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# **INSOLVENCY AND BANKRUPTCY CODE, 2016 :** **The Journey So Far** **Key amendments and landmark judgments**

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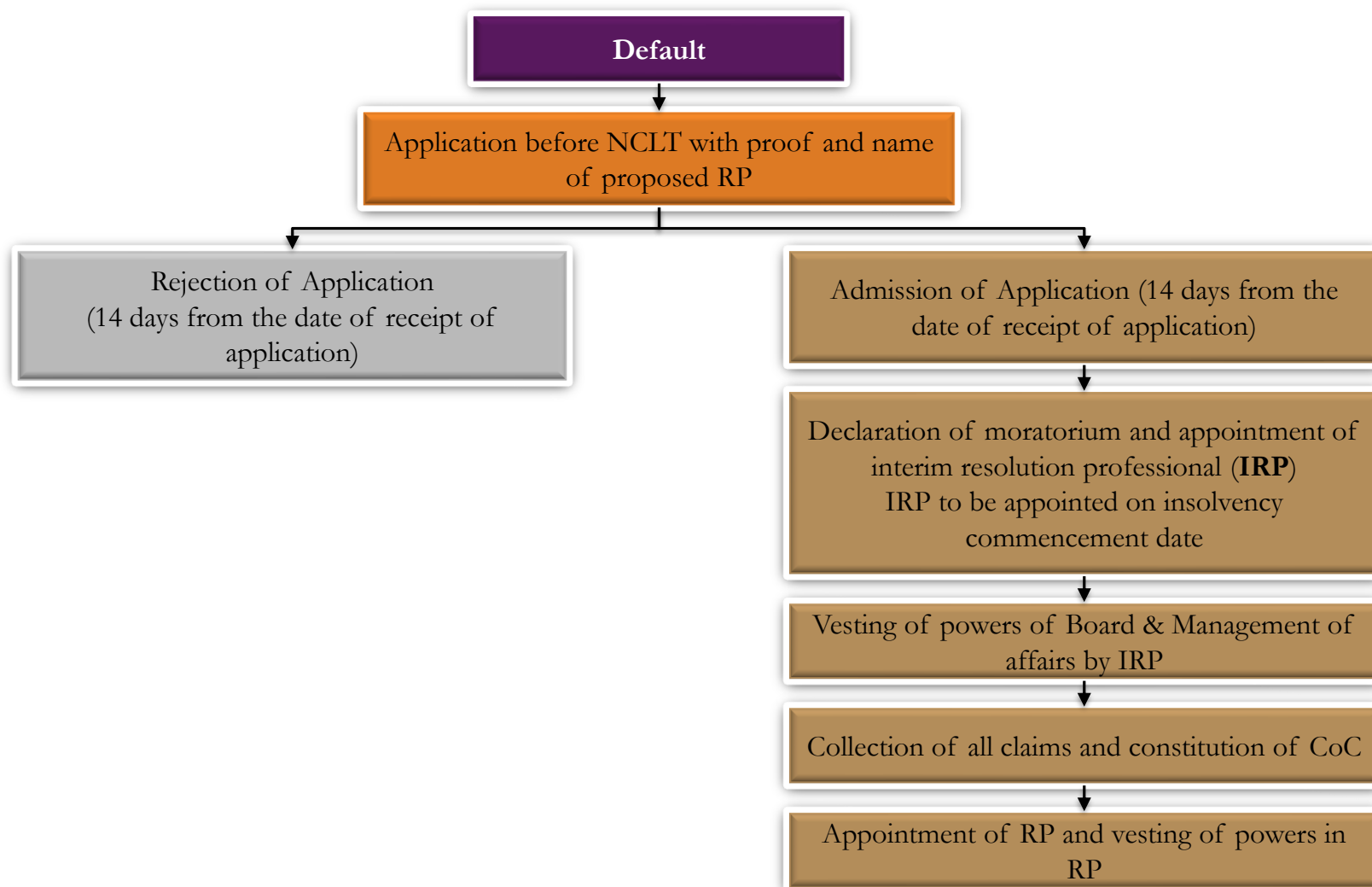
## Epilogue: Pre IBC

