

Individual Insolvency under IBC - Bankruptcy Proceedings

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INSOL INTERNATIONAL FLP BATCH OF 2024

CERTIFICATION IN FORENSIC ACCOUNTING AND FRAUD DETECTION (ICAI)

Objectives

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- I. Introduction
- II. Structure of IBC
- III. Insolvency Resolution Framework for Individuals / Partnership Firms / PGs
- IV. Broad Legal Framework of Guarantee
- V. Provisions/Mechanism
- VI. Practical Challenges in Insolvency Resolution & Bankruptcy
- VII. Role of Insolvency Professional
- VIII. Judicial Precedents shaping our understanding
- IX. Recommendations / Proposal / Suggestions

Introduction

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Structure of IBC For PGs to CD

Five Parts and then into Chapters.

Part II - Insolvency Resolution and Liquidation for Corporate Persons

Part III - Insolvency Resolution and Bankruptcy for Individuals and Partnership Firms

Insolvency Framework for Individual, Firms and PGs

a) Fresh Start Process (not notified)

b) Resolution and Bankruptcy for PG to CD - **Notified** - 15.11.2019

c) Non-PG - Presidency Town Insolvency Act, 1909 and Provincial Insolvency Act, 1920 may continue to apply to them.
(Not repealed as S.243 not notified yet)

Presidency Town Courts - High Courts of Calcutta, Madras, and Bombay

Provincial Insolvency Act - District Court has primary jurisdiction, but the State Government can also empower subordinate courts to exercise concurrent jurisdiction.

Adjudicating Authority

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i) Section 4 of the Insolvency and Bankruptcy Code, 2016 provides for threshold for filing an Application for insolvency against the Corporate Debtor is Rs. 1 crore with effect from 24.03.2020.

ii) Section 60 of the IBC provides for Adjudicating Authority for corporate person.

“60. Adjudicating Authority for corporate persons. –

(1) The Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and **personal guarantors thereof shall be the National Company Law Tribunal** having territorial jurisdiction over the place where the registered office of a corporate person is located.

(2) Without prejudice to sub-section (1) and notwithstanding anything to the contrary contained in this Code, where a corporate insolvency resolution process or liquidation proceeding of a corporate debtor **is pending** before a National Company Law Tribunal, an application relating to the insolvency resolution or liquidation or bankruptcy of a corporate guarantor or personal guarantor, as the case may be, of such corporate debtor **shall be filed before the National Company Law Tribunal.**

(3) An insolvency resolution process or liquidation or bankruptcy proceeding of a corporate guarantor or personal guarantor, as the case may be, of the corporate debtor pending in any court or tribunal shall stand transferred to the Adjudicating Authority dealing with insolvency resolution process or liquidation proceeding of such corporate debtor.

(4) The National Company Law Tribunal shall be vested with all the powers of the Debt Recovery Tribunal as contemplated under Part III of this Code for the purpose of subsection (2)

Adjudicating Authority

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iii) Section 78:

This Part shall apply to matters relating to fresh start, insolvency and bankruptcy of individuals and partnership firms where the amount of the default is not less than one thousand rupees: Provided that the Central Government may, by notification, specify the minimum amount of default of higher value which shall not be more than one lakh rupees.

iv) Section 79 defines the Adjudicating Authority, i.e., Debt Recovery Tribunal in Part-III. Section 79 is as follows: “79. Definitions. – In this Part, unless the context otherwise requires, – (1) “Adjudicating Authority” means the Debt Recovery Tribunal constituted under subsection (1) of section 3 of the Recovery of Debts Due to Banks and Financial Institution Act, 1993 (51 of 1993);

v) “**179. Adjudicating Authority for individuals and partnership firms.** – (1) Subject to the provisions of section 60, the Adjudicating Authority, in relation to insolvency matters of **individuals and firms** shall be the **Debt Recovery Tribunal having territorial jurisdiction** over the place where the individual debtor actually and voluntarily resides or carries on business or personally works for gain and can entertain an application under this Code regarding such person.”

iv) On 15.11.2019, Notification S.O. 4126(E) was issued by Central Government under Section 1(3) of the IBC, by which various provisions of the Code were enforced. On the date when Notification dated 15.11.2019 was issued, Central Government also notified the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019. Section 2(e) was also inserted defining personal guarantor to a Corporate Debtor.

The Rule 3(1)(a) of Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 clearly contemplate that Adjudicating Authority for the purposes of Section 60 is National Company Law Tribunal and for other cases, it is Debt Recovery Tribunal. This notification is upheld of Hon'ble SC in Lalit Kumar Judgement

Introduction to PG Resolution

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- i) Who is a Personal Guarantor? - Individual who agrees to pay loan of CD
- ii) Why Personal Guarantee? - Lenders requirement / Credit worthiness / Check on misuse
- iii) Who generally extend Personal Guarantee - Promoter / Director etc
- iv) Effect of Corporate Insolvencies on PG - Cascading effect on PGs
- v) Background on Evolvement of IBC -

- BLRC : Acknowledged systemic importance of guarantee

- Working Group -

- Aug'17 - First Group

- Oct'18 and Mar'19 - Reconstituted Group - Phase Wise Implementation

- Notification dated 15.11.2019 - Notifying provisions w.r.t Section 2(e) w.e.f 1.12.2019.

