with the business activity of the resolution applicant. If this cannot be shown such person cannot be disqualified under section 29A(j). All the categories in this subsection deal with persons, natural as well as artificial, who are connected with the business activity of the resolution applicant. The expressions "related party" and "relative" contained in the definition sections must be read noscitur a sociis (the meaning of an unclear word or phrase should be interpreted within the context it is being used) with the categories of persons mentioned in Explanation 1. So read, they would include only persons who are connected with the business activity of the resolution applicant



*"Resolution Applicant" means a person, who individually or jointly with any other person, submits a resolution plan to the resolution professional pursuant to the invitation made under clause (h) of subsection (2) of section 25 [Section 5(25)].*

**Kundan Care Products Ltd. Vs. Amit Gupta and Ors. (NCLAT)**

A resolution applicant whose resolution plan stands approved by CoC, cannot be permitted to alter his position to the detriment of various stake holders after pushing out all potential rivals during the bidding process, and the same fraught with disastrous consequences for the CD which may be pushed into liquidation, as the CIRP period may by then be over thereby setting at naught all possibilities of insolvency resolution and protection of a CD, more so, when it is a going concern.



***Seroco Lighting Industries Pvt. Ltd. Vs. Ravi Kapoor, RP for Arya Filaments Pvt. Ltd. & Ors (NCLAT)***

*A successful resolution applicant cannot be permitted to withdraw the approved resolution plan, coupled with the fact in the instant case being the sole RA in the CIRP, which is an MSME and having knowledge of the financial health of the CD as a promoter or as a connected person cannot be permitted to seek revision of the approved plan, on the ground which would not be a material irregularity within the ambit of section 61(3) of the Code.*



*"Resolution Plan" means a plan proposed by resolution applicant for insolvency resolution of the corporate debtor as a going concern in accordance with Part II. It may be noted that a resolution plan may include provision the restructuring of the corporate debtor, insolvency by way of merger, amalgamation and demerger.*

**IMPORTANT DEFINITIONS UNDER SECTION 79-**

*"Associate" of the debtor means -*

- (a) a person who belongs to the immediate family of the debtor;*
- (b) a person who is a relative of the debtor or a relative of the spouse of the debtor;*
- (c) a person who is in partnership with the debtor;*
- (d) a person who is a spouse or a relative of any person with whom the debtor is in partnership;*
- (e) a person who is employer of the debtor or employee of the debtor;*
- (f) a person who is a trustee of a trust in which the beneficiaries of the trust include a debtor, or the terms of the trust confer a power on the trustee which may be exercised for the benefit of the debtor;*

(g) a company, where the debtor or the debtor along with his associates, own more than fifty per cent. of the share capital of the company or control the appointment of the board of directors of the company

**"Bankrupt"** means -

- (a) a debtor who has been adjudged as bankrupt by a bankruptcy;
- (b) each of the partners of a firm, where a bankruptcy order has been made against the 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)].

**"Bankruptcy Commencement Date"** means the date on which a bankruptcy order is passed by the Adjudicating Authority.

**"Debtor"** includes a judgment-debtor.

**"Discharge Order"** means an order passed by the Adjudicating Authority discharging the debtor under sections 92, 119 and section 138, as the case may be.

**"Excluded Assets"** for the purposes of this part includes -

- (a) unencumbered tools, books, vehicles and other equipment as are necessary to the debtor or bankrupt for his personal use or for the purpose of his employment, business or vocation,
- (b) unencumbered furniture, household equipment and provisions as are necessary for satisfying the basic domestic needs of the bankrupt and his immediate family;

(c) any unencumbered personal ornaments of such value, as may be prescribed, of the debtor or his immediate family which cannot be parted with, in accordance with religious usage;

(d) any unencumbered life insurance policy or pension plan taken in the name of debtor or his immediate family;

(e) an unencumbered single dwelling unit owned by the debtor of such value as may be prescribed [Section 79(14)].

**"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;

(e) any other debt as may be prescribed [Section 79(15)].