- multiplicity of laws
- **arbitrage:** secured / unsecured; domestic / foreign lenders; banks / nonbanks
- **trigger either too early or too late**
  - **SICA:** 50% of net worth
  - **SARFAESI:** 90 days of NPA declared
  - **JLF:** slightly earlier (SMA 0, 1 and 2) but applies only to banks
  - **SDR-** exit related issues
  - **Winding up:** INR 500 default (Companies Act 2013- INR 100,000 proposed)
- no collective action process
- “sick companies but no sick promoters”- divine right
- “liquidation reluctance”
- distribution waterfall complex and unclear

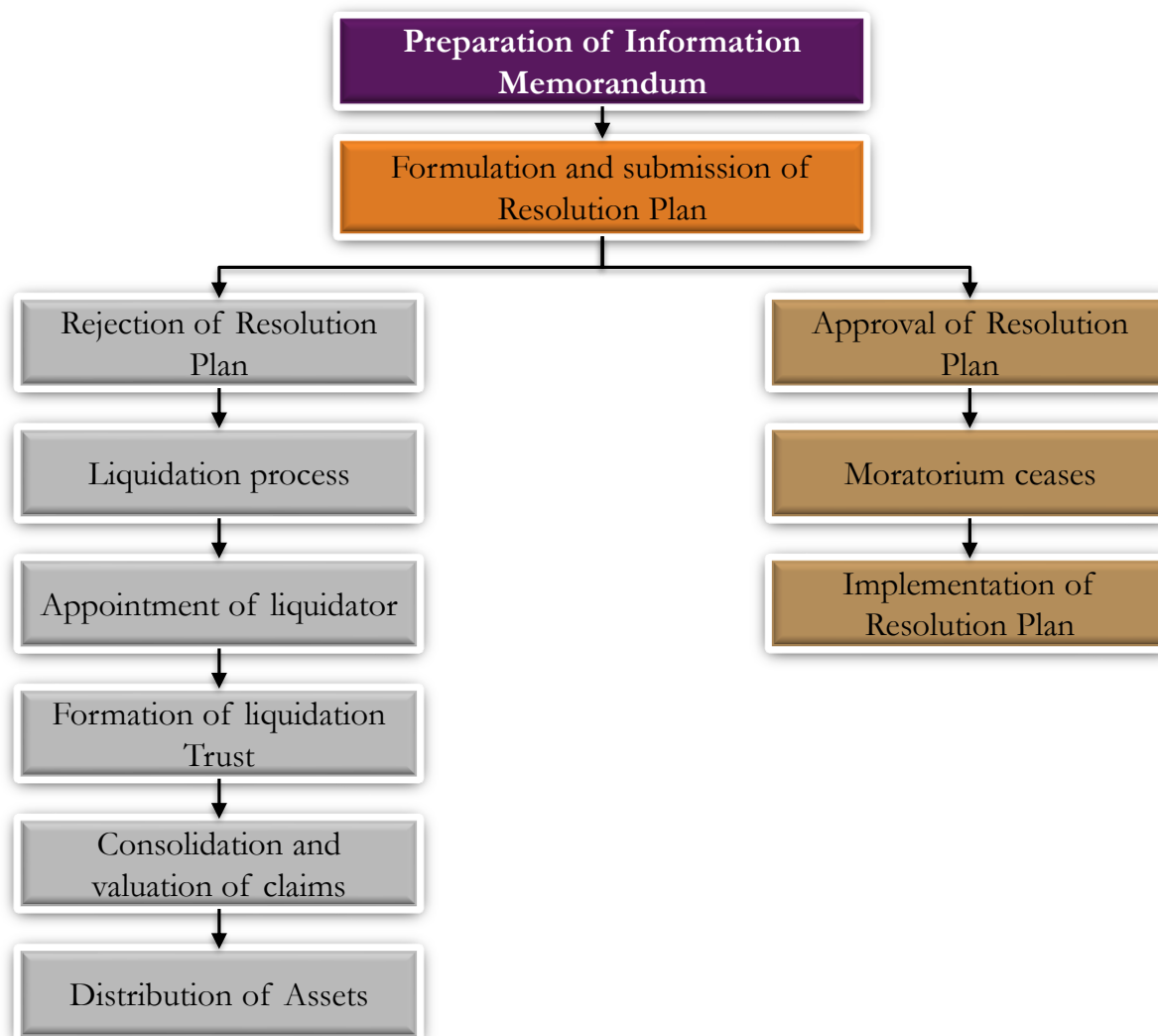
## IBC - Salient Features

- Restructuring of all corporate persons except “financial service provider” (“**FSP**”) (new regime for notified FSPs)
- “Default” of debt of INR 1 Lakh or more when due
- Classification of creditors
- Timelines: 14 days for admission, at most 330 days for CIRP completion (including time spent on litigation) and 1 year for liquidation
- Moratorium
- Resolution professional (“**RP**”) has control of borrower
- Overriding effect: on all existing laws as well as shareholder arrangements
- Committee of creditors (“**CoC**”): comprises of all financial creditors (excluding related party creditors)
- Disenfranchisement of shareholders
- Malicious initiation of CIRP
- Director’s liability

# Process flow chart for insolvency resolution



# Process flow chart for insolvency resolution



# Priority in Liquidation



## Recent Trends

- *how does bankruptcy occur? gradually and then suddenly*
  - paraphrasing ernest hemingway's the son also rises, india's ibc's effectiveness was gradual and then sudden and pervasive
  - headline recovery number: approx. usd 10.38 billion
  - average recovery >2x liquidation value
  - regulators fleetfooted, responsive, market-oriented; refinements to law through subordinate legislation, next generation of insolvency reforms
    - pre-packaged arrangements being considered
    - group, cross border and
    - personal insolvency underway
    - transactional innovations in the absence of group insolvency law
      - amalgamating IBC principles value maximization, distribution waterfall with company law framework
  - courts commercially expedient and adaptive
    - constitutionality upheld