- Vi) PGIRP and Bankruptcy Regulations and Rules 2019 notified.

- vii) Broadly two phases similar to CD - Resolution and Bankruptcy

Broad Legal Framework

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i) Legal framework of Guarantee

S.126 of ICA - “a contract to perform the promise, or discharge the liability, of a third person in case of his default.”

Rule 3(e) of PGIRP Rules, ““guarantor” means a debtor who is a personal guarantor to a corporate debtor and in respect of whom guarantee has been **invoked** by the creditor and remains **unpaid in full or part**;”

S.128 ICA - Liability of guarantor is co-extensive with that of principal borrower

S. 140 / 141 - Doctrine of Subrogation

ii) Structure of IBC For PGs to CD

Five Parts and then into Chapters.

Part III - Insolvency Resolution and Bankruptcy for Individuals and Partnership Firms

Chapter 3 contains PGIRP (S.94-120), Chapter 4-7 contains, S.121 to 187, w.r.t bankruptcy, administration, AA, Offences/Penalties

Broad Legal Framework

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ii) Structure of IBC For PGs to CD

- Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 (“**PGIRP Rules**”)
- Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Regulations, 2019, (“**PGIRP Regulations**”)
- Insolvency and Bankruptcy (Application to Adjudicating Authority for Bankruptcy Process for Personal Guarantors to Corporate Debtors) Rules, 2019 (“**Bankruptcy Rules**”)
- Insolvency and Bankruptcy Board of India (Bankruptcy Process for Personal Guarantors to Corporate Debtors) Regulations, 2019 (“**Bankruptcy Regulations**”)

Broad Legal Framework

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ii) Structure of IBC For PGs to CD

Part III of IBC	Particulars	Section coverage
Chapter 1	Preliminary	78-79
Chapter 2	Fresh Start Process	80-93
Chapter 3	Insolvency Resolution Process	94-120
Chapter 4	Bankruptcy Order for Individuals and Partnership Firms	121-148
Chapter 5	Administration and Distribution of the Estate of the Bankrupt	149-178
Chapter 6	Adjudicating Authority for Individuals and Partnership Firms	179-183
Chapter 7	Offences and Penalties	184-187

Broad Legal Framework

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ii) Structure of IBC For PGs to CD - Insolvency Resolution

Section		Coverage
Section 94	Initiation	Initiation of Process by PG, by themselves or through RP. This application must include a statement of affairs, details of the debt, and comply with prescribed forms.
Section 95	Initiation	Initiation of Process by Creditor, by themselves or through RP. Issue of Notice in Form B of PGIRP Rules seeking payment within 14 days, then filing IA in Form C
Section 96	Interim Moratorium	Upon filing an application, an interim moratorium is imposed in relation to all the debts, preventing further legal proceedings against the guarantor related to the debt. Creditors of the PG shall not initiate any legal action or proceedings in respect of any such debt. This ceases to have effect on the date of admission of application
Section 97	RP Appointment	If the application is filed through a RP, the AA checks the database of IBBI for any disciplinary proceedings against the RP. If there are no disciplinary proceedings, the AA appoints the RP. If the application is filed by the applicant himself, AA may appoint from panel

Broad Legal Framework

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ii) Structure of IBC For PGs to CD

Section		Coverage
Section 99	RP Report	RP examines the application with respect to the eligibility of the PG or creditor, as the case may be, for initiation of insolvency resolution process along with other requirements as specified in section 94 or 95 of the Code and submits a report recommending acceptance or rejection of the application, within ten days of his appointment. As per Hon'ble Supreme Court judgement dated 9.11.2023, in the matter of Dilip B. Jiwrajka v. Union of India and Others, RP only performs a "facilitative task" of collating information/documents for the purpose of examination of the Petition filed u/s 95 of the Code.
Section 100	AA Decision	The Adjudicating Authority, based on the RP's report, decides whether to admit or reject the application <u>within fourteen days</u> of the receipt of report of the RP. Where the AA rejects the application on the basis of report submitted by the RP or that the application was made with the intention to defraud the creditors or the RP, the creditors are entitled to file an application for bankruptcy
Section 101	Moratorium	When the application is admitted under Section 100, a moratorium shall commence in relation to all the debts and <u>shall cease to have effect at the end of the period of one hundred and eighty days beginning with the date of admission of the application or on the date the Adjudicating Authority passes an order on the repayment plan under section 114, whichever is earlier.</u> During this period, every legal action or proceeding pending in respect of any debt owed by the PG is deemed to have been stayed. Further, the creditors of the PG are barred from initiating any legal action or proceedings in respect of any such debt and the PG is barred from transferring, alienating, encumbering, or disposing of any of his assets or legal rights or beneficial interests therein.