**"Immediate Family"** of the debtor means his spouse, dependent children and dependent parents.

**"Partnership Debt"** means a debt for which all the partners in a firm are jointly liable.

**"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.

*"Repayment Plan" means a plan prepared by the debtor in consultation with the resolution professional under section 105 containing a proposal to the committee of creditors for restructuring of his debts or affairs [Section 79(20)].*

*"Undischarged Bankrupt" means a bankrupt who has not received a discharge order under section 138.*

### MAJOR CASE LAWS

#### *1. Innoventive Industries Limited v. ICICI Bank [SC]*

##### *Facts :*

- A. ICICI Bank had taken Innoventive Industries Ltd. to NCLT for the recovery of its due as the company had defaulted on loan repayment. The NCLT had given a verdict in favour of the ICICI Bank, which Innoventive Industries challenged in the National Company Law Appellate Tribunal (NCLAT), which also ruled in the favour of ICICI Bank.*
- B. Aggrieved, Innoventive Industries filed an appeal in the Supreme Court seeking relief under the Maharashtra Relief Undertaking (Special Provisions) Act, 1958 (MRUA), which states that if a company is facing bankruptcy, protection needs to be provided for the employees.*

##### *Legal Principles held / Observations made -*

- 1. That that the MRU Act is repugnant to the IBC.*
- 2. Under the MRUA, the State Government may take over the management of the undertaking and impose a moratorium in much the same manner as that contained in the IBC. By giving effect to the MRUA, the plan/scheme that may be adopted under the IBC will directly be hindered. There would be a direct clash between moratoriums under the two statutes.*
- 3. That the non-obstante clause of the IBC will prevail over the non-obstante clause in the MRUA.*

#### *2. Arun Kumar Jagatramka vs. Jindal Steel and Power Ltd [SC]*



*Legal Principles held / Observations made -*

- 1. That enactment of the IBC has marked a quantum change in corporate governance and the rule of law. IBC perceives good corporate governance, respect for and adherence to the rule of law as central to the resolution of corporate insolvencies.*
- 2. IBC perceives corporate insolvency not as an isolated problem faced by an individual business entities but places it in the context of a framework which is founded on public interest in facilitating economic growth by balancing diverse stakeholder interests.*
- 3. IBC attributes a primacy to the business decisions taken by creditors acting as a collective body, on the premise that the timely resolution of corporate insolvency is necessary to ensure the growth of credit markets and encourage investment.*
- 4. In its diverse provisions, the IBC ensures that the interests of corporate enterprises are not conflated with the interests of their promoters; the economic value of corporate structures is broader in content than the partisan interests of their managements.*
- 5. IBC is a legislation aimed at re-organization and resolution of insolvencies. Liquidation is a matter of last resort.*

**3. Gujarat Urja Vikas Nigam Limited Vs. Mr. Amit Gupta & Ors. [SC]**

*Legal Principles held / Observations made -*

- 1. That the primary focus of the IBC is to ensure the revival and continuation of the corporate debtor.*
- 2. The interests of the corporate debtor have been bifurcated and separated from the interests of persons in management.*
- 3. The timelines which are prescribed in the IBC are intended to ensure the resuscitation of the corporate debtor.*
- 4. The enactment of the IBC is in significant senses a break from the past. While interpreting the provisions of the IBC, care must be taken to ensure that the regime which Parliament found deficient and which was the basic reason for the enactment of*

*the new legislation is not brought in through the back door by a process of disingenuous legal interpretation.*

- 5. However, this is not to say that the interpretation given to the statutory provisions that existed prior to the enactment IBC is to be rejected in toto. The interpretation given to such statutory provisions that are textually similar may be relevant, provided that such interpretation is in tandem with the objective of enacting the IBC, that is, inter alia, avoidance of multiplicity of fora and a timely resolution of the insolvency process.*

#### **4. Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors [SC]**

**Legal Principles held / Observations made -**

- 1. The Code is first and foremost, a Code for reorganization and insolvency resolution of corporate debtors. Unless such reorganization is effected in a time-bound manner, the value of the assets of such persons will deplete.*
- 2. Maximization of value of the assets of such persons so that they are efficiently run as going concerns is another very important objective of the Code. This, in turn, will promote entrepreneurship as the persons in management of the corporate debtor are removed and replaced by entrepreneurs.*
- 3. When, a resolution plan takes off and the corporate debtor is brought back into the economic mainstream, it is able to repay its debts, which, in turn, enhances the viability of credit in the hands of banks and financial institutions.*
- 4. Ultimately, the interests of all stakeholders are looked after as the corporate debtor itself becomes a beneficiary of the resolution scheme - workers are paid, the creditors in the long run will be repaid in full, and shareholders/investors are able to maximize their investment.*
- 5. The Preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plans submitted are not up to the mark. Even in liquidation, the liquidator can sell the business of the corporate debtor as a going concern.*

*"It always seems impossible unless it is DONE!"*