    - 14 nclt benches with a total of ~ 60 judges and 6 additional posts of nclat members for circuit benches proposed
    - “commercial wisdom” of committee of creditors now upheld

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## IBC | KEY AMENDMENTS



# Insolvency and Bankruptcy Code, 2016 (IBC)

## | Key Amendments

- Insolvency and Bankruptcy (Amendment) Act, 2018
  - CoC empowered to lay down criteria for resolution applicants having regard to complexity & scale of operations of the business
  - Prohibition on certain persons, from submitting resolution plans, on account of their antecedents and their adverse impact on the credibility of the process [Sec. 29A introduced]
    - Bar also applies to sale of property in liquidation
  - CoC required to consider feasibility and viability when approving resolution plan
- Insolvency and Bankruptcy (Second Amendment) Act, 2018
  - Amendment to Section 29A
    - Section 29A(c) (*NPA disqualification criteria*)
      - clarity on time at which the disqualification to be tested - submission of resolution plan

# Insolvency and Bankruptcy Code, 2016 (IBC)

## | Key Amendments

- Excludes specified ‘financial entities’ from being considered ‘connected persons’ – NBFCs are conspicuous by their absence – notifications required?
  - Exempts a class of ‘connected persons’ from scrutiny under Section 29A(d) and 29A(e)
  - “Related Party” of an individual defined – wide definition to include most of the relatives
  - Exemption for micro, medium and small enterprises
  - Applies to Resolution Applicants who submit their plan after June 6, 2018
- Moratorium not applicable to guarantors
- Linking proceedings of the corporate guarantor to the corporate debtor
- Resolution applicant mandated to submit affidavit certifying eligibility to bid under Section 29A

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# Insolvency and Bankruptcy Code, 2016 (IBC) | Key Amendments

- Approval and implementation of Resolution Plans
  - RP to continue till the time of approval of the Resolution Plan by the NCLT
  - NCLT to satisfy itself regarding ‘effective implementation’ of the resolution plan
  - Outer timeline of 1 year for Resolution Applicants to obtain necessary regulatory approvals under the Plan
  - Competition Act approval required before CoC approval