Broad Legal Framework

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ii) Structure of IBC For PGs to CD

Section		Coverage
Section 102-104	Claims	AA issues public notice within 7 days of admission inviting creditors to file claims within 21 days of notice . The creditors register claims with RP along with proof. Based on verification of claims, RP prepares a list of creditors on the basis of information provided in the application and based on claims received, within 30 days of public notice . The list of creditors contains the names of creditors, amount claimed, amount admitted and security interest, if any, in respect of such claims.
Section 105 and 106	Repayment Plan	The PG prepares a Repayment Plan, in consultation with the RP, containing a proposal to the creditors for restructuring of his debts or affairs and its implementation schedule as well as the source of funds. (Reg. 17 of PGIRP Regulations). As per Regulation 17A, RP to place the repayment plan u/s 105 in a meeting of creditors for consideration. The RP submits the repayment plan along with his report on such plan to the AA within twenty-one days from the last date of submission of claims. (S.106).
Section 107	Creditor Meeting	As per the report of the RP, he summons the first meeting of the creditors to approve the repayment plan by issuing a notice calling the meeting of creditors at least fourteen days before the date fixed for such meeting (S.107 (1)). In the meeting of creditors, creditors may decide to approve, modify or reject the repayment plan. (S.108). The voting share of each creditor is in proportion to the debt owed to such creditor. The repayment plan shall be approved by a majority of more than three-fourth in value of the creditors present in person or by proxy and voting on the resolution in the meeting. (S.111)

Broad Legal Framework

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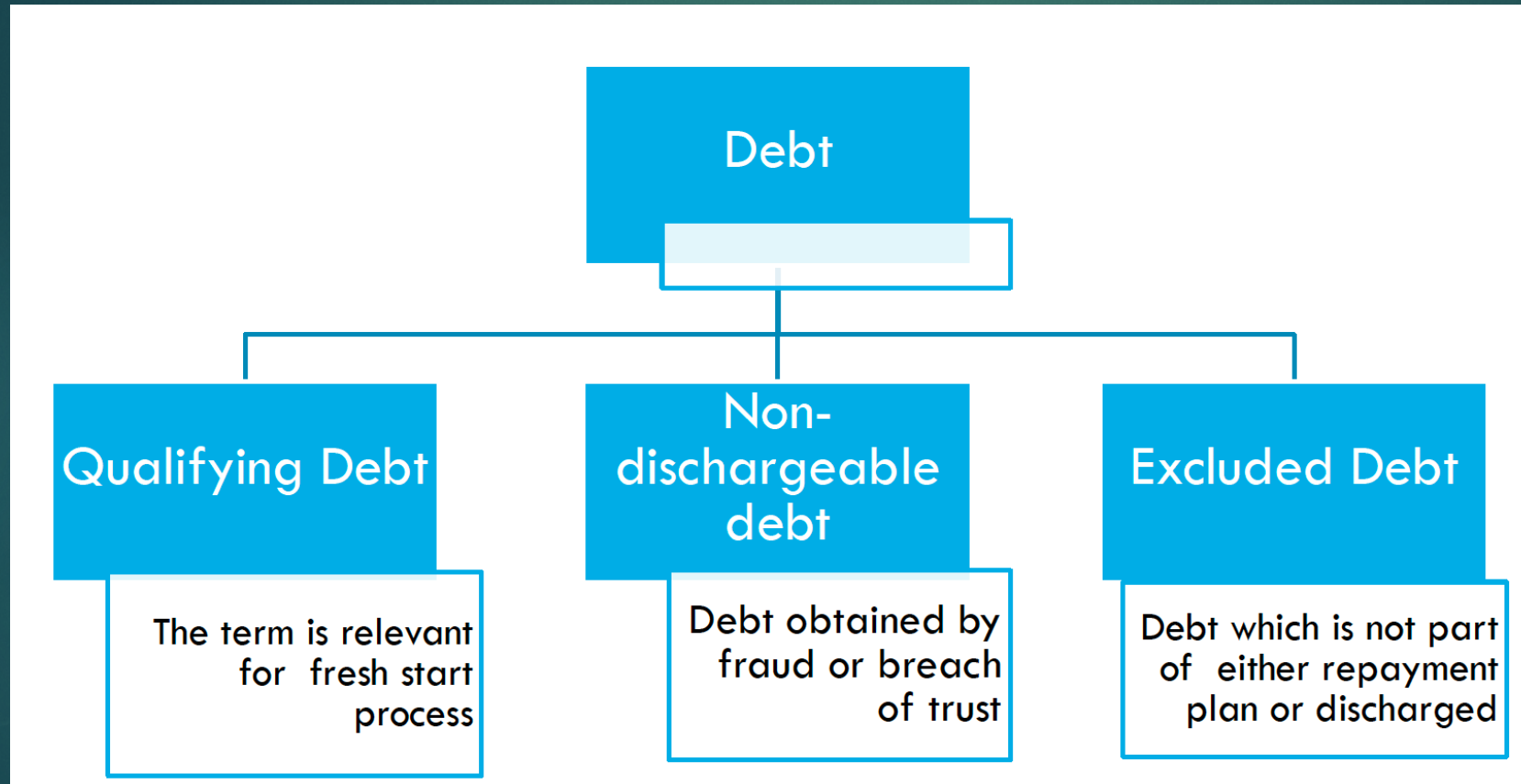
ii) Structure of IBC For PGs to CD