# Insolvency and Bankruptcy Code, 2016 (IBC) | Key Amendments

- Other key provisions
  - Withdrawal of insolvency applications
  - Homebuyers to be treated as ‘financial creditors’
  - Special resolution by shareholders for Section 10 application
  - Applicability of Limitation Act
  - Concept of ‘class of creditors’ introduced
- Insolvency and Bankruptcy (Amendment) Act, 2019
  - Revised timeline – 330 days (including time expended on litigation)
  - Payment of liquidation value to dissenting financial creditors in resolution plan
  - Payment to operational creditors to be higher of : (i) liquidation value; or (ii) amount entitled to be received as per waterfall in Section 53 of IBC

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# Insolvency and Bankruptcy Code, 2016 (IBC)

## | Key Amendments

- Distribution to creditors to be “fair and equitable”
  - similar treatment for similarly situated creditors?
  - concept of senior debt?
- CoC may consider, when evaluating Resolution Plan, the priority and value of the security interest of secured creditors

# Insolvency and Bankruptcy Code, 2016 (IBC)

## | Key Amendments

- Insolvency and Bankruptcy (Amendment) Ordinance, 2019
  - Highest priority in repayment of last mile funding for prevention of insolvency, if CIRP or liquidation commence
  - Date of admission clarified to be Insolvency Commencement Date
  - Threshold prescribed for classes of Financial Creditors (including homebuyers) for filing Section 7 application
  - Corporate Debtor enabled to initiate CIRP in respect of other corporate debtors
  - Termination of licenses, permits, concessions barred during moratorium provided current dues serviced
    - *only* for termination on the grounds of insolvency
  - RP in charge of affairs till liquidator appointed
  - Critical supplies (identified on case-by-case basis) not to be affected during moratorium subject to servicing of dues during Moratorium
  - Liability w.r.t. pre-CIRP offences to cease ; action against corporate debtor's property (covered under Resolution Plan) barred

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**LIQUIDATION REGIME | SOME  
KEY FEATURES**

## Section 230 Schemes in Liquidation

- Possibility first recognized in several decisions
  - Liquidator can sell the business - take steps in terms of Section 230 of Companies Act (*Swiss Ribbons Pvt. Ltd. v. Union of India*)
  - NCLAT directed the liquidator to take steps through a scheme of arrangement for revival of corporate debtor. In case of failure, two further steps to be taken: (i) sale of the assets as a whole; and, if that is not possible, (ii) sale of assets in part. (*S.C Sekaran v. Amit Gupta & Ors.*)
- Costs to be incurred by corporate debtor if scheme sanctioned
  - Otherwise, costs to be borne by person who proposed the scheme
- Timeline of 90 days
- Applicability of Section 29A
  - *Jindal Steel and Power Limited v. Arun Kumar Jagtramka* [NCLAT]
- Basis of classification of creditors?
- Revival of rights of disenfranchised shareholders?



## Sale on “going concern” basis

- Different modes recognized in the Liquidation Process Regulations
  - sale of assets on standalone basis, slump sale of assets, set of assets sold collectively, assets sold in parcels
  - sale of corporate debtor or sale of its business on “*going concern*” basis
- Timeline of 90 days
- GCS on the recommendation of erstwhile CoC or if the Liquidator deems fit for maximization of value
  - Grouping of assets and liabilities for GCS by CoC or the Liquidator
- Treatment of workmen & employees during GCS process?
- Disclaimer of onerous contracts – impact on “going concern”?

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## RESTRUCTURING REGIME AND ITS INTERACTION WITH RBI REGULATIONS

## SC Judgement on RBI Restructuring Circular

- rbi issued a circular on february 12, 2019 (1) ending existing regulatory forbearance, fresh prudential norms (2) directing banks to trigger insolvency proceedings against borrowers
- circular was quashed for being ultra vires section 35aa of the banking regulation act, 1949
  - rbi cannot issue general directions to banks for reference of debtors to ibc
  - rbi can direct banks to move under ibc only if two conditions precedents are met, namely; (i) there is a central government authorization to do so; and (ii) the direction has to be in respect of ‘specific’ defaults
- supreme court upheld
  - rbi’s broad and expansive powers under the banking regulation act for regulation of banks including powers to issue directions for resolution of stressed assets outside ibc