Section		Coverage
112-114	Plan approval / rejection	The RP prepares a report of the meeting of creditors on the repayment plan. (S.112(1)). He provides a copy of the report of the meeting of the creditors to the PG, creditors, and the AA. (S.113). The AA, by an order, approves or rejects the repayment plan based on the report submitted by the RP. The order of the AA may provide for directions for implementation of repayment plan. Where the AA is of the opinion that the repayment plan requires modification, it may direct the RP to re-convene a meeting of the creditors for reconsidering the same. (S.114)
Other provisions		The Repayment Plan is binding on guarantor and creditors. If AA rejects the repayment plan, creditors can file application for bankruptcy. Upon completion of repayment plan implementation, RP reports to AA along with summary of receipts and payments. There can be premature end to repayment plan for lack of implementation and may trigger bankruptcy. Upon completion of implementation, RP may apply to AA for discharge order

Broad Legal Framework

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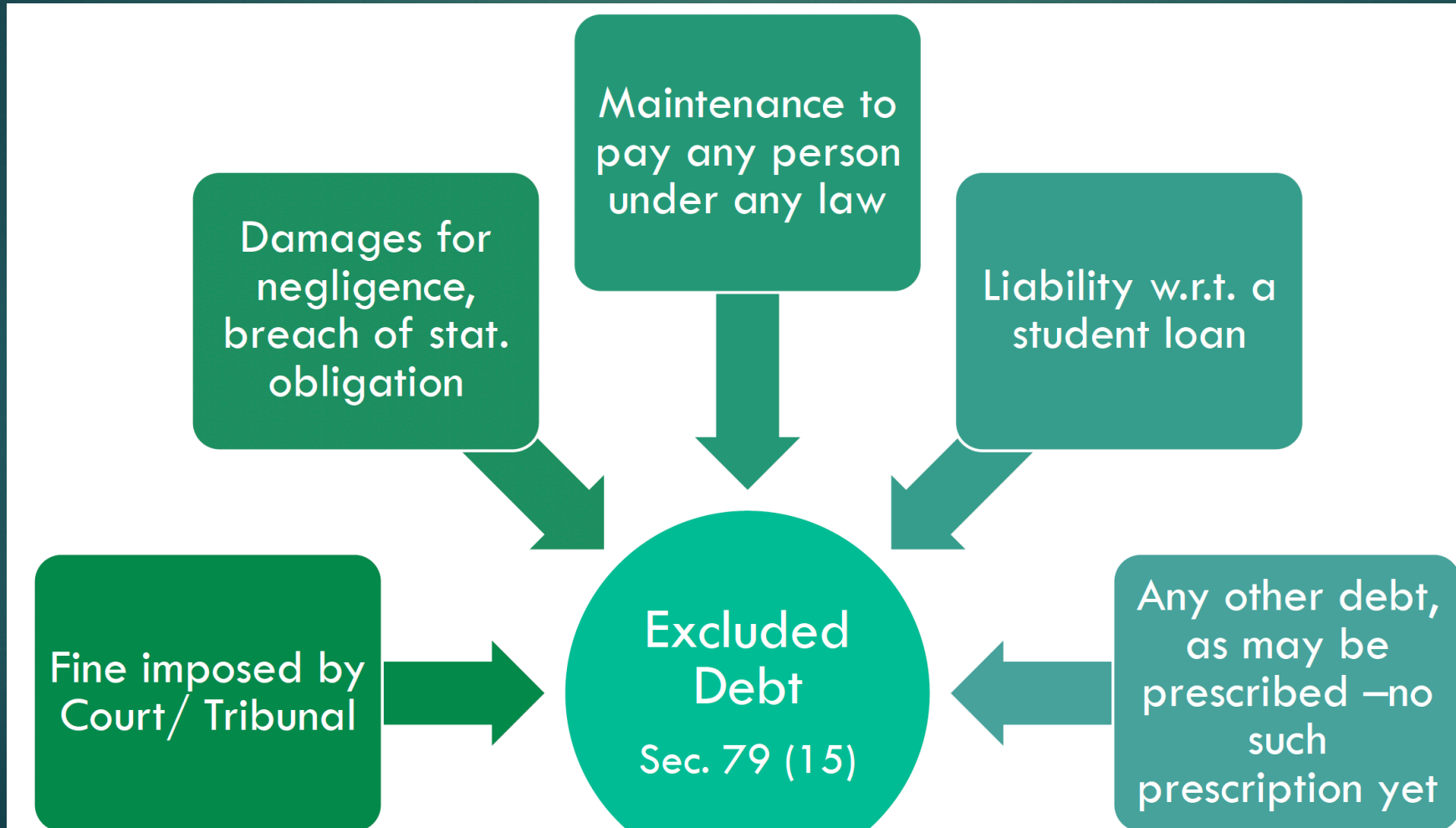
ii) Structure of IBC For PGs to CD