## June 7 Circular

- court acknowledged rbi's wide regulatory powers, several provisions reintroduced
- loan renegotiation continues in the “shadow of ibc”
- new restructuring and prudential norms
  - lower risk weightages for loans referred to insolvency proceedings
  - encouraged resolution through formal proceedings if consensual work-outs don't work
  - strict timelines are continued

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## LANDMARK JUDGMENTS

# Commencement of CIRP

- *Innoventive Industries Limited v. ICICI Bank Limited (Supreme Court)*
  - Held that once an insolvency professional has been appointed, an appeal by erstwhile directors is not maintainable
  - Under Section 7, NCLT to merely see the records provided by the financial creditor to satisfy itself that the default has occurred – corporate debtor entitled to challenge

# Section 29A | ArcelorMittal v. Satish Kumar Gupta (Supreme Court)

- **Purposive Interpretation of S. 29A**
  - necessitates the lifting of corporate veil
  - even for group companies to look at the economic entity of the group as a whole
  - antecedent facts ‘**reasonably proximate**’ to the time of submission of resolution plan - to determine whether otherwise ineligible applicants are seeking to avoid clearing NPA overdues before submitting a resolution plan
- **“management” and “control”**
  - “management” refers to de jure (or actual) management of a corporate debtor in accordance with law
  - “control”, in Section 29A(c), denotes only ‘positive’ (or actual) control of management or policy decisions – and not the mere existence of the right to block decision making
- **S. 29A eligibility determination – role of the RP and the CoC**
  - RP only required to give a prima facie opinion to the CoC on 29A eligibility – supplemented by *Swiss Ribbons*
  - CoC to determine eligibility - no fetter on CoC from seeking additional information from the resolution applicant and undertake independent diligence / analysis
- **Persons acting jointly or in concert**
  - to be seen whether certain persons have got together and are acting “jointly” in the sense of acting together
  - no added element of “joint venture” required

# Constitutional Validity Upheld | Swiss Ribbons v. Union of India (Supreme Court)

- Classification of ‘financial creditors’ and ‘operational creditors’ not discriminatory or violative of Article 14 of the Constitution of India
  - intelligible differentia having direct relation to the objects of the IBC
- Representation of operational creditors in CoC
  - Financial creditors held to be best equipped to assess viability and feasibility of the business of the corporate debtor and the contents of the resolution plan
- Section 12A constitutionally valid
  - point of ‘no return’ (publication of EOI) in Regulation 30A held to be directory in *Swiss Ribbons and Brilliant Alloys*
  - exercise of inherent powers by NCLT recognized



# Constitutional Validity Upheld | Swiss Ribbons v. Union of India (Supreme Court)

- defaulter’s paradise is lost” “wide latitude in economic legislation” “grave to stay representation in economic matters”
- accorded certainty to insolvency proceedings
- judicial endorsement of “fair and equitable treatment of creditors” replacing “equal” recovery for unsecured operational creditors
- upheld “collective action” nature of insolvency proceedings, even for withdrawal
- judicial recognition of distinction between promoter and management, permitting displacement of defaulting promoter
  - reasonable reading down of restrictions on “related party” of bidders for the purpose of eligibility

# Scope of Jurisdiction of NCLT and NCLAT

- *Embassy Property Developments Pvt. Ltd. v. State of Karnataka (Supreme Court)*
  - The Supreme Court upheld the decision of the HC:
    - The HC held the direction by NCLT to the Government of Karnataka to execute supplemental lease deeds for extension of the mining lease to be *coram non judice*
    - Only in the matter of the initiation of CIRP, jurisdiction of NCLT to inquire into fraud was upheld not otherwise under other laws where dispute involves judicial review of administrative action

## Other Key Supreme Court Decisions

- *K. Sashidhar v. Indian Overseas Bank & Ors.*
  - Scope of judicial review of ‘commercial wisdom’ of CoC to approve or reject a resolution plan clarified
  - Commercial decision of the CoC held to be non-justiciable
  - NCLT’s jurisdiction in respect of resolution plan held limited to consideration of requirements under Section 30(2)
- *Pr. Commissioner of Income Tax v. Monnet Ispat*
  - In view of Section 238 of IBC, the provisions of IBC will override anything inconsistent in any other enactment, including Income-Tax Act