Broad Legal Framework

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ii) Structure of IBC For PGs to CD - Excluded Debt



Broad Legal Framework

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ii) Structure of IBC For PGs to CD - Excluded Asset

Sec 79 (14) read with Rule 5



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/-

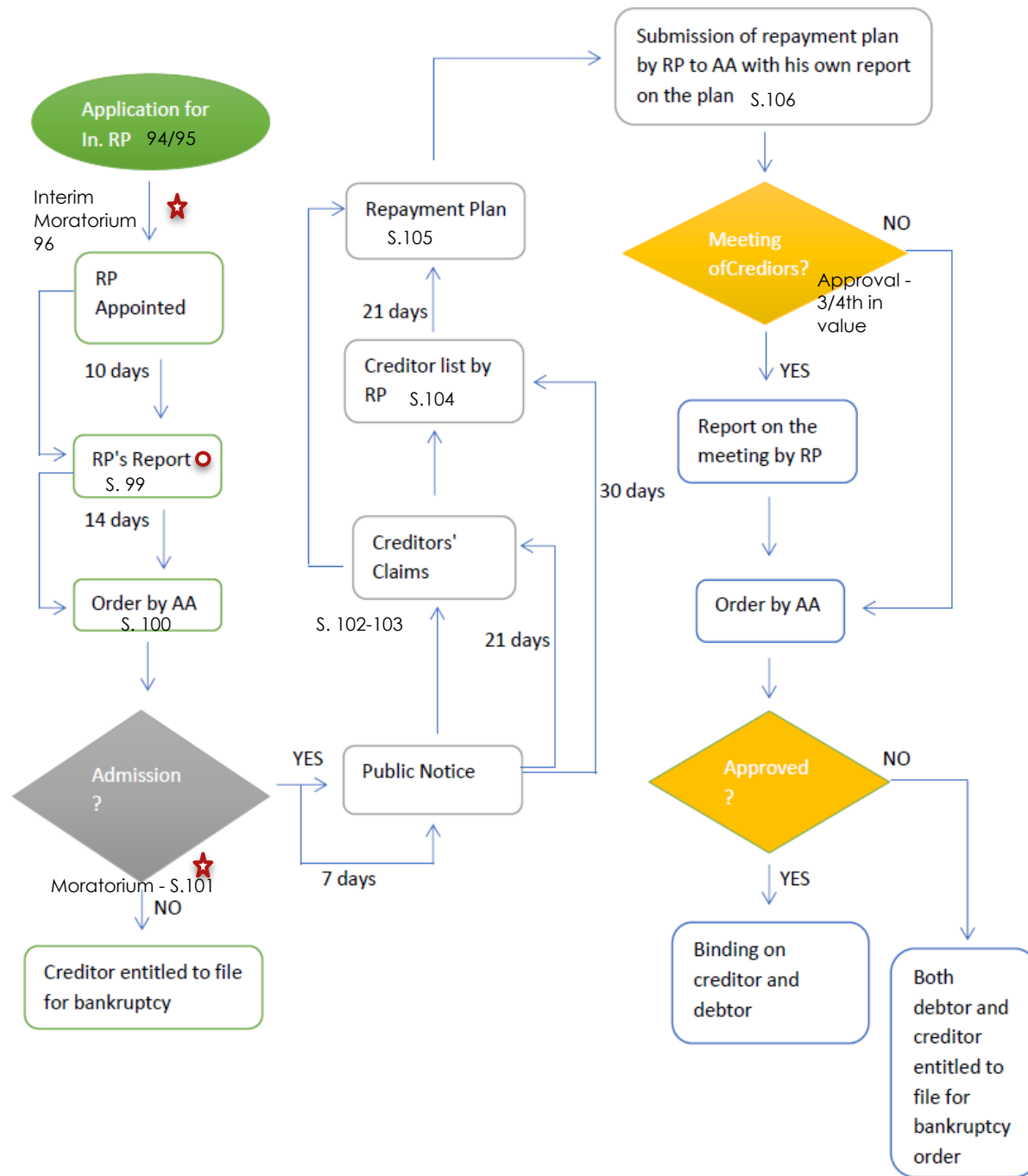


Unencumbered life insurance policy/
pension plan



Unencumbered single dwelling unit

Upto Rs.
20,00,000/- in
Urban area;
Rs. 10,00,000/-
in rural area



Insolvency Resolution Process for PGs Provisions/Mechanism

Repayment Plan

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- i) The PG prepares a Repayment Plan, in consultation with the RP, containing a proposal to the creditors for restructuring of his debts or affairs and its implementation schedule as well as the source of funds. (Reg. 17 of IIRP Regulations)
- ii) The plan may provide for **transfer or sale of all or part of the assets of the PG** along with the mode and manner of such sale, satisfaction or modification of any security interest, **reduction in amount payable to creditors** and **modification as to the terms of repayment**, etc.
- iii) The plan provides for a **minimum budget required for the PG to cover his reasonable expenses** and also of his immediate family members to the extent they are dependent on him, provided that at the very least, 10 per cent of the realizable income of the PG is used for repayment of his debts.
- iv) The RP submits the repayment plan along with his report on such plan to the AA within **twenty-one days** from the last date of submission of claims. (§.106)
- v) The report may provide for necessity of summoning a meeting of creditors to consider repayment plan, and if necessary, the date, place, and time of the meeting. Reg 17A now requires meeting to consider plan.

Repayment Plan - Contents - Reg17

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17. Contents of repayment plan.

- (1) The repayment plan shall provide the following -
 - (a) the term of the repayment plan and its implementation schedule, including the amounts to be repaid and dates of repayment to creditors;
 - (b) the source of funds that will be used to pay resolution process costs and that such payment shall be made in priority over any creditor;
 - (c) a minimum budget for the duration of the repayment plan, to cover the reasonable expenses of the guarantor and members of his immediate family to the extent they are dependent on him, provided that at least ten percent of the realisable income of the guarantor shall be utilised for repayment of debts;