# Group Insolvency Framework

- *In the matter of Videocon Industries (NCLT, Mumbai)*
  - Consolidation of 13 out of the 15 Videocon Group Companies
  - Recognition that requires case-by-case consideration of following factors:
    - where the management, staff, production of goods, distribution system, funding arrangement, loan facilities so intricately interlinked that segregation results in unviable solution
    - debt agreements providing for joint liabilities of entities having separately identifiable assets for independent survival, held not to require consolidation
- *EARC v. Adel Landmarks and Ors. (NCLAT)*
  - Owing to the corporate debtor having agreed to jointly develop the land with some of its guarantors, it was held that the insolvency resolution of the entities should run simultaneously to ensure completion of project

# November 15, 2019

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“There are decades where nothing happens,  
and there are weeks where decades happen.”

# CoC of Essar Steel India Limited v. Satish Kumar Gupta (Supreme Court)

- Role of the RP
  - Recognized to be not adjudicatory but administrative involving management of affairs of corporate debtor, convening CoC meetings and collation of claims
- Role of CoC in CIRP
  - Upheld commercial wisdom to decide whether or not to accept a particular resolution plan
    - after accounting for all aspects *including* manner of distribution of funds among various classes of creditors
  - Rationale for only financial creditors handling the affairs of the corporate debtor and resolving the same was emphasized
- Role of the Prospective Resolution Applicant
  - Upheld its right to receive complete information (in IM and Evaluation Matrix) as to the corporate debtor prior to commencement of CIRP

# CoC of Essar Steel India Limited v. Satish Kumar Gupta (Supreme Court)

- Differential Treatment of Creditors
  - Principle of “fair and equitable” explained to mean not proportionate payment depending on amount of debt
  - Held that “equitable treatment” to each creditor depends upon the class to which it belongs
  - Held that the CoC may approve differential payments for different classes of creditors and negotiate with Resolution Applicant for better or different terms
- Constitution of sub-committee by the CoC
  - Recognized vitality of the powers of the CoC in the running of the business of the corporate debtor
  - Held that CoC may not delegate important business decisions
    - sub-committees may be appointed for negotiations with resolution applicants or for ministerial or administrative acts, subject to CoC ratification

# CoC of Essar Steel India Limited v. Satish Kumar Gupta (Supreme Court)

- Rights of creditors against guarantors
  - Held that claims of guarantor (including, for guarantee furnished by erstwhile directors) on account of subrogation can be extinguished in resolution plan
- Role of the NCLT and the NCLAT
  - Recognized limits of judicial review available to the NCLT
  - Review not to trespass a business decision of the majority of the CoC (includes its ultimate discretion with respect to payments for each class (or subclass) of creditors)
  - Residual jurisdiction of NCLT may not be invoked for interference with CoC's decision



# Regime for Financial Service Providers

- For companies other than notified FSPs : IBC read with CIRP Regulations applicable
- Section 227 empowers Central Government to notify FSPs w.r.t. IBC applicability
  - MCA on November 18, 2019 notified NBFCs (including HFCs) with asset size > 500 Crores
  - IBC modified by the Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019 (“**FSP Rules**”) applicable
- For notified FSPs : filing of Section 7 application *only* by appropriate regulator (RBI, at present)

# Regime for Financial Service Providers

- Moratorium upon admission by NCLT
  - Interim moratorium operative on filing of application for notified FSPs
  - Carve-out for third party assets in custody of FSPs (such as, funds, assets and securities held in trust)
    - MCA Notification on January 30, 2020
- Filing of proof of claims with the Administrator (for notified FSPs)
- Resolution Plan
  - Statement on satisfaction of requirements applicable to FSP's business
  - Section 29A v. fit and proper criteria
  - Upon approval, NOC from Appropriate Regulator for incoming resolution applicant
  - Liquidation waterfall same regardless of classification as notified FSP
- Appropriate Regulator to be heard in case of liquidation

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# Personal Insolvency

- notified with effect from December 1
- personal guarantors
- other debtors
- “Fresh start”

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**QUESTIONS?**



THANK YOU