 - (d) financing required for implementation of the repayment plan;
 - (e) if the guarantor has any business, the manner in which it is proposed to be conducted during the course of the repayment plan, and the role of the resolution professional;
 - (f) the manner in which funds held for the purposes of the repayment plan, invested or otherwise dealt with, pending repayment to creditors;
 - (g) the functions which are to be undertaken by the resolution professional, including supervision and implementation of the repayment plan;
 - (h) variation of onerous terms of a contract or transaction involving the guarantor;
 - (i) the details of excluded assets and excluded debts of the guarantor; and
 - (j) terms and conditions for the discharge of the guarantor.
- (2) The repayment plan may provide for the following-
 - (a) transfer or sale of all or part of the assets of the guarantor along with the mode and manner of such sale;
 - (b) administration or disposal of any funds of the guarantor;
 - (c) satisfaction or modification of any security interest;
 - (d) reduction in the amount payable to creditors;
 - (e) curing or waiving of any breach of a debt due from the guarantor;
 - (f) modification in the terms of repayment of any debt due from the guarantor;
 - (g) part of the income of the guarantor to be used for the repayment of the debt, and the manner of calculating the income of the guarantor;
 - (h) the manner in which funds held for the purpose of repayment to creditors, and not so repaid at the end of the repayment plan, are to be dealt with; and
 - (i) such other matters as may be required by the creditors.

Repayment Plan

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Section 105

(1) The debtor shall prepare, in consultation with the resolution professional, a repayment plan containing a proposal to the creditors for restructuring of his debts or affairs.

(2) The repayment plan may authorise or require the resolution professional to - **(a) carry on the debtor's business or trade on his behalf or in his name; or (b) realise the assets of the debtor; or (c) administer or dispose of any funds of the debtor.**

(3)The repayment plan shall include the following, namely: - (a) **justification** for preparation of such repayment plan and reasons on the basis of which the creditors may agree upon the plan; (b) **provision for payment of fee** to the resolution professional; (c) such other matters as may be specified.

Repayment Plan

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Section 106

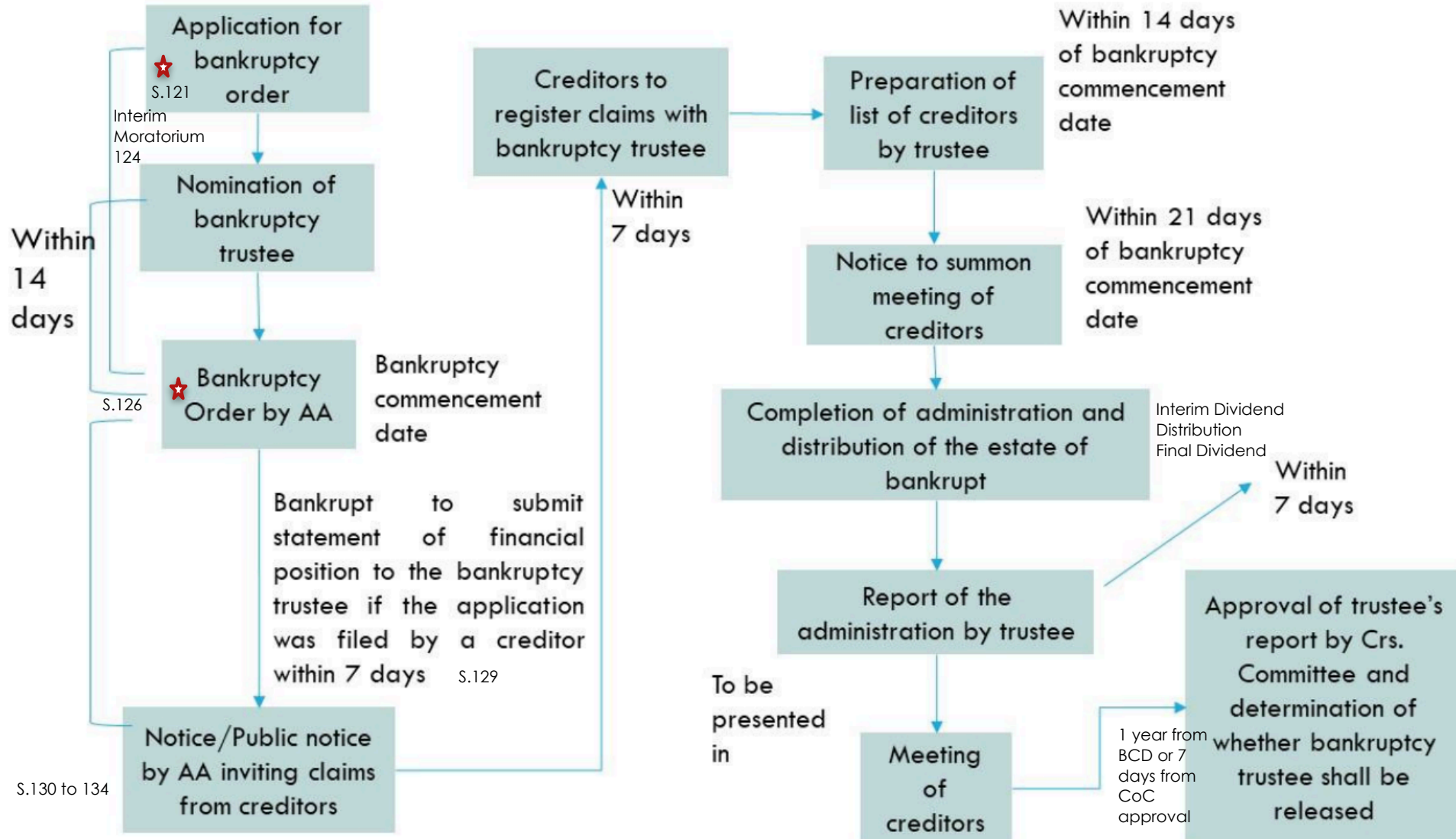
(1) The resolution professional shall submit the repayment plan under section 105 along with his report on such plan to the Adjudicating Authority within a period of twenty-one days from the last date of submission of claims under section 102.

(2) The report referred in sub-section (1) shall include that- **(a) the repayment plan is in compliance with the provisions of any law for the time being in force; (b) the repayment plan has a reasonable prospect of being approved and implemented; and (c) there is a necessity of summoning a meeting of the creditors, if required, to consider the repayment plan:**

Provided that where the resolution professional recommends that a meeting of the creditors is not required to be summoned, reasons for the same shall be provided.

Bankruptcy Process for PGs - Provisions/Mechanism

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Broad Legal Framework

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Section		Coverage
Section 121	Initiation	Either by the PG himself or by creditor individually or jointly, within 3 months from the date of order passed by the AA rejecting an application for initiation of insolvency process against the PG; rejecting the repayment plan; or recording that the repayment plan has not been completely implemented.
Section 124	Interim Moratorium	is imposed u/s 124 similar to Section 96
Section 125	Appointment of BT	AA may appoint the BT nominated by applicant, and in other cases, appoint an IP from IBBI panel.
Section 126	AA Order	PG is considered bankrupt and order continues to have effect till discharge order u/s 138.
Section 129	Vesting	On passing of bankruptcy order, the assets of PG, i.e bankruptcy estate vest with the BT. PG to submit statement of financial position to BT within 7 days of admission.
Sec 130-134		BT issues notice to creditors, public notice of bankruptcy commencement. Creditors are required to register claims with BT within 7 days of public notice. A creditor can claim future payment as well however for interest, rent and payments of periodical nature, creditor can claim only for amounts due and unpaid upto bankruptcy commencement date ("BCD"). Within 14 days from BCD, BT prepares list of creditors and within 21 days from BCD, issues a notice calling for meeting of creditors. During the meeting, a Committee of Creditors is established

Broad Legal Framework

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Section		Coverage
Section 140/141	Disqualifications	contains certain disqualifications and restrictions on the bankrupt.
Section 149/151	Rights Functions of BT	Functions and rights of BT are given in Section 149 and 151. The BT is responsible for investigating the affairs, realizing the estate, and distributing the estate of the bankrupt among the creditors
Section 174(1) / 175 / 176	Distribution as Dividend	can be by way of interim dividend u/s 174(1), distribution of property in existing form u/s 175 and/or final dividend u/s 176.
Section 178	Order of Priority	Order of priority of payment of debt is provided u/s 178

Practical Challenges - PGIRP

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- i) Clarity required on coverage of moratorium.
- ii) Contours of repayment plan and guidance to deal with deferred payment scenarios
- iii) Lack of info on excluded asset and excluded debt
- iv) PG related info like ITR, books of account, net worth not available so IP unable to assess credibility of PG
- v) Lack of clarity on who is entitled to file claim.
- vi) Unique Challenges - attachment of asset of PG in MPID / PMLA
- vii) Non-cooperation of PG - lack of response for report and subsequently
- viii) Frivolous defences / litigations on technicalities creating delays
- ix) Frivolous litigation by PG connecting the CIRP with PG proceedings
- x) Issue on invocation of guarantee - Form B is not considered as invocation.

Practical Challenges - Bankruptcy

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- i) Lack of cooperation from bankrupt, IRP/RP/Liquidator etc. R.12 non-compliance
- ii) S. 150, S. 156, S.157 - Non-compliance owing to absence of bankrupt, inability to take custody and control of assets
- iii) Claimants: Whether moratorium covers all debt or only CD related debt. Avoiding parallel and multiple bankruptcies. Lack of awareness in other creditors.
- iv) Claim as on BCD: Security creditors relinquishing interest - Amount as on BCD is claimed. For enforcing secured creditors, S.128(2), states enforcing creditors not entitled to interest after BCD if no action is taken within 30 days. Reg. 16 mentions periodical payments cannot be claimed. Contradiction to be cleared.
- v) Bankruptcy Estate: Inability to identify due to lack of info.
- vi) Security Enforcement - Lack of strict timelines on creditors
- vii) Voting right and CoC: Reg.24 r.w Section 135(2), voting right is based on unsecured portion of debt. But creditor may be a member in CoC without voting right. Also need the creditor to contribute to cost.
- viii) Lack of specialised skills like asset tracing agencies. Assets like gold, cash are hardly recoverable. Avoidance transaction to ring fence assets require special skills.

Role of IP in PGIRP vs Bankruptcy

Judicial Precedents shaping our understanding

SC Judgements

- a) State Bank Of India v. V. Ramakrishnan - Approval of plan does not discharge guarantor
- b) Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta - Binding nature
- c) Lalit Kumar Jain v. Union of India - Validated 2019 Notification
- d) K. Paramasivam Vs. The Karur Vysya Bank Ltd. & Anr. - Can proceed 1st against PG
- e) Dilip B. Jiwrajka v. Union of India and Others - Validity of provisions / RP's Role
- f) BRS Ventures Investments Ltd. v. SREI Infrastructure Finance Ltd. and Anr - Guarantor resolution does not release CD's obligation
- g) Gourishankar Poddar v. State Bank of India and Anr - Acknowledgement by CD is by PG
- h) Saranga Anilkumar Aggarwal v. Bhavesh Dhirajlal Sheth and Ors - moratorium under Section 96 of the IBC does not extend to regulatory penalties

Judicial Precedents shaping our understanding

NCLAT Orders on AA - NCLT has jurisdiction even when no CIRP pending

- a) State Bank of India, Stressed Asset Management Branch vs Mahendra Kumar Jajodia and
- b) Mahendra Kumar Agarwal vs PTC India Financial Services Ltd

NCLT Orders on threshold being INR 1 Crore

- a) Mudraksh Investfin Pvt. Ltd. v. Gursev Singh (NCLT New Delhi), upheld by NCLAT on 02.05.2025. Also held NCLT would be AA.
- b) in the matter of Mr. Keerthan Kumar Upadhyaya (NCLT Chennai)

NCLT and not DRT would be AA for PG CD - Kamlesh Devi Agarwal vs SBI - NCLT New Delhi (29.01.2025)
Company Appeal (AT) (Ins.) No.2282 of 2024 – **Anita Goyal vs. Vistra ITCL (India) Ltd. & Anr.** 23.02.2025

Recommendations and Proposal

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- a) Lender awareness in Pre-CIRP / CIRP stage for documents, obtain details on excluded asset / debt, obtain updated net worth statements / conduct quarterly due diligence, check on collateral for alienation, internal controls for legal proofing
- b) Clarification required w.r.t moratorium, opening of bank account, excluded debt, interplay of resolution plan in CIRP
- c) Provisions in Code required to implement cooperation from PG, moratorium, provisions to build specialised domain like asset tracing agencies
- d) direction to relevant forums / authorities like Income Tax, CDSL/NSDL, Banks to provide information available w.r.t assets of PG.
- e) Extended monitoring mechanism on alienation during interim moratorium.
- f) IBBI portal to be revamped to address requirement of PG cases
- h) We need to track data on haircut in PG cases
- i) Clarity on invocation of PG

Conclusion and Q & A

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